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# The Multistate Consumer Class Action: Local Solutions, National Problems, 87 W. Va. L. Rev. 271 (1985)

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# THE MULTISTATE CONSUMER CLASS ACTION: LOCAL SOLUTIONS, NATIONAL PROBLEMS

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## I. Introduction

The question of whether a state court may entertain a class action that includes class members from many states was expected to be answered by the Supreme Court in *Gillette Co. v. Miner.*[1] After hearing oral argument, however, the Court decided that it did not have jurisdiction because there was no final judgment.[2] This disposition left undecided the problem presented by *Gillette*: How to provide a forum adequate to adjudicate claims arising from a nationwide consumer promotion scheme?

The solution offered by the state of Illinois is a state class action that includes as plaintiffs all the alleged victims of the scheme wherever located. This Article argues that in doing so, the Illinois courts are acting unconstitutionally in that they seek to bind the class members adversely. According to the Constitution, a grant of relief to out-of-state class members in a state consumer class action should not bar them from subsequent actions in other forums. On the other hand, allowing subsequent actions is unfair to the defendant's interests in having all claims against it adjudicated in one final action. This Article suggests that a federal forum would provide a better solution.

## II. GILLETTE CO. V. MINER

Although there have been other nationwide class actions that have been entertained in state court,[3] *Gillette* presents the problem in a unique form. In several other cases involving state class actions, it has been thought that if the subject matter of the suit is local in nature, the state with a special relationship to that matter could entertain a nationwide class suit. In *Daar v. Yellow Cab*,[4] for example, the class consisted of those who suffered excessive taxicab charges in the Los Angeles area. By definition, all class claims related to California in that they arose out of taxi rides in California. Another example is *Schlosser v. Allis-Chalmers Corp.*,[5] which involved a nationwide class of retired employees of a Wisconsin cor-

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[1] Gillette Co. v. Miner, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. dismissed*, 459 U.S. 86 (1982).

[2] *Gillette*, 459 U.S. 86 (1982).

[3] *See, e.g.*, Shutts v. Phillips Petroleum Corp., 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978) (Shutts I). There the Kansas court entertained a class suit brought to enforce interest payments or royalties earned from an oil and gas field located primarily in that state, although the majority of the class members were not Kansas residents. 222 Kan. at 532, 558, 567 P.2d at 1298, 1315. The Supreme Court has granted certiorari in a different case with the same name and similar facts. Shutts v. Phillips Petroleum Corp., 235 Kan. 195, 679 P.2d 1159 (1984), *cert. granted*, 105 S. Ct. 242 (1984) (Shutts II).

[5] Schlosser v. Allis-Chalmers Corp., 86 Wis. 2d 226, 271 N.W.2d 879 (1978). A class of retired,

poration that sued for breach of contract to provide free life insurance benefits. *Gillette*, however, grew out of a nationwide sales promotion with no special relationship to Illinois.

In *Gillette*, a Delaware corporation, with its headquarters in Massachusetts, offered, in a nationally promoted advertising campaign, to supply a free Accent table lighter to anyone who sent in proof of purchase of two Cricket lighters with fifty cents for postage and handling to a "fulfillment house"[6] in Minnesota.[7] In all, there were approximately 450,000 orders, 200,000 lighters on hand, 70,000 subsequently assembled in response to the demand, and 180,000 unfilled orders. Forty percent of the requests thus were not met. Gillette wrote letters of apology to each of the disappointed 180,000 persons stating that the supplies had been exhausted, returning the fifty cents together with a Cricket lighter.

The suggested retail price of Accent lighters is $7.95; for Cricket lighters, $1.10. Assuming that the failure to receive one's lighter is a legally recompensible harm, the damages are the amount of failed expectations, $7.95, the price of the Accent lighter; or the difference between the Cricket lighter and the Accent, $6.85. Individually, the amount is trivial, but with a class of 180,000 disappointed participants, the damages equal $1,431,000 or $1,233,000.[8]

Steven Miner, one of the would-be Accent recipients, filed a class action in the Circuit Court of Cook County, Illinois, alleging breach of contract and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.[9] Subsequently, plaintiff alleged that:

> Notwithstanding the fact that defendant Gillette soon after its promotional campaign was initiated became aware of the fact that it would not have an adequate supply of Accent table lighters available to fill orders received from members of the public accepting defendant's unconditional offer, it fraudulently and deceptively concealed such fact from prospective purchasers by continuing to extensively advertise and promote its "free" Cricket promotional offer, taking no steps to acquire an additional supply of Accent table lighters nor withdrawing its offer.[10]

Miner filed pursuant to the Illinois class action statute,[11] which provides that there may be a class action where "there are questions of fact or law common

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salaried, nonunion employees sued for breach of contract for free life insurance benefits for those over 65. The representation that free insurance was to be given and the decision to change the plan were made in Allis-Chalmers' home office in Wisconsin. The company's corporate headquarters was in Wisconsin and had long done business there. *Id.*, 86 Wis. 2d at 240, 242-43, 271 N.W.2d at 886-87.

[6] A business that fills the orders.

[7] *Gillette*, 87 Ill. 2d at 21, 428 N.E.2d at 486 (Ryan, J., dissenting).

[8] Brief for Petitioner at 2, 3, *Gillette*, 87 Ill. 2d 7, 428 N.E.2d 478.

[9] ILL. REV. STAT. ch. 121 1/2, §§ 261-72 (Supp. 1979).

[10] Brief for Respondent at 2, *Gillette*, 87 Ill. 2d 7, 428 N.E.2d 478.

[11] ILL. REV. STAT. ch. 110, § 57.2 (1979) (*recodified as* ch. 110, § 2-801 to -806 (1982)).

to the class, which common questions predominate over any questions affecting individual members."[12] The court shall "describe those whom the court finds to be members of the class."[13] Any judgment in the class is then binding on all members of the class except those who have "opted out."[14]

The proposed class included all persons nationwide who had requested an Accent lighter pursuant to the promotion but had not received one.[15] It consisted of about 12,000 residents of Illinois and an additional 168,000 would-be recipients who were from every other state, the District of Columbia, Puerto Rico, and Canada.[16]

On defendant's motion to dismiss the class, the trial court dismissed the nonresident class members, leaving a class of Illinois residents only. The issue of the propriety of maintaining the class action on behalf of the non-Illinois residents was certified for immediate appeal. The dismissal of the nonresident class members was affirmed[17] by the Illinois Appellate Court; however, the Illinois Supreme Court, although affirming the denial of the motion to dismiss the class action as to Illinois residents, reversed the lower court's dismissal of the nonresident class and remanded the case for further proceedings.[18] Gillette's subsequent petition to the United States Supreme Court for certiorari was granted, but after oral argument, the Court dismissed the case on jurisdictional grounds for lack of a final judgment.[19] After this dismissal, the case was remanded to the Circuit Court of Cook County, Illinois. Subclasses were then certified. Residents of forty-five states were divided into three subclasses according to the nature of the states' consumer protection laws. Each remaining jurisdiction formed its own subclass. There was no record of any other action in any other court arising out of the Accent table lighter promotion.[20]

Whether the United States Supreme Court was correct in dismissing the writ of certiorari is a question beyond the scope of this Article. In any event, the awaited word from the Court on nationwide state class actions was not forthcoming.

