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Class Action Boundaries

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CLASS ACTION BOUNDARIES

*Daniel Wilf-Townsend**

In recent years, some judges have begun doubting—and at times denying—their jurisdiction in class actions whose membership crosses state lines. This doubt has followed from the U.S. Supreme Court's significant tightening of personal jurisdiction doctrine, which has led many to argue that courts no longer have jurisdiction over the claims of unnamed class members unless those claims have some independent relationship with the forum state. Such an argument raises foundational questions about due process and federalism, and has significant implications for the size, location, and feasibility of many class actions.

This Article argues that what it terms the "state-border argument" should be rejected. Proponents of the argument have cast it as a natural implication of defendants' due process rights, ignoring the underlying question about what scope those rights have to begin with. Due process rights are often understood to have different contours in the context of representative litigation, such as class actions. And representative litigation has historically been a tool for resolving disputes even when doing so requires expansive understandings of courts' territorial authority. Meanwhile, the underlying concerns of personal jurisdiction doctrine either do not clearly support the state-border argument or actively militate against it. As a result, defendants' due process rights do not require courts to apply the same personal jurisdiction tests to unnamed, out-of-state class members as those that are applied to named plaintiffs, and class actions should be permitted to proceed as they have for decades.

INTRODUCTION 1612

I. THE STATE-BORDER ARGUMENT IN MULTISTATE CLASS ACTIONS 1617

A. *The Narrowing of Personal Jurisdiction* 1618

B. Bristol-Myers Squibb v. Superior Court of California ... 1621

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C. The State-Border Argument Emerges 1622
II. CLARIFYING THE QUESTION 1625
A. Constitutional Requirements and Subconstitutional Exceptions 1625
B. Distinguishing Between Defendants and Plaintiffs 1630
III. REPRESENTATION AND TERRITORIAL POWER 1631
A. Class Actions as Representative Litigation 1633
B. The Treatment of Absent Class Members in Other Contexts 1635
C. The Geographic Exceptionalism of Group Representative Litigation 1638
1. The Early Precursors to Class Actions..................... 1639
2. The Transition to the Modern Class Action............. 1642
3. The Modern Class Action 1644
IV. THE STATE-BORDER ARGUMENT AND DEFENDANTS' DUE PROCESS RIGHTS 1646
A. Fairness 1647
1. Low Marginal Burdens 1648
2. No Significant Foreseeability Concern 1650
3. The "Overall Reasonableness" Option for Declining Jurisdiction 1651
4. Traditional Notions of Fairness............................... 1652
B. Federalism 1653
1. The Horizontal Federalism Concern Raised by the Model Class.. 1654
2. The Horizontal Federalism Benefits of Exercising Jurisdiction 1658
a. Avoiding Inconsistent Outcomes........................ 1658
b. The Efficient Resolution of Mass Disputes 1661
c. Avoiding Unresolved Claims............................. 1662
d. Decreasing Opportunities for Collusive Settlements... 1662
e. Improving Deterrence 1663
CONCLUSION 1664

INTRODUCTION

Consider the following scenario: Money Corp., a bank incorporated in Delaware and headquartered in New York, systematically defrauds hundreds of thousands of its customers by creating fake accounts in their names to

boost the bank's performance statistics.[1] A group of those customers who live in Illinois are injured by fines and fees that were charged to them as a result of this fraud, and they file suit in the federal district court in Chicago alleging violations of state and federal law. The customers also seek to represent a nationwide class of Money Corp. customers who were similarly injured. Can such a nationwide class action be heard in Illinois?

For most of the lifespan of the modern class action, there would have been little argument that the geography of such a lawsuit—a nationwide class arising out of one of the states where the alleged harm occurred—would cause a jurisdictional problem. Plaintiffs have been able to challenge a defendant's multistate or nationwide course of conduct with a similarly broad multistate or nationwide class action in courts around the country, with few geographic restrictions.

But in recent years, a new argument has emerged that such class actions should be constrained by states' borders.[2] This argument, which has arisen in more than sixty class action cases across the country and which has been accepted by numerous judges and commentators, has been fueled by two related developments.[3] The first is new restrictions on the doctrine of general jurisdiction, which used to allow many class actions to proceed without any inquiry as to their relationship with the forum state. With general jurisdiction no longer widely available, questions of courts' territorial power are now more often governed by specific jurisdiction, a doctrine that focuses on the relationship between plaintiffs' claims and the forum in which the claims are brought.[4] The second development, in turn, is a set of cases in which the U.S. Supreme Court has tightened the tests governing specific jurisdiction. The most notable of these for purposes of class actions is the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*[5] (*BMS*), which rejected the notion that plaintiffs in a mass (not class) action could establish specific jurisdiction in a given forum based only on their claims' similarity to other claims that have a more direct connection to the forum.[6] There is a seemingly straightforward argument that *BMS*'s holding should be extended to class actions because class actions are based on the similarity of claims between the named class representatives and the unnamed absent class members.[7]

Adopting this argument, which this Article terms the "state-border argument," would result in a sea change in the law.[8] The state-border

1. *Cf.* Emily Glazer, *Wells Fargo's Sales-Scandal Tally Grows to Around 3.5 Million Accounts*, WALL ST. J. (Aug. 31, 2017, 6:59 PM), https://www.wsj.com/articles/wells-fargos-sales-scandal-tally-grows-to-around-3-5-million-accounts-1504184598 [https://perma.cc/C94R-CJQT].
2. *See infra* Part I.C.
3. *See infra* Part I.
4. *See infra* Part I.
5. 137 S. Ct. 1773 (2017).
6. *See id.* at 1777, 1781–82; *see also infra* Part I.B.
7. *See infra* Part I.C.
8. *See, e.g.*, Mussat v. IQVIA, Inc., 953 F.3d 441, 448 (7th Cir. 2020) (Wood, J.) (noting that adopting the state-border argument would be "a major change in the law of personal

argument holds that the claims of absent, out-of-state class members should have to meet the same jurisdictional test—the minimum contacts test—that the claims of the named class representatives in a class action must satisfy.[9] As a result, the argument goes, courts should not be able to exercise jurisdiction over defendants with respect to absent class members' claims unless those claims have some independent connection to the forum at issue, even if jurisdiction is appropriate with respect to the claims of the named class representatives.[10]

It is unsurprising, then, that the state-border argument has become one of the most important and contentious issues in aggregate litigation.[11] In many cases, because large numbers of unnamed class members have little or no connection to the state in which the class action gets filed, this legal change would prohibit jurisdiction over multistate class actions that used to be completely ordinary. At best, such a change would result in the inefficient proliferation of small, one-state-at-a-time class actions, or force claimants in multistate class actions to litigate in the one or two (potentially distant) states where the defendant is subject to general jurisdiction.[12] And worse, such a change could prevent litigants in smaller states from having their claims heard, thwart multistate class actions when multiple defendants are located in different states, generate conflicting judicial outcomes, and allow defendants to "reverse forum shop" by consenting to nationwide jurisdiction in states where they are able to litigate or settle on more favorable terms.[13]

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jurisdiction and class actions"). This Article also refers at times to the "state-border question," i.e., the question whether the state-border argument is correct.

9. *See infra* Part I.C.

10. *See infra* Part I.C.

11. *See infra* notes 14–15, 26 (identifying academic articles discussing the state-border argument); *see also* Gregory J. Casas, Alan W. Hersh & Blakeley S. Oranburg, *The Perpetuation of Class-Action Forum Shopping?: Federal Circuits Address Whether Courts Need Personal Jurisdiction to Hear Nationwide Class Actions*, NAT'L L. REV. (June 25, 2020), https://www.natlawreview.com/article/perpetuation-class-action-forum-shopping-federal-circuits-address-whether-courts [https://perma.cc/3LSR-5UKQ]; KEARA M. GORDON, ISABELLE ORD, CHRISTOPHER M. YOUNG, COLLEEN CAREY GULLIVER & DAVID PRIEBE, DLA PIPER, MAJOR DEVELOPMENTS IN CLASS ACTION LITIGATION: WHAT TO WATCH FOR THROUGHOUT 2019, at 6–7 (2019), https://www.dlapiper.com/en/us/insights/publications/2019/06/major-developments-in-class-action-litigation/ [https://perma.cc/ERU6-GNKE]; JULIANNA THOMAS MCCABE, CARLTON FIELDS, THE LONG REACH OF CLASS ACTIONS: TRENDS IN CLASS ACTION LITIGATION 35 (2018), https://nysba.org/NYSBA/Meetings%20Department/2019%20Annual%20Meeting/Coursebooks/TICL%20and%20Trial%20Lawyers%20Sections/CarltonFields2018-class-action-survey-C1.pdf [https://perma.cc/4LG8-T68L] (listing *BMS* as the second-most-mentioned Supreme Court case identified by corporate counsel as impacting their approach to class action management, behind *Spokeo v. Robins*).

12. *See infra* Part IV.

13. *See infra* Part IV; *see also* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1289 (2018) (discussing the reverse-forum-shopping problem of "reverse auctions"); Bristol-Myers Squibb Co. v. Superior Ct. Cal., 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J., dissenting) (discussing some analogous problems in the context of mass actions).

The state-border argument has garnered significant attention, but most scholarship to date has taken one of two paths: (1) concluding that the argument is correct[14] or (2) assuming that courts will adopt the argument and therefore focusing on the ramifications of such a significant change.[15] Such approaches are understandable, given that the trend of the Supreme Court's case law has generally been restrictive when it comes to both class actions and personal jurisdiction.[16] But focusing on the effects of courts' adoption of the state-border argument may also be premature: in a recent survey of more than sixty rulings on the issue in the last few years, a significant supermajority of judges who considered the argument rejected it.[17]

Although this judicial trend is notable, it does not indicate that the merits of the state-border question have been fully addressed. To the contrary, many judges have interpreted the argument essentially as a question of the correct application of the Supreme Court's decision in *BMS* and have rested their rulings in large part on the fact that *BMS* did not explicitly extend itself to class actions—often without much more reasoning than that.[18] As a result, despite the frequency with which the issue has arisen in recent years, courts have yet to develop a systematic account of why one answer is better than

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14. Two articles address the state-border argument in detail and conclude that the minimum contacts test should be applied to unnamed class members. *See* Louis J. Capozzi III, *Relationship Problems: Pendent Personal Jurisdiction After* Bristol-Myers Squibb, 11 DREXEL L. REV. 215, 278–80 (2018); A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction over Absent Class Member Claims Explained*, 39 REV. LITIG. 31, 51–52 (2019). Another reaches the same conclusion with little discussion. *See* Philip S. Goldberg, Christopher E. Appel & Victor E. Schwartz, *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 DUKE J. CONST. L. & PUB. POL'Y 51, 77–78 (2019); *see also infra* notes 15, 26 (discussing other existing scholarship that addresses the state-border argument).

15. The primary approach in the scholarship to date has been to examine the implications that this argument will have for class actions, proceeding from the assumption that courts will likely conclude that the minimum contacts test should apply to the claims of absent class members, rather than spending significant time analyzing the merits of that argument. *See* Bradt & Rave, *supra* note 13, at 1281–91; Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 28–32 (2018); Samuel P. Jordan, *Hybrid Removal*, 104 IOWA L. REV. 793, 799–805 (2019); Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1429–33 (2018). *See generally* Annie McClellan, Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, et al*: A Death Knell for Nationwide Class Actions?*, 87 U. CIN. L. REV. 829 (2019). Other articles discuss the debate in the context of other arguments regarding personal jurisdiction doctrine, also without spending significant time analyzing which side of the debate is correct. *See* Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 96–98 (2018); Alan B. Morrison, *Safe at Home: The Supreme Court's Personal Jurisdiction Gift to Business*, 68 DEPAUL L. REV. 517, 551–55 (2019).

16. *See, e.g.*, Bradt & Rave, *supra* note 13, at 1285–86 ("The door remains open for the Court to look only to the named plaintiffs' claims when assessing the connection between the litigation and the forum state . . . . But, given recent trends in personal jurisdiction, subject matter jurisdiction, and class action law, we would not bet on it, at least in the mass-tort context.").

17. *See generally* Daniel Wilf-Townsend, *Did* Bristol-Myers Squibb *Kill the Nationwide Class Action?*, 129 YALE L.J.F. 205 (2019) (surveying court rulings in the first two years after *BMS*).

18. *See id.*; *see also infra* Part I.C.

another.[19] And with only two federal circuit courts weighing in so far, it is far from clear where the law will ultimately end up.[20]

This Article builds such an account, defending the outcome in the majority of cases and responding to the concerns raised by the state-border argument. The Article explains that the state-border argument, by focusing myopically on jurisdictional tests developed and articulated outside of the context of representative litigation, falls short in two ways. First, it overlooks the historical and doctrinal support for treating representative litigation as meaningfully different from traditional litigation when it comes to questions of courts' power and litigants' rights. And second, it does not properly balance the relevant concerns protected by personal jurisdiction doctrine, namely fairness to defendants and the protection of states' interests in a system of horizontal federalism. The state-border argument thus departs from the methodology of past Supreme Court cases in similar contexts.[21] These cases suggest that when evaluating the requirements of due process in the context of representative litigation, rather than mechanically applying doctrinal due process tests from the nonrepresentative context, we should consider both the unique traditions and goals of representative litigation as well as the fundamental underlying concerns of due process.[22]

The Article therefore reexamines the state-border argument in light of these broader considerations: the rules, goals, and traditions of representative litigation and the basic concerns articulated in personal jurisdiction doctrine. It concludes that these considerations militate against the state-border argument. The treatment of absent class members in other contexts suggests that they should not be subject to the same jurisdictional rules as those that apply to class representatives.[23] And representative litigation has, historically, been used as a tool for courts to expand their territorial power, with courts sometimes explicitly praising this function of the class device.[24] Meanwhile, the two primary concerns of personal jurisdiction doctrine—the fair treatment of defendants and the balance of state powers in a system of horizontal federalism—do not support the state-border argument. The structure of class actions, in which the claims of absent class members are

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19. *See generally* Wilf-Townsend, *supra* note 17.

20. *See* Mussat v. IQVIA, Inc., 953 F.3d 441, 443 (7th Cir. 2020); Lyngaas v. Ag, 992 F.3d 412, 435 (6th Cir. 2021) (following *Mussat*). The state-border question has also arisen in other federal circuit cases that have declined to reach a ruling on the merits of the issue. *See, e.g.*, Moser v. Benefytt, Inc., 8 F.4th 872, 879 (9th Cir. 2021); Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240, 252 (5th Cir. 2020); Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 298 (D.C. Cir. 2020). A related but distinct issue—how *BMS* applies in collective actions brought in federal courts under the Fair Labor Standards Act—has arisen in several other federal appellate cases and has split the courts. *See* Waters v. Day & Zimmermann NPS, Inc., No. 20-1997, 2022 U.S. App. LEXIS 1061 (1st Cir. Jan. 13, 2022); Vallone v. CJS Sols. Grp., LLC, 9 F.4th 861 (8th Cir. 2021); Canaday v. Anthem Cos., Inc., 9 F.4th 392 (6th Cir. 2021).

21. *See infra* Part II (discussing Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), and Hansberry v. Lee, 311 U.S. 32 (1940)).

22. *Id.*

23. *See infra* Part III.B.

24. *See infra* Part III.C.

highly similar to the claims of the named representative, limits the additional litigation burdens that a defendant may face. In turn, the horizontal federalism concerns raised by multistate class actions are mitigated by a variety of factors, and multistate class actions bring a range of benefits that sound in horizontal federalism as well.[25] Multistate class actions allow for more efficient and effective resolutions of disputes, avoid the possibility of conflicting judgments, and protect the citizens of states that may not be populous enough to support as-robust private enforcement within their own borders. As a result, the horizontal federalism considerations supported by personal jurisdiction doctrine weigh against adopting the state-border argument.[26]

The Article proceeds as follows: First, Part I provides an overview of the state-border argument, detailing how and why it has arisen in recent years. Part II then discusses the proper framing of the questions raised by the state-border argument, critiquing two existing approaches to the argument. Next, Part III considers the state-border argument in light of the doctrines and history of representative litigation in particular. Part IV then evaluates the state-border argument from the perspectives of fairness and horizontal federalism, concluding that fairness concerns do not require adopting the state-border argument and that horizontal federalism concerns suggest that it should be rejected.

I. THE STATE-BORDER ARGUMENT IN MULTISTATE CLASS ACTIONS

The doctrine of personal jurisdiction governs the geographic scope of courts' power, determining when and whether a state or nation's courts may hear a particular dispute and issue a binding judgment on the parties involved.[27] For a court to assess the availability of personal jurisdiction, it must consider the relationship between the defendant, the forum in issue, and

25. *Id.*

26. This Article thus takes a different tack than existing work that argues against the extension of *BMS* to the claims of unnamed class members. *See* David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 BYU L. REV. 1511; Megan Crowe, *Can You Relate?:* Bristol-Myers *Narrowed the Relatedness Requirement but Changed Little in the Specific Jurisdiction Analysis*, 63 ST. LOUIS U. L.J. 505, 515 (2019); David W. Ichel, *A New Guard at the Courthouse Door: Corporate Personal Jurisdiction in Complex Litigation After the Supreme Court's Decision Quartet*, 71 RUTGERS U. L. REV. 1, 37–48 (2018); Justin A. Stone, Note, *Totally Class-Less?: Examining* Bristol-Myers*'s Applicability to Class Actions*, 87 FORDHAM L. REV. 807, 833 (2018). The most thorough discussion of *BMS*'s application in this context comes from David Marcus and Will Ostrander, who focus on the state-border argument as it arises in and informs the long-running debate over whether to understand class actions as a dispute-resolution device or a regulatory tool. *See* Marcus & Ostrander, *supra*, at 1520–33. Marcus and Ostrander do consider the state-border argument in light of the concerns articulated in personal jurisdiction doctrine, but it is not the focus of their article. *Compare id.* at 1547–49, *with infra* Part IV. In contrast, this Article focuses on the foundational concerns of personal jurisdiction doctrine, *see infra* Parts II, IV, and discusses traditional understandings of class litigation as they inform that doctrine, *see infra* Part III.

