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The Trouble with *Zahn*: Progeny of *Snyder v. Harris* Further Cripples Class Actions

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The Trouble With *Zahn*[1]: Progeny of *Snyder v. Harris*[2] Further Cripples Class Actions

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I. INTRODUCTION

In recent years, especially since the 1966 amendments to the Federal Rules of Civil Procedure, legal problems involving consumerism and environmental protection have evoked considerable interest and public concern. Public awareness of the problems in these areas of the law is due in large part to the procedural device of the class action. By spreading the cost of expensive litigation over all class members, individuals seeking to prosecute a class action generally are trying to redress their claims as well as disgorge the defendant of ill gotten gain al-

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1. Zahn v. International Paper Co., 94 S. Ct. 505 (1973).
2. Snyder v. Harris, 394 U.S. 332 (1969).

legedly derived from violation of common law or statutory standards of primary conduct.

There is no unanimity regarding the utility of the class action. It has met praise from various consumer, environmental and other public interest groups as well as alarm and disappointment from business and industry. Moreover, by denying access to federal courts under diversity and general federal question jurisdiction because individual claims of class members are monetarily too small, recent judicial decisions have created considerable doubt regarding the future of this particular procedural device. Thus, proponents of the class action are forced to turn to state courts. Even if a state court would entertain the class action, the procedural rules often are so restrictive that prosecution of the class action becomes an exercise in futility.

Consequently, if proponents of class actions are as unsuccessful in state courts as they have been in federal courts, not only will numerous claims remain unredressed but important cases or controversies involving national policy will remain unlitigated.

The liberalized provisions for the joinder of claims and parties contained in the Federal Rules of Civil Procedure have greatly increased the efficiency of the federal courts. However, requirements of subject matter jurisdiction have limited, to some extent, use of those joinder provisions.

During the past several years, expansion of the use of ancillary jurisdiction has allowed the federal courts to circumvent some of those jurisdictional obstacles.

Last year the Supreme Court was confronted with a case that raised questions regarding the "amount in controversy" requirement for class actions, as well as the use of the concept of ancillary jurisdiction. The facts were these:

> The complaint, brought by the four named owners of lakefront property on Lake Champlain on behalf of themselves and some 200 other similarly situated riparian landowners and lessees, sought compensatory and punative damages in the total amount of $40,000,000 for damages to their property rights caused by [International Paper Company's] alleged pollution of the lake's waters. Purportedly the discharge of untreated or inadequately treated waste from [International's] now-closed pulp and paper making plant in the Village of Ticonderoga, passing into the lake via Ticonderoga Creek created a massive sludge blanket on the bottom of the lake; masses of sludge apparently break off periodically to wash up on [plaintiff's] property. As a consequence [plaintiff's] property is claimed to be unfit for any recreational or other reasonable use and to be permanently diminished in value.[3]

3. Zahn v. International Paper Co., 469 F.2d 1033, 1034 (2d Cir. 1972).

The class action suit was brought as a diversity action with subject matter jurisdiction assertedly resting on section 1332(a) of Title 28 of the United States Code, which requires that the "matter in controversy" exceed the sum or value of $10,000.

> The claim of each of the named plaintiffs was found to satisfy the $10,000 jurisdictional amount, but the District Court was convinced "to a legal certainty" that not every individual owner in the class had suffered pollution damages in excess of $10,000. Reading [*Snyder v. Harris*] as precluding maintenance of the action by any member of the class whose separate and distinct claim did not individually satisfy the jurisdictional amount and concluding that it would not be feasible to define a class of property owners each of whom had more than a $10,000 claim, the District Court then refused to permit the suit to proceed as a class action.[4]

The court of appeals affirmed the lower court decision over a vigorous dissent by Judge Timbers,[5] and the Supreme Court granted a petition for writ of certiorari.[6]

In that posture, the case of *Zahn v. International Paper Co.*[7] presented what the authors consider to be two "separate and distinct" questions to the Court.

First—Whether each of several class action plaintiffs who are suing a single defendant may aggregate their separate and distinct claims in order to meet the jurisdictional amount requirement of section 1332(a)? Predictably, the Court answered that question in the negative, refusing to retreat from the doctrine espoused in *Snyder v. Harris*[8] five years earlier.

Second—Whether members of a class whose separate and distinct claims do not meet the jurisdictional amount requirements of section 1332(a) may have their claims determined by a federal court under a theory of ancillary jurisdiction[9] where other members of the class have similar claims that do meet federal jurisdictional requirements?

Had the Court chosen to overrule *Snyder* by answering the first question in the affirmative, the second question would have become moot, because the theory of ancillary jurisdiction is used only to allow the federal courts to hear claims over which they would otherwise lack subject matter jurisdiction.

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4. 94 S. Ct. at 507.
5. 469 F.2d at 1036.
6. *Cert. granted*, 410 U.S. 925 (1973).
7. 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 94 S. Ct. 505 (1973).
8. 394 U.S. 332 (1969).
9. For a discussion of ancillary jurisdiction, see notes 185-204 and accompanying text *infra*.

However, having chosen to reaffirm the position taken in *Snyder* on the question of aggregation of claims, the Court majority in *Zahn* completely ignored[10] the second question in spite of the fact that the ancillary jurisdiction theory was the principal argument raised in plaintiff's brief, and was the main thrust of dissents by Judge Timbers[11] (when the case was before the court of appeals) and Justice Brennan.[12] The only inference to be drawn from the Court's holding, affirming both lower courts, is that the second question was also answered in the negative.

Part II of this article will deal with some of the "problems" raised by the Court's affirmation of the *Snyder* doctrine with particular reference to restrictions placed on the use of the class action by that doctrine. Part III will discuss ancillary jurisdiction as it relates to class actions and joinder of parties.

II. SNYDER AND THE CLASS ACTION

Because federal courts are not courts of general jurisdiction and are empowered to hear only actions within the judicial power of the United States as defined by the Constitution and executed by the laws of Congress,[13] a party attempting to invoke jurisdiction of a federal court must establish that the action is within the province of such a court. Although Article III of the Constitution provides nine possible situations in which the federal courts may exercise jurisdiction,[14] this constitutional

10. The only possible reference to the ancillary jurisdiction theory in the majority opinion is where the Court quotes the court of appeals opinion to the effect that: "'[O]ne plaintiff may not ride in on another's coattails.'" 94 S. Ct. at 512. That is hardly a sufficient response to the elaborate arguments contained in plaintiff's brief and in the dissenting opinions of Judge Timbers and Justice Brennan. *See* notes 11, 12 *infra*.
11. 469 F.2d at 1036.
12. 94 S. Ct. at 512. Justices Douglas and Marshall joined in Justice Brennan's dissent.
13. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 15-26 (2d ed. 1970) [hereinafter cited as WRIGHT].
14. U.S. CONST. art. III, § 1 vests the judicial power of the United States in certain courts. Section 2 provides that such

> judicial Power shall extend to all Cases, in Law and Equity, arising *under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority*;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; —*between Citizens of different States*;—between Citizens of

grant of power is not self-executing and, therefore, congressional enactments are necessary to determine how the judicial power shall be executed.[15] Thus, in order to overcome the presumption that jurisdiction does not rest in a federal court, a party must establish requisite jurisdictional facts required by both the Constitution and the federal statutes.[16] Since the Judiciary Act of 1789,[17] "[o]ne of the essential requisites for maintaining suit in federal district court is satisfaction of a mandatory jurisdictional amount."[18] Purportedly, the requirement of jurisdictional amount

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> the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.

(Emphasis added).

15. *See* WRIGHT, *supra* note 13, at 17-26, for a discussion of the debate over whether article III, § 2 of the Constitution is self-executing absent congressional authorizations and enactment.
16. *See* WRIGHT, *supra* note 13, at 15-53 for a general discussion of the requisites for an action in federal court.
17. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.
18. Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum—A Post Synder v. Harris Analysis*, 22 AM. U.L. REV. 79 (1972) [hereinafter cited as Strausberg]. In regard to jurisdictional amount, Congress has provided that there shall be a jurisdictional amount requirement for both federal question and diversity of citizenship cases. The following excerpt from the Supreme Court's decision in *Zahn* explains the history underlying the jurisdictional amount requirement:

> 1. The section provides in pertinent part that:
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> "(a) 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. . . ."
>
> Section 11 of the First Judiciary Act of 1789 set the jurisdictional amount in diversity suits at $500. 1 Stat. 78. In 1801, Congress lowered the requirement to $400 in The Law of the Midnight Judges, 2 Stat. 89, 92, but it was quickly restored to $500 the following year. 2 Stat. 132. The jurisdictional amount requirement remained fixed at this level until the Act of March 3, 1887, 24 Stat. 552, when it was raised to $2,000. This figure was subsequently increased by $1,000 by the Act of March 3, 1911, § 24, 36 Stat. 1091. See S.Rep.No.388, 61st Cong., 2d Sess., pt. 1, 30-32 (1910); H.R. Rep.No.818, 61st Cong., 2d Sess. (1910); Conference Report, S.Doc.No.848, 61st Cong., 3rd Sess. (1911); 45 Cong.Rec. 3596-3599 (March 23, 1910); 46 Cong.Rec. 4002, 4003, 4004 (March 2, 1911).
>
> The current $10,000 jurisdictional amount, codified in 28 U.S.C. § 1332(a), was enacted by the Act of July 25, 1958, 72 Stat. 415. The legislative history discloses that the change was made "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

is intended to keep "petty controversies" out of federal courts.[19] However, since the initiation of the jurisdictional amount requirement, the requisite element has been the subject of considerable controversy and debate.[20] The general thrust of the following discussion focuses on the impact that the Supreme Court's decisions in *Snyder* and *Zahn* will have on class actions in federal courts where class members are not allowed to aggregate their "separate and distinct" claims in order to satisfy the requirement of jurisdictional amount.

Snyder was the first major class action case to reach the Supreme Court after the promulgation of the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure. The issue in *Snyder* was whether the named parties of record, who sought to maintain a class action predicated on diversity of citizenship, could aggregate their "separate and distinct" claims in order to satisfy the ten thousand dollar jurisdictional amount requirement. Based on the Court's previous decisions in *Troy Bank v. Whitehead & Co.*,[21] *Pinel v. Pinel*[22] and *Clark v. Paul Gray, Inc.*,[23]

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of big business nor so law [sic] as to fritter away their time in the trial of petty controversies." S.Rep.No. 1830, 85th Cong., 2d Sess., 3-4 (1958); U.S. Code Cong. & Admin. News 1958, p. 3101; see also *id.*, at 21; H.R.No. 1706, 85th Cong., 2d Sess., 3 (1958).

2. Section 1331(a) provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

94 S. Ct. at 508 nn. 1, 2.

19. S. REP. No. 1830, 85th Cong., 2d Sess. 4 (1958).

20. *See* WRIGHT, *supra* note 13, at 107-29, for a general discussion and analysis of the jurisdictional amount requirement.

21. 222 U.S. 39, 40-41 (1911) (plaintiffs seeking enforcement of a vendor's lien had a *joint* interest in the claim). *See* New Orleans Pac. Ry. v. Parker, 143 U.S. 42, 51 (1892) (bond holders secured by a mortgage had a *joint* interest in the property of the mortgage); Handley v. Stutz, 137 U.S. 366, 369-70 (1890) (individual shareholders and creditors of an insolvent corporation had a *joint* interest in a claim for failure to pay stock subscriptions); The Connemara, 103 U.S. 754, 755 (1880) (salvors had a *joint* interest in recovery); Shields v. Thomas, 58 U.S. (17 How.) 3, 4-5 (1854) (plaintiff distributees had a *joint* interest in the estate). Because the interests of the plaintiffs in the above cases were characterized as *joint*, as opposed to *separate and distinct*, the court allowed aggregation of the collective claims in order to satisfy the jurisdictional amount.

22. 240 U.S. 594 (1916). The Court prohibited aggregation of what it characterized as 'separate and distinct' claims brought by plaintiffs, who as children and heirs, claimed an interest under the testator's will. The Court held that testator's omission of one of his children

the *Snyder* Court held that named plaintiffs could not aggregate the amount of their "separate and distinct" claims in order to invoke the jurisdiction of the federal courts.[24] *Snyder* was received with mixed feelings;[25] moreover, instead of synthesizing the argu-

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from his will was distinct from the question of whether a similar mistake was made with reference to another child.

23. 306 U.S. 583, 589 (1939) (plaintiffs' interest in enjoining enforcement of a state statute exacting fees for the caravaning of vehicles were *separate and distinct* and thus could not be aggregated to satisfy the jurisdictional amount).

24. Snyder v. Harris, 394 U.S. 322, 336-37 (1969):

> The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based upon this Court's interpretation of the statutory phrase "matter in controversy." The interpretation of this phrase as precluding aggregation substantially predates the 1938 Federal Rules of Civil Procedure. In 1911 this court said in *Troy Bank v. Whitehead & Co.*:
>
> > "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. . . ." 222 U.S. 39, 40.
>
> By 1916 this Court was able to say in *Pinel v. Pinel*, 240 U.S. 594, that it was "settled doctrine" that separate and distinct claims could not be aggregated to meet the required-jurisdictional amount. In *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), this doctrine, which had first been declared in cases involving joinder of parties, was applied to class actions under the then recently passed Federal Rules. In that case numerous individuals, partnerships, and corporations joined in bringing a suit challenging the validity of a California statute which exacted fees of $15 on each automobile driven into the State. Raising the jurisdictional amount question *sua sponte*, this Court held that the claims of the various fee payers could not be aggregated *"where there are numerous plaintiffs having no joint or common interest or title* in the subject matter of the suit." 306 U.S., at 588. Nothing in the amended Rule 23 changes this doctrine.

(Emphasis added).

25. Maraist & Sharp, *After Snyder v. Harris: Whither Goes The Spurious Class Action?*, 41 MISS. L.J. 379 (1970) (generally agreeing with *Snyder*) [hereinafter cited as Maraist & Sharp]. However, they began their article with the observation that:

> The United States Supreme Court's somewhat surprising decision in the recent case of *Snyder v. Harris* has dealt a crippling blow to hopes for widespread use of the "spurious" type of class action in federal courts and has forced procedural scholars to take another look at the future of this fascinating procedural device.

Id. at 379. For a general criticism, see Strausberg, *supra* note 18. For the debate over the utility of class actions, see, e.g., Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365 (1972); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969); Simon,

ments as to the role of class actions in federal courts, the decision merely confused the issues[26] and compounded the uncertainty as to the future of Federal Rule 23 (b) (3) class actions.[27] The question of aggregation was again presented to the Court in *Zahn*. In *Zahn* the Court held that although each of the named plaintiff lakefront owners individually satisfied the jurisdictional amount requirement, the class action aspect of the suit against the defendant papermill was properly dismissed by the federal district court since it had not been established that each of the unnamed class members, about two hundred unnamed lakefront property owners and lessees, had satisfied the jurisdictional amount requirement.[28] Thus, although *Zahn* dispells any confusion as to how far *Snyder* extends to limit the aggregation of "separate and distinct" claims with respect to class actions, the full impact of *Snyder* and *Zahn* on the future of class actions in federal courts remains uncertain. The *Snyder* Court opined that

> while the class action device serves a useful function across the entire range of legal questions, the jurisdictional amount requirement applies almost exclusively to controversies based upon diversity of citizenship. A large part of those matters involving federal questions can be brought, by way of class actions or otherwise, without regard to the amount in controversy.[29]

In a vigorous dissent, Justice Fortas took issue with the majority's perception of the *Snyder* holding's impact.[30] According to the dissent, the *Snyder* decision's major shortcoming is that it fails to

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Class Actions—Useful Tool or Engine of Destruction? 55 F.R.D. 375 (1972); Weithers, *Amended Rule 23: A Defendant's Point of View*, 10 B.C. IND. & COM. L. REV. 515 (1969).

