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Federal Jurisdictional Amount and Rule 20 Joinder of Parties: Aggregation of Claims

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The Federal Jurisdictional Amount and Rule 20 Joinder of Parties: Aggregation of Claims

I. INTRODUCTION

By statute, federal district courts have original jurisdiction over actions based on the presence of a federal question[1] or diversity of citizenship[2] only if the matter in controversy exceeds $10,000. With some exceptions,[3] courts in the past construed this to mean that *each* party to an action must satisfy the amount requirement before the district court could properly exercise jurisdiction.[4] If several plaintiffs were permitted to join their claims in a common action, each was allowed to aggregate the amounts of all claims against the defendant which *he* possessed[5] in order to attain the jurisdictional amount. He was not, however, allowed to aggregate his claims with those of other plaintiffs[6] or to rely upon satisfaction of the statute by another plaintiff.[7] Those who could not meet these requirements were dismissed and forced to pursue their remedies in state courts,

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

28 U.S.C. § 1331(a) (1964).

2. The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
   (1) citizens of different States;
   (2) citizens of a State, and foreign states or citizens or subjects thereof; and
   (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 1332(a) (1964).

3. *See* note 54 *infra*, and accompanying text.

4. *See* notes 39-53 *infra*; 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 534 (Wright ed. 1961); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.97 (2d ed. 1964); C. WRIGHT, FEDERAL COURTS § 36, at 102 (1963).

5. Crawford v. Neal, 144 U.S. 585 (1892); Gray v. Blight, 112 F.2d 696 (10th Cir. 1940); Cashmere Valley Bank v. Pacific Fruit & Produce Co., 33 F. Supp. 946 (E.D. Wash. 1940). This is consistent with the language of Rule 18 of the Federal Rules of Civil Procedure, which provides that "a party . . . may join . . . as many claims . . . as he has against an opposing party." FED. R. CIV. P. 18(a).

6. Pinel v. Pinel, 240 U.S. 594 (1916).

7. Note that the term "aggregation" is a misnomer in the latter context. The question is not whether the claims of *A* and *B* can be aggregated, but whether *A*'s satisfaction of the requirement can be used by *B*. However, as the courts have applied the term to both situations it will be similarly applied in this Note.

regardless of whether other plaintiffs were retained in federal court.[8]

The inflexible results of the early jurisdictional amount cases created little controversy, since common law joinder was rare. The adoption of Rule 20 of the Federal Rules of Civil Procedure, however, provided a new and comparatively liberal approach to joinder of parties, permitting it whenever the parties possessed claims growing out of a unitary or serial transaction or occurrence and involving common questions of law or fact.[9] Past judicial construction of the amount in controversy statute, requiring that each party involved in the litigation show the requisite amount, now appears to frustrate the Rule's goal of litigating all issues arising from the same transaction or occurrence in a single action, regardless of the number of parties involved. Conversely, any attempt to achieve this goal must ultimately conflict with the strict judicial construction of the jurisdictional amount requirement. The question therefore becomes which approach should prevail.

Since a growing number of courts are becoming disenchanted with the traditional rules against aggregation and are placing increased emphasis on the liberal purposes of the Rules,[10] the substance of the competing philosophies should be understood. This Note will discuss the basic premises of both the joinder Rule and the jurisdictional amount statute as well as the judicial treatment of the conflict thus far. Based on this discussion, suggestions for a reasonable solution to the conflict will be proposed.

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8. Aggregation difficulties may also rise in multiple-defendant contexts, as where one or more plaintiffs bring an action against two or more defendants. However, since the variation is generally of little substantive import, a multiple-plaintiff model shall be used throughout.

9.
> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. . . . A plaintiff . . . need not be interested in obtaining . . . all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief . . . .

FED. R. CIV. P. 20(a). *See also* FED. R. CIV. P. 23 (class actions).

10. *See, e.g.*, Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960); Note, *The Federal Jurisdictional Amount Requirement and Joinder of Parties Under the Federal Rules of Civil Procedure*, 27 IND. L. REV. 199 (1952).

II. THE FEDERAL JURISDICTIONAL AMOUNT

A. The Policy

1. *The Federalism Rationale*

One of the traditional rationales for the requirement of a jurisdictional amount is that it preserves a distinction between the jurisdictions of federal and state courts, thereby protecting the independence of the latter.[11] During the debate over the judiciary clause of the proposed Constitution,[12] there was fierce controversy over the establishment of a federal judiciary and its proper jurisdiction.[13] Those who opposed a broad federal system sought to include in the judiciary clause a jurisdictional amount requirement[14] in order to "prevent an extension of the federal jurisdiction, which may, and in all probability will, swallow up the state jurisdictions. . . ."[15] In order to save the clause, proponents of the federal judiciary agreed to this requirement,[16] but succeeded in making the amount statutory rather than con-

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11. It was intended both to reduce the danger of encroachment on state court jurisdiction by the federal judiciary and to serve as a compromise between those who desired no federal judiciary and those who wished to create a federal judiciary possessing all powers permissible under the Constitution. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 53-54 (1923).

12. U.S. Const. art. III, § 1, provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . . Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

13. *See* 1 W. Crosskey, Politics and the Constitution in the History of the United States 610 (1953); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928); Warren, *supra* note 11, at 49.

14. 2 J. Elliot, Debates 550-51 (1891).

15. *Id.* The Massachusetts convention submitted the following proposal:

> . . . [t]he federal judicial powers shall not extend to any actions between citizens of different states, when the matter in dispute . . . is not of the value of fifteen hundred dollars at least.

1 J. Elliot, Debates 323 (1891). Maryland made a similar proposal. 2 J. Elliot, Debates 550-51 (1891).

16. Friendly, *supra* note 13, at 501.

stitutional,[17] and in reducing its size. Thus, although clearly not required by the terms of the Constitution,[18] the Judiciary Act of 1789[19] contained a $500 jurisdictional amount requirement for original jurisdiction.

The interrelationship between notions of federalism and the jurisdictional amount requirement has continued to find expression.[20] The author of the most recent jurisdictional amount increase testified during committee hearings that the federal courts must be restricted from leaving to "the government of the States and localities nothing more than the hollow shells of lost liberty."[21]

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17. The evidence shows that a jurisdictional amount was included in the original draft of the Act. F. WHARTON, STATE TRIALS OF THE UNITED STATES 38 (1849).

18. *Cf.* Turner v. Bank of North America, 4 U.S. (4. Dall.) 8 (1799), where the Court, speaking of Congressional restrictions on federal jurisdiction, said:

> The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant.

19. 1 Stat. 73, 79 (1789).

20. In 1801 when the Federalists drastically altered the federal judicial system to give federal courts more nearly their full constitutional authority, the jurisdictional amount was retained. 2 Stat. 89 (1801). The amount was increased the following year when the Federalist alterations were eliminated. 2 Stat. 132 (1802). *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 21 (1928); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 185 (1928). The amount was increased to $2,000 in 1887, 24 Stat. 552 (1887), $3,000 in 1911, 36 Stat. 1091 (1911), and to the present $10,000 in 1958, 28 U.S.C. §§ 1331, 1332 (1964).

21. *Hearings Before Subcomm. No. 3 on Jurisdiction of Federal Courts Concerning Diversity of Citizenship of the House Comm. on the Judiciary*, 85th Cong., 1st Sess. ser. 5, at 3 (1957) [hereinafter cited as *1957 Hearing*]. The committee which studied the possibility of change in the jurisdictional amount rationalized the increase by stating that if $3,000 was the smallest amount considered "substantial" in 1911, and the consumer price index had increased by 152% since 1911, $7,500 was more nearly "substantial" in 1958. S. REP. No. 1830, REPORT OF COMMITTEE ON JURISDICTION AND VENUE, 85th Cong., 2d Sess. 21 (1958) [hereinafter cited as SENATE]; H.R. REP. No. 1706, 85th Cong., 2d Sess., 18 (1958) [hereinafter cited as HOUSE]. The committee's recommendation was accepted, but the amount was increased to $10,000. *See also* 104 CONG. REC. 12687 (1958), where Congressman Keating explained the increase as an attempt to equate $3,000 in 1911 with an amount in 1958, thus retaining the same Congressional intent as in prior years.

