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Civil Procedure—Environmental Class Actions: Economic Ramifications of the Rule 23 Nonaggregation Doctrine—Zahn v. International Paper Co., 414 U.S 291 (1973)

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RECENT DEVELOPMENTS

CIVIL PROCEDURE—ENVIRONMENTAL CLASS ACTIONS: ECONOMIC RAMIFICATIONS OF THE RULE 23 NONAGGREGATION DOCTRINE—*Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

Four individual owners of property fronting on Vermont's Lake Champlain commenced a class action pursuant to Federal Rule of Civil Procedure 23(b)(3)¹ in federal district court on behalf of themselves and some 200 similarly situated lakefront property owners and lessees. The plaintiffs, basing federal jurisdiction on diversity of citizenship, sought to recover compensatory and punitive damages of \$40,000,000 for the impairment of their property rights caused by the defendant's alleged pollution of the lake's waters.² The claim of each of the four named plaintiffs was found to independently satisfy the jurisdictional amount requirement of \$10,000, but the district court was convinced "to a legal certainty" that not every individual owner or lessee in the class had suffered pollution damages in excess of \$10,000.³

1. FED. R. CIV. P. 23 provides in part:

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

2. Plaintiffs alleged that defendant International Paper Company permitted discharges of untreated or inadequately treated waste from its pulp and paper plant in the Village of Ticonderoga to flow into Ticonderoga Creek and then into the lake. The pollutants created a massive sludge blanket on the bottom of the lake; masses of sludge apparently separated from the bottom periodically and were deposited on appellants' property. As a consequence, appellants alleged diminution in the value and utility of their own property as well as the surrounding properties. 414 U.S. at 292.

3. *Zahn v. International Paper Co.*, 53 F.R.D. 430, 431 (D. Vt. 1971), quoting *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). In *St. Paul Mercury Indemnity*, the Supreme Court stated:

The rule governing dismissal for want of jurisdiction in cases brought in the

The district court, reading *Snyder v. Harris*⁴ as precluding maintenance of an action by any member of the class whose "separate and distinct" claim did not individually satisfy the federal jurisdictional amount requirement,⁵ refused to allow the suit to proceed as a class action on the ground that it would not be feasible to define a class of property owners each of whom had more than a \$10,000 claim.⁶ A divided court of appeals affirmed.⁷ On certiorari to the Supreme Court, *held*: Affirmed. Where the rights asserted are separate and distinct, all members of the proposed class, both named and unnamed, must individually satisfy the jurisdictional amount requirement. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

This note will examine the impact of *Zahn v. International Paper Co.* within the context of environmental litigation. It will briefly trace the history of the nonaggregation doctrine relied upon and reaffirmed by the *Zahn* majority, and describe the limitations imposed upon would-be federal plaintiffs by that doctrine. The note then will examine various alternative modes of adjudication, including the ancillary jurisdiction alternative suggested by dissenting Justice Brennan, which would have been preferable to the position adopted by the majority. Finally, and most importantly, the note will take a hard look at the deleterious economic effects of *Zahn* upon environmental plaintiffs, concluding that the inevitability of these economic effects justifies a result other than that reached by the Court.

federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

Id. at 288-9.

4. 394 U.S. 332 (1969).

5. 28 U.S.C. § 1332 (a) (1970) provides:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

6. Judge Leddy, in the district court opinion, concluded by stating:

We reach our decision today with great reluctance. . . . [T]he requirement that each class member meet the jurisdictional amount clearly undermines the usefulness of Rule 23(b)(3) class suits, because the problem of defining an appropriate class over which the court has jurisdiction will often prove insuperable.

53 F.R.D. at 433.

7. *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972).

I. CLASS ACTIONS AND THE
NONAGGREGATION DOCTRINE

The availability of the aggregation doctrine as a mechanism to recognize federal claims which do not independently satisfy the jurisdictional amount requirement has traditionally turned upon whether the rights asserted by the plaintiffs were characterized as “separate and distinct,” or “common and undivided.”⁸ This distinction led to the general rule, as set forth in *Troy Bank v. G. A. Whitehead & Co.*:⁹

When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.

The rule that separate and distinct claims may not be aggregated to invoke federal jurisdiction is dictated neither by the language nor the legislative history of 28 U.S.C. § 1332 and its predecessors.¹⁰ Rather,

8. Judicial decisions considering aggregation of claims can be traced back to 1832 when the Supreme Court in *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143 (1832), held that the statutory phrase “matter in dispute” did not permit the aggregation of “separate and distinct” claims in order to invoke the Court’s appellate jurisdiction. The *Alexander* rule, which was extended to federal trial court jurisdiction in *Walter v. Northeastern R.R.*, 147 U.S. 370 (1893), was supplemented by *Shields v. Thomas*, 58 U.S. (17 How.) 3 (1854), in which the Court held that where the plaintiffs establish the existence of a “common and undivided” interest in the recovery, aggregation of claims is proper.

The Congress has historically required that a jurisdictional minimum be established as a prerequisite to the initiation of a federal diversity suit. Section 11 of the first Judiciary Act of 1789 set the jurisdictional amount in diversity suits at \$500. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78. In 1801, Congress lowered the requirement to \$400 in *The Law of the Midnight Judges*, Act of Feb. 13, 1801, ch. 4, § 13, 2 Stat. 92, but it was quickly restored to \$500 the following year. Act of March 8, 1802, ch. 8, § 3, 2 Stat. 132. The jurisdictional amount requirement remained fixed at this level until the Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552, when it was increased to \$2000. The figure was increased by \$1000 by the Act of March 3, 1911, ch. 2, § 24, 36 Stat. 1091. 45 CONG. REC. 3596–99 (Mar. 23, 1910); 46 CONG. REC. 4002–04 (Mar. 2, 1911). This history was recited by the majority in *Zahn*. 414 U.S. at 293 n.1.

The current \$10,000 jurisdictional amount, codified in 28 U.S.C. § 1332(a) (1970), was enacted by Pub. L. No. 85–554, § 1 (July 25, 1958).

9. 222 U.S. 39, 40–41 (1911), cited in *Zahn*, 414 U.S. at 294. See also *Clay v. Field*, 138 U.S. 464, 479 (1891).

10. The statutory language makes no mention of “separate” or “distinct.” Comment, *Aggregation of Claims in Class Actions*, 68 COLUM. L. REV. 1554, 1568 (1968). Congress, when reenacting the jurisdictional statutes, did not add such language nor change the original phraseology. *Id.* It has been suggested, however, that Congress acquiesced in the judicial construction, and that “separate” and “distinct” was incorporated by silence. *Gibson v. Shufeldt*, 122 U.S. 27, 40 (1887).

it derives from the collective interests of Congress and the federal judiciary in precluding "petty controversies" from gaining a federal forum¹¹ and in preserving the independent authority of the state courts.¹² Accordingly, federal courts, where separate and distinct claims are present, have held that convenience of the parties is not a suitable basis for jurisdiction.¹³

The 1966 amendment to Federal Rule of Procedure 23 replaced the original tripartite analysis¹⁴ of the Rule with a "functional" ap-

11. The only recent suggestion of congressional purpose is the often repeated statement in the legislative history of the 1958 amendments:

The recommendations of the Judicial Conference [of the United States] regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies.

S. REP. NO. 1830, 85th Cong., 2d Sess. 3-4 (1958) (emphasis added); H. R. REP. NO. 1706, 85th Cong., 2d Sess. 3 (1958) (containing identical language).

