

BEYOND THE CLASS ACTION RULE: AN INVENTORY OF STATUTORY POSSIBILITIES TO IMPROVE THE FEDERAL CLASS ACTION

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This Article surveys several areas in which legislation might enhance the utility of federal class actions. It does not suggest a statutory form of class action like statutory interpleader, but it takes initial inspiration from the interpleader statutes' treatment of subjects beyond the joinder device itself—subject-matter jurisdiction, venue, personal jurisdiction, and antisuit injunctions. The matters on which legislation might be most useful are supplemental jurisdiction, to overrule the limiting holding of Zahn v. International Paper Co. with some possible parallel broadenings of supplemental jurisdiction for nonclass contexts; and authority to enjoin state-court proceedings that could substantially interfere with the conduct of a federal class action. The Article omits treatment of choice-of-law issues, which are the subject of another contribution to this Symposium. Beyond areas suggested by the interpleader statute, the Article discusses some issues of substance-specific procedural rules and the problems posed by global settlement funds. Aside from particular substantive fields such as securities-fraud litigation, federal legislation dealing with class actions does not seem likely for the present. While some statutory measures could be helpful, and others of a broader nature such as authorization for trial in addition to pretrial proceedings after transfer and consolidation could be useful in class as well as nonclass litigation, the main focus for any class action changes belongs on Rule 23 itself and not on legislation.

INTRODUCTION

Part of the inspiration for this Article comes from the federal interpleader statute,¹ which in scattered sections of the Judicial Code treats several aspects of procedure and jurisdiction. The statute provides for the joinder device itself;² defines a special subject-matter jurisdiction;³ creates venue “in the judicial district in which one or more of the claimants reside”;⁴ authorizes nationwide service of process on claimants in “the respective districts where the claimants reside or

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¹ 28 U.S.C. §§ 1335, 1397, 2361 (1994).

² See 28 U.S.C. § 1335 (1994).

³ See 28 U.S.C. § 1335(a) (1994).

⁴ 28 U.S.C. § 1397 (1994).

may be found";⁵ and makes an exception to the federal anti-injunction statute⁶ to let federal courts enter orders restraining 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."⁷ This Article will explore the various areas treated by the interpleader statute, and others, in an effort to identify areas of class action practice that might benefit from legislative attention. I shall not propose the creation of a separate federal class action statute, nor do I expect that Congress will soon enact significant legislation to ease the way for class actions in federal court. Still, it may be useful to bring together in one document the main ways in which federal legislation might remove obstacles to federal class action jurisdiction and practice, both in case certain legislative measures are possible and to emphasize the division between legislative and rulemaking authority as rulemakers consider revisions to Federal Rule 23.

Leaving to the Reporter, Professor Cooper, the many matters addressable through rule amendments,⁸ I will survey for class actions the several areas—other than the joinder device itself—that are covered in the interpleader statute: subject-matter jurisdiction—original, supplemental, and removal; appellate jurisdiction; personal jurisdiction; venue—chiefly trial after transfer for coordinated or consolidated proceedings;⁹ and injunctions against parallel proceedings. Statutory proposals have been made regarding choice of law,¹⁰ but this area has

⁵ 28 U.S.C. § 2361 (1994); see also Fed. R. Civ. P. 4(k)(1)(C) (making service or filing of waiver of service "effective to establish jurisdiction over the person of a defendant . . . who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335"). This provision, added in 1993, may help provide notice and clarity but seems superfluous given the existence of both § 2361 and subsection (D) of Rule 4(k)(1), which makes service or filing of waiver of service effective to establish jurisdiction "when authorized by a statute of the United States." Fed. R. Civ. P. 4(k)(1)(D).

⁶ 28 U.S.C. § 2283 (1994). "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." *Id.*

⁷ 28 U.S.C. § 2361 (1994).

⁸ See Edward H. Cooper, Rule 23: Challenges to the Rulemaking Process, 71 N.Y.U. L. Rev. 13 (1996).

⁹ For the present statute authorizing interdistrict transfer of related federal-court civil actions "to any district for coordinated or consolidated pretrial proceedings," see 28 U.S.C. § 1407 (1994).

¹⁰ See H.R. 3406, 101st Cong., 2d Sess. § 6 (1990) (authorizing creation of federal common law of choice of law in cases within multiparty, multiforum federal subject-matter jurisdiction, but including list of several factors relevant to law choice); American Law Inst., *Complex Litigation: Statutory Recommendations and Analysis with Reporter's Study*, ch. 6 (1994) [hereinafter ALI *Complex Litigation Project*].

been amply treated by others¹¹ and is treated by Larry Kramer's article for this Symposium.¹² In addition to those areas suggested by the statutory-interpleader analogy, I will touch on the possible utility or necessity of statutory provisions for subject-specific procedural rules like those enacted in securities-reform legislation recently passed by Congress,¹³ and for a "kinder, gentler bankruptcy" to deal with mass claims that threaten to sink a going concern.¹⁴

I

SUBJECT-MATTER JURISDICTION

The Supreme Court's power under the Rules Enabling Act to "prescribe general rules of practice and procedure" for federal trial and appellate courts¹⁵ is generally regarded as quite broad. It also seems universally accepted, though, that definitions and modifications of the federal courts' subject-matter jurisdiction are the province of Congress.¹⁶ Thus, to the extent that subject-matter jurisdiction statutes or doctrines for class actions are broken, as a practical matter any fixes must come from Congress. My major suggestion will be for an

¹¹ See, e.g., Symposium, American Law Institute Complex Litigation Project, 54 *La. L. Rev.* 833 (1994) (containing collection of articles on statutory proposals regarding choice of law); Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 *Rev. Litig.* 309, 316, 317 (1991) (criticizing proposals that list but do not suggest how to weigh factors to be considered in choice of law decisions).

¹² Larry Kramer, *Choice of Law in Complex Litigation*, 71 *N.Y.U. L. Rev.* 547 (1996). Since I claim no special competence in the choice-of-law area, I will only note its significance and concentrate on fields where I can speak with greater confidence.

¹³ See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (to be codified in scattered sections of 15 U.S.C.).

¹⁴ Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102d Cong., 1st & 2d Sess. 12 (1993) [hereinafter *Asbestos Litigation Crisis in Federal and State Courts*] (statement of Hon. William W. Schwarzer, Director, Federal Judicial Center); see *infra* text accompanying notes 119-22.

¹⁵ 28 U.S.C. § 2072(a) (1994).

¹⁶ Federal Rule of Civil Procedure 82, of course, includes a ban on the civil rules being "construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." Fed. R. Civ. P. 82. For discussion of whether Rule 82 is required by either the Rules Enabling Act or the Constitution, see Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 *Stan. L. Rev.* 395, 431-43 (1976) (concluding that Rule 82 is "self-imposed rule of judicial restraint" with overtones of ratification by Congress). Congress might, to be sure, explicitly include jurisdiction-defining authority in its delegation of rulemaking power. It has done so for some aspects of federal courts' appellate jurisdiction. See 28 U.S.C. § 1292(e) (1994) (granting Supreme Court power to add by rule to categories of interlocutory appeal provided for in § 1292(a)-(d)); 28 U.S.C. § 2072(c) (1994) (authorizing Supreme Court to define by rule when district-court rulings are "final for the purposes of appeal" under 28 U.S.C. § 1291 (1994)). Congress has not, however, made any such express rulemaking delegation concerning the federal trial courts' subject-matter jurisdiction.

amendment to the supplemental-jurisdiction statute¹⁷ that would explicitly overrule *Zahn v. International Paper Co.*¹⁸ and, for good measure, would also eliminate parallel restrictions on aggregation of below-limit claims in nonclass actions and the complete-diversity requirement for alienage cases. Before that small bombshell, though, the Article will proceed in logical order, beginning with original jurisdiction.

