2005

The Personal Jurisdiction Problem Overlooked in the National Debate about Class Action Fairness

Carol Rice Andrews
University of Alabama - School of Law, candrews@law.ua.edu

THE PERSONAL JURISDICTION PROBLEM OVERLOOKED IN THE NATIONAL DEBATE ABOUT "CLASS ACTION FAIRNESS"

*Carol Rice Andrews**

THE Class Action Fairness Act became law in early 2005.[1] A principal aim of the Act was to broaden the jurisdiction of federal courts so that they could hear more nationwide (or multi-state) class actions—class actions that purport to resolve claims of persons throughout the United States. Previously, state courts had been the primary forum for many nationwide class actions, but in the early 1990s, critics increasingly complained of a variety of problems and abuses in state court class actions. This view was not universally shared, and for over a decade, debate raged about the fairness of state courts hearing nationwide class actions. The debate about class action fairness overlooked one fundamental fairness issue: whether any court (state or federal) may properly assert personal jurisdiction over a defendant on all claims of the nationwide class, when only a small portion of the class claims arise out of the defendant's forum state activities. In federal court, this issue principally is one of policy, but in state court, personal jurisdiction raises constitutional questions, primarily due process issues but also some dormant commerce clause concerns. This article examines all of the personal jurisdiction issues arising in nationwide class actions in both state and federal court.

In Part I, I look generally at the phenomenon of nationwide or multi-state class actions. I start by examining the procedural changes and Supreme Court decisions, such as *Phillips Petroleum Co. v. Shutts*,[2] that enabled multi-state class actions to flourish in state court. I next report how this growth caused critical backlash, which eventually led to the Class Action Fairness Act ("Act" or "CAFA"). I conclude by describing how the debate about "class action fairness" largely ignored personal jurisdiction from the perspective of the entity defending a nationwide class action. This is a surprising and critical oversight. The personal jurisdiction problem encompasses many of the concerns that critics raised about class actions in state court—procedural fairness, forum shopping, and

* Professor of Law at the University of Alabama School of Law.

1. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

2. 472 U.S. 797 (1985).

state court overreaching—but the objection to the state court's personal jurisdiction puts these concerns in terms of constitutional mandates, not mere policy preferences.

In Part II, I examine the personal jurisdiction issues as they arise in state court. I start with an overview of the Supreme Court's cases addressing the constitutional limitations on a state court's personal jurisdiction. I focus on how and why relatedness—the degree to which a claim concerns the defendant's forum contacts—has become a critical factor in testing state court jurisdiction. I next examine four arguments that might justify state court personal jurisdiction over the defendant on out-of-state claims in a nationwide class action. The first argument is that even though the non-local claims do not directly arise out of the defendant's forum activities, they are sufficiently related to the defendant's business in the forum state to justify specific personal jurisdiction. The second argument is that the defendant conducted sufficient business in the forum state to justify assertion of general jurisdiction over all suits, regardless of whether the claims relate to the defendant's forum state activities. The third argument is that by registering to do business in the state, as many out-of-state corporations do, the defendant corporation consented to general jurisdiction on all claims. The final argument is that class actions are unique devices that warrant special jurisdiction rules without regard to whether each claim individually satisfies jurisdictional standards. I conclude that none of these arguments justify jurisdiction in every case and that the Federal Constitution does not permit state court jurisdiction in at least some nationwide class actions.

In Part III, I examine the personal jurisdiction issues in federal court. I begin by explaining the constitutional standards that govern a federal court's personal jurisdiction. I next look to the current statutory authority of federal courts to assert personal jurisdiction over defendants. I conclude that federal courts do not have a constitutional problem in asserting personal jurisdiction in nationwide class actions, but that federal courts face a statutory limitation. In most suits based on state law, federal long-arm statutes limit a federal court's jurisdiction to that of its state court counterpart, which means that federal courts are without statutory power to assert personal jurisdiction in many nationwide class actions.

In Part IV, I conclude by assessing the implications of the personal jurisdiction problem. Identification of the problem does not mean an end to multi-state class actions. Federal courts can assert personal jurisdiction in most nationwide class actions if Congress expands the federal long-arm statutes and rules. In addition, state courts will remain proper forums for many class actions. Class counsel has many options, including filing in the defendant's home state, filing in the forum of common action by the defendant, or limiting the class so that it properly relates to the chosen state forum, such as a statewide class. These may not be the class plaintiffs' preferred alternatives, but the personal jurisdiction problem overrides strategic preferences. Moreover, the CAFA already has motivated

some class counsel to consider more moderate forms of class actions. The personal jurisdiction issue puts those considerations into constitutional terms.

I. THE PHENOMENON OF NATIONWIDE CLASS ACTIONS

Class actions as we know them today are a relatively modern procedural innovation. The multi-state class action seeking large sums of damages was primarily the creation of the 1966 amendments to the Federal Rules of Civil Procedure. The nationwide class action has had two brief periods of relative prosperity in federal court, only to be met with judicial backlash, which caused litigants to resort to state court. The increase in class action filings in state court, in turn, prompted criticism and debate, which ultimately resulted in the passage of the Class Action Fairness Act in February 2005. The new Act modifies federal subject-matter jurisdiction statutes to permit federal courts to hear more class actions based on state law, but it does not speak to the ability of federal courts to assert personal jurisdiction over the defendant in nationwide class actions. Indeed, essentially none of the general debate about class action fairness, including the Supreme Court's seminal decision concerning multi-state class actions in *Shutts*,[3] addressed the problem of personal jurisdiction from the perspective of the defendant in these actions.

A. THE PROCEDURAL CHANGES THAT ENABLED NATIONWIDE CLASS ACTIONS

Modern class action practice came about largely as a result of amendments made in 1966 to Rule 23 of the Federal Rules of Civil Procedure. Class actions existed earlier,[4] but they were not class actions in the modern sense. Under prevailing procedural standards before 1966,[5] class members in class actions had to have some form of united interest or

3. 472 U.S. at 797.

4. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 228-30 (1987) (summarizing early history of class actions); *see generally* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998) (summarizing early history of class actions).

5. *See generally* JACK FRIEDENTHAL, MARY KAY KANE & ARTHUR MILLER, CIVIL PROCEDURE § 16.1 (West 4th ed. 2005) (summarizing procedural rules before 1966) [hereinafter FRIEDENTHAL].

privity.[6] Moreover, class actions had uncertain binding effect.[7] For example, Rule 23 of the 1938 federal rules permitted a damages class action based on common interest alone,[8] the "spurious" class action, but this suit typically bound only the named class representatives.[9] Unnamed class members could wait and intervene if the judgment was favorable to them.[10]

In 1966, federal rule-makers substantially revised Rule 23, governing class action procedure in federal court. Rule 23(a) specified four preliminary standards for certification that applied to all types of class actions: numerosity, typicality, commonality, and adequate representation.[11] Rule 23(b) set additional standards for each of three new types of class actions, based on functional distinctions, such as the relief sought.[12] Fi-

---

6. *See* Adolf Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 615-25 (1971) (discussing privity in state court class actions under Field Code); *id.* at 629 (stating that the "net effect" of the 1938 federal rule was to "impart[ ] to the federal system the notion of privity—lock stock and barrel"); Glenn A. Danas, Comment, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 EMORY L.J. 1305, 1310 (2000) (noting that the 1938 federal rule governing class actions was burdened by "two main limitations: (1) the requirement that there be a 'jural relationship' between the parties . . . and (2) the rule that negative judgments were not binding on all class members"); *but see* Hazard et al., *supra* note 4, at 1918 (discussing late nineteenth century treatise reporting that "overwhelming authority" argued for not imposing privity standards on class members).

7. *See generally* Hazard et al., *supra* note 4 (discussing binding effects of early class actions).

8. The 1938 version of Rule 23 had three categories of class suits. The first two were narrow and concerned either a "joint" or "common" interest (the "true" class action) or a "several" interest in a specific property (the "hybrid" action). FED. R. CIV. P. 23(a). The third (the "spurious" action) had a far broader standard, requiring only a common question of law or fact and common relief. *Id.*

9. The 1938 rule was silent as to binding effect, but the principal drafter of the rule, Professor Moore, proposed a sliding scale of binding effect: the judgment would bind all members of a true class action; in hybrid class actions, it would bind all appearing parties and would be conclusive as to all claims concerning the property; and in spurious actions, it would bind only the appearing parties. *See* James William Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 571 (1937). Most courts adopted Moore's view. *See* Hazard et al., *supra* note 4, at 1938-39, nn.409-10 (collecting authorities).

10. Amends. to R. of Civ. P., 39 F.R.D. 69, 99 (1966) (noting problem of intervention under 1938 rule). *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the FRCP (I)*, 81 HARV. L. REV. 356, 385 (1967) (collecting criticism of "one-way intervention" in spurious suits).

11. FED. R. CIV. P. 23(a); 39 F.R.D. at 95-96.

12. The 1966 version of Rule 23(b) provided:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate

nally, the 1966 rule added new procedures for the conduct and maintenance of the class action, including notice to class members.[13]

The new rule revolutionized class action litigation, making class actions available under more circumstances than previous procedural rules. The primary difference was the new damages class action.[14] Rule 23(b)(3) permitted class actions in damages cases where the members were united only by a predominance of common factual and legal issues.[15] The Rule 23(b)(3) suit was a class action in the full sense of the word. Unlike the "spurious" action, the Rule 23(b)(3) class action had a binding effect on the entire class.[16] The new class suit could involve hundreds or thousands of unnamed parties, as opposed to the small number of named plaintiffs and interveners under the spurious class action.[17] The 1966 rule thus enabled what has become the paradigm class action. Rule 23(b)(3) allowed persons with minimal damages to come together and present a case of considerable magnitude. In short, Rule 23(b)(3) created a new form of class litigation that is commonplace today but was relatively unknown only a half-century ago.

B. Nationwide Class Actions Before the 1980s

The Rule 23(b)(3) damages class action is more conducive to classes of persons from multiple states than actions brought under earlier rules. Multi-state class actions were theoretically available under earlier class

---

> over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

13. *See* Fed. R. Civ. P. 23(c)(2); 39 F.R.D. at 97 (requiring notice and opportunity for opt-out in Rule 23(b)(3) class actions).

14. *See* James Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 S. Tex. L. Rev. 391, 400 (2004) (noting that the Rule 23(b)(3) class action had "dramatic effects" and was "the source of an enormous increase in class action litigation since 1966").

15. *See* Homburger, *supra* note 6, at 630 (stating that the 1966 revision to Rule 23 "opened for class action treatment a wide new area, formerly deemed off limits, where common questions of law or fact form the only bond of union among the members of the class").

16. *See* Fed. R. Civ. P. 23(c)(2); 39 F.R.D. at 97 ("the judgment, whether favorable or not, will include all members who do not request exclusion"); *see also* 39 F.R.D. at 99 ("all class actions maintained to the end will as such result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class").

17. *See* Underwood, *supra* note 14, at 419 n.101 (stating that although the spurious class had potential for larger classes due to its broad commonality standard, its intervention requirement meant that large class actions were rare) (citing Edward F. Sherman, *Group Litigation Under Federal Legal Systems: Variations and Alternatives to American Class Actions*, 52 DePaul L. Rev. 401, 404 (2002)).

action rules,[18] but the privity and other restrictions of the earlier rules tended to localize class actions.[19] A class of persons claiming title to a single property, for example, was likely to be smaller and more localized than a class of consumers who had claims against a national corporation. Soon after the 1966 rule change, federal courts saw increasing numbers of large, multi-state class actions.

In the 1970s, however, the Supreme Court issued three rulings that made federal courts unattractive and, in many cases, unavailable forums for large class actions.[20] First, in 1973, the Court in *Zahn v. International Paper Co.*[21] interpreted the federal diversity statute to require that every class member meet the statutory jurisdictional amount,[22] which today is $75,000.[23] One year later, the Court in *Eisen v. Carlisle & Jacquelin*[24] held that Rule 23(c)(3) required individual notice to class members in Rule 23(b)(3) damages suits,[25] and that during the pendency of the action, the plaintiff class, as opposed to the defendants, had to bear the expense of the notice.[26] In 1978, the Court in *Coopers & Lybrand v. Livesay*,[27] held that the "final decision" statute governing appellate jurisdiction[28] did not permit interlocutory review of class certification

18. *See generally* Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718, 725-26 (1979) (concluding that the multi-state class suits before 1966 involved "circumstances of unique state interest or competence not generally present in multistate common-question suits" and categorizing the older multi-state cases in two groups—first, unique state regulatory interest such as liability of stockholder for debts of state-chartered corporations, and second, common fund cases) [hereinafter Note, *Multistate Class Actions*].

19. *Id.* at 724 ("Before the general acceptance of binding common-question class actions reflected in the 1966 federal rule, the issue of jurisdiction over absentees who had no contacts with the forum state could have arisen only infrequently.").

20. *See* Danas, *supra* note 6, at 1319 (noting that state courts immediately following the amendment of Rule 23 were relatively hostile to damages class actions, which initially increased class actions in federal courts, but that the tide turned when the Supreme Court restricted federal procedural rules in the 1970s); *cf.* Comment, *Expanding the Impact of State Court Class Action Adjudications to Provide an Effective Forum for Consumers*, 18 UCLA L. REV. 1002, 1021 (1971) (noting that despite numerous filings, not a single successful nationwide class action was litigated to conclusion in federal court in the five years following the 1966 revision of Rule 23).

21. 414 U.S. 291 (1973).

22. *Id.* at 301. Four years earlier, in *Snyder v. Harris*, 394 U.S. 332, 338 (1969), the Court held that small claims could not be aggregated to meet the jurisdictional amount. *See Zahn*, 414 U.S. at 301. In *Zahn*, the Court held that all class members, not just the named plaintiffs, must meet the jurisdictional amount. *Id.* The *Zahn* focus on the entire class was contrary to the Court's earlier ruling that only named class representatives are relevant in determining whether the plaintiffs and defendants are of diverse citizenship. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 364-67 (1921). The jurisdictional rules of both *Snyder* and *Zahn* were modified significantly in 2005. *See infra* notes 113-28 (discussing Supreme Court interpretation of CAFA supplemental and jurisdiction statute).

23. 28 U.S.C. § 1332(a) (2005).

24. 417 U.S. 156 (1974).

25. The Court held that Rule 23 required individual notice only to "those class members who are identifiable through reasonable effort." *Id.* at 175.

26. *Id.* at 177-79.

27. 437 U.S. 463 (1978).

28. 28 U.S.C. § 1291 (granting jurisdiction to the federal courts of appeals over "appeals from all final decisions of the district courts of the United States").

orders.[29]

These three decisions, issued within five years of each other, curtailed the use of federal courts for class actions. The paradigm class action—large numbers of persons with small dollar claims joining together—could not go to federal court at all if the claims were based on state law. Even class suits permitted in federal court met procedural obstacles. Claims with large dollar damages were difficult to certify because the presence of large individual claims is a factor arguing against class treatment under Rule 23(b)(3).[30] Class counsel had to front the cost of notice to class members, which was prohibitively expensive in many class actions with large classes seeking small dollar claims.[31] Adverse class certification decisions were effectively unreviewable,[32] thus ending litigation of many class actions.[33]

State courts did not present the same obstacles. State courts did not have jurisdictional amount limitations on their subject-matter jurisdiction. In addition, states could offer more flexible procedures. To be sure, many states adopted a class action rule based on the federal rule. In fact, state adoption of Rule 23 facilitated class action procedure in state courts,[34] but state courts were free to apply their own interpretations of Rule 23. Some states adopted class action rules that were more liberal than Rule 23.[35] Finally, states could allow their appellate courts to review class certification decisions. Thus, although federal courts were effectively closed to many small claims class actions, state courts were not, and

29. *Coopers & Lybrand*, 437 U.S. at 467-76; *see generally* FRIEDENTHAL, *supra* note 5, §§ 13.1-13.3 (discussing law governing final decision rule and exceptions permitting interlocutory appeals).

30. Large individual claims can be pursued in individual actions without class joinder. Rule 23(b)(3) requires the court to find that the "class action is superior to other available methods for the fair and efficient adjudication of the controversy," and a "pertinent" factor is "the interest of members of the class in individually controlling the prosecution . . . of separate actions." FED. R. CIV. P. 23(b)(3); *see supra* note 12 (1966 version of Rule 23).

31. The named plaintiff in *Eisen* argued that he could not and would not bear the costs of notice, which prompted the Court to remand with instructions to dismiss. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 179 (1974).

32. Plaintiffs in class suits could seek interlocutory review of class certification orders only under the discretionary certification procedure of section 1292(b). 28 U.S.C. § 1292(b). The availability of appellate review of certification orders was broadened by rule amendment in 1998. *See infra* note 106 (discussing amendment of Rule 23).

33. The *Coopers & Lybrand* Court acknowledged this potential effect, but it noted that class suits "often survive an adverse class determination" and whether the claim is abandoned depends on a variety of factors, such as the plaintiff's resources, the size of his claim, and the chance of success on the merits. 437 U.S. at 470.

34. By the early 1970s, twelve states had adopted class action rules modeled on the 1966 federal rule. Homburger, *supra* note 6, at 631 n.133 (listing 12 state rules modeled on the 1966 version of federal Rule 23, as of 1971). Many states followed. *See* ROBERT H. KLONOFF & EDWARD K. BILICH, CLASS ACTIONS 439 (2000) (reporting that as of 2000, two-thirds of the states had adopted class action rules based on Rule 23).

35. *See* Note, *Multistate Class Actions*, *supra* note 18, at 718 n.8 (surveying state rules as of 1979 that had more liberal terms than federal Rule 23, including relaxed notice provisions and claim procedures); *see also* Donald Ricketts, *The Ebb & Flow of Class Action Lawsuits*, 27 L.A. LAW. 12, 13 (June 2004) (describing California's "broad, sweeping endorsement of class actions" after the federal rule revision in 1966 and subsequent state procedural innovations, including "fluid recovery").

by the late 1970s, many legal observers considered state courts as the only viable judicial forum for multi-state, small-claim consumer class actions.[36]

C. THE IMPACT OF *SHUTTS*

By the early 1980s, large class actions with plaintiff class members from all over the nation began to appear with added frequency in state court. This is not to say that there was a groundswell of such suits. The new phenomenon, if it could be fairly called a phenomenon in the early 1980s, initially faced cautious skepticism by courts and commentators.[37] Large nationwide class actions were new to state court, and legal observers raised due process concerns with the new class actions. First, courts and academic writers speculated as to whether a state court could properly assert personal jurisdiction over unnamed plaintiffs in multi-state class actions.[38] Indeed, state courts divided on the issue; some entertained nationwide class suits[39] while others held that they had no jurisdiction over out-of-state plaintiff class members.[40] Second, courts and scholars questioned whether a state court may apply its own law to resolve all claims, including non-local claims, in a multi-state suit.[41] In 1985, the Supreme Court addressed both questions in *Phillips Petroleum Co. v. Shutts*,[42] and even though the opinion was mixed, the case ultimately encouraged filing of nationwide class actions in state court.

The *Shutts* case was one of several large class actions brought in Kansas state court against natural gas producers, including Phillips Petroleum

---

36. Barry Abrams, *Toward a Policy-Based Theory of State Court Jurisdiction Over Class Actions*, 56 TEX. L. REV. 1033, 1033 & n.4 (1978) (stating that "[r]ecent Supreme Court cases have effectively closed the federal courts to many nationwide or multistate plaintiff class actions" and that this "foreclosure. . . has focused increasing attention on the state courts as the only available judicial forum"); *see generally* Miner v. Gillette, 428 N.E. 2d 478, 485 (Ill. 1981) (Ryan, J., dissenting) (surveying cases and commentary and observing that "[s]ince the Supreme Court has severely limited the availability of the Federal courts for class action litigation . . . , those seeking to litigate consumer claims have been urging the use of State courts in which to maintain multi-state plaintiffs class suits") (citations omitted).

37. CHARLES ALAN WRIGHT, ARTHUR MILLER, & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1757 (3d ed. 2005) (collecting authorities that raised "serious" questions concerning the viability of state courts as forums for nationwide class actions after the Supreme Court restricted federal court class action procedure and caused the shift of such suits to state court) [hereinafter WRIGHT]; FRIEDENTHAL, *supra* note 5, § 16.4, at 755-56.

38. *See* Abrams, *supra* note 36; Andrea Martin, *Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction*, 25 HASTINGS L.J. 1411 (1974); Thomas D. Waterman, *State Court Jurisdiction Over Multistate Plaintiff Class Actions: Minimum Contacts Under* Miner v. Gillette, 69 IOWA L. REV. 795 (1984).

39. *Miner*, 428 N.E.2d at 483 (affirming jurisdiction over nationwide consumer class action); *see supra* note 36 for further discussion of case.

40. Feldman v. Bates Mfg. Co., 362 A.2d 1177, 1180 (N.J. Super. Ct. App. Div. 1976) (denying class certification on ground that class members lacked minimum contacts with New Jersey).

41. *See* Note, *Multistate Class Actions*, *supra* note 18, at 712 (noting in 1979 that the Full Faith and Credit and Due Process Clauses "may limit the ability of the court to judge the defendant's liability to the entire multi-state class solely according to the law of the forum").

42. 472 U.S. 797 (1985).

Company. The plaintiffs were royalty owners who sought interest on royalty payments delayed by the gas companies during the period in which rate hike approvals were pending with the federal government.[43] Ira Shutts and Robert and Betty Anderson filed suit against Phillips on behalf of approximately 28,000 royalty owners.[44] Shutts was a Kansas resident, and the Andersons lived in Oklahoma. They owned gas leases in Texas and Oklahoma.[45] Phillips was incorporated in Delaware and had its principal place of business in Oklahoma.[46]

The lawsuit had only a peripheral connection to Kansas. The gas leases were located on land in eleven states, including Kansas, but Kansas constituted a very small portion of the leases: "[o]nly a miniscule amount, approximately one quarter of one percent, of the gas leases involved in this lawsuit were on Kansas land."[47] The plaintiff class members lived in all fifty states and in foreign countries.[48] The Supreme Court acknowledged that "some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit."[49] The Andersons were a good example. They were citizens of Oklahoma, who had leases with an Oklahoma company for royalties on gas taken from Oklahoma land.[50]

The Kansas court applied Kansas law to every claim in the action[51] and found Phillips liable on all claims.[52] Phillips apparently did not challenge personal jurisdiction as to it, the defendant.[53] Instead, Phillips raised two other due process objections in the United States Supreme Court: (1) that the Kansas court lacked personal jurisdiction over the thousands of unnamed class members who had no contacts with Kansas and (2) that the Kansas trial court improperly applied Kansas law to resolve the thousands of claims that had no connection with Kansas.[54] The Supreme Court split its decision: it upheld jurisdiction over the plaintiff class but held that the Kansas court improperly applied Kansas law to the claims that had no connection to Kansas.[55]

As to personal jurisdiction over the plaintiff class, the Court held 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

43. *Id.* at 799-800.
44. *Id.* at 800-01.
45. *Id.*
46. *Id.* at 799.
47. *Id.* at 801. The total royalties paid on Kansas leases were less than $3,000, compared to the more than the $11 million total royalty payments at issue in the *Shutts* class action. *Id.* at 815.
48. *Id.* at 799.
49. *Id.* at 815.
50. Shutts v. Phillips Petroleum Co., 679 P.2d 1159, 1165 (Kan. 1984).
51. *Shutts*, 472 U.S. at 815.
52. *Id.* at 801.
53. *See infra* Part I(F) (discussing possible bases for and assumptions regarding jurisdiction over Phillips Petroleum Co.).
54. *Shutts*, 472 U.S. at 802.
55. *Id.* at 823.

contacts with the forum which would support personal jurisdiction over a defendant."[56] This difference is justified, according to the Court, because "[t]he burdens placed by a State upon an absent class action plaintiff are not of the same order of magnitude as those it places upon an absent defendant."[57] Unlike an absent defendant, who must travel and hire counsel to defend itself at peril of a default judgment,[58] the absent class member already has representatives in court and "is not required to do anything."[59] This does not mean that class members are not entitled to due process, but rather that due process is satisfied by different procedural protections of the class, including adequate representation and an opportunity to opt out of the class.[60]

As to the application of Kansas law, the Court stated that the Due Process and Full Faith and Credit Clauses of the Federal Constitution impose only "modest restrictions" on a state court's choice of law.[61] These restrictions require "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[62] Significantly, the Court held that the fact that the suit was a class action did not give Kansas sufficient interest to apply its own law to all claims.[63] Kansas needed independent, significant contacts with and interest in the claims of each class member.[64] These contacts were lacking even though Phillips owned property in Kansas, conducted substantial business there, and had hundreds of leases with Kansas residents.[65] The Court stated that "an important element" in the consideration of fairness

---

56. *Id.* at 811.