12. An underlying premise of the decision in *Snyder v. Harris* is a recognition of the sovereignty of the states in the federal system and the independence of the states' judicial authority. The Court in *Snyder* expressed a fear that to allow aggregation of claims under the circumstances of that case might result in many local controversies, involving exclusively questions of state law, being transferred into federal courts. 394 U.S. 332, 340 (1969); see *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

13. When parties, for their own convenience, join actions that could be litigated separately, the court would be disregarding the strictures of 28 U.S.C. § 1332(a) if it accepted jurisdiction over the combined actions when such jurisdiction would be lacking over the actions separately. *Clay v. Field*, 138 U.S. 464 (1891). On the other hand, when the interest is a common and undivided one, and when the interests of one party cannot be determined without directly affecting the rights of others, then it can be said that the matter in controversy consists of the combined financial interests of all of the plaintiffs. Thus, in effect, aggregation is permitted only in cases of compulsory joinder and the parties' convenience is not a factor. In *Pinel v. Pinel*, 240 U.S. 594, 596 (1916), the Court said: "[W]hen two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount" See also *Troy Bank v. G. A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911); *Walter v. Northeastern R.R.*, 147 U.S. 370, 373 (1893). See generally, Comment, *Aggregation of Claims in Class Actions*, 68 COLUM. L. REV. 1554, 1556 & 1559 (1968).

14. The original Rule 23(a) divided class actions into three categories according to whether the rights of the class were (1) joint and common, (2) several, but affecting the same specific property, or (3) several, but having common factual or legal questions. Fed. R. Civ. P. 23, 308 U.S. 689 (1939). These relationships came to be known as "true," "hybrid" and "spurious" class actions respectively. The tripartite approach taken by the original class action rule made a basic distinction between a "joint" right and those rights that were to be considered "several." This distinction permitted consistent application of the *Troy Bank* aggregation rules in class suits: The aggregation of claims in class actions was permitted only in true class actions; i.e., where the rights of the class members were joint, common and undivided. *Giesecke v. Denver Tramway Corp.*, 81 F. Supp. 957, 961 (D. Del. 1949). In hybrid and spurious actions, where the rights asserted were several, the claim of each named party of record had to meet the required jurisdictional amount to avoid dismissal. *Hackner v. Guaranty Trust of New York*, 117 F.2d 95, 98 (2d Cir. 1941).

proach to the maintenance of class actions.¹⁵ The amended Rule 23 permits maintenance of a class action upon a finding of: undue risk, to either party, of separate adjudications; the appropriateness of class injunctive or declaratory relief; or the predominance of common questions of law or fact in the action.¹⁶ With the change in the categories of Rule 23, many commentators had hoped that the adoption of the new Rule 23 would result in a new approach to the treatment of the aggregation question in class actions.¹⁷ However, the Court in *Snyder v. Harris*¹⁸ asserted that the nonaggregation doctrine was not based upon the categories of the old Rule 23 or upon any rule of procedure, but rather upon judicial interpretation of the statutory phrase "matter in controversy."¹⁹ The *Snyder* Court then held that where none of the plaintiffs in a Rule 23(b)(3) class action allege damages in excess of \$10,000, their separate and distinct claims may not be aggregated to meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a).

In *Zahn*, Mr. Justice White, writing for a majority of six, recognized the historic dichotomy between interests of plaintiffs which are "common and undivided" and those which can be termed "separate and distinct," and invoked the "well established" rule that where multiple plaintiffs assert separate and distinct claims, "[e]ach . . . must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case"²⁰ The *Zahn* Court thus extended the *Snyder* nonaggregation principle to require that any plaintiff with a claim of less than the jurisdictional amount must be dismissed, even where the named plaintiffs allege jurisdictionally sufficient claims.²¹ The extension of *Snyder* was premised on the notion that, among individuals related only by common questions of law and fact, juris-

15. See *Snyder v. Harris*, 394 U.S. 332, 335 (1969). See also 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1753, at 538 (1972) [hereinafter cited as WRIGHT & MILLER].

16. For discussion of the new categories, see J. MOORE, FEDERAL PRACTICE, ¶ 23.30-.45 (1969).

17. See, e.g., Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B. C. IND. & COM. L. REV. 601 (1969); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 399-400 (1967), Note, 43 TUL. L. REV. 360 (1969); Note, 52 MINN. L. REV. 509, 514-15 (1967). But see Note, *Aggregation of Claims in Class Actions*, 68 COLUM. L. REV. 1554 (1968).

18. 394 U.S. 332 (1969).

19. *Id.* at 336.

20. 414 U.S. 291, 301 (1973).

21. 414 U.S. at 300.

diction should not attach for those without claims of the requisite amount merely "by adding a plaintiff who can show jurisdiction."²²

Despite the historical and doctrinal legitimacy of the nonaggregation decision in *Zahn*, the Court's extension of *Snyder* significantly reduces the utility of the class mechanism and frustrates its three-fold purpose: (1) to take "care of the smaller guy" whose claim is less than the costs of enforcing it;²³ (2) to promote judicial efficiency and comity;²⁴ and (3) to deter antisocial conduct by those who—absent the class device—might never be required to account for their conduct.²⁵ By redefining the scope of the class to include only those plaintiffs who can independently establish damages of the jurisdictionally required amount, the Court requires delineation of class on the basis of the dollar amount of each claim, rather than utilization of the modern Rule 23 functional approach which seeks to define the class on the basis of the nature of the claim asserted.²⁶ The extension of *Snyder* has not only adversely affected the traditional purpose of the class action but, as will be discussed, has also frustrated Rule 23's unique function within the context of environmental litigation.

22. 414 U.S. at 297. *citing* *Hackner v. Guaranty Trust*, 117 F.2d 95, 98 (2d Cir. 1941). It should be noted that the decision in *Hackner* was written by Judge Clark who is the "principal architect" of the Federal Rules of Civil Procedure. This decision was influential by reason of Judge Clark's analysis of Rule 23 in light of the established case law interpreting the "matter in controversy" clause.

The legal basis for the extension was the Court's earlier decision, to like effect, in *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), and *Snyder's* approval of the Fifth Circuit's decision in *Alvarez v. Pan American Life Ins. Co.*, 375 F.2d 992 (5th Cir. 1967). *cert. denied*, 389 U.S. 827 (1967). *Alvarez* was decided after the 1966 amendments to Rule 23 and involved a class action with only one member of the class having a claim sufficient to satisfy § 1332.

23. See Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969).

24. Advisory Comm.'s Note on Rule of Civil Procedure 23(b)(3), 39 F.R.D. 98, 102-03 (1966); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 (1967). See also *Mungin v. Florida E. Coast Ry.*, 318 F. Supp. 720, 730 (M.D. Fla. 1970). *aff'd*, 441 F.2d 728 (5th Cir. 1971).

25. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 437 (1960).

26. See text accompanying note 16 *supra*.

II. ALTERNATIVE MODES OF ADJUDICATION

A. *Ancillary Jurisdiction*

Justice Brennan, dissenting in *Zahn*, recognized the principle that separate and distinct claims could not be aggregated to invoke the district court's jurisdiction, but argued that "[o]nce jurisdiction has attached to the 'action' . . . the 'aggregation' rule has been but one of several ways to establish jurisdiction over additional claims and parties."²⁷ Since each of the four named plaintiffs in *Zahn* asserted jurisdictionally sufficient claims, Justice Brennan contended that jurisdiction had been established over the "action" and that the Court should invoke "ancillary jurisdiction"²⁸ to recognize the claims of unnamed class plaintiffs who could not independently satisfy the requirements of 28 U.S.C. § 1332(a).²⁹ Justice Brennan suggested that by allowing the plaintiffs to proceed as a class, the Court could have effectuated both the economic and procedural purposes of class action litigation without seriously frustrating enforcement of the jurisdictional amount requirement.³⁰

Ancillary jurisdiction was originally invoked only when necessary to dispose effectively of all claims to specific property before the

27. 414 U.S. at 305.