A. Original Jurisdiction

1. Federal-Question Cases

It is always a pleasure, if a brief one, to be able to tell students in Complex Civil Litigation that federal-question class actions—the vast majority of all federal-court class actions, according to the Federal Judicial Center¹⁹—pose no problems of federal subject-matter jurisdiction that are unique to class actions. The well-pleaded complaint requirement and kindred brambles may brandish their thorns,²⁰ but the challenges arise for class and nonclass litigation impartially. If legislative fixes are in order here, they transcend the class context.

2. Diversity Cases

The spectrum of legislative possibilities for original jurisdiction over diversity class actions plausibly ranges from doing nothing about existing citizenship and amount-in-controversy doctrines to creating a special, new jurisdiction for multiparty, multiforum class and nonclass actions based on minimal diversity and with special requirements for amounts in controversy and number of claimants. Although my pref-

¹⁷ 28 U.S.C. § 1367 (1994).

¹⁸ 414 U.S. 291 (1973). In *Zahn*, the Court held that in separate-claim diversity actions, federal jurisdiction does not extend to claims of class members that do not satisfy the amount-in-controversy requirement. *Id.* at 301.

¹⁹ In a random national sample of 8320 civil cases filed in 1987-90, Federal Judicial Center researchers found 51 class actions, of which only two were diversity cases. Memorandum from Thomas E. Willging et al. to Advisory Committee on Civil Rules, Preliminary Report on Time Study Class Action Cases 1, 7 (Feb. 9, 1995) [hereinafter FJC Time Study] (on file with Information Services Office of the Federal Judicial Center). Similarly, in an intensive study of class action terminations of 1992-94 in the Eastern District of Pennsylvania and the Northern District of California, the same researchers found 85% and 89% respectively of the class actions to be federal-question cases. Thomas E. Willging et al., Preliminary Empirical Data on Class Action Activity in the Eastern District of Pennsylvania and the Northern District of California in Cases Closed Between July 1, 1992 and June 30, 1994, at 12 (Apr. 13, 1995) [hereinafter FJC Districts Study] (preliminary draft on file with Information Services Office of the Federal Judicial Center).

²⁰ See generally Charles A. Wright, Law of Federal Courts §§ 17-18 (5th ed. 1994) (describing complexity of determining federal-question jurisdiction under "arising under" language of 28 U.S.C. § 1331 (1994) and describing often-subtle requirement that federal question appear on face of complaint).

erence is for the more ambitious approach, I have long since spoken my piece on the subject,²¹ and proposals for such a jurisdiction are well developed.²² Here, time is better spent considering the citizenship and amount-in-controversy doctrines as they apply to class actions within the existing general diversity jurisdiction with its complete-diversity²³ and minimum amount-in-controversy²⁴ requirements.

a. The Ben-Hur Rule and Complete Diversity in Class Actions. The firmly established rule of *Supreme Tribe of Ben-Hur v. Cauble*²⁵ that only the citizenships of named class representatives count for purposes of the complete-diversity requirement²⁶ can charitably be described as quirky, anomalous, arbitrary, and antiquarian—yet felicitous. *Ben-Hur* may have rested on a mind-set that regarded unnamed class members as later-joined parties,²⁷ which does not jibe with the modern view of allowing class actions to be filed as such.²⁸ Looking only to the named parties is also inconsistent with practice in most other diversity contexts²⁹ and at loggerheads with well-settled

²¹ See Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7 passim, app. at 49-58 (1986) (supporting creation of new federal subject-matter jurisdiction for multiparty, multiforum litigation and setting forth model statute).

²² See, e.g., Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess. § 1367(a) (1990) (establishing federal district-court jurisdiction for complex, multidistrict litigation involving at least 25 persons killed or seriously injured in an accident).

²³ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (establishing that all plaintiffs must be of diverse citizenship from all defendants under diversity-jurisdiction statute).

²⁴ See 28 U.S.C. § 1332(a) (1994) (providing that "the matter in controversy [must] exceed[] the sum or value of \$50,000, exclusive of interest and costs").

²⁵ 255 U.S. 356 (1921).

²⁶ *Id.* at 366.

²⁷ See *id.* at 366 ("The intervention of the Indiana citizens [cocitizens of the class's adversary] in the [previous] suit would not have defeated the jurisdiction already acquired."). The *Ben-Hur* opinion had previously described and quoted from *Stewart v. Dunham*, 115 U.S. 61 (1885), a nonclass equity action in which nondiverse creditors were admitted as co-complainants on a creditor's bill after the original state-court case was removed to federal court on diversity grounds. See *Ben-Hur*, 255 U.S. at 365 (noting principle that introduction of nondiverse parties "'afterwards as co-complainants [does] not oust the jurisdiction of the court, already lawfully acquired, as between the original parties'. . . controls this case." (quoting *Stewart*, 115 U.S. at 64)).

²⁸ See Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all . . ."); Fed. R. Civ. P. 23(c)(4) ("When appropriate . . . an action may be brought or maintained as a class action with respect to particular issues" (emphasis added)).

²⁹ See, e.g., *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189, 195-96 (1990) (holding that, in limited partnership and most other artificial-entity contexts except that of corporate citizenship, citizenships of all entity members count for complete-diversity determination).

doctrine that usually requires *all* parties to satisfy the amount-in-controversy requirement individually in class and nonclass actions.³⁰

That said, the effect of following the converse of the *Ben-Hur* rule—looking to the citizenships of all class members for complete-diversity purposes—would be highly cumbersome administratively and would virtually complete the elimination of diversity class actions. As it now meshes with other statutory and rule requirements, *Ben-Hur* has the effect of allowing mass-tort and perhaps other state-law class actions in which *all* claims are large—over \$50,000 each—to be brought in federal court if all of the named plaintiffs are diverse from all defendants.³¹ It is precisely in such cases that diversity jurisdiction can serve the purpose sometimes cited by its defenders of making available a single forum for dispersed litigation.³²

If Congress were to create a multiple-claimant jurisdiction in which incomplete diversity was no bar to federal jurisdiction in multi-state state-law cases, *Ben-Hur* could honorably and safely join other venerable rules in the history books. But while state law governs in most mass-tort class actions, and so long as diversity jurisdiction with its other limitations is the only possible way for such nationwide controversies to gain a federal forum, all but those who favor virtually ending access to the federal forum for large, state-law, multistate class actions should be content to leave the *Ben-Hur* rule's quarter-measure undisturbed.

b. The Snyder Rule, Amount in Controversy, and Original Diversity Jurisdiction. Shortly after the present version of Rule 23 took effect in 1966, the Supreme Court held in *Snyder v. Harris*³³ that le-

³⁰ On the general rule against aggregation of legally separate claims of multiple parties and its application to class actions in *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), see Wright, *supra* note 20, § 36, at 211-15.

