A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction

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TABLE OF CONTENTS

INTRODUCTION 104

I. THE SCOPE OF THE PROBLEM: LIMITED FEDERAL JURISDICTION AND THE APPARENT INABILITY OF A FEDERAL COURT TO RESOLVE AN ENTIRE LEGAL DISPUTE 106

A. *The Barrier of Limited Federal Jurisdiction* 106

B. *Partially Overcoming the Barrier — Pendent and Ancillary Jurisdiction* 114

1. Accommodating Limited Federal Jurisdiction and the Desire to Adjudicate Nonfederal Claims — The Historical Response of Federal Courts 115

2. General Outline of the Power of a Federal Court to Decide Nonfederal Claims 117

II. CONSTITUTIONAL LIMITS TO PENDENT AND ANCILLARY JURISDICTION 118

A. *Pendent Jurisdiction* 119

1. Substantiality 124

2. Common Nucleus of Operative Fact 128

3. Ordinary Expectation of Trial Together 134

4. The Scope of the *Gibbs* Test 140

B. *Ancillary Jurisdiction* 141

1. Defining the Same Transaction or Occurrence 145

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2. The Constitutional Limits of Ancillary Jurisdiction: The Reconciliation of the Pendent and Ancillary Doctrines 149
III. STATUTORY LIMITS TO PENDENT AND ANCILLARY JURISDICTION 157
A. *The Post* Gibbs *Era* 157
B. *Recognition of Statutory Limits to Pendent and Ancillary Jurisdiction* 160
C. *Ramifications of* Aldinger *and* Kroger 167
IV. ANOTHER BARRIER TO THE EXERCISE OF PENDENT AND ANCILLARY JURISDICTION — DISCRETION 178
A. *Pendent Jurisdiction Cases* 181
B. *Ancillary Jurisdiction Cases* 184
CONCLUSION 189

INTRODUCTION

Pendent and ancillary jurisdiction,[1] or as they are sometimes described,[2] supplemental jurisdiction,[3] are the primary doctrines permitting efficient adjudication of entire legal disputes between litigants in

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[1] Pendent and ancillary jurisdiction are judicial doctrines permitting a federal court to exercise jurisdiction over a party or claim normally outside of federal judicial power. *See* Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1401 n.1 (1983). Traditionally, the two doctrines have been treated differently. Pendent jurisdiction dealt with the addition of claims and parties by plaintiffs, and ancillary jurisdiction dealt with the addition of claims and parties by defendants or intervenors. *See infra* text accompanying notes 57-59. However, the Supreme Court recently described the doctrines as "two species of the same generic problem: Under what circumstances may a federal court hear and decide a state law claim arising between citizens of the same State?" Owen Equip. &b Erection Co. v. Kroger, 437 U.S. 365, 370 (1978). This Article asserts that the two doctrines may be separate in name only. *See infra* text accompanying notes 235-65.

[2] *See* Matasar, *supra* note 1, at 1402.

[3] Supplemental jurisdiction deals with the generic problem of joining claims and parties normally outside of federal jurisdiction. *See supra* note 1. The term is apt, as the exercise of such jurisdiction ordinarily serves important federal interests supplemental to the merits of decisions on the underlying federal claims, for example allowing a federal court to function as such, *see, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), ensuring a forum for vindication of claims, *see, e.g.*, Freeman v. Howe, 65 U.S. (24 How.) 450 (1861), and allowing convenient and efficient litigation of a dispute, *see, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715 (1966). *See infra* text accompanying notes 50-54, 241-251; Matasar, *supra* note 1, at 1402 n.3. When necessary to identify pendent jurisdiction separately from ancillary jurisdiction, this Article uses the specific labels.

federal court. These well-known jurisdiction expansion devices are often cited[4] and commented upon,[5] and their limits seem clearly outlined by Supreme Court decisions. Yet to practitioners and courts working with the doctrines, supplemental jurisdiction decisions are shrouded in mystery.[6] The problem lies with the assumption that when the Supreme Court labels things separately as pendent or ancillary, the Court has actually described two separate phenomena.[7] In fact, those labels, at least at their core, describe the same thing.[8]

This Article attempts to weave the divergent strands of pendent and ancillary jurisdiction into a whole fabric. First, the Article sets forth the structure, sources, and limits of federal jurisdiction,[9] illustrating the absence of efficient and fair litigation options to parties involved in com-

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[4] *See, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Aldinger v. Howard, 427 U.S. 1 (1975); United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Valencia v. Anderson Bros. Ford, 617 F.2d 1278 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981); Revere Copper & Brass v. Aetna Casualty & Sur. Co., 426 F.2d 709 (5th Cir. 1970); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

[5] *See, e.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 917-26, 1211-14 (2d ed. 1973) [hereafter HART & WECHSLER]; M. REDISH, FEDERAL COURTS — CASES, COMMENTS, AND QUESTIONS 462-501 (1983); Baker, *Toward a More Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 762-84 (1972); Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753 (1978); Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U.L. REV. 245 (1980); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968); Note, *The Concept of Law-Tied Pendent Jurisdiction*: Gibbs *and* Aldinger *Reconsidered*, 87 YALE L.J. 627 (1978).

[6] The decisions seem especially enigmatic to students. It never ceases to amaze me that at the end of the semester each year the question I most often hear from my students is: "Say, just what is the difference between pendent and ancillary jurisdiction anyhow?" So much for the clarity of my teaching; or, is it so much for the clarity of the decisions?

[7] This practice is best described by Humpty Dumpty:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master — that's all."

L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 186 (Signet Classic ed. 1960).

[8] *See* Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935, 1935-36 (1982) [hereafter Note, *Theory of Incidental Jurisdiction*]; Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263, 1271-87 (1975).

[9] *See infra* text accompanying notes 15-31.

plex litigation when pendent and ancillary jurisdiction are unavailable.[10] Second, the Article outlines the traditional view of the pendent and ancillary jurisdiction doctrines.[11] Third, the Article details the current scope of the doctrines, reviews their historical constitutional limits, and explains their divergence, concluding that at least on the constitutional level the doctrines are identical.[12] Fourth, the Article examines statutory and discretionary barriers to the exercise of supplemental jurisdiction.[13] Finally, the Article offers a starting point for proper analysis of all supplemental jurisdiction cases.[14] Together, these sections serve as a primer for understanding and analyzing the basic structure of pendent and ancillary jurisdiction.

I. The Scope of the Problem: Limited Federal Jurisdiction and the Apparent Inability of a Federal Court to Resolve an Entire Legal Dispute

A. The Barrier of Limited Federal Jurisdiction

Under the United States Constitution, the federal government possesses only limited powers. Article I describes its legislative power; article II describes its executive power; and article III describes its judicial power. The Supreme Court has long held that the nine categories of cases and controversies listed in article III, section two of the Constitution[15] set the outside limits of federal court jurisdiction.[16] Congress may,

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[10] *See infra* text accompanying notes 34-42.

[11] *See infra* text accompanying notes 43-59.

[12] *See infra* Part II.

[13] *See infra* Parts III and IV.