28. The doctrine of ancillary jurisdiction is premised on this notion:

[A] district court acquires jurisdiction of a *case or controversy* as an entirety, and may, as an incident to disposition of a matter properly before it, possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented.

C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 9, at 19 (2d ed. 1970) (emphasis added). An ancillary claim may be considered without regard to the citizenship of the parties, amount in controversy or any other factor generally determinative of the court's jurisdiction. The ancillary power has been exercised to take cognizance of jurisdictionally-deficient, compulsory counterclaims, cross claims, impleader of third party defendants, interpleader and intervention as of right. 414 U.S. at 306.

29. 414 U.S. at 306.

30. The concern for overworking the federal judiciary would be overcome because ancillary jurisdiction requires that there be a party who has independently invoked the court's jurisdiction. Since the court's jurisdiction has already been established the court is required to hear the action. Only if the class were so large and cumbersome as to be unmanageable could it be said that unnecessary additional burdens were being placed on the court. This situation would effectively be remedied by Rule 23(b)(3), which requires that a class action be superior to other methods "for the fair and efficient adjudication of the controversy. . . ." See also Advisory Comm.'s Note, *supra* note 24, at 103; *Minnesota v. U.S. Steel Corp.*, 44 F.R.D. 559, 569 (D. Minn. 1968).

court.³¹ Although the concept was employed in other limited contexts,³² its early application was only as a necessary adjunct to the effective exercise of a court's primary jurisdiction.³³ The Court in *Moore v. New York Cotton Exchange*³⁴ provided the foundation for expansion of ancillary jurisdiction by recognizing a defendant's counterclaim, even though it lacked an independent jurisdictional basis, where the counterclaim arose from the same "transaction" or "series of . . . occurrences" as the plaintiff's jurisdiction-conferring claim. Such extensions of ancillary jurisdiction are premised upon a desire:³⁵

to effectuate judicial economy and efficiency, to prevent piecemeal litigation of connected claims which would otherwise result from the limited jurisdiction of the federal courts, [and] . . . most importantly, to render more complete justice and convenience to litigants.

Development of the ancillary concept has also been influenced by the doctrine of pendent jurisdiction,³⁶ whereby original federal jurisdiction is, in certain specified circumstances, extended to nonfederal claims. In *United Mine Worker v. Gibbs*,³⁷ the Supreme Court held

31. *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1861).

32. See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 9, at 20 (2d ed. 1970).

33. When federal court jurisdiction had been properly exercised, a court would extend this jurisdiction to other parties and claims if necessary to implement its judgment. See, e.g., *Cincinnati, I. & W. R.R. v. Indianapolis Union Ry.*, 270 U.S. 107 (1926); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Root v. Woolworth*, 150 U.S. 401 (1893); *Pacific R.R. v. Missouri P. Ry.*, 111 U.S. 505 (1884).

34. 270 U.S. 593 (1926). In *Moore* plaintiff sued defendant under the antitrust laws for withholding cotton quotations, and asked for an injunction to compel the defendant to furnish them. Defendant counterclaimed to enjoin plaintiff from purloining the quotations. The Supreme Court held that both claims arose out of the same subject matter because essential facts alleged by the plaintiff constituted part of the cause of action set forth in the counterclaim, although the counterclaim also embraced additional allegations. See Fraser, *Ancillary Jurisdiction and The Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1963).

35. *Lucas v. Seagrave Corp.*, 277 F. Supp. 338, 348 (D. Minn. 1967). See also 7 WRIGHT & MILLER § 1659, at 313; *Walmac Co., Inc. v. Isaacs*, 220 F.2d 108, 113 (1st Cir. 1955); *Childress v. Cook*, 245 F.2d 798, 805 (5th Cir. 1957).

36. The doctrine of pendent jurisdiction has traditionally been invoked only where a plaintiff seeks to annex a state law claim to his federal question claim and assert both against a nondiverse defendant. Ancillary jurisdiction generally involves the joinder of additional parties to an existing controversy or assertion of new claims by existing parties. 7 WRIGHT & MILLER § 1659, at 314. With the recent growth of pendent party jurisdiction, the two concepts are becoming increasingly similar in nature. See Comment, *Federal Pendent Subject Matter Jurisdiction*, 73 COLUM. L. REV. 153, 164-65 (1973).

37. 383 U.S. 715 (1966).

that federal judicial power to exercise pendent jurisdiction over a plaintiff's state law claim exists where the primary federal question independently satisfies the jurisdictional requirements and is "substantial," and where both claims "derive from a common nucleus of operative fact" constituting one "constitutional case."³⁸ Implicit in the Court's reasoning was the notion that the federal question statute, 28 U.S.C. § 1331, carries with it the constitutional authorization of pendent power.³⁹ A similar power base has been recognized in actions dealing specifically with ancillary jurisdiction.⁴⁰

Although *Gibbs* did not involve joinder of new parties, recent federal courts of appeals decisions have recognized the existence of judicial power to hear pendent claims involving pendent parties, *i.e.*, claims of an additional plaintiff against an original defendant, or claims by an original plaintiff against a new defendant, where the entire action before the court comprises but one "constitutional case" as defined by *Gibbs*.⁴¹ Where jurisdiction is based upon diversity, joinder of parties with claims below \$10,000 has generally been allowed if the claims of the parties seeking to join are sufficiently related to those of

38. 383 U.S. at 725. The boundaries of the "common nucleus of operative fact" test are not precise, but claims arising out of the same accident or personal injury have been aggregated and recognized even though they individually lacked an independent jurisdictional basis. *See, e.g.*, *Hipp v. United States*, 313 F. Supp. 1152 (E.D. N.Y. 1970); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8th Cir. 1969); *Newman v. Freeman*, 262 F. Supp. 106 (E.D. Pa. 1966).

39. Note, 41 *FORDHAM L. REV.* 991, 997 (1973). However, the constitutional grant of judicial power in art. III, § 2 is not self-executing and the *Gibbs* Court did not explain precisely how the pendent power was transmitted to the district courts.

40. *See, e.g.*, *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 714 (5th Cir. 1970) (ancillary jurisdiction over a state law claim of a nondiverse plaintiff found so long as that claim "bears a logical relationship to the aggregate core of operative facts" which constitutes the primary jurisdiction-enforcing claim); *Dery v. Wyer*, 265 F.2d 804, 807 (2d Cir. 1959) ("aggregate of operative facts").

41. *See, e.g.*, *Almenares v. Wyman*, 453 F.2d 1075, 1083-85 (2d Cir. 1971) *cert. denied*, 405 U.S. 944 (1972); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809-10 (2d Cir. 1971); *F.C. Stiles Contracting Co. v. Home Ins. Co.*, 431 F.2d 917, 919-20 (6th Cir. 1970); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 816-17 (8th Cir. 1969); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968); *Connecticut Gen. Life Ins. Co. v. Craton*, 405 F.2d 41, 48 (5th Cir. 1968); *Jacobson v. Atlantic City Hospital*, 392 F.2d 149, 153-54 (3rd Cir. 1968). While *Gibbs* did not involve pendent party claims, judicial extension has been undertaken in light of dictum that joinder of parties is to be encouraged: "Joinder of claims, parties, and remedies is strongly encouraged." 383 U.S. at 724 (emphasis added). *See generally* Comment, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons Not Party to the Jurisdiction Conferring Claim*, 73 *COLUM. L. REV.* 153 (1973).

