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REWRITING SHUTTS FOR FUN, NOT TO PROFIT

Edward H. Cooper*

It has not been easy to reconcile contemporary class-action practice with traditional adversary procedure. For that matter, it is not easy to craft a unitary "class-action" procedure that serves well the many different purposes pursued by the many different species of class actions. The practice has flourished, but few would dare say it has really matured. Many problems remain. The decision in Phillips Petroleum Co. v. Shutts\(^1\) addresses some of the peculiar problems arising from a federal system's opportunities to compound the intrinsic confusions by creating opportunities for forum shopping (including law-shopping and settlement-shopping) and for the proliferation of overlapping, duplicating, and competing class actions. State courts have been accorded sweeping freedom to entertain regional and national class actions by the Court's generous view of state-court jurisdiction, coupled with the practical failure of even its minimalist attempt to set outer limits for choice of law. Freedom opens opportunities for mischief. Opinions differ widely on the question whether some state courts, aided and abetted by litigants, have exploited these opportunities to bad effect. Answers to that question depend on the complex perspectives that shape evaluation. Opinions that are both well-informed and neutral are hard to come by. The Class Action Fairness Act of 2005\(^2\) adopts the view that bad effects have followed state-court freedom. But it does not directly limit state-court authority. Instead, it creates indirect limits by expanding federal subject-matter jurisdiction and easing removal. Whatever the unpredictable precise results may be, state courts are likely to lose many of the class actions that Shutts authorizes. The wisdom of the Shutts decision is not as pressing a question as it once was. But state courts remain free to entertain actions that include class members beyond their borders. Some of these actions will remain in state courts, either because they fall outside the new federal jurisdiction or because the parties are content to be in state court. The effects of the Shutts decision have been softened, not mooted.

The suggestions here offered for consideration are these: the Shutts decision was essentially correct, for want of any better alternative, as to state-court competence to adjudicate with respect to absent members of a plaintiff class. Special rules should be developed, however, to constrain personal jurisdiction over defendants sued on behalf of class members whose claims have no direct connection to the forum. Whether or not that is done, it is not yet time to consider alternative authoritative constraints on state-court authority. The most startling examples of obvious excess are likely to be corrected by the states themselves, informal means of coordination and cooperation remain promising as to most state courts, and more formal methods of interstate consolidation or coordination are so complex—and often controversial—as to prove attractive only to address a compelling need.

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1 472 U.S. 797 (1985).

I. REWRITING SHUTTS: PLAINTIFF CLASS MEMBERS

It is not difficult to make light of the Shutts ruling that Kansas could assert jurisdiction to resolve the claims of plaintiff class members who had no connection to Kansas. Ordinarily, it is easy enough to poke holes in opinions that resolve difficult problems. Coming up with a more persuasive opinion is not as easy. So it is with this aspect of the Shutts opinion. Resolution of class claims by a single court is often desirable—that is why we have class actions. At times, the single court may as well, or better, be a state court. And it is not easy to define the circumstances that should require adjudication either in a single federal court or in several courts, state or federal.

Two major themes appear in the jurisdiction ruling. The first and more central emphasizes the differences between the burdens litigation imposes on a person made a party defendant and the much reduced burdens encountered by a member of a plaintiff class. The second seizes on the rule that “[a]ny plaintiff may consent to jurisdiction” to conclude that failure to opt out is consent enough.

The most general expression of the holding is that “a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.”

These words seem to distinguish “personal jurisdiction” over a defendant from a nearly in rem jurisdiction over a class member’s claim. That is a rather neat way of expressing the distinction between imposing a liability or extinguishing a claim and imposing significant burdens of litigating on pain of default. The distinction is valid up to a point—a class member who does not appear still has an opportunity to win through the adequate representation provided by named class members, while a defendant who defaults has forfeited any opportunity to win. But a class member who does not wish to trust the class representation must do something to avoid preclusion, either by opting out or by participating in the action.

