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INTRODUCTION

Nearly thirty years ago, the United States Supreme Court held in *Zahn* v. International Paper Co., ¹ that every member of a federal court *class action* asserting claims based solely upon state law must have a claim in excess of the minimum amount in controversy required by the statute conferring federal subject matter jurisdiction based upon *diversity* of citizenship. ... One might argue that, assuming large-claim individuals do not opt out (at least in that situation), abrogating *Zahn* would allow a unified *class action* to proceed in federal court and thus achieve efficient packaging. ... One of the major criticisms of *Zahn* a quarter century ago was that courts in many states were structurally inadequate to entertain *class actions* because they had overly restrictive *class action* rules. ... Since *Zahn* was decided, many states that lacked modern *class action* rules promulgated rules substantially identical to Federal Rule 23. ... Prior to *Zahn*, Professor Hamburger was a fierce critic of New York's nineteenth century *class action* rule. ... After the *Zahn* decision, however, New York adopted a modern *class action* statute, partly in response to *Zahn*. ... Just the reverse actually occurred; since *Zahn*, *class action* litigation has flourished in state court. ...
American Law Institute (ALI) is now considering a proposal to recommend to Congress that it abrogate the Zahn decision through legislation that would grant federal courts supplemental jurisdiction over claims of class members, so long as the named plaintiffs' claims exceeded the minimum jurisdictional amount. The current supplemental jurisdiction statute provides federal district courts with jurisdiction over nonfederal claims that are substantially related to federal claims, but it does not expressly extend such jurisdiction to class actions. The ALI proposal, however, would replace the current statute and, in the process, make it explicit that supplemental jurisdiction extends to class actions. This proposal, if adopted by Congress, would reverse three decades of class action jurisprudence and foster the return of small-claim class actions based upon state law to federal court, either by plaintiffs who choose to file suit in federal court or by defendants who elect to remove such actions, originally filed in state court, to federal court.

The ALI proposal to overturn Zahn is embedded in a broader proposal to address perceived problems with the current supplemental jurisdiction statute, and it must be understood in that context. Congress enacted the current statute (28 U.S.C. 1367) in 1990, in response to the Supreme Court's decision in Finley v. United States. In Finley, the Court held that federal courts may not exercise pendent jurisdiction over claims by plaintiffs that lack an independent basis of jurisdiction, even if such claims are closely related to claims by other plaintiffs over which federal courts do have jurisdiction (known as pendent party jurisdiction). The Court reasoned that Congress had not conferred statutory authority to exercise pendent party jurisdiction. Pendent jurisdiction, and its sister ancillary jurisdiction, were long-established, judicially-created doctrines that were designed to facilitate joinder of related claims and parties, as a means of efficiently packaging litigation in a single forum. The Finley decision, however, did not merely eliminate pendent party jurisdiction. It also cast doubt upon the legitimacy of pendent and ancillary jurisdiction in their entirety, because they were judge-made doctrines with no statutory basis. Thus, out of concern that the court had upset well-settled understandings of federal jurisdiction in a way that threatened efficient joinder of claims and parties, Congress soon enacted the current statute. This statute was intended to restore pre-Finley jurisdictional law, codify the doctrines of pendent and ancillary jurisdiction under the common terminology of supplemental jurisdiction, and abrogate the holding in Finley.

A storm of academic criticism quickly engulfed the infant statute. Commentators charged that it unduly restricted the use of supplemental jurisdiction in diversity cases and that, read literally, it would abrogate well-settled rules of jurisdiction in diversity cases and prevent efficient packaging of federal diversity cases. Over the next decade, federal courts of appeals rendered conflicting interpretations of the statute. In particular, a difference of opinion emerged over the effect of the new statute on small-claim state-law class actions. In In re Abbott Laboratories, the Fifth Circuit adopted the literal reading of the statute and held Congress had abrogated Zahn. In contrast, the Tenth Circuit in Leonhardt v. Western Sugar Co., refused to read the statute strictly, concluding that Congress did not intend to overrule Zahn.

The criticisms and split of judicial authority led to calls to amend the statute, and the ALI took up the challenge. Its latest tentative proposal would completely reconceptualize supplemental jurisdiction in "claim-specific" terms, and codify much of the prior law of supplemental jurisdiction in diversity cases. At the same time, it would abrogate other pre-existing jurisdictional law, generally expanding the scope of diversity jurisdiction. Specifically, the ALI proposal would expressly abrogate Zahn, thus permitting plaintiffs - or defendants on removal - to channel small-claim state-law class actions into federal court. The thesis of this Article is that this particular proposal lacks sufficient justification at best, and at worst reflects profound disrespect for the proper role of state courts, in our constitutional system, to adjudicate matters of state law. As such, the ALI should drop this particular proposal from any supplemental jurisdiction statute it proposes to Congress, and, if the ALI retains this proposal in a recommendation to Congress, Congress should reject it.
Part I of this Article describes the law of diversity jurisdiction that provided the backdrop for the decision in Zahn and analyzes the Zahn decision itself. Part II examines the genesis of the current supplemental jurisdiction statute, from its common law antecedents of pendent and ancillary jurisdiction, through the controversial decision in Finley, to its current form. Part III explains the ALI proposal to amend the statute by reconceptualizing supplemental jurisdiction in claim-specific terms, codifying some jurisdictional doctrines, and abrogating others, including Zahn. Part IV analyzes the justifications for overruling Zahn and rechanneling small-claim state-law class actions into federal court. Part IV also provides a rebuttal of each such justification, especially the notion that federal courts are superior to state courts in managing complex, multi-state litigation. The Article concludes that there is insufficient justification for abrogating Zahn, and that doing so contravenes the constitutional structure of our government. Thus, this portion of the ALI proposal should be rejected.

I. DIVERSITY OF CITIZENSHIP JURISDICTION AND ZAHN V. INTERNATIONAL PAPER

A. The Rules of Diversity of Citizenship

Congress for many years has authorized original federal subject matter jurisdiction over suits between citizens of different states, so long as the matter in controversy exceeds a minimum dollar amount. 19 The Supreme Court has long interpreted this legislation narrowly to require complete diversity of citizenship; all plaintiffs must be citizens of different states than all defendants. 20 With respect to the amount in controversy requirement, by contrast, the Court established a lenient test: if the plaintiff alleges in the complaint that it is entitled to recover more than the statutory minimum amount, the requirement is satisfied unless it appears to a legal certainty that the plaintiff cannot recover more than the minimum. 21

In cases involving multiple plaintiffs with separate and distinct claims, however, each plaintiff must satisfy the minimum amount requirement regardless of how closely related the claims are; plaintiffs in such cases cannot aggregate their claims in order to meet this requirement. 22 Commentators have observed that the law on aggregation of claims "is in a very unsatisfactory state." 23 In particular, the leading cases that prohibit aggregation of separate and distinct claims provide no justification for the rule and hinder the ability of federal courts to permit joinder of closely related claims. 24 Nevertheless, this was the established rule when Zahn v. International Paper Co. 25 came before the Supreme Court.

B. Diversity of Citizenship Requirements in Class Actions

In class actions in which the sole basis for federal jurisdiction is diversity of citizenship, the rigors of the complete diversity rule have long been relaxed, but the reasons for doing so are shaky at best. The Court ruled in Supreme Tribe of Ben-Hur v. Cauble 26 that only the named plaintiffs are required to be citizens of states different from those of the defendants; so long as there is complete diversity between the named plaintiffs and defendants, there is ancillary jurisdiction over the claims of class members. 27 Thus, citizenship of unnamed members of the plaintiff class is irrelevant. The Ben-Hur opinion asserted two unsatisfactory justifications for this rule. First, the Court asserted that the decree in a class action is binding on the class, so in order to make the decree effective, the court must have the authority to assert jurisdiction over class members' claims. 28 It is not necessary, however, to relax the rule of complete diversity in order to make class action decrees binding and effective, because state courts certainly have the authority to enforce their own class action decrees. If the complete diversity requirement were applied to every class member, federal courts would lack diversity jurisdiction if any class member were a citizen of the same state as any defendant. This would simply force plaintiffs to file suit in state court, where any decree would be just as binding and effective as one rendered in federal court.

The Court reasoned, secondly, that an inability to assert such jurisdiction could lead to
inconsistent results because the rights of nondiverse class members would have to be adjudicated in state court, which might reach a different decision than the federal court in an action between the diverse parties. 29 It is highly unlikely, however, that such inconsistency would occur if the complete **diversity** requirement were applied to every class member. The potential inconsistency would only arise if plaintiffs filed separate suits in state and federal court. If some class members are diverse from the defendants but others are not, however, there is no good reason why the plaintiffs would choose to split their litigation by filing two actions, one in federal court on behalf of diverse class members and one in state court on behalf of nondiverse class members. The essential value of a **class action** resides in the ability to join numerous claimants in a single, unified lawsuit. That value would be undermined by a decision to file separate **class actions** in different courts. Thus, if the complete **diversity** requirement were applied to every class member, and some members were nondiverse, plaintiffs almost invariably would choose to file a unified **class action** in state court, thus avoiding the potential for inconsistent results. The pernicious effect of the Ben-Hur decision is that, for no good reason, it reallocates power to decide important issues of state law in many **class actions** from state courts to federal courts.

While this named-plaintiffs-only rule had been well settled for many years, it remained an open question whether every named plaintiff and every class member in a **diversity class action** must assert a claim in excess of the requisite minimum amount, or whether the amounts of their claims could be aggregated. This issue first came before the Supreme Court solely with respect to the named plaintiffs. In **Snyder v. Harris**, 30 the Court held that all named plaintiffs with separate and distinct claims must each assert a claim in excess of the statutory minimum. 31 Plaintiffs argued that the rule against **aggregation** of separate and distinct claims should not be applied to **class actions** in order to accommodate the 1966 amendments to Rule 23, which abolished the distinction between "true" **class actions** asserting [*331] common interests and "spurious" **class actions** asserting separate interests. 32

The Court rejected this argument, reasoning that changes in the Rules cannot change the scope of jurisdiction granted by **Congress**. 33 More fundamentally, the **Snyder** Court rejected plaintiffs' policy argument that the nonaggregation doctrine should not be applied to **class actions** because it would prevent important issues from being decided in federal court. First, the Court asserted that overruling the nonaggregation doctrine would conflict with **Congress'** desire to stem the rising caseload of the federal judiciary. 34 In order to limit the number of federal cases, **Congress** had steadily increased the required amount in controversy. Overruling the nonaggregation doctrine would funnel below-minimum claims back into federal court and thus "add to the burdens of an already overloaded federal court system." 35 Second, leaving to state courts the adjudication of state-law claims below the minimum amount in controversy reflects "due regard for the rightful independence of state governments"; 36 indeed, such claims "can often be most appropriately tried in state courts."

The **Snyder** decision did not put the axe to all small-claim state-law **class actions** in federal court, because the amount in controversy requirement would be met if just one named plaintiff met the minimum amount. Since the citizenship of class members was irrelevant under the Ben-Hur decision, one could argue logically that the amount of their claims should be also irrelevant.

A few years after **Snyder**, however, the Court swung its mighty axe. In **Zahn**, it held that every class member's claim must also exceed the requisite amount. The Court simply reiterated its reasoning in **Snyder**: the nonaggregation rule requires that every class member must satisfy the minimum amount, and to hold otherwise would undermine congressional intent. 39 The Court did not specify how congressional intent would be undermined, but presumably it had in mind the policy reasons advanced in **Snyder**: to ease the burden on overworked federal courts and to respect the authority of state courts to adjudicate claims based on state law. The practical effect of the **Zahn** decision was to eliminate small-claim
state-law class actions from federal court. Even if the named plaintiffs' claims exceeded the *jurisdictional amount as required by Snyder*, in virtually every case either no class member's claim would do so, or not enough members' claims would meet the requisite amount to make the class sufficiently numerous, or, as in Zahn itself, it would not be feasible to determine which members' claims exceeded the minimum amount.

C. The Criticisms of Zahn

Commentators were, with few exceptions, highly critical of the Zahn decision. These criticisms fell into three categories: (1) the Zahn opinion contained analytical deficiencies; (2) the decision would result in inefficiencies; (3) state courts were not adequate fora for small-claim class actions based on state law.

1. The Analytical Critique

One analytical deficiency identified in the Zahn opinion is its failure to address the argument that class members' claims falling below the jurisdictional amount would be within the federal courts' ancillary jurisdiction. The Zahn dissent did not question the validity of the nonaggregation rule, but asserted that if the requirements for class certification were met, class members' claims necessarily would be closely related to the claims of the named plaintiffs, thus meeting the requirements for ancillary jurisdiction.

A second, perceived analytical weakness followed from the first. Under the Ben-Hur decision, claims of nondiverse class members fell within ancillary jurisdiction, so Zahn created a logical asymmetry by holding that below-minimum class members do not fall within ancillary jurisdiction. If citizenship of class members was irrelevant, commentators argued, simple logic would dictate that the amount of their claims should also be irrelevant. Absent from this critique was any consideration of whether Ben-Hur was correctly decided. If, as argued above, Ben-Hur is wrong, then the asymmetry should be corrected by overruling Ben-Hur, not by abrogating Zahn.

After Zahn, there remained the possibility that, if the class members' claims represented a "joint interest," their claims could then be aggregated to meet the jurisdictional amount. This possibility, however, was the basis for the third analytical criticism of Zahn. Commentators argued that the Court had perpetuated the archaic distinction between "true" and "spurious" class actions that the 1966 Amendments to Rule 23 had been designed to eliminate. Prior to 1966, "true" class actions were those in which the class represented a "joint" interest, whereas "spurious" class actions were those in which the class claims were "separate and distinct" but presented common questions of law or fact. It was necessary to determine whether a class represented a "joint" or "separate" interest because "true" and "spurious" class actions were treated differently. Critics of Zahn asserted that the decision perpetuated this confusing distinction because litigants in small-claim class actions would continue to dispute whether the class claims were "joint" (so the claims could be aggregated to satisfy the amount in controversy requirement) or "separate" (so the claims could not be aggregated).

2. The Inefficiency Critique

By retaining the distinction between "joint" and "separate" interests, critics charged, the Court failed to align jurisdictional doctrine with the procedural innovations of the 1966 Amendments to Rule 23 and thus undermined the effectiveness of the Rule changes. Not only would there continue to be wasteful litigation over whether claims were "joint" or "separate," but also commentators asserted that the Zahn decision was inconsistent with the binding effect that class actions were intended to have. Class members whose claims fell below the minimum amount and were "separate" so as to prohibit aggregation would not be bound by the findings or judgment if the class action proceeded without them because the court would lack jurisdiction over their claims. Alternatively, if the class action could not proceed...
without such class members, 49 members would pursue individual litigation. Either way, critics charged, Zahn would spawn wasteful and unnecessary relitigation of common issues. 50

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3. The State Court Critique

Zahn had the effect of requiring that small-claim state-law class actions be filed in state court, or not at all. Commentators, however, contended that state courts would not be adequate fora for such litigation. First, while some states had adopted functional class action rules similar to Rule 23, as amended in 1966, other states retained outmoded, inadequate rules, while still other states had no class action provisions at all, but relied on ancient common law and equity class action jurisprudence. 51 Second, critics expressed concern that state judges were far less experienced in the management of class actions than their federal counterparts. 52 Finally, commentators charged that state judges simply were hostile to class actions, whether due to local political pressure, ideology, or the like. 53

Even the few defenders of Zahn conceded its analytical deficiencies. 54 They countered, however, that there is no overriding federal interest at stake in small-claim state-law class actions, and state courts are the appropriate fora for such litigation. 55 Nevertheless, the critics of Zahn viewed it as "a tragedy to those who view class actions as a powerful weapon on behalf of the average citizen." 56

II. THE CONTROVERSY OVER SUPPLEMENTAL JURISDICTION

Thus matters stood when the controversy erupted over supplemental jurisdiction. Since the ALI proposal seeks to use supplemental jurisdiction as the vehicle for abrogating Zahn, an overview of the evolution of supplemental jurisdiction is essential to a full understanding of the asserted justifications for the proposal.

A. The History of Ancillary and Pendent Jurisdiction

Federal courts are courts of limited subject matter jurisdiction. They can exercise jurisdiction only over the types of cases specified in Article III of the Constitution and in legislation passed by Congress. Congress cannot confer jurisdiction beyond the limits established in Article III. 57 So fundamental is the principle of limited subject matter jurisdiction that every claim asserted in a civil action must have some basis of jurisdiction. Taken to its logical extreme, this principle could require that every claim must have an independent basis of jurisdiction found in Article III and congressional legislation. Such logic might dictate that, even if the plaintiff states a claim with an independent basis of federal jurisdiction, any other claim lacking a federal constitutional or statutory basis for jurisdiction could not be asserted in the action, no matter how closely the other claim is related to the claim that has an independent basis of jurisdiction.

The federal courts, however, have not taken so limited a view of their power, largely for reasons of efficiency. In two separate lines of cases, the judiciary has asserted jurisdiction, in varying degrees, over claims lacking an independent basis for jurisdiction so long as the plaintiff has stated a jurisdictionally sufficient claim. With respect to claims by parties other than the plaintiff, federal courts have established the doctrine of ancillary jurisdiction. In the leading case of Moore v. New York Cotton Exchange, 58 the Supreme Court held that, where a plaintiff's claim arises under federal law, a federal court has jurisdiction over a nondiverse defendant's state-law counterclaim if it is so closely related to the plaintiff's claim "that it only needs the failure of the former to establish a foundation for the latter." 59 Although Moore expanded the doctrine of ancillary jurisdiction beyond its original scope - cases in which property was under the control of the court 60 - it also limited ancillary jurisdiction to cases in which the nonfederal claim was logically dependent on the federal claim.
Nevertheless, federal courts used the authority established by Moore to assert ancillary jurisdiction over a variety of nonfederal claims by defendants and other nonplaintiffs, such as third party claims, cross-claims and the like. 61

The other line of authority involved the doctrine of pendent jurisdiction, concerning cases in which plaintiffs assert claims arising under federal law and seek to join claims based on state law. In the [*336] landmark case of United Mine Workers of America v. Gibbs, 62 the Court held that federal courts have pendent jurisdiction under Article III of the Constitution when the relationship between the nonfederal and federal claims is such that they would ordinarily be expected to be tried in one case, because they "derive from a common nucleus of operative fact." 63 Gibbs rejected the narrower formulation of pendent jurisdiction in which the state and federal claims must present two grounds "in support of a single cause of action." 64 The primary rationale for this expansive definition of pendent jurisdiction was to align it with the liberal joinder provisions of the Federal Rules of Civil Procedure and thus achieve efficient packaging of all related claims in a single federal action. 65 The Court also held, however, that the exercise of pendent jurisdiction is discretionary and need not be exercised in every case in which it exists; for example, if the federal claim is dismissed before trial, the court would have discretion to dismiss the pendent state claim. 66

The scope of ancillary jurisdiction as defined in Moore was narrower than the scope of pendent jurisdiction as defined in Gibbs. A nonfederal claim might not be logically dependent upon the outcome of the plaintiff's claim, as required by Moore, yet arise from the same nucleus of operative fact as the federal claim, as required by Gibbs. If that were so, defendants could not join nonfederal claims that were closely related to plaintiff's federal claims but were not logically dependent on them, whereas plaintiffs could join all related nonfederal claims, dependent or not. Lower federal courts resolved this asymmetry by redefining ancillary jurisdiction, and applying the Gibbs "common nucleus of operative fact" test to nonfederal claims by nonplaintiff parties, rather than the logical dependence test of Moore. 67 Thus, expansion of ancillary jurisdiction to the boundaries established in Gibbs occurred at the behest of the inferior federal courts.

Lower federal courts also expanded pendent jurisdiction after Gibbs to include nonfederal claims against additional parties. In Astor-Honor, [*337] Inc. v. Grosset & Dunlop, Inc., 68 for example, the Second Circuit held that pendent jurisdiction existed over a nonfederal claim against one party if it was sufficiently related to a federal claim against another party. 69 Although pendent jurisdiction previously had been understood to apply only to claims between the same parties, this new concept of "pendent party" jurisdiction gained favor with other courts and commentators as a means of avoiding duplicative litigation. 70

The Supreme Court placed one important limit on this steady expansion of ancillary jurisdiction. In Owen Equipment & Erection Co. v. Kroger, 71 the Court held that, in suits in which federal jurisdiction is based solely on diversity of citizenship, ancillary jurisdiction does not extend to claims by plaintiffs against nondiverse third parties. 72 The primary rationale for the holding in Kroger is to avoid circumvention of the rule of complete diversity by plaintiffs who sue only diverse defendants, wait for defendants to bring in nondiverse potential defendants via third party claims, and then assert claims against the nondiverse third parties. 73

The Kroger Court, however, also cast doubt on the scope of ancillary jurisdiction in general. The plaintiff in Owen argued that her claim against the nondiverse third-party fell within ancillary jurisdiction because it arose from the same set of facts as her claim against the original defendant. The Court rejected this argument, stating that the test is "not mere factual similarity but logical dependence." 74 This statement cast doubt upon the lower federal courts' rejection of the Moore test for ancillary jurisdiction in favor of the broader Gibbs test. Nevertheless, federal courts largely ignored the broader implications of Kroger and limited that decision to its facts. 75 With the exception of Kroger, therefore, the broad application of pendent and ancillary jurisdiction to achieve efficient resolution of all related
claims in a single federal action seemed secure.