As noted earlier, this Article suggests that constitutional and other problems created by nationwide state class actions could be avoided by providing for adjudication of these matters in a federal forum. The balance of this Article will discuss constitutional objections to nationwide state class actions; will review specific state and federal class action precedents; will discuss modern jurisdictional doctrines; and will critique the Court's use of federalism.

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[12] *Id.* at § 2-801(2).

[13] *Id.* at § 2-802(a).

[14] *Id.* at § 2-805.

[15] Brief for Petitioner at 3, *Gillette*, 87 Ill. 2d 7, 428 N.E.2d 478.

[16] *Gillette*, 87 Ill. 2d at 21, 428 N.E.2d at 486 (1981) (Ryan, J., dissenting).

[17] *Gillette*, 89 Ill. App. 3d 315, 411 N.E.2d 1092 (1980). The appellate court at first refused to hear the case but was reversed by the Illinois Supreme Court.

[18] *Gillette*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981).

[19] *Gillette*, 459 U.S. 86 (writ of certiorari dismissed for want of jurisdiction).

[20] Brief for Respondent at 2, *Gillette*, 87 Ill. 2d 7, 428 N.E.2d 478.

## III. THE CONSTITUTIONAL OBJECTIONS

Understanding the nationwide state class action requires an appreciation of jurisdictional limitations in federal courts. Consumer class actions such as *Gillette* which do not involve a federal question must now be brought in state court because of *Snyder v. Harris*[21] and *Zahn v. International Paper Co.*[22] These two cases held that in a class action suit each individual class member must meet the amount in controversy requirement for diversity jurisdiction in federal court. Thus, in a situation such as *Gillette*, in which each member has a small amount of damages, the case cannot be tried in federal court.

The constitutional challenge to having one state adjudicate the rights of a nationwide class is based on two objections: the possible deprivation of a class member's due process rights and the conflict of such a procedure with the allocation of judicial power among the states based on our system of federalism.

The due process argument addresses the possible destruction of the class members' right to sue. Under the Illinois Code of Civil Procedure an unsuccessful result for the plaintiff class (or any result giving the class less than the maximum relief possible) would bar the class members from suing again:

> Any judgment entered in a class action brought under Section 2-801 of the Act shall be binding on all class members, as the class is defined by the court, except those who have been properly excluded [under the opt-out provision] from the class under subsection (b) of Section 2-804 of this Act.[23]

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[21] Snyder v. Harris, 394 U.S. 332 (1969) (class members' claims that were individually under the $10,000 amount in controversy requirement for diversity jurisdiction could not be aggregated to meet the jurisdictional amount).

[22] Zahn v. International Paper Co., 414 U.S. 291 (1973). (district court cannot exercise pendent or ancillary jurisdiction over those individual claims that do not meet the jurisdictional amount, even where the named plaintiffs do satisfy the amount in controversy requirement).

[23] ILL. REV. STAT. ch. 110, § 2-805 (1982). Illinois law provides that notice and an opt-out right be given to each class member:

> Notice in class cases. Upon a determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties.
>
> An order entered under subsection (a) of Section 2-802 of this Act, determining that an action may be maintained as a class action, may be conditioned upon the giving of such notice as the court deems appropriate.

ILL. REV. STAT. ch. 110, § 2-803 (1982).

> (b) Exclusion. Any class member seeking to be excluded from a class action may request such exclusion and any judgment entered in the action shall not apply to persons who properly request to be excluded. P.A. 82-280.

ILL. REV. STAT. ch. 110, § 2-804(b) (1982). The Illinois Supreme Court held in *Gillette* that, where the identity and address of each class member is readily accessible, notice to each class member informing the member of the right to opt-out was mandatory. *Gillette*, 87 Ill. 2d at 15, 428 N.E.2d at 482-83.

Under case law, class members are also bound by res judicata.[24] Collateral estoppel also binds the members on any finding of fact or conclusions of law adjudicated in class action.[25]

One's cause of action, however, is a protected property right under the fourteenth amendment.[26] Thus the question is whether Illinois constitutionally can take away a class member's property right in a cause of action without personal jurisdiction over him. Since *Pennoyer v. Neff*[27] personal jurisdiction has been required to take a *defendant's* property right. *Gillette* poses the question of whether personal jurisdiction is required where *plaintiff's* rights are at issue.

Assuming that personal jurisdiction is required to bind the plaintiff class, the question becomes one of the appropriate standard of jurisdiction. Today's standard of "minimum contacts" was created to deal with problems of jurisdiction over defendants[28] but the minimum contact standard has never been used to decide issues of jurisdiction over plaintiffs. Perhaps a different standard than minimum contacts would be appropriate here.

Any objection to a nationwide state class action based on due process rights could be met by not binding the class to any adverse judgment. In this way a class member could share in any relief granted but would not be barred from seeking additional relief. Although such a system would prove unfair to the defendants, it is not unconstitutional. The federal precursor to rule 23 allowed for a system in which plaintiffs were not bound by an adverse judgment, but could opt-in if the judgment were favorable.[29] Moreover, by the Supreme Court's rejection of mutuality of estoppel, a class of beneficiaries is created who may use a favorable

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[24] *See generally* Braveman, *Class Certification in State Court Welfare Litigation: A Request for Procedural Justice*, 28 BUFFALO L. REV. 57 (1979). *See, e.g.*, Goff v. Menke, 672 F.2d 702 (8th Cir. 1982); Dosier v. Miami Valley Broadcasting, 656 F.2d 1295 (9th Cir. 1981); Nathan v. Rowan, 651 F.2d 1223 (6th Cir. 1981); Laskey v. UAW, 638 F.2d 954 (6th Cir. 1981); Robertson v. NBA, 622 F.2d 34 (2d Cir. 1980); Bronson v. Board of Education, 525 F.2d 344 (6th Cir. 1975) *cert. denied*, 425 U.S. 934 (1976); Wren v. Smith, 410 F.2d 390 (5th Cir. 1969); *see also* Annot., 48 A.L.R. FED. 675 (1980).

[25] *E.g., Bronson*, 525 F.2d 344; *Laskey*, 683 F.2d 954.

[26] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). The Illinois Supreme Court held that the Illinois Fair Employment Practices Commission had to hold a factfinding conference within 120 days of bringing a charge of employment discrimination in order for the charge to be heard. The Court held that such dismissals violated the due process and equal protection clauses. In doing so, the Court held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan*, 455 U.S. at 428. *See also* Boddie v. Connecticut, 401 U.S. 371 (1971); Societe Internationale v. Rogers, 357 U.S. 197 (1958); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[27] Pennoyer v. Neff, 95 U.S. 714 (1877).

