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Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts

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Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*

Arthur R. Miller† and David Crump‡‡

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Few decisions have been more eagerly awaited by lawyers interested in class actions than that of the United States Supreme Court in Phillips Petroleum Co. v. Shutts.1 During the years preceding Shutts, courts had found themselves increasingly presented with problems of personal jurisdiction and choice of law in multistate class actions.2 Suits on behalf of

claimants scattered throughout the United States and foreign countries had become commonplace,\(^8\) in part because more sophisticated litigation management techniques\(^4\) made courts and lawyers more disposed\(^8\) to regard the class action as an efficient vehicle for resolving disputes.\(^6\)

Significant controversy remained, however, concerning whether a forum lacking a traditional basis of jurisdiction over a class of nonresident plaintiffs could properly adjudicate their claims without their affirmative consent.\(^7\) Almost a half-century ago, in *Hansberry v. Lee*, the Supreme Court had hinted in dictum that it could adjudicate such claims.\(^8\) A few years later, however, the venerable case of *International Shoe Co. v. Washington*\(^6\) set forth the well-known minimum contacts test.\(^10\) This test originally was designed to establish due process limits on the assertion of judicial power over defendants.\(^11\) But since class plaintiffs have claims that are

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8. 311 U.S. 32, 41 (1940) ("[T]o an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit ... may bind members of the class or those represented who were not made parties to it.").


11. See *International Shoe Co. v. Washington*, 326 U.S. at 316 ("due process requires only that in order to subject a defendant to a judgment in personam, ... he have certain minimum contacts")
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constitutionally protected property rights that might be adjudicated and lost in their absence, it seemed that International Shoe might be interpreted to require that they, too, either have an affiliation with the forum or affirmatively opt to be bound by the litigation.

Similarly, the multistate class action often meant that all fifty states’ laws, along with those of foreign nations, might apply to the various claims. Some courts, however, chose to apply forum law to all claims, including those in which the forum had little or no interest. Although the Supreme Court, in cases such as Allstate Insurance Co. v. Hague, had set constitutional limits upon choice of law by requiring an adequate nexus between the litigation and the state whose law was applied, these limits remained unexplored in the class action context.

These questions arose against a background of class action decisions concerning other issues of jurisdiction and due process. In Supreme Tribe of Ben-Hur v. Cauble, for example, the Supreme Court had held that only the citizenship of named plaintiffs was relevant for determining diversity jurisdiction. Later, in Snyder v. Harris and Zahn v. International Paper Co., the Court disallowed federal jurisdiction over many class actions by holding that each claimant in a diversity case had to sue for the jurisdictional amount of more than ten thousand dollars. Then, in

(continued...)

13. See infra notes 113–19 and accompanying text.
15. Compare Miner v. Gillette Co., 87 Ill. 2d at 17, 428 N.E.2d at 484 (laws of all fifty states and foreign countries held applicable to different claims) with Shutts v. Phillips Petroleum Co., 235 Kan. 195, 221, 679 P.2d 1159, 1181 (1984) (forum’s law held applicable uniformly to all claims, including those having little, if any, connection to forum).
20. The usual requirement of complete diversity otherwise would have made federal diversity jurisdiction inapplicable to most nationwide classes. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978).
22. 414 U.S. 291, 294–95 (1973). In Zahn, unlike Snyder, the named plaintiffs asserted claims exceeding $10,000, but the class also included claimants who did not assert that amount. The plaintiffs argued that ancillary jurisdiction could encompass the lesser claims. The Court disagreed, holding that all claims must exceed the minimum unless the claims are joint. See Currie, Pendent Parties, 45 U. CHI. L. REV. 753, 762–64 (1978); Goldberg, The Influence of Procedural Rules on Federal Jurisdiction, 28 STAN. L. REV. 395, 400–07 (1976). Ben-Hur and Zahn thus result in a situation in which diversity generally is determined by reference to the named plaintiffs, but amount in controversy is not. See R. MARCUS & E. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 383–84 (1985).
Eisen v. Carlisle & Jacquelin, the Court held that plaintiff representatives in Rule 23(b)(3) class actions must provide individual notice to all reasonably identifiable members because Rule 23(c)(2), which was drafted in an effort to comply with due process, explicitly so required. This requirement must be satisfied, said the Court, even if the cost of notice would sound the death knell for many meritorious actions.

There also were decisions more directly relevant to multistate class actions. Some state courts had refused to recognize judgments rendered in the absence of personal jurisdiction over claimants, and defendants thus were left without assurance that they would be protected by the binding effects of class decrees. All of these decisions sharpened interest in the questions of personal jurisdiction and due process raised by multistate class actions.

In 1982, the Supreme Court granted certiorari in Gillette Co. v. Miner, which presented the question of jurisdiction over multistate class claimants. Gillette was the prototypical small consumer class action. Each class member had a potential claim for only a few dollars, and the putative claimants resided in all fifty states.

The Illinois courts assumed jurisdiction despite constitutional challenge but recognized the need to apply

24. The pre-1966 class action rule did not create a binding effect in spurious actions. Instead, it was interpreted to permit "one-way intervention": After a finding of liability, class members could intervene to file claims. See Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), cert. dismissed, 371 U.S. 801 (1963). Rule reformers, mindful of criticisms concerning the unfairness of binding defendants but not plaintiffs, extended binding effect to each class action category. To be fair to class members, however, the reformers determined to require notice to them in Rule 23(b)(3) class cases, coupled with the right to opt out. This notice appeared to be a condition of due process in light of the extension of binding effect. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Kennedy, supra note 1, at 256; see generally 7A WRIGHT, MILLER & KANE, supra note 21, §§ 1752-1753.
25. The district court had found that mailing notice to all reasonably identifiable class members would have cost approximately $225,000. Rather than imposing this expense on class counsel, the court devised a less expensive system of notification, costing approximately $22,000. It included notice to potentially larger claimants, notice to others selected at random, and newspaper advertisements. Furthermore, after a mini-hearing in which the court assessed plaintiffs' probable success, it required defendant to advance 90% of this expense. Eisen, 417 U.S. at 166-68. The Supreme Court disapproved of both the method of notice and the shifting of its cost to defendant. Id. at 172-79.
27. See authorities cited supra note 26. It has been argued that this concern is insubstantial, in that "it would be the rare class member who would attempt to tread the same ground as the unsuccessful representative plaintiff. . . . [S]econd actions need hardly be feared, for what entrepreneur would invest time and money in a venture already demonstrated to be profitless?" Dam, Class Action Notice: Who Needs It?, 1974 Sup. Ct. Rev. 97, 120. But see infra Section IV(D).
28. See authorities cited supra note 2.
30. 87 Ill. 2d at 21-22, 428 N.E.2d at 486 (Ryan, J., dissenting). For a description of the nature of the action, see infra text accompanying note 231.
different states' laws to the claims\textsuperscript{31} and thus faced the possible task of creating fifty or more categories or subclasses within the class.\textsuperscript{32} After granting certiorari and hearing oral argument, however, the Supreme Court dismissed\textsuperscript{33} because the Illinois judgment was not final.\textsuperscript{34}

Then, in \textit{Phillips Petroleum Co. v. Shutts}, the Supreme Court was presented with another opportunity to address these questions. The courts of Kansas had exercised jurisdiction over, and applied Kansas substantive law to, a multistate class action in which the overwhelming majority of the claims and claimants had no connection with Kansas.\textsuperscript{35} The Supreme Court upheld Kansas' exercise of jurisdiction over class members,\textsuperscript{36} but it reversed the application of Kansas law to persons and transactions insufficiently related to Kansas.\textsuperscript{37} Thus, although \textit{Shutts} makes multistate class actions more readily available, the opinion also requires that the forum, in its choice of law, respect the reasonable expectations of the parties.\textsuperscript{38}

The \textit{Shutts} decision raises important new questions about the propriety of multistate jurisdiction over defendant classes, equitable claims, and cases in which burdens are placed on class members. The Court rejected interstate federalism as a concern underlying personal jurisdiction, at least in the multistate class action context, but gave it increased importance in choice of law analysis. The opinion leaves open a number of important questions about notice and about the binding effect of class decrees. Its effects on actions in federal courts or cases in which a court has traditional jurisdiction over class members are as yet undetermined, and its reasoning threatens the continued viability of so-called mandatory classes. The treatment of choice of law raises possibilities of harmful forum shopping and may make multistate class actions difficult to manage.

Section I of this Article describes the \textit{Shutts} case. The Article then considers questions of jurisdiction in multistate class actions in Section II. Section III discusses the issues raised by mandatory classes and proposes a four-factor analysis for the certification of classes that involves considera-

\textsuperscript{31}. 87 Ill. 2d at 17, 428 N.E.2d at 483–84.
\textsuperscript{32}. The courts recognized that some states might be classified together because their law might be similar, and this approach could have reduced the number of discrete categories. 87 Ill. 2d at 18, 428 N.E.2d at 484. \textit{But cf. infra} Section IV(D)(2).
\textsuperscript{33}. Gillette Co. v. Miner, 459 U.S. 86 (1982).
\textsuperscript{34}. The underlying action ultimately was settled.
\textsuperscript{35}. The Kansas court emphasized Kansas' interest in regulating defendant's business activities within its borders, in protecting the rights of royalty owners (whether they were Kansas residents or merely "members of this particular class"), and in deciding a case involving law with which it was familiar, concerning class members who implicitly had "indicated their desire" to have Kansas law apply, and presenting an alleged "common fund" analogy. 235 Kan. 195, 210–12, 222, 679 P.2d 1159, 1174–75, 1181 (1984), \textit{rev'd}, 105 S. Ct. 2965 (1985).
\textsuperscript{36}. 105 S. Ct. at 2972–77.
\textsuperscript{37}. \textit{Id.} at 2977–81.
\textsuperscript{38}. \textit{See generally infra} Sections II, IV.
tions of equity, efficiency, distant forum abuse, and individual control. Section IV examines the choice of law questions raised by Shutts. It discusses the issues of "magnet" forums, preference for the forum's own law, and management difficulties in the fifty-states-plus-foreign-countries class action. Then, since the Shutts decision increases the need for judges to become good litigation managers, Section V of the Article considers how judicial management of such matters as certification, forum determination, notice, and supervision of counsel may reduce management difficulties. Finally, Section VI discusses possible national legislation that would improve multistate litigation and class action practice after Shutts.

I. THE SHUTTS DECISION

A. Shutts in the Trial Court: The Class Claims and Their Resolution

Shutts had its origins in Phillips Petroleum Company's suspension of increases in natural gas royalties to landowners pending final determination of the lawfulness of the prices upon which the royalty increases were based. Phillips paid royalties on the increases only to landowners who agreed to refund any amount adjudged excessive, together with interest at the rate Phillips would be required to pay in making its own refunds. The courts ultimately upheld the prices in question, and Phillips then paid the suspended royalties in full.

Some landowners complained, however, that Phillips' refusal to pay interest on the royalty increases that accrued during the period of suspension was unlawful. Phillips denied that interest was payable. This seemingly simple dispute was complicated by the wide variety of individual arrangements that Phillips had entered into with royalty owners and with other producers. Different resolutions of questions of law applica-

39. 105 S. Ct. at 2968-70. The increases were the consequence of contractual provisions triggered by actions of the Federal Power Commission under its statutory authority to determine "just and reasonable" price ceilings. The Commission's actions were of uncertain validity. During the 1970s, the courts reversed administrative increases on many occasions, subjecting gas producers to liabilities for enormous refunds and accompanying interest. See generally Crump, Natural Gas Price Escalation Clauses: A Legal and Economic Analysis, 70 Minn. L. Rev. 61 (1985).

The practice of suspension was a response to difficulties in enforcing collection. No convenient mechanism was available for a producer who had paid a portion of a later invalidated increase to royalty owners to collect these funds back. Because owners were dispersed widely and interests often were transferred, the alternative of collection was impractical.

40. 105 S. Ct. at 2969.
41. Id.
42. There were some other persons pressing complaints in addition to plaintiff Shutts. See infra note 397 and accompanying text.
43. 105 S. Ct. at 2969.
44. Phillips produced some of the gas and sold it to interstate pipelines. It used some of the gas itself to manufacture carbon black, or as a feedstock to make other products, or in other transactions not involving sales to pipelines. Brief for Petitioner at 2, Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985) [hereinafter Brief for Petitioner]. In addition, the Shutts action encompassed some gas
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...able to differently situated potential claimants could have produced results ranging from no liability to liability at very high interest rates.

*Shutts* and other representative parties brought an action in the district court of Seward County, Kansas seeking to recover interest from Phillips on behalf of the entire royalty owner class. Only a small minority of the class members were Kansas residents, with the rest distributed throughout all fifty states, the District of Columbia, and several foreign countries. Similarly, only a tiny fraction of the affected lands were in Kansas; the majority were in Oklahoma and Texas, and eleven states were represented in lease holdings. Thus, most of the controversies that the plaintiffs asked the Kansas court to adjudicate were unrelated to Kansas.

The Kansas court certified a nationwide class of approximately 33,000 claimants over Phillips' jurisdictional objections. The class was reduced by deleting members from whom notice had been returned as undeliverable, as well as those who requested exclusion. The case then was tried on behalf of approximately 28,100 class members. The trial court held Phillips liable for interest to the class members, with every claim to be decided pursuant to Kansas law. The court set interest at the rate which Phillips itself purchased, rather than produced, but as to which it had contracted with various producers to dispense royalties to royalty owners to whom those producers became obligated. See *infra* note 44.

*Id.* at 3.


105 S. Ct. at 2968, 2977 n.6.

*Id.* at 2968–69.

Phillips itself was a Delaware corporation with its principal place of business in Oklahoma. *Id.* at 2968.

*Journal Entry on Class Certification and Notice*, Joint Appendix, *supra* note 46, at 17. The court made findings on class action requisites, including adequacy of representation, typicality, and commonality. *Id.* at 17–18. The approved form of notice was attached to the certification order, as was a "request for exclusion" that was ordered included with all copies of the notice. Notice of Class Action Suit, Joint Appendix, *supra* note 46, at 20–23. A return address was ordered attached to the envelope in the event of nondeliverability, and an address was provided for return of the request for exclusion. *Id.* at 18, 21. Defendant was ordered to provide pressure-sensitive mailing labels addressed to all class members, and plaintiffs were ordered to cause the notice to be mailed. *Id.* at 18. For affidavits of mailing, see *id.* at 24–27.

*Id.* at 24–27.


Roughly 1,500 notices were undeliverable and 3,400 class members opted out. 105 S. Ct. at 2969. Plaintiff class members were permitted to opt out pursuant to *KAN. STAT. ANN.* § 60-223(c)(2). *Shutts v. Phillips Petroleum Co.*, 235 Kan. at 206, 679 P.2d at 1170.

105 S. Ct. at 2969.

*Id.* at 2970.

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that the Federal Power Commission made applicable to Phillips, which Phillips had incorporated into its indemnity agreements.\footnote{Id. at 2969.}

B. The Kansas Supreme Court's Decision

Phillips argued in the Kansas Supreme Court that the trial court's exercise of jurisdiction over nonresident plaintiffs was unconstitutional. The Kansas court, however, affirmed the judgment.\footnote{56. Shutts v. Phillips Petroleum Co., 235 Kan. 195, 679 P.2d 1159 (1984), rev'd, 105 S. Ct. 2965 (1985). The court drew heavily upon an earlier, unrelated class action between the same nominal parties, styled Shutts, Executor v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978) [hereinafter "Shutts I"]. The principal opinion discussed in this Article, which was reviewed by the Supreme Court, is referred to as "Shutts II."}

The Kansas court also rejected Phillips' objection to the application of

\footnote{55. Id. at 2969. These FPC rates were applicable by regulation to any refunds that Phillips might be required to make as a result of price increases that later were invalidated. See \textit{supra} note 39. The use of this high interest rate, which was applicable to an unrelated transaction, was thus a key feature of the court's decision. There was, however, no indication of any agreement to such a rate between Phillips and its royalty owners, nor was there any evidence that applicable state law would impute it, except in Kansas. Accordingly, this conclusion gave rise to one of Phillips' most vigorous complaints. Brief for Petitioner, \textit{supra} note 44, at 32.}

\footnote{58. 235 Kan. at 210-12, 679 P.2d at 1174. This interest was enhanced, said the court, because the suit involved the oil and gas industry, an industry that was "significant" in Kansas. 235 Kan. at 212, 679 P.2d at 1174.}

\footnote{59. The principal decision of this type was Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 670-71 (1915), in which the Court concluded that an insurer's safety fund, consisting of policyholders' contributions, was necessarily treated as a unit because "[t]he Fund was single. . . . It would have been destructive of [the policyholders'] mutual rights . . . to use the Mortuary Fund in one way . . . in one State and to use it in another way . . . in a different State." In \textit{Ibs}, this reasoning provided a justification for both jurisdiction over a multistate class and application of uniform law.}

\footnote{60. 235 Kan. at 201, 211-12, 679 P.2d at 1168, 1174.}

\footnote{62. \textit{Id.} at 206-07, 679 P.2d at 1171.

61. This reasoning was subject to the criticism that none of the criteria for a common fund was met. Phillips described the Kansas Court's reasoning as "sheer alchemy." \textit{Petition for Certiorari} at 18, Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985). The Supreme Court said that there was "no 'common fund' located in Kansas . . . [T]he term becomes all but meaningless when used in such an expansive sense." 105 S. Ct. at 2979.}
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Kansas law to transactions unrelated to Kansas. It reasoned that forum law should control unless "compelling reasons" required the application of another state's law. It buttressed this conclusion with the same common fund analogy that it had used to uphold jurisdiction. The court also noted that "[t]he plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." Thus, the choice of Kansas law did not depend upon any contacts between the forum and the claims and it resulted in a judgment for all class members at the highest arguable interest rates.

C. *Shutts in the United States Supreme Court*

1. **Jurisdiction over Multistate Claimants**

The United States Supreme Court unanimously upheld Kansas' exercise of jurisdiction. The purpose of the *International Shoe* test, said Justice Rehnquist for the Court, was to protect an unaffiliated defendant "from the travail of defending in a distant forum." Although the Court recognized that class plaintiffs were in danger of losing the property interest rates.

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63. Id. at 221-22, 679 P.2d at 1181.
64. Id. at 201, 211-12, 679 P.2d at 1168, 1174; see supra notes 59-61 and accompanying text.
65. 235 Kan. at 222, 679 P.2d at 1181.
66. Indeed, the Kansas Supreme Court noted with apparent approval that the trial court had neither considered whether any differences existed between Kansas law and the laws of other states nor examined whether other states' law should be applicable. Id. at 221, 679 P.2d at 1180-81.


Furthermore, the law thus applied by Kansas also differed from that of Louisiana, which had a 7% rate at the time of suit. See Wurzlow v. Placid Oil Co., 279 So. 2d 749, 772-74 (La. Ct. App. 1973) (applying statute to oil and gas royalties); La. Civ. Code Ann. art. 1938 (West 1977). Louisiana had approximately ten times as many affected leases as Kansas and more than a thousand times as much in suspended royalties. *Shutts*, 105 S. Ct. at 2977 n.6.

68. The rates set by the Kansas courts for all claims were 7% for royalties retained until October 1974, 9% for royalties retained between that date and September 1979, and the average prime rate thereafter. 105 S. Ct. at 2970. The differences attributable to applicable rates alone "certainly amounted to millions of dollars in liability." Id. at 2978. This greater rate primarily was attributable to Kansas' replacement of Texas and Oklahoma law with FPC interest rates, used for another purpose in unrelated transactions. See supra note 55.
69. 105 S. Ct. at 2977.
70. Id. at 2973.
ests represented by their claims, it reasoned that they were unlikely to be subjected to judgments against them, or to other significant burdens such as discovery, costs, or attorneys’ fees.

Finally, the Court discussed the equity protections traditionally accorded class members. Certain of these protections were required as a matter of procedural due process in the multistate class action: (1) the nonresident plaintiff must “receive notice”; he must be provided the “opportunity to be heard and participate”; (3) the notice must be “the best practicable, ‘reasonably calculated, under all the circumstances,’ ” to serve its constitutional purposes; (4) the notice should “describe the action and the plaintiffs’ rights in it”; (5) the absent plaintiff must be provided with an “opt-out” form by which he may make a “request for

71. Id. The Court thus accepted Phillips’ contention that a “chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs.” Id.; see also Estin v. Estin, 334 U.S. 541 (1948) (claim protected from effort to extinguish it in court without personal jurisdiction); cf. Brief of Amicus Curiae, The Legal Foundation of America at 13, Phillips Petroleum Co. v. Shutts, 105 S. Ct. 2965 (1985) (‘nonresident class members are actually in a position analogous to that of defendants in that they may lose their rights involuntarily’).

72. 105 S. Ct. at 2973.

73. Id. at 2974; cf. infra Section II(C)(2) (discussing the propriety of burdens on class members).

74. 105 S. Ct. at 2974.

75. The Court contrasted class members’ freedom from these typical defense burdens with the benefits to plaintiffs of participating in an economically viable means of recovering small claims. 105 S. Ct. at 2974.

The Kansas court had been especially concerned about these issues. After pointing out that Eisen, Zahn, and Snyder precluded federal jurisdiction, and that the FPC also lacked jurisdiction over the issue, the Shutts I court asked, “[i]f the state courts will not hear the matter, who will grant relief?” Shutts I, 222 Kan. at 545, 567 P.2d at 1306 (1977). The court continued: “If state courts cannot maintain class action suits, can the ‘small man’ find legal redress in our modern society which increasingly exposes people to group injuries . . . ?” Id. at 545, 567 P.2d at 1307 (citing Homburger, State Class Actions and the Federal Rule, 71 COLUM. L. REV. 609, 641–43 (1971)). The Shutts II court cited this prior reasoning with approval, and it charged that Phillips was arguing for actions in several different state courts and thus was using “‘divide and conquer’ as a strategy to avoid liability to individual royalty owners.” 235 Kan. at 204, 679 P.2d at 1169.

76. 105 S. Ct. at 2975.

77. This right must be available, said the Court, whether it is asserted in person or through counsel. Id.

The elevation of this right of participation or intervention to due process status is new. Cf. Woolen v. Surtran Taxicabs, Inc., 684 F.2d 324 (5th Cir. 1982) (relegating intervention in class action to status governed by Federal Rule 24(a)); 7B C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1799 (1986) [hereinafter 7B WRIGHT, MILLER & KANE] (“Intervention in class actions is governed by the same principles as apply in any other proceeding.”). It seems that the right to opt out and to bring one’s own action separately (a right that the Court also established in Shutts II) would protect interests of the claimant. Conversely, numerous interventions may diminish the efficiency of the class action (or even enable obnoxious small claimants to make extortionate demands on other parties by threatening costly delay). Whether the Court’s unconditional statement of the right of participation reflects its true thinking remains to be seen.


