The Jurisdictional Nature of Adequate Representation in Class Litigation

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INTRODUCTION

The American Law Institute ("ALI") sets an ambitious goal in *Principles of the Law of Aggregate Litigation* ("*Principles*")[1]: "to identify techniques that promote the efficiency and efficacy of aggregate lawsuits as tools for enforcing valid laws."[2] The ALI identifies many techniques that promote that goal. But in focusing so singlemindedly on efficiency and efficacy, the ALI gives short shrift to external constraints that the law imposes on the class device.[3]

The *Principles*' bare-bones discussion of personal jurisdiction, for example, peremptorily dismisses the longstanding link between adequate representation and personal jurisdiction in class suits as a product of jurisdictional confusion.[4] Because the conclusion that inadequately represented class members have a constitutional right to collaterally attack the class judgment rests on this link, decoupling the two would have the effect of undermining the argument that the Constitution protects the right of absent class members to collaterally attack a judgment for inadequate representation.[5] This, in fact, appears

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1 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (2010). The Reporters were Samuel Issacharoff, Robert Klonoff, Richard Nagareda, and Charles Silver. I was deeply saddened to learn of Professor Nagareda's death as this Essay was going through the editing process. Although we have sometimes disagreed in print, Professor Nagareda was a good friend and a wonderful colleague. I will miss him.

2 *Id.* intro., at 1–2.

3 My argument that the *Principles* give short shrift to external constraints on class action law should not be read to suggest that the *Principles* give insufficient respect to the requirements of the substantive law. The *Principles*' insistence on fidelity to the substantive law is commendable. *Id.* § 1.03 cmt. c; *see also id.* § 1.03 ("Aggregation should further the pursuit of justice under law by advancing the following goals: (a) enforcing substantive rights and responsibilities . . . .").

4 *See id.* § 2.07 reporters' note cmt. d ("Existing law has a tendency to confuse matters . . . by casting adequate representation—without clear differentiation between structure and outcome—as an aspect of personal jurisdiction, at least when class members otherwise lack 'minimum contacts' with the rendering forum."); *see also* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1700 (2008) (using the term "jurisdictional confusion").

5 *See infra* Part I.

to be the *Principles*' objective. The *Principles* make clear that they oppose giving absent class members a robust right to collaterally attack a class judgment for inadequate representation,[6] presumably out of fear that collateral attacks will undermine the finality—and therefore the efficiency and efficacy—of class litigation.[7]

But while considerations of efficiency and efficacy may play a role at the margins, personal jurisdiction is not about the efficiency and efficacy of litigation. Rather, as I discuss below, the law of personal jurisdiction imposes serious external constraints on the law of class actions to safeguard important legal values quite apart from the efficiency and efficacy of class litigation.[8] The failure of the *Principles* to sympathetically explore external legal constraints—such as the law of personal jurisdiction—on class action law ill serves those who would rely on the *Principles* as a blueprint for class action reform.[9]

I. The Collateral Attack Debate

Because the argument over the jurisdictional nature of adequate representation has practical implications primarily with respect to the availability of collateral attack, I begin my discussion of personal jurisdiction with an overview of the collateral attack debate. The traditional understanding has long been that an absent class member who has been inadequately represented has the right to collaterally attack the class judgment in subsequent litigation.[10] This understanding has proven unsatisfactory to those more concerned with the efficiency and

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6 *See* Principles of the Law of Aggregate Litig. § 3.14 cmt. a (2010) ("This Section does not approve of postjudgment challenge as a vehicle for relitigating findings of adequacy of representation that were made before judgment by the court approving the settlement."); *id.* § 2.07 cmt. d ("[S]ubsection (a)(1) consciously implies that a judicial finding of loyalty as part of the decision to aggregate—like a determination made on the merits in the aggregate proceedings—should have preclusive effect, unless challenged on direct appeal.").

7 *See, e.g.*, *id.* § 2.02 cmt. e ("[I]f a determination in the aggregate would occur only amidst doubts about its preclusive effect, then those concerns should stand as warning signs counseling strongly against aggregation in the first place."). The Reporters' desire to foreclose the availability of collateral attack may also have led them to champion a remarkably narrow conception of adequate representation in the class context. *See generally id.* § 2.07 cmt. d; Issacharoff & Nagareda, *supra* note 4, at 1675–700.

8 *See infra* Part II.

9 *See infra* Part III.

10 Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. Kan. L. Rev. 917, 917–18 (2010) (documenting the traditional understanding); *see also* 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4455, at 485 (2d ed. 2002) ("It has long been the general understanding that only adequate representation can justify preclusion against nonparticipating class members.").

efficacy of class suits than with the protection of absent class members. Some courts and commentators accordingly have insisted that the Due Process Clause does not require that absent class members be given the right to collaterally attack class judgments for inadequate representation and have suggested that courts can adequately protect the rights of absent class members even in the absence of collateral attack.[11] In the *Principles*, the ALI joins the critics of collateral attack, without even acknowledging that the first *Restatement of Judgments* and the *Restatement (Second) of Judgments* accept as settled law that an absent class member may collaterally attack a judgment for inadequate representation.[12]

The conclusion that the Due Process Clause does not protect the right of an absent class member to collaterally attack a class judgment for inadequate representation typically rests on one of two premises: (1) that an absent class member is bound by the issue-preclusive effect of a judicial finding of adequate representation in the class proceeding because a fiduciary has protected the absent class member's interest in the determination of adequacy,[13] or (2) that an absent class member who fails to raise an adequacy objection in the class proceeding waives her right to pursue the objection,[14] at least if the question of adequacy

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11 *See, e.g.*, Issacharoff & Nagareda, *supra* note 4, at 1651–55; *cf.* 18A WRIGHT ET AL., *supra* note 10, § 4455, at 487 (arguing that "[t]he traditional view" permitting collateral attack "should not be allowed to pass easily into the discarded heap of nice-but-antique procedures that are too wearisome to be endured in the press of modern needs"). For authorities rejecting the availability of collateral attack, see Woolley, *supra* note 10, at 918 nn.6–7.