[28] International Shoe Co. v. Washington, 326 U.S. 310 (1945) (applied the minimum contacts standard to determine whether the state of Washington could exercise jurisdiction over a defendant).

[29] See 3B J. MOORE, MOORE'S FEDERAL PRACTICE ¶23.11[3] (2d ed. 1984).

result in one litigation to sue or defend a loser in subsequent litigation.[30] Thus, there is a "beneficial class," created by the collateral estoppel doctrine, that may use the prior litigation to its benefit and yet cannot be detrimentally affected by any adverse determination because they have not had their day in court.[31] Such a procedure presents a "heads I win, tails you lose" situation to the estoppel party, but its constitutionality has not been questioned in modern times. Therefore, any constitutional objection to the nationwide class action on the basis that it is depriving class members of their right to sue could be met by ruling that any decision is to be beneficial only.

The other constitutional issue raised by *Gillette*, that of federalism, goes beyond individual due process concerns. May an individual state adjudicate the rights of other states residents under our federal system? *World-Wide Volkswagen Corp. v. Woodson*[32] states that the jurisdictional requirement of minimum contacts "acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[33] Does our federal system permit a state to make a nationwide adjudication as sought in *Gillette*?

## IV. Review of the Specific Precedent

An analysis of the specific precedent indicates that the inclusion of nonresident class members in the adjudication of a nonlocal cause of action does go beyond past authority.

### A. *Cases That Adjudicate Rights Through Representation*

The class adjudication is a type of binding through representation: the court binds the class members in an action brought by a representative. If the court has jurisdiction over a representative, such as the named plaintiff, does it need jurisdiction over the represented class members?

In 1912, the Supreme Court ruled that a state could not so bind a party. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*[34] held that a New York court could not bind a Massachusetts defendant through privity. The plaintiff's suit against

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[30] Parklane Hosiery v. Shore, 439 U.S. 322 (1979).

[31] After the Court's decision in *Blonder-Tongue* and *Parklane*, the victory of an unrelated plaintiff or defendant—a "stranger"—opens up two "classes" of beneficiaries: an offensive class of "other plaintiffs" who can share in an earlier plaintiff's victory over a common defendant, and a defensive class of "other defendants" who can share in an earlier defendant's victory over a common plaintiff.

George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 Stan. L. Rev. 655, 656-57 (1980).

[32] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[33] *Id.* at 292.

[34] Bigelow v. Old Dominion Mining & Smelting Co., 225 U.S. 111 (1912).

a joint tortfeasor located in New York was dismissed, and the plaintiff then sought to sue Bigelow, the other tortfeasor, who was located in Massachusetts. The question was whether the Massachusetts defendant could set up the New York judgment as a bar. Since mutuality of estoppel then applied, the plaintiff would be bound by the prior loss only if the Massachusetts defendant would have been bound if the litigation had gone the other way. The question then was whether that defendant would have been so bound. The Court stated that:

> The New York court had no jurisdiction to render judgment *in personam* against Bigelow. He was confessedly not a party. He did not voluntarily appear. He had no legal right to appear, no right to introduce evidence, control the proceedings, nor appeal from the judgment. To say that nevertheless the judgment rendered there adverse to the plaintiff in that case may be pleaded by him as a bar to another suit by the same plaintiff upon the same facts, because such is the effect of that judgment by the usage or law of New York, would be to give the law of New York an extra-territorial effect, which would operate as a denial of due process of law.[35]

Whether *Bigelow* remains good law is questionable. A more expansive view is taken by the RESTATEMENT (SECOND) OF JUDGMENTS, which states that personal jurisdiction is not necessary to adjudicate the rights of individuals represented in an action. If a court has personal jurisdiction over a party, it has jurisdiction over every person that party represents: "A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process."[36]

The RESTATEMENT's position has been criticized by Professor McCoid, who argues that the standards for personal jurisdiction should be more stringent in representation cases than in cases where one is suing on his or her own behalf:

> It makes no sense to me to say that a court without authority to adjudicate directly against one as a party has authority to bind him indirectly as a nonparty. And if the response is that the court has jurisdiction over one with whom the nonparty

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[35] *Id.* at 137.

[36] RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS § 41(2) (1982). comment (f) This section states:

*Represented person beyond jurisdiction of court.* Participation through a representative implies that it is unnecessary for the represented person himself to be before the court. As stated in paragraph (2), it is therefore immaterial that the represented person had no notice of the suit (unless such notice was required in connection with appointment of the representative, see § 42(1)(a)), or was beyond the reach of the court's process. Sometimes a representative is constituted to act only with reference to property or transactions within the territorial limits of the forum's jurisdiction, as in the case of an ancillary administrator. Such a limitation of authority stems from the limited purposes for which the representative is designated, however, and not from the fact that the represented person is beyond the court's reach of jurisdiction. With respect to the limited purposes of the representation, the judgment in such a proceeding is effective to bind the represented person even though he himself cannot be subjected to the jurisdiction of the court.

> is in privity, then the scope of privity becomes directly suspect: authority to adjudicate and opportunity to be heard, both governed by due process, are at stake.[37]

The RESTATEMENT's conclusion becomes even more suspect in a class action. Most nonclass representatives are in some way voluntarily selected by a party or that party's predecessor in interest. The examples given by the RESTATEMENT involve such consent. A trustee, for example, is selected by the settlor of a trust and then represents the beneficiary. Another example, "an official or agency invested by law with authority to represent the person's interests"[38] is chosen in a democracy by the governed. The "managing officers of an unincorporated association"[39] are generally elected. A class representative, however, is self-appointed. The class members have not, nor have any of their predecessors in interest, affirmatively consented in any way to the named plaintiffs being their representatives.

Another citation of the RESTATEMENT is to "the cases involving representation of unborn remainderman."[40] Jurisdiction over unborn property owners is based on necessity, because future generations necessarily are affected by decisions made today without their consent or presence.

Adjudication through representation in a class action thus presents a different problem from other representative adjudication. The problem of jurisdiction through representation in the class action has been previously decided—but never in a context resembling *Gillette*.

### B. *State Nationwide Class Actions: Local Subject Matter*

Traditionally, state nationwide class actions have involved matters localized in a particular jurisdiction. In these cases, the localized nature of the subject matter creates ties between the class members and the forum, which in turn supports a finding of minimum contacts between the class members and the forum. One common circumstance involving the nationwide class is that of the "common fund" where claimants from several states claim an interest in property located in one state. Frequently, state and federal courts reorganize the common fund of an insurance company or fraternal benefit society to adjust the rights of shareholders and policyholders.[41] In such cases, the state has a strong interest in adjudicating

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[37] McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 713 (1976). *See also* Fisch, *Common-Question Class Action*, 38 Mo. L. REV. 173, 212 (1973).

[38] RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(d) at 393.

[39] *Id.*, comment b, at 395.

[40] *Id.*, reporter's note, at 405.