79. 105 S. Ct. at 2975.
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exclusion\footnote{Id.}, and (6) nominal parties must "adequately represent the interests of the absent class members."\footnote{Id.}

In adopting these protections, the Court held that due process did not require nonresident claimants to "opt in" to the class.\footnote{Id.} Since plaintiffs may consent to jurisdiction in any forum,\footnote{Id.} the Court concluded that silence after notice was adequate evidence of that consent.\footnote{Id.} Small claims of individuals unfamiliar with the law would be lost through an opt-in requirement, said the Court; however, sophisticated claimants would receive sufficient protection from the right to opt out.\footnote{Id.} The Court was unwilling to sacrifice the efficiency of opt-out class actions for the "somewhat rare" claimant whose silence might not indicate consent.\footnote{Id.}

2. \textit{Choice of Law}

A seven-member majority of the Court began its discussion of the choice of law issue\footnote{Id.} by pointing out that ninety-nine percent of the gas leases and approximately ninety-seven percent of the plaintiffs had no apparent connection to Kansas.\footnote{Id.} It then considered whether Kansas law conflicted with the laws of states having more significant interests in the claims.\footnote{Id.} An examination of Texas, Oklahoma and Louisiana law convinced the Court that differences in applicable laws were not "false conflicts" and could affect "millions of dollars in liability."\footnote{Id.}

The Court based its analysis of these conflicts principally upon \textit{Allstate Insurance Co. v. Hague}.\footnote{Id.} In that case, the decedent had resided, obtained insurance, and been killed in Wisconsin, although he had worked in Minnesota and his widow had moved to Minnesota after his death for

\footnotesize

80. Id.
81. Id. This requirement is among those imposed by federal rule 23, but \textit{Shutts} thus made it a condition of due process in any state.
82. Id.
84. 105 S. Ct. at 2976.
85. Id. The Court did not deal with the possibility that a sophisticated class member desiring to file her own action on a substantial claim might not receive the notice or might have it mislaid by personnel who do not appreciate its significance. \textit{See infra} Section II(A)(2).
86. 105 S. Ct. at 2976. \textit{But see supra} note 85.
87. Justice Stevens dissented from this holding and Justice Powell did not participate in the decision. 105 S. Ct. at 2981.
88. 105 S. Ct. 2977. The dollar amount of suspended royalties provides an even better indication of Kansas' tenuous interest in the action. Kansas leases represented less than $3,000, out of a total of more than $10 million. The Court set out state-by-state information in a chart. \textit{Id.} at 2977 n.6.
89. Id. at 2977–78.
90. Id. at 2978; \textit{see supra} notes 67–68.
reasons unrelated to the litigation. The Minnesota courts had applied Minnesota law allowing plaintiffs to recover under multiple uninsured motorist policies, rather than Wisconsin law disallowing such “stacking.”

The Supreme Court held that the selection of applicable law must be based upon “a significant contact or significant aggregation of contacts, creating state interests, such that [the] choice . . . is neither arbitrary nor fundamentally unfair.” Using this test, the Allstate plurality found Minnesota’s contacts with the litigation sufficient to support that state’s application of its own law.

In Shutts, however, the absence of contacts tying most of the claims to Kansas led to the opposite result. The Court flatly rejected Kansas’ common fund reasoning. Likewise, the Court gave “little credence” to the argument that the class plaintiffs had evidenced their desire to be bound by Kansas law. Because that approach would make “the invitation to forum shopping . . . irresistible,” the Court concluded that “plaintiffs’ desire for forum law is rarely, if ever, controlling.”

Finally, the Court rejected the argument that a forum had greater latitude in applying its own law merely because it was adjudicating a multi-state class action. Constitutional requirements could not be avoided merely because it was more burdensome to adjudicate a large number of unaffiliated transactions. The Court considered the “expectation of the parties” to be an important element in this calculus. Although the Court made no effort to determine which states’ laws should have been applied, it did proscribe the application of Kansas law to every claim as “sufficiently arbitrary and unfair as to exceed constitutional limits.”

92. 449 U.S. at 306.
93. Id. at 312–13.
94. Id. There has been substantial controversy over this result, with the Allstate dissenter and several commentators arguing that Minnesota’s contacts were insufficient to justify application of its own law. See infra note 408.
95. 105 S. Ct. at 2979; see also supra notes 59–60. The Court found that there was neither a specific identifiable res in Kansas nor a limited amount that might be depleted.
96. 105 S. Ct. at 2979.
97. Id. at 2979 (quoting Allstate, 449 U.S. at 337 (Powell, J., dissenting)).
98. 105 S. Ct. at 2979.
99. Id. at 2980.
100. Thus the Court criticized as “bootstrapping” the argument of the Kansas court that application of Kansas law was satisfied by the class certification requirement of common questions of law or fact. Id. A question of fact common to the class could arise in a state other than Kansas, and although that commonality would help to satisfy one of the certification requirements, it would furnish no reason for the application of Kansas law.
101. Id.
102. Id.
103. Id.
3. **Justice Stevens' Dissent**

Justice Stevens dissented from the choice of law holding.\(^{104}\) He concluded that there was "no 'direct' or 'substantive' conflict between the law applied by Kansas and the laws of . . . other States."\(^{105}\) In his view, Kansas had merely "developed general . . . principles to accommodate the novel facts of this litigation—other state courts either agree with Kansas or have not yet addressed precisely similar claims."\(^{106}\)

To Justice Stevens, the other seven Justices' definition of conflicts was excessively "loose."\(^{107}\) He rejected the finding of a conflict based upon a conclusion that Texas or Oklahoma would "most likely"\(^{108}\) decide the issue differently.\(^{109}\) Instead, Justice Stevens searched for constructions of those states' laws that could be considered consistent with Kansas' holding.\(^{110}\) As a result, he saw the litigation as "a classic 'false conflicts' case."\(^{111}\) In Justice Stevens' view, a choice of law decision could present no constitutional question unless it involved an "unambiguous conflict with the established law of another State."\(^{112}\)

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104. *Id.* at 2981.
105. *Id.*
106. *Id.*
107. *Id.* at 2982.
108. *Id.* at 2989.
109. Justice Stevens argued that mere error or novelty in the Kansas court's construction of sister states' laws should not influence the outcome. Otherwise, he maintained, Supreme Court jurisdiction would be invoked whenever a state court arguably misconstrued another state's statute. *Id.* at 2992. Although the majority shared this principle, see *id.* at 2980, its conclusion differed from that of Justice Stevens primarily because the majority did not view the Kansas decision as reflecting a mere error in choosing or determining the substantive law. In a situation in which Kansas had had no prelitigation contacts with most of the disputes in the action, Kansas had declined to consider the law likely to be applied in any other state. The majority's reasoning thus would recognize a difference between a tribunal, on the one hand, that conscientiously attempts to determine other states' law but does so in a less than perfect manner, and a tribunal, on the other hand, that refuses the attempt. *Id.* at 2978.
110. Justice Stevens defended Kansas' authority to reject as inapplicable all statutes urged by Phillips as controlling and to base its decision, instead, on general principles of equity. *Id.* at 2990-91. The difficulty, however, was that Kansas had made no effort to determine the likelihood that these general principles of equity would have been followed by Texas, Oklahoma and Louisiana.

Justice Stevens also defended Kansas' authority to decide the case under common fund analysis, *id.* at 2984 n.5, 2986, contrary to the majority's conclusion that no justification could be found for this reasoning and that it would reduce the term to "meaninglessness." See *supra* note 95 and accompanying text.
111. 105 S. Ct. at 2989. Professor Kennedy argues that Justice Stevens "reveals his true concern" as "protect[ing] the Supreme Court from plodding through the dismal swamp of conflict of laws at the call of every losing lawyer." Kennedy, *supra* note 1, at 277. Ironically, Justice Stevens' approach required him to "wade through the quicksand of Oklahoma and Texas oil and gas law in order to prove the 'false conflict.'" *Id.*
112. 105 S. Ct. at 2990 (emphasis in original).
II. PERSONAL JURISDICTION AFTER SHUTTS

A. Implied Consent as the Basis of Power To Adjudicate

1. Inference of Consent from Silence

An unbroken series of decisions before Shutts, stretching back beyond International Shoe,113 requires a substantial relationship between a state and any individual over whom its courts seek to assert jurisdiction.114 Many formulations of the relevant test refer expressly to defendants. However, the affiliation requirement obviously is intended to protect all interests that might be affected by an assertion of state judicial power. Thus, in Shaffer v. Heitner,115 in which the forum purported to base jurisdiction upon power over property rather than power over persons, the Court stated: "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny."116

In Shutts, the Court did not remove this protection from class plaintiffs. Its reasoning, instead, was based upon the inference of consent from class members' failure to opt out.117 In the absence of appropriate evidence of a plaintiff's consent, the International Shoe reasoning presumably would prevent adjudication of that plaintiff's interests.118 Shutts poses the question whether the general proposition that jurisdiction may be based on consent119 should be extended to situations in which a nonaffiliated person silently fails to opt out.

The rights of nonresident class members can be appreciated by considering either a class action in which defendant prevails and claimants take nothing120 or an action that is settled for much less than some class mem-

113. 326 U.S. 310 (1945).
114. See, e.g., Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory") (emphasis added).
116. Id. at 212 (citation omitted).
117. See supra notes 82-86 and accompanying text. See generally Kennedy, supra note 1, at 270-71 (analyzing consent theory advanced in Shutts).
118. This conclusion is reinforced by the Court's express reservation of cases in which plaintiffs are subject to counterclaims or other litigation burdens. See infra Section II(C)(2).
120. For example, during the pendency of similar class claims elsewhere, at least two suits by school districts for damages pertaining to asbestos installation resulted in defendants' verdicts. See S.C. School District Loses Asbestos Damage Suit, Nat'l L.J., Sept. 2, 1985, at 5, col. 1.

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bers think is reasonable. These possibilities suggest that the power to adjudicate depends upon nonresidents' having voluntarily and intelligently submitted themselves to the court's jurisdiction for better or for worse. However, a court lacking power to compel appearance arguably has no authority to compel a putative class member to opt in or to opt out. Absence of power to compel appearance logically is inconsistent with power to compel a binding choice through the compulsory filing of a paper with the court. Furthermore, class notices are not comparable in effectiveness to service of process. They are notoriously poorly understood, and lay recipients may be tempted to throw them away because they give the false impression that legal effects can be avoided by inaction.

In Shutts, the Supreme Court considered these arguments and held that the benefits of opt-out class actions overcame them. However, the development of these concerns shows how heavily the Court's opinion is dependent upon class members' receipt and clear understanding of the notice and opt-out form. The notice-related concerns, which are discussed later in this Article, are more important because of the Court's reliance on consent as the basis of jurisdiction.

In fact, as Professor Kennedy demonstrates, the Court's consent reasoning is theoretically flawed, even though it may reach a desirable result. Justice Rehnquist labels class members from the outset as "plaintiffs," but the better approach is to regard them as sui generis. Rule 23 avoids characterizing them as either plaintiffs or defendants. Persons who opted out may have been Phillips employees, or altruistic idealists who agreed with Phillips on the merits, or conscientious objectors to litigation, or large claimants who intended to file their own actions—and there is no way to determine how many of those who did not opt out may have fallen into these categories as well. Thus, the class members' implied consent is at least in some measure fictitious. It transforms the class members into "super plaintiffs": persons who have the benefits of plaintiff status but

122. See Miller, Giving Notice, supra note 5, at 321-22; see also Kennedy, supra note 2, at 42-44 (emphasizing need to explain procedural rights of notice to recipients).
123. See supra note 75.
124. See infra Section II(B).
125. Kennedy, supra note 1, at 278-84, 290-97.
126. Id. at 280.
127. Id. at 290-91.
few of the disabilities. Furthermore, as has been pointed out, this reasoning subtly expands the nature of judicial power itself; the judge becomes a quasi-administrative officer dealing with the rights of passive "plaintiffs." At the same time, the fictitious nature of the consent rationale makes it difficult to predict its application in future cases.

2. Inadvertent Loss of Claims Through Inaction

The Shutts Court's consent reasoning raises the prospect of a more substantial issue. It is based on a vision of a plaintiff with a small claim that would not be adjudicated but for the inference of consent through silence. Its holding, however, also may affect the rights of a large claimant. A class member with a large claim may fail to opt out, and thus may evidence consent, because she has misplaced a class notice or failed to receive it. If the class member then fails to file a claim at the damage or settlement stage because of lack of actual notice, her nonresponsiveness not only signals consent but forecloses her from sharing in the award.

To evaluate these concerns, one may imagine a hypothetical entity called the Small Stakes Royalty Company, which receives an opt-out notice (or a damage claim form) written in legal jargon. The notice is received by accounting personnel, because that department is the place where the class defendant usually mails royalty checks. The notice wends its way up the corporate hierarchy through different personnel who consider what to do about it; ultimately, it is lost or inadvertently thrown away. Another possibility is that an opt-out cutoff date imposed by the court passes in the interim, and although Small Stakes files the form and believes it has opted out, it instead has been included in the class. Unless Small Stakes makes proof of its damages before the cutoff date imposed by the court, it may lose all entitlement to relief.

Not all class actions involve average claims of a few dollars, as in Gillette, or of a hundred dollars, as in Shutts. In the federal context, an antitrust claim, a claim arising from a mass tort, a securities class claim, or an asbestos removal claim, may be sufficiently large to support individual litigation quite comfortably. Should a substantial claim be lost because

128. Id. at 282-83.
129. Id. at 284.
130. See, e.g., Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86 (3d Cir.), cert. denied, 106 S. Ct. 228 (1985); see also infra Section II(B)(1).
131. In one antitrust class action, the potential recovery fund was $2 million, but payable claims after trebling totalled only $17,482. Greenhaw v. Lubbock County Beverage Ass'n, 721 F.2d 1019, 1024, 1032 (5th Cir. 1985). The occurrence of shortfalls of this size indicates that the Small Stakes scenarios hypothesized in the text are significant possibilities.
132. Although some of these examples concern federal claims, they probably would involve multistate classes, and would implicate issues analogous to those in state courts hearing multistate class actions. See infra Section II(D)(1).
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a lay employee has not initiated appropriate action in response to a printed sheet concerning a case in which his employer does not appear to be involved?

The Shutts Court resolved this problem by balancing interests.\textsuperscript{133} If the class claims are uniformly small, the problem disappears,\textsuperscript{134} but in cases with both large and small claims, or with generally large claims, it could be significant. It can be reduced if the trial court takes care in giving notice.\textsuperscript{135}

B. Notice Requirements

1. The Requirement that Notice Be "Received"

In its formulation of due process requirements, the Court states that each claimant in a multistate class action "must receive notice."\textsuperscript{136} A requirement of actual receipt of notice would be a major departure from past requirements. Federal Rule 23(c)(2) has been interpreted to require individual notice only in Rule 23(b)(3) actions, and then only to members "who can be identified through reasonable effort."\textsuperscript{137} Insistence on actual receipt would go beyond due process requirements for defendants, who can have judgment rendered against them upon notice "reasonably calculated" to reach them, even if it never is received.\textsuperscript{138} Perhaps the Shutts Court considered that more stringent notice requirements were justified when jurisdiction was dependent upon the implication of consent by claimants.\textsuperscript{139} The opt-out right and the inference of consent are meaningless without actual notice.

However, the requirement that notice be "received" is followed, in the Court's opinion, by a statement that the notice must be "reasonably calculated" to reach the claimant\textsuperscript{140} and by citation to the Mullane and Eisen cases, which do not require actual receipt.\textsuperscript{141} Furthermore, the Court implicitly approves the method of notice actually used in Shutts.\textsuperscript{142} The class

\textsuperscript{133} The Court's opinion deals carefully with notice of the class action, but issues surrounding notice at the claim stage, or nonreceipt of notice, were not presented in Shutts.

\textsuperscript{134} In the case of small claims, individual litigation is impractical. Notice costs greater than the amount of probable claims less attorney's fees thus would be inappropriate.

\textsuperscript{135} See infra Section V(D).

\textsuperscript{136} 105 S. Ct. at 2975 (emphasis added).


\textsuperscript{138} See Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 319 (1950) ("notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all"); cf. Miedreich v. Lauenstein, 232 U.S. 236, 246-47 (1914) (judgment upheld against due process attack, even though return was made falsely, and defendant in fact was not served and had no knowledge of proceeding).

\textsuperscript{139} See supra Section II(A)(I).

\textsuperscript{140} 105 S. Ct. at 2975.

\textsuperscript{141} See supra notes 137-138 and accompanying text.

\textsuperscript{142} 105 S. Ct. at 2969, 2975.
representatives provided each member with notice by first-class mail, and the district court excluded potential class members whose notices were returned as undeliverable. If actual receipt is the requirement, this method may provide circumstantial evidence of its satisfaction. Direct proof of receipt could be obtained only by certified mail restricted to the addressee. This method would so increase costs that it should not be inferred as a general requirement without an express statement of the Court. Thus the most appropriate reading of *Shutts* may be that class members constitutionally may be included if first-class mail is directed to them and is not returned as undeliverable.

Although *Shutts* may not require receipt of notice, it may invalidate state rules relaxing notice requirements. In the wake of *Eisen*, some states sought to enhance the efficiency of class actions by allowing partial mailing, advertising, notice to class members suffering large damages, and notice as prescribed by the court, as substitutes for individual first-class mail which *Eisen* had held was required under the Federal Rules. Indeed, a special committee of the Litigation Section of the American Bar Association has recommended elimination of the individual notice requirement of Rule 23(c)(2) in favor of a discretionary notice provision. At least in the multistate context, *Shutts* appears to invalidate these provisions. The *Eisen* requirement of the best practical notice to individual claimants, which is based directly on Rule 23 and only indirectly on due process, is expanded by *Shutts* into a more general due process requirement.

Yet another issue is presented by the possibility that, in a subsequent suit, a person might be bound upon "delivery" that does not amount to "receipt." The simplest example is that of the individual who has moved from the residence to which the notice is addressed. In that event, the

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143. *Id.*

144. When service by mail is authorized, rules of court generally require certified, restricted mail. *Cf. Tex. R. Civ. P. Ann.* r. 106 (Vernon 1979).

145. Ironically, even a requirement that nondelivery result in exclusion (if that is what *Shutts* means) would go beyond the requirements of *Eisen*, a case often thought to impose notice requirements so stringent as to sound the death knell for many class actions. See *supra* notes 23-25 and accompanying text.

146. *E.g.*, *Okla. Stat. Ann.* tit. 12, § 2023(C) (West Supp. 1985) (providing alternatives to individual notice, including publication and posting, when class numbers more than 500 members).

147. See *supra* notes 23-25 and accompanying text.

148. See *infra* note 217.

149. *See, e.g.*, Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983); Greene v. Lindsey, 456 U.S. 444 (1982); Sterling v. Environmental Control Bd., 793 F.2d 52 (2d Cir. 1986); *cf.* Covey v. Town of Somers, 351 U.S. 141 (1956) (mailed notice, although ordinarily sufficient, did not satisfy due process in the case of individual known to be insane and committed to hospital). In *Greene*, the majority held that notice posted in forcible entry and detainer cases on the doors of tenants' residences, which tenants claimed not to have received, was constitutionally inadequate unless supplemented by mailed notice. The dissenters argued: "It is no secret, after all, that unattended mailboxes are subject to plunder by thieves." 456 U.S. at 460 (O'Connor, J., dissenting).
notice might well be "delivered," but the potential claimant would not "receive" it. Another possibility, already discussed, is that of notice directed to a division of a large organization, in which nonlawyer employees may treat it as junk mail. The solution to this problem may be to allow exceptions to the binding effect of a class action. However, the defendant's interest in finality, recognized in Shutts, correspondingly would be undermined. If the amounts at issue are small, as they would be in consumer class actions, the problem may be insignificant. However, the Shutts opinion applies to cases in which some class members may have substantial damages, and in that event, instances of delivery-but-nonreceipt may cause very real problems.

For example, in one recent case, *Zimmer Paper Products, Inc. v. Berger & Montague, P.C.*, a class member failed to receive notice of the need to prove its damages and was precluded after settlement from recovery of a sum approximating $250,000 by a court-imposed cutoff date. Having failed to opt out of the class, it was bound by the judgment. It sued the class attorneys, on the novel theory that the use of mere first-class mail, rather than a means that would ensure receipt, such as certified mail, constituted legal malpractice. The class member supported the argument by showing that the response rate of claims was only twelve percent, even though the settlement was for $20,000,000. The class was relatively small, so that certified mail would have been inexpensive, and each member's settlement share was large.

The court in *Zimmer Paper Products* denied recovery on the ground that the attorneys had followed standard practice. Nevertheless, the case clearly illustrates the need for distinguishing among requirements for the "sending" of notice, the "delivery" of first-class mail, and the actual "receipt" of notice by the claimants. Each of these formulations can be justified by reference to the reasoning in Shutts, and the yardstick that is chosen could make quite a difference.

Furthermore, although the Supreme Court's downplaying in Shutts of the arguments for opt-out requirements may be persuasive, the *Zimmer Paper Products* case shows that notice to class members at the damage

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150. *See supra* note 131 and accompanying text.
151. *See infra* Section II(F).
152. 758 F.2d 86 (3d Cir.), *cert. denied*, 106 S. Ct. 228 (1985).
153. *Id.* at 92.
154. The class consisted of approximately 1550 members. Thus the average payout, not considering deductions for attorneys' fees and expenses, would have been approximately $12,000. *Id.*
155. *Id.* at 91–92.
156. Shutts says that a class plaintiff "must receive" notice, 105 S. Ct. at 2975, but it also describes with apparent approval the method used by the Kansas trial court, which emphasized deliverability, *id.* at 2969–70, and cites cases that require only the sending of mailed notice. *Id.* at 2975.
phase sometimes presents a serious issue. Inaction at the initial notice stage can be treated as consent, but the inaction of a huge, passive class at the damage stage has the effect of cutting off recoveries, because proof of loss cannot be inferred as easily as can consent. The existence of class actions in which settlement funds remain largely unclaimed indicates that the problem is real, even though the Shutts situation did not present it.

2. Incomprehensible Notice and Nonresponsive Responses

The Court’s inference of consent in Shutts depended upon the assumption that notice would communicate effectively to claimants their rights and options. Much of what lawyers write, however, including many class action notices, is incomprehensible to average citizens. The lawyerly concern for completeness and accuracy may conflict with the objective of intelligibility.

The tetracycline cases provide a good illustration. The Attorney General of North Carolina sent notice of these actions to a broad spectrum of people. The responses he received provide amusing evidence of the difficulty of communicating legal matters to lay people. They also offer clear evidence that attempts to secure and distribute relief will be frustrated without comprehensive notice.

In Aguchak v. Montgomery Ward Co., standard-form legal notices were held unconstitutional because they were written in such a way that a non-lawyer could not understand his or her rights with respect to appearance, venue, or other procedures. The application of such decisions as Aguchak to class action notices has been suggested. However, since the

157. See supra note 131.
158. See supra notes 117–123 and accompanying text.
159. For example, technically accurate statements of processes controlled by the federal rules would require either use of legal terminology unfamiliar to nonlawyers or complex explanation. Complete portrayal of future possibilities would require careful hedging. See infra note 166. A better solution may be to limit the description to simple explanations and reasonable probabilities.
160. See Miller, Giving Notice, supra note 5, at 321–22.
161. Id. at 321.
162. The responses included the following:

Dear Mr. Clerk: I have your notice that I owe you $300 for selling drugs. I have never sold any drugs, especially those you have listed; but I have sold a little whiskey once in a while.

Dear Sir: I received this paper from you. I guess I really don’t understand it, but if I have been given one of those drugs, nobody told me why. If it means what I think it does, I have not been with a man in nine years.

Dear Sir: I received your pamphlet on drugs, which I think will be of great value to me in the future. I am unable to attend your class, however.

Dear Mr. Attorney General: I am sorry to say this, but you have the wrong John Doe, because in 1954, I wasn’t but three years old and didn’t even have a name. Mother named me when I got my driver’s license. Up to then, they just called me Baby Doe.