[14] *See infra* text accompanying notes 262-65, 359-61, 410-12.

[15] The Constitution's judicial article enumerates the power held by federal courts:

> The judicial Power [of the United States] 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.

U.S. Const. art. III, § 2.

[16] *See* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) (in a suit involving alien plaintiffs, defendant's citizenship must be shown despite jurisdictional statute providing jurisdiction over any suit by an alien because if defendant were also alien, no

however, further restrict that jurisdiction by narrowly defining the authority of the lower federal courts it creates[17] and making exceptions and regulations to the jurisdiction of the United States Supreme Court.[18] Hence, the jurisdiction of federal courts is limited not only by the Constitution, but by statutes as well.[19]

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jurisdiction under article III could be found); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (congressional act giving Supreme Court original jurisdiction over a case not within the article III, § 2 grant of original jurisdiction to the Court unconstitutional).

At one time, a plurality of the Court contended that Congress, pursuant to its article I legislative power, might give jurisdiction to federal courts over cases and controversies beyond those enumerated in article III. *See* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 600 (1949) (Justice Jackson, joined by Justices Black and Burton, would hold that Congress under article I of the Constitution may give justiciable controversies otherwise outside of article III to federal courts, "regardless of lack of diversity of citizenship"); *see also* Williams v. United States, 289 U.S. 553 (1933) (suggesting that article III courts' review of court of claims decisions could be justified, although such jurisdiction was outside of article III, because courts could hear other matters of judicial nature); O'Donoghue v. United States, 289 U.S. 516 (1933) (permitting article I power to be exercised under a hybrid theory of jurisdiction applicable to federal courts in the District of Columbia). The better view, however, is that article III, § 2 sets the constitutional limits of federal judicial power, and that Congress is powerless to expand that jurisdiction. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) ("The character of the controversies over which federal judicial authority may extend are delineated in Art. III, § 2, cl. 1."); *see* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) (six Justices indicating that federal courts have no power beyond article III).

[17] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 429-30 (1944); Lockerty v. Phillips, 319 U.S. 182, 187-88 (1943); Sheldon v. Sill, 49 U.S. (8 How.) 440, 448 (1850) (Congress, under its authority either to create or not to create lower federal courts, may exercise lesser power of restricting the jurisdiction of lower federal courts). *But see* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974) (arguing that current docket of Supreme Court is so congested that Congress must keep lower courts open in order to insure compliance with the requirement of article III, § 2 that the judicial power shall be vested in federal courts).

[18] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1869); *see* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 168-71 (1960); Sager, *The Supreme Court, 1980 Term — Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

[19] *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) ("Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction."). Congress has used this regulatory power to eliminate several types of federal jurisdiction. For example, Congress has limited diversity jurisdiction to controversies in which over $10,000 is at

From the Judiciary Act of 1789[20] until the Civil War, the lower federal courts exercised only narrow original jurisdiction over diversity cases and a limited number of federal question cases.[21] Additionally, a few types of cases begun in state court were removable to federal courts.[22] Thus, original jurisdiction of most federal question cases[23] was reserved to the states, subject to appellate review by the United States Supreme Court.[24]

The passage of the thirteenth, fourteenth, and fifteenth amendments to the Constitution greatly expanded federally guaranteed rights. To enforce these rights, Congress[25] enacted several civil rights statutes[26] and gave lower federal courts original jurisdiction over cases arising under them. During the same era, Congress greatly expanded removal jurisdiction[27] and significantly broadened federal habeas corpus relief.[28] In 1875, for the first time,[29] Congress effectively gave lower federal

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stake, 28 U.S.C. § 1332(a) (1976), has not provided for appellate jurisdiction in the Supreme Court over diversity cases begun in state court, 28 U.S.C. § 1257 (1976), and has forbidden federal courts to issue injunctions in some cases, *see, e.g.*, Anti-Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1976); Johnson Act, 28 U.S.C. § 1342 (1976); Anti-Injunction Statute, 28 U.S.C. § 2283 (1976); Norris-La Guardia Act, 29 U.S.C. §§ 101-115 (1976).

[20] Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

[21] *See* Judiciary Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (diversity jurisdiction); *id.* § 9, 1 Stat. 73, 77 (suits by an alien in violation of the law of nations); Act of Apr. 10, 1790, § 5, 1 Stat. 109, 111 (patents). *See generally* HART & WECHSLER, *supra* note 5, at 844-46.

[22] *See, e.g.*, Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 73, 79 (diversity removal); Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. 233; Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633 (removal of actions against federal officers in state courts).

[23] Article III, § 2 in part extends the federal judicial power to "Cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." These cases are generally called federal question cases. *See* C. WRIGHT, LAW OF FEDERAL COURTS 90 (4th ed. 1983).

[24] *See* Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85. *See generally* HART & WECHSLER, *supra* note 5, at 844-50.

[25] The post-Civil War amendments are enforceable by appropriate congressional legislation. *See* U.S. CONST. amends. XIII, § 2, XIV, § 5, XV, § 2.

[26] *See* Act of Mar. 1, 1875, ch. 114, 18 Stat. 335; Act of Apr. 20, 1871, ch. 22, 17 Stat. 13; Act of Feb. 28, 1871, ch. 99, 16 Stat. 433; Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. *See generally Developments in the Law, "Section 1983 and Federalism,"* 90 HARV. L. REV. 1133, 1141-56 (1977) (outlining development of civil rights laws) [hereafter *Developments in the Law*].

[27] *See* Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756.

[28] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

[29] The Act of 1875 was the first long-lasting general grant of original federal question jurisdiction. Federal courts had previously received a short lived statutory grant of

courts general federal question jurisdiction.[30]

This expansion of federal rights increased the availability of federal trial courts, but not by eliminating state court participation in federal question cases. Rather, Congress permitted concurrent jurisdiction in state courts, giving the parties a choice between a state or federal forum.[31] The changes Congress made were more than cosmetic gestures. They represented a significant change in the distribution of jurisdiction between federal and state courts, creating new opportunities for original federal jurisdiction. Moreover, this new jurisdictional opportunity was motivated, at least in part, by congressional distrust of state action — including that of state courts.[32]

Congress did not articulate how its new statutes would function in actual legal disputes. Although it built a system permitting litigants broader access to federal courts, Congress could not expand those new opportunities beyond the limits of article III of the Constitution. If the principles of limited federal jurisdiction would reduce the attractiveness of a federal forum or provide incentives to litigate in state courts, the congressional intent to give litigants a true choice could be undermined.

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such jurisdiction in the Midnight Judges Act of Feb. 13, 1801, ch. 4, 2 Stat. 89. That Act, however, was quickly repealed before having much impact. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

[30] Act of Mar. 3, 1875, ch. 137, §§ 1-2, 18 Stat. 470. On its face, the Act of 1875 contains language nearly identical to the constitutional grant in article III, § 2. *Compare* Act of Mar. 5, 1875, ch. 137, § 1, 18 Stat. 470 *with* U.S. CONST. art. III, § 2. Thus, with the exception of its amount in controversy requirement, the Act of 1875 might have been read to give all the jurisdiction constitutionally permissible. *See* Forrester, *The Nature of a "Federal Question,"* 16 TUL. L. REV. 362, 374-75 (1942). Soon after 1875, it became apparent that the statute would be read much more narrowly than the Constitution. *Compare* Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908) (interpreting Act of 1875 to require well-pleaded complaint) *and* Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 206 (1877) (same) *with* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) (Constitution requires only presence of federal claim in either plaintiff's or defendant's case).