12 The first *Restatement of Judgments* is crystal clear:

> Where a person is not a party to a class action the judgment therein has conclusive effect against him only if his interests were adequately represented. . . . [A] person as to whom a class action is ineffective is not required to seek relief during the continuance of the action.

RESTATEMENT OF JUDGMENTS § 116 cmt. b (1942).

The *Second Restatement* is in accord:

> [N]otice concerning designation of a representative is an invitation to dispute the propriety of the designation and does not foreclose the notified party from later contesting the adequacy of the representation and on that basis avoiding the conclusive effect of a judgment involving the representative. The purpose of offering opportunity to dispute the fitness of the representative is to permit anticipation of the possibility of subsequent attack on his authority and thus to assure as far as possible that the judgment in the action will have conclusive effects.

RESTATEMENT (SECOND) OF JUDGMENTS § 42 cmt. b (1982) (contrasting the use of notice in class actions with process in ordinary litigation); *see also id.* reporters' note cmt. e (citing *Hansberry v. Lee*, 311 U.S. 32 (1940), for the proposition that "[t]he finding of divergence of interest may, *of course*, be made on collateral challenge" (emphasis added)).

13 *See* Woolley, *supra* note 10, at 954 (discussing the argument).

14 *See id.* at 952–53 (same).

has been determined.[15] The *Principles* would permit a collateral challenge only if the class court "failed to make the necessary findings of adequate representation"[16] but does not make clear on which ground they rely.[17]

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15 *See, e.g.*, *In re* Diet Drugs Prods. Liab. Litig., 431 F.3d 141, 146 (3d Cir. 2005) (stating "that notice and failure to exercise an opportunity to 'opt out' constitutes consent to the jurisdiction of the class action court by an absent member of a plaintiff class" and that "where the class action court has jurisdiction over an absent member of a plaintiff class and it litigates and determines the adequacy of the representation of that member, the member is foreclosed from later relitigating that issue" (citations omitted)).

16 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.14(a)(2) (2010). Citing three cases decided since 1990, the Reporters contend that their position on collateral attack accords "with an emerging consensus among federal courts of appeal." *Id.* § 2.07 reporters' note cmt. d. The contention is misleading in several respects. To begin with, one of the three cases cited by the Reporters does not even address whether an absent class member may collaterally attack a judgment for inadequate representation. *See* Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29, 32–33 (1st Cir. 1991) (holding that a class member who appeared in the class litigation to object to the settlement and pursued its objections to the Delaware Supreme Court was subject to claim preclusion). Moreover, the Reporters simply ignore cases decided after 1990 that do not support their position. *See, e.g.*, Pelt v. Utah, 539 F.3d 1271, 1284–86 (10th Cir. 2008) (recognizing the availability of collateral attack for inadequate representation in Rule 23(b)(1) and (b)(2) class suits); Twigg v. Sears, Roebuck & Co., 153 F.3d 1222, 1226 (11th Cir. 1998) (stating in a case involving a collateral attack premised on inadequate notice that "an absent class member may collaterally attack the prior judgment on the ground that to apply claim preclusion would deny him due process" (citing Gonzales v. Cassidy, 474 F.2d 67, 74–75 (5th Cir. 1973))).

The timeframe the Reporters select is also questionable. The availability of collateral attack is hardly a new issue. Indeed, the leading circuit decision affirming the availability of collateral attack was decided in 1973. *See Gonzales*, 474 F.2d at 74 ("Due process of law would be violated for the judgment in a class suit to be res judicata to the absent members of the class unless the court applying res judicata can conclude that the class was adequately represented in the first suit."). Given the relatively small number of federal circuit court decisions on collateral attack, it is a mistake to ignore cases decided after 1990, as the Reporters do, when assessing the state of the law. Both *Pelt* and *Twigg*, for example, reaffirmed the rule stated in earlier circuit decisions. *See* Guthrie v. Evans, 815 F.2d 626, 628 (11th Cir. 1987) (affirming that class members can pursue relief in a collateral proceeding when the class representative inadequately represents the class); Garcia v. Bd. of Educ., 573 F.2d 676, 679 (10th Cir. 1978) (indicating that collateral attack is permissible when absent class members have been inadequately represented). For citations to federal and state cases on both sides of the issue, see Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 384–86 (2000); Woolley, *supra* note 10, at 918 n.7.