The theme that representation greatly eases the burdens on unnamed class members carries to the further observation that the unnamed members are further protected by the court’s duties to ensure adequate representation and to review any settlement, and also by the defendant’s interest in either defeating class certification or ensuring that the judgment binds class members. Trust in representation is further warranted by the Court’s identification of the “minimal procedural due process protection” that must be afforded class members. They

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3 Shutts, 472 U.S. at 808.
4 Id. at 812.
5 Id. at 811.
6 This interest was separately relied upon in ruling that the defendant had “standing” to challenge jurisdiction as to plaintiff class members. Id. at 803-06.
7 Id. at 811-12.
must have an opportunity to be heard and participate, supported by the best notice practicable under the circumstances; an opportunity to opt out; and must "at all times [be] adequately represent[ed]" by the named plaintiffs.\(^8\)

The "consent" part of the opinion asks "how stringent the requirement for a showing of consent will be."\(^9\) The Court rejects the defendant's argument that only an affirmative choice to opt into the class suffices.\(^10\) An opt-in requirement "would probably impede the prosecution of those class actions involving an aggregation of small individual claims."\(^11\) Small-claims classes would be impeded because class members might think their individual claims too small, or be "so unfamiliar with the law."\(^12\) An opt-out requirement, on the other hand, suffices to protect a class member whose "claim is sufficiently large or important that he wishes to litigate it on his own."\(^13\) It "must be [a] somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so."\(^14\)

The Court concludes that the "obvious advantages in judicial efficiency" created by opt-out procedure need not be sacrificed to protect "the rara avis portrayed" by the defendant.\(^15\)

Questioning these explanations may begin with a slight diversion. The Court prefaced its exploration of jurisdiction by quoting a particularly misleading statement from *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, proclaiming that "[t]he [personal jurisdiction] requirement . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."\(^16\) Sovereignty cannot so easily be stripped away from the due

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8 Shutts, 472 U.S. at 811-12.
9 Id. at 812.
10 Id. at 812-13.
11 Id. at 813.
12 Id. At this point the Court quotes an explanation by Professor Benjamin Kaplan, Reporter for the Civil Rules Advisory Committee that drafted the 1966 Civil Rule 23 amendments. Professor Kaplan explained that an opt-in requirement "would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step." Id. at 813 n.4 (quoting Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II), 81 HARV. L. REV. 356, 397-98 (1967)).
13 Shutts, 472 U.S. at 813.
14 Id.
15 Id. at 812-14.
16 Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). The Court recognized in a footnote "that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States." Id. at 702 n.10. The case before it was brought in a federal court. But footnote 10 goes on to observe that

[t]he restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause . . . makes no mention of federalism concerns. Furthermore, if the federalism concept
process limits on state-court jurisdiction. It is accepted that the due process test applied to federal courts begins by looking for sufficient contact with the United States as a whole, not the particular state in which a federal court sits. Due process may prohibit an exercise of personal jurisdiction by a state court next door to a federal court that can assert personal jurisdiction on the same facts. The distinction is one of sovereignty. And the tie to sovereignty is not accidental. Personal jurisdiction is limited not only to protect against geographic disadvantage but also to protect against other impulses that may flow from the choice between the courts of different sovereigns. Those impulses lie at the heart of concerns with establishing nationwide “universal venue” for any state court that may choose to adjudicate the claims of a nationwide plaintiff class.

The consent explanation blends together two elements that should be separated for initial analysis. One is the question whether a court that unquestionably could assert jurisdiction over all class members must require some form of “consent” before nonparty class members can be represented by a named class representative. The common assumption is that, at least in sufficiently pressing circumstances, due process permits certification of a “mandatory” class that does not allow individual class members to request exclusion. The second is the question directly addressed—whether an opportunity to opt out establishes “consent” by a class member who as a matter of due process could not independently be subjected to jurisdiction as a member of a mandatory class. The Court’s answer that this is consent enough is not particularly persuasive if “consent” means a knowing and free decision to participate. Consumer-protection authorities would not look kindly upon a book club’s assertion that consent to join is established by failure to return a postage-paid coupon from an unsolicited letter offering membership. It does not help to label as a “rare bird” a putative “class member who is unwilling to execute an ‘opt-out’ form but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so.” That is a class-action explanation, not a jurisdiction explanation. The opinion’s attempt to move from a class-action explanation to a jurisdiction explanation mixes two perspectives that are not fully congruent. One is that the motive for failing to opt out is that the member’s claim is too small to reckon with—due process need not bother with anything so trivial. The other—expressed in terms that today seem unfortunately paternalistic—is that we need to protect “small people” from the “ignorance, timidity, [or] unfamiliarity with

operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

Id.
18 Shutts, 472 U.S. at 812.
19 Id.
20 Id. at 813.
21 Id.
business or legal matters" that deter involvement even to the extent of returning an opt-out form. Each perspective is more persuasive as a reason for accepting jurisdiction without regard to consent than as an argument that all (or even most) class members actually consent by failing to return an opt-out form. The move from fictive "consent" to a more direct justification is important not only to confront the question directly but also to approach the question deliberately left open by the Court—whether similar reasoning justifies state-court jurisdiction when the class claims are not "wholly or predominately for money judgments" but concern other matters "such as those seeking equitable relief." The direct question, then, is how far a state court should be allowed to extend jurisdiction over members of a plaintiff class consistent with the elements of sovereignty that cannot be expunged from Fourteenth Amendment due process limits on state-court jurisdiction. This part of the Court's opinion is not unpersuasive. Depending on a host of variables, there will be situations in which a single class action in a single state is the only plausible means of "enforcing" the claims of absent class members. The claims may be small and the claimants dispersed, defeating either individual actions or alternative and smaller class actions. Converting the claims to judgment may be valued either as a means of vindicating individual class members' interests or as a means of enforcing public policies by disgorging ill-gotten gains and thereby deterring other wrongdoers. Even if some class members have claims that would support enforcement by individual actions or by some number of class actions in different courts, efficiency is gained by bringing all together in a single court. The single action, further, has the advantage of achieving a consistent resolution, win or lose, as to all class members.

Why then hesitate? The underlying concern continues to focus on the limited sovereignty of states in our federal union and a fear of overreaching. Notorious examples of overreaching are catalogued in the Senate Report on the Class Action Fairness Act. The overreaching may be simply bad class-action practice, such as the short-lived "drive-by certifications" or approval of a settlement that manifestly violates class interests. But the overreaching also may be an attempt to export a particular court's view of justice beyond any sensible limits of sovereignty. The most prominent recent example is one of

22 Id. at 813 n.4.
23 Shutts, 472 U.S. at 811 n.3.
24 Id. at 807.
excess corrected. Reversal of the class judgment in *Avery v. State Farm Mutual Automobile Insurance Co.* rested in part on a ruling as a matter of statutory interpretation that the Illinois Consumer Fraud Act should not be applied to claims of class members based on insurance claims practices pursued outside Illinois; the opinion does not offer any exciting views on choice-of-law constraints in state-court class actions. But the opinion also demonstrates graphically a more subtle danger of attempts to frame a multistate class: the need to establish the predominance of common issues led the plaintiffs to advance contract damages theories that—to achieve common issues free of individual circumstances—were simply absurd.

The *Shutts* opinion speaks directly to the sovereignty concerns in ruling that Kansas courts could not apply Kansas law to the transactions that had no connection whatever to Kansas. The Court adopted a test announced in an earlier plurality opinion. State law may apply only if the state has a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

Whatever minimal assurance this elastic formula might provide in the abstract, the aftermath demonstrates the Court’s inability to do anything effective in policing state-court choice of law. In parallel litigation, the Kansas Supreme Court concluded that Texas, Oklahoma, and Louisiana would apply the Kansas theory of interest. The Supreme Court affirmed, ruling that merely misconstruing another state’s law does not violate a constitutional compulsion to apply that state’s law. The constitutional duty is violated only if the misconstruction “contradict[s] law of the other State that is clearly established and that has been brought to the court’s attention.” Here too the formula could mean significant constraint. The Court, however, offered nothing persuasive to counter Justice O’Connor’s dissenting observation that accepting the Kansas determinations of other states’ laws in this case leaves the constitutional command “without the capacity to fulfill its purpose.” It is understandable that the Supreme Court may not wish to devote its finite capacities to policing state-court determinations of the law of other states. But the result is the absence of any authoritative constraint. In cases involving multistate classes the only real protection is self-restraint in choosing the law and in determining the content of the chosen law.