27. *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117, 125–32 (2014).

the lawsuit.[28] In a class action, questions can arise as to how absent class members should be treated for purposes of this inquiry: Are they just like the named plaintiffs in a class action? Does their location matter, and if so, how does it matter?

These questions are not new, but they have mostly lain dormant for decades. The Supreme Court has examined personal jurisdiction in the class action context only once, nearly forty years ago, when *Phillips Petroleum Co. v. Shutts*[29] considered the due process rights of absent class-member plaintiffs.[30] The question of what a *defendant's* rights require with respect to personal jurisdiction and the claims of absent class members, meanwhile, was largely unaddressed by anyone until the last few years.[31]

This part describes how and why that question has recently arisen to become one of the most important and contested issues in class litigation. As it describes, over the last decade, the Supreme Court has drastically narrowed the doctrine of general jurisdiction, decreasing plaintiffs' ability to bring cases with claims that are unconnected to a given forum state. With general jurisdiction unavailable in many states, plaintiffs now must rely on the more cabined doctrine of specific jurisdiction. The Court's decision in *BMS*, in turn, immediately raised questions about how the rules of specific jurisdiction apply in the class action context to the claims of absent class members. The result is that the last few years have seen scores of cases asking whether a defendant's due process rights require courts to apply the minimum contacts test to the claims of absent class members.

A. The Narrowing of Personal Jurisdiction

The narrative of the traditional canon of personal jurisdiction cases, ranging from *Pennoyer v. Neff*[32] through *International Shoe Co. v. Washington*[33] and into the twenty-first century, has become a familiar tale in law review articles and classrooms alike.[34] The Supreme Court is in the midst of adding a new chapter to that narrative: After a relatively peaceful period in the 1990s and 2000s, the last decade has seen a steady march of

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28. *Id.* at 126.

29. 472 U.S. 797 (1985).

30. *Id.* at 799.

31. The question of what a defendant's due process rights require regarding personal jurisdiction over absent class members' claims is addressed in depth in two law review articles separated by decades, both of which predate the Court's sweeping revision of the doctrine of general jurisdiction. *See* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About Class Action Fairness*, 58 S.M.U. L. REV. 1313 (2005); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597 (1987). Otherwise, the issue appears to have largely been ignored in both the academic literature and case law prior to *BMS*.

32. 95 U.S. 714 (1878).

33. 326 U.S. 310 (1945).

34. *See, e.g.*, Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1178 (2018) (noting that "[t]he American personal jurisdiction story is familiar and oft told").

new, significant cases.[35] Individually and collectively, these cases have had the effect of restricting the ability of plaintiffs to bring defendants into state and federal court in a wide variety of scenarios.[36]

In the first half of the 2010s, the Court's decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*[37] and *Daimler AG v. Bauman*[38] brought about the most significant change in personal jurisdiction doctrine since *International Shoe* itself. For the first sixty-plus years after *International Shoe*, courts throughout the country had interpreted that case's "continuous and systematic" standard for general jurisdiction to mean that such jurisdiction was available over a defendant in any state where it had substantial long-term operations.[39] A national hotel chain, for instance, with numerous buildings and significant revenue in every state, would have been considered by many courts to be subject to general jurisdiction in every state.[40] General jurisdiction, in turn, is a doctrine that provides for jurisdiction over a defendant in a particular forum without asking about the relationship between the claims at issue in the lawsuit and the forum itself. This meant that plaintiffs suing a large, established company often did not have to worry much about personal jurisdiction because general jurisdiction was available in many states.

But in *Goodyear* and *Daimler*, the Supreme Court restricted general jurisdiction's availability to only those places where a defendant could be considered "essentially at home."[41] As a result, with limited (and possibly nonexistent) exceptions, defendants are now subject to general jurisdiction only in the state where they are incorporated and/or the state in which they

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35. *See generally* Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021); Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017); Daimler AG v. Bauman, 571 U.S. 117 (2014); Walden v. Fiore, 571 U.S. 277 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

36. *See* Dodson, *supra* note 15, at 15 (describing "how personal jurisdiction has changed from being relatively expansive . . . to being more constrictive"). In state court, personal jurisdiction over defendants is governed by state statute, state constitutions, and the limits of the U.S. Constitution—in particular, the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980). In many cases, the limitations that the Fourteenth Amendment places on state jurisdiction effectively end up limiting federal courts, as well, under the federal rules governing service of process. *See* FED. R. CIV. P. 4(k)(1)(A).

37. 564 U.S. 915 (2011).

38. 571 U.S. 117 (2014).

39. *See, e.g.*, Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 214 (2014) ("Procedure casebooks taught students that national corporations with substantial operations in all fifty states (such as McDonalds or WalMart) would likely be subject to general personal jurisdiction in all fifty states.").

40. *See id.* (providing this example). It is important to note that even if this result may have been common, there was still widespread disagreement and inconsistency regarding many dimensions of the "continuous and systematic" test. *See* Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 856–86 (2004) (surveying cases in a variety of contexts). Nonetheless, "[p]rior to *Goodyear*, the common understanding was that companies doing substantial business in all fifty states . . . would have been subject to general jurisdiction in every state." Dodson, *supra* note 15, at 24.

41. *See* BNSF Ry. Co. v. Tyrrel, 137 S. Ct. 1549, 1558 (2017).

have their principal place of business.[42] So the same national hotel chain that once may have been subject to general jurisdiction in fifty states is now subject to general jurisdiction in only two states (or only one state, if it is headquartered in the same state in which it is incorporated).

This change, in turn, puts significantly more pressure on the doctrine of specific jurisdiction.[43] Specific jurisdiction, or "case-linked" jurisdiction, requires a plaintiff to prove that their chosen forum has some sort of relationship to the case at hand that justifies the court's exercise of jurisdiction.[44] But the Court's case law has been vague about precisely what kind of relationship is satisfactory.[45] The general formulation that courts have converged on is a three-part "minimum contacts" test, in which a plaintiff must show (1) that a defendant has purposefully availed itself of the forum state in some way; (2) that the "contacts" created by that purposeful availment are related to the lawsuit in some way; and (3) that the exercise of jurisdiction is reasonable, given all the circumstances of the suit.[46] But even with this three-part test, much ambiguity remains about how exactly specific jurisdiction applies in any given situation.[47]

Now that general jurisdiction is less available, the ambiguities and unanswered questions of specific jurisdiction are increasingly relevant. Specific jurisdiction remains the only path for many lawsuits and litigation strategies. Plaintiffs often prefer to sue somewhere other than a company's state of incorporation or principal place of business—perhaps because the plaintiff lives in a different state or was injured there, or because the law, judges, or juries are perceived as more favorable there. Some plaintiffs may not have a choice—for instance, if two defendants are indispensable parties to a lawsuit and are not both subject to general jurisdiction in the same state, specific jurisdiction may be the only path forward for the suit to proceed.[48] But whatever the reason, plaintiffs who do not wish to file their suit in a

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42. *Id.* The Court has acknowledged the possibility of an "exceptional case" where "a corporate defendant's operations in another forum 'may be so substantial and of such a nature as to render the corporation at home in that State,'" *id.*, but it is not clear what magnitude of activity would be necessary to trigger that exception, *see id.* at 1561 (Sotomayor, J., dissenting) (stating that the majority's opinion in *BNSF Ry. Co.* "is so narrow as to read the exception out of existence entirely").

43. *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117, 157 (2014) (Sotomayor, J., concurring) (noting that the holding regarding general jurisdiction "curtails the States' sovereign authority to adjudicate disputes," leaving only specific jurisdiction as an option).

44. *See, e.g.*, Rhodes & Robertson, *supra* note 39, at 230–31.

45. *Id.*

46. *See* Linda Sandstrom Simar, Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *Ford's Hidden Fairness Defect*, 106 CORNELL L. REV. ONLINE 45, 48 (2020) (noting that lower courts have "largely converged" around this test).

47. *See, e.g.*, Howard M. Erichson, John C.P. Goldberg & Benjamin C. Zipurksy, *Case-Linked Jurisdiction and Busybody States*, 105 MINN. L. REV. HEADNOTES 54, 73–74 (2020) (describing ambiguities in specific-jurisdiction doctrine).

48. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J., dissenting) (noting the difficulties in bringing cases "against two or more defendants headquartered and incorporated in different States" or against a defendant "not headquartered or incorporated in the United States").

defendant's home state or are unable to do so must now rely on the availability of specific jurisdiction to bring their claims.

B. Bristol-Myers Squibb v. Superior Court of California

Against this backdrop, the Supreme Court decided *Bristol-Myers Squibb* in June 2017.[49] The facts giving rise to *BMS* parallel those of many large pharmaceutical tort suits.[50] Bristol-Myers Squibb, a drug company incorporated in Delaware and headquartered in New York, developed a prescription blood thinner called Plavix that it sold nationwide.[51] Its sales in California in particular were extensive, with more than $900 million in sales revenue in the state over a six-year period generated by the sale of nearly 187 million Plavix pills.[52] A large group of plaintiffs sued the company in California state court, alleging that they had been injured and that the company had knowingly made false representations about the drug's safety and efficacy.[53] The suit was structured as a mass tort suit rather than as a class action—all 678 plaintiffs were named parties, and no class certification was sought.[54] Of those plaintiffs, eighty-six were residents of California and the rest were spread across thirty-three other states.[55]

Significantly, for purposes of personal jurisdiction, these out-of-state residents did not allege that their claims had any sort of connection to events that took place in California.[56] They "did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California."[57] Although California's state courts upheld jurisdiction, the U.S. Supreme Court reversed, holding that no jurisdiction existed regarding the nonresident plaintiffs' claims.[58]

In its description of the legal standards governing the case, the Court placed particular emphasis on concerns about federalism, affirming the statement in *World-Wide Volkswagen Corp. v. Woodson*[59] that "[t]he sovereignty of each State implies a limitation on the sovereignty of all its sister States," and noting that "this federalism interest may be decisive,"

49. *Id.* at 1773.

50. *See, e.g.*, Bradt & Rave, *supra* note 13, at 1274 ("On the substance, *Bristol-Myers* is something of a standard defective-drug case.").

51. *See Bristol-Myers Squibb*, 137 S. Ct. at 1777–78.

52. *Id.*

53. *See* Bristol-Myers Squibb Co. v. Superior Ct., 377 P.3d 874, 878 (Cal. 2016).

54. *Bristol-Myers Squibb*, 137 S. Ct. at 1778.

55. *Id.* One plausible explanation for why the lawsuit was structured this way is that it was devised both as an alternative to the existing Plavix multidistrict litigation in federal court and to avoid being removable under the Class Action Fairness Act of 2005 (CAFA). *See* Bradt & Rave, *supra* note 13, at 1274–75. The plaintiffs had added a state defendant (a California-based drug distributor), and the case was structured as a series of separate complaints that each had fewer than one hundred plaintiffs to thwart CAFA's removal provisions for "mass actions." *Id.*

56. *Bristol-Myers Squibb*, 137 S. Ct. at 1778.

57. *Id.*

58. *Id.* at 1784.

59. 444 U.S. 286 (1980).

conclusively militating against jurisdiction even where the other factors all favor jurisdiction.[60] The Court located this federalism interest in the traditional due process analysis regarding "the burden on the defendant" of litigating the case, saying that this consideration "encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."[61]

But when it came time to apply the law to the facts of the case, there was little analysis of the burden on the defendant or a weighing of the factors favoring jurisdiction.[62] Instead, the Court relied primarily on its statement in *Walden v. Fiore*[63] that "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction," and held that to mean that "[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."[64] The Court stated that it was not breaking new doctrinal ground, announcing that its holding resulted from a "straightforward application . . . of settled principles of personal jurisdiction."[65]

C. The State-Border Argument Emerges

Before the ink was dry on the Court's opinion in *BMS*, commenters began asking whether the decision contained implications for class action practice throughout the country.[66] In dissent, Justice Sotomayor flagged the class

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60. *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (ellipses and bracket omitted) (citing *World-Wide Volkswagen*, 444 U.S. 286, 293–94 (1980)).

61. *Id.* The Court did not reference the footnote in *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 n.10 (1982), which some have seen as walking back *World-Wide Volkswagen*'s language by rejecting the notion that this "federalism concept" might "operate[] as an independent restriction on the sovereign power of the court." *See, e.g.*, Dodson, *supra* note 15, at 16 (describing *Bauxites* as "distanc[ing] personal jurisdiction's connection to both interstate federalism and state sovereignty, and instead link[ing] personal jurisdiction primarily (even solely) to individual rights"); Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"?: It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 80 n.170 (2004) (describing *Bauxites*'s "repudiation of the 'instrument of interstate federalism' conception of due process"); *see also* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 65 n.261 (2010) (critiquing the rationales offered in *Bauxites* for retreating from the federalism emphasis in *World-Wide Volkswagen*). It is possible, though, to harmonize *Bauxites* and *World-Wide Volkswagen*, largely along the lines of reasoning deployed in *BMS*. *See, e.g.*, Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 711–12 (1987) (describing how the federalism concerns protected by due process, as well as the ability of a plaintiff to consent to jurisdiction, make sense together as an individual "right to resist unauthorized jurisdiction").

62. *See Bristol-Myers Squibb*, 137 S. Ct. at 1781–82.

63. 134 S. Ct. 1115 (2014).

64. *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (quoting Walden v. Fiore, 134 S. Ct. 1115, 1123 (2014)).

65. *Id.* at 1783.

66. *See, e.g.*, Richard Levick, *The Game Changes: Is* Bristol-Myers Squibb *the End of an Era?*, FORBES (July 11, 2017, 2:21 PM), https://www.forbes.com/sites/richardlevick/2017/

action issue, noting that the majority opinion did not confront the question of how its decision would apply to multistate class actions.[67] But many began arguing nonetheless that *BMS* should be read as prohibiting a court's exercise of jurisdiction over a defendant with respect to the claims of out-of-state class members, unless the defendant is subject to general jurisdiction in the forum state or unless the out-of-state class members' claims have some connection to the forum.[68]

This "state-border argument" amounts to a stance that the claims of absent class members must satisfy the minimum contacts test for a court to have jurisdiction over a defendant with respect to the class. The basic argument is that a court cannot exercise jurisdiction over a defendant regarding the claims of absent class members if jurisdiction would have been lacking with respect to those claims standing on their own outside of the class action. In other words, the fact that there are named representatives over whose claims the court *does* have jurisdiction does not add anything that enables the court to have jurisdiction over *other* people's claims. And because the minimum contacts test is the critical test for specific personal jurisdiction—i.e., the test that is applied when general jurisdiction is not available—as a practical matter, the state-border argument can also be stated as the position that, where general jurisdiction over a defendant is unavailable, a court does not have jurisdiction over a defendant with respect to the claims of the absent, unnamed members of a class action unless those claims can satisfy the minimum contacts test.

This argument has some appeal. After all, *BMS* held that the out-of-state plaintiffs in that case could not justify the state courts' jurisdiction over the defendant simply because they "sustained the same injuries" as the in-state residents.[69] At first glance, that logic could plausibly apply to class actions as well, given that the ability of a class action to proceed is generally predicated on the similarities between the claims of named representatives and the claims of the absent class members who they represent.

Perhaps due to this appeal—and its obvious utility for defendants who are facing multistate class actions and wish to limit their potential liability—the state-border argument has become widespread, raised in more than eighty class actions in the first two years after *BMS* alone.[70] The majority of courts to weigh in on the state-border argument have rejected it, but a notable minority has accepted it, declining to exercise jurisdiction over class members outside of the forum state.[71] Most of the rulings to date have been in federal district courts; although the issue has made it to the federal circuit

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07/11/the-game-changes-is-bristol-myers-squibb-the-end-of-an-era/?sh=2778f212e831 [https://perma.cc/JSV2-5RAK].

67. *Bristol-Myers Squibb*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting).

68. *See* Wilf-Townsend, *supra* note 17, at 206–07 (collecting examples of commenters making this argument).

69. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

70. *See* Wilf-Townsend, *supra* note 17, at 206–07 (collecting and surveying cases applying *BMS* in the class-action context).

71. *Id.*

level in several cases, most of the federal appellate courts to be presented with the issue so far have declined to reach it for a variety of procedural reasons.[72] The only circuit to reach the issue, the Seventh Circuit, has ruled in keeping with the majority of the district courts and upheld the exercise of jurisdiction over the defendant with respect to the claims of out-of-state unnamed class members.[73]

But despite the many cases to address the issue, much of the analysis in the case law so far has been brief and ad hoc.[74] A common approach among judicial opinions on the issue has been to say, essentially, that applying *BMS* to prohibit jurisdiction in many multistate class actions would amount to a big change in the law, and the Supreme Court in *BMS* said that it was applying only settled law, so *BMS* does not change anything.[75] Courts looking beyond *BMS* itself have also frequently pointed to the Supreme Court's opinion in *Devlin v. Scardelleti*[76] as precedent indicating that courts may treat absentee class members as akin to named parties in some circumstances but not in others.[77] But the case law has not developed a deep or systematic account as to *why* the flexibility afforded by cases like *Devlin* should be exercised in one way or another in response to the questions raised by *BMS*.[78]

In the academic literature, meanwhile, the approach has primarily been to assume that the state-border argument will be adopted.[79] Fewer have grappled with the question of *whether* the argument should be adopted, instead focusing on the implications that adopting the argument would have for aggregate litigation.[80] As a predictive matter, such an approach may be

72. *See* Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293, 298 (D.C. Cir. 2020); Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240, 251–52 (5th Cir. 2020); Beaton v. SpeedyPC Software, 907 F.3d 1018, 1025 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 1465 (2019).