³¹ Whether mass-tort class actions are appropriate under Federal Rule 23 is itself a vexed issue in the cases and commentary, in considerable part because of the comment in the Civil Rules Advisory Committee's note on the 1966 amendment adding Rule 23(b)(3):

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Fed. R. Civ. P. 23 advisory committee's note (1966). For a brief discussion of and citations to several cases and secondary sources on the inappropriateness of mass-tort class actions under Rule 23(b)(3), see Wright, *supra* note 20, § 72, at 517 & nn.62-65.

³² On this function of diversity jurisdiction—and the frequent problem that present diversity rules hinder, rather than facilitate, the joinder of related actions—see Rowe & Sibley, *supra* note 21, at 19-20, 45-46.

³³ 394 U.S. 332 (1969).

gally separate claims, all of which fell under the required amount in controversy, could not be aggregated to satisfy the amount requirement.³⁴ Although subject to criticism for slighting the class action's important function of pooling small claims to make them economical to pursue, *Snyder* properly directs to state courts cases composed of small state-law claims that could not be brought in federal court on their own. The opposite result in *Snyder*—combined with the *Ben-Hur* rule letting counsel pick diverse class representatives to satisfy the complete-diversity requirement—would have let into federal court cases that were not just agglomerations of small state-law claims but class actions that were highly local with only a few class members diverse from a local defendant.³⁵ True, *Snyder* also excludes from federal court most claims of large-scale, widely scattered, small rip-offs that are illegal under state but not federal law. Such cases, though, may not be numerous; and it would probably be difficult to draft well a limited jurisdictional extension, based on the degree of dispersion, to keep out predominantly local cases.³⁶

One somewhat more promising idea could be a legislative exception to the *Snyder* rule for cases in which the claimed total of compensatory damages came to some fairly large amount—say \$1,000,000 or \$10,000,000—to make the case worth federal-court attention even if the individual claims were all small and under state law.³⁷ Yet if many such cases are out there and suffering for being consigned to state court,³⁸ they have escaped my attention. Any amount chosen, more-

³⁴ *Id.* at 336.

³⁵ Suggestive of that possibility is the second of the two cases decided in the single *Snyder* opinion, *Gas Service Co. v. Coburn*. The plaintiff class representative in *Coburn* claimed individual damages of \$7.81 from the utility company's allegedly illegal franchise tax collection from Kansas residents. *Snyder*, 394 U.S. at 334. Although the Court's jurisdiction was predicated upon diversity of citizenship, *id.*, cases could readily arise in which the defendant company was a cocitizen with most of its customers but also served others across a state line.

³⁶ An alternative, for which I am indebted to Professor Larry Kramer, would be a legislative overruling of *Snyder* coupled with discretion conferred on district courts to decide whether to exercise jurisdiction in such cases, based on such factors as the number of claimants, how scattered or concentrated they are, the gravity of the claims, and the availability of alternative state-court forums. Subject to some vagaries in the exercise of such discretion, which might tempt federal trial judges to duck messy-looking state-law class actions, a discretionary approach should be workable. Cf. 28 U.S.C. § 1367(c) (1994) (providing discretion to decline exercise of supplemental jurisdiction in certain circumstances). The main question would be how many cases *Snyder* excludes that would be significantly better off in federal court; I know of no sign that such cases arise often.

³⁷ My thanks for this suggestion to Natalie Kay Sidles of my spring 1995 Complex Civil Litigation class.

³⁸ For discussion of the availability of the class device in state courts, see generally Thomas A. Dickerson, *Class Actions: The Law of 50 States* § 1.04[3] (1995) ("With the exception of Mississippi and Virginia, every state has enacted some form of rule of civil

over, would probably draw at least some satellite litigation over whether claims were being inflated to qualify for federal jurisdiction. Whatever one may think of its doctrinal justifications, the *Snyder* rule's effects include some that are quite defensible, particularly that of excluding from federal court predominantly local agglomerations of small state-law claims that can just as well be handled in state court. Complete reversal of the *Snyder* rule would let in such cases even if the total of claims came to only a little over \$50,000, which seems an unneeded expansion of federal jurisdiction. Lesser modifications would draw some pretty fine distinctions for no great benefit, and any legislative energy available to focus on class actions would be better spent on more pressing matters. Within the context of the present general diversity jurisdiction, *Snyder*, if broken at all, is not so badly broken as to demand legislative fixing. If readers share my conclusion that the same is true of federal-question jurisdiction and the *Ben-Hur* rule on citizenship in diversity class actions, then—short of major jurisdictional reforms aimed at complex litigation in general—our present ramshackle structure of original federal jurisdiction as it applies to class actions is best left alone.

B. Supplemental Jurisdiction

Although legislation concerning original jurisdiction for federal class actions may not be called for, the case for doing something about supplemental jurisdiction is considerably stronger. The rule of *Zahn v. International Paper Co.*³⁹ that legally separate, below-limit claims may not be part of a diversity class action brought by representatives whose claims all exceed \$50,000⁴⁰ has come under heavy criticism.⁴¹ It lacks *Snyder*'s justification of keeping small-claim, state-law aggregations out of federal court, because some of the claims are large and can be there by themselves. Indeed, *Zahn* poses the danger of splitting related actions between state and federal court, if those with large enough claims pursue them on either an individual or class basis in federal court.⁴² Further, when plaintiff class representatives try to

procedure which directly pertains to class action litigation. . . . On balance, the state courts have been expansive and experimental in applying class action theory to common group problems, particularly in areas expressly rejected by the federal courts, such as common law fraud actions and actions arising from mass torts." (footnote omitted)).

³⁹ 414 U.S. 291 (1973).

⁴⁰ *Id.* at 301.

⁴¹ See, e.g., 7A Charles A. Wright et al., *Federal Practice and Procedure* § 1756, at 75 n.31 (2d ed. 1986) (citing and quoting critical commentary).

⁴² *Zahn* is thus subject to some of the same criticisms in the class context as was *Finley v. United States*, 490 U.S. 545 (1989), which triggered enactment of the supplemental-jurisdiction statute. See, e.g., Report of the Federal Courts Study Committee 47 (1990)

take advantage of the opportunity afforded by *Ben-Hur* to bring a large state-law damage class action in federal court, litigation over whether some class members have claims that do not exceed \$50,000—and thus must be excluded—can readily follow.⁴³

Zahn, then, is high on a list of candidates to be overruled, but the Supreme Court seems most unlikely to overrule the decision on the merits. Congress may have done so unintentionally in the 1990 supplemental-jurisdiction statute, depending upon how the courts read the combination of statutory text omitting Rule 23 from a list of diversity joinder situations excepted from supplemental jurisdiction⁴⁴ with legislative history reflecting an intent not to affect jurisdiction over class actions.⁴⁵ It would be better to address the question squarely. This could be done by simply amending the present language at the end of 28 U.S.C. § 1367's subsection (b) on exceptions to supplemental jurisdiction in diversity cases: Instead of banning supplemental jurisdiction when exercising it "over such claims would be inconsistent with the jurisdictional requirements of section 1332,"⁴⁶ the concluding words could refer only to "the jurisdictional requirement of section 1332(a)(1)." By this referencing of just section 1332(a)(1), the state-citizen diversity subsection, the complete-diversity rule would still apply in full force to state-citizen diversity cases, but it would not apply to supplemental jurisdiction over below-limit claims in class or nonclass actions. Nor would complete diversity be the rule for any alienage cases or for foreign-state-as-plaintiff cases under section 1332(a)(4).