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28 *See generally id.*
32 *Id.* at 730-34.
33 *Id.* at 749 (O’Connor, J., dissenting). The most biting statement was that a court constitutionally obliged to apply another state’s law “apparently need take only two steps in order to avoid applying it. First, invent a legal theory so novel or strange that the other State has never had an opportunity to reject it; then, on the basis of nothing but unsupported speculation, ‘predict’ that the other State would adopt that theory if it had the chance.” *Id.*
The same concerns can be put in blunt terms. The act of asserting jurisdiction entails several consequences. The parties—including absent class members—face decision by this court, not another. This court will supply its own judge, draw the jury if the case progresses to trial in that mode, apply its own procedure, make the choice of governing "substantive" law, and determine the content of the chosen law. These consequences flow from the exercise of sovereign powers, and one sovereign may behave quite differently from others. In our federal system authoritative constraint can be imposed only through federal law. Direct constraint on the choice of law has essentially failed, and direct regulation of procedure or the neutrality and competence of judges, juries, and procedure is not feasible. What remains is the prospect of indirect control by denying jurisdiction, and with that refusing to enforce or recognize the court's proceedings and judgment.

The Shutts case itself offers a clear illustration of the reasons for doubting that Kansas should be allowed to impose its own court system on the absent class members. The portion of the opinion that addresses choice of law rather than jurisdiction provides footnote information about the tenuous link between Kansas and the litigation.

Three rate increases and three sets of deferred royalty payments were involved. The first involved $3,696,274.97 of royalties—$152.88 on Kansas leases. The second involved $2,873,827.18 of royalties—$2,619.24 on Kansas leases. The third involved $4,744,024.10 of royalties—$115.10 on Kansas leases. Other states were affected far more. Why should Kansas arrogate to itself the responsibility of deciding all claims in a multistate class?

Intrinsic doubts raised by the Shutts litigation itself are augmented by experience in the years that have followed. The Class Action Fairness Act is supported by anecdotal descriptions of blatant overreaching by state courts in class actions that include nonresidents who have no connection to the state. If control of state-court jurisdiction is the only obvious means of reining in these excesses, it is fair to reconsider the ruling that appropriate procedural safeguards can substitute for any connection between the forum, the defendant, the plaintiff class members, and the claims in litigation.

Reconsideration may seem all the more important in face of the reality that most class actions, in common with all other civil actions, are resolved by settlement rather than a litigated judgment. We accept the proposition that class representation justifies representation for settlement. This proposition has extended to allow settlement and release in a state court of claims that lie in exclusive federal jurisdiction, despite grave doubts whether a court that cannot

34 See id.
36 Id. at 816 n.6.
37 Id.
38 Id.
39 Id. Earlier in the opinion, the Court stated that "[o]nly a minuscule amount, approximately one quarter of one percent, of the gas leases involved . . . were on Kansas land." Id. at 801. The number of Kansans owning royalty interests apparently was greater; fewer than 1,000 members of the final 28,100-member class "resided in Kansas." Id.
approve representation to litigate and decide the claim should have authority to approve representation and also to approve the settlement.\textsuperscript{40} Settlement, even a settlement approved on judicial review as fair, reasonable, and adequate, lacks the reassurance of actual litigation and decision on the merits. Class representatives may provide inadequate supervision of counsel, counsel may have interests at war with class interests, and the adversary process may prove ineffective to test a settlement championed by all the parties.

Reconsideration is fair, but the conclusion is no different. To be sure, there is no real comfort in the notion that we need not worry about the claims of class members who lack the energy to opt out of the class. The problem is not only the conceptual difficulty of saying that a valid legal claim need not be taken seriously because the costliness of our legal system makes it worthless for any practical purpose. Nothing in the \textit{Shutts} opinion limits state-court jurisdiction to class members whose claims are worthless.\textsuperscript{41} To the contrary, the Court relies on the assumption that a class member who wishes to protect a claim by litigation individually or through a different class action will protect that interest by opting out of the present class action.\textsuperscript{42} That assumption may hold true as to many class members, but seldom will hold true for all. Notice is one problem. Assuming that notice is effectively delivered—as it was to most class members in \textit{Shutts}—notice is useful only if it is read and understood. Reading and understanding should not be taken for granted; class notices seem designed as much to assuage the yearnings of lawyers and courts for “full information” as to be practically useful to most class members. Even notice that is read and understood imposes the burden of making a decision and acting on it, no small affair when a class member is asked to decide what role to play with respect to litigation. And then there are cases in which a reasonable notice program, complying with due process, fails to deliver actual notice to some class members. The common understanding is that actual notice is not required—the absent class member can be bound by a judgment, or settlement, without having known of the action.\textsuperscript{43} If a class includes “future” claimants who have not yet suffered injury, finally, notice may not be possible.\textsuperscript{44}


\textsuperscript{41} \textit{See Shutts}, 472 U.S. 797.

