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Class Actions, Jurisdiction, and Principle in Doctrinal Design

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INTRODUCTION

Two conceptions of the class action have long motivated debates over its role in American civil litigation. Starting in the late 1960s,

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proponents of the then-fledgling device advocated a "regulatory" understanding of its nature and purpose. As vehicles for law enforcement, they argued, class actions succeed when they prohibit or deter widespread misconduct. Undue attention to the circumstances of individual class members and their claims interferes with class-wide proceedings and serves little legitimate purpose. Class action skeptics, by contrast, advanced a "conflict resolution" conception.[1] To them, the class action does little more than join individual claims for the purposes of adjudicative efficiency. Class-wide litigation must respect preexisting features of these discrete claims, even if attention to them precludes class certification or otherwise creates considerable expense.

Combatants in fights over class action law and policy continue to couch their arguments in regulatory and conflict resolution terms. But these conceptions have earned their retirement, at least as principled bases for doctrinal design. The claims that each conception supports are fundamentally incommensurate.[2] To those convinced by the class action's regulatory value, the fact that many cases generate little recovery for individual class members matters little. To those insistent that private litigation resolve genuine conflicts, whatever regulatory effect litigation has cannot justify a case that procures minimal relief for class members who barely know that they are injured.

But the two conceptions have proven limited for a reason beyond the inconclusive normative combat they have fueled.[3] A

1. In prior work, one of us used the term "adjectival conception." David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 FORDHAM L. REV. 1785, 1809 (2018) [hereinafter Marcus, *History Part II*]. This term is less descriptive and dissimilar from what scholars of the time used. We therefore use a new one here.

2. Robert Bone describes the landscape of debates over class action law and policy by contrasting two competing "views" of the class action, but he uses different terms for them and describes them with more theoretical nuance than what I provide here. Still, the "internal" and "external" views, as he calls them, roughly correspond with the regulatory and conflict resolution conceptions. Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 651–53 (2014). Prof. Bone likewise describes "the powerful influence on the shape of modern class action law" that the "two views of the class" he describes have had. *Id.* at 653. We agree with Professor Bone that "the two sides frequently talk past one another." *Id.* at 654.

3. *Cf.* David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 609 (2013) [hereinafter Marcus, *History Part I*] ("Before the 1960s ended, the now-hardened battle lines in the war over Rule 23 formed, with clashes erupting over the same alleged legal and economic pathologies that fuel debates today.").

proponent of a powerful class action cannot maintain a principled commitment to the regulatory conception and still argue consistently for doctrine that empowers the device. Likewise, a class action skeptic cannot argue for the conflict resolution conception and consistently advocate for restraint in procedural doctrine. If these conceptions motivate doctrinal design, then either preference or principle must be sacrificed.

We work through problems involving personal and subject matter jurisdiction in class actions to illustrate this claim. These problems warrant attention for two reasons. First, they remain unanswered, and thus this symposium essay can contribute to their resolution. The personal jurisdiction problem emerged abruptly in summer 2017 after the U.S. Supreme Court rejected a specific strain of personal jurisdiction doctrine for aggregate litigation in *Bristol-Myers Squibb Co. v. California Superior Court, San Francisco County* (*BMS*).[4] Defendants have seized on the decision to challenge a decades' old consensus that personal jurisdiction in class actions depends on the relationship between the named plaintiff's claim and the defendant's forum contacts. Arguing that each class member's claim must independently satisfy jurisdictional requirements, defendants hope to narrow the plaintiff's choice of forum in multistate class actions considerably—an outcome that would have significant ramifications for the enforcement of state law through private litigation. The issue of *BMS*'s application in class actions has "preoccupied" the federal courts, generating considerable disagreement.[5]

The subject matter jurisdiction problem has to do with Article III standing doctrine. Faced with inconclusive guidance from the Supreme Court, the lower federal courts have long struggled to fashion consensus answers to two related questions. Do differences between the named plaintiff's injury and those suffered by absent class members deprive the former of standing to sue on the latter's behalf? If so, when do such differences create jurisdictional

4. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773,1777 (2017).

5. McCurley v. Royal Sea Cruises, Inc., 331 F.R.D. 142, 164 (S.D. Cal. 2019). As of the time of writing, the Fifth, Seventh, and D.C. Circuits are considering the issue but have not yet issued decisions. *D.C Circuit Wary of Putting Mass Tort Limit on Whole Foods Suit*, LAW360 (Sept. 25, 2019), https://www.law360.com/articles/1202715/dc-circ-wary-of-putting-mass-tort-limit-on-whole-foods-suit.

problems? Some circuits insist that this "injury difference problem" requires a test for named plaintiff standing. Others deny that such differences require a standing analysis at all.[6]

Our second reason for focusing on the personal and subject matter jurisdiction problems involves what we argue is the key to each one's resolution. Both hinge on a determination of whether absent class members are *juridically relevant*, or whether absent class members are parties or share party-like features. As a doctrinal matter, this status changes depending on the procedural issue at stake.[7] But courts have long expressed the sentiment that, whatever status an absent class member has for personal jurisdiction purposes, principled doctrinal design requires that she have the same status for subject matter jurisdiction purposes.[8] After all, the doctrines share a "key feature": "[E]ach governs a court's ability, constitutional or statutory, to adjudicate a particular person's or entity's claim against a particular defendant."[9]

The regulatory and conflict resolution conceptions seem obviously germane to the question of absent class member juridical relevance. Stressing the overall effect of litigation on the defendant's behavior, the regulatory conception deemphasizes individual class member identity and thereby justifies a finding of juridical irrelevance. Conversely, the conflict resolution conception treats the class action as little more than a joinder device for discrete claims that are independently litigable. It supports a determination of absent class member juridical relevance.

Here is where principle and preference collide. A proponent of a powerful class action can use the regulatory conception to justify a class action exception to *BMS*. If absent class members are juridically irrelevant, then only the named plaintiff's claim remains as the basis for the personal jurisdiction determination. But the easiest answer to the injury difference problem requires that absent class members be juridically relevant. If so, then standing in class actions is no different than standing in other multiparty cases. Differences between the named plaintiff's claim and the class

6. *See infra* notes 138–146 and accompanying text.

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

8. *See* Al Haj v. Pfizer, Inc., 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018). For a pre-1966 case to this effect, see *Calagaz v. Calhoon*, 309 F.2d 248, 254 (5th Cir. 1962).

9. *Al Haj*, 338 F. Supp. 3d at 820.

members' claims may impact class certification under Rule 23. But these differences have no Article III implications. If, however, absent class members are juridically irrelevant for standing purposes, then the named plaintiff's standing to represent others, however different or similar their claims, becomes harder to justify. A class action skeptic sits at the same crossroads. Juridical relevance raises personal jurisdiction barriers to litigation, but it lowers subject matter jurisdiction hurdles.

The best answers to the two jurisdictional problems indeed align with preferences for liberality in class action doctrine. But a principled justification for juridical irrelevance in one jurisdictional context and juridical relevance in the other requires something other than an argument couched in regulatory or conflict resolution terms. A class action exception to *BMS* should exist, and the injury difference problem should not trigger standing problems most of the time. But these answers are right not because they best comport with an abstract conception of litigation fixed *a priori*, or because they posit a single juridical status for absent class members. Rather, the answers best serve the basic policies and goals that animate each line of jurisdictional doctrine.

Our Essay proceeds as follows. In Part I, we describe the regulatory and conflict resolution conceptions, tracing their origins to theorizing about the nature and purposes of litigation that coincided with the class action's emergence in the late 1960s. We delve into personal jurisdiction in Part II. We argue that a class action exception to *BMS* requires the juridical irrelevance of absent class members, a status that the regulatory conception supports. Part III turns to subject matter jurisdiction. We explain how the juridical relevance of absent class members, a status that the conflict resolution conception justifies, solves an Article III standing puzzle. Their juridical irrelevance, by contrast, creates difficult jurisdictional problems. We conclude in Part IV. We argue against the continued use of the regulatory and conflict resolution conceptions as guides to doctrinal design, and we suggest a contextual, pragmatic way to make a principled argument in favor of a class action unencumbered by needless jurisdictional constraint.

I. MODELS OF LITIGATION AND CONCEPTIONS OF THE CLASS ACTION

The competing conceptions of the class action are more particular versions of contrasting "models" of civil litigation that first appeared in 1960s-era procedural commentary. During a convulsive period for American civil justice that witnessed the modern class action's emergence, participants in debates over litigation's nature and purpose often cast their arguments in regulatory or conflict resolution terms. These models and the conceptions based on them continue to motivate arguments about procedural law and policy.

As the landscape of American civil justice began to shift rapidly in the 1960s, a number of prominent scholars crafted models that tried to capture litigation's essence.[10] These models were similar to each other, and they all came in pairs. A representative one, which Kenneth Scott called the "conflict resolution" model,[11] described litigation as a process for resolving disputes between private parties attempting to vindicate private rights.[12] Its purpose, to restore peace to an "essentially harmonious" system, [13] has several implications for the process's legitimate use. Cases must involve "concrete disputes."[14] This requirement limits litigation to those instances when social peace is genuinely threatened,[15] incentivizes parties to control the proceedings, and restricts participation to a narrow set of individuals.[16] To ensure that litigation restores and does not transform a social, political, or economic status quo, a lawsuit should be "bounded in effect[,]" and its impact should be "limited to the (two) parties before the court."[17]

10. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 636 n.4 (1982) (commenting on these efforts and linking them to changes to judicial practice).

11. Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937 (1975).

12. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976) [hereinafter Chayes, *Role of the Judge*]; Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 6 (1985); Paul Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406, 410 (1968).

13. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 18 (1979).

14. Weiler, *supra* note 12, at 414.

15. Scott, *supra* note 11, at 937–38.

16. Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4–5 (1982) [hereinafter Chayes, *Burger Court*]; Weiler, *supra* note 12, at 414.

17. Chayes, *Burger Court*, *supra* note 16, at 5; *see also* Dan-Cohen, *supra* note 12, at 3.

We call the second the "regulatory" model, although no scholar at the time used precisely this term.[18] This model attempted to capture the various developments—the nascent class action, legislated damages enhancements, fee-shifting provisions, the new multidistrict litigation system, and so forth[19]—that were expanding the footprint of American civil justice. Litigation does not merely restore social peace pursuant to "established rules and principles" of substantive law, as the conflict resolution model contemplated.[20] Rather, litigation *qua* a regulatory process furthers the design and administration of public policy.[21] A lawsuit focuses not on "particularized and discrete events" concerning a limited set of private parties, but instead on a "social condition" that affects groups.[22] Discrete individual parties do not control the litigation or serve as its exclusive subjects. Rather, "the party structure and the matter in controversy are both amorphous."[23] A case seeks prospectively-oriented remedies to vindicate the interests of undifferentiated beneficiaries.[24] Accordingly, litigation implicates matters that extend well beyond "the effects of the decision on the parties before the court."[25]

Some scholars developed their versions of the paired models simply as aids in understanding the shifting sands of American civil justice.[26] A normative tint colored others' descriptive efforts. Some championed the regulatory model's emergence,[27] and others lamented it.[28]

18. *Compare* Chayes, *Role of the Judge*, *supra* note 12, at 1284 ("public law"), Dan-Cohen, *supra* note 12, at 3 ("regulation"), Scott, *supra* note 11, at 938 ("behavior modification"), and Weiler, *supra* note 12, at 407 ("policy-making").