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B. Finley v. United States and the Enactment of the Supplemental Jurisdiction Statute

In 1989, however, the Supreme Court threw the world of pendent and ancillary jurisdiction into a tizzy. In a narrow 5-4 decision in Finley v. United States, 76 the Court held that where a plaintiff asserts a claim with an independent jurisdictional basis against one defendant, a federal court might not assert pendent jurisdiction over the plaintiff's related nonfederal claims against additional parties. 77 The Court sharply distinguished between "pendent claim" and "pendent party" jurisdiction, and purported to reject only "pendent party" jurisdiction, thus leaving "pendent claim" jurisdiction undisturbed. 78

The Court's rationale for rejecting "pendent party" jurisdiction, however, caused great consternation. The Court stated that the reason for its holding was that Congress had not, by statute, authorized such jurisdiction. 79 This rationale cast doubt upon the legitimacy of pendent and ancillary jurisdiction as a whole because, as judge-created doctrines, they also lacked any statutory basis. Six decades of jurisprudence that aligned jurisdiction with liberal joinder rules, in order to achieve efficient packaging of litigation, now appeared threatened.

Congress reacted quickly to Finley by passing a new statute conferring supplemental jurisdiction on the federal courts. 80 The major purpose of the new statute was to codify Gibbs and apply its test to claims by both plaintiffs and nonplaintiffs; since the test was the same, the common law terms pendent and ancillary jurisdiction were combined under the statutory term "supplemental jurisdiction." To accomplish this purpose, subsection (a) of the statute provides that, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 81 This provision codifies the holding in Gibbs that pendent jurisdiction extends to the limits of Article III. 82 It also applies that test to all claims - whether made by plaintiffs or nonplaintiffs - and groups all such [*339] claims under the term supplemental jurisdiction. 83 Subsection (a) also provides that "such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." 84 This provision abrogates Finley by allowing a plaintiff who asserts a federal claim against one defendant to join a related nonfederal claim against another defendant. Subsection (c) codifies the discretionary portion of Gibbs by providing that, even if the test of subsection (a) is met, "the district courts may decline to exercise supplemental jurisdiction over a claim" for various reasons, primarily the discretionary factors mentioned in Gibbs. 85 The provisions of subsection (a) apply to all federal civil actions, regardless of whether original jurisdiction is derived from claims based on federal law or from diversity of citizenship.

Subsection (b) was designed to codify both the holding and the broader rationale of Kroger. It provides that, if original jurisdiction is based solely on diversity of citizenship, supplemental jurisdiction shall not extend to "claims by plaintiffs against persons made parties under Rule 14" and various other rules, "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." 86 Subsection (b) codifies the narrow holding of Kroger because it prohibits the exercise of supplemental jurisdiction in a diversity-only case, by a plaintiff against a nondiverse third-party defendant joined under Rule 14. 87 Subsection (b) also codifies the broader rationale of Kroger - that diversity plaintiffs should not be permitted to evade the rule of complete diversity - by prohibiting the exercise of supplemental jurisdiction, in diversity-only cases, over any claims by plaintiffs against nondiverse persons made parties under Rules 14, 19, 20 or 24. Subsection (b) thus expanded Kroger beyond its narrow holding because it prohibited supplemental jurisdiction over a much wider range of claims than was prohibited by Kroger, such as counterclaims against third-party defendants who asserted claims against plaintiffs,
claims by plaintiffs who intervened as of right, claims against persons joined as necessary [*340] parties, and the like. 88 Notably, however, subsection (b) does not expressly prohibit the exercise of supplemental jurisdiction in diversity class actions, for it does not mention Rule 23 as a joinder provision included within its prohibitions.

In federal civil actions where original jurisdiction is based on claims arising under federal law, the supplemental jurisdiction statute has not been controversial. Courts have applied subsection (a) in ways that follow the route established by Gibbs with little difficulty. 89 Fate has been less kind, however, to subsection (b). In actions where federal jurisdiction is founded solely on diversity of citizenship, the exceptions stated (and not stated) in subsection (b) have encountered fierce academic criticism and judicial conflict.

C. Academic Criticism of 28 USC 1367(b)

Professor Richard Freer quickly emerged as the most vociferous critic of the new statute. Professor Freer is the Robert Howell Hall Processor of Law at Emory University. While Freer applauded the codification of Gibbs and the abrogation of Finley in subsection (a), he charged that subsection (b) "embodies a disquieting bias against diversity of citizenship jurisdiction that maims packaging in diversity cases." 90 Freer observed that the lower federal courts had limited Kroger to its facts - asserting ancillary jurisdiction over numerous claims by diversity plaintiffs against parties joined under other rules - and had exhibited no inclination to apply the broad rationale of Kroger to further restrict ancillary jurisdiction. 91 Ignoring this judicial support for a broad application of ancillary jurisdiction, however, the drafters of subsection (b), in Freer's view, prohibited the exercise of supplemental jurisdiction over a broad range of claims by diversity plaintiffs against newly joined parties. For example, if a defendant filed a third-party claim under Rule 14, and the third-party defendant asserted a claim against the plaintiff, the plaintiff could not assert a counterclaim against the third-party defendant if they were not of diverse citizenship, because subsection (b) prohibits supplemental jurisdiction over any claim by a plaintiff against persons made parties under Rule 14. For the same reason, if the defendant filed a counterclaim [*341] against the plaintiff, the plaintiff could not assert a third-party claim against a nondiverse third-party for indemnification or contribution on the counterclaim. 92

Another baleful effect of subsection (b) cited by Freer is that there would be no supplemental jurisdiction over claims asserted by nondiverse persons who seek to intervene as of right under Rule 24(a), because Rule 24 is included in subsection (b)'s list of prohibitions; the intervenor's inability to protect her interest would in turn invite the federal court to dismiss the entire case for failure to join an indispensable party under Rule 19(b), thus depriving the original plaintiff of a federal forum and forcing resort to state court. 93 Finally, plaintiffs could not assert claims either against nondiverse, necessary parties joined as defendants under Rule 19, or against persons who intervened under Rule 24. 94 Thus, the antidiversity bias perceived by Freer to be lurking in subsection (b)'s prohibition of supplemental jurisdiction over numerous claims by plaintiffs is that, "The ultimate effect of the statute will be to force plaintiffs to forego the federal forum altogether if there is a likelihood of joinder of a nondiverse litigant against whom the plaintiff will want to assert a claim." 95 He did not explain, however, why that would be bad policy.

Freer also argued that subsection (b) ironically expanded supplemental jurisdiction in unintended ways by omitting certain Rules from its list of prohibitions. It appeared to abrogate the rule of complete diversity, in his view, because nondiverse plaintiffs or defendants can be joined under Rule 20, and Rule 20 is not mentioned in subsection (b). 96 Most significantly, Freer argued that subsection (b) might abrogate Zahn itself, because class members are joined under Rule 23 which, like Rule 20, is omitted from subsection (b). 97

Professor Thomas Rowe, one of the principal drafters of the statute, leaped to its defense against Freer's onslaught. Professor Rowe is the Elvin R. Latty Professor of Law at Duke University. In response to the antidiversity bias Freer saw in subsection (b), Rowe countered:
so be it; litigants should not be able to circumvent the rule of complete diversity by first having suit brought between diverse parties, then piling on additional claims against newly joined nondiverse parties, resulting in a suit that could not have been brought originally in federal court if all parties have been joined in the first place. 98 To Freer's [*342] charge that these restrictions would force diversity plaintiffs to sue in state court, Rowe again replied: so be it; "if you want to bring an incomplete diversity state-law case all in one piece, sue in state court." 99 Rowe acknowledged that a literal reading of subsection (b)'s omission of Rules 20 and 23 could lead courts to conclude that both the rule of complete diversity and Zahn had been abrogated. He argued, however, that courts should not read the words of the statute literally when to do so would achieve results not intended by Congress, and that the more responsible judicial approach would be to follow the legislative history, which showed that Congress did not intend to abrogate either the complete diversity rule or Zahn. 100

In reply to Rowe's defense of the statute, Freer countered that where the text of a statute is unambiguous, judges should not use legislative history to reach results that they believe Congress intended to achieve. In his view, the Constitution delegates to Congress, not judges, the role of defining the jurisdiction of the courts. Thus, judicial reinterpretation of subsection (b) at odds with its text would violate that constitutional delegation of authority. 101 If confined to Freer's view of their proper role, courts would be obliged to abrogate Zahn and the rule of complete diversity, and also to prohibit the exercise of supplemental jurisdiction over claims by plaintiffs against nondiverse defendants and third-party defendants who have made claims against the plaintiffs. 102

In the years since 1367 was enacted, it has, for the most part, worked well. One commentator has observed, "In most cases, courts follow Section 1367 along a predictable path, applying the Gibbs common nucleus of operative fact test under Section 1367(a) and Kroger's limitations on supplemental jurisdiction when jurisdiction is based solely on diversity under Section (b) in a noncontroversial manner." 103 With respect to Freer's concern that subsection (b) unduly hampered the ability of a diversity plaintiff placed in a defensive posture to assert responsive claims, the same commentator observed that such cases are "rare if not unique." 104 Moreover, no court has held that [*343] subsection (b) superseded the complete diversity rule. 105 In other respects, however, fate has been less kind to 1367 as applied in diversity cases.

D. Judicial Conflict in Interpretation of 1367

Several conflicts have arisen over interpretation of 1367 in diversity cases. These conflicts have arisen in both class action and non-class contexts. In part, the conflicts involve a debate over the proper method of statutory interpretation. More importantly for this discussion, however, the diverse opinions embody radically different attitudes toward the proper scope of diversity jurisdiction. Some decisions exemplify a philosophy that federal courts should narrowly confine diversity jurisdiction in order to minimize intrusion upon the authority of state courts to adjudicate claims based on state law. Other decisions reflect a philosophy that federal courts should afford a broad scope for diversity jurisdiction as a means of efficiently resolving related claims in a single case. Thus, the wisdom of the proposal to abrogate Zahn cannot be fully assessed without examining the broader context in which the proposal has arisen: the debate over the proper scope of diversity jurisdiction.

In In re Abbott Laboratories, 106 the Fifth Circuit held that 1367(b) abrogated Zahn to permit federal courts to exercise supplemental jurisdiction, in state-law diversity class actions, over class members' claims that do not exceed the requisite amount in controversy. 107 The court refused to consider legislative history that Congress meant to restore the pre-Finley law of supplemental jurisdiction in general, and not to abrogate Zahn in particular:

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We cannot search legislative history for congressional intent unless we find the statute unclear ... . The statute's first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute's second section. Class actions are not among the enumerated exceptions. 108

[*344] Notably absent from the court's discussion was any analysis of the policy concern that animated the Zahn decision itself: easing the burden on federal dockets and respecting the authority of state courts to decide important issues of state law. 109 The Abbott decision would not only permit plaintiffs to file such actions in federal court, but, as Abbott itself demonstrates, permit defendants to remove to federal court such actions that plaintiffs filed in state court. 110

In Leonhardt v. Western Sugar Co., 111 the Tenth Circuit took the opposite view. The court found the statute ambiguous because, while Rule 23 is omitted from the limitations in subsection (b), those limitations would arguably come into play only if new parties were sought to be added to an action in which diversity jurisdiction existed at the outset of the case, as in Kroger. As such, subsection (b) could be read to have no effect on the question whether jurisdictional requirements were met when the suit was filed initially. Under that reading of the statute, Congress did not intend to change pre-Finley rules of jurisdiction, including Zahn. 112 Given the textual ambiguity, the court resorted to the legislative history, which clearly showed that Congress did not intend to override Zahn. 113 Like the Abbott court, the Leonhardt court did not discuss the policy implications of its decision.

The Supreme Court granted certiorari in Abbott to resolve the issue, but merely affirmed without opinion in an equally divided vote, one Justice having recused herself. 114 The issue therefore remains unresolved.

Conflicts in interpretation of 1367(b) also arose in non-class action contexts. The settled rule prior to the statute was that separate and distinct claims might not be aggregated to satisfy the minimum amount, so that a district court lacked jurisdiction over the claim of any plaintiff who did not meet the minimum amount. 115 In Stromberg Metal Works v. Press Mechanical, Inc., 116 however, the Seventh Circuit held that 1367 abrogated this nonaggregation rule. In [*345] Stromberg, two plaintiffs brought a diversity action, but one plaintiff’s claim was below the minimum amount. The court held that the below-minimum claim fell within supplemental jurisdiction because the unambiguous text of subsection (a) authorizes supplemental jurisdiction over claims that involve joinder of additional parties, and this would include a diversity plaintiff who demands a below-minimum amount. 117 Even though the "pendent party" provision of subsection (a) was only intended to overrule Finley, it does not exclude diversity cases: "the text is not limited in this way. When text and legislative history disagree, the text controls." 118 Moreover, tracking the logic of the Fifth Circuit in Abbott, the Stromberg court asserted that joinder of plaintiffs under Rule 20 is not among the limitations listed in subsection (b) for diversity cases. 119

The Third Circuit reached a contrary result in Meritcare, Inc. v. St. Paul Mercury Insurance Co., 120 holding that a diversity plaintiff whose claim is less than the minimum amount may not invoke supplemental jurisdiction, even though a co-plaintiff’s separate claim does satisfy the requisite amount. 121 Unlike the Stromberg court, the Third Circuit found subsection (b) anomalous in several ways; for example, it prohibits supplemental jurisdiction over claims against persons joined under Rule 20, but it allows supplemental jurisdiction over claims by persons joined under Rule 20. 122 Given such an anomaly, the court resorted to legislative history, which clearly showed Congress did not intend to upset pre-Finley jurisdictional rules. 123

The first decade of experience with 1367 in its present form thus reveals that the statute has posed no serious interpretational problems for cases arising under federal law. The difficulties
have arisen in diversity cases, and appear to result from a textually strict, plain meaning approach to statutory construction followed by some judges.\(^{124}\) Professor Rowe had argued that consequences not intended \([\ast346]\) by Congress could be avoided by reading the text in a manner sympathetic to the expressed will of Congress to codify, not abrogate, pre-Finley jurisdictional rules. He warned that drafting a statute that attempts to cover every possible contingency, in anticipation of textually strict judicial interpretation, would result in a statute that is "too prolix and baroque for everyday use and application by practitioners and judges."\(^{125}\) After decisions such as Abbott and Stromberg, however, even Rowe now concedes that the statute should be redrafted in order to avoid consequences Congress did not intend.\(^{126}\)

This conflict of judicial opinion, however, implicates a more fundamental issue: what is the proper scope of diversity jurisdiction? The decisions in Abbott and Stromberg portend major expansions of the \([\ast347]\) scope of diversity jurisdiction via supplemental jurisdiction. Abbott would do so by rechanneling small-claim state-law class actions to federal courts. Stromberg would do so by abrogating the nonaggregation rule.\(^{127}\) Both decisions were based upon strict interpretation of statutory language. This correlation between strict interpretation and expanding the scope of diversity jurisdiction suggests that Abbott and Shanaghan reflect a policy judgment that the scope of diversity jurisdiction should be enlarged to permit efficient resolution of related claims in a single suit.\(^{128}\) Thus, viewing the proposal to abrogate Zahn in the broader context of the various issues raised by supplemental jurisdiction reveals that it is part of a broader effort - not limited to class actions - to achieve judicial economy by expanding the scope of diversity jurisdiction. What this effort ignores is that there is no need to expand the scope of diversity jurisdiction to achieve this goal. The very same efficiency can be obtained in state court.\(^{129}\)

III. THE ALI PROPOSAL TO REVISE 1367: INTO THE THICKET

The ALI proposal would not merely amend the current statute to resolve current uncertainties. Instead, it would represent a completely new statute.\(^{130}\) One's initial reaction to this proposed statute surely is that the text is so dense as to be nearly impenetrable. It \([\ast348]\) \([\ast349]\) lends weight to Rowe's warning about prolix and baroque statutes. Its drafter, Professor John Oakley, candidly admits that a reader "may feel like the proverbial snake after dining on a pig."\(^{131}\) He explains, however, that the text of the general statutes conferring original jurisdiction speak in terms of jurisdiction over an entire civil action, but have been interpreted to mean every claim made in a case must have its own basis of jurisdiction.\(^{132}\) Much of the uncertainty with the current statute, in Oakley's view, can be traced to this "claim-specific" approach to jurisdiction; there is a contradiction between conferring jurisdiction over a civil action, but then supplementing such jurisdiction "on a claim-by-claim basis."\(^{133}\)

To resolve this contradiction, the ALI proposal is expressly "claim-specific" and completely reconceptualizes the law by creating two categories of claims in subsection (a): "freestanding" claims (defined as claims that fall within original jurisdiction) and "supplemental" claims. It defines "supplemental" claims by the same standard as the present 1367 (a): "part of the same case or controversy under Article III of the Constitution as a freestanding claim." Subsection (b) expressly confers "original" jurisdiction over such supplemental claims. Subsections (a) and (b), read together, thus appear to restate the general rule of present subsection (a), albeit in a reconceptualized manner.\(^{134}\)

The complexity of the ALI proposal is found primarily in the interaction between subsections (c) and (a)(3), which appear to be the counterpart of the troublesome current subsection (b). Subsection (c) provides that, if jurisdiction over a "freestanding" claim "asserted in the same pleading" is based solely on diversity of citizenship, there is jurisdiction over the "supplemental" claim in only three instances. Subsection (a)(3), however, defines "asserted in the same pleading" in an unnatural and awkward manner that is inconsistent with the ordinary meaning of the term. The "same pleading" includes not only the original pleading,
but is also stretched to include amendments, claims against third-party defendants, court-reformulated pleadings, and claims or defenses by intervenors who seek "to be treated as if the pleading had joined a claim by or against that intervenor." 135 Professor Oakley asserts that the intent of the general provisions of subsections (c) and (a) (3) is to "replicate the effect of the rule of complete [*350] diversity." 136 A major impetus for the attempt to revise 1367, however, is the premise that courts will read the statute literally, without regard to legislative history. If this premise is correct, then it is highly likely that lawyers and judges will encounter extraordinary difficulty thrashing through the text of subsections (c) and (a) (3) and reach confusing and conflicting conclusions that will make the difficulties with current subsection (b) look like a cakewalk.

Having attempted to codify the rule of complete diversity, subsection (c) then sets forth the following three exceptions: if the supplemental claim (1) is asserted in a class action, (2) would be "freestanding" but for the value of the claim, or (3) was joined by an intervenor who is not indispensable. Professor Oakley explains that subsection (c)(1) codifies the Ben-Hur rule that, for purposes of diversity jurisdiction, only the citizenship of named parties is considered; if the named plaintiffs are diverse from all defendants so that their claim qualifies as "freestanding," then the class members fall within supplemental jurisdiction because their claims are "asserted representatively by or against a class of additional unnamed parties." 137 Moreover, subsection (c)(1) codifies the literal construction of present subsection (b) that claims of class members below the required minimum fall within supplemental jurisdiction, thus abrogating Zahn. 138 Similarly, subsection (c)(2) brings below-minimum claims by or against diverse parties within supplemental jurisdiction, and therefore eliminates the nonaggregation rule of Clark. 139 Subsection (c)(3) includes claims by nonindispensable intervenors within supplemental jurisdiction, hence restoring the pre-Finley rule that had been displaced by current subsection (b).

Proposed subsection (c) is also significant for what it does not include. Absent from the exceptions to the general rule are claims by diversity plaintiffs placed in a defensive posture, such as a compulsory counterclaim against a third-party defendant who has made a claim against the plaintiff. Such claims would not qualify for supplemental jurisdiction under current subsection (b), but, being absent from the exceptions, they would qualify under the general rule of proposed subsection (c). Even the Kroger rationale would appear to be abrogated, because claims by plaintiffs against third-party defendants who have not made claims against those plaintiffs do not appear among the exceptions - but for subsection (a) (3). Such claims are not "asserted in the same pleading" as defined in subsection (a)(3), and therefore do [*351] not fall within the scope of proposed subsection (c) at all. A judge who is able to claw through this textual thicket might come to understand that Kroger would survive, but limit it to its facts. 140

This ALI proposal represents a triumph for Freer's views. It accepts the premise that courts should follow unambiguous statutory text even if doing so achieves results Congress did not intend. Accordingly, it represents the very sort of "prolix and baroque" statute that Rowe predicted would sow confusion in everyday law practice. Moreover, the proposal rejects the "anti-diversity bias" of current 1367 that so enraged Freer, by limiting Kroger to its facts, if not abrogating it. Indeed, the proposal swings far in the opposite direction and reflects a pro-diversity bias by not only providing supplemental jurisdiction over claims by plaintiffs placed in a defensive posture but also abrogating the nonaggregation rules of Clark and Zahn. If enacted, this statute will greatly expand the scope of federal diversity jurisdiction. It is likely that the single greatest component of that expansion will be the abrogation of Zahn and the reintroduction of small-claim state-law class actions into federal court. 141

IV. WHY ZAHN SHOULD NOT BE ABROGATED

Some of the justifications advanced for using a new, pro-diversity supplemental jurisdiction statute to abrogate Zahn replicate the original criticisms of the Zahn decision itself. 142 Other justifications are new. Both old and new justifications fall into three categories: (A) analytical
deficiencies in the Zahn opinion; (B) inefficiencies resulting from prohibiting small-claim state-law class actions in federal court; (c) inadequacies of state courts. All these justifications are either insufficient, contrary to the evidence, or outweighed by the increased burden on the federal courts and the major erosion of state sovereignty that are the likely result of abrogating Zahn.