57. *Id.* at 808.

58. The Court detailed these burdens:

> An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forces to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney's feed. These burdens are substantial, and the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant.

Id. (emphasis in original).

59. *Id.* at 808-10. "He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Id.*

60. Opt-out was of critical importance: "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." *Id.* at 812.

61. *Id.* at 818.

62. *Id.* (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).

63. *Id.* at 820-22.

64. "Kansas must have a 'significant contact or significant aggregation of contacts' to the claim asserted by each member of the class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 822.

65. *Id.* at 819. Only a few of the Kansas leaseholders were class members in the suit. *Id.*

was "the expectation of the parties" and that there was "no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control."[66] Accordingly, the Court concluded that "[g]iven Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, . . . application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits."[67]

The *Shutts* case at first seemed to be a mixed blessing for class action litigation. Legal observers predicted that *Shutts* would confuse and perhaps curtail class action practice.[68] Academic commentators criticized the personal jurisdiction holding, primarily for its potential negative impact on other forms of class actions.[69] They likewise questioned the implications of the choice of law holding, fearing that the prospect of applying the law of multiple states would weaken commonality, impede class management, and cause courts to deny certification.[70] Despite this criticism, nationwide class actions persisted and arguably thrived. *Shutts* removed the doubt about the propriety of jurisdiction over absent class members in damages class actions under Rule 23(b)(3), the primary form of multi-state class actions.[71] Even the choice of law prong of *Shutts* did not prevent nationwide class actions. As the Court noted in *Shutts*, the constitutional limitations on choice of law are "modest,"[72] and "in many situations a state court may be free to apply one of several choices of

66. *Id.* at 822.

67. *Id.*

68. *See generally* Kurt A. Schwartz, Note, *Due Process and Equitable Relief in State Court Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 68 TEX. L. REV. 415, 415 n.3 (1989) (collecting commentary and noting that the "eagerly awaited" *Shutts* decision "met with critical and even derisive scholarly commentary").

69. The *Shutts* Court expressly reserved opinion on jurisdiction in other types of class actions, including suits seeking equitable relief and suits against a defendant class. 472 U.S. at 811 n.3; *see* Linda Mullenix, *Getting to Shutts*, 46 KAN. L. REV. 727, 727 (1998) (noting that *Shutts* "subsequently took on a life of its own because of Footnote Three"); *see also* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 38-57, 80 (1986) (discussing argument that "*Shutts* prohibits mandatory classes" and concluding that although *Shutts* "made the class action format economically attractive, . . . it is not clear whether *Shutts* will expand the real availability of class actions, because the opt-out right may undermine class inclusion or even destroy the mandatory class, at least in damage cases").

70. In order to certify a class under Rule 23(b)(3), a court must find that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and a pertinent factor includes "the difficulties likely to be encountered in the management of a class action." FED. R. CIV. P. 23(b)(3).

71. Even mandatory class actions continued. *See* Linda Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871 (1995) (surveying class action cases in ten years following *Shutts* and reporting that many courts upheld 23(b)(1) and (b)(2) mandatory class actions against due process challenges).

72. *See supra* note 58. Indeed, the *Allstate* test for constitutionally permissible choice of law, which the Court applied in *Shutts*, has been criticized as too permissive. *Shutts*, 472 U.S. at 818; *see* DAVID P. CURRIE ET AL., CONFLICT OF LAWS 339 (6th ed. 2001) (citing commentary and stating that "conflicts scholars have made a cottage industry of criticizing the plurality opinion in *Hague* [*Allstate*]").

law."[73]

Moreover, in *Sun Oil Co. v. Wortman*,[74] a follow-up case to *Shutts* in 1988, the Court illustrated that state courts still offer significant forum shopping advantages for plaintiffs in nationwide class actions.[75] *Wortman* involved a class action virtually identical to that in *Shutts*.[76] The Kansas trial court applied the Kansas five-year statute of limitation to all claims[77] and purported to apply Louisiana, Oklahoma, and Texas substantive law but held that the law of these states was essentially the same as Kansas law.[78] Defendant Sun Oil challenged the judgment, claiming that application of the Kansas limitation statute violated the principles announced in *Shutts* and that the trial court unconstitutionally distorted the substantive law.[79] The United States Supreme Court rejected the challenges and upheld the judgment.[80] A majority of the Court agreed that Kansas could properly apply its statute of limitation,[81] and a different majority held that the Kansas court's errors, if any, in applying the law of Louisiana, Oklahoma and Texas did not rise to the level of constitutional deprivation.[82] Thus, under *Wortman*, states may apply their own procedural law—and thereby provide forum shopping incentives to class counsel[83]—even in cases "where its contacts with the dispute stem only from its status as the forum."[84] Moreover, *Wortman* reassured litigants and state

73. *Shutts*, 472 U.S. at 823. This is not to say that choice of law in complex litigation is easy or without controversy. *See generally* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547 (1996) (discussing and criticizing ways in which courts in class and other complex litigation manipulate choice of law rules to result in choice of a single law).

74. 486 U.S. 717 (1988).

75. *Id.*

76. *Id.*

77. *Id.* at 721.

78. *Id.* at 722. The trial court originally applied Kansas law to resolve all claims, and the Court vacated and remanded in light of *Shutts*. *Id.* at 721. On remand, the trial court reached the same outcome. *Id.*

79. *Id.* at 719.

80. *Id.* at 722.

81. The Justices disagreed as to the proper mode of analysis, but they agreed that a forum state may properly apply procedural law, including statutes of limitation, to all claims, regardless of other state interests. Justice Scalia relied primarily on the long-standing practice in the field of choice of law to characterize statutes of limitation as procedural and within a forum state's permissible realm of regulation. *Id.* at 722-29. Justice Brennan argued for interest analysis and found that the forum had sufficient interest to apply its own statute of limitation. *Id.* at 734-43.

82. *Id.* at 732-34. All Justices agreed that the test for constitutional error in the application of another state's law is whether the court contradicts "law of the other State that is clearly established and that has been brought to the court's attention." *Id.* at 730-31. Justice O'Connor argued that the Kansas court's application of the other law "was not supported with so much as a single colorable argument" and constituted a "failure to give full effect—or any effect—to the laws of its sister States." *Id.* at 743-49 (O'Connor, J., concurring in part and dissenting in part).

83. *See generally* Sam Walker, *Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws*, 23 AKRON L. REV. 19 (1989) (surveying forum shopping advantages resulting from a forum applying its own statute of limitation and noting that certain states, including New Hampshire, had become well-known "havens" for forum-shopping plaintiffs).

84. *Wortman*, 486 U.S. at 736 (Brennan, J., dissenting).

courts that federal courts will defer to a state court's application of sister states' laws in complex suits. In sum, the combined effect of *Shutts* and *Wortman* was to clarify some of the uncertainty surrounding state court nationwide class actions, which in turn let the suits prosper.

D. A Second Wave of Nationwide Class Actions in State Court

In the meantime, federal courts in the 1980s saw a new type of large, nationwide class action. These new suits were damages class actions, filed under Rule 23(b)(3) and based on state law, but unlike the consumer class actions of the 1970s, the new class actions arose from mass torts and sought large dollar damages, sufficient to satisfy federal subject-matter jurisdiction standards. The new suits were not the product of a rule amendment but instead changes in judicial attitude and litigation strategy. In the years immediately following the 1966 amendment to Rule 23, courts refused to certify large tort classes under Rule 23(b)(3), based largely on a comment by the drafters of the 1966 rule that mass accident cases "ordinarily are not appropriate" for class action treatment.[85] In the mid-1980s, courts, particularly federal courts facing an onslaught of asbestos cases,[86] began to look beyond this comment and recognize the efficiencies of collecting cases into a class action format. Defendants also saw advantages in global settlement.[87] Courts initially certified such classes under Rule 23(b)(3), but the ability of class members to opt-out of Rule 23(b)(3) actions undermined efficiency and deterred global settlements.[88] Accordingly, litigants and courts began to experiment with certifying mass tort classes under one of the mandatory class options of Rule 23—often using a limited fund theory under Rule 23(b)(1)(B)[89]—thereby

---

85. The committee stated:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individual in different ways. In these circumstances. . . a class action would degenerate in practice into multiple lawsuits separately tried.

FED. R. CIV. P. 23 advisory committee's note; Amends. to R. of Civ. P., 39 F.R.D. 69, 103 (1966); *see* Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 92 (1997) (collecting cases and describing four phases of mass tort class actions, beginning with the first stage in which "most courts followed the Advisory Committee's views and largely denied class action treatment in any kind of mass tort case").

86. *See* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 598-99 (1997) (noting turbulent history of asbestos litigation and noting unanswered pleas for Congressional action to regulate asbestos recovery).

87. *See* Pamela Coyle, *When Bigger Isn't Better*, ABA J., 66-72 (Mar. 1995) (reporting on the phenomenon of large class actions in personal injury and other large dollar cases and the changing perspective of defendants).

88. Perino, *supra* note 85, at 97 (collecting cases and describing the second phase of mass tort class actions which "corresponded closely with the burgeoning of asbestos and other mass tort litigation" and which saw increasing numbers of mass tort suits certified as class actions under Rule 23(b)(3)).

89. *See supra* note 12 (reprinting Rule 23(b)(1)(B)).

making opt-out unavailable.[90] Such treatment, however, received a chilly reception in the federal appellate courts.[91]

In the 1990s, federal appellate courts, including the Supreme Court, repeatedly rejected attempts to certify large dollar mass tort claims as class actions.[92] In *Amchem Products Inc. v. Windsor*, the Court reversed an asbestos class action settlement for failure to comply with Rule 23.[93] In *Ortiz v. Fibreboard Corp.*, the Court struck down use of the limited fund class in another mass asbestos class action.[94] Likewise, the federal courts of appeals decertified class actions in a number of prominent, nationwide mass tort suits.[95] Many of these rulings were grounded on Rule 23, as opposed to constitutional grounds, which meant that state courts were not bound by the federal decisions. Accordingly, as in the late 1970s, class counsel again looked to state courts, creating a second wave of nationwide class actions in state courts.[96]

E. The Debate Concerning Multi-State Class Actions in State Court and the Class Action Fairness Act

The increasing number of multi-state class actions filed in state court began to garner considerable criticism and debate by the early 1990s.[97] Observers raised concerns that isolated state courts were overreaching and repeatedly deciding cases of national importance.[98] Critics charged

90. Perino, *supra* note 85, at 97 (collecting cases and describing the third phase of mass tort class actions in which courts turned to mandatory Rule 23(b)(1) class certification for mass tort cases).

91. *Id.* at 101 (collecting cases and describing the fourth phase of mass tort class actions in which "many appellate courts" not only have criticized use of Rule 23(b)(1) class certification for mass tort cases but also "have reasserted much of their original skepticism about the utility of mass tort class actions").

92. *See generally* Joel S. Feldman, *Class Certification Issues for Non-Federal Question Class Actions—Defense Perspective*, 710 PLI Litig. 259, 302-32 (2004).

93. 521 U.S. 591, 629 (1997). The proposed settlement in *Amchem* prompted complaints of collusion and unethical behavior, even before the case reached the Supreme Court. *See* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, 80 Cornell L. Rev. 1045 (1995). The Court did not address these questions, holding instead that the class did not meet the Rule 23(a) adequate representation and Rule 23(b)(3) predominance standards. *See* 521 U.S. at 626 n.20 (noting argument and reserving question).

94. 527 U.S. 815, 864-65 (1999).

95. *See In re* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (ordering decertification of "the largest class action ever attempted in federal court," which consisted of all persons, and their heirs, who were injured by defendants' cigarettes after 1943); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (ordering decertification of nationwide class of hemophiliacs exposed to AIDS-infected blood products).

96. *See* Jesse Tiko Smallwood, Note, *Nationwide, State Law Class Actions and the Beauty of Federalism*, 53 Duke L.J. 1137, 1137-38 (2003) (reporting migration of class actions to state court following "chilly reception in federal court").

97. *See* 151 Cong. Rec. H723-01, H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (stating that state court class action filings increased 1,315 percent over last ten years).

98. A House Report in support of the Interstate Class Action Jurisdiction Act of 1999 stated:

> Because of the way in which they have overreached in the use of the class device, some State courts have effectively made themselves the arbiters of

that some state courts had become forum shopping havens for class counsel by applying loose standards of class management.[99] A particular concern was settlements under which class counsel received large fees and class members received minimal or illusory relief, such as coupons for future purchases.[100] Critics charged that some state courts did not adequately monitor settlements and fee agreements, resulting in tremendous fees for class counsel and, according to some critics, collusion between class counsel and defendants.[101] Moreover, as nationwide class suits gained popularity in state court, a new problem arose—overlapping class actions, in which more than one state court purported to hear the claims of the same national class.[102] Unlike the federal system, which can consolidate suits pending in different federal courts, state court systems are independent of each other and typically cannot force coordination before

---

> the laws of other States, raising serious federalism concerns . . . [A] single State court decides the law of many other jurisdictions, effectively telling other States what their laws are with no input from the judiciaries of those other jurisdictions. Again, this practice means that a State court, which has no accountability to the residents of any other State, is dictating applicable laws to out-of-State residents.

H.R. REP. NO. 106-320, at 8-9 (1999).

99. *See generally* John H. Beisner & Jessica Davidson Miller, *They're Making A Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 205 (2001) (reporting that many interstate class actions in state court were "being heard by locally elected county judges, who typically have only scant resources to devote to such complex cases, who are often viewed by plaintiff's lawyers as willing to 'rubber stamp' class certification orders and 'coupon' settlements, and who are periodically forced to turn to the local bar to fund their efforts at re-election"). The House Report described the phenomenon as a "race to the bottom."

> Although class certification standards do not differ radically among Federal and State court, some State courts have shown very lax attitudes toward class certification . . . . Essentially, there is a race to the bottom—class action lawyers find the State courts with the most lax attitude toward class actions and file their cases there. As a result, certain State courts hear a highly disproportionate amount of nationwide or multi-State class actions and thereby effectively dictate Federal class action policy (even though they have no charter to do so).

H.R. REP. NO. 106-320, at 8. The state court in Madison County, Illinois became so notorious that President Bush chose Madison County as the location to kick-off his early 2005 campaign support for federal class action reform. *See* David Rogers & Monica Langley, *Bush Set to Sign Landmark Bill on Class Actions*, WALL ST. J., Feb. 18, 2005, at A1, A7 (reporting passage of legislation and President's January 2005 campaign launch in Illinois).

100. *See generally In re* Gen. Motors Corp., 55 F.3d 768 (3d Cir. 1995) (discussing issues arising in coupon settlements and reversing approval of class settlement centered on coupon payments to the class); Note, *In-Kind Class Action Settlements*, 109 HARV. L. REV. 810 (1996).

101. *See* H.R. Rep. No. 106-320, at 7-8 (charging that some state courts are not properly monitoring class counsel fee, such that "class counsel become the primary beneficiaries of [class] settlements" and that class members "get little or nothing—or worse"). *See also supra* note 93 (discussing settlement proposal in *Amchem* asbestos case and charges of collusion).

102. *See* Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514 (1996) (describing problem of overlapping class actions); Underwood, *supra* note 14, at 408-411 (same); Thomas Woods, Note, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdiction Reform*, 75 N.Y.U. L. REV. 507, 507-09 (2000) (same).

final judgment.[103]

Citing these concerns, critics moved for reform on several fronts. One was to change the procedure governing class actions.[104] In the early 1990s, federal rule-makers began considering amendments to Rule 23.[105] One relatively non-controversial proposal—to expand the jurisdiction of federal appellate courts to review class certification orders—was adopted early in 1998.[106] Other reforms were more controversial.[107] Several different amendments to Rule 23 were debated for almost a decade.[108] Finally, in December 2003, rule changes made "modest" adjustments to the formal class action procedure in federal court.[109] For the most part, the rule changes either clarified ambiguities in the 1966 rule[110] or codified practices already used by federal courts, such as scrutiny of the adequacy of proposed class counsel.[111] The amendments did not change the standards for certifying the class.[112]

---

103. *See* MANUAL FOR COMPLEX LITIGATION (THIRD) §§ 31.1-31.3 (1995) (describing federal court coordination mechanisms and limitations); Miller, *supra* note 102 (noting limited coordination options of state courts before a class action is reduced to judgment).

104. Some observers reported that a few state court systems so changed their procedure in response to criticism that they became hostile to class actions. *See* Stephen D. Sussman, *Class Actions: Consumer Sword Turned Corporate Shield*, 2003 U. CHI. LEGAL F. 1, 5 (2003) (arguing that although state courts once might have been receptive to class actions, solicitude had disappeared in Texas, where the state supreme court had become actively critical of class actions); Terry Carter, *Class Action Climax*, 4 A.B.A. J. E-REPORT 7 (2005) (noting recent procedural changes in Texas that made "class actions virtually nil").

105. *See* Advisory Comm. Recommendation, 215 F.R.D. 158, 238-39 (2003) (summarizing decade-long work in studying and revising Rule 23).

106. *See* Amends. to Fed. R. of Civ. P., Evid., & App. P., 177 F.R.D. 530, 531 (1998) (order approving rule amendment to add Rule 23(f), providing for discretionary appeals of class certification order).

107. While federal rule-makers considered changes in Rule 23, Congress in 1995 acted on its own to restrict class actions in federal securities litigation. The Private Securities Litigation Reform Act ("PSLRA") added new restrictions on federal securities class action procedure, including specific standards for lead plaintiffs, 15 U.S.C. § 78u-4(a)(2), (3) (1998); limits on attorney's fees, 15 U.S.C. § 78u-4(a)(6) (1998); and posting of security, 15 U.S.C. § 78u-4(a)(8) (1998). Lawyers attempted to avoid the new PSLRA limits by drafting class actions as state law suits, but in 1998, Congress made federal courts the exclusive forum for most class actions alleging fraud in connection with securities. *See* 15 U.S.C. § 78bb(f) (2005).

108. The rules committee considered a variety of proposals, including a "top–to-bottom revision of all of Rule 23" and special rules governing settlement classes and mass tort litigation. *See* 215 F.R.D. at 238-39.

109. *Id.* at 204-16 (red-lined version of proposed Rule 23); *see also id.* at 239 (advisory committee recommendation, characterizing rule changes as "modest" compared to previous proposals).

110. The amendment, for example, struck the 1966 rule's reference to "conditional" certification in order to stop the practice of some courts under which they immediately certified classes, subject to later consideration of the requirements of Rule 23(a) and (b). *See id.* at 205 (new Rule 23(c)(1)(C)); *see also id.* at 217-18 (advisory committee notes).

111. *See id.* at 205 (proposed new FED. R. CIV. P. 23(g)); *see also id.* at 225-30 (advisory committee notes explaining that Rule 23(g) "responds to the reality that selection and activity of class counsel are often critically important" and that "[u]ntil now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4)").

112. Rules 23 (a) and (b) were unchanged. *See id.* at 239 ("There is no attempt to change the criteria for class certification"). The most substantive amendment was to Rule 23(e), which allows the court to deny settlement unless class members are given another

Reformers also proposed changing federal subject-matter jurisdiction standards to permit more class actions in federal court. The proposals centered on a new federal statute that would override *Zahn*'s restrictive reading of the diversity statute and set a new jurisdictional amount for class actions.[113] This legislative proposal eventually became known as the Class Action Fairness Act.[114] The proposal drew both academic[115] and political opposition,[116] and it stalled for years in Congress. Finally, in early 2005, CAFA became law.[117]

CAFA primarily addresses federal subject-matter jurisdiction. Under CAFA, a class action may be filed in, or removed to,[118] federal court if its claims in the aggregate exceed $5 million (without regard to the amount of the individual claims)[119] and at least one member of the plaintiff class is diverse from one of the defendants.[120] CAFA excludes a number of class actions from federal jurisdiction, including those that are primarily local to a particular state.[121] In addition, CAFA adds a few new general procedures, apparently applicable to all class actions in federal court.[122]

---

chance to opt out. *See id.* at 211 (new FED. R. CIV. P. 23(e)(3)); *see also id.* at 222-24 (advisory committee notes).

113. *See supra* notes 21-23 and accompanying text (discussing Zahn v. Int'l Paper Co., 414 U.S. 291 (1973)); *see* H.R. REP. NO. 106-320, at 8-9 (1999) (proposing to "correct a technical flaw" in the diversity statute and arguing that multi-state class actions "deserve Federal court access because they typically affect more citizens, involve more money, and implicate more interstate commerce issues that any other type of lawsuit").

114. The first legislative proposal was made in 1998. A bill passed the House in 1999, but the Senate did not consider it. *See* John Conyers, Jr., *Class Action "Fairness"—A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 493-94 nn.2 & 4 (2003) (summarizing history of CAFA).

115. *See* Woods, *supra* note 102, at 522-532 (criticizing proposed reforms).

116. A persistent opponent in the House was Representative John Conyers. *See generally* Conyers, *supra* note 114 (arguing against 2002 version of CAFA). He spoke on the House floor against the final version of the bill. *See* 151 CONG. REC. H723-01, H726-27 (daily ed. Feb. 17, 2005) (statement of Rep. Conyers) (describing CAFA as an "assault on our Nation's civil justice system" and as "one-sided, anti-consumer and anti-civil rights legislation").

117. Pub. L. No. 109-2, 119 Stat. 4 (2005).

118. CAFA also lessens statutory limits on removal. Previously, a defendant who was a resident of the state in which a suit was pending could not remove based on diversity, even if the action was otherwise subject to removal. *See* 28 U.S.C. § 1441(b) (2005). CAFA exempts class actions from this and other restrictions on removal. Pub. L. No. 109-2, 119 Stat. 4, § 4 (new removal statute applicable to class actions, 28 U.S.C. § 1453).

119. *Id.* § 4 (28 U.S.C. § 1332(d)(2) and (d)(6)).

120. *Id.* (28 U.S.C. § 1332(d)(2)(A)).

121. There are several levels to this exception. The federal court has discretion to decline jurisdiction if, among other things, one-third to two-thirds of the plaintiff class members and the "primary defendants" are residents of the state in which the action is originally filed. *Id.* (28 U.S.C. § 1332(d)(3)). The federal court must decline jurisdiction if, among other things, more than two-thirds of the plaintiff class are local residents. *Id.* (28 U.S.C. § 1332(d)(4)). CAFA also exempts suits in which there are fewer than 100 class members or in which state officials are parties. *Id.* (28 U.S.C. § 1332(d)(5)); *see also id.* (28 U.S.C. § 1332(d)(9)) (exempting securities actions and suits relating to corporate governance).

122. CAFA adds a new section to the judicial code that addresses class actions generally: Chapter 114, which was previously a vacant block in Title 28. *Id.* § 3. Among other things, this new section requires the defendant to notify specified state officials of pending settlements. *Id.* (new provision, 28 U.S.C. § 1715).

For example, federal courts must scrutinize class action settlements involving coupons or monetary detriment to the class[123] and may not approve a settlement in which class members get greater recovery based on their close geographic proximity to the court.[124] The procedural changes are modest: once a class action is in federal court, CAFA does not significantly modify the procedure for or law governing class actions.[125]

The passage of CAFA did not calm the controversy. Critics charged that CAFA would mean the death knell to class litigation.[126] Class counsel claimed that they would avoid its effect by crafting class actions to evade CAFA's expanded subject-matter jurisdiction, and others predicted wasteful satellite litigation over the meaning and application of CAFA.[127] The extent of federal subject-matter jurisdiction over class actions was further confused by the Supreme Court's decision in June 2005 in *Exxon Mobil Corp. v. Allapattah Services Inc.*, which broadly interpreted the federal supplemental jurisdiction statute to effectively overrule *Zahn* and permit jurisdiction over class actions in which only the named plaintiff meets the jurisdictional amount.[128] Regardless of the impact of CAFA and *Allapattah*, one problem of class action fairness and jurisdiction remains unaddressed: personal jurisdiction over the defendant.

---

123. *Id.* (new provisions, 28 U.S.C. §§ 1712, 1713).

124. *Id.* (new provision, 28 U.S.C. § 1714).

125. *See* Rogers & Langley, *supra* note 99, at A7 (stating that plaintiffs' lawyers "took some comfort" in that CAFA does not contain provisions that they had feared, such as caps on damages, caps on legal fees, or substantive changes in tort law) (quoting Todd Smith, president of American Trial Lawyers Association); Carter, *supra* note 104, at 7 (quoting Yale Law Professor George Priest: "This legislation is not the end of class actions by any means;" "I think this is reasonable reform, but it's modest.").