The Supreme Court has also taken a strong position on the relationship between the jurisdictional amount and federalism:

> [T]he jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the statute calls for its strict construction. The power reserved to the states, under the constitution, to provide for the determination of controversies in their courts may be restricted only by the actions of Congress in conformity to the judiciary sections of the Constitution. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.[22]

Thus, despite attacks by the commentators,[23] neither Congress nor the Courts have abandoned their belief in the role of the jurisdictional amount as a device by which a political balance between federal and state judicial powers can be achieved.[24]

2. *The Log-Jam Rationale*

Although originally conceived as a technique of safeguarding state autonomy, the jurisdictional amount has recently been cited as a method of stabilizing or even reducing the backlog of

22. Healy v. Ratta, 292 U.S. 263 (1934). *See also* Gay v. Ruff, 292 U.S. 25, 36-37 (1934); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922); Elgin v. Marshall, 106 U.S. 578, 580 (1882). Chief Justice Warren, addressing the American Law Institute regarding the 1958 jurisdictional changes, stated, "[i]t is essential that we achieve a proper jurisdictional balance between the Federal and State court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism." 1959 AMERICAN LAW INSTITUTE—PROCEEDINGS 27, 33.

23. *See, e.g.,* Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure,* 45 YALE L.J. 393, 416-17 (1936); Note, *supra* note 10, at 200.

24. *Cf.* Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 CORN. L.Q. 499, 500 (1928). In those cases where Congress has recognized the need for direct federal jurisdiction, the requirement of a jurisdictional amount has been expressly eliminated. This has occurred so frequently in cases based on the existence of a federal question that aggregation problems arise almost exclusively in the context of diversity of citizenship. *See, e.g.,* 28 U.S.C. § 1337, cases arising under any Act of Congress regulating commerce; § 1343, civil rights cases; § 1357, personal injuries giving rise to claims under federal law. Moreover, Congress has reacted to individual jurisdictional amount decisions which it thought inequitable. *See* 50 U.S.C. § 459(d) (1964), giving federal courts jurisdiction over actions by servicemen to retain civilian jobs, regardless of jurisdictional amount. The statute was enacted in response to Christner v. Poudre Valley Cooperative Ass'n, 134 F. Supp. 115 (D. Colo. 1955), which held that although plaintiff had a federal statutory right to retain his civilian position, the statute failed to give the federal courts jurisdiction in absence of the requisite jurisdictional amount.

cases in federal courts. The so-called log-jam rationale gained prominence in 1958 when Congress, in dealing with federal jurisdiction, became greatly concerned with the tremendous volume of cases the federal courts were being asked to handle.[25]

While the effect of the jurisdictional amount requirement on the number of cases brought in federal courts is undoubtedly one of its current justifications, several factors indicate that this rationale is not devoid of weaknesses. Congress itself has recognized the limited utility of the requirement as a device to reduce the volume of federal litigation. The committee recommending the increase in 1958 admitted it did not believe that "raising . . . the jurisdictional amount would appreciably lessen the load of work on the Federal courts."[26] Similarly, the author of the 1958 bill stated that when viewed as an attempt to reduce the federal caseload "such a bill isn't worth the paper it is written on."[27] Moreover, prior statistics showed that increase would have little effect,[28] and this indication proved true.[29] Further

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25. In a further effort to relieve the situation [the heavy increase in caseload] the Judicial Conference of the United States in 1950 undertook to study the overall problem of jurisdiction and venue and as a result made the following recommendations which are incorporated in the present legislation:

> (3) that the jurisdictional amount prescribed by sections 1331 and 1332 . . . be raised from $3,000 to $10,000.

SENATE 3; HOUSE 2-3.

26. SENATE 22; HOUSE 19.

27. *1957 Hearing* at 3. The optimistic language in the 1958 legislative history concerning the reduction of the federal case load was directed primarily at another change—that of limiting federal diversity jurisdiction over corporations by providing that a corporation should be deemed a citizen of both the state of its incorporation and its principal place of business:

> In adopting this legislation, the committee feels that it will bring the minimum amount in controversy up to a reasonable level by contemporary standards *and* that it will ease the workload of our Federal courts *by reducing the number of cases involving corporations which come into Federal district courts on the fictional premise that a diversity of citizenship exists.*

SENATE 3; HOUSE 3 (emphasis added). The optimism was the result of statistics indicating that in 1958, 62% of all diversity cases involved corporations. SENATE 13; HOUSE 10.

28. In 1877 the amount was raised from $500 to $2,000, but the volume of cases did not significantly decrease in subsequent years:

1876	11,366
1877	10,258
1878	11,501
1879	12,801

In 1911 the amount was raised to $3,000:

1910	10,618
1911	10,191
1912	12,992
1913	11,183

SENATE 23; HOUSE 20.

doubt is cast on the validity of the log-jam rationale by the general rule that the measure of the amount in controversy is simply the amount claimed by the plaintiff.[30] Although a challenge by the defendant will put the burden on plaintiff to show that the amount claimed is reasonable, the burden is easily satisfied.[31] Thus, unless Congress drastically raised the required amount, plaintiffs will usually be able to inflate their claims to meet the jurisdictional requirement.[32]

Despite the arguments discussed above, it is likely that raising the jurisdictional amount does have some effect on the volume of contract and other liquidated amount cases. It is clear, however, that, standing alone, this effect is inadequate to justify

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29.

Year	Federal Question	Diversity
1957	8,220	23,223
1958	8,992	25,709
1959	8,437	17,342
1960	9,207	17,048

Statistics gathered from Table C-2, DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. (1957-1960). These figures should not be considered conclusive as to the effectiveness of increasing the jurisdictional amount as a method of reducing the federal caseload. Numerous other factors influence the volume of federal litigation, such as alterations in jurisdiction over corporations, *see* note 27 *supra,* and continual expansion of federal question jurisdiction, *see* note 24 *supra.* The 1960 report of the Administrative Office, written after Congress raised the jurisdictional amount, stated that "the courts in 1960 experienced about the same rate of increase as the annual average over the years 1948 to 1958." DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. 74 (1960). In the same year, Chief Justice Warren stated that "while the jurisdiction act of 1958 . . . did result in a temporary reduction in the filings of private civil cases, the net effect on the workload has been very slight." Address by Hon. Earl Warren, Annual Meeting of the American Law Institute, May 18, 1960, 25 F.R.D. 213 (1960).

30. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).

31. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938).

32. Congress has attempted to combat the inflated claim difficulty by inclusion of the following in 28 U.S.C. §§ 1331 and 1332:

> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recovery less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

The effectiveness of this provision is questionable since only in the clearest case should the court find the existence of no colorable claim, and in many of those cases Rule 12(h)(3) FED. R. CIV. P., requires the court to dismiss for lack of jurisdiction. *See* Friedenthal, *New Limitations on Federal Jurisdiction,* 11 STAN. L. REV. 213, 216 (1959).

the existence of the requirement.

3. *Protection of the Litigants Rationale*

The jurisdictional amount requirement has also been defended on the ground that it protects litigants against the increased burdens and expenses of federal courts.[33]

While this argument appealed to several courts in the past,[34] and was undoubtedly valid with respect both to the costs of appeal to the Supreme Court[35] and original jurisdiction, its validity has diminished in modern times. Geographic accessibility to the federal courts is no longer a critical factor. While it may affect the choice of forum,[36] there is little evidence that

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33. Congress has always been unwilling to permit suits for small sums to be brought into its own courts, not because it especially wanted to save the Courts labor, or even because it wished to uphold their dignity, but principally, if not solely, for the protection of litigants. When the amounts at issue are not large, litigation in the federal courts may be unduly burdensome.

J. ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS 211 (5th ed. 1938). *See also* Note, *supra* note 10, at 201.

34. Thus all the safeguards, whether of protection of the courts against the annoyance of numerous petty litigations, or of *parties against being burdened with the more inconvenient and expensive proceedings of courts of the United States, would be effectually destroyed.*

Adams v. Douglas County, 1 F. Cas. 106, 107 (No. 52) (C.C.D. Kan. 1868) (emphasis added). *See also* Chase v. Sheldon Roller-Mills Co., 56 F. 625-26 (N.D. Iowa 1893).

35. Warren, *supra* note 11, at 118-19.

36. *See* Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 937-38 (1962), where statistics gathered from questionnaires returned by 82 lawyers showed the following about reasons for the choice of federal court:

Reason for Choosing Federal Court	% of total responses
Geographical convenience	18.3
Broader discovery procedures	15.9
Federal juries render higher awards	14.0
Greater confidence in the independence and judicial temperament of federal jurist	9.8
More current calendar	9.1
Federal juries superior	6.7
Choice made by client	6.7
On referral from an attorney who had selected federal court	4.9
Other	4.9
Local bias against nonresident client*	4.3
More congested calendar	1.8
Bias other than nonresidency	1.2
Greater familiarity with federal procedure	1.2
Availability of federal interpleader	1.2
	100.0%

*Justification for federal diversity jurisdiction according to classical theory.

that choice is deliberately exercised with a view towards inconveniencing the opposition. Some of this undoubtedly exists, but there is growing feeling that federal courts are no longer more expensive or more burdensome than state courts:

> Fees and costs in Federal courts are by no means excessive. . . . It is doubtful that these charges are now any higher than those in most State courts. Furthermore, in the Federal courts there is no jury fee as there is in many States, and there is adequate provision for the conduct of cases "in forma pauperis" without prepayment of fees or costs or charge for court reporting services, a feature which not a few State courts lack. In recent years the improvements in transportation facilities . . . have so reduced the difficulties of travel as to make that objection seem obsolete. . . .[37]

Moreover, the adoption of the Federal Rules of Civil Procedure should reduce the difficulties for an attorney who is unfamiliar with federal practice.[38]

These factors demonstrate the weakness of justifying the jurisdictional amount requirement on the ground that it saves litigants from the burdens of suing in the federal judicial system. While such a justification may have been valid 50 years ago, modern reforms and conditions have undercut its plausibility.

B. Pre-Rule Judicial Development of Aggregation of Claims

The jurisdictional amount statutes have never expressly dealt with the multiple party situation. The rules which govern application of the jurisdictional amount requirement to joinder of party cases have been entirely developed by judicial construction. The development of these rules originated in cases construing the amount requirement for appeal to the Supreme Court.[39] In *Oliver v. Alexander*,[40] the Supreme Court dismissed an appeal against several seamen[41] whose individual recoveries were less than the requisite amount but whose total recovery exceeded that sum. The Court reasoned that a rule which allowed aggregation of the plaintiff seamen's judgments to satisfy the statute would be oppressive, since an appeal against

37. *1957 Hearing* at 12.

38. *Id.*

39. The jurisdictional amount requirement for such appeal was repealed by the Judiciary Act of 1925. 43 Stat. 936 (1925).

40. 31 U.S. (6 Pet.) 143 (1832).

41. The joinder was allowed under federal statute in such cases in order "to save the parties from oppressive costs and expenses, and to enable speedy justice to be administered to all who stand in a similar predicament." *Id.* at 146.

the judgment of any one of the seamen would mean that the rest would be "dragged before the appellate tribunals and incur enormous expenses, even when their rights and claims were beyond all controversy, and in truth, were not controverted."[42] The requirement of individual satisfaction of the jurisdictional amount for appeal was upheld in a later case involving fifteen plaintiff-respondents, only two of whom had received lower court judgments which satisfied the statute. The appeal against the remaining thirteen was dismissed for want of jurisdiction,[43] without any attempt to distinguish the *Oliver* case.

The rigidity of the rulings involving the jurisdictional amount requirement for appeal was relaxed in only one context. Aggregation of separate claims for the purpose of satisfying the appeal statute was permitted when the plaintiffs were claiming a "common or undivided" interest in the recovery.[44] The existence of identical facts or principles was not considered sufficient grounds to justify abandonment of the traditional rule against aggregation.[45] Thus where several distributees of an estate sued the administrator to compel payment of money alleged to be due them, the Court held there was jurisdiction to hear the appeal, even though the amount payable to each distributee was less than the requisite amount.[46] The Court reasoned that the matter in controversy was the sum due them collectively since it was immaterial to the administrator how it was shared among them:

> He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him.[47]

The case was distinguished from *Oliver* on the ground that the seamen in the latter were allowed to join only for the sake of convenience, and not because their claims were in any sense common. The Court noted:

> . . . the right of each seaman is separate and distinct from his associates. His contract is separate; and his recovery does not

42. *Id.* at 147.
43. Rich v. Lambert, 53 U.S. (12 How.) 347 (1851).
44. Shields v. Thomas, 58 U.S. (17 How.) 3 (1854).
45. *See* Note, *Aggregation of Plaintiffs' Claims to Meet the Jurisdictional Minimum Amount Requirement of the Federal District Courts*, 80 U. PA. L. REV. 106 (1931). For a collection of cases applying the common and undivided principle for original jurisdiction, see MOORE, *supra* note 4. For a summary of the early aggregation cases see Gibson v. Shufeldt, 122 U.S. 27 (1887).
46. Shields v. Thomas, 58 U.S. (17 How.) 3 (1854).
47. *Id.* at 5.

> depend upon the recovery of others, but rests altogether on its own evidence and merits.[48]

In accord with this concept, two judgment creditors who joined their respective claims to set aside a fraudulent conveyance of property were not allowed to aggregate their judgments on the ground that the interest of each was separate and distinct.[49]

Walter v. Northeastern Railroad[50] was the first Supreme Court case which posed the problem of applying the jurisdictional amount requirement to a multiple party lawsuit for the purpose of determining the existence of *original* jurisdiction. Instead of analyzing the underlying distinctions between the jurisdictional amount requirement in the context of appeals as opposed to the context of original jurisdiction,[51] the Court simply assumed that the early appeal cases were applicable to the issue of original jurisdiction.[52] Following this case the applicability of the early decisions to cases involving both appellate and original jurisdiction was apparently never questioned.[53] The rule that each party must individually satisfy the jurisdictional amount requirement, except where the claims were considered "common or undivided," was generally followed:

> When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdic-

48. *Id.*
49. Seaver v. Bigelows, 72 U.S. (5 Wall.) 208 (1866).
50. 147 U.S. 370 (1893).
51. It is generally agreed that the primary purpose of the appellate amount requirement is to protect the litigants. *See* Warren, *supra* note 11, at 118-19. As we have seen, there is no such agreement as to the primary purpose of the original jurisdiction requirement.
52. 147 U.S. at 373-74. The Court's lack of analysis might have been due to its preoccupation with the somewhat unusual fact situation. Plaintiff railroad had filed a bill in equity to enjoin several defendants from executing upon plaintiff's property for purpose of tax collection. The sum of the taxes due to all defendants was more than the requisite amount, but no single defendant was claiming that amount. Thus the issue of aggregation involved multiple defendants and a single plaintiff rather than the more common multiple plaintiff-single defendant situation. The Court concentrated its attention on this factual distinction.
53. In Wheless v. St. Louis, 180 U.S. 379 (1901), the Supreme Court affirmed a lower court decision which had stated:

> It is clear . . . that the principles governing the right of an appeal to the supreme court of the United States, in so far as the amount is concerned, requisite to confer jurisdiction upon the supreme court of the United States in such an appeal, are the same as those involved in considering the amount requisite to give jurisdiction to this court in an original proceeding.