19. For histories of some of these developments, see generally SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017); Marcus, *History Part I*, *supra* note 3.

20. Weiler, *supra* note 12; *cf.* Dan-Cohen, *supra* note 12, at 17 (noting that the arbitration model assumes a "sharp distinction" between judging and legislating).

21. Chayes, *Burger Court*, *supra* note 16, at 5; Dan-Cohen, *supra* note 12, at 4; Fiss, *supra* note 13, at 2; *see* Scott, *supra* note 11, at 938.

22. Fiss, *supra* note 13, at 18.

23. Chayes, *Burger Court*, *supra* note 16, at 5.

24. *Id.*; Fiss, *supra* note 13, at 19.

25. Dan-Cohen, *supra* note 12, at 3; *accord* Chayes, *Burger Court*, *supra* note 16, at 5.

26. *See* Scott, *supra* note 11, at 950; Weiler, *supra* note 12, at 471.

27. Chayes, *Burger Court*, *supra* note 16, at 7.

28. *E.g.*, Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 101; *id.* at 104.

This fight over litigation's legitimate uses and purposes found concrete expression in disputes over the then-fledgling class action.[29] In prior work, one of us described two conceptions of the class action, each connecting to one of the models, that crystallized as debates over class action law and policy proceeded in the late 1960s and 1970s:

> To proponents of the regulatory conception, a class was not an assembly of discrete individuals, but a group of undifferentiated regulatory beneficiaries on whose behalf litigation pursues vindication of a substantive policy regime. The class action existed to mobilize claims. The civil rights litigators, plaintiffs' lawyers, and progressive judges who advanced this view emphasized the regulatory efficacy of the substantive law, not individualized compensation for class members, as litigation's goal. The regulatory conception provided a normative justification for a powerful class action device because it deemphasized differences among individual class members' claims and the particular relief owed to them as subordinate to the regulatory imperative the class action furthered.
>
> Defense counsel, industry representatives, and others uncomfortable with powerful class action litigation argued for the [conflict resolution] conception. They viewed Rule 23 as a mere joinder device, no different in its essence than any of the other joinder rules, and certainly not a device with a particular regulatory mission. Rule 23 took the claims of otherwise disconnected individuals and allowed their assembly in one case for the sake of litigation efficiency. Individual relief remained the litigation's primary goal, and any other benefits the class action might create were incidental.[30]

Participants in debates over class action law and policy understood their preferences for an expansive or restrained device in terms of the two conceptions.[31] A good example comes from an

29. *E.g.*, *Editor's Forword* to Kenneth E. Scott, *Two Models of the Civil Process*, 4 CLASS ACTION REPORTS, Jan.–Feb. 1975 at 51 ("[A]cceptance of the validity of the Behavior Modification Model is absolutely critical to the viability of the large class action lawsuit, which is in turn a necessary prerequisite for the viability of that model.").

30. Marcus, *History Part II*, *supra* note 1 (footnotes omitted); *see also* Marcus, *History Part I*, *supra* note 3, at 593–94.

31. *E.g.*, Chayes, *Burger Court*, *supra* note 16, at 28 (1982); Rifkind, *supra* note 28, at 102 & n.7 (citing to doctrines that facilitate class actions as examples of a mentality favoring the use of courts as "problem-solvers").

internecine fight within the American Bar Association over a set of proposed reforms to Rule 23 that gained considerable ground in the 1980s before ultimately failing.[32] The ABA formed a "Special Committee" to consider possibilities for class action reform. It recommended changes that would have facilitated class litigation by minimizing the relevance of class members' individual circumstances to the class certification decision and by weakening participation rights for absent class members. "Central to the Committee's recommendations," its final report noted, was the conviction "that the class action is a valuable procedural tool affording significant opportunities to implement important public policies."[33]

The ABA's Antitrust Section dissented from the recommendations. Although the Section challenged various specifics, it also faulted the Committee for taking sides in "a continuing and sometimes bitter debate" over "diametrically opposed views as to the fundamental purpose for which courts and private litigation exist." One side, the Section explained, "argues that the purpose of private litigation should be to compensate injured parties"—a traditional role fitting the conflict resolution model. The Antitrust Section linked the Committee to the other side, or the view that "private litigation should serve a higher purpose than the compensation of victims, namely the deterrence of violations of law."[34]

As they did in the 1960s, 1970s, and 1980s, the conflict resolution and regulatory models continue to motivate normative claims about procedural design and litigation's proper use.[35] The class action's champions couch arguments in regulatory terms.

32. The ABA proposals went to the Federal Civil Rules Advisory Committee, which used them as a basis for a set of proposed reforms that only ran aground in 1994. Marcus, *History Part II*, *supra* note 1, at 1794–95.

33. Am. Bar Ass'n Section of Litig., *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 198 (1986).

34. AM. BAR ASS'N SECTION OF ANTITRUST LAW, REPORT TO THE HOUSE OF DELEGATES 7–9 (1985) (on file with author).

35. *See* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 153 (2005) ("[T]he classic and public law models represent the dominant conceptions of adjudication . . . ."). For other important modeling exercises, see Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 414–15 (1999); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001).

Negative value cases win praise, for example, because they mobilize claims that would lie dormant and thereby vindicate substantive liability policy. They therefore incentivize better behavior through cost internalization.[36] Those who aim to limit the class action's use, on the other hand, argue for a conflict resolution conception.[37] Negative value class actions get faulted because they yield little of value to individual class members and arise from "faux" disputes involving no real injuries.[38]

To the extent that each model or conception expresses a normative vision of what roles litigation can legitimately assume, they are incommensurate. Those committed to one of them are likely to find arguments that smack of the other fundamentally misguided or inapposite. Less appreciated are the limits to the normative direction that either conception can offer to doctrinal design. As a general matter, the regulatory conception correlates with doctrine that empowers the class action and the conflict resolution conception with doctrine that limits it. But this relationship is not necessarily so, as the rest of this essay shows by working through the personal and subject matter jurisdiction problems.

II. PERSONAL JURISDICTION, *BRISTOL-MYERS*, AND THE CLASS ACTION EXCEPTION

Our argument for the two conceptions' normative limits requires some doctrinal spadework. This Part asks whether the claims of absent class members matter to the determination of whether a defendant comes within the court's personal jurisdiction, a question prompted by the 2017 *BMS* decision.[39] A majority of lower

36. *E.g.*, Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104–05 (2006).

37. Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 319–22 (2010); Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L. REV. 369, 383–90 (2012); *see* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 622–23 (2010); *cf.* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates Over Ascertainability and Cy Pres*, 65 U. KAN. L. REV. 913, 953–54 (2017) (describing but not endorsing arguments couched in terms of the models).

38. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77–78 (2003).

39. Then-Professor Diane Wood addressed this issue in 1987. Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 616–17 (1987). We are unaware of any serious engagement with it in the courts before *BMS*. *See infra* note 51.

federal courts have refused to apply *BMS* in class actions, thereby preserving the maximum jurisdictional reach for federal courts supervising class actions. But their justifications for this class action exception are thin. The regulatory conception can supply missing normative heft by justifying a status of juridical irrelevance for absent class members.

A. BMS

In *BMS*, several hundred plaintiffs, many of whom were residents of states other than California, sued Bristol-Myers in a California state court.[40] They alleged injuries caused by their ingestion of Plavix, a blood-thinning drug. The plaintiffs' similar cases, all filed by the same lawyers, got consolidated into a single episode of litigation. Initially, the California Supreme Court affirmed the trial court's power to adjudicate the claims of other states' residents based on a general jurisdiction theory.[41] Bristol-Myers has extensive contacts with California, including hundreds of millions of dollars of Plavix sales and extensive research activities in the state.[42] After a U.S. Supreme Court decision narrowed general jurisdiction's boundaries, a California Court of Appeal revisited the matter and determined that the state court had specific jurisdiction over nonresidents' claims.[43] The California Supreme Court agreed. Bristol-Myers's extensive engagement in California, if insufficient for general jurisdiction, warranted a looser connection between its California contacts and nonresidents' claims. The company had targeted California as well as other states with a single, undifferentiated marketing and sales campaign. All of the plaintiffs' claims arose out of this conduct, even if some of them bought and used Plavix in other states. The non-residents' claims thus related sufficiently to Bristol-Myers's California contacts to meet the specific jurisdiction threshold.[44]

The California Supreme Court abstracted away from the specifics of each individual claim to assess personal jurisdiction. This attempt to fashion a distinctive strain of jurisdictional doctrine

40. Bristol-Meyers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1778 (2017).
41. *Id.* at 1778.
42. *Id.* at 1786 (Sotomayor, J., dissenting).
43. *Id.* at 1778 (majority opinion).
44. *Id.* at 1779.

for aggregate litigation foundered in the Supreme Court. A state infringes on another state's sovereignty if it exercises its "coercive power" through adjudication, the Court insisted, when the state has "little legitimate interest in the claims in question."[45] The legitimacy of this interest requires a claim-by-claim, not aggregate, measure. Thus, the Court held, personal jurisdiction depends on the connection between the defendant's forum contacts and each individual plaintiff's "specific claims." The defendant's "forum contacts that are unrelated to those claims," no matter how "extensive," are irrelevant.[46] None of Bristol-Myers's California contacts led directly to injuries in Kansas, Texas, or any of the nonresident plaintiffs' states. Accordingly, these contacts could not require the company to litigate non-residents' claims in California.[47]

BMS ensures that non-class aggregate litigation involving plaintiffs from different states will proceed in one of only two sets of fora.[48] If the defendant has continuous and systematic contacts with the forum state, the state has a legitimate interest in the litigation, regardless of where the plaintiffs' claims arise. This general jurisdiction exists in those states where the defendant is "at home," a category that for corporate defendants likely includes only the state hosting its principal place of business and the state of its incorporation.[49] Otherwise, the Judicial Panel on Multidistrict Litigation can consolidate multiple suits filed in different states and transfer them to any federal court for pre-trial processing.[50]

B. The Class Action Exception

BMS involved the consolidation of hundreds of individually-filed claims into one proceeding. In a class action, of course, absent class members do not individually file claims. The class certification decision joins them. Before *BMS*, in no instance of which we are aware did a class action fail because of an inadequate relationship