[31] Since the Reconstruction era, this policy of free choice of forum has remained a dominant goal of federal jurisdiction. *See* Haring v. Prosise, 103 S. Ct. 2368, 2378 (1983); Patsy v. Board of Regents, 457 U.S. 496 (1982); Mitchum v. Foster, 407 U.S. 225, 240-42 (1972); *Developments in the Law, supra* note 26. Of course, through the use of removal, a plaintiff's choice of a state forum can be defeated by a defendant seeking a federal forum. *See, e.g.*, 28 U.S.C. § 1441(a)-(c) (1976).

[32] "[O]ne of the central concerns which motivated the enactment of [the Civil Rights Act was] the 'grave congressional concern that state courts had been deficient in protecting federal rights.'" Haring v. Prosise, 103 S. Ct. 2368, 2378 (1983) (quoting Allen v. McCurry, 449 U.S. 90, 98-99 (1980)); *see also* Patsy v. Board of Regents, 457 U.S. 496 (1982); Mitchum v. Foster, 407 U.S. 225, 240-42 (1972); Monroe v. Pape, 365 U.S. 167, 180 (1961).

Limited federal jurisdiction at first posed little threat to the congressional free choice scheme, for the period following the Civil War was characterized by simple lawsuits involving single plaintiffs with single claims against single defendants.[33] Such lawsuits either came within article III, section two and the accompanying jurisdictional statutes, or did not.[34] But as modern procedural rules developed, lawsuits have presented a greater potential for undermining free choice. The federal procedural rules now permit broad types of joinder of parties and claims which greatly expand the scope of lawsuits,[35] whether the claims are federal or nonfederal.[36] Together these rules create the opportunity to present and resolve an entire legal dispute[37] between parties.

When an entire legal dispute contains some claims that are within article III, section two and some that are not, it directly poses a limited

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[33] *See infra* note 81 and accompanying text.

[34] The notion that this is a simple task is a gross underestimation of the difficulties of deciding whether a claim arises under federal law for purposes of federal question jurisdiction. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Moore v. Chesapeake & O. Ry., 291 U.S. 205 (1934); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921); American Well Workers Co. v. Layne & Bowler Co., 241 U.S. 257 (1916). These cases demonstrate the difficulty of deciding if a case arises under federal question jurisdiction statutes. Similarly, demonstrating that parties are diverse for purposes of diversity jurisdiction has also proven difficult. *See, e.g.*, Kramer v. Caribbean Mills, 394 U.S. 823 (1969); United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965). Despite these difficulties, the task of determining jurisdiction no doubt is made simpler as fewer claims and parties are involved.

[35] The Rules permit joinder of all claims one party has against an opposing party. FED. R. CIV. P. 18(a). Additionally plaintiffs may join several defendants, or join with several others as multiple plaintiffs. FED. R. CIV. P. 20(a). Other rules permit counterclaims of all kinds by defendants, FED. R. CIV. P. 13(a)-(b), and myriad other expansive joinders. *E.g.*, FED. R. CIV. P. 13(g) (cross-claims), 13(h) (addition of new parties to cross-claims), 14 (impleader), 22 (interpleader), 24 (intervention).

[36] For convenience, claims or questions that come within article III, § 2 are hereafter referred to as federal claims, and any other claims or questions in such a dispute as nonfederal claims. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 n.11 (1978) (adopting the same terminology).

[37] As used in this Article, an "entire legal dispute" refers to the scope of joinder of parties and claims permissible under federal procedural rules. The term also includes parties who may intervene in a dispute. Essentially, the scope of a federal lawsuit today is governed by the Federal Rules of Civil Procedure. An entire legal dispute in federal court is measured by those rules, which provide broadly for joinder of claims, FED. R. CIV. P. 13(a)-(b), (g), 18(a), joinder of parties, FED. R. CIV. P. 13(h), 14, 19, 20(a), and intervention, FED. R. CIV. P. 24(a), (b).

Congress has a long-standing preference for efficient litigation, *see infra* note 256, and this policy is fostered by permitting the federal rules their full scope. *E.g.*, FED. R. CIV. P. 1 (the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").

jurisdiction problem. Litigants seeking to adjudicate their entire legal dispute in federal court would be frustrated by limited federal jurisdiction if all of their claims — including those outside of article III, section two — could not be heard in a federal court. It might seem that the Constitution mandates strict adherence to jurisdictional limits in such cases,[38] for it says nothing about allowing federal courts to hear nonfederal claims simply to ensure efficient litigation or a party's forum choice.

If limited jurisdiction bars federal adjudication of an entire legal dispute, litigants would have two equally undesirable alternatives: splitting their claims between federal and state courts, or litigating their entire dispute in state court.[39] These alternatives undercut the usefulness of the Federal Rules of Civil Procedure and have serious consequences. Splitting claims between state and federal courts is inefficient. It forces several lawsuits instead of one and raises costs by duplicating service, pleadings, discovery, court time, and lawyer time. It could lead to wasteful judicial activity, as litigation of one part of the controversy

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[38] One might easily envision a legal dispute in which only some claims for relief could be brought independently under article III. For example, a plaintiff who is the victim of police brutality could assert a federal claim alleging a Civil Rights Act violation under 42 U.S.C. § 1983 (Supp. V 1981) and a nonfederal claim alleging assault and battery under state law against the police officer. If the plaintiff and the officer were citizens of the same state, the state law claim against the officer could not be brought independently in federal court. The problem would only be intensified if in addition to plaintiff's two claims, either plaintiff desired to add another defendant to the nonfederal claim or if the defendant wished to implead a nondiverse party.

[39] A lawsuit containing both federal and nonfederal claims might be split into its constituent parts. For example, in the civil rights hypothetical outlined above, *supra* note 38, plaintiff could bring the § 1983 claim in federal court and the nonfederal assault and battery claim in state court. Alternatively, the parties might bring the entire legal dispute in state court. In many complex lawsuits containing both federal and nonfederal claims the parties can obtain a resolution of the entire dispute in a state court. Unless Congress explicitly makes jurisdiction over the federal claim exclusive in federal courts, state courts ordinarily are obligated to hear the federal claim. *See, e.g.*, Testa v. Katt, 330 U.S. 386 (1947). Also, the limited jurisdiction of article III, § 2 of the Constitution does not prevent litigation of nonfederal claims in state courts, since by definition, article III describes "the judicial Power" of the United States. Thus, provided that the federal claim may be heard by the state court and that the state procedural rules are broad enough to encompass all elements of the dispute, a forum exists to adjudicate the entire legal dispute between parties.