Wheless v. City of St. Louis, 96 F. 865, 868-69 (E.D. Mo. 1899).

It should be noted that the aggregation principles, and the "common and undivided" distinction have been held equally applicable to class actions. Pinel v. Pinel, 240 U.S. 594 (1916).

> tional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.[54]

III. THE IMPACT OF THE FEDERAL RULES OF CIVIL PROCEDURE

A. The Policy

Because joinder of parties was difficult before adoption of the Federal Rules, the judicial policy of dismissing from federal court parties who could not individually establish a requisite amount in controversy caused little dissatisfaction. The mere existence of common questions of law or fact was generally considered insufficient to justify joinder.[55] Thus the early law governing jurisdictional amount in the multiple party context was largely developed in cases involving special statutory or judicial permission to join,[56] or in cases litigated in equity. In the latter, the question of whether a party could join turned on his relationship to the other interests that were being asserted.[57]

Rule 20 of the Federal Rules of Civil Procedure was patterned after the early equity rules to the extent that joinder of parties was permitted whenever the claims by or against them arose from a common transaction or occurrence and involved a common question of law or fact.[58] The goals of the Rules are, "settling at one time all the disputes of whatever kind which exist between opposing parties or all questions involving one affair, no matter how many parties may be af-

54. Troy Bank v. Whitehead & Co., 222 U.S. 39, 40 (1911). The rule has been followed in other Supreme Court decisions. Thomson v. Gaskill, 315 U.S. 442 (1942); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Scott v. Frazier, 253 U.S. 243 (1920); Pinel v. Pinel, 240 U.S. 594 (1916).

55. B. Shipman, Common Law Pleading 364-66 (2d ed. 1895); Clark & Moore, *A New Federal Procedure II. Pleadings and Parties*, 44 Yale L.J. 1291, 1319 (1935). As a general rule, courts held there could be only one undivided judgment growing out of each multiple party litigation, and that judgment could not be individualized to each party plaintiff. If the action required individualized judgments, joinder was not allowed. Jones & Carlin, *Non-Joinder and Misjoinder of Parties in Common-Law Actions*, 28 W. Va. L. Rev. 197 (1922).

56. *See, e.g.*, Oliver v. Alexander, 31 U.S. (6 Pet.) 143 (1832).

57. R. Foster, 1 Federal Practice 110 (2d ed. 1892). Rule 37 of the 1912 Equity Rules provided:

> All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. . . .

C. Clark, Code Pleading 252-53 (1928).

58. Individualized judgments were also allowed. *See* note 9 *supra*.

fected;"[59] "saving of time of witnesses and parties and minimizing expenses of litigation;"[60] and "simplifying and reducing the formal and permanent history of litigation."[61] The fundamental conflict between these policies and the discouragement of joinder which resulted from the old cases involving the jurisdictional amount is unmistakable.

There are, however, indications that the Rules were not intended to change the aggregation principles. Not only does Rule 82 provide that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts . . ." but the act of Congress which empowered the Supreme Court to promulgate the Rules provided that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[62] Moreover, Judge Alexander Holtzoff, a consultant to the Advisory Committee which helped frame the Rules, said when asked whether aggregation would be allowed under the Rules when some but not all parties had satisfied the amount requirement:

> As confession is good for the soul, I am going to say I do not know; but I am somewhat justified in that statement because I do not believe this point has been passed upon under the new Rules. . . .[63]

Finally, while the Federal Rules are patterned after equity rules which encouraged the settlement of claims in a single action, many of the early developments in the construction of the jurisdictional amount statutes, among them those forbidding aggregation, occurred in equity cases.[64] These developments took place despite the recognition that joinder was for the convenience of the litigants as well as to save them expense.[65]

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59. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A.J. 447, 449 (1936). *See also* Holtzoff, *Foreward to the Federal Rules of Civil Procedure* 6-7 (1966).

60. Chestnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A.B.A.J. 533, 534 (1936).

61. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A.J. 976, 977 (1937).

62. 48 Stat. 1064 (1934).

63. A. HOLTZOFF, PRACTICE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE 238-39 (1940). Judge Holtzoff further stated that in his opinion each party still must satisfy the statute unless the parties are asserting a joint or common right. These comments were aimed directly at class actions, but since aggregation principles developed without distinction between joinder and class action cases, it seems clear that Holtzoff's answer is equally applicable to both.

64. *See* notes 55-57 *supra*, and accompanying text.

65. *See, e.g.*, Seaver v. Bigelows, 72 U.S. (5 Wall.) 208 (1866).

B. POST-RULE JUDICIAL DEVELOPMENT OF AGGREGATION OF CLAIMS

Since adoption of the Federal Rules, the majority of courts have continued to apply traditional concepts. The leading case of this type is *Clark v. Paul Gray, Incorporated*,[66] where the Supreme Court held that several plaintiffs[67] should have been dismissed in district court for failure to establish the requisite amount in controversy, even though one plaintiff did satisfy the requirement and was properly retained. The only reason given, other than weight of authority, was that if the rule were otherwise,

> . . . an appellate court could be called to sustain a decree in favor of a plaintiff who had not shown that his claim involved the jurisdictional amount, even though the suit were dismissed on the merits as to the other plaintiffs who had established the jurisdictional amount for themselves.[68]

The adherence to the rules of the past has been justified by lower courts in various ways. Some have simply relied on the language in *Healy v. Ratta*,[69] stating that the jurisdictional amount statute must be strictly construed since it establishes a political balance between federal and state functions.[70] Others have reasoned that since the Federal Rules expressly repudiate any intent to extend federal jurisdiction,[71] "the broad language of Rule 20 . . . which liberally allows permissive joinder of claims, does not allow plaintiffs to aggregate their claims to achieve the requisite jurisdictional amount. . . ."[72] Still others argue that regardless of purported equities, the goal should be a rule which simplifies these "perplexing and constantly recurring jurisdictional questions," and that traditional concepts best serve this function.[73]

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66. 306 U.S. 583 (1939).

67. The California Caravan Act of 1937 imposed a license fee requirement for transportation of vehicles into the state for purposes of sale. The plaintiff joined in bringing suit seeking an injunction against state officials charged with enforcing the Act.

68. *Id.* at 590. *See also* Eagle Star Ins. Co. v. Maltes, 313 F.2d 778 (5th Cir. 1963) and cases cited therein; Kataoka v. May Dep't Stores Co., 115 F.2d 521 (9th Cir. 1940); Sobel v. National Fruit Product Co., 213 F. Supp. 564 (E.D. Pa. 1962); Diana v. Canada Dry Corp., 189 F. Supp. 280 (W.D. Pa. 1960).

69. 292 U.S. 263 (1934).

70. *See, e.g.*, Thomson v. Gaskill, 315 U.S. 442 (1942); Aetna Ins. Co. v. Chicago, R.I. & P.R.R., 229 F.2d 584, 586 (10th Cir. 1956).

71. FED. R. CIV. P. 82.

72. McCormick v. Labelle, 189 F. Supp. 453 (D. Conn. 1960). *See also* Rompe v. Yablon, 277 F. Supp. 662 (S.D.N.Y. 1967); Colman v. Pitzer, 160 F. Supp. 862, 864 (W.D. Pa. 1958).