126. *See Skewering the Lawyers*, ECONOMIST (Feb. 19, 2005), at 29 (arguing that "it will be virtually impossible now to get a nationwide class-action suit off the ground" due to "all sorts of constraints" that federal judges face in certifying classes and the "huge backlog in federal cases").

127. Garth Yearick, *New Class Action Fairness Act Makes Sweeping Changes*, 30 LIT. NEWS (A.B.A.) (May 2005), at 1, 3 (quoting Gregory P. Joseph, past chair of ABA Section on Litigation: CAFA "is going to result in a lot of very carefully crafted state court class actions and a great deal of litigation about who is a 'primary' defendant, what are 'principal injuries,' and what is 'significant relief'" and "the plaintiffs will plead around the Act by filing separate non-removable actions in different states"); *see also* Carter, *supra* note 104, at 7 (quoting Harvard Law Professor Arthur Miller: CAFA "creates skirmish points where everyone can now fight in court about everything, including the terms of the legislation," which "plays into the hands of the defense interests and the defense lawyers being paid by the hour").

128. Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611 (2005). The Court interpreted the supplemental jurisdiction statute, 28 U.S.C. § 1367, to permit subject-matter jurisdiction over class actions so long as the named plaintiff meets jurisdictional standards, irrespective of the remaining class claims, thus changing the doctrine of *Zahn*. *Id.* at 2625-27. *See supra* notes 21-23 (discussing *Zahn*). The exact jurisdictional impact of *Allapatah* and CAFA remains to be seen, but the two will have different impact. The *Allapatah* expansion of jurisdiction applies only where at least one claimant meets jurisdictional standards, and CAFA allows aggregation of claims and does not require that any one meet the jurisdictional amount. Moreover, the exceptions to jurisdiction under section 1367 differ from those under CAFA. Indeed, the *Allapatah* Court noted that CAFA did not "moot the significance of our interpretation of § 1367, as many proposed exercises of supplemental jurisdiction, even in the class-action context, might not fall within the CAFA's ambit." 125 S. Ct. at 2628.

F. The Overlooked Question of Personal Jurisdiction Over the Defendant in Nationwide Class Actions

CAFA, and the debate leading to its passage, largely ignored one key fairness question—whether a single court, state or federal, can determine the claims of persons throughout the United States, when only a few of the claims arise out of the defendant's activities in the forum state. This is a question of personal jurisdiction. In state court, the question closely resembles the issues addressed by the Court in *Shutts*—whether it is fair under due process for one state court, which has only marginal connection to the class as a whole, to decide the claims of a nationwide class. *Shutts* addressed personal jurisdiction in this context, but only from the perspective of the plaintiff class.[129] *Shutts* also addressed due process from the perspective of the defendant, but the issue was application of forum state law, not personal jurisdiction.[130]

In *Shutts* itself, neither the Court nor the parties mentioned personal jurisdiction from the defendant's perspective. In an earlier, related class action, the Kansas Supreme Court suggested that jurisdiction was proper over defendant Phillips because it did business in the state and was served in Kansas.[131] Phillips likely was registered to do business in Kansas, but under Kansas law, jurisdiction apparently did not depend on whether Phillips was registered as an out-of-state corporation. In June 1977, a Kansas appellate court interpreted the Kansas foreign corporation statute as conferring general personal jurisdiction over non-registered, out-of-state corporations on claims unrelated to Kansas if the claims arose during the time period in which the corporation was doing business in Kansas.[132] Thus, regardless of whether Phillips was formally registered to do business in Kansas, the parties in *Shutts* probably assumed general personal jurisdiction over Phillips on all claims, even claims unrelated to Kansas, because Phillips had been doing business in Kansas.

Shutts drew considerable academic scrutiny and criticism, but few commentators questioned jurisdiction from the defendant's perspective. In 1987, Judge (then Professor) Diane Wood offered the most extensive discussion of jurisdiction over class action defendants, but even this discussion was limited and part of a longer article concerning a variety of

129. *See supra* notes 56-60 and accompanying text (discussing *Shutts*, personal jurisdiction ruling).

130. *See supra* notes 61-67 and accompanying text (discussing *Shutts*, choice of law ruling).

131. *Ex rel* Shutts v. Phillips Petroleum Co., 567 P.2d 1292, 1304 (Kan. 1977) ("The named defendant does business in Kansas, and has been duly served with process in Kansas. No question is asserted on this appeal as to the jurisdiction of the trial court over the defendant or the trial court's power to enforce a judgment against the defendant.").

132. Scrivner v. Twin Am. Agric. & Indus. Developers, Inc., 573 P.2d 404, 408 (Kan. Ct. App. 1977) (noting dual bases for jurisdiction—actions that "arise out of" Kansas business or "while" defendant was doing business in Kansas—applicable to corporations which do business in Kansas, regardless of whether they have formally registered and qualified to do business); *id.* at 414 (explaining theory of jurisdiction: the defendant is "present" in Kansas when he is doing business "so as to be amenable to service of process on any cause of action arising 'while' it was here").

jurisdictional issues in class actions.[133] Judge Wood argued that it is difficult to justify jurisdiction over class action defendants, such as Phillips in *Shutts*, where the claims of the unnamed class members do not arise in the forum.[134] Judge Wood said that most observers of the *Shutts* case assumed that the Kansas court had general jurisdiction over Phillips based on its contacts with Kansas, but she argued that this was a faulty assumption.[135] Judge Wood proposed a new theory of jurisdiction for certain types of class actions, under which jurisdiction would be justified if the class action were of a "purely representational variety," typically class actions under Rule 23(b)(1) and 23(b)(2).[136] By contrast, she argued that jurisdiction in "joinder" class actions, typically those under Rule 23(b)(3), must be founded on the defendant's contacts with the forum, either extensive contacts or local conduct addressed to the class as a whole, both of which she found missing in *Shutts*.[137] Thus, in at least one scholar's view, jurisdiction was far from certain as to defendants in nationwide class actions.

Yet, critics of class actions did not press the issue when they complained of state court abuses in nationwide class actions. This is an odd oversight, given that a jurisdictional challenge is of constitutional proportions and is a means by which a defendant in a nationwide class action can attempt to move the suit out of an undesirable forum. The oversight also is surprising because the critics' arguments—abusive forum shopping and state courts exceeding sovereign limits[138]—parallel some of the fairness concerns of jurisdictional analysis. I do not mean to say that everyone overlooked these issues. Surely some litigants, courts, and other commentators[139] considered the issues. Yet, the fairness of personal jurisdiction over the defendant obviously has not been a significant part of the recent national debate concerning "class action fairness." It is an issue that merits more careful consideration.

---

133. Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597 (1987).

134. *Id.* at 613 ("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—a subtlety that the Court's analysis did not capture.").

135. *Id.* at 614-15.

136. *Id.* at 616-18.

137. *Id.*

138. For example, CAFA lists Congressional "findings" of "abuses" by state courts that include "keeping cases of national importance out of Federal court," "sometimes acting in ways that demonstrate bias against out-of-State defendants," and "making judgments that impose their views of the law on other States and bind the rights of the residents of those States." Pub. L. No. 109-2, 119 Stat. 4, § 2 (2005); *see also* notes *supra* 97-103 (reporting criticisms of state court class actions).

139. Professor John E. Kennedy, in his 1985 general critique of *Shutts*, briefly questioned personal jurisdiction over Phillips. He believed that the Court either assumed jurisdiction based on consent or based jurisdiction over Phillips on a theory of necessity, what he called "exaggerated necessity." John E. Kennedy, *The Supreme Court Meets the Bride of Frankenstein:* Phillips Petroleum Co. v. Shutts *and the State Multistate Class Action*, 34 KAN. L. REV. 255, 281-82 n.140, 285-86, 306 (1985).

II. THE PERSONAL JURISDICTION PROBLEM IN NATIONWIDE CLASS ACTIONS FILED IN STATE COURT

The principal problem with a state court asserting personal jurisdiction over a defendant in a nationwide class action occurs when the bulk of the class claims do not arise out of the defendant's forum contacts. To be sure, the named class representative often has a local claim, but the class consists of residents of many states and their claims usually arise in their home states. This problem is fundamental because the relationship of the claim to the forum is a crucial factor in determining the due process fairness of state court jurisdiction. Not all assertions of jurisdiction require that the claims arise out of forum activities, but the lack of such relationship makes jurisdiction more difficult to justify. In this section, I start in Part II(A)(1) by examining the Supreme Court's cases regarding state court personal jurisdiction with a particular emphasis on the criterion that claims relate to the defendant's forum contacts. In Part II(A)(2), I look at the policies underlying the relationship standard. I conclude in Part II(B) with an in-depth examination of four possible arguments that might justify state court personal jurisdiction over the defendant in nationwide class actions.

A. The Function of Relatedness in Assessing Personal Jurisdiction in State Courts

The Supreme Court has long imposed limits on a state court's personal jurisdiction, primarily under the Due Process Clause of the Fourteenth Amendment. In *Pennoyer v. Neff*, the Court established a physical power theory of state court jurisdiction, based on "principles of public law" that the Court equated with notions of due process.[140] In the early twentieth century, the Court invalidated some state court assertions of jurisdiction under the dormant commerce clause.[141] In 1945, the Court in *International Shoe Co. v. Washington*[142] introduced the "minimum contacts" test for judging the due process fairness of state court personal jurisdiction.[143] The minimum contacts due process test is now the primary basis for assessing state court jurisdiction, but the Court has struggled to define the minimum contacts test and its relationship, if any, with other tests of jurisdiction. Throughout this struggle, the Court has repeatedly recognized a distinction between jurisdiction over claims that arise out of a defendant's activities in the forum state and jurisdiction over claims that do not concern the defendant's forum activities.

140. 95 U.S. 714, 722 (1877). The Court based its holding on general principles of law because the judgment preceded enactment of the Fourteenth Amendment, but the Court also stated that jurisdiction from thereafter should be tested under due process standards. *Id.* at 733-34.

141. Davis v. Farmer's Co-op Equity Co., 262 U.S. 312 (1923).

142. 326 U.S. 310 (1945).

143. *Id.* at 316-19.

1. *The Supreme Court Cases Governing State Court Personal Jurisdiction and the Relatedness Factor*

Under *Pennoyer*, a state court could assert jurisdiction over a defendant if, at the beginning of the suit, the defendant was found and served in the forum state (*in personam* jurisdiction) or his property in the state was properly attached (*in rem* and *quasi in rem* jurisdiction).[144] The rule had two exceptions—suits determining the marital status of forum citizens and suits in which the defendant consented to jurisdiction—but in all other cases, a state court's jurisdiction required in-state service on the defendant or attachment of the defendant's in-state property.[145] The physical presence of the person of the defendant or his property was the key under *Pennoyer*. Without physical power over the defendant or his property, the assertion of jurisdiction violated the defendant's right to due process, and any resulting judgment was void and unenforceable.[146]

In most cases, the relationship of the plaintiff's claim to the forum was irrelevant. If a state had power over the person or his property, then the state had power to adjudicate any claim, even a claim that arose outside the forum. However, relationship played a role in a few forms of jurisdiction under *Pennoyer*. In early automobile cases, for example, the Court permitted state court jurisdiction through express or implied consent, but such jurisdiction was limited to suits arising from the defendant's driving in the forum state.[147] Relationship also played a role in jurisdiction over corporations, although that role was far from clear.

Corporations did not fit comfortably in the physical power theory of jurisdiction because a corporation is a fictional entity that has no physical presence,[148] and as a result, a variety of theories developed to justify ju-

144. 95 U.S. at 724.

145. "Except in cases affecting the personal *status* of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance," a defendant must be personally served in the state or his property must be brought under the control of the court. *Id.* at 733.

146. Initially, courts tended to interpret *Pennoyer* as applying only to enforcement of judgments in subsequent proceedings, but by the early twentieth century, the Court interpreted *Pennoyer* as declaring that a judgment entered without jurisdiction was itself a violation of due process at the outset. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 196-97 (1915) ("[U]nobservedly or otherwise, judgments have been rendered in violation of the due process clause, and their enforcement has been refused under the full faith and credit clause, affords no ground for refusing to apply the due process clause and preventing that from being done which is by it forbidden, and which, if done, would be void and not entitled to enforcement under the full faith and credit clause.").

147. *See generally* Hess v. Pawloski, 274 U.S. 352 (1922) (implied appointment of agent for service of process in suits arising out of driving in Massachusetts); Kane v. New Jersey, 242 U.S. 160 (1916) (actual appointment of in-state agent for service on suits arising out of driving in New Jersey).

148. The prevailing law in the early nineteenth century held that a corporation could be "found" only in its state of incorporation. *See* Bank of Augusta v. Earle, 38 U.S. 519, 588 (1839) (stating that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created"); *see also* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts, From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 578 (1958).

risdiction over corporations.[149] The first theory was consent. Before *Pennoyer*, an out-of-state corporation needed a state's permission before it could do business in the state, and the Court allowed states to condition that permission on the corporation consenting to jurisdiction through appointment of an in-state agent for service of process.[150] In addition, when a corporation failed to register or appoint an agent, but nonetheless did business in a state, the Court allowed the state to imply assent from the act of doing business.[151] In implied consent cases, the state statute usually provided for service on a state official, such as the Secretary of State. *Pennoyer* did not change this scheme; it recognized express and implied consent as permissible bases of jurisdiction over corporations.[152]

In the decades following *Pennoyer*, many courts, including the Supreme Court, suggested an alternative theory to implied consent, based on corporate presence. Under the presence theory, a corporation that conducted a certain level of in-state business was deemed to be present and subject to jurisdiction in the state.[153] The theories co-existed, and courts used the same term, "doing business," to describe the level of in-state activity that would trigger jurisdiction in both presence and implied consent cases.[154] Although courts rarely articulated a constitutional theory in the corporate consent and presence cases, most cases can be fairly characterized as deciding the due process limits of state court jurisdiction. In the early twentieth century, however, the Court used the dormant

149. *See generally* GERALD HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, ch. V (1918) (tracing early history and development of jurisdictional principles as to corporations).

150. The seminal decision was *Lafayette Ins. Co. v. French*, in which the Court in 1855 stated that a "corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State," and that "[t]his consent may be accompanied by such conditions as Ohio may think fit to impose," including in-state service of process. 59 U.S. 404, 407 (1855).

151. *Id.*; *see also* R.R. Co. v. Harris, 79 U.S. 65, 81 (1870) (stating that a corporation "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place" and that "[i]f it do business there it will be presumed to have assented and will be bound accordingly").

152. The court explained:

> Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent . . . in the state State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association or contracts, . . . and provide, upon their failure, to make such appointment . . . that service may be made upon a public officer designated for that purpose.

Pennoyer v. Neff, 95 U.S. 714, 735 (1877).

153. *See* St. Louis S.W. Ry. Co. v. Alexander, 227 U.S. 218, 226-28 (1913) (surveying "doing business" standards for determining "the presence of the corporation within the jurisdiction of the court"); ROBERT C. CASAD, MOORE'S FEDERAL PRACTICE § 108.23[1][b][iii] (2005) (describing doing business-presence theory).

154. *See* Kurland, *supra* note 148, at 584 (noting that the application of either the consent or the presence doctrine "created difficulties, for whichever was chosen it became necessary to determine whether the foreign corporation was 'doing business' within the state, either to decide whether its 'consent' could properly be 'implied,' or to discover whether the corporation was 'present'"); *see generally* HENDERSON, *supra* note 149 (discussing competing theories).

commerce clause to invalidate state court jurisdiction over corporations engaged in interstate commerce in cases that the Court acknowledged might survive a due process challenge.[155]

The relationship of the claim to the corporation's forum activities was relevant under some of these theories of corporate jurisdiction. Relationship was an important factor in the dormant commerce clause cases. Indeed, the only cases in which the Court invalidated state court jurisdiction under the dormant commerce clause involved claims that arose outside the forum state.[156] In the due process cases, the courts seemed to make distinctions based on the theory of jurisdiction. The Supreme Court held that implied consent to appointment of a state officer for service of process must be limited to claims arising from the corporation's in-state activity,[157] but that actual appointment of an agent for service of process could authorize general jurisdiction over claims having no relation to the forum state.[158] In the presence cases, the Court did not directly address whether the claim must be related to the corporate defendant's forum activities, but some contemporaneous scholars argued that lack of relationship was an unstated but critical factor in many of the cases in which the Court invalidated jurisdiction.[159] Nevertheless, a few

155. *See* Davis v. Farmer's Co-op Equity Co., 262 U.S. 312, 317-18 (1923) (holding that dormant commerce clause forbid Minnesota from asserting jurisdiction over a Kansas railroad on a claim by a Kansas resident that arose in Kansas and noting that the case resembled two cases in which the Court previously had upheld jurisdiction but stating that "in both cases, the only constitutional objection asserted was violation of the due process clause").

156. *See id.* at 316-17 (noting that the statutory authorization of jurisdiction might withstand commerce class scrutiny if, among other things, "the transaction out of which it arose had been entered upon within the state"); *see also* Missouri v. Taylor, 266 U.S. 200, 207 (1924) (upholding jurisdiction against commerce clause challenge and distinguishing *Davis*, in part based on possibility that suit at issue in *Taylor* concerned negligence in the forum state). That a cause of action arose outside the state, however, did not necessarily mean that the Court would invalidate the assertion of jurisdiction as unreasonably burdening interstate commerce. The Court also looked at other factors, including party residence. *See* Hoffman v. Missouri, 274 U.S. 21, 21-23 (1927) (upholding Missouri state court jurisdiction over claim that arose in Kansas where the defendant was incorporated in Missouri).

157. Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 21 (1907) (rejecting jurisdiction over Indiana insurance company that did business in Pennsylvania: "it cannot be held that the company agreed that the service of process upon the Insurance Commissioner of that commonwealth would alone be sufficient to bring it into court with respect to *all* business transacted by it, no matter where, with, or for the benefit of, citizens of Pennsylvania") (emphasis added); Simon v. S. Ry., 236 U.S. 115, 130 (1915) (stating that the "power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law" and that "the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other States").

158. Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917) (distinguishing *Old Wayne* and *Simon*, *supra* note 157, as involving fictional consent: "when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts").

159. Note, *What Constitutes Doing Business By a Foreign Corporation for Purposes of Jurisdiction*, 29 COLUM. L. REV. 187, 190-91 (1929) (reviewing cases, noting that "[f]ew courts consider directly where the cause arose" and concluding that "while courts continue to talk in the traditional jargon . . . whether the cause of action arose in the forum is more often than not the determinative factor").

lower courts suggested that a corporation's presence through doing business was analogous to the physical presence of a natural person, thereby extending general jurisdiction over corporations on unrelated claims.[160] These distinctions were by no means settled, and they created anomalies.[161] In some courts, the same level of activities—"doing business"—conferred different levels of jurisdiction, depending on whether the theory was implied consent or presence, and under consent theory, a corporation who defied registration statutes might face lesser jurisdictional consequences than a corporation who complied and registered.[162]

In 1945, the Court in *International Shoe* tried to end the confusion by developing a new minimum contacts test for corporate jurisdiction, and in doing so, it clarified the importance of the relationship of the claim to the defendant's forum state activities.[163] The minimum contacts test asks whether the defendant had sufficient minimum contacts with the state so that the assertion of personal jurisdiction would not offend "traditional notions of fair play and substantial justice."[164] The aim of the minimum contacts test, according to the Court, is to more directly ask the question at the heart of both the presence and implied consent cases: whether it is fair to subject the corporation to jurisdiction.[165]

To illustrate and give meaning to the new test, the Court in *International Shoe* collected many of its prior decisions and grouped them into four categories.[166] The first and easiest case for finding jurisdiction is one

160. Tauza v. Susquehanna Coal Co., 115 N.E. 915, 918 (N.Y. 1917) (Cardozo, J., stating that "the jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business here transacted;" and "the essential thing is that the corporation shall have come into the state"); *see also* Kurland, *supra* note 148, at 583.

161. *See generally* Kurland, *supra* note 148, at 579-80; HENDERSON, *supra* note 149, at 96-100 (discussing issues regarding the relationship of the claim to the forum under early twentieth century jurisdictional principles).

162. HENDERSON, *supra* note 149, at 96-100; *see also* Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148, 150-51 (S.D.N.Y. 1915) (Learned Hand, J., stating that the argument that "an outlaw who refused to obey the laws of the state would be in a better position that a corporation which chooses to conform," confuses "a legal fiction with a statement of fact" and holding that implied consent is a fiction that, as "a mere creature of justice" should be limited, but that actual consent "must be measured by the proper meaning to be attributed to the words used, and, where that meaning calls for wide application, such must be given").

163. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945).

164. "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1941)).

165. *Id.* at 316-17 (stating that "presence" in its prior decisions was "used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process"); *id.* at 318 (stating that some of its earlier jurisdiction decisions were "supported by resort to the legal fiction that [the corporation] has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents" and that "more realistically it may be said that those authorized acts were of such a nature as to justify the fiction").

166. In the following discussion, *infra* notes 167-70, I have included the Court's full quotation and citation to its previous cases, and I have added bracketed explanations of the essential holding of each case cited by the Court.

"when the activities of the corporation [in the forum] have not only been continuous and systematic, but also give rise to the liabilities sued upon."[167] The easiest case against jurisdiction is one where the corporation has "isolated" forum activities "unconnected" to the claim.[168] The more difficult cases for deciding jurisdiction, according to the Court, are those in which the two factors are mixed—extensive but unrelated con-

167. "Presence" in the state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liability sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. St. Clair v. Cox, 106 U.S. 350, 355 [rejecting jurisdiction over an unrelated claim but stating that it is "only right" to hold corporations "responsible in those courts to obligations and liabilities there incurred"]; Connecticut Mutual Life Insurance Co. v. Spratley, 172 U.S. 602, 610, 611 [finding personal jurisdiction over an in-state insurance claim where the defendant had many insurance policies in the forum state]; Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U.S. 407, 414, 415 [same]; Commercial Mutual Accident Co. v. Davis, 213 U.S. 245, 255, 256 [same]; International Harvester Co. v. Kentucky, [234 U.S. 579 (1909) [finding jurisdiction on a criminal restraint of trade claim, even if defendant's contacts were exclusively interstate commerce, where they constituted a continued course of dealings with forum]; *cf.* St. Louis S.W. R. Co., 227 U.S. 218 [finding jurisdiction over claim arising from failed railroad delivery to the forum where defendant was "present" in forum, due to agent, office and other business]."

Int'l Shoe Co., 326 U.S. at 317 (bracketed case explanations added) (parallel cites omitted).

168. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. St. Clair v. Cox . . ., 106 U.S. 359, 360 [rejecting jurisdiction where there was there was no evidence that defendant engaged in business in forum at time agent served]; Old Wayne Mut. Life Ass'n v. McDonough 204 U.S. 8, 21 [rejecting jurisdiction over an insurance claim on a policy executed outside the forum, even if defendant insurer did other business in forum]; Frene v. Louisville Cement Co. . . , 134 F.2d 511, 515 and cases cited [surveying expansion of jurisdictional law and finding jurisdiction in forum over foreign manufacturer, based on its forum solicitation of sales and other activities]. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

Id. (bracketed case explanations added) (parallel citations omitted).

tacts[169] or isolated but related contacts.[170] Jurisdiction in either case could fail or satisfy the demands of due process, depending on the facts of each case.

In all four examples, the Court manipulated two factors: first, the extent of the defendant's forum contacts (whether continuous and systematic or merely isolated), and second, the relationship of the claim to the defendant's forum contacts (whether the forum activities gave rise to the suit or were unconnected to the forum activities). Substantial contacts by themselves could be enough in some cases even without relatedness, but relatedness moved the substantial contacts case to the "easy yes" category. On the other extreme, where the defendant had only isolated contacts with the forum, the relationship of the contacts to the claim might be

169. While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, Old Wayne Mut. Life Ass'n v. McDonough . . ., 204 U.S. at 22 [rejecting jurisdiction on unrelated claim where consent was merely implied and there was a factual question as to degree of other business in the forum], Green v. Chicago, Burlington & Quincy R. Co. . . . [rejecting jurisdiction over railroad based on passenger agent's "mere solicitation" of ticket sales in forum where claim arose outside forum], Simon v. Southern R. Co., 236 U.S. 115 [rejecting jurisdiction over railroad in Louisiana on a personal injury claim arising in Alabama where there was a factual question as to whether the defendant conducted any business in forum]; People's Tobacco Co. v. American Tobacco Co. 246 U.S. 79, 87 (1918) [rejecting jurisdiction in Louisiana on antitrust claim by competitor based on defendant's mere stock ownership in subsidiary corporation and advertisements of product in forum]; *cf.* Davis v. Farmers' Co-operative Equity Co., 262 U.S. 312, 317 [invalidating Minnesota state court jurisdiction on commerce clause grounds over claim against Kansas railroad that arose in Kansas, where defendant's only contacts with Minnesota was a freight agent soliciting business there], there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. *See* Missouri, K. & T.R. Co. v. Reynolds, 255 U.S. 565 (1921) [affirming without opinion Massachusetts case that found jurisdiction over defendant railroad, based on solicitation-plus in forum], Tauza v. Susquhanna Coal Co., 115 N.E. 915 [finding personal jurisdiction over unrelated claim based on steady sales and shipments to New York); *cf.* St. Louis S.W. Ry. v. Alexander . . ., [finding jurisdiction on related claim based on solicitation-plus in the forum].