plaintiffs properly before the court.⁴² Similar results have been reached in cases involving federal question jurisdiction. In *Almenares v. Wyman*,⁴³ the Second Circuit appended a Rule 23(b)(2) class suit to a jurisdictionally sufficient federal claim and allowed the action to proceed even though the subject class had failed to satisfy the jurisdictional requirements of 28 U.S.C. § 1331. While limiting its holding to pendent class actions seeking injunctive or declaratory relief, the court clearly recognized the power to join additional plaintiffs and, in addition, found no inherent limitation in Rule 23 which would per se preclude recognition of a pendent class claim.⁴⁴

In addition to the *Almenares* recognition of a pendent class injunctive suit, it has been held that the court has the power to append a class suit for damages to an injunctive action which independently satisfies the jurisdictional requirement. In *Biechele v. Norfolk & W. Ry.*,⁴⁵ plaintiffs instituted a class action seeking damages and injunctive relief to abate air pollution created by the railroad's coal storage and shipping facilities. The court, relying on *Snyder v. Harris*, stated that aggregation of claims for damages alone was improper to provide the necessary jurisdiction.⁴⁶ The court recognized that there were two distinct and separate class actions involved, one for damages and one for injunction; it then determined that the claim for injunctive relief, which satisfied the jurisdictional amount requirements, was the "first

42. See, e.g., *Beautytuft, Inc. v. Factory Ins. Ass'n*, 431 F.2d 1122, 1128 (6th Cir. 1970) (actions against insurers with less than \$10,000 potential liability joined with actions against insurers with more than \$10,000 liability); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809, 816 (8th Cir. 1969) (district court jurisdiction extended to party claiming only \$9,999 when the underlying cause was removed from state court); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968) (diversity action for less than \$10,000 pendent to diversity action for more than jurisdictional amount against different party); *Jacobson v. Atlantic City Hospital*, 392 F.2d 149 (3d Cir. 1968) (claim against hospital, limited by statute to less than \$10,000, pendent to action against physician).

43. 453 F.2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1972). Plaintiff *Almenares* and others sued the Commissioner of Social Services of New York City for restoration of welfare payments, claiming that the termination procedure violated due process of law. The primary action established subject matter jurisdiction under 28 U.S.C. § 1343(3) (1970). *Almenares* also sought an injunction against the state Commissioner of Social Services for the class of welfare recipients in the state. None of the class members could independently establish damages in excess of \$10,000.

44. 453 F.2d at 1084. Other courts have followed the example of *Almenares* in exercising pendent jurisdiction over a class action. See *Serritella v. Engelman*, 339 F. Supp. 738 (D. N.J. 1972); *Fischer v. Weaver*, 55 F.R.D. 454 (N.D. Ill. 1972).

45. 309 F. Supp. 354 (N.D. Ohio 1969).

46. *Id.* at 355.

47. *Id.* The requisite jurisdictional amount existed for this action by virtue of a liberal evaluation of the right to live in a clean environment and the application of the

and principal action.”⁴⁷ Noting that the same evidence would be presented for the damage claims as for the equitable claim already properly before the court—in effect, stating that the claims derived from “a common nucleus of operative fact”—the court concluded that “in the interest of judicial efficiency, [it] will assume jurisdiction over the entire controversy.”⁴⁸ Thus, *Biechele* represents an application of ancillary jurisdiction, in a manner consistent with the *Gibbs* test, in order to adjudicate a class claim in its entirety.

The individual claims of the class members in *Zahn* derived from a “common nucleus of operative fact,”⁴⁹ thereby permitting, under the reasoning of *Gibbs*, the exercise of ancillary jurisdiction. This reasoning was employed in *Lesch v. Chicago & E. Ill. R.R.*,⁵⁰ a Rule 23(b)(3) class action in which two of three named plaintiffs failed to independently establish the jurisdictional amount. The *Lesch* court held that where at least one representative had established damages in excess of \$10,000, and where members of the class having smaller claims were originally named parties, the class action could proceed as constituted.⁵¹ Application of the doctrine of ancillary jurisdiction to class actions has also been exercised in cases where the unnamed parties of a class action do not satisfy the rule of complete diversity. In *Supreme Tribe of Ben-Hur v. Cauble*,⁵² the Supreme Court held that only the originally-named plaintiffs and defendants had to satisfy the diversity requirements and that intervention by nondiverse parties would not destroy the district court’s jurisdiction.

Even though the claims of the pendent or ancillary parties may derive from a “common nucleus of operative fact,” the Court in *Gibbs* distinguished the *power* to exercise such jurisdiction from the *dis-*

defendant’s viewpoint to determine “matter in controversy.” For discussion of the defendant viewpoint test, see Comment, *Taxpayer Suits and the Aggregation of Claims: The Vitiating of Flast by Snyder*, 79 YALE L.J. 1577 (1970), and notes 68–69 & accompanying text *infra*.

48. 309 F. Supp. at 355.

49. The damages claimed by all parties in *Zahn* resulted from one source—the activities of defendant International Paper Company. See note 2 *supra*. The activities of the defendant constitute a “common nucleus of operative facts.”

50. 279 F. Supp. 908 (N.D. Ill. 1968). *Lesch* was a pre-*Snyder* case which presented factual considerations identical to *Zahn*. It would appear that the decision in *Zahn* overrules *Lesch* sub silentio. The majority in *Zahn* neither discussed nor attempted to distinguish *Lesch* in any manner.

51. *Id.* at 912.

52. 255 U.S. 356 (1921). Justice Brennan emphasized this point in his dissent in *Zahn*. 414 U.S. at 309.

cretionary use of that power.⁵³ Dismissal of a pendent claim is presumptively required unless the court is convinced that retention would result in substantial "economy, fairness and convenience to litigants."⁵⁴ The federal courts have wisely exercised this discretionary power to further federal policy in areas of special concern,⁵⁵ while seeking to maintain comity between the federal and state courts.⁵⁶

Discretionary exercise of ancillary jurisdiction in the context of environmental class actions would promote the substantial federal interest in environmental quality⁵⁷ by facilitating proper judicial consid-

53. 383 U.S. at 727. This distinction had been recognized by many lower courts. See, e.g., *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 501 (1st Cir. 1950); *Strachman v. Palmer*, 177 F.2d 427, 431 (1st Cir. 1949) (Magruder, C. J., concurring); *Walters v. Shari Music Publishing Corp.*, 193 F. Supp. 307 (S.D. N.Y. 1961), *appeal dismissed conditionally*, 298 F.2d 206 (2d Cir. 1962). See also 383 U.S. at 727, where it is suggested that the existence of power to hear pendent claims will normally be determined on the basis of the pleadings, because a motion to strike the state claims from the complaint will generally be made. Whether to exercise discretion, however, might not be determined until the trial court is more familiar with the basic facts and the nature of the probable proofs. See Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018, 1047 (1962) (decision should await disposition of federal claim). See also Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 659-60 (1968).

54. *Id.* at 726. The Court might have established a presumption in favor of retention; once power was established, dismissal would be required only when a court was convinced that economy, convenience or fairness would not be served. This view has been adopted by the American Law Institute, but the existence of power is limited to cases where a "substantial question of fact is common" to both claims. See ALI STUDY OF THE DIV. OF JURISDICTION BETWEEN STATE & FED. COURTS § 1313(a), Comment at 120-22 (Tent. Draft No. 5, 1967).

55. *Sherrod v. Pink Hat Cafe*, 250 F. Supp. 516 (N.D. Miss. 1965) (pendent state claim allowed in action initiated pursuant to Title II of the Civil Rights Act of 1964). The power has also been exercised to insure effective remedies for federal rights, see *Pennsylvania v. Brown*, 260 F. Supp. 323 (E.D. Pa. 1966), and to define the permissible limits of state intrusion into federal spheres of concern. *Wilson H Lee Co. v. New Haven Printing Pressmen Local 74*, 255 F. Supp. 929 (D. Conn. 1966). See also Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 667-70 (1968).