Id. at 322.
164. E.g., Kennedy, supra note 2, at 42–43.
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concern for completeness and accuracy may conflict with the value of com-
prehension, a short notice written in clear English, even though failing to
set forth the recipient’s rights in the utmost detail, should be preferred.
The Court’s opinion in Shutts, which highlights only a few aspects of the
notice,165 is consistent with this conclusion.166

The North Carolina tetracycline case responses167 also illustrate an-
other problem: What is to be done if a putative class member answers
ambiguously? Although a categorical rule treating any variation from the
opt-out form as a consent might produce undesirable results, it may be
needed to prevent strategic behavior by claimants. A class member other-
wise might attempt to “ride the verdict” by writing a letter attaching con-
ditions to her inclusion and hoping to place herself in a position in which
she may participate in the class award if the action terminates in a large
settlement, but pursue her own action if it does not. A categorical rule also
is needed for efficient administration. For example, a court could expend
considerable effort guessing whether the tetracycline class responses re-
ferred to above were elections to opt out; thus, a rule simply including
these individuals seems fair as well as administratively convenient.

C. Other Issues of Adjudicatory Power in Particular Actions

1. Multiple Competing Nationwide Class Actions

The possibility that courts in two or more states might certify different
actions covering the same nationwide class raises a separate issue of adju-

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165. The Court quoted the test set forth in Mullane, 339 U.S. at 314, that the notice must be
“reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them
an opportunity to present their objections.” Shutts, 105 S. Ct. at 2975. It also stated that the notice
should “describe the action and the plaintiffs’ rights in it.” Id.

166. A separate but potentially significant problem is that of redefining the class or the claims
after initial certification. Shutts requires, as one of the due process requirements, that the notice
“describe the action and the plaintiffs’ rights in it.” 105 S. Ct. at 2975. A class action, however, is a
fluid thing, as are the rights of claimants. A certification order is conditional and “may be altered or
amended before the decision on the merits.” Fed. R. Civ. P. 23(c)(1). The pleadings also may be
amended, and the lawsuit’s complexion may change in ways that are unforeseeable at the time of
notice.

The resulting difficulties may be appreciated by considering a nonresident notice recipient who
relies upon class certification and therefore refrains from filing her own action. Subsequently, the class
is redefined to exclude that class member. The resulting delay in bringing her own action may
prejudice her chances.

The Shutts opinion implicitly treats this problem of unanticipated adverse change by balancing
costs and benefits to class members. 105 S. Ct. at 2976. The Court divides the universe into small
claimants, whose unresponsiveness indicates the economic advantages of inclusion, and large sophisti-
cated claimants. Perhaps it is reasonable to impose the risk of unanticipated adverse change upon
claimants in either category, since the sophisticated class member must anticipate some risk in a law-
suit and the small claimant could not recover absent class relief anyway. Id. The Court’s requirement
that the notice set forth “the plaintiffs’ rights” must be viewed in light of the reality that a lawsuit has
an uncertain future. In particular, the prediction of future contingencies, although it marginally might
help sophisticated class members, inappropriately complicates communication to consumers.

167. See supra note 162.
dicatory power. Both actions would proceed with a passive class virtually intact in each. Professor Kennedy describes the problem best: 166

Among the hypothetical parade of horribles which can be projected is the scenario in which 50 competing, national, multistate opt-out class actions are brought on the same claims and all members remain silent in response to the fifty notices. . . . [T]his dilemma of interstate federalism perhaps can only be solved by the United States Supreme Court constitutionally requiring pre-trial opt-in as to nonresident class members who have no minimum contacts with the forum.

In Shutts, however, the Supreme Court declined to adopt this solution, 169 and the issue of adjudicatory power in competing class actions remains open.

Presumably, competing class actions could be resolved only by a race to judgment if no national means for selecting among different courts is developed. 170 Race to judgment would induce several undesirable kinds of behavior. For example, defendants could forum-shop by delaying or accelerating particular actions. 171 Plaintiffs could collude with similarly aligned parties in “stalking horse litigation,” diverting their opponents’ attention or seeking collateral advantages such as the cumulative benefits of inconsistent discovery rulings. Whatever form it takes, a race is an irrational method of adjudicating controversies of overlapping jurisdiction. 172

Injunctions against litigants or courts are unlikely to provide a satisfactory solution. Parallel state sovereignties probably lack the authority to enforce their orders. 173 A federal court’s authority to enjoin a pending

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166. Kennedy, supra note 2, at 81.
169. See supra notes 82–86 and accompanying text.
171. The argument that defendants had unfairly influenced the choice of forum was part of the plaintiffs’ argument, for example, in In re Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983). See generally Motion for Leave and Brief Amicus Curiae on Behalf of Plaintiffs in the Dalkon Shield IUD Products Liability Litigation, Gillette Co. v. Miner, 456 U.S. 914, cert. dismissed, 459 U.S. 86 (1982).
172. Cf. Barancik v. Investors Funding Corp. 489 F.2d 933, 935 n.5 (7th Cir. 1973) (labeling race “unseemly”).
173. Some authority does exist for a court enjoining the parties before it from pursuing other litigation. E.g., State ex rel. General Dynamics Corp. v. Luten, 566 S.W.2d 452, 458 (Mo. 1978) (power is “clear” but should be used “with great caution”); see also Brown v. Brown, 387 A.2d 1051 (R.I. 1978) (divorce action); PPG Indus. v. Continental Oil Co., 492 S.W.2d 297, 299 (Tex. Civ. App. 1973) (“There can be no doubt that the District Court . . . had the power, in a proper case, to restrain persons in its jurisdiction from prosecuting suits in other states.”).
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state action is circumscribed by the Anti-Injunction Act,\textsuperscript{174} which protects federalism by preventing these orders, with narrow exceptions.\textsuperscript{175} Perhaps the statute's exceptions allowing injunctions to protect a federal court's jurisdiction,\textsuperscript{176} or to prevent relitigation of its orders, might be stretched to authorize injunctions in the competing class action situation, but the doubtful validity of these orders itself presents difficulties.\textsuperscript{177} Federalism concerns also should prompt restraint. A better solution would be for the less appropriate forum to stay (or, in some cases, dismiss) its own proceedings.\textsuperscript{178}

Thus far, competing multistate class actions have not been frequent enough to create a highly visible problem. The situation has occurred,\textsuperscript{179} however, and it is possible that the Shutts holding will give rise to more. If so, the recognition of comity principles may enable the courts to avoid wasteful proceedings in which they spend years determining where litigation will take place or whether there can be parallel state and federal proceedings.\textsuperscript{180}


176. Courts have applied this exception to situations involving property in the custody of a federal court and to cases analogous to in rem proceedings, such as school desegregation suits, in which it has been necessary to prevent state court interference with continuing jurisdiction. \textit{See} 17 WRIGHT, MILLER & COOPER, \textit{supra} note 175, § 4225. Perhaps a similar analogy could be made to some kinds of class actions, particularly those brought under subdivision (b)(1) of Rule 23. \textit{See infra} Section III(A).


178. \textit{See infra} notes 485-86 and accompanying text.

179. "It is not unusual for a particular course of conduct to prompt contemporaneous class suits in a number of jurisdictions." \textit{Note}, \textit{Multistate Class Actions, supra} note 2, at 738 n.153 (citing \textit{In re} Glenn W. Turner Enter. Litig., 521 F.2d 775, 777 (3d Cir. 1975)). Another example is \textit{In re} Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982), in which overlapping actions were filed in state and federal courts. Judge Wright, who presided over the federal action, later wrote that justice in such a case "can only be accomplished through the use of the mandatory class action device." \textit{Wright & Colussi, supra} note 173, at 150.

2. The Imposition of Litigation Burdens upon Class Members

In *Shutts*, the Supreme Court concluded that burdens imposed upon class members ordinarily would be insubstantial. It was convinced that class members rarely would be subjected to expensive discovery, counterclaims, costs, or attorneys' fees. Therefore, the Court expressly declined to decide whether maintenance of an opt-out multistate class action imposing substantial burdens on class members would be consistent with due process.

One situation in which real burdens may be placed on class plaintiffs is mass tort litigation in which individual injuries and damage amounts differ. Discovery of each individual's damages might be necessary. Counterclaims in commercial litigation present another prospect. The *Shutts* case itself provides an example. Federal authorities sometimes have ordered natural gas refunds that producers either must collect from royalty owners or pay themselves from earnings. The possibility of a convenient nationwide forum, in which such a claim could be offset against a class recovery, might enhance the economy of collection. Phillips, in fact, did plead a counterclaim for any sums it might be due from any member of the class.

The Supreme Court may have been justified in treating these concerns

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181. See *supra* notes 72-75 and accompanying text.
182. "We are convinced that such burdens are rarely imposed upon plaintiff class members, and that the disposition of these issues is best left to a case which presents them in a more concrete way." 105 S. Ct. at 2974 n.2.
183. *Cf.* Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977) (rejecting argument of defendant who claimed surprise owing to testimony of unnamed class members, on ground that defendant should have attempted discovery from class members), *cert. denied*, 438 U.S. 916 (1978). Damage differences, although a significant issue in some cases, frequently may be dealt with by bifurcation, use of affidavit procedures managed by claims settlement services, or special masters.
185. Thus, for example, producers faced with making refunds to pipeline companies, because of a method of computing Btu content of gas that was invalidated in court, sought a means to offset the refunds against amounts collectible from companies because of the producers' likely inability to collect these amounts from royalty owners, whom they had paid without deducting the amounts in question. *Foster Nat. Gas Rep. No.* 1483, at 3 (Sept. 13, 1984). The ultimate denial of this offset request, however, meant that producers were unable to recover except from the royalty owners to whom they had made payment. Interstate Nat. Gas Ass'n of Am. v. FERC, 756 F.2d 166, 170-71 (D.C. Cir.), *cert. denied*, 106 S. Ct. 139 (1985). These amounts could not be offset against future royalties without danger of lease termination; hence, producers were reduced to collecting from royalty owners out of pocket, if at all. The small size of the amounts due from large numbers of dispersed royalty owners made this alternative difficult as a practical matter.
186. Joint Appendix, *supra* note 46, at 14-15. The counterclaim sought offset of any amounts due Phillips, indemnity from any class member that was a producer for which Phillips had performed accounting services, administrative expenses incurred by Phillips in obtaining higher gas prices, and interest on any payments by any producer class member to Phillips pursuant to the Federal Power Commission opinions at issue. Most of the claimants who were possible objects of the counterclaim apparently were oil and gas producers and opted out of the litigation; hence the counterclaim was not a part of any further proceedings.
as less weighty than the efficiency gains of multistate class actions. In any event, the Court’s cost-benefit reasoning may provide a glimpse of the answer that its opinion declined to provide directly. If the burdens upon class members are significant and the expected recovery for each member is small, the due process balance should tip against jurisdiction.\textsuperscript{187} But if the economy of a class action is great, the prospect of some inconvenience to claimants, such as discovery requirements, should not necessarily end the action.

3. \textit{Equitable Relief and Defendant Classes}

The reasoning in \textit{Shutts} arguably supports the assertion of claims against defendant classes, one or more members of which lack minimum contacts with the forum. It also may support class actions for equitable relief. However, the facts in \textit{Shutts} did not present issues raised by these types of actions and, therefore, the Court expressly reserved both questions.\textsuperscript{188}

Equitable relief appears in a variety of forms. Some equitable remedies, such as restitution, might present the same issues in the class action context as ordinary damages.\textsuperscript{189} A nationwide class action for injunctive relief against the defendant’s repeated conduct may raise more serious problems. For example, a nationwide class of debtors might sue a creditor to enjoin automobile repossessions that assertedly are unlawful. Should the decision of a court in one state be binding upon nonresident class “members” who failed to opt out, even if courts in their respective states might reach different results?

The issue might be viewed more appropriately as one of the policy underlying res judicata and collateral estoppel, rather than as unique to class

\textsuperscript{187} The courts arrived at a similar approach prior to \textit{Shutts}. \textit{Compare} Brennan v. Midwestern United Life Ins., 450 F.2d 999, 1006 (7th Cir. 1971) (enforcing requirement that absent class members respond to interrogatories requesting information “actually needed in preparation for trial and . . . not used to take unfair advantage of ‘absent’ class members”), \textit{cert. denied}, 405 U.S. 921 (1972) with Clark v. Universal Builders, Inc., 501 F.2d 324, 340 & n.24 (7th Cir.) (refusing to require answers to questions that “would have required the assistance of technical and legal advice”), \textit{cert. denied}, 419 U.S. 1070 (1974); \textit{cf.} Gruenberger, \textit{Discovery from Class Members: A Fertile Field for Abuse}, 4 \textit{Litigation} 35 (Fall 1977) (discussing abusive discovery practice against absent class members).

\textsuperscript{188} “We intimate no view concerning either types of class action lawsuits, such as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a defendant class.” 105 S. Ct. at 2975 n.3 (emphasis in original).

\textsuperscript{189} Restitution differs from damage remedies in that its objective is to cause the defendant to disgorge unjust enrichment rather than to compensate for actual loss, but it resembles damages in that it is measured in monetary terms. D. \textit{Dobbs, Handbook on the Law of Remedies} §§ 4.1-9 (1973). Although technically different from equitable remedies generally, restitution partakes of the character of “substantive” equity, or the discretion exercised by courts to effectuate individual justice. \textit{Id.} § 4.1. It is related closely to the equitable remedy of constructive trust, which also is designed to redress unjust enrichment. \textit{Id.} § 4.3.
actions. Thus, res judicata may not bar a later court from reaching a different result because policy exceptions would support nonrecognition of preclusive effect.\textsuperscript{190} Exceptions to the binding effect of the action, however, would tend to undercut the basis upon which \textit{Shutts} was decided: the Court expressly recognized the binding effect of multistate opt-in class actions as a matter of fairness to the defendant.\textsuperscript{191}

Yet another reason for the Court's reservation of the equitable-relief class action may be the absence of a notice requirement in cases calling for uniform declaratory or injunctive relief.\textsuperscript{192} The civil rights class action seeking to declare a statute unconstitutional is the prototype.\textsuperscript{193} Strictly speaking, class relief may be unnecessary because a nonclass declaration of unconstitutionality would benefit the entire class as a consequence of stare decisis.\textsuperscript{194} It is customary, however, for class relief to be sought so that the action will not become moot when, for example, test case parties die, or plaintiffs in a prison dispute are paroled, or an abortion case lasts more than nine months.\textsuperscript{195} Again, the real issue concerns preclusion doctrines. These judgments should be given persuasive authority status or stare decisis effect, but one jurisdiction with an aberrant view ought not to have power to bind the nation.\textsuperscript{196}

With respect to defendant classes, \textit{Shutts} cuts in different directions. The Court's approval of jurisdiction over claimants is based upon the unlikelihood of relief against the class, and this reasoning tends to oppose jurisdiction over multistate defendant classes in the absence of forum contacts. On the other hand, the Court's broad cost-benefit analysis tends to support jurisdiction, at least if the burdens upon defendants in individual litigation significantly would outweigh those of a class defense.\textsuperscript{197}

For example, in \textit{Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.},\textsuperscript{198} the plaintiff sued a class of defendants, asserting various claims related to patent infringement. In a clearly reasoned opinion, the district court held that the action satisfied Rule 23 and therefore certified

\begin{itemize}
  \item \textsuperscript{190} "Principles of res judicata are not ironclad. This court has frequently stated that res judicata will not be applied when it contravenes an important public policy." Bogard v. Cook, 586 F.2d 399, 408 (5th Cir. 1978) (citation omitted) (allowing individual plaintiff's suit for money damages against prison system after class action covering similar transaction), \textit{cert. denied}, 444 U.S. 883 (1979).
  \item \textsuperscript{191} \textit{See generally infra Section II(F).}
  \item \textsuperscript{192} \textit{Fed. R. Civ. P. 23(b)(2), (c)(2)-(3). Some courts have held that notice in subdivision b(1) or b(2) actions is required by the Constitution. \textit{See infra} note 263.}
  \item \textsuperscript{193} \textit{See generally} 7A \textit{WRIGHT, MILLER \& KANE, supra note 21, § 1776.}
  \item \textsuperscript{194} \textit{Id.}
  \item \textsuperscript{195} \textit{Id. See} Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982) (challenge to prison system brought as class action to avoid mootness), \textit{cert. denied}, 460 U.S. 1042 (1983).
  \item \textsuperscript{196} \textit{See supra note 190; see also infra Section II(F).}
  \item \textsuperscript{197} \textit{See supra notes 71-75 and accompanying text.}
  \item \textsuperscript{198} 285 F. Supp. 714 (N.D. Ill. 1968); see Wolfson, \textit{Defendant Class Actions}, 38 OHIO ST. L.J. 459 (1977); \textit{Note, Defendant Class Actions}, 91 HARV. L. REV. 630 (1978); \textit{Note, Personal Jurisdiction and Rule 23 Defendant Class Actions}, 53 IND. L.J. 841 (1978).}
\end{itemize}
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it—without recognizing the jurisdictional issue. *Technograph* may be the type of case in which the multistate jurisdiction recognized in *Shutts* should be applied to a class of defendants. A patent holder, faced with flagrant acts of infringers too numerous to sue individually,\(^{199}\) is as deserving of an economical forum as are the members of a plaintiff class with small claims.\(^{200}\)

A different result might be appropriate in a damage suit against a defendant class without minimum contacts,\(^{201}\) although the nature and outcome of such actions are difficult to predict if *Shutts* encourages their use. Finally, a difficult case is presented by the possibility that a defendant in Phillips' position might outmaneuver plaintiffs' attorneys by filing an action for a declaratory judgment that it owes nothing to the class claimants.\(^{202}\) The action may seem suspect in that the defendant's principal motive may be forum shopping; however, since *Shutts* provides the plaintiff class with powerful forum-shopping tools, it is not easy to explain why defendants cannot also use them.\(^{203}\)

D. *Federal Courts, Statewide Actions, and Forums with Minimum Contacts: Does Shutts Apply?*

1. *Shutts and the Federal Courts*

At first blush, it seems clear that the *Shutts* due process criteria must apply to federal as well as state courts. It has been argued, however, that the Fifth Amendment due process clause, which is applicable to the federal government, is less restrictive than the Fourteenth Amendment due process clause, which was the provision at issue in *Shutts*.\(^{204}\) Proponents of mandatory classes also argue that Supreme Court decisions uphold


200. In Rule 23(b)(3) actions, the literal terms of the rule would allow defendant class members to opt out. See Fed. R. Civ. P. 23(c)(2). This right, if widely exercised, would destroy the effectiveness of the class device. In *Technograph*, the trial judge apparently avoided this result by certifying the action pursuant to each of the three subdivisions of Rule 23(b).


202. This tactic may be confined to statewide actions, see infra Section II(D)(2), or to mandatory actions. See infra Section III.

203. A declaratory victory for the party opposing the class has the same effect as a take-nothing judgment in a plaintiff class action.

204. The argument is asserted, for example, in Brief of Appellees at 30, In re Asbestos School Litig., 789 F.2d 996 (3d Cir.), vacated, 791 F.2d 920 (1986) (No. 84-1642).
Congress' authority to provide for nationwide service of process. For example, in *United States v. Union Pacific Railroad*, the Court said:

> The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries . . . .

> There is, therefore, nothing in the Constitution which forbids Congress to enact that . . . any [federal trial court] . . . shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision.

The *Shutts* opinion, on the other hand, speaks directly to the power only of the states. Therefore, federal courts are not affected by *Shutts*—or so the argument goes.

This reasoning, however, is subject to question. Although it technically is accurate to say that the Fifth Amendment provides a "different due process" than the Fourteenth Amendment, the two clauses have been construed to produce generally similar meanings. Moreover, even if distinctions might be drawn between the territorial reach of state and federal courts in some contexts, it seems difficult to justify due process differences affecting notice and opt-out protection provided by *Shutts* when the alternative is to bind nonconsenting litigants by adjudication in forums.


206. Several courts have upheld nationwide jurisdiction in cases concerning federal claims when Congress has so provided. *See* Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974). In *Mariash*, the defendants argued that notice and opportunity to be heard were not sufficient to establish the jurisdiction of a federal court in New York over them, and that minimum contacts with that state were required. The court responded by holding:

> It is not the State of New York but the United States "which would exercise its jurisdiction over [the defendants]." And plainly, where, as here, the defendants reside within the territorial boundaries of the United States, the "minimal contacts," required to justify the federal government's exercise of power over them, are present.


209. For example, *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985) concerns the jurisdiction of a federal district court over a defendant's person. *Burger King* applies the *International Shoe* standard, uses as authority cases dealing with state courts, and draws no distinction between federal and state forums with respect to the applicability of the minimum contacts test.
with which they have no affiliation. The disadvantages of distant forum abuse are not mitigated by the forum's federal rather than state character.

Furthermore, the nationwide service argument ignores the fact that Congress has not provided for this service in federal class actions. Proponents might argue that congressional authority is found in Rule 23 itself. Even assuming that the Rule is a "congressional" enactment, however, the authority can be found only by very broad implication, because the Rule does not address service of process or jurisdiction.210 Rule 4, which does, adopts service limits similar to those of the forum state.211 It seems doubtful, therefore, that federal courts should be excused212 from requirements that Shutts declares213 fundamental to due process.214

2. Jurisdiction Not Based on Consent: Statewide Class Actions and Forums with Minimum Contacts

If all class members have an affiliation with the forum, the court can compel appearance, and the inference of consent is unnecessary.216 Notice and an opportunity to be heard probably still would be required as independent due process guarantees,216 but the right to opt out presumably could be denied. It is even conceivable that cheaper notice, such as the substitutes provided by some state class action rules,217 would be accept-

210. Fed. R. Civ. P. 23(c)(2) may strengthen the argument in that it provides for notice by mail but imposes no territorial limitations. This reasoning, however, should be compared with statutes in which Congress has provided expressly for nationwide service. E.g., 28 U.S.C. § 1391(e) (1982) (mandamus directed to federal officer); 28 U.S.C. § 2361 (1982) (interpleader).


212. Some courts upholding nationwide service have based that result upon the applicability of federal question jurisdiction, as opposed to diversity jurisdiction. E.g., Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1984) ("nationwide service for federal question cases does not fall short of requirements of due process"). This reasoning implicates a knotty Erie doctrine problem. However, it seems unlikely that the Erie doctrine would countermand an otherwise proper nationwide service provision even in a diversity case. See infra note 534.

213. The Shutts opinion refers at several points to "state courts." For example, it says, "Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in non-class suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." 105 S. Ct. at 2975. However, this reference seems more readily explained by the Shutts Court's focus on the state as the source of possible due process impairment, than by the possibility that the Court was distinguishing federal courts from state courts.

214. See 105 S. Ct. at 2975.

215. This result follows from the line of cases based upon International Shoe. See cases cited supra note 10.


217. See supra note 146. Before Shutts, a Special Committee of the Litigation Section of the American Bar Association had recommended elimination of the individual notice requirement in favor of a discretionary notice provision, permitting the court to tailor both the group to be notified and the method of notice to the particular case. See Gruenberger, Plans for Class Action Reform, Nat'l L.J., July 8, 1985, at 32, col. 1, at 33 (reporting recommendations of Special Committee on Class Action Improvements). Even though Shutts does not address the question whether an appropriately drafted and exercised discretionary provision would be constitutional, the literal language of the decision indicates that such a provision would be unconstitutional.
able in an action in which traditional jurisdictional requirements are met.218

The removal of the consent requirement might be important in mass disaster cases. For example, In re Federal Skywalk Cases219 concerned the collapse of certain structures in the Hyatt Hotel in Kansas City, Missouri. All claims resulted from a single event in a single state, and all claimants probably had sufficient contacts with that state to support its exercise of traditional personal jurisdiction. Arguably, both efficiency and just adjudication would be enhanced, in this kind of case, by joining all claimants in a single class action.220 In Skywalk, the court of appeals disallowed this result because of the federal anti-injunction statute.221 Nothing in Shutts, however, prevents a state from empowering its courts to require joinder or a federal court from proceeding when the absence of previously commenced state court litigation meant the Anti-Injunction Act was not an obstacle. Conversely, defendants in Skywalk-type circumstances might seek unified litigation by requesting declaratory relief against the class of claimants in state court at the site of the disaster, and the court probably could compel joinder.