A. The Analytical Deficiencies of Zahn.

Like the critics of a quarter century ago, proponents of the ALI proposal contend that the Zahn opinion is flawed because it failed to address the issue whether class members' claims fell within ancillary [*352] (now supplemental) jurisdiction. The short answer to this contention is that, having concluded that claims of class members cannot be aggregated to satisfy the amount in controversy requirement of the diversity statute, there was no need to address the issue of ancillary jurisdiction. If the statute is construed as prohibiting aggregation, it necessarily follows that courts lack the authority to apply the judge-made doctrine of ancillary jurisdiction in a way that is inconsistent with the statute. Proponents also argue the Zahn opinion is flawed because it is inconsistent with Ben-Hur. The argument appears to be that Ben-Hur held the citizenship of class members is irrelevant to determining diversity, so it is inconsistent to consider the size of their claims in determining the amount in controversy. The premise of this argument is that Ben-Hur was correctly decided. This premise, however, is shaky at best. As stated earlier, the plaintiffs-only rule is not needed to make class action decrees effective, because the same binding effect can be achieved in state court. This rule is not needed to avoid inconsistent results because, where some class members are not diverse from defendants, plaintiffs would simply file unified class actions in state court seeking single adjudications, rather than splitting the litigation between state and federal courts. Even if Ben-Hur was correctly decided, moreover, the apparent asymmetry between Ben-Hur and Zahn can be explained by reference to jurisdictional policy. Limiting the citizenship inquiry to named plaintiffs serves the purpose of protecting outsiders against state court prejudice, whereas inquiring into the size of class members' claims serves the purpose of assuring that only diversity cases in which the stakes are high ought to command the resources of the federal courts.

More fundamentally, however, neither of these purported analytical weaknesses is a sufficient reason for Congress to abrogate Zahn. As with all grants of subject matter jurisdiction, the issue for Congress is not whether judicial decisions are incomplete or internally inconsistent. Congress' role is to decide whether the practical results of [*353] judicial decisions represent bad policy that needs to be corrected. The analytical critiques of Zahn do not, in and of themselves, represent bad policy results that deserve Congress' attention.

B. The Inefficiencies of Zahn

Like the original critics of Zahn, proponents of the ALI proposal assert that Zahn created the risk that parallel class actions raising common issues will be litigated separately in state and federal court. They explain that class actions could be filed in federal court for members whose claims exceed the required amount, but as to members of the class whose claims fall below the minimum, separate class actions would have to proceed in state court. This scenario might serve as a classroom hypothetical, but there is no cited evidence that such litigation decisions have actually been made. Moreover, it bears repeating that it is difficult to imagine a good reason why a plaintiffs' attorney who represents a large class, some with big claims and some with small claims, would choose to split the litigation into federal and state components. It seems far more likely that the attorney would choose to bring one unified class action in state court. Thus, the split-litigation justification for abrogating Zahn is unsupported by evidence and presumes a most unlikely litigation strategy.

A related criticism is that Zahn creates the risk that persons with large claims will pursue
individual actions in federal court while persons with small claims must file separate class actions in state court. Abrogating Zahn will do nothing, however, to avoid this risk. Even if a diversity class action were filed in, or removed to, federal court, any class member has the right to opt out and pursue separate litigation. Thus, a class member with a large claim would be free to opt out of the federal class action and file a separate suit, either in federal or state court. One might argue that, assuming large-claim individuals do not opt out (at least in that situation), abrogating Zahn would allow a unified class action to proceed in federal court and thus achieve efficient packaging. The very same efficiency is produced, however, if the unified class action proceeds in state court. Thus, abrogating Zahn is not needed to produce efficient packaging of class litigation.

C. Inadequacies of State Courts

One of the major criticisms of Zahn a quarter century ago was that courts in many states were structurally inadequate to entertain class actions because they had overly restrictive class action rules. Proponents of the ALI proposal do not mention this justification for abrogating Zahn. There is good reason for this omission. Since Zahn was decided, many states that lacked modern class action rules promulgated rules substantially identical to Federal Rule 23. New York provides an instructive example. Prior to Zahn, Professor Hamburger was a fierce critic of New York's nineteenth century class action rule. He contended that, because the old rule required privity, or unity of interest, among class members, many class actions that presented common issues were barred because the claims were not joint. Thus, individuals whose claims or resources were too small to pursue individual litigation were left without a remedy. After the Zahn decision, however, New York adopted a modern class action statute, partly in response to Zahn. Professor Hamburger praised the new provision as, "a functional class action statute, freed from antiquated notions of privity." Many other states have followed suit. Thus, the original structural critique of the state forum has been largely eliminated.

Another original criticism of state courts was that state court judges were less experienced with, or simply hostile to, class actions. Like the structural criticism, however, this criticism is not echoed by proponents of the ALI proposal, again for good reason. Experience with state court class actions in the quarter century since Zahn demonstrates that state judges have proven quite receptive to class actions. By one estimate, state court class actions increased by over 1300% between 1988 and 1998.

The leading state court class action suit demonstrates this point. In Shutts v. Phillips Petroleum Co., a nationwide class action was brought in Kansas state court on behalf of over 28,000 owners of royalty interests in land from which natural gas was produced. Many of these owners both resided and owned land outside Kansas. Plaintiffs sought to recover interest on royalty payments that had been suspended pending federal approval of an increase in gas prices, even though the producer sold the gas at the increased price. Far from showing hostility to the suit, the state trial court rendered a multimillion-dollar judgment for the class. On appeal, the Kansas Supreme Court affirmed the judgment, concluding that Kansas had personal jurisdiction over nonresident class members who lacked minimum contacts with Kansas, so long as they had been notified of the suit and afforded the opportunity to opt out. The Court also held that, under contract principles of unjust enrichment, the producer was liable for interest on the suspended royalties, at rates of 7% prior to judgment and 15% post-judgment.

The producer appealed to the Supreme Court of the United States on two grounds: (1) that Kansas lacked personal jurisdiction over class members who lacked minimum contacts with Kansas and who had not consented to jurisdiction by affirmatively opting into the class; and (2) that Kansas erred in applying Kansas law to claims of class members who did not reside in Kansas and whose land was not located in Kansas. The Court held unanimously that a state might exercise jurisdiction over the claims of class members who do not possess minimum contacts with the state and have not affirmatively consented to
jurisdiction by opting into the class. 166 A divided Court also held, however, that the Kansas courts erred in ruling that Kansas law applied to class members' claims that were unrelated to Kansas, if there was a conflict between Kansas law and the law of the states with connections to such claims. 167 The dissent contended that the majority had misread the Kansas Supreme Court's opinion; the Kansas court had already ruled, in related litigation, that there was no material conflict between Kansas and the other states' laws. 168 The dissent was accurate. On remand, the Kansas Supreme Court thoroughly reexamined the laws of the other states where royalty-producing lands were located and concluded - once again - those laws did not conflict with Kansas law. 169

The stakes were high in the Phillips litigation because the overarching issue was whether state courts would have the authority to entertain multistate class actions. The jurisdictional ruling established that state courts have the authority to adjudicate class actions where the members of the class actions reside in multiple states, and to render judgments binding on nonresident class members. 170 Whatever validity there may have been to the original criticism that state courts were inexperienced or hostile to class actions, cases like Phillips demonstrate that such criticism lacks substance today. Not only was every original ruling by the Kansas trial court upheld on appeal, but the plaintiffs won a resounding victory.

Proponents of the ALI proposal do not attack the general willingness of state courts to entertain class actions and instead launch an attack on the capabilities of state courts to adjudicate class actions with multistate connections. Freer asserts that "overruling Zahn will better equip federal courts to resolve complex interstate disputes that [*357] may not be well handled in the courts of some states." 171 He offers no evidence that such disputes are not well handled in state courts. The evidence of incompetence that others have offered is entirely anecdotal. Critics of state court class actions typically cite individual cases as proof of general incompetence. 172 Cases such as the Phillips litigation contradict this leap of logic. Phillips was a "complex interstate dispute" that included 28,100 class members residing in all fifty states and some foreign countries, and involved land located in several states. 173 Moreover, every ruling by the Kansas trial court survived the rigors of appellate review. 174 In addition, these critics ignore the fact that state appellate courts are a structural safeguard against abuse at the trial level. 175 Finally, a recent exhaustive study of class actions found that "incomplete reporting of cases [actually filed] means that it is impossible to select a random sample of all class action lawsuits for quantitative analysis." 176 Until a detailed study of the relative competence of state and federal courts is completed, there [*358] is no reliable basis for concluding that state courts are incompetent or, more to the point, any less competent than federal courts.

The competence critique is thus reduced to an assumption that state courts are incompetent managers of complex state-law class actions. Such an assumption, however, does violence to two bedrock principles of the constitutional structure of American government. First, Article III of the U.S. Constitution grants Congress the power to decide whether or not to establish the lower federal courts. 177 This provision represents a compromise at the Constitutional Convention between delegates who opposed any federal judiciary because they feared it would usurp state authority, and delegates who believed state courts were inadequate and thus wanted a mandatory federal judiciary. The compromise, giving Congress the power to decide this matter, established a basic principle that state courts are adequate fora for adjudication of disputes. 178 Second, the U.S. Supreme Court has recognized that state, not federal, courts are the supreme interpreters of state law. 179 The assumption that state courts are incompetent managers of class actions contravenes the first principle. The corollary assumption that federal courts are more competent than state courts in matters of state law cannot be reconciled with the second principle.

A variant of the competence critique is that state courts are overly friendly to class actions. This argument asserts that there is "the possibility, or at least the fear of excessive influence by lawyers over carefully selected local judges to settle mass-tort and mass-disaster litigation in ways that benefit lawyers and defendants, but often do not adequately benefit class
members." The evidence cited in support of this argument, however, is derived from experience with federal as well as state court class actions. Even if such collusion existed in state court as well as federal court, moreover, it suggests a need to address ethical issues. It does not support an argument to favor federal court over state court as the forum for small-claim class actions.

[*359] Other supporters of reasserting federal control over small-claim class actions also argue that plaintiffs' attorneys carefully select state courts in which to sue, but for a different, antidefendant motive: "There are certain places in this country where as a defendant you just can't get justice." This argument tends to confuse success with injustice; merely because plaintiffs prevail does not mean an injustice was done to the defendant. The very case cited to support this argument demonstrates this point: the defendant did get justice - it got what it deserved. In Avery v. State Farm Mutual Automobile Insurance Co., policymakers brought a nationwide class action alleging that State Farm routinely replaced damaged auto parts with inferior parts not manufactured by the original maker. Plaintiffs claimed this practice constituted breach of contract because the policy provided State Farm would pay for replacement parts of the same quality. Plaintiffs also claimed this practice violated the state consumer fraud statute because State Farm knew the replacement parts were inferior and failed to so inform its policyholders. The case was tried to a jury on the contract claim and to the court on the fraud claim. The jury found that State Farm had breached the contract, and the court found that State Farm had committed fraud. Compensatory and punitive damages totaling $1.18 billion were awarded.

On appeal, the court held that "there is evidence the breaching party willfully engaged in deceptive practices that deprived the policyholder of the benefit of his bargain." The court affirmed the award of all items of damages, with one exception that did not undermine the validity of the factual findings. State Farm explicitly attacked various rulings by the trial judge as being motivated by a desire to promote the class action. The appellate court admonished defense counsel as follows: "we feel obligated to caution counsel that an appeal is not a license to vilify the trial court. Several comments in this portion of State Farm's brief approach criticism that is inappropriate." Examination of the actual opinion in Avery, therefore, discloses that not only the trial judge, but also the jury, found State Farm guilty of deception, and the appellate court found ample support in the evidence for these findings. Three different decision makers thus examined State Farm's behavior and found it illegal. Far from constituting evidence that state courts are prejudiced against class action defendants, Avery is evidence that state courts will do their duty by holding defendants liable for classwide relief if the evidence shows defendants violated their legal obligations. That is the very definition of justice.

One case does not prove state courts are, or are not, biased. Once again, however, until a comprehensive comparative study concerning the presence or absence of bias in state and federal class actions is done, any assumption that state courts are biased, and more so than federal courts, fails to respect the dignity afforded to state courts in our constitutional system.

CONCLUSION

The inadequacies of the justifications for abrogating Zahn suggest that the proposal to do so is linked to the general pro-diversity bias of the ALI proposal to revise the supplemental jurisdiction statute. The primary traditional reason for federal diversity jurisdiction has always been the fear, not the reality, that state courts would be prejudiced against out-of-state litigants. No substantial evidence has ever been presented that such local prejudice exists in fact, so that defenders of diversity jurisdiction are reduced to the argument that the absence of local prejudice is "presumptively improbable." Thus, in the context of the ALI proposal to favor federal courts over state courts in small-claim state-law class actions, the root justification for the proposal is that state courts are prejudiced in favor of class action plaintiffs. The mere fact that state courts over the past quarter century have been
receptive to hearing **class actions** and that plaintiffs have prevailed in many such actions does not, of course, demonstrate lack of impartiality. Judicial prejudice consists of rulings not based on law or fact, and driven by improper motive. No evidence has been presented that there is a pattern of such prejudice in state court **class actions**.

[*361*] Support for the ALI proposal is reduced to the assumption that state courts are not competent to manage complex **class actions**. This assumption reflects profound disrespect for coequal, sovereign state judiciaries and contravenes the constitutional structure of American government. Fear is the unspoken driving force behind proposals to funnel small-claim state-law **class actions** to federal court; defendants have lost many such actions in state courts, or settled them unfavorably, and they hope to achieve better results before a federal judiciary perceived to be pro-business. 194 The irony of such a hope is remarkable. A quarter century ago, plaintiffs perceived that state courts were hostile to **class actions** while federal courts were quite receptive, so they viewed the **Zahn** decision as a tragedy for plaintiffs. 195 Just the reverse actually occurred; since **Zahn**, **class action** litigation has flourished in state court. Today it is defendants who perceive that state courts are hostile to them, so it is now defendants, not plaintiffs, who view **Zahn** as a tragedy. If it is defendants' hope that federal courts will be hostile to **class actions**, history suggests that in the long run, like plaintiffs a quarter century ago, actual experience will be the opposite of their perception and their efforts will be in vain. The portion of the ALI proposal that would abrogate **Zahn** should not be approved and, if approved, **Congress** should reject it.

**FOOTNOTES:**


†n3. Brian Mattis & James S. Mitchell, The Trouble With **Zahn**: Progeny of **Snyder** v. Harris Further Cripples **Class Actions**, 53 Neb. L. Rev. 137, 194 (1974) (stating that the **Zahn** decision dealt a "crippling blow" to federal diversity **class actions**). The **Zahn** decision has no effect on small-claims **class actions** based on federal law, because 28 U.S.C. 1331, conferring original federal question jurisdiction, does not require a minimum amount in controversy. Thus, the scope of this Article is limited to small-claim **class actions** based on state law, where federal jurisdiction is based solely on diversity of citizenship.

†n4. Federal Judicial Code Revision Project 1-4 (Tentative Draft No. 2, 1998). As a tentative draft, this proposal does not yet represent the ALI's position because it has not yet been authorized by the ALI's membership and approved by its Council. It is for this reason that this Article contends, in part, that the ALI itself should eliminate this portion of the proposal from any recommendation to **Congress**. Separately from the ALI proposal, bills have been introduced in **Congress** that would permit **aggregation** of class members' claims to meet the amount in controversy requirement. Positions taken in this Article are equally applicable to such bills.

†n5. 28 U.S.C. 1367(a) provides, in pertinent part:
In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the Constitution.

28 U.S.C. 1367(a) (1994). Courts have split over whether Congress inadvertently extended supplemental jurisdiction to class actions by this statute, but the fact remains that the current statute does not do so in explicit terms. See infra notes 106-14 and accompanying text.

n6. For a discussion of how the ALI proposal would accomplish this change, see infra, notes 130-39 and accompanying text.

n7. Defendants could remove such actions to federal court pursuant to 28 U.S.C. 1441(a) (1994) because federal courts would have jurisdiction based on diversity of citizenship. The only exception to such removal would be if one named defendant were a citizen of the forum state. See 28 U.S.C. 1441(b) (1994) (stating that diversity action may be removed only if no defendant is a citizen of the forum state).


n10. Finley, 490 U.S. at 548.


n13. Freer, 40 Emory L.J at 473-74. See also Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer, 40 Emory L.J. 943, 960-61 (1991). The authors of the latter Article were the principal drafters of 1367. For brevity's sake, their views are set forth collectively in this Article as those of Professor Rowe.

n15. 51 F.3d 524 (5th Cir. 1995).

n16. In re Abbott Laboratories, 51 F.3d 524, 525, 529 (5th Cir. 1995).

n17. 160 F.3d 631 (10th Cir. 1998).

n18. Leonhardt v. Western Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998).


n23. See, e.g., Charles A. Wright, Law of Federal Courts 209 (5th Ed. 1994). For example, if plaintiffs' claims asserted "joint" interests, their claims could be aggregated, but there was much confusion over which claims were "separate" and which were "joint."

n24. Id. at 210-11.


n29. Id. at 366-67.


n32. *Snyder*, 394 U.S. at 335.

n33. Id. at 336.

n34. Id. at 338.

n35. Id. at 341.

n36. Id. at 340 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

n37. Id. at 341.


n39. See supra note 3 and accompanying text.
n40. Fed. R. Civ. P. 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."

n41. *Zahn*, 414 U.S. at 292.


n43. *Zahn*, 414 U.S. at 306-09.

n44. Mattis & Mitchell, 53 Neb. L. Rev. at 181 n.33; Theis, 35 La. L. Rev. at 94; Coiner, 4 Mem. St. L. Rev. at 433-34.

n45. Wright, supra note 23 at 209.


n47. Goldberg, 28 Stan. L. Rev. at 401. In particular, aggregation of claims was allowed for "true" class actions, but not for "spurious" class actions.

n48. Id. at 405.

n49. The remaining class might be too small to satisfy the numerosity requirement of Fed. R. Civ. P. 23 (a)(1), or, as illustrated by *Zahn*, it might not be feasible to determine which class members' claims satisfied the amount in controversy requirement.


n53. Mattis & Mitchell, 53 Neb. L. Rev. at 172. See also Coiner, 4 Mem. St. L. Rev. at 447.


n55. Banks, 1 Ohio N.U. L. Rev. at 496, 498.

n56. Coiner, 4 Mem. St. L. Rev. at 447.

n57. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-76 (1803) (finding that Congress cannot confer original mandamus jurisdiction on Supreme Court).

n58. 270 U.S. 593 (1926).


n60. Freeman v. Howe, 65 U.S. 450 (1860) (finding that a state court may not interfere with property under control of federal court; claim to property may be asserted in federal court, pursuant to ancillary jurisdiction).


n64. Gibbs, 383 U.S. at 722 (quoting Hurn v. Oursler, 289 U.S 238, 246 (1933)).


n66. Gibbs, 383 U.S. at 722. Other discretionary reasons mentioned by the Court included novel or complex issues of state law, likelihood of jury confusion and predominance of state-law issues. Id.

n67. See, e.g., Revere Copper & Brass Inc., 426 F.2d at 710-17. See generally Miller, 26 S. Tex. L.J. at 5-8.

n68. 441 F.2d 627 (2d Cir. 1971).


n73. Kroger, 437 U.S. at 374-75.

n74. Id. at 376.

n75. Freer, 40 Emory L.J. at 462-64.

n76. 490 U.S. 545 (1989).

n78. Finley, 490 U.S. at 553.

n79. Id. at 555.


n81. 28 U.S.C. 1367(a).

n82. See supra note 63 and accompanying text.

n83. In doing so, the new statute appeared to reject the suggestion in Kroger that ancillary jurisdiction extends only to nonfederal claims that are logically dependent on federal claims. See Kroger, 437 U.S. at 365, 374-76.

n84. 28 U.S.C. 1367(a) (1994).

n85. 28 U.S.C. 1367(c). For example, one statutory discretionary factor is the novelty or complexity of state-law issues, also a factor mentioned in Gibbs, 383 U.S. at 726.

n86. 28 U.S.C. 1367(b).

n87. Fed. R. Civ. P. 14 (a) permits a plaintiff to assert a claim against an impleaded third-party defendant. Kroger held, however, where jurisdiction is based solely on diversity of citizenship, ancillary jurisdiction does not extend to such a claim; if the plaintiff and third-party defendant are not diverse, the claim must be dismissed. Kroger, 437 U.S. at 365, 374-75.

n88. Richard D. Freer, Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute, 40 Emory L.J. 445, 474-82 (1991). See also Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, Compounding or Creating...


[n90. Freer, 40 Emory L.J. at 446.

[n91. Id. at 462-64.

[n92. Id. at 474, 480-82.

[n93. Id. at 478.

[n94. Id. at 479-80.

[n95. Id. at 480.

[n96. Rowe, 40 Emory L.J. at 982.

[n97. Freer, 40 Emory L.J. at 485-86.

[n98. Rowe, 40 Emory L.J. at 952, 956.

[n99. Id. at 953.

[n100. Id. at 960-61 nn.90-91.

