CHOICE OF LAW AND THE MULTISTATE CLASS: FORUM INTERESTS IN MATTERS DISTANT

WILLIAM D. TORCHIANA†

The due process clause of the fourteenth amendment¹ and the full faith and credit clause of article four² together limit the power of a state to exercise jurisdiction over parties and to apply its own law in a case over which it has jurisdiction. For a court to assert valid judicial jurisdiction, there must be a nexus built on "certain minimum contacts"³ between the the forum and nonresident defendants.⁴ For choice-of-law purposes, a court may apply forum law only when there is "a significant contact or significant aggregation of contacts" between the parties, the forum, and the litigation.⁵

These principles are well established in the context of litigation between individual parties. Class actions, however, require special consideration,⁶ and until the Supreme Court's recent decision in *Phillips Petroleum Co. v. Shutts*⁷ it was unclear whether traditional choice-of-law and jurisdictional standards applied to them.⁸ In *Shutts*, the Court

† J.D. Candidate 1986, University of Pennsylvania.

¹ U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

² U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."); see also 28 U.S.C. § 1738 (1982) (setting forth the procedures for authenticating the acts, records, and proceedings to which full faith and credit must be given).

³ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁴ "Judicial jurisdiction" refers to the power of a state to try a case in its courts; "legislative jurisdiction" refers to the power of a state to apply its own law to a particular matter. See, e.g., Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587-89 (1978).

⁵ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality opinion).

⁶ Class actions aim at the vindication of a large number of claims in a single forum. The federal rules and most state rules governing class actions provide for the use of class representatives, special res judicata significance for class judgments, and special notice and jurisdictional requirements. See, e.g., FED. R. CIV. P. 23; ALA. R. CIV. P. 23. For a discussion of the historical background of the federal class action rule, see 7 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1751 (1972 & Supp. 1985).

⁷ 105 S. Ct. 2965 (1985).

⁸ For varying approaches to choice-of-law questions in multistate class actions before *Shutts*, see *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981) (deciding to apply forum law with the proviso that if necessary other states' laws could be applied in accordance with established choice-of-law principles), *cert. dismissed per curiam*, 459 U.S. 86 (1982); *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159 (1984) (certifying a multistate class under Kansas law despite acknowledged

lowered the jurisdictional threshold in multistate plaintiff class actions. As a result, courts may now exercise jurisdiction over nonresident plaintiff class members for whom traditionally recognized jurisdictional contacts are entirely lacking, provided only that those class members are given notice and an opportunity to opt out of the action.⁹ At the same time, the *Shutts* Court held that traditional choice-of-law standards govern class actions, thereby forbidding courts from applying forum law to nonresident plaintiff class members with whom the forum does not have "significant" choice-of-law contacts.¹⁰ In *Shutts*, the Su-

choice-of-law problems), *rev'd*, 105 S. Ct. 2965 (1985); *Schlosser v. Allis-Chalmers Corp.*, 86 Wisc. 2d 226, 271 N.W.2d 879 (1978) (certifying a multistate class under Wisconsin law despite the absence of traditional choice-of-law contacts).

The question of the jurisdictional standards applicable to nonresident plaintiff class members has been widely discussed. *See, e.g.*, Sobeloff, *Jurisdiction of State Courts over Non-Residents in Our Federal System*, 43 CORNELL L.Q. 196 (1957) (discussing the states' judicial power over nonresidents in the context of *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956)); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) (proposing new terminology for use in analyzing problems of judicial jurisdiction); Note, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions Under Rule 23*, 49 BROOKLYN L. REV. 517 (1983) (discussing the special problems of class certification in mass tort actions and proposing an amendment to 28 U.S.C. § 1407 (1982) (governing multidistrict litigation)); Comment, *Jurisdiction over Unnamed Plaintiffs in Multistate Class Actions*, 73 CALIF. L. REV. 181 (1985) (advancing the argument—rejected in *Shutts*—that traditional "minimum contacts" jurisdictional limits should be applied to nonresident plaintiff class members); Note, *Personal Jurisdiction and Multistate Plaintiff Class Actions: The Impact of World-Wide Volkswagen Corp. v. Woodson*, 32 DRAKE L. REV. 441 (1983) (identifying and discussing various individual and state interests at issue in class actions involving multistate plaintiffs); Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718 (1979) (discussing the jurisdictional contacts requirements and res judicata effects of multistate plaintiff class actions) [hereinafter cited as Note, *Jurisdiction and Certification*]; Comment, *Jurisdiction and Notice in Class Actions: "Playing Fair" with National Classes*, 132 U. PA. L. REV. 1487 (1984) (arguing that traditional due process safeguards, such as the minimum contacts requirement, do not apply to class actions) [hereinafter cited as Comment, *Jurisdiction and Notice*].

A number of commentators have briefly discussed the relationship between the constitutional limits on choice of forum law and those on judicial jurisdiction. While most of them do not expressly consider choice of law and jurisdiction in the class action setting, *but see* Note, *Jurisdiction and Certification*, *supra*, at 733, they do speak to the topic in terms of other litigation. *See, e.g.*, Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1065 (1983) (suggesting that federalism is more threatened by improper choice-of-law decisions than by jurisdictional "reaching out"); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 202 (1976) (comparing jurisdictional and choice-of-law standards); Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 89 (1978) (suggesting that constitutional limits on choice of law should provide the basis for limits on judicial jurisdiction, rather than vice versa); von Mehren & Trautman, *supra*, at 1130-31 ("[C]ourts and commentators are likely to become increasingly aware of choice of law as an element to be considered in thinking about adjudicatory jurisdiction . . .").

⁹ *See Shutts*, 105 S. Ct. at 2976-77.

¹⁰ *See id.* at 2980.

preme Court has in effect told lower courts that they " 'can't cavalierly apply a single law to a case . . . [and] must [now] think about applying multiple state laws' " to the claims of nonresident plaintiff class members.¹¹

Class action procedure, however, operates to precisely the opposite effect. Aimed at providing a fair and efficient means of mass dispute resolution, the procedural rules require that there be issues of law or fact that are common to the class,¹² that such common questions predominate over individual questions of law or fact,¹³ and that the class action be superior to other methods for the adjudication of the controversy;¹⁴ pertinent to the question of superiority is the degree of difficulty in managing the litigation.¹⁵ These procedural requirements encourage courts to avoid the application of potentially diverse "multiple state laws" either by applying forum law uniformly to the claims of all class members or by dismissing the class action altogether. As a result, courts that exercise jurisdiction over multistate plaintiff class actions are now placed in a difficult position: the class action rules encourage the application of forum law while *Shutts* may require otherwise. This conflict must be resolved if class actions are to remain an available instrument for resolving complex disputes.

This Comment explores the choice-of-law issues that courts now face when they assert jurisdiction over multistate plaintiff class actions. Part I sets forth the constitutional limitations on the power of a court to apply forum law to a case and to exercise jurisdiction over nonresident parties. Part II examines how choice-of-law issues are shaped by the requirements of class action procedure in light of *Shutts*. Part III suggests several approaches to class actions that present choice-of-law problems, concluding that, through the proper use of subclasses, partial dismissal, and certification of questions of foreign law, the constitutional concerns of *Shutts* can be met without destroying the viability of the class action device.

¹¹ Greenhouse, *Class Actions: A Key Ruling*, N.Y. Times, Sept. 24, 1985, at D2, col. 1 (quoting Professor Arthur R. Miller of Harvard Law School, who argued *Shutts* before the Supreme Court on behalf of the Phillips Petroleum Company).

¹² See FED. R. CIV. P. 23(a)(2); see also *infra* note 76 (discussing the procedural rules employed in state courts).

¹³ See FED. R. CIV. P. 23(b)(3).

¹⁴ See *id.*

¹⁵ See FED. R. CIV. P. 23(b)(3)(D).

I. CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW AND JUDICIAL JURISDICTION

A. *The Choice of Forum Law*

1. Individual Litigation

The Supreme Court established the modern constitutional limitations on choice of law in *Allstate Insurance Co. v. Hague*.¹⁶ In *Hague*, a plurality of the Court, along with Justice Stevens in concurrence, upheld a Minnesota court's application of Minnesota law to a case involving the death of a Wisconsin resident in an accident in Wisconsin.¹⁷ At issue was the interpretation of insurance policies made in Wisconsin for the decedent's automobile, which had been registered in Wisconsin. The contacts between Minnesota and the litigation were slim,¹⁸ and under most choice-of-law theories Wisconsin law would have been applied to the case.¹⁹ Nevertheless, the Court held that Minnesota's use of forum law was constitutional.

The plurality opinion stated that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."²⁰ This choice-of-law standard embodies two distinct interests. The first—fairness to the parties—is reflected in the requirement that the choice of a state's law must be "neither arbitrary nor

¹⁶ 449 U.S. 302 (1981) (plurality opinion).

¹⁷ See *id.* at 305; *id.* at 331-32 (Stevens, J., concurring).

¹⁸ See *id.* at 331 (Stevens, J., concurring).

¹⁹ See *id.* at 331-32; see also Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 105 & nn.8-10 (1981) (arguing that the facts of *Hague* point to an application of Wisconsin law under a number of different choice-of-law theories). The first *Restatement of Conflict of Laws* would point to Wisconsin under the "place of the wrong" rule if the action is characterized as one in tort, and also to Wisconsin under the "place of contracting" rule if the action is characterized as one in contract. See Silberman, *supra*, at 105 & nn.8-9. The *Restatement (Second) of Conflict of Laws* would point to the law of the state with "the most significant relationship" to the litigation for purposes of either tort or contract. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 188 (1971). The contacts relevant to choice-of-law decisions in tort actions are the place of injury; the domicile, residency, nationality, place of incorporation, and place of business of the parties; the situs of the injury; and the place where the relationship between the parties is centered. See *id.* § 145(2). The contacts relevant to choice-of-law decisions in contract actions are the place of contracting; the place of negotiation; the place of performance; the location of the subject matter of the contract; and the domicile, residence, and place of business of the parties. See *id.* § 188(2). The "most significant relationship" test, given the facts of *Hague*, would point to Wisconsin law. See Silberman, *supra*, at 105.

²⁰ *Hague*, 449 U.S. at 312-13.

fundamentally unfair.”²¹ The Minnesota court clearly had jurisdiction over the parties. The defendant did business in the state, and the plaintiff, who had recently become a Minnesota resident, voluntarily came before the court to institute the suit.²² Nevertheless, the plurality disclaimed the view that contacts sufficient to support an assertion of jurisdiction would *automatically* ensure that a choice of forum law would be fair.²³ Instead, for the choice of forum law to be fair, contacts between the forum and the parties must be of such a nature that the parties might have expected their activities to be judged under forum law.²⁴ On this point, the plurality noted that due to the insurance company’s business presence in Minnesota it could “hardly claim . . . surprise that the state courts might apply forum law to litigation in which the company is involved.”²⁵ In his concurring opinion, Justice Stevens observed in a similar vein that a choice of forum law would result in unfairness, and thus violate the due process clause, when litigants “could not reasonably have anticipated that their actions would later be judged by [forum] law.”²⁶

The second interest promoted by the *Hague* standard is the federal interest in ensuring that each state respects the other states’ legitimate interests and avoids infringing upon their sovereignty.²⁷ This interest limits the extent to which a state may reach out to apply its law to a case involving parties and events that lie outside it. Thus, the plurality required not only that there be significant contacts among the forum, the parties, and the litigation, but also that these contacts create “state interests” in applying forum law.²⁸ Applying this analysis to the facts of *Hague*, the plurality opinion found that the state of Minnesota had three categories of interests in the application of its law. First, the decedent’s employment in Minnesota gave rise to “police power responsibil-

²¹ *Id.* at 313.

²² *See id.* at 317-18.

²³ *See id.* at 320 n.29. In his concurring opinion, Justice Stevens noted that “[t]he Court has made it clear over the years that the personal jurisdiction and choice-of-law inquiries are not the same.” *Id.* at 321 n.3. The Court emphasized this distinction in *Shutts*, holding that a state “may not use [an] assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law.” *Shutts*, 105 S. Ct. at 2980; *see also* Drobak, *supra* note 8, at 1065 (“If there is a threat to federalism or state sovereignty in a multistate class action, it comes from improper choice of law, not jurisdiction. Effective limits on choice of law . . . should satisfy that concern.”); Silberman, *supra* note 8, at 79-90 (discussing interplay between jurisdiction and choice of law).

²⁴ *See Hague*, 449 U.S. at 318 n.24.

²⁵ *Id.* at 317-18.

²⁶ *Id.* at 327.

²⁷ *See id.* at 320.

²⁸ *See id.* at 313.

ities . . . that are analogous . . . [to those] towards residents.”²⁹ Second, the defendant’s in-state business activities created a regulatory interest on Minnesota’s part.³⁰ Finally, the decedent’s widow’s post-accident move to Minnesota gave that state “an interest in [her] recovery, . . . [namely] to keep [her] ‘off welfare rolls’ and able ‘to meet financial obligations.’ ”³¹

The reason for the “state interests” requirement becomes apparent upon considering the effect of a court’s application of forum law to matters affecting nonresidents. A state court applying its law to a multistate plaintiff class disregards any interests other states may have in applying their laws to the matters from which the dispute arose. In so doing, the forum encroaches upon the rights of other states to adjudicate disputes according to the social and economic policies enacted by their legislatures or formed by their courts. To the extent that one state is thus able to export its domestic law, neighboring states lose “the right to pursue local policies diverging from those of [their] neighbors.”³² Unless the forum state has sufficient interests of its own in the matter, application of its law unnecessarily infringes upon the sovereignty of those states whose interests it has disregarded and undermines the concerns of interstate federalism.

2. Class Actions

The Supreme Court held in *Shutts* that the constitutional limits announced in *Hague* “must be respected even in a nationwide class action.”³³ Thus, in a class action a court may apply forum law to the claims of any particular plaintiff in the class only if the forum has significant contacts with that plaintiff. These contacts must create state interests in applying forum law, and an application of forum law must

²⁹ *Id.* at 314.

³⁰ *See id.* at 318.

³¹ *Id.* at 319 (citation omitted) (quoting *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1978), *aff’d*, 449 U.S. 302 (1981)). *But see id.* at 332 (Powell, J., dissenting) (characterizing these contacts and interests as “trivial”).

³² *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), spoke of the ability of each state to “try novel social and economic experiments without risk to the rest of the country.” *Id.* at 311. Such experiments will pose a risk to the rest of the country, or at least prevent other states from trying different experiments, to the extent that the “experimenting” state is able to apply its law to transactions beyond its borders. *See* 3 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 13.28, at 63 (2d ed. 1985) (“The simple institution of a multistate class suit in one forum cannot provide the foundation for applying that forum’s law to nonresidents, without creating a ‘substantial threat to our constitutional system of cooperative federalism.’”) (quoting *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979)).

³³ *Shutts*, 105 S. Ct. at 2981.

not unfairly frustrate the parties' expectations about which law would govern their actions.³⁴

The decision in *Shutts* helps to protect federalism concerns by ensuring that plaintiffs cannot use the class action as a vehicle for forum shopping.³⁵ Prior to *Shutts*, plaintiffs could bring class actions in the state whose laws were most favorable to their claims, knowing that forum law would be applied to the claims of the entire class despite the absence of contacts between the forum and most of the individual class members. Without restrictions on the application of forum law to the entire class, there was nothing to prevent such forum shopping.³⁶ This process threatened to balkanize the federal system by allowing certain states to become centers for class action litigation because of the attractiveness of their laws to class claims. Kansas, for example, became a center for oil and gas litigation of the type seen in *Shutts*.³⁷ Judgments in such suits effectively forced the forum's legislative and judicial policies upon the rest of the nation. *Shutts* has largely foreclosed this possibility.