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{See Reppert v. Marvin Lumber & Cedar Co.}, 359 F.3d 53, 56-57 (1st Cir. 2004) (discussed \textit{infra} at notes 46-58 and accompanying text).

\textsuperscript{44} \textit{Id.} at 59.
If jurisdiction without regard to forum contacts cannot be justified by assuming that class members either will opt out, choose to participate, or knowingly hazard their claims to the fate of class representation, justification must be sought in the colder arguments for efficiency, enforcement, and consistent outcomes. Despite the dangers, these arguments in the end support the Shutts decision.

The broad arguments supporting state-court jurisdiction to resolve the claims of out-of-state class members are easily stated. States are allowed to have state courts. State courts are allowed to develop and apply state law—indeed only a state court can provide an authentic determination of state law. A state court is allowed, within very capacious limits, to determine whether to apply its own substantive law to an event with interstate incidents. And state courts are allowed to entertain class actions. It seems safe to guess that most state court class actions involve no trespass on other sovereigns' interests. All of the purposes served by a class action may be best served by entertaining one action in one state court. One easy illustration suffices. A manufacturer discharges pollutants into a river. The pollutants are gradually diluted as the river flows 200 miles into another state. Ninety percent of the affected riparian owners, and more than ninety percent of the damages, are located in one state. A single class action in that state may prove ideal, even at the risk that the court may choose to apply to the next state owners its own law that affords them less protection than their own local state law. And so the Class Action Fairness Act itself includes elaborate provisions designed to retain state-court jurisdiction of actions that seem more local than multistate.\(^4\)

A less compelling but persuasive justification for state-court jurisdiction may be illustrated by a case that is not likely to attract much attention. *Reppert v. Marvin Lumber & Cedar Co.*\(^4\) was itself an aftermath of a class action that settled in a Minnesota state court.\(^4\) The defendant made windows and doors.\(^4\) From 1985 to 1988 it treated its products with a wood preservative that eventually proved defective.\(^4\) The class was defined to include all owners of these windows and doors, and was framed under the consumer protection statutes of all fifty states and the District of Columbia.\(^4\) The settlement included a $300,000 fund to pay for notice by direct mail to all identifiable class members and by publication in thirty-three newspapers throughout the country.\(^4\) Then a new action was brought in a Massachusetts court and removed to the local federal court.\(^4\) The plaintiffs were Massachusetts purchasers of the defendant's defective doors and windows.\(^4\) They had not received direct notice of the

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\(^{45}\) The most direct provisions are 28 U.S.C. § 1332(d)(3) and (4).

\(^{46}\) 359 F.3d 53.

\(^{47}\) *Id.* at 54.

\(^{48}\) *Id.* at 55.

\(^{49}\) *Id.*

\(^{50}\) *Id.*

\(^{51}\) *Reppert*, 359 F.3d at 55.

\(^{52}\) *Id.* at 55-56.

\(^{53}\) *Id.* at 55.
Minnesota action because they had not purchased directly from the defendant and were not known to the defendant. Their claims included breach of a post-sale duty to warn, a theory distinct from the contract and warranty theories advanced in the Minnesota class action. The remedy extended to property damages associated with the defects, not the replacement costs sought in the class action. Some of these claims supported litigation in the form of a new action with multiple individual plaintiffs, seeking relief from meaningful injury—they were not the trivial claims envisioned by the Shuts opinion. Yet the court held the claims barred by the Minnesota judgment and, separately, defeated by the release of all class-member claims that was part of the settlement.