[n101. Id. at 985-86.
n102. Arthur, 40 Emory L.J. at 985-89.


n104. Id. But see Chase Manhattan Bank, N.A. v. Aldridge, 906 F. Supp. 866 (S.D.N.Y. 1995) (stating that 1367(b) prohibits the exercise of supplemental jurisdiction over plaintiff's third-party claim for indemnification, in event insurance policy was rescinded pursuant to counterclaim against plaintiff, against third party whose misrepresentations caused such rescission).

n105. One court has suggested, in obiter dictum, that section (b) may abrogate the complete diversity rule. Stromberg Metal Works v. Press Mech., Inc., 77 F.3d 928, 931-32 (7th Cir. 1996) (holding that 1367(a) confers supplemental jurisdiction over diversity plaintiff's claim that fell below the minimum amount but was closely related to another plaintiff's above-minimum claim; also observing that "supplemental jurisdiction has the potential to move from complete to minimal diversity ... 1367(b) does not block adding an additional plaintiff with a closely related claim against the defendants who are already in the federal forum").

n106. 51 F.3d 524 (5th Cir. 1995).

n107. In re Abbott Labs, 51 F.3d 524, 529 (5th Cir. 1995).

n108. Abbott, 51 F.3d at 528. The court also held that it was an abuse of discretion to decline to exercise supplemental jurisdiction under 1367(c). Id. at 529-30.

n109. The absence of such discussion is especially puzzling because the court did not dispute that the case presented novel and complex issues of state law. If that is so, it would seem to be an encroachment upon the authority of state courts to adjudicate unsettled, complicated state-law issues for a federal court to arrogate that authority to itself.

n110. In Abbott, the plaintiff filed suit in state court and defendant removed it to federal court. The Fifth Circuit held such removal was proper because the district court had original jurisdiction over the named plaintiffs' claims and supplemental jurisdiction over the class claims. Abbott, 51 F.3d at 525.

n111. 160 F.3d 631 (10th Cir. 1998).

n113. Leonhardt, 160 F.3d at 640-41.


n115. See supra notes 22-24 and accompanying text.

n116. 77 F.3d 928 (7th Cir. 1996).

n117. Stromberg Metal Works v. Press Mech., Inc., 77 F.3d 928, 931 (7th Cir. 1996).

n118. Stromberg, 77 F.3d at 931.

n119. Id.

n120. 166 F.3d 214 (3d Cir. 1999).


n122. Meritcare, 166 F.3d at 222. This observation echoes Freer's criticism that 1367(b) unduly restricts the ability of plaintiffs placed in a defensive posture to assert responsive claims. See Freer, 40 Emory L.J. at 446, 462-64, 474-80. Unlike Freer, however, the Meritcare court used this apparent anomaly to justify resort to legislative history to resolve the ambiguity. Meritcare, 166 F.3d at 222.

n123. Meritcare, 166 F.3d at 222. The court also asserted that even if the statute were unambiguous, a literal application of the text would be so obviously contrary to Congress' intent that consulting the legislative history would still be justified. Id.
Yet another conflict has arisen concerning the legal certainty test. A long-established rule in diversity cases prior to the statute was that a plaintiff who demands relief in excess of the statutory minimum amount in controversy meets that requirement unless it is certain as a matter of law that she cannot recover that amount. St. Paul Mercury, 303 U.S. at 289. Under this legal certainty test, the district court must retain jurisdiction, even if, during the course of the litigation, dismissal of part of plaintiff's claims drops the remaining claims below the minimum amount. In Shanaghan v. Cahill, however, the Fourth Circuit found that 1367 superseded the latter part of the legal certainty test. The court held that, if dismissal of one claim reduced the amount in controversy on the plaintiff's remaining claims below the minimum, the district court had discretion, rather than a mandatory obligation, to exercise jurisdiction over the remaining, below-minimum claims. Shanaghan v. Cahill, 58 F.3d 106, 109, 112-13 (4th Cir. 1995). Despite Congress' express intent to restore pre-Finley rules of supplemental jurisdiction - including the legal certainty test - the court reasoned that it was bound by the plain language of sections 1367(a) and (b): "The only possible interpretation of this language is that state law claims between diverse parties that do not, however, satisfy the jurisdictional amount requirements appended to diversity actions are cognizable under supplemental jurisdiction." Id. at 109. Once such jurisdiction attached initially, the court asserted that 1367(c) afforded "wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished." Id. at 110. The court acknowledged that, under the law prior to Finley and 1367, retention of jurisdiction in such cases would have been mandatory, but such a strict rule could not be reconciled with the plain language of 1367 and therefore must be replaced with a rule of discretion. Id. The court also asserted that this was sound policy. Mandatory retention of jurisdiction over below-minimum claims "fails to respect the congressional purpose in raising the jurisdictional amount to the fifty thousand dollars [now $75,000] threshold. ... in an effort to prevent state law claims from landing in federal court." Id. at 111. Accord Stevenson v. Severs, 158 F.3d 1332, 1334 (D.C. Cir. 1998).

The Second Circuit created a conflict with Shanaghan by its decision in Wolde-Meskel v. Vocational Instruction Project Community Services, Inc., 166 F.3d 59 (2d Cir. 1999). The Second Circuit asserted that the Shanaghan court had confused state-law claims related to claims within a district court's original jurisdiction (and thus covered by 1367 and heard at the discretion of the court under section (c)) and state-law claims that have been aggregated to satisfy the requisite minimum amount. In the latter situation - of which both Shanaghan and Wolde-Meskel are examples - the claims are not treated as supplemental to each other, but as a constituent whole that falls within original diversity jurisdiction. As such, supplemental jurisdiction is irrelevant and does not disturb the preexisting rule that, once diversity jurisdiction attaches, the court must retain it even if dismissal of one or more of the aggregated claims reduces the amount in controversy below the minimum. Id. at 64-65.

Rowe, 40 Emory L.J. at 959-961.


Shanaghan, the other case following a strict interpretation approach, neither expands nor limits the scope of diversity jurisdiction, but merely makes retention of jurisdiction over below-minimum claims discretionary rather than mandatory. Shanaghan, 58 F.3d at 108-13.
n128. The Stromberg court was explicit about this policy preference: "It is two for the price of one: to decide either plaintiff's claim is to decide both, and neither private interests nor judicial economy would be promoted by resolving Stromberg's claim in federal court while trundling Comfort Control [the plaintiff whose claim was below-minimum] off to state court to get a second opinion." Stromberg Metal Works v. Press Mech., Inc., 77 F.3d 928, 931 (7th Cir. 1996).


n130. The text of the ALI proposal is as follows:

1367. Supplemental jurisdiction

(a) Definitions. As used in this section:

(1) A "freestanding" claim means a claim for relief that is within the original jurisdiction of the district courts independently of this section.

(2) A "supplemental" claim means a claim for relief, not itself freestanding, that is a part of the same case or controversy under Article III of the Constitution as a freestanding claim that is asserted in the same civil action.

(3) "Asserted in the same pleading" means that the relevant claims have been joined either in the pleading as originally filed with the court, or by amendment of the pleading, or by the pleader's assertion of a claim against a third party impleaded in response to the pleading, or by order of the court reformulating the pleading, or by the assertion of the claim or defense of an intervenor who seeks to be treated as if the pleading had joined a claim by or against that intervenor.

(4) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(b) General grant of supplemental jurisdiction. Except as provided by subsection (c) or as otherwise expressly provided by statute, a district court shall have original jurisdiction of all supplemental claims, including claims that involve the joinder or intervention of additional claiming or defending parties.

(c) Restriction of supplemental jurisdiction in diversity litigation. When the jurisdiction of a district court over a supplemental claim depends upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title, the court shall have jurisdiction of the supplemental claim only if it -

(1) is asserted representatively by or against a class of additional unnamed parties; or

(2) would be a freestanding claim on the basis of section 1332 of this title but for the value of the claim; or

(3) has been joined to the action by the intervention of a party whose joinder is not
indispensable to the litigation of the action.

(d) Discretion to decline to exercise jurisdiction. This section does not permit a district court to decline to exercise jurisdiction of any freestanding claim except as provided by subsection (e). A district court may decline to exercise jurisdiction of a supplemental claim if:

(1) all freestanding claims that are the basis for its jurisdiction of a supplemental claim have been dismissed before trial of that claim; or

(2) the supplemental claim raises a novel or complex issue of State law that the district court need not otherwise decide; or

(3) the exercise of supplemental jurisdiction would substantially alter the character of the litigation; or

(4) in exceptional circumstances, there are other compelling reasons for declining supplemental jurisdiction.

(e) Joinder of additional defendant after removal. If after removal of a civil action the plaintiff moves to amend the complaint to join a supplemental claim against an additional defendant that is subject to the jurisdictional restriction of subsection (c), the district court may either deny such joinder, or permit such joinder and remand the entire action to the State court from which the action was removed, or permit such joinder without remanding the action. In exercising its discretion the district court shall consider judicial economy, convenience, and fairness to litigants, as well as the reasons permitting supplemental jurisdiction to be declined under subsection (d). If the district court decides to permit such joinder without remanding the action, it may exercise supplemental jurisdiction of the claim so joined as provided by subsections (b) and (d) without regard to the jurisdictional restriction of subsection (c).

(f) Disposition of supplemental claims; tolling of limitations period. When a district court lacks or declines to exercise supplemental jurisdiction, the court shall dismiss the supplemental claim unless it was joined before removal of the action, in which case the district court shall remand the claim to the State court from which it was removed. The period of limitations for the following claims shall be tolled until 30 days after their dismissal becomes final, unless the applicable law provides for a longer tolling period:

(1) any supplemental claim dismissed because the district court lacks or declines to exercise supplemental jurisdiction; and

(2) any other claim in the same civil action that is voluntarily dismissed as the result of a notice or stipulation of dismissal, or motion for order of dismissal, filed within 30 days after:

(A) the dismissal or remand of a supplemental claim because the district court lacks or declines to exercise supplemental jurisdiction; or

(B) the court's decision under subsection (e) to refuse to permit the joinder of a supplemental claim against an additional defendant.


\textsuperscript{n132.} Oakley, 74 Ind. L.J. at 26, 41-42.

\textsuperscript{n133.} Id. at 26.

\textsuperscript{n134.} See supra note 130.

\textsuperscript{n135.} 28 U.S.C. 1367(a)(3).

\textsuperscript{n136.} Oakley, 74 Ind. L.J. at 38.

\textsuperscript{n137.} Id. at 36 (citing Federal Judicial Code Revision (Tentative Draft No. 2, 1998)).

\textsuperscript{n138.} Id. at 44.

\textsuperscript{n139.} Id.

\textsuperscript{n140.} The ALI proposal also contains provisions for discretionary refusal to exercise supplemental jurisdiction, supplemental jurisdiction over removed claims, and tolling statutes of limitations. Supra, note 130, sections (d), (e) and (f).

\textsuperscript{n141.} Cf. Stromberg Metal Works v. Press Mech., Inc., 77 F.3d 928, 931 (7th Cir. 1996) ("To the extent practical considerations enter in, it is hard to avoid remarking that allowing thousands of small claims into federal court via the \textbf{class action} device is a substantially greater expansion of jurisdiction than is allowing a single pendent party.").

\textsuperscript{n142.} See supra notes 42-56 and accompanying text.

\textsuperscript{n143.} Richard D. Freer, Toward a Principled Statutory Approach to Supplemental Jurisdiction in \textbf{Diversity} of Citizenship Cases, 74 Ind. L.J. 5, 18-19 (1998).

n145. Freer, 74 Ind. L.J. at 18-21. For a discussion of Ben-Hur, see supra notes 27-31 and accompanying text.

n146. See supra notes 27-31 and accompanying text.

n147. If incomplete reasoning were a sufficient reason for congressional abrogation, then Strawbridge v. Curtiss, 7 U.S. 267 (1806) should have been superseded long ago. Chief Justice Marshall's opinion gives no justification for the complete diversity rule, yet the decision has stood for nearly two centuries. Similarly, if internal inconsistency were a sufficient reason for Congress to act, the well-pleaded complaint rule of Tenn. v. Union & Planters' Bank, 152 U.S. 454 (1894) should have been superseded long ago. The holding that federal question jurisdiction exists only if the plaintiffs' cause of action is based on federal law is inconsistent with the statutory language that such jurisdiction exists if the "civil action" - which would include defenses based on federal law - arises under federal law. 28 U.S.C. 1331 (1994). Congress, however, has not disturbed the rule for nearly two centuries.

n148. The third analytical critique of Zahn advanced twenty-five years ago - that the decision would perpetuate confusion in determining which class action claims were "joint" rather than "distinct," is not echoed by proponents of the ALI proposal. The most likely reason for this omission is that few, if any, modern class actions involve "joint" claims, so the predicted confusion is largely academic. See supra notes 45-47 and accompanying text.

n149. Oakley, 74 Ind. L.J. at 63.

n150. Even Professor Freer, the most avid proponent of the ALI proposal, asserts "Presumably, there will be few cases in which the representative claims more than $75,000 and the class members have 'small claims'." Freer, 74 Ind. L.J. at 21.

n151. Hypothetically, an attorney might perceive the state forum to be so hostile or inadequate that she would prefer to split the class litigation so as to give at least the big claim class the advantages of the federal forum. Such a scenario is highly unlikely, however, because state courts have proven to be quite hospitable to class actions in the years since Zahn. See infra notes 161-70 and accompanying text.

n152. Oakley, 74 Ind. L.J. at 63.
Fed. R. Civ. P. 23 (c)(2)(A). Even though the opt-out provision only applies to class actions certified under Fed. R. Civ. P. 23 (b)(3), class actions for money damages typically are certified under (b)(3), so the opt-out provision would apply in a diversity action for money damages.

See supra note 51 and accompanying text.

Of those forty-one states, twenty adopted their modern rule after Zahn was decided. Id.


See Newberg & Conte, supra note 155, at 13-143 app. 13-1.

See supra notes 52-54 and accompanying text.

See, e.g., Geller v. Tabas, 462 A.2d 1078 (Del. 1983); Miner v. Gillette, Co., 428 N.E.2d 478 (Ill. 1981); Katz v. NVF Co., 462 N.Y.S.2d 975 (N.Y. 1983); Schlosser v. Allis-Chalmers Corp., 271 N.W.2d 879 (Wis. 1978). Perhaps the best evidence that state courts have been receptive to class actions is the movement in Congress to pass legislation channeling such actions into federal court on the supposed ground that state courts have been overly generous to class actions. See infra note 182; see generally supra note 51 and accompanying text (noting that Zahn caused widespread exploration of class actions in state courts).


Shutts v. Phillips Petroleum Co., 679 P.2d 1159, 1170-71 (Kan. 1984), cert. granted, 469 U.S. 879 (1984), and aff'd in part, rev'd in part, 472 U.S. 797 (1985). The class originally consisted of over 33,000 members. Some 3,400 opted out and another 1,500 could not be located and were excluded. Thus, the final class included over 28,000 members. Id. at 1165.

Id. at 1183.


Phillips, 472 U.S. at 822. The claims that were unrelated to Kansas were those of class members who neither resided in Kansas nor had royalty land located in Kansas. Id.

Phillips, 472 U.S. at 824, 830-33 (Stevens, J., dissenting).


Freer, 74 Ind. L.J. at 20. See also Howard P. Fink, Supplemental Jurisdiction - Take It to the Limit!, 74 Ind. L.J. 161, 166 (1998) (suggesting that state judges "may have little or no expertise in handling massive litigation").

Glenn A. Danas, Comment, The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law, 49 Emory L.J. 1305, 1321-23 (2000) (stating that the debate over state court abuse is "fraught with anecdotes").

Phillips, 679 P.2d at 1165-66. Furthermore, the sources cited by Professor Fink to support his argument that state judges lack expertise actually contradict his argument. See Fink, 74 Ind. L.J. at 166 n.30. Fink cites the case of Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996), as an example of a poorly handled class action. One of his own sources concluded, however, that the case was correctly decided, and that state courts should have power to approve global class action settlements, including those that release claims exclusively within federal jurisdiction. Marcel Kahan & Linda Silberman, Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims, 1996 Sup. Ct. Rev. 219, 230 (1996). Two other sources cited by Professor Fink are critical of...

\[n174. \] See supra notes 161-66 and accompanying text.

\[n175. \] Danas, 49 Emory L.J. at 1323-31.

\[n176. \] Deborah R. Hensler et al., The RAND Institute for Criminal Justice, Class Action Dilemmas: Pursuing Public Goals for Private Gain (1999), at MR-969/1-ICJ.

\[n177. \] U.S. Const. art. III 1.

\[n178. \] Martin H. Redish & Curtis E. Woods, Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45, 52-56 (1975). While Redish and Woods contended that state courts may not be adequate to adjudicate constitutional claims against federal officers, they expressed no doubt about state courts' competence to decide state-law claims. Id.

\[n179. \] Danas, 49 Emory L.J. at 1342-44.

\[n180. \] Freer, 74 Ind. L.J. at 166.


n185. Avery, 746 N.E.2d at 1247.

n186. Id.

n187. Id. at 1247-49.

n188. Id. at 1259.

n189. Id. at 1261. The court ruled that the portion of the judgment requiring State Farm to disgorge its profits duplicated an award of specification damages. Id. This ruling did not disturb the trial findings that State Farm had misled its policyholders.

n190. Avery, 746 N.E.2d at 1258.


n192. Fallon, supra note 191, at 1523 (summarizing views expressed by Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928)).

n193. Id. (summarizing the views of Hessel E. Yntema & George H. Jaffin, Preliminary Analysis of Concurrent Jurisdiction, 79 U. Pa. L. Rev. 869, 873-76 (1931)).

n194. Id. at 1523-24 (summarizing the views of Jerome Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Prob. 3, 22-28 (1948)).
n195. See supra notes 52-55 and accompanying text.
ARTICLE: THE AMERICAN LAW INSTITUTE PROPOSAL TO BRING SMALL-CLAIM STATE-LAW CLASS ACTIONS WITHIN FEDERAL JURISDICTION: AN AFFRONT TO FEDERALISM THAT SHOULD BE REJECTED

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SUMMARY:
... Nearly thirty years ago, the United States Supreme Court held in Zahn v. International Paper Co., that every member of a federal court class action asserting claims based solely upon state law must have a claim in excess of the minimum amount in controversy required by the statute conferring federal subject matter jurisdiction based upon diversity of citizenship. One might argue that, assuming large-claim individuals do not opt out (at least in that situation), abrogating Zahn would allow a unified class action to proceed in federal court and thus achieve efficient packaging. One of the major criticisms of Zahn a quarter century ago was that courts in many states were structurally inadequate to entertain class actions because they had overly restrictive class action rules. Since Zahn was decided, many states that lacked modern class action rules promulgated rules substantially identical to Federal Rule 23. Prior to Zahn, Professor Hamburger was a fierce critic of New York's nineteenth century class action rule. After the Zahn decision, however, New York adopted a modern class action statute, partly in response to Zahn. Just the reverse actually occurred; since Zahn, class action litigation has flourished in state court. ...

TEXT:

INTRODUCTION

Nearly thirty years ago, the United States Supreme Court held in Zahn v. International Paper Co., that every member of a federal court class action asserting claims based solely upon state law must have a claim in excess of the minimum amount in controversy required by the statute conferring federal subject matter jurisdiction based upon diversity of citizenship. The Zahn decision had the effect of eliminating federal jurisdiction over small-claim state-law class actions, thus requiring such actions to be filed in state court. The prestigious
American Law Institute (ALI) is now considering a proposal to recommend to Congress that it abrogate the Zahn decision through legislation that would grant federal courts supplemental jurisdiction over claims of class members, so long as the named plaintiffs' claims exceeded the minimum jurisdictional amount. The current supplemental jurisdiction statute provides federal district courts with jurisdiction over nonfederal claims that are substantially related to federal claims, but it does not expressly extend such jurisdiction to class actions. The ALI proposal, however, would replace the current statute and, in the process, make it explicit that supplemental jurisdiction extends to class actions. This proposal, if adopted by Congress, would reverse three decades of class action jurisprudence and foster the return of small-claim class actions based upon state law to federal court, either by plaintiffs who choose to file suit in federal court or by defendants who elect to remove such actions, originally filed in state court, to federal court.

The ALI proposal to overturn Zahn is embedded in a broader proposal to address perceived problems with the current supplemental jurisdiction statute, and it must be understood in that context. Congress enacted the current statute (28 U.S.C. 1367) in 1990, in response to the Supreme Court's decision in Finley v. United States. In Finley, the Court held that federal courts may not exercise pendent jurisdiction over claims by plaintiffs that lack an independent basis of jurisdiction, even if such claims are closely related to claims by other plaintiffs over which federal courts do have jurisdiction (known as pendent party jurisdiction). The Court reasoned that Congress had not conferred statutory authority to exercise pendent party jurisdiction. Pendent jurisdiction, and its sister ancillary jurisdiction, were long-established, judicially-created doctrines that were designed to facilitate joinder of related claims and parties, as a means of efficiently packaging litigation in a single forum.

The Finley decision, however, did not merely eliminate pendent party jurisdiction. It also cast doubt upon the legitimacy of pendent and ancillary jurisdiction in their entirety, because they were judge-made doctrines with no statutory basis. Thus, out of concern that the court had upset well-settled understandings of federal jurisdiction in a way that threatened efficient joinder of claims and parties, Congress soon enacted the current statute. This statute was intended to restore pre-Finley jurisdictional law, codify the doctrines of pendent and ancillary jurisdiction under the common terminology of supplemental jurisdiction, and abrogate the holding in Finley.

A storm of academic criticism quickly engulfed the infant statute. Commentators charged that it unduly restricted the use of supplemental jurisdiction in diversity cases and that, read literally, it would abrogate well-settled rules of jurisdiction in diversity cases and prevent efficient packaging of federal diversity cases. Over the next decade, federal courts of appeals rendered conflicting interpretations of the statute. In particular, a difference of opinion emerged over the effect of the new statute on small-claim state-law class actions. In In re Abbott Laboratories, the Fifth Circuit adopted the literal reading of the statute and held Congress had abrogated Zahn. In contrast, the Tenth Circuit in Leonhardt v. Western Sugar Co., refused to read the statute strictly, concluding that Congress did not intend to overrule Zahn.

The criticisms and split of judicial authority led to calls to amend the statute, and the ALI took up the challenge. Its latest tentative proposal would completely reconceptualize supplemental jurisdiction in "claim-specific" terms, and codify much of the prior law of supplemental jurisdiction in diversity cases. At the same time, it would abrogate other pre-existing jurisdictional law, generally expanding the scope of diversity jurisdiction. Specifically, the ALI proposal would expressly abrogate Zahn, thus permitting plaintiffs - or defendants on removal - to channel small-claim state-law class actions into federal court. The thesis of this Article is that this particular proposal lacks sufficient justification at best, and at worst reflects profound disrespect for the proper role of state courts, in our constitutional system, to adjudicate matters of state law. As such, the ALI should drop this particular proposal from any supplemental jurisdiction statute it proposes to Congress, and, if the ALI retains this proposal in a recommendation to Congress, Congress should reject it.
Part I of this Article describes the law of diversity jurisdiction that provided the backdrop for the decision in Zahn and analyzes the Zahn decision itself. Part II examines the genesis of the current supplemental jurisdiction statute, from its common law antecedents of pendent and ancillary jurisdiction, through the controversial decision in Finley, to its current form. Part III explains the ALI proposal to amend the statute by reconceptualizing supplemental jurisdiction in claim-specific terms, codifying some jurisdictional doctrines, and abrogating others, including Zahn. Part IV analyzes the justifications for overruling Zahn and rechanneling small-claim state-law class actions into federal court. Part IV also provides a rebuttal of each such justification, especially the notion that federal courts are superior to state courts in managing complex, multi-state litigation. The Article concludes that there is insufficient justification for abrogating Zahn, and that doing so contravenes the constitutional structure of our government. Thus, this portion of the ALI proposal should be rejected.