This solution would work in the civil rights hypothetical. Because civil rights jurisdiction is not exclusively federal, *see* 28 U.S.C. § 1343 (Supp. V 1981), the plaintiff's federal claim could be litigated together with all the nonfederal claims in state court.

might preclude litigation of other parts.[40] Similarly, inducing litigation

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[40] A plaintiff who splits federal and nonfederal claims, litigating the former in federal court and the latter in state court, may risk claim preclusion if the nonfederal claim reaches judgment before the federal claim. Claim preclusion, or res judicata, occurs when a party attempts to litigate in a subsequent lawsuit a claim that is part of the same cause of action as a suit previously litigated between the parties so long as the previous lawsuit resulted in a judgment on the merits. The preclusion occurs whether plaintiff raised the claim in the prior suit or omitted it. F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE § 11.3, at 532-33 (2d ed. 1977); *see* Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876). If plaintiff was successful in the prior lawsuit, subsequent claims arising from the same cause of action merge into the judgment. F. JAMES, JR. & G. HAZARD, JR., *supra*, § 11.3, at 533. If plaintiff lost the prior lawsuit, subsequent claims are barred by the judgment. *Id.* For example, if our hypothetical civil rights plaintiff splits the federal civil rights action from the state assault and battery claim, and loses the assault and battery claim on the merits in state court before a judgment is reached on the federal claim in federal court, the federal claim is barred by the state judgement because plaintiff could have brought the federal claim in state court. *See* Migra v. Warren City School Dist. Bd. of Educ., 52 U.S.L.W. 4151, 4154 (U.S. Jan. 23, 1984) (federal court must give same preclusive effect to state court judgment in which § 1983 claim is omitted as would the state court); *cf.* Allen v. McCurry, 449 U.S. 90, 98 (1980) (collateral estoppel bars subsequent federal action when issue already decided in state court; Court states that scant legislative history of § 1983 does not suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion).

A federal court is statutorily obligated to give full faith and credit to a state court's judgment; it must give the judgment at least the effect that the state would give its own judgment. 28 U.S.C. § 1738 (1976) (authenticated judicial records of the states "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State"); *see also Migra*, 52 U.S.L.W. at 4153. Therefore, even if the federal court desires to avoid res judicata, Congress has mandated that the court give full effect to the state judgment. Since in many instances a plaintiff may bring federal and nonfederal claims together in state court, *see supra* text accompanying notes 25-31, 39 (outlining concurrent state and federal jurisdiction), splitting federal and nonfederal claims may lead to a res judicata bar of the federal claim, if the nonfederal claim reaches judgment first.

Defendants, as well as plaintiffs, face claim preclusion problems. If defendant is sued in a state having a compulsory counterclaim rule, *see, e.g.*, IOWA R. CIV. P. 29 ("A final judgment on the merits shall bar such compulsory counterclaim, although not pleaded."), and if defendant fails to file a compulsory federal counterclaim in state court, but instead brings it in federal court as an original action, defendant's federal claim will be barred if the state court reaches judgment first.

Even if claim preclusion is not applicable, splitting federal and nonfederal claims raises a substantial risk of issue preclusion. Issue preclusion, or collateral estoppel, extends the res judicata effect of a prior judgment. It permits a court to use the prior judgment to bar retrial of an issue arising in a second action that is identical to an issue tried in the first lawsuit, even if the subsequent action is based on a new claim. The bar applies so long as the issue was finally determined in the prior litigation and the party to be precluded had an adequate opportunity to be heard on the issue in the prior case. *See* Allen v. McCurry, 449 U.S. 90 (1980). For example, a state court might find that a plaintiff's federal civil rights claim and state assault and battery claim are not

of the entire dispute in an available state court[41] would be undesirable. It would frustrate the congressional policy of giving litigants a free choice of a forum and could prove ineffective, as many lawsuits cannot be shoehorned into one state court.[42] Thus, under either of these alter-

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part of the same cause of action, and that a decision on one of the claims would not be claim preclusion as to the other. Nonetheless, the state court's findings of fact on the nonfederal claim — for example, whether defendant actually struck the plaintiff — could be used to preclude a contrary finding of fact by the federal court on the federal claim.

To the extent that the state case reaches judgment prior to the federal case, and either issue or claim preclusion is used in the federal case, the choice of a federal forum has been defeated. This would run counter to the long-held congressional intent of permitting litigants a choice of a federal forum. *See supra* text accompanying notes 29-43.

This problem would be intensified if the federal court deliberately delayed action in the federal case to await the outcome of the state action. For example, under some circumstances, the federal court, to control its docket, might stay its hand in a federal action to take advantage of state factfinding and use issue or claim preclusion to decide federal claims related to the state case. This would save judicial time and avoid the possibility of a federal court decision inconsistent with that reached in the state courts. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976). Moreover, even if no preclusive effect is found, splitting federal and nonfederal claims is inefficient; it increases costs, causes duplication of court efforts, and runs counter to federal policies favoring efficient litigation. *See supra* note 37. Splitting federal and nonfederal claims is a poor resolution of the conflict between the desire for efficient litigation and limited federal jurisdiction.

[41] *See supra* note 39.

[42] First, while it may be possible to bring an entire dispute to state court, policy matters and practical considerations may make this solution unworkable. The ability to choose to litigate the entire dispute in state court is outside the hands of any single litigant. If plaintiff possesses both federal and nonfederal claims, plaintiff may or may not choose to bring them both to state court. If plaintiff does bring both claims to state court, this would force other parties to litigate their nonfederal claims in that court as well. But, any other party having a federal claim could not be prevented from seeking a federal forum for the federal claim and splitting the entire legal dispute.

Second, if plaintiff begins a lawsuit that raises a federal claim in federal court, other parties generally cannot force litigation in state court just because nonfederal claims also exist between the parties, although in some limited situations the presence of unclear state law questions may lead to a federal court either dismissing or staying a federal action, and relegating litigation to state courts. *See* Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm'n v. Pullman, 312 U.S. 496 (1941). When the action cannot be forced into state court, the dispute might be split at the outset with no apparent means to bring the entire dispute to one forum.

Third, in some instances, congressional action may compel a party to seek a federal forum. Some federal claims, such as admiralty, 28 U.S.C. § 1333 (1976), may not be brought in state court because federal jurisdiction over them is exclusive. Parties desir-

natives, limited federal jurisdiction could frustrate important federal goals.

B. Partially Overcoming the Barrier — Pendent and Ancillary Jurisdiction

Courts fashioned supplemental jurisdiction as a partial remedy for the problems of limited jurisdiction. Because such jurisdiction permits a federal court to decide nonfederal claims having a factual relationship to federal claims properly brought to the court, the likelihood that an entire legal dispute can be determined in one federal lawsuit is increased. This avoids the pitfalls of defeating the choice of a federal fo-

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ing an efficient and economical judicial treatment of their claims want to try those claims together with other claims existing in the entire dispute. A plaintiff with both federal and nonfederal claims would be forced to litigate in state court to have the entire case decided by one tribunal. Even if the plaintiff had no nonfederal claim, but anticipated nonfederal claims from the defendant or potential intervenors, the plaintiff might begin the case in state court in an effort to keep the entire dispute confined to one forum. Splitting the case could subject the plaintiff to a substantial risk that the claims in one action would be precluded if judgment were reached on related claims in the other action first. *See supra* note 40.