[41] *See, e.g.*, Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915); Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal. 2d 307, 74 P.2d 761 (1937), *aff'd sub nom.*; Neblett v. Carpenter, 305 U.S. 297 (1938); Sovereign Camp of the Woodmen of the World v. Bolin, 305 U.S. 66 (1938); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531 (1915). *Mullane* can also be seen as a common fund case—the trustee was seeking an order approving his dealings with the New York trust fund and was permitted to bind out of state beneficiaries if he gave adequate notice.

the matter. These cases, moreover, comport with the modern minimum contacts test asserted by *Shaffer v. Heitner*.[42] In *Shaffer* it was stated that the state in which property is located can adjudicate the rights of those who claim an interest in that property because the claiming of property amounts to a submission to that state's jurisdiction.[43] In the cases reorganizing insurance companies, those claiming an interest in a company domiciled in a state can be said to be "purposefully availing themselves" of the protection of that state's laws. In these localized actions, minimum contacts between the class members and the forum can be seen.

Another category of state class actions is the type of consumer action exemplified by *Daar v. Yellow Cab*[44] in which the class consisted of those who suffered excessive taxicab charges in the Los Angeles area. By definition, all class members had minimum contacts with California because all had been overcharged in California. Another example is *Schlosser v. Allis-Chalmers Corp.*[45] which involved a nationwide class of employees of a Wisconsin corporation. All employees had some relation to Wisconsin.

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[42] Shaffer v. Heitner, 433 U.S. 186 (1977).

[43] The case for applying to jurisdiction *in rem* the same test of "fair play and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971) (hereinafter RESTATEMENT). This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe*.

This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State. The presence of property may also favor jurisdiction in cases such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership.

It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard.

*Shaffer*, 433 U.S. at 207.

[44] *Daar*, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1978).

[45] *Schlosser*, 86 Wis. 2d 226, 271 N.W.2d 879. *See supra* note 5. The result in *Schlosser* may be questioned in light of *Shaffer*. A corporation having a director or offices in Delaware did not support jurisdiction in Delaware.

Two Kansas cases, both entitled *Shutts v. Phillips Petroleum Co.*,[46] went further than the *Daar*-type class action. Royalty owners, in both cases, as a class sued Phillips Petroleum for interest on certain oil and gas royalties held by Phillips. The oil and gas royalties were earned on gas produced in the "Hugoton-Anardarko" gas producing region, which is primarily within Kansas. Of the class members, only a few were Kansas residents and few of the individual leases were located within that state. The Kansas court ruled, however, that it had jurisdiction to determine the right of the non-Kansas class members. The *Shutts* cases did not involve a common fund located in Kansas, nor did their non-Kansas class members have dealings in Kansas. Yet they may be distinguished from *Gillette* in that the gas producing region was located in Kansas.[47]

Thus, a nonlocal subject matter such as in *Gillette* never before has been held to support a nationwide class. Dicta approving a nationwide state class action, however, was given in *Hansberry v. Lee*.[48] That case involved the validity of a racially restrictive covenant covering a Chicago neighborhood. The covenant by its terms was to be valid if ninety-five percent of the area's property owners had signed it. It was argued in *Hansberry* that the validity of the covenant had been established in a prior class action, *Burke v. Kleiman*,[49] brought by property owners in the area covered by the covenant. The Court held that the defendant was not bound by the prior lawsuit because his interests had not been "adequately represented." The Court stated that:

> It is a principle of general application in Anglo-American jurisprudence 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. . . .
>
> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative"

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[46] *Shutts II*, 105 S. Ct. 242. It is important to note that the Court could approve the *Shutts II* class action, because of the relation of the subject matter to Kansas, without necessarily approving of the *Gillette* class action. A decision reversing *Shutts*, however, would a fortiori reject *Gillette*. *See* Comment, *Civil Procedure: In Personam Jurisdiction Over Nonresident Plaintiffs in Multistate Class Actions*, 17 WASHBURN L.J 382 (1978); Note, *Multistate Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718 (1979); Note, *Toward a Policy-Based Theory of State Court Jurisdiction Over Class Actions*, 56 TEXAS L. REV. 1033 (1978).

[47] Moreover, the approach of *Shutts* was not followed in two cases involving consumer class actions. In Kelmow v. Time, Inc., 352 A.2d 12 (Pa.) *cert. denied* 429 U.S. 828 (1976), a class action was brought in Pennsylvania state court to force the continued publication of Life Magazine. The court limited the action to Pennsylvania residents and those that submitted themselves to the jurisdiction of the court. In Feldman v. Bates Manufacturing Co., 143 N.J. Super. 84, 362 A.2d 1177 (1976), plaintiffs brought an action in New Jersey state court to compel a corporation to convert preferred stock into common stock. The corporation had no assets in New Jersey, was not authorized to do business there, and the majority of stockholders were not New Jersey residents. The court refused to certify a class, stating that affiliating circumstances or a common fund was not necessary.

[48] Hansberry v. Lee, 311 U.S. 32 (1940).

[49] Burke v. Kleiman, 277 Ill. App. 519 (1934).

> suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.[50]

Whether *Hansberry* means that no personal jurisdiction is required in a class action is debatable; but it is certain that all members of the class discussed in *Hansberry* had minimum contacts with Illinois—they were all property owners in Chicago.

One explanation reconciling these state class action cases is that a state may adjudicate the class members' rights where it has an interest in the subject matter of the transaction or where the subject matter is localized. In *Gillette*, however, Illinois had little interest in the transaction with respect to out-of-state residents. The contract between the Gillette Co. and the out-of-state residents had nothing to do with Illinois.

The plaintiff in *Gillette*, however, argued that Illinois did have an interest in protecting its residents:

> The availability of a nationwide class greatly enhances the legal position of an Illinois citizen *in a number of ways including the reduction of the costs of litigation in relation to the potential recovery to the class and the individual Illinois class member and the ability to attract competent legal counsel on a case* which otherwise may not economically warrant a significant expenditure of time or contingent risk.[51]

The plaintiff argued that Illinois also had an interest in policing business within its borders, an interest that is enhanced by providing a powerful vehicle for redress, the nationwide class action.[52] Plaintiff also argued that by entertaining the litigation, Illinois was making a contribution to the joint effort of all states to provide an effective system of remedial justice.[53]

The problem with this analysis is that it would allow any state with one would-be recipient of an Accent lighter to entertain a nationwide class action. In fact, such a state would have the strongest interest in that it would have a greater need to join members in the class than if there were many class members in the state. *Gillette* represents an extension of the use of multistate class action to a nonlocalized situation, in which the state has little interest other than giving relief.

### C. *Federal Class Actions*

Federal class actions present an analogous problem of personal jurisdiction. The federal courts' response to the problem of jurisdiction over the class members has largely been one of ignoring the issue or approving a nationwide class. That response indicates, however, that the normal rules of personal jurisdiction do not

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[50] *Hansberry*, 311 U.S. at 40-41.

[51] Brief for Respondent at 23, *Gillette*, 87 Ill. 2d 7, 428 N.E.2d 478 (emphasis in original).