26. In Strausberg, *supra* note 18, at 79, the holding of *Snyder* was characterized as "that where multiple plaintiffs have claims that are separate and distinct, to maintain a successful class suit in federal court, each individual member of the class must meet the monetary requirement." The author's comment inaccurately states the holding of the *Snyder* court. In Maraist & Sharp, *supra* note 25, at 384, the authors carefully delimit the extent of the *Snyder* opinion:

> The decision in *Snyder*, however, does not foreclose the possibility that the existence of one named representative whose claim reaches the jurisdictional amount requirement might empower the court to entertain a class action that includes other members with claims that do not satisfy the requirement.

Whether the unnamed members of the FED. R. CIV. P. 23(b)(3) class action must individually satisfy the jurisdictional amount was the issue raised and decided affirmatively by *Zahn*.

27. *See* 73 COLUM. L. REV. 359 (1973); 6 IND. L. REV. 812 (1973); 61 GEO. L.J. 1327 (1973); 7 GA. L. REV. 390 (1973).
28. 94 S. Ct. at 507.
29. 394 U.S. at 341.
30. *Id.* at 342.

consider the full impact that disallowing aggregation of claims will have on class actions predicated on federal questions.[31] The dissent's objection to *Snyder* is compounded by *Zahn*. Here the Court extended *Snyder* in holding that even if the named plaintiffs satisfy the jurisdictional amount requirement, a class action cannot be maintained unless each individual unnamed class member also satisfies the jurisdictional amount. In view of this recent development, any future that a class action might have in federal court based on the jurisdictional predicate of federal question, under section 1331 of Title 28 of the United States Code, appears quite limited. A more detailed examination of the impact of *Snyder* and *Zahn* on federal question class actions will indicate that the deliterious effect of these decisions will hardly be *de minimus*. Morever, where a plaintiff, whether as a representative or represented party, is denied access to federal court to litigate a federal question because his claim is too "small" to invoke federal jurisdiction, it becomes necessary to examine the efficacy of requiring the plaintiff, if he is to redress his claim at all, to proceed in the state courts. In examining the judiciousness of having the plaintiff litigate his federal question in state court, two general considerations should be kept in mind: first, is requiring state court adjudication of a federal question a frustration by *Snyder* and *Zahn* of the policy underlying the 1966 amendments to Federal Rule of Civil Procedure 23; and second, is allowing multiple state court adjudication of issues and rights created pursuant to acts of Congress desirable?

A. Development of Class Actions

With the historical aspects of the class action fully explicated elsewhere,[32] suffice it to say here that the class action emerged in 17th century England as an equitable tool fashioned by the English chancery. The development occurred in two phases in response to the rule that in a common law suit "persons who were not joint obligees or jointly liable could not be united on one side of a case either by the writ or by court action."[33] This rule proved to be extremely cumbersome and inconvenient for the parties as well as the common law court.[34] In order

31. *Id.* at 342-43 n.2.
32. Z. CHAFEE, SOME PROBLEMS OF EQUITY 149-242 (1950) [hereinafter cited as CHAFEE]. 3b J. MOORE, FEDERAL PRACTICE ¶ 23.02 (2d ed. 1969) [hereinafter cited as MOORE].
33. CHAFEE, *supra* note 32, at 153.
34. For example, assume a situation where a manorial lord attempts to appropriate part of the real property which was used by all the tenants. The tenants in defense assert a common right in the same real property. To resolve this question, it is important to note that the

to circumvent this restrictive rule prohibiting joinder of parties with claims that were separate and distinct, chancery created the bill of peace.[35] Although subject to some dispute,[36] it was generally held that multiplicity of suits alone was a ground of equitable jurisdiction over claims raising common questions of fact and issues of law, equitable and legal.[37] It is important to note, however, that in the earlier bills of peace, the common law requirement of joining *all* interested parties carried over to the chancery. Thus, no matter how numerous the parties to the bill of peace might be, all had to be brought before the court of equity.[38] The second phase of the evolving bill of peace was a natural development from the common law requirement of compulsory joinder of parties who had joint or common property interests.[39] "The very identity of interests which made it easy to bring everybody in, also made it somewhat superfluos to do so."[40] Consequently, the chancery allowed the representative suit[41] where numerous parties, often people of small means, could

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question is legally and factually common to all tenants; it is not a question of joint interests, because each tenant has a separate and distinct claim. Thus, in a common-law court, the lord would bring a separate action against each tenant. Such duplicity of suits is clearly inconvenient to both the manorial lord and the common-law court.

In order to avoid the multiplicity of suits, chancery in How v. Tenants of Broomsgrove, 1 Vern. 22 (1681), accepted a bill of peace founded on the above facts. "Lord Nottingham observed that these issues would ordinarily be triable at common-law, but took jurisdiction because the bill was brought to prevent multiplicity of suits." CHAFEE, *supra* note 32, at 161-63.

35. Bills of peace may be roughly divided into two groups. In the first, there are several persons (conveniently called the Multitude) on one side of a controversy, and one person (whom we may call the adversary) on the other side. Each member of the multitude threatens litigation or is engaged in pending litigation with the adversary, and these parallel litigations involved one or more common questions of law or fact, or both. The multitude are not joint obligees or obligors, so that they cannot join or be joined in one common-law writ. In the second group, there are only two parties with numerous parallel litigations between them.
CHAFEE, *supra* note 32, at 149-50.

36. *Id.* at 157-71. For a general discussion of whether in addition to multiple suits, it was necessary to have a "general right," "community of interest" or privity before equity jurisdiction would issue, see CHAFEE, *supra* note 32, at 161-63.

37. *Id.* at 157.

38. 1 C. POMEROY, EQUITY JURISPRUDENCE 445 (4th ed. 1918).

39. CHAFEE, *supra* note 32, at 201.

40. *Id.*

41. In Sheffield Waterworks Co. v. Yeomans, L.R. 2 Ch. App. 8 (1866), discussed at CHAFEE, *supra* note 32, at 202-03, chancery allowed one

"pool their resources and let a few of their trusted leaders bear the brunt of the fight."[42] With the development of the representative suit, the parties to the suit as well as the chancery benefited from the convenience and judicial economy.[43]

Although the English courts continue to operate under the simple rule of 1883,[44] representative suits in the United States federal courts are governed by Federal Rule of Civil Procedure 23.[45] One of the central questions that was not answered in

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of the first representative suits.

In 1864 the reservoir of the waterworks had burst causing loss of life and property damage. Parliament set up a commission to pass on damage claims. About 1,500 claims were recognized, however, after the statutory expiration of the commission. Sheffield Waterworks Co. sought a bill of peace in chancery to quash the unlawful claims. The court of equity allowed the company to bring the bill of peace against only five of the 1,500 claimants. The remaining 1,495 claimants were not named nor joined as defendants. However, the equity court took it for granted that it had proper jurisdiction over the unnamed defendants.

The *Waterworks* decision was largely predicated on the principles of an earlier case in chancery. In Adair v. New River Co., 11 Ves. 429, 444 (1805), Lord Eldon decided that when a claim brought to equity by a bill of peace was "by or against the public or by or against a large indefinite number of persons with the exact limits virtually unascertainable", CHAFEE, *supra* note 32, at 210, nonjoinder of parties in a bill of peace did not render the bill defective. Thus, two important considerations arise: first, the concept of the representative suit where parties of record litigate on behalf of unnamed class members; and second, recognition of the principle that a bill of peace could be maintained even though all of the parties with separate and distinct claims were not joined.

Consequently, aside from the fact that these two cases were some of the first representative suits, the cases clearly illustrate that representative suits can be used by equity regardless of whether the parties too numerous to be joined are plaintiffs or defendants. Moreover, it is also important to note that both cases were predicated on issues of common questions of fact and law where the interests of the "multitude" were separate and distinct and not joint and common.

42. CHAFEE, *supra* note 32, at 202.

43. *Id.* at 201.

44. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

S. Ct. R. 9, Order XVI (1883) (commonly referred to as the English Court Rule). For a discussion of the English Rule of 1883, see CHAFEE, *supra* note 32, at 213.

45. For the federal courts, the equity rules simply provided:

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or

Equity Rule 38 or under Federal Rule of Civil Procedure 23 pertained to the *res judicata* aspects of the court's judgment.[46] Professor Moore proposed to define the *res judicata* effect of a judgment in terms of the "jural relations" set forth in the rule.[47] His proposed draft was not accepted by the committee,[48]

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more may sue or defend for the whole.

Equity R. 38, 226 U.S. 659 (1912). Original FED. R. CIV. P. 23 promulgated on Dec. 20, 1937, 302 U.S. 783 (1937), as authorized by Rules Enabling Act of 1934, 48 Stat. 1064 (1934) (now 28 U.S.C. § 2072 (1958)), was essentially a restatement and clarification of Equity R. 38. *See* MOORE, *supra* note 32, ¶23.02[1] at 23-74; FED. R. CIV. P. 23 provided in pertinent part:

> (a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Subsequent to its promulgation, Rule 23 was widely acclaimed. Lesar, *Class Suits and The Federal Rules,* 22 MINN. L. REV. 34 (1937). *See also* Sunderland, *The New Federal Rules,* 45 W. VA. L.Q. 5, 16 (1938). It was not too long, however, before the class action rule was the focal point of heated debate and severe criticism. *See* Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684 (1941); Keefee, Levy & Donovan, *Lee Defeats Ben Hur,* 33 CORNELL L.Q. 327 (1948); Developments in the Law, *Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 929-33 (1958). Note, *Federal Class Actions: A Suggested Revision of Rule 23,* 46 COLUM. L. REV. 818 (1946); Comment, *Federal Rules: Class Actions,* 7 OKLA. L. REV. 472 (1954); Note, *Class Actions and Interpleaders: California Procedure and the Federal Rules,* 6 STAN. L. REV. 120 (1953); 76 HARV. L. REV. 1675 (1963).

46. CHAFEE, *supra* note 32, at 250.

47. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 GEO. L.J. 551, 571 (1937):

> (b) *Effect of Judgment.* The judgment rendered in the first situation [the "true" class action, (a)(1)] is conclusive upon the class; in the second situation [the "hybrid" class action, (a)(2)] it is conclusive upon all parties and privies to the proceeding and upon all claims, whether presented in the proceedings or not, insofar as they do not or may affect specific property involved in the proceedings; and in the third situation [the "spurious" class action, (a)(3)] it is conclusive upon only the parties and privies to the proceeding.

48. In addition to disagreeing with Moore's attempt to substantially de-

since it was felt the tentative draft would be contrary to the Enabling Act[49] which required that the Federal Rules should "neither abridge, enlarge, nor modify the substantive rights of any litigant." Nevertheless, despite the committee's rejection of his tentative drafts defining the conclusive attributes of judgments on the class action and the modification of the prohibition against aggregation of claims in order to satisfy the jurisdictional amount requirement, Moore's basic objectives were realized. The committee accepted Moore's characterization of the jural relations of class members as "true," "hybrid" and "spurious."[50]

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fine the conclusive effect of judgment for the "true" and "hybrid" class actions, the committee also rejected Moore's proposal that the parties to a Rule 23(a)(1) class suit should be allowed to aggregate their claims in order to invoke the jurisdiction of the federal court. *See* Moore & Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 556-63 (1938); 2 J. MOORE, FEDERAL PRACTICE ¶¶ 23.04, 23.05, 23.08 (1938).

49. 48 Stat. 1064 (1934), codified as 28 U.S.C. § 2072 (1970).

50. A student commentator accurately stated the law in noting:

> Prior to the promulgation of the Federal Rules of Civil Procedure it was well established that plaintiffs who possessed separate and distinct rights and who attempted to join in one diversity [or federal question] action had to independently satisfy the jurisdictional amount requirement. Aggregation of claims to satisfy that requirement was allowed only if the plaintiffs asserted a joint right. These jurisdictional rules were not changed by the cases under the original rule 23 of the Federal Rules of Civil Procedure.

Note, 7 GA. L. REV. 390, 391 (1973). Thus, in "true" class actions, the plaintiffs asserted a joint and common right and aggregation was permitted. *See, e.g.*, Gibbs v. Buck, 307 U.S. 66, 72 (1939) (joint interest found in effort to restrain enforcement of state statute which prevented plaintiffs' licensing of the public performance of their copyrights for profit); Berman v. Narragansett Racing Ass'n, Inc., 414 F.2d 311 (1st Cir.), *cert. denied*, 362 U.S. 1037 (1969) (horse owners had common and undivided interest in fund created by racetrack); Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969) (pension rights in defendant's pension fund were joint and common and amount of trust res satisfied the amount in controversy requirement). *See also* 3b MOORE, *supra* note 32, at ¶ 23.95.

In "hybrid" and spurious class actions, the plaintiffs' claims were separate and distinct and aggregation was denied. *See, e.g.*, City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1972) (action for damages for personal injury and property damage brought against operator of airport); Givens v. W.T. Grant Co., 457 F.2d 612 (2d Cir. 1972) (no aggregation of claims in action on behalf of class of persons purchasing books and alleging that interest charges were usurious); Russo v. Kirby, 453 F.2d 548 (2d Cir. 1971) (no aggregation in action by striking employees against commissioner of social services for a county seeking an injunction compelling continued payment of welfare benefits); Troup v. McCort, 238 F.2d 289, 294 (5th Cir. 1956) (action by certificate holding members of mutual life in-

As the use of the class action became more widespread, Moore's tripartite characterization of jural relations became the subject of considerable controversy.[51] Partially in response to analytical difficulties inspired by Moore's nomenclature, the 1966 amendment to Federal Rule of Civil Procedure 23[52] purportedly aban-

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surance society against life insurance company to recover value of assets); Ames v. Mengel Co., 190 F.2d 344, 347 (2d Cir. 1951) (suit by stockholders to enjoin sale of unissued stock); Knowles v. War Damage Corp., 171 F.2d 15, 18 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 914 (1949) (claims of policyholders to recover insurance premiums).

51. Professor Keefee's analysis of the authority cited in Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (diversity of citizenship need only exist between the plaintiff and the named parties of record for the defendant class), demonstrates that the distinction between "common" and "several" is illusive and hardly an adequate criterion for categorizing the attributes of jural relations. Keefee, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 333-36 (1948). *See also* Advisory Committee's Note, 39 F.R.D. 98 (1966); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356, 380-81 (1967); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 630-32 (1965). *But see* Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905, 953 (1962) (suggesting that the "true" and "hybrid" characterizations of jural relations have produced successful results); Van Dercreek, *The "Is" and "Ought" of Class Actions Under Federal Rule 23*, 48 IOWA L. REV. 273, 282 (1963). It is important to note that Simeone and Van Dercreek both suggest basic revisions in the "spurious" class suit.

52. The new rule was adopted by the Supreme Court on Feb. 28, 1966, 383 U.S. 1031, 1047-48 (1966). FED. R. CIV. P. 23 provided in pertinent parts:

> (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 or 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:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or
>
> (2) the party opposing the class has acted or refused to

doned the tripartite classification.[53] The amendments substituted what was thought to be a more functional and practical clarification of the utility of the class action.[54] By placing considerably less emphasis on the "jural relations," the amendment drafters sought to realize three basic purposes.[55]

First, the 1966 amendments were intended to maximize the utility of the class action in reducing the burden on judicial dockets resulting from multiplicity of suits.[56] This particular objective is, of course, merely a reiteration of the basic policy upon which the English chancery built the bill of peace and the subsequent representative suit. The second basic objective

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act on the grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(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 in individually 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.

