

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

1-1-1996

## What's Wrong with This Picture?: Rule Interpleader, the Anti-Injunction Act, In Personam Jurisdiction, and M.C. Escher

Donald L. Doernberg

*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Civil Procedure Commons](#), [Jurisdiction Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

Donald L. Doernberg, What's Wrong with This Picture?: Rule Interpleader, the Anti-Injunction Act, in Personam Jurisdiction, and M.C. Escher, 67 U. Colo. L. Rev. 551 (1996), <http://digitalcommons.pace.edu/lawfaculty/45/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

**WHAT'S WRONG WITH THIS PICTURE?:  
RULE INTERPLEADER, THE ANTI-  
INJUNCTION ACT, *IN PERSONAM*  
JURISDICTION, AND M.C. ESCHER**

DONALD L. DOERNBERG\*

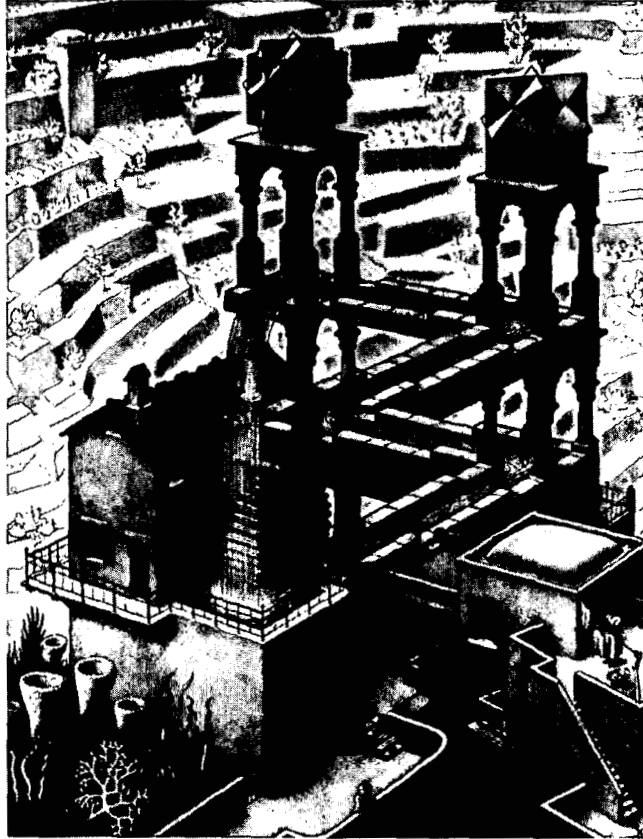


Plate "Waterfall" © 1995 M.C. Escher/Cordon Art—Baarn—Holland. All rights reserved. Reprinted by permission.

I. INTRODUCTION

At first glance, the picture above may seem unremarkable; the eye is apt to brush over the image uncritically, taking in the whole without focusing on the details. On closer examination,

---

\* Charles A. Frueauff Research Professor of Law, Pace University. B.A., Yale University; J.D., Columbia University.

one notices that the structure is physically impossible, pleasing to the eye but not of the real world—unless, of course, there is some undiscovered place where water spontaneously recycles itself from the bottom of a waterfall to the top. Much the same problem afflicts one aspect of federal interpleader. Viewed quickly enough, it seems to make sense and to represent coherent policy. Closer examination reveals that the structure is every bit as impossible as any that Escher himself could have created.<sup>1</sup>

Interpleader is a procedural device designed to settle conflicting claims to property usually (though not always) held by a non-claimant without exposing the possessor to multiple or inconsistent judgments.<sup>2</sup> It has existed since the 1300s.<sup>3</sup> For interpleader to be effective, claimants must not be able to seek possession of the stake except in the interpleader proceeding; were they able to do so, the interpleader court might enter a judgment only to discover that the stake had already been delivered to one claimant pursuant to another proceeding.<sup>4</sup> Accordingly, the interpleader court must be able to enjoin either the claimants or other courts from pursuing litigation inconsistent with the interpleader action.

The foregoing is unremarkable, but when the interpleader court is federal, the Anti-Injunction Act<sup>5</sup> creates special problems because of the federalism issues inherent in any federal court

---

1. I am not the only person to find the law surrounding federal interpleader to be a bit strange. Professor Zechariah Chafee, Jr., properly regarded as the father of modern federal interpleader, compared it to the Looking Glass House in Barrie's classic. See Zechariah Chafee, Jr., *Interpleader in the United States Courts* (pt. 1), 41 YALE L.J. 1134, 1134 (1932) [hereinafter Chafee, *United States Courts* (pt. 1)].

2. The property is known as the stake; the beleaguered possessor is known as the stakeholder.

3. Werner Ilsen & William Sardell, *Interpleader in the Federal Courts*, 35 ST. JOHN'S L. REV. 1, 2 (1960). That the device existed, however, does not tell the whole story. Common-law interpleader apparently existed primarily to determine conflicting claims of detainee. Equitable interpleader developed in the eighteenth and nineteenth centuries. Two scholars, after exhaustive study, declared common-law interpleader "doctrinally irrelevant to modern interpleader." Geoffrey C. Hazard, Jr., & Myron Moskovitz, *An Historical and Critical Analysis of Interpleader*, 52 CAL. L. REV. 706, 709 (1964).

4. Zechariah Chafee, Jr., *Interstate Interpleader*, 33 YALE L.J. 685, 687 (1924) [hereinafter Chafee, *Interstate*]. See also Zechariah Chafee, Jr., *Federal Interpleader Since the Act of 1936*, 49 YALE L.J. 377, 414 (1940) [hereinafter Chafee, *1936*]; Zechariah Chafee, Jr., *Interpleader in the United States Courts* (pt. 2), 42 YALE L.J. 41, 41 (1932) [hereinafter Chafee, *United States Courts* (pt. 2)]; Chafee, *United States Courts* (pt. 1), *supra* note 1, at 1136.

5. 28 U.S.C. § 2283 (1994).

attempt to influence state litigation. As a rule, federal courts may not enjoin state court proceedings, nor may they circumvent that rule by enjoining state court litigants instead.<sup>6</sup> This principle has existed since 1793,<sup>7</sup> the date of the original Anti-Injunction Act.<sup>8</sup> Any attempt by federal interpleader courts to affect litigation in state courts must first confront this long-standing prohibition and the delicate power issues that underlie it.

Interpleader in the federal courts comes in two varieties, known colloquially as statutory interpleader and rule interpleader. Statutory interpleader came into existence in 1917;<sup>9</sup> rule interpleader is a creature of Rule 22 of the Federal Rules of Civil Procedure ("Rule 22" or the "Rule") and made its appearance in 1938.<sup>10</sup> Congress explicitly permitted injunctions when enacting statutory interpleader; for that reason, injunctions in statutory interpleader cases—even those against state actions—present no Anti-Injunction Act problem.<sup>11</sup> But Rule 22 has no corresponding provision.<sup>12</sup> Thus, an action under the Rule must either fit within

---

6. "It is settled that the prohibition of § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970), citing *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940) ("That the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial."); see also *Hill v. Martin*, 296 U.S. 393 (1935).

7. Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334 (current version at 28 U.S.C. § 2283 (1994)).

8. Congress has reenacted the statute several times. The only major change in its provisions came in the 1948 reenactment, when Congress overruled *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941). *Toucey* interpreted the Act far more narrowly than before, perhaps reflecting frustration with how the courts had been treating it. "[B]y the 1930's, so many exceptions had been recognized to the Act that some commentators remarked that 'except for the prohibition, in some cases, of injunction before judgment, the statute has long been dead.'" ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 11.2.1, at 643 (2d ed. 1994) (citation omitted). Congress evidently intended the 1948 reenactment to recreate the *status quo ante*, *id.* at 644, but subsequent Supreme Court interpretation of the amended Act has given it some teeth. See *infra* notes 68-84 and accompanying text.

9. Act of Feb. 22, 1917, ch. 113, 39 Stat. 929 (current version codified at 28 U.S.C. §§ 1335, 1397, 2361 (1994)).

10. FED. R. CIV. P. 22 (1938) (current version at FED. R. CIV. P. 22).

11. Injunctions "authorized by act of Congress" are an exception to the Anti-Injunction Act's bar. 28 U.S.C. § 2283 (1994). See *infra* notes 69, 75-76 and accompanying text.

12. It is at least arguable that it would be unavailing to attempt to justify injunctions against state litigation with a mere rule of civil procedure. See *infra* text accompanying note 78.

one of the exceptions to the Anti-Injunction Act that does not depend on congressional action or forgo the advantages of an injunction against collateral proceedings.<sup>13</sup> Few courts have discussed this problem explicitly, but some have asserted that such injunctions are permissible "in aid of" the federal court's jurisdiction.<sup>14</sup> That is easy to assert, but it ignores the fact that the Supreme Court has made clear that the in-aid-of-jurisdiction exception to the Anti-Injunction Act is not available for *in personam* actions.<sup>15</sup>

The easy answer to that difficulty, of course, is to regard interpleader as an *in rem* action. But that easy answer runs into the considerable difficulty that the Supreme Court and lower federal courts have made clear that interpleader is an *in personam* action.<sup>16</sup> And so, the conflict is revealed. The effectiveness of interpleader depends upon the availability of injunctions against other proceedings. There is no congressional authorization of such injunctions for rule interpleader cases. If interpleader were an *in rem* action, one of the other exceptions to the Anti-Injunction Act might save the day, but the Supreme Court has apparently foreclosed that option.

This article examines that three-sided conflict. Part II discusses the problem in greater depth, focusing first on how

---

13. This may raise the question of why one would opt to proceed under the Rule rather than under the Federal Interpleader Act. The answer lies in the differing requirements of the two interpleaders. There are circumstances in which a case cannot satisfy the requirements of statutory interpleader but can satisfy those of rule interpleader. For example, if the stakeholder is a resident of one state and all of the claimants reside in another state, the minimal diversity required by 28 U.S.C. § 1335 is unattainable, though the complete diversity required by 28 U.S.C. § 1332 (1994) is present. Other things being equal, a litigant would probably prefer to proceed under statutory interpleader because its service-of-process provisions are more lenient (nationwide service pursuant to 28 U.S.C. § 2361 (1994) versus the customary geographical restrictions of FED. R. CIV. P. 4), the venue provisions are easier to satisfy (compare 28 U.S.C. § 1397 (1994) (statutory interpleader) with 28 U.S.C. § 1391 (1994) (rule interpleader)), the amount-in-controversy requirement is less (\$500 for statutory interpleader, pursuant to 28 U.S.C. § 1335 (1994), versus in excess of \$50,000 for rule interpleader, pursuant to 28 U.S.C. § 1332 (1994)), and the diversity requirement can often be easier to satisfy (any diversity among the claimants satisfies statutory interpleader's requirements pursuant to 28 U.S.C. § 1335 (1994), whereas rule interpleader requires complete diversity pursuant to 28 U.S.C. § 1332 (1994)). But other things are not always equal.

14. See, e.g., *Pan Am. Fire & Casualty Co. v. Revere*, 188 F. Supp. 474 (E.D. La. 1960), discussed *infra* at notes 116-21 and accompanying text.

15. See *infra* notes 79-83 and accompanying text.

16. See *infra* part II.D.

interpleader functions and why it depends on being "the only game in town." Part II next addresses the background and interpretation of the Anti-Injunction Act, exploring particularly the Supreme Court's narrow interpretation the Act's provisions and discussing the federalism values that the Act and the Court seek to serve. Finally, Part II reviews interpleader's status as an *in personam* action.

Even in setting out the problem, one can conceive of at least three potential solutions. One might simply acknowledge that injunctions are not available in rule interpleader actions. Alternatively, one might reverse the Supreme Court's view of interpleader as an *in personam* action, recharacterizing it as *in rem* to get around the strictures of the Anti-Injunction Act. Finally, one might leave interpleader itself untouched but reinterpret the jurisdiction exception to the Anti-Injunction Act. Unfortunately, each of these solutions comes with an unpalatable price. Part III discusses the price of each solution.

Part IV considers whether, despite the costs of each solution, Congress or the Court should adopt any of them or whether there is some other alternative. In fact, there are two alternatives. Recharacterizing interpleader as an *in rem* proceeding to fit it within the Anti-Injunction Act is possible, though not the best answer because it would require extended judicial effort to refine the courts' jurisdictional treatment of *in rem* proceedings generally. This approach is anything but simple and easy to implement. The more elegant option is for Congress explicitly to authorize injunctions against state proceedings in rule interpleader actions, and Part IV offers language that does so.