56. In *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Supreme Court stated that, assuming, *arguendo*, the district court had judicial power to exercise pendent jurisdiction over the petitioners' state law claims, the court did not abuse its discretion in not exercising that power in view of unsettled questions of state law. See also *Rundle v. Madigan*, 331 F. Supp. 492, 495 n.5 (N.D. Cal. 1971). The Court in *Moor* also stated that the likelihood of jury confusion was an appropriate factor to consider. 411 U.S. at 716.

For discussion of federal-state comity, see Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 665-67 (1968).

57. The federal interest in environmental quality is expressly set forth in § 101 of the National Environmental Policy Act, 42 U.S.C. § 4321 (1970), which provides:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment:

eration of the full range of problems and potential remedies. Moreover, such exercise would minimize the presence of piecemeal litigation and the production of diverse, and perhaps inconsistent, judicial solutions and patchwork remedies,⁵⁸ all of which have undesirable economic consequences.⁵⁹ In light of *Gibbs*, *Biechele*, *Lesch* and *Cauble*, and the time-honored recognition of ancillary power, the discretionary exercise of ancillary jurisdiction, as urged by Justice Brennan, would have been most appropriate in *Zahn*.

B. *Parens Patriae*

State government bodies can participate in the enforcement of individual rights asserted by citizens of the state under the doctrine of *parens patriae*.⁶⁰ To proceed under the doctrine, the state must independently assert a claim of the requisite amount to invoke federal jurisdiction.⁶¹ It has been suggested that citizens having small claims for environmental injury could circumvent *Snyder* and *Zahn* by transferring their claims to the state attorney general.⁶² Although this proced-

to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

This federal interest is further evidenced by the enactment of significant environmental measures such as the Federal Clean Air Act, 42 U.S.C. 1857 *et seq.* (1970); Federal Water Pollution Control Act, *as amended* 33 U.S.C. § 1151 *et seq.* (1970); Federal Dept. of Trans. Act. 49 U.S.C. § 1653(f) (1970); Coastal Zone Mgmt' Act, 16 U.S.C. §§ 1451-61 (Supp. III, 1973).

58. While each court handling a portion of an environmental problem might handle that portion in an efficient manner, there is no guarantee that the aggregate effect of the individual adjudications will result in an optimal or consistent solution to the problem as a whole.

59. See section III *infra*.

60. See generally *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J. LAW & SOC. PROB. 411 (1970); Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under The Antitrust Laws*, 43 S. CAL. L. REV. 570 (1970).

61. There are two basic jurisdictional requirements which must be satisfied for a suit in *parens patriae*: The state must have some interest apart from the individual citizens, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1922), and it must be acting to protect a "substantial" portion of its populace. *Id.*; *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 986 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972); *accord*, *Louisiana v. Texas*, 176 U.S. 1, 28 (1900).

62. Comment, *The Federal Class Action in Environmental Litigation: Problems and Possibilities*, 51 N.C.L. REV. 1385, 1402 (1973). This suggestion is based upon the commentator's interpretation of *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971), wherein the court apparently approved an assignment of claims.

dure would prevent individual recovery by the citizens, it would serve the societal interests in cost internalization and deterrence.

However, the viability of the *parens patriae* suit as an alternative to *Zahn* is uncertain. While governmental bodies have long had standing to sue for *injunctive* relief to preserve access to natural resources⁶³ and to preserve the health and comfort of their citizens,⁶⁴ they have not been permitted to recover *damages* in compensation for the injuries suffered by their citizens.⁶⁵ Thus, the action would be primarily limited to injunctive relief and subject to the same economic criticisms as other injunctive remedies.⁶⁶

C. *Injunctive Relief*

Both *Snyder* and *Zahn* were class actions commenced pursuant to Rule 23(b)(3) in which the plaintiffs sought damages for impairment of separate and distinct rights. The inhibiting impact of these decisions upon subsequent environmental litigation may be mitigated by utilization of injunctive or declaratory procedures. Rule 23(b)(2) permits a class action when the party opposing the class has acted, or refused to act, on grounds generally applicable to the class. The rule is expressly limited to cases in which "final injunctive relief or corresponding declaratory relief with respect to the class as a whole" will be appropriate.⁶⁷

The establishment of jurisdiction in a class injunctive suit will de-

This approach is uncertain, however, in light of *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969), which stated that assignments to *create* federal jurisdiction will not be recognized.

63. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1922) (suit to enjoin a plan which would have foreclosed substantial natural gas reserves from use).

64. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (suit to enjoin discharge of sewage).

65. The court in *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 986 (D. Hawaii 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972), stated:

[T]he state's *parens patriae* claim cannot be a disguised attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23

Accord, In re Motor Vehicle Air Pollution Control Equipment, 52 F.R.D. 398, 401 (C.D. Cal. 1970).

66. See text accompanying notes 73 & 74 *infra*.

67. FED. R. CIV. P. 23(b)(2) provides:

An action is maintainable as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .
(2) the party opposing the class has acted or refused to act on grounds generally

pend upon the court's valuation of the relief sought⁶⁸ and the characterization of the rights asserted. Courts in various nondamage suits have allowed the plaintiff to measure the amount in controversy from the defendant's point of view rather than from his own.⁶⁹ Even if the courts were to reject the "defendant's viewpoint" test, it is probable that when environmental interests are asserted by the class in an injunctive action, such interests will be characterized as "common and undivided" and therefore appropriate for aggregation.⁷⁰ This characterization of the interest asserted by plaintiff was implied in *Illinois v. City of Milwaukee*,⁷¹ in which the Supreme Court disposed of the valuation problem summarily by stating that the "considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount"⁷²

The class injunctive solution to environmental controversies represents a shift from the decentralized decision-making process, associated with the individual damage remedy, to a centralized judicial planning process.⁷³ Use of the injunction compels the federal judiciary, rather than private market mechanisms, to make environmental protection and resource allocation decisions. However, while injunc-

applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole

68. Traditionally, there have been two possible ways to measure the amount in controversy: (1) the plaintiff's viewpoint, or (2) the defendant's viewpoint. Most cases, and all those cases in which individual plaintiffs allege separate and distinct claims for damages, have applied the plaintiff's viewpoint. See Strausberg, *Class Actions and the Jurisdictional Amount: Access to a Federal Forum—A Post Snyder v. Harris Analysis*, 22 AM. U.L. REV. 79, 102-09 (1972); Comment, *Taxpayer Suits and the Aggregation of Claims: The Vitiation of Flast by Snyder*, 79 YALE L.J. 1577 (1970).

69. See, e.g., *Chicago v. General Motors Corp.*, 332 F. Supp. 285 (N.D. Ill. 1971) (alternate holding). See also *Bass v. Rockefeller*, 331 F. Supp. 688 (E.D. Wis. 1969). Although this interpretation is not uniformly applied, several recent environmental class suits have indicated that the jurisdictional amount is to be measured by the "pecuniary results to the defendants" which would occur from the relief requested by the plaintiffs. See *James River and Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority*, 5 ENVIRON. RPTR. 1353, 1359 (E.D. Va. 1973); *Biechle v. Norfolk & Western Ry.*, 309 F. Supp. 354 (N.D. Ohio 1969). Comment, *Amount in Controversy in Suits for Nonmonetary Remedies*, 46 CALIF. L. REV. 601 (1958).

70. The court in *Citizens for Clean Air, Inc. v. Corps of Engineers*, 349 F. Supp. 696, 704 (S.D. N.Y. 1972), held that where an injunction is sought, the \$10,000 jurisdictional amount may be determined by the value of the project sought to be enjoined or "the quantified costs from new pollution" rather than the value of injunctive relief to each individual member of the class.