Id. at 318. (bracketed case explanations added) (parallel citations omitted).

170. [A]lthough the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 518 (1923) [rejecting jurisdiction in New York based solely on defendant corporation's New York purchases through mail and regular visits], other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. *Cf.* Kane v. New Jersey, 242 U.S. 160 [finding jurisdiction over non-resident motorist based on express consent to jurisdiction over claims arising out of driving in forum]; Hess v. Pawloski . . . , 274 U.S. 352 [allowing jurisdiction over nonresident motorist based on implied consent to jurisdiction over claims arising out of driving in forum]; Young v. Masci . . ., [allowing application of New York law to insurer that issued policies on New York property]."

Id. (bracketed case explanations added) (parallel citations omitted).

enough to justify jurisdiction, but lack of relationship was fatal to jurisdiction. Thus, relationship of the claim to the forum contacts played a pivotal role under the Court's new minimum contacts test.

Most of the Court's personal jurisdiction cases since *International Shoe* have concerned the propriety of jurisdiction in the second mixed factor case isolated and related contacts with the forum, what the Court now calls "specific" personal jurisdiction.[171] The most important development in this line of cases was the "purposeful availment" factor. In *Hanson v. Denckla*, the Court held that a Florida court could not assert jurisdiction over a Delaware trust company even though the suit concerned its business dealings with a Florida resident.[172] The defendant trust company originally formed its relationship with the trust settlor while she was a resident of Pennsylvania, and it continued to do business with her after she moved to Florida.[173] The "unilateral activity" of the settlor was not enough to establish the defendant's minimum contacts with the state of Florida: "[i]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[174]

The purposeful availment standard did not replace the two *International Shoe* factors of extent of contacts and degree of relationship. Instead, the Court added the purposeful availment as a third factor to determine jurisdiction in cases of related but isolated contacts. In order to justify specific jurisdiction, the defendant's isolated contact with the forum not only must be related to the suit, but the forum contacts also must be purposely initiated by the defendant.

In 1980, the Court in *World-Wide Volkswagen Corp. v. Woodson*[175] separated the minimum contacts test for specific personal jurisdiction into two parts, each correlating to a separate function of the minimum contacts test. According to the Court, the minimum contacts test serves two functions: first, "to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system," and second, to protect "the defendant against the burdens of litigating in a distant or inconvenient forum."[176] The sovereignty function is served by the first prong of the test, which looks to three factors: the extent of contacts, the relationship of contacts,

171. The Court adopted the terminology in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415 n.9 (1984), based on an influential article by Professors Arthur T. von Mehren and Donald T. Trautman: *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-44 (1966).

172. 357 U.S. 235, 254 (1958).

173. *Id.* at 252-53.

174. *Id.* at 253.

175. 444 U.S. 286 (1980).

176. *Id.* at 292. I have reversed the order of the two functions, as originally stated by the Court. The Court's later discussion and application demonstrate that the Court considered the sovereignty function to be the crucial first inquiry. *See infra* notes 177-79.

and purposeful availment.[177] The second prong protects the defendant from an unreasonable assertion of jurisdiction.[178] Although the burden on the defendant is a primary concern under this "reasonableness" prong, the defendant's burden must be balanced against other relevant factors, including the "forum State's interest in adjudicating the dispute," the plaintiff's interest in suit in the forum, interstate judicial efficiency, "and the shared interest of the several States in furthering fundamental social policies."[179]

The assertion of jurisdiction must pass both prongs of the test. If there is an insufficient connection between the defendant, the suit, and the forum under the first prong, it does not matter how reasonable the assertion of jurisdiction otherwise would be.[180] Indeed, the Court in *Burger King Corp. v. Rudzewicz* described the first "contacts" prong as the "constitutional touchstone."[181] Once the first prong is met, the jurisdiction is presumed reasonable, and the defendant must show a "compelling case" of unreasonableness before the jurisdiction will be deemed unconstitutional.[182]

The Court rarely has addressed jurisdiction in the other *International Shoe* mixed factor case substantial but unrelated contacts, what the Court now calls "general" personal jurisdiction.[183] In general jurisdiction cases, the court must consider two key issues: whether the claim is "unrelated," and if so, whether the defendant has sufficient contacts to justify general jurisdiction.[184] The Supreme Court has addressed only the second question—the extent of contacts necessary to justify jurisdiction on unrelated claims.

In 1952, the Court in *Perkins v. Benguet Consolidated Mining Co.* held that an Ohio state court could properly assert jurisdiction over a shareholder claim against a Philippine mining company that had halted opera-

---

177. *World-Wide Volkswagen Corp.*, 444 U.S. at 295-98. *See infra* notes 214-20 (discussing holding in *World-Wide Volkswagen*).

178. *Id.* at 292.

179. *Id.*

180. The Court stated:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for the litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Id. at 294 (citing Hanson v. Denckla, 357 N.S. 235, 254). In *World-Wide Volkswagen* itself, the Court did not consider the reasonableness factors because the case did not satisfy the first prong. *Id.* at 299.

181. 471 U.S. 462, 474 (1985).

182. *Id.* at 477. The *Burger King* Court acknowledged that the second prong's factors sometimes could "establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts" under the first prong. *Id.*

183. *See supra* note 169 (discussing *International Shoe* mixed factor cases).

184. *But see* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 643-45 (1988) (criticizing this statement of issues) [hereinafter Twitchell, *Myth of General Jurisdiction*].

tions during World War II and moved its scaled-back office to Ohio.[185] The defendant's president "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company," which was sufficient to justify suit on claims that the Court said did not arise in the forum.[186] In *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[187] the defendant operated a helicopter charter service in South America, and one of its helicopters crashed in Peru, killing American oil pipeline workers.[188] Their widows sued in state court in Texas. The defendant had purchased helicopters in Texas, sent some of its staff for training in Texas, negotiated the particular charter service with the decedent's employer in Texas, and taken payment from checks drawn on Texas banks.[189] The Court assumed an unrelated cause of action[190] and held that the Texas contacts were not enough to support general jurisdiction because Helicopteros Nacionales de Columbia's activities did not constitute a continuous and systematic business presence in Texas.[191]

Relationship—or more accurately, lack of relationship—played a pivotal role in *Perkins* and *Helicopteros*. The Court in both cases acknowledged that jurisdiction based on unrelated contacts requires a different analysis than jurisdiction based on related contacts, but it did not address how to determine whether a particular contact is related to the plaintiff's claim. Instead, the Court summarily stated or assumed that the claims were unrelated to the defendants' forum contacts.

Relationship undoubtedly is a critical element under minimum contacts analysis, but minimum contacts analysis does not necessarily apply to test all assertions of jurisdiction. Many theories of jurisdiction existed before *International Shoe*, and the Court did not necessarily replace all of these theories with minimum contacts analysis. The Court in *International Shoe* strongly suggested that the new minimum contacts test replaced the presence and implied consent tests for corporate jurisdiction, but it did not speak directly to other theories or bases of jurisdiction.[192] It did not address two other issues of corporate jurisdiction—express consent and dormant commerce clause.[193] Moreover, because *International Shoe* was a

185. 342 U.S. 437 (1952).
186. *Id.* at 448.
187. Helicopteros Nacionaloes de Columbia v. Hall, 466 U.S. 408 (1984).
188. *Id.* at 410.
189. *Id.* at 410-12 & 416-17.
190. The Court stated that the plaintiffs conceded that the claim was unrelated to Helicopteros's Texas contacts. *Id.* at 415 & n.10. *See also infra* notes 239-43 (discussing relatedness issues in *Helicopteros*).
191. *Helicopteros*, 466 U.S. at 416.
192. *See supra* notes 164-70 (discussing *International Shoe*).
193. However, in listing the four cases of jurisdiction, the *International Shoe* Court obliquely referred to both consent and commerce clause jurisdictional principles or cases. *See supra* notes 167-70 (quoting *International Shoe* Court's discussion of four cases of jurisdiction). In noting the first easy case of jurisdiction—related and substantial contacts—the Court stated that jurisdiction had never been doubted "even though no consent to be sued or authorization to an agent to accept service of process had been given." *Int'l Shoe Co.*, 326 U.S. at 317. In noting that general jurisdiction over unrelated claims could be denied in some cases, the Court included a "cf" citation to *Davis*, the leading case in which the

corporate jurisdiction case, the Court did not consider the due process limits on personal jurisdiction over property or natural persons. Since *International Shoe*, the Court has not directly tested personal jurisdiction under the dormant commerce clause, and it has struggled, with mixed success, to determine whether minimum contacts analysis supplants or merely supplements the *Pennoyer* due process tests. The lingering doubt about these other tests of jurisdiction in turn creates uncertainty as to the proper role of relationship of the claim to the forum in these cases.

First, in 1977, in *Shaffer v. Heitner*,[194] the Court held that *Pennoyer*'s property bases for personal jurisdiction (*in-rem* and *quasi-in-rem* jurisdiction) were no longer valid and that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[195] Under minimum contacts analysis, the property is merely one forum contact that must be evaluated under the minimum contacts test to determine if the exercise of jurisdiction is fair.[196] The essential difference was the relationship factor of the minimum contacts test: "the central concern of the inquiry into personal jurisdiction" involves "the relationship among the defendant, the forum, and the litigation."[197] Thus, as the Court explained, minimum contacts analysis would result in "significant change" in many cases formerly based on *quasi-in-rem* jurisdiction where, by definition, the defendant's contact with the forum state—the property—is not related to the suit.[198]

Despite *Shaffer*, the Court has since endorsed both consent and in-state service as grounds for jurisdiction, independent of minimum contacts analysis. In *Shaffer* itself, the Court in a dictum seemingly approved of a statute whereby directors consented to jurisdiction through acceptance of directorship in corporations incorporated in the forum state.[199] In 1982, the Court in *Insurance Corp. of Ireland v. Campagne des Bauxites de Guinee*[200] held that a court, consistent with due process, may sanction a defendant for misconduct by holding that the defendant waived its challenge to personal jurisdiction.[201] The Court explained that the require-

---

Court invalidated jurisdiction under the dormant commerce clause. *Id.* at 318; *see supra* notes 155-56 (discussing *Davis* and related cases).

194. 433 U.S. 186 (1977).

195. *Id.* at 212.

196. *Id.* at 207-08.

197. *Id.* at 204.

198. *Id.* at 208. Under *Pennoyer*, the property in *quasi in rem* cases was used to acquire jurisdiction and was "completely unrelated to the plaintiff's cause of action." *Id.* at 209. *See supra* notes 144-46 and accompanying text (discussing *Pennoyer quasi in rem* jurisdiction).

199. 433 U.S. at 216 n.47 (noting that "Delaware unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the state").

200. 456 U.S. 694 (1982).

201. The defendant in *Bauxites* challenged personal jurisdiction, and the trial court ordered discovery on jurisdictional facts. *Id.* at 698-99. When the defendant failed to comply with the discovery orders, the trial court sanctioned it under Rule 37 of the Federal Rules of Civil Procedure and ordered that personal jurisdiction over the defendant was established. *Id.* at 699; *see* FED. R. CIV. P. 37(b)(2)(A) (providing that for failure to comply with a discovery order, the court may order "that the matters regarding which the order was

ment that a court have personal jurisdiction does not flow from Article III, but instead the Due Process Clause, which protects an individual's liberty interest, and as an individual liberty interest, the defendant may consent to or waive this protection.[202] Likewise, in *Shutts*, the Court in 1985 relied in part on a consent theory to uphold jurisdiction over the plaintiff class, independent of minimum contacts analysis.[203]

In 1990, the Court in *Burnham v. Superior Court of California* held that personal service in the forum—commonly called transient or tag jurisdiction, and the primary basis for jurisdiction under *Pennoyer*—continued as a basis for jurisdiction, at least as to natural persons.[204] The *Burnham* Court split as to the proper mode of analysis, but all nine Justices upheld in-state service as a means of securing jurisdiction over individual defendants.[205] Justice Scalia relied on historical precedent for determining due process standards and distinguished *Shaffer* as demanding minimum contacts analysis only in cases involving persons not present in the forum state at time of service.[206] Justice Brennan held that tag jurisdiction must be assessed under the minimum contacts test, but he suggested that most cases of tag jurisdiction would easily satisfy minimum contacts analysis.[207]

The Court did not conclusively state in these cases whether jurisdiction based on consent or in-state service requires any relationship between the claim and the forum. In the consent cases, the consent to or waiver of jurisdiction was limited to particular claims, and the Court had no occasion to consider broader consent to unlimited jurisdiction. By contrast, in *Burnham*, the entire Court seemed to assume that the defendant's presence in the forum at the time of service need not be related to the suit.[208]

---

made or any other designated facts shall be taken to be established for purposes of the action").

202. *Compagnie des Bauxites de Guinee*, 456 U.S. at 702. The Court clarified that *World-Wide Volkswagen* did not hold otherwise. *Id.* at 702 n.10 ("The restriction on state sovereign power described in *World-Wide Volkwagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."). *See supra* notes 175-77 and accompanying text (discussing *World-Wide Volkswagen* discussion of sovereignty function).

203. "Any plaintiff may consent to jurisdiction. The essential question, then, is how stringent the requirement for a showing of consent will be." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

204. Burnham v. Super. Ct. of Cal., 495 U.S. 604 (1990).

205. *Id.*

206. *Id.* at 607-28.

207. *Id.* at 628-40. *See infra* note 208 (discussing Justice Brennan's "rule" as to tag jurisdiction cases).

208. According to Justice Scalia, *International Shoe* permitted jurisdiction based on the contacts of an absent defendant "only with respect to suits arising out of the absent defendant's contacts with the State," which made the question before the *Burnham* Court "whether due process requires a similar connection between the litigation and the defendant's contacts with the State in cases where the defendant is physically present in the State at the time process is served upon him." *Id.* at 610. He answered no. Justice Brennan in *Burnham* concluded that "*as a rule* the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process." *Id.* at 629 (Brennan, J., concurring) (emphasis added). Under this "rule," the relationship of the claim to the defendant's forum contacts is immaterial.

Thus, although relationship is a key element in minimum contacts analysis, it may not be in all cases.

2. *The Policy Reasons In Support of the Relatedness Requirement*

Despite the uncertainty as to some bases of jurisdiction, relationship unquestionably is a key factor in most assertions of jurisdiction. The Court has not articulated precisely why relationship plays an important role in determining jurisdiction, but the Court has explained the policies underlying the minimum contacts test as a whole, which in turn help explain the importance of relationship. The foremost policy reason underlying personal jurisdiction analysis is fairness—jurisdiction must comport with "traditional notions of fair play and substantial justice"[209]—and this general fairness policy has four components—reciprocity, predictability, state sovereignty, and inconvenience. Academic commentators have struggled to use these individual components to explain the role of the relatedness factor, particularly as applied to the policy justification for general jurisdiction over unrelated claims.[210] I contend that all of the component elements of jurisdictional fairness are important in understanding the role of relatedness and defining the proper parameters of general and specific jurisdiction.

First, in *International Shoe*, the Court stated that when a corporation "exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state" and that the "exercise of that privilege may give rise to obligations."[211] The Court next stated that "so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."[212] This suggests a *quid pro quo* or exchange theory of fairness. Because the corporation received benefits from the state, it is fair for the corporation to bear similar burdens.

Relationship helps test whether the benefits and burdens are similar. When a suit concerns the activities from which the corporation received

209. *See supra* note 164 (quoting Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945)).

210. Of particular note was a 1988 debate between Professors Lea Brilmayer and Mary Twitchell concerning the role of relationship and the scope of general jurisdiction. *See* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV 721 (1988) [hereinafter Brilmayer, *General Look*]; Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Twitchell, *Myth of General Jurisdiction*, *supra* note 184; Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465 (1988). Other scholars have entered the debate. *See* Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807 (2004); Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction, But is it Constitutional?*, 48 CASE W. RES. L. REV. 559 (1998); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); *see generally* Mary Twitchell, *Why We Keep Doing Business With Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 172-79 (2001) (surveying the academic commentary as to the "baffling rationale" for general jurisdiction) [hereinafter Twitchell, *Doing Business*].

211. *Int'l Shoe Co.*, 326 U.S. at 319.

212. *Id.* at 318.

in-state benefits, there is some similarity in the burden imposed by the assertion of jurisdiction. By the same logic, the burdens imposed by jurisdiction over unrelated claims are excessive unless the benefits of in-state corporate activity themselves are substantial. The corporation must receive so many benefits from the forum state that the burden imposed by defending unrelated suits in the state is sufficiently reciprocal to the benefits. Relatedness may be a rough measure, but it placed a logical limit on the burdens arising from in-state activities.

Another fairness concern is the "orderly administration of laws."[213] This concern has two aspects. One is predictability. The Court in *World-Wide Volkswagen*[214] stated that the "Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. . . ."[215] The predictability must be such that the defendant can make meaningful choices with regard to activity in the forum state. "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State."[216]

Although the Court advanced the predictability rationale to support the purposeful availment standard, predictability also helps explain the relationship standard.[217] In order for a business to properly structure its behavior—set consumer costs, procure insurance, or sever its relationship with a particular state—it must not only know that a contact has been made in a particular state (an aim protected through the purposeful availment standard), but it also must have some minimal appreciation of the effect of that contact. The relationship standard helps give this knowledge. If a business entity chooses to enter a state on a minimal level, it knows that under the relationship standard, its potential for suit will be limited to suits concerning the activities that it initiates in the state. Likewise, it knows that if it instead chooses to engage in substantial activities,

213. The Court in *International Shoe* stated that "[w]hether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.* at 319.

214. *See supra* notes 175-82 (discussing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) policy discussion) and *infra* notes 232-37 (discussing *World-Wide Volkswagen*).

215. *World-Wide Volkswagen Corp.*, 444 U.S. at 297 (citing *Int'l Shoe Co.*, 326 U.S. at 319).

216. *Id.* (citing Hanson v. Denckla, 357 U.S. 235 (1958)).

217. Indeed, in *Burger King*, the Court noted that the "'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, *and* the litigation results from alleged injuries that 'arise out of or relate to' those activities." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (emphasis added).

such as centering its corporate operations in a state, the potential for suit there will be substantial, extending to any claim.

The Court in *World-Wide Volkswagen* articulated a second aspect of the orderly administration of laws—a state must not exceed its sovereignty.[218] Although the Court in *Bauxites* clarified that this aim is a function of due process rather than an aspect of federalism, the Court did not remove the sovereignty component from jurisdictional analysis.[219] The defendant has a due process right to have states act only within the limits of their sovereignty.[220]

The relationship element is fundamental to the sovereignty limitation. A state has sovereignty with regard to activity conducted within its borders, and it thus has power over claims arising from that activity. Similarly, a state has sovereignty over its citizens, no matter where they act. This would justify general jurisdiction over unrelated claims against forum state citizens and perhaps even non-citizens who have equivalent contacts with the state. A state seemingly has no sovereignty over activity that neither involves its citizens nor occurs within its borders.

The first three policies—reciprocity, predictability, and sovereignty—are reflected primarily by the first prong of the *World-Wide Volkswagen* test. The fourth policy concern—inconvenience—is served by the second prong of the test. This prong balances the relative burden of the defendant arising from litigation in a distant forum against other factors, such as the plaintiff's interest in that forum. Relatedness can affect most of the reasonableness factors. A claim that has a weak relationship to a forum state heightens the defendant's burden and lessens judicial efficiency because witnesses and other evidence are not readily available in the forum state. A weak relationship also lessens both the plaintiff's interest in the forum and the forum state's interest in litigating the claim. The mix of factors changes when the defendant has substantial and continuous contacts with the forum. Even though witnesses and other evidence may be located elsewhere, the burden on the defendant to litigate in its home state is significantly less and the state's interest in providing a forum is higher.

Thus, relatedness is an essential element in protecting all of the fairness policies underlying modern personal jurisdiction analysis. Relatedness helps assure reciprocity between the benefits and burdens of an outsider

---

218. *See supra* notes 176-77 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)).

219. Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); *see supra* notes 200-02 and accompanying text; *infra* notes 314 & 317-18 (discussing case).

220. That a state may act only within its sovereign limits is not only a due process concern of the defendant but also a potential issue under the dormant commerce clause. A state that exceeds its sovereignty and asserts jurisdiction over out-of-state activity of corporations may impermissibly burden interstate commerce. *See generally supra* notes 155-56 and accompanying text (discussing Davis v. Farmer's Co-op Equity Co., 262 U.S. 312 (1923)); *infra* notes 323-52 and accompanying text (discussing commerce clause concerns arising out of conferring jurisdiction from corporate registration statutes).

acting in a state. A requirement that the suit be related to the defendant's forum activities gives the predictability necessary for orderly administration of laws. It also helps limit the reach of states so that they do not exceed legitimate state interests. Finally, relatedness assists courts in their assessment of the relative burdens and interests in litigation in the forum. Together, these policies and explanations give guidance in analyzing the propriety of personal jurisdiction in any given case, including the nationwide class action.

B. An Analysis of State Court Jurisdiction Over Defendants in Nationwide Class Actions

Personal jurisdiction analysis depends on the facts of each case. A global answer cannot be given for any particular category of cases. Even the category of nationwide class actions has endless variations in legal and factual issues. Accordingly, to illustrate and analyze the problems of jurisdiction in nationwide class actions, I select one common fact pattern as the "problem" class action. In this assumed class action, a class of consumers alleges product defects or pricing irregularities in a product that the defendant corporation sells in every state. The consumer class members are residents of all fifty states, and they bought the product in their home states. The named plaintiff sues on behalf of all consumers nationwide, and she files the class action in her home state court. The defendant is incorporated and based (including manufacture and primary distribution) in a state other than the forum.

Four possible arguments might support personal jurisdiction over the absent class members' claims in the problem case. One is that the claims of the absent class members are sufficiently related to the defendant's forum sales, even though they do not arise out of those sales. This argument centers on the degree of relationship needed to support specific personal jurisdiction. The second argument asserts that relationship is unnecessary because the defendant conducts enough business in the forum to support general jurisdiction over any claims. This argument turns on the extent of contacts required to justify unlimited jurisdiction over unrelated claims. The third argument is that the defendant consented to general jurisdiction in the forum by registering to do business and sell products there. This argument turns on the reasonableness and effect of corporate consent statutes. The final argument relies upon the class action device itself. Unlike the first three arguments, which examine whether the state court would have jurisdiction over the defendant if the absent class claims were separate suits, the fourth argument looks to the class as a whole and examines whether jurisdiction is justified by the joinder device alone.

Each argument raises difficult questions that courts and scholars have struggled to answer in other contexts. I focus on class actions, but similar personal jurisdiction problems arise in any multiple-plaintiff suit in which the claims do not all arise out of the defendant's forum contacts. I do not

purport to conclusively settle these issues for class actions, let alone other suits. Instead, I use the problem class action to illustrate that there are at least significant uncertainties and often constitutional problems in a state court asserting personal jurisdiction over the defendant in a nationwide class action.

1. *Specific Jurisdiction Based on the Relationship of the Absent Class Claims to the Defendant's Forum Contacts*

The first argument focuses on the degree of relationship needed to support specific personal jurisdiction. Specific jurisdiction can be based on a single contact if the defendant purposefully directs the contact to the forum and if it is sufficiently related to the claim.[221] The problem class action easily meets the purposeful availment standard. The defendant deliberately directed its products to the forum state. The pivotal question is whether the defendant's forum sales are sufficiently related to the claims of the absent class members who both bought their product and were injured outside the forum. Relationship is characterized in different ways, but three prevailing standards have emerged from cases and commentary: the "proximate cause," "but for," and similarity tests. The difference in these tests is more than semantic. The three tests require decreasing degrees of relationship, and the selection of one test over another often will change the result in the minimum contacts analysis. Indeed, in the problem class action, the absent class members' claims fail all but the most liberal test, based on mere similarity.

In *International Shoe*, the Court used several different terms to describe relationship and lack of relationship: activities that "give rise to" liabilities versus "unconnected," "unrelated," or "entirely distinct" activities.[222] Since then, the Court has continued to vary its terminology, and the Court has not conclusively defined the necessary degree of relationship. However, the Court has pointed to a somewhat strict standard for relationship, requiring more than mere subject matter similarity between the plaintiff's claim and the defendant's forum activities.