## II. FEDERAL INTERPLEADER AND INJUNCTIONS: GENESIS OF AN UNEASY MARRIAGE

### A. *How Interpleader Works*

In modern times, interpleader arises most often in the context of insurance cases.<sup>17</sup> If an insured dies, and there is some

---

17. The original interpleader act authorized only "insurance companies and fraternal beneficiary societies to file bills of interpleader." Act of Feb. 22, 1917, ch. 113, 39 Stat. 929 (current version at 28 U.S.C. §§ 1335, 1397, 2361 (1994)). Professor Zechariah Chafee, Jr., noted of the 1917 Act: "The Act endeavors to secure interstate interpleader for the class of stakeholders who need it most, insurance companies."

difficulty knowing who the intended beneficiaries of the policy are, the insurer confronts a problem. Suppose, for example, that the insured originally designated one beneficiary (A) but subsequently may have designated another (B), the paperwork having become lost. If A sues the company seeking payment, the company may defend on the ground that B is entitled to the proceeds. If the company loses, it will pay the proceeds to A. B may then sue the company to collect the proceeds. The company may defend on the ground that the evidence shows that A was entitled to the proceeds, but it may not use issue preclusion to establish that conclusion because B was not a party to the first action; due process prohibits burdening B with the results of the first action.<sup>18</sup> A trial in the second action may therefore result in a verdict for B, in which case the insurance company would be forced to pay twice.<sup>19</sup> Interpleader seeks to avoid this sort of bind by permitting the insurance company (the stakeholder) to join all competing claimants in a single proceeding to determine conflicting claims without exposing the stakeholder to the possibility of having to pay more than one time on a single liability.<sup>20</sup>

---

Chafee, *Interstate*, *supra* note 4, at 723. In 1940, commenting on the 1936 expansion of the Federal Interpleader Act to permit interpleader actions "by any person, firm, corporation, association, or society," Act of Jan. 20, 1936, ch. 13, 49 Stat. 1096, Professor Chafee observed:

It was hoped that the new law would be helpful to railroads, warehouses, banks (especially savings banks) and oil companies, which are all likely to be vexed by conflicting claims made by citizens of different states. So far, however, nearly all the suits under the present statute have been brought by life insurance companies, and very little advantage has been taken of it by new kinds of businesses.

Chafee, *1936*, *supra* note 4, at 381. That hope remains largely unrealized. "Today, the standard case of interpleader is the insurance company confronted by rival claimants to the proceeds of a life insurance policy." Hazard & Moskowitz, *supra* note 3, at 706-07 (footnote omitted).

18. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 761 (1989) ("All agree that '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). See also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (citing *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 329 (1971)).

19. This was the result in one of the most famous interpleader cases, *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916). See *infra* notes 87-94 and accompanying text for a discussion of *Dunlevy*.

20. A stakeholder may assert interpleader offensively or defensively. When the stakeholder takes the initiative and brings the first proceeding, seeking to join all of the claimants as defendant parties, that is offensive interpleader. On the other hand, if one of the claimants sues the stakeholder for the stake, the defendant stakeholder

The conventional view is that common law required an action to satisfy a four-part test to be eligible for interpleader: (1) all of the claimants had to be claiming precisely the same property or obligation; (2) all claims had either to be dependent upon each other or to derive from a common source; (3) the stakeholder could claim no interest in the stake; and (4) the stakeholder could have no independent obligation to any claimant.<sup>21</sup> The initial requirement seems at first blush to be obvious; there is no inherent reason for a party potentially indebted to numerous individuals on different claims to be able to compel them to submit to a joint adjudication of their diverse claims on the

---

may then seek to join the other claimants. This is defensive interpleader. Rule 22 explicitly contemplates defensive interpleader, noting that "[a] defendant . . . may obtain such interpleader by way of cross-claim or counterclaim," and incorporating the additional party joinder provisions of Rule 20 by reference. FED. R. CIV. P. 22. The statute does not seem to permit defensive interpleader, discussing only actions "filed by any person . . . having in his . . . custody or possession [a stake]." 28 U.S.C. § 1335 (1994). The 1936 statute specifically provided for defensive interpleader. Act of Jan. 20, 1936, ch. 13, 49 Stat. 1096. The current statute, 28 U.S.C. § 1335, speaks only of a stakeholder *filing* an interpleader action, but statutory interpleader actions proceed under the Federal Rules of Civil Procedure, FED. R. CIV. P. 22(B), and therefore may take advantage of the joinder provisions of Rules 13 and 20. Ilsen & Sardell, *supra* note 3, at 57-58. For convenience, this article will discuss interpleader as if it were always offensive.

21. 4 JOHN N. POMEROY, EQUITY JURISPRUDENCE § 1322 at 906 (3d ed. 1905) [hereinafter POMEROY]. Pomeroy's four requirements, though so often reiterated by courts and accepted without comment, may have a questionable ancestry. After an extensive review of each requirement and the cases discussing it, Hazard and Moskowitz report:

1. The "classic" requirements for interpleader are not in any proper sense classic but in fact are of fairly late origin in the history of equitable jurisdiction.
2. The four requirements for interpleader stated by Pomeroy originated as improvisations *ad hoc* and achieved generalization and authority by virtue of credulous extensions of precedent.
3. Of the four requirements, one—the requirement that the claimants' titles be "derivative" or from a "common source"—is plainly insupportable; another—the requirement that the stakeholder not dispute the extent of his liability—is the subject of divided authority concealed by the suppositious "bill in the nature of interpleader"; another—that the stakeholder have no "independent liability" to either claimant—was a response to a now obsolete procedural difficulty; and the remaining one—that the claims relate to the "same debt or duty"—is question begging.

. . . [A] fresh start is in order.

Hazard & Moskowitz, *supra* note 3, at 749-50. That may be, but the courts have made none. Rule and statutory interpleader, however, abandon in varying degrees some of the common-law rules. See *infra* notes 24-32 and accompanying text. Whether or not Pomeroy's four requirements actually existed in historical times, seen from today's perspective with modern interpretations they may as well have.



debtor's property. On the other hand, there are many circumstances in which claimants may make conflicting demands for different amounts from a common fund, and Pomeroy criticizes what he sees as an overly strict reading of this criterion to exclude such cases from the remedy.<sup>22</sup> The second criterion's rationale is not clear. Pomeroy explains and criticizes it without documenting its origins or purpose.<sup>23</sup> Both requirements have disappeared from rule and statutory interpleader.<sup>24</sup>

The third criterion did not apply to interpleader in its earliest years.<sup>25</sup> The requirement of a disinterested stakeholder—the strict bill of interpleader—arose in the late 1700s, when the equity courts began developing settled rules for interpleader.<sup>26</sup> Thus, by 1840 there were “two kinds of interpleader where one grew before.”<sup>27</sup> So, although in the mid-nineteenth century Pomeroy described interpleader as requiring the stakeholder to deposit the stake with the court and to retire from the action, leaving the claimants to present their arguments without the presumably indifferent stakeholder,<sup>28</sup> this description gives too

22. POMEROY, *supra* note 21, § 1323, at 2638-39 n.1.

23. Specifically, Pomeroy has stated:

[I]t is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be, and is, exposed to danger, vexation, and loss from conflicting *independent* claims to the same thing, as well as from claims which are dependent; and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands. It is not surprising, therefore, that courts have sometimes ignored this doctrine in their decisions, or have been ready to admit exceptions to its operation.

*Id.*, § 1324, at 2640 n.1.

24. 7 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE (CIVIL 2d)* § 1701, at 489 (2d ed. 1986) [hereinafter *FEDERAL PRACTICE*].

25. Ralph V. Rogers, *Historical Origins of Interpleader*, 51 *YALE L.J.* 924, 932 (1942).

26. Hazard & Moskowitz, *supra* note 3, at 708.

27. *Id.* at 748. Professor Rogers notes that the terminology “in the nature of interpleader” may have existed in equity as early as 1310 in cases similar to interpleader. Ralph V. Rogers, *supra* note 25, at 949.

28. Pomeroy described the process as follows:

The object of the suit is, that the conflicting claimants shall litigate the matter among themselves, without involving the stakeholder in their controversy, with which he has no interest. It is plain, therefore, that the plaintiff can obtain no *specific* relief. So far as he is concerned, upon his filing the bill, and surrendering up the thing or money into the custody of the court, *his* remedy is exhausted by the decree that the defendants do interplead with each other, and that he be freed from or indemnified against their demands, and that he recover his costs; with the result of their dispute he has no concern.

POMEROY, *supra* note 21, § 1320, at 2635-36.

much weight to the comparatively late advent of strict interpleader. Today, both rule and statutory interpleader specifically proclaim the irrelevance of this criterion.<sup>29</sup>

The fourth criterion may have existed to keep out of interpleader's realm cases in which the stakeholder had some incentive to favor a claimant,<sup>30</sup> although the interpleader device contemplated that the stakeholder would deposit the stake with the court and retire from the action.<sup>31</sup> The status of this criterion in federal interpleader today is not as clear, although commentators note its decline.<sup>32</sup>

---

29. "It is not ground for objection to the joinder that the . . . [stakeholder] plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants." FED. R. CIV. P. 22. "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person . . ." 28 U.S.C. § 1335 (1994).

30. For example, Pomeroy described the purpose of the fourth criterion as follows:

In the first place, the agent, depositary, bailee, or other party demanding an interpleader, in his dealings with one of the claimants, may have expressly acknowledged the latter's title, or may have bound himself by contract, so as to render himself liable upon such independent undertaking, without reference to his possibility to the rival claimant upon the general nature of the entire transaction. Under these circumstances, as the plaintiff is liable at all events to one of the defendants, whatever may be their own respective claims upon the subject-matter as between themselves, he cannot call upon these defendants to interplead. He does not stand indifferent between the claimants, since one of them has a valid legal demand against him at all events. . . . In the second class of cases, the independent liability of the plaintiff to one of the defendants arises from the very nature of the original relation subsisting between them, without any reference to any collateral acknowledgment of title, or promise to be bound. The most important examples of such relations are those subsisting between a bailee and his bailor, an agent or attorney and his principal, a tenant and his landlord, and the like. In pursuance of the doctrine above stated, if a bailee is sued by his bailor, or an agent by his principal, or a tenant by his landlord, and at the same time a third person asserts a claim of title adverse and paramount to that of the bailor, principal, or landlord, a suit of interpleader cannot, in general, be maintained against the two conflicting claimants, since, from the very nature of the relation, there is an independent personal liability, with respect to the subject-matter, of the bailee to his bailor, of the agent to his principal, and of the tenant to his landlord.

POMEROY, *supra* note 21, § 1327, at 2643-44 (footnote omitted).

31. See *supra* note 28. See also *Lummis v. White*, 629 F.2d 397, 400 (5th Cir. 1980).

32. Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1109 n.243 (1985) ("[T]he trend in the cases is that the fourth traditional requirement is no longer a restriction under either rule or statutory interpleader.") See also FEDERAL PRACTICE, *supra* note 24, § 1706, at 518-22.

It requires little imagination to see why injunctions are indispensable to interpleader.<sup>33</sup> Suppose a case where the disputed property is unique—an auction house holding a valuable painting to which there are conflicting claims. Such a case could arise if the winning bid had been submitted by an agent and if there were multiple possible principals asserting the agency. The house might certainly want to have a single proceeding determine which claimant is entitled to the painting, and it might bring an interpleader action for that purpose. If the action were in federal court, its mere pendency would not prevent any claimant from proceeding separately against the auction house in state court. If the state court then enters a judgment requiring delivery of the painting to the state plaintiff, of what remaining use is the federal action?

One may be tempted to solve the unique-property problem by requiring the stakeholder to deposit the stake with the court. Unfortunately, although that might be an effective solution for the interpleader device when the stake is unique, it does not solve the problem when the stake is cash or fungible goods. Certainly the court can require the stakeholder to deposit the stake with the court, but that does not prevent individual claimants from bringing independent actions and satisfying judgments from the stakeholder's other assets. Unless the disputed stake is the only asset the stakeholder possesses, a deposit requirement will not ensure the utility of interpleader in the general case. As a practical matter for the stakeholder, it is injunctive protection or nothing.<sup>34</sup>

---

33. See *Pan Am. Fire & Casualty Co. v. Revere*, 188 F. Supp. 474 (E.D. La. 1960).

Usually interpleader will not be really effective unless all claimants are brought before the same court in one proceeding and restricted to that single forum in the assertion of their claims. To accomplish that end, absent voluntary self-restraint on the part of all interested parties, it is of course essential that the interpleader court enjoin the institution or prosecution of other suits on the same subject matter elsewhere.

*Id.* at 483.

34. Cf. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("For people in *Bivens'* shoes, it is damages or nothing.").

### B. *The Two Faces of Federal Interpleader*

Modern federal interpleader comes in two varieties that arose at different times: statutory interpleader and rule interpleader. Congress created statutory interpleader in 1917 in reaction to *New York Life Insurance Co. v. Dunlevy*.<sup>35</sup> Before the federal interpleader act, interpleader in the federal courts was sometimes available through state interpleader procedures.<sup>36</sup> Rule interpleader, of course, came in with the adoption of the Federal Rules of Civil Procedure in 1938.<sup>37</sup>

---

35. 241 U.S. 518 (1916). Chafee, *Interstate*, *supra* note 4, at 722-23; Chafee, *United States Courts* (pt. 1), *supra* note 1, at 1136 ("The *Dunlevy* decision led the life insurance companies to obtain the first federal interpleader statute in the following year, 1917, in order to bring claimants who are citizens of different states into the United States courts."). *Accord* Ilsen & Sardell, *supra* note 3, at 9, 11.