Shutts obviously facilitates the filing of nationwide actions without minimum contacts. As the Skywalk example shows, however, there still may be advantages to statewide actions or class litigation based upon minimum contacts. Contacts less weighty than those required to bind defendants might be sufficient to support this result for plaintiff classes; the true common fund cases, for example, hint at this possibility.222 Furthermore, as suggested below, choice of law probably will present significant management difficulties in some nationwide actions.223 Denial of nationwide certification then could present another situation in which statewide class actions would be useful.

E. Interstate Federalism and State Sovereignty: How Much Is Left?

The International Shoe224 test sometimes has been viewed as a protection against one state's infringement of another's sovereignty. Thus, in World-Wide Volkswagen Corp. v. Woodson,225 the Court said:

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218. Shutts provides no authority for this kind of notice, however, and its doubtful validity might make its use unwise. The amount at issue in each claim may be so small that binding effect is unimportant, but otherwise the risk of an invalid decree ordinarily will be excessive.
220. See infra Section III(C)(3).
221. See infra notes 314–16 and accompanying text.
222. See infra notes 279–85 and accompanying text.
223. See infra notes 440–42 and accompanying text.
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The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system. Arguably, the Kansas court in *Shutts* and the Illinois court in *Gillette* acted in derogation of the interstate federalism concern, which is expressed in statements tracing back to *International Shoe*.

However, in such cases as *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, the Court indicated that this interstate federalism concern was a less significant objective than the individual liberty interests of parties. The *Shutts* opinion concluded, consistently with *Bauxites* and contrary to *World-Wide Volkswagen*, that interstate federalism is not relevant to personal jurisdiction. This holding probably was necessary if the Court was to preserve the economic advantages it ascribed to multistate class actions. But it raises the question whether there are valid interests that will be left unprotected by the abandonment of the *World-Wide Volkswagen* approach.

*Miner v. Gillette Co.* provides a striking example of the interstate federalism concern. The company gave away hundreds of thousands of items in a promotional effort but underestimated demand. It offered a refund and substitute to the remaining applicants. The class complaint charged that this conduct constituted a deceptive concealment by Gillette of the fact that it did not have sufficient merchandise to give to all who asked.

There are two ways in which a conscientious state government might regard such a class claim. The Supreme Court of Illinois evidently consid-

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226. *Id.* at 291–92. The Court also concluded that the jurisdictional limit of due process was "an instrument of interstate federalism," which protects the "orderly administration of the laws" of other states. *Id.* at 294 (quoting *International Shoe*, 326 U.S. at 319).


228. *Id.* at 702 n.10.

229. The Court quoted *Bauxites*, 456 U.S. at 702-03, to the effect that the personal jurisdiction aspect of due process "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Shutts*, 105 S. Ct. at 2973. The federalism theme still may exist in personal jurisdiction, but it is "no more than a by-product." Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 Iowa L. Rev. 1015, 1065 (1983).

230. See *supra* note 86 and accompanying text. It should be pointed out, however, that Phillips argued that a single class action might be appropriate in Oklahoma, since each class member had accepted royalties paid from that state. Brief for Petitioner, *supra* note 44, at 45. If, as seems possible, appropriate forums similarly could be found for most nationwide class actions, the economic argument would be weakened.

ered it a valuable regulatory protection for consumers. Another reasonable view, however, is that the suit would raise costs disproportionate to its putative benefits to all consumers, both in Illinois and in every other state. A state other than Illinois might conclude that the labelling of apparently innocuous conduct as deceptive reduces the availability of goods and services, because producers must protect themselves from unpredictable liability. The ease of blackmail, disproportionate enrichment of class counsel, and frustration of state policy that result from even conscientious efforts to adjudicate fifty states' laws might be further concerns to such a state. Particularly when, as in Gillette, there is no monetary loss to any consumer and potential recoveries are only a few dollars, a thoughtful state citizenry might choose to avoid these disadvantages.

For example, Oregon has a carefully designed state policy, originally expressed in a statute, deliberately narrowing class actions. The Oregon Supreme Court has noted that:

232. 87 Ill. 2d at 18-19, 428 N.E.2d at 484.
233. Some commentary in Illinois has harshly criticized of Miner. See Note, Illinois Multistate Plaintiff Class Actions: Abrogation of Jurisdictional Limitations on State Sovereignty, 31 DE PAUL L. REV. 471, 496 (1982) (Miner "invites an onslaught of trivial suits to be filed in Illinois courts, suits that the state will have little reason to consider"). For articles favoring the Miner holding, see Ross, Multistate Consumer Class Actions in Illinois, 57 CHI.-KENT L. REV. 397 (1981) (authored by member of firm that served as plaintiffs' class counsel); Drobak, supra note 229, at 1064-65; Comment, supra note 2, at 806-10.
234. A state also might conclude that the labelling of ostensibly honest conduct as deceptive trivializes the law and results in oppression.
236. Id. at 566. "The lawyer for the class will be tempted to offer to settle with the defendant for a small judgment and a larger legal fee. . . . Although the judge must approve the settlement, the lawyers largely control his access to information." Id. at 531.
For example, in Greenhaw v. Lubbock County Beverage Ass'n, 721 F.2d 1019 (5th Cir. 1983), the court upheld an attorney's fee award of $246,517 although actual payable claims proved to be only $17,482. This example may be unusual because claims against the $2 million settlement fund may have been discouraged by the trial court's rulings. See Crump & Crump, The Year's Developments in Civil Procedure, 16 TEX. TECH. L. REV. 115, 124-25 (1985). From an economic point of view, one might approve of this payment into a liability fund even if injured parties do not ultimately recover damages, because the creation of the fund itself internalizes social costs.
238. See infra Section IV(D).
239. OR. R. CIV. P. 32(B)(3). The most significant local restriction imposed by the Rule is that, in the local analogues to Rule 23(b)(3) actions,
[c]ommon questions . . . shall not be deemed to predominate . . . if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages.
OR. R. CIV. P. 32(B)(3). This provision would prevent most class recovery of non-economic damages, for example, and could prevent even economic recoveries unless they were mathematically ascertainable.
Another provision requires the likelihood of "significant" relief to class members as compared to the complexity and expense of the action and prohibits certification when individual claims are "insuffi-
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There can be no doubt that the purpose of the amendments was to prevent abuses perceived under Rule 23... and that the scope of the class action in Oregon was intended to be circumscribed to a greater extent than is the case under some federal courts' interpretation of Rule 23.240

Oregon’s policy may be seen as similar to tax or other economic concessions that a state might offer to stimulate business. Ultimately, the purpose is to benefit Oregon citizens by sparing them from having the costs of regulation passed on to them.241

However, Oregon’s citizens cannot effectively benefit themselves economically by limiting class actions they consider abusive, because those very actions can be brought in other states with Oregon citizens included if embraced by the claims. The opt-out right is an ineffective solution to this concern because Oregon residents would likely refuse to opt out, thus benefitting by undermining Oregon’s policy. Mass-marketed products, if priced uniformly nationwide, may not be affected; but products or services such as intrastate transportation or consumer credit, which often are priced locally even if provided by national firms, may become more expensive in Oregon than they otherwise would be. Forums such as Kansas or Illinois thus will impose upon Oregon the economic costs that it has sought to avoid.

The Court’s holding in *Shutts* may be justified by the resulting efficiency gains. However, the removal of personal jurisdiction as a protection of interstate federalism puts greater emphasis upon choice of law, which was the protection the court did provide. Trial courts also may protect interstate federalism by taking it into account in class certification and forum contests.242

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241. Similarly, the Uniform Class Actions Act respects the concerns of interstate federalism through a process of comity that has been interpreted to respect through individual due process. *See Uniform Class Actions Act § 6* (court of one state may exercise jurisdiction over residents of another state to the extent that the latter state has made its residents subject to suit in the former). Only North Dakota has adopted the reciprocal feature of the Uniform Act, however. *See N.D. R. Civ. P. 23(f). See generally Scher, Uniform Class Actions: A Critical View, 63 A.B.A. J. 840 (1977) (discussing Uniform Act).*

242. *See infra Section V(A)–(B).*
F. Binding Effect: The Application of Preclusion Doctrines

Before *Shutts*, the fifty state supreme courts were not clearly required to give res judicata effect to judgments rendered by courts without personal jurisdiction over class claimants. Some refused to give that effect. Defendants therefore could not know whether judgments in multistate class actions would protect them.

Doubts about binding effect before *Shutts* were especially undesirable when a defendant wished to pursue a settlement overture. Settlement is strongly favored because class actions are uncertain and costly. A defendant without assurance of binding effect was likely to be subjected to a "heads you win, tails I lose" approach. If it settled for an amount that plaintiffs elsewhere might think was inadequate, a defendant might fear that nonresident class members over whom the court had no jurisdiction would relitigate in their home forums and be sympathetically received.

The Supreme Court, in *Shutts*, recognized the defendant's "distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [the defendant] is bound." The Court's decision stands for the proposition that binding effect does attach in multistate class actions under the conditions prescribed in *Shutts*. The Court's discussion is general, however, and the opinion points out that "a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment." Therefore, issues regarding the breadth of or conditions for claim preclusion may persist after *Shutts*.

For example, a state court might determine that notice issued by another court did not properly describe the suit, or inadequately explained class plaintiffs' rights, or failed to include an appropriate opt-out form. This holding would mean that a defendant settling a class action might be

244. See supra notes 26-27 and accompanying text.
245. See Note, Multistate Class Actions, supra note 2, at 734-43; Note, Binding Effect of Class Actions, 67 Harv. L. Rev. 1059 (1954).
247. Before *Shutts*, it could be said that "[c]ollateral attacks on class judgments have usually succeeded." Note, Multistate Class Actions, supra note 2, at 737 n.150. In fact, an illustration can be found in an action parallel to *Shutts*. Amoco Production Company paid interest at rates provided by various state laws, believing it thus had discharged its liability, but then was sued for the greater amounts allegedly due under Kansas law. Dudley v. Amoco Prod. Co., No. 5188 (Dist. Ct. Stevens County, Kan. 1986).
248. 105 S. Ct. at 2972.
249. Id.
250. See supra Section II(B)(2).
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held liable for a recovery exceeding the settlement amount. To minimize these occurrences, a court hearing a class action should take care in giving notice, and the court in the second suit should be liberal in accepting it, in light of the inherent difficulty of achieving perfect notice.

Additional issues may be raised by the confusing law of res judicata and collateral estoppel itself. Some courts, for example, do not impose a broad procedural duty upon the plaintiff to bring all related claims in a single action, but rather allow a second suit, even covering the same dispute, if the substantive claim technically is different. Likewise, factual differences can prevent preclusive effect. Finally, many jurisdictions recognize vaguely defined limits on preclusion as a matter of public policy. In a subsequent class suit, skillful counsel would advance all of these exceptions to preclusion, and together they may provide the forum with considerable wiggle room to protect its residents from an assertedly inadequate settlement.

Although the phenomenon of the subsequent suit after resolution of a class action has not been common, it has occurred. The question remains whether increasing resort to the class action device will produce more multiple litigation in which defendants are subjected to the "heads you win, tails I lose" syndrome. It should be added that the class frequently is not only interstate but also international, as was the class in

251. The full faith and credit clause, U.S. CONST. art. IV, § 1, could be asserted in favor of binding effect, but for that effect to attach, the first court must have had jurisdiction; jurisdiction, in turn, is conditioned upon satisfactory compliance with the due process criteria set forth in Shutts.

252. See supra notes 158-66 and accompanying text (discussing notice difficulties); see also infra text accompanying notes 501-04 (discussing inevitable differences in appropriate notice).


255. E.g., Westinghouse Credit Corp. v. Kownslar, 496 S.W. 2d 535 (Tex. 1973) (final judgment in suit on guaranty does not preclude subsequent suit on same guaranty concerning other outstanding notes).

256. See supra note 190.

257. See Note, Multistate Class Actions, supra note 2, at 738-40 (discussing preclusive effect).

258. Cf. supra note 27 (discussing improbability of individual plaintiff relitigating cause of action in which class lost).

259. E.g., Cooper v. Federal Reserve Bank, 104 S. Ct. 2794 (1984); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915); Johnson v. McKaskle, 727 F.2d 498 (5th Cir. 1984); Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978); In re Transocean Tender Offer Sec. Litig., 427 F. Supp. 1211 (N.D. Ill. 1977).
Preclusive effect then becomes a matter of international or transnational law.\textsuperscript{261}

III. MANDATORY CLASS ACTIONS AFTER \textit{SHUTTS}

Before \textit{Shutts}, not every class action was subject to notice and opt-out requirements. By its express terms, Rule 23 imposes these requirements only in actions under subdivision (b)(3), in which common question predominance and superiority over other procedures support class certification.\textsuperscript{262} The rule contains no provision for notice or opt-out in class actions certified under subdivision (b)(1), in which risk of inconsistency justifies unified treatment, or under subdivision (b)(2), in which injunctive or declaratory relief is at issue.\textsuperscript{263}

Subdivisions (b)(1) and (b)(2) have given birth to the so-called "mandatory" class action, in which class members are denied the right to opt out.\textsuperscript{264} Proponents of mandatory class certification can claim support not only from the absence of express notice or opt-out provisions in the rule, but also from the implicit preference for unitary adjudication that underlies subdivisions (b)(1) and (b)(2).\textsuperscript{265} These arguments typically are accompanied by the claim that widespread opt-out will prevent the fair and efficient determination of the particular dispute at issue. In fact, a special committee of the Litigation Section of the American Bar Association has recommended the amendment of Rule 23 to allow flexible use of mandatory certification in all class actions for this reason.\textsuperscript{266}

\begin{itemize}
  \item \textsuperscript{260} See supra text accompanying note 47.
  \item \textsuperscript{261} Similar concerns arose, for example, in suits for damages from the Bhopal Disaster. \textit{In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984}, 634 F. Supp. 842 (S.D.N.Y. 1986). The Indian government addressed the issue by passing a law enabling it to sue in the United States as the "exclusive" representative of all victims, although the status of the Indian government in the action had not been determined. Riley, \textit{New Bhopal Law May Affect Future Role of U.S. Lawyers}, Nat'l L.J., Mar. 11, 1985, at 4, col. 2. In suits already filed, the exclusive representation provision applies only as [the] court . . . permits." Id. The federal district judge handling the cases thus far has not ruled on whether the Indian government's representation is exclusive of individual counsel. These concerns may be moot, however, since the district court dismissed on forum non conveniens grounds. 634 F. Supp. at 866-67.
  \item \textsuperscript{262} FED. R. CIV. P. 23(b)(3), (c)(2).
  \item \textsuperscript{263} FED. R. CIV. P. 23(b)(1)-(2). However, FED. R. CIV. P. 23(d) empowers the court to tailor its orders to the needs of the case, and some courts have held that prejudgment notice in subdivision (b)(1) and (b)(2) actions is required by the Constitution if money damages are at issue. E.g., Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979). \textit{Contra Larionoff v. United States}, 533 F.2d 1167, 1186 (D.C. Cir. 1976), \textit{aff'd on other grounds}, 431 U.S. 864 (1977).
  \item \textsuperscript{265} See infra Section III(A)(1).
  \item \textsuperscript{266} Gruenberger, \textit{Plans for Class-Action Reform}, Nat'l L.J., July 8, 1985, at 32, col. 1 (reporting recommendations of Special Committee on Class Action Improvements); see also N.Y. CIV. PRAC.
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Although Shutts does not address the issue directly, the concept, expressed in Shutts, that the right to opt out is a fundamental due process requirement seems to contradict the mandatory class action that has developed under Federal Rule 23 and its state counterparts. There can be no mandatory class if the members have the constitutional right to opt out. The conclusion seems to follow that Shutts prohibits mandatory classes.

The question is both important and controversial. The prospect of mandatory class certification has motivated strenuous efforts by some attorneys to characterize their actions as falling within subdivision (b)(1) or (b)(2). For plaintiffs’ counsel, a mandatory class may reduce conflicts among claimants, increase efficiency, provide for equitable distribution of the recovery, and, not incidentally, provide a large, captive group for counsel to represent. For the defendant, mandatory class certification may provide a single convenient forum, lower litigation costs, and reduce the possibility of inappropriate multiple liability, particularly for punitive damages. Mandatory certification also may increase prospects for settlement by preventing claimants from increasing the defendant’s perceived litigation costs by the threat of opt-out. On the other hand, there are always some claimants or defendants who oppose mandatory classes because they see individual, as opposed to group, control as essential to the fair presentation of their cases. The following sections explore this controversy over mandatory class certifications in light of Shutts, and conclude with a suggested four-factor analysis to assist courts with these determinations.

A. The Uses of Mandatory Classes

1. Mandatory Classes for Limited Funds and Common Rights

Mandatory classes find historical precedent in the equitable bill of peace. This procedure developed as a means of preventing multiple suits concerning common questions, particularly those in which many peo-

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L. & R. 903 (McKinney’s 1977) (class members may be permitted to opt out when “appropriate”); infra Section III(A)(2).

267. See Byer, National Mandatory Class Actions: Key Questions Remain Unanswered, Nat’l L.J., Sept. 30, 1985, at 19, col. 1, at 21, col. 2 (Shutts “was not a mandatory class action, and the court [sic] stated in a footnote that its holding was limited to the type of class action involved in that case”).

268. Shutts, 105 S. Ct. at 2975 (absent plaintiff must be provided with opt-out form).

269. See infra Sections III(A)(3), III(B). One of the more inventive efforts involved an attempt to invoke subdivision (b)(2), by claiming “mandatory injunctive relief in the form of asbestos abatement” and restitution for expenses of remedying asbestos hazards. In re Asbestos School Litig., 104 F.R.D. 422, 438 (E.D. Pa. 1984), aff’d in part, vacated in part, 789 F.2d 986 (3d Cir.), vacated, 791 F.2d 920 (1986). The court rejected this argument as an effort to transform a claim for damages into an equitable remedy merely by changing the name. Id. at 438-39.

people made claims to the same property or fund by consolidating them in a single suit in equity. The class action is an extension of this device.

The 1938 federal class action rule also provides historical support for mandatory classes, particularly in cases concerning common rights or limited funds. The rule divided class actions into three categories. The "spurious" class action loosely resembled today's subdivision (b)(3) action in that it concerned separate claims with common questions. Class members were not bound unless they opted in, and this action was permissive rather than mandatory. On the other hand, "true" class actions, which involved joint or common interests, and "hybrid" actions, which involved claims against fixed properties or limited funds, generally were treated as mandatory in effect, although the right to opt out had not yet crystallized enough to make that terminology meaningful. The categories actually reflected differences in binding effect, in that members of true classes were bound by res judicata and hybrid class members were bound to the extent that their claims concerned the fund before the court.

When the federal rule was revised in 1966, the categories of class actions took their present form. Subdivisions (b)(1) and (b)(2) came to include most of the actions that would have been called true or hybrid under the 1938 terminology. Although the terminology has now been changed, suits involving common rights or limited funds—the old true or hybrid class actions—often present the most appealing situations for mandatory class joinder today.

By definition, it is impossible to resolve separately individual claims involving common rights or limited funds. One of the best examples is *Hartford Life Insurance Co. v. Ibs*, in which the Supreme Court concluded that an insurer's contingency fund, composed of contributions from policyholders, was treated appropriately as a unit, in a single suit in which all policyholders necessarily were joined. The reason, said the Court, was that "[t]he Fund was single. . . . It would have been destructive of [policyholders'] mutual rights . . . to use the Mortuary Fund in
one way . . . in one State and to use it another way . . . in a different State.\footnote{280}

Similarly, compulsory joinder has been justified by necessity in such contexts as group challenges to reorganization of a fraternal benefit association,\footnote{281} attacks on the proposed merger of two professional athletic leagues that would reduce the number of player positions,\footnote{282} group challenges to a statutory provision regarding Navy re-enlistment bonuses,\footnote{283} and multiple claims regarding declaration of a dividend.\footnote{284} In each of these situations, as in the common rights or limited fund cases, a unitary decision is essential.\footnote{285} It is impossible to reorganize a single fraternal benefit organization in inconsistent ways, or to keep two basketball leagues both merged and separate, or to distribute uniform bonuses according to conflicting plans, or simultaneously to pay and withhold a dividend.

2. \textit{Mandatory Classes for Mass Tort Punitive Damage Claims}

A more recent use of mandatory classes has been in mass tort cases. During the last two decades, there has been a vast increase in suits filed to redress widespread injuries from mass disasters or nationally marketed products. As one district court has stated, claims concerning certain of these products have achieved such notoriety "that the mere mention of their names—Agent Orange, Asbestos, DES, MER/29, Dalkon Shield—conjure [sic] images of massive litigation" and of claims for "‘big money’ punitive damage awards."\footnote{286} The mandatory class action has been advanced as a means of dealing efficiently and fairly with claims for punitive damages in these cases.\footnote{287}
Proponents of mandatory classes have suggested several theories for categorizing massive punitive damages claims under subdivision (b)(1) of Rule 23. First, aggregate damage claims in a mass tort case may exceed a defendant's net worth. The defendant's assets arguably are then analogous to a limited fund, so that, in the language of subdivision (b)(1)(B), separate suits would "create a risk of . . . adjudications . . . which would as a practical matter be dispositive of the interests" of other class members. Without a mandatory class, huge damage awards might go to those few lucky claimants who were first in line at the courthouse, while others might receive nothing. This argument sometimes is referred to as the "constructive bankruptcy" theory.

A second argument for mandatory classes in mass tort cases sometimes is called the "punitive damage overkill theory." It assumes that there must be a limit to aggregate punitive damage recoveries for a single course of conduct or event, since the function of punitive damages is to provide an economic deterrent to undesirable conduct. A few states in fact do have specific limits, while others require a reasonable relationship in amount between actual and punitive damages. The law of other states is ambig-

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288. FED. R. CIV. P. 23(b)(1)(B). See generally 7B Wright, Miller & Kane, supra note 77, §§ 1783, 1805; Weinstein, Preliminary Reflections on the Law's Reaction to Disasters, 11 COLUM. J. ENVTL L. 1, 28 (1986); authorities discussed infra Section III(A)(3); cf. Miller, Federal Class Actions, supra note 6, at 211.


Appellants, in Asbestos, argued that the overkill rationale was invalid because (1) trial judges had procedural devices to guard against overkill, (2) each plaintiff had to prove punitive damages in relation to himself, and (3) there had to be a relationship between punitive and compensatory damages. See generally Transcript of Oral Argument at 1-19, In re Asbestos School Litig. 789 F.2d 996 (3d Cir.) (argument of Professor Miller), vacated, 791 F.2d 920 (1986).

292. There is apparently no double jeopardy prohibition on repetitive assessments of punitive damages in civil cases. In the absence of a limit, a defendant may be subjected repeatedly to overlapping penalties in independent actions concerning the same conduct. See authorities cited infra notes 294-95. For a discussion of the purposes of punitive damages, see Mallor & Roberts, Punitive Damages: Toward a Principled Approach, 31 HASTINGS L.J. 639, 647-50 (1980).

293. For example, some states limit punitive damages by dollar amounts or by percentages of a defendant's net worth. E.g., MONT. CODE ANN. § 27-1-221(b) (1985) (limiting punitive damages for most categories of cases to $25,000 or one percent of defendant's net worth, whichever is greater).