I. DIVERSITY OF CITIZENSHIP JURISDICTION AND ZAHN V. INTERNATIONAL PAPER

A. The Rules of Diversity of Citizenship

Congress for many years has authorized original federal subject matter jurisdiction over suits between citizens of different states, so long as the matter in controversy exceeds a minimum dollar amount. The Supreme Court has long interpreted this legislation narrowly to require complete diversity of citizenship; all plaintiffs must be citizens of different states than all defendants. With respect to the amount in controversy requirement, by contrast, the Court established a lenient test: if the plaintiff alleges in the complaint that it is entitled to recover more than the statutory minimum amount, the requirement is satisfied unless it appears to a legal certainty that the plaintiff cannot recover more than the minimum.

In cases involving multiple plaintiffs with separate and distinct claims, however, each plaintiff must satisfy the minimum amount requirement regardless of how closely related the claims are; plaintiffs in such cases cannot aggregate their claims in order to meet this requirement. Commentators have observed that the law on aggregation of claims "is in a very unsatisfactory state." In particular, the leading cases that prohibit aggregation of separate and distinct claims provide no justification for the rule and hinder the ability of federal courts to permit joinder of closely related claims. Nevertheless, this was the established rule when Zahn v. International Paper Co. came before the Supreme Court.

B. Diversity of Citizenship Requirements in Class Actions

In class actions in which the sole basis for federal jurisdiction is diversity of citizenship, the rigors of the complete diversity rule have long been relaxed, but the reasons for doing so are shaky at best. The Court ruled in Supreme Tribe of Ben-Hur v. Cauble that only the named plaintiffs are required to be citizens of states different from those of the defendants; so long as there is complete diversity between the named plaintiffs and defendants, there is ancillary jurisdiction over the claims of class members. Thus, citizenship of unnamed members of the plaintiff class is irrelevant. The Ben-Hur opinion asserted two unsatisfactory justifications for this rule. First, the Court asserted that the decree in a class action is binding on the class, so in order to make the decree effective, the court must have the authority to assert jurisdiction over class members' claims. It is not necessary, however, to relax the rule of complete diversity in order to make class action decrees binding and effective, because state courts certainly have the authority to enforce their own class action decrees. If the complete diversity requirement were applied to every class member, federal courts would lack diversity jurisdiction if any class member were a citizen of the same state as any defendant. This would simply force plaintiffs to file suit in state court, where any decree would be just as binding and effective as one rendered in federal court. The Court reasoned, secondly, that an inability to assert such jurisdiction could lead to...
inconsistent results because the rights of nondiverse class members would have to be adjudicated in state court, which might reach a different decision than the federal court in an action between the diverse parties. 29 It is highly unlikely, however, that such inconsistency would occur if the complete diversity requirement were applied to every class member. The potential inconsistency would only arise if plaintiffs filed separate suits in state and federal court. If some class members are diverse from the defendants but others are not, however, there is no good reason why the plaintiffs would choose to split their litigation by filing two actions, one in federal court on behalf of diverse class members and one in state court on behalf of nondiverse class members. The essential value of a class action resides in the ability to join numerous claimants in a single, unified lawsuit. That value would be undermined by a decision to file separate class actions in different courts. Thus, if the complete diversity requirement were applied to every class member, and some members were nondiverse, plaintiffs almost invariably would choose to file a unified class action in state court, thus avoiding the potential for inconsistent results. The pernicious effect of the Ben-Hur decision is that, for no good reason, it reallocates power to decide important issues of state law in many class actions from state courts to federal courts.

While this named-plaintiffs-only rule had been well settled for many years, it remained an open question whether every named plaintiff and every class member in a diversity class action must assert a claim in excess of the requisite minimum amount, or whether the amounts of their claims could be aggregated. This issue first came before the Supreme Court solely with respect to the named plaintiffs. In Snyder v. Harris, 30 the Court held that all named plaintiffs with separate and distinct claims must each assert a claim in excess of the statutory minimum. 31 Plaintiffs argued that the rule against aggregation of separate and distinct claims should not be applied to class actions in order to accommodate the 1966 amendments to Rule 23, which abolished the distinction between "true" class actions asserting [*331] common interests and "spurious" class actions asserting separate interests. 32

The Court rejected this argument, reasoning that changes in the Rules cannot change the scope of jurisdiction granted by Congress. 33 More fundamentally, the Snyder Court rejected plaintiffs' policy argument that the nonaggregation doctrine should not be applied to class actions because it would prevent important issues from being decided in federal court. First, the Court asserted that overruling the nonaggregation doctrine would conflict with Congress' desire to stem the rising caseload of the federal judiciary. 34 In order to limit the number of federal cases, Congress had steadily increased the required amount in controversy. Overruling the nonaggregation doctrine would funnel below-minimum claims back into federal court and thus "add to the burdens of an already overloaded federal court system." 35 Second, leaving to state courts the adjudication of state-law claims below the minimum amount in controversy reflects "due regard for the rightful independence of state governments"; 36 indeed, such claims "can often be most appropriately tried in state courts." 37

The Snyder decision did not put the axe to all small-claim state-law class actions in federal court, because the amount in controversy requirement would be met if just one named plaintiff met the minimum amount. Since the citizenship of class members was irrelevant under the Ben-Hur decision, one could argue logically that the amount of their claims should be also irrelevant.

A few years after Snyder, however, the Court swung its mighty axe. In Zahn, it held that every class member's claim must also exceed the requisite amount. The Court simply reiterated its reasoning in Snyder: the nonaggregation rule requires that every class member must satisfy the minimum amount, and to hold otherwise would undermine congressional intent. 38 The Court did not specify how congressional intent would be undermined, but presumably it had in mind the policy reasons advanced in Snyder: to ease the burden on overworked federal courts and to respect the authority of state courts to adjudicate claims based on state law. The practical effect of the Zahn decision was to eliminate small-claim
state-law class actions from federal court. Even if the named plaintiffs' claims exceeded the [\*332] jurisdictional amount as required by Snyder, in virtually every case either no class member's claim would do so, or not enough members' claims would meet the requisite amount to make the class sufficiently numerous, or, as in Zahn itself, it would not be feasible to determine which members' claims exceeded the minimum amount.

C. The Criticisms of Zahn

Commentators were, with few exceptions, highly critical of the Zahn decision. These criticisms fell into three categories: (1) the Zahn opinion contained analytical deficiencies; (2) the decision would result in inefficiencies; (3) state courts were not adequate fora for small-claim class actions based on state law.

1. The Analytical Critique

One analytical deficiency identified in the Zahn opinion is its failure to address the argument that class members' claims falling below the jurisdictional amount would be within the federal courts' ancillary jurisdiction. The Zahn dissent did not question the validity of the nonaggregation rule, but asserted that if the requirements for class certification were met, class members' claims necessarily would be closely related to the claims of the named plaintiffs, thus meeting the requirements for ancillary jurisdiction.

A second, perceived analytical weakness followed from the first. Under the Ben-Hur decision, claims of nondiverse class members fell within ancillary jurisdiction, so Zahn created a logical asymmetry by holding that below-minimum class members do not fall within ancillary jurisdiction. If citizenship of class members was irrelevant, commentators argued, simple logic would dictate that the amount of their claims should also be irrelevant. Absent from this critique was any consideration of whether Ben-Hur was correctly decided. If, as argued above, Ben-Hur is wrong, then the asymmetry should be corrected by overruling Ben-Hur, not by abrogating Zahn.

After Zahn, there remained the possibility that, if the class members' claims represented a "joint interest," their claims could then be [\*333] aggregated to meet the jurisdictional amount. This possibility, however, was the basis for the third analytical criticism of Zahn. Commentators argued that the Court had perpetuated the archaic distinction between "true" and "spurious" class actions that the 1966 Amendments to Rule 23 had been designed to eliminate. Prior to 1966, "true" class actions were those in which the class represented a "joint" interest, whereas "spurious" class actions were those in which the class claims were "separate and distinct" but presented common questions of law or fact. It was necessary to determine whether a class represented a "joint" or "separate" interest because "true" and "spurious" class actions were treated differently. Critics of Zahn asserted that the decision perpetuated this confusing distinction because litigants in small-claim class actions would continue to dispute whether the class claims were "joint" (so the claims could be aggregated to satisfy the amount in controversy requirement) or "separate" (so the claims could not be aggregated).

2. The Inefficiency Critique

By retaining the distinction between "joint" and "separate" interests, critics charged, the Court failed to align jurisdictional doctrine with the procedural innovations of the 1966 Amendments to Rule 23 and thus undermined the effectiveness of the Rule changes. Not only would there continue to be wasteful litigation over whether claims were "joint" or "separate," but also commentators asserted that the Zahn decision was inconsistent with the binding effect that class actions were intended to have. Class members whose claims fell below the minimum amount and were "separate" so as to prohibit aggregation would not be bound by the findings or judgment if the class action proceeded without them because the court would lack jurisdiction over their claims. Alternatively, if the class action could not proceed...
without such class members, critics charged, Zahn would spawn wasteful and unnecessary relitigation of common issues. Either way, critics charged, Zahn would spawn wasteful and unnecessary relitigation of common issues.

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3. The State Court Critique

Zahn had the effect of requiring that small-claim state-law class actions be filed in state court, or not at all. Commentators, however, contended that state courts would not be adequate fora for such litigation. First, while some states had adopted functional class action rules similar to Rule 23, as amended in 1966, other states retained outdated, inadequate rules, while still other states had no class action provisions at all, but relied on ancient common law and equity class action jurisprudence. Second, critics expressed concern that state judges were far less experienced in the management of class actions than their federal counterparts. Finally, commentators charged that state judges simply were hostile to class actions, whether due to local political pressure, ideology, or the like.

Even the few defenders of Zahn conceded its analytical deficiencies. They countered, however, that there is no overriding federal interest at stake in small-claim state-law class actions, and state courts are the appropriate fora for such litigation. Nevertheless, the critics of Zahn viewed it as "a tragedy to those who view class actions as a powerful weapon on behalf of the average citizen."

II. THE CONTROVERSY OVER SUPPLEMENTAL JURISDICTION

Thus matters stood when the controversy erupted over supplemental jurisdiction. Since the ALI proposal seeks to use supplemental jurisdiction as the vehicle for abrogating Zahn, an overview of the evolution of supplemental jurisdiction is essential to a full understanding of the asserted justifications for the proposal.

A. The History of Ancillary and Pendent Jurisdiction

Federal courts are courts of limited subject matter jurisdiction. They can exercise jurisdiction only over the types of cases specified in Article III of the Constitution and in legislation passed by Congress. Congress cannot confer jurisdiction beyond the limits established in Article III. So fundamental is the principle of limited subject matter jurisdiction that every claim asserted in a civil action must have some basis of jurisdiction. Taken to its logical extreme, this principle could require that every claim must have an independent basis for jurisdiction so long as the plaintiff has stated a jurisdictionally sufficient claim. With respect to claims by parties other than the plaintiff, federal courts have established the doctrine of ancillary jurisdiction. In the leading case of Moore v. New York Cotton Exchange, the Supreme Court held that, where a plaintiff's claim arises under federal law, a federal court has jurisdiction over a nondiverse defendant's state-law counterclaim if it is so closely related to the plaintiff's claim "that it only needs the failure of the former to establish a foundation for the latter." Although Moore expanded the doctrine of ancillary jurisdiction beyond its original scope - cases in which property was under the control of the court - it also limited ancillary jurisdiction to cases in which the nonfederal claim was logically dependent on the federal claim.
Nevertheless, federal courts used the authority established by Moore to assert ancillary jurisdiction over a variety of nonfederal claims by defendants and other nonplaintiffs, such as third party claims, cross-claims and the like. 61

The other line of authority involved the doctrine of pendent jurisdiction, concerning cases in which plaintiffs assert claims arising under federal law and seek to join claims based on state law. In the [*336] landmark case of United Mine Workers of America v. Gibbs, 62 the Court held that federal courts have pendent jurisdiction under Article III of the Constitution when the relationship between the nonfederal and federal claims is such that they would ordinarily be expected to be tried in one case, because they "derive from a common nucleus of operative fact." 63 Gibbs rejected the narrower formulation of pendent jurisdiction in which the state and federal claims must present two grounds "in support of a single cause of action." 64 The primary rationale for this expansive definition of pendent jurisdiction was to align it with the liberal joinder provisions of the Federal Rules of Civil Procedure and thus achieve efficient packaging of all related claims in a single federal action. 65 The Court also held, however, that the exercise of pendent jurisdiction is discretionary and need not be exercised in every case in which it exists; for example, if the federal claim is dismissed before trial, the court would have discretion to dismiss the pendent state claim. 66

The scope of ancillary jurisdiction as defined in Moore was narrower than the scope of pendent jurisdiction as defined in Gibbs. A nonfederal claim might not be logically dependent upon the outcome of the plaintiff's claim, as required by Moore, yet arise from the same nucleus of operative fact as the federal claim, as required by Gibbs. If that were so, defendants could not join nonfederal claims that were closely related to plaintiff's federal claims but were not logically dependent on them, whereas plaintiffs could join all related nonfederal claims, dependent or not. Lower federal courts resolved this asymmetry by redefining ancillary jurisdiction, and applying the Gibbs "common nucleus of operative fact" test to nonfederal claims by nonplaintiff parties, rather than the logical dependence test of Moore. 67 Thus, expansion of ancillary jurisdiction to the boundaries established in Gibbs occurred at the behest of the inferior federal courts.

Lower federal courts also expanded pendent jurisdiction after Gibbs to include nonfederal claims against additional parties. In Astor-Honor, [*337] Inc. v. Grosset & Dunlop, Inc., 68 for example, the Second Circuit held that pendent jurisdiction existed over a nonfederal claim against one party if it was sufficiently related to a federal claim against another party. 69 Although pendent jurisdiction previously had been understood to apply only to claims between the same parties, this new concept of "pendent party" jurisdiction gained favor with other courts and commentators as a means of avoiding duplicative litigation. 70

The Supreme Court placed one important limit on this steady expansion of ancillary jurisdiction. In Owen Equipment & Erection Co. v. Kroger, 71 the Court held that, in suits in which federal jurisdiction is based solely on diversity of citizenship, ancillary jurisdiction does not extend to claims by plaintiffs against nondiverse third parties. 72 The primary rationale for the holding in Kroger is to avoid circumvention of the rule of complete diversity by plaintiffs who would sue only diverse defendants, wait for defendants to bring in nondiverse potential defendants via third party claims, and then assert claims against the nondiverse third parties. 73

The Kroger Court, however, also cast doubt on the scope of ancillary jurisdiction in general. The plaintiff in Owen argued that her claim against the nondiverse third-party fell within ancillary jurisdiction because it arose from the same set of facts as her claim against the original defendant. The Court rejected this argument, stating that the test is "not mere factual similarity but logical dependence." 74 This statement cast doubt upon the lower federal courts' rejection of the Moore test for ancillary jurisdiction in favor of the broader Gibbs test. Nevertheless, federal courts largely ignored the broader implications of Kroger and limited that decision to its facts. 75 With the exception of Kroger, therefore, the broad application of pendent and ancillary jurisdiction to achieve efficient resolution of all related claims...
claims in a single federal action seemed secure.

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B. Finley v. United States and the Enactment of the Supplemental Jurisdiction Statute

In 1989, however, the Supreme Court threw the world of pendent and ancillary jurisdiction into a tizzy. In a narrow 5-4 decision in Finley v. United States, 76 the Court held that where a plaintiff asserts a claim with an independent jurisdictional basis against one defendant, a federal court might not assert pendent jurisdiction over the plaintiff's related nonfederal claims against additional parties. 77 The Court sharply distinguished between "pendent claim" and "pendent party" jurisdiction, and purported to reject only "pendent party" jurisdiction, thus leaving "pendent claim" jurisdiction undisturbed. 78

The Court's rationale for rejecting "pendent party" jurisdiction, however, caused great consternation. The Court stated that the reason for its holding was that Congress had not, by statute, authorized such jurisdiction. 79 This rationale cast doubt upon the legitimacy of pendent and ancillary jurisdiction as a whole because, as judge-created doctrines, they also lacked any statutory basis. Six decades of jurisprudence that aligned jurisdiction with liberal joinder rules, in order to achieve efficient packaging of litigation, now appeared threatened.

Congress reacted quickly to Finley by passing a new statute conferring supplemental jurisdiction on the federal courts. 80 The major purpose of the new statute was to codify Gibbs and apply its test to claims by both plaintiffs and nonplaintiffs; since the test was the same, the common law terms pendent and ancillary jurisdiction were combined under the statutory term "supplemental jurisdiction." To accomplish this purpose, subsection (a) of the statute provides that, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 81 This provision codifies the holding in Gibbs that pendent jurisdiction extends to the limits of Article III. 82 It also applies that test to all claims - whether made by plaintiffs or nonplaintiffs - and groups all such [>*339] claims under the term supplemental jurisdiction. 83 Subsection (a) also provides that "such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." 84 This provision abrogates Finley by allowing a plaintiff who asserts a federal claim against one defendant to join a related nonfederal claim against another defendant. Subsection (c) codifies the discretionary portion of Gibbs by providing that, even if the test of subsection (a) is met, "the district courts may decline to exercise supplemental jurisdiction over a claim" for various reasons, primarily the discretionary factors mentioned in Gibbs. 85 The provisions of subsection (a) apply to all federal civil actions, regardless of whether original jurisdiction is derived from claims based on federal law or from diversity of citizenship.

Subsection (b) was designed to codify both the holding and the broader rationale of Kroger. It provides that, if original jurisdiction is based solely on diversity of citizenship, supplemental jurisdiction shall not extend to "claims by plaintiffs against persons made parties under Rule 14" and various other rules, "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." 86 Subsection (b) codifies the narrow holding of Kroger because it prohibits the exercise of supplemental jurisdiction, in a diversity-only case, by a plaintiff against a nondiverse third-party defendant joined under Rule 14. 87 Subsection (b) also codifies the broader rationale of Kroger - that diversity plaintiffs should not be permitted to evade the rule of complete diversity - by prohibiting the exercise of supplemental jurisdiction, in diversity-only cases, over any claims by plaintiffs against nondiverse persons made parties under Rules 14, 19, 20 or 24. Subsection (b) thus expanded Kroger beyond its narrow holding because it prohibited supplemental jurisdiction over a much wider range of claims than was prohibited by Kroger, such as counterclaims against third-party defendants who asserted claims against plaintiffs,
claims by plaintiffs who intervened as of right, claims against persons joined as necessary [*340] parties, and the like. 88 Notably, however, subsection (b) does not expressly prohibit the exercise of supplemental jurisdiction in diversity class actions, for it does not mention Rule 23 as a joinder provision included within its prohibitions.

In federal civil actions where original jurisdiction is based on claims arising under federal law, the supplemental jurisdiction statute has not been controversial. Courts have applied subsection (a) in ways that follow the route established by Gibbs with little difficulty. 89 Fate has been less kind, however, to subsection (b). In actions where federal jurisdiction is founded solely on diversity of citizenship, the exceptions stated (and not stated) in subsection (b) have encountered fierce academic criticism and judicial conflict.

C. Academic Criticism of 28 USC 1367(b)

Professor Richard Freer quickly emerged as the most vociferous critic of the new statute. Professor Freer is the Robert Howell Hall Processor of Law at Emory University. While Freer applauded the codification of Gibbs and the abrogation of Finley in subsection (a), he charged that subsection (b) "embodies a disquieting bias against diversity of citizenship jurisdiction that maims packaging in diversity cases." 90 Freer observed that the lower federal courts had limited Kroger to its facts - asserting ancillary jurisdiction over numerous claims by diversity plaintiffs against parties joined under other rules - and had exhibited no inclination to apply the broad rationale of Kroger to further restrict ancillary jurisdiction. 91 Ignoring this judicial support for a broad application of ancillary jurisdiction, however, the drafters of subsection (b), in Freer's view, prohibited the exercise of supplemental jurisdiction over a broad range of claims by diversity plaintiffs against newly joined parties. For example, if a defendant filed a third-party claim under Rule 14, and the third-party defendant asserted a claim against the plaintiff, the plaintiff could not assert a counterclaim against the third-party defendant if they were not of diverse citizenship, because subsection (b) prohibits supplemental jurisdiction over any claim by a plaintiff against persons made parties under Rule 14. For the same reason, if the defendant filed a counterclaim [*341] against the plaintiff, the plaintiff could not assert a third-party claim against a nondiverse third-party for indemnification or contribution on the counterclaim. 92

Another baleful effect of subsection (b) cited by Freer is that there would be no supplemental jurisdiction over claims asserted by nondiverse persons who seek to intervene as of right under Rule 24(a), because Rule 24 is included in subsection (b)'s list of prohibitions; the intervenor's inability to protect her interest would in turn invite the federal court to dismiss the entire case for failure to join an indispensable party under Rule 19(b), thus depriving the original plaintiff of a federal forum and forcing resort to state court. 93 Finally, plaintiffs could not assert claims either against nondiverse, necessary parties joined as defendants under Rule 19, or against persons who intervened under Rule 24. 94 Thus, the antidiversity bias perceived by Freer to be lurking in subsection (b)'s prohibition of supplemental jurisdiction over numerous claims by plaintiffs is that, "The ultimate effect of the statute will be to force plaintiffs to forego the federal forum altogether if there is a likelihood of joinder of a nondiverse litigant against whom the plaintiff will want to assert a claim." 95 He did not explain, however, why that would be bad policy.