As compared to the Shuts litigation, Minnesota had a strong claim to be the class-action forum. The defendant was a Minnesota corporation, described by the district court as “Minnesota based.” If there is to be a single nationwide class action at all, Minnesota could well claim the best title as forum. Difficulties remained. Calculation of individual damages could hardly be ministerial, particularly if the law in some or all of the states provides not only for replacement but also for repairing other injuries caused by the defective products. The claims of class members from different states might well be different with respect to limitations defenses, theories of liability, measure of damages, and the like—the homogenizing tendency of settlement is likely to trade more valuable claims off for the benefit of less valuable claims. Disposition by settlement and blanket release is always risky. But these difficulties inhere in class actions generally. They are offset by the efficiencies of a single action in place of fifty statewide classes or untold numbers of individual actions; by providing a remedy to many individuals who otherwise would have none; by enforcing the public interest in consumer protection; and by achieving comparable treatment of those similarly situated. State courts generally may be trusted with the discretion to evaluate these costs and benefits in deciding whether to certify a class and whether to approve a settlement. The greatest dangers—apart from choice of law—are those that inhere in all class actions, no matter how the class members are dispersed geographically.

Examples could be proliferated across settings that involve two states or all, small individual claims or large or both small and large, a natural single forum or a welter of equally attractive fora, or the least likely forum of all. Resistance to state-court jurisdiction reaches a peak when a nationwide class including individually substantial claims is certified by a remote rural court in a state that includes only a small fraction of the class. But how could we define principles of jurisdiction that deny authority to that court but accord authority to another court that seems somehow better for this litigation?

54 Id. at 57.
55 Id.
56 Reppert, 359 F.3d at 57.
57 Id. at 58-59.
Someone may one day work out a theory that satisfies two needs. It must be conceptually persuasive. And it must be capable of reasonably accurate administration by state courts. The Shutts decision is not conceptually persuasive, but it creates no significant problems of administration. Until something better appears, we might as well accept state-court jurisdiction over class members who have no connection to the forum.

II. FILLING THE GAP: PERSONAL JURISDICTION OVER DEFENDANTS

Acceptance of the Shutts ruling on jurisdiction over absent plaintiff-class members need not force us to cede to Kansas authority to apply to the defendant an eccentric, perhaps willful, definition of the laws of Texas, Oklahoma, and Louisiana. Our concepts of personal jurisdiction over defendants might well be developed to provide some measure of restraint.

As noted above, the total royalty interests on Kansas leases in the Shutts class were almost vanishingly small. It is reasonable to recognize Kansas jurisdiction to force Phillips Petroleum to litigate those claims in Kansas. It is less certain whether Kansas should be able to assert personal jurisdiction as to royalty interests held by Kansas citizens on producing fields in other states. A Texas citizen who negotiates a lease and royalty interest in Texas as to Texas property and then moves to Kansas does not present a compelling argument for personal jurisdiction unless Phillips is carrying on such activities in Kansas as to be subject to “general” personal jurisdiction. But conceding personal jurisdiction on that basis need not lead to personal jurisdiction over Phillips when the Texas lessor remains in Texas and becomes part of a multistate plaintiff class in Kansas courts.

Development of special personal jurisdiction rules for class-action defendants can begin with the zones characterized as “specific” and “general” jurisdiction. The concepts that distinguish specific jurisdiction tend to be expressed in terms such as “arising out of” or “related to.” Applying these terms to specific situations is an uncertain art. It would be easy enough to say that Phillips Petroleum carries on its oil and gas business in Kansas, that all of the class claims arise out of its oil and gas business, and that there is specific jurisdiction. The nexus, however, is too tenuous to qualify. Some more direct Kansas connection is required for specific jurisdiction. Only general jurisdiction can explain authority to adjudicate with respect to the leases and lessors who have no connection to Kansas.

General jurisdiction theory, although often applied both in recognizing and rejecting jurisdiction, is not particularly well developed. There is ample room to develop it further by asking whether special rules should apply to multistate class actions. This approach offers advantages over the Shutts perspective that looks for jurisdiction over absent plaintiff class members. One clear advantage is that it reorients the relationship between class-action conceptualism and jurisdiction conceptualism. The Shutts approach invites the Court’s actual tack of melding together the concepts of consent that emerge from millennia of jurisdiction concepts and the concepts of consent that have come to characterize some
rationalizations for class-action representation. The notion that consent good enough for a class action is also good enough for jurisdiction short-circuits the process. A second clear advantage is that—for better or worse—we have long relied upon rules of personal jurisdiction over defendants to police limits on the respective adjudicating authority of the separate state sovereigns bound together in our federal structure. The dialogue may not be as direct or open as it could be, but the motives are there.