In the case of class members to whom forum law cannot be applied under the *Hague* standard, a court adjudicating a class action must embark on a rather complex choice-of-law analysis. First, it must decide, based on the choice-of-law rules of the forum, what law will apply to plaintiffs not covered by forum law. The court must then examine the foreign law or laws so selected and compare them to the laws of the forum. If the foreign law is the same as the law of the forum there is no conflict, and in such a case "[t]here can be no injury in applying [forum] law."³⁸ In choice-of-law parlance, such a case presents a "false" conflict.³⁹ In the case of a "true" conflict, in which

³⁴ See *id.* at 2980.

³⁵ See *id.* at 2979 (citing *Hague*, 449 U.S. at 337 (Powell, J., dissenting)).

³⁶ See, e.g., *Greenhouse*, *supra* note 11, at D2, col. 3 ("For instance, if you brought your royalty case in Kansas [prior to *Shutts*], it had a lot more oomph to it. The *Shutts* case will prevent the creation of these havens.") (quoting Professor Arthur R. Miller).

³⁷ In addition to *Shutts*, such cases include *Wortman v. Sun Oil Co.*, 236 Kan. 266, 690 P.2d 385 (1984), *vacated*, 106 S. Ct. 40 (1985); *Lightcap v. Mobil Oil Corp.*, 221 Kan. 448, 562 P.2d 1, *cert. denied*, 434 U.S. 876 (1977); *Gray v. Amoco Prod. Co.*, 1 Kan. App. 2d 338, 564 P.2d 579 (1977), *modified*, 223 Kan. 441, 573 P.2d 1080 (1978). In an amicus brief filed in *Shutts*, the Consumer Coalition listed multi-state class actions litigated in state courts between 1838 and 1980. See Brief of Amicus Curiae (The Consumer Coalition) at app. A, *Shutts*. Ten of the 15 most recent cases on this list were litigated in either Kansas or Illinois, the site of *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. dismissed per curiam*, 459 U.S. 86 (1982), *discussed infra* text accompanying notes 68-74, and a number of other consumer-related class actions.

³⁸ *Shutts*, 105 S. Ct. at 2977.

³⁹ See R. LEFLAR, *AMERICAN CONFLICTS LAW* § 93 (3d ed. 1977); E. SCOLES &

forum and foreign law actually differ, the court must apply foreign law to the plaintiff class members' claims.

Some of the difficulties in this process are well illustrated by the *Shutts* case itself. The plaintiff class in *Shutts* consisted of 28,100 oil and gas royalty owners who sued the Phillips Petroleum Company for interest on royalty payments that Phillips had withheld pursuant to an order of the Federal Power Commission.⁴⁰ Ninety-seven percent of the class members had "no apparent connection" to Kansas, the forum state.⁴¹ The plaintiffs came from all fifty states, as well as some foreign countries, and most of the lands from which royalties were due were located in Texas and Oklahoma;⁴² the rest were located in nine other states, including Kansas.⁴³ Despite the slim contacts between Kansas, the litigation, and the plaintiff class, the court certified the class, applied Kansas common law to the case, and found the defendants liable for several million dollars of interest.⁴⁴ The Supreme Court subsequently ruled that the choice of Kansas law was unconstitutional and asked the Kansas Supreme Court, on remand, to make its choice-of-law decision according to the dictates of *Hague*.⁴⁵

On remand, the Kansas Supreme Court could constitutionally apply its own law only to those few hundred members of the class who had sufficient contacts with Kansas. Given Kansas' lack of interest in the remaining claims⁴⁶—those of ninety-seven percent of the 28,100 class members—the Kansas court must employ foreign law to decide all but a small fraction of the claims advanced by the class, except to the extent that it finds no conflict between applicable foreign law and Kansas oil and gas law. The number of other states' laws to be considered by the Kansas court on remand is at least two and is probably eleven.⁴⁷

Moreover, with respect to one of these states, Oklahoma, the Court noted that "there is no recorded decision dealing with interest liability for suspended royalties: whether Oklahoma is likely to impose

P. HAY, CONFLICT OF LAWS § 2.6 (1982); see also 3 H. NEWBERG, *supra* note 32, § 13.28, at 63 (suggesting, prior to the United States Supreme Court's contrary findings, that *Shutts* involved only a "false" conflict).

⁴⁰ *Shutts*, 235 Kan. at 197, 679 P.2d at 1165.

⁴¹ *Shutts*, 105 S. Ct. at 2977.

⁴² *Shutts*, 235 Kan. at 199, 679 P.2d at 1166.

⁴³ *Id.* at 197, 679 P.2d at 1165.

⁴⁴ *Shutts*, 105 S. Ct. at 2978; see also Reply Brief of Petitioner at 16, *Shutts* (asserting that application of Texas law to claims concerning Texas leases would have reduced Phillips' liability for interest on those claims from approximately \$5.6 million to approximately \$2.0 million).

⁴⁵ See *Shutts*, 105 S. Ct. at 2981.

⁴⁶ See *id.* at 2980.

⁴⁷ See *id.* at 2977-78 & n.6.

liability would require a survey of Oklahoma oil and gas law.”⁴⁸ As a result, even the preliminary task of ascertaining whether foreign law is in conflict with forum law will be a daunting task. With a nationwide class numbering in the thousands and a difficult choice-of-law analysis, *Shutts* fulfills Justice Stevens’ prediction in *Hague* that judges “may find it difficult and time consuming to discover and apply correctly the law of another State.”⁴⁹ Given the complexity of the choice-of-law analysis that the trial court would otherwise have faced, one can easily appreciate its decision to apply Kansas law uniformly to the class before it.

B. *Jurisdiction over Nonresident Parties*

The two interests identified in *Hague*—fairness to the parties and interstate federalism—are also protected by constitutional limits on a state’s ability to assert jurisdiction over nonresident parties. These limits are important for their similarity to choice-of-law restrictions and for the special jurisdictional standards that apply to plaintiff class members.

1. Jurisdiction over Nonresident Defendants

State judicial jurisdiction over nonresident defendants is limited by the due process clause of the fourteenth amendment.⁵⁰ A state may exercise jurisdiction only when the nonresident defendant has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁵¹ The minimum contacts standard

can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.⁵²

⁴⁸ *Id.* at 2977-78.

⁴⁹ *Hague*, 449 U.S. at 326 (Stevens, J., concurring). In *Shutts*, the Supreme Court of Kansas, approving the trial court’s decision not to embark on a choice-of-law analysis of the claims before it, asserted that “the law of the forum should be applied unless compelling reasons exist for applying a different law.” *Shutts*, 235 Kan. at 221, 679 P.2d at 1180-81.

⁵⁰ U.S. CONST. amend. XIV, § 1.

⁵¹ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁵² *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291-92 (1980).

Although personal jurisdiction and choice-of-law inquiries are not necessarily identical,⁵³ the above passage touches on both aspects of the choice-of-law standard enunciated in *Hague*. The fairness issue in the jurisdictional inquiry concerns the forum in which a defendant might be forced to litigate. In the choice-of-law inquiry, however, the fairness issue concerns which substantive law will be applied in judging the defendant's conduct. The potential for unfairness is arguably greater when a court chooses to apply forum law than when it simply asserts jurisdiction. As one commentator has succinctly noted, to argue otherwise is to argue "that an accused is more concerned with where he will be hanged than whether."⁵⁴ This assumes, of course, that once a defendant has arrived at a distant or inconvenient forum, choice-of-law rules will point to the law of a jurisdiction with which the defendant's contacts were "significant."⁵⁵

The Court linked federalism concerns to personal jurisdiction in *International Shoe Co. v. Washington*.⁵⁶ In that case, the Court noted that jurisdictional contacts must be "reasonable, in the context of our federal system of government."⁵⁷ The Court further suggested that due process limitations on state jurisdiction advanced the "fair and orderly administration of the laws."⁵⁸ Again, however, the consequences of reaching out to assert jurisdiction may not be as severe as the conse-

⁵³ See *Hague*, 449 U.S. at 320 n.3 (Stevens, J., concurring) ("While it has been suggested that [the] minimum-contacts analysis [applied to personal jurisdiction] be used to define the constitutional limitations on choice of law, the Court has made it clear over the years that the personal jurisdiction and choice-of-law inquiries are not the same.") (citations omitted).