73. Aetna Ins. Co. v. Chicago, R.I. & P.R.R., 229 F.2d 584 (10th Cir. 1956). Adherence to the past is also found in class action cases, where

Some courts, however, have not been content with precedent and have taken the position that the policy of the Federal Rules compels a change in aggregation principles to support the goal of litigating all common questions in a single suit regardless of the number of parties involved. Several approaches have been taken to reach this result: expansion of existing exceptions to the rule against aggregation; application of doctrines previously limited to other contexts; and creation of broad new rules.

1. *Judicial Redefinition of Common and Undivided Interests*

The exception to the rule against aggregation afforded those parties asserting a "common and undivided" right[74] has been found by some courts to be a flexible rubric under which traditional nonaggregation rules can be avoided.[75] For example, in *Raybould v. Mancini-Fattore Company*,[76] plaintiff, seeking to try his case in federal court, relied on the aggregation of his own claim for personal injuries with a Wrongful Death Act claim for the loss of his wife. Although traditionally considered two "separate" causes of action,[77] it was held that the "common and undivided" doctrine "could be stretched to cover the situation," since the plaintiff had a "definite interest" in any recovery under either claim.[78] This result was reached despite the Supreme Court's previous statement that "aggregation of plaintiffs' claim cannot be made merely because . . . the plaintiffs

the courts allow aggregation under Rule 23(a)(1), the "true" class action, Buck v. Gallagher, 307 U.S. 95 (1939), but not under Rule 23(a)(2) "hybrid" or Rule 23(a)(3) "spurious" class actions. Alfonso v. Hillsborough County Aviation Authority, 308 F.2d 724 (5th Cir. 1962); Andrews v. Equitable Life Assurance Society, 124 F.2d 788 (7th Cir.), *cert. denied*, 316 U.S. 682 (1941). The 1966 amendment to Rule 23 eliminated the "true," "hybrid" and "spurious" classifications, but since there is no indication of intent to alter the aggregation principles, it seems likely that courts will continue to apply the "true" versus "hybrid" and "spurious," or "common and undivided" versus "separate and distinct" classifications. *See, e.g.*, Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir. 1967); Snyder v. Harris, 268 F. Supp. 701 (E.D. Mo. 1967). *Contra*, Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967).

74. *See* notes 45-48 *supra*, and accompanying text.

75. Note, *supra* note 45. Although many cases have *arguably* violated the "common and undivided" principle, each case cited in this section contains relatively clear indications that dissatisfaction with past aggregation principles caused the particular interpretation of "common and undivided."

76. 186 F. Supp. 235 (E.D. Mich. 1960).

77. W. PROSSER, LAW OF TORTS § 120 (3d ed. 1964).

78. Raybould v. Mancini-Fattore Co., 186 F. Supp. 235, 236 (E.D. Mich. 1960) (alternative holding).

have a community of interest."[79] In another case several employees, who had been issued stock purchased by the trustee of their pension fund, were held to be asserting a "common or undivided" right when they sued the trustee for misuse of the funds in purchasing the stock.[80] The court was not deterred by the obvious argument that each plaintiff was asserting a claim based upon his interest in his own stock, completely apart from the claims of the other parties, so that little more than a "community of interest" or common questions of law or fact existed. Similarly, a court of appeals has held that the claims of several children injured in a school bus were "common and undivided" since the claims all arose from the same instrument—defendant's insurance policy.[81] In view of the Supreme Court's statement that "aggregation of plaintiffs' claim cannot be made merely because the claims are derived *from a single instrument* . . ."[82] it is clear that dissatisfaction with traditional applications of the jurisdictional amount requirement prompted the apparent attempt to expand the "common and undivided" exception.

While it is true that the language of the Supreme Court's decisions in this area did not compel contrary holdings on these aggregation issues, such holdings would have been more consistent with prior cases.

2. *Ancillary Jurisdiction*

The ancillary jurisdiction doctrine provides that federal courts have the power to settle cases properly before them in their entirety, even if this involves litigating matters which would be beyond federal jurisdiction if asserted independently.[83] Although its premise is that piecemeal litigation should be avoided and complete justice rendered,[84] ancillary jurisdiction has traditionally been limited to cases where (1) the federal

79. Thomson v. Gaskill, 315 U.S. 442, 447 (1942).
80. Dixon v. Northwestern Nat'l Bank, 276 F. Supp. 96 (D. Minn. 1967).
81. Manufacturer's Casualty Ins. Co. v. Coker, 219 F.2d 631 (4th Cir. 1955). The alternative holding of the case was that when the children received judgments exceeding the amount of the insurance policy, a "common and undivided" right was created in them for the purpose of the insurer's action for a declaratory judgment of nonliability on the policy. *See also* Carnes & Co. v. Employers' Liability Assurance Corp., 101 F.2d 739 (5th Cir. 1939).
82. Thomson v. Gaskill, 315 U.S. 442, 447 (1942) (emphasis added).
83. 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23 (Wright ed. 1960).
84. Walmac Co. v. Isaacs, 220 F.2d 108, 113 (1st Cir. 1955); Hoosier Cas. Co. v. Fox, 102 F. Supp. 214, 225-26 (N.D. Iowa 1952).

court had actual or constructive control of property involved in the litigation;[85] (2) federal jurisdiction was necessary to effectuate the judgment on the matter over which the court had jurisdiction;[86] or (3) the ancillary matter had to be decided in order to reach a conclusion with respect to the matter properly within the courts' jurisdiction.[87] Since adoption of the Federal Rules of Civil Procedure, however, the doctrine has been put to new uses.[88] It now represents the approach most often taken to avoid traditional rules against aggregation.[89] If one party asserts an amount in controversy exceeding the statutory requirement, other parties are often retained even though they do not individually meet the requirement on the theory that their claims are "ancillary" to the other. Property in possession of the court or the necessity of protecting a federal judgment are no longer requirements for application of ancillary jurisdiction.

The cases clearly illustrate the flexibility of the ancillary jurisdiction doctrine. Where a plaintiff asserted two separate claims, one on his own behalf and one on behalf of his wife's estate, against the same defendant and one failed to meet the jurisdictional amount requirement, it was held that the federal court should retain jurisdiction. The court reasoned that dismissal was unwarranted since the parties were the same in both claims and since the ancillary jurisdiction doctrine permitted retention of both claims if one satisfied the jurisdictional amount requirement.[90] The doctrine has also been used to support federal jurisdiction when plaintiff joined his own personal injury claim with that of his living children and the latter failed independently to satisfy the amount requirement.[91] Nor is it a requirement that the plaintiff be acting in a representative capac-

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85. *E.g.*, Freeman v. Howe, 65 U.S. (24 How.) 450 (1860).

86. *E.g.*, Hair v. Burnell, 106 F. 280 (8th Cir. 1900).

87. *E.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

88. Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1964). It is often argued that the Rules did not expand ancillary jurisdiction, but merely increased the opportunity for its application. *Id.* at 28.

89. At least one pre-1938 case exists where the Court used ancillary jurisdiction to avoid dismissal for failure to satisfy a jurisdictional amount requirement. White v. Ewing, 159 U.S. 36 (1895). However, that case was based on the Court's authority to collect and administer property, and was therefore consistent with the traditional restricted use of the doctrine.

90. Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960). *See also* Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964). For the court's alternative holding that the rights were "common and undivided," *see* notes 78 and 79 *supra*, and accompanying text.