How might a general jurisdiction theory be developed for state-court class actions? Many questions would be answered easily. A state should have jurisdiction to include in a class persons who experienced physical injury to person or property in the state. It should have jurisdiction to include persons injured anywhere by activity centered in the state. Often it should have jurisdiction to include its own citizens who were injured elsewhere by activity centered elsewhere. And almost always it should have jurisdiction with respect to all claims against a defendant whose legal home is in the state.

More difficult illustrations test the proposition. A defendant may engage in a uniform course of conduct throughout a region or the nation. An automobile may be made in one state according to a design made in another state with components made or acquired in several other states and countries. Identical automobiles may be sold throughout the country. Should a court in one state have jurisdiction over the defendant with respect to a nationwide class? The answer might depend on the facts picked out of the web to support the claim—a claim based on a single nationwide advertising campaign may seem different from one based on defective specification of original equipment tires. Or it might depend on the questions of law raised by the claim—a design claim might invoke significant variations in state laws, an advertising claim might turn on individual reliance, a consumer-protection claim might turn on an idiosyncratic forum statute. Or it might depend on the convenience of the forum in case-specific terms, including the prospect that several defendants are better joined in this court than joined in any other court or pursued through multiple actions. Although we are not accustomed to applying it directly, another component of defendant-jurisdiction thought focuses on the strength of the forum’s claim to choose its own law. This calculus could become complicated for a geographically dispersed class—the forum’s choice of its own law in preference to divergent laws that might reasonably apply to some class members (as in Shutts) may advance the manageability of class litigation but also count as a strong reason to deny jurisdiction over the defendant to enforce this choice. A choice to apply multiple laws, on the other hand, affects not only manageability and the fairness of attempting to manage a single class but also suggests that the risks of mistaken understanding and application of other law count against jurisdiction (as in Sun Oil v. Wortman).

Difficult illustrations could be multiplied beyond number. No more are needed to accept the argument that it will not be easy to develop a special variation of defendant-jurisdiction analysis for multistate class actions. The effort is worthwhile nonetheless. The Shutts case is example enough of one in which Kansas should have been denied authority to entertain a nationwide class. The reason is not so much concern for “jurisdiction” as to plaintiff class members...
as it is concern for subjecting the defendant to this forum and its choice, definition, and application of other states’ laws. We do know how to impose some restraints on excessive assertions of state sovereign authority to adjudicate through rules of personal jurisdiction over defendants. The rules are sufficiently developed in broad outline to support reasonably accurate self-restraining administration by state courts. And the concepts are sufficiently elastic and indistinct to support flexible application to meet the special challenges of multistate class actions.

It hardly need be added that further consideration of defendant jurisdiction is much easier to accomplish than direct reconsideration of the Shutts decision. Neither is there much hope for meaningful constitutional control of state-court choice-of-law rules.

III. COMPULSORY CONTROLS OR COOPERATIVE COORDINATION?

Great ingenuity has been devoted to constructing systems that might be used to reduce the evils that can flow from overlapping, duplicating, and competing class actions. Some involve compulsory consolidation or other compulsory controls. Others seek cooperation. The Class Action Fairness Act has changed the setting by introducing a system calculated to bring into the federal court system, by initial filing or removal, many actions that earlier would have been filed in state courts. It is too early to predict how practice will evolve, apart from a guess that the balance will shift toward more class actions in federal court, commonly including consolidation of related actions under the auspices of the Judicial Panel on Multidistrict Litigation. Many ingenious lawyers will have a motive to frame unremovable state-court actions; it seems likely that they will achieve substantial successes. It would be premature to declare moot the problems that may arise from state-court actions that run parallel to actions in other state courts or in the federal courts. But it is not premature to suggest that serious consideration of coercive control devices should be deferred for a few years while experience builds under the Class Action Fairness Act.