[52] *Id.* at 24.

[53] *Id.* at 33-34.

apply in class actions. Service of process is not required. District courts normally determine their powers of personal jurisdiction from rule 4, which limits the service of process powers of the district court to that of a state court of the state in which the district court sits.[54] Rule 4 is uniformly ignored in class actions—the district court assumes personal jurisdiction over the class without mentioning the rule. Thus the federal cases stand at least for two propositions: (1) Ordinary limitations of personal jurisdiction do not apply to jurisdiction over class members in class actions. Personal jurisdiction over class members stems from an inherent power of the courts. (2) It has never been held that it is unconstitutional for federal courts to exercise nationwide jurisdictional powers.

One group of federal jurisdiction cases is that dealing with corporate reorganization such as *Supreme Tribe of Ben-Hur v. Cauble.*[55] In these cases the federal district court has taken jurisdiction over the rights of all beneficiaries and shareholders wherever located of an organization. Of course, the exercise of personal jurisdiction in these cases can be explained by the "common fund" rationale.

Some recent lower court cases, however, have entertained nationwide classes in nonreorganization situations.[56] In *Robertson v. National Basketball Association*[57] the class consisted of all active players of the NBA. Defendants were granted a preliminary injunction to prevent Wilt Chamberlain from prosecuting a separate lawsuit, on the grounds that he was within the present class. The court rejected Chamberlain's argument of lack of jurisdiction: "Even in defendant class actions, 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."[58]

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[54] FED. R. CIV. P. 4(e):

(e) [Summons]: Service upon Party Not Inhabitant of or Found within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, a notice, or an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, a notice, or an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule. . . .

*Id.*

[55] *Supreme Tribe of Ben-Hur*, 255 U.S. 356; see also cases cited *supra* note 41.

[56] *E.g., In re* Dalkon Shield IUD Products Liability Litigation, 521 F. Supp. 1188 (N.D. Cal. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom.* A.H. Robins v. Abed, 103 S.Ct. 817 (1983); Oskoian v. Canuel, 269 F.2d 311 (1st Cir. 1959); *In re* Agent Orange Products Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd on other grounds*, 725 F.2d 858 (2d Cir. 1984), *cert. denied* 104 U.S. 1417 (1984).

[57] Robertson v. National Basketball Ass'n, 413 F. Supp. 88 (S.D.N.Y. 1976).

[58] *Id.* at 90.

In *Advertising Specialty National Association v. F.T.C.*,[59] the Federal Trade Commission sued the Association's members for antitrust violations. The court considered it well settled that "in 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."[60] And in *Appleton Electric Co. v. Advanced-United Expressways*,[61] the court rejected any necessity of personal jurisdiction over a defendants' class in an action to recover freight charges ruled unlawful by an I.C.C. order.[62]

The Supreme Court has never clearly decided the issue. In *Christopher v. Brusselback*,[63] the Court ruled that jurisdiction was necessary over each defendant. Creditors of a land bank had sued the bank and its shareholders and won. The creditors then sought to enforce that judgment in a second suit against stockholders residing in Ohio who were not served with process in the first action. The Court noted that it would be possible to draft a statute providing that the corporation represent all stockholders in the action, but that no such statute existed in the case at bar. Therefore, in personam jurisdiction over the Ohio defendants was required to bind them. The Court stated that "[t]he obligation which the statute imposes upon the stockholders is personal, and petitioners can be held to respond to it only by a suit maintained in a court having jurisdiction to render a judgment against them *in personam*."[64] The Court ruled that Equity Rule 38 prescribed only the class action procedure and did not enlarge the district court's jurisdiction. The rule's "purpose was to prescribe the procedure in equity to be followed in cases within the jurisdiction of the federal courts and not to enlarge their jurisdiction."[65]

The application of this language is a matter of controversy. One interpretation is that personal jurisdiction over each member of a defendant class is necessary. By analogy, the same jurisdictional requirement should be imposed on adjudication of the interests of members of a plaintiff class. One may distinguish between plaintiff and defendant class actions. In the former, the class members have less at risk; they may lose a benefit rather than being detrimentally affected. Thus, a less stringent jurisdictional standard may be applied in the plaintiff class actions. However, *Christopher* involved the issue of whether the defendants who were not served with process were bound by an action against the bank, not against them as a class. The issue of jurisdiction over class members was not decided by the Court. As stated by one commentator:

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[59] Advertising Specialty Nat'l Ass'n v. F.T.C., 238 F.2d 108 (1st Cir. 1956).

[60] *Id.* at 120.

[61] Appleton Elec. Co. v. Advanced-United Expressways, 494 F.2d 126 (7th Cir. 1974).

[62] *See also In re* United States Financial Securities Litigation, 69 F.R.D. 24, 48-52 (S.D. Cal. 1975) (personal jurisdiction over foreign members of plaintiff's class unnecessary to recover for fraud and negligence of defendant's accounting firm in auditing the issuer of debentures to the plaintiff).

[63] Christopher v. Brusselback, 302 U.S. 500 (1938).

[64] *Id.* at 502.

[65] *Id.* at 505.

> The shareholders in *Christopher*—the "absent defendants" to whom the Court referred—were held not bound by the decree in the prior plaintiff class action against the corporation only because there was no statute to put defendants on notice that the corporation would stand in judgment for them, and there existed no other jurisdictional nexus.[66]

In a more modern case, *Califano v. Yamasaki*,[67] the court validated a nationwide class action without discussing the personal jurisdiction issue. *Yamasaki* involved consolidated lawsuits attacking the Secretary of the Department of Health, Education and Welfare's (HEW) recoupment of Social Security overpayments without a hearing. The class included "all individuals eligible for [old age and survivors' benefits] whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for hearing."[68] Nothing in *Yamasaki* indicates that the Court was in any way bothered by questions of a district court's personal jurisdiction over class members. The Court in *Yamasaki* seems to have implicitly rejected any requirement of personal jurisdiction over class members.

These federal cases can be distinguished from class actions in state courts. First, the unit of sovereignty is different. The district courts are part of the federal sovereignty while the state courts are limited by the particular state's sovereignty. There appears to be no constitutional objection, therefore, to a nationwide class in a federal district court. There is little disagreement that nationwide service of process in federal courts is constitutional.[69] The federal cases also generally involve reorganizations which require unitary adjudication, or involve matters of nationwide concern such as the federal social security statutes in *Yamasaki*. Thus, they are not direct precedent for allowing nationwide state class actions. Because the actions are in federal court, there is no conflict with the Court's modern concern over extension of state personal jurisdiction.

## V. The Nationwide State Class Action and Modern Jurisdictional Doctrine

Because many of the nationwide class action cases are old and were decided prior to the minimum contacts test of *International Shoe v. Washington*[70] and because few cases explicitly discuss the issues involved in *Gillette*, the problem must be discussed on a more theoretical level, considering the nationwide state class action in light of the Supreme Court's contemporary personal jurisdiction doctrine. Even though the Court's personal jurisdiction decisions involve defendants rather than plaintiffs, the Court's statement of the principles underlying personal jurisdiction is directly applicable to the problem addressed by this Article.