53. Moore's jural relation categorization, however, was not the only shortcoming of old Rule 23. Other deficiencies which the amendments sought to correct were the lack of adequate guides as to the proper extent of judgments in class actions and the failure of old Rule 23 to adequately handle problems of procedural fairness. Advisory Committee's Note, 39 F.R.D. 98, 99 (1966). FED. R. CIV. P. 23(c) is largely designed to resolve these deficiencies. Probably one of the most important features of 23(c) is the provision that makes the court's ruling on the merits of the case binding on all class members, regardless whether the suit is a 23(b)(1), (2) or (3) class action, unless individual class members had previously requested the court for leave "to opt" out of the class. This was a major modification, especially in regard to the spurious class action, since under former Rule 23 a judgment was not binding on absentee class members. Moreover, some courts allowed such absentee class members to sit back to wait until the outcome of the suit was evident; then, if the action looked favorable to the class, these absentee members would seek judicial permission to intervene and take advantage of the class victory. *See, e.g.*, Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587-90 (10th Cir. 1961), *petition for cert. dismissed*, 371 U.S. 801 (1962).
54. *See* Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 99 (1966).
55. Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501, 504 (1969) [hereinafter cited as Ford].
56. *Id.* at 504.

of the amendments focused on minimizing the possibility of inconsistent judicial determinations resulting from multiple actions. The third policy consideration, probably the most important, was that of fashioning a procedural device aiding the individual seeking redress from small claims or injuries.[57]

Since adoption of the Rule 23 amendments in 1966, there have been three important cases which clearly illustrate that the underlying purpose of the class action is to aid the individual claimant with small claims. In *Escott v. Barchris Construction Corp.*,[58] the court emphasized the policy of old Rule 23 in protecting the small investor:

> In our complex modern economic system where a single harmful act may result in damages to a great many people there is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group. In a situation where we depend on individual initiative, particularly the initiative of lawyers, for the assertion of rights, there must be a practical method for combining these small claims, and the representative action provides that method. The holders of one or two of the debentures involved in the present action could hardly afford to take the risk of an individual action. The usefulness of the representative action as a device for the aggregation of small claims is "persuasive of the necessity of a liberal construction of . . . Rule 23."[59]

The judiciary's concern for the small investor was reiterated in *Dolgow v. Anderson*,[60] a class action fashioned under amended Rule 23. In an action for recission and damages, four purchasers, on their own behalf and as representatives of other purchasers of Monsanto common stock, sued Monsanto and its principal officers for stock manipulation.[61] In holding that the action

57. *Id.* *See* Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, (1941) [hereinafter cited as Kalven]; Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 ANTITRUST L.J. 295, 299 (1966).

58. 340 F.2d 731 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1966). *See* Comment, *Barchris and The Securities Act: Practical Responses for Attorneys*, 10 B.C. IND. & COM. L. REV. 360 (1969).

59. 340 F.2d at 733.

60. 43 F.R.D. 472 (E.D.N.Y. 1968).

61. *Id.* at 479. The court quoted from the amicus brief filed by the Securities and Exchange Commission:

> "Since the enforcement activities of this Commission do not serve to make whole investors who have been injured by a fradulent course of business and since it is economically impracticable in many instances for investors individually to pursue available remedies, the representative action appears to provide the most meaningful method by which their claims may be pursued and the Congressional policy favoring such

could properly proceed as a class action, the court noted:

> On oral argument in the present case, it was assumed that, in view of the fact that the costs of the litigation would far exceed any damages the individual plaintiffs might possibly recover, if this case does not proceed as a class action, it is unlikely that it would proceed at all. Thus, to hold that this action could not proceed as a class action "would . . . be tantamount to a denial of private relief."[62]

The most significant case in the trilogy is *Eisen v. Carlisle & Jacquelin*.[63] Eisen, an odd-lot investor, sought to represent the class of odd-lot investors who purchased stock between 1962-1966 from two brokerage firms and the New York Stock Exchange. In reversing the district court's dismissal of the class action, the court of appeals stated:

> Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.[64]

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remedies may be vindicated."

Id. at 483-84.

62. *Id.* at 485. The court's conclusion was predicated on the authority of the Rules Advisory Committee's statement that "the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also be fairly considered." 39 F.R.D. at 104.
63. 391 F.2d 555 (2d Cir. 1968), *rev'g* 41 F.R.D. 147 (S.D.N.Y. 1966).
64. 391 F.2d at 560. In analyzing the comparative impact on the small claimant, the court observed:

> Nevertheless, Rule 23 of the Federal Rules of Civil Procedure, as it was originally enacted, did not effectively achieve either of the above two objectives [eliminate repetitious suits and aid the small claimant in seeking legal redress]. Class actions were divided into various categories reflecting the "jural relationships of the members of the class." See 3 Moore, Federal Practice par. 23.08 at 3434 (2d ed. 1953). Only after a determination of the nature of the rights: "joint, common or secondary" in the true class action, "several related to specific property" in the hybrid class action, and "several affected by a common question and related to common relief" in the spurious class action, was a court able to proceed. Advisory Committee's Note, Proposed Rules of Civil Procedure, 39 F.R.D. 98 (1965) . . . . There were significant differences in the *res judicata* effects accorded to the various class actions. Thus while a judgment in a true class action was binding on the entire class, the spurious class action only concluded the rights of parties. 3 Moore, Federal Practice par. 23.11 at 3472 (2d ed. 1953). Since the great majority of cases fell into this latter category, the objective of determining all questions in one suit was effectively frustrated. In essence,

"This last, and most important, objective of the Rule is then quite clear. It is to redress grievances of small claimants."[65] This principle was embodied in the equity rules and Rule 23 preceding the 1966 amendments. Yet, the 1966 amendments, as promulgated by the Supreme Court, expressly strengthened the small claimant's arsenal of legal ammunition.[66] In so doing, the intent underlying the amended rule was not only to aid the small claimant redressing his injuries and claims, but also to facilitate the small guy in his role as a "private attorney general."[67] Because of these very significant policies underlying the amended Rule 23, it becomes clear that the tension between Rule 23 and the amount in controversy requirement has been drawn. This is to say, that if one of the central purposes of amended Rule 23 is to aid the small claimant, it would appear anomalous, if not expressly contrary to the spirit of the new rule, to require

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the spurious class action was interpreted as merely a permissive joinder device.

391 F.2d at 560 (citations omitted). It should be added, parenthetically, that on removal the federal district court, after a full evidentiary hearing, determined the class action was maintainable. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 272 (S.D.N.Y. 1971). However, on appeal the second circuit reversed and dismissed the case since the class was determined to be unmanageable and since the plaintiff could not provide notice to all class members. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *cert. granted*, 94 S. Ct. 235 (1973).

65. Ford, *supra* note 55, at 507.

66. However the Equity Rules and the former Rule [23] did little to further this objective [aid the small claimant]. As Professor Kaplan stressed, the "smaller guy" normally is not involved with lawyers and legal proceedings. Not many of such persons would take affirmative action to intervene in a spurious action under the former Rule. Perhaps recognizing this reluctance to litigate on the part of the "smaller guy," the drafters of the amended Rule, by obviating in subsection (c) (2) this need for affirmative action, took a major step in the direction of securing for small claimants a mode for effective compensation. Subsection (c) (2) is probably the most dramatic indication that the chief purpose of the amended Rule is to aid the small claimant.

Id.

67. Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.

Kalven, *supra* note 57, at 686.

individual members of the spurious class action to meet the jurisdictional amount requirement of ten thousand dollars.[68]

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68. Prior to the *Snyder* decision, several different courts allowed the parties to a Rule 23(b)(3) class action to aggregate the amount of damages in order to satisfy the jurisdictional amount requirement. Based on the inherent purpose of Rule 23 as amended to provide redress for the small claimant, the district court in Snyder v. Epstein, 290 F. Supp. 652, 658 (D. Wis. 1968), held:

> The purposes of class actions would be largely defeated, especially in the situation like this one before the court where a stockholder is seeking to recover for the breach of trust by officers and directors of the corporations, [if] it is held that only persons with a claim in excess of $10,000 may institute a class action. With such reasoning, it is not inconceivable that corporate directors could be totally immune from suit in a federal court, although there could be literally hundreds of stockholders with a legitimate cause of action against the directors.

See Collins v. Bolton, 287 F. Supp. 393, 398, 399 (D. Ill. 1968); Booth v. General Dynamics Corp., 264 F. Supp. 465, 470-71 (D. Ill. 1967).

In *Snyder*, the Supreme Court granted certiorari to consider decisions of the fifth and eighth circuits that were in conflict with a decision of the tenth circuit on whether it was permissible to aggregate claims of members of a Rule 23 (b)(3) class action in order to satisfy the $10,000 jurisdictional amount necessary for a diversity of citizenship action pursuant to § 1332.

In Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967), the court held that named plaintiffs in a diversity action against defendant insurance company, brought as a Rule 23(b)(3) class action, could not aggregate their separate and distinct claims to meet the jurisdictional amount requirement. The court noted that the amended Rule 23, in regard to the issue of aggregation, is "of no avail to (plaintiffs) as it does not abrogate the well settled principle that separate and distinct claims may not be aggregated to make the jurisdictional amount even in a class action." *Id.* at 993. *Alvarez* was the controlling authority for the eighth circuit's *per curiam* decision in Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968), *aff'd*, 394 U.S. 332 (1969). The conflict between the circuits arose with Gas Service Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968), *rev'd*, Snyder v. Harris, 394 U.S. 332 (1969). In *Gas Service*, a consumer on his own behalf along with all other similarly situated sued to recover the gas company's overcharges. In reliance on Gibbs v. Buck, 307 U.S. 66 (1939), *Gas Service* held that the basic question was whether aggregation under *any* circumstances can meet the monetary restriction on federal jurisdiction. The Court looked to the Advisory Committee's Note, 39 F.R.D. 98 (1966), which placed "great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as 'true,' 'hybrid,' and 'spurious.'" 389 F.2d at 834. In allowing aggregation of the separate and distinct claims, the *Gas Service* court held:

> These terms [true, hybrid, and spurious] were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool

Snyder, in affirming the eighth circuit and reversing the fifth, disposed of the aggregation of claims issue arising under the jurisdictional predicate of diversity of citizenship. "Nowhere in its decision did the seven-man majority of the Supreme Court allude to the effect that the decisions might have upon the future of the spurious type of class action in federal courts, but the effect is apparent to any student of federal jurisdiction and procedure."[69]

B. Rule 23(b)(3) and Federal Questions

Notwithstanding learned commentary to the contrary,[70] the Supreme Court in *Snyder* and *Zahn* resolved in the negative whether aggregation of separate and distinct claims could be allowed in satisfaction of the jurisdictional amount requirement. The impact of these two decisions extends primarily to Rule 23(b)(3) class actions—the "spurious" class action.[71]

By act of Congress in execution of Article III, section 2 of the Constitution, the jurisdictional amount requirement is mandatory in all federal question cases.[72] Because of the numerous

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> of a class action must be workable if it is to be desirable. To now hold that the former classification of "true," "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

389 F.2d at 834.

69. Maraist & Sharp, *supra* note 25, at 383.
70. 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 569, at 106 (Supp. 1967) (comment by Professor Charles Alan Wright); Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount,* 10 B.C. IND. & COM. L. REV. 601, 609 (1969).
71. One of the major criticisms of the majority's decision in *Snyder* focused on the re-establishing by judicial fiat of the old nomenclature of unamended Rule 23. 394 U.S. at 343, 354 (Fortas & Douglas, JJ., dissenting). Consequently, the "well settled" aggregation rules that had developed along with the characterization of jural relations were resurrected with regard to class actions.

    In a "true" class action, the Court in Gibbs v. Buck, 307 U.S. 66 (1939), allowed the aggregation of joint and common interests. However, in Pinel v. Pinel, 240 U.S. 594 (1916), the Court prohibited aggregation of separate and distinct claims in order to invoke jurisdiction of the federal courts. This principle was held to apply to the separate and distinct claims of members in a "spurious" or "hybrid" classification. Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Snyder v. Harris, 394 U.S. 332 (1969); Zahn v. International Paper Co., 94 S. Ct. 505 (1973).
72. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, *as amended* 28 U.S.C. § 1331 (1964), provides in part:

    > The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and

exceptions to the jurisdictional amount requirement enacted by Congress,[73] the *Snyder* Court apparently determined that the rule against aggregation of separate and distinct claims would not appreciably affect the continued utilization and development of federal question class actions.[74] The antithesis of the *Snyder* Court's conclusion, as raised by Fortas' vigorous dissent,[75] serves as the context for the following discussion.

To appreciate fully the impact that *Snyder* and *Zahn* will have on future class actions fashioned as federal questions, it is necessary first to characterize the various types of federal questions to determine whether Congress has specifically provided

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arises under the Constitution, laws, or treaties of the United States.

Generally speaking, an action involves a federal question conferring jurisdiction in federal courts only where a right, privilege, title or immunity created by the Constitution, treaties or laws of the United States is an essential aspect of the plaintiff's cause of action; the action involves a question regarding the construction or effect of the Constitution; or validity, construction or effect of an act of Congress or a treaty for which determination is necessary in order to resolve the dispute. *See* WRIGHT, *supra* note 13, at 54-59; H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 844-926 (2d ed. 1973); Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942). Premised on the aforementioned jurisdictional basis of federal question, the subsequent analysis of whether a particular claim invokes the jurisdiction of the federal district court is twofold: first, whether the allged claim "arises under" the Constitution, laws or treaties of the United States; and second, if the first is resolved affirmatively, whether the claim satisfies the jurisdictional amount requirement. The second prong of this analysis is the object of § 1331. Section 1331 confers general federal question jurisdiction, as defined by the Constitution, on the federal district courts. Consequently, when determining the Court's construction of the jurisdictional amount requirement in *Snyder* and *Zahn*, it is necessary to ascertain or characterize the type of federal question alleged in order to apply the appropriate amount in controversy provision enacted by Congress.

73. 28 U.S.C. §§ 1333 (admiralty), 1334 (bankruptcy), 1335 (statutory interpleader), 1336 (Interstate Commerce Commission), 1337 (interstate commerce and antitrust questions), 1338 (patents and copyrights), 1339 (postal questions), 1340 (internal revenue) and 1343 (civil rights) (1970). *See also* WRIGHT, *supra* note 13, § 32, at 107-08.

74. "A large part of those matters involving federal questions can be brought, by way of class actions or otherwise, without regard to the amount in controversy." 394 U.S. at 341.

75. Justice Fortas argued that the effect of the majority's decision "is substantially to undermine a generally welcomed and long-needed reform in federal procedure. . . . Its impact will be noticeable . . . in important classes of federal question cases. . . ." 394 U.S. at 332, 342 (1969).

an exception to the amount in controversy requirement. As the several types of federal questions are examined, the diminished utility of the 23(b)(3) class action will become readily apparent where satisfaction of the jurisdictional amount requirement is not allowed by aggregation of separate and distinct claims in actions with common questions of law and fact.

The first category for discussion of federal questions involves those claims, arising under the Constitution, laws or treaties of the United States, where section 1331 serves as the jurisdictional predicate. In order to redress a claim under section 1331, the plaintiff must consider the requirement of the jurisdictional amount. In the landmark case of *Bell v. Hood*,[76] the Court held that plaintiffs had alleged a substantial federal question in charging defendants' violation of rights secured to plaintiffs under the fourth and fifth amendments to the Constitution of the United States. After determining that plaintiffs had adequately pleaded amount in controversy, the Court reversed the lower court for denying subject matter jurisdiction over the cause of action.