⁵⁴ Silberman, *supra* note 8, at 88; cf. R. GRAVESON, *Choice of Law and Choice of Jurisdiction in the English Conflict of Laws*, in *COMPARATIVE CONFLICT OF LAWS* 99, 112 (1977):

On general grounds it would seem sound to suggest that the question of choice of law is more important than that of choice of jurisdiction. It is more in the interests of uniformity of decision, of justice, and of the parties themselves that the proper law should be applied to the merits of their dispute than that some law should be applied by the courts of one country rather than those of another.

⁵⁵ This argument also assumes that the forum will construe foreign laws correctly. Because a judge in State A will rarely behave precisely like a judge in State B or C, however, one cannot say in the abstract that foreign law will be construed "just like" it would be in the foreign jurisdiction itself. *Shutts* is a classic example. The trial court decided that applicable foreign law did not conflict with Kansas law and applied Kansas law to the entire 28,100-member class. The Supreme Court ruled, however, that other states' laws did conflict with the laws of Kansas and that the defendant's liability would be greatly reduced by the proper application of foreign law to the claims against it. See *Shutts*, 105 S. Ct. at 2978.

⁵⁶ 326 U.S. 310 (1945).

⁵⁷ *Id.* at 317.

⁵⁸ *Id.* at 319.

quences of reaching out to apply forum law. An overbroad assertion of jurisdiction merely deprives another state of the opportunity to hear a particular case; in an age of crowded dockets, this may not be wholly unwelcome. A state's assertion of jurisdiction should not, of itself, give offense to other states with an interest in the litigation, because when conflicts rules point to another state's substantive laws a forum should either apply those laws⁵⁹ or decline jurisdiction under *forum non conveniens* principles.⁶⁰

2. Jurisdiction over Plaintiff Class Members

In *Shutts* the Court held that the "minimum contacts" requirement applicable to a state's exercise of judicial jurisdiction over nonresident defendants does not apply to nonresident members of a plaintiff class.⁶¹ According to the Court, the touchstone for jurisdiction over plaintiffs in class actions is "minimal procedural due process protection,"⁶² which requires only that class members receive notice of the action and have the opportunity to "opt out" of the litigation.⁶³

This requirement is understandable given the reasons for the minimum contacts standard for judicial jurisdiction. The minimum contacts standard allows defendants to avoid "the burdens of litigating in a distant or inconvenient forum."⁶⁴ This concern does not exist for plaintiffs

⁵⁹ See Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 668 (1959). An example is *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), in which the Supreme Court held that Oklahoma's assertion of jurisdiction over a case involving an auto accident within its borders was improper because the state had no other contacts with the parties and the litigation. New York had the most substantial contacts in the case. Nevertheless, if the Oklahoma court applied New York products liability law, its assertion of jurisdiction alone presumably would not have "offended" New York or violated the parties' due process rights under *Hague*. For an argument in support of the contrary view—that a *Hague* analysis would have supported an application of Oklahoma law in *World-Wide Volkswagen*—see Lowenfeld & Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by Allstate Insurance Co. v. Hague*, 14 U.C.D. L. REV. 841, 852 (1981).

⁶⁰ See *Shaffer v. Heitner*, 433 U.S. 186, 228 n.8 (1977) (Brennan, J., concurring in part, dissenting in part) ("[I]f a preferable forum exists elsewhere, a State that is constitutionally entitled to accept jurisdiction nonetheless remains free to arrange for the transfer of the litigation under the doctrine of *forum non conveniens*."); see also 28 U.S.C. § 1404(a) (1982) ("For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."). See generally Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985) (analyzing the relationship between the *forum non conveniens* doctrine and other standards used to control access to the courts).

⁶¹ See *Shutts*, 105 S. Ct. at 2975.

⁶² *Id.*

⁶³ See *id.*

⁶⁴ *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980).

in a class action: class action procedure does not require the presence of most class members in court.⁶⁵ Likewise, in terms of interstate federalism, plaintiff class members voluntarily submit to jurisdiction by declining to opt out of the class. Thus, the state is not reaching out jurisdictionally, but rather is allowing itself to be used as a forum for the resolution of class claims.

This lower jurisdictional requirement allows multistate plaintiff class actions to proceed in cases in which many class members have had no contact with the forum. Indeed, given the inhospitality of the federal courts to class action suits,⁶⁶ this lower jurisdictional standard is all that keeps the multistate class action a viable form of litigation.⁶⁷

*Miner v. Gillette Co.*⁶⁸ provides a good example of the jurisdictional standards applicable to plaintiff class members. *Miner* was an Illinois class action involving a plaintiff class of 180,000 members, of whom roughly ninety-five percent were nonresidents.⁶⁹ The court had jurisdiction over the defendant by virtue of its business activities in Illinois, and it asserted jurisdiction over the plaintiff class solely on the

⁶⁵ See, e.g., *Miner v. Gillette Co.*, 87 Ill. 2d 7, 14, 428 N.E.2d 478, 482 ("[The class action suit] does not contemplate or necessitate the appearance of absent parties."), *cert. dismissed per curiam*, 459 U.S. 86 (1982), *quoted in* Comment, *Jurisdiction and Notice*, *supra* note 8, at 1500.

⁶⁶ The Supreme Court has severely limited the use of class action procedure in the federal courts. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 359-64 (1978) (Class representatives must pay the costs of ascertaining class membership.); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974) (Rule 23(b)(3) class actions require individual notice to plaintiff class members regardless of the cost of such notice.); *Zahn v. International Paper Co.*, 414 U.S. 291, 300-01 (1973) (Each class member's claim in a diversity action must exceed the \$10,000 minimum amount required for the assertion of jurisdiction.); *Snyder v. Harris*, 394 U.S. 332, 336 (1969) (The various claims in a class action may not be aggregated to provide the \$10,000 amount in controversy required for diversity jurisdiction.).

This does not mean, however, that the federal courts are closed to all class actions. Federal courts are still open to class actions brought under federal question jurisdiction, such as antitrust actions, actions under the securities acts, consumer actions under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1982), and actions brought under various other federal statutes allowing private rights of action. In any such actions, plaintiffs may also advance state law claims to the extent permitted under pending jurisdiction doctrine.

⁶⁷ See Greenhouse, *supra* note 11, at D2, col. 2 ("If [Shutts] had gone the other way, it would have largely closed the door to nationwide class actions in state courts by undercutting the ability of plaintiffs' attorneys to put together large classes.") (quoting Professor Lea Brilmayer of Yale Law School); see also *Hearings on S. 3201 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. 277 (1970) (statement of J. Dushoff, a class action plaintiff's attorney) ("The 'promise' of the federal [consumer] class action was nipped in the bud by the unfortunate decision in [*Snyder v. Harris*, 394 U.S. 332 (1969)].") (footnote omitted).

⁶⁸ 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. dismissed per curiam*, 459 U.S. 86 (1982).