In *Perkins*, for example, the plaintiff's claim sought dividends and damages due to the defendant's failure to issue certificates for her stock.[223] These corporate governance failures had a subject-matter similarity to the defendant corporation's Ohio activities. At the time of the suit, Ohio was the center of corporate operations, including meetings of the board, maintenance of bank accounts, and stock transfer decisions.[224] Yet, the

221. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957) (finding jurisdiction over a Texas insurance company based on a single insurance policy with a forum resident); *see also supra* notes 172-74 and accompanying text (discussing *Hanson* purposeful availment factor).

222. *See supra* notes 167-70 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)).

223. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 439. *See supra* notes 185-86 (discussing *Perkins*).

224. 342 U.S. at 445-46.

Court summarily concluded that the "cause of action sued upon did not arise in Ohio and does not relate to the corporation's activities there."[225]

Likewise, in *Shaffer*, where relationship was a decisive element,[226] the Court suggested a strict test. *Shaffer* was a shareholder's derivative action, filed in Delaware state court against Greyhound Corporation (a Delaware corporation based in Arizona) and twenty-eight Greyhound officers and directors.[227] The suit alleged corporate wrongdoing in Oregon.[228] The plaintiff secured jurisdiction over twenty-one of the twenty-eight individual defendants by sequestering their Greyhound stock.[229] There was a form of subject matter relationship between the defendants' stock and the claim; both were tied to the Greyhound Corporation. The defendants' stock holdings certainly were more related to the suit than other property that the corporate executives might have owned in Delaware, such as a vacation home. This minimal relationship was not enough for the Court: the defendant's Greyhound stock "is not the subject matter of this litigation, nor is the underlying cause of action related to the property."[230] The Court further explained that the plaintiff's "failure to secure jurisdiction over seven of the defendants named in his complaint demonstrates . . . [that] there is no necessary relationship between holding a position as a corporate fiduciary and owning stock or other interests in the corporation."[231] The Court thus suggested a "but for" test: because the fiduciary liability would have occurred regardless of share ownership, the claim was not related to the stock ownership.

Some commentators and courts cite *World-Wide Volkswagen* as endorsing a similarity test,[232] but that conclusion is questionable. *World-Wide Volkswagen* was a product liability action by New York residents who bought their car in New York but were injured by the car during travel in Oklahoma.[233] The only issue before the Court was whether an Oklahoma state court could assert jurisdiction over the New York dealership and distributor.[234] The Court held it could not assert jurisdiction due to lack of purposeful availment.[235] However, in dictum regarding Audi,

225. *Id.* at 438.

226. *See supra* notes 197-98 and accompanying text (discussing *Shaffer*).

227. *Shaffer*, 433 U.S. at 189-90.

228. *Id.* The action charged that the defendants violated their duties to Greyhound by causing the company to be held liable for civil damages in excess of $3 million and a large criminal fine in antitrust suits. *Id.* at 190 n.2.

229. *Id.* at 191-92. Delaware law provided that Delaware was the physical location of stock issued by Delaware corporations and that shares of stock could be sequestered as a means of asserting jurisdiction over absent defendants. *Id.* at 193-94.

230. *Id.* at 213.

231. *Id.* at 214.

232. *See* Flavio Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545 (1994); Twitchell, *Myth of General Jurisdiction*, *supra* note 184, at 661-62 (arguing that jurisdiction over Audi in *World-Wide Volkswagen* was justified on product similarity, not extent of contacts).

233. *World-Wide Volkswagen*, 444 U.S. at 288.

234. *Id.* at 287.

235. The unilateral act of the plaintiffs in taking the car to Oklahoma did not establish purposeful availment by the New York defendants. *Id.* at 298.

the car's manufacturer, the Court stated:

> if the sale of a product of a manufacturer . . . such as Audi . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer . . . to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.[236]

The dictum is ambiguous. The central issue in the case was purposeful availment, and the Court likely was making a point about purposeful availment by distinguishing the actual case from this hypothetical case involving deliberate efforts to reach the forum state. Yet, because relationship also is critical to specific jurisdiction, the hypothetical case necessarily raises a question of relationship, albeit an uncertain one.

On the one hand, the Court may be explaining why the Oklahoma court in the actual case would have jurisdiction over Audi, which did not contest jurisdiction.[237] If so, it might suggest a liberal test of relationship, under which similarity in product sales would be enough. In other words, Audi's marketing and sales of similar cars in Oklahoma would be sufficiently related to plaintiffs' claims to justify suit against Audi there, even though the plaintiff bought the actual car without regard to Audi's Oklahoma marketing. On the other hand, the dictum may suggest only that Audi would be subject to jurisdiction if its marketing reached an Oklahoma consumer and motivated the consumer to buy the car, regardless of the actual place of purchase. This interpretation suggests a stricter "but for" test for relationship. Under this scenario, the sale and the later injury would not have occurred but for Audi's marketing in the forum state. Thus, the *World-Wide Volkswagen* dictum does not conclusively endorse any view of relationship.

In *Helicopteros*, plaintiffs apparently conceded lack of relationship,[238] so the Court did not consider whether the claim was related to the forum activities. Instead, it expressly reserved decision on three key relatedness issues:

> whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with the forum[;] . . . what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists[;] . . [and] whether . . . a cause of action [that] "relates to" but does not "arise out of" the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.[239]

---

236. *Id.* at 297.

237. *Id.* at 288 n.3.

238. *See supra* note 190.

239. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 416 n.10 (1984). *See supra* notes 187-91 (discussing *Helicopteros*).

Justice Brennan, in dissent in *Helicopteros*, refused to concede lack of relationship. He agreed that the claims did "not formally 'arise out of' [Helicopteros's] specific activities" in Texas,[240] but he argued that the claims were not "wholly unrelated"[241] and were "significantly related" to the defendant's Texas contacts.[242] Indeed, the defendant negotiated in Texas the very charter service that led to the deaths that were at issue in the wrongful death suits.[243] The plaintiffs could have argued that but for the defendant's Texas activities, the plaintiffs' husbands would not have died in the Peru helicopter crash.

In the twenty years since *Helicopteros*, the Court has not addressed the three reserved relationship questions. In the absence of clear authority from the Court, lower courts have developed differing tests for relationship. The circuit split is most prominent in vacation travel cases, similar to *Shute v. Carnival Cruise Lines*,[244] where the Ninth Circuit explored the different tests.[245] In vacation travel cases, an out-of-state corporation is in the vacation business—cruise trips, bus tours, and hotels—and it advertises and sells tickets or enters into reservation contracts with forum citizens. The plaintiff is injured during the vacation at the distant locale and later brings a tort suit in his home state. The question is whether the solicitation and formalization of the vacation, through ticket sales or reservation contracts, in the plaintiff's home state, are sufficiently related to the tortious acts in the vacation locale to support jurisdiction in the plaintiff's home state.

In *Carnival Cruise*, plaintiffs were injured on a cruise several hundred miles from their Washington home,[246] and the Ninth Circuit analyzed at length the proper test for determining whether the tort suit arising from this injury was sufficiently related to the cruise ticket sale in Washington. The court first observed that the First, Second, and Eighth Circuits use a strict test and decline jurisdiction in vacation travel cases.[247] This strict test has a variety of names—often called the "proximate cause" test but also termed the "arise out of" or "substantive relevance" test[248]—but its application to the vacation cases is largely the same. The personal injury tort claim is not sufficiently related to the defendant's forum activities because the claim depends on defendant's wrongful conduct in the vacation locale, not the advertisements or ticket sales in the forum. Perhaps a breach of contract or misrepresentation claim would be sufficiently re-

240. *Id.* at 425 (Brennan, J., dissenting).
241. *Id.* at 426 (Brennan, J., dissenting).
242. *Id.* at 425 (Brennan, J., dissenting).
243. *Id.* at 410-12.
244. 897 F.2d 377 (9th Cir. 1990), *rev'd*, 499 U.S. 585 (1991). I discuss the grounds for the Supreme Court's reversal of the Ninth Circuit holding *infra* at notes 254-56 & 316 and accompanying text.
245. *Carnival Cruise Lines*, 897 F.2d at 383-86.
246. *Id.* at 379.
247. *Id.* at 383-84.
248. The term "substantive relevance" was developed by Professor Brilmayer. *See generally* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77 [hereinafter Brilmayer, *How Contacts Count*].

lated but not the personal injury claim. In other words, the personal injury plaintiff would not need to rely on any of the defendant's forum activities to establish her claim. The theory underlying this view is that substantive relevance is essential to the foreseeability component of minimum contacts analysis.[249]

The Ninth Circuit in *Carnival Cruise* concluded that the proximate cause test too narrowly confined jurisdiction in suits such as the vacation travel cases where the defendant's forum contacts are causally related to the cause of action.[250] It instead adopted a more liberal causation test used by the Fifth and Sixth Circuits, usually articulated as the "but for" test.[251] Under this test, the court found that Carnival Cruise's advertisements and ticket sales in Washington were essential causative elements in the tort and were sufficiently related to support specific jurisdiction over the cruise line in Washington.[252] The Ninth Circuit did not consider a test more liberal than "but for." To the contrary, the court acknowledged that the "but for" test can be too liberal in some cases, but it instructed lower courts to use second prong reasonableness analysis to limit jurisdiction in such cases.[253]

The Supreme Court granted certiorari in *Carnival Cruise*,[254] and although it heard argument on the relationship issue,[255] the Court avoided the constitutional question of relatedness.[256] The circuit split as to the proper test of relationship remains unresolved.

The "proximate cause" and "but for" tests are the two prevailing tests,

---

249. *See* Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 715 (1st Cir. 1996) ("we think the proximate cause standard better comports with the relatedness inquiry because it so easily correlates to foreseeability, a significant component of the jurisdictional inquiry").

250. 897 F.2d at 385. The court quoted "key analysis" on this issue from the Fifth Circuit:

> Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a 'but for' causative factor for the tort, since it brought the parties within tortious 'striking distance' of one another. While the relationship between a tort suit and a contractual contact is certainly more tenuous than when a tort suit arises from a tort contact, that only goes to whether the contact is by itself sufficient for due process, not whether the suit arises from the contact.

Id. (citing Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270 n.21 (5th Cir. 1981)).

251. *Carnival Cruise Lines, Inc.*, 897 F.2d at 382 (citing Lanier v. Am. Bd. of Endodontics, 843 F.2d 901 (6th Cir. 1986), *cert. denied*, 488 U.S. 962 (1988) and *Prejean*, 652 F.2d 1260); *see also id.* (surveying cases and concluding that the "'but for' test is consistent with the basic function of the 'arising out of' requirement—it preserves the essential distinction between general and specific jurisdiction").

252. *Carnival Cruise Lines*, 897 F.2d at 386.

253. *Id.* at 385. *See also* SCOLES & HAY, CONFLICT OF LAWS 346 (3d ed. 2000) (arguing that the "'but for' test is so potentially broad as to collapse the distinction between specific and general personal jurisdiction" and the "mere fact that the contact ultimately led to other events that produced the dispute . . . is not . . . sufficient to qualify it as related").

254. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589 (1991).

255. *See* Carnival Cruise Lines, Inc. v. Shute, 1991 WL 636293 at *3-11, 22-36 (oral argument concerning relationship issue).

256. The Court enforced a forum selection clause printed on the back of the cruise ticket and held that the plaintiffs agreed to bring their claims only in Florida, not the Washington forum. *Carnival Cruise Lines, Inc.*, 499 U.S. at 589. *See infra* note 316 and accompanying text (discussing *Carnival Cruise* forum selection clause).

and they apply in contexts other than vacation cases.[257] To be sure, lower courts and commentators have advocated other tests, including a product similarity test,[258] and many courts find jurisdiction in cases of weak relationship without ever addressing the issue. However, courts that have actually considered relationship tend to adopt one of the two stricter tests,[259] rather than a more liberal test.[260] Moreover, the Supreme Court's cases generally point to a test stricter than mere subject matter similarity.

This state of the law argues against specific jurisdiction in the problem class action. The absent class members' claims satisfy only a product similarity test.[261] All class claims concern the same general product, but the absent class claims are not causally related to the defendant's forum sales. In other words, an absent class member plaintiff could prove her claim without relying on any of the defendant's forum contacts, thus failing the strict proximate cause test. Likewise, her claim fails the intermediate "but for" test because the product sale and subsequent injury in her home state would have occurred "but for" the defendant's forum product sales.

A policy analysis argues against use of the liberal similarity test in the problem class action. The benefits and burdens of entering a state for product sales are not reciprocal when a nationwide class action puts all product sales at issue in a single state, regardless of the extent of sales in that state. The orderly administration of laws also is undermined. Under a similarity test, the defendant has no basis on which to predict the extent of suits based on isolated product sales. Any sales in the forum state, even a single sale, could subject the defendant to a suit in which it must defend all sales, nationwide. In addition, the forum state arguably ex-

257. In *Carnival Cruise*, for example, the Ninth Circuit noted a number of applications of the "but for" test. 897 F.2d at 384-85. Indeed, the repercussions of applying the proximate cause test outside the vacation travel context was one reason that the court opted for the "but for" test. *Id.* at 385 (noting that application of the proximate cause test would mean that product defect claims arise only in the place of manufacture and not the place of sale).

258. *See* Rose, *supra* note 232 (criticizing the "but for" test and arguing for a substantive relevance test that would include an exception permitting jurisdiction based on sales of similar products in the forum); Twitchell, *Myth of General Jurisdiction*, *supra* note 184, at 659-62 (arguing that substantive relevance test is "under inclusive" because it eliminates jurisdiction in cases, such as product similarity, where jurisdiction is fair).

259. *See* CASAD, *supra* note 153, § 108.42[b] (surveying federal circuits and concluding that most use an "arise out of" or proximate cause test but that some apply the test in a "roundabout" way so that it is essentially a "but for" test).

260. Courts rarely address product similarity as a test, but many decisions, such as the vacation travel cases, implicitly reject it. *See* Seymour v. Parke, Davis & Co., 423 F.2d 584, 585 (1st Cir. 1970) (holding that a New Hampshire court could not assert jurisdiction over a drug maker in a product liability claim brought by a Massachusetts consumer of drugs purchased in Massachusetts, even though the defendant advertised and solicited orders for the same drug in New Hampshire); *see also infra* note 280 and accompanying text (discussing *Seymour*).

261. The claims also would meet the "not wholly unrelated" test suggested by Justice Brennan in his dissent in *Helicopteros*, but likely not his "significantly" related test, at least as he applied it in *Helicopteros*. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 425-26 (1984); *see supra* notes 240-42 and accompanying text (discussing Justice Brennan's dissent in *Helicopteros*).

ceeds its sovereignty when it asserts jurisdiction over claims that are merely similar to activities within its borders, as opposed to causally connected to the forum conduct. Finally, the balance of reasonableness factors shifts somewhat when jurisdiction is based on similarity, as opposed to stricter causation. Evidentiary burdens and judicial inefficiencies are greater where the only connection to the forum is similar sales, as opposed to design or manufacture. Moreover, the out-of-state plaintiffs have less interest in the forum, and the forum state has less interest in providing a forum to out-of-state claimants.

In sum, both case law and policy argue against finding specific jurisdiction in the problem class action. Under most accepted views of specific personal jurisdiction, the out-of-state class claims are not sufficiently related to the defendant's forum activities to justify jurisdiction over those claims alone. Therefore, jurisdiction in the problem class action should not be based merely on the relationship of the absent class members' claims to the sales in the forum.

2. *General Jurisdiction Based on the Defendant's Business Contacts with the Forum*

A second possible basis for personal jurisdiction in the problem class action is general jurisdiction, where the relationship of the class claims to the defendant's forum contacts is immaterial. To justify general jurisdiction, the defendant's contacts with the forum must be substantial. The defendant's home state would have sufficient contacts to justify jurisdiction over unrelated claims, but the problem class action, like many class actions, is not pending in the defendant's home state. Instead, class counsel has chosen any one of the states in which the defendant has regular sales but no significant corporate operations. As to the volume of sales in the chosen forum, assume for the problem class action that the defendant's sales are equally divided between all fifty states, resulting in two percent of sales in each state, including the forum.

Perkins and *Helicopteros* reaffirm the *International Shoe* dictum that personal jurisdiction may be asserted over claims unrelated to the defendant's forum contacts, but they provide only marginal guidance in determining the point at which the defendant's contacts are substantial enough to support general jurisdiction. In *Perkins*, Ohio had essentially become the principal place of business of the defendant; no other state had more contacts with the defendant.[262] In *Helicopteros*, the defendant's home base remained in South America.[263] Texas was far from being the defendant's center of operations.[264] Thus, the two cases are relatively far apart in terms of extent of contacts, and the point of general jurisdiction falls

262. Perkins v. Benquet Consol. Min. Co., 342 U.S. 437, 447-48 (1952). *See supra* notes 185-86 and 223-25 (discussing *Perkins*).

263. *Helicopteros Nacionales de Colom., S.A.*, 466 U.S. at 409. *See supra* notes 187-91 and 238-43 (discussing *Helicopteros*).

264. *See id.* at 409-12.

somewhere between the level of forum activities in *Perkins* and *Helicopteros*.[265]

In *Rush v. Savchuck*,[266] the Court stated in dicta that "State Farm is 'found,' in the sense of doing business, in all fifty States"[267] and that State Farm's "forum contacts would support *in personam* jurisdiction even for an unrelated cause of action."[268] This might suggest that a corporation is subject to general jurisdiction in every state in which it does business, but this dicta is far from certain. First, State Farm was registered to do business in the forum state,[269] and as I discuss in the next section (Part II(B)(3)), this registration suggests a consent theory rather than a contacts-based theory of general jurisdiction. Moreover, the dicta, if aimed at a contacts-based form of general jurisdiction, are arguably inconsistent with other Court dicta regarding forum sales and general jurisdiction. Four years after *Rush*, the Court in *Keeton v. Hustler Magazine, Inc.*, stated that Hustler Magazine's regular sales of 10,000-15,000 magazines per month in New Hampshire were not enough to support general jurisdiction there.[270] These New Hampshire sales were undoubtedly on the low side of Hustler's magazine sales, in terms of percentage of national sales, and likely constituted less than two percent of the defendant's total sales. In *Rush*, however, State Farm necessarily had business levels of two percent (or less) in some states, yet the Court suggested that State Farm was subject to general jurisdiction in every state.[271] If the *Rush* dictum was directed to contacts-based general jurisdiction, it seemingly should have justified general jurisdiction over Hustler in New Hampshire.[272] Thus, the *Rush* dictum may have no application at all to contacts-based jurisdiction. At a minimum, the Court later clarified in *Keeton* that some instances of low sales volume are not sufficient to establish general personal jurisdiction.[273]

Lower courts and scholars have not reached a consensus as to the number and type of contacts necessary to establish general jurisdiction over

265. *See* SCOLES & HAY, *supra* note 253, at 350 (stating that *Perkins* and *Helicopteros* "provide some guidance at the margins" and that there are "literally infinite number[s] of factual permutations falling in between the two cases").

266. 444 U.S. 320 (1980).

267. *Id.* at 330.

268. *Id.*

269. Savchuk v. Rush, 245 N.W.2d 624, 629 (Minn. 1976).

270. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984).

271. *Rush*, 444 U.S. at 333.

272. The dollar differences in volume of business may reconcile the dicta in the two cases, but the parties in *Rush* did not brief the absolute level of State Farm's contacts with the forum. *Cf.* Brilmayer, *General Look*, *supra* note 210, at 743 (arguing that "for purposes of general jurisdiction, the relevant issue is the absolute amount of activity, not the amount of activity relative to what the defendant does outside the state"). This attempted reconciliation of the *Rush* and *Keeton* dicta is not satisfactory, for it argues for general jurisdiction over companies that have low percentage, perhaps even isolated, sales of high purchase price items (luxury cars) before it would support general jurisdiction over a corporation that sells almost all its low price product (penny candy) in the forum.

273. *Keeton*, 465 U.S. at 775-76.

unrelated claims.[274] Academic commentators tend to narrowly view general jurisdiction, typically arguing for general jurisdiction over corporate defendants in only the few states in which the corporation has contacts close to domicile status.[275] Few would support general jurisdiction based on sales alone.[276]

Lower courts are divided as to whether sales volume alone can support personal jurisdiction.[277] Many have refused to base general jurisdiction on sales and related contacts.[278] In *Carnival Cruise*, the Ninth Circuit rejected general jurisdiction based on forum cruise sales constituting only 1.29% of defendant's cruise business.[279] The First Circuit in *Seymour v. Parke, Davis & Co.* rejected general jurisdiction where the defendant only advertised and solicited orders in the forum state.[280] In *Bearry v. Beach Aircraft Corp.*,[281] the Fifth Circuit set a particularly high threshold. It reversed a finding of general jurisdiction where the defendant sold $250 million in airplane products in the forum.[282] The court relied in part on the fact that the defendant structured the sales to occur in its home state of Kansas, in an attempt to shield itself from the general jurisdiction of other states.[283]

---

274. General jurisdiction case law is difficult to study. As noted in Part I(F) with regard to nationwide class actions, many litigants may simply assume general jurisdiction. In response to isolated (as opposed to class) claims, the defendant may note the issue but decide that it is not economically feasible to pursue objections to general jurisdiction. *See* Twitchell, *Doing Business*, *supra* note 210, at 193-94 (stating that because defendants do not always pursue objections to general jurisdiction, "published case law does not reflect the entire picture").

275. *See* Rhodes, *supra* note 210, at 886-90 (proposing a three-prong test for general jurisdiction that would ask first whether the defendant's forum activities are analogous to the in-state activities of a forum domiciliary); Stein, *supra* note 210, at 758 (arguing that the test for general personal jurisdiction should be "whether the defendant has adopted the forum as its sovereign" and that the court should not ask about convenience but instead whether the defendant has "for most other purposes treated the forum as its home, notwithstanding its domicile elsewhere"); Wood, *supra* note 133, at 614 (arguing that 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").

276. *See* Wood, *supra* note 133, at 614-15 (arguing that general jurisdiction "should not be found in every state where a defendant has a significant amount of business," but instead should be "confined to those few places that can legitimately be viewed as. . . [a] corporation's base of operations"); *but see* Brilmayer, *General Look*, *supra* note 210, at 741-43 (arguing that place of incorporation and principal place of business are not the only legitimate places for general jurisdiction and that "[t]he nonunique relationship of continuous and systematic activities . . . satisfies the reciprocal benefits and burdens rationale as well as do unique affiliations . . . .").

277. SCOLES & HAY, *supra* note 253, at 351 (stating that courts "are severely divided as to whether substantial in-state sales" support general personal jurisdiction) (footnotes omitted).

278. *See* CASAD, *supra* note 153, § 108.41[3] (stating that "lower courts have evinced a reluctance to assert general jurisdiction over . . . foreign corporations even where the contacts with the forum are quite extensive").

279. Shute v. Carnival Cruise Lines, 897 F.2d 377, 381 (9th Cir. 1990).

280. 423 F.2d 584 (1st Cir. 1970); *see supra* note 260 (discussing *Seymour*).

281. 818 F.2d 370 (5th Cir. 1987).

282. *Id.* at 372-73.

283. *Id.* at 375-76 (stating that defendant "has not afforded itself the benefits and protections of the laws of Texas, but instead has calculatedly avoided them").

On the other hand, some lower courts have based general jurisdiction on sales in the forum state. For example, the Second Circuit in *Metropolitan Life Insurance Co. v. Robertson-CeCo Corp.* found general jurisdiction where the defendant had less than one percent of its total sales in the forum.[284] In *Ex Parte Newco Mfg. Co.*,[285] the Alabama Supreme Court, in stark contrast to the Fifth Circuit in *Bearry*, based general jurisdiction on sales ranging only from $65,000 to $85,000 over a five-year period, even though the defendant structured its sales to occur either through independent agents or through mail from its home state of Kansas.[286] Thus, there is conflicting authority as to whether sales volume can support general jurisdiction.[287]

A policy analysis argues against basing general jurisdiction on mere sales volume. First, there is no proportionality. The reciprocity policy requires that the burdens of entering a state (extent of jurisdiction) be proportional to the benefits (sales). In the problem class action, the defendant has a small benefit (two percent of total sales volume) relative to the unlimited burden of defending all possible claims, by all consumers, nationwide. Orderly administration of laws also argues against this low threshold for general jurisdiction because the defendant would have little opportunity for meaningful planning. It would have to assume that any regular sales volume would expose it to jurisdiction on any suit, no matter how unrelated to the forum. Likewise, the state would have a weak sovereignty interest in basing general jurisdiction on sales alone. The activity underlying the claims of the unnamed class members did not occur in the forum state's borders, and the defendant is far from being a forum citizen. A corporation is not a state citizen merely because it sells two percent of its products there. The corporation certainly would not view this state as its home.