The *Principles*' citation to *Devlin v. Scardelletti*, 536 U.S. 1 (2001), is similarly misleading. The Reporters claim that *Devlin* stands for the proposition that "appealing the approval of the settlement is [a class member's] only means of protecting himself from being bound . . . ." PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.14 reporters' note cmt. a (2010) (alteration in original) (quoting *Devlin*, 536 U.S. at 10–11). It is true that *Devlin* stated that an appeal was the only way for the *petitioner* in that case to protect himself. *Devlin*, 536 U.S. at 10–11 (emphasis added). But the petitioner in *Devlin* made an appearance in the litigation by objecting to the settlement in a fairness hearing. *Id.* at 5. Thus, *Devlin* simply has no bearing on the rights of *absent* class members who have been inadequately represented.

17 I have explained elsewhere that the former premise "stretch[es] the principles of preclu-

Absent class members should be deemed to waive their adequacy objections by failing to raise them in the class proceeding only if the class court (1) has authority to require absent class members to appear for the purpose of litigating their adequacy objections and (2) exercises that authority. Critics of collateral attack have often assumed that a class court with jurisdiction to hear the class claims has jurisdiction to bind absent class members on the adequacy of class representation. But as I explain in detail below, the class court has authority to require an absent class member to raise adequacy objections in the class proceeding on pain of waiver only if the class member has minimum contacts with the forum sovereign and has received process-like notice requiring an appearance.[18] In the absence of these standard jurisdictional requisites, a class court has only "limited and conditional" jurisdiction over absent class members.[19] In other words, "the court has power to enter a judgment against an absent class member on the basis of adequate representation, but no power to compel an absent class member to appear in the forum to contest adequate representation or anything else."[20]

Nor does the invocation of issue preclusion substantially change this analysis. The issue preclusion theory rests on the assumption that an adequate fiduciary will fully protect an absent class member in a hearing on the adequacy of class representation. But even assuming the validity of the assumption, an absent class member should not be bound by issue preclusion unless the class member has waived the right to challenge the adequacy of the fiduciary.[21] As noted above, a class court should be deemed to have authority to require an absent class member to raise adequacy objections in the class proceeding on pain of waiver only if the class member has minimum contacts with the forum sovereign and has received process-like notice requiring an appearance.[22] In short, waiver and issue preclusion legitimately can

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sion law beyond the breaking point." Woolley, *supra* note 10, at 921; *see also id.* at 953–58. I need not pursue that line of argument here.

18 *See infra* Part II.C.

19 Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1154–55 (1998) ("[W]hether [*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)] is read as a case of implied consent or fundamental fairness, the scope of *in personam* jurisdiction it countenances over nonresident class members lacking minimum contact with the forum is both limited and conditional.").

20 Woolley, *supra* note 10, at 972. As I explain, "[t]he concept of limited jurisdiction is an old one, regularly used, for example, when courts routinely asserted quasi-in-rem jurisdiction by seizing property of the defendant within the jurisdiction." *Id.*

21 *See id.* at 954 (agreeing with the *Second Restatement*'s analysis of an analogous issue).

22 *See* text accompanying note 18.

be invoked to deny absent class members the right to collaterally attack a class judgment for inadequate representation only if the standard requisites of personal jurisdiction have been satisfied.

II. Personal Jurisdiction in Class Litigation

A. The Principles' *Approach*

There can be little doubt that the *Principles* give the law of personal jurisdiction short shrift. There are only a few scattered references in the work to the concept of personal jurisdiction in class litigation. Indeed, section 3.14 ("Post Judgment Challenges to Settlement") is the only blackletter provision of the *Principles* that expressly mentions personal jurisdiction in class suits.[23] The section permits a postjudgment challenge to a settlement for lack of personal jurisdiction,[24] but purports to distinguish personal jurisdiction in the class context from adequate representation and notice.[25] Suggesting that only a lack of minimum contacts in ordinary litigation provides a justification for collateral attack based on personal jurisdiction,[26] the Reporters emphasize that "[i]n *Phillips Petroleum Co. v. Shutts*, the Court held that class members are not normally subject to the 'minimum contacts' personal-jurisdiction analysis that applies to defendants."[27] The Reporters state elsewhere in the *Principles* that "[e]xisting law has a tendency to confuse matters . . . by casting adequate representation—without clear differentiation between structure and outcome—as an aspect of personal jurisdiction, at least when class members otherwise lack 'minimum contacts' with the rendering forum."[28] Nothing else of substance is said about what personal jurisdiction requires in the class context.

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23 Principles of the Law of Aggregate Litig. § 3.14 (2010).

24 *Id.* § 3.14(a)(2). Section 3.14(a)(2) also authorizes collateral attack on the ground that the court lacked "subject-matter jurisdiction, failed to make the necessary findings of adequate representation, or failed to afford class members reasonable notice and an opportunity to be heard as required by applicable law." *Id.*

25 *Id.*

26 The Reporters' Note to section 3.14 cites *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), a case that involved whether a defendant had sufficient minimum contacts with the forum, for the proposition that collateral attacks are available for lack of personal jurisdiction. Principles of the Law of Aggregate Litig. § 3.14 reporters' note cmt. a (2010).

27 *Id.*; *see also* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811 (1985).

28 Principles of the Law of Aggregate Litig. § 2.07 reporters' note cmt. d (2010). Section 2.07 is entitled "Scope of Preclusion as a Constraint on Aggregation." For an extensive critique of the *Principles*' conception of adequate representation, see generally Woolley, *supra* note 10, at 921–42.