71. 406 U.S. 91 (1972). The case involved a non-class action to abate a public nuisance arising from the alleged dumping of raw sewage into Lake Michigan.

72. *Id.* at 98.

73. See generally Michelman, *Pollution as a Tort: A Non-accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647 (1971). A centralized decision making pro-

tion actions have the advantage of reducing costs to the individual litigants and providing a viable mechanism for technological assessment, they are inefficient by themselves. Serious economic and social distortions may result from: (1) the substantial cost and time required by the federal judiciary to define the environmental problem and determine appropriate relief; (2) the limitation of relief to abatement only;⁷⁴ (3) the inefficiencies inherent in centralized decision making;⁷⁵ and (4) the difficulty in valuing both private and societal costs as presented in an injunctive suit.⁷⁶

Thus, although utilization of *parens patriae* and class injunctive actions may in certain instances open the door of environmental litigation closed so firmly by *Zahn*, the ancillary jurisdiction alternative is much more attractive because it encompasses the full range of possible legal actions. As will be discussed below, the peculiar economics of activities affecting the environment mandate use of the private class action for damages as a principal legal mechanism. The discretionary exercise of ancillary power, properly accounting for the unique character of environmental problems, is the most practical and doctrinally sound method by which to recognize and delimit environmental class actions for damages.

III. THE ECONOMIC CONSIDERATIONS OF ENVIRONMENTAL CLASS ACTIONS

The environmental class action has the potential of providing a

cess will result because the court will be required to provide a pervasive plan to deal with an environmental problem. The court will no longer be aided by a decentralized process—*i.e.*, damage awards which will become a part of private cost-benefit decisions—in the allocation of resources and solution to environmental controversies. A decentralized system would bring private market factors to bear since the cost would be internalized to the producer of the pollution and his production would be adjusted in accordance with the costs associated with alternative courses of action.

74. Imposition of an injunction which could be lifted upon the agreement of the parties involved could be utilized to incorporate the private market into the judicial solution. The plaintiffs could then bargain with the polluter for an amount representing the economic value of the injunction to them.

75. Centralized judicial decision-making may prove to be inefficient because the courts are not equipped to fully and adequately evaluate all the economic, scientific and technological data essential to the complex solution. While courts have the capacity, *e.g.*, by utilization of special masters, to consider such factors, it is important to note that such an analysis would require the development of a complete environmental plan for an area. The courts' limited expertise and resources would be especially taxed in injunctive actions.

76. See also *Sierra Club v. Froelke*, 359 F. Supp. 1289 (S.D. Tex. 1973).

mechanism by which the judiciary may fully consider the societal costs and benefits emanating from particular activities and thereby resolve environmental controversies in a manner which promotes economic efficiency and optimal allocation of natural resources.⁷⁷ Environmental problems such as pollution, being peculiarly group problems resulting from deficiencies in the market-pricing mechanism, require the judiciary to respond in a manner which recognizes both the group and economic character of the problem. Thus, judicial resolution of any environmental question must be premised upon consideration of the group affected by a particular activity and the economic aspects of the controversy. A failure to fully and adequately deal with these factors will result in continued economic inefficiencies and pollution.

A. *Economic Considerations in Pollution Control*

The degree of pollution present in our society is in large part due to a failure of the market-pricing mechanisms to accurately reflect the true cost to society of producing a particular product.⁷⁸ Traditionally, the market system controls private production by informing the entrepreneur of the anticipated costs *to him* of a specific activity. The entrepreneur will respond to these "private" costs and will increase production until he reaches the optimal level of output.⁷⁹ But cases arise, as in the case of pollution, in which the producer's "private" costs do not include all the costs of his decision; *i.e.*, some costs are imposed upon people who do not make the business decision. To the extent that the costs to society, produced by the polluting activity, remain "external" to the private decision-maker, society will witness an excessive amount of pollution and an inefficient allocation of resources. These distortions in the price mechanism are known as "externalities."⁸⁰ In order to insure an efficient allocation of resources and

77. See generally Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969) [hereinafter cited as *Cost-Internalization*].

78. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

79. Each profit maximizing entrepreneur considers his opportunity costs when considering a course of action. If the marginal benefit (revenue for the business) exceeds marginal costs, the action will be profitable and will be undertaken. If the marginal cost includes all the costs which result from the action, the profit seeking decision will result in resources being used most efficiently.

80. *Cost-Internalization*, *supra* note 77, at 383. Technically, the term externalities refers to any benefit or cost which is created by a particular activity but which

minimum level of pollution, it is necessary that the external costs of a given activity be effectively "internalized."

The legal system hinders cost internalization by failing to adequately define property rights in such resources as the atmosphere and water. Nonproducers burdened by external costs are unable to assert property rights so as to receive compensation for invasion of those rights. Even if property rights were adequately defined, costs may remain external because of the traditional undervaluation of aesthetic and recreational interests in the environment.⁸¹ While it is recognized that valuation problems exist,⁸² to deny *any* consideration of environmental interests leads to greater economic inefficiencies and inequities than to attempt *some*, albeit inaccurate, valuation. It is necessary to *attempt* to value legally cognizable interests in environmental quality in order to approach an economically efficient solution.⁸³

B. Cost Internalization Via Legal Processes

One of the functions of a legal system should be to ensure that the external costs and benefits of a particular activity do not remain external to the person or enterprise generating such diseconomies.⁸⁴ In-

does not become a part of the private cost-benefit calculation of the producer. Thus, as its name suggests, it remains external to the private decision making process.

In *Zahn* an external diseconomy resulted from the fact that the pollution of Lake Champlain imposed costs upon society in general, and upon members of the class in particular, in terms of decreased recreational and property values. Therefore, the social cost of producing paper (social cost equals private costs plus external costs) exceeded the private cost and an overproduction of paper resulted because the producer's private cost understated the true cost to society of producing the good.

See also Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1, 39 (1968); A. Pigou, *The Economics of Welfare* (4th ed. 1932).

81. See generally Note, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 STAN. L. REV. 1092 (1972).

82. Attempts at evaluating the "cost" of pollution have met with mixed sentiments. See, e.g., Ridker, *Strategies for Measuring the Cost of Air Pollution*, in THE ECONOMICS OF AIR POLLUTION 87, 92 (H. Wolozin ed. 1966) ("How much would you be willing to pay to obtain a more pleasant environment?"); Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J. LAW & ECON. 11, 25-26 (1964) (analysis of property values and regional demand shifts). See also *Sierra Club v. Froelke*, 359 F. Supp. 1289 (S.D. Tex. 1973).

83. The legal system is continually faced with the burden of placing monetary values on injuries and damage which is generally not susceptible to such valuation. For example, what is the value of a human life, loss of consortium, loss of an arm or an eye? Simply because valuation problems exist does not mean the loss of such interests is not a loss. It is essential that the judicial system attempt to value such interests.

84. In a sense, the whole legal structure of society is a mechanism for dealing with the "costs" that individuals impose on each other. Criminal sanctions, tort lia-

ternalization of such activities is, in fact, a basic purpose of law. If an individual imposes a cost upon another, *e.g.*, by tortious conduct or breach of contract, the judicial system provides a mechanism by which the victim is compensated by the wrongdoer. Thus, cost internalization is not a novel legal concept.

1. *The individual tort remedy*

Historically, an individual whose person or property has been adversely affected by the use to which his neighbor's property has been devoted may sue for damages or injunctive relief on the theories of nuisance, negligence or trespass.⁸⁵ The award of damages or the granting of injunctive relief forces the polluter to bear the cost that his activities have imposed on the particular plaintiff. There remain, however, at least four inherent deficiencies in the individual tort action mode of relief.