More recently, plaintiffs seeking to maintain class actions under section 1331 have had considerable difficulty invoking federal district court jurisdiction. In *City of Inglewood v. City of Los Angeles*,[77] plaintiffs sought to maintain a class action based upon the noise arising in the operation of an airport by defendant city. In reversing the federal district court's dismissal of plaintiff's complaint, the court of appeals held that plaintiffs had invoked federal jurisdiction by properly alleging a substantial federal question. The court ruled, however, that the class action aspect of the complaints should be dismissed since aggregation of separate and distinct claims to satisfy the jurisdictional amount requirement was precluded by the Supreme Court's decision in *Snyder*.[78]

The *Snyder* decision was utilized as controlling authority frustrating plaintiff's attempt to invoke federal question jurisdiction in *Rosado v. Wyman*.[79] Plaintiff welfare recipients brought a class action challenging the constitutionality of a New York social services law. In reversing the district court, the court of appeals held that although the plaintiffs may have properly raised a federal question, they were not allowed to aggregate their separate

76. 327 U.S. 678 (1946). *See also* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
77. 451 F.2d 948 (9th Cir. 1972).
78. *Id.* at 952, 956-57.
79. 414 F.2d 170 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 397 (1970).

and distinct claims in satisfaction of the ten thousand dollar requirement.[80]

The first type of federal questions, cases arising under section 1331, clearly illustrates the "unfortunate[81] and disheartening[82] results of the continuance of the *Snyder* rule."[83]

The second category of federal questions arises through congressional enactment of substantive law creating private rights and duties with attendent provisions for original jurisdiction in federal courts.[84] This type of federal question is illustrated by *Textile Workers Union of America v. Lincoln Mills.*[85] The Court in *Lincoln*

80. The district court ruled that the named plaintiffs' damages did not exceed $10,000; however, the judge ruled that the "indirect damage" they might sustain as a result of the reduced payments was sufficient to satisfy the amount in controversy requirement. 414 F.2d at 176. The court of appeals reversed by holding " 'indirect damage' is too speculative to create jurisdiction under Section 1331." *Id.* The appellate court went on to observe

> [i]t is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars. The rule was laid down in Barry v. Mercein, 46 U.S. (5 How.) 103 . . . (1847) . . . . 'The words of the act of Congress are plain and unambiguous . . . . There are no words in the law, which by any just interpretation can be held to . . . authorize us to take cognizance of cases to which no test of money can be applied. 46 U.S. at 120.'

Id. at 176-77.

81. Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount*, 10 B.C. IND. & COM. L. REV. 602, 606 (1969).
82. 49 B.U.L. REV. 682, 715 (1969).
83. Strausberg, *supra* note 18, at 99. For a general discussion of additional cases under the category of general federal questions, see Strausberg, *supra* note 18, at 99-102. *See also* Opelika Nursing Home, Inc. v. Richardson, 448 F.2d 658 (5th Cir. 1971); Spears v. Robinson, 431 F.2d 1089 (8th Cir. 1970); Kiernan v. Lindsay, 334 F. Supp. 588 (S.D.N.Y.), *aff'd*, 405 U.S. 1000 (1971); Jones v. North Bergen, 331 F. Supp. 1281 (D.N.J. 1971); Bass v. Rockefeller, 331 F. Supp. 945 (S.D.N.Y. 1971); Dougall v. Sugarman, 330 F. Supp. 265 (S.D.N.Y. 1971); Holloway v. Bristol-Myers Corp., 327 F. Supp. 17 (D.D.C. 1971); Buckingham v. Lord, 326 F. Supp. 218 (D. Mont. 1971); English v. Town of Huntington, 335 F. Supp. 1369 (E.D.N.Y. 1970); Spears v. Mont Etna Morris, 313 F. Supp. 52 (W.D. Mo.), *aff'd*, 431 F.2d 1089 (8th Cir. 1969); Fischer v. Division West Chinchilla Ranch, 310 F. Supp. 424 (D. Minn. 1970); Local 1497, National Fed'n of Fed. Emp. v. City and County of Denver, 301 F. Supp. 1108 (D. Colo.), *appeal dismissed*, 396 U.S. 273 (1969); Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F. Supp. 85 (D. Mont. 1969).
84. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15-54 (1973) [hereinafter cited as FRIENDLY].
85. 353 U.S. 448 (1957). *See* Strausberg, *supra* note 18, at 89-90, for a general discussion of the federal question aspects of *Lincoln Mills.*

Mills noted it was Congress' intent in enacting the Labor Management Relations Act of 1947[86] that unions as well as employers be bound to collective bargaining contracts.[87] Although Congress did not expressly provide a remedy compelling the employer to bargain collectively with the union, the Court held that by conferring jurisdiction on the federal courts, Congress intended federal courts to fashion necessary remedies. The analysis of *Lincoln Mills* is twofold. First, Congress enacted substantive policy requiring unions and employers to fulfill labor contract obligations—the collective bargaining agreement. In so doing, Congress created specific substantive rights and obligations of primary conduct addressed to private parties. Second, the analysis should focus on jurisdictional considerations of a suit seeking redress of rights and obligations created by Congress. Section 301 of the act provides in pertinent part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, *without respect to the amount in controversy* or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.[88]

In construing section 301, the Court held that the above provisions created substantive rights and remedies in addition to conferring original jurisdiction irrespective of jurisdictional amount.

The *Lincoln Mills* decision is extremely important in that it illustrates the type of federal question arising under the "laws" of the United States where Congress has expressly provided a specific exception to the amount in controversy requirement.[89]

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86. 29 U.S.C. §§ 161 *et seq.* (1965).
87. 353 U.S. at 453.
88. 29 U.S.C. § 185(a)(b) (1965) (emphasis added).
89. *See, e.g.*, Schneider v. Electric Auto-Lite Co., 456 F.2d 366 (6th Cir. 1972); Harris v. Chemical Leamon Tank Lines, Inc., 437 F.2d 167 (5th Cir. 1971); Acree v. Air Line Pilots Ass'n, 390 F.2d 199 (5th Cir.), *cert. denied*, 393 U.S. 852 (1968); International Longshoreman's & Warehouseman's Union v. Kuntz, 334 F.2d 165 (9th Cir. 1964).

Therefore, in regard to certain labor management questions, Congress has authorized private actions in federal courts where *Snyder* and *Zahn* will not frustrate the utility of a Rule 23(b)(2) or (3) class suit.[90]

Beyond the area of labor law, "Congress has been far from idle in creating new federal statutory rights during the last decade."[91] Consequently, in each instance where Congress has expressly enacted federal substantive rights[92] or where federal rights are to be implied from statutory enactments,[93] the juris-

90. *See* Illinois Cent. R.R. v. Brotherhood of Locomotive Eng'rs, 288 F. Supp. 504 (N.D. Ill. 1968) (employer allowed to bring class action to enjoin labor organization from instituting strike).

91. FRIENDLY, *supra* note 84, at 22. Judge Friendly illustrates his point by collecting a representative sampling of some recent congressional enactments:

> Investment Company Act Amendments of 1970, § 20, 84 Stat. 1428, 15 U.S.C. § 80a-35 (permitting actions by the SEC and private parties for certain violations of the Act); Egg Products Inspection Act, §§ 20, 21, 84 Stat. 1631-32 (1970), 21 U.S.C. §§ 1049, 1050 (authorizing actions by the United States for the seizure of products which are to be sold in violation of the Act); Fair Credit Reporting Act, § 601, 84 Stat. 1134 (1970), 15 U.S.C. § 1681p (actions by private parties to recover penalties specified in the Act); Public Health Cigarette Smoking Act of 1969, § 2, 84 Stat. 89, 15 U.S.C. § 1339 (authorizing actions by the Attorney General to enjoin violations of the Act); Federal Coal Mine Health and Safety Act of 1969, § 108, 83 Stat. 756, 30 U.S.C. § 818 (authorizing actions by the Secretary of the Interior to enjoin violations of the Act); Consumer Credit Protection Act, § 130, 82 Stat. 157 (1968), 15 U.S.C. § 1640 (suits by private parties to recover statutory penalties); Interstate Land Sales Full Disclosure Act, 82 Stat. 595 (1968), 15 U.S.C. § 1710 (suits for untrue statement or omission to state material fact, or for prohibited sale or lease); Wholesome Meat Act, § 16, 81 Stat. 597-99 (1967), 21 U.S.C. §§ 671-74 (actions by private parties to challenge certain determinations of the Secretary of Agriculture and actions by the Secretary to enjoin violations of the Act); National Traffic and Motor Vehicle Safety Act of 1966, § 110, 80 Stat. 723, 15 U.S.C. § 1399 (authorizing actions by the Attorney General to enjoin violations of the Act); 1971 Economic Stabilization Act Amendments, 85 Stat. 743 (suits in respect of prices exceeding those permitted by Price Commission); Federal Water Pollution Control Act Amendments of 1972, § 309(b), 86 Stat. 815 (suits by Administrator to enjoin violation of the Act).

Id. at 24 n.53.

92. *See* note 91 *supra*.

93. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). In *Kardon*, the court held that the cause of action for redressing private claims properly invoked federal court jurisdiction. The court found that 15 U.S.C. § 78a (1971) of the Securities Exchange Act of 1934 provided exclusive jurisdiction over the plaintiff's cause of action, even though the action was derived from rights implied from the standards of primary conduct promulgated by Congress. *Id.* at

dictional aspects of these enactments must be considered to determine whether section 1331's jurisdictional amount requirement has been expressly waived.

In addition to federal statutes creating substantive rights with corresponding provisions for federal court jurisdiction irrespective of amount in controversy, Congress has enacted several general exceptions to the jurisdictional amount requirement found in section 1331.[94] In more recent years, the most important of these has probably been section 1343(3) of Title 28 of the United States Code[95] which provides the jurisdictional basis for civil rights suits in federal courts:[96]

> The prime vehicle for equal protection litigation . . . has been the Civil Rights Act of 1871 [Act of April 20, 1871, ch. 22, §1, 17 Stat. 13], 42 U.S.C. section 1983, and its jurisdictional implementation, 28 U.S.C. section 1343 (3), which are peculiarly attractive because of the appropriate absence of any amount in controversy requirement.[97]

Moreover, whereas traditionally civil rights actions have been confined to violations of personal liberty,[98] the Supreme Court in *Lynch v. Household Finance Corp.*[99] extended the scope of protected

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513. Thus, in the instant case, even though the rights for which plaintiffs sought recovery were implied, Congress expressly granted jurisdiction to the federal courts. Moreover, the amount in controversy requirement was expressly waived by Congress. *See also* Texas & Pac. R.R. v. Rigsby, 241 U.S. 33, 39 (1916).

94. *See* note 73 *supra.*

95. 28 U.S.C. § 1343 (1958) provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. . . .

96. Judge Friendly recently characterized private actions charging violation of federal civil rights as "the outstanding category of federal question jurisdiction today." FRIENDLY, *supra* note 84, at 75. For a concise summary of civil rights litigation, see *id.* at 75-92.

97. *Id.* at 19. In Douglas v. City of Jeannette, 319 U.S. 157 (1943), the Court held that federal district courts had jurisdiction over a civil rights action based on § 1343, arising under 42 U.S.C. § 1983 (1970), without allegations or proof of any jurisdictional amount. *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

98. FRIENDLY, *supra* note 84, at 91 n.69.

99. 405 U.S. 538 (1972). *See* Strausberg, *supra* note 18, at 101 n.152.

interests to include property rights. Thus, with an expanded arena for civil rights actions as defined by federal statutes and the Court, "every conceivable attack on state action violating a specific provision of the Constitution"[100] apparently comes under the umbrella of the civil rights exception to the amount in controversy requirement.

Although Judge Friendly is correct in concluding that the amount in controversy requirement does not hinder private actions charging state action violation of constitutionally secured rights, there are numerous situations where private redress of state action in federal courts is precluded unless the jurisdictional amount requirement is satisfied. Despite the fact a plaintiff raises a federal question when challenging the action of state officials infringing rights secured by federal statute, the amount in controversy nevertheless must be satisfied before the plaintiff may invoke federal jurisdiction. This jurisdictional obstacle confronting the small claimant clearly impinges upon the viability of a Rule 23(b)(3) class action.[101]

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100. FRIENDLY, *supra* note 84, at 121.

101. Other than federal questions against federal officials,

> [t]he remaining general federal question cases fall into two principal classes: suits by citizens against state officers and suits between private citizens. Under the Supreme Court's recent ruling [in *Lynch v. Household Finance Corp.*] the former are now cognizable in federal court without regard to amount, under the jurisdictional implementation of the Civil Rights Act, if the state action is alleged to have violated the Constitution even as regards property rights. *However, the $10,000 amount is required if the complaint alleges merely that the state has violated a federal statute, unless the statute be one providing for equal rights of citizens,* a phrase that has properly been given a rather narrow meaning. Suits between private citizens generally will not be cognizable in the absence of the jurisdictional amount unless there is a specific provision for such suits in the relevant statute or they arise under one of the types of statute [sic] described in various sections of Chapter 85, notably "any Act of Congress regulating commerce or protecting trade or commerce against restraints and monopolites." [28 U.S.C. § 1337 (1958)].

FRIENDLY, *supra* note 84, at 122 (citations omitted) (emphasis added). *See* Strausberg, *supra* note 18, at 94-102, for a rather detailed discussion of the impact of *Snyder*, and now as extended by *Zahn*, on federal question class actions where the amount in controversy requirement must still be satisfied. Strausberg concludes his discussion by contending that *Snyder* precludes the individual with small claims from effectively redressing federally "secured rights" in such important areas of the law as: (1) consumer protection, see E. KITCH & H. PERLMAN, LEGAL REGULATION OF THE COMPETIVE PROCESS 123-38 (1972); Krahmer, *Some Problems of Consumer Class Actions*, 7 U. RICH. L. REV. 213 (1972); (2) federal housing and tenant actions, see

In summary, the second general category of federal questions includes actions based on specific congressional promulgation of substantive rights with attendent jurisdictional provisions; or the more general statutory waivers of the jurisdictional amount requirement as illustrated by section 1343. The jurisdictional amount requirement in numerous instances will not impose an obstacle to the small claimant seeking to unite with others similarly situated in a Rule 23 (b) (3) class suit.

In the third general category of federal questions, however, the small claimant does confront the burdensome *Snyder* decision. As observed by Judge Friendly,

> [t]he area where a jurisdictional amount for federal question cases has long been recognized to be most offensive[102] is one considered in the discussion of suits against the United States,[103] namely, suits against federal officers or agencies to enjoin or require action alleged to be forbidden or required by federal law.[104]

In *Oestereich v. Selective Service System Local Board No. 11*,[105] the petitioner, in protest of the Vietnam war, returned his draft card to his local selective service board. The board responded by withdrawing the divinity student's exempt classification and ordering him to report for induction. The Court held that the board had exceeded its jurisdictional authority. Despite the statutory preclusion of pre-induction judicial review, the Court stated that the federal district court should have granted judicial review of the petitioner's cause of action.[106] The Court reversed the judgment and remanded the case to the district court "where petitioner must have the opportunity to prove the facts alleged and also to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. § 1331."[107]

Although *Oestereich* is not a case involving a class action, it illustrates that actions against federal officials, if federal jurisdiction is to be invoked, must be brought under the general federal question provision of section 1331, unless Congress has

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1971 WASH. U.L.Q. 696 (1971); and (3) environmental protection, see 70 COLUM. L. REV. 734 (1970); 2 ECOLOGY L.Q. 533 (1972).

102. *See* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 220 (1948) [hereinafter cited as Wechsler].

103. See FRIENDLY, *supra* note 84, at 69-70.

104. *Id.* at 121. *See* Comment, *The Constitutional Implications of the Jurisdictional Amount Provision in Injunction Suits Against Federal Officers*, 71 COLUM. L. REV. 1474 (1971).