Indeed, one must turn to an article by two of the Reporters—Samuel Issacharoff and Richard Nagareda—to understand the *Principles*' reasoning.[29] In the article, Professors Issacharoff and Nagareda dismiss the significance of personal jurisdiction in class litigation. They write: "[T]he Constitution seems an unlikely source of review for the exercise of personal jurisdiction, something that is easily waived under Rule 12 of the *Federal Rules of Civil Procedure* and readily satisfied under *Shutts* for absent class members."[30] They further insist that the conclusion that a class court lacks jurisdiction over an inadequately represented class member would be inconsistent with the principle that jurisdiction must be determined at the outset of litigation: "Everywhere else in procedural law, jurisdiction is the paradigmatic subject of first-order inquiry that courts are obliged to address at the outset of a lawsuit."[31] Finally, they argue that the territorial concerns of personal jurisdiction cannot realistically be addressed in the context of nationwide class actions:

> The simple fact is that national markets transcend the territorial boundaries of particular states. As a result, national markets give rise to both legal claims and demands for closure that are national in scope. Where jurisdiction realistically cannot turn on some vestigial notion of territoriality, the basis for the rendering court's assertion of authority over absent class members must proceed on some other basis—in *Shutts*, implied consent to a process that combines rights in the vein of self-help (exit and voice rights) with a right to oversight by fiduciaries (loyalty rights, whereby "the court and named plaintiffs protect [absent class members'] interests").[32]

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29 Issacharoff & Nagareda, *supra* note 4, at 1700–06. In the article, Professors Issacharoff and Nagareda carefully note: "The views stated herein represent our shared assessment as commentators, not necessarily the position of the ALI." *Id*. at 1649 n.††.

30 *Id.* at 1676.

31 *Id.* at 1703.

32 *Id.* at 1702 (alteration in original) (internal quotation marks and footnote omitted). Professors Issacharoff and Nagareda insist that a right to oversight by fiduciaries is the only proper way of understanding *Shutts*' insistence that absent class members receive adequate representation "at all times." *Id.* (quoting Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 812 (1985)). They argue:

> A due process command for adequate representation "at all times" is susceptible to overextension, however, if read to admit no difference between structural defects and performance defects in class representation. Both, to be sure, can be a concern at some point within the class proceeding. Yet, only structural defects go to the authority to aggregate, as distinct from the manner of its exercise.

Id. at 1703. The *Principles* define structural conflicts narrowly as those that "present a significant risk that the conduct of the litigation will be skewed systematically—that is, in some direction

A clear objective of the article authored by Professors Issacharoff and Nagareda is to refute the argument that the law of jurisdiction authorizes absent class members who have been inadequately represented to collaterally attack a class judgment. But Professors Issacharoff and Nagareda's brief discussion of personal jurisdiction provides a shaky basis for the *Principles*' conclusion that inadequate representation has no jurisdictional significance.

The claim, for example, that the Constitution seems an unlikely source of review for personal jurisdiction because jurisdiction is "easily waived under Rule 12"[33] simply ignores the fact that absent class members do not appear in class litigation. Parties who appear in a forum must comply with the forum's procedural rules for asserting a personal jurisdiction objection—in federal court, Rule 12(h)(1).[34] But Rule 12 has no application to persons who have not appeared.[35] In

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predictable before the determination of related claims on an aggregate basis." PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07 cmt. d (2010). Professors Issacharoff and Nagareda's argument improperly conflates the authority to aggregate—governed in federal court by Rule 23 when aggregation is sought through the class device—with the authority to bind absent class members to the class judgment. Rule 23(a)(4) authorizes class aggregation based on a prediction that absent class members *will* be adequately represented, a requirement consistent with a structural understanding of adequate representation. *See* FED. R. CIV. P. 23(a) ("One or more members of the class may sue or be sued as representative parties on behalf of all members only if: . . . (4) the representative parties *will* fairly and adequately protect the interests of the class." (emphasis added)). But as the Court in *Hansberry v. Lee* suggests, it is a mistake to conflate the authority to aggregate and the authority to bind. *See* Hansberry v. Lee, 311 U.S. 32, 42 (1940) ("It is evident that the considerations which may induce a court thus to proceed, despite a technical defect of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it is adjudged that they are, in ascertaining whether such an adjudication satisfies the requirements of due process and of full faith and credit."). *Hansberry* makes clear that due process requires adequate representation "in fact" before a class member may be bound in class litigation. *Id.* at 42–43 ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are *in fact* adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties . . . ." (emphasis added)). Indeed, *Hansberry* expressly requires that class action procedure be "so devised and *applied* as to insure that those present are of the same class as those absent and that the litigation is so *conducted* as to insure the full and fair consideration of the common issue." *Id.* at 43 (emphasis added). It is hard to square this language—or that of the *Shutts* Court—with the notion that a process of fiduciary oversight is sufficient to satisfy due process when the designated representative has not adequately represented the absent class members.

33 Issacharoff & Nagareda, *supra* note 4, at 1676.

34 *See* FED. R. CIV. P. 12(h)(1) (providing for the waiver of the personal jurisdiction defense in specified circumstances); *see also, e.g.*, Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 705 (1982) (recognizing that "the failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection").