36. *Dunlevy* itself involved state interpleader. *Bache Halsey Stuart Shields, Inc. v. Germaise*, 519 F. Supp. 682, 687 n.12 (S.D.N.Y. 1981). *See also, e.g.*, *Huxley v. Pennsylvania Warehousing & Safe Deposit Co.*, 184 F. 705 (3d Cir. 1911); *Montgomery v. City of Philadelphia*, 253 F. 473 (E.D. Pa. 1918); *Kingdom of Roumania v. Guaranty Trust Co.*, 244 F. 195 (S.D.N.Y. 1917). Until 1938, there were no federal procedural rules. From 1789 until 1872, the Process Act of 1789, ch. 21, § 2, 1 Stat. 93 (a temporary statute made permanent by Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275), required each federal court to use the procedural law of the state in which it sat as that law had been on September 29, 1789, the date of adoption of the Act. In 1872, Congress passed the Conformity Act, ch. 255, § 5, 17 Stat. 196, 197 (1872), *repealed by* Rules Enabling Act, ch. 651, §§ 1-2, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (1994)), which commanded the federal courts to use contemporaneous state procedures.

Professor Chafee, though noting the existence of these cases, also notes: However, other decisions take a sounder view in refusing to extend the interpleader procedure allowed by these state statutes to actions at law in the United States courts. The Conformity Act does not apply to state statutes injecting equitable issues into actions at law, for equitable proceedings are governed by another federal statute, which declares that "the forms and modes of proceeding in suits of equity . . . shall be according to the principles, rules, and usages which belong to courts of equity" unless it is otherwise provided by Acts of Congress or by Federal Equity Rules duly made by the Supreme Court. The federal courts have insisted that their barrier between law and equity must not be undermined by state legislation.

Chafee, *United States Courts* (pt. 2), *supra* note 4, at 46-47 (footnotes omitted).

37. FED. R. CIV. P. 22. One of the interesting questions about federal interpleader is why, given the existence of statutory interpleader, the Federal Rules provided a different form of interpleader at all. It may have been to take advantage of a diversity pattern different from that authorized by the statute (i.e., one where all of the claimants were from the same state and the stakeholder was diverse from them). Chafee points out that the Rule explicitly discarded the disinterested-stakeholder rule, though the statute had not. Chafee, *1936*, *supra* note 4, at 380. The proceedings of the advisory committee give only a hint of the reason for rule interpleader:

### 1. The Characteristics of Statutory Interpleader

The federal interpleader act now permits both true interpleader and bills in the nature of interpleader. The statute requires only that the claimants seek possession of the same property with a value of at least \$500, that any two of the claimants be of diverse citizenship,<sup>38</sup> and that the stakeholder deposit the stake with the court or post a bond in an amount fixed by the court.<sup>39</sup> There is no requirement that the claimants seek precisely the same property<sup>40</sup> or that their claims have a common origin.<sup>41</sup> Thus, the statute dispenses entirely with the second and third common-law requirements, modifies the first, and fails entirely to mention the fourth.<sup>42</sup>

Perhaps the most interesting feature of the statute is the provision for nationwide service of process<sup>43</sup> with the concomitant establishment of personal jurisdiction by such service.<sup>44</sup> While

Rule 22 deals with Interpleader, and it continues the existing statutory or insurance interpleader, a statute recently passed which authorizes the service of process in all federal districts.

... In fact, this [rule] is interpleader with the shackles of the requirements such as privity, no interest in the stake, and so on, taken away, and made freely available either as a claim or a counterclaim or otherwise. There is really no necessity for having a separate rule on interpleader here, in view of the broad provisions of Rule 20 on general joinder, for that includes all that is authorized by the interpleader rule.

FEDERAL RULES OF CIVIL PROCEDURE, PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C., OCT. 6, 7, 8, 1938, AND OF THE SYMPOSIUM AT NEW YORK CITY, OCT. 17, 18, 19, 1938 66 (Edward H. Hammond ed., 1939).

38. The statute does not require "complete diversity," as does 28 U.S.C. § 1332 (1994). Instead, minimal diversity among the claimants is sufficient. In *State Farm Ins. Co. v. Tashire*, 386 U.S. 523 (1967), the Court upheld this part of the statute, confirming that the complete diversity rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), is not a constitutional requirement.

39. 28 U.S.C. § 1335(a) (1994).

40. *Id.* § 1335(b) (dispensing with the common-law requirement of "identical" claims). Such a situation might arise, for example, if multiple claimants seek the proceeds of an insurance policy but not every claimant seeks the entire amount. See, e.g., *Metropolitan Life Ins. Co. v. Enright*, 231 F. Supp. 275 (S.D. Cal. 1964).

41. 28 U.S.C. § 1335(b).

42. See *supra* notes 21-32 and accompanying text.

43. 28 U.S.C. § 2361 (1994).

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants . . . . Such process . . . shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

*Id.*

44. See *Stitzel-Weller Distillery, Inc. v. Norman*, 39 F. Supp. 182 (W.D. Ky. 1941).

this might seem unremarkable today, consider that the Federal Interpleader Act arrived in 1917, when the only bases for personal jurisdiction were those described in *Pennoyer v. Neff*.<sup>45</sup> Thus, Congress must have proceeded upon a presence-plus-service theory of jurisdiction.<sup>46</sup> The lingering question is whether the Due Process Clause permits Congress to do that.<sup>47</sup> Congress also prescribed wide-ranging venue for statutory interpleader actions, complementing the broad jurisdiction and service provision: venue is proper wherever one of the claimants

---

Except where specifically authorized by a Federal statute, the civil process of a Federal District Court does not run outside the district and service outside the district is void. . . . Th[e] [interpleader] statute does provide that the Court in which the interpleader suit is filed shall have power to issue its process against all claimants . . . which process . . . shall be addressed to and served by the United States marshal [sic] "for the respective districts wherein said claimants reside or may be found." This statute confers jurisdiction over all the defendants served, even those residing in Ohio and Florida.

*Id.* at 187-88. Service under the interpleader statute does establish personal jurisdiction, but the courts have limited its scope to the interpleader dispute itself, refusing to permit other claims to rely on the same jurisdictional predicate. *See infra* note 91. "There is considerable case law and literature dealing with the inequity of obtaining personal jurisdiction over a nonresident claimant by means of nationwide service of process, thence to subject the claimant to personal liability by cross claim which could exceed the amount of the interpled *res* itself." *National Coop. Refinery Assoc. v. Rouse*, 60 B.R. 857, 862 (Bankr. D. Colo. 1986).

45. 95 U.S. 714 (1877).

46. One is tempted to see the jurisdiction as based on residence or domicile, but the statute permits service upon the claimants wherever they may be *found* in the United States without requiring that a claimant live in the United States. Thus, although at least one claimant must be a citizen of a state to bring the case within the diversity requirements of 28 U.S.C. § 1332 (1994) (made applicable explicitly by 28 U.S.C. § 1335 (1994)), other claimants may be from other countries.

47. Although beyond the scope of this article, the implications of Congress's action in this respect are fascinating. Note that interpleader almost invariably seeks to adjudicate a state-created claim—essentially a property-rights claim. If Congress can decree nationwide jurisdiction for those state claims, could it do so for all state-created claims heard in the federal courts? There seems little basis on which to distinguish between interpleader claims and other claims presented to the federal courts in diversity cases. Of course, if nationwide jurisdiction became available for diversity cases generally, that would give plaintiffs an enormous advantage from proceeding in federal court, far beyond the desire to avoid "local prejudice" that seemingly underlies diversity jurisdiction. *See* JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 23-24 (2d ed. 1993). *But see* CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* 142 (5th ed. 1994) ("The traditional explanation of the diversity jurisdiction is a fear that state courts would be prejudiced against those litigants from out of state. . . . This explanation for the grant of diversity jurisdiction has been disputed."). It is ironic that Congress should have created (and maintained) such an incentive to forum shop when *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), placed such emphasis on avoiding it.

resides.<sup>48</sup> These provisions also explain the great importance of federal statutory interpleader. Although all of the states have interpleader,<sup>49</sup> it is a device of limited utility when the claimants are scattered through many jurisdictions, because there may be no state in which all claimants are amenable to personal jurisdiction.<sup>50</sup> Thus, the advent of the federal statute with its nationwide service and jurisdictional assumption was a major benefit for stakeholders.

The statute also explicitly authorizes the federal courts to enjoin claimants from otherwise litigating with respect to the stake.<sup>51</sup> The injunction that Professor Chafee described as essential<sup>52</sup> is thus freely available. Interestingly, and perhaps as a bow to federalism, the statute describes the injunction as running against the litigants, not against state courts.<sup>53</sup>

## 2. The Characteristics of Rule Interpleader

Like statutory interpleader, rule interpleader dispenses with many of the requirements of common-law interpleader.

It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff [stakeholder] avers that the plaintiff is not liable in whole or in part to any or all of the claimants.<sup>54</sup>

---

48. 28 U.S.C. § 1397 (1994).

49. See, e.g., ALA. R. CIV. P. 22; ARIZ. R. CIV. P. 22; CAL. CIV. PROC. CODE § 386 (West Supp. 1995); DEL. CT. C. P. R. 22; DEL. CT. CH. R. 22; KY. R. CIV. P. 22; MASS. R. CIV. P. 22; N.Y. C.P.L.R. § 1006 (McKinney 1976 & Supp. 1995); TEX. R. CIV. P. 22; VT. R. CIV. P. 22.

50. See Chafee, *United States Courts* (pt. 1), *supra* note 1, at 1134-35 (“[I]f there are two claimants living in different states, neither of whom can be personally served in the state where the other resides, it is unlikely that the state courts in either state will be able to give adequate relief to the stakeholder.”) (citing Chafee, *Interstate*, *supra* note 4).

51. 28 U.S.C. § 2361 (1994) (“[A] district court may . . . enter its order restraining them [all claimants] from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court.”).

52. See *supra* note 4 and accompanying text.

53. The Supreme Court, however, has made clear that for purposes of the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), the difference is immaterial. See *supra* note 6.

54. FED. R. CIV. P. 22.

Thus, rule interpleader expressly disposes of the first three common-law requirements.<sup>55</sup>

The traditional rules that apply to diversity jurisdiction govern rule interpleader.<sup>56</sup> The opposing parties must be completely diverse, satisfying the rule of *Strawbridge v. Curtiss*.<sup>57</sup> The amount in controversy must exceed \$50,000.<sup>58</sup> Rule 4 governs service of process,<sup>59</sup> and the traditional venue requirements apply.<sup>60</sup> Personal jurisdiction, not being covered explicitly in the Rule, is governed by the jurisdictional statutes of the states in which the federal courts sit.<sup>61</sup>

---

55. See *supra* notes 21-32 and accompanying text.

56. The predominance of insurance cases, see *supra* note 17 and accompanying text, suggests that interpleader based upon federal question jurisdiction will be rare. In *General Ry. Signal Co. v. Corcoran*, 921 F.2d 700 (7th Cir. 1991), the court found such jurisdiction because of the federal identity of one claimant. In *UIU Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers of America*, 998 F.2d 509 (7th Cir. 1993), the court upheld jurisdiction under 28 U.S.C. § 1331 (1994) where a trustee under the Employees Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (1994), brought an interpleader action against rival claimants. One asserted entitlement to the fund under ERISA, while the other's claim sounded in common-law restitution. Finally, one court upheld federal question jurisdiction interpleader in a circumstance in which one of the defendant-claimants (a United States agency) asserted a claim under the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653 (1994), on the theory that although the stakeholder's interpleader action itself was not federal, the court could consider what the defendants' coercive claims would have been had they filed them individually, analogizing the situation to that presented in declaratory judgment cases. *Commercial Union Ins. Co. v. United States*, 999 F.2d 581 (D.C. Cir. 1993). The dearth of reported cases involving interpleader and federal question jurisdiction implies that although such cases can arise, they will be a small proportion of all federal interpleader actions.

57. 7 U.S. (3 Cranch) 267 (1806).

58. 28 U.S.C. § 1332 (1994).

59. FED. R. CIV. P. 4.

60. 28 U.S.C. § 1391 (1994).

61. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

[T]he federal district courts possess no warrant to create jurisdictional law of their own. Under the Rules of Decision Act . . . they must apply state law "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide. . . ." Thus, in the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the district courts is determined in diversity cases by the law of the forum State.

*Id.* at 711 (Powell, J., concurring) (citation omitted) (citing *inter alia* *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980); *Intermeat, Inc. v. American Poultry Co.*, 575 F.2d 1017 (2d Cir. 1978); *Wilkerson v. Fortuna Corp.*, 554 F.2d 745 (5th Cir.), *cert. denied*, 434 U.S. 939 (1977); *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963)).



No difference between rule and statutory interpleader is more important than the fact that the Rule contains no authorization for injunctions to prevent competing litigation for the stake. Other things being equal, that lack would make rule interpleader a true poor relation of statutory interpleader; stakeholders having the choice would certainly elect the latter.<sup>62</sup> The lower federal courts, implicitly recognizing the inutility of rule interpleader without injunctions, have issued injunctions regularly,<sup>63</sup> solving the potential problem of the Anti-Injunction Act by declaring such injunctions necessary in aid of the court's jurisdiction.<sup>64</sup> That declaration requires a closer look at the Anti-Injunction Act and the second exception to its otherwise blanket prohibition of federal court injunctions of state court proceedings.

### C. *A Primer on the Anti-Injunction Act*

It is not possible to identify an immediate stimulus for the Anti-Injunction Act.<sup>65</sup> Its early appearance and remarkable persistence emphasize the extreme sensitivity of federal-state relations. When the Act appeared in 1793, state suspicion of the then-new federal government was as great as it has ever been. This was the period of the Bill of Rights, the bitter fight over the establishment of a national bank, and the Whiskey Rebellion, all of which concerned the powers of the federal government.<sup>66</sup>

---

62. Given the different requirements of rule and statutory interpleader, stakeholders may not have the choice. If a stakeholder, for example, shares citizenship with any claimant, the case cannot qualify for rule interpleader because the complete diversity requirement is not satisfied. On the other hand, if all of the claimants reside in one state, the case cannot qualify for statutory interpleader but may do so for rule interpleader, provided only that the amount in controversy is sufficient.