(arguing that denial of supplemental jurisdiction could force "splitting [of] the claims and bringing duplicative actions in state and federal courts," which "wastes judicial resources").

⁴³ See, e.g., *Carlough v. Amchem Prods., Inc.*, 834 F. Supp. 1437, 1456-62 (E.D. Pa. 1993) (discussing extensively whether exposure-only plaintiff class members who would receive no immediate payment in asbestos class action settlement met amount requirement). The problem of deciding whether the *Zahn* requirement is met can be greater regarding class members not before the court:

Application of *Zahn* demands a curious inquiry. Usually the court is to ask whether a claim that on its face exceeds the jurisdictional minimum is made in good faith. That does not work very well as to claims that have not really been made, like those of the absent class members, since it is difficult to assess the good faith of somebody who has not made a claim.

Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 Cornell L. Rev. 858, 887 n.148 (1995) (citation omitted).

⁴⁴ See 28 U.S.C. § 1367(b) (1994).

⁴⁵ For a summary of the issue and a listing of decisions, a majority of which have relied on the legislative history to hold that *Zahn* survives, see 7A Wright et al., *supra* note 41, § 1756 (Supp. 1995). For an important recent decision adopting the minority view that the supplemental jurisdiction statute overrules *Zahn*, see *In re Abbott Lab.*, 51 F.3d 524, 527-29 (5th Cir. 1995) (holding that court "cannot search legislative history for congressional intent unless . . . the statute [is] unclear or ambiguous").

⁴⁶ 28 U.S.C. § 1367(b) (1994).

This is not the place to debate the merits of the complete-diversity rule for alienage cases; long ago I argued that it produces a "crazy quilt" of results and is an "egregiously bad rule" that should be abolished for alienage cases.⁴⁷ Similarly, no reason comes to mind why the diversity statute's text should afford any basis for an argument that complete diversity—whatever it could mean—might be required in foreign-state-as-plaintiff cases. As for the amount in controversy, confining the supplemental-jurisdiction limits for diversity cases to the state-citizen subparagraph in section 1332(a)(1)⁴⁸ would overrule *Zahn* by making supplemental jurisdiction available for below-limit claims in class actions and would do the same for non-class diversity cases. In both class and nonclass actions, allowing joinder of related below-limit claims of other parties to claims that can be in federal court on their own seems sensible.⁴⁹ That this extension would be of supplemental and not original jurisdiction should limit any impact on federal-court caseloads: It would apply only to cases that could, and sometimes would, be in federal court anyway, and thus should not increase greatly the presently very small number of diversity class actions.⁵⁰ Last and crucially, the extension of supplemental jurisdiction would carry with it the explicit discretion of section 1367(c) to decline the exercise of supplemental jurisdiction in several

⁴⁷ Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 Harv. L. Rev. 963, 966-68 (1979).

Section 1332(a) has a closing proviso, added in 1988, meant to exclude diversity jurisdiction over cases between legal resident aliens and citizens of the same state in which the aliens reside. See 28 U.S.C. § 1332(a) (1994) ("For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the state in which such alien is domiciled."). The phrasing of the proviso has proved troublesome in other applications where it could—apparently contrary to Congress's intent—create diversity in cases involving other aliens. See, e.g., *Arai v. Tachibana*, 778 F. Supp. 1535, 1538-43 (D. Haw. 1991) (interpreting proviso as not creating diversity in case brought by nonresident aliens against citizen and resident aliens). To keep the proviso's mischief from being compounded by the proposed abolition of the complete-diversity rule in alienage cases, it could be amended as follows (deleted language is ~~stricken through~~ and new text is *italicized*):

For the purposes of this section [1332], section 1335, and section 1441, *jurisdiction shall not rest upon adversity between* an alien admitted to the United States for permanent residence ~~shall be deemed and~~ a citizen of the State in which such alien is domiciled.

⁴⁸ The amount requirement appears in subsection (a) before the subparagraphs enumerating state-citizen diversity, alienage, and foreign-state-as-plaintiff jurisdictions. 28 U.S.C. § 1332(a) (1994).

⁴⁹ See, e.g., *Patterson Enters. v. Bridgestone/Firestone, Inc.*, 812 F. Supp. 1152, 1153-55 (D. Kan. 1993) (upholding supplemental jurisdiction over family trucking corporations' claims below \$50,000 in diversity case brought by family member with claim over \$50,000 arising from same accident).

⁵⁰ See *supra* note 19.

circumstances,⁵¹ providing the federal courts with significant control over imposition on their dockets.

Just as was true in the discussion of original jurisdiction above, more ambitious changes for class and nonclass complex litigation could use or revise present supplemental-jurisdiction authority. Here, as before, a careful development of the idea appears in the literature—in this case in the ALI Complex Litigation Project's section 5.03 on supplemental jurisdiction for claims that are not within independent federal jurisdiction, but that are related to claims within the Project's proposed federal complex-litigation jurisdiction and transfer provisions.⁵² The desirability of such a provision is best discussed as part of a broader debate on the merit of the overall ALI complex-litigation proposal, which has already taken place in another symposium.⁵³

C. *Removal Jurisdiction*

Removal issues seem to arise rarely in connection with federal class actions,⁵⁴ and indeed the class device may forestall removal issues if class members who might be tempted to bring individual state-court actions are content to have their interests represented in an ongoing federal class action. Individual opt-outs could bring their own claims that might then be subject to ordinary nonclass suit re-

⁵¹ 28 U.S.C. § 1367(c) (1994) reads as follows:

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances there are other compelling reasons for declining jurisdiction.

⁵² See ALI Complex Litigation Project, *supra* note 10, § 5.03.

⁵³ Symposium, *supra* note 11.

⁵⁴ One sign that special removal problems are infrequent in federal class actions is that in both Moore's and Wright & Miller's federal practice treatises, the index headings for "Class Actions" and for "Removal" respectively have no subheadings for "Removal" or "Class Actions." See 3B James W. Moore et al., *Moore's Federal Practice*, I-73 (2d ed. 1995); Wright et al., *supra* note 41, *General Index and Tables to Federal Practice and Procedure*, at 745, 1417 (1996). The Federal Judicial Center's recent random sample of filings notes that only three of the 51 class actions found had been removed from state courts, and makes no mention of any problems with the removals. FJC Time Study, *supra* note 19, at 7. Similarly, the two-district study reports that 5% and 7% of class actions had been removed in the Eastern District of Pennsylvania and the Northern District of California respectively, again with no mention of removal problems. See FJC Districts Study, *supra* note 19, at 12.

removal and possible transfer and consolidation with a class action.⁵⁵ However, the only problem particularly in need of legislative attention here is the possible amendment of 28 U.S.C. § 1407 to authorize retention of transferred cases for trial as well as pretrial proceedings, which is discussed below.⁵⁶

One way in which thorny removal issues can occasionally arise in connection with class actions is if parallel state-court litigation somehow interferes with federal-court class proceedings. Recently the Second Circuit affirmed transferee judge Jack Weinstein's use of the All Writs Act⁵⁷ to uphold removal of otherwise unremovable Texas state-court, state-law class actions that threatened to undermine the settlement mechanism established in the Agent Orange litigation.⁵⁸ This judicial tour de force seems best regarded as an extraordinary remedy for truly extraordinary circumstances, which the Agent Orange situation may have been.⁵⁹ Even so, this type of problem may lend itself better to treatment not by removal but by an injunction against the state-court proceedings, which appears to have been permissible in the Agent Orange case under the "necessary in aid of its jurisdiction" and "to protect or effectuate its judgments" exceptions to the Anti-Injunction Act.⁶⁰ If legislation is in order to improve federal courts' capacity to deal with such parallel-litigation problems, amending the Anti-Injunction Act would address the area more squarely than reliance upon judicial or legislative creation of exotic removal varieties for situations that seem likely to remain highly unusual. The possibil-

⁵⁵ See 28 U.S.C. § 1407 (1994) (providing for transfer for coordinated or consolidated pretrial proceedings); Fed. R. Civ. P. 42(a) (establishing judicial authority to order joint hearings or trials, and to consolidate actions, when "actions involving a common question of law or fact are pending before the court").