91. Wiggs v. Tullahoma, 261 F. Supp. 821, 823 (E.D. Tenn. 1966).

ity, since ancillary jurisdiction has been used to retain an otherwise improper loss-of-consortium claim by a husband which was joined with a proper personal injury action by the wife.[92] The court maintained that this was not an extension of the cases turning on the representative capacity of the plaintiff, since in those cases the real parties in interest were the plaintiff and the spouse's estate or the children, equally separate entities.[93] Ancillary jurisdiction has also been used in the non-family context. Thus, federal jurisdiction was retained over a case involving complaints by some thirty company employees for accrued pension funds, even though some did not individually satisfy the amount requirement.[94]

The ancillary jurisdiction cases have explained their circumventions of the jurisdictional amount requirement in several ways. Some cases reason that the purpose of the jurisdictional amount is solely to check the number of cases coming into federal court. Satisfaction of the statute by any one of the parties means the case must be retained regardless of whether those failing to show $10,000 in controversy are dismissed. Thus it is illogical to force litigation in both the state and federal courts, especially in view of the intent of the Federal Rules to settle the total controversy in a single suit.[95] A different explanation is used in cases involving more than one member of the same family. In this situation, retention of all parties is justified by the likelihood that they will have the same lawyer and that there will be common elements of proof.[96]

92. Morris v. Gimbel Bros. Inc., 246 F. Supp. 984 (E.D. Pa. 1965). *See also* Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967). Although these cases speak of "pendent" jurisdiction, the issues presented more properly should be categorized as "ancillary." *See* note 116 *infra*, and accompanying text.

93. *Id.* at 986.

94. Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967).

95. *See* Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964); Dixon v. Northwestern Nat'l Bank, 276 F. Supp. 96 (D. Minn. 1967); Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967); Wiggs v. Tullahoma, 261 F. Supp. 821 (E.D. Tenn. 1966); Morris v. Gimbel Bros., 246 F. Supp. 984 (E.D. Pa. 1965); Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960); Note, *The Federal Jurisdictional Amount Requirement and Joinder of Parties Under the Federal Rules of Civil Procedure*, 27 IND. L. REV. 199, 203-04 (1952).

96. *See* Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964); Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967); Wiggs v. Tullahoma, 261 F. Supp. 821 (E.D. Tenn. 1966); Morris v. Gimbel Bros., 246 F. Supp. 984 (E.D. Pa. 1965); Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960). This position has been accepted by the American Law Institute in its study of state and federal jurisdiction. The A.L.I. has recommended that whenever one member of the family

Analogy to the discretion given district courts to permit removal of an otherwise nonremovable claim when joined with a properly removable claim[97] has also been used to justify this use of ancillary jurisdiction.[98] Thus where several plaintiffs brought an action in diversity arising out of an automobile accident, and not all could establish the requisite jurisdictional amount, it was said to be illogical to disallow original jurisdiction over some of the parties when the district court would be authorized to take all claims on removal by defendants.[99]

An analogy has also been noted between ancillary and pendent jurisdiction. Pendent jurisdiction permits federal courts to retain jurisdiction over state claims whenever federal questions are involved.[100] The Supreme Court recently broadened the scope of pendent jurisdiction by ruling that the state and federal causes of action no longer have to involve "substantially identical" facts,[101] but must merely derive from a common nucleus of operative fact such that plaintiff would ordinarily be expected to try them all in one judicial proceeding.[102] This ruling, it is argued, indicates that the Supreme Court may now look favorably upon a similar extension of ancillary jurisdiction.[103]

Ancillary jurisdiction and the above justifications for its use as a means of avoiding the rule against aggregation are open to several criticisms. The doctrine is completely open-ended and therefore of little predictive value, since there is no limitation on its operation other than the court's interpretation of the "equities." This is evidenced by the extension of the doctrine from a

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satisfies the jurisdictional requirements, any claim arising out of the same transaction or occurrence asserted by another member of the family living in the same household should be litigated in the same court, regardless of its amount. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Part 1, § 1301(e) (official draft, Sept. 1965).

97.
> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c) (1964).

98. *See* Note, *supra* note 95, at 202-03.

99. Orn v. Universal Auto Ass'n, 198 F. Supp. 377 (E.D. Wis. 1961). *Accord*, Lauf v. Nelson, 246 F. Supp. 307 (D. Mont. 1965).

100. Hurn v. Oursler, 289 U.S. 238 (1933).

101. Bell v. Hood, 71 F. Supp. 813, 819-20 (S.D. Cal. 1947) and cases cited therein.

102. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

103. *See, e.g.*, Wilson v. American Chain & Cable Co., 364 F.2d 558, 564-65 (1966).

case where a single plaintiff joins his own claim with one which he is asserting in a representative capacity,[104] to the situation where thirty employees join to recover pension rights.[105]

Also open to criticism is the argument that all parties should be retained when one satisfies the statute because the basic purpose of the jurisdictional amount is reduction of the volume of federal litigation. In the first place, the log-jam rationale is by no means the only justification for the jurisdictional amount requirement.[106] Secondly, concern for the burden on federal courts involves not only the number of cases, but also the time consumed by those cases.[107] While it is true that a prerequisite for joinder is that the claims must arise out of the same transaction or occurrence,[108] and this somewhat mitigates the increased burden of retaining all joined parties, there may still be issues peculiar to particular parties,[109] the resolution of which will

104. Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960).

105. Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967). The courts could have reached the same result in the representative cases without unreasonably expanding the reach of the ancilliary jurisdiction doctrine. Courts have consistently allowed aggregation of all claims possessed by a single plaintiff *See* note 9 *supra.* An analogy could have been drawn between joinder of claims by a single plaintiff who *owns* each of the claims, and joinder of claims by a single plaintiff who *possesses* each claim for procedural purposes, even though he owns but one. This analogy might be extended to the case of the plaintiff acting on behalf of other *living* parties, such as his children, *see, e.g.,* Wiggs v. Tullahoma, 261 F. Supp. 821 (E.D. Tenn. 1966), but would not be susceptible to the same open-endedness as ancillary jurisdiction.

106. *See* notes 26-32 *supra,* and accompanying text.

107. *Median time interval (in months) from issue to trial, for trials completed in the United States district courts, fiscal years 1962 to 1966.**

	Median Time Interval (in months)		
Fiscal Year	All trials	Nonjury trials	Jury trials
1962	10	9	12
1963	10	9	12
1964	11	11	12
1965	11	9	12
1966	11	10	13

*From ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 94 (1966).

108. FED. R. CIV. P. 20.

109. It could also be argued that double litigation could easily be avoided if the district court would abstain from hearing the claims of even those establishing the requisite jurisdictional amount, thus dismissing as to all parties, and leaving them free to join in an action in state court. *See* Note, *supra* note 95, at 207-08 for this argument in detail. While this would provide a partial solution to the whole difficulty, it does not appear that the courts are willing to exercise abstension powers in this context. *See, e.g.,* Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Grosjean v. American Press Co., 297 U.S. 233 (1936). Moreover, this approach might raise serious questions of deprivation of the right of access to the courts.

be time consuming.

The use of ancillary jurisdiction to retain jurisdiction over relatives of a party who satisfies the amount requirement is also susceptible to attack. The only distinguishing feature of these family suits is the likelihood that the parties will be represented by the same attorney. The mere fact that the parties are related is unlikely to mean that the proof will be identical. Moreover, it might well be argued that a refusal to retain the claims of related persons when one does not satisfy the amount requirement is less prejudicial than such a refusal in the non-family joinder context. A plaintiff trying to protect his interests against the collateral estoppel effect of another suit,[110] or wishing to retain the advantage of having the jury consider his claim in the context of all other claims arising from the common transaction or occurrence, might feel compelled to join his claim with one being pursued in federal court. His dismissal for failure to satisfy the jurisdictional amount seems harsher in certain respects than the dismissal of a husband's joined loss-of-consortium claim, since there is presumably total cooperation of control over the suit in the latter case. The husband and wife could more readily agree to join their claims in state court,[111] thereby retaining whatever advantage there is in litigating the claims together.