294. See, e.g., Taylor v. Sandaval, 442 F. Supp. 491 (D. Colo. 1977); International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 584 (Tex. 1963) ("[t]he remedy selected in relation to the actual harm done the plaintiff [is a] proper consideration[] in weighing the amount of an exemplary
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uous, but courts considering the argument generally have been willing to accept the probability that these states also would impose limits at some point. In the alternative, constitutional doctrines such as the Eighth Amendment or the due process clause might prohibit excessive or irrational uses of punitive damages.

Without mandatory classes, widespread opt-out may produce individual punitive damage adjudications whose aggregate would exceed the appropriate limit. The defendant therefore faces a risk of "inconsistent standards" for punitive damage liability. This risk arguably satisfies the requirements of subdivision (b)(1)(A) of Rule 23. At the same time, claimants face the risk that their recoveries of punitive damages may be prevented by state law or constitutional limits, unless they are among the fortunate early winners of very large judgments—in short, there is limited generosity in the punitive damage field. This risk may satisfy subdivision (b)(1)(B) of the rule.

District judges have certified mandatory punitive damage classes in several mass tort cases but rejected them in several others. One or more of these theories has justified the result in each case. Among the most recent cases, however, only one nationwide mandatory certification has withstood appellate review.

295. For example, in Skywalk, the district court recognized that a Missouri appellate court had considered the argument that a defendant could be liable for punitive damages only once on the basis of any given transaction. 93 F.R.D. at 424 (citing Monsanto Co. v. Parker, 634 S.W.2d 506 (Mo. App. 1982)).

296. "There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction." In re "Agent Orange" Prods. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983). But see Skywalk, 680 F.2d at 1190 (Heaney, J., dissenting) (arguing that "[t]he Constitution does not create an absolute bar" to punitive damages).

There are other ways in which punitive damages arguably might be limited. Earlier awards might be admitted in later claimants' cases as relevant to the quantum of deterrence. Cf. Agent Orange, 100 F.R.D. at 728 (noting potential relevance of punitive damages to courts considering subsequent claims). Specific federal policies might limit punitive damages. Id. at 727-28 (federal policy against impairing national defense capability could limit punitive damages). Finally, punitive damages may be limited by creating federal common law. See Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526-30 (5th Cir.), rev'd on other grounds, 750 F.2d 1314 (1984).

Several courts have rejected these overkill arguments, holding that multiple awards need not be limited. E.g., Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985), cert. denied, 106 S. Ct. 3335 (1986); In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847, 851-52 (9th Cir. 1982). The Third Circuit avoided the questions in In re Asbestos School Litig., 789 F.2d 996 (3d Cir.), vacated, 791 F.2d 920 (1986). Concerns about the handling of punitive damages in mass tort and product liability contexts has also generated pressure to create a federal common law rule on the subject. See Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) (en banc), cert. denied, 106 S. Ct. 3339 (1986).

297. See authorities cited supra notes 293-94.


300. See infra Section III(A)(3).

301. The petition for mandamus was denied in Agent Orange. See infra note 334; see also...
3. **Mandatory Punitive Damage Classes in Nationwide Product Liability and Mass Accident Cases: From Skywalk to Dalkon Shield to Agent Orange**

One of the major mandatory punitive damage class cases arose from the collapse of two skywalks in the lobby of the Kansas City Hyatt Regency Hotel, which killed 114 persons and injuring at least 212 others. Approximately 150 separate federal and state suits resulted. In *In re Federal Skywalk Cases*, Judge Scott Wright certified a Rule 23(b)(1) mandatory class for punitive damages.

The *Skywalk* case was of the "mass disaster" genre. When many injuries are traceable to a single incident, almost all liability inquiries, including most questions of specific causation, are focused on an event that occurred at a definite time and place. As a result, gains in both efficiency and equity from group resolution may be greater than in other mass tort cases.

Although Judge Wright also accepted certification arguments that were not dependent on mass accident reasoning, the single event nature of

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307. Actually, the drafters of the 1966 Rules had expressed the concern that personal injury tort claims might be inappropriate for class resolution because numerous individual issues ordinarily would overwhelm the common issues. Thus a mass tort class action "would degenerate in practice into multiple lawsuits separately tried." Proposed Amendments to Rules of Civil Procedure of the United States District Courts, 39 F.R.D. 73, 103 (1966) (Advisory Committee Note to Rule 23(b)(3)).

This qualification, however, expressly was attached only to Rule 23(b)(3) actions. Arguably, subdivision (b)(1) and (b)(2) actions could be distinguished, and a coherence of issues—as might occur in the mass accident case—then could strengthen the argument for certification. See generally 7B WRIGHT, MILLER & KANE, *supra* note 77, § 1783.

One approach to such a case is to inquire whether it is brought together "more by a mutual interest in the settlement of common questions than it is divided by the individual members' interest in matters peculiar to them." 3B J. MOORE, *FEDERAL PRACTICE* ¶ 23.45[2], at 23–324 to -325 (2d ed. 1980).

Certification should then depend upon whether class members are "seeking to remedy a common legal grievance." *Id.* at 332.

Another approach, borrowed from the language of pendent jurisdiction, is to ask whether a “common nucleus of operative facts” can be addressed in a unified adjudication. 7A WRIGHT, MILLER & KANE, *supra* note 21, § 1778.

the *Skywalk* case had a clear influence on his certification order. For example, it appeared that Missouri law might prevent a single defendant from becoming liable for more than one punitive damage award for a single accident.\(^{309}\) The first claimant to obtain an award then might be the "first and only winner," and this result supported arguments for a Rule 23(b)(1)(B) mandatory class.\(^ {310}\) Judge Wright also saw a risk of inconsistent adjudications from the defendants' standpoint sufficient to support subdivision (b)(1)(A) certification.\(^ {311}\) By unitary adjudication, the court could avoid "allow[ing] a minority of claimants to take any or all defendants to trial time and time again," with varying outcomes.\(^ {312}\) "Economy of effort," as well as "uniformity of result," would follow.\(^ {313}\)

The Eighth Circuit, without reaching the merits of the certification order, reversed.\(^ {314}\) The majority concluded that the mandatory class order amounted to an injunction against pending state actions prohibited by the federal Anti-Injunction Act.\(^ {315}\) In dissent, Judge Heaney argued that the certification order did not violate the Act and that the equity and efficiency arguments supported Judge Wright's actions.\(^ {316}\)

Shortly before *Skywalk*, in *In re Northern District of California “Dalkon Shield” IUD Products Liability Litigation*, Judge Spencer Williams had certified a mandatory nationwide punitive damages class under subdivision (b)(1)(B).\(^ {317}\) The two cases, *Skywalk* and *Dalkon*

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In addition, the district court concluded that multiple litigation by plaintiffs could be unfair to defendants, *Id.* at 423–24 (citing Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 561 (S.D. Fla. 1974), aff'd, 507 F.2d 1278 (5th Cir. 1975)) which in turn was based upon the concern that offensive collateral estoppel might apply. *But see In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984) (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)). The *Skywalk* district court further concluded that a mandatory class would reduce unethical conflicts of interest on the part of attorneys representing multiple claimants. 93 F.R.D. at 425.

309. 93 F.R.D. at 424.
310. 93 F.R.D. at 425.
311. *Id.* at 423–24.
312. *Id.* at 425.
313. *Id.* at 424.
315. *Id.* at 1180–83. The court reasoned that the district court's prohibition on settlement of punitive claims was an injunction against state proceedings and that, in addition, the "substantial effect" of the district court's order "enjoined" ongoing state compensatory and punitive damage litigation. *Id.* at 1180. *But cf. supra* note 175 (discussing exception to federal anti-injunction statute).

316. *Id.* at 1184–93.


318. 526 F. Supp. at 893–900. The court also certified a statewide Rule 23(b)(3) class action on compensatory damages. *Id.* at 900–03.
Shield, involved many similar arguments. But Dalkon Shield differed from Skywalk in certain important respects. Rather than a mass disaster occurring at a definite time and place, Dalkon Shield concerned allegations that a nationally distributed product had injured each claimant at a different time and place.\textsuperscript{319} Different plaintiffs claimed different kinds of injuries, ranging from uterine perforations, infections, and hysterectomies to spontaneous abortion, fetal injuries, and pregnancy.\textsuperscript{320} The virtually complete commonality of liability issues in Skywalk thus was lacking in the nationwide product liability claims of Dalkon Shield.\textsuperscript{321} The case for certification correspondingly was weaker.\textsuperscript{322}

Nevertheless, Judge Williams certified the mandatory class on the basis of the constructive bankruptcy theory. He concluded that nationwide punitive damage claims, which totalled more than $2.3 billion, exceeded the $280 million net worth of the principal defendant, A. H. Robins Company.\textsuperscript{323} He also concluded that the overkill justification was present because punitive damages “certainly” would be subject to limits “implied in law.”\textsuperscript{324} Judge Williams’ certification in Dalkon Shield thus rested upon equity and efficiency reasons analogous to those given by Judge Wright in Skywalk.

The Ninth Circuit reversed.\textsuperscript{325} It found insufficient commonality in claims depending on widely differing facts and arising under the laws of fifty jurisdictions that “do not apply the same punitive damages standards.”\textsuperscript{326} Furthermore, since no plaintiff sought certification and no attorney already involved in the case was willing to serve as class counsel, the court found typicality and adequacy of representation to be deficient.\textsuperscript{327}

The Ninth Circuit also rejected the reasoning at the heart of mandatory class certification in Dalkon Shield. Rule 23(b)(1)(B), it said, could not be used in a mass tort case unless the record established that early awards “inescapably” would affect later awards; a mere “risk” of that result, even

\begin{itemize}
  \item \textsuperscript{319} Id. at 892-93.
  \item \textsuperscript{320} Id.
  \item \textsuperscript{321} In particular, causation issues varied with the individual and with the type of injury. Furthermore, issues regarding defectiveness or adequacy of warning could have been affected by different state of the art considerations (and similarly punitive damages could be affected by differences in defendants' knowledge of risk), since usage of the product took place over roughly a five-year span. Id. The case also presented issues of liability of other persons, such as physicians, that would depend upon different facts in each case.
  \item \textsuperscript{322} See supra note 307. Judge Williams recognized the distinction, but his analysis found sufficient commonality for certification.
  \item \textsuperscript{323} 526 F. Supp. at 897.
  \item \textsuperscript{324} Id. at 898.
  \item \textsuperscript{325} 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).
  \item \textsuperscript{326} 693 F.2d at 850.
  \item \textsuperscript{327} Id. at 850-51.
\end{itemize}
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though it satisfied the literal terms of the rule, was not enough.\textsuperscript{328} "[W]ithout more," said the court, "numerous plaintiffs and a large \textit{ad damnum} should [not] guarantee (b)(1)(B) certification."\textsuperscript{329} Since there was no showing that punitive recoveries "inescapably" would exceed the defendant’s net worth, the constructive bankruptcy argument failed.\textsuperscript{330} As for the "punitive damages overkill" theory, although recognizing that there might be situations in which a court should "protect a defendant from unreasonable punitive damages," the court merely asserted, cryptically, that a class action "is not the only way" to accomplish that result.\textsuperscript{331}

The one recent case\textsuperscript{332} in which an appellate court has upheld a mandatory class\textsuperscript{333} is \textit{In re “Agent Orange” Product Liability Litigation}.\textsuperscript{334} Plaintiffs, Vietnam War veterans and members of their families, claimed to have suffered damages as a result of the veterans’ exposure to herbicides allegedly produced by the defendants.\textsuperscript{335} \textit{Agent Orange} superficially resembled the dispersed product tort case, such as \textit{Dalkon Shield}, rather than the mass disaster typified by \textit{Skywalk}. Differences in exposure

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{328} Id. at 851 (citing McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083, 1086 (9th Cir. 1975), \textit{cert. denied}, 425 U.S. 911 (1976)).
\item The court distinguished Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 n.9 (9th Cir. 1976), in which it had indicated that subdivision (b)(1)(B) certification could apply if the claims exceeded defendant’s assets, on the ground that it “was a 10b-5 [securities] action and did not involve mass personal injury claims.” 693 F.2d at 851. Since a securities action could turn upon a single course of allegedly fraudulent or misleading conduct, and damages could be liquidated, the distinction may be valid.
\item Id. at 852.
\item \textit{After Skywalk and Dalkon Shield}, in \textit{In re “Bendectin” Prods. Liab. Litig.}, 102 F.R.D. 239 (S.D. Ohio 1984), Judge Carl Rubin certified a mandatory class for settlement purposes under the asserted authority of both Rule 23(b)(1)(A) and Rule 23(b)(1)(B). In addition to efficiency concerns, Judge Rubin felt that the defendant’s exposure to inconsistent adjudications and the risk that defendant’s assets might be a limited fund that would not satisfy all claims warranted certification. 102 F.R.D. at 241. The Sixth Circuit granted mandamus and reversed the certification. \textit{In re Bendectin Prods. Liab. Litig.}, 749 F.2d 300 (6th Cir. 1984).
\item \textit{Bendectin}, in which pregnant women asserted claims alleged to have resulted from a morning sickness drug, presented varying issues of liability that included individualized causation questions. \textit{See id.} at 301–02. It more closely resembled the dispersed product torts claimed in \textit{Dalkon Shield} than the mass disaster of \textit{Skywalk}. The Sixth Circuit held that the risk of varying adjudications required by subdivision (b)(1)(A) was not satisfied merely because some plaintiffs might be successful while others might not. \textit{Id. at 305}. Any resulting variation might not be inconsistent at all, because it might reflect factual differences in individual cases. Nor was the constructive bankruptcy determination supported by proof. \textit{Id. at 306}; \textit{see also Mertens v. Abbott Laboratories}, 99 F.R.D. 38, 41 (D.N.H. 1983) (mem.) (denying certification in DES mass tort case).
\item Not only had \textit{Skywalk}, \textit{Dalkon Shield}, and \textit{Bendectin}—the recent major mandatory class certifications—all been reversed, but the rationales of earlier certifications that had survived review, such as \textit{Coburn}, had been undermined. \textit{See supra} note 301.
\item \textsuperscript{335} 100 F.R.D. at 720.
\end{enumerate}
\end{footnotesize}
levels and other aspects of causation ostensibly made each individual’s claim distinct and, therefore, inappropriate for class resolution.336

Judge Jack Weinstein, however, did not accept the analogy to the dispersed product tort cases. He concluded, instead, that “[u]nlike litigations such as those involving DES, Dalkon Shield and asbestos, the [Agent Orange] trial is likely to emphasize critical common defenses applicable to the plaintiffs’ class as a whole.”337 These defenses included “general,” as opposed to individual, causation, because the defendants’ theory was that their herbicides “could not have caused [any of] the injuries claimed.”338 Furthermore, the “government contractor” defense, or the assertion that defendants were not liable because the government had prescribed the specifications for the product for defense purposes, was “inextricably interwoven” with the causation issues.339 Finally, Judge Weinstein said that the “extraordinary size” and “posture” of the case, including its place in the “real world” of dispute settlement, enhanced the need to resolve the general causation issue on a classwide basis.340 Judge Weinstein’s opinion thus stressed the unique nature of the dispute and persuasively compared it to the Skywalk mass disaster model for which tort class actions presumably were more appropriate.

With respect to the constructive bankruptcy theory, Judge Weinstein pointed out that courts had disagreed over the magnitude of the risk that was required to justify Rule 23(b)(1)(B) certification.341 The Ninth Circuit’s stringent demand in Dalkon Shield, that impairment of claims must be “inescapable,” seemed inconsistent with Rule 23, which required only a “risk” of impairment.342 On the other hand, some courts apparently had concluded that the mere existence of some degree of risk was enough; Judge Weinstein found this standard too lax.343 Ultimately, Judge Weinstein approached the issue by balancing the advantages and disadvantages of certification. He saw the disadvantages of claims impairment in Agent Orange as significant, since it would mean that tens of thousands of veterans and their families would be without means to collect on a judgment.344 Judge Weinstein therefore concluded that a standard of “substantial probability” was appropriate.345 By com-

336. Id. at 722.
337. Id. at 723.
338. Id.
339. Id.
340. Id.
341. Id. at 726.
342. Id.; see supra note 328 and accompanying text.
343. 100 F.R.D. at 726 (citing Coburn v. 4-R Corp., 77 F.R.D. 43, 46 (E.D. Ky. 1977)).
344. 100 F.R.D. at 726.
345. Judge Weinstein supported this test of less than preponderance but more than mere possibility by reference to similar standards in other procedural contexts. Id. at 726–27.
paring evidence of the defendants' financial position with the claims in the case, however, he concluded that factual proof of the requisite substantial probability was lacking.\textsuperscript{346}

Judge Weinstein's mandatory class certification in *Agent Orange* instead was based on the punitive damages overkill theory. There must be "some limit," either as a matter of policy or as a matter of due process, to the amount a defendant can be punished for a single transaction, said the judge.\textsuperscript{347} Again, he stressed the uniqueness of the case, pointing out that it presented a special policy consideration against "substantial" punitive damages, since they might discourage future defense contractors and thereby impair the national government's ability to formulate policy under its war powers.\textsuperscript{348} The probability of a limited fund of punitive damages thus was enhanced. The only available means for equitably distributing this fund to claimants, Judge Weinstein concluded, was a subdivision (b)(1)(B) mandatory class.\textsuperscript{349}

The *Agent Orange* defendants sought mandamus. The Second Circuit denied the writ, stressing the uniqueness of the case, the commonality of issues, the significant economies of a class action, and the need for unitary disposition of the potential limited fund of punitive damages.\textsuperscript{350} The district judge's forceful opinion had succeeded in upholding mandatory certification when the superficial aspects of the case seemed against it, but when the need appeared great.

B. Mandatory Certification After Shutts: The Asbestos Example

*Agent Orange* was the only recent mandatory certification before *Shutts* to withstand appellate review. The first post-*Shutts* mandatory class opinion was not long in coming. In *In re Asbestos School Litigation*,\textsuperscript{351} Judge

\begin{itemize}
  \item \textsuperscript{346} Id.
  \item \textsuperscript{347} Id. at 728.
  \item \textsuperscript{348} Id. at 727–28.
  \item \textsuperscript{349} Id. at 728.
  \item \textsuperscript{351} Although the appeal challenges various aspects of the settlement, Judge Weinstein's certification does not appear to be in jeopardy.
  \item There have been at least three mandatory certifications since *Shutts*, but they have tended not to focus on monetary recovery. In *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703 (E.D. Mich. 1985) (seeking declaratory and injunctive relief relating to prison lock down policy; court noted that monetary claims were less significant than claims for injunctive relief); Avagliano v. Sumitomo Shoji America, Inc., 107 F.R.D. 748, 749–50 (S.D.N.Y. 1985) (certification under Rule 23(b)(2) of action for declaratory and injunctive relief). However, in *In re Fernald Litig.*, No. C-1-85-0149 (S.D. Ohio Sept. 8, 1986), a class was certified under Rule 23(b)(1)(A) seeking damages for property damages and emotional distress, as well as clean-up efforts flowing from uranium leakages over a considerable period of time.
\end{itemize}
James McGirr Kelly considered whether *Shutts* affected mandatory classes and held that it did not.

The proposed class in *Asbestos* consisted of school districts throughout the nation seeking relief for the removal of asbestos coating from school buildings. Certain plaintiffs sought nationwide mandatory class certification and three major asbestos-producing defendants cooperated with their request. Another group of school boards, however, opposed mandatory class certification and supported a Rule 23(b)(3) opt-out action. Finally, a group of defendants opposed certification of any class, whether mandatory or opt-out. In an order issued before *Shutts* and under unusually controversial circumstances, Judge Kelly certified a mandatory nationwide class for punitive damages. He also enjoined the filing of new actions as well as further prosecution of many cases pending throughout the nation.

The *Asbestos* district court did not rely upon the constructive bankruptcy justification for mandatory certification because proponents did not support it with evidence. The certification, as in *Agent Orange*, instead was based on the "punitive damages overkill" theory. Judge Kelly adopted the substantial probability analysis of *Agent Orange* and found it satisfied by the likelihood that awards to early prevailing school districts would impair those to later districts.

The decision in *Shutts* led Judge Kelly to reconsider the mandatory class. He recognized that *Shutts* required, as a condition of due process, that an unaffiliated class member "at a minimum . . . be provided with an opportunity to remove himself from the class," but he did not consider

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353. *Id.* at 426–27 (setting out postures of the four groups). Professor Miller represented the Barnwell School District of South Carolina, the principal representative of the group opposing mandatory certification but supporting a Rule 23(b)(3) opt-out class. *Id.* at n.5.
354. The pro-certification plaintiffs filed their initial class motion on March 30, 1984. Later, they moved for "immediate" mandatory certification as to three large defendants. These three defendants promptly agreed not to oppose a nationwide mandatory class. Thereafter, the district court also acted promptly in entering a certification order. Only two weeks elapsed between the initial pleading, and the certification of the mandatory class on April 13, 1984. *Id.* at 426.
356. 104 F.R.D. at 434 n.15.
357. *Id.* at 434–36. Judge Kelly's opinion also referred to the standard as requiring a "substantial possibility." *Id.* at 437.
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this language controlling. Instead, Judge Kelly emphasized language in footnote 3 of the Supreme Court's opinion, limiting the holding to traditional class actions for "money judgments."

Although punitive damages might call for a "money judgment," and although they are an "ancient legal remedy," the district court considered them similar to equitable relief. Much as do criminal fines, claims for punitive damages, Judge Kelly reasoned, seek to provide for the public good, rather than for compensation. Furthermore, the Asbestos district court concluded that due process arguments actually supported the mandatory class, since due process required punitive recoveries to be distributed fairly among all claimants. Finally, although plaintiffs' claims would be the focus of a suit for compensatory damages, the Asbestos district court saw punishing the defendant as the true object of punitive dam- age actions. The court therefore concluded that less protection was appropriate for punitive damage claimants' right to opt out.

The Third Circuit reversed the certification of a mandatory punitive damage class in Asbestos on the ground that "neither the record nor the court's findings are adequate to support the procedure." Because there were no factual findings "as to the potential amount and scope of punitive damages," the appellate court concluded that the district court's certification was an abuse of discretion. By disposing of the case on that basis, the Third Circuit was able to avoid deciding any of the questions that Shutts presented. The court did "hold open the possibility," however, of a Rule 23(b)(1)(B) punitive damage class "in more appropriate circumstances." Therefore, Shutts itself remains the only appellate decision relevant to the issue.

359. Id. (citing Shutts, 105 S. Ct. at 2975) ("We intimate no view concerning other types of class action lawsuits, such as those seeking equitable relief.").
360. Id.
361. Id.
362. Id. at 877.
363. Id. at 876-77.
365. Id. The court buttressed its conclusion by saying that because the class only embraced some of the property damage claimants, and none of the personal injury plaintiffs, numerous other punitive damage actions would go forward, making Judge Kelly's Rule 23(b)(1)(B) mandatory school board class "under-inclusive" and potentially prejudicial to its members. Finally, the court expressed concern about respecting the various state laws relating to punitive damages, noting that "the dictates of state law may not be buried under the vast expanse of a federal class action." Id. at 1007.
366. Id. at 1008. The court did not indicate, however, whether such a class could be mandatory.
C. Mandatory Class Actions After Shutts: A Policy Analysis

There is no neat and logical means of resolving the question whether mandatory actions survive Shutts. The answer depends upon the view one takes of Shutts itself and of the need for mandatory classes. It also depends upon the characteristics of the particular class action.