45. *Id.* at 1780.
46. *Id.* at 1781.
47. *Id.* at 1782.
48. Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1252 (2018).
49. 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1067.5 (4th ed. Apr. 2019 update).
50. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1205, 1212–13 (2018).

between the defendant's forum contacts and absent class members' claims.[51]

But many, beginning with Justice Sotomayor in her *BMS* dissent, quickly appreciated the decision's potential significance for multistate class actions.[52] Personal jurisdiction requires a close nexus between the defendant's forum contacts and each plaintiff's claim. If aggregation of any sort does not affect this standard prerequisite, then *BMS* would seem to limit class counsel suing on behalf of people from different states to one of two forum choices. They could file a single multistate case in the court of a state that has general jurisdiction.[53] Otherwise, class counsel could file several cases in several states, with each class defined to include only those injured within each forum state. This strategy would require class counsel to retain local counsel and litigate redundant lawsuits unless they sought multidistrict litigation (MDL) transfer

51. *See* Allen v. ConAgra Foods, Inc., No. 3:13-cv-01279-WHO, 2018 WL 6460451, at *7 (N.D. Cal. Dec. 10, 2018) ("Prior to *Bristol-Myers*, there would have been no basis for [the defendant] to mount a due process challenge against the nonresident absent class members . . . ."); Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815, 819 (N.D. Ill. 2018) (describing the defendant's effort to apply *Bristol-Myers* to class actions as amounting to an "extraordinary sea change in class action practice"); 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6:26 (5th ed. Nov. 2018 update) ("Nationwide class actions filed against large national corporations in states that are not their homes have not raised significant personal jurisdiction challenges."). Two of the country's leading class action defense firms argued after *BMS* that the decision amounted to a change in law for class actions. Memorandum of Points and Authorities in Support of Scotts' Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings at 1, *In re* Morning Song Bird Food Litig., No. 3:12-cv-01592-JAH-AGS, 2018 U.S. Dist. LEXIS 44825 (S.D. Cal. Mar. 19, 2018) (No. 344-1) (Jones Day); Defendant James Hagedorn's Memorandum in Support of Motion for Reconsideration of the Court's September 29, 2016 Order Granting in Part and Denying in Part Defendant Hagedorn's Motion to Dismiss, or, in the Alternative, Motion for Judgment on the Pleadings at 1–2, *In re* Morning Song Bird Food Litig., No. 3:12-cv-01592-JAH-AGS, 2018 U.S. Dist. LEXIS 44825 (S.D. Cal. Mar. 19, 2018) (No. 345-1) (Kirkland and Ellis). For decisions describing the doctrine pre-*BMS*, see, e.g., *In re* Western States Wholesale Natural Gas Antitrust Litig., No. MDL 1566 2:03–CV–01431–PMP–PAL 2:07–CV–01019–PMP–PAL, 2009 WL 10692801, at *5 (D. Nev. Mar. 9, 2009) ("The named class representatives' claims must satisfy the specific jurisdiction test."); Williams v. Firstplus Home Loan Trust 1996-2, 209 F.R.D. 404, 412 (W.D. Tenn. 2002) ("[N]amed plaintiffs' claims must satisfy the requirements for personal jurisdiction . . . ."); Barry v. Mortgage Servicing Acquisition Corp., 909 F. Supp. 65, 73 (D.R.I. 1995) ("It is the named class representative . . . whose claims must satisfy [the specific jurisdiction] test in order for the Court to have personal jurisdiction over [the defendant] . . . .").

52. *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting); *see also* Bradt & Rave, *supra* note 48, at 1282, 1288.

53. Rafferty v. Denny's, Inc., No. 5:18-cv-2409, 2019 WL 2924998, at *7 (N.D. Ohio July 8, 2019); 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6:26 (5th ed. Nov. 2018 update).

and consolidation. If class counsel did not pursue an MDL strategy, the defendant would, unless litigating multiple smaller cases would give the defendant a settlement advantage.[54]

Either way, *BMS*'s application would deprive class counsel of control over forum choice. The party controlling the choice of forum always has an advantage,[55] but this advantage can be particularly significant in class actions. The lower federal courts have splintered on a number of important aspects of class action doctrine, including, for instance, issue certification,[56] administrative feasibility,[57] class member evidence-of-injury requirements,[58] and, as discussed below, class standing.[59] Different approaches to the choice-of-law problems created by multi-state class actions alleging state law claims have particular significance for the sort of litigation that *BMS* implicates.[60]

It perhaps overstates the matter to assert, as one district court did, that *BMS*'s application "would eviscerate the class action vehicle as we know it . . . ."[61] But litigant behavior clearly indicates something significant afoot. Class counsel have fought dozens of *BMS*-prompted motions to dismiss rather than acquiesce in a transfer to the defendant's home jurisdiction, indicating that forum choice indeed matters. In a minority of instances, courts have determined that *BMS* does apply in class actions.[62] The logic follows a

54. A defendant might, if it believed that it could, conduct a "reverse auction" between competing sets of class counsel to settle its liability at the cheapest price.

55. *See* Scott Dodson, *Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73, 78 (2018). *See generally* Neel U. Sukhatme, *A Theoretical and Empirical Study of Forum Shopping in Diversity Cases* (Apr. 18, 2014), http://ssrn.com/abstract=1989250.

56. Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405, 411–13 (6th Cir. 2018) (describing circuit split).

57. *In re* Petrobras Sec., 862 F.3d 250, 267–68 (2d Cir. 2017).

58. *In re* Deepwater Horizon, 739 F.3d 790, 800–01 (5th Cir. 2014).

59. *See infra* Section III.B.

60. *See* 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:61 (5th ed. Nov. 2018 update).

61. Lyngaas v. Curaden AG, No. 17-cv-10910, 2019 WL 2231217, at *18 (E.D. Mich. May 23, 2019).

62. *E.g.*, *In re* Dicamba Herbicides Litig., 359 F. Supp. 3d 711, 722–23 (E.D. Mo. 2019); America's Health & Res. Ctr., Ltd. v. Promologics, Inc., No. 16 C 9281, 2018 WL 3474444, at *2 (N.D. Ill. July 19, 2018); Chavez v. Church & Dwight Co., No. 17 C 1948, 2018 WL 2238191, at *10 (N.D. Ill. May 16, 2018); Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018); DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018); Greene v. Mizuho Bank, Ltd., 289 F. Supp. 3d 870, 874 (N.D. Ill. 2017); McDonnell v. Nature's Way Prods., LLC, No. 16 C 5011, 2017 WL 4864910, at

few simple steps. Absent class members' claims get joined through Rule 23's application. The Rules Enabling Act, Rule 23's source, prohibits rules of procedure that "abridge, enlarge or modify any substantive right."[63] The statute thus requires that "a defendant's due process interest . . . be the same in the class context" as it is in any other case.[64] A defendant has a due process right to demand that the relationship between its forum contacts and a plaintiff's claim meet a particular jurisdictional threshold. If a defendant has this right in an individual action, the Rules Enabling Act cannot allow the right to disappear just because the claimant joins the case as an absent class member.[65]

The majority of federal courts disagree and have fashioned a class action exception to *BMS*.[66] Two of their justifications, one rooted in federalism and the other in due process, are unconvincing. The third, which rests on a presumption of absent class member juridical irrelevance, holds promise. But it needs further elaboration.

1. Federalism and the class action exception

BMS has had a negligible impact on state class action litigation,[67] while federal courts have wrestled with the decision. This pattern makes sense, at least superficially. *BMS* only matters when class members come from different states. Cases fitting this description almost always qualify for federal subject matter jurisdiction.[68] If a

*4 (N.D. Ill. Oct. 26, 2017); Wenokur v. AXA Equitable Life Ins. Co., No. CV-17-00165-PHX-DLR, 2017 WL 4357916, at *4 n.4 (D. Ariz. Oct. 2, 2017); *In re* Dental Supplies Antitrust Litig., No. 16 Civ. 696 (BMC)(GRB), 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017).

63. 28 U.S.C. § 2072(b) (2018).

64. *Practice Mgmt.*, 301 F. Supp. 3d at 861.

65. *See Greene*, 289 F. Supp. 3d at 874; *see also In re Dicamba*, 359 F. Supp. 3d. at 723; *In re Dental Supplies*, 2017 WL 4217115, at *9 ("Personal jurisdiction in class actions must comport with due process just the same as any other case.").

66. Knotts v. Nissan N. Am., Inc., 346 F. Supp. 3d 1311, 1332 (D. Minn. 2018); MCLAUGHLIN ON CLASS ACTIONS § 2:44 (15th ed. 2018) ("Most courts that have addressed the applicability of the ruling to class actions have concluded that *Bristol-Myers* does not apply to class actions.").

67. As of the time of writing, Westlaw did not contain a single opinion from a state court addressing *BMS*'s applicability to class actions.

68. If the plaintiffs bring a federal claim, the case satisfies the requirements for federal question jurisdiction. If the plaintiffs bring state law claims but allege more than $5 million in controversy, then the case typically qualifies for diversity jurisdiction. *See* 28 U.S.C. § 1332(d) (2018).

named plaintiff does not file originally in federal court, the defendant will likely remove.

At a more fundamental level, the fact that federal courts have had to wrestle with *BMS* highlights a conceptual difficulty with modern personal jurisdiction doctrine.[69] It developed in part to referee interstate relations.[70] This "horizontal federalism" motivation has long proven difficult to parse.[71] Personal jurisdiction doctrine flows from the Fourteenth Amendment's Due Process Clause, and thus it involves personal, not structural, concerns.[72] *BMS* recognizes that this is so, insisting that the doctrine's "'primary concern' is 'the burden on the defendant.'"[73] A few sentences later, however, *BMS* identifies state sovereignty as the doctrine's animating force, noting that one state's excessive exercise of jurisdiction infringes on the sovereignty of others.[74] "[A]t times," the Court maintains, "this federalism interest may be decisive."[75]

The doctrine's restatement mostly in terms of substantive due process can straighten out this tangle.[76] The courts of a state have jurisdiction over a defendant when the defendant's relationship with the state gives it a legitimate regulatory interest, subject to a check for serious inconvenience to the defendant. This formulation recognizes that courts, as institutions of state government, engage in a regulatory exercise when they supervise litigation and enter judgments.[77] As such, litigation in a state court necessarily has

69. *Cf.* Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 533 (2012).

70. *E.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (describing the Due Process Clause "as an instrument of interstate federalism"); *cf.* Bradt, *supra* note 50, at 1179–80 (contrasting the "theoretical justifications for limitations on jurisdiction" and including a "power theory" based on concerns about state sovereignty).

71. For a thorough treatment, see Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 61–74 (2010).

72. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

73. Bristol-Meyers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1780 (2017). (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

74. *Id.*

75. *Id.*

76. *See, e.g.*, Charles W. Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 602–19 (2007); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 633–34 (2006).