Similar incentives would lead defendants and intervenors to try their claims together with the plaintiff's original claim. Once plaintiff has begun a state case, defendants and intervenors would be strongly influenced to bring their claims in the state court, especially if risks would attach to the failure to do so. *See supra* note 40. These influences would apply to either federal or nonfederal claims.

To the extent any party is influenced to bring a federal claim in state court to achieve efficiency unavailable in federal court due to limited federal jurisdiction, important federal interests are undermined. Congress in its various jurisdictional grants has allowed litigants a free choice between state and federal courts. *See supra* text accompanying notes 25-31. For at least some federal rights, Congress gave plaintiffs this choice to permit them to avoid potential inadequacies of state courts. *See, e.g.*, 28 U.S.C. § 1332 (Supp. V 1981) (diversity jurisdiction); 42 U.S.C. § 1983 (Supp. V 1981) (civil rights action). *See generally* Mitchum v. Foster, 407 U.S. 225, 240-42 (1972) (explaining congressional policy). Limited federal jurisdictional provisions which make state courts more attractive to litigants than federal courts run counter to the congressional intent of permitting free choice. Hence, the alternative of litigating an entire legal dispute containing some federal claims in state court is not a very attractive method of serving important federal interests.

rum and creating judicial inefficiency outlined above.[43]

1. Accommodating Limited Federal Jurisdiction and the Desire to Adjudicate Nonfederal Claims — The Historical Response of Federal Courts

Early in the history of our republic, the Supreme Court recognized that the desire for efficiency could not adequately be reconciled with limited federal jurisdiction either by bringing an entire legal dispute in state court or by splitting claims.[44] Accordingly, the Court generated the supplemental jurisdiction doctrines, and permitted adjudication of some nonfederal matters in federal court.

In *Osborn v. Bank of the United States*,[45] the United States Supreme Court flatly rejected the argument that the presence of nonfederal questions in a case containing a federal claim prevents a federal court from adjudicating the federal claim in the case. The Court noted that such a construction of "arising under" jurisdiction[46] would severely erode federal jurisdiction, because "[t]here is scarcely any case, every part of which depends upon federal law."[47] Not only could the federal issue in the case be heard, the entire action could be decided:

> [W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give [federal courts] jurisdiction of that cause, although other questions of fact or of law may be involved in it.[48]

At first reading, the *Osborn* doctrine appears inconsistent with the commonly held belief that article III, section two of the Constitution sets the limit of federal judicial power. This appearance is deceiving. *Osborn* holds that a federal court is empowered to hear nonfederal questions only if they are contained in the same "cause" as a federal claim. It does not contradict or go beyond article III, section two limits.

"Cause," as used in *Osborn*, relates to the scope of the case or controversy between the plaintiff and the defendant.[49] Since article III, sec-

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[43] *See supra* text accompanying notes 39-42.

[44] Siler v. Louisville & N.R.R., 213 U.S. 175, 191 (1909); Freeman v. Howe, 65 U.S. (24 How.) 450, 457-59 (1861); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 820 (1824).

[45] 22 U.S. (9 Wheat.) 738 (1824).

[46] "Arising under" jurisdiction encompasses "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 . . . ." U.S. CONST. art. III, § 2.

[47] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 820 (1824).

[48] *Id.* at 823.

[49] *Id.* at 820.

tion two extends the judicial power of the United States to cases and controversies, a federal court would not exceed the limits of the Constitution by deciding nonfederal claims contained in the same case as a federal claim.[50] The Supreme Court, in *Siler v. Louisville & Nashville Railroad*,[51] used the *Osborn* rationale to permit a lower federal court to take jurisdiction in a case containing only a colorable federal claim and decide the case solely on nonfederal grounds — an apparent broadening of *Osborn*, which turned at least potentially on federal grounds.

Paralleling its decisions in *Osborn* and *Siler*, which involved plaintiffs bringing cases containing nonfederal issues or claims, the Supreme Court permitted certain nonfederal claims to be brought into cases by parties other than plaintiffs. Like *Osborn* and *Siler*, these nonfederal claims were held within the article III power of federal court. In *Freeman v. Howe*,[52] the first of these cases, the Supreme Court indicated that a nondiverse person may intervene in a federal action to state a nonfederal claim to property held by the federal court.[53] The rationale of *Freeman* and other claim to property cases was that once a federal court properly acquired jurisdiction over a case, it could "entertain, by intervention, dependent or ancillary controversies."[54]

In addition to the *Freeman* property claim cases, the Supreme Court explicitly permitted another type of nonfederal claim to be brought into federal court. In *Moore v. New York Cotton Exchange*,[55] the Court held that because defendant's nonfederal compulsory counterclaim arose from the same transaction or occurrence as did plaintiff's federal anti-

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[50] *Osborn* made clear that the only type of federal claim in a case that gives a federal court power over nonfederal claims is one that is not peripheral to the outcome of the action. Rather, there must be present a "title or right set up by the party, [that] may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." *Id.* at 822. The *Osborn* test, while broadly authorizing decisions on nonfederal matters, requires that those matters be part of the same case as a dispute containing at least a potentially dispositive federal issue. In this way, *Osborn* strikes a sensitive balance between the need to adjudicate federal rights and the desire to adhere to article III limits. *See* Matasar, *supra* note 1, at 1446-47 n.208.

[51] 213 U.S. 175, 191 (1909) (a federal court has the right to decide all questions in cases before it, even if it decides the federal questions adversely to the party raising them, or even if it fails to decide them at all and decides the case on local or state questions only).

[52] 65 U.S. (24 How.) 450 (1861).

[53] *Id.* at 457-59; *see also* Stewart v. Dunham, 115 U.S. 61 (1885). For a discussion of *Freeman*, see *infra* text accompanying notes 243-44.

[54] Fulton Bank v. Hozier, 267 U.S. 276, 280 (1925). For a detailed discussion of claim to property and other ancillary jurisdiction cases, see Matasar, *supra* note 1, at 1463-69, 1474-77.

[55] 270 U.S. 593, 609-10 (1926).

trust claim, both claims could be heard by a federal court, even though the federal claim was dismissed for failure to state a claim and the counterclaim had no independent basis for federal jurisdiction.[56]

2. General Outline of the Power of a Federal Court to Decide Nonfederal Claims

The *Osborn/Siler* line of cases is the ancestor of what is now called pendent jurisdiction. This jurisdiction is identifiable by two salient characteristics. First, plaintiff is bringing both federal and nonfederal claims. Second, a factual relationship exists between plaintiff's federal and nonfederal claims.[57] The *Freeman/Moore* line of cases developed into what is now called ancillary jurisdiction. Two characteristics also identify this jurisdiction. First, defendant or an intervenor is bringing the nonfederal claims into the litigation. Second, either the nonfederal claim concerns property brought before the federal court by a proper federal claim or the nonfederal claim is transactionally related to the federal claim.[58]

These two lines of cases establish a simple rule of thumb to distinguish pendent from ancillary jurisdiction: *P* is for pendent and plaintiff, *A* is for ancillary and all others.[59] Despite this axiom suggesting differences, this perception may be more illusory than real.[60] Yet as described below, courts continue to separate the doctrines and give the labels

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[56] *Id.* For a detailed discussion of *Moore*, see *infra* text accompanying notes 197-204.