⁵⁶ See *infra* text accompanying notes 72-78.

⁵⁷ 28 U.S.C. § 1651(a) (1994) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

⁵⁸ *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1431-32 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994), and *Hartman v. Diamond Shamrock Chems.*, 114 S. Ct. 1126 (1994).

⁵⁹ As the Second Circuit reasoned:

Given the "exceptional circumstances" surrounding the instant case, [use of the All Writs Act] was a proper exercise of judicial discretion. The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.

In re "Agent Orange," 996 F.2d at 1431.

⁶⁰ 28 U.S.C. § 2283 (1994); see *In re "Agent Orange,"* 996 F.2d at 1432 (holding that case came "squarely within" aid-of-jurisdiction and protecting-judgments exceptions).

ity of amending the Anti-Injunction Act is discussed in a later section.⁶¹

II

APPELLATE JURISDICTION

Trial court rulings that either grant or deny class certification often have make-or-break significance, with a grant greatly enhancing settlement value and a denial making a case far less worth pursuing on a claim-by-claim basis.⁶² Nonetheless, decisions either way on class certification are usually unappealable and can be reviewed only after final judgment.⁶³ Not long ago, changing this rule would have taken legislation. Now, though, recent amendments to the Supreme Court's rulemaking power authorize it both to promulgate definitions of finality for purposes of 28 U.S.C. § 1291⁶⁴ and to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under" the remainder of 28 U.S.C. § 1292.⁶⁵ A new Rule 23(f) that would grant the courts of appeals discretion to allow prompt appeal from the grant or denial of class certification has been under consideration in contemplated revisions of the federal rule⁶⁶ and seems likely to be adopted if amendments are made.⁶⁷ This broadening of rulemaking authority makes unnecessary any further consideration of possible statutory amendments on appeal of class-certification rulings.

III

VENUE

Like removal, basic venue appears to pose few, if any, special problems for federal class actions. The general venue statute's authorization for venue in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substan-

⁶¹ See *infra* text accompanying notes 91-102.

⁶² See, e.g., *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-70 (1978) (discussing "death knell" rationale followed in some circuits to allow appeal of some class-certification denials).

⁶³ See, e.g., *id.* at 465, 468-69 (holding class-certification denial not appealable as final decision under 28 U.S.C. § 1291 and not within collateral-order exception to finality requirement).

⁶⁴ 28 U.S.C. § 2072(c) (1994).

⁶⁵ 28 U.S.C. § 1292(e) (1994).

⁶⁶ A court of appeals may permit an appeal from an order granting or denying a request for class action certification under this rule upon application to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders. Proposed Amendments to Rule 23, 16 Class Action Rep. 640, 642 (1993).

⁶⁷ See generally Cooper, *supra* note 8, at 64-73.

tial part of property that is the subject of the action is situated,"⁶⁸ will often afford a forum, and by focusing on events and property avoids raising any issues unique to class actions. The main parts of the venue statute that do focus on parties⁶⁹ are interpreted in defendant class actions to refer only to the named defendants,⁷⁰ and with better reasoning than supports the *Ben-Hur* rule of looking exclusively to named parties to determine diversity: "Because venue turns upon the convenience of the parties in litigating in the particular forum chosen, it would make no sense to consider the residency of the other members of the class. Only the named defendants will be litigating the suit."⁷¹

Some room may exist for change in the multidistrict-litigation provision on venue transfer for coordinated or consolidated proceedings, which now limits its authorization to pretrial.⁷² Although trials—especially on individual damages—should often be back in transferor districts, and transferee courts can frequently keep them for trial with the parties' consent or by transfer under section 1404(a) when cases do not settle,⁷³ it could still make sense to allow transfer for all purposes in appropriate circumstances.⁷⁴ Most prominently, common issues that need trial could well stay before the transferee judge, who should not have to engage in subterfuge to reach a sensible result. Though not addressed specifically to the class context, the American Law Institute's Complex Litigation Project has one well developed

⁶⁸ 28 U.S.C. § 1391(a)(2)-(b)(2) (1994).

⁶⁹ See 28 U.S.C. § 1391(a)(1)-(b)(1) (1994) (authorizing venue in both diversity and federal question cases in "a judicial district where any defendant resides, if all defendants reside in the same State"); see also 28 U.S.C. § 1391(a)(3)-(b)(3) (1994) (setting forth fallback provisions, likely to be used rarely, authorizing venue in diversity-only cases in "a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced," and in other cases in "a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought").

⁷⁰ See 3B Moore et al., *supra* note 54, ¶ 23.96, at 23-560.1 (discussing named defendants and venue requirements). But see *Sperberg v. Firestone Tire & Rubber Co.*, 61 F.R.D. 70, 72-74 (N.D. Ohio 1973) (holding that lack of venue as to defendant requires dismissal under special patent venue statute, 28 U.S.C. § 1400(b)).

⁷¹ 3B Moore et al., *supra* note 54, ¶ 23.96, at 23-560.1 n.11 (citation omitted).

⁷² See 28 U.S.C. § 1407(a) (1994) (authorizing transfer of pending actions for coordinated and consolidated pretrial proceedings).

⁷³ 28 U.S.C. § 1404(a) (1994) (providing that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought").

⁷⁴ See generally Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. Pa. L. Rev. 711, 712 (1991) (discussing need to enhance Judicial Panel's role in multidistrict litigation).

proposal for a provision authorizing multidistrict-litigation transfer for trial as well as pretrial proceedings.⁷⁵

All told, multidistrict-litigation transfer seems to work well enough when needed for federal class actions, and any changes to authorize transfer for trial in addition to pretrial should not require tweaking to adapt to the class context. A case certified as a class action often will not need the transfer provision; the class members are "before" the court without need of transfer. Where transfer for pretrial or trial can help a class action is with individual suits filed separately in other federal courts, or with overlapping class actions. The former could be actions filed before the class case, or opt-outs, or perhaps renegades in a mandatory class action. For opt-out cases proceeding individually as of right, transfer may enhance the trial court's management powers and ability to economize in the litigation, and the authority to retain transferred cases for trial would add to the transferee judge's leverage. If strong-arm powers are needed—as to deal with mavericks from a mandatory class action—transfer including trial authority could help, although a stay of the separate action should often do the trick. Stays are also one way of dealing with the overlapping class actions that may be filed as counsel and parties race for control of class litigation.⁷⁶ Another is the use of transfers to bring scattered, related class actions together to the extent the multidistrict-litigation statute allows.⁷⁷ The problems seem likely to be more serious if the cases are in state rather than federal courts and thus beyond transfer powers, in which case direct authority for an antisuit injunction seems better suited to the task.⁷⁸ Adding explicit trial authority to the multidistrict-litigation statute does seem like a worthwhile idea, but it should be considered largely on its own merits because its utility in the class context seems modest.