⁶⁹ See *id.* at 21-22, 428 N.E.2d at 486 (Ryan, J., dissenting).

basis of the opt-out notice sent to class members by the class representatives.⁷⁰

The members of the plaintiff class in *Miner* were victims of a failed promotional scheme that Gillette, a Delaware corporation headquartered in Massachusetts,⁷¹ had operated through an intermediary company located in Minnesota.⁷² Thus, for nonresident class members, the only contact with Illinois was the litigation itself: no prelitigation event linked them to the forum. A full-blown "minimum contacts" requirement for jurisdiction over the plaintiffs would have meant that the class could not have been certified as constituted. The Illinois court applied a more lenient standard, however, and proceeded to certify the class.⁷³

II. CHOICE OF LAW AND CLASS ACTION PROCEDURE

As has been seen, *Allstate Insurance Co. v. Hague*⁷⁴ requires that there be "significant contacts" between the forum, the parties, and the litigation and that these contacts give rise to forum "state interests" before a court may constitutionally apply forum law to a case. At the same time, *Shutts* now allows courts to exercise jurisdiction over plaintiff class members who have no contacts at all with the forum. For these class members, the *Hague* choice-of-law requirement of "significant contacts" creating "state interests" will not be met. Under *Shutts*, their claims must be adjudicated under law chosen according to the choice-of-law rules of the forum. Current federal⁷⁵ and state⁷⁶ class action procedure, however, encourages courts either to apply a single law to class members' claims or to dismiss the action altogether. This section sets forth the fundamental conflict between the goals of class action

⁷⁰ See *id.* at 13-16, 428 N.E.2d at 481-83.

⁷¹ See *id.* at 21, 428 N.E.2d at 486 (Ryan, J., dissenting).

⁷² See *id.*

⁷³ See *id.* at 20, 428 N.E.2d at 485.

⁷⁴ 449 U.S. 302 (1981) (plurality opinion).

⁷⁵ See FED. R. CIV. P. 23.

⁷⁶ For an exhaustive survey and comprehensive listing of the rules in all 50 states, as well as of all state and federal class actions brought since the 1966 amendments to Rule 23, see 3 H. NEWBERG, *supra* note 32, at 105-83 (state class action rules); 5 *id.* at 262-83 (state class actions); *id.* at 4-261 (federal class actions, arranged topically and by court and judge).

The following discussion of the influences of class action procedure concerns federal actions involving questions of state law through pendent jurisdiction, federal causes of action that look to or incorporate state law on certain matters, and state actions brought in the overwhelming majority of jurisdictions that have adopted either the federal rules, FED. R. CIV. P. 23, or the Uniform Class Actions Rule, 12 U.L.A. 23 (Supp. 1986). See also *infra* note 97 (discussing choice-of-law problems presented in federal class actions).

procedure and the constitutional requirements for the application of forum law.

A. *Requirements for Maintaining a Class Action*

1. Commonality and Predominance

An action may be maintained as a class action only if it involves questions of law or fact common to the class.⁷⁷ Moreover, in a Rule 23(b)(3) action these common questions of law or fact must predominate over any questions of law or fact affecting only individual members of the class.⁷⁸ If issues of fact are not common to the class, and the forum must apply multiple laws, then neither questions of fact nor questions of law will be common to the class and the action will not satisfy even the threshold commonality requirement. If questions of fact are common, but multiple questions of law exist, then the common questions of fact will not "predominate" over the individual questions of law, and the action will fail the predominance test.⁷⁹

In class actions such as *Shutts* and *Miner*, involving plaintiffs from numerous foreign jurisdictions who have little or no contact with the forum, application of multiple states' laws will mean that the requirements of commonality and predominance will not be met. Specifically, questions of law will not be "common" to a class and common questions will not "predominate," and after *Shutts* a court may not satisfy these requirements simply by deciding to apply forum law uniformly to all claims.⁸⁰

2. Manageability

The manageability requirement for maintaining certain class actions also encourages courts either to apply a single law to the claims of a multistate class or to dismiss the class altogether. Rule 23(b)(3) re-

⁷⁷ FED. R. CIV. P. 23(a)(2). The presence of common issues of fact or law is a prerequisite to any action under Rule 23 or the state rules that follow it. *See id.* It is also a prerequisite to an action under the Uniform Class Actions Rule. *See* UNIF. CLASS ACTIONS RULE § 1(2), 12 U.L.A. 25 (Supp. 1986). Under the 1938 Field Code rules, it is required in the case of a "spurious" class action. *See* 7 C. WRIGHT & A. MILLER, *supra* note 6, at § 1752.

⁷⁸ FED. R. CIV. P. 23(b)(3). Under the Uniform Class Actions Rule, predominance is a "relevant factor" in the decision to certify any class action. *See* UNIF. CLASS ACTIONS RULE § 3(a)(5), 12 U.L.A. 26 (Supp. 1986). "Choice of law problems" are another factor. *See id.* § (3)(a)(12), 12 U.L.A. at 26.

⁷⁹ *See* 3 H. NEWBERG, *supra* note 32, at §§ 4.25-26.

⁸⁰ *See Shutts*, 105 S. Ct. at 2980 ("A state may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.'").

quires that the court find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . . The matters pertinent to the findings include . . . the difficulties likely to be encountered in the management of the class action."⁸¹

In any case in which there are class members who have insufficient contact with the forum to support the application of forum law, the court must investigate the forum's choice-of-law rules as they apply to each plaintiff, select the appropriate foreign law, and determine whether that law conflicts with forum law. If the class members hail from many states, such an undertaking would make the class action unmanageable even if the law of most of the foreign states were ultimately found to be the same as the law of the forum. In this way, the requirement that the class action be superior to other methods for the efficient adjudication of the controversy encourages courts either to apply forum law uniformly or to deny certification altogether.⁸²

B. *Judicial Responses: Choosing Forum Law or Denying Certification*

1. Choosing Forum Law

Prior to *Shutts*, many courts solved the commonality, preponderance, and manageability problems by choosing forum law in the face of a conflict, either ignoring or failing to recognize the possibility that choice-of-law principles or the Constitution might demand otherwise.⁸³

⁸¹ FED. R. CIV. P. 23(b)(3)(D). Similarly, the Uniform Class Actions Rule directs a court to consider whether "management of the class action poses unusual difficulties" and whether "any conflict of laws issues pose unusual difficulties" before it decides to certify a class action. UNIF. CLASS ACTIONS RULE § 3(11)-(12), 12 U.L.A. 26 (Supp. 1986).

⁸² See, e.g., *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir.) ("The management of a class action with many thousands of class members imposes tremendous burdens on overtaxed district courts . . ."), *cert. denied*, 423 U.S. 1018 (1975); *Elster v. Alexander*, 76 F.R.D. 440, 443 (N.D. Ga. 1977) (reasoning that because of choice-of-law problems treatment of a rule 10b-5 claim "in a class action . . . would create a judicial nightmare" and holding that "the problems of manageability . . . preclude this action from being treated as a class action"), *appeal dismissed per curiam*, 608 F.2d 196 (5th Cir. 1979); *Schmidt v. Interstate Fed. Sav. & Loan Ass'n*, 74 F.R.D. 423, 429 (D.D.C. 1977) (denying certification because the choice-of-law problems would "undoubtedly complicate the proceedings and heighten the unmanageability that already inheres in class suits"); *Causey v. Pan American World Airways*, 66 F.R.D. 392, 399 (E.D. Va. 1975) (denying certification because "conflict of law questions would be extremely complex").

⁸³ For example, the Kansas Supreme Court discussed the choice-of-law questions in *Shutts* at some length without a single reference to *Hague*. See *Shutts*, 235 Kan. at 221-22, 679 P.2d at 1181.

This approach allowed such class actions to proceed and thus permitted courts to conserve judicial resources by resolving a large number of claims in a single action.⁸⁴ It also allowed courts to avoid the difficulty of first ascertaining and then applying the foreign law or laws appropriate to the class.⁸⁵ Under this approach, all questions of law were questions of forum law and thus common and predominant, and such actions remained manageable.