105. 393 U.S. 233 (1968).

106. *Id.* at 239.

107. *Id.*

expressly provided otherwise.[108] In *Hartman v. Secretary of Department of Housing & Urban Development*,[109] plaintiffs brought a class action seeking a declaratory judgment as to the validity of the federal government's requirement that "occasional consultants" undertake a loyalty oath before being compensated for services rendered. The federal district court dismissed the complaint without prejudice since plaintiffs failed to allege that the amount in controversy exceeded the sum of ten thousand dollars. The court said this sum could not be satisfied by aggregation since the class action was "spurious" in nature.[110]

Notwithstanding viable alternatives and recommendations to the contrary,[111] *Oestereich* and *Hartman* demonstrate how the amount in controversy requirement, a requisite jurisdictional element in suits against the United States in federal courts, frustrates effective redress of numerous important federal questions.

In looking back over the three general categories of federal questions discussed above, the present "patch-work structure" of federal questions and the requisite amount in controversy is indefensible.[112] Because of the "patch-work structure," many commentators support abolishing the jurisdictional amount requirement for "initial invocation of jurisdiction in general federal question cases."[113] Such a move seems necessary to assure that class actions

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108. "[T]here are instances where Congress has neither provided for nor excluded such review, and it is in these that the problem of jurisdictional amount still arises." FRIENDLY, *supra* note 84, at 122. *See* 1 RECOMMENDATION AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 169 (1970) which provides that Title 28 should be amended

> to eliminate any requirement of a minimum jurisdictional amount before U.S. district courts may exercise original jurisdiction over any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States or any agency thereof, acting under color of Federal law.

Professor Davis addresses the problem of amount in controversy in actions against the United States from a different vantage. It is his contention that § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (1971), serves as a congressional grant of original jurisdiction in federal court where the requirement of jurisdictional amount has been deleted. However, as noted by Judge Friendly, "The courts have been slow either to affirm or to deny this proposition." FRIENDLY, *supra* note 84, at 122 n.65.

109. 294 F. Supp. 794 (D. Mass. 1969).

110. *Id.* at 796.

111. *See* note 108 *supra*.

112. FRIENDLY, *supra* note 84, at 123.

113. *Id.* *See* WRIGHT, *supra* note 13, at 110:

> It is difficult to understand why there should ever be a monetary requirement in federal question cases. The re-

have a viable role in resolving important federal questions involving substantive rights and determination of public policy at the national level of government.

C. An Environmental Case Study

The named plaintiffs in *Zahn* invoked federal district court jurisdiction by alleging diversity of citizenship. To appreciate the full impact of the Supreme Court's affirmation of the dismissal of the class action aspects of the case for want of the requisite amount in controversy on the part of the unnamed class members, the case will be considered in terms of a federal question arising under federal common law with jurisdictional implementation under section 1331.

In the landmark case of *Illinois v. City of Milwaukee*,[114] Illinois sought to invoke the Court's original jurisdiction to abate a public nuisance of interstate water pollution. Although the Court rejected plaintiff's contention that it had original and exclusive jurisdiction as granted by Congress under section 1251 (a) (1) of Title 28 of the United States Code, a unanimous Court remanded the case to the federal district court, observing that it would be proper for the plaintiff to invoke jurisdiction based on principles of federal common law.[115]

In arriving at the determination that plaintiff's complaint arose under federal common law, the Court noted

> the question is whether pollution of interstate or navigable waters creates actions arising under the "laws" of the United States within the meaning of § 1331(a). We hold that it does; and we also hold that § 1331(a) includes suits brought by a state.[116]

This conclusion was in part based on Judge Harvey M. Johnsen's statement in *Texas v. Pankey*[117] of the controlling principle:

> quirement is of extremely limited application, and when it does apply the effect is to deny a federal forum in cases in which the amount involved is small but for which the federal courts have a special expertness and a special interest.

For concurrence with Judge Friendly and Professor Wright, see AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1311(a) (1969) [hereinafter cited as ALI STUDY]; Wechsler, *supra* note 102, at 225-26.

114. 406 U.S. 91 (1972).

115. *See* Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 789 (1963); Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 412-21 (1964); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969); Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439 (1972).

116. 406 U.S. at 99. *See also* 52 NEB. L. REV. 301 (1973).

> As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.[118]

Implied in the afore-mentioned statement of the court in *Pankey* is the increasing awareness of the national ramifications of unabated interstate water and ambient air pollution. The *Illinois* decision is properly viewed as the judicial corollory to actions previously taken by Congress to meet ever-increasing problems in this area. Because Congress had taken the initiative in response to environmental problems,[119] the Court viewed its tasks as defining the substantive rights and duties predicated on existing congressional promulgations of national standards and policy.[120]

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117. 441 F.2d 236 (10th Cir. 1971). *See* Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439 (1972).

118. 441 F.2d at 240, *cited approvingly*, 406 U.S. at 99-100.

119. *See* 406 U.S. at 101-03 (brief discussion of legislation pertaining to interstate waters). In more recent years, Congress has enacted numerous pieces of legislation concerned with air and water pollution problems. Many enactments establish standards of primary conduct directed to government and industry with enforcement responsibilities residing in the public as well as private sectors. *See, e.g.*, Clean Air Amendments of 1970, 42 U.S.C. §§ 1857d(g), 1857h-2 (1964) (authorizing suits by the attorney general on behalf of the Environmental Protection Agency administrator and limited actions by private individuals to enjoin violation of the act); Water Quality Improvement Act of 1970, 33 U.S.C. § 1163(i) (1964) (allowing federal suits to enjoin violations of the act); Noise Control Act of 1972, 42 U.S.C. §§ 4910, 4911 (1970) (allowing suits by the United States to enjoin violations of the act, and limited actions by private citizens to enjoin violations of the act); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1319, 1365 (Supp. 1973) (authorizing actions by the Environmental Protection Agency administrator and private citizen suits to enjoin violation of the act). *See generally* O. GRAY, CASES AND MATERIALS ON ENVIRONMENTAL LAW (2d ed. 1973).

120. Pursuant to the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321 *et seq.* (1970), Congress

> "authorizes and directs" that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act" and that "all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical consideration." Sec. 102, 42 U.S.C. § 4332.

406 U.S. at 101-02. With this broad statement in mind, the Court in *Illinois* went on to add that

Therefore, in looking to its prior decision in *Lincoln Mills*, where the Court was willing to fashion substantive rights under section 301(a) of the Labor Management Relations Act of 1947,[121] the Court when confronting an issue of environmental pollution concluded:

> The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. "It is not uncommon for federal courts to fashion federal laws where federal rights are concerned." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457.[122]

Thus, with the need for uniform standards of environmental rights as the requisite tool for implementation of congressional policy, "only a federal common law can provide an adequate means for dealing with such claims as alleged federal rights. And the logic and practicality of regarding such claims as being entitled to be asserted within the federal-question jurisdiction of § 1331(a) would seem self-evident."[123]

Based on the Supreme Court's recognition of federal common law involving interstate water pollution in Illinois, the named plaintiffs in *Zahn* could have invoked the jurisdiction of the federal district court alleging that discharge from the New York corporation's pulp and paper-making plant violated congressional standards giving rise to a federal question under section 1331. Even though *Illinois* authorizes such suits under federal common law as implemented by section 1331, the plaintiffs must nevertheless satisfy the requirement of jurisdictional amount. After authorizing federal question jurisdiction, the Court noted that "[t]he considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331(a)."[124] Reading this language broadly, it might be argued the Court intended all questions arising under federal common law involving interstate water pollution to satisfy the requisite amount in controversy. Such an interpretation of the Court's decision could stem only from a misconception of the case's underlying facts.

> [t]he Federal Water Pollution Control Act in § 1(b) declares that it is federal policy "to recognize, preserve, and protect the primary responsibilities and rights of the states in preventing and controlling water pollution." *But the Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters.*

406 U.S. at 102 (emphasis added).

121. *See* note 88 and accompanying text *supra*.
122. 406 U.S. at 103.
123. *Id.* at 107 n.9.
124. *Id.* at 98.

In *Illinois* the State of Illinois was the sole plaintiff. By granting that Illinois' considerable interest in the purity of Lake Michigan exceeded ten thousand dollars, the Court made it clear that rather than assuming all interstate water pollution cases automatically satisfy the jurisdictional amount, federal courts are to require each individual claimant to allege the requisite amount with respect to his own interest. This narrower reading of the Court's language is consistent with the *Zahn* decision.

Although the named plaintiffs in *Zahn* invoked federal jurisdiction by alleging diversity of citizenship, the Supreme Court affirmed the dismissal of the class action since the unnamed class members had not alleged with necessary certainty that their interests had been damaged in excess of ten thousand dollars. Because determining amount in controversy is the same under both diversity of citizenship and federal questions, the Court would deny aggregation of the unnamed class members' claims in the hypothetical case reframed as a federal question under federal common law just as it did in *Zahn*.

If the Court will not allow aggregation of unnamed class members' claims, despite congressional promulgation of national policies and primary conduct standards recognized in *Illinois* as giving rise to federal common law, plaintiffs alleging injuries less than the jurisdictional amount will be denied redress in federal court. Such a result conflicts with the Court's conclusion in *Illinois* that a federal common law pertaining to interstate water and ambient air pollution is necessary to implement environmental legislation enacted by Congress.

D. Class Actions in State Courts

Since denying aggregation of the unnamed class members' claims bars jurisdiction of their claims in federal court under section 1331, the following discussion will consider viability of successful prosecution of class actions in state courts.[125]

"Although most states provide for some form of class action, state remedies are generally inadequate, inefficient, and ineffec-

125. *See* D. JONES & C. WELDON, LAWYER'S READY REFERENCE TO CLASS ACTIONS 55-77 (1972) [hereinafter cited as JONES & WELDON]; Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407 (1969) (a comprehensive examination of procedural problems attendent to state class actions) [hereinafter cited as Starrs]; Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971) (a definitive discussion and analysis of the current status of class actions in most state jurisdictions) [hereinafter cited as Homburger].

tive."[126] In examining the current status of class actions at the state level, Professor Homburger describes three types of class action statutes which predominate in the United States:[127]

> (1) the New York provision, dating back to an 1849 amendment of the Field Code, which spread to many other states; (2) state statutes modelled on rule 23 of the Federal Rules of Civil Procedure as it existed prior to July 1, 1966; and (3) the new federal rule 23 which has governed class actions in federal district courts since July 1, 1966 and which has been adopted by a number of states.[128]

As Professor Homburger's classification indicates, the statutory class action provisions at the state level are in an evolutionary process which has not obtained the degree of maturation found in the federal courts.

The problems confronting the plaintiff seeking a class action in state court is clearly evidenced in the states where the statutory provisions of the 1848 Field Code are still maintained. As an example of this type of statutory class action, Professor Starrs summarized the situation in Nebraska:[129]

> The Nebraska decisions under the state's class action statute are so few in number that wide generalization would be hazardous. However, it has been held that a class action will have binding effect,[130] that single-issue class actions will have a preferred status[131] and that the named representative is not free to dismiss or compromise a class action over the objections of class members.[132] And, most significantly, it has been said, in dictum, that the economic infeasibility[133] of any other course of action by the

126. Strausberg, *supra* note 18, at 93. *See also* Leete, *The Right of Consumers to Bring Class Actions in the Federal Courts—An Analysis of Possible Approaches*, 33 U. PITT. L. REV. 39 (1971).

127. In addition to the three types of class action statutes identified by Professor Homburger, several states do not have statutory provisions for class actions. *See, e.g.*, Mississippi, New Hampshire, Rhode Island and Vermont, JONES & WELDON, *supra* note 125, at 142, 146, 153, 156. In each of these states, the common law class action is recognized but there are no statutory procedures. *See also* Starrs, *supra* note 118, at 425-33.

128. Homburger, *supra* note 125, at 612.

129. Nebraska's class action statute, NEB. REV. STAT. § 25-319 (Reissue 1964), provides:

> **Class Actions; representation.** When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

130. Hickman v. Loup River Pub. Power Dist., 173 Neb. 428, 435-36, 113 N.W.2d 617, 622 (1962).

131. *Id.*; Gamboni v. County of Otoe, 159 Neb. 417, 57 N.W.2d 489 (1954).

132. 173 Neb. at 438, 113 N.W.2d at 623.

133. Keedy v. Reid, 165 Neb. 519, 86 N.W.2d 370 (1957).

> class will cause the court to look with favor on the class action.[134]

In Nebraska as well as in other states still relying on the class action provisions of the old Field Code, the dearth of class action juisprudence is generally attributed to three major problem areas.

As analyzed by Professor Homburger, the most puzzling procedural problem is presented at the very outset.[135] The difficulty arises as a question of statutory construction.

> If the disjunctive "or" which connects the two clauses of the provision[136] were read literally, class actions would be available in two separate and distinct situations: (1) when the question is one of a common or general interest of many persons; *or* (2) when the parties composing the class are very numerous[137] and it may be impracticable to join them all. Since impracticability of joinder, an express requirement under the second alternative clause, is not mentioned in the first, the statute, on its face, seems to authorize class actions under the first clause even if joinder is practicable.[138]

This statutory problem is more than just of academic significance since the disjunctive construction would aid those prosecuting the class action in overcoming the state courts' imposition of the burdensome requirement that all parties to the action have a "common or general interest."[139] To date most courts have failed to confront, let alone resolve, this construction problem; consequently, the evolution of the class action at the state level has been somewhat restricted.[140]

Attendant to the statutory construction problem are the second and third considerations of compulsory joinder of parties and the notion of privity. Since the Field Code's class action provision was part of the same statutory provision pertaining to joinder of parties, the courts very early saw the class action as an escape from the common law's compulsory joinder of parties requirement. By confining judicial consideration to this restrictive view of joinder, as opposed to the more liberal rules of permissive joinder of parties under the modern federal rules,[141] the courts used the "common or general interest" provision as a substantive standard defining compulsory joinder of parties. Thus, successfully to prosecute a class action in state courts under the

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134. Starrs, *supra* note 125, at 455.
135. Homburger, *supra* note 125, at 614.
136. N.Y. Session Laws 1849, ch. 438, § 119. *See* note 129 *supra.*
137. *See* Homburger, *supra* note 125, at 614, n.32.
138. *Id.* at 614.
139. Starrs, *supra* note 125, at 437.
140. *Id.* at 438.
141. *See* FED. R. CIV. P. 20. *See also* WRIGHT, *supra* note 3, at 302-06.

Field Code, plaintiffs were required to establish that the parties to the action had sufficient common or general interests. This concept was traditionally construed to mean class members needed joint or common interests in specific funds or properties. It is in this sense that the courts required the parties to establish a privity relationship to the subject matter of the suit.[142] The various state courts operating under the Field Code hardly agreed as to the precise definitions of "common or general interest" or "privity."[143]

It is hardly surprising that parties attempting to use state class actions under the Field Code, or modified versions of the Code, have met with limited success. More important, is the inescapable conclusion that the state courts have been hostile to the so-called "spurious" class actions. It is doubtful whether the *Zahn* class members who were denied jurisdiction in federal court could maintain a class action in a New York court, a Field Code state, or in a Vermont court, a common law class action state.[144]

Based on the preceding discussion regarding the viability of perfecting a "spurious" class action in a state court, unless the ap-

142. *See* Homburger, *supra* note 125, at 615; Starrs, *supra* note 125, at 434-36, 439-44.

143. *See* Homburger, *supra* note 125, at 617-21, which presents the very restrictive view taken by the New York courts. *See, e.g.*, Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970). The New York decisions should be carefully contrasted with the more liberal construction of Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). *See also* Homburger, *supra* note 125, at 624 n.89; Annot., 132 A.L.R. 749 (1941).