⁷⁵ See ALI Complex Litigation Project, *supra* note 10, § 3.06(a) ("Unless the Complex Litigation Panel otherwise provides, transfer and consolidation shall be for all purposes . . ."); see also *id.*, app. A, at 438 (proposing enactment of 28 U.S.C. § 1407(b) to provide that "[w]hen civil actions pending in more than one district involve one or more common questions of fact, they may be transferred by the Complex Litigation Panel to any district for consolidated pretrial proceedings or trial, or both").

⁷⁶ See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 165-66 (1996) (noting problems involved with duplicative and overlapping classes).

⁷⁷ See *id.* at 86 n.46.

⁷⁸ See *infra* text accompanying notes 91-102. For a proposal to amend the federal multidistrict-litigation statute to provide for coordination of pretrial proceedings in related class and nonclass actions pending in state as well as federal courts, see William W. Schwarzer et al., *Judicial Federalism: A Proposal To Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 Tex. L. Rev. 1529, 1550-63 (1995).

IV PERSONAL JURISDICTION

The constitutional frontiers of federal and state courts' personal jurisdiction over absent class members are much debated in the wake of *Phillips Petroleum Co. v. Shutts*.⁷⁹ *Shutts* held that state courts could exercise jurisdiction over adequately represented, absent, damage class action plaintiffs who lacked minimum contacts with the state, so long as they had notice, the opportunity to be heard, and the chance to opt out.⁸⁰ Among the issues not fully settled after *Shutts* are its effect on mandatory or equitable damage class actions⁸¹—as opposed to those of the Rule 23(b)(3) type for damages—and its impact on federal courts' personal jurisdiction in state-law cases.⁸² Absent valid positive law authorizing exercise of federal jurisdiction on a national-contacts rather than state-contacts basis, *Shutts* "probably places the same limits on [federal-court] cases as actions in state court."⁸³ It seems likely, though, that national-contacts personal jurisdiction for the federal courts in class and other complex litigation would be constitutional.⁸⁴

National-contacts jurisdiction would mean, I take it, that federal courts would have the same authority over those having minimum contacts with the United States as state courts have over parties who have minimum contacts with the state. State courts may presumably bind such unnamed class members in damage class actions on something less than the notice, opportunity, and opt-out conditions required for parties *without* minimum contacts in *Shutts*—perhaps on as

⁷⁹ 472 U.S. 797 (1985).

⁸⁰ *Id.* at 811-12.

⁸¹ See *id.* at 811-12 n.3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately [sic] for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief."); see also Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 54 (1986), (stating that extension of reasoning of *Shutts* to logical extreme would prohibit mandatory class certification completely).

⁸² For a survey of the due process implications of *Shutts* for mass-tort class actions, see Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. Davis L. Rev. 871, 895 (1995). For an argument that the exigent circumstances of asbestos litigation would justify limits on the right to opt out, such as requiring a showing of good cause, see Steve Baughman, *Note, Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right To Opt Out*, 70 Tex. L. Rev. 211, 215 (1991).

⁸³ Richard L. Marcus & Edward F. Sherman, *Complex Litigation: Cases and Materials on Advanced Civil Procedure* 425 (2d ed. 1992).

⁸⁴ See ALI Complex Litigation Project, *supra* note 10, § 3.08 cmt. e (noting probable congressional authority under commerce clause to enact federal national-contacts long-arm statute for complex cases).

little as the adequate-representation basis of *Hansberry v. Lee*,⁸⁵ although state rules (not to mention one's sense of fairness, apart from what due process may require) generally call for more. The *Shutts* requirements are not all that confining for damage class actions, even if they apply in full force to federal-law cases; the federal courts should not often chafe under their limits, and the need for legislation does not appear strong. Similarly, if the *Shutts* requirements were relaxed for mandatory or equitable class actions, the constitutional limits on state-court authority—whatever they might be—should not be a significant problem regardless of how they would carry over to the federal courts. At the least it may make sense to see if developing case law under *Shutts* turns out to be unexpectedly restrictive, in which case the possibility of legislative broadening of federal-court authority based on a national-contacts approach should be revisited.

The proposition that federal class actions have no pressing need for national-contacts personal-jurisdiction authority because of *Shutts* does not mean that such authority—as proposed, for example, by the ALI Complex Litigation Project⁸⁶—is unneeded for complex litigation in general. *Shutts* authorized, under certain circumstances, the binding of absent class members whom a court could not bring before it. Federal courts in scattered, complex litigation—whether class or non-class, diversity or federal question—could still benefit from authority to bring before them individual parties with minimum contacts with that big state that is the United States, whether or not the courts of the state in which the federal court sits would have the same authority. Such a federal-court power might be appropriate in a case like *In re Real Estate Title & Settlement Services Antitrust Litigation*,⁸⁷ a federal antitrust action in which the Third Circuit reversed an injunction against state-court litigation in Arizona after the state, as a class member, was denied permission to opt out on behalf of itself and its residents from a class the Eastern District of Pennsylvania certified as mandatory.⁸⁸ Some of the “residents”—Arizona school boards—then went home and filed in state court.⁸⁹ The Arizona parties, the Third Circuit held, were not subject to the personal jurisdiction of the Penn-

⁸⁵ 311 U.S. 32 (1940). In *Hansberry*, the Supreme Court stated that “[i]t is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present.” *Id.* at 42-43.

⁸⁶ See ALI Complex Litigation Project, *supra* note 10, § 3.08(a) & cmt. e (discussing personal jurisdiction in transferee court over parties involved in complex litigation).

⁸⁷ 869 F.2d 760 (3d Cir.), cert. denied, 493 U.S. 821 (1989).

⁸⁸ *Id.* at 771.

⁸⁹ *Id.* at 762.

sylvania federal court.⁹⁰ Coupled with an exception to the Anti-Injunction Act, discussed next, national-contacts jurisdiction could be useful in such cases. The apparent rarity of situations of that sort, however, suggests that the need for such jurisdiction for class actions specifically is not pressing.

V

INJUNCTIONS AGAINST STATE-COURT PROCEEDINGS

The last of the several areas covered in the interpleader statute is authority to enjoin proceedings in other courts.⁹¹ The need for such power in interpleader cases is clear: letting parallel litigation go to judgment could subvert the core purpose of interpleader—protecting the stakeholder against logically contradictory obligations. The same can be said of at least some of the mandatory class action types, particularly cases arising under Rule 23(b)(1)(A) for the prevention of “inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.”⁹² Injunctions could also be useful to prevent efforts in separate actions to raid a limited fund in a Rule 23(b)(1)(B) class action.⁹³ Situations can arise that call for injunctive powers even in nonmandatory class actions under Rule 23(b)(3), as in the recent phase of the *Agent Orange* litigation when state-court filings by class members threatened to disrupt an already entered settlement.⁹⁴ And revisions of Rule 23 might confer authority to condition or even forbid opting out in damage class actions, which could call for injunctive teeth.⁹⁵

⁹⁰ Id. at 762-63.