63. In *Lowther v. New York Life Ins. Co.*, 278 F. 405 (3d Cir. 1922), a statutory interpleader case, the court refused, on Anti-Injunction Act grounds, to enjoin state proceedings. *Lowther* caused Congress to amend the statute in 1926 (Act of May 8, 1926, ch. 273, 44 Stat. 416) specifically to permit such injunctions. Chafee, *United States Courts* (pt. 1), *supra* note 1, at 1164 n.100. That judicial reticence, however, has not manifested itself in rule interpleader cases. *Boston Old Colony Ins. Co. v. Balbin*, 591 F.2d 1040, 1042 n.5 (5th Cir. 1979), mentions the potential Anti-Injunction Act problem without speculating upon a solution. There are no reported cases explicitly denying injunctive relief in a rule interpleader action on the basis of the Anti-Injunction Act.

64. See *infra* notes 116-24 and accompanying text.

65. CHEMERINSKY, *supra* note 8, at 642 ("Because there is no legislative history for the statute, it is unknown why Congress chose to enact this restriction.")

66. ALLAN NEVINS & HENRY STEELE COMMAGER, *A SHORT HISTORY OF THE*

Moreover, in the same year as the Anti-Injunction Act, the Supreme Court decided *Chisholm v. Georgia*,<sup>67</sup> which sparked the Eleventh Amendment.<sup>68</sup>

While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and "to prevent needless friction between state and federal courts," it was necessary to work out lines of demarcation between the two systems. Some of these limits were spelled out in the 1789 Act. Others have been added by later statutes as well as judicial decisions. The 1793 anti-injunction Act was at least in part a response to these pressures.<sup>69</sup>

---

UNITED STATES 136-49 (5th ed. 1966).

67. 2 U.S. (2 Dall.) 419 (1793).

68. U.S. CONST. amend. XI. "The decision in that case, that a State was liable to suit by a citizen of another State or of a foreign country, literally shocked the Nation. Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum, and five years after *Chisholm* the Eleventh Amendment was officially announced by President John Adams." *Edelman v. Jordan*, 415 U.S. 651, 662 (1974).

69. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970) (footnote and citations omitted). The Court cited the inconclusive, though extended, discussion of the Act's history in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 130-31 (1941) (footnote and citations omitted):

The history of this provision in the Judiciary Act of 1793 is not fully known. We know that on December 31, 1790, Attorney General Edmund Randolph reported to the House of Representatives on desirable changes in the Judiciary Act of 1789. . . . A section of the proposed bill submitted by him provided that "no injunction in equity shall be granted by a district court to a judgment at law of a State court." Randolph explained that this clause "will debar the district court from interfering with the judgments at law in the State courts; for if the plaintiff and defendant rely upon the State courts, as far as the judgment, they ought to continue there as they have begun. It is enough to split the same suit into one at law, and

Whatever the specific stimuli, the thrust of the Act was and is clear: the federal judiciary has quite limited power to enjoin state court proceedings. The Supreme Court's interpretation of the Act has solidified that message.

By its terms the Act permits the federal judiciary to enjoin state proceedings in only three circumstances. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."<sup>70</sup> It is noteworthy that the Act seeks directly to protect the states not from the federal government as a whole but from the federal judiciary. This appears to reflect two things: first, the underlying suspicion of the federal judiciary as a countermajoritarian (and certainly counterstate) institution and second, the then-prevailing view that the political branches of the federal government were more amenable to state influence because of the states' role in declaring the qualifications of the electorate,<sup>71</sup> electing senators,<sup>72</sup> and providing the electors who

---

another in equity, without adding a further separation, by throwing the common law side of the question into the State courts, and the equity side into the federal courts." . . .

Charles Warren . . . suggests that this provision was the direct consequence of Randolph's report. This seems doubtful, in view of the very narrow purpose of Randolph's proposal, namely, that federal courts of equity should not interfere with the enforcement of judgments at law rendered in the state courts.

There is no record of any debates over the statute. It has been suggested that the provision reflected the then strong feeling against the unwarranted intrusion of federal courts upon state sovereignty. *Chisholm v. Georgia* was decided on February 18, 1793, less than two weeks before the provision was enacted into law. The significance of this proximity is doubtful. Much more probable is the suggestion that the provision reflected the prevailing prejudices against equity jurisdiction.

70. 28 U.S.C. § 2283 (1994). For brevity's sake, this article will refer to the three areas of permissible federal injunctions as the congressional exception, the jurisdiction exception, and the judgment exception.

71. U.S. CONST. art. I, § 2, cl. 1: "[T]he electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Twenty-Fourth and Twenty-Sixth Amendments now limit the states' ability completely to control voter qualifications for federal election purposes. U.S. CONST. amends. XXIV, XXVI.

72. U.S. CONST. art. I, § 3, cl. 1: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . ." The Seventeenth Amendment, U.S. CONST. amend. XVII, superseded this selection method, providing for direct election of senators and reiterating the voter qualification rule then applicable for the House of Representatives, but now subject to further constitutional limitation. See *supra* note 71.

actually selected the president.<sup>73</sup> The Madisonian Compromise in the Constitutional Convention concerning the structure of the federal judiciary<sup>74</sup> reflected the battle between Federalists and Anti-Federalists over whether to have a full set of trial and appellate courts or whether that would at best duplicate the state courts' efforts and at worst invite unwanted exercise of unreviewable federal power.<sup>75</sup> Consistent with that history, the Supreme Court has, for the most part, interpreted the exceptions to the Act narrowly.

The congressional exception seems to brook little interpretation. One's first impression is that it should be easy to determine whether Congress has expressly authorized injunctions against state proceedings, and most of the time it is. The statutory interpleader authorization is a good example; it leaves no doubt about the courts' injunctive power.<sup>76</sup> On the other hand, the Supreme Court has interpreted at least one statute to be such an authorization despite the absence of a clear statement.<sup>77</sup> For purposes of this article, however, the congressional exception offers no hope for rule interpleader, because there is no statute upon which to lean.<sup>78</sup>

---

73. U.S. CONST. art. II, § 1, cl. 2:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

74. NEVINS & COMMAGER, *supra* note 66, at 135-36. Article III reflects the Convention's deferring to Congress for resolution of the issue. U.S. CONST. art. III, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

75. WRIGHT, *supra* note 47, at 2; CHEMERINSKY, *supra* note 8, at 2-4.

76. *See supra* note 51. *See also* 11 U.S.C. § 105(a) (1994); Indian Gaming Regulatory Act, 18 U.S.C. § 1166(d) (1994).

77. *Mitchum v. Foster*, 407 U.S. 225 (1972), held that the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994), is such an exception. The statute itself merely discusses the general availability of equitable relief, without any mention of such relief running against state courts or state litigation. "In what may be one of the most bizarre contortions of Supreme Court analysis, the Court in *Mitchum* found section 1983 to be an 'implied' express exception (an oxymoron if ever there was one) . . ." Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 87 (1984).

78. *See* 28 U.S.C. § 2074 (1994). It is important to note the distinction between congressional action in passing a statute and congressional behavior in permitting a proposed new rule of civil procedure to become effective. To become law, a bill must pass both houses of Congress and then either receive the President's signature (or grudging acquiescence implied in withholding the signature without vetoing the

The Supreme Court has interpreted the jurisdiction exception to the Act very restrictively. The leading case is *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*,<sup>79</sup> in which the parties, in state and federal cases, were litigating the union's entitlement to picket free from state interference. The Railroad unsuccessfully sought a federal injunction against union picketing, but later obtained one from a state court. After an intervening decision of the Supreme Court in a related case upheld the union's right to picket an adjacent facility, the union petitioned the state court to dissolve its injunction. The state court refused, and the union, rather than appealing through the state system, secured from the federal court an injunction restraining enforcement of the state injunction.<sup>80</sup> The issue for the Supreme Court was whether the federal injunction was justified under either the jurisdiction or judgment exceptions of the Anti-Injunction Act. The Court lost no time limiting the scope of both.

[I]f the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be "*necessary in aid of*" that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to "protect or effectuate" judgments. Both exceptions to the general prohibi-

---

measure) or have two-thirds support in each house of Congress if the President vetoes it. A proposed rule of civil procedure, however, need merely fail to move Congress to act in order to become law. If Congress fails affirmatively to override a proposed rule between the May 1 submission date and December 1 effective date prescribed by § 2074, the rule is law. It is difficult to equate congressional failure to act to block a proposed rule with the "express[ ] authoriz[ation] by act of Congress" that the Anti-Injunction Act contemplates. Indeed, the Anti-Injunction Act's great concern with the federalism issues inherently raised whenever a federal court enjoins a state court strongly suggests that Congress intended not to permit such injunctions unless the federal legislative process had run its full course. Congressional failure to override a proposed rule is hardly that.

79. 398 U.S. 281 (1970).

80. Justice Black's majority opinion attempted to identify the theory underlying the union's return to federal court in apparent defiance of the Act:

[T]he argument is somewhat unclear, but it appears to go in this way: The District Court had acquired jurisdiction over the labor controversy in 1967 when the railroad filed its complaint, and it determined at that time that it did have jurisdiction. The dispute involved the legality of picketing by the union and the *Jacksonville Terminal* decision clearly indicated that such activity was not only legal, but was protected from state court interference. The state court had interfered with that right, and thus a federal injunction was "necessary in aid of its jurisdiction."

*Id.* at 294.

tion of [section] 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case. . . . [T]he state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts. Therefore the state court's assumption of jurisdiction over the state law claims and the federal preclusion issue did not hinder the federal court's jurisdiction so as to make an injunction *necessary* to aid that jurisdiction.<sup>81</sup>

As a practical matter, the Court has upheld injunctions based on the jurisdiction exception only in two circumstances: (1) removal jurisdiction, under which a federal court may enjoin further proceedings in the state court from which the action came,<sup>82</sup> and (2) cases in which the federal court's jurisdiction depended on attachment of property: jurisdiction that is either *in rem* or *quasi in rem*.<sup>83</sup>

---

81. *Id.* at 295-96 (citations omitted).

82. The Anti-Injunction Act "has always been deemed inapplicable to removal proceedings. The true rationale of these decisions is that the Removal Acts qualify *pro tanto* the Act of 1793." *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 133 (1941) (citations omitted). One might also argue that such injunctions are at least as "expressly authorized" as those issued under 42 U.S.C. § 1983 (1994). See *supra* note 77 and accompanying text. After all, the removal statute, 28 U.S.C. § 1446(d) (1994), explicitly provides that after the defendant or defendants file the removal petition, the "State court . . . shall effect the removal and . . . shall proceed no further unless and until the case is remanded."

83. *Mandeville v. Canterbury*, 318 U.S. 47 (1943), provides the best single statement by the Supreme Court of this rule, though the Court decided the case before the 1948 amendment of the Anti-Injunction Act. The Act then read: "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State." Act of Mar. 3, 1911, ch. 231, § 265, 36 Stat. 1162. The Court observed:

To this sweeping command there is a long recognized exception that if two suits pending, one in a state and the other in a federal court, are *in rem* or *quasi in rem*, so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant the relief sought, the court first acquiring jurisdiction or assuming control of such property is entitled to maintain and exercise its jurisdiction to the exclusion of the other.

In such cases this Court has uniformly held that a federal court may protect its jurisdiction thus acquired by restraining the parties from prosecuting a like suit in a state court notwithstanding the prohibition of § 265. This exception to the prohibition has been regarded as one of necessity to prevent unseemly conflicts between the federal and state courts and to prevent the impasse which would arise if the federal court were unable to maintain its possession and control of the property, which are indispensable to the exercise of the jurisdiction it has assumed. But

The Supreme Court has also restricted the scope of the judgment exception, as the quotation above suggests. As a general rule, the Court has allowed injunctions based on this exception to implement the principles of claim and issue preclusion, reflecting the exception's purpose of overruling *Toucey*.<sup>84</sup> The judgment exception might be relevant to interpleader cases in the federal courts after they have gone to judgment. Once the federal court has adjudicated the rights of the conflicting claimants and decreed the disposition of the stake, it would be appropriate for the court to ensure the effectiveness of its judgment by preventing losing claimants from evading the federal result by beginning a state action.<sup>85</sup> It is noteworthy, however, that the Court has interpreted the judgment exception so that it is superfluous unless a state court ignores the normal rules of preclusion.<sup>86</sup> In addition, the judgment exception does nothing to protect the stakeholder when a state case brought by a claimant concludes before the federal interpleader case.

Against this backdrop, it is tempting to classify interpleader cases as *in rem* or *quasi in rem* so that the jurisdiction exception applies. But that door, as the next subsection shows, may be a trap door.

---

where the judgment sought is strictly *in personam* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as *res judicata* in the other.

*Mandeville*, 318 U.S. at 48-49. Since Congress intended the 1948 amendment to the statute merely to reestablish the law as it had existed prior to *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), *see supra* note 8, the change in the statute makes no difference to the principle the Court expressed.