Compulsory methods of control have tended to follow one of three distinctive strategies. The most ambitious, exemplified by the American Law Institute Complex Litigation project, included provisions for state-court actions and a Reporter’s Study sketching a state-court analogue of the Judicial Panel on Multidistrict Litigation. Some such system could provide a highly sophisticated, flexible, and situation-specific structure for rationalizing such problems as may arise from small- or large-scale proliferation of related class actions and, for that matter, non-class litigation. Enactment of the Class Action Fairness Act, however, presents the prospect that many of the most troublesome situations will be resolved by removal to federal courts and consolidation within the federal system. If that is not reason enough to defer action, the sheer political

difficulty of creating the system is. The most likely methods of creation are federal statute, widespread adoption of a uniform state law, or widespread adherence to an interstate compact. Congress may find it difficult to agree even on the concept of dictating a system for transfer among state courts, much less to agree on the details. Congress might be much more willing to approve a compact, but states may prove reluctant to act either by statute or compact to surrender either the authority to retain actions they wish to retain or the authority to reject actions they do not wish to accept.

A second model would rely on establishing authority in a single court. It might be authority to order transfer—including initial consolidation and eventual remand—or a lesser authority to stay or otherwise regulate competing proceedings. A wise judge, or panel of judges, supported by adequate staff and relief from other docket commitments, might accomplish much. But the power to do good things also includes power to be mistaken, including mistakes that will delay, confuse, or thwart appropriate final resolutions of many claims that in the end would be better handled in some number of independent proceedings. The single court, further, must almost inevitably be a federal court. Designation of a single state court with authority to control all other state courts and federal courts as well would stir many of the impulses that gave rise to the Class Action Fairness Act—the controlling court might be one of those most feared elsewhere.

A third model relies on some measure of preclusion to defeat repeated attempts to achieve certification of a class that has been denied by one court or to win judicial approval of a settlement that has been once rejected. This model involves much less control. It also presents significant conceptual issues. We are accustomed to thinking of preclusion only when later litigation presents the same issue or claim. Application of different class-action rules, whether worded identically or not, opens the prospect that differences in certification standards generate new issues. The argument that a repeated request to certify a class pursuing the same claim on the merits is itself a "claim" that can be precluded is pure assertion, nothing more. Even if the first court is prepared to assert that definition of a procedural claim for purposes of its own system, it is far from clear that it has the authority to demand that other courts accord full faith and credit to the attempt to control their own class-action procedures. Preclusion, further, would depend on a willingness both to find that the putative class whose existence is denied by the refusal to certify has sufficient identity to be subject to preclusion and also to find that the class was adequately represented in the first

60 Tentative sketches of approaches that would authorize a federal court to assert some measure of control over competing litigation are set out in Reporter's Call for Informal Comment: Overlapping Class Actions, Sept. 2001 (on file with the author), circulated in advance of a conference held by the Advisory Committee on the Federal Rules of Civil Procedure. The conference reaction to the sketches was not favorable. See Minutes, Civil Rules Advisory Committee, Oct. 22-23, 2001, http://www.uscourts.gov/rules/Minutes/CRAC1001.pdf.

61 Certification and settlement preclusion proposals were sketched in the Reporter's Call for Informal Comment, supra note 60. They, too, failed to gain any substantial support.

proceeding. Similar problems attend preclusion as to approval of a proposed settlement, in part because of the ease with which essentially the same deal can be adorned with different details. Apart from these problems—which may seem quibbles to be resolved by a more robust focus on the need to find some restraint—preclusion on such narrow matters is far too limited to address situations in which different courts certify differently defined classes that overlap without complete duplication and that continue to compete.

Little may be lost by deferring further consideration of control models to supplement the still uncertain effects of the Class Action Fairness Act. The Act may achieve a generally workable allocation of class actions between federal and state courts that reduces significantly the problems caused by filing multiple related class actions. However that may be, state courts themselves ordinarily behave sensibly. Only a small fraction of state-court class actions will pose serious problems of overlap, duplication, and competition. Many state courts have proved willing to cooperate in achieving orderly relations, and at times have proved ingenious in devising means of cooperation. The most useful next steps may be to provide greater resources to support interstate cooperation. There seems to be no real hope for widespread enactment of the noncontrolling but facilitating Uniform Transfer of Litigation Act, but even without voluntary transfer much can be done. Informal cooperation works. It would be useful to adopt state rules that both legitimate and regularize direct conversations among judges in different states, but the most important resources are financial. It is much easier to become the lead court if the court can fund adequate staff, shared discovery, and other support devices. This hope too may be slim, but it seems the most promising next step.