Freer also argued that subsection (b) ironically expanded supplemental jurisdiction in unintended ways by omitting certain Rules from its list of prohibitions. It appeared to abrogate the rule of complete diversity, in his view, because nondiverse plaintiffs or defendants can be joined under Rule 20, and Rule 20 is not mentioned in subsection (b). 96 Most significantly, Freer argued that subsection (b) might abrogate Zahn itself, because class members are joined under Rule 23 which, like Rule 20, is omitted from subsection (b). 97

Professor Thomas Rowe, one of the principal drafters of the statute, leaped to its defense against Freer's onslaught. Professor Rowe is the Elvin R. Latty Professor of Law at Duke University. In response to the antidiversity bias Freer saw in subsection (b), Rowe countered:
so be it; litigants should not be able to circumvent the rule of complete diversity by first having suit brought between diverse parties, then piling on additional claims against newly joined nondiverse parties, resulting in a suit that could not have been brought originally in federal court if all parties have been joined in the first place. To Freer's [*342] charge that these restrictions would force diversity plaintiffs to sue in state court, Rowe again replied: so be it; "if you want to bring an incomplete diversity state-law case all in one piece, sue in state court." Rowe acknowledged that a literal reading of subsection (b)'s omission of Rules 20 and 23 could lead courts to conclude that both the rule of complete diversity and Zahn had been abrogated. He argued, however, that courts should not read the words of the statute literally when to do so would achieve results not intended by Congress, and that the more responsible judicial approach would be to follow the legislative history, which showed that Congress did not intend to abrogate either the complete diversity rule or Zahn. 100

In reply to Rowe's defense of the statute, Freer countered that where the text of a statute is unambiguous, judges should not use legislative history to reach results that they believe Congress intended to achieve. In his view, the Constitution delegates to Congress, not judges, the role of defining the jurisdiction of the courts. Thus, judicial reinterpretation of subsection (b) at odds with its text would violate that constitutional delegation of authority. 101 If confined to Freer's view of their proper role, courts would be obliged to abrogate Zahn and the rule of complete diversity, and also to prohibit the exercise of supplemental jurisdiction over claims by plaintiffs against nondiverse defendants and third-party defendants who have made claims against the plaintiffs. 102

In the years since 1367 was enacted, it has, for the most part, worked well. One commentator has observed, "In most cases, courts follow Section 1367 along a predictable path, applying the Gibbs common nucleus of operative fact test under Section 1367(a) and Kroger's limitations on supplemental jurisdiction when jurisdiction is based solely on diversity under Section (b) in a noncontroversial manner." With respect to Freer's concern that subsection (b) unduly hampered the ability of a diversity plaintiff placed in a defensive posture to assert responsive claims, the same commentator observed that such cases are "rare if not unique." Moreover, no court has held that subsection (b) superseded the complete diversity rule. 105 In other respects, however, fate has been less kind to 1367 as applied in diversity cases.

D. Judicial Conflict in Interpretation of 1367

Several conflicts have arisen over interpretation of 1367 in diversity cases. These conflicts have arisen in both class action and non-class contexts. In part, the conflicts involve a debate over the proper method of statutory interpretation. More importantly for this discussion, however, the diverse opinions embody radically different attitudes toward the proper scope of diversity jurisdiction. Some decisions exemplify a philosophy that federal courts should narrowly confine diversity jurisdiction in order to minimize intrusion upon the authority of state courts to adjudicate claims based on state law. Other decisions reflect a philosophy that federal courts should afford a broad scope for diversity jurisdiction as a means of efficiently resolving related claims in a single case. Thus, the wisdom of the proposal to abrogate Zahn cannot be fully assessed without examining the broader context in which the proposal has arisen: the debate over the proper scope of diversity jurisdiction.

In In re Abbott Laboratories, 106 the Fifth Circuit held that 1367(b) abrogated Zahn to permit federal courts to exercise supplemental jurisdiction, in state-law diversity class actions, over class members' claims that do not exceed the requisite amount in controversy. The court refused to consider legislative history that Congress meant to restore the pre-Finley law of supplemental jurisdiction in general, and not to abrogate Zahn in particular:...
We cannot search legislative history for congressional intent unless we find the statute unclear ... . The statute's first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute's second section. Class actions are not among the enumerated exceptions. 108

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Notably absent from the court's discussion was any analysis of the policy concern that animated the Zahn decision itself: easing the burden on federal dockets and respecting the authority of state courts to decide important issues of state law. 109 The Abbott decision would not only permit plaintiffs to file such actions in federal court, but, as Abbott itself demonstrates, permit defendants to remove to federal court such actions that plaintiffs filed in state court. 110

In Leonhardt v. Western Sugar Co., 111 the Tenth Circuit took the opposite view. The court found the statute ambiguous because, while Rule 23 is omitted from the limitations in subsection (b), those limitations would arguably come into play only if new parties were sought to be added to an action in which diversity jurisdiction existed at the outset of the case, as in Kroger. As such, subsection (b) could be read to have no effect on the question whether jurisdictional requirements were met when the suit was filed initially. Under that reading of the statute, Congress did not intend to change pre-Finley rules of jurisdiction, including Zahn. 112 Given the textual ambiguity, the court resorted to the legislative history, which clearly showed that Congress did not intend to override Zahn. 113 Like the Abbott court, the Leonhardt court did not discuss the policy implications of its decision.

The Supreme Court granted certiorari in Abbott to resolve the issue, but merely affirmed without opinion in an equally divided vote, one Justice having recused herself. 114 The issue therefore remains unresolved.

Conflicts in interpretation of 1367(b) also arose in non-class action contexts. The settled rule prior to the statute was that separate and distinct claims might not be aggregated to satisfy the minimum amount, so that a district court lacked jurisdiction over the claim of any plaintiff who did not meet the minimum amount. 115 In Stromberg Metal Works v. Press Mechanical, Inc., 116 however, the Seventh Circuit held that 1367 abrogated this nonaggregation rule. In [*345] Stromberg, two plaintiffs brought a diversity action, but one plaintiff's claim was below the minimum amount. The court held that the below-minimum claim fell within supplemental jurisdiction because the unambiguous text of subsection (a) authorizes supplemental jurisdiction over claims that involve joinder of additional parties, and this would include a diversity plaintiff who demands a below-minimum amount. 117 Even though the "pendent party" provision of subsection (a) was only intended to overrule Finley, it does not exclude diversity cases: "the text is not limited in this way. When text and legislative history disagree, the text controls." 118 Moreover, tracking the logic of the Fifth Circuit in Abbott, the Stromberg court asserted that joinder of plaintiffs under Rule 20 is not among the limitations listed in subsection (b) for diversity cases. 119

The Third Circuit reached a contrary result in Meritcare, Inc. v. St. Paul Mercury Insurance Co., 120 holding that a diversity plaintiff whose claim is less than the minimum amount may not invoke supplemental jurisdiction, even though a co-plaintiff's separate claim does satisfy the requisite amount. 121 Unlike the Stromberg court, the Third Circuit found subsection (b) anomalous in several ways; for example, it prohibits supplemental jurisdiction over claims against persons joined under Rule 20, but it allows supplemental jurisdiction over claims by persons joined under Rule 20. 122 Given such an anomaly, the court resorted to legislative history, which clearly showed Congress did not intend to upset pre-Finley jurisdictional rules. 123

The first decade of experience with 1367 in its present form thus reveals that the statute has posed no serious interpretational problems for cases arising under federal law. The difficulties
have arisen in diversity cases, and appear to result from a textually strict, plain meaning approach to statutory construction followed by some judges. Professor Rowe had argued that consequences not intended [*346] by Congress could be avoided by reading the text in a manner sympathetic to the expressed will of Congress to codify, not abrogate, pre-Finley jurisdictional rules. He warned that drafting a statute that attempts to cover every possible contingency, in anticipation of textually strict judicial interpretation, would result in a statute that is "too prolix and baroque for everyday use and application by practitioners and judges." After decisions such as Abbott and Stromberg, however, even Rowe now concedes that the statute should be redrafted in order to avoid consequences Congress did not intend. 126

This conflict of judicial opinion, however, implicates a more fundamental issue: what is the proper scope of diversity jurisdiction? The decisions in Abbott and Stromberg portend major expansions of the [*347] scope of diversity jurisdiction via supplemental jurisdiction. Abbott would do so by rechanneling small-claim state-law class actions to federal courts. Stromberg would do so by abrogating the nonaggregation rule. 127 Both decisions were based upon strict interpretation of statutory language. This correlation between strict interpretation and expanding the scope of diversity jurisdiction suggests that Abbott and Shanaghan reflect a policy judgment that the scope of diversity jurisdiction should be enlarged to permit efficient resolution of related claims in a single suit. 128 Thus, viewing the proposal to abrogate Zahn in the broader context of the various issues raised by supplemental jurisdiction reveals that it is part of a broader effort - not limited to class actions - to achieve judicial economy by expanding the scope of diversity jurisdiction. What this effort ignores is that there is no need to expand the scope of diversity jurisdiction to achieve this goal. The very same efficiency can be obtained in state court. 129

III. THE ALI PROPOSAL TO REVISE 1367: INTO THE THICKET

The ALI proposal would not merely amend the current statute to resolve current uncertainties. Instead, it would represent a completely new statute. One's initial reaction to this proposed statute surely is that the text is so dense as to be nearly impenetrable. It [*348] [*349] lends weight to Rowe's warning about prolix and baroque statutes. Its drafter, Professor John Oakley, candidly admits that a reader "may feel like the proverbial snake after dining on a pig." He explains, however, that the text of the general statutes conferring original jurisdiction speak in terms of jurisdiction over an entire civil action, but have been interpreted to mean every claim made in a case must have its own basis of jurisdiction. Much of the uncertainty with the current statute, in Oakley's view, can be traced to this "claim-specific" approach to jurisdiction; there is a contradiction between conferring jurisdiction over a civil action, but then supplementing such jurisdiction "on a claim-by-claim basis." To resolve this contradiction, the ALI proposal is expressly "claim-specific" and completely reconceptualizes the law by creating two categories of claims in subsection (a): "freestanding" claims (defined as claims that fall within original jurisdiction) and "supplemental" claims. It defines "supplemental" claims by the same standard as the present 1367 (a): "part of the same case or controversy under Article III of the Constitution as a freestanding claim." Subsection (b) expressly confers "original" jurisdiction over such supplemental claims. Subsections (a) and (b), read together, thus appear to restate the general rule of present subsection (a), albeit in a reconceptualized manner.

The complexity of the ALI proposal is found primarily in the interaction between subsections (c) and (a)(3), which appear to be the counterpart of the troublesome current subsection (b). Subsection (c) provides that, if jurisdiction over a "freestanding" claim "asserted in the same pleading" is based solely on diversity of citizenship, there is jurisdiction over the "supplemental" claim in only three instances. Subsection (a)(3), however, defines "asserted in the same pleading" in an unnatural and awkward manner that is inconsistent with the ordinary meaning of the term. The "same pleading" includes not only the original pleading,
but is also stretched to include amendments, claims against third-party defendants, court-reformulated pleadings, and claims or defenses by intervenors who seek "to be treated as if the pleading had joined a claim by or against that intervenor." 135 Professor Oakley asserts that the intent of the general provisions of subsections (c) and (a) (3) is to "replicate the effect of the rule of complete [\*350] diversity." 136 A major impetus for the attempt to revise 1367, however, is the premise that courts will read the statute literally, without regard to legislative history. If this premise is correct, then it is highly likely that lawyers and judges will encounter extraordinary difficulty thrashing through the text of subsections (c) and (a) (3) and reach confusing and conflicting conclusions that will make the difficulties with current subsection (b) look like a cakewalk.

Having attempted to codify the rule of complete diversity, subsection (c) then sets forth the following three exceptions: if the supplemental claim (1) is asserted in a class action, (2) would be "freestanding" but for the value of the claim, or (3) was joined by an intervenor who is not indispensable. Professor Oakley explains that subsection (c)(1) codifies the Ben-Hur rule that, for purposes of diversity jurisdiction, only the citizenship of named parties is considered; if the named plaintiffs are diverse from all defendants so that their claim qualifies as "freestanding," then the class members fall within supplemental jurisdiction because their claims are "asserted representatively by or against a class of additional unnamed parties." 137 Moreover, subsection (c)(1) codifies the literal construction of present subsection (b) that claims of class members below the required minimum fall within supplemental jurisdiction, thus abrogating Zahn. 138 Similarly, subsection (c)(2) brings below-minimum claims by or against diverse parties within supplemental jurisdiction, and therefore eliminates the nonaggregation rule of Clark. 139 Subsection (c)(3) includes claims by nonindispensable intervenors within supplemental jurisdiction, hence restoring the pre-Finley rule that had been displaced by current subsection (b).

Proposed subsection (c) is also significant for what it does not include. Absent from the exceptions to the general rule are claims by diversity plaintiffs placed in a defensive posture, such as a compulsory counterclaim against a third-party defendant who has made a claim against the plaintiff. Such claims would not qualify for supplemental jurisdiction under current subsection (b), but, being absent from the exceptions, they would qualify under the general rule of proposed subsection (c). Even the Kroger rationale would appear to be abrogated, because claims by plaintiffs against third-party defendants who have not made claims against those plaintiffs do not appear among the exceptions - but for subsection (a) (3). Such claims are not "asserted in the same pleading" as defined in subsection (a)(3), and therefore do not fall within the scope of proposed subsection (c) at all. A judge who is able to claw through this textual thicket might come to understand that Kroger would survive, but limit it to its facts. 140

This ALI proposal represents a triumph for Freer's views. It accepts the premise that courts should follow unambiguous statutory text even if doing so achieves results Congress did not intend. Accordingly, it represents the very sort of "prolix and baroque" statute that Rowe predicted would sow confusion in everyday law practice. Moreover, the proposal rejects the "anti-diversity" bias of current 1367 that so enraged Freer, by limiting Kroger to its facts, if not abrogating it. Indeed, the proposal swings far in the opposite direction and reflects a pro-diversity bias by not only providing supplemental jurisdiction over claims by plaintiffs placed in a defensive posture but also abrogating the nonaggregation rules of Clark and Zahn. If enacted, this statute will greatly expand the scope of federal diversity jurisdiction. It is likely that the single greatest component of that expansion will be the abrogation of Zahn and the reintroduction of small-claim state-law class actions into federal court. 141

IV. WHY ZAHN SHOULD NOT BE ABROGATED

Some of the justifications advanced for using a new, pro-diversity supplemental jurisdiction statute to abrogate Zahn replicate the original criticisms of the Zahn decision itself. 142 Other justifications are new. Both old and new justifications fall into three categories: (A) analytical
deficiencies in the Zahn opinion; (B) inefficiencies resulting from prohibiting small-claim state-law class actions in federal court; (c) inadequacies of state courts. All these justifications are either insufficient, contrary to the evidence, or outweighed by the increased burden on the federal courts and the major erosion of state sovereignty that are the likely result of abrogating Zahn.

A. The Analytical Deficiencies of Zahn.

Like the critics of a quarter century ago, proponents of the ALI proposal contend that the Zahn opinion is flawed because it failed to address the issue whether class members' claims fell within ancillary [\(\text{[*352]}\) (now supplemental)] jurisdiction. The short answer to this contention is that, having concluded that claims of class members cannot be aggregated to satisfy the amount in controversy requirement of the diversity statute, there was no need to address the issue of ancillary jurisdiction. If the statute is construed as prohibiting aggregation, it necessarily follows that courts lack the authority to apply the judge-made doctrine of ancillary jurisdiction in a way that is inconsistent with the statute. Proponents also argue the Zahn opinion is flawed because it is inconsistent with Ben-Hur. The argument appears to be that Ben-Hur held the citizenship of class members is irrelevant to determining diversity, so it is inconsistent to consider the size of their claims in determining the amount in controversy. The premise of this argument is that Ben-Hur was correctly decided. This premise, however, is shaky at best. As stated earlier, the plaintiffs-only rule is not needed to make class action decrees effective, because the same binding effect can be achieved in state court. This rule is not needed to avoid inconsistent results because, where some class members are not diverse from defendants, plaintiffs would simply file unified class actions in state court seeking single adjudications, rather than splitting the litigation between state and federal courts. Even if Ben-Hur was correctly decided, moreover, the apparent asymmetry between Ben-Hur and Zahn can be explained by reference to jurisdictional policy. Limiting the citizenship inquiry to named plaintiffs serves the purpose of protecting outsiders against state court prejudice, whereas inquiring into the size of class members' claims serves the purpose of assuring that only diversity cases in which the stakes are high ought to command the resources of the federal courts.

More fundamentally, however, neither of these purported analytical weaknesses is a sufficient reason for Congress to abrogate Zahn. As with all grants of subject matter jurisdiction, the issue for Congress is not whether judicial decisions are incomplete or internally inconsistent. Congress' role is to decide whether the practical results of [\(\text{[*353]}\)] judicial decisions represent bad policy that needs to be corrected. The analytical critiques of Zahn do not, in and of themselves, represent bad policy results that deserve Congress' attention.

B. The Inefficiencies of Zahn

Like the original critics of Zahn, proponents of the ALI proposal assert that Zahn created the risk that parallel class actions raising common issues will be litigated separately in state and federal court. They explain that class actions could be filed in federal court for members whose claims exceed the required amount, but as to members of the class whose claims fall below the minimum, separate class actions would have to proceed in state court. This scenario might serve as a classroom hypothetical, but there is no cited evidence that such litigation decisions have actually been made. Moreover, it bears repeating that it is difficult to imagine a good reason why a plaintiffs' attorney who represents a large class, some with big claims and some with small claims, would choose to split the litigation into federal and state components. It seems far more likely that the attorney would choose to bring one unified class action in state court. Thus, the split-litigation justification for abrogating Zahn is unsupported by evidence and presumes a most unlikely litigation strategy.

A related criticism is that Zahn creates the risk that persons with large claims will pursue
individual actions in federal court while persons with small claims must file separate class actions in state court. Abrogating Zahn will do nothing, however, to avoid this risk. Even if a diversity class action were filed in, or removed to, federal court, any class member has the right to opt out and pursue separate litigation. Thus, a class member with a large claim would be free to opt out of the federal class action and file a separate suit, either in federal or state court. One might argue that, assuming large-claim individuals do not opt out (at least in that situation), abrogating Zahn would allow a unified class action to proceed in federal court and thus achieve efficient packaging. The very same efficiency is produced, however, if the unified class action proceeds in state court. Thus, abrogating Zahn is not needed to produce efficient packaging of class litigation.

C. Inadequacies of State Courts

One of the major criticisms of Zahn a quarter century ago was that courts in many states were structurally inadequate to entertain class actions because they had overly restrictive class action rules. Proponents of the ALI proposal do not mention this justification for abrogating Zahn. There is good reason for this omission. Since Zahn was decided, many states that lacked modern class action rules promulgated rules substantially identical to Federal Rule 23. New York provides an instructive example. Prior to Zahn, Professor Hamburger was a fierce critic of New York's nineteenth century class action rule. He contended that, because the old rule required privity, or unity of interest, among class members, many class actions that presented common issues were barred because the claims were not joint. Thus, individuals whose claims or resources were too small to pursue individual litigation were left without a remedy. After the Zahn decision, however, New York adopted a modern class action statute, partly in response to Zahn. Professor Hamburger praised the new provision as, "a functional class action statute, freed from antiquated notions of privity." Many other states have followed suit. Thus, the original structural critique of the state forum has been largely eliminated.

Another original criticism of state courts was that state court judges were less experienced with, or simply hostile to, class actions. Like the structural criticism, however, this criticism is not echoed by proponents of the ALI proposal, again for good reason. Experience with state court class actions in the quarter century since Zahn demonstrates that state judges have proven quite receptive to class actions. By one estimate, state court class actions increased by over 1300% between 1988 and 1998.

The leading state court class action suit demonstrates this point. In Shutts v. Phillips Petroleum Co., a nationwide class action was brought in Kansas state court on behalf of over 28,000 owners of royalty interests in land from which natural gas was produced. Many of these owners both resided and owned land outside Kansas. Plaintiffs sought to recover interest on royalty payments that had been suspended pending federal approval of an increase in gas prices, even though the producer sold the gas at the increased price. Far from showing hostility to the suit, the state trial court rendered a multimillion-dollar judgment for the class. On appeal, the Kansas Supreme Court affirmed the judgment, concluding that Kansas had personal jurisdiction over nonresident class members who lacked minimum contacts with Kansas, so long as they had been notified of the suit and afforded the opportunity to opt out. The Court also held that, under contract principles of unjust enrichment, the producer was liable for interest on the suspended royalties, at rates of 7% prior to judgment and 15% post-judgment.