35 *Ins. Corp. of Ir., Ltd.*, 456 U.S. at 706 ("A defendant is always free to ignore the judicial

any event, the Court has made clear that the personal jurisdiction requirement—notwithstanding its waivability—recognizes and protects an individual liberty interest that flows from the Due Process Clause.[36]

The argument that treating adequate representation as jurisdictional would be inconsistent with the principle that jurisdiction must be determined at the outset of the litigation is similarly wide of the mark. Professors Issacharoff and Nagareda's confident assertion that "[e]verywhere else in procedural law, jurisdiction is the paradigmatic subject of first-order inquiry that courts are obliged to address at the outset of a lawsuit"[37] is based on an incomplete understanding of the law.[38] Although it is true that courts generally are required to rule on jurisdiction before entering a judgment on the merits, courts need not adjudicate the issue of personal jurisdiction at the outset of a lawsuit.[39] Rule 12 states that a court in appropriate circumstances may defer a ruling on personal jurisdiction until trial,[40] and courts have so recognized.[41]

If, on the other hand, Professors Issacharoff and Nagareda's point is that the personal jurisdiction defense ordinarily is determined on facts that exist at the start of the litigation, there can be no question that adequate representation is a striking exception to the general rule. But that hardly resolves the issue. Class suits themselves are a

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proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding.").

36 *See id.* at 702.

37 Issacharoff & Nagareda, *supra* note 4, at 1703.

38 *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 430–31 (2007) (stating that "a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)"); Sys. Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy, 242 F.3d 322, 324 (5th Cir. 2001) (agreeing with the Ninth and Tenth Circuits that "'[w]hen entry of default is sought against a party who has failed to plead or otherwise defend, the district court has an affirmative duty to look into its jurisdiction both over the subject matter and the parties'" (quoting Williams v. Life Sav. & Loan, 802 F.2d 1200, 1203 (10th Cir. 1986))). A class court similarly must determine that absent class members have received adequate representation before entering a judgment.

39 *See* FED. R. CIV. P. 12(i).

40 *Id.* ("If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.").

41 *See, e.g.*, Peterson v. Highland Music, Inc., 140 F.3d 1313, 1319 (9th Cir. 1998) (stating that "plaintiffs would have borne the heavier burden of prevailing on the jurisdictional issue by a preponderance of the evidence if the issue had been contested at trial"); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 469 (1985) (noting that "[a]fter a 3-day bench trial, the [district] court again concluded that it had jurisdiction over the subject matter and the parties . . ." (internal quotation marks omitted)).

striking exception to the general rule that a judgment does not bind a person who has not been made a party to the litigation by service of process.[42]

Finally, the claim that territorial boundaries cannot realistically affect the jurisdictional analysis with respect to legal claims and demands for closure that are national in scope rests on a questionable assumption.[43] It is even arguably unrealistic only if the "efficiency and efficacy"[44] of class litigation are the primary concerns of jurisdictional doctrine. If, on the other hand, personal jurisdiction is designed to protect persons from prejudicial exercises of power by sovereigns that lack an appropriate connection with the individual, the claim falls flat. Attention to the territorial connections of absent class members would be especially important in sprawling multistate class suits that may draw into their webs absent class members who lack an appropriate connection with the forum state.

B. The Jurisdictional Significance of Adequate Representation in Class Litigation

1. The Notice and Amenability Requirements in Ordinary Litigation

In thinking about personal jurisdiction in ordinary litigation, it is critical to distinguish between two separate but sometimes interrelated issues: (1) whether the court has provided adequate notice that a person has been subjected to the jurisdiction of the court and must appear to protect his interests, and (2) whether there is a sufficient jurisdictional nexus between the forum, the claim, and the person to subject the person to the territorial jurisdiction of a court, i.e., whether the person is amenable to jurisdiction in a particular forum. Although use of the term "personal jurisdiction" to refer solely to the amenability requirement is not uncommon, there can be no doubt that personal jurisdiction also requires notice that the person who has been sued must appear to protect his interests.[45] In *Griffin v. Griffin*,[46] for exam-

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42 *See* Martin v. Wilks, 490 U.S. 755, 761 (1989) ("All agree 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.'" (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940))).

43 *See* Issacharoff & Nagareda, *supra* note 4, at 1702.

44 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. intro., at 2 (2010).

45 *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 5.16, at 324 (4th ed. 2004) ("In the United States there are other preconditions to effective judicial action commonly termed 'jurisdictional.' One important requirement is that the defendant be given reasonable notice of the proceedings against him."); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAW

ple, the United States Supreme Court had no difficulty concluding that a judgment "without actual notice to or appearance by petitioner, and without any form of service of process calculated to give him notice of the proceedings" meant that there was a "want of that jurisdiction over the person . . . prerequisite to the rendition of a judgment *in personam* against him."[47]

2. *Adequate Representation as a Substitute for Service of Process*

Hansberry v. Lee[48] made explicit the jurisdictional nature of adequate representation, holding that adequate representation can substitute for service of process.[49] The conclusion that adequate representation in class suits may take the place of service of process makes sense. Service of process provides notice that a person must appear in the litigation to protect his or her interests.[50] But the very idea that absent class members must appear in the litigation to defend their interests is inconsistent with the representative nature of class suits.[51] As *Shutts* explained, "an absent class action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards for his protec-

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§ 4.4, at 125–26 (5th ed. 2006) ("Now that courts utilize many bases for jurisdiction other than personal presence in the forum, it is imperative to recognize notice and opportunity to be heard as a distinct and essential element in the constitutional exercise of judicial jurisdiction."); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 987 (1960) ("Since failure to provide proper notice, like absence of jurisdiction over the parties, will subject a judgment to collateral attack, it has been said that adequate notice is a prerequisite to jurisdiction."); Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 970 (1999) (noting that notice and an opportunity to be heard are part of "Anglo-American conceptions of judicial jurisdiction").