First, the individual tort remedy is inadequate because it fails to provide for complete assessment of the environmental problem. The tort remedy deals with specific private property interests and seeks to compensate only for identifiable injuries to such interests. Substantial societal interests in environmental quality, however, are not subject to definition in terms of private property⁸⁶ and are thereby excluded from judicial consideration in individual tort actions.⁸⁷ Thus, substantial societal costs, *e.g.*, excessive air and water pollution, remain unquantified and external to both the private market-pricing mechanism and the judicial process. Cost internalization is thereby thwarted and resource misallocation persists.

bility, and contract damages are all means of forcing one party to 'internalize' the external costs that his actions might cause others to bear.

Cost-Internalization, supra note 77, at 384.

85. For a discussion of traditional tort remedies as alternative courses of action, see Esposito, *Air and Water Pollution: What to do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32, 35 (1970); Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126 (1967).

86. See discussion in section II-A *supra*.

87. In many instances the sum of the private damages will not equal the total societal costs of a particular activity. For example, pollution of Lake Champlain by International Paper in *Zahn* resulted in compensable damage to the private property interests of the individual class members. There are certain costs, however, which are not considered; *e.g.*, the effect of pollution on fish and wildlife, the loss of aesthetic values enjoyed by society, and the economic cost to society resulting from the overproduction of paper. Because these substantial costs are generally over-

Second, the tort remedy imposes substantial, often prohibitive, "bargaining costs" upon the individual litigant. Bargaining costs are those costs associated with resolving the conflict between the polluter and individual pollutees.⁸⁸ These costs include attorneys' fees, expert witness fees, and similar fees associated with the resolution of the dispute between the parties. Where an action by a polluter affects a group of individuals, and each must independently pursue a judicial remedy, excessive societal bargaining costs will result from duplicative adjudications of similar facts, rights and liabilities. The purpose of *bargaining*, and the expenditures of time and money associated therewith, is, simply, to determine "whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm."⁸⁹ Thus, if individuals are forced to seek independent judicial remedies for damages sustained from pollution, for example, the judicial system will fail to compensate for all resulting external costs if the bargaining costs outweigh the relative benefits to be derived from litigation; the individual will simply not sue. To the extent that victims fail to sue, cost externalization continues and the efficient resource allocation is diminished. Even though the damage to the individual plaintiff may be small, the aggregate of small injuries may produce a significant societal cost. This is particularly true in environmental cases, where the effect of pollution on individual property may be de minimus but the total cost imposed upon society substantial.⁹⁰

Third, associated with the substantial bargaining costs of private tort litigation is the risk of inconsistent adjudication of claims. Environmental planning and coordination will be severely hampered by piecemeal litigation emanating from courts which are unable to consider the full scope of the problem. Externalities will continue because

looked, the societal cost of an activity exceeds the sum of *all* private damages recouped through individual tort actions.

88. Professor Coase states concerning "bargaining costs":

Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon rearrangement is greater than the costs which would be involved in bringing it about. . . . In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates.

Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 15-16 (1960). See also *Cost-Internalization*, *supra* note 77, at 388.

89. Coase, *supra* note 88, at 27.

90. See note 87 *supra*.

of incomplete consideration and inaccurate valuation of the societal interests affected by challenged activities.

Fourth, private tort litigation, which forces consideration of external costs of production only *after* those costs are incurred, fails to utilize cost internalization as a vehicle for technological assessment.⁹¹ This serves to frustrate the purpose of cost internalization which is to provide full cost data to the producer so that he may view alternative courses of action in proper economic perspective at the planning stage.⁹² It is unlikely that the threat to the polluter of an occasional damage award will either effectively deter the byproduction of pollution or induce meaningful technological assessment of potential costs and benefits of an activity *prior* to the initiation of the activity.⁹³

Successful deterrence is predicated upon the ability of pollutees to mount a legal threat of such financial proportion that the polluter is forced to consider the potential economic consequences of his continued byproduction of pollution. The class action for damages provides the means to successfully mount such a threat.

2. *Class actions and environmental economics*

The environmental class action is a mechanism which can effectively make the social cost of pollution a part of the cost calculation of the polluting industry, equalize the respective bargaining positions of polluters and pollutees in pollution cases, and reduce the costs of reaching optimal solutions. The class action is, in addition, an impor-

91. See generally Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587 (1969).

92. Technological assessment, however, may be stimulated by several recent judicial decisions which have interpreted subsections 102(2)(A)-(C) of the National Environmental Policy Act, 42 U.S.C. §§ 4332(2)(A)-(C) (1970). These require federal officials to utilize a cost-benefit analysis to evaluate proposed actions falling within the scope of the Act and to incorporate environmental values into that analysis in conjunction with traditional economic and technical elements. See *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971). See generally Comment, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 STAN. L. REV. 1092 (1972).

93. For discussion of centralized versus decentralized methods of promoting cost-internalization, see Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647 (1971), reviewing, G. Calabresi, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

tant citizen action mechanism;⁹⁴ it provides the small stakeholder in a large controversy not only the opportunity to promote his own individual interest, but also allows him to promote class or public interests.⁹⁵

The effectiveness of the class action as a cost internalizing device is a function of the scope of the class itself. If the scope of the class is limited, for example, by denying a federal forum to class members who assert claims of less than \$10,000, externalities will not be internalized because of the reviewing court's inability to adequately consider the activity in full perspective.

When internalization of costs occurs by recourse to the judicial process, the costs of prosecuting a class claim to judgment take the form of both "bargaining" and "transaction" costs. Bargaining costs, as previously discussed, are those costs associated with negotiating a solution to the conflict between polluter and pollutees.⁹⁶ Transaction costs, peculiar to group or class litigation, are those costs incurred by class members when dealing among themselves with respect to a common problem. These costs may be of two kinds:⁹⁷ (1) conference costs that occur whenever a large group of people must arrive at common agreement; and (2) collective-good costs, incurred (a) in convincing aggrieved individuals of the importance of joining and contributing to the class action, even though effort or funds on their part may not be necessary in order to gain the benefits (*e.g.*, cleaner air and water), accruing from resolution of an environmental problem, and (b) in the continued environmental degradation and resource misallocation in society due to delay in the initiation of lawsuits.⁹⁸

94. Experience has shown that administrative agencies do not always adequately protect the public interest. Citizen lawsuits are increasingly being proposed to act as an independent mechanism to supplement agency action, to monitor and check agency and executive action, to spotlight needed areas of legislation and to insure the inclusion and adequate consideration of all relevant factors. Lamm & Davison, *Environmental Class Actions Seeking Damages*, 16 ROCKY MTN. MIN. L. INST. 59, 61 (1971).

95. Class actions have been described as "a way of redressing group wrongs . . . a semi-public remedy administered by the lawyer in private practice"—a cross between administrative action and private litigation." *Dolgow v. Anderson*, 43 F.R.D. 472, 481 (E.D. N.Y. 1968), quoting Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

96. See text accompanying note 88 *supra*.

97. *Cost-Internalization*, *supra* note 77, at 403. See also Comment, *The Viability of Class Actions in Environmental Litigation*, 2 ECOL. L.Q. 533, 539-40 (1972).

98. Collective goods, such as air and water, are presently free goods. This, in effect, means that such goods carry a zero price and are subject to the collective use of

The class mechanism should produce substantial reductions in bargaining costs, and insure only de minimus transaction costs, by consolidating all individual damage claims arising from one environmental controversy. Thus, class action adjudication permits relatively distortion-free analysis of the economic consequences of pollution byproduction. More fundamentally, and of greater importance, the class mechanism facilitates the full exposure, in a common forum, of economic issues surrounding an environmental controversy which have heretofore been imperfectly addressed by the judiciary.