Finally, reasonableness analysis does not support general jurisdiction based on sales alone. By definition, the claims are unrelated to the defendant's forum activities, so the defendant bears evidentiary and other burdens in defending in the forum, and the out-of-state plaintiffs have low interest in the forum. Contrast this mix of factors with general jurisdic-

284. 84 F.3d 560, 570 (2d Cir. 1990). The defendant was a Delaware corporation, based in Pennsylvania, whose St. Louis division contracted with plaintiff Met-Life to build "curtain walls" for a building in Miami. Met-Life filed suit in Vermont, which had a long limitation period, and conceded that "none of the activities that served as a basis for [its] complaint took place in Vermont." *Id.* at 565.

285. 481 So. 2d 867 (Ala. 1985).

286. *Id.* at 869; *see also Ex Parte* United Bhd. of Carpenters, 688 So. 2d 246, 251-52 (Ala. 1997) (reaffirming *Newco* and permitting general jurisdiction over defendant union based on ten local affiliates with Alabama membership constituting only one half of one percent of total membership).

287. In the sales cases, product sales usually are not the defendant's only contacts with the forum. The defendant necessarily has marketing activities, such as national advertising, local dealerships, and phone help lines, to facilitate the sales. The courts rely on these other contacts to varying degrees, but the marketing contacts do not seem to distinguish the different holdings. *Cf.* Twitchell, *Doing Business*, *supra* note 210, at 187-89 (surveying cases and noting that courts tend to look at comparative sales volumes "because they lack any better guide").

tion in the defendant's home state. To be sure, when the forum is the defendant's home state, the defendant also might face some evidentiary burdens in defending unrelated claims, but these burdens would be offset by other efficiencies of defending at its home. Moreover, the forum state would have an interest in providing a forum in which its citizens can defend themselves. This balance is not present when the defendant merely sells products in the forum.

Some courts and commentators have suggested a blending between the two key factors of general personal jurisdiction—degree of relationship and extent of contacts.[288] They object to strict characterization of a case as falling in one category or the other—specific versus general personal jurisdiction. They suggest a "sliding scale" or "hybrid" approach, under which a moderate amount of contacts would justify jurisdiction over a claim that has marginal relationship to those contacts.[289] For example, as applied to the problem class action, the marginal relationship of the claims (product similarity) would justify jurisdiction because the defendant has regular, rather than merely isolated, sales in the forum.[290]

This theory could explain the holdings in cases such as *Metropolitan Life* and *Newco*.[291] In both cases, the claim was marginally related to the defendant's forum contacts, even though the claim did not arise out those contacts. In *Metropolitan Life*, the claim concerned curtain walls installed in Florida, but which the defendant also sold in the Vermont forum.[292] In *Newco*, the out-of-state claims likewise concerned a product similar to those sold by the defendant in the forum state.[293] Neither court likely would have based jurisdiction on a clearly unrelated claim—for example, an employment contract claim brought by an employee who worked in another state. This is not to say that either court backhandedly used a lesser relationship test. Neither court likely would have found specific jurisdiction over an out-of-state consumer claim if the defendant had only a single sale in the forum state. Instead, jurisdiction seemingly resulted from a blending of the two factors.

---

288. *See* William M. Richman, *Jurisdiction in Civil Actions: By Robert C. Casad*, 72 CAL. L. REV. 1328 (1984) (book review).

289. *Cf.* Shutt v. Carnival Cruise Lines, 897 F.2d 377, 385 n.7 (9th Cir. 1990) (noting "that where the defendant has only one contact with the forum state, a close nexus between its forum-related activities and the cause of the plaintiffs' harm may be required").

290. Richman, *supra* note 288, at 1343-44 (arguing for jurisdiction in a product similarity case even though the case "satisfies neither paradigm" of specific or general personal jurisdiction); *cf.* Simard, *supra* note 210, at 580-82 (noting problems with sliding scale theory as applied to product similarity cases and arguing for a restrained specific personal jurisdiction approach for "hybrid" cases).

291. *See* Twitchell, *Doing Business*, *supra* note 210, at 191-93 (studying hundreds of cases and concluding that in most cases in which the court found general jurisdiction, the claim was somehow related to the defendant's forum contacts).

292. Metro. Life Ins. Co. v. Robertson-CeCo Corp., 84 F.3d 560, 565 (2d Cir. 1990). *See supra* note 284 (discussing *Metropolitan Life*).

293. *Ex Parte* Newco Mfg. Co., 481 So. 2d 867, 869 (Ala. 1985). *See supra* notes 285-86 (discussing *Newco*).

Policy analysis, however, argues against jurisdiction based on a sliding scale theory. As set out in the preceding section (Part II(B)(1)), mere similarity in product is not a sufficient relationship on which to base jurisdiction because sale of a similar product does not give sufficient reciprocity, predictability or state interest. These failures are not cured by increasing the amount of sales in the forum from isolated to regular sales. The benefits of selling two percent of the defendant's total sales volume is not reciprocal to the burden of having to defend product claims based on all national sales. Mere regularity does not equalize the burdens. The defendant is not given fair warning of potential exposure to suit; it instead must assume that a steady stream of product sales, even sales as low as two percent of total sales, will expose it to unlimited jurisdiction as to all sales. Although the state has an interest in the products sold within its borders, it has little interest in products sold elsewhere, unless the defendant has enough of a substantial connection with the state to make it the equivalent of a state citizen. In short, an assertion of jurisdiction that is otherwise unfair is not made fair by making relatively minor adjustments in either the degree of relationship or the extent of local contacts. The policy reasons underlying personal jurisdiction argue for more clear-cut standards for jurisdiction.

Accordingly, although there might be some support in the case law for general jurisdiction based on regular sales volume as low as two percent, the better view is that a state court's exercise of jurisdiction under these circumstances would violate due process. Jurisdiction over the out-of-state claims in the problem class action therefore likely cannot rest merely on the defendant's forum contacts. In other words, the problem class action fails minimum contacts analysis. Neither specific, nor general, personal jurisdiction, based on the defendant's forum contacts, is justified.

3. *Defendant's Consent to General Jurisdiction Through Corporate Registration in the Forum State*

The next argument also relies on general jurisdiction, but it uses corporate registration, not forum contacts, as the basis for that broad jurisdiction. This argument asserts that an out-of-state corporation that has registered to do business in a state has thereby consented to general jurisdiction in that state. Corporate registration seems to be a commonly assumed basis for jurisdiction over out-of-state corporations. Indeed, such assumption probably explains the lack of debate concerning jurisdiction over the defendant in nationwide class actions,[294] but jurisdiction under this theory is far from a foregone conclusion. First, by definition, the argument applies only to corporations who register to do business in the forum state. Second, the statutes vary from state to state, and courts cannot agree as to their effect. Finally, even in the states that broadly inter-

294. *See supra* Part I(F) (discussing likely assumption regarding jurisdiction in nationwide class actions).

pret their statutes to confer general jurisdiction, such extracted consent might violate due process and the dormant commerce clause. The following analysis of jurisdiction in the problem class action will assume that the first hurdle is cleared; the defendant has complied with the foreign corporation registration statute in the forum and has appointed an agent there for service of process.[295]

A preliminary question is whether in-state service on the appointed agent establishes general jurisdiction over the corporation, independent of consent, under a tag jurisdiction theory. The Court has not directly addressed the question, but the likely answer is no. Even under *Pennoyer*, where service was the primary means of securing jurisdiction,[296] corporate jurisdiction was based on theories of implied consent or presence through business activities, not the mere fact of in-state service.[297] Indeed, the Court in the *Pennoyer* era repeatedly held that in-state service on a corporate agent was not enough to confer jurisdiction where the corporation otherwise did not do sufficient business in the state.[298] *International Shoe* did not change this view. In fact, in *International Shoe* itself, the defendant's salesman was served in the forum, but the Court based jurisdiction on contacts rather than in-state service.[299] Likewise, in *Perkins*, the defendant's president was served in Ohio while acting in his corporate capacity, but the Court based general jurisdiction on the corporation's forum contacts, not in-state service.[300]

Nevertheless, some courts have used *Burnham* to justify tag jurisdiction over corporations.[301] This likely is an erroneous view, for the rea-

295. Without registration and actual appointment of an agent, there is no basis on which to argue consent. The Court in *International Shoe* rejected the theory of implied consent based on business activity and substituted minimum contacts analysis. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-18 (1945); *see supra* note 167 (quoting *International Shoe* concerning implied consent).

296. *See supra* notes 144-52 (discussing *Pennoyer*). By contrast, today service is largely seen as a question of notice, distinct from amenability to jurisdiction. *See* FRIEDENTHAL, *supra* note 5, at 176 ("Due process not only requires that the court must have power to adjudicate, it also demands that the defendant have notice of the institution of proceedings against him. The constitutional obligation to provide the defendant with proper notice and an opportunity to be heard is an additional aspect of the due-process limitation on a court's ability to exercise jurisdiction.").

297. *See supra* notes 148-62 (discussing corporate jurisdiction under *Pennoyer*).

298. *See, e.g.*, Riverside & Dan River Cotton Mills, Inc. v. Menefee, 237 U.S. 189 (1915) (service on corporate director who is forum resident insufficient to confer jurisdiction); Goldey v. Morning News of New Haven, 156 U.S. 518 (1895) (service on defendant's president who was temporarily in forum insufficient to confer jurisdiction).

299. *Int'l Shoe Co.*, 326 U.S. at 312, 320.

300. Perkins v. Banquet Consol. Mining Co., 342 U.S. 437, 438-440 (1952) (noting service). The Court stated that statutes requiring corporations to obtain a license and designate a statutory agent for service is "not a conclusive test" as to jurisdiction. *Id.* at 445. *See supra* notes 185-86 & 223-25 and accompanying text (discussing *Perkins*).

301. *See* Allied-Signal Inc. v. Purex Indus., Inc., 576 A.2d 942 (N.J. Super. Ct. App. Div. 1990) (applying *Burnham* and holding that service on the corporate defendant's registered agent conferred general jurisdiction on unrelated claims); *but see* Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 182-83 (5th Cir. 1992) (rejecting argument that *Burnham*, establishes that service on an in-state agent "automatically subjects the corporation to jurisdiction"); MBM Fisheries, Inc. v. Bollinger Mach. Shop Shipyard, Inc., 804 P.2d 627, 631 (Wash. Ct. App. 1991) (distinguishing *Burnham*, and holding that in-state service on

sons stated above. Moreover, *Burnham* involved in-state service on a natural person, and Justice Scalia, who wrote the primary opinion on which these courts rely, suggested that tag jurisdiction is limited to natural persons.[302] Service on an ordinary corporate agent may have different jurisdictional consequences than service on an agent officially designated as the corporation's agent for in-state service, but the significance, if any, derives from the corporation's consent to jurisdiction through the official appointment itself.

Most courts that rely on corporate registration to confer jurisdiction do so on a consent theory. In the *Pennoyer* era, the Court suggested that actual appointment of an in-state agent pursuant to a corporate registration statute could confer general personal jurisdiction and not offend due process.[303] Moreover, as illustrated by *Bauxites*, consent has clearly survived *International Shoe* as a basis for jurisdiction,[304] but this does not mean that corporate registration is a valid form of consent. It certainly does not mean that corporate registration is the easy answer to jurisdiction in the problem class action.

First, not all registration statutes confer general jurisdiction. Registration statutes vary in each state, and most do not specify the effects of registration.[305] Instead, registration statutes typically require simply that the corporation name an in-state agent for service and do not mention "jurisdiction."[306] Accordingly, whether the appointment of an agent con-

---

corporate officer "cannot alone confer general jurisdiction"). *See supra* notes 204-07 and accompanying text (discussing *Burnham*).

302. Justice Scalia compared contacts-based general jurisdiction over corporations to in-state tag service on a private person. *Burnham*, 495 U.S. at 610 n.1. Citing *Perkins*, Justice Scalia noted that the only case in which the Court had upheld general jurisdiction on a corporation included in-state service on the defendant corporation's president but that the Court based jurisdiction on contacts, not service. He suggested that contacts-based general jurisdiction may be limited to corporations because they "have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person.'" *Id.* (quoting *Int'l Shoe Co.*, 362 U.S. at 316).

303. Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); *see supra* notes 148-62 (discussing *Gold Issue Mining* and other *Pennoyer*-era consent cases).

304. *See supra* notes 200-02 (discussing Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)).

305. *See* Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1 (1990) (collecting statutes and stating that "each state mandates that an agent be appointed" but that "most statutes fail to discuss the effects of appointment on the state's jurisdiction over the foreign corporation"). Registration statutes are relics of the *Pennoyer* era. *See supra* notes 144-52 (discussing *Pennoyer* consent statutes); *see also In re* Mid-At. Toyota Antitrust Litig., 525 F. Supp. 1265, 1278 n.10 (D. Md. 1981) ("consent statutes are largely obsolete and serve only to confuse matters"); William L. Walker, *Foreign Corporation Laws: A Current Account*, 47 N.C. L. REV. 733, 734-38 (1969) (arguing that the requirement that corporations appoint local agents has no jurisdictional purpose after *International Shoe* and that registrations statutes "have encouraged inappropriate expansions of unlimited general jurisdiction and discouraged worthwhile analysis").

306. *See* MODEL BUS. CORP. ACT ANN. § 15.03 (1998) (providing that an application for a certificate of authority to transact business in the state must set forth the name and addressed of the corporation's registered agent in the state); § 15.10 (providing that "[t]he registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice or demand required or permitted by law

fers jurisdiction usually depends on statutory interpretation by local courts. A few states interpret the appointment of agent requirement only as a means of facilitating service where jurisdiction is otherwise proper under the long-arm statute or as merely one contact to be analyzed in minimum contacts analysis.[307] Some courts hold that the local registration statute confers consent to jurisdiction, but they limit it to specific jurisdiction over claims arising out of the corporation's in-state activities.[308] In these states, corporate registration would not confer jurisdiction over the defendant in the problem class action.

A number of states, however, interpret their registration statutes as conferring general jurisdiction,[309] and the remaining analysis will assume that class counsel has selected one of these states as the forum for the problem class action. In these states, the question is whether it is constitutional for courts to assert general jurisdiction based solely on corporate registration. The Supreme Court has not directly addressed the issue. A few scholars have argued that forced consent to general jurisdiction through a corporate registration statute is unconstitutional.[310] Lower courts are split on the issue. Some courts hold that as matter of due pro-

---

to be served on the foreign corporation"). A very few states have modified their statutes to specify that they have no impact on a foreign corporation's amenability to suit. *See* FLA. STAT. § 607.1501(4) (2001) (providing that requirement of certificate of authority "has no application to the question of whether any foreign corporation is subject to service of process and suit in this state").

307. *See* Freeman v. Dist. Ct. of Washoe County, 1 P.3d 963, 968 (Nev. 2000) (holding that "the appointment of an agent to receive service of legal process pursuant to [the Nevada foreign insurance corporation registration statute] does not in itself subject a nonresident insurance company to the personal jurisdiction of Nevada Courts").

308. *See* Freeman Funeral Home, Inc. v. Diamond S. Constructors, Inc., 266 So. 2d 794, 795-96 (Ala. Civ. App. 1972) (holding that "a statutory agent may be served with process only in cases where the cause of action arose in [Alabama]" because the Alabama foreign registration statute was "enacted to protect the citizens of the state as to causes of action arising within the state and resulting from the doing of business by foreign corporations in this state" and thus a corporation's consent to jurisdiction "is confined to transactions or causes of action arising in this state and not those arising in other states"); Gray Line Tours v. Reynolds Elec. & Eng'g Co., 238 Cal. Rptr. 419, 421 (Cal. Ct. App. 1987) (holding that California statute requiring consent to service on in-state agent did not confer jurisdiction on suits not arising out of business done in California); *see generally* CASAD, *supra* note 153, § 108.41[4] (stating that some statutes are limited to specific jurisdiction and others are interpreted to confer only specific personal jurisdiction).

309. *See* ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 3-2[2][a] (3d ed. 1998) (surveying interpretations of statutes); Kipp, *supra* note 305, at 44 (stating that "only a few states have registration statutes that expressly provide for the assertion of general jurisdiction").

310. *See* CASAD & RICHMAN, *supra* note 309, § 3.2[2][a][ii] (stating that consent through registration statutes "may raise due process problems if the required consent is held to extend to causes of action unrelated to the state and to claims by persons having no connection with the state"); Brilmayer, *A General Look*, *supra* note 210, at 756-60 (questioning consent to jurisdiction and stating that the "most formidable constitutional issue surrounding general jurisdiction by consent arises when consent derives from a statutorily required appointment rather than from contract"); D. Craig Lewis, *Jurisdiction Over Foreign Corporations Based On Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1 (1990) (arguing that the doctrine of "unconstitutional conditions" bars states from using corporate registration statutes to exact consent not otherwise sufficient under minimum contacts analysis).

cess, *International Shoe* requires minimum contacts analysis as to all assertions of state court jurisdiction over out-of-state corporations.[311] Others hold that registration-consent may confer general jurisdiction, consistent with due process, independent of minimum contacts analysis.[312] These courts may be dividing on the wrong grounds. The first group of courts runs afoul of the Court's clear precedent under *Bauxites* that due process permits jurisdiction based on consent without minimum contacts analysis.[313] The second group does not look closely enough at the consent itself.

State-extracted waiver or consent to jurisdiction is subject to a due process inquiry, although the test is difficult to identify. In *Bauxites*, the Court applied the due process standards applicable to procedural sanctions to test a finding that a defendant waived its jurisdictional challenge.[314] In *Shutts*, the Court looked to a variety of procedural protections to assess the fairness of basing jurisdiction on absent class members' failure to opt out of the class.[315] In *Carnival Cruise*, the Court used a "fundamental fairness" test to assess a forum selection clause in a private contract.[316] Nevertheless, regardless of its wording, the due process test seemingly sets a low threshold, since the Court found the "consent" to be valid in all three cases.

These holdings might suggest that the Court would approve of consent through corporate registration. Indeed, in *Bauxites*, the court in a dictum broadly endorsed a variety of forms of consent to jurisdiction, including "constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures."[317] Although the *Bauxites* Court did not list corporate registration as an example of consent through voluntary use of state procedures, the Court two years earlier, in *Rush*,

311. *See* Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183-84 (5th Cir. 1992) (holding that Texas registration statute may extend only jurisdiction that is otherwise "constitutionally permissible" under independent minimum contacts analysis).

312. Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir. 1990) (interpreting Minnesota registration statute as conferring general jurisdiction and stating that "[o]ne of the most solidly established ways of giving such consent is to designate an agent for service of process within the State").

313. Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982). *See supra* notes 200-02 (discussing *Bauxites*).

314. The Court upheld a trial court's sanction under which the court ruled that a foreign defendant waived its jurisdictional challenge through its misconduct in discovery. The Court asked whether it was valid to presume "[']that the refusal to produce evidence material . . . was but an admission of the want of merit in the asserted defense.'" *Bauxites*, 456 U.S. at 704-06 (quoting Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350-51 (1909)). "Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption." *Id.* at 706.

315. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (noting that the "essential question" was "how stringent the requirement for a showing of consent will be"); *id.* at 814 (citing *Bauxites* and concluding that the "interests of the absent plaintiff are sufficiently protected by the forum State when those plaintiffs are provided with a request for exclusion that can be returned within a reasonable time to the court").

316. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (stating that forum selection clauses are "subject to judicial scrutiny for fundamental fairness").

317. *Bauxites*, 456 U.S. at 703-04.

seemingly approved such consent in dictum, stating that State Farm was "doing business" and subject to general jurisdiction in every state.[318] As I note above, this statement likely referred to corporation registration, given that State Farm was registered to do business in Minnesota and had in fact appointed an in-state agent.[319]

Nevertheless, arguments can be made that the consent through corporate registration does not comport with due process. The state is coercing the consent, usually without explicit warning.[320] In *Bauxites*, the discovery sanction rule did not mention consent to jurisdiction, but the trial court previously warned the defendant that it must comply with its discovery order or waive its challenge to jurisdiction.[321] More importantly, the consent at issue in the problem class action registration is unlimited, conferring jurisdiction over all claims on any matter by any person. In *Bauxites*, there was reciprocity in the behavior that constituted waiver and the consequences of that behavior; the jurisdiction was limited to the particular suit. Likewise, jurisdiction in *Shutts* extended only to the royalty claim, and the *Carnival Cruise* consent was limited to suits arising from the cruise.[322] In the problem class action, the unlimited nature of the jurisdiction may tip the scales and render this "consent" fundamentally unfair.

That the state is reaching out to claims that arise outside the forum suggests another constitutional problem under the dormant commerce clause. Full analysis of this issue is beyond the scope of this article, but some commentators have suggested that when corporate registration statutes confer general jurisdiction, they impermissibly interfere with interstate commerce.[323] Before *International Shoe*, the Court invalidated some state court exercises of general jurisdiction on dormant commerce clause grounds,[324] but that test faded as the due process minimum contacts test developed. In the case of corporate registration, however, reliance on the dormant commerce clause rather than due process might impact the outcome. As I note above, courts in due process cases set a low threshold for consent, which in turn might allow a court to avoid a negative outcome under due process analysis. Consent plays a different role in dormant commerce clause analysis.

---

318. Rush v. Savchuk, 444 U.S. 320, 330 (1980).

319. *See supra* notes 266-72 and accompanying text (discussing *Rush*).

320. *See supra* notes 305-06 and accompanying text (noting lack of specificity as to jurisdictional effect of corporate registration).

321. *Bauxites*, 456 U.S. at 699.

322. *See supra* notes 244-56 and accompanying text (discussing Ninth Circuit and Supreme Court decisions in *Carnival Cruise Lines*).

323. Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1189 (2003) (noting that registration-consent statutes might be "obnoxious" to the Commerce Clause); T. Griffin Vincent, Comment, *Toward a Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents*, 41 BAYLOR L. REV. 461, 493 (1989) (exploring arguments and concluding that registration-consent may violate the Commerce Clause).

324. *See supra* notes 155-56 (discussing Davis v. Farmers' Co-op Equity Co., 262 U.S. 312 (1923) and related cases).

In *Bendix Autolite Corp. v. Midwesco Enterprises*,[325] the Court invalidated Ohio's scheme in which the state penalized out-of-state corporations that refused to register and consent to general jurisdiction.[326] *Bendix* was a dormant commerce clause challenge to an Ohio law that forced out-of-state corporations to choose between registration-consent to general jurisdiction and the statute of limitation defense.[327] The Court found that the law impermissibly burdened interstate commerce.[328] The Court's analysis focused on the forfeiture of the statute of limitation defense and did not address the consent to general jurisdiction standing alone.[329] Nevertheless, that Ohio required the corporation to consent to general jurisdiction, as opposed to more limited specific jurisdiction, was critical to the Court's holding. The Court stated that the "designation of an agent subjects the foreign corporation to the general jurisdiction of the Ohio courts in a manner to which Ohio's tenuous relation would not otherwise extend."[330] It described general jurisdiction as a "significant burden"[331] and concluded that the "exaction" of the consent through waiver of the limitation defense was "an unreasonable burden on commerce."[332]

The repercussions of *Bendix* are not certain. Scholars and lower courts debate its impact.[333] Moreover, as a result of *Bendix*, most state foreign registration schemes today do not force the choice between consent to general jurisdiction and waiver of the statute of limitation defense. Yet, registration statutes are still coercive. They penalize non-registration

325. 486 U.S. 888 (1988).

326. *Id.* at 895 (noting that "a designation with the Ohio Secretary of State of an agent for the service of process likely would have subjected [defendant] to the general jurisdiction of Ohio's courts over transactions in which Ohio had no interest").

327. "The statute [of limitation] is tolled . . . for any period that a person or corporation is not 'present' in the state. To be present in Ohio, a foreign corporation must appoint an agent for service of process, which operates as consent to general jurisdiction of the Ohio courts." *Id.* at 889.

328. *Id.* at 894-95. The Court majority seemingly found that the Ohio scheme violated both tiers of dormant commerce clause analysis. It first suggested that the Ohio law impermissibly discriminated against interstate commerce. The Court found that the Ohio statute "imposes a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulation." *Id.* at 894. This alone would have been enough to invalidate the statute. Indeed, Justice Scalia's concurrence rested on this ground alone. *Id.* at 898. The majority, however, proceeded to find that the Ohio scheme also violated the balancing test.

329. Some scholars have questioned why the Court did not independently condemn this aspect of the Ohio law as a matter of due process. *See* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 550-51 & 557-60 n.152 (1991) (analyzing *Bendix* and questioning why "none of the Justices seemed troubled by this extorted waiver of a constitutional right").