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[66] Wolfson, *Defendant Class Actions*, 38 Ohio St. L.J. 459, 465 (1977).

[67] Califano v. Yamasaki, 442 U.S. 682 (1979).

[68] *Id.* at 689.

[69] *See, e.g.*, C. Wright, Handbook of the Law of Federal Courts § 64, at 421 (4th ed. 1983).

[70] *International Shoe*, 326 U.S. 310.

In *World-Wide Volkswagen*,[71] the Court explicitly described the function of the present jurisdictional test of minimum contacts: (1) "[i]t protects the defendant against the burdens of litigation in a distant or inconvenient forum" and (2) it serves values of federalism, ensuring "that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[72] Of these two functions, that of federalism is paramount: the due process clause, "acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment"[73] even where convenience factors would support jurisdiction. Thus, modern personal jurisdiction doctrine has been characterized by two concerns: federalism and the relation between the defendant and the forum.

### A. *Considerations of Fairness and Convenience with a Bias for the Defendant*

The purpose of the minimum contacts test is to protect the defendant from inconvenient litigation. In *World-Wide Volkswagen*, the Court stated "the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors. . . ."[74] Factors the Court listed included the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.[75] *World-Wide Volkswagen*, nevertheless, emphasizes that after state sovereignty, the convenience of the defendant is the "primary concern" of jurisdictional analysis.

Although considerations of federalism have a direct relevance to the multistate class actions, factors of convenience seem irrelevant. Members of a plaintiff class are not, like defendants, forced to appear at trial, hire attorneys, and attend depositions in a distant forum; rather, they need only sit back and let the class representatives do the work. In fact, in a rule 23(b)(1) or (2) action, they may never know that a class action is proceeding that is adjudicating their rights.

### B. *The Concern for Federalism*

The federalism concern in personal jurisdiction is an expression of the Supreme Court's present commitment to state's rights.[76] These concerns are especially rele-

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[71] *World-Wide Volkswagen Corp.*, 444 U.S. 286.

[72] *Id.* at 292.

[73] *Id.* at 294 (citing Hanson v. Denckla, 357 U.S. 235, 251, 254 (1958)).

[74] *Id.* at 292.

[75] *Id.* (citations omitted).

[76] For good discussions of the Burger Court's federalism see Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1976); Note, *Rizzo v. Goode: The Burger Court's Continuing Assault on Federal Jurisdiction*, 30 RUTGERS L. REV. 103 (1976).

vant in weighing the plaintiff's argument in favor of Illinois jurisdiction that is based on an "interstate venue" concept of personal jurisdiction. The interstate venue concept contemplates the states as parts of a coordinated whole, in which the system composed of all the state courts can adjudicate controversies governed by state law. It asks the question: Which is the best state in which to adjudicate the controversy?

The use of the interstate venue concept supports jurisdiction in Illinois. The plaintiff in *Gillette* argued that by accepting the case for adjudication, the Illinois courts were only taking on part of their shared responsibility for adjudicating state-law based lawsuits. As stated by the plaintiff:

> The Illinois Supreme Court considered the burden it was imposing on the Illinois court system in allowing the trial court to maintain this relatively straightforward and eminently feasible and manageable class action. The court also realized the duty it was undertaking, for, as Professor Hazard once wrote: "A state court system of remedial justice that is actually effective is a legitimate objective to which each state may *pro tanto* make contribution."[77]

Under such a theory, it does not matter which state adjudicates the nationwide class—Illinois may do it for *Gillette*, Kansas will do it for *Shutts*,[78] while another state will do it for the next case that arises. In so doing, each state is adding its help to the nationwide system of state court justice.

The Court, however, by concentrating on state sovereignty and federalism has rejected the "interstate venue" test. In *World-Wide Volkswagen* it ruled:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[79]

In rejecting the interstate venue approach, the Court has focused on the defendant's activities. In *Shaffer v. Heitner*,[80] for example, the Court looked at the relation of the directors and officers of Greyhound to Delaware rather than to Delaware's interest in regulating and giving relief for wrongful actions of fiduciaries of Delaware corporations. *World-Wide Volkswagen*[81] and *Rush v. Savchuk*[82] returned the focus to the defendant, not to the transaction underlying the suit. In *Savchuk*,

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[77] Brief for Respondent at 33-34, *Gillette*, 87 Ill. 2d 7, 428 N.E.2d 478 quoting Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 282, n.147.

[78] *Shutts*, 222 Kan. 527, 567 P.2d 1292 (1977).

[79] *World-Wide Volkswagen Corp.*, 444 U.S. at 294 (citing *Hanson* 357 U.S. at 251, 254).

[80] *Shaffer*, 433 U.S. 186.

[81] *World-Wide Volkswagen Corp.*, 444 U.S. 286.

[82] Rush v. Savchuk, 444 U.S. 320 (1980).

Justice Marshall disapproved of Minnesota's "subtle shift in focus from the defendant to the plaintiff."[83] The Court also emphasized that Minnesota's aggregation of both defendants' contacts was unconstitutional. The minimum contacts test had to be met as to *each* defendant.[84]

*World-Wide Volkswagen* follows this restrictive test even more closely. It looks solely at the relation of the dealer and the distributor to Oklahoma. Oklahoma, not New York, had the greater relationship with the lawsuit: the automobile accident occurred in Oklahoma, the injuries took place in Oklahoma, the law of Oklahoma was the law of the case, the hospital records and treating physicians were in Oklahoma, and the plaintiffs were in Oklahoma at the time the suit was filed. In fact, the only relation of the State of New York to the suit was that it was the place of sale of the automobile. The Court, however, only looking at the contacts of the defendants, ruled that they could not be sued in Oklahoma. The formulation of the issue, then, was a narrow one focusing on the activities of the defendant, a unilateral jurisdictional test rather than the multifactored test of interstate venue.

Three cases decided at the end of the 1983-84 Term, *Keeton v. Hustler Magazine, Inc.*,[85] *Calder v. Jones*,[86] and *Helicopteros Nacionales de Columbia v. Hall*,[87] continue this narrow formulation. In *Calder*, the Court stated that "[p]etitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum state must be assessed individually."[88]

In *Keeton*, the Court found that the regular sale of thousands of magazines in New Hampshire was enough to subject *Hustler* Magazine to personal jurisdiction in New Hampshire. The Court stated that "New Hampshire also has a substantial interest in cooperating with other States, through the 'single publication rule,' to provide, in a unitary proceeding, a forum for efficiently litigating all issues and damage claims arising out of a libel. This rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment resulting from multiple suits."[89]

Although *Keeton* does recognize a state interest in cooperating with other states, such an interest is only relevant *after* determining that there exists a relationship between the defendant and the forum. The Court did consider New Hampshire's

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[83] *Id.* at 332.
[84] *Id.* at 332-33.
[85] Keeton v. Hustler Magazine, Inc., 104 S. Ct. 1473 (1984).
[86] Calder v. Jones, 104 S. Ct. 1482 (1984).
[87] Helicopteros Nacionales de Columbia v. Hall, 104 S. Ct. 1868 (1984).
[88] *Calder*, 104 S. Ct. at 1487.
[89] *Keeton*, 104 S. Ct. at 1480.

interest in adjudicating the dispute in resolving the question of the fairness of subjecting the defendant to New Hampshire jurisdiction.[90] But the discussion of New Hampshire's interest is focused on the propriety of subjecting a libel defendant to the jurisdiction of the forum, assuming that the minimum contacts test has been met.[91] Nowhere in *Keeton* does the court say that a state's interest in adjudicating the controversy can substitute for the presence of a relation between the defendant and the forum.