84. *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941). *See supra* note 8 and accompanying text. *See generally* WRIGHT, *supra* note 47, at 304-05.

85. FEDERAL PRACTICE, *supra* note 24, § 1717, at 616.

86. Given the background of the Anti-Injunction Act and the continuing theme of federal-state friction in American history, perhaps this is not so odd. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), arose because of the Virginia Supreme Court's refusal to acknowledge the United States Supreme Court's position in the hierarchy, and as recently as nine years ago the Attorney General of the United States expressed the view that the Court's rulings were not "the supreme law of the land." Stuart Taylor, *Meese Says Rulings by U.S. High Court Don't Establish Law*, N.Y. TIMES, Oct. 23, 1986, at 1.

D. In Personam *Interpleader*

Ironically, the case that spawned federal statutory interpleader is also the case whose declaration threatens the efficacy of rule interpleader. *New York Life Insurance Co. v. Dunlevy*<sup>87</sup> is both a textbook example of the necessity of the interpleader device and an unwitting partner of the Anti-Injunction Act in making rule interpleader less useful. Close examination of the facts demonstrates why.

Effie Dunlevy's father, Joseph Gould, purchased a life insurance policy from New York Life. In 1893, after Gould took out the policy, he may have assigned it to his daughter; the dispute in the case ultimately revolved, inconclusively, around that event. In an action entirely unconnected with the policy, Boggs & Buhl recovered a judgment against Dunlevy in 1907. Two years later, when the policy became payable, she had moved to California. Boggs & Buhl attempted to execute the judgment against the proceeds of the policy. New York Life and Gould appeared, the latter denying that an assignment had occurred and demanding payment in full. At that point, New York Life obtained an order of the Pennsylvania court permitting it to interplead Gould and Dunlevy. The court directed notice to Dunlevy in California, but she did not appear. The court awarded Gould the proceeds, and New York Life paid him the full amount. Of Boggs & Buhl no more is heard.

In 1910, Dunlevy began a California action against Gould and New York Life, establishing jurisdiction by serving both with process in California. New York Life defended the California action on *res judicata* grounds, but the lower federal courts (to which Dunlevy's state action had been removed) ruled in her favor.<sup>88</sup> The Supreme Court affirmed, with the result that New York Life had to pay twice, once to Gould as a result of the Pennsylvania proceeding and once to Dunlevy as a result of the California proceeding. Explaining why the Pennsylvania

---

87. 241 U.S. 518 (1916).

88. Then as now, the predecessor of today's Full Faith and Credit Act, 28 U.S.C. § 1738 (1994), required federal courts to give full faith and credit to state court judgments. See Act of Mar. 27, 1804, ch. 56, 2 Stat. 298-99. But also then as now, a defect in personal jurisdiction took the relied-upon judgment out of the statute, permitting the second forum to ignore the void judgment. See generally EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 968-73 (2d ed. 1992); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 94 (1986).



proceeding was ineffective to adjudicate Dunlevy's rights to the policy proceeds, the Court rejected New York Life's argument that the Pennsylvania court had jurisdiction over Dunlevy as a part of the Boggs & Buhl action.

[T]he interpleader initiated by the company was an altogether different matter. This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court and required to respond to that issue, its orders and judgments in respect thereto were not binding on her.

....  
... The interpleader proceedings were not essential concomitants of the original action by Boggs & Buhl against Dunlevy but plainly collateral and when summoned to respond in that action she was not required to anticipate them.

....  
The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the state, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person.<sup>89</sup>

Accordingly, the Court concluded "that the proceedings in the Pennsylvania court constituted no bar to the action in California."<sup>90</sup>

Note that had the Pennsylvania interpleader action been viewed as *in rem*, even though the Court regarded it as separate from the Boggs & Buhl suit,<sup>91</sup> jurisdiction over Dunlevy would not

---

89. 241 U.S. at 521-23 (citations omitted) (citing *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1877)).

90. *Id.* at 523.

91. The Court seems to have viewed it as a separate proceeding for due process and notice purposes. Its theory is clearly that the original process that Dunlevy received in the Boggs & Buhl action cannot have put her on notice that property rights unrelated to that dispute were subject to the court's adjudication. *See supra* text accompanying note 89. Thus, even though New York Life apparently interpleaded as a part of the garnishment proceeding, the Court ruled that jurisdiction to adjudicate Dunlevy's entitlement to the insurance proceeds had to be established separately. New York Life relied upon *Michigan Trust Co. v. Ferry*, 228 U.S. 346 (1913), in which the Court, reviewing a proceeding involving an estate, had said that "if a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause." *Id.* at 353. But, discussing *Ferry*, the *Dunlevy* Court observed:

have been a problem, and the resulting judgment would have been entitled to full faith and credit in the California action.<sup>92</sup> But the Court's language leaves no doubt that nothing less than *in personam* jurisdiction in the interpleader proceeding would do. Courts since that time have followed this view of interpleader,<sup>93</sup> although some have noted that the law is confused as to the proper characterization.

[T]he question is unsettled. While there is broad language implying that interpleader is an action *in personam* in *New York Life Insurance Co. v. Dunlevy*, . . . the effect of the holding has been diminished by later Supreme Court decisions taking a due process approach to jurisdiction and service of process and blurring the distinctions between actions *in personam* and actions *in rem*. This unclarity is noticeable in the lower courts' decisions where interpleader has been held to [be] an action *in*

---

The judgment under consideration was fairly within the reasonable anticipation of the executor when he submitted himself to the probate court. But a wholly different and intolerable condition would result from acceptance of the theory that, after final judgment, a defendant remains in court and subject to whatsoever orders may be entered under title of the cause.

241 U.S. at 522. See also *Metropolitan Life Ins. Co. v. Enright*, 231 F. Supp. 275 (S.D. Cal. 1964) (interpleader court lacked jurisdiction to direct one claimant to pay disputed amount to another claimant where stakeholder had made preliminary distribution to first claimant); *Stitzel-Weller Distillery, Inc. v. Norman*, 30 F. Supp. 182, 188 (W.D. Ky. 1941):

[The interpleader statute] does not confer jurisdiction over defendants in another state against whom a personal judgment is sought by a cross-bill filed by a codefendant. Such a proceeding is not an interpleader proceeding, and in such a proceeding the cross-defendants are not "claimants" as provided by the statute, but they are defendants in an action *in personam*.

92. See generally SCOLAS & HAY, *supra* note 88, at 225-31, 963, 968-70.

93. See, e.g., *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 362 (11th Cir. 1984); *United States v. Major Oil Corp.*, 583 F.2d 1152, 1155 (10th Cir. 1978); *Humble Oil & Refining Co. v. Copeland*, 398 F.2d 364, 367 (4th Cir. 1968); *Kitzer v. Phalen Park State Bank*, 379 F.2d 650, 654 (8th Cir. 1967); *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425, 429 (10th Cir. 1966); *Preferred Risk Mut. Ins. Co. v. Greer*, 289 F. Supp. 261, 263 (D.S.C. 1968); *Metropolitan Life Ins. Co. v. Dumpson*, 194 F. Supp. 9, 11 (S.D.N.Y. 1961); *United States v. Coumantaros*, 146 F. Supp. 51, 53 (S.D.N.Y. 1956); *Aetna Life Ins. Co. v. Du Roure*, 123 F. Supp. 736, 740 (S.D.N.Y. 1954). Commentators seem to agree with the courts. See, e.g., Janet C. Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 445 n.231 (1992); Stanley E. Cox, *Jurisdiction, Venue and Aggregation of Contacts: The Real Minimum Contacts and Federalism Questions Raised by Omni Capital, International v. Redolf Wolff & Co.*, 42 ARK. L. REV. 211, 318 n.236 (1989); Steven M. Larimore, *Exploring the Interface Between Rule 23 Class Actions and the Anti-Injunction Act*, 18 GA. L. REV. 259, 286-88 (1984); Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 532 (1987).

*personam*, an action *in rem*, and an action *in personam* only as to the disposition of the funds deposited into court.<sup>94</sup>

While most of this quotation may be agreeable, it misses the point with respect to the Anti-Injunction Act. For purposes of due process and personal jurisdiction, it may make little difference in the post-*Shaffer* era how one characterizes interpleader.<sup>95</sup> On the other hand, the Supreme Court has never retreated from the *in personam* characterization itself, and this view of interpleader is very important with respect to whether the device qualifies under the Anti-Injunction Act's jurisdiction exception.

Thus, the three pieces of the picture are in place. Injunctions are necessary for effective interpleader. The Anti-Injunction Act's general prohibition of injunctions against state proceedings appears to preclude rule interpleader injunctions unless they are "necessary in aid of the court's jurisdiction." The Supreme Court has limited that exception to the Anti-Injunction Act to *in rem* or *quasi in rem* cases, but also has declared interpleader actions to be *in personam*. Unfortunately, as the next section demonstrates, changing any part of this three-cornered dilemma creates additional problems.

### III. SOLUTIONS THAT DO NOT WORK (WELL)

There are at least three conceivable solutions to rule interpleader's impossible picture that do not involve congressional action. First, one might simply declare injunctions unavailable in rule interpleader cases. Second, one might recharacterize interpleader as a proceeding *in rem* or *quasi in rem*. Third, one might reconceptualize the jurisdiction exception of the Anti-

---

94. First Tenn. Nat'l Bank, Chattanooga v. FDIC, 421 F. Supp. 35, 37-38 (E.D. Tenn. 1976) (citations omitted). Accord Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d at 363 ("Courts are not in complete agreement over the nature of an interpleader action. Some have indicated that interpleader is an *in rem* or *quasi in rem* proceeding, while others have characterized interpleader as *in personam*.") (citations omitted). See also United States v. Major Oil Corp., 583 F.2d at 1158; Knoll v. Socony Mobil Oil Co., 369 F.2d at 429; Preferred Risk Mut. Ins. Co. v. Greer, 289 F. Supp. at 263 (all note that the interpleader court's jurisdiction extends only to the stake); Cf. Northern Natural Gas Co. v. Grounds, 441 F.2d 704, 715 (10th Cir. 1971); Phillips Petroleum Co. v. Riverview Gas Compression Co., 409 F. Supp. 486, 491 (N.D. Tex. 1976) (both take the position that the interpleader court cannot entertain unrelated *in personam* claims against any claimant).

95. See *infra* notes 103-11.

Injunction Act, broadening it to include *in personam* cases. Each of these approaches, however, arguably creates more problems than it solves.

#### A. *Rule Interpleader Without Injunctions*

As courts and commentators have recognized, interpleader is ineffective without injunctions that limit claimants to one forum for a binding adjudication,<sup>96</sup> so the practical effect of declaring injunctions unavailable in rule interpleader cases would be to render rule interpleader substantially useless. Stakeholders having a choice would certainly opt for statutory interpleader. Stakeholders may, of course, favor statutory interpleader in any case when a choice exists simply because of its more generous service-of-process, jurisdiction, and venue provisions.<sup>97</sup> The competitive edge that statutory interpleader enjoys under those provisions, however, would be comparatively insignificant if statutory interpleader also offered the only possibility of preventing claimants from pursuing individual claims against the stakeholder. Without injunctions to support it, rule interpleader would certainly qualify for the endangered species list.

#### B. *Interpleader as an In Rem Action*

In some ways, characterizing interpleader as an *in rem* action is the most attractive of the three alternatives, because it seems not to carry the institutional price of the other two. It would not, as a practical matter, destroy rule interpleader, nor would it have the broader implications for federal-state relations that reinterpreting the Anti-Injunction Act would have.<sup>98</sup> Although the institutional price of this solution is not high, it carries a potential personal cost to claimants.

The forum for an action *in rem* is determined by the location of the property.<sup>99</sup> When the disputed property is real estate, that result is logical and, indeed, unavoidable because the courts of

---

96. See *supra* notes 4, 34 and accompanying text.

97. See *supra* notes 43, 48, 58-60 and accompanying text. There apparently are no statistics kept on the distribution of interpleader cases between those brought under the Rule and those brought under the statute.

98. See *infra* part III.C-D.

99. FRIEDENTHAL ET AL., *supra* note 47, at 83-84.

one jurisdiction cannot directly affect title to real property situated elsewhere.<sup>100</sup> If the dispute involves personal property, however, as interpleader so often does,<sup>101</sup> that logic disappears. In its wake comes the danger that claimants may be forced to travel to distant and inconvenient jurisdictions to protect their rights. That difficulty is exacerbated because the claimants have no power over where the stakeholder takes the property. Indeed, a stakeholder who is also a claimant might remove the property to a forum known to be inconvenient for many of the claimants, thereby enhancing the possibility of retaining the stake. In a related context, the Supreme Court cautioned that chattel should not function as a defendant's agent for service of process and concomitant establishment of jurisdiction.<sup>102</sup> *Shaffer v. Heitner*<sup>103</sup> underlies that pronouncement. There the Court considered whether property within a state is sufficient, without more, to subject its owner to the power of the forum's courts. *Shaffer* requires further examination, because of both its similarities to and differences from typical interpleader cases.