330. *Bendix Autolite Corp.*, 486 U.S. at 892-93 (citing *World-Wide Volkswagen*).

331. *Id.* at 893.

332. *Id.* at 894-95.

333. *See* Sternberg v. O'Neil, 550 A.2d 1105, 1107, 1109 (Del. 1988) (relying in part on *Bendix* to hold that registration-consent remains a viable basis for jurisdiction); *see also* Lea Brilmayer, *Consent, Contract and Territory*, 74 MINN. L. REV. 1, 29 n.86 (1989) (citing *Bendix* and stating that "[a]lthough the case law on this issue is not entirely clear, such assertions of jurisdiction may be unconstitutional"); Kipp, *supra* note 305, at 32-33 (arguing that the *Bendix* case is ambiguous and that use of registration statutes to infer consent to general jurisdiction is an "anachronism").

through a variety of means, including fines and forfeiture of the right to sue in local courts.[334] Given the *Bendix* Court's condemnation of consent to general jurisdiction as a "substantial burden," *Bendix* at least raises doubt about the constitutionality of any statute that purports to coerce this consent.

In sum, the proper effect of corporate registration statutes raises issues that warrant more in-depth study. It is safe to say for this analysis that jurisdiction based on corporate registration does not clearly establish jurisdiction in the problem class action. This form of jurisdiction, if permitted at all, applies only to corporations who register in the forum state, and it applies only in states that broadly interpret their registrations statutes to confer general jurisdiction. Even then, jurisdiction in the problem class action presents uncertainty as to both the due process fairness of the consent and its effect on interstate commerce.

4. *Special Jurisdiction in Nationwide Class Actions Based on Joinder*

Unlike the prior arguments, which look to the class claims as separate suits, the final argument views the class claims as one unit. Under this view, the principal jurisdictional focus is on the claims of the named plaintiffs rather than the claims of the absent members. So long as some of the claims arise out of the defendant's forum activity—the named plaintiff's claims in the problem class action—the court has personal jurisdiction over the remaining claims based on their joinder to the local claims. Some legal observers call this doctrine "pendent" personal jurisdiction, but because that doctrine has a particular meaning in federal court, I use the term "joinder" jurisdiction.[335]

One Supreme Court case, *Keeton v. Hustler*,[336] arguably supports this theory. In *Keeton*, a New York resident brought a defamation suit in New Hampshire against Hustler, an Ohio magazine publisher. The plaintiff had virtually no relationship with New Hampshire,[337] and only a small percentage of the offending copies of the magazine were sold in New Hampshire.[338] New Hampshire allowed the plaintiff to sue for all of her nationwide damages, not just those arising in New Hampshire, and its six-year limitation period made New Hampshire the only state in which her

334. MODEL BUS. CORP. ACT ANN. § 15.02(a) (1998) (providing that a "foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority"); *id.* § 15.02(d) (providing civil penalties for transacting business without a certificate of authority).

335. *See* Linda Samstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619 (2001) (arguing that state and federal courts can exercise pendent personal jurisdiction) [hereinafter Simard, *Exploring the Limits*]; *see also Ex Parte* Dill, Dill, Carr, Stonbraker & Hutchins, 866 So. 2d 519, 544-47 (see dissent) (arguing application of "pendent personal jurisdiction" to justify state court personal jurisdiction over related out-of-state claim). I discuss the federal doctrine *infra* in Part III(B).

336. Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

337. Plaintiff was a resident of New York and her only connection with New Hampshire was that she was an editor of Penthouse magazine with sales in New Hampshire. *Id.* at 772.

338. *Id.* at 772-73, 775.

claim was not time-barred.[339] The case thus presented a situation similar, but not identical, to the problem class action—the plaintiff was injured by an act (publication of the magazine) in the forum and she sought damages for this injury, but the bulk of her damages arose from injuries suffered elsewhere, primarily as a result of defendant's publication outside the forum.[340]

In *Keeton*, the Court acknowledged that personal jurisdiction must be judged in light of the plaintiff's[341] nationwide claim: whether it is "'fair' to compel [defendant] to defend a multi-state lawsuit in New Hampshire seeking multi-state damages for all copies of the five issues in questions, even though only a small portion of those copies were distributed in New Hampshire."[342] Yet, the Court evidently concluded that the claim was sufficiently related to New Hampshire because it characterized *Keeton* as a specific rather than general jurisdiction case and stated that plaintiff's "cause of action arises out of the very activity being conducted, in part, in New Hampshire."[343] *Keeton* thus suggests that only part of the plaintiff's claim must arise in the forum to satisfy the first prong of the *World-Wide Volkswagen* test for specific jurisdiction.[344] This is significant because once a case passes the first prong, the burden shifts to the defendant to show a compelling case of unreasonableness. The Court has only once held that jurisdiction was unreasonable under the second prong, and that case involved foreign national parties and other extraordinary facts.[345]

Despite this broad suggestion of personal jurisdiction based on joinder to in-state claims, *Keeton* does not conclusively establish jurisdiction in the problem class action. *Keeton* did not involve joinder of parties. In *Calder v. Jones*, a companion case to *Keeton*, the Court suggested that party joinder does not lessen jurisdictional standards at least as to joined defendants; the claim against each defendant must be judged independently for jurisdictional purposes.[346] *Keeton* involved one person's claim for damages that occurred in multiple places.[347] The appropriate analogy

339. *Id.* at 773; *see* Walker, *supra* note 83, at 19 (noting that New Hampshire had become a well known "haven" for forum shopping plaintiffs due to its long limitation period).

340. *Keeton*, 465 U.S. at 770.

341. The out-of-state plaintiff's lack of relationship to the forum was not by itself grounds to deny jurisdiction. The Court explained that forum shopping is a normal aspect of litigation and the plaintiff need not have minimum contacts with the forum. *Id.* at 779.

342. *Id.* at 775 (citations omitted) (emphasis in original).

343. *Id.*

344. *See* Simard, *Exploring the Limits*, *supra* note 335, at 1661 (arguing that the *Keeton* case provides "evidence that the Due Process Clause is broad enough to permit adjudication of entire controversies" based on a pendent jurisdiction theory).

345. Asahi Metal Indus. Co. v. Sup. Ct. of Cal., 480 U.S. 102, 116 (1987) (finding jurisdiction unreasonable under second prong where California asserted jurisdiction over a Japanese third-party defendant to an indemnity claim brought through impleader by a Taiwanese primary defendant after the main claim had settled).

346. Calder v. Jones, 465 U.S. 783, 790 (1984) ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction.") (quoting Rush v. Savchuk, 444 U.S. 320, 322 (1980)).

347. Professor Kennedy distinguishes the plaintiff class members in *Shutts* on this basis:

> Plaintiff Keeton's claim was a compulsory, indivisible claim that required a unitary adjudication in one forum. In contrast, in *Shutts*, the nonresident

to the problem class action would be a class action in which a class of nationwide magazine purchasers sued Hustler in New Hampshire for consumer fraud. Such a class action would be an extension of the *Keeton* holding.

A policy analysis of *Keeton* shows that its holding already stretched the justifications for jurisdiction[348] and that any extension to the problem class action would violate the policies underlying minimum contacts analysis. First, as to reciprocity, in the actual *Keeton* case, the benefits of Hustler entering the New Hampshire market and selling a low volume of a particular magazine arguably did not match the burden of Hustler having to defend a suit for nationwide defamation damages. In the problem class action, the imbalance would be greater. The defendant (Hustler in this variation) would have to bear the burden of defending in any state all claims by magazine purchasers throughout the country, not just the claims of the persons it potentially defames in each issue. The same comparison applies to the predictability rationale. In the actual case, Hustler likely did not predict that any person defamed in its magazine could sue in any state in which it sold a copy of the magazine, but in the Hustler version of the problem class action, the warning would be even less. Hustler's potential for suit no longer would be limited to defamation suits by persons targeted in its magazine;[349] it would extend to every form of consumer suit in every state.

As to state sovereignty, the Court in the actual case said that New Hampshire had three different interests: first, regulating defamation that entered its borders and impacted New Hampshire readers; second, redressing plaintiff's harm occurring in its borders; and third, cooperating with other states to efficiently resolve defamation suits in one setting.[350] The first two interests are local and justify jurisdiction over the plaintiff's harm in New Hampshire, as it would justify jurisdiction in the problem class action over the local claims of the named class plaintiffs. Neither interest was implicated by the out-of-state harm suffered by the plaintiff

---

> members were permissibly joinable parties with permissibly joinable claims that did not arise out of Phillips' act in Kansas. If a second permissibly joinable co-plaintiff had joined Keeton to sue for a version of the story not published in New Hampshire, . . . the co-plaintiff's consent should not be able to overcome the limitation that the co-plaintiffs' claim must arise out of Hustler's acts in New Hampshire.

Kennedy, *supra* note 139, at 281-82, n.140.

348. The mere fact that *Keeton* involved a defamation claim might be grounds to limit its holding. Although the Court in *Calder*, 465 U.S. at 790-91, refused to develop special jurisdictional rules for defamation cases, lower courts have limited the Court's personal jurisdiction holdings in defamation cases, largely due to the unusual damages in defamation cases—intangible injuries suffered by an individual that transcend state borders. *See* Griffis v. Luban, 646 N.W.2d 527, 532-35 (Minn. 2002) (surveying differing interpretations of *Calder* and joining majority of courts that are cautious and narrowly interpret *Calder*).

349. In *Calder*, the Court suggested that such targeting was an essential component in its expansion of jurisdictional theory to individual defendants in defamation cases. *Calder*, 465 U.S. at 788-89; *see also Keeton*, 465 U.S. at 789-90 (contrasting "mere untargeted negligence" from the deliberate defamation of a forum citizen).

350. *Keeton*, 465 U.S. at 776-78.

in *Keeton*. Only the third interest, interstate judicial cooperation and efficiency, was relevant to New Hampshire asserting jurisdiction to remedy harm occurring outside the state, and this interest arguably extends to the problem class action. A primary aim of class action procedure is efficient resolution of multiple claims in a single setting. Yet, there is both a qualitative and quantitative difference in the effect on state sovereignty between a case such as *Keeton*, in which a state expands an existing plaintiff's claim to include all of her personal harm, and one such as the problem class action, in which a state expands a single plaintiff's suit to include thousands of other plaintiffs with no local connection. In sum, the problem class action would push the policy limits beyond the already weak underpinnings of the *Keeton* holding.

Shutts, decided one year after *Keeton,* also argues against extending personal jurisdiction over the defendant in the problem class action.[351] The Court in *Shutts* did not address personal jurisdiction over Phillips, but *Shutts*, taken in context with the Court's other decisions, shows that class action joinder does not justify lesser standards of jurisdiction as to the defendant. To be sure, the Court in *Shutts* acknowledged that class actions serve special state and judicial interests.[352] The Court recounted the history and purpose of class actions and stated that in an action such as that against Phillips, where each claim averaged $100, "most of the plaintiffs would have no realistic day in court if a class action were not available."[353] Some courts have used this statement as justification for special jurisdictional standards for defendants in complex tort cases based on special need and state interests,[354] but this is an erroneous reading of *Shutts*.

First, expansion of *Shutts* to create jurisdiction by necessity over class action defendants is not consistent with the Court's other cases concerning jurisdiction and so-called necessity. The case most often cited for a doctrine of jurisdiction by necessity is *Mullane v. Central Hanover Bank & Trust Co.*[355] In *Mullane*, a New York trust company petitioned for a judicial settlement of accounts pursuant to a New York statute regulating common trust funds.[356] Many beneficiaries were unknown, and some beneficiaries were not residents of New York.[357] A special guardian acting on behalf of the beneficiaries challenged both jurisdiction and notice.[358] *Mullane* has become a landmark case for the Court setting a

351. *See supra* Part I(C) (discussing *Shutts*).
352. *Shutts*, 472 U.S. at 806.
353. *Shutts*, 472 U.S. at 809.
354. Most notable is Judge Weinstein's assertion of jurisdiction over out-of-state defendants to correspond to the forum state's market share liability law. *In re* DES Cases, 789 F. Supp. 552, 572 (E.D.N.Y. 1992); *see id.* at 576-77 (discussing *Shutts'* special jurisdictional rules for plaintiff class and stating that although *Shutts* expressly did not apply to defendants, "the difficulties raised by mass litigation . . . warrant a restatement of jurisdictional due process law that can function in . . . mass torts").
355. 339 U.S. 306 (1950).
356. *Id.* at 306.
357. *Id.* at 309.
358. *Id.* at 311.

flexible reasonableness standard for notice,[359] but the Court gave relatively little attention to the jurisdictional challenge. It simply observed that the case did not fit into any existing categories of jurisdiction[360] and held that "the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident."[361]

Although many observers interpret *Mullane* as establishing a doctrine of jurisdiction by necessity,[362] the Court has not relied upon it to justify jurisdiction over defendants in other cases. To the contrary, the Court has denied jurisdiction where the doctrine has been urged. In *Hanson*, the Court, citing *Mullane*, stated that *in-rem* jurisdiction and minimum contacts standards did "not exhaust all the situations that give rise to jurisdiction,"[363] but it rejected jurisdiction without considering any other basis, even though Justice Brennan in dissent argued that *Mullane* justified jurisdiction.[364] In *Shaffer*, the Court stated that it was not addressing "whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff,"[365] and, in dissent, Justice Brennan again cited *Mullane* and argued that state interests justified jurisdiction.[366] In *Helicopteros*, the plaintiffs argued necessity as an alternative basis for jurisdiction, but the Court rejected it.[367] The Court stated that plaintiffs' "failed to carry their burden of showing that all three defendants could not be sued together in a single forum," and it declined "to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in ab-

359. *Id.* at 314 (requiring "notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

360. *Id.* at 312.

361. *Id.* at 313.

362. *See* George B. Fraser, *Jurisdiction By Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305, at 311-12 (1951) (arguing that *Mullane* is an example of jurisdiction by necessity); SCOLES & HAY, *supra* note 253, § 6.6, at 341-42 n.1, 343 (collecting authorities addressing jurisdiction by necessity and concluding that "the consensus appears to be that *Mullane*—at the very least—is a sui generics departure from conventional jurisdiction categories"); von Mehren & Trautman, *supra* note 171, at 1173-75 (noting that "the establishment in the forum state of a legal entity such as the trust in the *Mullane* case has been recognized as an appropriate basis for the exercise of what might be called jurisdiction by necessity").

363. Hanson v. Denckla, 357 U.S. 246 n.13 (1958) (citing *Mullane*, 399 U.S. at 312; Fraser, *supra* note 362, at 305). *In rem* jurisdiction was not applicable because the Florida forum was not the situs of the trust assets. *Id.* at 246-47 & n.16. *See supra* note 170-74 (discussing lack of purposeful availment in *Hanson*).

364. *Hanson*, 357 U.S. at 260-61 (Brennan, J., dissenting) ("the same kind of considerations are present here [as in *Mullane*] supporting Florida's jurisdiction over the non-resident defendant").

365. Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1977); *see supra* notes 194-98 & 226-31 and accompanying text (discussing *Shaffer*).

366. *Id.* at 223-24 (Brennan, J., dissenting).

367. Helicopteros Nationales de Colom., S.A. v. Hall, 466 U.S. 408, 419 n.13 (1989); *see also supra* notes 187-91 & 238-43 and accompanying text (discussing *Helicopteros*).

sence of a more complete record."[368]

These cases show that if the doctrine of jurisdiction by necessity is valid—an uncertain proposition—it has limited application.[369] Necessity might help justify jurisdiction over unnamed plaintiff class members in a case like *Shutts*,[370] and it also might justify jurisdiction over defendants, but only in cases of true necessity, not simply forum state interest.[371] In *Mullane*, where the Court arguably relied upon jurisdiction by necessity, New York was the best, if only, available forum.[372] Likewise, in *Hanson*, *Helicopteros*, and *Shaffer*; the forum was not the only alternative, and the Court denied jurisdiction even though the states arguably had interests in resolving the dispute.[373]

In the problem class action, there is no genuine necessity to file in class counsel's preferred forum. The plaintiff class has alternative forums for jurisdiction over the defendant—the defendant's principal place of business and state of incorporation—through general jurisdiction. By contrast, jurisdiction as to the plaintiff class in the problem class action comes closer to true necessity, no matter where counsel chooses to file. The plaintiffs are consumers who bought the defendant's products in their home states. They do not have a purposeful affiliation with the defendant's home state or any other state in which the defendant sells its product. Without special standards of jurisdiction applicable to the plaintiff class, the action might not be able to be maintained on a nationwide basis, because there is not a single state with which all consumers have deliberately associated themselves.

Returning to *Shutts*, this necessity helps explain the Court's adoption of special jurisdictional standards for the plaintiff class. Indeed, the unique nature of the plaintiff class was a recurring theme in the personal jurisdiction portion of the *Shutts* opinion. The Court listed a number of differences between the plaintiff class and the defendant "in a normal civil suit"[374] and concluded that the burdens placed on the plaintiff class are "not of the same order of magnitude as those [placed] upon an absent

368. *Helicopteros*, 466 U.S. at 419 n.13.

369. *See* SCOLES & HAY, *supra* note 253, § 6.6, at 342 (noting that to the extent that the doctrine is recognized it is limited to "circumstances in which no reasonable alternative forum exists, and the connection of the parties and events makes the chosen forum a fair one"); *see also* CASAD, *supra* note 153, § 108.43 (stating that jurisdiction by necessity is "probably not" an alternative ground for jurisdiction and that lack of an alternative forum is instead a factor under the reasonableness prong).

370. The Court in *Shutts* did not rely on *Mullane* for its jurisdictional holding even though it otherwise cited *Mullane* for general due process standards. Phillips Petroleum Co. v. Shutts, 472 U.S 797, 807, 812 (1985).

371. *See* Brilmayer, *How Contacts Count*, *supra* note 248, at 108-10 (arguing that jurisdiction by necessity be limited to cases of true necessity, if recognized at all).

372. *See supra* notes 362-68 (discussing Mullane v. Cent. Hanover Bank & Trust Co., 397 U.S. 306 (1950)).

373. *See supra* notes 172-74 (discussing *Hanson*), notes 187-91 & 238-43 (discussing *Helicopteros*), and notes 194-98 & 226-31 (discussing *Shaffer*).

374. *Shutts*, 472 U.S. at 810.

defendant."[375] For this reason, the Court held that the minimum contacts test, which is designed to protect the defendant, does not apply to the plaintiff class.[376] This reasoning does not extend to the defendant in class actions. Indeed, it would turn the Court's logic on its head to conclude that because plaintiff class members have less burden and greater protection in class actions, that the *defendant* in a class action should not get the full protection of the minimum contacts test. Under the logic of *Shutts*, the defendant in a nationwide class action arguably warrants additional, not less, protection than a defendant in a normal suit because the defendant faces far greater costs and risks in a class action than in a normal civil suit.

This theme also is shown in the choice of law portion of the *Shutts* opinion, where the Court held that the class action device did not warrant a special exception to the due process protections due the defendant.[377] To be sure, choice of law is a distinct constitutional inquiry from personal jurisdiction, but both are tests under due process that look at contacts and the relationship of the claims with the forum. The due process test for personal jurisdiction is usually more demanding than the choice of law test. In personal jurisdiction analysis, unlike choice of law, the Court requires that the defendant deliberately affiliate itself with the forum as an added protection of the defendant's expectations. In *Hanson*, for example, the Court observed that the forum likely had sufficient interest in the trust dispute to apply its own law, but it denied jurisdiction because the defendant trust company had not deliberately affiliated itself with the forum.[378]

In *Shutts*, Kansas' interests were not sufficient to meet the less strict due process standard for choice of law. The Court acknowledged that Kansas had an interest in the Kansas leases, but this interest did not extend to the out-of-state leases. The parties to these other leases had no expectation that Kansas law would apply. The fact that the claims were joined as a class action did not overcome these deficiencies. The same conclusion can apply to personal jurisdiction. If the relationship between the claims of the unnamed class members and the forum were insufficient to meet the test for choice of law, then it seemingly would be insufficient to meet the more demanding due process test for personal jurisdiction over the defendant. Put another way, if the class action device did not warrant reduced due process protections for the defendant as to choice of

375. *Id.* at 808; *see supra* notes 57-60 and accompanying text (*Shutts* contrast of plaintiff class from defendant).

376. *Shutts*, 472 U.S at 807 ("The purpose of this test, of course, is to protect a defendant from the travail of defending in a distant forum, unless the defendant's contacts with the forum make it just to force him to defend there.").

377. *Id.* at 820-21; *see also id.* at 823 ("the constitutional limitations . . . must be respected even in nationwide class actions").

378. *Hanson*, 357 U.S. at 253 (noting that "[f]or choice of law purposes [a ruling of sufficient forum interest] may be justified, but we think it an insubstantial connection . . . for purposes of determining the question of personal jurisdiction over a nonresident defendant"); *see supra* notes 172-74 and accompanying text (discussing *Hanson*).

law, it should not justify lower due process protections for the defendant as to personal jurisdiction.

Keeton creates some uncertainty as to the proper "joinder" distinctions, if any, to be made in personal jurisdiction analysis. Both common sense and policy analysis, however, show that the joinder of the claims in a nationwide class action is "not of the same order of magnitude"[379] as the claim in *Keeton*. *Shutts*, when viewed in context of the Court's other decisions regarding both jurisdiction and choice of law, argues for drawing the line on the side of greater protection for the defendant. Accordingly, the joinder argument does not justify jurisdiction in the problem class action.

In sum, all four possible arguments for jurisdiction fail to conclusively establish jurisdiction in the problem class action. Assertion of either specific or general jurisdiction based on contacts likely violates the due process rights of the defendant. The third argument, consent through registration, is a stronger argument for personal jurisdiction in some states, but it by no means settles jurisdiction in the problem class action. Finally, the unique nature of class actions is not sufficient reason to lessen the defendant's due process protections. Thus, far from being easily assumed, state court personal jurisdiction over the defendant in nationwide class actions is at best uncertain and more likely unconstitutional, no matter the theory of jurisdiction.

III. THE PERSONAL JURISDICTION PROBLEM IN NATIONWIDE CLASS ACTIONS FILED IN FEDERAL COURT

Personal jurisdiction in federal court involves different analyses than jurisdiction in state court. First, due process requires that federal courts have proper jurisdiction, but the due process standards governing federal courts derive from the Fifth Amendment, not the Fourteenth Amendment.[380] Under most articulations of the due process standards for federal courts, the relationship of the defendant to a particular state takes on far less significance than under minimum contacts analysis for state court jurisdiction. This is because the sovereign at issue in jurisdictional analysis for federal courts is the United States as a whole, rather than a particular state. Similarly, the dormant commerce clause by definition limits only exercise of state power, and it does not limit the jurisdiction of federal courts. The broader constitutional reach of federal courts, however, is rarely seen in practice because Congress has not given federal courts the full range of their potential jurisdiction. Due to statutory limits on their power, federal courts in most cases have only as much personal jurisdiction as their state court counterparts, which means that federal

379. *See supra* note 375-76 and accompanying text (quoting *Shutts*).

380. The Fifth Amendment by its terms applies to the federal government, while the Fourteenth Amendment applies to state governments. *See* U.S. CONST., amends. V & XIV.

courts also face problems and uncertainty in asserting jurisdiction over defendants in nationwide class actions.

A. The Constitutional Standards for Federal Court Personal Jurisdiction and the Limited Role of Relationship

Since the early nineteenth century, the Supreme Court has suggested that a different standard governs personal jurisdiction in federal court than in state court, and that Congress may authorize federal courts to serve process anywhere in the United States.[381] The Court explained in 1878 that Congress has the discretion to establish lower federal courts and that Congress may either broadly establish lower federal courts on a nationwide basis or strictly limit their territorial reach by state borders or otherwise.[382] In the *Pennoyer* era, this broad service of process power meant broad personal jurisdiction of the federal courts. Just as a state court had sovereignty and power over persons and property found within the state borders, the federal courts had potential power over all persons and property within the national borders.

International Shoe set new due process standards under the Fourteenth Amendment for assessing jurisdiction in state court, but the Court has never addressed how, if at all, minimum contacts analysis applies to federal courts.[383] In absence of definitive word from the Court, lower federal courts have struggled to define the due process limits on their

381. Toland v. Sprague, 37 U.S. 300, 328 (1838) ("Congress might have authorized civil process from any circuit court, to have run into any state of the Union. It has not done so.").

382. United States v. Union Pac. R.R., 98 U.S. 569, 604 (1878) (stating that there "is nothing in the Constitution which forbids Congress to enact that, as to a class of cases or a case of special character, a circuit court—any circuit court—in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision"); *see* Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U. L. Rev. 1, 23-30 (1984) (examining the "textual argument" that Article III permits Congress to develop one nationwide federal court).