*In re Saxon Securities Litigation*⁸⁶ provides an example of the uniform application of a single state's law to a multistate class. In

⁸⁴ Class action procedure facilitates the resolution of a large number of related claims in a single forum, and as such is more efficient than the alternative of having a great number of actions brought in different jurisdictions. Dismissal on choice-of-law grounds would frustrate this purpose. See *infra* text accompanying note 107. The accommodation of serious choice-of-law problems through the use of numerous subclasses is also inefficient, because a single trial judge will in effect have to conduct multiple trials. The Court in *Shutts*, however, made light of this concern in stating that the choice-of-law decision may not be "altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum." *Shutts*, 105 S. Ct. at 2980; see also *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 883 (5th Cir. 1973) ("[T]he geographical dispersion of the alleged [fraudulent] representations would bring into issue various state common law standards. With no single law governing the entire class, common issues of law cannot be shown to warrant Rule 23 treatment."); *Schlusser v. Allis-Chalmers Corp.*, 86 Wisc. 2d 226, 241, 271 N.W.2d 879, 886 (1978) ("[T]he judicial task is simplified by applying the law of a single forum to [class actions].").

⁸⁵ As Justice Stevens noted in *Hague*, "This task can be particularly difficult for a trial judge who does not have ready access to a law library containing the statutes and decisions of all 50 states." 449 U.S. at 326 n.14 (Stevens, J., concurring); see also *Behr, Judge in Pennzoil-Texaco Lawsuit Reportedly Has Doubts About Case*, Washington Post, Apr. 12, 1986, at G1, col. 3:

[Judge Solomon Casseb, Jr.] said his instructions to the jury were based on "what I felt was the procedure in following the New York law as to what constituted . . . a binding agreement between the parties."

"Now if it was in Texas, you had to have that baby in writing all the way and signed," he told [a group of] California lawyers. "No question you had to have a contract."

But Casseb said that as he interpreted New York law and legal precedents, a binding agreement did not require a definitive, written contract. "You know, this is my first experience in trying to analyze New York law after I did 46 years with Texas," he said. "So you can see, that [misinterpretation] can happen to any judge."

The Kansas Supreme Court in *Shutts* noted that the trial court had not examined the choice-of-law issues presented by the case. See *Shutts*, 235 Kan. at 221, 679 P.2d at 1180-81. The trial judge in *Shutts* has decided a number of other massive oil and gas class actions involving nonresident plaintiff classes and difficult choice-of-law issues, and he has generally applied Kansas common law to the entire class. See, e.g., *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), *cert. denied*, 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Co.*, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied*, 434 U.S. 1065 (1978).

⁸⁶ [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,691 (S.D.N.Y. Feb. 23, 1984).

Saxon, the plaintiffs pleaded pendent state law fraud claims in a class action alleging securities fraud under the Securities Exchange Act of 1934.⁸⁷ The court chose to reject a magistrate's recommendation that the state law claims not be certified because of choice-of-law and manageability problems.⁸⁸ Because of an apparent lack of "significant variations" in the various states' treatment of common-law fraud, the court concluded, "it may well be reasonable to apply the law of New York to all of the non-residents' claims or to allow both sides to explore the possibility of picking another state's laws to be applied uniformly."⁸⁹ The court avoided even the preliminary task of ascertaining the particular laws to which New York's conflicts rules might have pointed.

In *Shutts*, the trial court took a similar approach. The court applied forum law to the multistate class, recognizing that "[w]hen liability is to be determined according to varying and inconsistent state laws, the common question of law or fact prerequisite . . . will not be fulfilled."⁹⁰ The Kansas Supreme Court acknowledged that the trial court had not examined the choice-of-law issues,⁹¹ but approved the application of forum law nevertheless, stating that "[t]he general rule is that the law of the forum applies."⁹²

2. Denying Certification

Some courts have responded to the problems created by the procedural need to apply forum law by simply refusing to certify the class and dismissing the case. In *Chmielewski v. City Products Corp.*,⁹³ a plaintiff class brought state law claims for breach of fiduciary duty pendent to a federal antitrust action.⁹⁴ These claims concerned contracts for franchise stores located in 48 states.⁹⁵ The court denied class certification with respect to the state law claims on the grounds that the pre-

⁸⁷ See *id.* at 97,776 (referring to SEC Rule 10(b)(5), 17 C.F.R. § 240.10b-5 (1985) (implementing section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982)).

⁸⁸ See *id.* at 97,776-77.

⁸⁹ *Id.* at 97,777 (citations omitted). The *Saxon* court indicated that if the state law claims before it were to become "unmanageable," *id.*, it might decertify the class. A concern for manageability, however, only reinforces the tendency to apply forum law to a class action, since it is the most "manageable" law a forum could select. See *supra* notes 81-82 and accompanying text.

⁹⁰ *Shutts*, 235 Kan. at 212, 679 P.2d at 1175 (citing *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 557, 567 P.2d 1292, 1314 (1977), *cert. denied*, 434 U.S. 1068 (1978)).

⁹¹ See *id.* at 221, 679 P.2d at 1180-81.

⁹² *Id.* at 221, 679 P.2d at 1181.

⁹³ 71 F.R.D. 118 (W.D. Mo. 1976).

⁹⁴ See *id.* at 128.

⁹⁵ See *id.* at 169.

dominance requirement of Rule 23(b)(3) had not been met.⁹⁶ Looking to the choice-of-law principles of Missouri, the forum state,⁹⁷ the court found that Missouri would use the "most significant relationship" test of the *Restatement (Second) of Conflict of Laws* to determine which state law would apply to each claim.⁹⁸ The court concluded that "a class action for breach of fiduciary duty would not present questions of law common to the class and would in fact involve the application of the law of virtually every state in the Union."⁹⁹

*Rental Car v. Westinghouse Electric Corp.*¹⁰⁰ provides another example. In *Rental Car*, the United States District Court for the District of Massachusetts found that Massachusetts conflicts rules pointed to the law of the place of the wrong in cases involving tort claims.¹⁰¹ Thus, in the plaintiffs' class action claim for breach of fiduciary duty, the court would have had to apply the law of each state in which fiduciary duties to the plaintiff class members arose and were broken—the "place of the wrong."¹⁰² The resultant choice-of-law problems destroyed the possibility that common questions of law would predominate over individual questions, and the class was not

⁹⁶ See *id.* at 171-72.

⁹⁷ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), requires that federal courts sitting in diversity apply the choice-of-law rules of the forum state. See *id.* at 496. Federal courts must use the forum state's choice-of-law rules in adjudicating state-law claims brought under diversity jurisdiction, state-law claims brought pendent to actions involving federal questions, and federal actions that look to state substantive law. A federal court's application of the forum state's substantive law is subject to the constitutional limits that *Hague* places on any choice of forum law.

For pendent state law claims raising choice-of-law issues to be decided under the law of the forum state, see, for example, *In re United States Fin. Sec. Litig.*, 64 F.R.D. 443, 455 (S.D. Cal. 1974) (denying class treatment of state-law fraud claims pendent to a federal securities action). For actions under federal statutes that look to the substantive law of the forum state, see *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 605-06 (S.D.N.Y. 1982) (finding class certification inappropriate for an action under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1982), which looks to state law for the definition of "implied warranty"); *Harrigan v. United States*, 63 F.R.D. 402, 405 (E.D. Pa. 1974) ("[T]he substantive law of the state wherein the cause of action accrues . . . governs the liability of the United States on claims brought under the [Federal Tort Claims Act, ch. 753, §§ 401-424, 60 Stat. 812, 842-47 (1946) (codified as amended in scattered sections of 28 U.S.C.)]."). See also L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 1167-68 (1983) (discussing the application of state statutes of limitations to implied rights of action under the federal securities laws). The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1982), requires that a number of special procedures be followed in class actions brought under that Act. See *id.* § 2310(e).

⁹⁸ See *Chmielewski*, 71 F.R.D. at 169.

⁹⁹ *Id.*

¹⁰⁰ 496 F. Supp. 373 (D. Mass. 1980).

¹⁰¹ See *id.* at 381; see also *supra* note 19 (discussing various choice-of-law rules for actions in tort and contract).

¹⁰² *Rental Car*, 496 F. Supp. at 381.

certified.¹⁰³

B. *The Effects of Shutts*

The Court's decision in *Shutts* permits the assertion of jurisdiction over nonresident plaintiffs in a class action who have no contacts of any sort with the forum; most nonresident plaintiffs will not appear before the court, and the matters being litigated may have occurred in other jurisdictions.¹⁰⁴ The result is that for many class members the only contact with the forum may be the litigation itself.