73. Mussat v. IQVIA, Inc., 953 F.3d 441, 443 (7th Cir. 2020).

74. Two significant exceptions are the discussions of the issue by Judge Gary S. Feinerman in *Al Haj v. Pfizer, Inc.*, 338 F. Supp. 3d 815 (N.D. Ill. 2018), and by Judge Diane Wood in *Mussat*, 953 F.3d at 445–48, both of which provide more detailed reasoning.

75. *See, e.g.*, Morgan v. U.S. Xpress, Inc., No. 17-CV-00085, 2018 WL 3580775, at *3 (W.D. Va. July 25, 2018) ("The Supreme Court, however, described its work more modestly, writing that the case was a 'straightforward application . . . of settled principles of personal jurisdiction . . . .' Because this Court does not believe *Bristol-Myers Squibb* upended years of class action practice *sub silentio*, Defendant's motion will be denied."); *see also* Wilf-Townsend, *supra* note 17, at 214 ("[M]any cases organized their approach to *BMS*'s application by noting what *BMS* did not say or do.").

76. 536 U.S. 1 (2002).

77. *See id.* at 9–10; *see also Al Haj*, 338 F. Supp. 3d at 819 (quoting *Devlin*, 536 U.S. at 10); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., No. 17-cv-00564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017).

78. *See* Wilf-Townsend, *supra* note 17, at 214–25 (providing an overview of the reasoning and analysis of district court cases addressing the *BMS* question).

79. *See supra* note 15.

80. *See id.* (discussing existing work). There are two main exceptions. The first is A. Benjamin Spencer's article *Out of the Quandary*, *supra* note 14, which discusses how *BMS* should apply in the context of federal courts. Professor Spencer's work is discussed below. *See infra* note 114. The second is David Marcus and Will Ostrander's article *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, *supra* note 26, which examines the state-border argument in the context of a larger conversation about the juridical relevance of

in keeping with the generally restrictive trend of the Supreme Court's class action and personal jurisdiction case law.[81] But the fact that the state-border argument has not been widely adopted in the courts—and, in fact, has mostly been rejected—suggests that it is worth evaluating the argument in greater depth. The sections that follow do just that.[82]

II. CLARIFYING THE QUESTION

What is the right way to determine whether the state-border argument is correct? In other words, how do we know whether the rules of personal jurisdiction apply to absent class members' claims in the same way that they apply to plaintiffs' claims outside the context of representative litigation?

This part establishes the groundwork for how to approach the state-border question. In doing so, it critiques two common framings of the question. The first is that the limitations posed by state boundaries follow naturally from the priority of the U.S. Constitution over other sources of law. The second is that the state-border argument is a necessary implication of the fact that defendants and plaintiffs are differently situated in ways that are relevant to personal jurisdiction doctrine.

Understanding why these two framings are unsuccessful, in turn, sheds light on a better approach. The state-border argument requires us to ask about the nature and scope of the rights protected by personal jurisdiction doctrine; both of the unsuccessful framings assume this question away. A better approach to the question grapples with this issue head-on, as past Supreme Court cases have done: by engaging with the traditional understanding of the scope of the right, as well as the underlying values at stake. Evaluating the state-border argument thus necessitates an examination of the values underlying personal jurisdiction doctrine in the context of representative group litigation in which the argument arises.

A. Constitutional Requirements and Subconstitutional Exceptions

To begin, some of those who would limit the scope of class actions lean heavily on the distinction between constitutional sources of law and subconstitutional sources of law, such as the Federal Rules of Civil Procedure. Their argument draws on the fact that the minimum contacts test

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absent class members and the advantages and disadvantages of principled (as opposed to pragmatic) legal design. *See also supra* note 26 (discussing the Marcus & Ostrander article).

81. *See, e.g.*, Bradt & Rave, *supra* note 13, at 1285–86; Dodson, *supra* note 15, at 15.

82. At the outset, it is worth taking pains to define the contours of the argument, as some litigants (and even courts) have gotten basic questions of *BMS*'s application wrong. *See* Wilf-Townsend, *supra* note 17, at 219. The state-border argument arises in class actions where (1) jurisdiction is permissible over a defendant with respect to a named plaintiff's claims, but only on a theory of specific (not general) jurisdiction, and (2) specific jurisdiction is unavailable for the claims of some portion of unnamed class members under the traditional minimum contacts test. For simplicity's sake, this Article occasionally refers to this type of class action as a "model class." The hypothetical class action involving Money Corp. in the introduction is an illustration of one such model class.

is a constitutional requirement for safeguarding defendants' rights.[83] As a result, the argument goes, any legal rules from subconstitutional authority, like the common law or the Federal Rules of Civil Procedure, must yield in the face of a conflicting constitutional command.[84] Because the rules governing class actions arise from the Federal Rules of Civil Procedure and various judge-made doctrines interpreting them, nothing about *how* a proceeding is brought—i.e., whether as a class action or otherwise—can override the constitutional command that absent class members' claims must satisfy the minimum contacts test. This argument is sometimes bolstered by reference to the text of the Rules Enabling Act, which provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right."[85]

This argument gets some things right and some things wrong. It is obviously right that where the Constitution commands a result, a lesser authority that commands a contrary result is overridden. But where the argument errs is in assuming that the procedural exceptions that are carved out for representative litigation are subconstitutional. In fact, the case law defining the due process exceptions that are afforded to class actions are not instances of Rule 23 overriding the Constitution, but are instead examples of courts defining the scope of a litigant's due process rights in the specific context of group representative litigation.[86]

Take, for instance, the Supreme Court's decision in *Hansberry v. Lee*.[87] Decided in 1940, shortly after the emergence of the modern Federal Rules of Civil Procedure, *Hansberry* recognized the "principle of general application" dating back to *Pennoyer* that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[88] But, the Court said, "a 'class' or 'representative' suit" was "a recognized exception" to those rules "to an extent not precisely defined by judicial opinion."[89] In such a suit, "some members of the class are parties," and they "may bind members of the class or those represented who were not made parties to it."[90] The Court noted that, in addition to the long pedigree of class actions in particular, the broader notion that someone "may be bound by [a] judgment where they are in fact

83. *See, e.g.*, Leppert v. Champion Petfoods USA Inc., No. 18-C-4347, 2019 WL 216616, at *4 (N.D. Ill. Jan. 16, 2019) ("[A] defendant's due process rights should remain constant regardless of the suit against him, be it an individual, mass, or class action."); Mussat v. IQVIA Inc., No. 17 C 8841, 2018 WL 5311903, at *5 (N.D. Ill. Oct. 26, 2018), *rev'd and remanded*, 953 F.3d 441 (7th Cir. 2020).

84. *See, e.g.*, Prac. Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018) ("Rule 23's [class action] requirements must be interpreted in keeping with Article III constraints . . . ." (alteration in original) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 592 (1997))).

85. *Prac. Mgmt. Support Servs., Inc.*, 301 F. Supp. 3d at 861 (quoting 28 U.S.C. § 2072(b)).

86. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809–12 (1985).

87. 311 U.S. 32 (1940).

88. *Id.* at 40.

89. *Id.* at 41.

90. *Id.*

adequately represented by parties who are present" was "familiar doctrine," citing several nonclass cases in which individuals had been deemed bound by prior judgments even though they had not been parties because the named litigants could be considered to represent their interests.[91]

Hansberry provides a useful model for how to think about exceptions to constitutional requirements. *Hansberry* acknowledged the restrictions of due process but also noted that the traditions of representative litigation had carved out an exception.[92] Then, when evaluating the contours of that exception, the *Hansberry* Court looked to the broad values underlying the relevant constitutional provision rather than laying out a specific rule: There would be "a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."[93] *Hansberry* thus affirmed that due process's requirements may be distinct in the context of group representative litigation, and also indicated that the contours of class litigations' exceptions can be determined not through applying traditional tests mechanically but instead by considering broader, more standard-like concerns such as fair treatment.

Decades later, the Supreme Court reaffirmed this approach in *Phillips Petroleum Co. v. Shutts*.[94] As background to *Shutts*, Rule 23 underwent a number of significant changes in 1966 and emerged in a form close to what it is today.[95] In particular, the new Rule 23(b)(3) permitted courts to issue binding judgments in class actions on the basis of common questions of law or fact shared by all class members, even if there was no preexisting association between the members or common fund that the members had claim to.[96] This revision created due process concerns for cases adjudicated

91. *Id.* at 43 (first citing Plumb v. Goodnow's Adm'r, 123 U.S. 560, 560 (1887); then citing Confectioners' Mach. & Mfg. Co. v. Racine Engine & Mach. Co., 163 F. 914, 919 (E.D. Wis. 1908), *aff'd*, 170 F. 1021 (7th Cir. 1909); and then citing Bryant Elec. Co. v. Marshall, 169 F. 426, 427 (D. Mass. 1909), *aff'd*, 185 F. 499 (1st Cir. 1911)).

92. *Id.* at 41.

93. *Id.* at 42. The Court went on to specify that states' procedures must be "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Id.* at 43. But more broadly, this language suggested an expansive potential reach of the class device, beyond the limits of what was then provided for in Rule 23. *See* Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1944 (1998). That rule had permitted class actions to bind absent parties only in cases that would have otherwise required the joinder of those absent parties as necessary parties. *Id.* at 1937–38 (discussing the 1938 version of Rule 23). By holding that adequate representation was the only relevant due process concern for class actions' ability to bind, the Court approved the consistency of "common question" class actions, a potentially much broader category, with due process requirements. *Id.* at 1943–44; *see also* David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 601 (2013) (noting that the constraints of the 1938 version of Rule 23 "made sleight of hand necessary for courts to realize the broad potential of *Hansberry v. Lee*, which allowed *res judicata* for any judgment, provided the class members had received adequate representation").

94. 472 U.S. 797 (1985).

95. *See* Marcus, *supra* note 93, at 588.

96. *See* FED. R. CIV. P. 23(b)(3).

under Rule 23 and its state court analogues, including concerns about personal jurisdiction in particular. A split among state courts developed as to whether they could constitutionally issue judgments that would bind out-of-state absent class members in a common-question class action, or whether the absence of personal jurisdiction over those class members prohibited such binding judgments.[97] The Supreme Court stepped in in *Shutts*, a case arising out of a state-court class action, to resolve this issue.

Shutts held explicitly that out-of-state unnamed members in the kind of plaintiff classes enabled by Rule 23(b)(3) and its analogues do not need to have minimum contacts with a forum for that forum's courts to exercise jurisdiction over a defendant with respect to their claims.[98] *Shutts* considered the issue from the perspective of the absent class members' rights and interests, and noted that while the minimum contacts standard is designed to protect defendants, absent plaintiff class members are differently situated.[99] They are protected by the requirement of adequate representation and are not burdened by the court's exercise of jurisdiction in the same way a named defendant is burdened.[100] *Shutts* therefore held that protecting absent class members' due process rights in Rule 23(b)(3) litigation requires only that they receive notice and an opportunity to opt out of the class action, along with the preexisting requirement of adequate representation acknowledged in *Hansberry*.[101]

Shutts thus affirmed the ability of class actions in state and federal court to operate outside the minimum contacts paradigm established in *International Shoe*, albeit with increased due process protections for absent class members in the (b)(3) context. *Shutts* also addressed the horizontal federalism concerns that might arise in a multistate class action, holding that the Due Process Clause and Full Faith and Credit Clause prevent an "arbitrary" or "fundamentally unfair" application of state law in a given case by requiring some sort of "significant contact or significant aggregation of contacts" between the defendant and the state whose law is applied.[102]

These two cases—*Shutts* and *Hansberry*—are important here for two reasons. The first is their substantive holdings: they each affirm that the requirements of due process are different when it comes to absent class members in representative litigation. The second is the model that they provide for approaching questions at the intersection of the constitutional due process inquiry and the exceptions and limitations of representative litigation. In deciding the contours of the different treatment of representative litigation, they refer to core due process considerations, such as notice, the ability of parties to protect their interests, a fair weighing of

97. *See* Katz v. NVF Co., 100 A.D.2d 470, 474–75 (N.Y. App. Div. 1984) (discussing split); Stellema v. Vantage Press, Inc., 470 N.Y.S.2d 507, 512 (Sup. Ct. 1983) (same).

98. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985).

99. *Id.* at 809–11.

100. *Id.*

101. *Id.* at 811–12.

102. *Id.* at 818.

benefits and burdens, and a balance of power between the states.[103] In doing so, they resist the mechanical application of preexisting doctrinal tests in favor of more flexible standards that are adapted to the specific needs of aggregate litigation while being conscientious of individual rights.[104]

Bearing these cases in mind, the state boundary question is thus not a question about which rule of law wins in a conflict between Rule 23 and the Due Process Clause—a question that is answered as soon as it is asked. Instead, it is a question about the *scope* of due process rights, and in particular, how those rights apply in the context of representative litigation.[105] And that question is far from clearly answered by existing case law. But, as the following sections will show, there is a strong case to be made that courts do not need to apply the minimum contacts test with respect to the claims of every absent class member to legitimately exercise jurisdiction over a defendant.

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103. *See Hansberry*, 311 U.S. at 41–46; *Shutts*, 472 U.S. at 808–23. As noted, *Shutts*, *Hansberry*, and many of the other cases discussed above focused on the due process rights of the absent class members themselves—not on the due process rights of named defendants in plaintiff class actions. Part IV considers how the same basic approach suggested by these cases—an examination of the core values of due process in light of the goals and advantages of representative litigation—should apply when the rights of those defendants are at issue.

104. *Hansberry* and *Shutts* also demonstrate that at least when it comes to the due process rights protected by personal jurisdiction doctrine, it is not entirely accurate to say that Rule 23 "like traditional joinder . . . leaves . . . parties' legal rights and duties intact." Spencer, *supra* note 14, at 44–45 (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins., 559 U.S. 393, 408 (2010) (Scalia, J.)). For instance, *Shutts* establishes that Rule 23, by permitting representative litigation, changes the normal rights of absent class members, allowing courts to resolve their claims without their consent, and requiring affirmative steps from them to opt out even if they are outside the court's territorial power. *See* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 17 (1986) ("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."); *see also Hansberry*, 311 U.S. at 40–41 (noting normal constitutional due process requirements that do not apply in representative suits). So although Rule 23 may not "itself provide[] the relevant jurisdictional rule," Spencer, *supra* note 14, at 44, *Shutts* and *Hansberry* show that Rule 23 can, by authorizing representative litigation, affect parties' due process rights in a way that is relevant to the determination of a court's jurisdictional power.

105. This Article refers to defendants' "due process rights" and the "due process concerns" raised in the state-border argument because the Due Process Clause is understood to be the source of personal jurisdiction doctrine. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1779 (2017). But that is not to say that the concerns raised by personal jurisdiction doctrines are reducible to or contiguous with procedural due process concerns, such as notice and the opportunity to be heard. *See, e.g.*, Effron, *supra* note 15, at 26 ("Personal jurisdiction encompasses doctrines and concepts that are not natural or obvious fits with due process."). Many view the protections that are afforded by personal jurisdiction doctrine to be best understood as examples of substantive due process, not procedural due process. *See, e.g.*, Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479 (1987); Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567 (2007); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006). For a contrary view, namely that the due process clause helps enforce personal jurisdiction rules but should not determine their content, see Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249 (2017).

B. Distinguishing Between Defendants and Plaintiffs

A second approach to the question of class actions' boundaries is to focus on the distinction between plaintiffs' due process rights and defendants' due process rights. The Supreme Court's decision in *Shutts* addressed the rights of absent class member plaintiffs,[106] while the question raised by the state-border argument is about the rights of defendants facing a class action. To some, the distinction between plaintiffs and defendants in this context is the whole ball game.[107]

This argument again gets some things right and some wrong. To start with, it is right to find this distinction meaningful. *Shutts* reasoned that due process generally requires stronger protection for defendants than it does for plaintiffs because defendants usually have more at stake.[108] Plaintiffs typically consent to jurisdiction, and the safeguards required by *Shutts*—notice and a chance to opt out—in some ways mimic that consent for absent plaintiffs in the class context.[109] This reasoning does not obviously extend to permit jurisdiction over a nonconsenting defendant, and the mechanism that *Shutts* provides for protecting absent plaintiffs' claims has nothing to do with the due process rights of defendants.[110] So there is a meaningful distinction between plaintiffs and defendants in this context.

But the argument goes too far by positing that the switched focus of the personal jurisdiction inquiry from the rights of absentee plaintiffs to the rights of defendants is, alone, enough to conclude that the minimum contacts test applies to absent class members and that *BMS* therefore prohibits the exercise of jurisdiction over those absent class members in many class actions. The argument thus assumes the premise that it must prove: that the rules of personal jurisdiction, and in particular the minimum contacts test, apply with respect to defendants the same way in group representative litigation as in normal litigation. This argument—that we know that *BMS* applies to render jurisdiction impermissible in the model class action because that is what the minimum contacts test indicates should happen—is, at best, a tautology.

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106. 472 U.S. 797, 807–08 (1985).

107. *See, e.g.*, Defendants' Reply in Support of Motion to Strike Plaintiffs' Class Definition Asserting Claims on Behalf of Non-Ill.-Residents at 10, *Am.'s Health & Res. Ctr., Ltd. v. Alcon Lab'ys, Inc.*, No. 16-cv-4539, 2018 WL 8667925, at *10 (N.D. Ill. May 17, 2018); *see also* Prac. Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840, 862 (N.D. Ill. 2018) ("Here, by contrast, defendants are asserting an improper exercise of personal jurisdiction over them with respect to nonresident class members' claims. *Shutts* does not speak to this argument.").

108. *Shutts*, 472 U.S. at 806–12.

109. *Id.* at 812–13. *Shutts* has long been criticized for creating a veneer of consent in the absence of actual consent. *See, e.g.*, Miller & Crump, *supra* note 104, at 17; Wood, *supra* note 31, at 620 ("The *Shutts* consent finesse, whereby consent can be inferred from a failure to opt out, does violence to the general theory of consent."). To the extent *Shutts* must be read as changing the rights of absent class members rather than merely creating a specific mechanism by which they may consent to jurisdiction, that supports the conclusion that the content of due process rights may be altered by the context of representative litigation. *See supra* note 104.