77. As Clyde Spillenger argues, modern personal jurisdiction law originated in concerns about the legitimate extent of a state's regulatory authority. Clyde Spillenger, *Risk Regulation, Extraterritoriality, and Domicile: The Constitutionalization of American Choice of Law, 1850-1940*, 62 UCLA L. REV. 1240, 1326–27 (2015).

implications for the state's relationship with others. The excessive exercise of jurisdiction by the courts of one state projects the state's power beyond situations in which it has a legitimate regulatory interest, at odds with a system of limits on the respective states' sovereign authority.[78] Individuals have a right to a government that abides by limits on its power, and thus they can object by raising a personal jurisdiction defense.[79]

If this description of personal jurisdiction doctrine is correct,[80] one wonders why *BMS* has anything to do with federal class actions at all.[81] If a court exercises the sovereign power of the government to which it belongs, then the jurisdictionally relevant sovereign for the federal courts should be the United States. When a federal court adjudicates, it does not occasion an infringement on one state's power by another state's instrument of government.[82] A defendant's contacts with one state or another are therefore irrelevant.[83] Horizontal federalism concerns should be inapposite; as one district court insisted, "[a] nationwide class action in federal court is not about a state's overreaching[.]"[84]

Some courts have justified a class action exception to *BMS* with this reasoning.[85] While we agree that federalism's irrelevance should support the exception on policy grounds,[86] a legal argument anchored solely in federalism terms proves too much. No principled reason exists to sideline standard personal jurisdiction doctrine only in class actions, as the argument succeeds (or fails) equally for

78. *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1780.

79. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011).

80. *Cf.* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 231–32 (2004) (conceding that "[l]anguage in modern Supreme Court decisions . . . suggests that the Court conceives of [personal jurisdiction] as a species of substantive due process," but arguing that the modern test for personal jurisdiction "is considerably out of line with the rest of substantive due process doctrine").

81. Sanchez v. Launch Tech. Workforce Sols., LLC, 297 F. Supp. 3d 1360, 1367 (N.D. Ga. 2018); *In re* Chinese Mfr. Drywall Prods. Liab. Litig., No. 09-2047, 2017 WL 5971622, at *19–20 (E.D. La. Nov. 30, 2017).

82. Sloan v. Gen. Motors LLC, 287 F. Supp. 3d 840, 859 (N.D. Cal. 2018).

83. *See, e.g.*, *id.* at 857–58.

84. *Chinese Mfr. Drywall*, 2017 WL 5971622, at *20.

85. *See* Pascal v. Concentra, Inc., No. 19-cv-02559-JCS, 2019 WL 3934936, at *5 (N.D. Cal. Aug. 20, 2019); Cabrera v. Bayer Healthcare, LLC, No. LA CV17-08525 JAK (JPRx), 2019 WL 1146828, at *6 (C.D. Cal. Mar. 6, 2019); *Sanchez*, 297 F. Supp. 3d at 1367; *Chinese Mfr. Drywall*, 2017 WL 5971622, at *19–20.

86. *See infra* p. 1548.

all federal litigation.[87] Congress has enacted more expansive jurisdictional provisions for some types of federal litigation, and Rule 4 of the Federal Rules of Civil Procedure exempts certain types of claims from standard doctrine.[88] Otherwise, since at least 1938, a federal court's jurisdictional reach equals that of a state court of the state where the federal court sits.[89] A court-fashioned class action exception, justified in federalism terms, usurps control over jurisdictional policy that belongs either to Congress or to the Federal Civil Rules Advisory Committee.[90]

2. Due process and the class action exception

A second justification for a class action exception to *BMS* explains that the due process protections Rule 23 extends to defendants obviate any need for personal jurisdiction limits.[91] As one court argued, "[p]ersonal jurisdiction is rooted in fairness to the defendant, and Rule 23 provides significant safeguards to that end."[92]

Stated in such conclusory terms, the justification is weak. One set of fairness protections cannot substitute for another just because both vindicate due process. A proceeding can violate a party's due process rights in various ways. A court may honor due process

87. *E.g.*, Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509, 523–30 (2019).

88. *Id.* at 521–22.

89. A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325, 326–27 (2010); *cf.* Muir v. Nature's Bounty (DE), Inc., No. 15 C 9835, 2018 WL 3647115, at *4 (N.D. Ill. Aug. 1, 2018) (noting that "*Bristol-Myers* imposes an *indirect* bar on federal courts' exercise of . . . personal jurisdiction" through the application of Rule 4).

90. *But cf.* Patrick Woolley, *Rediscovering the Limited Role of the Federal Rules in Regulating Personal Jurisdiction*, 56 HOUS. L. REV. 565 (2019) (challenging the assumption that the Federal Rules can regulate amenability to jurisdiction).

91. Ross v. Huron Law Grp. W. Va., PLLC, No. 3:18-0036, 2019 WL 637717, at *3–4 (S.D.W. Va. Feb. 14, 2019); Hicks v. Hous. Baptist Univ., No. 5:17-CV-629-FL, 2019 WL 96219, at *5 (E.D.N.C. Jan. 3, 2019); Casso's Wellness Store & Gym, LLC v. Spectrum Lab. Prods., Inc., No. 17-2161, 2018 WL 1377608, at *5 (E.D. La. Mar. 19, 2018); Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114, 126–27 (D.D.C. 2018).

92. Allen v. ConAgra Foods, Inc., No. 3:13-cv-01279-WHO, 2018 WL 6460451, at *7 (N.D. Cal. Dec. 10, 2018); *see also In re* Takata Airbag Prods. Liab. Litig., No. 2599, 2019 WL 2570616, at *18 (S.D. Fla. June 21, 2019); Cabrera v. Bayer Healthcare, LLC, No. LA CV17-08525 JAK (JPRx), 2019 WL 1146828, at *8 (C.D. Cal. Mar. 6, 2019); *Molock*, 297 F. Supp. 3d at 126; *In re* Chinese Mfr. Drywall Prods. Liab. Litig., No. 09-2047, 2017 WL 5971622, at *14 (E.D. La. Nov. 30, 2017).

limitations on non-party preclusion, for example.[93] But it can nonetheless violate the defendant's due process rights by excusing the plaintiff from notifying the defendant before entering judgment.[94] Due process provides for fundamental fairness in different, non-fungible ways at different stages in a case's life cycle.

A more convincing effort to justify a class action exception in due process terms stresses what "the requirements of Rule 23 class certification ensure[,]" that "the defendant is presented with a unitary, coherent claim to which it need respond only with a unitary, coherent defense."[95] To expand on this logic: if the named plaintiff's claim arises out of the defendant's purposeful availment of the forum, this individual claim meets specific jurisdiction requirements, *BMS* or no. Rule 23 requires that the adjudication of all class members' claims involve basically the same evidence and legal arguments. Thus, the burden on the defendant to defend a class suit on the merits, so the logic goes, differs in no appreciable way from the burden that an individual defense of the named plaintiff's claim entails. "[T]he unitary nature of [a] class claim" justifies "haling the defendant into court to answer" all of the class members' claims "in a forum that has specific jurisdiction . . . based on the representative's claim" alone.[96]

This argument has roots in *Phillips Petroleum Co. v. Shutts*, the only time the Court has addressed the intersection between Rule 23 and personal jurisdiction.[97] *Shutts* determined that a court can enter a judgment resolving absent class members' claims even if the class members lack jurisdictionally adequate contacts with the forum state, so long as the court provides "safeguards" to ensure the adequate representation of class member interests.[98] Protected thusly, absent class members can "sit back and allow the litigation to run its course[.]" They can justifiably assume that the named

93. The Due Process Clause requires strict limits on non-party preclusion. *See* Taylor v. Sturgell, 553 U.S. 880 (2008).

94. *Cf.* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (holding that due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the" lawsuit).

95. Sanchez v. Launch Tech. Workforce Sols., LLC, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018).

96. *Id.* at 1366.

97. 472 U.S. 797 (1985).

98. *Id.* at 810; *see also* Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 310 (2003).

plaintiffs' effort to win her own claim will also benefit their claims.[99] The "fewer burdens" than what litigation imposes on a defendant mean that absent class members can do without the protections that personal jurisdiction limitations offer.[100]

Shutts rests on two intertwined supports. First, class certification requirements and Rule 23's protections for absent class members ensure the adequate representation of their interests, obviating the need for class member participation.[101] Second, this representation happens without the imposition of any meaningful burden on absent class members. One of these supports falls away when the party seeking protection is the defendant, not an absent class member.[102] Rule 23 and the "unitary, coherent"[103] case it requires may indeed ensure that a merits defense against the named plaintiff's claim suffices as a merits defense against all class members' claims. But the notion that a class action imposes no meaningful burden on a defendant beyond what an individual claim occasions is absurd. The additional burden is indisputable,[104] even if one makes the formalistic assumption that a defendant's investment in litigating the merits does not differ from an individual case to a class action.[105] We agree that the "unitary, coherent" case Rule 23 requires should favor a class action exception.[106] Class certification means that, in real-world terms, the difference to the defendant between litigating a single-state class action (which *BMS*

99. *Shutts*, 472 U.S. at 810, 812.

100. *Id.* at 811.

101. Nagareda, *supra* note 98, at 310 ("[T]he due process checklist in *Shutts* tracks the familiar taxonomy of exit, voice, and loyalty rights[.]"); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 375–76 (2000) (conceiving of rights to notice, to opt out, and to a finding of adequate representation in terms of rights of exit, voice, and loyalty, and suggesting that these rights undergird a "theory of representational adequacy").

102. *Shutts*, 472 U.S. at 810.

103. Sanchez v. Launch Tech. Workforce Sols., LLC, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018).

104. Class actions necessarily increase costs above and beyond individual litigation. The class certification motion, for instance, involves time-consuming, expensive litigation. A loss on the merits authorizes the court to shift the cost of notice to the defendants. Hunt v. Imperial Merchant Servs., Inc., 560 F.3d 1137, 1143 (9th Cir. 2009); 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 8:33 (5th ed., 2018).

105. *Cf.* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408–09 (2010) (insisting that the class certification's effect—a transformation of a dispute from one with $500 at stake to one with $5 million at stake— "has no bearing . . . on legal rights").

106. *See infra* pp. 1547–49.

would not implicate) and a multi-state class action is not so significant as to require a wholesale change in decades of personal jurisdiction practice.[107] But the claim that Rule 23 and personal jurisdiction doctrine are fungible in terms of due process is implausible.

3. Juridical irrelevance, the regulatory model, and the class action exception

The third justification for a class action exception simply posits that absent class members "are not parties for the purpose of constitutional and statutory doctrines governing whether a court has the power to adjudicate their claims."[108] This argument has solid if superficial support. As the Supreme Court has recognized, "[n]onnamed class members . . . may be parties for some purposes and not for others."[109] Defendants can rarely allege counterclaims against absent class members, for instance,[110] and absent class members have no input when the parties consent to a magistrate judge.[111] But the justification also veers toward the *ipse dixit* unless it can answer the basic question: why shouldn't an absent class member count as a party for personal jurisdiction purposes?[112]

107. *See infra* pp. 1547–49.

108. Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815, 820 (N.D. Ill. 2018)*; see also* Sanchez v. Launch Tech. Workforce Sols., LLC, 297 F. Supp. 3d 1360, 1365 (N.D. Ga. 2018); Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114, 126 (D.D.C. 2018); Knotts v. Nissan N. Am., Inc., 346 F. Supp. 3d 1310, 1333 (D. Minn. 2018); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., Case No. 17-cv-00564 NC, 2017 WL 4224723, at *5 (S.D. Cal. Sept. 22, 2017); *In re* Chinese Mfr. Drywall Prods. Liab. Litig., Civil Action MDL No. 09-2047, 2017 WL 5971622, at *12 (E.D. La. Nov. 30, 2017); Morgan v. U.S. Xpress, Inc., Case No. 3:17-cv-00085, 2018 WL 3580775, at *5 (W.D. Va. July 25, 2018).

109. Devlin v. Scardelletti, 536 U.S. 1, 9 (2002); *see also Sanchez*, 297 F. Supp. 3d at 1368–69; Coleman v. Labor and Indus. Review Comm'n of Wis., 860 F.3d 461, 471 (7th Cir. 2017). For a reinterpretation of this statement and criticism of the claim that class members can be parties for some purposes and not others, see A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction Over Absent Class Members Explained*, 39 REV. LITIG. (forthcoming 2019) (Draft at 4-7) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461113).

110. Owner-Operator Indep. Driver Ass'n v. Arctic Express, Inc., 238 F. Supp. 2d 963, 967–68 (S.D. Ohio 2003).

111. Koby v. ARS Nat'l Servs., Inc., 846 F.3d 1071, 1076 (9th Cir. 2017).

112. One district court explained that "absent class members are *not* parties for purposes of diversity of citizenship, amount in controversy, and Article III standing . . . ." Personal jurisdiction, like subject matter jurisdiction, "set[s] forth the conditions under which a particular sovereign's courts may hear a case" and thus "[i]t follows that there is no good reason why absent class members should be treated as non-parties for purposes of

This is where the regulatory conception can help. It lends normative support to the notion that absent class members should not count as discrete, individual parties and are therefore juridically irrelevant.[113] The regulatory conception treats the class action as a device to enable law enforcement. A group of undifferentiated regulatory beneficiaries, absent class members serve as indistinct vessels through whom litigation can vindicate substantive liability policy. Details of each one's claim, such as where exactly it arose, do not matter. The case emphasizes the defendant's conduct and the proper regulatory response. If the named plaintiff's claim arises out of the defendant's forum contacts, the court has enough legitimate regulatory authority to adjudicate for the class.[114]

We suspect that something like an appreciation for litigation's regulatory role lurks somewhere in the motivation for the class action exception to *BMS*. Most of the cases that have presented the issue involve small-scale consumer protection claims. Affected consumers often have no idea that they are injured or do not care if they are. With no meaningful breach of the social peace to repair, the litigation of these claims makes little sense in conflict resolution terms. The only real argument for many negative value class

establishing subject matter jurisdiction, but as parties for purposes of establishing personal jurisdiction . . . ." Al Haj v. Pfizer Inc., 338 F. Supp. 3d 815, 820–21 (N.D. Ill. 2018). The district court reasoned that "[a]bsent class members are not parties for purposes of determining whether there is complete diversity of citizenship in cases governed by state substantive law[,]" citing the Supreme Court's 2002 *Devlin* decision. It continued: "Nor are they parties for purposes of calculating the amount in controversy in diversity suits not brought under the Class Action Fairness Act . . . ." *Al Haj*, 338 F. Supp. 3d at 820. This argument relies in significant measure on an outdated and now-erroneous understanding of absent class members as irrelevant for the purposes of assessing diversity of citizenship and determining the amount-in-controversy. The Class Action Fairness Act, passed in 2005, provides that the diversity of citizenship requirement is satisfied when "any member of a class of plaintiffs is a citizen of a State different from any defendant . . . ." 28 U.S.C. § 1332(d)(2)(A). It also pegs the amount-in-controversy requirement to the total amount the case implicates, a sum that necessarily includes the value of the absent class member's claims. 1332(d)(2). The category of "diversity suits not brought under the Class Action Fairness Act" to which the district court refers seems only to include defendant class actions, a set different from ones addressed by *Bristol-Myers*. *Al Haj*, 338 F. Supp. 3d at 820 (citing *Travelers Property Casualty v. Good*, 689 F.3d 714 (7th Cir. 2012)).

113. *Cf.* Wood, *supra* note 39, at 616 & n.50 (explaining personal jurisdiction's exclusive focus on the named plaintiff with reference to the "representational" model of the class action, and claiming that Abram Chayes' version of the regulatory model of litigation favors the "representational" model of the class action).

114. For a summary of a related argument, see Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 30–31 (2018).

actions is regulatory.[115] As of the time of writing, personal jurisdiction doctrine post–*BMS* offers district courts the rare doctrinal lever they can pull however they want, because no circuit has yet addressed the issue.[116] A skeptical district judge could freely apply *BMS* and raise a jurisdictional hurdle to the prosecution of negative value cases. The fact that a majority of courts have done otherwise suggests some deep underlying acceptance of or even enthusiasm for litigation in a regulatory vein.

As we argue in Part IV, this majority has rightly exempted class actions from *BMS*'s reach. But for those anxious to preserve the class action's power, a preexisting commitment to the regulatory conception runs into trouble as a motivation for doctrinal design. A powerful class action benefits from the conflict resolution conception when the focus shifts from personal to subject matter jurisdiction.

III. SUBJECT MATTER JURISDICTION AND THE INJURY DIFFERENCE PROBLEM

The federal courts have long struggled to navigate the tricky intersection between class actions and Article III standing doctrine.[117] The "injury difference problem" often arises: when do differences between the named plaintiff and absent class members deprive the former of standing to sue on behalf of the latter? The problem's persistence results in part from the Supreme Court's conflicting guidance on the administration of standing doctrine in class actions. Imprecision in how the lower federal courts categorize the problem's variations might also bear some responsibility. But the injury difference problem largely disappears if absent class members are juridically relevant, a status the conflict resolution conception supports. Their juridical irrelevance, by

115. *E.g.*, David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 924 (1998) ("[T]he small claim class action strikes me as one that serves the purpose not of compensating those harmed in any significant sense . . . but rather. . . the purpose of allowing a private attorney general to contribute to social welfare by bringing an action whose effect is to internalize to the wrongdoer the cost of the wrong.").

116. *E.g.*, Gress v. Freedom Mortg. Corp., 386 F. Supp. 3d 455, 461 (M.D. Pa. 2019) (commenting on the dearth of circuit guidance).

117. *E.g.*, Jean Wegman Burns, *Standing and Mootness in Class Actions: A Search for Consistency*, 22 U.C. DAVIS L. REV. 1239, 1262 (1989).

contrast, triggers tricky justiciability questions that existing doctrine poorly answers.

A. The Supreme Court's Muddled Guidance

By the mid–1970s, the Supreme Court had developed a basic principle of standing in class actions: a named plaintiff must have some injury of her own and cannot invoke class members' injuries to support her own claim for standing.[118] The Court's subsequent efforts to build on this foundation have zigged and zagged in confusing ways.[119] *Blum v. Yaretsky*, the Court's initial engagement with the injury difference problem, involved the adequacy of procedures that New York State used to determine whether to transfer Medicaid recipients living in nursing homes from one level of care to another.[120] The named plaintiffs, whom the state had transferred from a higher level of care to a lower one, had standing to sue on behalf of a class of similarly treated recipients.[121] But they lacked standing to challenge the adequacy of procedures for transfers from a lower to a higher level of care. "[T]he conditions under which such transfers occur are sufficiently different from those which respondents do have standing to challenge[,]" the Court explained, "that any judicial assessment of their procedural adequacy would be wholly gratuitous and advisory."[122]

Lewis v. Casey follows neatly from *Blum*.[123] The named plaintiffs, inmates in Arizona prisons, challenged a range of policies and practices in use at all facilities in the state that limited court access

118. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976) ("That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975))); Warth v. Seldin, 422 U.S. 490, 499 (1975); O'Shea v. Littleton, 414 U.S. 488, 494 (1974); Note, *Class Standing and the Class Representative*, 94 HARV. L. REV. 1637, 1637 (1981).

119. NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 160 (2d Cir. 2012) (commenting on "tension" in the Court's guidance); Plumbers Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 769 (1st Cir. 2011) (noting that "the Supreme Court has not been consistent").

120. Blum v. Yaretsky, 457 U.S. 991, 994–96 (1982).

121. *Id.* at 1000.

122. *Id.* at 1001.

123. Whether *Lewis v. Casey* is really a decision about standing or a decision about the scope of an injunctive remedy is up for debate. *E.g.*, 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE §§ 3531.2, 3531.6 (4th ed. 2019).

for prisoners.[124] At trial, only one named plaintiff proved an actual injury, and that injury involved only one specific barrier to court access at one prison.[125] The system-wide injunction the district court issued to correct the range of problems at all facilities could not stand. As the Court reasoned, "[t]he actual-injury requirement" for Article III standing "would hardly serve [its] purpose . . . if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration."[126]

Lewis v. Casey and *Blum* seem to hinge the named plaintiff's standing to litigate a class action and the court's power to issue a class-wide remedy on some threshold of similarity between the injury she suffers and the injuries she alleges for the class as a whole. In *Gratz v. Bollinger*, the Court backed away from this jurisdictional prerequisite. One of the named plaintiffs, who had unsuccessfully applied for admission as a freshman to the University of Michigan, challenged the university's affirmative action policies for both freshman and transfer admissions.[127] Citing *Blum* and *Lewis*, Justice Stevens insisted in dissent that differences between the freshman and transfer admission policies denied the named plaintiff standing to challenge the latter.[128] Chief Justice Rehnquist responded for the majority, asking "whether the relevance of this variation . . . is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to Rule 23."[129] Without answering directly, he hinted that Rule 23, not a standalone jurisdictional prerequisite, best addresses the necessary nexus between the named plaintiffs' injuries and the class's. Quoting from the "[p]articularly instructive" *General Telephone Co. of Southwest v. Falcon*,[130] a case about class certification, the Chief Justice reasoned that the named plaintiff could represent

124. Lewis v. Casey, 518 U.S. 343, 346–47 (1996).

125. *Id.* at 358.

126. *Id.* at 357 (emphasis omitted).

127. Gratz v. Bollinger, 539 U.S. 244, 251 (2003).

128. *Id.* at 286–87 (Stevens, J., dissenting).