At the same time, however, the Court held that any application of forum law, whether in individual or class action litigation, must meet the constitutional requirements of *Hague*: contacts between the forum, the parties, and the litigation must be "significant" and give rise to state "interests" so that application of forum law is neither arbitrary nor fundamentally unfair.¹⁰⁵ Thus, in many class actions involving plaintiffs from numerous states, a court may be permitted to assert jurisdiction over all claims but foreclosed from resolving those claims through the straightforward application of a single state's law.

The *Shutts* decision therefore presents the courts with some difficult choices. The requirements of commonality, predominance, and manageability in class action procedure previously encouraged courts either to deny certification to a class or to certify it under forum law. With the latter approach now ruled out by *Shutts*, some courts may feel compelled simply to dismiss class actions that present choice-of-law problems. Yet outright dismissal is not the only remaining approach. In the following section, alternatives are proposed that, if used properly, can assure the continued vitality of the class action.¹⁰⁶

¹⁰³ See *id.*; accord *Zandman v. Joseph*, 102 F.R.D. 924, 929-30 (N.D. Ind. 1984); *McMerty v. Burtress*, 72 F.R.D. 450, 456 (D. Minn. 1976).

¹⁰⁴ See *Shutts*, 105 S. Ct. at 2978-81.

¹⁰⁵ See *id.*

¹⁰⁶ Some of the approaches suggested here raise issues concerning offensive nonmutual collateral estoppel. In some cases, these approaches will lead to the noncertification of some class members, and a judgment for the plaintiffs who remain members of the class arguably could be used by the noncertified class members in subsequent suits against the defendants. Under the theory of nonmutual offensive collateral estoppel articulated in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), however, noncertified plaintiffs may not make offensive use of collateral estoppel if for any reason such use would be unfair to the defendants. Cf. *id.* at 331 (upholding the plaintiffs' use of offensive collateral estoppel based on an earlier declaratory judgment obtained by the SEC on essentially the same matter). Such unfairness may result, for example, in circumstances in which as a result of a choice-of-law determination the defendant did not have a sufficient incentive to litigate the issue in the first action. For a discussion of the use of offensive collateral estoppel in cases in which plaintiffs opt out of the class, see 3 H. NEWBERG, *supra* note 32, at § 16.27.

III. ALTERNATIVE APPROACHES

A. Subclasses

In class actions in which foreign states' substantive laws must be applied, class action procedure provides for application of those laws, at the court's discretion, through the use of subclasses.¹⁰⁷ In forming these subclasses, the court will be guided by choice-of-law principles.¹⁰⁸

In *Shutts*, for example, both Kansas' choice-of-law rules and those of the *Restatement (Second) of Conflict of Laws* pointed to the laws of the states in which the leaseholds at issue were located.¹⁰⁹ There were eleven such states, including Kansas,¹¹⁰ and the plaintiff class could thus have been broken up into eleven subclasses according to the location of the leaseholds. The contacts with these states would include the defendant's business activities, the land on which the royalties were earned, and the lease itself. These contacts would support a choice of law that could be found constitutional under the standard set forth in *Hague*.¹¹¹

The adjudication of the *Shutts* claims under such an arrangement

¹⁰⁷ See FED. R. CIV. P. 23(c)(4)(B); UNIF. CLASS ACTIONS RULE § 2(c)(3), 12 U.L.A. 25 (Supp. 1986).

¹⁰⁸ Courts have, on occasion, used this approach as a solution to class actions presenting choice-of-law problems. See, e.g., *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 861 (2d Cir.) (holding that the use of subclasses corresponding to variations in state law was not palpable error), *cert. denied*, 465 U.S. 1067 (1984); *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100, 113 (E.D. Va. 1980) (forming six subclasses based on choice-of-law rules in order to maintain "the advantages and economies to be achieved by a single adjudication of common issues" in class actions); *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wash. 2d 680, 688, 586 P.2d 830, 834-35 (1978) (en banc) ("[O]n remand the trial court is directed to divide the certified class into subclasses which will allow proper treatment under the conflict of laws analysis set forth herein."), *amended en banc*, 95 Wash. 2d 51, 605 P.2d 779 (1980).

¹⁰⁹ Kansas' choice-of-law rules point to the place of contracting for actions in contract. See *Ellis v. Eagle-Picher Lead Co.*, 116 Kan. 144, 145, 225 P. 1072, 1073 (1924); *Simms v. Metropolitan Life Ins. Co.*, 9 Kan. App. 2d 640, 642, 685 P.2d 321, 324 (1984). The litigation in *Shutts* concerned the terms of oil and gas royalty contracts made in various states. See *Shutts*, 235 Kan. at 217-19, 679 P.2d at 1178. The *Restatement (Second) of Conflict of Laws* looks to the following factors when choosing the law to govern contracts: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 188(2) (1971). All of these factors point to the state where the leased oil and gas lands were located.

¹¹⁰ See *Shutts*, 105 S. Ct. at 2968.

¹¹¹ The fact that a royalty lease covered land in a particular state would virtually guarantee that that state had the requisite interests in having its law applied to those leases. Cf. R. LEFLAR, *supra* note 39, § 108, at 216-17 (discussing choice of law in different types of cases involving land).

would be fair to both plaintiffs and defendants. It would provide uniform treatment to plaintiffs who are similarly situated by virtue of their leasehold interests in the same state. Furthermore, the defendant's legitimate expectations regarding the law applicable to its activities in any given state would be met.¹¹² Finally, each state's interest in having its oil and gas laws applied to in-state oil and gas transactions would be respected. Kansas would no longer act as the regional arbiter of oil and gas policy by virtue of its status as a forum for a class action suit.

B. *Partial Dismissal*

Under the subclass approach, several situations will call for the court to dismiss all or part of the class action before it. The first occurs when the number of subclasses required is so large as to render the class action inefficient. Another occurs when the subclass representing forum interests is so small that the task of adjudicating all of the class's claims is not worthwhile. A third occurs when the membership of particular subclasses is too small to meet the numerosity requirement of Rule 23.

*Miner v. Gillette Co.*¹¹³ provides an example of the first situation. The plaintiff class in *Miner* included residents of all fifty states. Thus, although the facts giving rise to the several thousand claims were virtually identical, the case implicated individual questions of law requiring resolution under as many as fifty separate jurisdictions.¹¹⁴ The majority reasoned, however, that the differing laws of the states might be grouped into a manageable number of subclasses in which common questions of fact would predominate.¹¹⁵

Judge Ryan recognized in dissent, however, that whether any number of subclasses is manageable depends on the judicial resources

¹¹² For example, the Phillips Petroleum Company entered into contracts on leases covering land in Texas. According to the Court in *Shutts*, use of Texas law rather than Kansas law would mean that interest on royalty monies would be awarded based on a substantially lower interest rate. *See Shutts*, 105 S. Ct. at 2978. *But see id.* at 2989 n.22 (Stevens, J., concurring in part and dissenting in part) (disputing the majority's suggestion that Texas courts would have applied a lower interest rate). Indeed, under an exception peculiar to Texas law Phillips might have been excused altogether from some of the interest payments at issue in *Shutts*. *See id.* (citing Phillips Petroleum Co. v. Riverview Gas Compression Co., 409 F. Supp. 486, 493-97 (N.D. Tex. 1976)). *But see id.* at 2989 n.22 (Stevens, J., concurring in part and dissenting in part) (arguing that this exception would not have applied to the *Shutts* case).

¹¹³ 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. dismissed per curiam*, 459 U.S. 86 (1982).

¹¹⁴ *See id.* at 17, 428 N.E.2d at 483-84.

¹¹⁵ *See id.*

that are devoted to the litigation.¹¹⁶ In a case in which the number of subclasses is great, the litigation might be manageable if sufficient judicial resources are devoted to it, but use of the class action procedure in such a case might very well be inefficient.