110. *See* Defendants' Reply in Support of Motion to Strike Plaintiffs' Class Definition Asserting Claims on Behalf of Non-Ill.-Residents, *supra* note 107.

Instead, it is only possible to draw a milder conclusion: that *Shutts* does not speak definitively either way as to what due process requires with respect to defendants' rights, because its exceptions to the norms of minimum contacts for absent class members did not explicitly include a consideration of the minimum contacts test when defendants' due process rights are invoked. But it is a significant step from there to argue that when defendants' due process rights *are* invoked the minimum contacts test applies as usual. The remainder of this Article argues that such a step is not warranted.[111]

As this part has demonstrated, the question of class actions' boundaries cannot be answered simply by invoking the Constitution's authority over the federal rules or by the acknowledgment that it is defendants' rights that are at issue rather than plaintiffs' rights. Instead, something more is needed—an account of the way that a defendant's due process rights should be viewed in light of the traditional exceptions accorded to representative litigation. The following sections build that account. They follow the lead of *Hansberry* and *Shutts*, examining both the unique traditions and goals of representative litigation as well as the constitutional concerns underlying the state-border argument. Only by evaluating the jurisdictional question at this level—the level of the foundational constitutional concerns of personal jurisdiction doctrine—is it possible to avoid starting from the assumption that due process for defendants in a class action requires applying the same test with respect to the claims of unnamed class members as the one that applies to the claims of named parties.

III. REPRESENTATION AND TERRITORIAL POWER

A core distinction of class litigation is that it is representative litigation. Representation allows one person to stand in court on behalf of another or a group of others. Representative litigation carries with it both advantages and risks; the doctrinal history of representative litigation is full of cases in which courts attempt to balance these advantages and risks. This effort to take advantage of representative litigation's benefits while limiting its costs is the balancing act displayed in cases like *Hansberry*, *Shutts*, and others, which have facilitated class actions while respecting fundamental constitutional values.

When it comes to the question of class actions' boundaries, then, a key question is whether the fact that class actions are representative litigation makes a difference to the personal jurisdiction inquiry. Many courts that have rejected the state-border argument have done so on the grounds that unnamed class members are different from normal litigants in some way—a justification that implicitly or explicitly relies on representation, given that the main difference between unnamed class members and named litigants is the fact that unnamed class members are represented by a class

111. *See infra* Parts III, IV; *see also infra* notes 195–96 (discussing historical instances where representative litigation created exceptions to usual litigation rules even where defendants' interests were invoked).

representative.[112] As for those who favor the state-border argument, some have explicitly rejected the notion that absent class members are meaningfully different from named plaintiffs,[113] while others have not addressed this potential distinguishing feature of class actions.[114]

This part examines the nature of representation, arguing that traditional understandings of representative litigation support the rejection of the state-border argument. The part begins by discussing the exceptions to business-as-usual afforded by representation in general, and then examines the treatment of absent class members in particular.

The part makes two main arguments. The first looks outside the realm of personal jurisdiction to make an analogy regarding the treatment of absent class members. The treatment of absent class members when it comes to issues other than personal jurisdiction suggests that, when it comes to personal jurisdiction, it would be more consistent to apply the minimum contacts test only to the claims of class representatives. Courts have often been asked in other contexts, such as subject matter jurisdiction or venue, to determine whether a group of plaintiffs can invoke a court's power. And when they have evaluated those questions, courts tend to apply the relevant doctrinal tests to the claims of the named plaintiffs without treating unnamed

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112. Wilf-Townsend, *supra* note 17, at 215–19. These justifications have not always been particularly deep—a court may note, for instance, that unnamed class members have been treated as normal litigants for some purposes but not for others, and not explain in any depth why the minimum contacts inquiry should fall on one side of the line or the other. *See, e.g.*, Fabricant v. Fast Advance Funding, LLC, No. 17-cv-05753, 2018 WL 6920667, at *5 (C.D. Cal. Apr. 26, 2018); Feller v. Transamerica Life Ins. Co., No. 16-cv-01378, 2017 WL 6496803, at *17 (C.D. Cal. Dec. 11, 2017); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-cv-00564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017).

113. *See, e.g.*, Mussat v. IQVIA, Inc., No. 17 C 8841, 2018 WL 5311903, at *5 (N.D. Ill. Oct. 26, 2018), *rev'd and remanded*, 953 F.3d 441 (7th Cir. 2020).

114. *See generally* Spencer, *supra* note 14. Professor Spencer's essay is one of the most thorough post-*BMS* discussions of how courts should treat the claims of unnamed class members. But his discussion does not consider the possibility that claims adjudicated via representation should be treated differently for jurisdictional purposes than claims added to a case through other mechanisms, such as the joinder of additional named parties. The essay does discuss cases such as *Devlin* and *Ben-Hur* to establish that "[n]o Supreme Court case regards absent class members as parties joined in the action filed by a *putative* class representative." *Id.* at 38 (emphasis added). But it then goes on to consider the claims of absent class members in a *certified* class action largely by assuming that the same jurisdictional analysis applies to those claims as would apply to the claims of named parties. *Id.* at 39–51. For instance, Spencer argues that the territorial limits imposed on federal courts by Rule 4(k) should be applied to unnamed class members, but relies entirely on analogies to the rules governing the addition of new named parties to an action or the addition of new claims brought by an existing named party. *Id.* at 43–44. Similarly, after noting that the Supreme Court's decision in *Shutts* demonstrates that due process puts a "limit on the ability of a court to render a binding judgment with respect to the claims of absent class members," *id.* at 40, Spencer invokes the same due process rules, i.e. the minimum contacts test, as those that exist in nonrepresentative litigation. *Id.* at 47–48 (citing *World-Wide Volkswagen* and *BMS*). But, as discussed above, *Shutts* and other cases such as *Hansberry* suggest that the scope of a person's due process rights may be different in representative litigation than in traditional litigation. *See supra* Part II (discussing *Shutts* and *Hansberry*). And this may be true for defendants as well as for unnamed plaintiff class members. *See id.*; *see also infra* Part III.C (discussing the historical analogy to defendants' invocation of the necessary party rule).

plaintiffs as parties. Such a principle suggests that when it comes to questions of personal jurisdiction, courts should likewise look to the named plaintiff or plaintiffs as the relevant party and not to unnamed class members.

The second argument looks to the question of territorial limits on courts' power in particular. Although no historical case or practice squarely resolves the question of whether the minimum contacts test should apply to absent class members, class actions and their precursors have for centuries allowed courts to adjudicate disputes involving far-flung individuals who reside beyond the courts' geographic power or whose whereabouts are entirely unknown. This geographic exceptionalism has long been a part of the tradition of class litigation and its precursors, and at times has been explicitly embraced as an advantage of group representative litigation. Such a tradition supports the analogy courts have drawn between personal jurisdiction and other areas in which only named parties, and not absent class members, must satisfy normal procedural requirements.

A. Class Actions as Representative Litigation

Class actions are a form of representative litigation, a category of litigation in which a named representative appears in court on behalf of one or more other people or entities.[115] Several other types of common litigation are routinely brought through the use of representatives, including executors of estates, trustees of trusts, guardians of children, shareholders of companies, and bailees of property.[116] As with class actions, the Federal Rules of Civil Procedure explicitly allow cases to be brought by these types of representatives "without joining the person" who is being represented.[117] And when courts issue judgments in these cases, they typically bind the represented entity even though that person or corporation was not formally present in court.[118]

Although representative litigation is common, it departs from some fundamental norms in the Anglo-American legal tradition. Legal rulings are not legislation; part of what it normally means for a court to be engaging in adjudication is that its judgments bind only those who are before it and who have had a chance at their day in court to present evidence and argument in their favor.[119] The underlying right to a day in court is bound up in both

115. *See, e.g.*, Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 577 (2011) (noting that representation "forms the cornerstone of the modern class action and also supports some forms of nonparty preclusion in nonclass suits"); Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1013 (2002).

116. *See* Lilly, *supra* note 115, at 1019; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 41 (AM. L. INST. 1982) (noting that "the problems of representation by trustees, executors, guardians and other conventional fiduciaries are integrated with those in class suit representation").

117. FED. R. CIV. P. 17(a)(1).

118. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 41 (AM. L. INST. 1982).

119. *See, e.g.*, 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4449 (3d ed. 2018) (describing "[o]ur deep-rooted historic tradition that

procedural due process rights and property rights, as a person's legal claim is often regarded as a form of property that a court cannot dispose of without adjudicatory process.[120] But represented parties can be bound by judgments even when they were not present in court, when they have not had notice of the suit, or when they are beyond reach of court process.[121]

The departures of representative litigation are justified by a variety of benefits that such litigation brings. Allowing representatives to act in a way that legally binds represented parties allows, for instance, for the creation of legal mechanisms that can preserve or dispose of interests across both time and space and separate a legal actor from the beneficiary of a legal action. Among other things, these mechanisms allow courts and the law to safeguard and manage the interests of people who cannot look after their own interests because of age or incapacity, whose whereabouts may be unknown, who have not yet been born, or who have died.[122] It allows for the creation of complex and flexible legal and commercial institutions and arrangements.[123] And it allows for the resolution of claims too numerous to be joined together or of claims whose low value would prevent them from being pursued on their own.[124]

Representative litigation bolsters these benefits with safeguards designed to protect the interests of the persons being represented. These safeguards generally take the form of heightened duties or rules permitting courts to supervise the representative's actions. For instance, the fiduciary obligations of trustees require them generally to act in the interests of the parties that they are representing when they appear on their behalf in court.[125] And in class actions, the multifaceted requirement of adequate representation places heightened duties on the class representatives and their counsel and also empowers courts to take a greater role in supervising class litigation.[126]

Representative litigation thus shares a common structure and overlapping justifications across a diverse set of legal contexts. In representative litigation, additional burdens are placed on a litigant—the representative—in order to permit exceptions to usual rules that limit judicial power in the name of individual rights. Representation thus, by its nature, expands court power by changing the scope of individual rights. This tool is justified with respect

everyone should have his own day in court" and noting that the "presumption that nonparties are not bound by a judgment . . . draws from the due process right to be heard").

120. *Id.*; *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs.").

121. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. f (AM. L. INST. 1982).

122. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 1 intro. note (AM. L. INST. 2003); *see also infra* notes 127–28 and accompanying text.

123. RESTATEMENT (THIRD) OF TRUSTS § 1 intro. note (AM. L. INST. 2003) (noting that "[a]mong the most important characteristics of the trust device is its flexibility" and describing the flexibility that arises from the separation of beneficiaries and trustees).

124. *See infra* Part II.C.

125. RESTATEMENT (THIRD) OF TRUSTS § 70 (AM. L. INST. 2007).

126. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32 (1940); *see also* Lilly, *supra* note 115, at 1021–36 (describing the legal tests and court practices designed to ensure that class representatives act to further the interests of absent class members).

to the goals of the particular doctrinal area at hand, whether it be trust law's goals of permitting the flexible allocation of beneficial interests in property, guardianship law's goals of promoting the interests of people who do not have the capacity to represent themselves,[127] or corporate law's goals of permitting shareholders to represent the interests of a corporation against directors that may have engaged in self-dealing.[128] As the next two sections will argue, this general structure of representative litigation creates a basis for rejecting the state-border argument and allowing multistate class litigation to proceed based on the relationship between the forum, defendant, and class representatives alone.

B. The Treatment of Absent Class Members in Other Contexts

To date, class actions' status as representative litigation has been a significant basis for rejecting the state-border argument in litigation. Courts that have declined to adopt the argument have relied, either explicitly or implicitly, on the mechanics of representative litigation to conclude that absent class members should be treated differently from normal parties when it comes to establishing personal jurisdiction over a defendant.[129] These holdings have drawn on exceptions to usual procedural requirements that have been made for absent class members in other contexts, with courts reasoning that this precedent militates in favor of excepting absent class members from the usual minimum contacts requirements of personal jurisdiction doctrine as well.[130]

As these courts note, absent class members have been treated differently from normal parties—and excepted from the usual requirements of litigation—in a variety of contexts.[131] For purposes of subject matter jurisdiction, for instance, before Congress mandated otherwise in the Class Action Fairness Act[132] (CAFA), absent class members' citizenship was not considered when assessing whether a federal court had diversity jurisdiction—and, indeed, the citizenship of absent class members did not

127. *See, e.g.*, Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 587 (2016) (describing common trends in guardianship law across a varied legal landscape).

128. *See, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549 (1949) ("[A] stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated."); Kamen v. Kemper Fin. Servs., 500 U.S. 90, 95 (1991) (describing the purposes of derivative actions).

129. *See, e.g.*, Mussat v. IQVIA, Inc., 953 F.3d 441, 447–48 (7th Cir. 2020) (explicitly discussing the nature of class actions as representative litigation and declining to apply *BMS* to the claims of absent class members); Al Haj v. Pfizer, Inc., 338 F. Supp. 3d 815, 819–21 (N.D. Ill. 2018) (discussing case law treating absent class members as nonparties and invoking the safeguards of adequate representation to explain that those class members "are not parties for the purpose of constitutional and statutory doctrines governing whether a court has power to adjudicate their claims").

130. *Mussat*, 953 F.3d at 447–48; *Al Haj*, 338 F. Supp. 3d at 819–21.

131. *Mussat*, 953 F.3d at 447–48; *Al Haj*, 338 F. Supp. 3d at 819–21.

132. Class Action Fairness Act § 4(a), 28 U.S.C. § 1332(d).

even need to be known when establishing jurisdiction over the named plaintiffs and the class as a whole.[133] This treatment of absent class members is particularly notable given the constitutional requirement that federal district courts must have a statutory basis to exercise jurisdiction in any case, and the Supreme Court's self-declared practice of reading the general federal statute authorizing diversity jurisdiction narrowly to require complete diversity of parties.[134]

A number of other procedural rules also carve out exceptions in the class context. Absent class members are not considered for purposes of determining whether venue is proper.[135] And although there is some debate on the issue among the federal circuits, the "vast majority" of courts treat the Article III standing inquiry as focused on the class representative and not requiring a showing that the elements of standing are met with respect to the claims of every unnamed class member.[136] This logic turns on the named plaintiffs' status as the class members' representative: The Article III inquiry into the named representative's standing ensures that there is a live case or controversy, and then the question becomes whether the absent class members' interests are sufficiently similar to the named party's interests for the named party to adequately represent the absent class members in court.[137]

Taken together, these examples militate against the state-border argument. These exceptions arise in the context of doctrines that govern how to determine whether and which courts have power to hear a particular case—subject matter jurisdiction, Article III standing, and venue.[138] They involve

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133. Devlin v. Scardelletti, 536 U.S. 1, 10 (2002) ("[C]onsidering all class members for [citizenship] purposes would destroy diversity in almost all class actions. Nonnamed class members are, therefore, not parties in that respect.").

134. *See* Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 552–54 (2005) (discussing 28 U.S.C. § 1332 and noting that the complete diversity requirement is not compelled by that statute's "plain text" or the Constitution). The relevance of the complete diversity requirement to class litigation has dwindled in recent years due to CAFA's provision that allows for class actions with only minimal diversity. *See* 28 U.S.C. § 1332(d).

135. 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1757 (4th ed. 2021) ("The general rule is that only the residence of the named parties is relevant for determining whether venue is proper.").

136. *See* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 2:3 (5th ed. 2021); Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 367 (3d Cir. 2015) ("Quite simply, requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23."). *But see* Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383, 387–91 (2014) (noting a split among the federal courts of appeals on the issue and arguing that federal courts should be required to determine that absent class members have standing before certifying a class); Marcus & Ostrander, *supra* note 26, at 1534–41 (discussing confusion and disagreement among different courts' approaches).

137. "Representative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation." 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1785.1 (3d ed. 2018) (collecting cases).

138. *See* Al Haj v. Pfizer, Inc., 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018) ("Personal jurisdiction shares a key feature with those other doctrines: each governs a court's ability,

constitutional requirements or implicate constitutional concerns. And courts answer the question of how these doctrines apply to class actions by looking to the features of the named representatives' claims and excluding consideration of the claims of the unnamed class members.

In contrast, in the contexts in which absent class members' claims are directly considered and those class members are treated more like parties, the question is not whether the representative alone is able to invoke the court's power on behalf of the class. Absent class members are treated more like parties in that they are allowed to appeal the approval of a class settlement without intervening; they are also treated more like parties in that the statute of limitations on their claims is tolled by the filing of the class action.[139] These rules are justified by the need to preserve unnamed class members' ability to defend their own interests, and to preserve the benefits of class litigation by avoiding scenarios in which absent class members are often required to intervene in pending class litigation.[140]

This general breakdown is, admittedly, imperfect. In particular, when it comes to mootness—a doctrine that relates to a court's power to hear a case—there is an important exception for class actions that does require courts to examine the claims of unnamed class members. Where a named representative's claims become moot, if the claims of unnamed class members are not themselves mooted, the named representative can continue the case.[141] As David Marcus and Will Ostrander point out, there is therefore some tension between existing mootness doctrine in class actions, which finds the claims of unnamed members to be juridically relevant, and the argument that these claims should not be relevant when it comes to personal jurisdiction.[142]

But this disanalogy does not spoil the usefulness of the other doctrinal examples that were just described. First, the cases establishing the mootness exception for class actions do not impose additional obligations or tests on the absent class members; instead, they are designed to excuse a failing by the named representative, so long as the named representative still satisfies the requirements of adequate representation. For instance, the mootness cases do not amount to a holding that *all* absent class members must have non-moot claims; to the contrary, the Court's original discussion of the mootness exception specifies that the case can go on as long as there is a live controversy "between a named defendant and *a* member of the class," not *every* member of the class.[143] Second, the mootness exception is fundamentally driven by an assessment of the goals and policies underlying the class device and the doctrines of mootness, a functionalist approach that

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constitutional or statutory, to adjudicate a particular person's or entity's claim against a particular defendant.").