The analogy between ancillary jurisdiction and the discretion of the district court to allow removal of an ordinarily non-removable claim when joined with a proper federal cause of action is not compelling, because it fails to account for the practical construction placed on the removal statute. Section 1441

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110. Although it is normally said that due process of law forbids application of collateral estoppel to an absent party, Hansberry v. Lee, 311 U.S. 32 (1940), an exception is provided for those parties deemed to be in privity with present parties. "Privities" are said to include "those who control an action although not parties to it . . . ; those whose interests are represented by a party to the action . . . ; successors in interest . . . ." Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 329 n.19 (1955), *quoting* RESTATEMENT OF JUDGMENTS § 83, comment *a* (1942). Thus it is possible that fear of collateral estoppel, under certain circumstances, might prompt a plaintiff to join in the federal action. *See, e.g.*, Morris Inv. Co. v. Moore, 332 Ill. App. 653, 75 N.E.2d 782 (1947) (unsuccessful action by a government agency against a landlord to enforce rent control legislation held to bind the tenant in a subsequent action).

111. There is no real difficulty with joining claims in a state court, as most states now have liberal joinder rules. Wright, *Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading*, 39 IOWA L. REV. 255 (1954).

(c)[112] provides that the otherwise nonremovable claim must be "separate and independent." The Supreme Court has ruled that this language clearly indicates congressional intent to require "more complete disassociation between the federally cognizable proceedings and those cognizable only in state courts before allowing removal." Thus if the claims arise out of the same transaction or occurrence and involve common questions of law or fact it "cannot be said that there are separate and independent claims for relief as section 1441(c) requires."[113] Since the existence of claims arising from the same transaction or occurrence and involving common questions of law or fact is expressly required for joinder under Rule 20, it appears that the analogy and the cases relied upon are inapt.[114]

Finally, the contention that the relaxation of pendent jurisdiction rules in the *Gibbs*[115] case presages a similar relaxation of ancillary jurisdiction rules is at best speculative. Ancillary jurisdiction involves multiple claims arising from the same transaction or occurrence whereas pendent jurisdiction involves the availability of parallel remedies to the wronged party.[116] Pendent jurisdiction seems more closely analagous to aggregation of claims asserted by a single plaintiff, which is clearly allowed,[117] than to retention of the claim of one plaintiff who has failed to satisfy the federal jurisdictional requirements when joined with that of another who has satisfied those requirements. Since pendent and ancillary jurisdiction are not the same, the *Gibbs* decision stands only for the proposition that the Court, in the ab-

112. *See* note 97 *supra.*

113. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 16 (1951). The Reviser's note to § 1441(c) made it clear that the amendment to the statute was restrictive rather than expansive, and that a reduction in federal litigation was expected therefrom. 28 U.S.C. § 1441, Reviser's Note. The Court's holding is also consistent with the traditionally restrictive construction of removal statutes in accordance with notions of federalism in Healy v. Ratta, 292 U.S. 263 (1934). *See also* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941).

114. C. Wright, Federal Courts 118 (1963). *See generally* Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 Minn. L. Rev. 1 (1961).

115. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

116. Note, *Ancillary Jurisdiction of the Federal Courts,* 48 Iowa L. Rev. 383, 394 (1963).

Pendent jurisdiction, like ancillary jurisdiction, has been criticized for its open-endedness. *See, e.g.,* Shakman, *The New Pendent Jurisdiction of the Federal Courts,* 20 Stan. L. Rev. 262 (1968); Silberg, *Ancillary Jurisdiction in the Federal Courts,* 12 J. Air L. 288 (1941); Note, *Pendent Jurisdiction: An Expanding Concept in Federal Court Jurisdiction,* 51 Iowa L. Rev. 151 (1965).

117. *See* note 5 *supra,* and accompanying text.

sence of countervailing policies, will give weight to the convenience of the parties and factors of judicial economy.[118]

3. *Breaking New Ground*

At least one court has rejected all the traditional doctrines, and has instead established a simple, but far-reaching rule. In *Johns-Manville Sales Corporation v. Chicago Title and Trust Company*,[119] the court, ignoring Supreme Court precedent and ancillary jurisdiction,[120] fashioned the rule that where one of the joined plaintiffs satisfies the amount requirement the court can retain jurisdiction over all of the joined parties. Although recognizing that reduction of the burden on federal courts and avoidance of encroachment on state courts are among the reasons underlying the jurisdictional amount requirement,[121] the court failed to attribute sufficient significance to the latter. The court stated that rather than encroaching upon the state courts, retention of jurisdiction over all parties, even those failing to satisfy the jurisdictional amount requirement, was "a service to the generally overburdened state court."[122]

While it is relevant to consider the burden on state courts when making ultimate policy decisions,[123] the court in *Johns-Manville* apparently did not recognize that "encroachment" in the federalism context of the jurisdictional amount statute involves more than the question of whether the state courts appreciate the efforts of the federal courts to lighten their caseloads. Moreover, the decision established an absolute rule rather

118. The Court's refusal to grant certiorari in the ancillary jurisdiction cases should also not be construed as a change in judicial attitude. If judicial silence indicates anything, it would be equally reasonable to construe this silence to indicate judicial uncertainty regarding the future of diversity as a basis for federal jurisdiction. Without diversity these questions would become virtually moot because most federal questions have been provided for by statute without regard to an amount requirement. The current ALI study on diversity was undertaken upon the request of Chief Justice Warren, *see* Address by Hon. Earl Warren, Annual Meeting of the American Law Institute, May 18, 1960, 25 F.R.D. 213 (1960), and recommended that diversity as a basis for federal jurisdiction be restricted. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Official Draft, Sept. 1965).

119. 261 F. Supp. 905 (N.D. Ill. 1966).

120. Although the court expressly stated otherwise, the decision has been erroneously interpreted as resting upon ancillary jurisdiction. *See* Lucas v. Seagrave Corp., 277 F. Supp. 338, 348 (D. Minn. 1967).

121. 261 F. Supp. at 907.

122. *Id.*

123. *See* note 134 *infra*.

than following the ad hoc approach of the ancillary jurisdiction cases, thus apparently removing even judicial discretion as a limitation on aggregation.[124]

It is submitted that the judicial attempts to avoid the rule against aggregation have not proven satisfactory, since they have created as many difficulties as they have solved. Although based on a policy which is consistent with modern joinder philosophies, their analyses have been shallow and the analogies loosely drawn. Moreover, the divergent approaches of the various courts have resulted in a total lack of consistency at the trial court level. Thus litigants are unable to predict either whether they will be allowed to remain in court, or what argument will be best received.

IV. SUGGESTED APPROACHES TO TEMPORARY AND ULTIMATE SOLUTIONS

A. A Temporary Solution

It is clear that nothing literally compels an abandonment of the rule against aggregation of claims. Congress has not clearly indicated any feeling that the premises which supported the jurisdictional amount requirement in 1789 are no longer applicable. The Supreme Court has failed to alter its traditional position. The Federal Rules, while they establish a conflicting policy of drawing all interested parties into the litigation, expressly provide that they are not intended to extend federal jurisdiction. Despite the argument that ancillary jurisdiction is not expanded by the Rules, but rather that the Rules merely provide new opportunities for applying the doctrine,[125] the net effect is an extension of federal jurisdiction—the very result which Rule 82 and the Rules Enabling Act forbid.

It is equally clear that the attempts by lower courts to avoid precedent are not only a contravention of federal judicial relationships, but also a source of confusion, inequality and uncer-

124. As was pointed out in Rompe v. Yablon, 277 F. Supp. 662, 665 (S.D.N.Y. 1967), if forty bus passengers are injured in the same accident and only one can properly allege damages in excess of $10,000, the other 39 may sue in federal court as well, even though their claims may be very minor and the burden on the court is thereby increased. Ancillary jurisdiction might not be applicable in such a case because judicial economy, a basic premise of the doctrine, is not served by retaining all parties.