[57] *See infra* text accompanying notes 120-50 (discussion of the factual relationship test used for pendent jurisdiction case: the common nucleus standard). The *Osborn/Siler* line of cases addresses only the situation in which a single plaintiff attempts to assert both federal and nonfederal claims against the same defendant. Such cases are called pendent claim cases. In a related type of case, either a plaintiff attempts to bring federal claims against one defendant, but nonfederal claims against another defendant, or a different plaintiff attempts to bring the nonfederal claim. These cases involve the pendent party concept, which is discussed in detail below. *See infra* Part III.

[58] *See infra* text accompanying notes 178-219 (discussing property and transactional relationship requirement). It is not always recognized that property claim cases involve a different application of ancillary jurisdiction than transactional cases. Thus, ancillary jurisdiction is sometimes thought of as involving only a quest for factual relationships between federal and nonfederal claims. Ancillary jurisdiction in the property claim context, however, does extend to many cases having no transactional relationship between claims. *See* Matasar, *supra* note 1, at 1463-65; *cf.* FED. R. CIV. P. 13(g), 24(a) (both treating claims to property and transactionally related claims as separate categories).

[59] *See* Note, *Theory of Incidental Jurisdiction*, *supra* note 8, at 1936-37. Both doctrines spring from the same source: *Osborn*. Both doctrines are characterized, in part, by a requirement of a factual relationship between the federal and nonfederal claim.

[60] *See infra* notes 237-64 and accompanying text.

vitality.[61]

II. Constitutional Limits to Pendent and Ancillary Jurisdiction

Since *Osborn v. Bank of the United States*, federal courts have had power to decide any nonfederal question of law, or find facts concerning any nonfederal claim, so long as that question or fact is part of the same constitutional case or controversy as a federal matter.[62] Early Supreme Court decisions concerning pendent and ancillary jurisdiction failed to define precisely the scope of either case or controversy in this context.[63] Nonetheless, two observations may be made as to the early theoretical limits of the power. First, cases and controversies were not limited to situations in which plaintiff had only one claim, which contained distinct issues of federal and state law; they also included situations in which plaintiff had separate federal and nonfederal claims.[64] Second, cases and controversies also encompassed matters that a defendant or intervenor could bring to an action.[65] However, these two observations provide little guidance in establishing the constitutional contours of case or controversy. Hence, following the early supplemental jurisdiction cases, the Supreme Court slowly developed the current constitutional limits to pendent and ancillary jurisdiction.[66]

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[61] As discussed below, there are statutory and discretionary limits to the exercise of pendent and ancillary jurisdiction which may make continued use of the labels sensible. *See infra* Part III (statutory limits) and Part IV (discretionary limits).

[62] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 821-23 (1824); *see supra* text accompanying notes 45-56.

[63] While it is true that early pendent and ancillary jurisdiction decisions did not define "case" or "controversy," the Supreme Court spoke clearly and often of those definitions in other contexts. Thus, in *Osborn*, the Court described a "case" as "rights" asserted "in the form prescribed by law." 22 U.S. (9 Wheat.) 738, 819 (1824). The Court later defined the "form prescribed by law" to be "the progressive course of [judicial] business, from its commencement to its termination." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 28 (1825); *see also* Tutun v. United States, 270 U.S. 568, 577 (1926); Muskrat v. United States, 219 U.S. 346, 356-57 (1911); Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 475 (1894); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

When "case" or "controversy" is defined in this fashion, it suggests that supplemental jurisdiction ought not be limited, at the constitutional level, by any sort of factual relationship test. Instead, constitutional limits would be provided by the scope of lawfully adopted rules governing federal procedure. *See* Matasar, *supra* note 1, at 1477-91.

[64] *See, e.g.*, Siler v. Louisville & N.R.R., 213 U.S. 175, 190-91 (1909).

[65] *See, e.g.*, Moore v. New York Cotton Exch., 270 U.S. 593, 609 (1926); Freeman v. Howe, 65 U.S. (24 How.) 450, 459 (1861).

[66] It is perhaps curious that the early Supreme Court cases failed to define the con-

This Article next examines those theoretical guidelines for determining one constitutional case or controversy. The Article turns first to the standards governing pendent jurisdiction, then to analysis of ancillary standards, and finally to reconciling the standards for both supplemental jurisdiction doctrines.

A. Pendent Jurisdiction

Siler v. Louisville & Nashville Railroad[67] and *Hurn v. Oursler*[68] are the Supreme Court's earliest attempts to fashion limits to pendent jurisdiction. In *Siler*, although the Court did not precisely define "case," it did state that pendent jurisdiction could be exercised over nonfederal issues contained in any case raising a colorable federal claim.[69] Later, in *Hurn*, the Court contracted the *Siler* colorable claim test, predicating the exercise of pendent jurisdiction on a finding that the federal claim was "not insubstantial."[70] Together *Siler* and *Hurn* set forth the precursor of the substantial federal question doctrine — one of the major components of the current constitutional test for pendent jurisdiction.[71] Even more significantly, *Hurn* for the first time described a limit to pendent jurisdiction based upon the degree of factual relationship between the federal and nonfederal claims in the action. That test is the antecedent of today's most important constitutional limit on supplemental jurisdiction.[72]

In *Hurn*, plaintiff alleged that he held valid federal and common law copyrights for one version of a play he had written, that he also held a

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stitutional limits of supplemental jurisdiction. This may be a reflection of the narrow joinder rules prevalent in federal court until 1938. *See infra* note 81 and accompanying text. An equally plausible explanation is that courts found no confusion in defining constitutional limits. *Osborn* tied those limits to the definition of case used in article III of the Constitution. *See supra* note 63. *Osborn*'s definition was followed and applied often. *Id.*

[67] 213 U.S. 175 (1909).

[68] 289 U.S. 238 (1933).

[69] Siler v. Louisville & N.R.R., 213 U.S. 175, 191 (1909). By colorable, the Court meant only that the federal claim appear to be viable and asserted in good faith. *Id.* For a further discussion of the colorable federal claim test, see *infra* text accompanying notes 98-106.

[70] *See* Hurn v. Oursler, 289 U.S. 238, 246-47 (1933) (applying standard of Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933)). The *Hurn* test differed from the *Siler* test in that the plaintiff's good faith alone could not save an otherwise trivial or obviously meritless claim. *See infra* text accompanying notes 106-17.

[71] *See infra* text accompanying notes 94-119 (discussing substantial federal question doctrine).