129. *Id.* at 263 (majority opinion). The majority noted "tension in our prior cases in this regard." *Id.* at 263 n.15.

130. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982); *see also* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 2:6 (5th ed. 2018) (discussing *Falcon*).

both freshman and transfer applicants because their claims all "implicate[]" the "same set of concerns."[131]

B. The Injury Difference Conundrum

1. Three injury difference scenarios

Not surprisingly, given the tension in Supreme Court treatments of class standing, lower courts have struggled to craft a consensus approach to the injury difference problem. A classification of the three ways in which the problem typically arises can help shed some light. The first is the "different defendant, same law, same conduct" scenario. The named plaintiff sues several defendants on behalf of the class. She alleges that all defendants engaged in the same general course of conduct, and that the same body of substantive law gives all class members their claims. But only one of the defendants actually injured the named plaintiff; different defendants injured different class members.

A few courts have held that named plaintiffs have standing to sue on behalf of the class under these circumstances so long as a "juridical link" joins all of the defendants' conduct together.[132] Such a juridical link exists, the Seventh Circuit held, if the defendants engaged in "a conspiracy or concerted scheme," or if their conduct is "otherwise 'juridically related in a manner that suggests a single resolution of the dispute would be expeditious' . . . ."[133] A court has jurisdiction under this scenario because after class certification "the class as a whole[,]" not individual members or the named plaintiff, "is the focal point" for the purposes of assessing standing.[134]

The second version of the injury difference problem involves the "same defendant, different laws, same conduct" scenario. It arises in multistate class actions alleging state law claims. The named plaintiff sues a defendant for an undifferentiated course of conduct it directed at all class members. They happen to live in different states, and the relevant substantive liability doctrine is

131. *Gratz*, 539 U.S. at 267.

132. Payton v. County of Kane, 308 F.3d 673, 678–80 (7th Cir. 2002); *see also* Stewart v. Bureau Inv. Group No. 1, LLC, 24 F. Supp. 3d 1142, 1154–56 (M.D. Ala. 2014).

133. *Payton*, 308 F.3d at 679 (quoting La Mar v. H&B Novelty & Loan Co., 489 F.2d 461, 466 (9th Cir. 1973)).

134. *Id.* at 681.

state law. Choice of law rules suggest that the law of each class member's home state will govern each one's claim.

Differences in the state laws that apply in multistate cases pose hurdles to class certification,[135] albeit not necessarily irreducible ones.[136] But some courts never get to class certification, reasoning that a named plaintiff lacks standing to sue on behalf of class members from different states.[137] This limitation, it seems, involves a corollary to the basic principle that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[138] A Connecticut resident injured in Connecticut has standing to bring a Connecticut law claim against the defendant, but he has no standing to bring claims under Massachusetts law.[139] Standing doctrine requires that the applicable law give the plaintiff a right to recover,[140] and Massachusetts law gives the Connecticut resident no claim.[141]

The "same defendant, same laws, different conduct" scenario creates the third version of the injury difference problem. The named plaintiff and the absent class members share a defendant in common, and they allege claims under a single body of law. But the conduct giving rise to their alleged injuries differs from one class member to another.[142] Securities fraud litigation often involves this type of difference. The named plaintiff owns one type of security,

135. *E.g.*, Mazza v. American Honda Motor Co., 666 F.3d 581, 590 (9th Cir. 2012).

136. *E.g.*, Sullivan v. DB Invs., Inc., 667 F.3d 273, 301 (3d Cir. 2011); *In re* McCormick & Co., 217 F. Supp. 3d 124, 141–42 (D.D.C. 2016); 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:61 (5th ed. Nov. 2018 update).

137. *E.g.*, Brenner v. Vizio, Inc., Case No. C17-5897 BHS, 2018 WL 2229274, at *2–*3 (W.D. Wash. May 16, 2018); Edwards v. North American Power & Gas, LLC, 120 F. Supp. 3d 132, 138–39 (D. Conn. 2015); *In re* G-Fees Antitrust Litig., 584 F. Supp. 2d 26, 35–36 (D.D.C. 2008).

138. Warth v. Seldin, 422 U.S. 490, 499 (1975).

139. Richards v. Direct Energy Servs., LLC, 120 F. Supp. 3d 148, 155 (D. Conn. 2015).

140. *Cf. Warth*, 422 U.S. at 500 ("[T]he standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.").

141. Corcoran v. CVS Health Corp., 169 F. Supp. 3d 970, 990 (N.D. Cal. 2016).

142. *E.g.*, Fallick v. Nationwide Mut. Ins., 162 F.3d 410, 423 (6th Cir. 1998).

for instance, but tries to sue on behalf of class members who own related but different securities.[143]

2. Injury difference, standing, and rule 23

The lower federal courts have responded in different ways to the three scenarios. The Seventh Circuit's approach to the "different defendant, same law, same conduct" version represents a minority view. The application of the juridical link doctrine enables a named plaintiff to sue a defendant who did not injure her. To most courts, this license conflicts with the basic standing principle that the Supreme Court has unambiguously articulated for class actions.[144] A plaintiff must have standing to assert a claim against a defendant, class action or no, and "Rule 23 . . . cannot affect the plaintiff's Article III standing to sue the non-injurious defendants."[145]

The other two scenarios have generated more entrenched division in the federal courts as they have struggled to respond.[146] Some have used a "standing approach" to address injury difference. Attempting fidelity to cases like *Lewis v. Casey* and *Blum*, these courts insist that "standing . . . [is a] jurisdictional requirement[] that must be satisfied prior to class certification."[147] Thus, some standalone jurisdictional inquiry must precede a Rule 23 analysis.

143. *E.g.*, NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 158–65 (2d Cir. 2012); *In re* Bear Stearns Mortg. Pass-Through Certificates Litig., 851 F. Supp. 2d 746, 778 (S.D.N.Y. 2012); Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co., 862 F. Supp. 2d 322, 330–41 (S.D.N.Y. 2012); F.D.I.C. v. Countrywide Financial Corp., No. 2:12-CV-4354 MRP (MANx), 2012 WL 5900973, at *9–*10 (C.D. Cal. Nov. 21, 2012); *In re* Salomon Smith Barney Mut. Fund Fees Litig., 441 F. Supp. 2d 579, 604–07 (S.D.N.Y. 2006). Other common scenarios involve consumer protection cases, where the class members purchased different products. *E.g.*, Anderson v. Jamba Juice Co., 888 F. Supp. 2d 1000, 1005 (N.D. Cal. 2012); Brazil v. Dell Inc., No. C-07-01700 RMW, 2008 WL 4912050, at *5 (N.D. Cal. Nov. 14, 2008). Still others involve impact litigation. *E.g.*, Melendres v. Arpaio, 784 F.3d 1254, 1261 (9th Cir. 2014); Stevens v. Harper, 213 F.R.D. 358, 367–68 (E.D. Cal. 2002).

144. *E.g.*, Wong v. Wells Fargo Bank N.A., 789 F.3d 889, 896 (8th Cir. 2015); Akaosugi v. Benihana Nat'l Corp., No. C 11-01272 WHA, 2011 WL 5444265 at *2 (N.D. Cal. Nov. 9, 2011); Buetow v. A.L.S. Enters., 564 F. Supp. 2d 1038, 1045–46 (D. Minn. 2008); *In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., 570 F. Supp. 2d 851, 853–56 (E.D. La. 2008); Popoola v. Md-Individual Practice Ass'n, 230 F.R.D. 424, 431–33 (D. Md. 2005); *In re* Franklin Mut. Funds Fee Litig., 388 F. Supp. 2d 451, 462 n.7 (D.N.J. 2005); *In re* Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162, 170 (D. Mass. 2004).

145. Mahon v. Ticor Title Ins., 683 F.3d 59, 64 (2d Cir. 2012).

146. *See Melendres*, 784 F.3d at 1261–62.

147. *Stevens*, 213 F.R.D. at 366; *see also* Prado *ex rel.* Prado-Steinman v. Bush, 221 F.3d 1266, 1280 (11th Cir. 2000); *Fort Worth*, 862 F. Supp. 2d at 335; *F.D.I.C.*, 2012 WL at *10; *In re Salomon Smith Barney*, 441 F. Supp. 2d at 606.

This inquiry has come in different guises. The Second Circuit fashioned one in a "same defendant, same law, different conduct" case. The named plaintiff's standing requires that her claim "implicate[] 'the same set of concerns' as the conduct alleged to have caused injury to other members of the putative class . . . ."[148] Another court crafted a functionally-oriented test. Standing depends on whether the named plaintiff's and class members' claims resulted from the "same underlying conduct," such that the named plaintiff has sufficient interest in redressing the defendants' conduct as other class members experienced it.[149] Yet another inquiry asks whether the "named plaintiff . . . suffered the same species of injury as the members of the class, traceable to the same unlawful conduct by a defendant."[150] One court framed the test particularly vaguely: "some differences" between class members' claims do not defeat the named plaintiff's standing, but differences that exceed this threshold do.[151]

To other courts, the notion that the injury difference problem poses a jurisdictional challenge "conflates standing and class certification."[152] They eschew any standing analysis at all and use a "class certification" approach to deal with differences between the named plaintiff and absent class members. Rule 23, not Article III, determines when the case can proceed as a class action. If the named plaintiff individually meets standing requirements, the standing analysis ends.

148. *NECA-IBEW*, 693 F.3d at 162.

149. *Fort Worth*, 862 F. Supp. 2d at 333, 335.

150. *In re Bear Stearns*, 851 F. Supp. at 778.

151. Arevalo v. Bank of America Corp., 850 F. Supp. 2d 1008, 1018 (N.D. Cal. 2011); *see also* Miller v. Ghiradelli Chocolate Co., 912 F. Supp. 2d 861, 869 (N.D. Cal. 2012) (holding that standing is sufficient if the named plaintiff and the class members' claims are "substantially similar").

152. Melendres v. Arpaio, 784 F.3d 1254, 1261 (9th Cir. 2014); *E.g.*, Langan v. Johnson & Johnson Consumer Cos., 897 F.3d 88, 95 (2d Cir. 2018); Morrison v. YTB Int'l, Inc., 649 F.3d 533, 536 (7th Cir. 2011); Fallick v. Nationwide Mut. Ins., 162 F.3d 410, 423 (6th Cir. 1998); Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114, 130 (D.D.C. 2018); Dragoslavic v. Ace Hardware Corp., 274 F. Supp. 3d 578, 585-86 (E.D. Tex. 2017); Milbourne v. JRK Residential America, LLC, Civil Case No. 3:12cv861, 2016 WL 1071564, at *6 (E.D. Va. Mar. 15, 2016); *In re* McCormick & Co., Inc., 217 F. Supp. 3d 124, 144 (D.D.C. 2016); Garner v. VIST Bank, Civil Action No. 12-5258, 2013 WL 6731903, at *9 (E.D. Pa. Dec. 20, 2013); *In re* Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig., 701 F. Supp. 2d 356, 376–77 (E.D.N.Y. 2010); *In re* Relafen Antitrust Litig., 221 F.R.D. 260, 267–69 (D. Mass. 2004).