46 Griffin v. Griffin, 327 U.S. 220 (1946).

47 *Id.* at 228 ("Because of the [lack of notice], and to the extent that petitioner was thus deprived of an opportunity to raise defenses otherwise open to him under the law of New York against the docketing of judgment for accrued alimony, there was a want of judicial due process, and hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of a judgment *in personam* against him.").

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

49 *Id.* at 41 (stating that in some circumstances adequate representation "may bind members of the class . . . who were not made parties" through service of process).

50 Woolley, *supra* note 10, at 960.

51 *See id.* As the Fifth Circuit has noted:

> The purpose of Rule 23 would be subverted by requiring a class member who learns of a pending suit involving a class of which he is a part to monitor that litigation to make certain that his interests are being protected; this is not his responsibility—it is the responsibility of the class representative to protect the interests of all class members.

Gonzales v. Cassidy, 474 F.2d 67, 76 (5th Cir. 1973).

tion."[52] Thus, if an absent class member has been adequately represented, he or she has no need for notice at the outset of the litigation that a failure to appear will lead to adverse consequences.

Because service of process is ordinarily a prerequisite to personal jurisdiction, adequate representation—its functional equivalent in class actions—must similarly be understood as a jurisdictional prerequisite in class actions. The Court's landmark decision in *Shutts* has sometimes led to confusion on this point. After all, *Shutts* expressly requires "notice plus an opportunity to be heard and participate in the litigation."[53] If *Shutts* requires notice and an opportunity to be heard—which service of process provides—why should adequate representation be viewed as the only approved jurisdictional substitute for service of process? Put simply, notice and opportunity to be heard in a class suit provide absent class members with an option to participate.[54] Service of process, by contrast, notifies a person of a command to participate or suffer the risk of adverse consequences.[55] It is adequate representation—not the option to participate—that renders service of process unnecessary in a class suit.

3. Adequate Representation as a Substitute for Minimum Contacts

Critics of treating adequate representation as a jurisdictional prerequisite have focused on the Court's conclusion in *Shutts* that a court may exercise personal jurisdiction over absent class members in the absence of minimum contacts.[56] Indeed, it has sometimes been argued

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52 Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 810 (1985). Rule 23 was drafted with this understanding in mind, as were its state-law equivalents. *See* FED. R. CIV. P. 23. Nothing in the text of Rule 23 authorizes class courts to require absent class members to raise adequacy objections in the class court, and the Advisory Committee Notes make clear that the omission was not a drafting error. The drafters of Rule 23 cited section 116 of the first *Restatement of Judgments*, Comment b of which provides in relevant part:

> Where a person is not a party to a class action the judgment therein has conclusive effect against him only if his interests were adequately represented. . . . *[A] person as to whom a class action is ineffective is not required to seek relief during the continuance of the action* . . . .

RESTATEMENT OF JUDGMENTS § 116 cmt. b (1942) (emphasis added); *see also* Woolley, *supra* note 10, at 962.

53 *Shutts*, 472 U.S. at 812.

54 I have argued elsewhere that class members have a right to be heard and participate in the litigation quite apart from the right of an absent class member to be adequately represented. *See generally* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997) (arguing that every class member whose identity can be ascertained has a constitutional right to prosecute his cause of action).

55 Woolley, *supra* note 10, at 960.

56 *See Shutts*, 472 U.S. at 811 ("[W]e hold that a forum State may exercise jurisdiction over

that a failure to opt out after notice of the proceedings—without more—represents consent to the personal jurisdiction of the class court.[57] But as Tobias Barrington Wolff has convincingly shown, an absent class member's failure to opt out is not persuasive evidence of consent to the jurisdiction of the class court.[58] And a close reading of *Shutts* makes clear that the Court never suggested that a failure to opt out is sufficient to establish jurisdiction.[59] Professors Issacharoff and Nagareda wisely eschew the argument that a failure to opt out is sufficient, relying instead on the argument that personal jurisdiction can be established through "a process that combines rights in the vein of self-help (exit and voice rights) with a right to oversight by fiduciaries (loyalty rights, whereby 'the court and named plaintiffs protect [absent class members'] interests')."[60] But their argument is problematic nonetheless.

Territorial boundaries traditionally have played a significant role in jurisdictional policy. Yet Professors Issacharoff and Nagareda simply assume that territorial boundaries cannot "realistically" affect the jurisdictional analysis with respect to "legal claims and demands for closure that are national in scope."[61] The sharp dichotomy in jurisdictional policy that they imagine between ordinary and class litigation has no justification apart from an apparent determination to preclude absent class members from collaterally attacking a judgment for inadequate representation. Professors Issacharoff and Nagareda choose to ignore—or fail to understand—that the policy at the heart of the minimum contacts requirement in ordinary litigation is appropriately effected in class litigation through the adequate representation requirement.[62]

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the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.").