In cases in which a significant resident subclass exists, however, a forum could deny certification to class members who were unable to plead forum law.¹¹⁷ In *Miner*, several thousand Illinois residents were included in the class, and various nonresidents might have been able to plead Illinois law.¹¹⁸ The *Miner* court could have denied certification to the remainder of the class; these parties presumably could pursue claims in their own jurisdictions or join a class elsewhere.¹¹⁹

The second problem pointed out above concerns the question "whether the forum state itself has an interest . . . strong enough to justify adjudicating the claims of non-residents."¹²⁰ If the Kansas court in *Shutts* were to consider the subclass approach, it might find that the Kansas interests represented by the class as a whole were so insignificant that Kansas was not the best place to resolve the dispute.¹²¹ Dismissal of the suit on forum non conveniens grounds would be an appropriate response, leaving Kansas residents or leaseholders free to proceed with more limited actions in the Kansas courts or to join a newly constituted class in a jurisdiction such as Texas or Oklahoma, where forum interests would be great enough to justify adjudication of the dispute.¹²²

The third problem identified above arises in connection with the

¹¹⁶ See *id.* at 27, 428 N.E.2d at 488-89 (Ryan, J., dissenting).

¹¹⁷ A federal district court took this approach in *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188, 1194-95 (N.D. Cal. 1981) (limiting the class to California residents to avoid choice-of-law problems), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1981). See also *Payton v. Abbott Labs*, 83 F.R.D. 382, 386 n.1 (D. Mass. 1979) (restricting the class to those with claims justiciable under forum law), *vacated*, 100 F.R.D. 336 (D. Mass. 1983).

¹¹⁸ See *Miner*, 87 Ill. 2d at 11, 428 N.E.2d at 480-81. The claims of nonresidents who subscribed to the promotion in Illinois or through the Illinois branch of Gillette might be justiciable under Illinois law.

¹¹⁹ See Firsch, *Notice, Costs, and the Effect of Judgment in Missouri's New Common-Question Class Action*, 38 MO. L. REV. 173, 211 (1973) (arguing that neither forum interests nor efficiency goals are threatened by denying certification to nonresidents who may pursue class or individual action elsewhere).

¹²⁰ *Id.*

¹²¹ Of the nearly 20,000 leaseholds at issue in *Shutts*, only 22 were in Kansas. Moreover, only approximately \$3,000 of the more than \$11,000,000 in contested royalties was attributable to Kansas leaseholds. See *Shutts*, 235 Kan. at 199, 679 P.2d at 1166.

¹²² Most of the leaseholds at issue were in Texas and Oklahoma. See *Shutts*, 105 S. Ct. at 2977. Oklahoma is also the site of the defendant's corporate headquarters. See *id.* at 2968.

numerosity requirement of Rule 23(a)(1),¹²³ which is a cornerstone of the efficiency goal of class action procedure. Where only a few class members are from a particular state whose law must be applied under *Shutts*, a subclass consisting of those persons will not meet the numerosity requirement, and dismissal of those persons will be appropriate.

C. *Interstate Certification*

The Uniform Certification of Questions of Law Act,¹²⁴ currently in effect in twenty-three states and the Commonwealth of Puerto Rico, allows a state court to answer questions of state law that have been certified to it by federal courts or other state courts.¹²⁵ The certification procedure makes it far easier for a forum to discover the proper foreign law applicable to a class action or subclass before it. Under this procedure, the forum court need decide only what subclasses are necessary, and then have questions of foreign law certified to the appropriate foreign courts. The use of certification in this manner would alleviate the problems of manageability that occur when the forum court tries to ascertain and apply foreign law, and would thereby preserve the class action as an efficient procedural device for the righting of mass wrongs. At the same time, it would satisfy the fairness concerns emphasized in *Shutts* by making it unnecessary to apply forum law in order to avoid choice-of-law problems.

Shutts illustrates the kind of case in which certification can be particularly useful. On remand, the Kansas Supreme Court must ascertain and apply the foreign laws applicable to the claims of plaintiff class members to which Kansas law cannot be applied.¹²⁶ Moreover, in at least one state, Oklahoma, there are no recorded decisions concerning interest liability on suspended lease royalties of the type at issue in *Shutts*.¹²⁷ Oklahoma, however, has adopted the Uniform Certification of Questions of Law Act and allows other states to request rulings on its law.¹²⁸ On remand, then, the Kansas court could use the certifica-

¹²³ FED. R. CIV. P. 23(c)(4)(B).

¹²⁴ UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 49 (1975).

¹²⁵ See *id.* For a listing of the 26 states that have adopted at least part of the Uniform Act, see 12 U.L.A. 18 (Supp. 1986). Approximately one-half of these states have adopted the Act's state-to-state certification clause in addition to the clause permitting answers to questions certified by the federal courts. The remaining states provide only for federal-to-state certification. For a general discussion of interjurisdictional certification, see Comment, *Inter-Jurisdictional Certification and Full Faith and Credit in Federal Courts*, 45 WASH. L. REV. 167 (1970).

¹²⁶ See *Shutts*, 105 S. Ct. at 2979.

¹²⁷ See *id.* at 2977.

¹²⁸ OKLA. STAT. ANN. tit. 20, §§ 1601-1612 (West Supp. 1985). West Virginia, another state in which *Shutts* leaseholds and class members are located, has a similar

tion device to enlist the aid of the Oklahoma state courts in deciding the liability standard for the more than 4,000 Oklahoma leases at issue in the litigation.¹²⁹

Certification can promote accurate decisionmaking as well as efficiency. Judges in one state can never behave precisely like judges in another, and they will inevitably be less familiar with the law and principles of the other states. Thus, one can never say in the abstract that the court of the forum will apply foreign law "just like" it would be applied in the foreign jurisdiction itself.¹³⁰ The proper application of foreign law is especially important in class actions, in which the magnitude of the aggregated claims is so great. Certifying questions of foreign law to the appropriate foreign courts not only frees the forum court from having to ascertain and apply foreign law, but also helps to ensure that these determinations are made correctly.

CONCLUSION

In *Phillips Petroleum Co. v. Shutts*, the Supreme Court addressed for the first time the issues of jurisdiction and choice of law in the class action setting. By lowering the jurisdictional requirements applicable to multistate plaintiff class actions, *Shutts* allows courts to exercise jurisdiction over nonresident plaintiffs who have had little or no contact with the forum. *Shutts* requires only that plaintiff class members receive adequate notice of the suit and an opportunity to opt out. At the same time, however, *Shutts* permits courts that exercise jurisdiction over multistate plaintiffs to apply forum law to class claims only if the choice-of-law standards enunciated in *Allstate Insurance Co. v. Hague* are met. Those standards, however, require contacts and state interests of a sort that will not be found among class members whose only contact with the forum is the litigation itself.

The tension between these two standards exists because procedural rules that are intended to ensure that class actions are efficient and manageable encourage the uniform application of forum law to all class members. Some courts have applied forum law to all the claims before them, while other courts have used the commonality, predominance, or manageability requirements of Rule 23 to dismiss class actions that presented choice-of-law problems. If the *Shutts* standards are to be reconciled, and if class actions are to remain a viable means of resolving

provision. See 15 W. VA. CODE §§ 51-1A-1 to -12 (1981).

¹²⁹ See *Shutts*, 105 S. Ct. at 2977 (describing the location of the various leaseholds at issue in the case).

¹³⁰ See *supra* note 85.

disputes involving multistate plaintiffs, courts must begin to accommodate class action procedure to the choice-of-law process. Creative use of subclasses formed by reference to choice-of-law principles is one means of achieving such accommodation. Another is the tailoring of the class to reflect the scope of the forum's interest in the litigation. Finally, the further adoption and use of the Uniform Certification of Questions of Law Act would be of great assistance to courts undertaking either of these options. Throughout, a balance must be maintained between the fairness and federalism interests emphasized in *Hague* and the efficiency goals of class action procedure.