C. Injury Difference and Conflict Resolution

Confusion about the injury difference problem runs deep.[153] On one hand, repeated statements disclaiming one plaintiff's standing to litigate another plaintiff's claim pepper Supreme Court standing jurisprudence.[154] The insistence that some independent class standing analysis precede the class certification determination ensures that a court does not decide a class certification motion before confirming its jurisdiction to do so.[155] On the other hand, a vague "same set of concerns" threshold comes with none of the specificity or doctrinal elaboration that Rule 23's commonality, typicality, and adequacy of representation requirements bring to the issue of a case's breadth.

Moreover, courts that have fashioned a version of the standing approach do not explain why justiciability problems in class actions disappear if the named plaintiff and the absent class members suffer the "same species of injury." To restate the basic principle once again, "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'"[156] Exceptions to this general rule exist,[157] but none outside the class action premises third party standing solely on some vague test that measures the factual resemblance among claims.[158] An insistence on some standalone standing inquiry calls for more doctrinal elaboration than what currently exists to justify the named plaintiff's authority to vindicate the rights of others.

All of these concerns disappear if absent class members are juridically relevant. This status makes standing in class actions no

153. In a "same defendant, same law, different conduct" case, for instance, the Second Circuit adopted a standalone standing test. *NECA-IBEW*, 693 F.3d at 162. In a "same defendant, different laws, same conduct" case, by contrast, the Second Circuit denied that the scenario involved a standing issue. *Langan*, 897 F.3d at 95.

154. *E.g.*, Warth v. Seldin, 422 U.S. 499 (1975); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972).

155. Neale v. Volvo Cars of N. America, LLC, 794 F.3d 353, 358–59 (3d Cir. 2015).

156. Kowalski v. Tesmer, 543 U.S. 125, 129 (2004).

157. *E.g.*, 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.9 (3d ed. Apr. 2019 update).

158. Third party standing doctrine typically requires something more than just the possession of similar claims, and usually a pre-existing "beneficial relationship" between the plaintiff and the third party. U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720–21 (1990); Singleton v. Wulff, 428 U.S. 106, 117 (1976); 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.9.3 (3d ed. Nov. 2018 update).

more difficult than standing in run-of-the-mill multiparty cases. For ordinary litigation, party joinder and standing have no inherent relationship. Consider how standing works in a case with two plaintiffs. Employee A sues Employer, alleging that Employer discriminated against her on the basis of disability. After filing, Employee A moves to amend the complaint, to add Employee B as a plaintiff alleging a race discrimination claim against Employer. The joinder issue does not somehow turn upon Employee A's standing to bring Employee B's claim. Whether the two employees can sue together depends solely on whether their claims meet the requirements of Rule 20 of the Federal Rules of Civil Procedure.[159] If Employee B's claim arises out of the same transaction or occurrence as Employee A's, and if the two claims share a common question of law or fact, then the case can proceed with Employee B joined.[160] Employee B would have to allege the requisite injury-in-fact to establish standing, but this obligation has nothing to do with Employee A's own standing.[161]

Justice Scalia once described Rule 23 as merely a "species" of "traditional joinder."[162] This understanding of class actions implies a "bedrock rule," that "the sole purpose of classwide adjudication is to aggregate claims that are individually viable."[163] Justice Sotomayor recently echoed these sentiments: "A class action is simply 'a procedural device' that allows multiple plaintiffs to aggregate their claims . . . ."[164] If these characterizations are right, then courts that use a standing approach for the injury difference

159. Of course, both parties' claims must meet requirements specified in one of the various statutes governing the federal courts' subject matter jurisdiction.

160. *E.g.*, Ivery v. Gen. Die Casters, Inc., Case No. 5:17-cv-37, 2017 WL 6270239, at *3–*4 (N.D. Ohio Dec. 8, 2017); Mann v. Con-Way Freight, Inc., Case No. 16-2196-CM, 2016 WL 6476548, at *2–*3 (D. Kan. Nov. 2, 2016); Rossi v. Fulton Cty. Bd. of Assessors, Civil Action File No. 1:10-CV-4254-RWS-AJB, 2011 WL 13254693, at *3–*6 (N.D. Ga. Mar. 21, 2011); Elliott v. USF Holland, Inc., Cause No. NA 01-159-C-H/H, 2002 WL 826405, at *1–*2 (S.D. Ind. Mar. 21, 2002); Byers v. Illinois State Police, No. 99 C 8105, 2000 WL 1808558, at *2–*5 (N.D. Ill. Dec. 6, 2000).

161. *Cf.* Lewis v. Nevada, No. 3:13-CV-00312-MMD-WGC, 2014 WL 65799, at *3 n.9 (D. Nev. Jan. 7, 2014); Ohio Valley Envtl. Coal., Inc. v. Patriot Coal Corp., No. 3:11-0115, 2011 WL 6101921, at *10 (S.D.W. Va. Dec. 7, 2011) (warning against "conflat[ing]" the standard for joinder under Rule 20 with Article III standing doctrine).

162. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010).

163. Brown v. Plata, 563 U.S. 493, 552 (2011) (Scalia, J., dissenting).

164. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1427 (2019) (Sotomayor, J., dissenting) (quoting WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS, § 1.1 (5th ed. 2011)).

problem err.[165] Each class member is a separate plaintiff, such as Employee A or B. If the Rule 23 joinder requirements are satisfied, then the absent class members can join, just as Employees A and B can join if their claims meet Rule 20's requirements.[166] The matter simply does not involve the named plaintiff's supposed attempt to vindicate the rights of others.

Answers to the three injury difference scenarios come easily. A plaintiff must have standing to sue "at the outset of the litigation."[167] If a named plaintiff sues a defendant who has not injured her, she lacks standing, even if she later plans to seek joinder of those whom the defendant did injure. The "juridical link" doctrine cannot paper over this constitutional flaw. After all, if Employee A worked for Employer A and Employee B for Employer B, Employee A cannot sue Employer B even if Employers A and B engaged in similar conduct. The putative class action can only proceed with the problematic defendant joined if the complaint includes a named plaintiff who alleges claims against this defendant.

By contrast, the "class certification" approach best resolves the "same defendant, different laws, same conduct" and "same defendant, same law, different conduct" scenarios. Before class certification, the named plaintiff's own injury gives her standing to sue the defendant. After class certification, each class member's injury gives the class as a whole standing to sue the defendant, under all of the laws the case implicates, and for all of the conduct challenged. No jurisdictional gap exists that requires dismissal.

Solutions to the injury difference problem that do not assume the juridical relevance of absent class members are possible. But they either fit extant standing doctrine poorly, or they require a good deal more elaboration. A named plaintiff should not have standing to sue on behalf of juridically irrelevant absent class members, regardless of the similarity between her and the class members' injuries, unless one of two claims is true. Either the named plaintiff enjoys some sort of third party standing, or upon

165. *See, e.g.*, Edwards v. 21st Century Ins. Co., No. 09-4364, 2010 WL 2652247, at *4 (D.N.J. June 23, 2010).

166. *E.g.*, *In re* Principal U.S. Prop. Account ERISA Litig., 274 F.R.D. 649, 656–57 (S.D. Iowa 2011) (discussing *Shady Grove* and following this logic).

167. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

class certification the class as an entity becomes the relevant party for standing purposes. As noted, third party standing does exist under limited circumstances, as an exception to the general rule that one person lacks standing to assert claims of another.[168] But, despite the odd and poorly supported claim to the contrary,[169] this doctrine shares—at best—a "confused conceptual nexus" with "class-action theory."[170] Given the extent of doctrinal detail that characterize other third party standing doctrines, and given the tens of thousands of class actions that the federal courts have adjudicated, one would expect a far more developed doctrinal foundation for this approach to standing in class actions.

The "class as entity" theory treats the class as a whole, not any member (named or absent), as the relevant party for standing purposes.[171] It has some doctrinal basis.[172] In a series of cases dating from the mid-1970s, the Supreme Court refused to dismiss class actions when the named plaintiff's claim became moot.[173] This core holding found support in the Court's insistence that, after class certification, the class "acquire[s] a legal status separate from the interest" of the named plaintiff.[174] While arguably consistent with a "class as entity" theory,[175] this line of decisions fits equally, if not better, with the notion that class certification simply involves the

168. Kowalski v. Tesmer, 543 U.S. 125 (2004); Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 80 (1978); *see also* Brian Charles Lea, *The Merits of Third-Party Standing*, 24 WM. & MARY BILL RTS. J. 277, 277 (2015).

169. In *Califano v. Yamasaki*, the Supreme Court noted that "the Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." 442 U.S. 682, 700–01 (1979). A few courts have cited this statement in support of a claim that class action standing is a form of third party standing, whereby the named plaintiff enjoys standing to assert claims of nonparties. *E.g.*, Adams v. Luxottica U.S. Holdings Corp., No. 07-1465, 2009 WL 7401970, at *2 (C.D. Cal. July 24, 2009). *Califano* did not involve standing, and the Court's statement was not about standing.

170. *E.g.*, 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.9.6 (3d ed. Aug. 2019 update).

171. Payton v. County of Kane, 308 F.3d 673, 680 (7th Cir. 2002); Vuyanich v. Republic Nat'l Bank of Dallas, 82 F.R.D. 420, 427 (N.D. Tex. 1979).

172. *E.g.*, *Payton*, 308 F.3d at 680–81 (explaining the doctrinal basis for the "entity" theory).

173. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397–401 (1980); Franks v. Bowman Transp. Co., 424 U.S. 747, 756 (1976); Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); Sosna v. Iowa, 419 U.S. 393, 401–02 (1975). *See generally* United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1538–39 (2018) (discussing mootness line of cases).

174. *Sosna*, 419 U.S. at 399.

175. Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 364–65 (3d Cir. 2015).

joinder of individual parties.[176] Moreover, other strains of standing doctrine fit the entity theory poorly. Most importantly, the named plaintiff does not recede into the class entity after certification; her individual standing remains relevant.[177]

The various standing issues that arise in class actions are complex. Our claim that the absent class members' juridical relevance resolves one of these issues may misfire or be inappropriate for another.[178] All we argue here is that the juridical relevance of absent class members offers a straightforward solution to the injury difference problem that fits existing doctrine better than others. But to posit the juridical relevance of absent class members as a solution to the injury difference problem is one thing. To justify this juridical relevance is another. Here, the conflict resolution conception lends normative support. Litigation offers individuals a process they can use to resolve the concrete injuries each has suffered. These individuals pursue relief as discrete parties. By this view, a mechanism that aggregates claims together is not an alchemical exercise that transforms individuals into an entity of undifferentiated regulatory beneficiaries. The mechanism simply joins them and their antecedently determined legal identities to a case.