57 *See, e.g.*, Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 263–64 (arguing that notice and an opportunity to opt out are sufficient for the exercise of personal jurisdiction over absent class members).

58 Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2086–90 (2008); *see also* Woolley, *supra* note 10, at 967–71.

59 *See Shutts*, 472 U.S. at 807–12.

60 Issacharoff & Nagareda, *supra* note 4, at 1702 (alteration in original) (footnote omitted) (quoting *Shutts*, 472 U.S. at 809).

61 *Id.*

62 The Fourteenth Amendment Due Process Clause also prohibits jurisdiction if the exercise of personal jurisdiction in the forum would not be reasonable. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985). I analyze the reasonableness prong in the next Subsection. *See infra* Part II.B.4.

The minimum contacts requirement protects a person's liberty interest in being free from the exercise of authority by a sovereign that lacks an appropriate connection with the person.[63] That person—whether a plaintiff or defendant—may choose, of course, to waive the protection offered by the minimum contacts requirement. Indeed, a rational litigant will waive the objection if it would be in his or her interest to litigate in the courts of a sovereign lacking an appropriate connection with him or her. Thus, as a practical matter, the minimum contacts requirement serves to protect an individual in ordinary litigation from the exercise of power by a sovereign that lacks an appropriate connection with the person, unless litigation in the courts of that sovereign would be in his or her interest.

The adequate representation requirement serves the same function in class litigation. An adequate class representative—properly defined—will pursue the claims of an absentee in the forum that, all things considered, would best serve the interests of the absent class member.[64] In other words, adequate representation, properly understood, protects the liberty interest of absent class members in being free from the authority of a sovereign that lacks an appropriate connection with the class member when litigating in that sovereign's courts would not be in the interest of the class member.[65] For that reason, the minimum contacts requirement is superfluous only when an absent class member has been adequately represented.

4. Adequate Representation as a Substitute for a Reasonableness Inquiry

A defendant in ordinary litigation is not amenable to personal jurisdiction in state court unless she has minimum contacts with the forum sovereign and the exercise of personal jurisdiction would be reasonable.[66] The reasonableness of state-court jurisdiction is determined by weighing a set of factors first catalogued in *World-Wide*

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63 Woolley, *supra* note 10, at 964–66.

64 *Id.* at 921–23 (discussing how the adequate representation and minimum contacts requirements provide similar protection).

65 *Id.* at 965–66.

66 *See Burger King Corp.*, 471 U.S at 476–77. It is unclear whether, as a constitutional matter, the reasonableness requirement places limits on the exercise of personal jurisdiction by federal courts. Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1599–606 (1992). But most courts have concluded that the reasonableness prong does not apply when a federal court uses a national contacts standard. Leslie M. Kelleher, *Amenability to Jurisdiction as a "Substantive Right": The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 IND. L.J. 1191, 1217 (2000).

Volkswagen Corp. v. Woodson,[67] which include the inconvenience of the forum to the defendant.[68] While inconvenience to the defendant is just one of the factors considered by the Court, it is the focal point of the inquiry.[69] The question in ordinary litigation is whether, in light of the other interests at stake, the inconvenience to the defendant is of sufficient magnitude to violate due process.

By contrast, the reasonableness factors have no role to play when an absent class member is being adequately represented. Because an adequately represented class member need never appear in the forum to protect his or her interests, the inconvenience of the forum should be of no relevance to the absent class member. Thus, it should not be surprising that the Court in *Shutts* did not even mention the reasonableness prong.

C. Personal Jurisdiction over Class Members Who Are Required to Act

As explained above, adequate representation is a sufficient basis for the exercise of personal jurisdiction over absent class members because absent class members are "not required to do anything."[70] But it should be obvious that requiring an absent class member to raise adequacy objections in the class proceeding on pain of waiver may require a class member to act to protect his or her interests in a way wholly inconsistent with the assumptions of *Shutts*. When a class member must act on pain of waiver, he or she is in no different a position than a person subjected to the full in personam jurisdiction of the forum court in ordinary litigation. Thus, a court may exercise personal jurisdiction over an absent class member who must act only if the standard requirements of personal jurisdiction are satisfied. The

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

68 *See Burger King Corp.*, 471 U.S at 477 (identifying factors to be weighed as "[1] the burden on the defendant, [2] the forum State's interest in adjudicating the dispute, [3] the plaintiff's interest in obtaining convenient and effective relief, [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and [5] the shared interest of the several States in furthering fundamental substantive social policies" (quoting *World-Wide Volkswagen*, 444 U.S. at 292)); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987) (noting that in cases with connections to foreign countries, the fifth factor should be understood to call for consideration of "the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court").

69 *See World-Wide Volkswagen*, 444 U.S. at 292 (noting that the protection of the defendant "against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness'" and stating that "[i]mplicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors . . .").