Heitner, owner of a single share of stock in Greyhound Corporation, brought a shareholder's derivative action against the company's officers and directors on the theory that they had exposed Greyhound to antitrust liability and a criminal contempt sanction. Greyhound was a Delaware corporation.<sup>104</sup> Heitner

---

100. *Durfee v. Duke*, 375 U.S. 106, 115 (1963) ("[T]he courts of one State are completely without jurisdiction directly to affect title to land in other States.") (citing *Olmsted v. Olmsted*, 216 U.S. 386 (1910); *Fall v. Eastin*, 215 U.S. 1 (1909); *Carpenter v. Strange*, 141 U.S. 87 (1891)). The *Fall* Court did point out that a state may indirectly affect title to out-of-state land if it has *in personam* jurisdiction over the owner by ordering the owner to convey the land. The state may not, however, when faced with the owner's refusal to do so, appoint its own officer to act in the owner's stead. 215 U.S. at 6-12. The *Fall* method is of no use in interpleader, however, because the claimants over whom the court requires jurisdiction do not, by definition, have title to the property in dispute; the stakeholder holds the title.

101. Recall that the original federal interpleader statute made the device available only for insurance companies and fraternal benefit associations. See *supra* note 17. Even the 1936 expansion of the Act added categories of stakeholders much more likely to hold personal than real property. See *id.*

102. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980). There the plaintiff attempted to use the chattel's presence as a predicate for *in personam*, not *in rem*, jurisdiction. But after *Shaffer v. Heitner*, 433 U.S. 186 (1977), there is no difference in standards. See *infra* notes 103-09 and accompanying text.

103. 433 U.S. 186 (1977).

104. After *Shaffer* and Delaware's legislative response to it, subjecting officers and directors of all Delaware corporations to Delaware jurisdiction, DEL. CODE ANN. tit. 10, § 3114 (Supp. 1994), Greyhound's officers and directors sought shareholder

invoked the Delaware courts' *quasi in rem* jurisdiction by obtaining sequestration of approximately 28,000 shares of the officers' and directors' stock in the corporation. At the time, Delaware had a statute making Delaware the situs of all stock in Delaware corporations, irrespective of the actual location of the stock certificates.<sup>106</sup> The Delaware courts upheld jurisdiction; the defendants appealed.

The Supreme Court seized the opportunity to attempt to unify the law of personal jurisdiction. From *Pennoyer v. Neff*<sup>106</sup> until *Shaffer, in rem* and *quasi in rem* jurisdiction were considered separately from *in personam* jurisdiction for due process purposes. *International Shoe Co. v. Washington*<sup>107</sup> and the Supreme Court cases that followed it (even those since *Shaffer*) discussed only *in personam* jurisdiction.<sup>108</sup> In *Shaffer*, the Court

---

approval to reincorporate in Arizona, at least in part to save officers and directors the jurisdictional inconvenience of Delaware. David L. Ratner & Donald E. Schwartz, *The Impact of Shaffer v. Heitner on the Substantive Law of Corporations*, 45 BROOK. L. REV. 641, 653-54 (1979). They got their wish. JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 164 (6th ed. 1993).

106. DEL. CODE ANN. tit. 8, § 169 (1991). This statute alters the customary rule that "[i]f the intangible interest is represented by a document in which the interest itself is merged, as in the case of the ordinary negotiable promissory note or bond, claims with regard to it may be adjudicated in the state where the document is located." SCOLAS & HAY, *supra* note 88, at 230 (footnote omitted).

The true purpose of the sequestration, as Delaware candidly admitted, was only incidentally to encumber the stock.

The primary purpose of "sequestration" as authorized by [the Delaware statute] is not to secure possession of property pending a trial between resident debtors and creditors on the issue of who has the right to retain it. On the contrary, as here employed, "sequestration" is a process used to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him in a court of equity. . . . If the defendant enters a general appearance, the sequestered property is routinely released . . . .

*Shaffer v. Heitner*, 433 U.S. at 193 (citation omitted) (quoting the unreported opinion of the Delaware Court of Chancery from which *Shaffer* sought review). The Supreme Court later noted the full effect of Delaware's system: "[T]he express purpose of the Delaware sequestration procedure is to compel the defendant to enter a personal appearance." *Id.* at 209. The footnote which follows this sentence reads as follows: "This purpose is emphasized by Delaware's refusal to allow any defense on the merits unless the defendant enters a general appearance, thus submitting to full *in personam* liability." *Id.* n.33. Thus, Delaware sought to hold defendants' property hostage to ensure the defendants' appearance.

106. 95 U.S. (5 Otto) 714 (1877).

107. 326 U.S. 310 (1945).

108. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson v. Denckla*, 357 U.S. 235 (1958); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408

consolidated its treatment of the three types of personal jurisdiction.

Well-reasoned lower court opinions have questioned the proposition that the presence of property in a State gives that State jurisdiction to adjudicate rights to the property regardless of the relationship of the underlying dispute and the property owner to the forum. The overwhelming majority of commentators have [sic] also rejected *Pennoyer's* premise that a proceeding "against" property is not a proceeding against the owners of that property. Accordingly, they urge that the "traditional notions of fair play and substantial justice" that govern a State's power to adjudicate *in personam* should also govern its power to adjudicate personal rights to property located in the State.

....  
... We ... conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.<sup>109</sup>

Thus, simply saying that an action is *in rem* or *quasi in rem* no longer solves an otherwise-existing jurisdictional problem.

*Shaffer* noted, however, that many assertions of jurisdiction based upon property would be legitimate even under the minimum contacts analysis of *International Shoe*. Property within the state is a form of contact between the person over whom the court seeks jurisdiction and the state. The Court noted that when "claims to the property itself are the source of the underlying controversy," jurisdiction will ordinarily exist.<sup>110</sup> That language seems perfect to describe interpleader. Claims to the property are

---

(1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *Burnham v. Superior Court*, 495 U.S. 604 (1990). The sole exception is *Rush v. Savchuk*, 444 U.S. 320 (1980), in which the Court repudiated a *quasi in rem* jurisdictional assertion that did not comply with *Shaffer*.

109. *Shaffer v. Heitner*, 433 U.S. at 205, 212. The final sentence of the quotation has been the subject of some dispute among the Justices, though not in a way that affects whether interpleader should be regarded as an *in rem* action. In *Burnham*, Justices Scalia and Brennan clashed over whether *Shaffer's* assertion of the general application of *International Shoe's* minimum contacts standard included all defendants (Brennan, J., concurring in the judgment) or only defendants not found within the state (Scalia, J., plurality). They agreed, however, that service of process upon *Burnham* while he was in the forum established *in personam* jurisdiction. See 495 U.S. 604.

110. *Shaffer v. Heitner*, 433 U.S. at 207-08 (footnote omitted).

the controversy. Nonetheless, the Court noted that jurisdiction is not automatic in disputed property cases.<sup>111</sup>

This precisely highlights one problem of regarding interpleader as an *in rem* action. Because the subject property is so often movable—and not at the claimants' instance—simply declaring an interest in property as sufficient for jurisdiction effectively makes the property the disfavored “agent for service of process” that the Supreme Court condemned.<sup>112</sup> The stakeholder could wield enormous power to affect the outcome of the dispute by removing the property to a forum chosen either for its substantive law or its choice-of-law rules.<sup>113</sup>

This possibility of stakeholder control might appear diminished in cases appropriate for defensive interpleader (where a claimant commences litigation against the stakeholder, who then seeks defensively to interplead the remaining claimants). Two possibilities undermine that conclusion. First, if the claimant-versus-stakeholder action is in a state court, the remaining claimants may not be amenable to jurisdiction. Second, the stakeholder may not wish to litigate in the original forum and so may commence its own federal litigation, either in the forum or in some other state. Although this would create parallel litigation involving the same dispute, it is far from clear

---

111. The materials the Court cites suggest cases such as where the property arrives in the jurisdiction by fraud, for use in judicial proceedings, or without the consent of the owner. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 60, cmts. c, d (1969); Note, *The Power of a State to Affect Title in a Chattel Atypically Removed to It*, 47 COLUM. L. REV. 767 (1947). Certainly a claimant could contest jurisdiction based on the stake's presence, arguing that she did not consent and that it is anomalous simultaneously to predicate jurisdiction upon ownership of property and to deny her the benefit of the consent rule.

112. *See supra* note 102 and accompanying text.

113. A stakeholder might wish to affect the outcome either if it were denying liability wholly or in part (i.e., if the stakeholder were also a claimant) or if the stakeholder, for whatever reason, favored one of the claimants.

Although this article concerns only federal interpleader, state law is also highly relevant. Because the underlying claims to the property are almost always founded on state law, *see supra* note 56 and accompanying text, the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), generally requires application of state substantive law. The federal courts must apply state conflicts law as well. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Thus, a stakeholder may be able to bring the interpleader either in a state that would apply its own (favorable) substantive law or in a state whose conflicts principles require application of the (favorable) substantive law of another state.



that the later-commenced federal action would defer to the state action brought by a single claimant.<sup>114</sup>

Thus, regarding interpleader proceedings as *in rem* cases creates some significant problems. All may not be lost, however; it may be possible to recharacterize interpleader and yet to cabin the *in rem* jurisdiction that recharacterization would spawn.<sup>115</sup> Before examining that possibility, however, it is necessary to consider whether rule interpleader proceedings as presently characterized should qualify for injunctions under the jurisdiction exception to the Anti-Injunction Act.

### C. In Personam Interpleader and the Jurisdiction Exception

The courts that have discussed injunctions and rule interpleader have concluded that rule interpleader cases qualify under the jurisdiction exception. In *Pan American Fire & Casualty Co. v. Revere*,<sup>116</sup> Judge Skelly Wright noted:

The question whether the court entertaining a non-statutory interpleader suit may enjoin state court proceedings on the same issues on the theory that it is "necessary in aid of its jurisdiction" is not free from doubt. Before *Toucey v. New York Life Ins. Co.*, such power appears to have been recognized. Not surprisingly, afterward, it was denied. But with the 1948 Revision overruling *Toucey* and expressly codifying the exception, the old rule may be deemed reestablished, and every

---

114. Federal courts often defer to pending state litigation, as is most vividly seen in the doctrines of *Younger v. Harris*, 401 U.S. 37 (1971), and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). There are even occasions when federal courts defer to state litigation commenced after the federal proceeding. See, e.g., *Wilton v. Seven Falls Co.*, 115 S. Ct. 2137 (1995); *Hicks v. Miranda*, 422 U.S. 332 (1975). Arguably, the hypothesized case of parallel state property and federal interpleader actions presents none of the predicates for federal abstention. There is no dominant state interest in federal noninterference with state processes, as is the case with *Younger* abstention. There is no specialized state expertise or administrative program with which federal litigation would interfere, as is the case with *Colorado River* abstention. And one cannot say that the state proceeding is just as likely to resolve the entire controversy as is the federal interpleader action, the primary factor upon which *Wilton* relied. Given the Court's great expansion of *Younger* abstention over the last quarter century, however, a federal court should perhaps abstain in favor of a parallel state case. See *infra* part III.D.

115. See *infra* part IV.A.

116. 188 F. Supp. 474 (E.D. La. 1960).

indication is that, regardless of the Interpleader Act, the power of a federal court to enjoin pending state court proceedings in a case like this one will be sustained. Certainly that result is desirable, if not indispensable.<sup>117</sup>

Judge Wright observed that before the 1948 recodification of the Anti-Injunction Act, there was no stated jurisdiction exception to its prohibition, "but the jurisprudence had nevertheless made such an exception."<sup>118</sup> The "reestablishment" of the old rule to which *Pan American* refers seems to have been less than thunderous. Judge Wright cites only two cases, one a declaratory judgment action upholding a stay of state proceedings and the other where he characterizes the proposition as dictum, and a secondary source.<sup>119</sup> Since *Pan American*, only three reported cases have mentioned the injunction difficulty under Rule 22. One cites only a secondary source as authority for the proposition;<sup>120</sup> the other two rely largely upon *Pan American*.<sup>121</sup>

Some commentators have attempted to bridge the gap, though some of their efforts seem more to highlight the courts' sleight of hand than to rationalize it.

Since *Atlantic Coast Line*, federal courts have consistently applied the necessary-in-aid exception to enjoin parallel state

---

117. *Id.* at 484-85 (citations and footnotes omitted).

118. *Id.* at 486 n.50.

119. *See id.* at 486 n.53.

120. *Sotheby's, Inc. v. Garcia*, 802 F. Supp. 1058, 1066 n.8 (S.D.N.Y. 1992) ("In rule interpleader actions, injunctive relief is available, albeit not pursuant to 28 U.S.C. § 2361, in order to effectuate a district court's exercise of its jurisdiction.") (citing FEDERAL PRACTICE, *supra* note 24, § 1717, at 615-16).

121. The more extended discussion appears in *General Ry. Signal Co. v. Corcoran*, 921 F.2d 700, 706-07 (7th Cir. 1991) (footnote and citations omitted):

If a plaintiff is otherwise qualified for injunctive relief, the Anti-Injunction Act presents no barrier to an injunction sought by General Railway in a Rule 22(1) interpleader action. . . . A federal court can issue an injunction directed at state court proceedings . . . if "necessary in aid of its jurisdiction." The All Writs Act, consistent with the Anti-Injunction Act, provides that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."

A federal court presiding over an interpleader action may stay pending state court proceedings involving the same interpled fund under the "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act. . . . Judge Wright's reasoning [in *Pan American*] has garnered the support of commentators.