⁹¹ 28 U.S.C. § 2361 (1994) provides:

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may . . . enter its order restraining [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. . . .

Such district court . . . may . . . make the injunction permanent, and make all appropriate orders to enforce its judgment.

⁹² Fed. R. Civ. P. 23(b)(1)(A).

⁹³ See also Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 B.Y.U. L. Rev. 289, 315 (arguing that strong case for antisuit injunction “arises in structural class litigation, usually under Rule 23(b)(2), when complex settlements and institutional arrangements can be thrown into chaos by side-litigation”).

⁹⁴ See *supra* notes 57-60 and accompanying text; see also Wood, *supra* note 93, at 315 (“One strong case for an anti-suit injunction would arise if a member of an opt-out style class action (Rule 23(b)(3)) decided *not* to opt out, but later regretted that decision and filed an independent state court action.”).

⁹⁵ See Proposed Amendments to Rule 23, *supra* note 66, at 641 (reporting proposed revision of Rule 23(c)(2) that would eliminate present requirement of notice of opt-out

Authority to issue stay orders enjoining parties from pursuing parallel actions in *federal* court may be strong enough under existing case law to require no statutory enhancement.⁹⁶ However, the authority of federal courts handling class litigation to stay possibly disruptive actions in *state* court is on shaky ground and could profit from reinforcement by amending 28 U.S.C. § 2283. A leading if disputed case is *In re Federal Skywalk Cases*,⁹⁷ in which a two-to-one majority of an Eighth Circuit panel held that the federal anti-injunction act barred an order forbidding members of a federal district court's (b)(1)(B) punitive-damages class to settle individual punitive-damage claims they had filed in state court.⁹⁸ As then-Professor (now Seventh Circuit Judge) Diane Wood has argued, there is also a strong case against fitting a federal class action court's injunction authority into the "in aid of jurisdiction" exception to section 2283, "because Rule 83 commands that the Federal Rules of Civil Procedure are not to affect basic jurisdictional statutes, and the 'jurisdiction' to be protected in these class actions is actually made possible by Rule 23 itself."⁹⁹ Professor Wood concluded that "injunction policy in the class action area needs reviewing, since in some cases injunctions against competing lawsuits are clearly warranted."¹⁰⁰

right to (b)(3) class members and would substitute general notice provision describing "any conditions affecting exclusion from or inclusion in the class"); see also *id.* at 644, 645 (presenting draft Committee Note referring to revision's "flexibility for the court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class," and to court authority to "impose a condition on 'opting out' that will preclude an excluded member from relying in a separate action upon findings favorable to the class").

⁹⁶ See, e.g., *William Gluckin & Co. v. International Playtex Corp.*, 407 F.2d 177, 180 (2d Cir. 1969) (affirming stay of defendant's previously filed federal patent-infringement action until final disposition of plaintiff's nonclass invalidity/noninfringement declaratory action in more convenient forum).

⁹⁷ 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988 (1982). For a survey of the law on injunctions in federal class actions against pending state-court proceedings and a discussion of the *Skywalk* decision, see Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 Ind. L.J. 507, 528-36 (1987).

⁹⁸ *Skywalk*, 680 F.2d at 1182-83. But see, e.g., *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 202-04 (3d Cir. 1993) (reasoning that likelihood or existence of federal multidistrict-action settlement justifies "necessary in aid of jurisdiction" injunction against duplicative state actions). For an argument supporting a broad reading of the "in aid of jurisdiction" exception, see Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. Chi. L. Rev. 717, 753-60 (1977). The disarray in the cases, and the disagreement among commentators reflected by Professor Wood's argument, see *infra* text accompanying notes 99-100, compound the need for amendment of the Anti-Injunction Act—a need already supported by the desirability of some federal-court authority to enjoin competing state-court litigation.

⁹⁹ Wood, *supra* note 93, at 315.

¹⁰⁰ *Id.*

I agree, and also find appealing her proposal to amend section 2283 by adding that injunctions may be appropriate "when necessary to ensure the effectiveness of a class action certified under federal statutes or rules, or multidistrict litigation ordered pursuant to 28 U.S.C. § 1407, or court-ordered arbitration, or in aid of a claim for interpleader."¹⁰¹ This language would let courts and litigants focus on the desirability of a federal stay of pending state-court proceedings under the guidelines that should govern such a sensitive matter: whether an injunction is "necessary to prevent irreparable harm to the parties or to federal interests, giving due regard to the interests of the state and the adequacy of the remedies in the state courts."¹⁰² Professor Wood's proposal also has the virtue of addressing other situations such as multidistrict litigation and interpleader in which antisuit injunctions could be appropriate, reminding us that in any consideration of statutory improvements for class actions we should be ready to broaden our focus to similar contexts in which the same or parallel enhancements could be warranted.

VI

SUBSTANCE-SPECIFIC MEASURES

Part of my socialization process as a junior member of the Advisory Committee on Civil Rules has involved learning that the Committee tries to steer well clear of the Rules Enabling Act's ban on abridging, enlarging, or modifying substantive rights.¹⁰³ That wariness applies to substance-specific rules such as heightened pleading requirements for civil rights or securities-fraud litigation, which might also be suspect under the Enabling Act's authorization for "general rules of practice and procedure."¹⁰⁴ Thus even if a rule is procedural, if it is specific to a particular substantive subject matter—as opposed to an element common to several areas¹⁰⁵ or a procedural category such as complex cases—it should come, if at all, from Congress.¹⁰⁶ This position need not reflect a view on whether federal procedural rules should be less "transsubstantive" than they generally have

¹⁰¹ Id. at 320.

¹⁰² Id. at 319-20.

¹⁰³ See 28 U.S.C. § 2072(b) (1994).

¹⁰⁴ 28 U.S.C. § 2072(a) (1994) (emphasis added).

¹⁰⁵ See Fed. R. Civ. P. 9(b) (requiring circumstances constituting alleged fraud or mistake to be stated with particularity, while allowing malice, intent, knowledge, or other conditions of mind to be averred generally); Fed. R. Civ. P. 9(g) (requiring specific statement of items of special damage).

¹⁰⁶ Congress has, indeed, recently enacted several procedural requirements specific to private federal securities-fraud actions. See Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 77z-1 (West Supp. 1996).

been;¹⁰⁷ rather, it flows from a sense of the proper use of the rulemaking power so long as the ban on affecting substantive rights remains in the rulemakers' charter.

The range of possible substance-specific measures with procedural overtones is vast, and I will offer just one contemporary example to illustrate some of the themes that arise. The recently enacted legislation to curb perceived abuses in private securities-fraud litigation¹⁰⁸ mixes clearly substantive measures such as scienter requirements with procedural changes such as heightened pleading rules. Besides trying to offer advice on the merits of the substance-specific procedural provisions, which can be a delicate political task, rulemakers can think about whether the proposals reflect broader problems that call for consideration of different, general rule changes. "Clientless" securities class action concerns that lead to legislative proposals for guardians ad litem, plaintiffs' steering committees, and named plaintiff minimum-ownership thresholds¹⁰⁹ can add impetus to consideration of rule alternatives, such as discretionary opt-in requirements.¹¹⁰ These would be available generally, but might be appropriately applied to bring pressure on large funds tempted to try fence-sitting either to stay entirely out of securities-fraud class actions brought by small shareholders or to play a greater role than they sometimes do now. Even more broadly, concerns about abusive class suits may support allowing courts to consider the likelihood of success on the merits in class-certification decisions—a practice familiar from the preliminary injunction context but now disapproved as a factor in class-certification rulings.¹¹¹ Such a change could have the added virtue of even-handedness: it would not just cut against technically proper but apparently weak class actions, but could also favor those that seemed strong on the merits.