176. *E.g.*, *Franks*, 424 U.S. at 756 (rejecting a mootness challenge on grounds that class certification joins "identifiable individuals" with live claims to the case); Chayes, *Burger Court*, *supra* note 16, at 28 ("In its encounters with class actions, the Burger Court has clung to the . . . conception of the class action as a congeries of individual claims loosely bundled together for purposes of judicial efficiency. For such purposes as . . . standing, the Court's decisions tend to treat class representatives and members as classical individual claimants.").

177. Martens v. Thomann, 273 F.3d 159, 173 n.10 (2d Cir. 2001); Mary Kay Kane, *Standing, Mootness, and Federal Rule 23—Balancing Perspectives*, 26 BUFF. L. REV. 83, 97–98 (1976).

178. The other major standing issue involves the question of whether each absent class member must demonstrate his or her standing. The lower federal courts have taken confusing—arguably contradictory, arguably resolvable—positions on this issue. *Compare Neale*, 794 F.3d at 358–69, *and In re* Deepwater Horizon, 739 F.3d 790, 799–802 (5th Cir. 2014), *with* Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383, 387–91 (2014) ("[S]ummarizing contradictory treatments of absent class member standing in the case law"). For a compelling account that maintains that the issue conflates standing, the requirements of the substantive law, and class certification, see Aaron-Andrew P. Bruhl, *One Good Plaintiff is Not Enough*, 67 DUKE L.J. 481, 544–46 (2017).

IV. BEYOND THE CLASS ACTIONS' TWO CONCEPTIONS

The two jurisdictional problems illustrate the limited value that the two conceptions of the class action have as guides to doctrinal design.[179] A proponent of a powerful class action can use the regulatory conception to justify the juridical irrelevance of absent class members and thereby support a class action exception to *BMS*. But this basic commitment denies the proponent an easy answer, rooted in class member juridical relevance, to difficult standing questions that class actions prompt. A class action skeptic can invoke the conflict resolution conception to argue for class member juridical relevance and thus *BMS*'s application in class actions. But doing so effectively concedes away the injury difference problem and along with it standing as a barrier to class action litigation.

We do not doubt the heuristic utility of the two conceptions, or the models they channel, as expressing in general terms ideas about what roles litigation can legitimately play. Nor do we challenge the benefit these or other dichotomous models offer as analytical tools for understanding and categorizing arguments about litigation.[180] But principled doctrinal design offers a combatant one of two choices. She can follow the implications of her baseline commitment to one conception or the other to its logical doctrinal conclusions. Alternatively, she can embrace something other than a commitment to one of the conceptions as an underlying motivation for doctrinal design. We expect that few combatants in the long-standing class action wars would accept the former. Can the latter yield doctrinal elaboration based on something other than mere preference? The regulatory and conflict resolution conceptions hardly exhaust the possible bases for engaging in a principled effort to fashion doctrine. But their normative limitations do highlight the challenge posed by reasoning from a set of foundational commitments fixed *a priori*.

Principled lawmaking can proceed one procedural problem at a time, without concern for consistency with a vague set of theoretical priors. A pragmatic, consequences-oriented approach to doctrinal administration, after all, is in the DNA of modern

179. For another discussion of the normative limits of models of litigation, see Bone, *supra* note 37, at 954.

180. *See also* Bone, *supra* note 2, at 663–65 (describing the value of models of litigation).

American civil procedure.[181] Pragmatism in doctrinal design takes seriously the basic objectives that animate particular requirements and asks how these requirements can best be administered to meet these objectives in particular contexts. If one context calls for absent class member juridical relevance and the other for their irrelevance, so be it.

A pragmatic treatment of each jurisdictional problem counsels in favor of a class action exception to *BMS* and against a standalone jurisdictional threshold for the injury difference scenarios. The concrete adversity and separation of powers functions that standing doctrine performs make the latter a straightforward case.[182] By limiting the federal courts to instances when parties have a genuine stake in a case's outcome, standing doctrine ensures that issues get presented with sufficient precision in a rich factual context, that the most effective advocate of each side participates, and that litigation does not generate advisory opinions.[183] Differences between the named plaintiff's claim and the absent class members' do not jeopardize any of these benefits. The class certification decision requires a finding that the named plaintiff will adequately represent the class, rendering the likelihood of ineffective advocacy remote. The case does not involve some abstract legal theory but a concrete argument that the defendant injured the class members in particular ways, allegations that place legal issues in a rich factual context. Differences between the named plaintiff's injury and those of absent class members in no way create a risk of an advisory opinion, since all are indeed injured.

Nor does standing's separation of powers motivation require some standalone jurisdictional threshold. Ordinary conflicts over preferences for law and policy belong in political processes. Standing doctrine reserves the federal courts for those instances when an injury-in-fact gives the alleged victim a special right to pursue redress outside of ordinary democratic channels.[184] If one or the other of the injury difference scenarios threatened to allow

181. *See generally* David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433 (2010) (describing the connection between pragmatism and the original Federal Rules of Civil Procedure of 1938).

182. *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 465–92 (2008).

183. *Id.* at 468–72.

184. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 895 (1983).

fights over mere preferences, not injuries, into the courts, a standalone threshold would be wise. But it does not. Differences among injuries is not the absence of injury, standing's central concern, but rather implicates concerns about the adequacy of representation afforded those seeking redress. Rule 23, of course, addresses this issue head-on.

The injury difference problem threatens to create none of the mischief that standing doctrine protects against. Because the juridical relevance of absent class members makes the standing concern disappear, no reason exists to deny them this status. The juridical irrelevance of absent class members for personal jurisdiction purposes shares this justification. None of personal jurisdiction's basic objectives requires a deviation from the decades' old consensus rule, that the named plaintiff's claim determines the court's territorial reach. The juridical irrelevance of absent class members supports a class action exception to *BMS* and thereby protects against an unnecessarily crabbed administration of personal jurisdiction doctrine in class actions.

Personal jurisdiction doctrine has several objectives, but it all flows from the basic principle that the exercise of jurisdiction must comport with "traditional notions of fair play and substantial justice."[185] Personal jurisdiction in the class action's modern era has always depended on the relationship between the named plaintiff's claim and the defendant's forum contacts. In light of this history, unbroken until 2017, defendants can scarcely claim that "traditional notions of fair play and substantial justice," long dormant, suddenly awoke to require that each class member's claim measure up by the jurisdictional metric.

The confused state of personal jurisdiction jurisprudence complicates an effort to enumerate all of the goals assigned to the doctrine, but in general terms two main objectives predominate.[186] First, limits on a court's territorial reach ensure that the court only exercises adjudicatory power when the sovereign on whose behalf it acts has legitimate regulatory authority. *International Shoe Co. v. Washington*, the font of modern doctrine, expanded litigation's

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

186. Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1173 (2014); *see also* Bradt, *supra* note 50, at 1179–80 (referring to the "power" and "reasonableness" theories of personal jurisdiction's "main theoretical justifications").

regulatory power.[187] As the Supreme Court has narrowed jurisdictional boundaries over the past several decades, it has tended to do so to privilege defendants' volition. It emphasizes a defendant's decision to affiliate voluntarily with a sovereign before litigation for purposes of the transaction at issue in the case, enabling defendants to choose where they risk litigation.[188]

A class action exception to *BMS* does not license sovereign overreach. If the named plaintiff's claim arises out of the defendant's purposefully created forum contacts, the forum state has a legitimate regulatory interest in the conduct giving rise to the claim. The class certification requirements ensure that the litigation does not force the defendant to defend fundamentally different conduct than what injured the named plaintiff. The case implicates only what the defendant voluntarily directed at the forum state. At any rate, concerns about sovereign overreach should weigh little in the balance unless the class includes people injured or residing abroad. As discussed, a federal court adjudicating a multistate class action exercises the federal government's power and does not project one state's sovereign prerogative beyond acceptable territorial limits. As a matter of law, the federalism argument against *BMS*'s application in class action proves too much. But the idea behind it, that a federal class action simply does not have federalism implications of the sort prompted by state court litigation, is sensible and counsels against *BMS*'s migration into the class action's domain.

Personal jurisdiction's second main function is to ensure that the exercise of adjudicatory power is reasonable. This determination includes attention to the burden the forum choice visits on the defendant, but it also assesses "'the forum [s]tate's interest in . . . the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' [and] 'the interstate judicial system's interest in . . . the most efficient resolution of controversies.'"[189] The undifferentiated nature of the defendant decreases the likelihood that the forum state has any less of a regulatory interest in the defendant's

187. Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 558–61 (1997).

188. *E.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

189. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

conduct than any other state.[190] As for the burden on the defendant, the "unitary, coherent" case required by Rule 23 lessens (if not eliminates) the gap between what the named plaintiff's case alone foists on the defendant and what the class action causes. Finally, a single multistate class action surely compares favorably by an efficiency metric to several single state ones.[191]

CONCLUSION

The solutions to the personal and subject matter jurisdiction problems that this essay proposes may seem unprincipled. If absent class members are juridically irrelevant, their status renders *BMS* irrelevant. But juridical irrelevance creates standing problems when class member injuries differ. These problems disappear if absent class members are juridically relevant. But juridical relevance opens the door to personal jurisdiction concerns.

Doctrinal design in class actions has never followed a rigidly principled course. The evolution of this doctrine has always had a pragmatic bent to it, as courts have tried to balance the claim-mobilizing, rights-vindicating power the device promises with the demand that class actions remain true to basic assumptions about how civil litigation legitimately proceeds.[192] The regulatory and conflict resolution conceptions of the class action have significant heuristic value, as they illuminate the many issues of public policy and institutional legitimacy that the class action implicates. But pragmatism, not these conceptions, should take center stage when new problems of class action administration arise.

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190. A premise of general jurisdiction is that, because the defendant is "at home" in the state, the state has an ongoing regulatory interest in everything the defendant does. Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 538–39 (2012). Arguably, then, this "home" state has a superior regulatory interest. But, consistent with *BMS*, class counsel could file multiple single-state class actions and have them consolidated and transferred through the MDL system to any district court in the country. The MDL transferee court surely has no more superior regulatory interest than a court in which a multistate class action is filed. The only difference is that, in the latter scenario, class counsel picks the forum, while in the former the choice is up to the Judicial Panel on Multidistrict Litigation.

191. These cases would likely get consolidated and transferred through the MDL system. But the MDL transferee court is no more efficient than a single multistate class suit. The only difference has to do with who chooses the forum. *See supra* note 190.

192. Marcus, *History Part I*, *supra* note 3, at 591 (commenting on the "pragmatic balancing strategy" courts used to develop class action doctrine during its formative years in the late 1960s and 1970s).