*See also Emmco Ins. Co. v. Frankford Trust Co.*, 352 F. Supp. 130, 133 (E.D. Pa. 1972).

court proceedings—even *in personam* proceedings—when the federal actions were brought as rule 22 interpleader cases. The crucial factor allowing the use of the exception when personal liability is at stake seems to be the existence of an identifiable property or limited fund. In essence, the presence of an identifiable property or limited fund permits reclassification of the case as *in rem*.<sup>122</sup>

Others, also without much discussion, simply assert the availability of injunctions under the jurisdiction exception:

[T]he mere fact that a nationwide injunction under Section 2361 is not available in a rule interpleader case does not mean that the court does not have discretion in the latter context to issue an order against those claimants that have been subjected to the court's jurisdiction in accordance with the more traditional rules applicable in cases under Rule 22. Certainly if the court can assert personal jurisdiction over a claimant it has the power to issue an order designed to effectuate that exercise of jurisdiction.<sup>123</sup>

But surely this is too broad an assertion; it implies that a federal court lacks power to issue injunctions against other proceedings only when it has no jurisdiction over the defendant. Such a reading deprives the Anti-Injunction Act of any effect, a problem not lost on, but also not solved by, the same commentators:

One argument against recognizing the court's discretion to enjoin overlapping proceedings in rule interpleader cases is that it might result in a significant incursion on the policies embodied in the [Anti-Injunction Act] . . . . But the . . . statute permits a federal court to stay proceedings in a state court "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." A preliminary injunction to stay a state court action while the federal court determines the Rule 22 interpleader case might be regarded as "necessary in aid of its jurisdiction. . . ." Accordingly, the proper accommodation between the policy against enjoining state proceedings and the objectives of rule interpleader is to recognize the federal court's power to issue an order whenever a pending state court action

---

122. Larimore, *supra* note 93, at 287-88 (footnotes omitted). *Accord* Sherman, *supra* note 93, at 531 ("The fact that they involve laying before the court the issue of who has the right to property or a fund allows them to be analogized to *in rem* proceedings.")

123. FEDERAL PRACTICE, *supra* note 24, § 1717, at 615-16.

represents a threat to the effectiveness of the interpleader suit or the enforceability of its judgment.<sup>124</sup>

This is a superficially attractive approach. Read fast enough, it appears to make sense. Taken at face value, however, it proves too much and overlooks the Supreme Court's teaching about the jurisdiction exception and the nature of interpleader.

There are several circumstances in which state litigation may threaten the efficacy of a federal action. For example, suppose the obligee on a contract brings a diversity action seeking specific performance. Simultaneously, the obligor commences a state action seeking rescission. The state action, if successful, may make the federal action unavailing. If the state case ends first and results in a judgment for the obligor, that will cut off the federal case because the state judgment must receive full faith and credit in the federal court.<sup>125</sup> Indeed, whenever there is parallel litigation, the state court can, by finishing first, effectively destroy the federal case. For a case that bears a closer resemblance to interpleader, suppose two litigants assert a right to possession of a chattel. The nonpossessor commences a federal action sounding in replevin. The possessor simultaneously commences a state action for a declaratory judgment that he is the rightful possessor. Should the mere possibility of inconsistent results permit the federal court to enjoin the state action under the jurisdiction exception? If the possibility of a conflicting state court result were enough to trigger the jurisdiction exception to the Anti-Injunction Act, there would be little left for the Act to do.

Accordingly, one must conclude that the commentators do not intend the suggestion that a federal court may issue an injunction "whenever a pending state court action represents a threat to the effectiveness of the interpleader suit"<sup>126</sup> to be a general prescription for federal injunctions against state proceedings. More likely, they are viewing interpleader as unique and urging that its unique nature requires this extraordinary remedy. As a matter of policy, one might agree; it probably is a good idea to permit such injunctions. But Congress has not delegated to the courts such free-wheeling authority to prescribe federal judicial policy in the face of the Anti-Injunction Act. Whether such

---

124. *Id.* at 616.

125. 28 U.S.C. § 1738 (1994).

126. *Id.*

injunctions are a good idea or not, the Act stands as a barrier not so easily overcome. In fact, by concentrating on the unique nature of interpleader, the commentators seem to be trying to squeeze it in as an *in rem* case through the back door. The difficulties hypothesized for interpleader suits also exist for *in rem* actions. Interpleader is not *in rem*, however, and the attempt fails.<sup>127</sup>

It is well to remember that although the motives underlying the original Anti-Injunction Act are not clear, the Supreme Court has taken the position that it was intended to prevent state-federal court friction.<sup>128</sup> Accepting that as the purpose of the Act, obviously Congress could not simultaneously have contemplated that the federal courts should decide for themselves when it would be a good idea to grant an injunction against state proceedings. This seems particularly the case with respect to rule interpleader, which, after all, is based not on an act of Congress but instead upon a rule of procedure that originates with the federal courts themselves, the very institution to be restrained by the Act.

The Court has implicitly recognized that the jurisdiction exception will swallow the rule unless carefully cabined. The difficulty in describing interpleader to bring it within the jurisdiction exception without simultaneously including other cases to which the Anti-Injunction Act has long applied strongly suggests that what might first appear to be only a modest expansion of the jurisdiction exception is ill-advised. The Anti-Injunction Act reflects a delicate balancing of federal and state interests and power, and reinterpreting an exception in a way that would greatly expand (even if unintentionally) the numbers and kinds of cases in which a federal court may enjoin a state proceeding would have enormous implications for federalism. The Court has often cautioned that the federal judiciary should be particularly cautious about upsetting the federalism balance by invading state prerogatives and interfering with state func-

---

127. See *supra* notes 87-94 and accompanying text.

128. CHERMERINSKY, *supra* note 8, at 642 (citing *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977); *Leiter Minerals v. United States*, 352 U.S. 220, 225 (1957)).

tions.<sup>129</sup> An acceptable solution to the problem of rule interpleader and injunctions does not lie here.

*D. Rule Interpleader Injunctions as Exceptions to the Younger Abstention Doctrine*

*Younger v. Harris*<sup>130</sup> has come to be synonymous with an abstention doctrine that actually antedates the case by nearly a century.<sup>131</sup> Briefly stated and somewhat oversimplified, it declares that federal courts should not interfere with pending state criminal proceedings unless the federal plaintiff will suffer great, immediate, and irreparable harm in the absence of federal intervention and has no adequate remedy at law.<sup>132</sup> *Younger* made plain as well that the opportunity to raise a federal constitutional claim in the state criminal process is a remedy at law sufficient to preclude federal court intervention.<sup>133</sup>

---

129. One manifestation of this came in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), when the Court refused to endorse a federal injunction against a state proceeding that threatened completely to ignore the res judicata effect of a final federal judgment. Characterizing the Anti-Injunction Act, the Court noted:

Section 265 is not an isolated instance of withholding from the federal courts equity powers possessed by Anglo-American courts. As part of the delicate adjustments required by our federalism, Congress has rigorously controlled the "inferior courts" in their relation to the courts of the states. . . .

The guiding consideration in the enforcement of Congressional policy was expressed by Mr. Justice Campbell, for the Court . . . : "The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision."

We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation.

*Id.* at 141 (citation omitted). Congress's subsequent repudiation of the specific holding of *Toucey*, see *supra* note 8, does nothing to undermine the Court's cautious approach generally. The Court's five abstention doctrines, under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Louisiana Power & Light Co. v. Thibodeaux*, 360 U.S. 25 (1959); and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), also demonstrate its deeply felt reluctance to permit the federal judiciary even to appear to invade an area occupied by state judicial power.

130. 401 U.S. 37 (1971).

131. For an excellent discussion of the history of *Younger* abstention, see Donald H. Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266 (1976).

132. *Younger*, 401 U.S. at 45-46.

133. *Id.* at 46.

In the years following *Younger*, the Court extended the doctrine to include proceedings not themselves criminal in nature but "in aid of and closely related to" state criminal proceedings,<sup>134</sup> state judicial proceedings in which the state was a party,<sup>135</sup> a contempt proceeding in an action involving private parties,<sup>136</sup> a purely civil proceeding involving state officials and state child neglect laws,<sup>137</sup> state administrative proceedings,<sup>138</sup> and a purely private civil proceeding not involving the state's contempt power.<sup>139</sup> The Court has also permitted a later-commenced state criminal proceeding to oust a federal court of jurisdiction when the latter had not yet conducted "proceedings of substance on the merits."<sup>140</sup> The doctrine is, in its modern form, one of great scope, imposing significant restraints on the federal courts' abilities to entertain litigation involving issues also of interest to the state courts.

Statutory interpleader does not implicate *Younger* concerns, probably because it would be unseemly for the Court to impose a judge-made abstention doctrine to override a specific legislative authorization of injunctions against state proceedings.<sup>141</sup> But the injunctions entered in rule interpleader proceedings do seem to collide with the *Younger* doctrine. In cases where a claimant has filed a state action against the stakeholder only to be precluded by a later-entered federal injunction in an interpleader action,

---

134. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). The Court described the state's nuisance proceeding in *Huffman* as "more akin to a criminal prosecution than are most civil cases." *Id.*

135. *Trainor v. Hernandez*, 431 U.S. 434 (1977).

136. *Juidice v. Vail*, 430 U.S. 327 (1977).

137. *Moore v. Sims*, 442 U.S. 415 (1979).

138. *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986).

139. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

140. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). *See also Wilton v. Seven Falls Co.*, 115 S. Ct. 2137 (1995), in which the Court ordered abstention where a later-commenced state civil suit between private parties sought to adjudicate the same issues as were involved in the earlier-commenced federal declaratory judgment action. Abstention here, however, was based on *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), rather than on *Younger*. *Wilton*, 115 S. Ct. at 2140.

141. *See* 28 U.S.C. § 2361 (1994). For the Court to do so without creating a constitutional crisis, it would have to find that *Younger* abstention expresses a constitutional imperative, making that part of the interpleader act unconstitutional. Although one commentator has argued that *Younger* is constitutionally based, *see Calvin R. Massey, Abstention and the Constitutional Limits of Judicial Power of the United States*, 1991 B.Y.U. L. REV. 811, the courts have not sounded that theme.

*Younger* seems clearly to be relevant. Even in cases where the federal rule interpleader action begins before independent state actions by claimants against the stakeholder, a rapid claimant response to the federal litigation in the form of an individual action against the stakeholder appears to present the sequence of actions found to require federal abstention in *Hicks v. Miranda*<sup>142</sup> and *Wilton v. Seven Falls Co.*<sup>143</sup>

It seems at least arguable, therefore, that when the federal courts issue injunctions against other actions during the course of litigating a rule interpleader case, they create a *de facto* exception to the scope of *Younger* abstention. After all, if federal intervention in an action between two private companies implicates *Younger*, as happened in *Pennzoil Co. v. Texaco, Inc.*,<sup>144</sup> it is difficult to see why entering an injunction in a rule interpleader situation would not. While that is hardly more offensive than *sub silentio* either creating additions to the Anti-Injunction Act<sup>145</sup> or revising the Supreme Court's characterization of interpleader as an *in personam* action,<sup>146</sup> it does add to the Looking Glass quality of the law surrounding federal interpleader. The present system works as long as no one stops to ask what is really happening or to examine the law's consistency and observation of its own tenets.

There are, however, two approaches that would reconcile the existing discord. As the next part shows, recharacterizing interpleader as an *in rem* action might solve the problem, provided that jurisdictional principles receive their due rather than being consigned to analysis by label. That is not the better solution, however. The cleaner, less troublesome answer should come from Congress.<sup>147</sup>

---

142. 422 U.S. 332.

143. 115 S. Ct. 2137.

144. 481 U.S. 1 (1987).

145. 28 U.S.C. § 2283 (1994). See *supra* part III.C.

146. See *supra* notes 87-94 and accompanying text.

147. An assertion that the easier, better answer lies with Congress deserves to be met with a certain skepticism. That Congress does hold the key perhaps demonstrates better than extensive analysis how seriously flawed the present accommodation of rule interpleader and the Anti-Injunction Act is.



## IV. SOLUTIONS THAT WILL WORK (BETTER)

A. *Recharacterizing Interpleader*

It might seem tempting simply to recharacterize interpleader as an *in rem* proceeding, overruling *Dunlevy*<sup>148</sup> and bringing interpleader within the ambit of the jurisdiction exception. The "simple" approach, however, would require extended judicial involvement because of the uncertainties left by *Shaffer v. Heitner*.<sup>149</sup> *Shaffer* trod a middle ground with respect to *in rem* cases. It did not leave them untouched, at least by dictum, yet it furnished no clear rules for how the new regime would apply. We have only Justice Marshall's cryptic statements that jurisdiction will normally exist in such cases.<sup>150</sup> This solution, therefore, would place an immediate and continuing burden on the courts to clarify when property within the forum is a sufficient jurisdictional predicate and, when it is not, to articulate what additional factors the courts should consider.

That job, however, is not impossible. Indeed, taking seriously *Shaffer's* teaching that all jurisdictional assertions must meet the *in personam* standards of *International Shoe* requires recognizing that the distinction between *in personam* and *in rem* is of no consequence whatever for jurisdictional purposes, having significance only for the Anti-Injunction Act. However true that may be, it does not avoid the problem; it merely pastes a different label on it. The fact is that neither the Supreme Court nor the inferior federal courts have been notably active since *Shaffer* in elaborating the circumstances in which property within the forum suffices to establish jurisdiction. That is work that the courts would have to do.<sup>151</sup>

---

148. See *supra* part II.D.

149. 433 U.S. 186 (1977). See *supra* notes 103-110 and accompanying text.