1. Shutts as a Case Concerned with the Evils of Distant Forum Abuse

One way to view Shutts is as a case about distant forum abuse. The right to opt out is essential to the Supreme Court's inference of consent, and that reasoning, in turn, is essential to the Court's validation of jurisdiction over members who have no affiliation with a distant forum. If this reasoning is accepted, Shutts does not abolish all mandatory classes. Instead, it prohibits only those mandatory actions that are brought in inappropriate forums.

This conclusion can be tested by considering the viewpoint of the class member. Mandatory certification does violence to the class member's right to opt out. But the forum can deny that right and force a class member to litigate in the action if that member or the object of the action has sufficient contacts with the forum, just as it could join her involuntarily if she were a defendant.

Thus, if this distant forum abuse reasoning is an accurate reflection of the Shutts holding, whether a mandatory class action is maintainable depends upon whether there are sufficient contacts between the claimants (or the object of the action) and the forum. For example, a case concerning a limited fund located in a particular state can be brought as a mandatory action, because the nexus between the fund, the claimants, and the action supports the exercise of jurisdiction over claimants even against their will. On the other hand, an action brought in a forum lacking the required relationship to the claimants or the object of the action cannot be made mandatory.

This approach also can be applied to mandatory punitive damage classes. A unified mass disaster, such as that in Skywalk, probably has the requisite nexus to support mandatory certification at the site of the disaster. Arguably, all of the putative claimants in Skywalk (or their decedents)

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367. Cf. Byer, supra note 351, at 21, 25 (Shutts is "ambiguous with respect to mandatory class actions;" questions "will persist until the . . . Supreme Court finally answers them").

368. See supra Section II(A)(1).

369. This holding is implicit in the common rights and limited fund class cases. See supra notes 279–85 and accompanying text.

purposely had availed themselves of the privilege of conducting activities in Missouri.\footnote{371} This analysis would be more difficult in other mass disaster cases; for example, it is harder to maintain that transcontinental air passengers purposely have availed themselves of a forum by crashing into it.\footnote{372} Even in those cases, however, it is arguable that the nexus is enough to overcome claims of distant forum abuse,\footnote{373} despite the fact that the classic \textit{International Shoe-Denckla-Woodson} criteria have not been met, as they would have to be in asserting jurisdiction over defendants.

A distant forum abuse analysis would not support mandatory actions in most nationwide product liability actions or claims for other dispersed torts. In \textit{Asbestos}, for example, the court, which was located in Pennsylvania, lacked the requisite relationship to claims by school districts in Omaha or Los Angeles for damages from installations in their buildings. Conversely, these school districts would have legitimate reason to view the assertion of jurisdiction by a Philadelphia federal court as distant forum abuse.\footnote{374} The same result follows in cases such as \textit{Dalkon Shield}.

This analysis, however, cannot explain the result in \textit{Agent Orange}, which suggests that there can be equity and efficiency factors so compelling as to overcome distant forum abuse concerns.\footnote{375} If this conclusion is correct, the requirement of a nexus between the forum and the claims

\footnote{371. See supra notes 219–20, 306–13, and accompanying text.}
\footnote{372. See Note, Mechanical Problems, supra note 264, at 545.}
\footnote{373. Several lines of reasoning support this conclusion. First, the case is one of specific rather than general jurisdiction, in that the claims would "arise out of or relate to" the contacts with the jurisdiction. \textit{Burger King Corp. v. Rudzewicz}, 105 S. Ct. 2174, 2182 (1985) (quoting \textit{Helicopteros Nacionales de Colombia, S.A. v. Hall}, 466 U.S. 408, 414 (1984)). Therefore, jurisdiction could be sustained on less substantial contacts than otherwise would be required. Second, in-hand service on overflying aircraft has been upheld by at least one court. \textit{Grace v. MacArthur}, 170 F. Supp. 442 (E.D. Ark. 1959). Third, the common right and limited fund cases concern instances in which the class members' relationship to the jurisdiction may be viewed as equally attenuated, but jurisdiction has been upheld. See \textit{supra} notes 278–279 and accompanying text. Finally, in class actions, even courts applying the minimum contact standard have tended to construe it liberally in favor of jurisdiction (although this rationale may be questionable). See Note, \textit{National Classes, supra} note 264, at 1503; \textit{Katz v. NVF Co.}, 119 Misc. 2d 48, 462 N.Y.S.2d 975 (Sup. Ct. 1983), rev'd, 100 A.D.2d 470, 473 N.Y.S.2d 786 (1984).

However, there could be variations in the litigation that would raise more serious questions. The recent crash in Newfoundland of an Arrow Airlines flight carrying United States servicemen returning from an overseas mission is an example. Whether a mandatory class could be certified in a place within the United States—at the point of destination, for example—is problematic.

\footnote{374. In particular, they may have a strong interest in presenting their claims in their own state before local citizens, where the damage is alleged to have occurred.}
\footnote{375. The authority of the court in a case like \textit{Agent Orange} to make class inclusion mandatory, if it exists, may be a manifestation of the elusive doctrine of jurisdiction by necessity. Cf. \textit{Mullane v. Central Hanover Bank & Trust Co.}, 339 U.S. 306, 312–13 (1950) (interest of the state in provision of forum for settling trust accounts is separate basis for jurisdiction, not depending upon in personam-in rem distinction); \textit{Helicopteros Nacionales de Colombia, S.A. v. Hall}, 466 U.S. 408, 414 n.13 (1984) (declaring implicit in jurisdiction by necessity).}
cannot be a talisman to solve every case. Instead, it becomes only one important factor to be weighed in the balance.

2. Shutts as a Decision Protecting the Claimant’s Interest in Individual Control of Litigation

Another way to analyze Shutts is as a decision protecting the right to opt out for its own sake. In this view, the right to opt out not only is a check against distant forum abuse, but it also protects the claimant’s right to control her litigation.

If this analysis were asserted to its logical extreme, it would prohibit mandatory class certification completely. That result seems to be supported by the unconditional statement of the right to opt out in Shutts. In tort cases, it also may be supported by a policy that regards individual control of personal injury claims as particularly important.

The difficulty with this absolute approach, however, is that it prevents rational adjudication of genuine Rule 23(b)(1) class claims which, by definition, require unified disposition. The common fund issues in Hartford Life Insurance Co. v. Ibs, for example, could not have been decided differently in individual suits without destruction of the policyholders’ mutual rights. The same could be said of limited fund cases generally, as well as disputes involving common rights that have arisen in cases involving such diverse entities as professional sports leagues and military bonus programs. If individual adjudication truly would be impossible, and the case must be adjudicated uniformly, it seems unlikely that Shutts is intended to prevent that resolution.

376. The Court stated that an opt-out form is required “at a minimum.” 105 S. Ct. at 2975. The Court also required that the absent class member receive “an opportunity to be heard and participate in the litigation, whether in person or through counsel.” Id.; see also supra note 50 (describing approved opt-out form).

377. Cf supra note 307 (citing Rules Advisory Committee Note). Although it expresses efficiency concerns, the Note tacitly recognizes that plaintiffs’ attorneys are likely to be insistent upon individual control in such cases. See also Trangsrud, supra note 287, at 820 (emphasizing the “psychological and emotional importance of individually vindicating [one’s] rights against the responsible parties” in cases of severe personal injury).


379. See supra notes 279–85 and accompanying text.

380. Cf supra note 375 (jurisdiction by necessity). In addition, Shutts adopts certain commentators’ theory that “a class action resembles a ‘quasi–administrative proceeding, conducted by the judge.’” 105 S. Ct. at 2974 (quoting 3B J. MOORE & J. KENNEDY, MOORE’S FEDERAL PRACTICE ¶ 23.45[4.5] (1984)). This model tends to support mandatory classes, since administrative proceedings can decide rights of non-parties who cannot opt to avoid that effect. Further support for mandatory classes, and authority for limiting the individual control model of litigation, can be found in cases allowing collateral estoppel of non-parties. E.g., Caeufield v. Fidelity & Casualty Co., 247 F. Supp. 851 (E.D. La. 1965), aff’d, 378 F.2d 876 (5th Cir.), cert. denied, 389 U.S. 1009 (1967); Southwest Airlines v. Texas Int’l Airlines, 546 F.2d 84 (5th Cir. 1977), cert. denied, 434 U.S. 832 (1979); cf. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968) (“[I]t might be argued that [a non-party] should be bound by the previous decision because . . . he had purposely
Furthermore, if individual control really is not feasible or is so hopelessly inefficient that it could not mean success for any claims, the interest in that control is diminished considerably. In Agent Orange, for example, the unique complexity of the common issues made it unlikely that adequate resources could have been marshalled for individual claims. Likewise, if constructive bankruptcy or overkill theories truly support treatment of potential recoveries as a limited fund, mandatory classes may be justified by the same equity concerns that support the result in Ibs. On the other hand, it seems correct to conclude, as Judge Weinstein did in Agent Orange, that a substantial probability, and not merely a generalized notion of "risk" of inconsistency, should be required. The interest in individual control, as well as the policy against distant forum abuse, thus support the denial of mandatory class certification in nationwide tort cases such as Dalkon Shield and Asbestos.

3. Weighing the Four Factors For and Against Mandatory Classes: Efficiency, Equity, Distant Forum Abuse, and Individual Control

The reasoning advanced thus far enables us to propose a four-factor analysis for determining the propriety of mandatory class certification after Shutts. These four factors reflect policies favoring mandatory classes as well as policies against them. The theory is speculative. Its uncertainty is due to the absence of direct analysis of mandatory classes in Shutts.

The principal factors to be considered include the (1) efficiency and (2) equity concerns that are well illustrated in the pre-Shutts mandatory class decisions, as well as (3) the concern about distant forum abuse and (4) the interest in individualized control that seem to underlie bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case.

381. See 506 F. Supp. at 790 (noting that "it is doubtful if a single plaintiff represented by a single attorney pursuing an individual action could ever succeed").

382. See supra notes 341–46.

383. By efficiency, we refer not to the general concept of economic efficiency, but to the economies of scale that can be achieved in a class action with cohesive issues. Cf. supra text accompanying note 307 (discussing efficiencies of class action).

By equity, we refer to the several issues that underlie the requirements of subdivisions (b)(1)(A) and (b)(1)(B): whether some plaintiffs will be harmed unfairly if other plaintiffs litigate first and whether defendants may be subjected to multiple (or otherwise inconsistent) liability. In mass tort cases, for example, these concerns are to be found in the constructive bankruptcy and punitive damage overkill theories. See supra notes 288–99 and accompanying text.

Efficiency and equity are independent variables. A given certification may be supported by one but not the other. For example, a class action for compensatory damages that does not threaten constructive bankruptcy could be supported by concerns of efficiency but probably not by those of equity.

384. Cf. Wright & Colussi, supra note 173, at 144–47 (discussing Skywalk); Williams, supra note 317, at 329–30 (discussing right to individualized control).
Our theory is that the propriety of mandatory class certification can best be determined by weighing the four enumerated policy factors in the context of each action.

For example, a highly complex case involving a severely limited common fund, brought at the fund's situs, would provide a strong argument for mandatory certification. Both efficiency and equity concerns would support that result, and since the forum is appropriate and individual control is not valuable in a highly complex case with small potential recovery for individual class members, these counterweights would not oppose a mandatory class. A slightly less compelling, but still persuasive case is presented by the simpler common or limited fund case, such as Ibs, brought at the fund's situs. In that context, efficiency concerns may not be sufficient to overcome interests in individual control, but equity concerns are particularly important because the case cannot be adjudicated effectively in separate suits, and the forum has jurisdiction.

For different reasons, cases such as Skywalk and Agent Orange also may present sound claims for mandatory certification. In Skywalk, the efficiency and equity factors are present and forum abuse is absent. In Agent Orange, the efficiency and equity factors arguably are strong enough to overcome the distant forum factor, and the interest in individual control is reduced by the size of the litigation and complexity of the common issues. On the other hand, the dispersed tort action, such as Dalkon Shield, presents the weakest claim for mandatory class certification, particularly if the constructive bankruptcy and punitive damage overkill theories are supported only by a generalized risk of inconsistency. Neither efficiency nor equity factors are persuasive in such a case. Furthermore, the factors of distant forum abuse and interest in individual control provide significant counterweights.

Although the four-factor analysis thus appears to give sound results in a wide variety of cases, the theory is supported only by the broadest inferences from Shutts. Mandatory classes are likely to remain as controversial as they are important. Unless Congress resolves the matter by statute, the

385. For example, conflicts are reduced if all plaintiffs are treated equally. Comity concerns are reduced if there is no forum abuse and if the interest in individualized control is given appropriate weight. Other factors have been suggested elsewhere, ranging from the reduction of attorneys' conflicts of interest to the preservation of comity between courts in different states, but these subsidiary considerations seem to be consequences of the four major factors.

386. See supra notes 279–85 and accompanying text.

387. See supra notes 302–16 and accompanying text.

388. In Agent Orange, the district court used the mandatory class to exercise jurisdiction over nonconsenting claimants having no contacts with the forum. Arguably, this result would require recognition of the unusual doctrine of jurisdiction by necessity. See supra note 375.

389. See supra notes 317–31 and accompanying text.

390. See supra note 383. Efficiency arguments, however, could be persuasive if clearcut common questions predominated and other issues were dealt with in bifurcated proceedings.
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Supreme Court someday may need to address the fascinating and knotty questions it has left open in Shutts.

IV. CHOICE OF LAW AFTER SHUTTS

The jurisdictional holding in Shutts means that attorneys for a multi-state class generally can file suit in whichever state they choose. As Shutts demonstrates, there may be few claimants residing in the forum. Indeed, under the logic of Shutts, a forum having literally no connection with the suit may still decide it. Like the tail wagging the dog, a state with an insubstantial interest in the dispute can bind the nation. These circumstances call for limits on the choice of law to prevent forum shopping, unfairness to defendants, and interference with other states' sovereignty.

A. Forum Shopping: The Issue of the "Magnet" Forum

The Kansas Supreme Court's essential choice of law holding in Shutts was that "the law of the forum should be applied unless compelling reasons exist for applying a different law." As the Kansas court itself appeared to recognize, this holding created the danger that resort to "magnet" forums might defeat the chosen substantive policy of other states. If all states adopted a similar approach, plaintiffs' attorney would be able to identify a "best" plaintiffs' forum in any class action. This "magnet" jurisdiction would be the state most likely to hold against the defendant or to award maximum damages. That forum might ignore laws of other states that would produce a defendant's judgment or a lower recovery.

Indeed, royalty class actions provide striking empirical evidence that the magnet forum phenomenon already has developed. There are reported appellate decisions in at least eight Kansas class actions similar to Shutts, 395

391. See supra text accompanying note 88.
392. 235 Kan. at 221, 679 P.2d at 1181.
393. "[T]his opinion should not be read as an invitation to file nationwide class action suits in Kansas and overburden our court system." 235 Kan. at 209, 679 P.2d at 1173 (quoting Shutts I, 222 Kan. at 557, 567 P.2d at 1292).
394. Cf Kennedy, supra note 1, at 286 ("The Court thus stripped the defendant Phillips of any due process protections against the class lawyer who is free . . . to bring the action in the most favorable state forum without any limitations as to where the claims arose."). This magnet forum argument was not incorporated in the Court's opinion. However, it was discussed in the briefing and argument. See Brief for Petitioner, supra note 44, at 39–40; Brief of Amicus Curiae, The Legal Foundation of America, supra note 71, at 14–17. The last question asked by the Court at oral argument was posed by the Chief Justice, who gave the example of the historical role of Nevada in migratory divorce cases and inquired of Phillips' counsel whether the choice of law principle adopted by Kansas would lead to similar kinds of forum shopping.
and its courts have entertained others.\textsuperscript{86} No other state has a reported class action decision concerning interest on suspended royalties.\textsuperscript{97}

\textit{Shutts} also illustrates the manner in which the Kansas court's reasoning would have frustrated regulatory choices made in the administrative agencies, legislatures, and courts of other states. Both Texas and Oklahoma had strong interests in the relationship between oil and gas producers and royalty owners within their borders. Both regarded the ability to suspend royalty payment as important,\textsuperscript{88} since loss of the lease could follow even inadvertent underpayment. To these states, the Kansas approach might seem calculated to discourage oil and gas production.\textsuperscript{99}

Furthermore, the result was that Kansas imposed higher energy costs on other states, in order to benefit a class of people that included its citizens.\textsuperscript{400} In doing so, Kansas declined to consider the applicable statutes, decisions, and in one instance, the constitution, of other states.\textsuperscript{401}

It is not a question of whether Kansas, Oklahoma, or Texas law is "better" in these respects. Kansas has the constitutional authority to deter-

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\item 397. The only class actions for interest on royalties against Phillips outside Kansas were both brought in Oklahoma by parties related to the \textit{Shutts} case, and both were dismissed. The first was brought by the senior partner of one of Shutts' counsel. The second was brought by two individuals who moved for dismissal when they joined as representative parties in the \textit{Shutts} complaint. Brief for Petitioner, \textit{supra} note 44, at 40 n.38.
\item 398. Both Oklahoma and Texas have well-developed law on suspension of royalty payments. \textit{See supra} note 67.
\item 399. For example, Kansas is one of a very few jurisdictions that have enacted intrastate price controls lower than those that would be administered by the Federal Energy Regulatory Commission. \textit{See} Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 417 (1983). Kansas has interpreted its law together with federal law so as to abrogate agreed pricing terms on gas sold within Kansas. Compare Mesa Petroleum Co. v. Kansas Power & Light Co., 229 Kan. 631, 629 P.2d 190, \textit{reh'g denied}, 230 Kan. 166, 630 P.2d 1129 (1981) (contract price not escalated under clause incorporating federal regulatory ceilings) \textit{with} Pennzoil Co. v. FERC, 645 F.2d 360 (5th Cir. 1981) (affirming contrary conclusion by FERC). FERC so disagreed with the \textit{Mesa} result that it took the unusual step of urging the Supreme Court to grant certiorari, even though it was not a party to the action. Brief for the United States and Fed. Energy Regulatory Comm'n as Amicus Curiae, Mesa Petroleum Co. v. Kansas Power & Light Co., 455 U.S. 928 (1982) (No. 81-711) (denying cert.); \textit{see also supra} note 67-68.
\item 400. The result of its decisions, \textit{see supra} note 68 and accompanying text, was not to lower energy prices in Kansas, but to increase amounts paid upon Kansas leases, which produced gas sold in interstate as well as intrastate commerce.
\item 401. \textit{See supra} note 66. Professor Kennedy, however, makes the following observations: "In contrast to the majority's casual survey . . . Justice Stevens' prodigious efforts tend to convince the reader that this case really is one of false conflicts, that he is right that Kansas did in fact apply the law of Oklahoma and Texas . . . . Ultimately, however, Justice Stevens reveals that his dissent is peculiarly a function of his minimalist philosophy of . . . conflict of law challenges. One therefore hesitates to rush to agree that his view of Oklahoma and Texas law has been as neutral as he claims the majority's has been biased." Kennedy, \textit{supra} note 1, at 302-03.
\end{itemize}
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mine its policy, or even to act as a maverick jurisdiction,\footnote{See Brief of Amicus Curiae, The Legal Foundation of America, supra note 71, at 15-16 ("Kansas, in fact, is a maverick jurisdiction in oil and gas matters, probably because a portion of the State produces oil and gas but a larger and politically more powerful segment does not") (footnote omitted).} in oil and gas matters that are properly subject to the application of its law. There have been instances when minority views ultimately have emerged as persuasive and have improved the common law.\footnote{For example, the doctrines of comparative negligence and products liability emerged from minority views that began as exceptions to virtually universal contrary rules. See W. PROSSER & W. KEETON, THE LAW OF TORTS §§ 67, 477-79 (5th ed. 1984).} But the difficulty with Kansas’ choice of law approach is clear: It inevitably defeated other states’ policies.\footnote{The effect would be similar to that condemned in the famous case of Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The Erie Court emphasized the frustration of state policy resulting from substitution of law preferred by the forum. As an example, it cited Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928), in which a federal court nullified a state anti-monopoly policy by substitution of a “general” rule to the contrary. 304 U.S. at 73-74.}

Furthermore, if the Kansas approach were adopted throughout the nation, it might create magnet forums for class actions of every kind. Diligent plaintiffs’ counsel would feel obligated to choose the state most receptive to their clients’ claims. These magnet states would resolve controversial issues on a nationwide basis.\footnote{Brief for Petitioner, supra note 44, at 39. The result, said petitioner, would be to “balkanize numerous areas of substantive law.” Id. at 45.}

B. The Constitutional Standards and the Forum’s Room for Choice

*Shutts* addresses these issues by invoking the restrictions on choice of law contained in *Allstate Insurance Co. v. Hague.*\footnote{449 U.S. 302 (1981); see supra notes 91-94 and accompanying text.} These limits, however, remain only generally defined.\footnote{The Court’s holding in *Shutts* was that the Kansas court’s choice of law was “sufficiently arbitrary and unfair as to exceed constitutional limits.” 105 S. Ct. at 2980. See generally Weintraub, *Who’s Afraid of Constitutional Limitations on Choice of Law?*, 10 Hofstra L. Rev. 17, 17 (1981) (“due process and full faith and credit clauses impose few limitations on choice of law”).} For example, *Allstate* actually upheld the application of Minnesota law, even though that state arguably had far less interest in the dispute than Wisconsin.\footnote{See supra note 94 and accompanying text. But see *Allstate*, 449 U.S. 334-36 (Powell, J., dissenting) (arguing that due process clause prohibits application of law only casually or slightly related to litigation). A number of commentators have argued that the contacts in *Allstate* were insufficient to support choice of forum law. See, e.g., Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 Mich. L. Rev. 1315, 1328-33 (1981); Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 Hofstra L. Rev. 103 (1981); von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 Hofstra L. Rev. 35 (1981).} For the *Allstate* plurality, the choice of law would be unconstitutional when the state whose laws were chosen lacked a “significant contact or significant aggregation of contacts, creating state interests such that choice of its law was
neither arbitrary nor fundamentally unfair."\textsuperscript{409} The \textit{Shutts} case adds that, "[w]hen considering fairness in this context, an important element is the expectation of the parties."\textsuperscript{410}

The Court in \textit{Shutts} did not attempt to specify which claims must be resolved by Texas law, Oklahoma law, or any other law upon remand.\textsuperscript{411} As \textit{Allstate} indicates, the forum often has power to choose the applicable law.\textsuperscript{412} To take but one example, the Kansas courts might be presented with a genuine choice of law issue by a situation in which a leasehold is located in one state, but all other contacts (such as the royalty owner's residence, the place of lease execution, and the payment of royalty) are in another.

These possibilities raise fascinating questions. To what extent can Kansas apply its own law to unaffiliated transactions upon the remand of \textit{Shutts}? Does Kansas violate the Constitution if it systematically determines its choice of law principles so as to apply its law to the broadest possible number of claims?\textsuperscript{413} The answer seems to be yes.\textsuperscript{414} The question is not an idle one, because plaintiffs in \textit{Shutts} consistently have argued for broad application of Kansas law\textsuperscript{415} and naturally have done so on remand.\textsuperscript{416}

C. The Forum's Tendency To Further Its Own Policy: Magnet Forums After \textit{Shutts}

The persistence of the magnet forum problem, after \textit{Shutts}, may depend upon whether the constitutional standards are loosely or tightly construed. Loose requirements will enable the forum to prefer its own policy in derogation of more significant interests in other states.

Even though his is a solitary dissent, Justice Stevens' opinion illustrates the dimensions of the incentive to forum shop that remain after \textit{Shutts}.\textsuperscript{417} The dissent is a virtual road map of the ways in which a forum can prefer its own law.\textsuperscript{418} It raises issues on two levels: first, in finding the existence of a conflict, and second, in resolving the conflict.