[72] *See infra* text accompanying notes 120-50 (discussing common nucleus test).

valid common law copyright for a slightly different version, and that defendant had violated those copyrights by producing a similar play. Plaintiff sought damages for infringement of the federally copyrighted version under federal law, damages for infringement of the common law copyright for that same version under state law, and damages for infringement of the common law copyright for the slightly different version under state law. The Supreme Court held first that the lower court could properly have decided both the federal claim for violation of the federal copyright and the state claim for violation of the common law copyright of the same version of the play,[73] and second that the lower court was without power to decide any state claim for violation of the common law copyright of the other version of the play.[74]

In distinguishing between the two state law claims, the Court articulated some limits to pendent jurisdiction based upon the factual relationship between federal and nonfederal claims. These limits become clearer if one examines the Court's rationale for hearing the first but not the second state claim. The Supreme Court held that its jurisdiction extended to any part of the plaintiff's cause of action against defendant.[75] Since the federal copyright and one of the common law copyrights concerned an identical play, the Court reasoned that they were separate grounds in the same cause of action and both could be heard by a federal court.[76] As to the other common law copyright, which concerned a slightly different version, the Court held it was without jurisdiction because that claim concerned a new cause of action.[77] In essence, the Court tied power to decide a nonfederal claim to its near factual identity to a federal claim: jurisdiction would be proper only when the nonfederal and federal claims were "little more than the equivalent of different epithets to characterize the same group of circumstances."[78]

Although the *Hurn* test was easily articulated, it proved difficult to apply since cause of action carries many meanings, depending on the precise facts to which the term is applied.[79] Consequently, courts applying the *Hurn* test avoided the conceptually difficult determination that two claims were contained within one cause of action. Rather, they fo-

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[73] *Hurn*, 289 U.S. at 247.

[74] *Id.* at 248.

[75] *Id.* at 247.

[76] *Id.*

[77] *Id.* at 246.

[78] *Id.*

[79] *See* United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966); American Fire & Casualty Co. v. Finn, 341 U.S. 6, 12 (1951); United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1933).

cused on the type of proof necessary for each claim. If the evidence necessary to prove the federal and nonfederal claims were virtually identical, the courts would exercise pendent jurisdiction.[80] Thus, immediately following *Hurn v. Oursler*, federal courts restricted pendent jurisdiction to cases containing factually identical federal and nonfederal claims.

This extremely narrow view of pendent jurisdiction was not problematic because federal pleading rules were extant when *Hurn* was announced[81] limited joinder of claims by plaintiffs and restricted opportunities to invoke pendent jurisdiction. In 1938, however, the adoption of the Federal Rules of Civil Procedure vastly increased the opportunities for joinder of claims. As provided in Rule 18(a), "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, *may join*, either as independent or as alternate claims, *as many claims, legal, equitable, or maritime, as he has against an opposing party.*"[82]

The increased opportunity for joinder of claims provided by the Rules spurred litigants to seek an expansion of the *Hurn* factual iden-

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[80] *See, e.g.*, Strey v. Devine's, Inc., 217 F.2d 187, 189 (7th Cir. 1954); Zalkind v. Scheinman, 139 F.2d 895, 901-02 (2d Cir. 1943), *cert. denied*, 322 U.S. 738 (1944); Musher Found. v. Alba Trading Co., 127 F.2d 9, 10 (2d Cir.), *cert. denied*, 317 U.S. 641 (1942); Foster D. Snell, Inc. v. Potters, 88 F.2d 611, 612 (2d Cir. 1937); Jerome v. Twentieth Century-Fox Film Corp., 58 F. Supp. 13, 15 (S.D.N.Y. 1944).

[81] *Hurn* was decided in 1933; until 1938, a federal court was obligated to follow the procedural rules of the state within which it sat in cases at law. *See* Conformity Act of June 1, 1872, ch. 255, 17 Stat. 196; Act of Aug. 23, 1842, ch. 188, 5 Stat. 516; Act of Aug. 1, 1842, ch. 109, 5 Stat. 499; Act of May 19, 1828, ch. 68, 4 Stat. 278; Judicial Courts Act of Mar. 2, 1793, ch. 22, 1 Stat. 333; Process Act of May 8, 1792, ch. 36, 1 Stat. 275. Since most states restricted joinder of claims by plaintiff to situations in which the claims were separate grounds of the same cause of action (roughly the *Hurn* test, *see* Hurn v. Oursler, 289 U.S. 238, 246 (1933)), or in which the claims shared a common legal theory for relief (i.e., all trespass on the case claims could be joined, but a trespass on the case claim could not be joined with a breach of contract claim, even if they arose from the same transaction), *see, e.g.*, C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 436 (2d ed. 1947); B. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING 200-01 (B. Ballantine ed. 3d ed. 1923), federal procedural rules would have blocked pendent jurisdiction more stringently than strict adherence to the *Hurn* test alone would have. While such narrow rules presented substantial barriers to joinder in cases at law, equity provided a much greater opportunity for expansive lawsuits. *See* Matasar, *supra* note 1, at 1484-86 n.387. Despite these equitable principles, until the merger of law and equity brought by the Federal Rules, FED. R. CIV. P. 1-2, suits at law were generally restricted.

[82] FED. R. CIV. P. 18(a) (emphasis added).

tity test.[83] Litigants urged courts to view "case" more generously to encompass any factually related claim. Most courts rejected these attempts as barred by stare decisis.[84] Nonetheless, the apparent disparity between permissible joinder under the Federal Rules and the *Hurn* test led to increased agitation to expand pendent jurisdiction.[85]

Against this background the Supreme Court, in *United Mine Workers v. Gibbs*,[86] set the accepted constitutional limits to pendent and probably ancillary[87] jurisdiction. The facts of *Gibbs* are straightforward: plaintiff had accepted a job as a coal mine superintendent and had contracted to haul coal away from the mine. After union activities prevented the opening of the mine, plaintiff lost his job and haulage contract. He alleged that he lost contracts at other mines as well. Plaintiff, claiming these losses to be the result of union activity, brought suit in the United States District Court for the Eastern District of Tennessee, alleging that the union's activities violated the Labor Management Relations Act,[88] a federal claim, and the common law of Tennessee, a nonfederal claim. The district court submitted the federal and nonfederal claims to a jury, which returned a verdict on both counts. On motion the trial court set aside the verdict on the federal claim, but sustained the nonfederal claim — exercising jurisdiction over the claim under the pendent jurisdiction doctrine. The Sixth Circuit affirmed.[89]

The Supreme Court addressed whether the district court properly entertained jurisdiction of the nonfederal claim. Although the Court might have decided the question under the *Hurn* cause of action test,[90]

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[83] *See infra* notes 84-85.