139. Devlin v. Scardelletti, 536 U.S. 1, 9–10 (2002).

140. *Id.* at 9–11.

141. *See* Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 75 (2013); *see also* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980).

142. *See* Marcus & Ostrander, *supra* note 26, at 1531–44.

143. Sosna v. Iowa, 419 U.S. 393, 402 (1975) (emphasis added).

can work just as well in the context of personal jurisdiction as in subject matter jurisdiction. As Marcus and Ostrander argue, such a functionalist approach can take seriously the fundamental concerns of doctrine while allowing for different perspectives on absent class members in different contexts.[144]

But the fact that the treatment of absent class members may vary from context to context, and that those differing contexts may implicate different doctrinal concerns, reinforces the conclusion that answering the state-border question will require examining courts' territorial power in particular, rather than simply analogizing to other areas of law. Although personal jurisdiction doctrine is also, broadly speaking, about whether courts have power to hear particular cases, there are specific concerns at play in personal jurisdiction cases that are not the same as those at play in cases about subject matter jurisdiction or venue. Personal jurisdiction doctrine focuses on the territorial nature of courts' power, not just their power over certain subject matters. And personal jurisdiction doctrine is also concerned not just with courts' power in the abstract but also with defendants' rights to be free from arbitrary authority. The next section therefore examines historical interactions between representation and courts' territorial power. After that, Part IV focuses on the state-border question from the perspective of defendants' due process rights.

C. The Geographic Exceptionalism of Group Representative Litigation

The relaxation of normal adjudicative requirements in the context of group litigation is well-documented and much-discussed.[145] But there is no case, or set of cases, that squarely outlines the nature and limits of representation when it comes to courts' territorial power. And certainly no case before the last few years considers in depth the state-border question—whether absent class members' contacts with a forum state must be considered when determining whether that forum has jurisdiction over the defendant with respect to the entirety of a multistate class action.[146]

But there have been moments throughout the development of class litigation that provide some insight into the relationship between representation and territorial boundaries. Class actions and other forms of group representative litigation have historically been understood to permit the adjudication of absentees' claims based on the presence of an adequate representative, without regard to where those absentees may be and whether

144. *See* Marcus & Ostrander, *supra* note 26, at 1545–46.

145. *See, e.g.*, STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990); Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 26 (1982); Steven T.O. Cottreau, Note, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480, 482 (1998); Hazard et al., *supra* note 93; Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 718 (2005).

146. *See* Wolff, *supra* note 145, at 719 (noting a lack "of any serious engagement with" the issue in courts before *BMS*).

their claims would ordinarily fall within the court's territory. At times, this form of doctrinal empowerment has been very explicit—courts have specifically adopted the representative device because of its ability to extend their territorial power.[147] While this tradition may not, as a doctrinal matter, provide a definite answer to the state-border question, it supports an understanding of representation as a tool that expands courts' territorial reach beyond what it would otherwise be.

1. The Early Precursors to Class Actions

The early precursors to class litigation in the United States can be found in the nineteenth century, when courts sitting in equity began applying a version of equitable group litigation that had originally arisen in England.[148] Centuries earlier, in medieval England, litigation in which a few representatives stood in for a larger group had been relatively common and was not thought of as unusual or exceptional.[149] But by the late seventeenth century, it was no longer seen as run-of-the-mill to have a few individuals purport to represent a group in court.[150] Instead, this arrangement came to be seen as a special and unusual form of litigation that required its own justification.[151]

In the United States, that justification was developed in large part by Justice Joseph Story, both as an author of case law and as an author of treatises.[152] A common structure to Justice Story's justifications was to point to the dilemmas that courts face when attempting to resolve a dispute involving a large but indeterminate or difficult-to-find group of people that is owed money by a common defendant.[153] A dilemma existed, Story noted, because "if the Court were compelled to wait" until "all of [the potential claimants] were technically parties before the Court," the challenge "would be almost insuperable" in many cases.[154] Creditors may be "out of the country" and hence outside the court's jurisdiction, or they might be "unascertained," or the status of the debt dependent on future events.[155] In many situations, such as those involving a common fund of money, a single creditor would not be permitted to sue for only their single demand without

147. *See infra* notes 176–77 and accompanying text; *see also infra* notes 156–57 and accompanying text.

148. *See, e.g.*, Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 460–61; YEAZELL, *supra* note 145, at 277.

149. YEAZELL, *supra* note 145, at 285–90.

150. *Id.* (describing such groups as "litigative anomalies").

151. *Id.*

152. *See, e.g.*, Wood Hutchinson, *supra* note 148, at 460–61 (discussing the link between *West v. Randall* and the modern class action); YEAZELL, *supra* note 145, at 277.

153. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA §§ 98–99, 111 (2d ed. 1840).

154. *Id.* § 103.

155. *Id.*

bringing other creditors in, because of the "injustice in deciding upon the extent of their rights and interests in their absence."[156]

But permitting a creditor or creditors to sue on behalf of all those similarly situated would allow the court to resolve legal issues common to all the creditors and also to create mechanisms to protect the interests of absent creditors. In these cases, the absent parties were not merely invoked symbolically or to facilitate the interests of the named parties. To the contrary, "the rights and interests of the absent party" were, in at least some sense, "before the Court."[157] Story thus tied the benefits of representative group litigation explicitly to the ability of courts to adjudicate the rights of individuals who may be outside their jurisdiction.[158]

The equitable principles in Story's treatises were first applied to a major class action by the U.S. Supreme Court in the pre–Civil War case *Smith v. Swormstedt*.[159] In *Swormstedt*, disparate groups of preachers of the Methodist Episcopal Church, which had fragmented as part of the nationwide conflict over slavery, sought money from a large fund that had been owned by the previously unified church.[160] The Court allowed the suit to proceed

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156. *Id.*

157. *Id.* § 96; *see also id.* § 99 ("But when the Bill is brought on behalf of themselves, and all others, all creditors are, in a sense, deemed to be before the Court.").

158. It is important to note the distinction between adjudicating the rights of absent individuals and binding those individuals via res judicata. Representative group litigation took a variety of forms, some of which did not always bind absent individuals via preclusion. *See, e.g.*, Bone, *supra* note 145, at 231, 233 (noting that representative suits "need not (although they can) involve binding nonparties in the strong res judicata sense" and that some early representative suits "had different binding effects on nonparticipating absentees"). It is difficult to construct an accurate and systematic account of when and why different binding effects would be present, as there are inconsistencies in the case law persisting across centuries. *See generally* Hazard et al., *supra* note 93. But even where a decree in representative litigation would not bind absent parties as a matter of res judicata, the use of the class device and its predecessors still allowed courts to escape meaningful limitations on their power over absent parties. To begin with, under the highly formal rules of equity, courts treated absent parties' legal rights as if they "had an existence and an inherent content independent of real world consequences." Bone, *supra* note 145, at 247 n.78. Courts were thus prohibited in general from acting in a way that adjudicated these rights of these absent parties, even if the ultimate result would not bind those parties. *Id.* at 243–44. But representative litigation freed them to adjudicate those rights by permitting decrees that could be comprehensive as to the rights and duties of everyone represented, even absentees. *Id.* Additionally, even in the absence of preclusive effects on the substance of absent members' claims, representative litigation also could have the effect of binding absent members to certain procedures, such as a prohibition on new actions at law and a requirement to prove claims before a master. *See* Hazard et al., *supra* note 93, at 1869–72 (describing how representative litigation in the creditor and legatee context could force absent members to subsequently observe certain legal procedures even if they would not be bound by the initial action as a matter of res judicata). And absent individuals seeking proceeds from a joint fund might not be able to challenge the representative litigation's decree as to the amount of the fund or the proportion to which other individuals were entitled. Bone, *supra* note 145, at 267–68 n.130. In this way, even in the absence of formal claim preclusion, representative suits could still have significant binding effects on absent individuals.

159. 57 U.S. 288 (1853).

160. *Id.* at 289–300. The *Swormstedt* Court goes out of its way to ignore the role of the underlying issue of slavery in the church's split, mentioning it only as a "cause[] which [] is not important particularly to refer to." *Id.* at 304.

despite the fact that many interested plaintiffs and defendants were scattered throughout the country and remained unjoined, invoking Justice Story's treatise on equity pleadings and holding that the absent parties could be represented by the present ones.[161]

Although *Swormstedt* does not discuss this mechanism in terms of the territorial limits on courts' authority, the surrounding legal context indicates that *Swormstedt*'s approval of a nationwide class action was at least an implicit adoption of a kind of geographic exceptionalism. *Swormstedt* upheld the exercise of jurisdiction by a nationwide plaintiff class over a nationwide defendant class on the basis of representatives of each class who were before the court.[162] But in 1853, the jurisdiction of the lower federal courts was understood to be confined to the territory of the state in which the court sat.[163] As Justice Story himself wrote, Congress's structuring of federal courts within state boundaries suggested such a restriction, as there was understood to be a "general principle, that a court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory."[164] Although Congress had the power to extend the reach of federal courts beyond state lines, it had not done so—the first nationwide service of process provision was enacted in 1873.[165]

In the face of the then-accepted territorial limits on courts' authority, *Swormstedt* thus represents an affirmation by the Supreme Court, at least implicitly, that class actions enabled courts to resolve the claims of individuals who not only had not been served with process but also could not be served with process because they were outside the court's territorial jurisdiction. And that geographic exceptionalism in *Swormstedt* extended with respect to both plaintiffs and defendants, allowing for the claims of plaintiffs who were both named and unnamed, inside and outside the court's territorial jurisdiction, to be resolved against defendants who were likewise both inside and outside the court's territorial jurisdiction.[166]

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161. *Id.* at 299–303.

162. *Id.* at 303.

163. *See* Picquet v. Swan, 19 F. Cas. 609, 611 (C.C.D. Mass 1828) (No. 11,134); *Ex parte* Graham, 10 F. Cas. 911, 912 (C.C.E.D. Pa. 1818) (No. 5657); *see also* Note, *Jurisdiction of Federal District Courts over Foreign Corporations*, 69 HARV. L. REV. 508, 509–10 (1956) (discussing the history of federal courts' territorial limitations); Patrick Woolley, *Rediscovering the Limited Role of the Federal Rules in Regulating Personal Jurisdiction*, 56 HOUS. L. REV. 565, 570–73 (2019).

164. *Picquet*, 19 F. Cas. at 611.

165. Woolley, *supra* note 163, at 574 n.28.

166. *Swormstedt* was brought in the U.S. Circuit Court for the District of Ohio, which was the home jurisdiction of the Methodist Book Concern, the fund of money that was at issue in the case and therefore a key defendant. Speaking in the anachronistic terms of *International Shoe*, the court can therefore be thought of as having general jurisdiction over the Methodist Book Concern. But it cannot be thought of as having general jurisdiction over the many other parties whose rights and interests were adjudicated in the case. The Methodist Episcopal Church was unincorporated, with its constitutive groups, officials, and members spread throughout the country. *Swormstedt*, 57 U.S. at 298–302. For a critique of the potential argument that *Swormstedt* can be viewed as an instance of in rem jurisdiction, see the discussion *infra* note 173 and accompanying text. Instead, the jurisdiction asserted over these

2. The Transition to the Modern Class Action

In between the earliest days of *Swormstedt* and the development of the modern class action, two types of cases—insurance fund cases and labor organization suits—stand out for their emphasis on aggregate litigation's ability to extend courts' powers beyond their borders. Insurance fund cases, arising frequently in the late-nineteenth and early-twentieth centuries, involved voluntary associations that had formed to provide insurance to their members.[167] Class actions in state court would purport to bind all association members nationwide to some dispute, such as a dispute over how to calculate benefits or interpret a contract term.[168] Then a new dispute would form between the association and some out-of-state member regarding whether that earlier class action had a binding effect on the out-of-state member.[169] If the rule of *Pennoyer* applied, many absent class members would arguably have a constitutional right not to be bound: they were not present in the state that had first addressed the issue and were not served process.

But a string of cases made clear that these sorts of class actions created an exception to the geographic constraints of *Pennoyer*, decades before *International Shoe* would abandon *Pennoyer*'s rule completely. The earliest cases at the U.S. Supreme Court, *Hartford Life Insurance Co. v. Ibs*[170] and *Supreme Tribe of Ben Hur v. Cauble*,[171] held that the out-of-state members were bound, and justified their holdings through the logic of representation: Because class representatives stood in for the interests of all policyholders, all policyholders could be bound, even if jurisdiction over them would have been impermissible in an individual suit.[172] The insurance fund cases thus represent a continuation and elaboration of the geographic exceptionalism that began with Justice Story and *Swormstedt*, in which the mechanism of representation allows a court to make binding judgments that reach beyond the territorial limitations that would otherwise apply.[173]

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various other parties would be most analogous to specific jurisdiction, based on the existence of the Methodist Book Concern and its connection to the claims at issue in the case.

167. *See, e.g.*, Hazard et al., *supra* note 93, at 1926–37 (discussing several mutual-benefit organization cases to make it to the Supreme Court and describing "a flood of such suits against various fraternal benefit associations").

168. *See, e.g.*, Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 665–66 (1915).

169. *Id.*

170. 237 U.S. 662 (1915).

171. 255 U.S. 356 (1921).

172. *See id.* at 367; *Hartford Life Ins. Co.*, 237 U.S. at 672.

173. Perhaps because of the emphasis in *Cauble* and *Ibs* on the need for states to be able to control entities within their borders, some have explained the insurance fund cases as justified by in rem jurisdiction, saying that the state courts were permitted to exercise their authority and bind those outside its jurisdiction because they had territorial power over the particular property involved—the fund or the corporate entity that controlled the fund. *See, e.g.*, Grimes v. Vitalink Commc'ns Corp., 17 F.3d 1553, 1568 (3d Cir. 1994) (Hutchinson, J., dissenting); Deborah Deitsch-Perez, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions Under Rule 23*, 49 BROOK. L. REV. 517, 539–40 (1983). But this explanation is essentially a post hoc rationalization. The class actions underlying the cases were not denominated as actions in rem but instead were in personam actions based on contractual rights. *See* Dresser v. Hartford Life Ins. Co., 70 A. 39, 46 (Conn.

Over the next few decades, another category of cases—lawsuits against unincorporated labor organizations—continued to illustrate the territorial power of representative litigation.[174] Suing a union could be difficult or impossible in some circumstances without using the class device to get around state boundaries. Some states' laws did not permit suing an unincorporated organization as an entity.[175] Suing the unions' members or leadership, meanwhile, could be difficult because many of them might reside outside the court's territory and have little or no connection to the forum state (particularly if the union was a national organization).[176] But if personal jurisdiction could be obtained over one or a few adequate representatives, a class could be certified that encompassed the entire organization via representation, enabling individuals to effectively sue the union.[177] This enabled suits like the one in *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*,[178] in which a group of Black workers sued a union for refusing to admit Black members.[179]

Federal courts explicitly noted the value of this mechanism where "it is not possible for the plaintiff to serve process on [an] association within a convenient jurisdiction."[180] In this way, the geographic flexibility of class litigation—allowing courts to hear important disputes involving far-flung parties—was a specific feature deployed to manage, in Judge John Minor Wisdom's words, "[t]he dead hand of the common law" that, if "carried to its logical extreme," would give "virtual immunity" to unincorporated associations.[181] As with the insurance fund cases, class actions' geographic flexibility allowed courts to advance goals not only of efficiency and efficacy but also of accountability and law enforcement—permitting the substantive law to reach entities that might not otherwise be accountable in court. The time period leading up to the emergence of the modern class action thus suggests that the geographic exceptionalism of representative litigation was alive and well.

1908); *see also* Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1067 (1954) ("[T]he class action [in *Ibs*] was not a proceeding in rem with the res before the state court; the fund was relevant only in determining rights in personam based on a contract."). The class action whose binding effect on out-of-state absent members was affirmed in *Ibs*, for instance, was brought not as an in rem action but with the traditional invocation of a suit brought on behalf of "all other similarly situated" holders of certificates in the insurance company's policy. *See Dresser*, 70 A. at 46. Neither that case nor *Ibs* itself even referred to in rem jurisdiction, despite the fact that if in rem jurisdiction were available, it would have neatly resolved the whole dispute, which centered on whether the exercise of jurisdiction had been permissible.

174. *See* Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 148 F.2d 403, 404–05 (4th Cir. 1945) (collecting cases).

175. *See, e.g.*, Montgomery Ward & Co. v. Langer, 168 F.2d 182, 186–87 (8th Cir. 1948) (discussing Missouri law).

176. *See, e.g.*, Calagaz v. Calhoon, 309 F.2d 248, 255–56 (5th Cir. 1962) (Wisdom, J.).

177. *See Tunstall*, 148 F.2d at 405; *Calagaz*, 309 F.2d at 259; *Langer*, 168 F.2d at 187–88.

178. 148 F.2d 403 (4th Cir. 1945).

179. *Id.* at 404.

180. *Id.* at 405; *see also Calagaz*, 309 F.2d at 252 (quoting *Tunstall*, 148 F.2d at 405).

181. *Calagaz*, 309 F.2d at 251–52.