\textsuperscript{409} 449 U.S. at 313.
\textsuperscript{410} 105 S. Ct. at 2980.
\textsuperscript{411} \textit{Id.} at 2981.
\textsuperscript{412} 449 U.S. at 312–13; accord \textit{Shutts}, 105 S. Ct. at 2978.
\textsuperscript{413} See infra Section IV(C)(2).
\textsuperscript{414} \textit{Id.}
\textsuperscript{415} \textit{See supra} note 66 and accompanying text.
\textsuperscript{416} On remand, the Seward County District Court concluded that the law of several of the most germane states was the same as the law of Kansas and persisted in applying Kansas law across the board. \textit{Shutts} v. Phillips Petroleum Co., No. 79-C-113 (Dist. Ct. Seward County, Kan. April 30, 1986), \textit{appeal docketed}, No. 86-59588-AS (Kan. July 7, 1986). The case has now returned to the Kansas Supreme Court.
\textsuperscript{417} \textit{See supra} notes 104–12 and accompanying text.
\textsuperscript{418} \textit{See infra} notes 419–29 and accompanying text.
1. The Existence of a Conflict: The False "False Conflict" Case

A forum bent upon applying its own policy can do so, first, by the simple device of declaring that no conflict exists. It can review the decisions of other states in a way that reconciles them with its own law, find separate grounds (such as waiver or estoppel) for reaching the result, or, as the Kansas court in Shutts purported to do, invoke a separate body of law in the name of equity. The worst-case scenario is that of a result-oriented court, camouflaging its true reasoning with a contrived analysis of another state's law.

The trouble with Justice Stevens' reasoning is that it would uphold a result-oriented court in virtually every case. No two cases are ever precisely alike, and if any distinction will do, the forum always would be able to choose its own law. The problem might be called the false "false conflict." The conflict is real, but it disappears because the forum says that it does.

The majority opinion in Shutts is more pragmatic. It finds conflicts on the basis of law that other states "most likely" would follow, because probable outcomes are all that can be predicted. A difficult problem of administration may be presented, however, by the false "false conflict" situation even if it is considered pragmatically. In the worst case scenario, in which the forum deliberately misstates its reasoning, the result can be corrected only if the Supreme Court detects that intention.

419. A choice of law question is not presented, in Justice Stevens' view, unless it involves an "ambiguous conflict with the established law of another State." 105 S. Ct. at 2990 (emphasis in original). "Putative" or "likely" conflicts would not suffice. Id.

420. Cf. 105 S. Ct. at 2989 (Justice Stevens' evaluation of Shutts as "a classic 'false conflicts' case"). The decision of the Seward County Court on remand in Shutts is illustrative of the ability of the forum court to choose its own law. See supra note 416.

421. See 105 S. Ct. at 2977–78. The Court's approach does not make completely clear the degree of probability required for the finding of a conflict. In summarizing differences among states' laws, the Court refers to "putative" conflicts, to law that other States "most likely" would follow, to law to which Petitioner "points," to the interpretation of "at least one court," and to other tentative characterizations. It then concludes that these "conflicts" cannot be labelled false "without a more thoroughgoing treatment than was accorded them" by the Kansas court. Id. at 2978. Uncertainty in state law naturally leads to uncertainty in determining conflicts. Thus the most reasonable interpretation of the Court's reasoning may be that conflicts are to be found by analysis of probable holdings in other jurisdictions.

422. Mere errors in reasoning, in a state court's sincere effort to discern another state's law, ordinarily are not a constitutional violation. See Shutts, 105 S. Ct. at 2987 (Stevens, J., dissenting) (citing Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917)); id. at 2992 (Stevens, J., dissenting) ("To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment.") (quoting Johnson v. New York Life Ins. Co., 187 U.S. 491, 496 (1903)).
2. Disposition of the Conflict

If a conflict does exist, the question remains: What choices can the forum constitutionally make? After *Allstate* and *Shutts*, that issue, in turn, depends upon an evaluation of the contacts that the dispute has with different states, and particularly on the parties' expectations.423

Although this test is general, several particulars can be stated. First, conduct related to the litigation itself has little weight. A claimant, for example, who initiated contacts with Kansas for the purpose of causing Kansas law to attach, should not succeed.424 Second, at some point even a forum that has some contact with the dispute must recognize that the interests of another state are so much more significant than its own as to require application of that state's law. For example, a single Kansas meeting, with respect to a transaction consummated in Texas between Texas residents regarding land in Texas, would not justify expectations that Kansas law would be applied, and that result should be precluded by the Constitution.425 Third, unexplained inconsistencies in the application of choice of law principles to a class action may signal a constitutional violation. If, for example, Kansas applied its own law to all Kansas residents irrespective of the location of their leases, and also applied Kansas law to all owners of Kansas leases irrespective of their residences, the inconsistency would telegraph the intention to invade other states' sovereignty.426

Finally, the constitutional limitations on choice of law should be interpreted to limit unreasonable forum shopping and preserve parties' expectations. These are the policies that underlie *Allstate* and *Shutts*.427 In the multistate class action, a context in which the magnet forum is a special problem, it should be possible to judge the choice of law by its tendency to encourage forum shopping.428

423. See *supra* note 102 and accompanying text.

424. Thus, in *Allstate*, plaintiff's change of residence to the forum was considered relevant because plaintiff had not moved "in anticipation of" litigation. 449 U.S. at 318-19. Similarly, the *Shutts* Court refused to base choice of law on plaintiffs' "desire for forum law." 105 S. Ct. at 2979 (citing *Allstate*, 449 U.S. at 337 (Powell, J., dissenting)).

425. See *Shutts*, 105 S. Ct. at 2980 (quoting *Allstate*, 449 U.S. at 333) ("reasonable expectation of the parties" is important element in choice of law analysis).

426. Given the jurisdictional holding of *Shutts*, choice of law is the principal protection of interstate federalism. Cf. Drobak, *supra* note 229, at 1065 (calling for "[e]ffective limits on choice of law," rather than minimum contacts, to protect state sovereignty). In *Shutts*, the Court recognized the arguments of the *Allstate* dissent that "the Full Faith and Credit Clause required the forum to respect the laws . . . of other States, subject to the forum's own interests in furthering its public policy." 105 S. Ct. at 2979.

427. See *Allstate*, 449 U.S. at 337 (Powell, J., dissenting) (criticizing plurality on facts for basing application of law on insufficient contacts); *Shutts*, 105 S. Ct. at 2979-80.

428. See *supra* notes 392–97 and accompanying text (discussing magnet forum problem in multistate class actions).
D. Managing Choice of Law in the Fifty-State Action

1. Determining Unsettled Law

Even if the forum attempts to divide a class and apply the state law that is appropriate to each subclass, it may experience difficulty in correctly determining those laws. As the Supreme Court repeatedly has recognized, the determination of unsettled state law is an inherently difficult task. For example, in Shutts, a conscientious forum attempting to apply other states' laws would find that the task was made more difficult because only Oklahoma and Texas have reported cases clearly requiring interest on suspended royalties. Whether other states would even recognize a claim for interest is uncertain. An equally compelling example is Miner v. Gillette. Although many states have complex consumer protection laws, few states have applied these statutes to the allegedly deceptive conduct at issue in that case. Some might decide that Gillette's conduct was culpable; others with similar statutory language might regard the conduct as wholly innocent.

State courts always have been assumed competent to apply the laws of other states when adjudicating transitory causes of action. The contemporary national class action, however, obliges them to undertake the task on an unprecedented scale. Thus, a state court faced with deciding an uncertain issue on the basis of its own plus forty-nine other states' laws

429. In Shutts I, for example, the Kansas Supreme Court concluded that Texas would permit interest rates determined by federal regulation. 222 Kan. at 563-64, 567 P.2d at 1318-19. This prediction proved incorrect when the Texas Supreme Court later limited interest to the Texas statutory rate. Phillips Petroleum Co. v. Stahl Petroleum Co., 569 S.W.2d 480 (Tex. 1978).
431. See supra note 67.
432. In Boutte v. Chevron Oil Co., 316 F. Supp. 524, 531 (E.D. La. 1970), aff'd per curiam, 442 F.2d 1337 (5th Cir. 1971), the court, in dictum, suggested that interest might be recoverable on suspended royalties. Id. This dictum appears to conflict with Louisiana cases concerning interest. See, e.g., Frankel v. Bellamore, 176 La. 1001, 147 So. 59 (1933).
435. Gillette was noteworthy precisely because it was a new use of the class action. The situation was unlikely to provoke litigation in any context other than a class action.
437. For an analysis of the issues presented by this assumption, see R. Weintraub, Comment-ary on the Conflict of Laws (1971).
may tend either to impose its own conception of good policy or to assume that other states would follow the forum's policies. Furthermore, a state court hearing a nationwide class action in all likelihood will apply local rules of evidence, statutes of limitations, and other procedural laws that dramatically affect substantive results.

2. *The Court's Ability To Focus and Decide the Fifty-State Action*

Beyond the difficult task of correctly determining foreign law, the nationwide class action may present an even greater problem because of the sheer burden of organizing and following fifty or more different bodies of complex substantive principles. Although the comparison obviously is inexact, one can appreciate the magnitude of the trial judge's task by imagining a first-year law student who, instead of a course in contracts, is required simultaneously to enroll in fifty courses, each covering the contract law of a single state, and to apply each body of law correctly on the final examination. Another way to appreciate the dimension of the task is to consider that fifty opinions are more than most appellate judges write in a year. The fifty-state-plus-foreign-countries class action may create a comparable workload within the confines of a single case.

A tempting solution is to group states with apparently similar laws for decisionmaking purposes. This approach may provide some benefit, but it would be illusory to think that the mere act of classifying can reduce the task to manageable proportions. In order to group the states, the court initially must make decisions about the meanings of the laws of each. This

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438. See infra notes 451-52 and accompanying text ("national consensus" found in *Agent Orange*).

439. Thus, for example, the court in Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 n.10 (1984), noted the "considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation." The plaintiff in *Keeton* had chosen the forum because its statute provided a long limitations period; limitations in most other States had run. The Court, however, did not determine "whether any arguable unfairness rises to the level of a due process violation." *Id.* A similar issue arises if a federal court sits in a diversity or federal question case, although it is less likely to apply local law in these matters.

440. See supra notes 435-36 and accompanying text (complexity of different sets of laws in *Gillette*).

441. The analogy understates the difficulty of the trial judge's task. A judge must rule on discovery and evidence matters, deal with counsel, hear and find facts, and simultaneously handle the hundreds (or thousands) of other matters on her docket.

442. The comparison is inexact; the trial judge's task in some respects is less difficult, and in other respects more difficult, than an appellate judge's.


444. The *Gillette* court placed that burden squarely on the plaintiff. 87 Ill. 2d at 17-18, 428 N.E.2d at 484 ("We believe that the issue of whether the common question of fact or the individual questions of law predominate in the present case is dependent upon plaintiff's ability to establish that the differing laws of the States are subject to grouping in a manageable number of subclasses.").
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approach, in effect, may amount to shifting those decisions to a time before the states are grouped. If the state classifications merely are tentative, the result may be two sets of decisions, one before and one after. Either approach may mean that the same quantum of decisionmaking ultimately will be necessary.

Of course, the classification of states might reduce effort dramatically if differences among bodies of law were to be compromised.445 Thus, in instances in which the general statutory language in two different states is similar, or when most states have no law resolving a disputed point, these superficial indications might result in their being grouped together and claims of their residents decided identically.446 The point is that the compromising of real but hard-to-perceive differences is at odds with Shutts but, in some cases, the court may have a tendency to group various states together as a natural result of Shutts' encouragement of multistate class actions.447

It is difficult to overstate the pressure towards this kind of compromise. In Agent Orange, for example, the court initially achieved uniformity by applying federal common law to all claims.448 After this decision was reversed by the Second Circuit,449 Judge Weinstein reached the same uniformity—this time, by finding a nationwide consensus.450 Although this basis for uniformity seems tenuous,451 the decision may be defended on the pragmatic grounds that it was necessary for the satisfactory resolution of this unique case. The court and attorneys in Agent Orange otherwise might have wasted resources in crystal ball gazing to determine legal issues that actually were indeterminable. The settlement of Agent Orange demonstrates that the game of highly refined law determination may not always be worth the candle and that rough justice is better than none. However, the application of uniform law is a legitimate policy choice that

445. The Gillette approach of creating a “manageable” number of subclasses may create a subtle compromise between management and fidelity to other states’ laws. The Third Circuit in In re Asbestos School Litig., 789 F.2d 996, 1007 (3d Cir.), vacated, 791 F.2d 920 (1986), observed that “the dictates of state law may not be buried under the vast expanse of a federal class action.”

446. Cf supra note 436 (similar statutory language yields opposing results).

447. See Comment, supra note 2, at 804 n.73 (“The usual risks involved interpreting unfamiliar laws increase exponentially in a nationwide class action.”). This phenomenon matters because “each state will apply rules of law that will further the interests of [its] citizens.” Id. Such misinterpretation frustrates other states’ efforts “to effectuate the social and economic policy decisions underlying their own substantive laws.” Id.; see supra Section IV(A) (discussing forum shopping).


451. The Second Circuit, in denying mandamus to decertify the class, said, “[w]hile we will not disclaim considerable skepticism as to the existence of a ‘national substantive rule,’ we note Chief Judge Weinstein’s declared intention to create subclasses as dictated by variations in state law.” In re Diamond Shamrock Chems. Co., 725 F.2d 858, 861 (2d Cir.), cert. denied, 456 U.S. 1067 (1984).
is better approached in a direct and honest way than through the subterfuge of simply fudging differences among state laws to reach a disingenuous conclusion that they are "all the same."

A trial judge presiding over a nationwide class action must avoid being unable to see the forest for the trees, and subclassing and grouping of states may be useful for that organizational purpose. At the same time, however, the judge must avoid obscuring important differences. And since class actions come in all sizes, shapes, and degrees of merit, the judge must adjust his attitude on these questions to fit the case before the court.

3. The Role of Counsel: Redundant Briefing and Conflicts of Interest

The fifty-state-plus-foreign-countries class action also will alter the role of attorneys representing and opposing the class. Attorneys may find it necessary to research every substantive issue in fifty-part redundancy and to present the result to the court in a readily comprehensible form. The time and money necessary to do so may be beyond the capacity of many lawyers and firms. New briefing techniques may need to be developed, especially to present the law to a state trial judge, typically operating without law clerks, often with somewhat limited research tools and a docket including thousands of other cases.

Furthermore, subtle kinds of conflicts of interest may arise from the grouping of state residents within subclasses. The use of a given choice of law principle or the use of a certain procedural device may mean that residents of state X receive an increased recovery at the expense of residents of state Y, who receive less. In Shutts, for example, if Kansas law had been chosen on the basis of leasehold location, the result would have benefitted different individuals than if some other set of contacts had provided the test. Which clients should class counsel favor? Or should it be concluded that these concerns are too ethereal for a practical world, given that none would recover at all without class counsel's efforts?
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In ordinary litigation, consent based on disclosure of the conflict to the client is an appropriate cure, but in a class action it would be impractical. The problem is exacerbated because conflicts may not be recognized until the case is well developed, and because they will tend to be masked by settlement and compromise. Furthermore, this conflict of interest is not merely potential; it is an unavoidable part of the process of subclassing for choice of law purposes.

A court hearing a multistate class action ordinarily should provide separate representation for subgroups with conflicting interests. Given the subtlety of conflicts in the class action context and the unavailability of consent as a cure, the court should take this action when a substantial probability of conflict appears. However, this advice should be tempered with realism. Appointing fifty-plus sets of independent attorneys in Gillette, for example, would impose costs that might exceed expected differences in recovery and would increase management burdens for the court beyond their worth.

V. PROCEDURAL TOOLS FOR JUDICIAL MANAGEMENT OF MULTISTATE CLASS ACTIONS

The Shutts decision increases the degree to which judges must assume the role of litigation managers—a role they already had assumed prior to Shutts. Fortunately, there are judicial tools with which to address the issues that Shutts raises. Federal district judges who can draw upon masters, magistrates, law clerks, and other resources may make ready use of these tools. The greatest difficulty probably will be that these techniques also must be used by solitary rural state judges with large dockets and little support.

difficulty with the proposal is that it reflects a conflict of interest. It may be seen as compromising the interests of claimants from more plaintiff-oriented states. Indeed, it might be argued that in cases with significant damages, class members should be notified of major differences that might result from classification and invited to come forward with evidence showing contacts their claims might have with states whose law is favorable.

457. See, e.g., In re Federal Skywalk Cases, 93 F.R.D. 415, 425 (W.D. Mo.) (court discovered at certification hearing that intervenor's counsel had failed to disclose potential conflict of interest), vacated, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982).

458. See supra text accompanying note 451.


460. Cf. Skywalk, 93 F.R.D. at 425 (advocating class-wide resolution of claims to avoid conflicts of interest created by counsel representing more than one damage claimant).

461. But see infra text accompanying note 493 (discussing use of local counsel in 50 state action).

462. See generally Miller, The Adversary System, supra note 4, at 19-22 (1984) (lawyers more willing to accept judicial management and judges more willing to exercise it).
A. The Certification Decision

The existence of multistate jurisdiction does not mean that it must be exercised in every instance. Federal Rule 23(b)(3), and state rules patterned upon it, expressly requires the court to consider whether common questions “predominate” and whether “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” The interests of class members, the existence of other litigation, the desirability of the forum, and, in general, “the difficulties likely to be encountered in the management of a class action,” are the factors that the Rule says are “pertinent.” Thus, most of the questions raised in this Article are encompassed within the matters properly considered in the certification hearing of a class action under Federal Rule 23(b)(3) and its state counterparts.

For example, the magnet forum phenomenon might induce counsel to bring an action such as Shutts in Maine, Hawaii, or another state having little or no interest in it. The Supreme Court’s holding would support the state’s jurisdiction as a matter of raw power. The appropriate response for the trial court, however, would be to deny certification by a finding pursuant to subdivision (b)(3) that it is “undesirable” to “concentrate the litigation . . . in the particular forum.”

A persuasive argument can be made on this ground that, even given the Supreme Court’s holding, the trial court in Shutts would have acted more appropriately had it denied certification. It is “undesirable,” to use the word found in Rule 23, to concentrate litigation of gas lease claims in a forum having no connection with fully ninety-nine percent of the leases and ninety-seven percent of the claimants. This conclusion is reinforced by the existence in Shutts of forums, such as Oklahoma and Texas, in which far more substantial state interests existed and in which the Shutts plaintiffs had filed previous claims that had been dismissed. A decision against certification would not have left the class members without a remedy.

463. FED. R. CIV. P. 23(b)(3). These principles would not apply to Rule 23(b)(1) and (b)(2) classes, but (except for the mandatory class issue) those subsections probably will give rise to fewer problems of the kinds posed in Shutts.

464. Id.

465. See supra notes 392–405 and accompanying text. The inducement would be forum law providing for clear interest liability at high rates, coupled with principles favoring choice of that law; state interests in the litigation would be strategically irrelevant.

466. 105 S. Ct. at 2975.

467. FED. R. CIV. P. 23(b)(3)(C).

468. See supra note 88 and accompanying text.

469. Phillips itself took the position that “Oklahoma appears to be . . . a proper forum to bind all plaintiffs,” even if minimum contacts were required. Brief for Petitioner, supra note 44, at 45.

470. See supra note 397.

471. The Kansas court concluded that limitations would bar recovery in other states. 235 Kan. at
Similarly, unusual difficulties in choice or ascertainment of law are a management problem that should be taken into account in certification. Gillette is an example. The wide diversity of applicable laws, scarcity of definitive authority, and the small amount in controversy for each claimant, may have meant that harm to interstate federalism would outweigh the benefits of a nationwide action.

These kinds of management or forum difficulties sometimes may be solved without completely denying certification. It may be possible to define a lesser included class, or a class sharing an interest in a given issue, for which it remains desirable to concentrate the litigation in the forum. Similarly, it may be possible to divide the class into subclasses, and to insure that each is separately represented, to highlight the development of other states’ law. If the problems remain significant compared to the advantages, however, certification should be denied in favor of litigation elsewhere. Perhaps this reasoning may cause some movement, even after Shutts, toward statewide actions or classes defined in terms of the court’s traditional jurisdiction over claimants.

B. Deference to Other Tribunals: The Doctrine of Forum Non Conveniens, Section 1404(a) Transfer, the Judicial Panel on Multidistrict Litigation, and Stay Orders

Although class certification may be a way of taking into account the appropriateness of the forum, there will be times when the old-fashioned doctrine of forum non conveniens may be superior. Certification rules may not enable the court to consider directly the defendant’s cooperation in removing procedural barriers to suit in an otherwise preferable forum. For example, the Kansas court in Shutts concluded that other forums were inappropriate because of statutes of limitations that would bar suit. Even if this conclusion had been correct, forum non conveniens might have allowed the court to condition dismissal of the Kansas action upon defendant’s waiver of limitations defenses elsewhere.

204, 679 P.2d at 1169. It did not, however, examine the statutes of other states in so holding. Many jurisdictions recognize tolling of limitations during the pendency of a class action.

473. See supra text accompanying notes 231–42 (Gillette and interstate federalism).
474. See supra notes 459–61 and accompanying text.
475. See infra Section V(C).
478. See supra note 471.
479. See J. Coud, J. Friedenthal, A. Miller & J. Sexton, Civil Procedure: Cases and Materials 298 (4th ed. 1985); see also In re Union Carbide Corp. Gas Plant Disaster at Bhopal,
In the federal system, venue provisions afford the court discretion to transfer the action to any other district and division where it might have been brought. Transfer in class actions, district judges have used transfer in novel ways, such as ordering a liability determination for the entire class followed by transfer of subclass litigation to other districts for damage determinations. The federal system also provides the advantages of the Judicial Panel on Multidistrict Litigation, which can order transfer of cases for consolidated pretrial proceedings. This procedure would be useful in the event of multiple competing class actions if all happened to be in the federal system, particularly since most could probably be disposed of in the transferee districts.

Competing actions in different state courts, or in a state and a federal court, present more difficult problems. The less appropriate forum, determined by state interests and aggregation of contacts, should dismiss if the action is in its early stages, or stay its own proceedings if not, to prevent irrational resolution by a race to judgment. A federal court might stay its proceedings, or, in an unusual case, might invoke the abstention doctrine, to defer to a state court, if important state policies are at issue and if the litigation has ties to one particular state. A mass tort presenting novel questions of liability might be an example. On the other hand, it frequently will be appropriate for state courts to defer to federal courts, owing to their superior ability to handle complex, multidistrict litigation. In some cases intersystem cooperation should be arranged, at least for purposes of discovery and motion practice, a device that seems particularly useful when the state and federal claims arise from a common transaction or occurrence or when parallel state and federal claims are involved.

An early multiparty telephone conference, including the two "compet-
ing” trial judges, may be highly desirable as a practical matter in this situation. Care should be taken that all parties have notice, that inappropriate ex parte contacts are avoided, and that neither jurisdiction’s pretrial rule prohibits the conference. 487 If competing actions become common, solutions such as redefinition of federal jurisdiction 488 and revision of the anti-injunction statute may become worth considering. 469

C. Deference to Statewide Actions as a Management Tool: Do Efficiency Concerns Dictate Otherwise?

Our analysis suggests that some of the problems of jurisdiction and choice of law could be solved by resort to statewide, as opposed to nationwide, class actions. 469 This result could be reached by the denial of certification in a nationwide action, by transfer, or by other mechanisms. 490 The solution would avoid many of the problems of competing actions, binding effect, or application of unfamiliar law.