144. The 1938 Federal Rule 23 class action was designed to accomplish two basic purposes: (1) "redefine 'more incisively' the meaning of the 'common or general interest' requirement of the Field Code." Starrs, *supra* note 125, at 463; and (2) expand the restrictive Field Code so as to provide for the "spurious" class action which in effect abandoned the common or general interest test as to this type of class action. *Id.* at 464. Few states adopting Federal Rule 23 class action provisions left them unchanged. Many of the modifications reflected the well-engrained class action law developed under the Field Code. Moreover, most of the confusion plaguing the state courts where Rule 23 was adopted concerned the new "spurious" class action. The cases confronting this new breed of class action were the source of "the most gruesome incongruities and obscurities imaginable." *Id.* at 466. Two states, Louisiana and Georgia, went so far as to do away with the "spurious" class action altogether. *Id.* at 470.

Because very little law has been developed, especially in states which adopted the third class action category, Federal Rule 23(b)(3) as amended in 1966, the state class action has not evolved to the point where it can be the useful procedural tool that it is in federal court. This would appear especially true when concern is focused on the "spurious" type of class action. *See id.* at 463-92.

proximately two hundred unnamed class members in *Zahn* elected to proceed individually or, if allowed, as parties permissively joined, they would be without redress of their alleged injuries. Moreover, if the plaintiff lakefront owners and lessees are not allowed to prosecute their class actions[145] in state court, or if they decide economic realities preclude them from individually assuming the burden of an expensive environmental suit,[146] an important question of environmental law will remain unlitigated. On the other hand, if they proceed individually with their claims, the state courts are burdened unnecessarily with multiple suits requiring repetitious litigation of essentially identical questions of law and fact. This creates the definite possibility that actions in various state courts will result in legally inconsistent decisions.

Regardless of the ultimate resolution of the various alternatives available to the *Zahn* class members, the Supreme Court's *Snyder* decision, as extended by *Zahn,* creates an untenable dilemma: the underlying policy of amended Rule 23 is juxtaposed with congressional enactment of substantive rights and standards of primary conduct which have given rise to federal common

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145. The notion that the litigants are free to pursue their rights in a state court may not always be realistic if the state procedural system tends to discourage class actions or if the individual claims are so small that the class members are remitted to a small claims court or a court of limited jurisdiction that is not authorized to hear class actions.
7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1756, at 561 (1972) [hereinafter cited as WRIGHT & MILLER]. It is important to note that the state courts disagree about whether separate and distinct claims should be aggregated to allow parties to invoke original jurisdiction. In Davies v. Columbia Gas & Elec. Corp., 151 Ohio St. 417, 86 N.E.2d 603 (1949), aggregation of separate and distinct was not permitted. *But see* Duke v. Boyd County, 225 Ky. 112, 7 S.W.2d 839 (1928). *See also* Annot., 141 A.L.R. 569 (1942) (general overview of state aggregation rules); Starrs, *supra* note 125, at 411.

146. Whether parties might prosecute their claims individually is a multifaceted question. The individual party's decision will probably depend on the size of his claim contrasted with the cost of proving his case. As environmental litigation has become often too costly for the plaintiff with small claims, many claims go unredressed where parties are not allowed the class action. Consequently, plaintiffs should carefully consider the rules of collateral estoppel. In states where mutuality is no longer required, small claimants individually may be able to litigate their claims if they can offensively rely on resolution of the same issue litigated by other plaintiffs against the same defendant. *See* F. JAMES, CIVIL PROCEDURE §§ 11.18-.22 (1965); Blonder-Tongue Labs., Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942) (rejection of the doctrine of mutuality).

law concerning water and air pollution. With the issue joined in this fashion, resolution might be realized by reconsidering the basis for the *Snyder* decision.[147]

The controlling authority for the *Snyder* decision was *Clark v. Paul Gray, Inc.*[148] The plaintiffs in *Clark* joined in an action to enjoin the state officers charged with a duty of enforcing an automobile tax. The district court found that the plaintiffs had sufficiently invoked federal jurisdiction by asserting that the amount in controversy exceeded the statutory requirement.[149] The Court raised *sua sponte* the question whether jurisdictional amounts were in controversy. Although the defendants' motion challenging the bill of complaint for want of amount in controversy was withdrawn, the Court held:

> The bill of complaint alleges generally that "the amount involved in this litigation is in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and costs." But it is plain that this allegation is insufficient to satisfy jurisdictional requirements where there are numerous plaintiffs having no joint or common interest or title in the subject matter of the suit. As the bill of complaint shows on its face, and as the findings establish, each [plaintiff] maintains his own separate and independent business, which is said to be affected by the challenged fees. No joint or common interest of [plaintiffs] in the subject matter of the suit is shown.[150]

After characterizing the plaintiffs' claims as separate and distinct, the Court disallowed aggregation of claims in satisfaction of the jurisdictional amount. Thus, the plaintiffs in *Clark* with claims less than the requisite amount were dismissed for want of jurisdiction.[151]

A major criticism of the *Snyder* decision concerns the Court's treatment of the *Clark* decision as controlling authority for the construction of amended Rule 23. If the facts of *Clark* were to confront the federal courts today, as a class action, it would be classified as a Rule 23(b)(2) case. The purpose underlying this type of class action was summarized as follows:

> Rule 23(b)(2) permits a class action where the party opposing the class has acted or refused to act on grounds generally applicable to the class. It is intended primarily for civil rights cases, there may well be other kinds of cases that will fall within it.[152]

147. Strausberg, *supra* note 18, at 102-09.
148. 306 U.S. 583 (1939).
149. *Id.* at 587.
150. *Id.* at 588.
151. *Id.* at 589.
152. *See* Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 648-49 (1965).

> It 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, and thus deliberately excludes action for damages . . . .[153]

By placing the *Clark* action in the Rule 23(b)(2) category, serious doubt can be raised whether *Clark* properly provides controlling authority for *Snyder* on the question of amount in controversy.

In enacting the amount in controversy requirement, Congress intended to keep insignificant cases out of federal court.[154] The traditional test for determining amount in controversy has been defined by Professor Dobie,[155] who later became a judge on the United States Court of Appeals for the Fourth Circuit, as the "plaintiff's viewpoint" test.[156] There is no uniform agreement among the lower federal courts as to the use of this standard for determining amount in controversy. Moreover, during recent years, numerous federal courts have had considerable difficulty in limiting their consideration of the amount in controversy solely to the value of plaintiff's interests. In *Ronzio v. Denver & Rio Grande Western Railroad*,[157] the plaintiff sued the defendant railroad for damages and quiet title to certain water rights. The plaintiff alleged one thousand dollars in damages; it was stipulated that the value of the water rights was less than two thousand dollars. The railroad removed the action to federal district court. The plaintiff appealed the removal contending that the federal court lacked jurisdiction because from the "plaintiff's viewpoint" the requisite amount in controversy was less than the required three thousand dollars. In affirming removal, the Court held it was proper to determine the amount in controversy from the defendant's standpoint where such interests clearly exceeded the statutory requirement.[158]

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153. WRIGHT, *supra* note 13, at 312. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968).

154. 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE WITH FORMS § 24, at 103 (Wright ed. 1960) [hereinafter cited as BARRON & HOLTZOFF].

155. *See* Dobie, *Jurisdictional Amount in the United States District Court*, 38 HARV. L. REV. 733, 734 (1925) (emphasis original).

> [The measure of the amount in controversy is] *the value to the plaintiff of the right which he in good faith asserts in his pleading that sets forth the operative facts which constitute his cause of action.*

156. *See* Ilsen & Sardell, *The Monetary Minimum in Federal Court Jurisdiction*, 29 ST. JOHN'S L. REV. 1 (1954); Note, *Federal Jurisdictional Amount: Determination of the Matter in Controversy*, 73 HARV. L. REV. 1369 (1960); Note, *Jurisdictional Amount in the Federal District Courts*, 4 VAND. L. REV. 146 (1950).

157. 116 F.2d 604 (10th Cir. 1940).

158. *Id.* at 606. *See* Smith v. Adams, 130 U.S. 167, 175 (1889), where the

E. "Jurisdictional Amount" vs. "Case or Controversy"

In the ordinary tort or contract case where the pecuniary interest of plaintiff's potential compensation equals the amount of defendant's loss, the amount in controversy problem imposes nominal difficulties. However, in cases involving injunctions, the problem of determining amount in controversy is more acute. *Clark v. Paul Gray, Inc.*[159] illustrates the difficulty of ascertaining the amount in controversy when pecuniary considerations are restricted to plaintiff's interest. In *Clark* the true amount in controversy should have been evaluated from the defendant's viewpoint. Individually, none of the plaintiffs' claims balanced the interests of the State of California. Moreover, the *Clark* case presented the Court with a controversy that should have been viewed from the defendant's standpoint since the pecuniary value of California's right to continue colecting the tax would probably have been a more accurate assessment of what was really at stake in the lawsuit. Contrary to the implications in *Clark*, because the Supreme Court has not taken a definitive position on the appropriate means to determine amount in controversy, it is not surprising that many lower courts have continued to hold "that the amount in controversy is the value to the plaintiff or the cost to the defendant, which ever is greater."[160]

The shortcoming of the *Snyder* Court's reliance on *Clark* is best illustrated by the recent, post-*Snyder* decision in *Berman v. Narragansett Racing Association.*[161] A class action was brought against defendant race track for allegedly withholding distributions to purse winners. The court held that the class members had a common and undivided interest;[162] consequently, aggregation

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Court held:

> It is conceded that the pecuniary value of the matter in dispute may be determined, . . . by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment.

But see St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938), where the Court seemed to follow a construction contrary to *Smith.*

159. 306 U.S. 583 (1939).

160. 1 BARRON & HOLTZOFF, *supra* note 154, at 113.

161. 414 F.2d 311 (1st Cir. 1969), *cert. denied,* 396 U.S. 1037 (1970). *But see* Lonnquist v. J.C. Penney Co., 421 F.2d 597 (10th Cir. 1970) (class action dismissed because from plaintiff's viewpoint amount in controversy was not met; aggregation of claim denied).

162. Further, the interest of the group of pursewinners in the asserted right is common and undivided. "It is not necessary that the claims of the plaintiffs be joint, in the technical legal sense of that word, as opposed to several. But it is essential that these claims constitute in their totality an *integrated*

would have been allowed for satisfaction of the amount in controversy.[163] However, aggregation was unnecessary since the pecuniary value of the defendants' interest satisfied the jurisdictional amount requirement.[164] The case is important because it illlustrates two propositions.

First, when one characterizes jural relationships as being separate and distinct, the thrust of the analysis centers on particular parties possessing interests which are to be viewed individually. Thus, when focusing on jural relationships, whether characterized as joint, common, undivided or several, the central thrust of the analysis concerns individual interests. Traditionally, and as revitalized by *Snyder*, such individual interests have been the focal point for determining the jurisdictional amount requirement and the attendant rules for aggregation. However, as argued by Justice Fortas in his *Snyder* dissent:

> Once it is decided under the new Rule that an action may be maintained as a class action, it is the claim of the whole class and not the individual economic stakes of separate members of the class which is the "matter in controversy."[165]

As Justice Fortas suggested, amended Rule 23 was intended to remove the characterization of individual jural relationships from the context of class actions. In other words, the determination of the amount in controversy in a class action was to be based on the actual "case or controversy"[166] before the federal court and not the characterization of individual jural relationships which may, or may not, accurately reflect the true nature of the dispute or the pecuniary interests at issue.

The second proposition suggested in *Berman* pertains to the "defendant's viewpoint" as the basis for determining amount in controversy. Focusing on the "defendant's viewpoint," thus avoid-

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right against the defendant." A. Dobie, Federal Procedure § 58, at 158 (1928); Manufacturers Casualty Insurance Co. v. Coker, 219 F.2d 631, 633-634 (4th Cir. 1955).

414 F.2d at 315.

163. *Id.* at 316.

164. In Snyder v. Harris, . . . the Court stated that the doctrine of aggregation is based upon its interpretation of the statutory phrase "matter in controversy." . . . "But in determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce." Ronzio v. Denver & R.G.W.R. Co., 116 F.2d 604, 606 (10th Cir. 1940).

Id. at 314.

165. 394 U.S. at 353.

166. *See generally* WRIGHT, *supra* note 13, at 34-38.

ing altogether the issue of aggregation, the court held, based on the *Ronzio*[167] decision, that

> the pecuniary result that the judgment would directly produce would be the awarding of a fund of several million dollars to the class. We think it is the amount of the entire fund, and not what each pursewinner's individual share will eventually be, that determines the amount in controversy here.[168]

Although Justice Fortas' analysis of *Snyder* does not expressly suggest the "defendant's viewpoint" as the proper standard for ascertaining the amount in controversy, under the conceptual term "case or controversy," utilization of the "defendant's viewpoint" assisted the *Berman* court in determining whether the requisite jurisdictional amount had been satisfied.

The companion case in *Snyder* was *Gas Service Co. v. Coburn*[169] where the lower court, as affirmed by the court of appeals, held that plaintiffs with separate and distinct claims could aggregate them in order to satisfy the jurisdictional amount requirement. The district court arrived at this conclusion based on the 1966 amendments to Rule 23.[170] In writing for the *Snyder* majority, Justice Black rebutted the conclusion reached by the district court and the court of appeals arguing that the doctrine of aggregation was not based upon Rule 23, but rather upon "well settled" judicial interpretation of the statutory phrase "matter in controversy."[171] It was apparently Justice Black's position that regardless of the 1966 amendments to Rule 23, the rule that precluded parties with "separate and distinct" claims from aggregating their claims would remain inviolate. Because the doctrine of aggregation was predicated on judicial definitions of jural relationships in terms of joint, common, undivided or separate and distinct, Justice Black apparently thought that unless the "spurious" class action concept was retained in the construction of the phrase "matter in controversy," the jurisdiction of federal courts would be expanded *sub silentio*.

> The fact that judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions is certainly no reason to treat them *differently* from joined actions for purposes of aggregation.
>
> Any change in the Rules that did purport to effect a change

167. Parenthetically, it is important to note that the Court in Illinois v. City of Milwaukee, 406 U.S. 91, 98 (1972), cited *Ronzio* as supporting authority for the proposition that Illinois had amount in controversy sufficient to invoke federal question jurisdiction over a claim arising under federal common law.
168. 414 F.2d at 314-15.
169. 389 F.2d 831 (10th Cir. 1968).
170. *Id.* at 834.
171. 394 U.S. at 336.

> in the definition of "matter in controversy" would clearly conflict with the command of Rule 82 that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."[172]

Justice Black's argument that the *Coburn* Court's construction of amended Rule 23 expands the jurisdiction of federal courts is subject to two general criticisms. First, in resurrecting the "spurious" class action, *Snyder's* reliance on the rules of aggregation regarding permissive joinder of parties is misplaced.[173] Not only did amended Rule 23 do away with the "metaphysics of conceptual analysis of the 'character of the right sought to be enforced,' "[174] it also redefined the binding effect of class action judgments.[175] It would appear inaccurate to characterize the class actions as instances of permissive joinder of parties. Under the concept of permissive joinder, parties *may* join in an action. However, the judgment will only bind them if they so elect such affirmative action. Judgment in an amended Rule 23(b)(3) class action binds parties who do not "opt out" of the class action. If a potential plaintiff sat back and passively allowed a class action of which he was a member to go to judgment for the defendant, he would be bound to the court's decision under principles of res judicata. Under the same hypothetical situation, where he was a potential plaintiff who could elect under Rule 20 to join, he would not be bound by the defendant's judgment. Quite clearly, amended Rule 23, by changing the res judicata effects of judgment, can no longer be analogized to principles of permissive joinder. Therefore, it is inaccurate to continue analyzing Rule 23(b)(3) class actions along the same lines as permissive joinder cases fashioned under Rule 20.[176]

The second criticism of the majority's decision in *Snyder* concerns its characterization of the class action under the amended rule. In attempting to do away with the tripartite classification of jural relations found in the 1938 Rule 23, the drafters of the new rule essentially created a more defined concept of class

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172. *Id.* at 337. *See* FED. R. CIV. P. 82.