3. The Modern Class Action

The modern class action began in 1966, when Rule 23 underwent significant amendments and emerged in a form close to what it is today.[182] For many, the modern form of the class action enabled by this rule and its state court analogues brought with it the geographic exceptionalism of the past without incident. Federal courts, for instance, continued to exercise jurisdiction over class members outside state boundaries, just as they had in the insurance fund cases or labor organization cases described above.[183] As one federal district court put it in 1976, "there is never a question that a court entertaining a proper class action has power to adjudicate the rights of class members even if they are outside the territorial jurisdiction of the court when served with notice of the pendency of the action."[184] Other courts and commenters made similar statements.[185]

But there were some who questioned that stance, focusing on the ability of the newly established (b)(3)-style class actions to bind out-of-state members to a judgment.[186] The Supreme Court stepped in to address these issues in *Phillips Petroleum Co. v. Shutts.*[187] As discussed above, *Shutts* considered the issue from the perspective of the absent class members' rights and interests, and held that out-of-state unnamed members in a (b)(3)-style plaintiff class do not need to have minimum contacts with a forum for that forum to exercise jurisdiction over a defendant with respect to their claims.[188] But in addition to this holding, *Shutts* also addressed the horizontal

182. *See* Marcus, *supra* note 93, at 588.

183. *See id.* at 644–45 (noting that "[t]he 1985 decision in *Phillips Petroleum v. Shutts* approved a jurisdictional understanding about which, at least in the federal courts, there was 'never any question' in the 1970s").

184. Robertson v. Nat'l Basketball Ass'n, 413 F. Supp. 88, 90 (S.D.N.Y. 1976).

185. *See* Andrea R. Martin, *Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction*, 25 HASTINGS L.J. 1411, 1435 (1974) ("[W]hen a federal court is initially satisfied that the due process requirements of adequate representation and notice can be met, it may properly exercise jurisdiction over the entire class. This is true whether or not there are class members outside of the court's normal jurisdictional boundaries."); Advert. Special. Nat'l Ass'n v. FTC, 238 F.2d 108, 120 (1st Cir. 1956) ("[I]n a proper class suit the fact that all members of the class are not within the jurisdiction of the court where the suit is tried does not exempt foreign members from the judgment."). At least one state court held a similar stance. *See* English v. Holden Beach Realty Corp., 254 S.E.2d 223, 229 (N.C. Ct. App. 1979) ("The fact that some members of the class are located outside the court's jurisdiction does not prevent the institution of a class action so long as there are class members within the jurisdiction who adequately represent those outside." (citing Vann v. Hargett, 22 N.C. (2 Dev. & Bat. Eq.) 31, 36 (1838))).

186. *See* Barbara A. Winters, *Jurisdiction over Unnamed Plaintiffs in Multistate Class Actions*, 73 CALIF. L. REV. 181, 181–83 (1985); Feldman v. Bates Mfg. Co., 362 A.2d 1177, 1180 (N.J. Super. Ct. App. Div. 1976) (noting that "there are . . . cases where a state's interest in the litigation has been deemed of such magnitude that it can exercise jurisdiction over nonresident class members" but declining to exercise jurisdiction on that basis); Katz v. NVF Co., 100 A.D.2d 470, 474–75 (N.Y. App. Div. 1984) (discussing the split among courts). This Article uses "(b)(3)-style class actions" to refer to both those actions brought under Rule 23(b)(3) and those brought under analogous state procedural rules.

187. 472 U.S. 797 (1985).

188. *Id.* at 811–12.

federalism concerns that might arise in a multistate class action. *Shutts* involved a suit by a class of royalty owners who claimed that Phillips Petroleum owed them interest on royalty payments attached to oil leases.[189] The royalty owners sued in Kansas state court, but less than 3 percent of the plaintiff class members and less than 1 percent of the property involved in the suit were in Kansas.[190]

Kansas courts had decided to apply Kansas's law to the class action as a whole, but the U.S. Supreme Court rejected that approach.[191] The Court held that the Due Process Clause and Full Faith and Credit Clause prevent an "arbitrary" or "fundamentally unfair" application of state law in a given case by requiring some sort of "significant contact or significant aggregation of contacts" between the defendant and the state whose law is applied.[192] It held that the application of Kansas law to claims that were unrelated to Kansas conflicted with these limits.[193]

Shutts thus incorporated personal jurisdiction's traditional concerns over the fair treatment of defendants and the equal dignity of the states into the doctrine governing the territorial breadth that class actions had, by that time, provided to courts for generations. It showed that these concerns could be addressed not only by doctrines grounded in constitutional due process but also in the protections of horizontal federalism provided for by the Full Faith and Credit Clause. As we will see in the next section, these protections are relevant when considering the horizontal federalism implications of the state-border argument.

As noted above, the cases in this section do not establish or reject the state-border argument as a clear-cut matter of doctrinal precedent. But they do inform the underlying question of how the traditional understanding of representative litigation intersects with the question of courts' territorial power. Group representative litigation has long allowed courts to adjudicate disputes involving far-flung individuals whose location is unknown. This feature has been a self-conscious part of courts' approach to group representative litigation, having been explicitly embraced in case law and treatise for centuries. Such a history provides reason to reject the state-border argument and allow courts to hear multistate class actions like the model class.

The cases also affirm a core point discussed above in Part II—that the state-border argument does not straightforwardly follow from the fact that defendants' rights, not absent plaintiffs' rights, are at issue. To the contrary, the procedural exceptions invoked in representative litigation have applied even where the traditional rules would have benefited defendants—the exceptions, in other words, were not just used to get around barriers posed by the rights of absent plaintiffs. Objections to the validity of representative

189. *Id.* at 799.
190. *Id.* at 815–16.
191. *Id.* at 818.
192. *Id.* at 819.
193. *Id.* at 822–23.

litigation have frequently been raised by defendants seeking to defend their own interests. In *Swormstedt* and *West v. Randall*,[194] for instance, the defendants were the ones raising the objection that the bill lacked necessary parties.[195] The same was true of various old English cases cited by Justice Story in his treatise on equity pleadings.[196] From the early days of representative litigation, then, the exceptions that have been made from the rules of personal jurisdiction have created additional risks and burdens for named defendants in addition to absent parties. The exception to the necessary party rule thus provides a model for how the exception to the minimum contacts rule could work—an exception that applies across the board where there is adequate representation, regardless of whose interests are considered.

The application of the exceptions in these cases makes sense: rules requiring necessary parties to be joined protected both those absent parties' interests and also the defendant's interest in avoiding conflicting or duplicative judgments (as well as in resolving multiple claims more efficiently in one case). The benefits that justified the exception to the normal rule would be in a precarious position if they did not apply regardless of who sought to invoke the usual requirements. Similarly, as discussed in more detail below, the reasons that have historically justified class actions' geographic exceptionalism apply strongly even when a defendant's rights are at issue.

IV. THE STATE-BORDER ARGUMENT AND DEFENDANTS' DUE PROCESS RIGHTS

As discussed in Part II, answering the state-border question requires developing an account of how a defendant's due process rights operate in the context of representative litigation, a form of litigation that has at times been understood to alter the requirements of due process. Part III examined representation in the context of absent class members and territorial limitations in particular, finding that the treatment of absent class members in other contexts and the history of representation in the context of territorial limitations both militate against the state-border argument.

But representative litigation is only part of the equation. The traditions and uses of representative litigation would not be enough to justify rejecting the state-border argument on their own, if exercising jurisdiction in classes like the model class were a violation of due process. This part therefore considers the exercise of jurisdiction in the model class in light of the due process concerns that have animated personal jurisdiction doctrine since *Pennoyer*. In particular, it examines the fairness of the additional burden to the defendant of this exercise of jurisdiction and the potential horizontal

194. 29 F. Cas. 718 (C.C.D.R.I. 1820) (No. 17,424).

195. *Id.* at 721; Smith v. Swormstedt, 57 U.S. 288, 302 (1853).

196. *See* STORY, *supra* note 153, § 98 n.2; *see also* Good v. Blewitt (1807) 33 Eng. Rep. 343 (Ch.) (defendant objects for want of parties); Leigh v. Thomas (1751) 28 Eng. Rep. 201 (Ch.) (defendant files demurrer for want of parties).

federalism concerns that might arise. This part argues that applying the minimum contacts test to only the named plaintiffs' claims in a multistate class action does not run afoul of these fundamental concerns. And, going further, it argues that some of the core underlying concerns of personal jurisdiction doctrine—concerns of horizontal federalism—affirmatively counsel against adopting the state-border argument.

A. Fairness

A main concern of personal jurisdiction doctrine—perhaps "the primary concern," to use *BMS*'s recent reformulation—is the fairness of subjecting a defendant to the burdens of litigation in the forum chosen by the plaintiff.[197] This concern underlies the minimum contacts test, which examines whether a defendant's contacts with a given jurisdiction justify the burden placed on it by litigation.[198] And it backstops the rest of the jurisdictional inquiry as well: even in cases where minimum contacts exist, courts must be satisfied that, considering all the circumstances, the burden placed on the defendant does not offend traditional notions of fairness.[199]

Evaluating whether the exercise of jurisdiction is fair does not—and cannot—mean considering the burden on the defendant in a vacuum. Given that all litigation imposes some burden, the question must be whether that burden is justified by other countervailing interests. Those interests have traditionally included a mix of the plaintiff's interests and the forum's interests: "the forum State's interest in adjudicating the dispute,"[200] "the plaintiff's interest in obtaining convenient and effective relief,"[201] "the interstate judicial system's interest in obtaining the most efficient resolution of controversies,"[202] and "the shared interest of the several States in furthering fundamental substantive social policies."[203]

In multistate class actions, these interests will typically weigh strongly in favor of exercising jurisdiction. This is true even if the relevant alternative is not individual litigation but instead maintaining class actions within state boundaries. Where the standards for class certification are met, a class action will almost certainly be more efficient than proliferating cases state by state. And in some situations there may be too few class members within a state's boundaries to make litigation economically feasible, making multistate

197. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1776 (2017).

198. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980) ("The concept of minimum contacts . . . protects the defendant against the burdens of litigating in a distant or inconvenient forum."); Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310, 316–19 (1945).

199. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 113–14 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–77 (1985).

200. *World-Wide Volkswagen*, 444 U.S. at 292 (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)).

201. *Id.* (citing Kulko v. Superior Ct., 436 U.S. 84, 92 (1978)).

202. *Id.* (citing *Kulko*, 436 U.S. at 93, 98).

203. *Id.* (citing *Kulko*, 436 U.S. at 93, 98).

litigation the only realistic way to bring claims.[204] Plus, as discussed in more depth below, states have a variety of interests that weigh in favor of the exercise of jurisdiction in the model class. The values that have supported class doctrine for centuries continue to do so even when the propriety of personal jurisdiction is considered with respect to the interests of defendants rather than absent class members.

There are, of course, interests on the other side of the scale—the defendant's interests. Developing an account of how to balance these interests is difficult and, of necessity, somewhat subjective—there is no objective scale that we can use to weigh the various due process considerations. But the case law emphasizes a few distinct concerns as particularly important and, in contrast, deemphasizes what is likely the most significant concern for defendants—namely, the increased scope of liability that they would face in a larger class action. Four factors suggest that the exercise of jurisdiction in the model class is not impermissibly unfair: the marginal litigation burdens on the defendant will be low, there is not a significant foreseeability problem, personal jurisdiction doctrine can retain an "escape valve" for particularly problematic circumstances, and jurisdiction has long been permitted under the kinds of facts giving rise to the model class.

1. Low Marginal Burdens

The marginal litigation burdens on the defendant from permitting jurisdiction in the model class will be low.[205] The state-border question arises only where a defendant is already subject to personal jurisdiction in the forum with respect to the named plaintiffs' claims—because regardless of whether the state-border argument is adopted, the named representative will still be required to meet the minimum contacts test. And in all or nearly all cases, the fact that the named representative satisfies the minimum contacts test will also mean that the in-state absent class members will also satisfy the minimum contacts test.[206] As a result, the marginal burdens on the defendant of the exercise of litigation will be low: the defendant will

204. *See, e.g.*, Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 551 (2018); Steinman, *supra* note 15, at 1454–55.

205. The burdens of adding absent, out-of-state class members should be evaluated on the margin. In cases where a defendant asserts personal jurisdiction defenses against some claims and not others, the fact that the court has jurisdiction over a defendant for one claim can weigh in favor of the exercise of jurisdiction over other claims. The doctrine of pendent personal jurisdiction, for instance, allows courts to assert jurisdiction over defendants in part because the defendants face a lower marginal burden to defend against those claims than if they had been brought on their own. *See* 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069.7 (4th ed. 2021).

206. It is conceivable that a class could be defined in such a way that the claims of some small number of class members who reside in the forum state do not satisfy the minimum contacts test—for instance, if satisfying the minimum contacts test requires an in-state purchase of a particular product and some class members live in the state but purchased their product out of state. *Cf.* Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

already have to hire lawyers, arrange for the travel of witnesses and staff, and handle all of the other usual burdens that attend litigation. The only question is what the *scope* of that defense will be: will it include only claimants with minimum contacts, or will it include out-of-state unnamed class members as well?

Notably, this question is different in a class action than in, say, a mass action such as *BMS*. The constitutional requirements of adequate representation in class actions, as well as requirements in the Federal Rules such as commonality, typicality, and predominance, safeguard the defendant's interests against being unduly burdened.[207] The additional claims of out-of-state class members cannot require significantly different evidentiary presentations or legal arguments, and so the potential additional burden on the defendant from the exercise of jurisdiction over these claims is minimized.[208] Class actions, by design, are only permitted to proceed when resolving the claims of class members in one fell swoop is more efficient than addressing those claims individually—a consideration that is highly relevant to the jurisdictional calculus of the defendant's litigation burdens.

Although these litigation efficiencies are relevant to the jurisdictional inquiry, the increased liability that the defendant faces should not be part of the calculus. When a class action is increased by a significant number of people, a defendant's primary concern is not likely to be the increased cost of evidentiary presentations—it will probably be the increased potential liability that it faces. But a defendant's contacts with a forum state weigh the same for purposes of personal jurisdiction whether the liability at stake is ten dollars or ten million dollars.[209] In other words, the personal jurisdiction inquiry does not regard increased liability as an increased burden when it comes to assessing the appropriateness of jurisdiction. Although this aspect of jurisdictional doctrine may seem odd, given its incongruence with what many defendants are most likely to care about, it makes sense when one considers that the relevant inquiry is jurisdictional in nature and therefore focused on the legitimate reach of authority rather than the substantive burdens of whatever regulations that authority may be enforcing. So although, for practical purposes, a defendant's concern about the state-border question may focus on the increased scope of liability it faces with larger class actions, that concern does not sound in personal jurisdiction doctrine.

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207. Judge L. Scott Coogler used similar reasoning to conclude that *BMS* does not apply to class actions in *Jones v. Depuy Synthes Products, Inc.*, 330 F.R.D. 298, 310 (N.D. Ala. 2018).

208. There may be a slight complication where variations in state law result in the need to use subclasses or to engage in a choice-of-law inquiry that would not otherwise be necessary, as discussed below. But out-of-state class members' claims cannot vary significantly from the class representatives' claims without thwarting the availability of the class device to begin with. *See* FED. R. CIV. P. 23.

209. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 207 n.23 (1977) ("The fairness of subjecting a defendant to state-court jurisdiction does not depend on the size of the claim being litigated.").

2. No Significant Foreseeability Concern

Personal jurisdiction doctrine has long been concerned with helping potential defendants order their affairs ex ante. This concern comes up in multiple ways—part of the goal of the post–*International Shoe* doctrine is ensuring that defendants have clear notice as to where they will be subject to suit,[210] and one of the key rationales for the purposeful availment test is that a defendant who purposefully avails itself of a given forum can reasonably expect to have to answer in that forum for disputes that arise out of its forum-directed activity.[211]

This concern provides some potential grounds for the state-border argument. A defendant could accurately point out that a multistate class action would allow one state's courts to resolve claims against a defendant that arose out of activity in another state. As a result, the defendant could argue, multistate class actions prevent defendants from knowing where they will be subject to suit for their activity in any one place. If a defendant sells 20,000 widgets in Texas, for instance, claims arising from those widgets could be litigated not only in Texas but also as part of a class action in Oregon, Florida, or any other state.

This objection loses steam, however, for two reasons. First, the availability of multistate class actions does not mean that a defendant will be subject to suit in any state whatsoever. A defendant that wishes to avoid a particular forum can still avoid engaging in activity directed toward that forum—class representatives must satisfy the minimum contacts test, preventing class actions from arising where a defendant has intentionally avoided engaging in activity. Second, choice-of-law rules, which often look to the law of the state with the most significant connections to a dispute, will in many instances preserve defendants' ability to order their conduct with a reasonable degree of foreseeability as to what kind of liability they may face.[212] These choice-of-law rules are backstopped by the constitutional requirements established in *Shutts*, which prevent states from too aggressively applying their own laws across the board in class actions. If a defendant sells twenty widgets in Oregon and 20,000 in Texas, an Oregon court cannot apply Oregon law to the claims of the thousands of Texan class members.[213]

As a result, even without adopting the state-border argument, defendants still have a large degree of control over (and therefore can foresee) their potential liability. They will only be subject to suit in locations that they have purposefully availed themselves of, involving conduct that, by the nature of class litigation, will be largely the same with respect to every class member. And they will still be able to organize their ex ante conduct in a way that leaves them reasonably assured of which laws will govern their conduct, as

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210. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); *see also* Effron, *supra* note 15, at 104.

211. Effron, *supra* note 15, at 65 (describing and critiquing this rationale).

212. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. L. INST. 1971).

213. *See supra* notes 189–93 and accompanying text.

choice-of-law rules (and the Constitution) limit the ability of states to apply their own laws to unrelated out-of-forum activity.