The producer appealed to the Supreme Court of the United States on two grounds: (1) that Kansas lacked personal jurisdiction over class members who lacked minimum contacts with Kansas and who had not consented to jurisdiction by affirmatively opting into the class; and (2) that Kansas erred in applying Kansas law to claims of class members who did not reside in Kansas and whose land was not located in Kansas. The Court held unanimously that a state might exercise jurisdiction over the claims of class members who do not possess minimum contacts with the state and have not affirmatively consented to...
jurisdiction by opting into the class. 166 A divided Court also held, however, that the Kansas courts erred in ruling that Kansas law applied to class members' claims that were unrelated to Kansas, if there was a conflict between Kansas law and the law of the states with connections to such claims. 167 The dissent contended that the majority had misread the Kansas Supreme Court's opinion; the Kansas court had already ruled, in related litigation, that there was no material conflict between Kansas and the other states' laws. 168 The dissent was accurate. On remand, the Kansas Supreme Court thoroughly reexamined the laws of the other states where royalty-producing lands were located and concluded - once again - those laws did not conflict with Kansas law. 169

The stakes were high in the Phillips litigation because the overarching issue was whether state courts would have the authority to entertain multistate class actions. The jurisdictional ruling established that state courts have the authority to adjudicate class actions where the members of the class actions reside in multiple states, and to render judgments binding on nonresident class members. 170 Whatever validity there may have been to the original criticism that state courts were inexperienced or hostile to class actions, cases like Phillips demonstrate that such criticism lacks substance today. Not only was every original ruling by the Kansas trial court upheld on appeal, but the plaintiffs won a resounding victory.

Proponents of the ALI proposal do not attack the general willingness of state courts to entertain class actions and instead launch an attack on the capabilities of state courts to adjudicate class actions with multistate connections. Freer asserts that "overruling Zahn will better equip federal courts to resolve complex interstate disputes that [*357] may not be well handled in the courts of some states." 171 He offers no evidence that such disputes are not well handled in state courts. The evidence of incompetence that others have offered is entirely anecdotal. Critics of state court class actions typically cite individual cases as proof of general incompetence. 172 Cases such as the Phillips litigation contradict this leap of logic. Phillips was a "complex interstate dispute" that included 28,100 class members residing in all fifty states and some foreign countries, and involved land located in several states. 173 Moreover, every ruling by the Kansas trial court survived the rigors of appellate review. 174 In addition, these critics ignore the fact that state appellate courts are a structural safeguard against abuse at the trial level. 175 Finally, a recent exhaustive study of class actions found that "incomplete reporting of cases [actually filed] means that it is impossible to select a random sample of all class action lawsuits for quantitative analysis." 176 Until a detailed study of the relative competence of state and federal courts is completed, there [*358] is no reliable basis for concluding that state courts are incompetent or, more to the point, any less competent than federal courts.

The competence critique is thus reduced to an assumption that state courts are incompetent managers of complex state-law class actions. Such an assumption, however, does violence to two bedrock principles of the constitutional structure of American government. First, Article III of the U.S. Constitution grants Congress the power to decide whether or not to establish the lower federal courts. 177 This provision represents a compromise at the Constitutional Convention between delegates who opposed any federal judiciary because they feared it would usurp state authority, and delegates who believed state courts were inadequate and thus wanted a mandatory federal judiciary. The compromise, giving Congress the power to decide this matter, established a basic principle that state courts are adequate fora for adjudication of disputes. 178 Second, the U.S. Supreme Court has recognized that state, not federal, courts are the supreme interpreters of state law. 179 The assumption that state courts are incompetent managers of class actions contravenes the first principle. The corollary assumption that federal courts are more competent than state courts in matters of state law cannot be reconciled with the second principle.

A variant of the competence critique is that state courts are overly friendly to class actions. This argument asserts that there is "the possibility, or at least the fear of excessive influence by lawyers over carefully selected local judges to settle mass-tort and mass-disaster litigation in ways that benefit lawyers and defendants, but often do not adequately benefit class
The evidence cited in support of this argument, however, is derived from experience with federal as well as state court class actions. Even if such collusion existed in state court as well as federal court, moreover, it suggests a need to address ethical issues. It does not support an argument to favor federal court over state court as the forum for small-claim class actions.

[*359] Other supporters of reasserting federal control over small-claim class actions also argue that plaintiffs' attorneys carefully select state courts in which to sue, but for a different, antidefendant motive: "There are certain places in this country where as a defendant you just can't get justice." This argument tends to confuse success with injustice; merely because plaintiffs prevail does not mean an injustice was done to the defendant. The very case cited to support this argument demonstrates this point: the defendant did get justice - it got what it deserved. In Avery v. State Farm Mutual Automobile Insurance Co., policyholders brought a nationwide class action alleging that State Farm routinely replaced damaged auto parts with inferior parts not manufactured by the original maker. Plaintiffs claimed this practice constituted breach of contract because the policy provided State Farm would pay for replacement parts of the same quality. Plaintiffs also claimed this practice violated the state consumer fraud statute because State Farm knew the replacement parts were inferior and failed to so inform its policyholders. The case was tried to a jury on the contract claim and to the court on the fraud claim. The jury found that State Farm had breached the contract, and the court found that State Farm had committed fraud. Compensatory and punitive damages totaling $1.18 billion were awarded.

On appeal, the court held that "there is evidence the breaching party willfully engaged in deceptive practices that deprived the policyholder of the benefit of his bargain." The court affirmed the award of all items of damages, with one exception that did not undermine the validity of the factual findings. State Farm explicitly attacked various rulings by the trial judge as being motivated by a desire to promote the class action. The appellate court admonished defense counsel as follows: "we feel obligated to caution counsel that an appeal is not a license to vilify the trial court. Several comments in this portion of State Farm's brief approach criticism that is inappropriate." Examination of the actual opinion in Avery, therefore, discloses that [*360] not only the trial judge, but also the jury, found State Farm guilty of deception, and the appellate court found ample support in the evidence for these findings. Three different decision makers thus examined State Farm's behavior and found it illegal. Far from constituting evidence that state courts are prejudiced against class action defendants, Avery is evidence that state courts will do their duty by holding defendants liable for classwide relief if the evidence shows defendants violated their legal obligations. That is the very definition of justice.

One case does not prove state courts are, or are not, biased. Once again, however, until a comprehensive comparative study concerning the presence or absence of bias in state and federal class actions is done, any assumption that state courts are biased, and more so than federal courts, fails to respect the dignity afforded to state courts in our constitutional system.

CONCLUSION

The inadequacies of the justifications for abrogating Zahn suggest that the proposal to do so is linked to the general pro-diversity bias of the ALI proposal to revise the supplemental jurisdiction statute. The primary traditional reason for federal diversity jurisdiction has always been the fear, not the reality, that state courts would be prejudiced against out-of-state litigants. No substantial evidence has ever been presented that such local prejudice exists in fact, so that defenders of diversity jurisdiction are reduced to the argument that the absence of local prejudice is "presumptively improbable." Thus, in the context of the ALI proposal to favor federal courts over state courts in small-claim state-law class actions, the root justification for the proposal is that state courts are prejudiced in favor of class action plaintiffs. The mere fact that state courts over the past quarter century have been...
receptive to hearing **class actions** and that plaintiffs have prevailed in many such actions does not, of course, demonstrate lack of impartiality. Judicial prejudice consists of rulings not based on law or fact, and driven by improper motive. No evidence has been presented that there is a pattern of such prejudice in state court **class actions**.

[*361*] Support for the ALI proposal is reduced to the assumption that state courts are not competent to manage complex **class actions**. This assumption reflects profound disrespect for coequal, sovereign state judiciaries and contravenes the constitutional structure of American government. Fear is the unspoken driving force behind proposals to funnel small-claim state-law **class actions** to federal court; defendants have lost many such actions in state courts, or settled them unfavorably, and they hope to achieve better results before a federal judiciary perceived to be pro-business. The irony of such a hope is remarkable. A quarter century ago, plaintiffs perceived that state courts were hostile to **class actions** while federal courts were quite receptive, so they viewed the Zahn decision as a tragedy for plaintiffs. Just the reverse actually occurred; since Zahn, **class action** litigation has flourished in state court. Today it is defendants who perceive that state courts are hostile to them, so it is now defendants, not plaintiffs, who view Zahn as a tragedy. If it is defendants' hope that federal courts will be hostile to **class actions**, history suggests that in the long run, like plaintiffs a quarter century ago, actual experience will be the opposite of their perception and their efforts will be in vain. The portion of the ALI proposal that would abrogate Zahn should not be approved and, if approved, Congress should reject it.

**FOOTNOTES:**


†n3. Brian Mattis & James S. Mitchell, The Trouble With Zahn: Progeny of Snyder v. Harris Further Cripples **Class Actions**, 53 Neb. L. Rev. 137, 194 (1974) (stating that the Zahn decision dealt a "crippling blow" to federal diversity **class actions**). The Zahn decision has no effect on small-claims **class actions** based on federal law, because 28 U.S.C. 1331, conferring original federal question jurisdiction, does not require a minimum amount in controversy. Thus, the scope of this Article is limited to small-claim **class actions** based on state law, where federal jurisdiction is based solely on diversity of citizenship.

†n4. Federal Judicial Code Revision Project 1-4 (Tentative Draft No. 2, 1998). As a tentative draft, this proposal does not yet represent the ALI's position because it has not yet been authorized by the ALI's membership and approved by its Council. It is for this reason that this Article contends, in part, that the ALI itself should eliminate this portion of the proposal from any recommendation to Congress. Separately from the ALI proposal, bills have been introduced in Congress that would permit aggregation of class members' claims to meet the amount in controversy requirement. Positions taken in this Article are equally applicable to such bills.

†n5. 28 U.S.C. 1367(a) provides, in pertinent part:
In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the Constitution.

28 U.S.C. 1367(a) (1994). Courts have split over whether Congress inadvertently extended supplemental jurisdiction to class actions by this statute, but the fact remains that the current statute does not do so in explicit terms. See infra notes 106-14 and accompanying text.

n6. For a discussion of how the ALI proposal would accomplish this change, see infra, notes 130-39 and accompanying text.

n7. Defendants could remove such actions to federal court pursuant to 28 U.S.C. 1441(a) (1994) because federal courts would have jurisdiction based on diversity of citizenship. The only exception to such removal would be if one named defendant were a citizen of the forum state. See 28 U.S.C. 1441(b) (1994) (stating that diversity action may be removed only if no defendant is a citizen of the forum state).


n10. Finley, 490 U.S. at 548.


n13. Freer, 40 Emory L.J at 473-74. See also Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer, 40 Emory L.J. 943, 960-61 (1991). The authors of the latter Article were the principal drafters of 1367. For brevity's sake, their views are set forth collectively in this Article as those of Professor Rowe.

n15. 51 F.3d 524 (5th Cir. 1995).

n16. In re Abbott Laboratories, 51 F.3d 524, 525, 529 (5th Cir. 1995).

n17. 160 F.3d 631 (10th Cir. 1998).

n18. Leonhardt v. Western Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998).


n23. See, e.g., Charles A. Wright, Law of Federal Courts 209 (5th Ed. 1994). For example, if plaintiffs' claims asserted "joint" interests, their claims could be aggregated, but there was much confusion over which claims were "separate" and which were "joint."

n24. Id. at 210-11.


n29. Id. at 366-67.


n32. Snyder, 394 U.S. at 335.

n33. Id. at 336.

n34. Id. at 338.

n35. Id. at 341.

n36. Id. at 340 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)).

n37. Id. at 341.


n39. See supra note 3 and accompanying text.
Fed. R. Civ. P. 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."

Zahn, 414 U.S. at 292.


Zahn, 414 U.S. at 306-09.

Mattis & Mitchell, 53 Neb. L. Rev. at 181 n.33; Theis, 35 La. L. Rev. at 94; Coiner, 4 Mem. St. L. Rev. at 433-34.

Wright, supra note 23 at 209.


Goldberg, 28 Stan. L. Rev. at 401. In particular, aggregation of claims was allowed for "true" class actions, but not for "spurious" class actions.

Id. at 405.

The remaining class might be too small to satisfy the numerosity requirement of Fed. R. Civ. P. 23 (a)(1), or, as illustrated by Zahn, it might not be feasible to determine which class members' claims satisfied the amount in controversy requirement.


n53. Mattis & Mitchell, 53 Neb. L. Rev. at 172. See also Coiner, 4 Mem. St. L. Rev. at 447.


n55. Banks, 1 Ohio N.U. L. Rev. at 496, 498.

n56. Coiner, 4 Mem. St. L. Rev. at 447.

n57. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-76 (1803) (finding that Congress cannot confer original mandamus jurisdiction on Supreme Court).

n58. 270 U.S. 593 (1926).


n60. Freeman v. Howe, 65 U.S. 450 (1860) (finding that a state court may not interfere with property under control of federal court; claim to property may be asserted in federal court, pursuant to ancillary jurisdiction).


n64. Gibbs, 383 U.S. at 722 (quoting Hurn v. Oursler, 289 U.S. 238, 246 (1933)).


n66. Gibbs, 383 U.S. at 722. Other discretionary reasons mentioned by the Court included novel or complex issues of state law, likelihood of jury confusion and predominance of state-law issues. Id.

n67. See, e.g., Revere Copper & Brass Inc., 426 F.2d at 710-17. See generally Miller, 26 S. Tex. L.J. at 5-8.

n68. 441 F.2d 627 (2d Cir. 1971).


n73. Kroger, 437 U.S. at 374-75.

n74. Id. at 376.

n75. Freer, 40 Emory L.J. at 462-64.

n76. 490 U.S. 545 (1989).

\*n78. Finley, 490 U.S. at 553.

\*n79. Id. at 555.


\*n81. 28 U.S.C. 1367(a).

\*n82. See supra note 63 and accompanying text.

\*n83. In doing so, the new statute appeared to reject the suggestion in Kroger that ancillary jurisdiction extends only to nonfederal claims that are logically dependent on federal claims. See Kroger, 437 U.S. at 365, 374-76.

\*n84. 28 U.S.C. 1367(a) (1994).

\*n85. 28 U.S.C. 1367(c). For example, one statutory discretionary factor is the novelty or complexity of state-law issues, also a factor mentioned in Gibbs, 383 U.S. at 726.

\*n86. 28 U.S.C. 1367(b).

\*n87. Fed. R. Civ. P. 14 (a) permits a plaintiff to assert a claim against an impleaded third-party defendant. Kroger held, however, where jurisdiction is based solely on diversity of citizenship, ancillary jurisdiction does not extend to such a claim; if the plaintiff and third-party defendant are not diverse, the claim must be dismissed. Kroger, 437 U.S. at 365, 374-75.


*fn90. Freer, 40 Emory L.J. at 446.

*fn91. Id. at 462-64.

*fn92. Id. at 474, 480-82.

*fn93. Id. at 478.

*fn94. Id. at 479-80.

*fn95. Id. at 480.

*fn96. Rowe, 40 Emory L.J. at 982.

*fn97. Freer, 40 Emory L.J. at 485-86.

*fn98. Rowe, 40 Emory L.J. at 952, 956.

*fn99. Id. at 953.

*fn100. Id. at 960-61 nn.90-91.

*fn101. Id. at 985-86.
n102. Arthur, 40 Emory L.J. at 985-89.


n104. Id. But see Chase Manhattan Bank, N.A. v. Aldridge, 906 F. Supp. 866 (S.D.N.Y. 1995) (stating that 1367(b) prohibits the exercise of supplemental jurisdiction over plaintiff's third-party claim for indemnification, in event insurance policy was rescinded pursuant to counterclaim against plaintiff, against third party whose misrepresentations caused such rescission).

n105. One court has suggested, in obiter dictum, that section (b) may abrogate the complete diversity rule. Stromberg Metal Works v. Press Mech., Inc., 77 F.3d 928, 931-32 (7th Cir. 1996) (holding that 1367(a) confers supplemental jurisdiction over diversity plaintiff's claim that fell below the minimum amount but was closely related to another plaintiff's above-minimum claim; also observing that "supplemental jurisdiction has the potential to move from complete to minimal diversity ... 1367(b) does not block adding an additional plaintiff with a closely related claim against the defendants who are already in the federal forum").

n106. 51 F.3d 524 (5th Cir. 1995).

n107. In re Abbott Labs, 51 F.3d 524, 529 (5th Cir. 1995).

n108. Abbott, 51 F.3d at 528. The court also held that it was an abuse of discretion to decline to exercise supplemental jurisdiction under 1367(c). Id. at 529-30.

n109. The absence of such discussion is especially puzzling because the court did not dispute that the case presented novel and complex issues of state law. If that is so, it would seem to be an encroachment upon the authority of state courts to adjudicate unsettled, complicated state-law issues for a federal court to arrogate that authority to itself.

n110. In Abbott, the plaintiff filed suit in state court and defendant removed it to federal court. The Fifth Circuit held such removal was proper because the district court had original jurisdiction over the named plaintiffs' claims and supplemental jurisdiction over the class claims. Abbott, 51 F.3d at 525.

n111. 160 F.3d 631 (10th Cir. 1998).

n113. Leonhardt, 160 F.3d at 640-41.


n115. See supra notes 22-24 and accompanying text.

n116. 77 F.3d 928 (7th Cir. 1996).

n117. Stromberg Metal Works v. Press Mech., Inc., 77 F.3d 928, 931 (7th Cir. 1996).

n118. Stromberg, 77 F.3d at 931.

n119. Id.

n120. 166 F.3d 214 (3d Cir. 1999).


n122. Meritcare, 166 F.3d at 222. This observation echoes Freer's criticism that 1367(b) unduly restricts the ability of plaintiffs placed in a defensive posture to assert responsive claims. See Freer, 40 Emory L.J. at 446, 462-64, 474-80. Unlike Freer, however, the Meritcare court used this apparent anomaly to justify resort to legislative history to resolve the ambiguity. Meritcare, 166 F.3d at 222.

n123. Meritcare, 166 F.3d at 222. The court also asserted that even if the statute were unambiguous, a literal application of the text would be so obviously contrary to Congress' intent that consulting the legislative history would still be justified. Id.
Yet another conflict has arisen concerning the legal certainty test. A long-established rule in diversity cases prior to the statute was that a plaintiff who demands relief in excess of the statutory minimum amount in controversy meets that requirement unless it is certain as a matter of law that she cannot recover that amount. St. Paul Mercury, 303 U.S. at 289. Under this legal certainty test, the district court must retain jurisdiction, even if, during the course of the litigation, dismissal of part of plaintiff's claims drops the remaining claims below the minimum amount. In Shanaghan v. Cahill, however, the Fourth Circuit found that 1367 superseded the latter part of the legal certainty test. The court held that, if dismissal of one claim reduced the amount in controversy on the plaintiff's remaining claims below the minimum, the district court had discretion, rather than a mandatory obligation, to exercise jurisdiction over the remaining, below-minimum claims. Shanaghan v. Cahill, 58 F.3d 106, 109, 112-13 (4th Cir. 1995). Despite Congress' express intent to restore pre-Finley rules of supplemental jurisdiction - including the legal certainty test - the court reasoned that it was bound by the plain language of sections 1367(a) and (b): "The only possible interpretation of this language is that state law claims between diverse parties that do not, however, satisfy the jurisdictional amount requirements appended to diversity actions are cognizable under supplemental jurisdiction." Id. at 109. Once such jurisdiction attached initially, the court asserted that 1367(c) afforded "wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished." Id. at 110. The court acknowledged that, under the law prior to Finley and 1367, retention of jurisdiction in such cases would have been mandatory, but such a strict rule could not be reconciled with the plain language of 1367 and therefore must be replaced with a rule of discretion. Id. The court also asserted that this was sound policy. Mandatory retention of jurisdiction over below-minimum claims "fails to respect the congressional purpose in raising the jurisdictional amount to the fifty thousand dollars [now $ 75,000] threshold. ... in an effort to prevent state law claims from landing in federal court." Id. at 111. Accord Stevenson v. Severs, 158 F.3d 1332, 1334 (D.C. Cir. 1998).

The Second Circuit created a conflict with Shanaghan by its decision in Wolde-Meskel v. Vocational Instruction Project Community Services, Inc., 166 F.3d 59 (2d Cir. 1999). The Second Circuit asserted that the Shanaghan court had confused state-law claims related to claims within a district court's original jurisdiction (and thus covered by 1367 and heard at the discretion of the court under section (c)) and state-law claims that have been aggregated to satisfy the requisite minimum amount. In the latter situation - of which both Shanaghan and Wolde-Meskel are examples - the claims are not treated as supplemental to each other, but as a constituent whole that falls within original diversity jurisdiction. As such, supplemental jurisdiction is irrelevant and does not disturb the preexisting rule that, once diversity jurisdiction attaches, the court must retain it even if dismissal of one or more of the aggregated claims reduces the amount in controversy below the minimum. Id. at 64-65.

Rowe, 40 Emory L.J. at 959-961.


Shanaghan, the other case following a strict interpretation approach, neither expands nor limits the scope of diversity jurisdiction, but merely makes retention of jurisdiction over below-minimum claims discretionary rather than mandatory. Shanaghan, 58 F.3d at 108-13.
\textit{n128.} The Stromberg court was explicit about this policy preference: "It is two for the price of one: to decide either plaintiff's claim is to decide both, and neither private interests nor judicial economy would be promoted by resolving Stromberg's claim in federal court while trundling Comfort Control [the plaintiff whose claim was below-minimum] off to state court to get a second opinion." Stromberg Metal Works v. Press Mech., Inc., 77 F.3d 928, 931 (7th Cir. 1996).


\textit{n130.} The text of the ALI proposal is as follows:

1367. Supplemental jurisdiction

(a) Definitions. As used in this section:

(1) A "freestanding" claim means a claim for relief that is within the original jurisdiction of the district courts independently of this section.

(2) A "supplemental" claim means a claim for relief, not itself freestanding, that is a part of the same case or controversy under Article III of the Constitution as a freestanding claim that is asserted in the same civil action.

(3) "Asserted in the same pleading" means that the relevant claims have been joined either in the pleading as originally filed with the court, or by amendment of the pleading, or by the pleader's assertion of a claim against a third party impleaded in response to the pleading, or by order of the court reformulating the pleading, or by the assertion of the claim or defense of an intervenor who seeks to be treated as if the pleading had joined a claim by or against that intervenor.

(4) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(b) General grant of supplemental jurisdiction. Except as provided by subsection (c) or as otherwise expressly provided by statute, a district court shall have original jurisdiction of all supplemental claims, including claims that involve the joinder or intervention of additional claiming or defending parties.