*Helicopteros* involved a wrongful death suit brought by United States citizens against a Columbian corporation which had owned a helicopter that crashed in Peru, killing four American employees. In sustaining jurisdiction the Texas Supreme Court relied heavily on Texas' interest in adjudicating the dispute and on the plaintiff's interest.[92] In deciding whether Texas could exercise jurisdiction over the foreign

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[90] The Court of Appeals expressed the view that New Hampshire's "interest" in asserting jurisdiction over plaintiff's multistate claim was minimal. We agree that the "fairness" of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957). But insofar as the State's "interest" in adjudicating the dispute is a part of the Fourteenth Amendment due process equation, as a surrogate for some of the factors already mentioned, see *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702-703 n. 10, 102 S.Ct. 2099, 2104-2105 n. 10, 72 L.Ed.2d 492 (1982), we think the interest is sufficient.

*Keeton*, 104 S. Ct. at 1479.

[91] New Hampshire has clearly expressed its interest in protecting such persons from libel, as well as in safeguarding its populace from falsehoods. Its criminal defamation statute bears no restriction to libels of which residents are the victim. Moreover, in 1971 New Hampshire specifically deleted from its long-arm statute the requirement that a tort be committed "against a resident of New Hampshire."

New Hampshire also has a substantial interest in cooperating with other States, through the "single publication rule," to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding. This rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment resulting from multiple suits. Restatement (Second) of Torts § 577A, comment f (1977). In sum, the combination of New Hampshire's interest in redressing injuries that occur within the state and its interest in cooperating with other States in the application of the "single publication rule" demonstrate the propriety of requiring respondent to answer to a multistate libel action in New Hampshire.

*Keeton*, 104 S. Ct. at 1479-80.

[92] *Helicopteros*, 638 S.W.2d 870, 873 (Tx. 1982), *rev'd*, 104 S. Ct. 1868 (1984). In reversing the Texas court, the Supreme Court observed:

It is undisputed that Helicol does not have a place of business in Texas and never has been licensed to do business in the State. Basically, Helicol's contracts [sic] with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training.

*Helicopteros*, 104 S. Ct. at 1873. It should be noted that the Court held that Helicopteros' purchases in Texas did not constitute sufficient contacts because of a 1923 case, Rosenberg Bros. & Co. v. Curtis

corporation, the Court went into a detailed analysis of the corporation's activities vis-a-vis Texas.

Thus, the justification of *Gillette* must fail because it is based on an interstate venue theory focused on the state's interest in adjudication and on plaintiff's convenience. Rather, the jurisdictional question should be phrased in terms of the relationship among the individual party, the forum, and the litigation. If the Court would use interstate venue in deciding the jurisdictional question with regards to a plaintiff's class, the focus would be on the forum's interest in adjudicating the lawsuit rather than on each plaintiff's relationship with the forum. In the nationwide state class action each individual party's situation, here the plaintiffs, must be weighed separately. The jurisdictional question in the nationwide state class action must concern itself with each plaintiff individually rather than with the class as a whole.[93] Since *Hanson v. Denckla*,[94] the Court has not taken an expansive view of jurisdiction and it is unlikely to in the *Gillette* situation. The plaintiff's defense of the nationwide state class action on the basis of one state sharing in a national duty of all the states to adjudicate does not fit the Court's jurisdictional theory which requires a relation between the party and the forum.

## VI. Recent Developments: The Critique of The Court's Use of Federalism and *Ireland*

The Court's decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*[95] contains a theoretical discussion of jurisdiction which relates directly to the question of whether federalism concerns defeat jurisdiction in a *Gillette* situation. *Ireland* can be seen as a response to academic criticism of *World-Wide Volkswagen*. Commentators stated that the Court had acted without constitutional justification. Professor Braveman argues that the Court's concern about jurisdictional intrusions into the affairs of a sovereign state is based on a perception of a problem where actually none exists: "[i]t is difficult to imagine how the exercise of judicial jurisdiction could actually intrude on the sovereignty of a sister state . . . ."[96] In *World-Wide Volkswagen*, the Court was unable to identify adequately any real threat to New York's power, dignity, or authority created by Oklahoma's exercise of judicial authority over New York citizens.[97] Moreover, any individual

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Brown Co., 260 U.S. 516. Such a reliance on precedent without logical justification can be criticized. Why should a 1923 case, decided prior to *International Shoe*, control a decision involving international commerce carried out under contemporary conditions in 1984?

[93] *See Calder*, 104 S. Ct. 1482 (employees' contacts had to be considered separately from the employer's).

[94] *Hanson*, 357 U.S. 235. Since *Hanson*, the Court has upheld jurisdiction only in *Keeton* and *Calder*.

[95] *Ireland*, 456 U.S. 694.

[96] Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 Syracuse L. Rev. 533, 542-43 (1982).

[97] *Id.*

can waive lack of personal jurisdiction.[98] "It is somewhat illogical to assert that the exercise of judicial authority by a forum state threatens the sovereign interests of a sister state and then allow any individual to waive those interests simply by submitting to the forum's jurisdiction."[99]

Professor Martin H. Redish, in his article, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation,*[100] argued that there is no basis in the Constitution to deprive a state of jurisdiction on federalism grounds:

> Although the Court has assumed since the time of *Pennoyer* that the due process clause embodies such notions of federalism, it has relied on neither the language, history, nor policy of the due process clause to justify its construction. Indeed, such notions of federalism as limitations on the reach of personal jurisdiction are found nowhere in the body of the Constitution, much less in the terms of the due process clause.[101]

Because of the lack of any constitutional basis to apply federalism concerns to the states through the due process clause, "the only concern of a principled due process jurisdictional analysis should be the avoidance of inconvenience to the defendant."[102]

The Court in *Ireland,* answered the academic criticisms and reworked jurisdictional theory. A mining company had purchased business interruption insurance from foreign insurers. The company, contending that a certain loss was covered under its policies, brought suit against the foreign insurers who had refused to pay. These insurers moved to dismiss for lack of in personam jurisdiction but failed to respond to discovery concerning that defense. As a sanction for failure to respond to discovery the company was ordered to subject itself to in personam jurisdiction.[103] Insurers then presented the following arguments to the Court:

> Petitioners urge that such an application of the Rule would violate Due Process: If a court does not have jurisdiction over a party, then it may not create the jurisdiction by judicial fiat. They contend also that until a court has jurisdiction over a party, that party need not comply with orders of the court; failure to comply, therefore, cannot provide the ground for a sanction.[104]

Justice White, in writing for the Court, rejected this argument and upheld the district court's actions. In doing so, the Court contrasted subject matter and personal jurisdiction. The former is a function of a court's power, while the latter is a protection of an individual liberty interest:

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[98] *See* FED. R. CIV. P. 12(h)(1).