3. The "Overall Reasonableness" Option for Declining Jurisdiction

The considerations discussed in this subsection so far have been broad and general, regarding the mine run of multistate class actions. But personal jurisdiction doctrine contains a rule that might be thought of as a useful escape valve for any situation in which the exercise of personal jurisdiction does not run afoul of any bright-line rule but nonetheless seems problematic. That is the provision that is sometimes referred to as the "overall reasonableness" requirement, exemplified in the third prong of the usual specific-jurisdiction test: even if there are minimum contacts, and even if the claim arises from those contacts, a defendant still should not be subject to personal jurisdiction where, given all the circumstances, exercising jurisdiction would undermine traditional notions of fair play and substantive justice.[214]

This requirement of overall reasonableness is useful when considering the state-border question because it provides a doctrinal mechanism for prohibiting jurisdiction in an extreme scenario that seems excessively burdensome or unfair. If one rejects the state-border argument, for instance, it might in theory be possible for a large nationwide class action to be conducted in a state where there was a single injured person, if that person were the named plaintiff. The standards for class certification might well prevent that suit from going forward, but if they did not, it could be unfair to a defendant to subject it to substantial litigation in that state based on such a thin reed. The same might be true if, for some reason, the addition of multistate class members did seriously complicate a lawsuit in a way that made it much more burdensome to defend but also did not thwart class certification.

It may be difficult to foresee exactly what kinds of suits would result in such scenarios, but that is basically the point of the exception—that there may be a variety of unforeseen circumstances in which litigation would result in unfairness even if it meets the normal standards for jurisdiction.[215] And it

214. *See, e.g.*, Consulting Eng'rs Corp. v. Geometric Ltd., 561 F.3d 273, 279 (4th Cir. 2009) ("The third prong—that the exercise of personal jurisdiction be constitutionally reasonable—permits a court to consider additional factors to ensure the appropriateness of the forum once it has determined that a defendant has purposefully availed itself of the privilege of doing business there."); United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 36 (1st Cir. 1999) (referring to this third prong as an "overall reasonableness" test); Terracom v. Valley Nat'l Bank, 49 F.3d 555, 561 (9th Cir. 1995) (same).

215. One particular set of issues specific to class actions that courts may wish to consider under the "overall reasonableness" test is how cohesive the class is. In Judge Wood's 1987 discussion of the relationship between personal jurisdiction and representative litigation, she argued that whether a class representative's claims alone can permit a court to have jurisdiction over a defendant for an entire class depends on how cohesive the class is. *See* Wood, *supra* note 31, at 601–05. Judge Wood's model does not map easily onto the categories within Rule 23, *see id.* at 602, but the common (b)(3) small-value damages class generally falls within her account of the "purely representational" class in which jurisdiction is permissible, *id.* at 616.

would be a mistake to declare multistate class litigation categorically unfair from the personal jurisdiction perspective simply because of these potential outlier scenarios. The "overall reasonableness" part of the personal jurisdiction inquiry can be taken as an acknowledgment that bright-line rules will inevitably miss certain concerns, and an indication that the current structure of the doctrine deals with this problem by having more permissive rules combined with a veto option provided to courts when those rules fail to catch particularly problematic instances. The third prong of the specific-jurisdiction test thus supports the conclusion that it is unnecessary to rule multistate class actions out entirely based on the possibility that in rare circumstances one may emerge that seems abusive.

4. Traditional Notions of Fairness

Finally, when considering whether it is appropriate to exercise jurisdiction over a defendant with respect to the claims of out-of-state absent class members, we should be mindful of the fact that suits like the model class have been proceeding for decades. Because of the previously broad understandings of general jurisdiction, defendants in these class actions would not have been able to successfully assert a personal jurisdiction defense. As a result, multistate class actions have proceeded regularly for nearly half a century against companies in states where they are not headquartered and do not have their principal place of business.[216]

The changed scope of general jurisdiction means that, as a legal matter, these cases must now proceed within the confines of specific jurisdiction. But the historical fact that companies have been subject for decades to multistate and nationwide suits outside their states of headquarter and incorporation should be relevant to the specific jurisdiction inquiry. That is because the underlying personal jurisdiction inquiry is grounded in

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This conclusion is bolstered by Judge Wood's recent invocation of the representative nature of class actions to justify personal jurisdiction in the post-*BMS* case *Mussat v. IQVIA*, 953 F.3d 441, 445–48 (7th Cir. 2020). In the years since Judge Wood's 1987 article, class certification standards have tightened significantly, and it is unclear whether there are many class actions that would now be certified under Rule 23 that would not be sufficiently cohesive to justify the exercise of personal jurisdiction under Judge Wood's reasoning. *See, e.g.*, Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 677–704 (2014) (describing the tightening of class certification standards as motivated in part by a desire to limit classes to cohesive groups). But for the kind of class that might fit such a bill—for instance, a class with a small number of individuals with large individual claims, where there are many potential individual defenses that a defendant could raise despite the predominance of common questions—the "overall reasonableness" element of the personal jurisdiction inquiry could be used to hold that, all things considered, it would be unreasonable to extend jurisdiction over the defendant to the claims of unnamed class members solely on the basis of representation.

216. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); *see also* Bradt & Rave, *supra* note 13, at 1284 ("Likely because they were operating under the more expansive understanding of general jurisdiction before *Goodyear*, no one involved seemed to question the court's jurisdiction over the *defendant* [in *Shutts*]."); Wood, *supra* note 31, at 613–15 (describing how general jurisdiction was available in *Shutts*).

adherence to traditional notions of fairness,[217] and particularly in the desire not to subject defendants to jurisdiction that they could not reasonably foresee.[218] Most companies have likely had to anticipate and address these lawsuits for the entire time that they have been in existence—the modern class action rule was adopted in 1966, and *Shutts* was handed down in 1985, while companies in the S&P 500 are, on average, only twenty years old.[219] For any defendant whose goods and services cross state boundaries, multistate and nationwide class actions outside of their home state have been a reality that should reasonably have been baked into their business expectations for decades.

On the other side of the scale, the benefits to plaintiffs, states, and the multistate judicial system as a whole have not changed.[220] Restricting jurisdiction in these cases where the facts on the ground are no different now than in the last half-century would thus amount to a jurisdictional windfall for defendants, giving them increased protections—and making it harder for plaintiffs to bring cases—when the distribution of benefits and burdens remains the same.

B. Federalism

In addition to considering the burden on the defendant, personal jurisdiction doctrine has another foundational concern: the limits of state power in a federal system of coequal sovereigns.[221] Although this concern is abstract, it can also be weighty in the eyes of the law—enough so that the "interstate federalism" concern "may be decisive," depriving a court of personal jurisdiction even if there is "minimal or no inconvenience" to the defendant, the forum state has a strong interest in the case, and the forum state is the most convenient location.[222]

It is this horizontal federalism concern that provides the strongest grounding for the state-border argument after the Supreme Court's decision in *BMS*. As just discussed, the argument about the burdens of litigation is not particularly strong—the defendant is already in the forum defending against identical or nearly identical claims to the claims at issue, and increased potential liability is not relevant to the inquiry. The only thing distinguishing the absent class members' claims at issue in the model class

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217. *See, e.g.*, Burnham v. Super. Ct., 495 U.S. 604, 621–22 (1990) (Scalia, J.); *id.* at 629 (Brennan, J., concurring) (noting that "history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements").

218. *See supra* notes 211–13 and accompanying text.

219. MICHAEL J. MAUBOUSSIN, DAN CALLAHAN & DARIUS MAJD, CREDIT SUISSE, CORPORATE LONGEVITY: INDEX TURNOVER AND CORPORATE PERFORMANCE 1 (2017), https://research-doc.credit-suisse.com/docView?language=ENG&format=PDF&sourceid=csplusresearchcp&document_id=1070991801&serialid=0xhJ7ymG%2BLuZxZzmUHitAOqfIGpMxjfNOq%2FHpp%2FK2LU%3D&cspId=null [https://perma.cc/P9DN-HP8Z].

220. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

221. *Id.*

222. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780–81 (2017) (quoting *World-Wide Volkswagen*, 444 U.S. at 294).

is that they may be unconnected with the forum state. If that distinction can be "decisive," then it may provide a basis for cleaving the out-of-state class members' claims from the in-state class members' claims.

But in addition to showing concern for the proper limitation of state power in a federated system, personal jurisdiction doctrine also is attentive to the benefits that may flow to "the interstate judicial system" by allocating jurisdiction efficiently.[223] And the various benefits that have historically justified class actions—in particular, the efficiency of resolving similar cases in one fell swoop and the resolution of claims that might not otherwise be brought—accrue to both the forum state and non-forum states. Additionally, states share an interest in deterring unlawful conduct—and nationwide class actions may be the most effective deterrent for a defendant's nationwide conduct.[224]

The section proceeds by identifying the main federalism concern raised by the model class—that declining to apply the minimum contacts test to absent class members' claims will allow some states to overreach and resolve claims that other states have more of an interest in. It then discusses factors that mitigate that concern and also notes that similar concerns have been outweighed by considerations of judicial efficiency in the context of nonmutual issue preclusion. The section then argues that the state-border argument itself has downsides from the perspective of horizontal federalism and that allowing the model class to proceed would have significant upsides from that perspective as well. The section concludes that, on balance, considerations of horizontal federalism weigh in favor of exercising jurisdiction.

1. The Horizontal Federalism Concern Raised by the Model Class

Personal jurisdiction's concerns for horizontal federalism go back to *Pennoyer v. Neff*,[225] which emphasized that the equal dignity of the states implies limitations on the territorial reach of their power.[226] Because each state, as a sovereign, has the power to try cases in its own courts, there are implied limits on the ability of states to exercise authority over cases that more appropriately "belong" to another state.[227] This, in turn, gives rise to the horizontal federalism concern underlying the state-border argument: if absent class members' claims are not required to satisfy the minimum contacts test, the argument posits, it will be possible for the forum state to

223. *See World-Wide Volkswagen*, 444 U.S. at 292.

224. *See, e.g.*, David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 782 (2016) (noting that Rule 23 allows for liability that "mirrors the scope of [a defendant's] misconduct"); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006) (arguing that class actions' deterrent power is the primary source of their social value).

225. 95 U.S. 714 (1877).

226. *Id.* at 722.

227. *See, e.g.*, *Bristol-Myers Squibb*, 137 S. Ct. at 1780–81.

exercise power over a claim that has no connection to its territory and that more rightfully should be adjudicated by another state.[228]

But in the particular context of multistate class actions, this horizontal federalism concern should be discounted for several reasons. First, as *Shutts* established, the Due Process Clause and Full Faith and Credit Clause of the U.S. Constitution limit the ability of states to apply their own laws to claims that have more of a connection to other states.[229] In the multistate class action context, this restriction protects non-forum-states' interests in having their own law apply to events that they have an interest in and which are only loosely or minimally connected to the forum state.[230] *Shutts* itself illustrates how this protection can work in practice: these constitutional choice-of-law principles prevented Kansas from applying its law across the board to claims arising from events in Oklahoma and Texas.[231] In the decades since *Shutts*, courts have employed its choice-of-law holding to guard against state-law overreach when plaintiffs have sought multistate and nationwide class certification.[232]

This choice-of-law protection, admittedly, does not entirely remove the federalism concern. After all, the Supreme Court tends to give forum states a relatively wide berth for their choice-of-law determinations,[233] and the forum state will still generally be applying its own procedural rules—including its rules governing class actions in the first place—to the claims of out-of-state absent class members. But states' choice-of-law rules still generally focus on the locus of the events giving rise to the claim, resulting in class actions that attend to the laws of different states.[234] And, as a practical matter, the CAFA means that most substantial class actions brought in states will be removed to federal courts, which have a standardized set of

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228. *See, e.g.*, Capozzi, *supra* note 14, at 279–80.

229. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818–21 (1985).

230. *See* 1 MCLAUGHLIN ON CLASS ACTIONS § 5:46 (18th ed. 2021).

231. *See id.*

232. *See, e.g.*, Corder v. Ford Motor Co., 272 F.R.D. 205, 208–09 (W.D. Ky. 2011) (holding that *Shutts* prohibited application of one state's laws to all claims in a multistate class); Cullen v. Nissan N. Am., Inc., No. 3:09-0180, 2010 WL 11579748, at *3–6 (M.D. Tenn. Mar. 26, 2010) (same); D.R. Ward Constr. Co. v. Rohm & Haas Co., No. 2:05-cv-4157, 2006 WL 8441573, at *1–2 (E.D. Pa. Feb. 23, 2006) (same); Montgomery v. New Piper Aircraft, Inc., 209 F.R.D. 221, 229 (S.D. Fla. 2002) (same). The principles discussed in *Shutts* also sometimes operate in tandem with state choice-of-law rules to prevent state overreach by defeating class certification to begin with, for instance where the necessary application of multiple states' laws means that a class action grows too complex to merit certification. *See* 1 MCLAUGHLIN ON CLASS ACTIONS, *supra* note 230, § 5:46 ("In accordance with *Shutts*, in a proposed nationwide or multi-state class action, proper application of the forum state's choice-of-law rules usually results in the application of numerous states' laws to the proposed class, and 'variations in state law may swamp any common issues and defeat predominance.'" (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996))).

233. Andrew D. Bradt, *Atlantic Marine and Choice-of-Law Federalism*, 66 HASTINGS L.J. 617, 623 (2015) (describing the Supreme Court's "lenient approach to constitutional supervision of states' choice-of-law rules").

234. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. L. INST. 1971); *see also* Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and A Beginning*, 2015 U. ILL. L. REV. 1847, 1900–04.

procedural rules.[235] This mitigates horizontal federalism concerns by creating a similar across-the-board process for much class litigation: federal law provides the rules of procedure, with state law providing the substantive standards in diversity cases—often with an examination and application of the varying laws of the different states in which class members reside, and always within the bounds of the Constitution's choice-of-law protections.[236]

Second, the horizontal federalism concerns of the state-border argument should be discounted at least somewhat because of the significant likelihood that if the state-border argument were adopted, a number of claims might simply never be brought to begin with. Class actions are expensive to bring, and lawyers will often be willing to bring them only if there is a mass of class members large enough to generate a sizeable damages award (or settlement).[237] While some larger states like California, Texas, or New York may be able to generate intrastate classes of a large enough size with some regularity, many other states—Vermont, Idaho, Wyoming, Kansas, etc.—may lack a sufficient population base to justify class actions for a wide variety of small-value claims.

As a result, the interests these states have in the adjudication of this class of claims is largely hypothetical. The states themselves will be unlikely to ever get a chance to adjudicate them. When it comes to assessing individuals' due process rights, courts take into account the fact that the value of their claims may be next to nothing absent the class device.[238] The

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235. Bradt & Rave, *supra* note 13, at 1282 ("[S]ince CAFA, most multistate class actions of any consequence have already wound up in federal courts . . . .").

236. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–23 (1985). The fact that most significant class actions end up in federal court also points to another mechanism by which multistate and nationwide class actions could proceed despite *BMS*. Although the Supreme Court has not conclusively weighed in, the best understanding of personal jurisdiction doctrine in federal courts is that it is governed by the Fifth Amendment, not the Fourteenth Amendment, and that the relevant minimum contacts analysis is with respect to the nation as a whole. *See* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 714 n.290 (2019). Aside from lawsuits in which Congress has provided for nationwide service of process, federal courts are usually limited by the personal jurisdiction constraints of the states in which they sit via Federal Rule of Civil Procedure 4. *See* FED. R. CIV. P. 4(k)(1)(A). But because that constraint is not constitutional, if Rule 4 were amended, it would be possible for federal courts to hear multistate or nationwide class actions based on a defendant's contacts with the United States as a whole, regardless of how absent class members are treated for purposes of constitutional due process. This, in turn, would likely allow for federal courts in most cases involving conduct that occurred in the United States to hear the claims of all absent class members within the United States as a whole. For an argument that Rule 4 should be amended to uncouple personal jurisdiction in federal courts from the territorial boundaries of the states in which they sit, see A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325 (2010).

237. *See, e.g.*, Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1916–17 (2015) (noting that "[a]ggregate litigation is not cheap: Plaintiffs' lawyers spend significant resources cultivating both generic and plaintiff-specific assets" and also that "without a class, some people would never sue" (citing Joe Nocera, *Forget Fair; It's Litigation as Usual*, N.Y. TIMES (Nov. 17, 2007), https://www.nytimes.com/2007/11/17/business/17nocera.html [https://perma.cc/W7U8-YU3D])).

238. *See, e.g.*, *Shutts*, 472 U.S. at 809 (noting that "[c]lass actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually" and describing

horizontal federalism inquiry should similarly acknowledge that states' interests in adjudicating their citizens' claims may be highly attenuated in a world where adopting the state-border argument makes it unlikely that some of those claims will be heard at all in the state to which they have the greatest connection.[239]

Next, the example of issue preclusion suggests that it is not particularly far-fetched to assess the tradeoff between horizontal federalism and the efficient allocation of judicial resources in a way that favors efficiency. The horizontal federalism concern raised by the state-border argument parallels the concerns that exist in the context of issue preclusion, where the law allows one state's courts to influence or even resolve the claims of unconnected individuals outside the state's borders. Where one court has jurisdiction over a defendant and decides an issue against that defendant, that determination binds that defendant in subsequent litigation even in other jurisdictions.

The fact that issue preclusion can be used offensively and nonmutually means that it can operate in a way that is quite similar to a court resolving absent class members' claims that are unconnected to the forum state. Take, for instance, a large corporate defendant facing a claim that it negligently designed a product that it sold throughout the country. A court in State A may issue a ruling against the defendant on the question of negligent design based on a sale that took place in State A to a resident of State A. Then, if a resident of State B sues the defendant in State B under a comparable law, issue preclusion will usually resolve the case, binding the defendant to the same outcome.[240] As a result, State A is able to bind the defendant to a particular resolution of the claims of individuals in other states who have no connection to State A.

There are, of course, meaningful differences between issue preclusion and class actions. First, issue preclusion requires the plaintiffs in other states to take a variety of affirmative steps—most basically, filing a suit and invoking issue preclusion. One could argue, therefore, that issue preclusion treats would-be class action members differently, requiring significantly more affirmative buy-in than the opt-out measures required by *Shutts* for (b)(3) class actions. Second, issue preclusion operates by the law of the forum state—for instance, the courts of State B in the example in the previous paragraph are bound only because the law of State B has adopted the doctrine

how in that case "most of the plaintiffs would have no realistic day in court if a class action were not available").