173. 394 U.S. at 335, where the Court noted:

> Spurious class actions, on the other hand, were in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact. In such cases aggregation was not permitted: each plaintiff had to show that his individual claim exceeded the jurisdictional amount.

174. *Id.* at 343 (Fortas & Douglas, JJ., dissenting).

175. *See* FED. R. CIV. P. 23(c)(2).

176. *See* WRIGHT, *supra* note 13, at 302-06.

action. As Justice Fortas argued in his dissent,[177] the basic thrust of amending procedural rules for class actions in federal courts was to remove the emphasis on the individual claimant, characterized in terms of jural relationships, and place the emphasis on the class as a whole.[178] In this sense, amended Rule 23 was remodeled and redesigned so that it would more accurately define the context of a "case or controversy" that arose as a class action. Thus, once the lower court determined that a class action can be maintained under the provisions of Rule 23(a), the class action, when viewed as a whole, comprised the "case or controversy" in the constitutional sense.

As the Court held in *United Mine Workers v. Gibbs*,[179] it is within the province of the judiciary, as authorized by the Constitution of the United States,[180] to define the "case or controversy" which comes before the federal courts.[181] If amended Rule

177. *See* note 165 and accompanying text *supra*.
178. *Id. See* Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969).
179. 383 U.S. 715 (1966).
180. U.S. CONST. art. III, § 2.
181. 383 U.S. at 725. The Court's landmark decision in *Gibbs* is extremely useful in examining the impact of the Court's later decision in *Snyder*, and as extended by *Zahn*. *Gibbs* stands for the proposition that it is proper for a federal district court, which has power over a substantial federal claim, to exercise discretion on whether state claims raised by the same party should be pendent to the federal claim. The constitutional authority for *Gibbs* stems from the notion that federal courts are empowered by the Constitution to entertain a "case or controversy." Therefore, if the state claim arises from the same operative facts and circumstances as the federal claim and the party alleging the claims normally would be expected to try both claims together, it is within the federal district court's constitutional authority to entertain both the federal and the state claims. Whether a federal court entertains the pendent state claim is a question of discretion that is guided by standards of judicial economy, convenience and fairness to the litigants as well as principles of comity. *Id.* at 725-26.

If amended Rule 23 is viewed as redefining the concept of class action in terms of "case or controversy," much of the adverse impact of *Snyder* and *Zahn* can be neutralized. Re-examination of *Snyder* and *Zahn* is necessary, whether by the Court or Congress, if class action is going to be allowed a productive future involving numerous important federal questions.

As discussed above in the text, *Snyder* has essentially precluded class action redress of important questions arising under federal common law involving interstate water and ambient air pollution. Congressional enactment of substantive rights and standards of primary conduct are demonstrative of national concern for environmental questions. Under the *Gibbs* decision, just as federal courts in the

23 more clearly defines the context of a "case or controversy" presented to the court as a class action, it hardly follows that allowing a lower court to entertain jurisdiction over the class action has expanded federal jurisdiction without congressional authorization. On the contrary, jurisdiction of lower federal courts has not been expanded.[182] Once it is recognized that the class action as an entity provides the court with a justiciable "case or controversy," determination of the requisite amount in controversy should also be directed to the class as a whole.[183] Construction of the amended Rule 23 along these lines does not abrogate congressional intentions of keeping insignificant cases out of federal courts.[184]

In conclusion of the *Snyder* discussion, it seems that the Court's reliance on *Clark* as controlling authority was misplaced. *Clark* was an injunctive action which under the amended rule would fall into 23(b)(2). Thus, assuming that the facts of *Clark* would arise today in a class action, analysis of the jurisdictional amount could be handled under the "defendant's viewpoint" theory which would allow federal jurisdiction. By resurrecting the *Clark* decision and labeling it a "spurious" class action, the *Snyder* Court effectively negated the conceptual remodeling of the amended rule. Restructuring was intended to characterize the class action in terms of the "class as a whole" in order to make the procedural tool more functional—more useful.

III. ANCILLARY JURISDICTION, CLASS ACTIONS AND JOINDER OF PARTIES

Ancillary jurisdiction and its kissin' cousin, pendent jurisdiction, have been the subject of much legal commentary in recent years.[185]

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interest of comity should avoid needless decision of state law, state courts should be restrained from having to determine unnecessary cases raising novel questions of federal law, whether statutory or common law. In denying aggregation of plaintiffs' claims to satisfy the amount in controversy, *Snyder* and *Zahn* frustrate the theory of comity decided in *Gibbs*.

182. 394 U.S. at 353-56 (Fortas, J., dissenting).

183. *Id.* at 353.

184. In viewing the class action as a whole with individual class members each having a common interest in the class, the amount in controversy presented to the Court in *Zahn* was more than $40,000,000—hardly an insignificant case.

185. Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759 (1972); Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties"*, 34 U. PITT. L. REV. 1 (1972); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968); Comment, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v.*

Therefore, rather than tracing the history and background of those doctrines, this article shall merely attempt to describe what they are, and how they relate to class actions and other procedural devices that are used to bring additional claims or parties into a lawsuit.

A. Ancillary and Pendent Jurisdiction

According to Professor Wright, ancillary jurisdiction is a concept under which

> it is held that a [federal] 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 independantly presented. Thus if the court has jurisdiction of the principal action, it may hear also any ancillary proceeding therein, regardless of the citizenship of the parties, the amount in controversy, or any other factor that would normally determine jurisdiction.[186]

Pendent jurisdiction is merely a subspecies of ancillary jurisdiction.[187] It is frequently used to describe a situation where a plaintiff seeks to join a state law claim with a closely related federal claim when the federal court could not hear the state claim standing alone. However, pendent jurisdiction is probably more accurately described by Professor Fortune where he states: "A pendent claim is one related to another claim in the same pleading."[188] He then describes an ancillary claim as one related

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Gibbs Extended to Persons Not Party to the Jurisdiction-Conferring Claim, 73 COLUM. L. REV. 153 (1972); Note, *Civil Procedure—Ancillary Jurisdiction—The Third party Defendant's Claim under Rule 14(a)*, 49 N.C. L. REV. 503 (1971); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971); Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968); Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018 (1962); Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1963). *See also* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1074-81 (2d. ed. 1973).

186. WRIGHT, *supra* note 13, § 9 at 19.

187. Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 762 n.24 (1972).

188. Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties"*, 34 U. PITT. L. REV. 1, 13 n.34 (1972). It would be theoretically possible to have one federal claim pendent to another federal claim if, for example, the first claim had no jurisdictional amount requirement and the second claim failed to meet a jurisdictional amount requirement. In such a case, if the two claims were closely related, the second claim could be heard along with the first under the theory of pendent jurisdiction. *Cf.*, Rosado v. Wyman, 397 U.S. 397 (1970).

to a claim asserted in a pleading filed at an earlier time and usually by a different party.[189] Since it is generally agreed that both pendent and ancillary jurisdiction are to be tested by the same principles,[190] the labels are probably not very important; and since pendent jurisdiction is a product of the concept of ancillary jurisdiction,[191] the term ancillary jurisdiction shall be used in this article to include both concepts.

B. Scope of Ancillary and Pendent Jurisdiction

The guiding star for determining the present day scope of ancillary and pendent jurisdiction has been the case of *United Mine Workers v. Gibbs*[192] decided in 1966. Gibbs alleged that the union had brought improper pressure on his employer to discharge him. He claimed violations of the Labor Management Relations Act[193] and the common law of Tennessee. After a trial on the merits, the court dismissed Gibbs' federal claim, but entered judgment for him on the state claim although there was no diversity of citizenship. The union contended that the court lacked jurisdiction over the state claim. Although reversing the lower court on the merits, the Supreme Court expressly decided that there was pendent jurisdiction to decide the state

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There is no need to use the concept of pendent jurisdiction in diversity cases between a single plaintiff and a single defendant. So long as diversity exists, FED. R. CIV. P. 18 "permits the plaintiff to join as many claims as he may have against the defendant, regardless of their nature, and the value of all the claims is added together in determining whether the jurisdictional amount is met." WRIGHT, *supra* note 13, § 36 at 121.

189. A classic example of an ancillary claim is found in Moore v. New York Cotton Exch., 270 U.S. 593 (1926). Plaintiff's claim alleged a violation of the Sherman Act and was properly before the federal court. Defendant asserted a non-federal compulsory counterclaim that arose out of the same transaction as plaintiff's claim. Since there was no diversity of citizenship, the court could not have asserted jurisdiction over the defendant's counterclaims standing alone. The Supreme Court neverthless permitted resolution of the counterclaim because of its close relationship to the claim of the plaintiff.

190. Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265, 282-89 (1971).

191. In Hurn v. Oursler, 289 U.S. 238 (1933), the precursor of the modern concept of pendent jurisdiction, the Court relied on the case of Moore v. New York Cotton Exch., 270 U.S. 593 (1926), as authority for allowing a federal court to assert jurisdiction over a non-federal claim when there was no diversity. The holding in *Hurn* was restricted to situations where a plaintiff presented two distinct grounds, one state and one federal, in support of a single cause of action.

192. 383 U.S. 715 (1966).

193. 61 Stat. 158 (1947), *as amended*, 29 U.S.C. § 187 (1964).

claim. In so doing, the Court set out the following test:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ," U.S. Const., Art. III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[194]

"The commentators and the lower courts read *Gibbs* as broadening the scope of pendent jurisdiction, a development that some applaud and others deplore."[195]

Although *Gibbs* apparently broadened the scope of the federal courts' power to hear pendent claims, it also broadened the discretion to *refuse* to hear pendent claims with the following admonition:

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.[196]

It did not take long for the lower federal courts to seize upon the language of *Gibbs* as authority for expanding ancillary jurisdiction in cases where primary jurisdiction was based on diversity of citizenship and where no "federal question" claims were involved. In *Wilson v. American Chain & Cable Co.*,[197] for example,

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194. 383 U.S. at 725.

195. WRIGHT, *supra* note 13, § 19 at 65, *citing* Note, 81 HARV. L. REV. 657 (1968), and Note, 44 TEX. L. REV. 1631 (1966), as mildly applauding, and Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968), as strongly deploring.

196. 383 U.S. at 726.

197. 364 F.2d 558 (3d Cir. 1966). For similar use of the concept of ancillary jurisdiction, see Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968), and Stone v. Stone, 405 F.2d 94 (4th Cir. 1968), both relying on the *Gibbs* analogy. *See also* Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969) (Blackmun, J.).

a diversity action was brought for injuries sustained by a child and consequential damage to the child's father arising out of the same accident. The trial judge held that the father's claim must be dismissed because it did not satisfy the jurisdictional requirement that the amount in controversy must exceed ten thousand dollars. In reversing the trial court on that point, the court of appeals stated:

> In these circumstances it seems to us both appropriate and right to apply the doctrine of pendent jurisdiction, by which a claim cognizable in the federal courts may be permitted to carry with it a related claim otherwise not within the federal jurisdiction, if both claims ordinarily would be tried in one judicial proceeding. The basis for this doctrine is the judicial economy, and the convenience and fairness to litigants which it serves.[198]

The court bolstered its argument for the use of ancillary jurisdiction in the case by citing a Pennsylvania requirement that injuries of the nature involved in the case be "redressed in one action."[199] However, it is difficult to understand how a rule of state practice could confer jurisdiction on a federal court.

Until recently, ancillary jurisdiction was used primarily to bring additional claims into a suit between parties who were already litigating claims within the jurisdiction of the federal courts. Only a few courts had used the concept to bring in additional parties.[200] However, as the Supreme Court recently recognized, "numerous decisions throughout the courts of appeals since *Gibbs* have recognized the existence of judicial power to hear pendent claims involving pendent parties where 'the entire action before the court comprises but one constitutional "case"' as defined in *Gibbs*."[201] The commentators have also noted the increasing variety of ways in which ancillary jurisdiction has been used to add both claims *and* parties to suits in federal courts

198. 364 F.2d at 564 (citations omitted).
199. *Id.*
200. 7 WRIGHT & MILLER, *supra* note 144, at § 1659.
201. Moor v. County of Alameda, 411 U.S. 693, 713 (1973). The Court cited Almenares v. Wyman, 453 F.2d 1075, 1083-85 (2d Cir. 1971); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809-10 (2d Cir. 1971); Nelson v. Keefer, 451 F.2d 289, 291 (3d Cir. 1971); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971); F.C. Stiles Constr. Co. v. Home Ins. Co., 431 F.2d 917, 919-20 (6th Cir. 1970); Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122, 1128 (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'l Life Ins. Co. v. Craton, 405 F.2d 41, 48 (5th Cir. 1968); Jacobson v. Atlantic City Hosp., 392 F.2d 149, 153-54 (3d Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558, 564 (3d Cir. 1968).

in diversity cases as well as in federal question cases.[202] Among cases decided by the courts of appeals, *Hymer v. Chai*[203] "stands virtually alone against this post-*Gibbs* trend . . . ."[204]

C. *Zahn* in the Trial Court[205]

It was "with great reluctance"[206] that the trial court dismissed the class action aspect of the *Zahn* case. In his opinion, the late Judge Leddy stated: "[I]f a construction of Rule 23 were controlling, rather than the phrase 'amount in controversy' in the jurisdictional statute, our decision would be different."[207] However, the court was of the opinion that *Snyder* precluded obtaining jurisdiction "over those members of the proposed class who do not meet the $10,000 jurisdictional requirement."[208]

Therefore, after finding that it would be impracticable to redefine the class to include only those members whose claims exceeded ten thousand dollars, the district court ordered "that reference to all persons other than the four named plaintiffs be stricken from the complaint and that [the] action not be permitted to proceed as a class action."[209]

The district court then certified, for interlocutory appeal under section 1291(b) of Title 28 of the United States Code, the following question:

> "[W]hether federal courts have jurisdiction over all members of an allegedly otherwise proper class, in a class suit in which the claims of the class members are separate and distinct, if some members of the class individually meet the jurisdictional requirement as to the amount in controversy and others, who are not named representatives, do not[?]"[210]

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202. Professor Baker applauds the trend and gives numerous hypothetical examples of the possible uses of ancillary jurisdiction together with appropriate citations to actual cases. *See* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759 (1972). Professor Fortune agrees with the use of ancillary in diversity cases. *See* Fortune, *Pendent Jurisdiction—Th Problem* jurisdiction in federal question cases, but cautions against the trend *of "Pendenting Partis"*, 34 U. PITT. L. REV. 1 (1972). *See also*, 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 (1972).
203. 407 F.2d 136 (9th Cir. 1969).
204. 411 U.S. at 713.
205. Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971).
206. *Id.* at 433.
207. *Id.*
208. *Id.* at 431-32.
209. *Id.* at 434.
210. *Id.* (quotation marks original).