70 Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 810 (1985); *see also supra* Part II.B.

class member must receive process-like notice commanding her to appear on pain of waiver to assert any objections to the adequacy of representation,[71] the sovereign must have purposeful contacts with the class member of a nature and quality to justify personal jurisdiction,[72] and (in state courts at least) the exercise of personal jurisdiction must not impose inconvenience of an unconstitutional magnitude on the class member.[73] Unless these standard requisites of personal jurisdiction are satisfied, a class court has only a "limited and conditional"[74] jurisdiction that does not permit a court to require an absent class member to appear on pain of waiver.[75]

Those who recognize that the waiver theory is inconsistent with the idea of representative litigation often seek to limit the availability of collateral attack for inadequate representation by invoking issue preclusion instead.[76] Reliance on issue preclusion is necessarily premised on the assumption that a fiduciary or other representative can legitimize the use of preclusion to bind an absent class member to a finding of adequate representation.[77] But whether issue preclusion in this context rests on the notion that an "adequate objector" who challenges the adequacy of the class representation can bind absent class members,[78] or even on the notion that the fiduciary role of the class

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71 *See supra* Part II.B.2.

72 *See supra* Part II.B.3. This assumes that amenability to personal jurisdiction in ordinary litigation turns on a minimum contacts analysis. *See* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) ("We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in [*International Shoe Co. v. Washington*, 326 U.S. 310 (1945)] and its progeny."). I do not address whether jurisdiction by necessity may provide an additional means of satisfying the amenability requirement in structural reform or limited-fund class suits. *Cf.* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 419 n.13 (1984) (declining "to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record"). But it should be obvious that jurisdiction by necessity has no role to play in class suits in which absent class members have the right to opt out.

73 *See supra* Part II.B.4.

74 Monaghan, *supra* note 19, at 1154.

75 *See supra* Part II.B.

76 *See, e.g.*, Wolfert *ex rel.* Estate of Wolfert v. Transamerica Home First, Inc., 439 F.3d 165, 170 n.6, 172 (2d Cir. 2006) (rejecting the notion that "an absent class member receiving adequate notice, even if not adequately represented, [must] object in the class action court in order to avoid the preclusive effect of the class action judgment," but insisting that "if, in the class action, a defendant opposing class certification or an objector to the settlement had made a serious argument that a sub-class was required because of claims substantially similar to hers, and that argument had been considered and rejected by the class action court, it would not be unfair to preclude collateral review of that ruling . . .").

77 Woolley, *supra* note 10, at 953–58.

78 *See id.* at 953–56.

court ensures the protection of absent class members,[79] an absent class member can be assured of adequate representation only if the objector or the class court fulfills its obligations. Thus, unless an absent class member may collaterally challenge whether an objector or class court has in fact fulfilled its obligations, the absentee will either have to appear in the litigation or accept the risk that he or she will be bound if the objector or the class court fails to fulfill its obligations. As explained above, a class court has power to require an absent class member to act in order to protect herself only if the standard requirements for the exercise of personal jurisdiction in ordinary litigation are satisfied.[80] In all other cases, the Due Process Clause protects the rights of absent class members to collaterally attack a judgment.

III. THE *PRINCIPLES* AND CLASS ACTION REFORM

This Essay has sought to demonstrate (1) that adequate representation is an essential aspect of personal jurisdiction in class litigation and (2) that absent class members have a constitutional right to collaterally attack a class judgment for inadequate representation unless the requirements of personal jurisdiction in ordinary litigation have been satisfied. But my criticism of the *Principles*' approach is premised not only on our different conclusions about the law of personal jurisdiction, but also on the *Principles*' failure even to take seriously the longstanding understanding that the adequate representation requirement is jurisdictional. Those who credulously rely on the *Principles* will be misled as a result.

The *Principles*' refusal to take personal jurisdiction seriously also makes it impossible for the ALI to provide practical advice to those who accept the existence of jurisdictional constraints but share the *Principles*' misguided desire to restrict collateral attack.[81] Individual states, for example, might choose to authorize process-like notice that would command absent class members otherwise amenable to jurisdiction to appear in the class court if the class member wishes to contest the adequacy of representation. The United States, for its part, could similarly authorize federal courts to command absent class members within the United States to raise adequacy objections in the

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79 *See id.* at 956–58.

80 *See supra* notes 70–75 and accompanying text.

81 I have argued elsewhere that the right to collaterally attack a judgment should be preserved as a policy matter, except perhaps in limited-fund and structural-reform class suits. *See* Woolley, *supra* note 16, at 432–45.

class court.[82] The *Principles* could, consistently with their goals, usefully have provided advice in implementing these jurisdictional innovations. But the *Principles* chose instead simply to dismiss the idea that inadequate representation has jurisdictional consequences as a product of "jurisdictional confusion."[83]

Conclusion

The Reporters are to be congratulated on the many valuable contributions to the law of aggregate litigation found in their work. But the Reporters' focus on the efficiency and efficacy of class litigation is problematic when it drives the discussion of legal rules that represent external constraints on the law of class actions. The *Principles*' handling of the relationship between adequate representation and personal jurisdiction stands as an unfortunate example of insufficient sensitivity to the external constraints imposed on class action law.

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82 There is substantial support for the view that federal courts may use a national contacts standard consistently with the Due Process Clause of the Fifth Amendment. *See* Scoles et al., *supra* note 45, § 10.2, at 426–28 (collecting caselaw and commentary). It is unclear whether the Constitution requires a federal court using a national contacts standard to weigh the reasonableness factors set forth in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 469 (1985) (or some substantial equivalent) before concluding that it may exercise territorial jurisdiction over a person in nonclass litigation. *See supra* note 63.

83 Issacharoff & Nagareda, *supra* note 4, at 1700.