150. *Id.* at 207-08 (footnote omitted). See *supra* note 110 and accompanying text.

151. The courts should already be engaged in this process for rule interpleader. Statutory interpleader avoids the problem because Congress has created nationwide jurisdiction. See *supra* notes 43-47 and accompanying text. Rule interpleader does not enjoy such an advantage, so theoretically, at least, the federal courts are even now engaged in evaluating this *in personam* device for jurisdictional purposes, presumably using the stake—the property—as one of the relevant contacts. The difficulty here is that there are very few reported cases discussing the jurisdictional issues.

The courts must confront the question of how much contact between claimant and forum is enough to support jurisdiction. When the stake is movable, the courts should be reluctant to declare that its mere presence subjects all claimants, irrespective of their other contacts with the forum, to jurisdiction. After all, that pattern bears an uncomfortable resemblance to the chattel-as-agent variation that the Court disparaged in *World-Wide Volkswagen Corp. v. Woodson*.<sup>152</sup> It is not even as strong a case for jurisdiction as *World-Wide*. At least in *World-Wide*, the Court hypothesized that the defendant was able to anticipate that its product could reach the forum.<sup>153</sup> That will often not be possible for claimants, most or all of whom have never had control of the stake.

The failure of simple presence of the stake as a jurisdictional predicate thrusts upon the courts the job of analyzing all of the other contacts with the forum of each claimant. It will be necessary to consider factors such as whether each claimant (1) anticipated having an interest in the stake and knew it would be in the forum, (2) knew that the stake might travel to the forum even if the claimant had no long-standing expectation of an interest in the stake or knowledge of its whereabouts, and (3) had any contact with or control over either the stakeholder or the person or entity that created the claimant's interest in the stake.<sup>154</sup> On top of these ethereal considerations, the courts will also have to consider the now-traditional factors under the heading of "convenience."<sup>155</sup> Although this may be the stuff of

---

152. 444 U.S. 286, 296 (1980). See *supra* note 102 and accompanying text.

153. *World-Wide*, 444 U.S. at 287.

154. These factors reflect the focus of modern jurisdictional analysis on forum contacts, as begun in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and continued in *Hanson v. Denckla*, 357 U.S. 235 (1958), *World-Wide*, 444 U.S. 286, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). Although the Court pointed out in each of those cases that foreseeability of forum involvement standing alone is insufficient to establish jurisdiction, it clearly is a relevant factor.

155. In *World-Wide*, 444 U.S. 286, Justice White's majority opinion noted several factors as significant to the jurisdictional inquiry, though in his view clearly subordinate to minimum contacts as guarantors both of defendants' individual liberty interests and states' sovereignty limitations. Those factors included the degree of inconvenience to the defendant if required to litigate in the forum, the forum's interest in the application of its own law to the case, and whether the forum is the most convenient place for litigation. *Id.* at 294. Justice Brennan's dissent took no issue with the particular factors but argued that the majority's hierarchy accorded them "too little weight." *Id.* at 299 (Brennan, J., dissenting). In *Burger King*, 471

which first-year Civil Procedure examinations are made, it is probably not a good recommendation for a predictable, easy-to-administer legal structure.

In addition to the complexities of fitting the newly-characterized *in rem* case into the analytical structure of jurisdiction, this proposed solution sidesteps the real issue. The underlying problem is not establishing jurisdiction in doubtful cases; it is justifying issuance of injunctions in rule interpleader cases, even those in which jurisdiction may present no problem at all.<sup>156</sup> Accordingly, it seems better to attack the Anti-Injunction Act problem head-on.

### B. A Capitol Solution

The cleanest way to rationalize the impossible picture now presented by injunctions in rule interpleader cases is for Congress to make rule interpleader an express exception to the general prohibition of the Anti-Injunction Act. Amending Rule 22 probably would not suffice. The Anti-Injunction Act speaks of something "expressly authorized by Act of Congress," and the Federal Rules of Civil Procedure, although Congress must at least acquiesce in them, are not themselves congressional acts.<sup>157</sup>

Congress could either pass an entirely new statute applying specifically to rule interpleader or amend the section of the federal interpleader act that grants injunctive power in statutory interpleader cases<sup>158</sup> to include rule interpleader cases. For example, the amended statute might read:

---

U.S. 462, Justice Brennan achieved a majority and apparently gave the convenience factors approximately equal weight. *Id.* at 482-84. Finally, in *Asahi*, 480 U.S. 102, eight justices endorsed jurisdictional analysis predicated partially on those factors. *Id.* at 112-15. Justice Scalia, the ninth, did not explicitly disagree, but he did not join Part II-B of Justice O'Connor's opinion, possibly because he accepted the hierarchy implied by Justice White in *World-Wide* and therefore felt discussion of the convenience factors to be dictum given *Asahi's* posture. *Id.* at 104.

156. It is not hard to hypothesize such a case. In a circumstance in which all of the claimants reside in one state and the stakeholder (perhaps an insurance company or the fiduciary of an estate) resides in another, the stakeholder may elect to bring a rule interpleader proceeding in the federal courts of the claimants' common domicile. Subject matter jurisdiction would exist pursuant to 28 U.S.C. § 1332 (1994), (assuming that the stake was worth more than \$50,000), and domicile obviously suffices to establish personal jurisdiction.

157. *See supra* note 78.

158. 28 U.S.C. § 2361 (1994).

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. *A district court may also issue such orders in civil actions of interpleader or in the nature of interpleader maintained under Rule 22 of the Federal Rules of Civil Procedure. . . .*

This solution eliminates the problem of unauthorized injunctions in rule interpleader actions without casting the courts adrift on the seas of a new and unfamiliar jurisdictional inquiry.<sup>159</sup> As proposed, the statute does not change the limitation of rule interpleader to "traditional" rather than "national" jurisdictional rules.<sup>160</sup> It merely addresses the problem that nobody talks about.

It is difficult to hypothesize a policy reason for statutory, but not rule, interpleader to enjoy an express exemption from the Anti-Injunction Act, a statute designed to protect the states' place in the federal structure. There do not seem to be greater federalism stresses from enjoining state proceedings in rule interpleader cases than in statutory interpleader cases.<sup>161</sup> That there are no reported cases refusing injunctions in rule interpleader cases on Anti-Injunction Act grounds connotes that there is no fundamental federalism policy battle going on here. The only thing happening is that the inferior federal courts are issuing injunctions in rule interpleader actions in apparent (but unspoken) defiance of Supreme Court declarations about the Anti-Injunction Act and the nature of interpleader. That combination has the

---

159. This would also eliminate whatever *Younger* problems might otherwise arise from a federal court's refusal to abstain because of a parallel state court proceeding. *See supra* note 141 and accompanying text.

160. It would be simple enough to amend the statute to provide nationwide jurisdiction in rule interpleader cases as well, and I confess that it is not readily apparent to me why only one of the interpleader devices should enjoy this advantage. That, of course, begs the question of whether Congress can accomplish this result constitutionally. *See supra* note 47 and accompanying text.

161. Perhaps Congress should consolidate the two types of interpleader into a single proceeding with alternative jurisdictional and venue requirements. There seems to be little reason to segregate rule and statutory interpleader, and it is not clear why they grew up separately in the first place. *See supra* notes 35-37 and accompanying text.

water of the law running uphill. Like Escher's "Waterfall," if one looks at it quickly enough, the picture is untroubling. If one looks carefully, the image is impossible and intolerable.<sup>162</sup>

## V. CONCLUSION

There is, without doubt, the temptation to brush the problem aside. Rule interpleader has been functioning since 1938 with the aid of injunctions. Stakeholders and claimants have not complained. The states, which the Anti-Injunction Act theoretically protects from the incursions of the federal judiciary, have not complained either. And the *de facto* principle that injunctions against state proceedings may issue in *in personam* actions has not threatened to spread beyond the bounds of rule interpleader. What is the harm?

The harm is to the structure of the law. No matter how complex, the law ought to make sense; it ought to be internally consistent. When the law "ignores itself," it diminishes respect for the law. The courts have not always resisted inconsistency. One of the best known examples occurs in the Eleventh Amendment area. In *Ex parte Young*,<sup>163</sup> the Court's analysis of the Eleventh Amendment and of *Hans v. Louisiana*<sup>164</sup> led it to declare a state attorney general both a private citizen and a state official when performing the same act. The Court then seized separately upon attributes of each of those statuses and combined them to permit the action to go forward. *Ex parte Young* is one of the most important constitutional cases of the twentieth century,<sup>165</sup>

---

162. See *supra* pages 551-52.

163. 209 U.S. 123 (1908).

164. 134 U.S. 1 (1890).

165. Justice Brennan has described *Ex parte Young* as the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution. During the years between *Osborn* and *Young*, and particularly after the Civil War, Congress undertook to make the federal courts the primary guardians of constitutional rights. . . . The principal foundations of the expanded federal jurisdiction in constitutional cases were the Civil Rights Act of 1871 . . . which in § 1 empowered the federal courts to adjudicate the constitutionality of actions of any person taken under color of state [law] . . . and the Judiciary Act of 1875 . . . which gave lower federal courts general federal-question jurisdiction . . . . These two statutes, together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference.

*Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring and dissenting).

yet commentators have ridiculed the manner in which the Court reached the result.<sup>166</sup> It benefits neither the Court nor the law to engage so patently in irrationality.

Hazard and Moskowitz, explaining the underlying need for interpleader,<sup>167</sup> also unintentionally highlighted the dilemma that confronts the courts in rule interpleader cases today. Interpleader must have injunctions to be an effective remedy. Under established Anti-Injunction Act jurisprudence, only *in rem* actions justify federal injunctions under the jurisdiction exception. Interpleader is an *in personam* action. The courts thus face conflicting demands of law and practicality similar to those that confront Hazard and Moskowitz's stakeholder.

This is not only a grave matter, it is a subversion of the very basis of the legal order. It is intolerable that a legal system should come down at the point of application to tell someone [perhaps especially a court] that he has orders such that he cannot help but disobey. It is subversive of the legal order that this be done, for a social order that is not a police state requires general voluntary obedience to the rules and this in turn requires general, *and certainly official*, assent that the

---

Justice Brennan also noted that "the doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law." *Id.* at 110 (quoting CHARLES A. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 186 (2d ed. 1970)).

166. For example, one scholar claimed:

[In *Ex parte Young*] the Court . . . unveiled one of the most remarkable sophistries in its history. . . .

If the statute is unconstitutional, the person charged with its enforcement is shorn of his official insignia and acts only in his private capacity. Therefore, a suit against him is not against the state and does not affront the eleventh amendment. Contrariwise, under a constitutional statute the eleventh amendment attaches to the public official and to the state which he personifies. Constitutionality thus becomes the litmus. If a statute is unconstitutional, judicial sorcery recasts city policeman as private eye.

Burton D. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 763 (1974).

167. Hazard and Moskowitz explained the need for interpleader as follows:

The principal point to be recognized is that the middleman [stakeholder] does not simply confront a dilemma [as to whom to pay first]—the debtor with two creditors does that—nor does he simply face "double or multiple liability"—the railroad with the train wreck is in that position. Rather the middleman that interpleader seeks to help is a man facing a dilemma that is *caused by* the fact that the law (incipiently if not yet actually) is addressing him with conflicting commands. . . . [I]f no procedure exists for reconciling the results [of separate litigation], the middleman is confronted with two commands one of which he must violate.

Hazard & Moskowitz, *supra* note 3, at 752.

rules are to be taken seriously as binding obligations. It is impossible for them so to be taken if the only sensible response to official command[s] is to laugh or cry or to fight or lie down.

... The legal sovereign can tolerate a lot of sloppiness and a lot of error in its administration. It can even swallow the incongruities of reaching contradictory decisions on identical law and similar facts, as in the train wreck situation [that produces some verdicts for passenger plaintiffs and some for the railroad defendant]. But it cannot even for a brief interval rest officially indifferent to the fact that on a particular occasion it was talking out of both sides of its mouth, and uttering a command that it knew it could not enforce.<sup>168</sup>

Federal courts today confront a situation in which either they must eviscerate rule interpleader by refusing injunctions or ignore either the Anti-Injunction Act or the Supreme Court's characterization of interpleader as an *in personam* action. They have been unwilling to do the first and consequently have thrust themselves into repeatedly doing one of the latter two, but without admitting it. Such action is, at the least, unseemly.

The incompatibility that exists in the law of rule interpleader is not the worst in the law nor the greatest threat to the law's harmony. But allowing injunctions in *in personam* cases under the jurisdiction exception to the Anti-Injunction Act invites expansion of that exception, eroding the Act's underlying policy.<sup>169</sup> That would have major implications for federalism. There is no need for the law to cast itself in disrepute or for the courts to continue, perhaps unwittingly, to pretend that the problem is not there. "Waterfall" is great art but terrible architecture. Congress can recognize and solve the problem with rule interpleader, and it should.

---

168. *Id.* at 752-53 (emphasis added) (footnotes omitted).

169. One might see expansion along the lines hypothesized earlier, where an obligee and an obligor in a contract dispute each begin a separate action, one in state court and one in federal court, and the federal plaintiff seeks then to enjoin the state action. *See supra* note 125 and accompanying text.