IV. RAMIFICATIONS OF *ZAHN*: SUMMARY

The Court in *Zahn* has severely limited the utility of the class action as an effective cost internalization device for environmental litigation. The decision will necessitate increased transaction and bargaining costs incident to class environmental litigation in several ways. Narrowing the scope of the class for purposes of Rule 23(b)(3) damage suits increases the potential number of lawsuits, together with their attendant fees and costs. The bilateral bargaining procedure between a class representative on either side of the lawsuit will be replaced by an unmanageable and more expensive multilateral bargaining procedure. Environmental coordination and planning will be severely impaired by piecemeal litigation emanating from courts unable to consider the full scope of the problem. Injunctive relief may still be available by utilization of Rule 23(b)(2) but will increase the burden on the federal judiciary. In addition, federal district courts will now be required to conduct tedious pretrial examinations of the extent of damages to all class members in order to determine the scope of the class.⁹⁹ These continuing inefficiencies will obviously deter many po-

society. Air is a free good because private appropriation is impossible: the individual's cost of controlling his bundle of rights is prohibitive. Therefore, if certain individuals pay to improve air quality, all people in the area, whether payers or nonpayers, benefit from the improved quality of the air. Individuals will delay their own action on an environmental problem because of the free rider effect, and they will bear an inordinate share of the costs of litigation because of other persons' free riding. As a consequence, an insufficient number of actions are individually initiated to prevent loss of collective goods.

99. This determination, while apparently required by *Zahn*, leaves open the general interpretation of Rule 23(c)(3) which dictates that the res judicata effect is to be determined in the subsequent action. See Advisory Comm.'s Note, *supra* note 24, at

tential environmental plaintiffs from seeking legal relief in the federal courts.

More deleterious is the effect of *Zahn* upon those individuals who cannot independently establish damages in the jurisdictional amount. Such individuals are compelled to choose a state forum or, more likely, to abandon litigation altogether. Since polluters will not be required to account to most of those parties unable to meet the jurisdictional amount requirement, the cost of much of America's pollution will continue to be borne principally by persons other than polluters and their customers. If pollution remains a public cost, rather than a private cost of the polluter, widespread distortion of natural resource allocation, as well as environmental damage in excess of the societal optimum, will continue.

V. A SUGGESTED ALTERNATIVE

The effectuation of the purposes of the private class action for damages within the context of environmental litigation is predicated upon the exercise of judicial power inherent in ancillary jurisdiction. Justification for the discretionary exercise of such power is found in the unique character of environmental problems and related diseconomies. Discretionary exercise of the court's ancillary power could proceed as follows: Once it is established that at least one of the plaintiffs has a claim in excess of the jurisdictional minimum, all other parties asserting claims which derive from the same, "common nucleus of operative fact," and supported by a showing of substantial economic harm, could be recognized as class members. Utilizing this approach, the court would have before it a more complete picture of the economic dynamics of the activity being scrutinized and could, thereby, more effectively deal with the environmental controversy.

Determination of whether a given plaintiff has made a good faith showing of "substantial economic harm" should be left to the discretion of the trial court for those plaintiffs asserting claims of less than \$10,000. Its decision may turn on a number of considerations including the proposed size of the class, the proportion of plaintiffs individually meeting jurisdictional amount requirements to those failing to

106: RESTATEMENT OF JUDGMENTS § 86 Comment *h*, § 116 (1942); Note, *Binding Effect of Class Action*, 67 HARV. L. REV. 1059, 1060 (1954).

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do so, the nature of the claim alleged, the availability of alternative modes of relief, the anticipated capability of the court to adjudicate an action of enlarged scope, and the perceived optimal size of the action to most fully effectuate the stated purposes of the class action mechanism.¹⁰⁰

Properly applied, Rule 23(b)(3) is an excellent vehicle for the effective resolution of class injuries in the environmental context. It is a rule of convenience¹⁰¹ designed to “achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated”¹⁰² Environmental class actions have the capacity to fulfill the stated purpose of the Rule by: (1) reducing the bargaining cost of litigation for the individual parties;¹⁰³ (2) reducing the transaction costs for each member of a class;¹⁰⁴ (3) reducing the

100. If such a proposal appears unmanageable, the reader is directed to consider the relative manageability of the procedure contemplated by the Court in *Zahn*, whereby the district court must individually determine which plaintiffs make a “good faith showing” of \$10,000 damages to meet the jurisdictional amount requirement.

101. See Krahmer, *Some Problems of Consumer Class Actions*, 7 U. RICH. L. REV. 213, 213–16 (1972).

102. Advisory Comm.’s Note, *supra* note 24, at 102–03. Prof. Kaplan, reporter for the Advisory Committee at the time of the 1966 amendments, has said:

The object [of Rule 23(b)(3)] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or the opposing party.

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 376 (1967).

103. J. MACDONALD & J. CONWAY, ENVIRONMENTAL LITIGATION § 2.04(a), at 19 (1972). Further, the class mechanism has the potential to provide:

[A]n administratively workable means of combining group bargaining strength at a minimum cost, and . . . by presenting the courts with an aggregated claim, it encourages courts to define substantive rights to the benefit of the large group, thereby creating a more effective bargaining force

Cost-Internalization, *supra* note 77, at 404.

104. See text accompanying note 97 *supra*. Conference costs can also be reduced by class actions. If there exists no clearly defined right to be free from pollution, the mere threat of a class action will not induce the polluter to reach a bargained solution with the class. Even if there is such a clearly defined and enforceable right, in the absence of a class action, no mechanism exists by which the class can reach a binding out of court agreement with the polluter:

It is only after a class suit is instituted and offers the prospect of judgment, including dismissal pursuant to judicially approved settlement, that there is any way to bind all of the class members. Therefore, the class action serves not only as a means of settling group claims but as a means for awarding legal authority to the class representatives. In other words, the self-, but duly, appointed representative has the power to assert all of the class interests and thereby construct a bilateral, and manageable, “bargaining” situation from a multilateral, unmanageable situation.

Cost-Internalization, *supra* note 77, at 404.

judicial burden of assessing the societal costs of a particular activity and of reaching optimal solutions;¹⁰⁵ and (4) promoting uniformity of results by avoiding a multiplicity of suits.¹⁰⁶ However, the Court in *Zahn*, by extending the nonaggregation doctrine of *Snyder v. Harris* and interpreting the "matter in controversy" clause of 28 U.S.C. § 1332(a) to preclude aggregation of separate and distinct claims by individual class members to satisfy the jurisdictional amount requirement, even where the named plaintiffs assert damages in excess of \$10,000, has severely and undesirably limited the effective use of Rule 23.

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105. Justice Brennan, dissenting in *Zahn*, stated:

It is, of course, true that the exercise of ancillary jurisdiction in such cases would result in some increase in the federal courts' workload, for unless the class action is permitted many of the claimants will be unable to obtain any federal determination of their rights. . . . It should be sufficient answer that denial of ancillary jurisdiction will impose a much larger burden on the state and federal judiciary as a whole, and will substantially impair the ability of prospective class members to assert their claims.

414 U.S. at 307-08. Although utilization of a liberalized class remedy would necessarily create larger individual cases, the overall effect of such action would most probably be to reduce the caseload of the federal and state judiciary as a whole.

106. Rule 23(c)(2) & (3) provide for notice to class members and require definition of the class. Res judicata will be extended to all members of the class who do not request exclusion. The effect is to adjudicate class rights in a single proceeding and to preclude subsequent individual proceedings based on common facts. See *Mun- gin v. Florida E. Coast Ry.*, 318 F. Supp. 720, 730 (M.D. Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir. 1971).