However, duplicative statewide actions could result in severely reduced efficiency. If, in a case such as Gillette, fifty actions in fifty states were required, it seems unlikely that many of them would be brought. 469 Alternatively, actions might be brought in populous states, while claimants in other states would have no redress. The federalism benefits hardly would be worthwhile if consumers in New York and California recovered but received less than they otherwise might, while those in Montana or New Mexico did not recover at all. The multiplication of judicial effort, moreover, is a cost that might offset potential gains.

On the other hand, one may question these premises. If plaintiffs’ attorneys are denied certification of the nationwide class they propose, they may contract with counsel in other states to bring actions there. 469 The result will not be a complete duplication of effort; instead, local counsel presumably will concentrate on local law while relying on national counsel for common issues. Pretrial proceedings, such as discovery, probably

487. This procedure was followed in In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006 (5th Cir. 1977). In Skywalk, ex parte contacts initiated by the judge, even though apparently innocent, created the perception that some claimants had opportunities to obtain more favorable results and prompted disqualification motions that required judicial effort to resolve. 93 F.R.D. at 425-28.
488. Cf. supra notes 20-21 and accompanying text (requirements for diversity jurisdiction).
490. See supra notes 215-23 and accompanying text.
491. See supra notes 463-89 and accompanying text.
492. Cf. supra note 75 (certification in Shutts based on value of class action to “small man”). Another source of difficulty is that different state actions might lead to inconsistent verdicts, which might create res judicata or collateral estoppel problems.
493. Cf. supra note 453 (appointment of counsel may also avoid conflict of interests).
could be carried out on a national scale. The filing and pendency of a suit in a local court does entail some cost, but if the suit is part of a national effort, that cost should be reduced considerably. If settlement negotiations are conducted between the defendant and national counsel, they will reflect federalism concerns, because they will anticipate results in different statewide forums; however, they will be conducted efficiently. It might be that the added costs in each forum faced by national counsel would include only those of filing suit and of retaining local counsel, whose efforts might be necessary in any case for the development of local law.

Whether this optimistic scenario is justified, or whether the Kansas court was correct in Shutts when it criticized the defendant's arguments as a strategy of "divide and conquer," probably depends upon the complexion of the individual class action at issue. In Shutts, for example, separate actions in Texas and Oklahoma might have been justified both by the contrast between those states' laws and the law of Kansas, and by the large number of claimants in those states. A coordinated effort could have been expected, particularly since parties in Shutts had filed and dismissed an earlier action in Oklahoma. This coordination might have meant little loss in efficiency. In other cases, such as Gillette, the proliferation of actions necessary to obtain federalism gains might not be justified.

D. Notice: Rule 23(d)(3) and the Case for Variable Notice

Eloquent arguments have been made to the effect that class notice is an overstated concern. Professor Kenneth Dam, for example, asks, "Who needs it?" He answers the question as follows:

Res judicata operates against class members, and so they do not benefit directly. As for defendants, they will not normally place much value on binding class members. If a defendant loses, the merger effect of res judicata is usually irrelevant. As for barring further actions by class members, it would be the rare class member who would attempt to tread the same ground as the unsuccessful representative plaintiff. To the extent that class actions are the result of a

494. The information-gathering function, which is likely to be the most important aspect of discovery in such a case, is not affected by rules governing use in court. Furthermore, coordination could enable a single deposition to qualify for use in many forums. The MER/29 litigation is an example of the successful use of this kind of coordination. "The MER/29 Group's primary achievement was management of mass pretrial discovery. By agreement with the defendant, all discovery carried out by the Group's representatives was made applicable to all cases . . . ." Rheingold, The MER/29 Story—An Instance of Successful Mass Disaster Litigation, 56 CALIF. L. REV. 116, 127 (1968).
496. See supra note 397.
497. Dam, supra note 27, at 120.
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lawyer's entrepreneurship, second actions need hardly be feared, for what entrepreneur would invest time and money in a venture already demonstrated to be profitless? Since the absent class members would be asserting claims presumably identical in every substantive respect with those of the representative plaintiff, the doctrine of *stare decisis* would apply in an uncommonly powerful way.

This analysis is appealing, and it may be useful in many kinds of actions; but like most generalizations, it requires qualification. All multistate class actions must comply with the due process minima set forth in *Shutts*. Furthermore, although pressures on the entrepreneurial lawyer do encourage him to concentrate on claims with merit, in some quarters there is a surprisingly large quantum of repetitive and vexatious, if ultimately doomed, litigation.

Some class actions, such as *Gillette*, concern claims so small that resources spent on notice seem largely wasted, and minimal lawful compliance may be appropriate. Others, such as *Shutts*, may contain both modest claimants and claimants with larger amounts at stake. Still others, such as *Zimmer Paper Products, Inc. v. Berger & Montague, P.C.* may consist primarily of significant claims. Finally, there are actions that include both very small and very large claims.

The assumption that significant claims will be protected satisfactorily in the latter types of actions without careful notice is unwarranted, because many people may tend to discard boilerplate documents they receive in the mail. Cutoff of the right to assert one's own claim, or even loss of the chance to participate in a class recovery, may follow. The argument in

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498. See Miller, *Administering Relief*, supra note 5, at 501-13. The responses received in the North Carolina tetracycline case provide documentary evidence of the limited usefulness of notice. See supra note 162.

499. See supra notes 76-81 and accompanying text.

500. For example, litigation by convicted state prisoners has increased almost 700% between 1961 and 1982, although relief is granted in a very small fraction of cases (approximately three percent). *Bureau of Justice Statistics*, *Special Report: Federal Review of State Prisoner Petitions—Habeas Corpus 1-5* (1984); *see also* Allen, Schachtman & Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 *Rutgers L.J.* 675, 694 n.73 (1982) (examining disposition of habeas cases). The tendency to relitigate extends to prisoners' class actions. *See*, e.g., Bogard v. Cook, 586 F.2d 389 (5th Cir. 1982). In the corporate context, the phenomenon of the strike suit led to a requirement of verified pleadings for stockholders' derivative claims. *Fed. R. Civ. P.* 23.1.


502. Although the average amount of the claims in *Shutts* was “about $100,” 105 S. Ct. at 2974, the class included all royalty owners, large and small.

503. 758 F.2d 86 (3d Cir.), cert. denied, 106 S. Ct. 228 (1985). For a discussion of the case, see supra notes 152-54 and accompanying text.

504. The *Skywalk* case, for example, included not only large claims for wrongful death, but also smaller claims for minor physical or psychic injury. *See* Kennedy, *supra* note 2, at 13 & n.56.

505. See supra note 131 ($2 million settlement fund yields less than $18,000 in payable claims).

506. See supra notes 130-35 and accompanying text.
these situations may be about more than notice; it may reflect a judgment that efficiency concerns justify some possibilities of erroneous adjudication without either affiliation with the forum or real consent.\textsuperscript{507}

In some actions, the court should address these concerns directly by enhanced notice. Rule 23(d)(2) empowers a federal court to require that notice be given “in such manner as the court may direct to some or all of the [class] members,” concerning “any step in the action.”\textsuperscript{508} In addition, the court may require the members “to signify whether they consider the representation fair and adequate.”\textsuperscript{509}

For example, the court might require certified mail to claimants with potential claims exceeding a threshold (which the court might set at $5,000, $10,000, or even $50,000) to avoid even the appearance of unnecessary burdens. It might use a form that contains both an opt-in and an opt-out choice, so that it can verify whether the addressee has taken conscious action in response to the notice and follow up by ordering further steps if a significant claimant does not respond. In appropriate circumstances, Rule 23(d) may give the court discretion to require that claimants opt in rather than out, as a means of insuring the fair conduct of the action even though the opt-out procedure would satisfy due process minima. Furthermore, the court can put special effort into insuring that persons with significant claims at the settlement or damage stage are afforded certified mail notice, or that a response is elicited, since the claims stage is in reality the point at which there is usually the greatest likelihood of loss.

In some actions, such as \textit{Gillette}, minimal notice may be followed by a lump-sum award that is distributed inexpensively. In general, however, a class member whose claim is significantly larger than minimum collection expenses, and who might have real options if given notice, “needs it,” if only to insure that he asserts the claim upon disposition. The court should provide the protections that \textit{Shutts} requires in every action.\textsuperscript{510} In many cases, it should insist upon more.

VI. LEGISLATIVE SOLUTIONS TO THE QUESTIONS RAISED BY \textit{SHUTTS}

Many of the problems presented by multistate class actions are of national dimensions. It is conceivable that they could be worked out by judicial development, but that solution would take years, create considerable

\footnotesize{\textsuperscript{507} All due process issues ultimately involve this comparison in some way. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (due process requires consideration of risk of erroneous deprivation by failure to provide hearing).
\textsuperscript{508} Fed. R. Civ. P. 23(d)(2).
\textsuperscript{509} Id.
\textsuperscript{510} This observation should be qualified by the recognition that there may be cases in which \textit{Shutts} will not require individual mailed notice. See supra notes 217-18 and accompanying text.}
uncertainty, and contribute significantly to the complexity of class litigation.\textsuperscript{511} Furthermore, a policy of judicial evolution would produce inconsistencies of result and conflicts between state and federal courts.\textsuperscript{512} Although the significance of the issues may make consensus difficult to achieve, a national legislative solution may be preferable to the common law process.

One possibility is a statute creating federal subject matter jurisdiction in multiparty, multistate cases, based upon the diversity of citizenship clause or the commerce clause. The idea of federal jurisdiction in multiparty, multistate disputes—whether in class form or not—is hardly new,\textsuperscript{513} but it has particular impetus today because the subject is part of an ongoing study of complex litigation by the American Law Institute.\textsuperscript{514}

One legislative approach is a statute providing for federal jurisdiction in cases of minimal diversity,\textsuperscript{515} when a threshold number of claimants allege individual injuries exceeding certain dollar amounts.\textsuperscript{516} If coupled with congressional reversal of the rule in \textit{Zahn v. International Paper Co.},\textsuperscript{517} so that smaller claimants could be included in an action that is within the jurisdiction of the federal courts, the proposal would create a federal forum for actions in which the nationwide coordination available in the federal system is most needed.\textsuperscript{518} The legislation also could address some of the problems of forum choice and management that \textit{Shutts} raises.

\textsuperscript{511} For example, in the asbestos litigation, the doubtful authority of the courts to undertake innovative solutions has retarded the resolution of a serious nationwide problem. See Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986). On the other hand, the volume of litigation has induced some courts to embrace solutions of dubious validity. See cases cited supra note 481.

\textsuperscript{512} The \textit{Asbestos School} case is an example. See supra notes 351–66 and accompanying text. \textit{Shutts} itself is an example of interstate conflict. See supra notes 398–401 and accompanying text.


\textsuperscript{515} Institute to Explore Possibility of Undertaking Study of Complex Civil Litigation, 7 A.L.I. REP. 1 (Jan. 1985). Professor Miller is Reporter for the Study.

\textsuperscript{516} Cf. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967) (statute providing for federal jurisdiction in interpleader cases upon the existence of minimal diversity, or the presence in the suit of at least one pair of adverse parties with diverse citizenship, permissible under Article III).

\textsuperscript{517} Maximum effectiveness probably requires liberalizing notions of pendent and ancillary jurisdiction, which means imposing legislative constraints on some of the narrowing of ancillary jurisdic-
Any expansion of federal jurisdiction, however, should be carefully limited, so that it does not result in the federalizing of all class action practice. An overly inclusive statute would dump into the federal courts small-claims class actions that state courts are as well or better equipped to handle efficiently. It also might denigrate the authority of state courts or countermand state policies. The creation of a federal forum for Gillette-type actions, for example, probably would be undesirable.\(^\text{519}\)

The adoption of significant thresholds for the amount in controversy and the number of claimants—perhaps a requirement that at least five or ten claimants assert claims exceeding $25,000 or $50,000—could prevent this result.\(^\text{520}\) In the alternative, jurisdiction over smaller claims could be made dependent upon the need for a federal forum to bring all appropriate parties before the court or to prevent inefficient, scattered litigation that transcends state boundaries.\(^\text{521}\) Yet another possible restriction would be to limit federal jurisdiction to actions in which at least one defendant is of different residence from the other defendants or from any place where liability-producing events have occurred.\(^\text{522}\) This last condition would identify cases in which scattered suits, joinder difficulties, or choice of law problems would be most significant,\(^\text{523}\) and the argument for a federal forum strongest.

The creation of federal jurisdiction need not be reserved to class actions. For example, a statute could establish a federal forum and offer consolidation techniques for the unification of scattered nonclass litigation. This proposal would have maximum utility in mass disaster cases, such as an airplane crash or a bus-automobile collision,\(^\text{524}\) and products liability and

\(^{519}\) See supra notes 231–42 and accompanying text.

\(^{520}\) These thresholds were featured in the Justice Department proposal of 1979. See authorities cited supra note 513.

\(^{521}\) For example, removal could be authorized in the class action context whenever two competing class actions, not otherwise within federal subject matter jurisdiction, were brought in the courts of different states.

\(^{522}\) Cf. ALI 1969 Study, supra note 489, at 386–88 (taking into account dispersion of potential or necessary defendants). This result also follows from proposals that the American Law Institute Study Project on Complex Litigation is now considering.

\(^{523}\) The existence of multiple defendants in differing locations would increase the chances of joinder difficulties and scattered suits in nonclass as well as class litigation. Id. In class actions, different locations for liability-producing acts and defendants' residences are more likely to be correlated with choice of law difficulties.

\(^{524}\) The well-known case of State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967) is an excellent illustration. A collision in northern California between a bus and a truck produced separate federal and state suits in several different places. The Supreme Court prevented one defendant's insurer's efforts to use federal interpleader to consolidate the claims, indicating that the federal statute
toxic substance litigation involving parties from multiple states. But class actions could be among the types of litigation most improved by the proposal, particularly in the aftermath of the Shutts decision. The extension of federal jurisdiction would mean that a case potentially requiring application of fifty states' laws would be heard by a judge who is more likely to have support personnel and other resources adequate to the task than is the average state judge. Likewise, federal jurisdiction could reduce uncertainties about the preclusive effects of class decrees. The mechanisms for transfer and multidistrict consolidation available in the federal system could eliminate the incidence of multiple, competing nationwide class actions, although amendment of the Anti-Injunction Act would be needed for maximum utility because of the prospect of competing federal and state actions. Consideration also might be given to employing an expanded federal subject matter jurisdiction for classwide adjudication of one or more critical common issues and allowing the individual issues to be adjudicated in those state or federal courts in which actions have been commenced. In effect, this proposal would enable greater use of the partial class action now provided for in Federal Rule 23(d)(2).

Proposals for multiparty, multistate federal jurisdiction logically would have to provide for mandatory joinder and nationwide service of process. These provisions could go far toward rationalizing the use of mandatory class actions after Shutts. The best method of addressing this issue in the class context may be to grant the district court discretion to prevent claimants from opting out when a class action is within the federal jurisdiction over multiparty, multistate actions, provided that the four-factor test proposed earlier in this Article for mandatory classes is met. These joinder and process provisions might be more effective if accompanied by liberalized transfer and consolidation privileges that would eliminate some of the barriers of existing law. For example, transfer by the Panel on Multidistrict Litigation could be permitted for all

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was not intended as a bill of peace in mass tort cases. An elaborate federal complex litigation statute could provide for mandatory consolidation that might have the practical effect of creating a new form of class action to cover situations such as Tashire. Notions of compulsory consolidation might even embrace cases pending in both state and federal courts.

525. See supra notes 440-42 and accompanying text.
526. See supra notes 243-61 and accompanying text.
527. See supra notes 168-80 and accompanying text.
528. 28 U.S.C. § 2283 (1982); see supra notes 174-78 and accompanying text.
529. See Justice Department proposal, supra note 513; ALI 1969 STUDY, supra note 489, at 401-02. See generally 4 WRIGHT & MILLER, supra note 206, § 1067 (discussing service of process). Proposals now before the American Law Institute Study Project on Complex Litigation, not limited to class actions, also would have these features. See supra note 514.
530. See supra Section III(C). A special committee of the Litigation Section of the American Bar Association has recommended discretionary authority to certify mandatory classes. See supra note 266 and accompanying text.
purposes, not merely for pretrial practice as under existing law. In addition, the limitation on transfer to a district where the action "might have been brought" originally, and the current Supreme Court constructions of that phrase, should be eliminated to the extent due process permits full transfer to a locale in which personal jurisdiction would have been initially improper. Intersystem coordination could be improved by widening the possibility for removing from state courts cases that are related to a multiparty, multistate case lodged in the federal courts or by developing procedures for marshalling the judicial resources of both the federal and state courts and bringing them jointly to bear on the adjudication of the pieces of the litigation.

Finally, multiparty, multistate federal jurisdiction could be accompanied by a federal provision for choice of law. In cases controlled by state law, the proposed statute could direct the district court itself to determine which state's law should apply rather than relying upon the forum's choice of law principles as is required by current doctrine. 534 Adherence to state choice of law principles in multistate class actions or other types of complex litigation is burdensome for the forum court and may lead to the application of conflicts rules that are inappropriate to these cases. There is little doubt that congressional power to enact a choice of law rule exists under the diversity jurisdiction, due process, privileges and immunities, commerce, equal protection, and full faith and credit clauses of the Constitution.

534. In the absence of a federal choice of law rule, a federal court hearing a diversity case must follow state choice of law rules. See Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487 (1941); Griffin v. McCoach, 313 U.S. 498 (1941); see also Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3 (1975) (reaffirming Klaxon). The weight of these precedents makes it unlikely that a federal common law conflicts rule will be developed. See generally 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters § 4506 (1982) (discussing choice of law in federal court); Horowitz, Towards a Federal Common Law of Choice of Law, 14 UCLA L. Rev. 1191 (1967) (same). However, it seems doubtful that Klaxon would countermand a federal statute governing choice of state law, even in a diversity case. See ALI 1969 Study, supra note 489, at 402-04. As Agent Orange shows, the federal interest in rationalizing choice of law in multistate, multiparty disputes in the federal courts is great. Cf. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) (strong federal interest shown by existence of constitutional jury trial provision causes federal distribution of power between judge and jury to apply in diversity case). Furthermore, the matter is one that fairly can be characterized as procedural, and a federal enactment therefore should control. Cf. Hanna v. Plumer, 380 U.S. 460, 472 (1965) (federal policies reflected in Federal Rules of Civil Procedure control matters "falling within the uncertain area between substance and procedure, . . . rationally capable of classification as either").
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Given the magnet forum issues raised by *Shutts* itself, a federal choice of law rule is at least as likely to reduce forum shopping as it is to increase it.\(^5\)\(^3\)\(^6\)\(^3\)\(^6\) Furthermore, rather than using the highly artificial, but admittedly pragmatic, technique of finding a national consensus on a legal point, as in *Agent Orange*,\(^5\)\(^3\)\(^7\) or simply ignoring differences in state law, a federal statute could rationalize the search for a workable conflicts rule by forthrightly directing the district court to consider both substantive policies and the need for a uniform rule of decision.\(^5\)\(^3\)\(^8\)

Unfortunately, no single choice of law principle is intuitively correct. Nor does it seem obvious that Congress is likely to do a more adequate job in the choice of law field than have the states. Thus the drafting of a federal choice of law statute presents serious difficulties. If the text is highly precise, there is a risk that there will be insufficient flexibility to permit courts to produce sensible results. Conversely, legislation that provides the courts with significant discretion is likely to produce inconsistent results and offer little predictability.

The viability of these proposals depends upon practical, philosophical and political considerations that are well beyond the scope of this Article. Any legislation must be appraised in terms of its ability to ameliorate the problems to which it is directed without either creating so much threshold litigation over its applicability as to make it counterproductive or promoting forum shopping incentives that lead to its inequitable administration. The political considerations would include concerns about the adverse impact of the newly created jurisdiction on the workload of the federal courts, the desirability of expanding the authority of unelected federal judges, upsetting the delicate balance between federal and state courts reflected in "Our Federalism,"\(^5\)\(^3\)\(^9\) and the costs attributable to procedural

\(^{536}\) See supra note 450 and accompanying text. For another case in which the court conveniently found a homogeneity of law in the choice of law determination, see *In re Air Crash Disaster Near Chicago on May 25, 1979*, 644 F.2d 594 (7th Cir. 1981).

\(^{537}\) See ALI 1969 STUDY, supra note 489, at 401-04. The American Law Institute Study Project on Complex Litigation is considering proposals that would direct the district court to such factors as the law that would have governed any claims that were or might have been brought in the absence of federal jurisdiction, the need for uniformity, and any possible inducements to forum shopping.

\(^{538}\) See generally 17 WRIGHT, MILLER & COOPER, supra note 175, §§ 4251-55 (discussing principles of "Our Federalism"). If efficiency and economy were the only criteria, a federal statute might attempt to assure maximum joinder and consolidation by insisting that all parallel state litiga-
litigation over the existence of the jurisdiction. Perhaps the proposed federal complex litigation statute could be coupled with the elimination or reduction of general diversity jurisdiction, as has been advocated in recent years.\textsuperscript{540} The tradeoff would lessen the adverse impact upon federal workloads and, at the same time, lessen federal-state conflicts. In addition, it would extend a federal forum to interstate cases in which the assertion of diversity jurisdiction seems logical and is most needed to solve problems that are national in character.

VII. CONCLUSION

After \textit{Shutts}, potential personal jurisdiction over multistate class claimants is broad. The Supreme Court has made the class action format economically attractive to attorneys representing class members with small claims as well as large ones. However, it is not clear whether \textit{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. Furthermore, the decision means that prevention of abuses will require careful use of the available procedural tools. For example, courts should use their authority under Rule 23(d) to tailor notice to the needs of the cases but, at the same time, they should be reluctant to recognize exceptions to the binding effect of class decrees because of notice defects.

The serious theoretical issues of jurisdiction left open by \textit{Shutts} include those raised by multiple competing class actions, notice that is not intelligible or not received, application of the \textit{Shutts} requirements to federal courts, and public policy exceptions to binding effect. These problems may not affect resolution of the typical claim in the typical case, but they will be significant concerns in some actions. Even more importantly, a court hearing a multistate class action should address problems of forum abuse with appropriate certification decisions and doctrines deferring to other forums. Furthermore, the impact of \textit{Shutts} upon mandatory class actions is an extremely important question that remains to be determined. This Article proposes a four-factor approach that would narrow use of these actions, yet preserve them for situations whose resolutions are best accomplished through the mandatory class action device.

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The knottiest questions left open by *Shutts*, however, may be those concerning choice of law. Although the Court's guidelines limit the worst abuses, enough play in the joints remains to allow the magnet forum phenomenon to persist. The multiplication of management problems and conflicts of interest that result from efforts to apply more than fifty sets of laws also will put heavy pressure on even the most conscientious courts to find consensus. Courts should address these concerns by careful use of subclassing, orders for multiple counsel, or bifurcation; in addition, they should refuse nationwide certification in favor of statewide or regional actions if management difficulties and federalism concerns outweigh the efficiency gains of a nationwide class.

Although judicial evolution could generate solutions to these questions, legislation is preferable. Proposals for multiparty, multistate jurisdiction coupled with restrictions on traditional diversity jurisdiction probably would result in a net reduction of federal workload and intersystem conflicts. Particularly if accompanied by provisions that legitimize mandatory classes as well as other compulsory joinder techniques, and that govern choice of law, legislation would go far towards rationalizing class action practice after *Shutts*. 