¹⁰⁷ See Mark C. Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases*, 14 *Rev. Litig.* 113, 114 (1994) (discussing how "[n]ew contributions to efficiency in the operation of the federal courts might be obtained by departing from the transsubstantivity and insensitivity to size that is characteristic of the current Federal Rules").

¹⁰⁸ Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 77z-1 (West Supp. 1996).

¹⁰⁹ See S. 240, 104th Cong., 1st Sess. §§ 101(c), 103 (1995) (proposing named plaintiff thresholds, guardians ad litem and plaintiffs' steering committees). These provisions did not survive in the enacted legislation.

¹¹⁰ See Proposed Amendments to Rule 23, *supra* note 66, at 641 (providing notice to include "any conditions affecting exclusion from or inclusion in the class").

¹¹¹ See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

VII

STANDARDS FOR SETTLEMENT-FUND CREATION

Litigants and judges have tried just about every avenue to deal with the crush of asbestos claims, including (b)(3) and (b)(1)(B) class actions,¹¹² collective trials,¹¹³ and bankruptcy.¹¹⁴ An increasingly prominent approach is to establish a settlement fund and give class action defendants at least some degree of protection from claims other than those brought against the fund, a technique currently being attempted in both asbestos¹¹⁵ and breast-implant¹¹⁶ litigation. Such mechanisms have promise for resolving massive litigation economically—getting payments to claimants while letting businesses keep serving customers and providing jobs for nonlawyers—but they also raise grave concerns about the adequacy of protections against abuse.¹¹⁷ These fund plans have much in common with bankruptcy yet operate under no clearly defined legal regime, which raises the danger of inconsistent or inadequate arrangements. Common provisions for the likes of scheduled payments and claims-processing facilities also take on the air of legislative solutions, raising questions of the judicial role in crafting and approving such plans.¹¹⁸

In testimony four years ago, Judge William Schwarzer, then director of the Federal Judicial Center, sketched some disadvantages of bankruptcy that lead to efforts to use other avenues and outlined a “kinder, gentler bankruptcy” that Congress might enact:

¹¹² See, e.g., *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995) (approving (b)(1)(B) class settlement in asbestos litigation because of possible inadequacy of funds to pay all claims).

¹¹³ See *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 659-66 (E.D. Tex. 1990) (approving, over defendant's objection, use of statistical damage projections from sample cases tried in groups to untried cases of consenting plaintiffs).

¹¹⁴ See *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.) (upholding use by Dalkon Shield manufacturer A.H. Robins Co. of Chapter 11 bankruptcy and preliminary injunction restraining suits against debtor and its assets and property), cert. denied, 479 U.S. 876 (1986).

¹¹⁵ See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (approving settlement between (b)(3) class of asbestos personal injury claimants and 20 defendant companies who maintained Center for Claims Resolution), vacated and remanded, Nos. 94-1925 et al., 1996 U.S. App. LEXIS 11191 (3d Cir. May 10, 1996).

¹¹⁶ See *In re Silicone Gel Breast Implant Prods. Liab. Litig.* (Lindsey v. Dow Corning Corp.), No. CV 92-P-100000-S, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994) (granting provisional approval to multibillion-dollar settlement of national breast-implant (b)(3) class action).

¹¹⁷ See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.) (setting aside approval of class settlement in pick-up truck products-liability litigation for, inter alia, inadequacy of representation and of proposed settlement), cert. denied, 116 S. Ct. 88 (1995).

¹¹⁸ See Marcus, *supra* note 43, at 866-71 (surveying “features of the recent experiments to see their tort reform aspects”).

Plaintiffs' claims are automatically stayed [when a defendant files for protection from creditors under Chapter 11], stopping any flow of settlements and payments to them. The defendant loses control of its business and may face difficulty obtaining credit for ongoing operations. . . .

Some alternative solutions for viable businesses may encourage such businesses to make assets and a stream of income available to meet the claims of past, present, and future claimants. For example, one alternative might be to provide protection for businesses that create a trust for current and future payments, following carefully selected procedures and standards for allocation of funds. Prior trusts may also establish some norms for funding from current assets and future earnings. Claimants might be given the opportunity to force this approach under specified conditions.¹¹⁹

Courts have, of course, been approving such funds in class rather than bankruptcy proceedings;¹²⁰ the pressure of felt necessity in the absence of legislative action can drive litigants to ever more inventive approaches that leapfrog the development of statutory proposals. The ability of private parties to write such virtual legislation subject only to the checks of what defendants can negotiate with plaintiffs' lawyers (often those of the defendant's choosing¹²¹) and the ad hoc scrutiny of the federal courts, however, remains a troubling end run around the regularized structures provided in bankruptcy for kindred situations. Responses might come either by statute or by rulemaking; since his testimony on possible bankruptcy-type legislation, Judge Schwarzer has raised the idea of amending Rule 23(e) on class action settlement approval by adding detailed criteria on which findings should be made,¹²² and this matter too is before the Advisory Committee on Civil Rules.

CONCLUSION

I undertook this Article as a thought experiment, not knowing what a survey of possible legislative measures to improve federal class actions might turn up. The results may be modest but worthwhile. As the Article reflects, much valuable work has already been done by individual writers and by such groups as the ALI in its Complex Liti-

¹¹⁹ See Asbestos Litigation Crisis in Federal and State Courts, *supra* note 14, at 11-12.

¹²⁰ See *supra* notes 115-16 and accompanying text.

¹²¹ See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1378-80 (1995) (discussing collusion dangers from "the ability on the part of the defendants to choose the counsel who will represent the plaintiff [settlement] class").

¹²² William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 *Cornell L. Rev.* 837, 843-44 (1995).

gation Project. Of the topics developed here, the fields in which the case for legislative action seems clearest are overruling *Zahn v. International Paper Co.* along with other supplemental jurisdiction changes, and amending the Anti-Injunction Act to reduce present statutory barriers to considering injunctions against state-court proceedings. Also important, but with less fully developed ideas for legislation or rulemaking, is the burgeoning area of settlement funds in lieu of bankruptcies or legislative solutions to mass-exposure torts. There, as with the eclipsing by judicial action of proposals for legislation on collective trials in asbestos cases, developments may be taking place so quickly as to allow at present for little if anything more than case-law treatment.

Finally, one theme that has emerged is the consistency with which legislation to improve class actions might best be targeted to reach beyond the class action context: *Zahn* may belong in the dustbin, but one good way of putting it there could eliminate other restrictions on supplemental jurisdiction as well. We may have accumulated enough experience in over five years with the statute to consider still other revisions in supplemental jurisdiction. Adding explicit trial authority to the multidistrict-litigation statute could help some class actions, but if done should be enacted in considerable part for its utility in non-class cases. National-contacts personal jurisdiction is a good idea for federal-court complex litigation, but is seemingly more needed in non-class than class actions. And the Anti-Injunction Act could use revision on several points besides the restrictions it now imposes on federal courts' authority in class litigation. Legislation, Congress willing, might thus be of some value, but most important to any effort at improving federal class action law is what is done with Rule 23 itself.