D. Issues Raised on Interlocutory Appeal in *Zahn*

The basic issue presented by the interlocutory appeal in *Zahn* was whether the trial court possessed the *power* (*i.e.*, jurisdiction over the subject matter) to hear the case as a class action under Federal Rule of Civil Procedure 23(b)(3). As stated in the introduction to this article, that issue raised at least two questions, *viz.*:

> *First*—Whether each of several class action plaintiffs who are suing a single defendant may aggregate their separate and distinct claims in order to meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a)?
>
> *Second*—Whether members of a class whose separate and distinct claims do not meet the jurisdictional amount requirements of 28 U.S.C. § 1332(a) may have their claims determined by a federal court under a theory of ancillary jurisdiction where other members of the class have similar claims that do meet federal jurisdictional requirements?[211]

The majority opinions in both the court of appeals[212] and the Supreme Court[213] were addressed to the first question. Neither majority specifically answered the second question. Nevertheless, it is obvious that the second question was answered in the negative by both courts because both holdings upheld the ruling of the trial court.

If the class plaintiffs had been permitted to aggregate their separate and distinct claims in order to meet the jurisdictional amount requirement, there would have been no need to consider the second question because the court then would have had primary (as opposed to ancillary) jurisdiction over the claims of the entire class. However, having concluded that the claims could not be aggregated, the court was still left in the position of having primary jurisdiction over the claims of the named parties, because their claims met the jurisdictional amount requirement individually. That situation left open the question of whether the claims of the non-named parties could be heard as ancillary to the claims of the named parties over which the court could exercise primary jurisdiction.

The doctrine of ancillary jurisdiction differs conceptually from the principle of aggregation of claims. Perhaps this difference can best be illustrated by examining a few non-class action situations in which those rules apply.

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211. The court of appeals also raised the question of whether the case was appropriate for class action treatment aside from the jurisdictional questions. 469 F.2d at 1035-36. However, the trial court had yet to give that question full consideration, having stopped at the threshold question of jurisdiction over the subject matter.
212. 469 F.2d 1033 (1972).
213. 94 S. Ct. 505 (1973).

If a single plaintiff has two entirely unrelated claims against a single defendant, each for six thousand dollars, he may sue in federal court since the total amount of the claims exceeds ten thousand dollars.[214] The federal court may exercise primary jurisdiction over *both* claims despite the fact that neither of the claims, standing alone, would be cognizable in a federal court. The reason that the federal court may exercise primary jurisdiction over the two claims standing together is that this is *one* of the situations where the federal courts *permit* aggregation of claims in order to meet the amount in controversy requirement. Here there is no room for the application of the doctrine of ancillary jurisdiction because there is no claim to which either claim could be ancillary. There are only two claims, and neither of them standing alone would sustain federal jurisdiction.

Contrast the above with the following situation: A child is injured by the defendant and brings a claim for twelve thousand dollars in a federal court for pain, suffering and disability. The child's father attempts to join in the suit by bringing a claim for six thousand dollars against the defendant for medical expenses incurred on behalf of the child arising out of the same incident. In that situation (assuming there was diversity of citizenship), the the child's claim would be cognizable in a federal court standing alone, but the father's claim would not be. It would be *possible* to have a rule permitting the father to aggregate his claim with the child's claim, but under current doctrine aggregation would not be permitted.[215] Nevertheless, under recent holdings of several of the courts of appeals, the father's claim could be determined by a federal court as being ancillary to the child's claims over which the court could exercise primary jurisdiction.[216]

In the *Zahn* case, the Supreme Court gave a thorough explanation of why it would not permit the claims of the class to be aggregated in order to satisfy jurisdictional requirements. One may not agree with the Court's resolution of that issue, but at least one can understand how the Court arrived at its conclusion. On the other hand, the Court gave no explanation whatsoever as to why the claims of the non-named class members could not be

214. WRIGHT, *supra* note 13, at § 36.

215. Even though the father's claim is closely related to that of the child, the two claims would still be characterized as separate and distinct, and aggregation would not be permitted. Pinel v. Pinel, 240 U.S. 594 (1916); Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911).

216. *See* Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966), in which the facts closely parallel those given in the example. *Cf.*, Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969) (Blackmun, J.); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968).

heard under a theory of ancillary jurisdiction. By its silence on that aspect of the *Zahn* case, the Court has left unanswered several questions concerning the proper application of the concept of ancillary jurisdiction.

The doctrine of ancillary jurisdiction is currently in a state of flux and development. It has been applied in many different contexts in the past; since the *Gibbs* decision, the lower federal courts have expanded the use of the concept.[217] As Professor Wright noted: "If there is any single rationalizing principle that will explain [the various uses of ancillary jurisdiction], it is not easily discerned."[218] Thus, it would have been extremely beneficial in providing guidelines for the lower federal courts if the Supreme Court had explained why *Zahn* was not a proper case for the exercise of ancillary jurisdiction.

It is unfortunate that neither appellate majority addressed itself to the ancillary jurisdiction issue. By their silence on that aspect of the *Zahn* case, the court of appeals and the Supreme Court have raised several questions concerning the proper application of the concepts of ancillary and pendent jurisdiction.

E. *Zahn* and Ancillary Jurisdiction

In his dissenting opinion in the *Zahn* case, Justice Brennan pointed out that the Supreme Court has sustained the exercise of ancillary jurisdiction over compulsory counterclaims as well as intervention as a matter of right. He then cited instances where the courts of appeals have sustained ancillary jurisdiction over cross-claims; impleaded defendants; and interpleaded defendants.[219] According to Justice Brennan:

> Class actions under Rule 23(b)(3) are equally appropriate for such treatment. There are ample assurances, in the provisions of the rule that "the questions of law or fact common to the members of the class [must] predominate over any questions affecting only members," to guarantee that ancillary jurisdiction will not become a facade hiding attempts to secure federal adjudication of nondiverse parties' disputes over unrelated claims. And the practical reasons for permitting adjudication of the claims of the entire class are certainly as strong as those supporting ancillary jurisdiction over compulsory counterclaims and parties that are entitled to intervene as of right. Class actions were born of necessity. The alternatives were joinder of the entire class, or redundant litigation of the common issues. The cost to the litigants and the drain

217. *See* WRIGHT, *supra* note 13, at § 9, and the authorities cited in note 185 *supra*.
218. WRIGHT, *supra* note 13, § 9 at 21.
219. 94 S. Ct. at 514.

> on the resources of the judiciary resulting from either alternative would have been intolerable. And this case presents precisely those difficulties: approximately 240 claimants are involved, and the issues will doubtless call for extensive use of expert testimony on difficult scientific issues.
>
> It is, of course, true that an 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. But that objection is applicable to every other exercise of ancillary jurisdiction. It should be a 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 the prospective class members to assert their claims.[220]

Justice Brennan's position is buttressed by a leading authority on federal practice that describes the use of ancillary jurisdiction in a case similar to *Zahn* as "a natural corollary to other applications of the ancillary jurisdiction concept."[221] Judge Timbers, dissenting from the majority opinion of the court of appeals in *Zahn*, chided the majority for ignoring

> the well-established principle that if a case is properly in a federal court, that court has subject matter jurisdiction over the case or controversy in its entirety and therefore can adjudicate related claims of ancillary parties who have no independent jurisdictional grounds.[222]

Characterizing the court of appeals' reliance on *Snyder* as being unsupportable, Judge Timbers went on to point out: "In *Snyder* no member of the class had a claim that could satisfy the amount in controversy requirement; so the Court never reached the ancillary jurisdiction issue."[223]

Furthermore, the class action in *Zahn* seemed to meet the requirement set out in *Gibbs*.[224] The claims of the named plain-

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220. *Id.* at 514-15.
221. WRIGHT & MILLER, *supra* note 144, § 1756 at 564.
222. 469 F.2d at 1036.
223. *Id.* at 1038.
224. The *Gibbs* test is set out in the text accompanying note 194 *supra*. Of course, the *Gibbs* test is phrased in terms of a state claim being ancillary to a substantial federal claim, the federal claim being necessary for the court's primary jurisdiction. However, the test for the substantial federal claim required by *Gibbs* is taken from Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933), and is the same test used to measure the substantiality of the claim in any federal question case. Therefore, it seems logical to state that the requirement of *Gibbs* is that there be some claim, either fderal question or diversity, that confers subject matter jurisdiction on the federal court.

tiffs were sufficient to confer subject matter jurisdiction on the court. The claims of the named plaintiffs and the claims of the other members of the class derived from a common nucleus of operative fact. Finally, the claims of the entire class were such that one would ordinarily expect them to be tried in one judicial proceeding, if possible. To say that the claims could not be tried in one judicial proceeding because the court lacked jurisdiction would be begging the question.

As the Court noted in *Gibbs*, the justification for the use of ancillary jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants . . . ."[225] Surely those goals would have been fostered by allowing the *Zahn* case to proceed as a class action.

F. The Ben-Hur Doctrine—Does It Still Live?

> *Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State.*

The italicized statement above is from Justice Black's opinion in *Snyder*.[226] It describes a doctrine derived from the case of *Supreme Tribe of Ben-Hur v. Cauble*,[227] and is recognized as being currently applicable by the leading authorities on federal practice.[228] It raises one of the most vexing questions left unanswered by the Court's opinion in *Zahn*. This can be illustrated by examining two hypothetical cases.

Case 1—A Rule 23(b)(3) class action diversity suit in which each member of the class has a claim in excess of ten thousand dollars. The *named* plaintiffs are citizens of State X. The defendant is a citizen of State Y. All of the un-named plaintiffs are citizens of State Y.

Case 2—A Rule 23(b)(3) class action diversity suit in which each *named* plaintiff has a claim in excess of ten thousand dollars. The un-named members of the class have claims of less than ten thousand dollars. All plaintiffs are citizens of State X. The defendant is a citizen of State Y.

Assuming that the Ben-Hur Doctrine is still valid, the claims

225. 383 U.S. at 726 (1966).
226. 394 U.S. at 340.
227. 255 U.S. 356 (1921).
228. *See* 7 WRIGHT & MILLER, *supra* note 144, § 1755 at 548; 3B MOORE, *supra* note 32, ¶ 23.95 at n.4.

of *all* of the class members in *Case 1* could be determined by a federal court. In *Case 2*, only the claims of the *named* class members could be determined by a federal court; and since all of the named class members would already be joined in the suit, the case could not proceed as a class action in a federal court. That just does not make any sense. Indeed, it must be questioned whether the *Zahn* case overruled the Ben-Hur Doctrine *sub silentio*!

In both hypothetical cases, the claims of the un-named class members would not be cognizable as individual claims in a federal court because in both cases the claims of the un-named members fail to meet the requirements of the statute that confers diversity jurisdiction on the federal courts.[229] However, under the Ben-Hur Doctrine, the claims of the un-named members in *Case 1* could be determined in a federal class action under the theory of ancillary jurisdiction. The holding of the *Zahn* case means that the un-named of the class in *Case 2* cannot have their claims determined in a federal class action under a theory of ancillary jurisdiction.

The majority opinion in *Zahn* explains that since the First Judiciary Act of 1789 the statutes conferring diversity jurisdiction on the federal courts have had an amount in controversy requirement and since 1832 "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount requirement for suit in the federal courts."[230] The majority opinion neglects to point out that those same statutes conferring diversity jurisdiction have been interpreted to require complete diversity of citizenship between all plaintiffs and all defendants since 1806. [231]

Furthermore, when the *Ben-Hur* case was decided it had not yet been authoritatively determined whether the requirement of complete diversity was a constitutional requirement, or merely a requirement of the diversity statute.[232]

> Because the jurisdictional amount requirement is statutory in character and the diversity of citizenship and federal question requirements are constitutionally based, the use of ancillary or pendent jurisdiction to overcome the latter type of subject matter jurisdiction defect is more difficult to justify.[233]

If the plaintiffs in hypothetical *Case 1* may have their claims heard in a federal class action, *a fortiori*, the plaintiffs in hypothet-

229. *See* 28 U.S.C. § 1332 (1964).
230. 94 S. Ct. at 508.
231. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
232. In State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967), the Court held that complete diversity was not a requirement of the Constitution.
233. 7 WRIGHT & MILLER, *supra* note 144, § 1659 at 315.

ical *Case 2* should be allowed to do likewise, since the requirement of diversity has greater dignity than the amount in controversy requirement, which is not based on the Constitution.

Yet, in the *Zahn* case itself, the Ben-Hur Doctrine was used by the trial court to circumvent the requirement of complete diversity. The defendant contended that some of the class members were citizens of the same state as the defendant and that the court therefore did not have jurisdiction over the claims of those class members. The district court found that argument to be "clearly untenable," citing *Ben-Hur*.[234]

So closely parallel were the issues in *Ben-Hur* and *Zahn* that it is very difficult to distinguish them.[235] Perhaps, that is why the Supreme Court chose not to do so.

If the *Zahn* case does in fact overrule *Ben-Hur*, it will have a significant effect upon suits involving unincorporated associations.

> For purposes of diversity jurisdiction, an unincorporated association is said to have no citizenship of its own. Thus, if suit is brought by or against an association as an entity or by or against its individual members, the organization's citizenship is deemed to be the same as that of its members. This effectively may bar resort to federal diversity jurisdiction because the requirement of complete diversity is virtually impossible to satisfy in cases involving large multistate associations. In sharp contrast to this, the approach [that has been] utilized when the association sues or is sued in a class action is that the citizenship of the class is considered to be that of the named representatives; the representatives usually can be chosen to insure complete diversity.
>
> As the foregoing discussion suggests, the treatment of unincorporated associations as classes [has provided] substantial benefits from the perspective of . . . subject matter jurisdiction. . . . Furthermore, when the association is a defendant, plaintiff's ability to select the class representatives enables plaintiff to choose his adversaries, which is helpful for purposes of securing personal

234. 53 F.R.D. at 430-31.

235. *Ben-Hur* could be distinguished from *Zahn* in that it was a "true" class action in which the members of the class had a common and indivisible interest in the subject of the action. *See* 255 U.S. at 361. In that sense, it would be easier to classify the claims of the class members in *Ben-Hur* as one constitutional "case" in determining whether it qualified for ancillary jurisdiction treatment. However, the Ben-Hur Doctrine (as opposed to the case itself) has not been restricted to "true" class actions. Furthermore, there was no suggestion in the *Zahn* opinion that the claims of the class members did not constitute one constitutional "case." Indeed, if a judgment in a Rule 23(b)(3) class action is binding on all of the members of the class, it would be difficult not to characterize it as a single constitutional "case."

jurisdiction, especially when a national organization is involved.[236]

If *Zahn* has abrogated the Ben-Hur Doctrine, the foregoing benefits of that doctrine are wiped out.

By failing to explain *why* use of ancillary jurisdiction was not appropriate, the *Zahn* case raises questions about the current and future use of ancillary jurisdiction in cases other than class actions. The non-aggregation rule expressed in *Zahn* and *Snyder* was spawned by cases involving joinder of parties.[237] In recent years, the theory of ancillary jurisdiction has been used to permit joinder of parties in cases where some of the parties have had claims that were separate and distinct and did not meet the jurisdictional amount requirement.[238] Are those cases now overruled by *Zahn*? Does the *Zahn* holding, forbidding the use of ancillary jurisdiction to overcome the jurisdictional amount requirement, carry over to cases involving joinder of parties? Only time will answer those questions. The opinion of the Court in *Zahn* did not. That is the trouble with *Zahn*.

IV. CONCLUSION

The *Zahn* decision dealt a crippling blow to use of the class action as a means for redress of small claims in the federal courts. Use of the class action in state courts does not present a viable alternative because many states lack a class action rule comparable to Federal Rule 23. It seems highly unlikely that *Zahn* will be overruled in the near future. Hence, it seems that the solution to the problem of availability of the class action for redress of small claims will have to lie in the enactment of remedial legislation, state and federal.

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236. 7A WRIGHT & MILLER, *supra* note 144, § 1861 at 454-56.
237. *See, e.g.*, Pinel v. Pinel, 240 U.S. 594 (1916); Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911).
238. *See, e.g.*, Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969) (Blackmun, J.); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966).