125. Childress v. Cook, 245 F.2d 798, 803 (5th Cir. 1957); Lesnik v. Public Industrials Corp., 144 F.2d 968, 973 (2d Cir. 1944); Foster v. Brown, 22 F.R.D. 471 (D. Md. 1958); Note, *supra* note 95, at 205-06.

tainty. For these reasons, it is suggested that new policy decisions must come from the proper authoritative body, in this case Congress or, more probably,[126] the Supreme Court. Until these policy decisions are made, the rule that several parties joined under Rule 20 and asserting separate and distinct demands must *each* satisfy the jurisdictional amount requirement should be followed by all lower federal courts.

B. AN ULTIMATE SOLUTION

The time has arrived to reassess the factors which underlie the jurisdictional amount requirement and to establish a system of priorities for those factors. In this connection the following suggestions are offered.

The fact that federalism was the basis of the amount requirement in 1789 should not preclude a present day reevaluation. Rigidly drawn lines between federal and state jurisdiction are not everlasting, and must be altered when they frustrate new and demanding considerations.[127] As our society increases in complexity, the various functions of the state and federal judicial systems increasingly expand and contract. Evidence of this is found in the expansion of state judicial power through "long-arm" statutes,[128] and federal judicial power through the Federal Interpleader Act.[129] With the increasing overlap between federal and state jurisdiction due to the application of state law by federal courts[130] and of federal law by state courts,[131] and the increasing uniformity of judicial standards due to uniform laws and the fourteenth amendment decisions requiring equal treatment at either the state or federal level,[132] the ancient lines

126. The Supreme Court is more likely to promulgate these policies not only because of Congress' tendency to ignore judicially manufactured technicalities, but also because any solution will be difficult to verbalize. In this respect, a judicial opinion is much more flexible than a statute, and can better deal with the relevant factors.

127. *Cf.* Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 CORN. L.Q. 499, 503 (1928).

128. Foster, *Expanding Jurisdiction Over Nonresidents,* 32 WIS. B. BULL. 3-4 (Oct. 1959 Supp.).

129. 28 U.S.C. § 1335 (1964).

130. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); 28 U.S.C. § 1652 (1964).

131. This may occur, for example, when Congress creates a federal right and provides for concurrent state and federal jurisdiction, as it did in the Federal Employers' Liability Act.

132. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (illegal search and seizure); Spano v. New York, 360 U.S. 315 (1959) (coerced confessions); Smith

of demarcation between the two judicial systems have become increasingly blurred.[133]

Similarly, the argument that strict interpretation of the jurisdictional amount requirement is justified because it reduces the volume of federal litigation has become myopic. Judicial economy is of the utmost importance, but it is time to recognize that it is needed in state as well as federal judicial systems, and that reduction of federal cases only increases the burden on the states.[134] Thus any solution to the problems of the jurisdictional amount requirement must necessarily involve consideration of *national judicial economy*.[135]

The recognition that federal courts speak with total authority only on matters involving federal law must be balanced against considerations of national judicial economy. Thus the federal courts should be free to concentrate upon these cases, rather than becoming overburdened with cases requiring application of state law, thereby forfeiting all opportunity for the exercise of creativity.[136] It is therefore submitted that the underlying premises of the jurisdictional amount requirement should now be (1) national judicial economy and (2) controlled reduction of federal litigation, and that these two factors must be balanced by courts considering aggregation cases.

When none of the plaintiffs bringing an action in federal court can individually establish the requisite amount in controversy, assuming the claims are separate and distinct, the court should dismiss them all. This would serve to reduce federal litigation, and yet would not contravene the policy of national judicial economy, since the parties could litigate the entire case in state court. When one or more of the plaintiffs establish the requisite amount, the following two-step process is recommended: (1) It should first be determined whether retention of

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v. Allwright, 321 U.S. 649 (1944) (right to vote); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of expression).

133. Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203 (1965).

134. Chief Justice Warren made this clear when requesting the American Law Institute to undertake a study of federal jurisdiction:

> We must take care lest the State court systems become swamped with litigation heretofore handled in the courts of the United States and which the States have had every reason to assume would continue to be handled there.

1959 AMERICAN LAW INSTITUTE—PROCEEDINGS 27, 33. Neither the ALI nor Congress has given much attention to this aspect of the problem.

135. "National judicial economy" means economy of judicial time and talent in its entirety, without regard to whether the federal or state judiciary benefits more.

136. ALI *supra* note 118, at 47.

all parties would increase the burden on the federal court. Since the claims must arise from the same transaction or occurrence, there will usually be no added burden, and the inquiry will end there. However, it is superficial to conclude that the burden will not increase simply because the court must hear the case anyway,[137] because the claim of each party may individually raise questions not common to all other parties. (2) Assuming that retention of all parties would increase the burden on the federal court, it then must be determined whether the added burden is such that considerations of national judicial economy no longer outweigh the desire to reduce the burden on federal courts. Such a result would be proper if the collateral issues were so diverse that national judicial economy would not be sacrificed by sending all those failing to satisfy the statute back to the state courts.[138]

The above approach focuses on practical rather than philosophical considerations. It presumes, and this must be decided by Congress or the Supreme Court, that notions of federalism can be suppressed to facilitate the growth of a coordinated, efficient national judicial system. Although this solution places broad discretionary powers in the court, the nature of the questions which must be decided dictates that this is the only rational approach available, and that the discretion is not as open-ended as that presently being exercised under the rubric of ancillary jurisdiction. Except where consideration of step two is necessary, the suggested rule is more certain than the ancillary jurisdiction approach. Moreover, step two contains clearly defined goals and factors to be placed in the balance, and these impose certain limitations on the court's discretion.[139]

Thus, the scope of the joinder rule—that claims must arise out of the same transaction or occurrence and involve common questions of law and fact[140]—should define the scope of the court's authority to retain all parties, provided at least one has satisfied the jurisdictional amount requirement. The only exceptions would be the infrequent cases where the court determines

137. *See* note 95 *supra.*

138. The dispositive considerations here do not include the convenience of the litigants. That interest can best be served by the creation of a smoothly functioning national judiciary.

139. Another potential difficulty lies in requiring the court to make a pre-trial determination of the complexity of the issues which are likely to be raised. In most cases, however, a reasonable determination can be made from the pleadings, and if this proved inadequate, a hearing could be provided.

140. FED. R. CIV. P. 20.

that retention of all parties would raise issues which would increase the burden on the court to such an extent that two trials, one in federal and one in state court, would not compromise national judicial economy.

The suggested solution is doubly consistent with the joinder of parties rule. Rule 20(b) allows the district courts to order separate federal trials when the issues are sufficiently complex. Step two of the suggested solution would grant a similar discretion to order separate federal and state trials.

It is evident that such a test will alter the complexion of cases which are retained by the federal courts. For example, when forty passengers are injured in a bus mishap, only one of whom can establish the requisite amount, the court might retain the 39 other claims, even though none of them exceeds $200.[141] This avoids a double drain on national judicial time and talent, and can be justified on that ground alone. On the other hand, a husband and wife might join in an action where each claim raises such diverse issues that the court would be justified in dismissing whichever claim failed to satisfy the statute.[142]

Regardless of the acceptability of the approach suggested above the problem requires immediate attention. While lower court compliance with Supreme Court precedent will remove some confusion and inconsistency, only a general reconsideration of the factors discussed herein can lead to a sensible and just solution.

141. Rompe v. Yablon, 277 F. Supp. 662, 665 (S.D.N.Y. 1967).

142. This would be appropriate in a case such as Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960), where a husband sued on his own behalf and joined a wrongful death action as administrator of his wife's estate. If a "presumption of due care" statute, creating a presumption in favor of the deceased, had been involved, then substantial issues would have been raised which were not relevant to the husband's personal claim. *See, e.g.*, MINN. STAT. § 602.04 (1967). The same situation might arise if contributory negligence was an issue for some parties and not others.