[99] Braveman, *supra* note 96, at 554.

[100] Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation,* 75 NW. U.L. REV. 1112 (1981).

[101] *Id.* at 1114.

[102] *Id.* at 1137.

[103] FED. R. CIV. P. 37(b)(2)(a).

[104] *Ireland,* 456 U.S. at 696.

> The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.[105]

In a footnote to the above passage, the Court discussed the relation between federalism and the individual liberty interest involved. The footnote, although lengthy, should be read in its entirety because it is the Court's only explicit discussion of the constitutional source of the requirement of personal jurisdiction:

> It is true 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. For example, in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-292 (1980), we stated:
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> "[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system." (citations omitted)
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> Contrary to the suggestion of Justice Powell, post, at 713-714, our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum State. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when a defendant fails to comply with court-ordered discovery. The restriction on state sovereign power described in World-Wide Volkswagen Corp., however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept 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.[106]

Because personal jurisdiction represents an individual right, it may be waived.[107] To have "minimum contacts" with a forum is therefore to have done enough with relation to the sovereign to allow that sovereign to adjudicate your interests. Minimum contacts is one way to meet the constitutional prohibition against being forced to subject oneself to a sovereign to which one has no relation. Other ways to overcome the prohibition are by filing a general appearance, contracting in ad-

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[105] *Id.* at 702 n.10.
[106] *Id.* at 702-03.
[107] *Id.* at 703.

vance, waiving by failure to object, or failure to comply with discovery rules.[108] The problem with a court exercising jurisdiction over someone with no minimum contacts with the forum is that it deprives that person of a "due process" right not to have his interests adjudicated by a sovereign with which he has no relation.

Integrating *Ireland* with the prior cases is difficult. *World-Wide Volkswagen*'s statement that the due process clauses act "as an instrument of interstate federalism"[109] speaks in terms of the relationship between the states rather than the liberty interest of the individual. It is doubtful that the Court in *Ireland* meant to jettison all its concerns with federalism. One hypothesis is that the individual's due process rights have two components: convenience and federalism. The latter component of due process is a personal right to have a case tried in accordance with "our system of federalism." Unless the individual consents to a state's exercise of sovereignty, that state cannot adjudicate his rights. The "minimum contacts" test that is satisfied where the party "purposefully avails itself of the privilege of conducting activities within the forum state"[110] operates as a test of consent to jurisdiction.

## VII. Application To *Gillette*

Applying the jurisdictional analysis and the specific precedent to *Gillette*, we conclude Illinois cannot adversely adjudicate someone's rights without that person's consent or some minimal relation to the forum. The class action, therefore, cannot bind the class members from suing again. To do so would deprive the class member of his right to sue without due process of law.[111] A binding effect on a class member cannot be justified on a basis of shared judicial responsibility because each sovereign unit must have its own justification in exercising jurisdiction over a party. Neither can it be justified by efficiency because one's due process rights cannot be taken away on such grounds.

It can be argued that the opt-out right works as a consent. The failure to opt out, however, is not an affirmative consent to jurisdiction. There is no submission to the forum that operates to justify personal jurisdiction.[112] Thus, under the Court's

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[108] *Id.* at 703-05.

[109] *World-Wide Volkswagen Corp.*, 444 U.S. at 294.

[110] *Hanson*, 357 U.S. at 253; *World-Wide Volkswagen*, 444 U.S. at 297; *Shaffer*, 433 U.S. at 216; Kulko v. California Superior Court, 436 U.S. 84, 94 (1978).

[111] *Logan*, 455 U.S. 422.

[112] The law of contract states that failure to respond to an offer does not operate as a consent. The failure to opt-out, then, should not operate as a waiver of jurisdiction. "It is an old maxim that silence gives consent; but this is not a rule of law. It is certain that, if the only facts are that A makes an offer to B and B remains silent, there is no contract." 1 Corbin, Contracts § 72, at 304-05 (1963). *Ireland*, however, could be used to bolster the opt-out justification. There the defendants failed to produce documents pursuant to discovery and did not affirmatively consent to jurisdiction. A discovery order, however, can be distinguished from an opt-out notice which may not have been received. The discovery order, by contrast, operates at a later period in the lawsuit after parties have been brought into court by service of process.

formulation of the jurisdictional issue, a single state cannot bind a nationwide class. Such an analysis fits with prior precedent, which required some nexus with the state in order to allow a nationwide class action.

This conclusion, however, leads to another—that there is at present no forum that can give adequate relief to a class injured by a nationwide scheme. If the inability to bind class members requires a rejection of the class action, then that also would be a violation of due process. It must be remembered that the fourteenth amendment does not prohibit abstract violations of due process, but instead reads "nor shall any State deprive any person of life, liberty, or property, without due process of law."[113] A denial of the class action forum would also deprive a class member of a right to relief.

If the class in *Gillette* is allowed, a plaintiff may gain $7.95. If the class is disallowed, he may not—and probably will not, since no other suit has been filed—gain anything. Here, it is the defendant, Gillette, that is arguing against class certification. If we assume that the Gillette Corporation is motivated by financial rather than *pro bono* considerations, we must assume that Gillette is arguing against the multistate class because it expects to pay out less money with a smaller class than a larger one. At least according to Gillette's expectations, the class will have more property by a violation of due process than it would if its due process rights were being observed.

## VIII. CONCLUSION

We are left with a paradox and no good solution. If the class decision would bind the parties, a state cannot constitutionally entertain a nationwide class action. Yet, after *Snyder* and *Zahn*, only a state court can entertain such an action and if there is no nationwide class, relief cannot be granted those harmed by a nationwide practice. There are two possible solutions: The first is a one-way class action, in which nonresidents would benefit from a decision but would not be barred by adverse results, or have Congress provide a federal forum. A state one-way action, although constitutional, is unfair to the defendant. The procedure does not meet a basic goal of any judicial system—the resolution of a controversy. No matter what the decision, out-of-state plaintiffs have another chance to get relief. The defendant can only lose. Secondly, Congress could pass a nationwide consumer practices act, as it has legislated federal securities and consumer warranties acts. This solution would avoid the jurisdictional difficulties with state adjudication, provide for fairness to the defendant, and definitely resolve the controversy. Until Congress acts, however, the courts of a single state will attempt to adjudicate a problem of nationwide scope.

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[113] U.S. CONST. amend. XIV.