(c) Restriction of supplemental jurisdiction in diversity litigation. When the jurisdiction of a district court over a supplemental claim depends upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title, the court shall have jurisdiction of the supplemental claim only if it -

(1) is asserted representatively by or against a class of additional unnamed parties; or

(2) would be a freestanding claim on the basis of section 1332 of this title but for the value of the claim; or

(3) has been joined to the action by the intervention of a party whose joinder is not
indispensable to the litigation of the action.

(d) Discretion to decline to exercise jurisdiction. This section does not permit a district court to decline to exercise jurisdiction of any freestanding claim except as provided by subsection (e). A district court may decline to exercise jurisdiction of a supplemental claim if:

(1) all freestanding claims that are the basis for its jurisdiction of a supplemental claim have been dismissed before trial of that claim; or

(2) the supplemental claim raises a novel or complex issue of State law that the district court need not otherwise decide; or

(3) the exercise of supplemental jurisdiction would substantially alter the character of the litigation; or

(4) in exceptional circumstances, there are other compelling reasons for declining supplemental jurisdiction.

(e) Joinder of additional defendant after removal. If after removal of a civil action the plaintiff moves to amend the complaint to join a supplemental claim against an additional defendant that is subject to the jurisdictional restriction of subsection (c), the district court may either deny such joinder, or permit such joinder and remand the entire action to the State court from which the action was removed, or permit such joinder without remanding the action. In exercising its discretion the district court shall consider judicial economy, convenience, and fairness to litigants, as well as the reasons permitting supplemental jurisdiction to be declined under subsection (d). If the district court decides to permit such joinder without remanding the action, it may exercise supplemental jurisdiction of the claim so joined as provided by subsections (b) and (d) without regard to the jurisdictional restriction of subsection (c).

(f) Disposition of supplemental claims; tolling of limitations period. When a district court lacks or declines to exercise supplemental jurisdiction, the court shall dismiss the supplemental claim unless it was joined before removal of the action, in which case the district court shall remand the claim to the State court from which it was removed. The period of limitations for the following claims shall be tolled until 30 days after their dismissal becomes final, unless the applicable law provides for a longer tolling period:

(1) any supplemental claim dismissed because the district court lacks or declines to exercise supplemental jurisdiction; and

(2) any other claim in the same civil action that is voluntarily dismissed as the result of a notice or stipulation of dismissal, or motion for order of dismissal, filed within 30 days after:

(A) the dismissal or remand of a supplemental claim because the district court lacks or declines to exercise supplemental jurisdiction; or

(B) the court's decision under subsection (e) to refuse to permit the joinder of a supplemental claim against an additional defendant.


n132. Oakley, 74 Ind. L.J. at 26, 41-42.

n133. Id. at 26.

n134. See supra note 130.


n136. Oakley, 74 Ind. L.J. at 38.

n137. Id. at 36 (citing Federal Judicial Code Revision (Tentative Draft No. 2, 1998)).

n138. Id. at 44.

n139. Id.

n140. The ALI proposal also contains provisions for discretionary refusal to exercise supplemental jurisdiction, supplemental jurisdiction over removed claims, and tolling statutes of limitations. Supra, note 130, sections (d), (e) and (f).

n141. Cf. Stromberg Metal Works v. Press Mech., Inc., 77 F.3d 928, 931 (7th Cir. 1996) ("To the extent practical considerations enter in, it is hard to avoid remarking that allowing thousands of small claims into federal court via the class action device is a substantially greater expansion of jurisdiction than is allowing a single pendent party.").

n142. See supra notes 42-56 and accompanying text.


n145. Freer, 74 Ind. L.J. at 18-21. For a discussion of Ben-Hur, see supra notes 27-31 and accompanying text.

n146. See supra notes 27-31 and accompanying text.

n147. If incomplete reasoning were a sufficient reason for congressional abrogation, then Strawbridge v. Curtiss, 7 U.S. 267 (1806) should have been superseded long ago. Chief Justice Marshall's opinion gives no justification for the complete diversity rule, yet the decision has stood for nearly two centuries. Similarly, if internal inconsistency were a sufficient reason for Congress to act, the well-pleaded complaint rule of Tenn. v. Union & Planters' Bank, 152 U.S. 454 (1894) should have been superseded long ago. The holding that federal question jurisdiction exists only if the plaintiffs' cause of action is based on federal law is inconsistent with the statutory language that such jurisdiction exists if the "civil action" - which would include defenses based on federal law - arises under federal law. 28 U.S.C. 1331 (1994). Congress, however, has not disturbed the rule for nearly two centuries.

n148. The third analytical critique of Zahn advanced twenty-five years ago - that the decision would perpetuate confusion in determining which class action claims were "joint" rather than "distinct," is not echoed by proponents of the ALI proposal. The most likely reason for this omission is that few, if any, modern class actions involve "joint" claims, so the predicted confusion is largely academic. See supra notes 45-47 and accompanying text.

n149. Oakley, 74 Ind. L.J. at 63.

n150. Even Professor Freer, the most avid proponent of the ALI proposal, asserts "Presumably, there will be few cases in which the representative claims more than $ 75,000 and the class members have 'small claims'." Freer, 74 Ind. L.J. at 21.

n151. Hypothetically, an attorney might perceive the state forum to be so hostile or inadequate that she would prefer to split the class litigation so as to give at least the big claim class the advantages of the federal forum. Such a scenario is highly unlikely, however, because state courts have proven to be quite hospitable to class actions in the years since Zahn. See infra notes 161-70 and accompanying text.

n152. Oakley, 74 Ind. L.J. at 63.
Even though the opt-out provision only applies to class actions certified under Fed. R. Civ. P. 23 (b)(3), class actions for money damages typically are certified under (b)(3), so the opt-out provision would apply in a diversity action for money damages.

See supra note 51 and accompanying text.

As of 1992, forty-one states had class action rules modeled on Federal Rule 23. Of those forty-one states, twenty adopted their modern rule after Zahn was decided. Id.


Homburger, 25 Buff. L. Rev. at 439.

See Newberg & Conte, supra note 155, at 13-143 app. 13-1.

See supra notes 52-54 and accompanying text.

See, e.g., Geller v. Tabas, 462 A.2d 1078 (Del. 1983); Miner v. Gillette, Co., 428 N.E.2d 478 (Ill. 1981); Katz v. NVF Co., 462 N.Y.S.2d 975 (N.Y. 1983); Schlosser v. Allis-Chalmers Corp, 271 N.W.2d 879 (Wis. 1978). Perhaps the best evidence that state courts have been receptive to class actions is the movement in Congress to pass legislation channeling such actions into federal court on the supposed ground that state courts have been overly generous to class actions. See infra note 182; see generally supra note 51 and accompanying text (noting that Zahn caused widespread exploration of class actions in state courts).


n164. Shutts v. Phillips Petroleum Co., 679 P.2d 1159, 1170-71 (Kan. 1984), cert. granted, 469 U.S. 879 (1984), and aff'd in part, rev'd in part, 472 U.S. 797 (1985). The class originally consisted of over 33,000 members. Some 3,400 opted out and another 1,500 could not be located and were excluded. Thus, the final class included over 28,000 members. Id. at 1165.

n165. Id. at 1183.


n167. Phillips, 472 U.S. at 822. The claims that were unrelated to Kansas were those of class members who neither resided in Kansas nor had royalty land located in Kansas. Id.


n171. Freer, 74 Ind. L.J. at 20. See also Howard P. Fink, Supplemental Jurisdiction - Take It to the Limit!, 74 Ind. L.J. 161, 166 (1998) (suggesting that state judges "may have little or no expertise in handling massive litigation").


n173. Phillips, 679 P.2d at 1165-66. Furthermore, the sources cited by Professor Fink to support his argument that state judges lack expertise actually contradict his argument. See Fink, 74 Ind. L.J. at 166 n.30. Fink cites the case of Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996), as an example of a poorly handled class action. One of his own sources concluded, however, that the case was correctly decided, and that state courts should have power to approve global class action settlements, including those that release claims exclusively within federal jurisdiction. Marcel Kahan & Linda Silberman, Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims, 1996 Sup. Ct. Rev. 219, 230 (1996). Two other sources cited by Professor Fink are critical of...

+n174. See supra notes 161-66 and accompanying text.

+n175. Danas, 49 Emory L.J. at 1323-31.

+n176. Deborah R. Hensler et al., The RAND Institute for Criminal Justice, Class Action Dilemmas: Pursuing Public Goals for Private Gain (1999), at MR-969/1-ICJ.

+n177. U.S. Const. art. III 1.


+n179. Danas, 49 Emory L.J. at 1342-44.

+n180. Freer, 74 Ind. L.J. at 166.


\footnote{185.} Avery, 746 N.E.2d at 1247.

\footnote{186.} Id.

\footnote{187.} Id. at 1247-49.

\footnote{188.} Id. at 1259.

\footnote{189.} Id. at 1261. The court ruled that the portion of the judgment requiring State Farm to disgorge its profits duplicated an award of specification damages. Id. This ruling did not disturb the trial findings that State Farm had misled its policyholders.

\footnote{190.} Avery, 746 N.E.2d at 1258.


\footnote{192.} Fallon, supra note 191, at 1523 (summarizing views expressed by Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928)).

\footnote{193.} Id. (summarizing the views of Hessel E. Yntema & George H. Jaffin, Preliminary Analysis of Concurrent Jurisdiction, 79 U. Pa. L. Rev. 869, 873-76 (1931)).

\footnote{194.} Id. at 1523-24 (summarizing the views of Jerome Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Prob. 3, 22-28 (1948)).
n195. See supra notes 52-55 and accompanying text.
To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 27, 2001

Mr. GOODLATTE (for himself, Mr. BOUCHER, Mr. SENSENBRENNER, Mr. MORAN of Virginia, Mr. ARMSEY, Mr. STENHOLM, Mr. HYDE, Mr. DOOLEY of California, Mr. BRYANT, Mr. HOLDEN, Mr. COX, Mr. CHABOT, Mr. CRAMER, Mr. OXLEY, Mr. SUNUNU, Mr. BACHUS, Mr. BARTLETT of Maryland, and Mr. GOSS) introduced the following bill; which was referred to the Committee on the Judiciary

MARCH 7, 2002

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on June 27, 2001]

A BILL

To amend the procedures that apply to consideration of
interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes.

Be it enacted by the Senate and House of Representa­tives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CON­TENTS.

(a) SHORT TITLE.—This Act may be cited as the “Class Action Fairness Act of 2002”.

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.
Sec. 2. Findings and purposes.
Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.
Sec. 4. Federal district court jurisdiction of interstate class actions.
Sec. 5. Removal of interstate class actions to Federal district court.
Sec. 6. Appeals of class action certification orders.
Sec. 7. Effective date.
SEC. 2. FINDINGS AND PURPOSES.
(a) FINDINGS.—The Congress finds as follows:

(1) Class action lawsuits are an important and valuable part of our legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have harmed class members with legitimate claims and defendants that have acted responsibly, and that have thereby undermined public respect for our judicial system.

(3) Class members have been harmed by a number of actions taken by plaintiffs' lawyers, which provide little or no benefit to class members as a whole, including—

(A) plaintiffs' lawyers receiving large fees, while class members are left with coupons or other awards of little or no value;

(B) unjustified rewards being made to certain plaintiffs at the expense of other class members; and

(C) the publication of confusing notices that prevent class members from being able to fully understand and effectively exercise their rights.
(4) Through the use of artful pleading, plaintiffs are able to avoid litigating class actions in Federal court, forcing businesses and other organizations to defend interstate class action lawsuits in county and State courts where—

(A) the lawyers, rather than the claimants, are likely to receive the maximum benefit; 

(B) less scrutiny may be given to the merits of the case; and 

(C) defendants are effectively forced into settlements, in order to avoid the possibility of huge judgments that could destabilize their companies.

(5) These abuses undermine our Federal system and the intent of the framers of the Constitution in creating diversity jurisdiction, in that county and State courts are—

(A) handling interstate class actions that affect parties from many States; 

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and 

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.
(6) Abusive interstate class actions have harmed society as a whole by forcing innocent parties to settle cases rather than risk a huge judgment by a local jury, thereby costing consumers billions of dollars in increased costs to pay for forced settlements and excessive judgments.

(b) PURPOSES.—The purposes of this Act are—

(1) to assure fair and prompt recoveries for class members with legitimate claims;
(2) to protect responsible companies and other institutions against interstate class actions in State courts;
(3) to restore the intent of the framers of the Constitution by providing for Federal court consideration of interstate class actions; and
(4) to benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) IN GENERAL.—Part V is amended by inserting after chapter 113 the following:

“CHAPTER 114—CLASS ACTIONS

“Sec.
“1711. Judicial scrutiny of coupon and other noncash settlements.
“1712. Protection against loss by class members.
“1713. Protection against discrimination based on geographic location.
"§1711. Judicial scrutiny of coupon and other noncash settlements

"The court may approve a proposed settlement under which the class members would receive noncash benefits or would otherwise be required to expend funds in order to obtain part or all of the proposed benefits only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.

§1712. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member outweigh the monetary loss.

§1713. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.
§1714. Prohibition on the payment of bounties

(a) IN GENERAL.—The court may not approve a proposed settlement that provides for the payment of a greater share of the award to a class representative serving on behalf of a class, on the basis of the formula for distribution to all other class members, than that awarded to the other class members.

(b) RULE OF CONSTRUCTION.—The limitation in subsection (a) shall not be construed to prohibit any payment approved by the court for reasonable time or costs that a person was required to expend in fulfilling his or her obligations as a class representative.

§1715. Clearer and simpler settlement information

(a) PLAIN ENGLISH REQUIREMENTS.—Any court with jurisdiction over a plaintiff class action shall require that any written notice concerning a proposed settlement of the class action provided to the class through the mail or publication in printed media contain—

(1) at the beginning of such notice, a statement in 18-point Times New Roman type or other functionally similar type, stating 'LEGAL NOTICE: YOU ARE A PLAINTIFF IN A CLASS ACTION LAWSUIT AND YOUR LEGAL RIGHTS ARE AFFECTED BY THE SETTLEMENT DESCRIBED IN THIS NOTICE.';
“(2) a short summary written in plain, easily understood language, describing—

“(A) the subject matter of the class action;

“(B) the members of the class;

“(C) the legal consequences of being a member of the class;

“(D) if the notice is informing class members of a proposed settlement agreement—

“(i) the benefits that will accrue to the class due to the settlement;

“(ii) the rights that class members will lose or waive through the settlement;

“(iii) obligations that will be imposed on the defendants by the settlement;

“(iv) the dollar amount of any attorney’s fee class counsel will be seeking, or if not possible, a good faith estimate of the dollar amount of any attorney’s fee class counsel will be seeking; and

“(v) an explanation of how any attorney’s fee will be calculated and funded; and

“(E) any other material matter.

“(b) TABULAR FORMAT.—Any court with jurisdiction over a plaintiff class action shall require that the information described in subsection (a)—
“(1) be placed in a conspicuous and prominent location on the notice;

“(2) contain clear and concise headings for each item of information; and

“(3) provide a clear and concise form for stating each item of information required to be disclosed under each heading.

“(c) TELEVISION OR RADIO NOTICE.—Any notice provided through television or radio (including transmissions by cable or satellite) to inform the class members in a class action of the right of each member to be excluded from the class action or a proposed settlement of the class action, if such right exists, shall, in plain, easily understood language—

“(1) describe the persons who may potentially become class members in the class action; and

“(2) explain that the failure of a class member to exercise his or her right to be excluded from a class action will result in the person’s inclusion in the class action or settlement.

§ 1716. Definitions

“In this chapter—

“(1) CLASS ACTION.—The term ‘class action’ means any civil action filed in a district court of the United States pursuant to rule 23 of the Federal
Rules of Civil Procedure or any civil action that is
removed to a district court of the United States that
was originally filed pursuant to a State statute or
rule of judicial procedure authorizing an action to be
brought by one or more representatives on behalf of a
class.

"(2) CLASS COUNSEL.—The term ‘class counsel’
means the persons who serve as the attorneys for the
class members in a proposed or certified class action.

"(3) CLASS MEMBERS.—The term ‘class mem-
bers’ means the persons who fall within the definition
of the proposed or certified class in a class action.

"(4) PLAINTIFF CLASS ACTION.—The term
‘plaintiff class action’ means a class action in which
class members are plaintiffs.

"(5) PROPOSED SETTLEMENT.—The term ‘pro-
posed settlement’ means an agreement that resolves
claims in a class action, that is subject to court ap-
proval and that, if approved, would be binding on the
class members.”.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The
table of chapters for part V is amended by inserting after
the item relating to chapter 113 the following:

"114. Class Actions ..................................................... 1711".
SEC. 4. FEDERAL DISTRICT COURT JURISDICTION OF INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.—Section 1332 is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

“(d)(1) In this subsection—

“(A) the term ‘class’ means all of the class members in a class action;

“(B) the term ‘class action’ means any civil action filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons on behalf of a class;

“(C) the term ‘class certification order’ means an order issued by a court approving the treatment of a civil action as a class action; and

“(D) the term ‘class members’ means the persons who fall within the definition of the proposed or certified class in a class action.

“(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy ex-
ceeds the sum or value of $2,000,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) Paragraph (2) shall not apply to any civil action in which—

"(A)(i) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed; and

"(ii) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed;

"(B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(C) the number of proposed plaintiff class members is less than 100.
“(4) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs.

“(5) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

“(6)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based on a failure to satisfy the requirements of rule 23 of the Federal Rules of Civil Procedure.

“(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal court or filing an action in State court, except that any such action filed in State court may be removed to the appropriate district court if it is an action of which the district courts of the United States have original jurisdiction.

“(C) In any action that is dismissed under this paragraph and is filed by any of the original named plaintiffs therein in the same State court venue in which the dismissed action was originally filed, the limitations periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The
limitations periods on any claims that were asserted in a
class action dismissed under this paragraph that are subse-
quently asserted in an individual action shall be deemed
tolled for the period during which the dismissed action was
pending.

"(7) Paragraph (2) shall not apply to any class action
brought by shareholders that solely involves a claim that
relates to—

"(A) a claim concerning a covered security as
defined under section 16(f)(3) of the Securities Act of
1933 and section 28(f)(5)(E) of the Securities Ex-
change Act of 1934;

"(B) the internal affairs or governance of a cor-
poration or other form of business enterprise and
arises under or by virtue of the laws of the State in
which such corporation or business enterprise is in-
corporated or organized; or

"(C) the rights, duties (including fiduciary du-
ties), and obligations relating to or created by or pur-
suant to any security (as defined under section
2(a)(1) of the Securities Act of 1933 and the regula-
tions issued thereunder).

"(8) For purposes of this subsection and section 1453
of this title, an unincorporated association shall be deemed
to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

"(9) For purposes of this section and section 1453 of this title, a civil action that is not otherwise a class action as defined in paragraph (1)(B) of this subsection shall nevertheless be deemed a class action if—

"(A) the named plaintiff purports to act for the interests of its members (who are not named parties to the action) or for the interests of the general public, seeks a remedy of damages, restitution, disgorgement, or any other form of monetary relief, and is not a State attorney general; or

"(B) monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact.

In any such case, the persons who allegedly were injured shall be treated as members of a proposed plaintiff class and the monetary relief that is sought shall be treated as the claims of individual class members. The provisions of paragraphs (3) and (6) of this subsection and subsections (b)(2) and (d) of section 1453 shall not apply to civil actions described under subparagraph (A). The provisions of paragraph (6) of this subsection, and subsections (b)(2) and
(d) of section 1453 shall not apply to civil actions described under subparagraph (B)."

(b) CONFORMING AMENDMENTS.—

(1) Section 1335(a)(1) is amended by inserting "(a) or (d)" after "1332".

(2) Section 1603(b)(3) is amended by striking "(d)" and inserting "(e)"

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

"§ 1453. Removal of class actions

"(a) DEFINITIONS.—In this section, the terms ‘class’, ‘class action’, ‘class certification order’, and ‘class member’ have the meanings given these terms in section 1332(d)(1).

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with this chapter, without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.
"(c) WHEN REMOVABLE.—This section shall apply to any class action before or after the entry of a class certification order in the action, except that a plaintiff class member who is not a named or representative class member of the action may not seek removal of the action before an order certifying a class of which the plaintiff is a class member has been entered.

"(d) PROCEDURE FOR REMOVAL.—The provisions of section 1446 relating to a defendant removing a case shall apply to a plaintiff removing a case under this section, except that in the application of subsection (b) of such section the requirement relating to the 30-day filing period shall be met if a plaintiff class member files notice of removal within 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action.

"(e) REVIEW OF ORDERS REMANDING CLASS ACTIONS TO STATE COURTS.—The provisions of section 1447 shall apply to any removal of a case under this section, except that, notwithstanding the provisions of section 1447(d), an order remanding a class action to the State court from which it was removed shall be reviewable by appeal or otherwise.

"(f) EXCEPTION.—This section shall not apply to any class action brought by shareholders that solely involves—
“(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

“(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

“(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).”.

(b) REMOVAL LIMITATION.—Section 1446(b) is amended in the second sentence by inserting “(a)” after “section 1332”.

(c) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

“1453: Removal of class actions.”.

SEC. 6. APPEALS OF CLASS ACTION CERTIFICATION ORDERS.

(a) IN GENERAL.—Section 1292(a) is amended by inserting after paragraph (3) the following:
“(4) Orders of the district courts of the United States granting or denying class certification under rule 23 of the Federal Rules of Civil Procedure, if notice of appeal is filed within 10 days after entry of the order.”.

(b) DISCOVERY STAY.—All discovery and other proceedings shall be stayed during the pendency of any appeal taken pursuant to the amendment made by subsection (a), unless the court finds upon the motion of any party that specific discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of the enactment of this Act.