383. The Court has noted and reserved the issue. *See* Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 103 n.5 (1987) (noting that it had "no occasion to consider the constitutional issues raised by" petitioner's argument that a "federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits"); *see also* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 113 (1987) (stating that it had "no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits") (emphasis in original). As post-*International Shoe* authority for broader jurisdictional reach of federal courts, commentators and lower courts cite the 1946 Supreme Court case of *Miss. Publ'g Co. v. Murphree*, 326 U.S. 438 (1946). *See* Fed. R. Civ. P. 4 advisory committee's notes (1963), *reprinted in* 31 F.R.D. 587, 629 (1963) (stating "[a]s to the Court's power to amend [Rule 4 regarding territorial reach of federal courts] see *Murphree*"). *Murphree* was a venue case, in which the Court stated in a dictum that "Congress could provide for service of process anywhere in the United States." 326 U.S. at 442. The case makes no mention of minimum contacts, even though *Murphree* was decided one month after *International Shoe* and Chief Justice Stone wrote both opinions. *Id.*

jurisdiction. Most courts and academic commentators agree that the due process limitation on a federal court's personal jurisdiction is different from that applicable to state court jurisdiction,[384] but they cannot agree as to how federal jurisdiction is different.[385] A few authorities suggest a strict territorial power approach to federal court jurisdiction—if the person is found within the United States, he is subject to the jurisdiction of any federal court.[386] Most modern observers, however, argue for a modified form of minimum contacts analysis, under which the relevant contacts are the defendant's contacts with the United States as a whole, rather than the defendant's contacts with a particular state.[387]

This change in focus for federal court minimum contacts analysis causes a significant difference in outcome from that applicable to a state court sitting in the same location as the federal court. Whereas the first prong is usually the deciding factor in state court minimum contacts analysis, the expanded focus on national contacts means that virtually every suit against a domestic corporation will pass the first prong for the simple reason that the corporation is based in the United States. The first prong's contacts analysis would be a limiting factor only where the defendant is an alien.

The difference in outcome can be reconciled through policy analysis by accounting for the different sovereign at issue. The burden of defending suits in the United States is reciprocal to the benefit of conducting its business in the United States. The defendant can expect suit in the United States. Moreover, a primary function of the first prong of minimum contacts analysis is to guarantee that the court does not exceed its

---

384. A small minority view holds that due process analysis for federal court jurisdiction is the same as that for state courts and requires minimum contacts with the forum state. *See* Fed. Fountain, Inc. v. KR Entm't, Inc., 143 F.3d 1138, 1139 (8th Cir. 1998) (reaffirming that "service of process outside the forum state under a national service of process statute confers personal jurisdiction over a defendant only if that defendant has the requisite minimum contacts with the forum state"); *see also* Gerald Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963) (arguing that Fifth Amendment and *Erie* considerations limit the nationwide process of federal courts).

385. *See* CASAD, *supra* note 153, § 108.123[2][b][ii] (surveying split in federal cases); CASAD & RICHMAN, *supra* note 309, at 1600-06 (collecting cases and summarizing "four views of what Fifth Amendment due process requires").

386. *See* Mariash v. Morrill, 496 F.2d. 1138, 1143 (2d Cir. 1974) ("the minimum contacts principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction based on nationwide, but *not* extraterritorial service of process") (emphasis in original); *see also* CASAD & RICHMAN, *supra* note 307, at 1600-01 (reporting view that minimum contacts analysis is irrelevant where a defendant is served inside the United States); David D. Siegel, *The New (Dec. 1, 1993) Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons, Service and Personal Jurisdiction*, 152 F.R.D. 249, 253 (1994) (arguing that where defendant is served within national borders, jurisdiction in federal court should be "just as available against that person as were he served within the borders of a particular state").

387. *See* Stafford v. Briggs, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting) ("due process requires only certain minimum contacts between the defendant and the sovereign that has created the court"); Busch v. Buchman, Buchman, & O'Brien, 11 F.3d 1255, 1258 (5th Cir. 1994) (holding that due process standard for federal courts is "whether the defendant has had minimum contacts with the United States").

sovereignty.[388] In federal court, the sovereign is the United States, and it does not exceed its power when it exercises jurisdiction over its citizens or persons who act within its national borders.

There is relative agreement as to this change to a national focus in the first prong of the *World-Wide Volkswagen* test (at least as to federal question cases), but commentators and courts disagree as to two secondary issues: whether the second prong of the test also applies and further limits jurisdiction and whether the national contacts test is limited to federal question cases, as opposed to federal diversity cases. As to the first issue, the proponents of the full two-prong approach argue that jurisdiction can be unfair even given the defendant's purposeful and related contacts with the national forum.[389] They propose a modified form of the second prong of the minimum contacts test. The modified reasonableness analysis might include some localized facts, such as the burden associated with trying the case in the particular locale, the location of witnesses and other evidence, and the plaintiff's interests in the chosen location.[390] Other factors, such as the forum's interest in the suit, also would include a national rather than local focus.[391]

The addition of the second prong would not make much practical difference. Federal courts still would have proper jurisdiction in most cases against domestic defendants.[392] Under *World-Wide Volkswagen*, the defendant must make a compelling case of unreasonableness under the second prong to render jurisdiction unconstitutional.[393] Furthermore, federal courts have procedural options not available in state court, such

388. *See supra* notes 176-77 & 202 (discussing the sovereignty function of the minimum contacts test); *see also Busch*, 11 F.3d at 1257-58 (addressing sovereignty rationale as applied to federal courts after *Bauxites* clarified that minimum contacts analysis was a function of due process as opposed to federalism).

389. *See* FED. R. CIV. P. 4 advisory committee's notes (1993) ("There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that is would be a denial of 'fair play and substantial justice' required by the due process clause, even though the defendant had significant affiliating contacts with the United States"); Republic of Pan. v. BCCI Holdings (Luxemborg) S.A., 119 F.3d 935, 945-47 (11th Cir. 1997) (applying reasonableness analysis to test federal court personal jurisdiction); Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 34-39 (1988) (collecting arguments and concluding that reasonablenss analysis should apply to federal courts).

390. Some have argued that the reasonableness analysis should be more localized for federal courts than state courts, in that federal courts should look to the fairness of placing the litigation in a particular district. *See* Fullerton, *supra* note 382, at 44-56 (considering different focal points for analysis of inconvenience, including the state, the district, and the general region).

391. *Id.* at 56-60 (surveying different federal governmental interests, including desire to provide a federal forum for suits beyond effective reach of any state, judicial economy, and foreign relations concerns in suits involving non-citizens).

392. *See Republic of Pan.*, 119 F.3d at 947 (emphasizing that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern").

393. *See supra* notes 180-81 (discussing presumption of reasonableness); *but see generally* Fullerton, *supra* note 382 (arguing against the presumption of reasonableness and advancing a three-part fairness test for federal personal jurisdiction).

as venue transfer within the federal system, to address inconvenience.[394] Only aliens are likely to show sufficient burden to overcome the presumption of reasonableness.[395]

The second point of contention is whether federal courts sitting in diversity must use the minimum contacts analysis applicable to state courts. The proponents of this view argue that even though federal courts in federal question cases have broader territorial reach depending on a proper authorizing statute, federal courts sitting in diversity are limited by the more narrow state-focused minimum contacts analysis applicable to state courts.[396] This may be a wise policy choice in many diversity cases, but it almost certainly is not a constitutional mandate.[397] First, due process does not require this distinction. The Fifth Amendment assures due process in federal courts, regardless of the basis for federal subject-matter jurisdiction. If application of a national contacts approach complies with due process in federal question cases, it seemingly would satisfy due process in diversity cases.[398]

It may seem unfair for parties in state law disputes to be subject to different rules as to the territorial reach of the court depending on whether the case is in federal or state court, but this "accident of diversity"[399] is true of virtually every procedural difference in diversity cases. The perceived unfairness is not a problem of due process but instead a

394. *See* 28 U.S.C. § 1404(a) (providing for discretionary transfer to another federal court: "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or divisions where it might have been brought").

395. *See supra* note 345 (discussing *Asahi* holding as to unreasonablenss of jurisdiction over Japanese defendant).

396. *See* Willingway Hosp., Inc. v. Blue Cross & Blue Shield, 870 F. Supp. 1102 (S.D. Ga. 1994) ("Personal jurisdiction in diversity cases are determined under the Fourteenth Amendment due process standard enunciated in *International Shoe*. . . ."); WRIGHT, *supra* note 37, § 1068.1, at 592 ("When a federal court adjudicates state-created rights under subject-matter jurisdiction bases on diversity of citizenship, the constitutional inquiry regarding questions of personal jurisdiction is guided by the Constitution's Fourteenth Amendment due process standards. . . ."); Abraham, *supra* note 384 (arguing that *Erie* doctrine requires application of state standards for jurisdiction in federal diversity cases); CASAD & RICHMAN, *supra* note 309, § 5-1, at 528-29 (stating that *Erie* doctrine "may pose limits on how far Congress can extend the range of a federal court's process beyond that of the courts of the state in which the federal court sits").

397. The current federal long-arm provision sets this limitation for most federal suits, whether based on diversity or federal question. *See infra* notes 411-12 (discussing long-arm provisions).

398. Indeed, Congress already has extended federal court personal jurisdiction beyond that of state courts in a few types of diversity suits, such as interpleader actions. *See infra* note 419 (discussing interpleader statute).

399. The Court has used the phrase "accident of diversity" as a short-hand reference to the aim underlying the *Erie* doctrine, that case outcomes do not turn on whether the parties are diverse and therefore able to gain access to federal court. *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 40 (1988) (stating *Erie* aim that "decision of an important legal issue should not turn on this accident of diversity of citizenship"); Klaxon v. Stentor Mfg., 313 U.S. 487, 496 (1941) (stating aim of *Erie* to not disturb "equal administration of justice" in "coordinate state and federal courts sitting side by side" due simply to the "accident of diversity of citizenship").

question under the principles announced in *Erie*[400] and *Hanna v. Plumer*.[401] Congress has the power to regulate the procedure of federal courts,[402] and this federal procedural power includes laws that are partly substantive.[403] The constitutional test for federal procedural law-making is whether the federal law is arguably procedural.[404] A statute that sets the territorial reach of federal courts easily meets the constitutional test.

Assume there is a federal long-arm statute that grants nationwide personal jurisdiction in all federal cases, including diversity suits. The statute would be procedural in that it limits the extent of the power of the federal courts and specifies the types of cases, in terms of defending parties, that the federal court may hear. To be sure, this law would impact litigants. The broader territorial reach of a federal court might lessen the plaintiff's burden in litigation by allowing a single suit in one location against all wrongdoers, for example, and it likewise might increase the burdens and costs imposed on some defendants. But these interests are procedural. Even assuming substantive repercussions, the statute would pass the constitutional test, which asks only if the law can rationally be classified as procedure. Laws that fall into the grey area of substance and procedure are within the Congressional rule-making power. Therefore, a statute authorizing nationwide jurisdiction of federal courts in diversity cases would be constitutional under *Erie* and *Hanna*.[405]

In summary, under most statements of the Fifth Amendment due process standards for federal court jurisdiction the defendant need only have minimum contacts with the United States as a whole. The problem class

400. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

401. 380 U.S. 460 (1965).

402. Under Article I of the Constitution, Congress has the enumerated power to establish inferior federal courts and also the general power to enact laws "necessary and proper" to carry out its enumerated powers. U.S. CONST., art. I, § 8.

403. In *Hanna*, the Court stated that Congress has the "power to make rules governing the practice and pleading in those courts, which in turn includes power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." 380 U.S. at 472.

404. *See id.* at 476 (Harlan, J., concurring) (describing majority test of constitutional rulemaking power as "arguably procedural, ergo constitutional").

405. *See* Arrowsmith v. United Press Int'l, 320 F.2d 219, 226 (2d Cir. 1963) (stating that "the constitutional doctrine announced in *Erie* would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the state court would not"); *see also* Fullerton, *supra* note 382, at 4 n.9 (reporting "general agreement" that practice of applying state court jurisdiction standards in federal diversity cases "is not constitutionally mandated"); Siegel, *supra* note 386, at 251 (noting that many lawyers "automatically assume" that the federal court reference to state law is by "mandate of the *Erie* doctrine" but that Rule 4 applies to most federal cases, whether based on diversity or not). If the long-arm provision were in a rule of civil procedure, paragraph (b) of the Rules Enabling Act (28 U.S.C. § 2072) would impose the added restriction that the rule not infringe a substantive right. *Hanna*, 380 U.S. at 471 (stating a presumption in favor of validity of rule). A rule of procedure granting broad territorial reach would meet this test. *See* WRIGHT, *supra* note 37, § 1075, at 410 (concluding that a federal rule of civil procedure would pass the *Hanna* tests); Siegel, *supra* note 386, at 253 (arguing that expansion of Rule 4 to include nationwide contacts would pass *Hanna* analysis because it is "not designed to change in any particular the substantive law to be applied . . . , but only to add the federal courts to the list of forums that can hear the action").

action would pass this test. The corporate defendant has extensive, purposeful, and related contacts with the United States. It is incorporated and based in the United States. All claims arise out of the defendant's activities in the United States—product sales and injuries in all fifty states. Under the second prong, the defendant would be burdened and inconvenienced by defending in a distant federal court almost as much as the comparable state court. The travel would be the same, but federal courts offer procedures, such as stream-lined discovery outside the district and state that might lessen the evidentiary burden. Moreover, the analysis is shifted to reflect the national government's interest in providing a forum not limited by state borders, and any inconvenience can be addressed through means short of constitutional declarations, such as transfer to another forum. The defendant likely could not show a compelling case of burden. Thus, federal courts may assert personal jurisdiction over the defendant in the problem class action without violating the Fifth Amendment.

Finally, the Commerce Clause of the federal constitution does not present an obstacle to federal courts exercising jurisdiction in the problem class action. The dormant commerce clause may prevent a state court from exercising jurisdiction over claims that have little or no relation to the forum,[406] but this limitation arises from the limitation on states generally: states may not unduly interfere with interstate commerce. The federal government does not face this limit. To the contrary, the federal constitution gives Congress the affirmative power to regulate interstate commerce.[407] Congress is free to authorize the federal courts to hear claims regardless of whether their local state court counterparts could do so. This leads to the real problem facing federal court jurisdiction in the problem class action—the lack of a federal authorizing statute.

B. Statutory Limitations on Federal Court Personal Jurisdiction

Constitutional power by itself does not mean that a federal court may assert personal jurisdiction over the defendant in the problem class action. The federal court must have statutory authority for personal jurisdiction.[408] This is also true for state courts, but most states have broad "long-arm" statutes that allow their courts to exercise personal jurisdiction to the limits of due process.[409] In most states, Fourteenth Amend-

406. *See supra* notes 155-56 (discussing early twentieth century cases holding that dormant commerce clause limits state court jurisdiction) and 325-32 (discussing *Bendix* and possible dormant commerce clause limitations on general jurisdiction).

407. U.S. Const., art. I, § 8 (giving Congress the power to "regulate Commerce . . . among the several states").

408. Congress has addressed territorial power of federal courts in a few specialized statutes, but for the most part Congress has delegated this authority to the Supreme Court through a general procedure for promulgation of court rules. *See* 28 U.S.C. §§ 2071-73; *see generally* Wright, *supra* note 37, § 4509 (discussing Rules Enabling Act).

409. Only a few states have long-arm provisions that in practice act to limit the jurisdiction of the state courts short of that permitted under the Fourteenth Amendment. *See*

ment due process analysis is the limiting factor for personal jurisdiction, and statutory authority rarely is an obstacle. In federal court, the authorizing statutes are narrower than the limits of Fifth Amendment due process, thereby making the statutes the primary determinant of permissible federal court personal jurisdiction.

Congress from its very beginning has limited the territorial reach of federal courts in most cases, usually along state lines.[410] Today, there are scores of statutes addressing the personal jurisdiction of federal courts, but these speak to particular types of cases, usually based on federal law.[411] In absence of a specific authorizing statute, the governing long-arm provision is Rule 4(k) of the Federal Rules of Civil Procedure. The most general provision is Rule 4(k)(1)(A), which allows a federal court to assert personal jurisdiction to the same extent as the state courts in the state in which the federal court sits.[412] This direction applies to both federal question and diversity cases, and it is the basis for personal jurisdiction in most cases in federal court. Accordingly, federal courts under the directive of Rule 4(k)(1)(A) usually assess their own personal jurisdiction by applying the local state long-arm statute and *International Shoe* minimum contacts standards applicable to state courts, including the requirement that the claim relate to the defendant's local state activities.[413]

Other provisions of Rule 4 permit federal courts to extend personal jurisdiction beyond that of their state court counterparts in a narrow set of cases. For example, Rule 4(k)(1)(B) allows a federal court to extend its jurisdiction into a neighboring state to a maximum of one hundred miles, but it is limited to defendants joined through impleader or the necessary party rule.[414] Rule 4(k)(1)(C) and (D) also allows jurisdiction where otherwise permitted by the federal interpleader statute or other federal statute.[415] None of these extensions apply to the problem class action.

---

generally CASAD & RICHMAN, *supra* note 309, ch. 4 (surveying various long-arm statutes); FRIEDENTHAL, *supra* note 5, §§ 3.12 & 3.13 (same).

410. *See* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1593-94 (1992) (surveying history and noting that since the Judiciary Act of 1789, Congress has established that federal process extend to its district borders, which are the same as those of the states).

411. *See generally* CASAD, *supra* note 153, § 108.123[2] (discussing statutes authorizing broader territorial reach of federal courts).

412. FED. R. CIV. P. 4(k)(1)(A) (stating that service is "effective to establish jurisdiction over the person of a defendant (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located").

413. For this reason, a few of the Supreme Court's seminal decisions regarding minimum contacts analysis, including *Burger King* (see *supra* notes 181-82), and *Keeton* (see *supra* notes 336-43), were in cases pending in federal court, rather than state court.

414. FED. R. CIV. P. 4(k)(1)(B) (stating that service is "effective to establish jurisdiction over the person of a defendant . . . (B) who is a party under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues").

415. FED. R. CIV. P. 4(k)(1)(C) (providing for jurisdiction over a defendant "who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335"); FED. R. CIV. P. 4(k)(1)(D) (providing for jurisdiction over a defendant "when authorized by a statute of the United States").

Some federal courts use a doctrine of "pendent personal jurisdiction" to fill gaps in the federal long-arm statutes and rules.[416] It is a judge-made doctrine of statutory construction.[417] Under pendent personal jurisdiction, federal courts look first to whether a federal statute authorizes nationwide jurisdiction on any portion of the suit. If so, they ask whether the remaining claims are sufficiently related to the main claim to "piggy-back" on its national jurisdiction. In other words, they broadly interpret the underlying statute to extend nationwide jurisdiction over all claims factually related to the main claim.

Pendent jurisdiction at first blush might seem to cure the statutory problem with personal jurisdiction in federal courts. In other words, if the federal court has jurisdiction over the named representative's claims under Rule 4(k)(1)(A), the pendent jurisdiction doctrine might allow personal jurisdiction over all the claims. This is an erroneous application of the doctrine. The doctrine depends on an anchor claim (usually a federal question) for which there is broad jurisdiction.[418] Jurisdiction under Rule 4(k)(1)(A) is limited to that of the local state court. The state court likely has jurisdiction over the claims by the named class representative, but that jurisdiction is local, not national. As I explain in Part II(B) above, the state court cannot reach outside its borders to assert nationwide jurisdiction over the unrelated absent class claims. Because Rule 4(k)(1)(A) does not extend nationwide jurisdiction as to any claim, there is no national anchor claim on which to append related claims and the doctrine of pendent personal jurisdiction fails. Federal courts do not have statutory power to assert personal jurisdiction over the defendant in the problem class action.

In short, the limitations of state courts in asserting jurisdiction over the defendant in nationwide class actions are imputed to the federal courts. However, unlike the due process issue in state court, the federal court's personal jurisdiction problem can be cured by statute or rule. Just as the federal interpleader statute applies special standards of personal jurisdiction to federal diversity cases based on the procedure by which the claim is asserted,[419] a similar law can do so for nationwide class actions. This is a matter of policy, political debate and legislative action. Yet, until Congress or federal rule-makers change the federal long-arm provision, fed-

416. *See generally* James S. Cochran, Note, *Personal Jurisdiction and the Joinder of Claims in the Federal Courts*, 64 TEX. L. REV. 1463 (1986); Jon Heller, Note, *Pendent Personal Jurisdiction and Nationwide Service of Process*, 64 N.Y.U. L. REV. 113 (1989).

417. The doctrine has never been approved by the Supreme Court. Its status is somewhat doubtful given that it is similar to the ancillary and pendent subject-matter jurisdiction doctrine that courts used prior to 1989, when the Supreme Court put a stop to the practice in *Finley v. United States*, 490 U.S. 545 (1989). In response to *Finley*, Congress enacted an authorizing statute for supplemental subject-matter jurisdiction. 28 U.S.C. § 1367. Some federal courts cite Section 1367 as their authority to assert pendent personal jurisdiction. *See* WRIGHT, *supra* note 37, § 1069.7 (noting debate as to whether section 1367 includes pendent personal jurisdiction and concluding that it does not).

418. *See generally* WRIGHT, *supra* note 37, § 1069.7.

419. *See* 28 U.S.C. §§ 1335, 1397, 2361 (addressing subject-matter jurisdiction, venue, and personal jurisdiction under federal interpleader statute).

eral courts, like their state court counterparts, will not be able to assert personal jurisdiction over the defendant in many nationwide class actions.

IV. CONCLUSION

This article shows that nationwide class actions raise personal jurisdiction concerns that were overlooked in the recent national debate about class action fairness. State courts likely violate the due process rights of the defendant and also may impermissibly infringe on interstate commerce. Federal courts exceed their statutory authority in asserting jurisdiction in nationwide class actions. At the very least, there is far more uncertainty as to personal jurisdiction than the debate has suggested. The problem with personal jurisdiction, however, does not mean an end to nationwide class actions. There are many alternatives that will enable large class actions to continue.

First, Congress can cure the problem in federal court by enacting a statute authorizing nationwide jurisdiction in specified class actions. There is precedent for such a statute. Congress enacted a comprehensive scheme regarding diversity interpleader actions in federal court, including both subject-matter and personal jurisdiction.[420] CAFA stopped short and did not address personal jurisdiction, but a relatively simple statute could authorize federal courts to assert personal jurisdiction to correspond to their new subject-matter jurisdiction over nationwide class actions. This statute should not be more politically charged than CAFA itself. It would merely effectuate the aim of CAFA, which was to enable federal courts to hear nationwide class actions.

The jurisdictional problem in state court cannot be cured by statute. It is a constitutional limitation on the power of state courts. CAFA made this issue moot to a large degree by allowing more class actions to be filed in, or removed to, federal court. CAFA, however, does not require that all actions go to federal court. Presumably, some actions will remain in state court, which will require litigants and state courts to more carefully consider personal jurisdiction from the defendant's perspective. The defendant and court must consider an objection to jurisdiction once the class action is filed in state court, but most of the analysis must be done by class counsel in selecting the forum.

Class counsel will have several options to find a state court with personal jurisdiction. They can rely on general jurisdiction by filing the nationwide class action in the state court of the defendant's home state. They can rely on specific jurisdiction by filing in a state in which the defendant acted collectively with respect to the national class, such as the state of the product's manufacture. Class counsel also could localize the class. In the problem class action, for example, a statewide class of consumers who bought the product in the forum state not only would solve the personal jurisdiction problem, but it also likely would avoid the new

420. *Id.*

federal subject-matter jurisdiction under CAFA. Finally, to the extent that CAFA motivates counsel to otherwise avoid federal subject-matter jurisdiction by joining a large number of multi-state plaintiffs under traditional party joinder rather than the class action device, counsel must bear in mind that the personal jurisdiction problem arises in this type of party joinder as well.

By highlighting the problems with personal jurisdiction in nationwide class actions, I do not advocate an end to large-scale class action practice, but I instead join the debate concerning the fairness of some state court class actions. I add to the debate by offering a constitutional basis for questioning the propriety of state court jurisdiction and by outlining the parameters of the constitutional objections. I also offer one more reason that federal courts are better suited than state courts to hear many nationwide class actions. Federal courts do not face the same due process limitations and dormant commerce clause concerns of state courts. A statute to extend the personal jurisdiction of federal courts will both cure the problem in federal court and fully implement the principal aim behind CAFA—to make federal courts an available forum for interstate class actions. In sum, the debate about "class action fairness" may not yet be over, but it is now more complete.