239. Although some of these claims could be resolved—consistent with the state-border argument—by a multistate class action brought under general jurisdiction in a defendant's home state, that does not significantly change the calculus from the perspective of the states that would not be the forum state in either event. If Vermont has an interest in adjudicating the claims of its residents, that interest is the same regardless of whether the claim ends up being adjudicated in California under a theory of specific jurisdiction or in Delaware under a theory of general jurisdiction.

240. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. L. INST. 1982).

of issue preclusion, not because State A's courts have forced anything on State B.

But while these distinctions are meaningful, they are discounted by personal jurisdiction doctrine's emphasis on the burden on the defendant—even when examining horizontal federalism concerns.[241] From the defendant's perspective, nonmutual issue preclusion has similar effects to multistate class actions in a world where the state-border argument is rejected. Both procedural devices permit a single state court to bind the defendant to the same outcome with respect to the claims of individuals in the state and outside the state, regardless of whether those individuals outside the state have a connection to the forum. And the resource efficiency considerations that justify issue preclusion certainly weigh even more heavily in favor of class adjudication for claims that are so similar that a class action is permissible.[242]

Issue preclusion thus suggests that the kind of horizontal federalism concerns invoked by the state-border argument may yield when there are strong enough advantages to the interstate judicial system to justify the ability of one state's courts to resolve issues in a way that has preclusive effects in other states. The following section describes the advantages that class actions like the model class have from the perspective of horizontal federalism, and concludes by arguing that, on net, considerations of horizontal federalism weigh in favor of exercising jurisdiction in the model class.

2. The Horizontal Federalism Benefits of Exercising Jurisdiction

Allowing multistate class actions to be brought as they have been for the last several decades—without requiring the absent class members' claims to satisfy the minimum contacts test—has a variety of benefits from the perspective of horizontal federalism.

a. Avoiding Inconsistent Outcomes

First, these multistate and nationwide class actions avoid the increased possibility of conflicting judicial outcomes that could result if the state-border argument were adopted. If functionally identical claims could not be litigated together in a single class action, the risk of inconsistent outcomes in different courts would increase. The desire to avoid inconsistent outcomes is well established, underwriting a wide variety of procedural rules—ranging from foundational rules such as res judicata[243] and the joinder

241. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017).

242. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327–28 (1979) (citing Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328 (1971)) (discussing the resource-allocation benefits of issue preclusion).

243. Kevin M. Clermont, *Limiting the Last-in-Time Rule for Judgments*, 36 REV. LITIG. 1, 2 (2017) ("One of the obvious purposes of our res judicata law is to minimize the possibility of inconsistent judgments.").

of necessary parties[244] to more specific doctrines such as the prior-pending-action doctrine[245] or the exhaustion of state remedies in habeas corpus actions.[246] And, of course, promoting "uniformity of decision" is one of the goals underlying Rule 23 and the creation of the modern class action itself.[247]

This concern is particularly strong when it comes to class actions brought under Rule 23(b)(1) and (b)(2). So far, these kinds of suits—the "mandatory" class actions—have largely escaped discussion in the case law and literature dealing with the state-border argument, which have generally exhibited what Professor Maureen Carroll has described more broadly as the "myopic" tendency to focus on class actions arising under Rule 23(b)(3).[248] But these other types of class actions pose a particular problem here because they are premised around factual scenarios that have a strong need for a unitary solution.[249] As discussed above, class actions arose historically from disputes where a fair and effective resolution depended on a single disposition—such as disputes where there are many claims to money from a common fund.[250] In these disputes, allowing one set of plaintiffs to recover first may diminish the availability of relief for other, identically situated plaintiffs. Similarly, in other cases plaintiffs may seek logically indivisible relief, such as the restructuring of a board or program, where a defendant is physically unable to provide partial relief or give relief only to some

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244. *See* FED. R. CIV. P. 19(a)(1)(B)(ii); *see also* 1 STEVEN S. GENSLER & LUMEN N. MULLIGAN, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY r. 19 (2021) (noting that courts examine whether a party will be subject to inconsistent obligations when determining whether the party is required to be joined under Rule 19).

245. *See, e.g.*, 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1360 (3d ed. 2021) (noting that the desire to avoid conflicting opinions leads courts to dismiss identical actions where earlier actions have already been filed); Quality One Wireless, LLC v. Goldie Grp., LLC, 37 F. Supp. 3d 536, 540–43 (D. Mass. 2014) (discussing the prior-pending-action doctrine).

246. *See, e.g.*, McDonough v. Smith, 139 S. Ct. 2149, 2156–57 (2019) (noting that the malicious prosecution tort's favorable-termination requirement and the state-exhaustion requirement of federal habeas law are both designed to promote consistency); *see also* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976) (noting a rule requiring courts to yield jurisdiction to avoid inconsistent dispositions of property in litigation).

247. FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

248. *See* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843 (2016) (describing how (b)(3) class actions often get more attention than the mandatory classes, even though the latter are still frequently used).

249. *See, e.g.*, *id.* at 852–60.

250. *See supra* notes 153–58 and accompanying text; *see also* Miller & Crump, *supra* note 104, at 38–57 (discussing mandatory class actions and their jurisdictional implications). Professors Miller and Crump propose a four-factor test regarding the permissibility of jurisdiction in multistate mandatory class actions, taking into account efficiency and equity concerns, as well as federalism concerns. *Id.* While they propose an analysis that would occur during the determination of whether class certification is appropriate, it is possible to envision a similar kind of determination as part of the "overall reasonableness" analysis as to whether personal jurisdiction over a defendant is appropriate. *See supra* notes 214–15 and accompanying text.

claimants and not to others.[251] The desire to avoid inconsistent judgments in such cases is baked into the text of Rule 23 itself.[252]

The conduct that gives rise to mandatory class actions may not be cleanly apportioned along state borders, and the nature of indivisible relief could give rise to serious problems if class actions were to become divided by state lines. Mandatory classes arise in a wide range of contexts—from reimbursements by insurance organizations to corporate dividend payments to the merging of sports leagues.[253] The conduct at issue in these circumstances can easily cross state lines. Consider, for instance, litigation arising from the question whether an insurer's policy covers consequential damages resulting from the COVID-19 pandemic. It may be clear that, if the policy does cover such damages, the insurer's fund is inadequate to satisfy all the claims that would be made on it and the claimants satisfy the requirements for a "common fund" class certification under Rule 23(b)(1)(B). If numerous intrastate class actions are brought, different rulings may result as to both whether the policy should be read to cover the damages and as to how the fund should pay out. The result would be to seriously undermine the desire, affirmed in cases such as *Ibs*, to have similarly situated parties treated the same even if they reside in a different state.[254]

From the perspective of horizontal federalism, it is not an adequate answer to point out that multistate or nationwide class actions could still be brought in a defendant's home state.[255] It may be the case that a nationwide class action brought in a defendant's home state could cleanly resolve a (b)(1) or (b)(2) class action even if the state-border argument were adopted. But that would cure the potential problem of fragmented judicial opinions only if such a case were brought *before* other, intrastate class actions that threatened inconsistent judgments arose.[256] In a world where *BMS* were applied to

251. *See, e.g.*, Carroll, *supra* note 248, at 852–61 (providing examples); *see also* Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59, 76–87 (2019) (discussing different contexts in which indivisible relief may be important in class actions brought under Rule 23(b)(2) in particular).

252. *See* FED. R. CIV. P. 23(b)(1) (providing grounds for class certification where "inconsistent or varying adjudications . . . would establish incompatible standards of conduct for the party opposing the class" or where "adjudications with respect to individual class members . . . would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests").

253. *See, e.g.*, Miller & Crump, *supra* note 104, at 40–41 & nn.279–85 (providing examples of cases).

254. *See* Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, at 670–71 (1915) ("The [f]und was single, but having been made up of contributions from thousands of members their interest was common. It would have been destructive of their mutual rights in the plan of [m]utual [i]nsurance to use the [m]ortuary [f]und in one way for claims of members residing in one [s]tate and to use it in another way as to claims of members residing in a different [s]tate.").

255. *See, e.g.*, Ichel, *supra* note 26, at 45–46 (arguing that "if plaintiffs [sic] class counsel are mindful in their forum selection process, the issue of non-resident absent class members should not present significant jurisdictional issues" because, in part, of the availability of general jurisdiction in a defendant's home state(s)).

256. In certain circumstances, it might also be possible for a class action proceeding in federal court to secure an injunction against pending state court proceedings, so long as the

absent class members' claims, states would still have an interest in adjudicating intrastate class actions based on theories of specific jurisdiction. And states acting on that interest would create serious horizontal federalism concerns, both because of the risk of inconsistent judgments and the possibility that people with identical claims will be treated differently based solely on their state of residence.[257]

b. The Efficient Resolution of Mass Disputes

As discussed in Part II, the efficient resolution of numerous claims has undergirded the use of group representative litigation for centuries. These efficiencies are just as present when class members come from multiple jurisdictions. In an integrated national market such as the United States, individuals throughout the country may sign on to the same contracts with a national bank; they may buy the same products from the same manufacturer at different branches of the same retailer; they may be employed by the same employer; they may be targeted by the same debt collector. Economies of scale allow these companies to grow and develop into national and international markets. Those same economies of scale, which may depend on standardized forms, marketing materials, employment practices, and so on, will often mean that a company's violation of the law occurs in a standardized way as well—such as when a negligently manufactured product is distributed nationwide or when a standard contract contains terms that violate common legal protections. As a result, legal disputes will often involve individuals scattered across the country who have essentially identical claims against a common actor.

It is far more efficient to allow all those who share a claim against a defendant to resolve those claims together, compared to an alternative of Balkanizing lawsuits along state lines. Class suits have high fixed costs but lower variable costs, for both courts and litigants—once lawyers are hired, arguments are made, evidence is gathered, and so on, the cost of resolving an additional class member's claims is small.[258] In contrast, the costs of setting up another case would be significant, potentially requiring the hiring of new counsel barred in the relevant jurisdiction, new rounds of motion practice, and so on.

For purposes of horizontal federalism, it is significant to note that the greater efficiency of multistate class actions accrues to the benefit of both the forum state and non-forum states. The forum state benefits from multistate

provisions of the Anti-Injunction Act are satisfied. *See, e.g.*, In re Joint E. & S. Dist. Asbestos Litig., 134 F.R.D. 32, 38 (E.D.N.Y. 1990).

257. Individuals in different states could be treated differently, even absent inconsistent judgments, because some states may simply have no intrastate class actions at all, leaving citizens in those states who do not bring their own suits with a different outcome than absent class members in states where there was an action.

258. Admittedly, the marginal cost of adding an additional class member goes up when adding that member means addressing the laws of a different state, adding a distinct subclass, or so on. But even that cost is amortized over all of the additional members of that state or subclass.

class actions because it is able to leverage the size of a multistate class to incentivize the vindication of its own residents' legal rights. Non-forum states, meanwhile, benefit from the efficient resolution of their own residents' claims (as compared to the costs of state-by-state litigation). This shared efficiency interest—"the interstate judicial system's interest in obtaining the most efficient resolution of controversies"—has long been part of personal jurisdiction doctrine's attention to horizontal federalism.[259]

c. Avoiding Unresolved Claims

As mentioned above, adopting the state-border argument increases the risk that some claims that would otherwise be adjudicated as part of a nationwide class action will not be resolved at all. Many states, particularly smaller ones, may not have enough affected residents in a given dispute to make an intrastate class action economically feasible.[260] In such a scenario, residents of those states have only two hopes: (1) that their state will become the forum state in a multistate class action, enabling them to benefit from the economies of scale generated by including more class members; or (2) that another state will hear a class action in which they are included in the class definition.

If the state-border argument is adopted, small states will be unable to be the forum state for a nationwide class action themselves unless they are the defendant's place of incorporation or headquarters; and they likewise will be unable to benefit from multistate class actions in other states unless a class action is brought in a state where the defendant is subject to general jurisdiction. To the extent that general jurisdiction suits filed in a defendant's home state do not make up for 100 percent of the multistate suits that would have been filed elsewhere, then, there will be claims that go unresolved because of the adoption of the state-border argument.

d. Decreasing Opportunities for Collusive Settlements

As Professors Andrew D. Bradt and D. Theodore Rave have pointed out, there are potentially concerning dynamics that arise in an interstate system from the fact that problems of personal jurisdiction can be waived by a defendant's consent.[261] In particular, defendants can engage in a "reverse auction," in which the defendant consents to nationwide jurisdiction in whatever jurisdiction is most favorable to the defendant.[262]

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259. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (citing Kulko v. Superior Ct., 436 U.S. 84, 93 (1978)).

260. *See* Steinman, *supra* note 15, at 1454–55 ("*Bristol-Myers* did not consider the possibility that aggregation *beyond* the claims of in-state plaintiffs might be necessary to make the claims of in-state plaintiffs economically viable."). The two possibilities outlined in this paragraph, along with the discussion in this section generally, assume that the defendant will not consent to multistate jurisdiction. The potential for a defendant to consent to jurisdiction in any particular state raises its own problems, discussed below. *See infra* notes 261–65 and accompanying text.

261. *See* Bradt & Rave, *supra* note 13.

262. *Id.* at 1289.

As Professors Bradt and Rave note, the adoption of the state-border argument would result in an asymmetry between plaintiffs' and defendants' forum-shopping abilities.[263] Plaintiffs seeking to certify a nationwide class would generally only be able to certify a class on the defendant's "home turf," the state where it is incorporated or headquartered (and therefore may have more political influence).[264] But defendants can consent to jurisdiction anywhere they want to. This creates an opportunity for collusion: sophisticated plaintiffs' lawyers in one forum can offer a class-wide settlement that is relatively more beneficial for the defendant and class counsel than it is for the absent class members. And the defendant, seeing a better deal than it is likely to receive elsewhere, can decline to assert a personal jurisdiction defense in that particular case, resulting in the settlement of a nationwide class in that forum on terms more favorable to the defendant.[265]

e. Improving Deterrence

Each of the preceding three problems—inefficient resolution of claims, claims going unheard, and collusive settlements—are issues in their own right. But they also combine to form aspects of a more general problem from the perspective of horizontal federalism, which is the problem of inadequate deterrence. In addition to the goals of efficiently resolving disputes and providing an effective forum, class actions further the foundational law enforcement goal of deterrence.[266] Investigating and policing infractions is often costly and difficult. Particularly in states where not enough individuals are harmed to justify an intrastate class action, there may not be enough harm within the state to justify the expenditure of scarce public resources on law enforcement. The availability of multistate class actions in particular thus helps bolster states' abilities to enforce their own laws against interstate and national actors whose violations may be too diffuse to be the focus of attention in many (or perhaps any) states.

The adoption of the state-boundary argument is therefore likely to undermine the deterrent effect served by multistate class actions. That deterrent effect is largely premised on the ability of class actions to force defendants to internalize the costs of their actions.[267] By decreasing the efficient resolution of claims, causing some claims to be left on the table, and incentivizing defendant-favoring settlements, the adoption of the

263. *Id.* at 1290.

264. In a limited subset of cases, it may also be possible to certify a class based on a theory of specific jurisdiction in a state where the defendant is not at home but has engaged in a nationwide course of conduct, such as a state where the defendant manufactured a product that it subsequently shipped across the country.

265. Bradt & Rave, *supra* note 13, at 1290–91.

266. *See, e.g.*, Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* (Vanderbilt Univ. L. Sch. Working Paper, Paper No. 17-40, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020282 [https://perma.cc/9W6E-5XY2].

267. *See, e.g.*, Gilles & Friedman, *supra* note 224, at 105 (arguing that the "normative polestar" of deterrence is whether a defendant "internalize[s] the social costs of its actions").

state-boundary argument would decrease the costs faced by defendants as a consequence of multistate class litigation. That conclusion should be unsurprising; the Court's recent personal jurisdiction decisions, and *BMS* in particular, are generally regarded as defendant-friendly, and the decreased costs defendants would face as a result of expanding their logic to class actions is relatively straightforward. But, importantly, those decreased costs are relevant to the horizontal federalism concerns of personal jurisdiction, which looks to the interests states have in the effective enforcement of their laws.[268]

Considerations of horizontal federalism thus, on balance, weigh in favor of exercising jurisdiction in the model class. The concerns regarding the inappropriate exercise of state power are mitigated by constitutional limits on the application of state substantive law, as well as Congress's ability (which it has exercised via CAFA) to make the majority of class actions removable to federal court, where state procedural rules do not apply.[269] And multistate class actions carry a significant number of benefits from the perspective of horizontal federalism—they militate against inconsistent outcomes, facilitate the adjudication of claims that otherwise would go unheard, provide a more efficient resolution of mass claims, lessen the problem of collusive settlements posed by the extension of *BMS*, and help to deter unlawful conduct. These benefits all sound in the register of horizontal federalism, addressing concerns that the Supreme Court has long held should be considered when evaluating whether jurisdiction is appropriate.[270] Respect for horizontal federalism thus cuts against adopting the state-border argument, not in favor of it.

CONCLUSION

The Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court* does not require lower courts to apply the minimum contacts test to the claims of absent class members, and it should not be expanded to create such a requirement. The history of class actions and their precursors demonstrate that representative litigation is often afforded a wide swath of procedural exceptions, and excepting the claims of absent class members from the normal minimum contacts requirement is well within the kinds of exceptions that have traditionally been carved out. Allowing multistate and nationwide class actions to proceed with specific jurisdiction based only on the named representative's claims, meanwhile, does not pose a significant problem from the perspective of constitutional due process. The state-border argument should therefore be rejected, and courts should continue allowing such multistate and nationwide class actions to proceed as they have for decades.

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268. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (citing Kulko v. Superior Ct., 436 U.S. 84, 93 (1978)).

269. Class Action Fairness Act of 2005 § 4(a), 28 U.S.C. § 1332(d).

270. *World-Wide Volkswagen*, 444 U.S. at 292.