[84] *See, e.g.*, Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 325 (1938); Woody v. Sterling Aluminum Prods., 365 F.2d 448, 456 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967); Dann v. Studebaker-Packard Corp., 288 F.2d 201, 215 (6th Cir. 1961); Delman v. Federal Prod. Corp., 251 F.2d 123, 126 (1st Cir. 1958); Kleinman v. Betty Dain Creations, Inc., 189 F.2d 546, 548 (2d Cir. 1951); General Motors Corp. v. Rubsam Corp., 65 F.2d 217, 218 (6th Cir.), *cert. denied*, 290 U.S. 688 (1933); Eisenmann v. Gould-National Batteries, 169 F. Supp. 862, 865 (E.D. Pa. 1958).

[85] *See, e.g.*, Strachman v. Palmer, 177 F.2d 427 (1st Cir. 1949); Zalkind v. Scheinman, 139 F.2d 895, 902-03 (2d Cir. 1943), *cert. denied*, 322 U.S. 738 (1944); Musher Found. v. Alba Trading Co., 127 F.2d 9 (2d Cir.), *cert. denied*, 317 U.S. 641 (1942).

[86] 383 U.S. 715 (1966).

[87] *See infra* text accompanying notes 237-261 (describing applicability of *Gibbs* to ancillary jurisdiction).

[88] 29 U.S.C. §§ 158(b)(4), 187 (1976).

[89] Gibbs v. United Mine Workers, 343 F.2d 609 (6th Cir. 1965).

[90] In both the federal and nonfederal claims, plaintiff asserted that the union had engaged in unlawful boycott activity. Accordingly, the claims were arguably properly joined under *Hurn*; they might both have been deemed separate counts of the same

it did not. Rather, the Court outlined the *Hurn* rule and the subsequent adoption of the Federal Rules of Civil Procedure, concluded that the *Hurn* approach was "unnecessarily grudging,"[91] and adopted the following test for constitutional power to exercise pendent jurisdiction:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ," and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[92]

The *Gibbs* pendent jurisdiction test begins with a general statement that the power to exercise pendent jurisdiction exists whenever the relationship between federal and nonfederal claims allows the conclusion that they are part of "one constitutional case." At that level, the opinion adds little to what courts have known since *Osborn*. *Gibbs*, however, then describes in some detail when claims are part of the same case. The opinion sets forth a three part method for assessing the relationship between claims: (1) the federal claim must be substantial; (2) the nonfederal and federal claims must derive from a common nucleus of operative fact; and[93] (3) the nonfederal and federal claims must be such that without regard to their nonfederal or federal character they would

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cause of action. The lower courts so found. Gibbs v. United Mine Workers, 343 F.2d 609, 615 (6th Cir. 1965), *aff'g* 220 F. Supp. 871, 879 (E.D. Tenn. 1963). Nonetheless, the Supreme Court used *Gibbs* to develop an expanded version of pendent jurisdiction.

[91] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[92] *Id.* at 725 (citations and footnotes omitted, emphasis and brackets in original). The Court stated that even if a federal court finds *power* to exercise pendent jurisdiction, it need not do so in every case because "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Id.* at 726. For a more detailed discussion of the *Gibbs* discretionary tests, see *infra* Part IV.

[93] *Gibbs* used the phrase "but if" to connect the common nucleus and expectation of trial parts of its test. Given ordinary language usage, the expectation of trial prong should be an alternative to the common nucleus requirement, rather than an additional requirement. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 150 (1976) (the word "but" used with the word "if" connotes "unless"). As discussed below, however, courts have rejected this linguistic approach and generally require litigants to show both a common nucleus of operative fact and an expectation of trial together as a prerequisite to pendent jurisdiction. *See infra* text accompanying notes 151-80.

ordinarily be expected to be tried together in one judicial proceeding.

In creating this three part test, *Gibbs* attempted to provide a simple standard for evaluating the constitutionality of each assertion of pendent jurisdiction. But the Court's attempt at a straightforward test fell short because the elements of the test have been applied inconsistently. The Court's search for the straightforward has produced the ambiguous. This Article next analyzes the *Gibbs* test, attempting to reduce its unintentional ambiguity by suggesting approaches for each element of its test.

1. Substantiality

The first prerequisite to pendent jurisdiction is determining whether the federal claim is substantial. If it is, there is a basis for pendent jurisdiction; if not, there is none. Hence, substantiality may be seen as a threshold jurisdictional requirement. The substantiality requirement comes from a long line of pendent jurisdiction and other federal jurisdiction cases that were dismissed for lack of a substantial federal question.[94] Beginning in 1877 with *Gold-Washing & Water Co. v. Keyes*,[95] the Supreme Court made the presence of a substantial federal question a prerequisite to lower federal court jurisdiction.[96] In that case, the Court held that a federal court must dismiss any case that does not "really and substantially involve a dispute or controversy properly within the jurisdiction of the court."[97] For cases of pendent jurisdic-

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[94] The presence of a substantial federal question is a prerequisite both to the original jurisdiction of lower federal courts, *see, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 70 (1978); Bell v. Hood, 327 U.S. 678, 681-82 (1946); The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913), and to the Supreme Court's appellate jurisdiction over decisions of state courts, *see, e.g.*, Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390, 391 (1952); Zucht v. King, 260 U.S. 174, 176-77 (1922); Millingar v. Hartupee, 73 U.S. (6 Wall.) 258, 261 (1868).

[95] 96 U.S. 199 (1877).

[96] Prior to that time, the substantiality doctrine was used only to dismiss appeals to the United States Supreme Court from state courts, *see, e.g.*, Zucht v. King, 260 U.S. 174, 176-77 (1922); Millingar v. Hartupee, 73 U.S. (6 Wall.) 258, 261 (1868), because until 1875 lower federal courts did not have general federal question jurisdiction. *See supra* text accompanying notes 20-30. Consequently, most federal question cases arose in state court.

[97] Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203-04 (1877). The use of an insubstantiality dismissal in *Gold-Washing* is the earliest example of the substantiality doctrine. Yet it cannot be used to support the conclusion in *Gibbs* that substantiality is a constitutional component of pendent jurisdiction. *See* Matasar, *supra* note 1, at 1433-38. Rather, the *Gold-Washing* test derived from a congressional statute, Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, *repealed by* Act of Mar. 3, 1911, ch. 231, § 297, 36 Stat.

tion,[98] however, the Supreme Court had stated the rule in a different fashion: a federal court may retain jurisdiction over any nonfederal claim so long as the case also contains a colorable federal claim.[99]

The difference between these standards is not readily apparent. In practice, however, the *Gold-Washing* standard became a more stringent barrier to federal jurisdiction than the *Siler* test.[100] The *Siler* line of cases required only that the federal claim appear in a form that would at least in theory permit a federal court to issue relief to the litigant stating the claim, and that the federal claim be more than a mere pretext for obtaining federal jurisdiction.[101] In contrast, the *Gold-Washing* test called for a judgment of the probability of success of the federal claim: a court had to find a federal claim insubstantial whenever the claim appeared frivolous or barred by prior precedent of the United States Supreme Court, regardless of whether the claim was colorable.[102]

In *Hurn v. Oursler*, the Supreme Court reconciled the *Siler* and *Gold-Washing* substantiality tests, holding that when "the federal question averred is not plainly wanting in substance" the federal court could exercise pendent jurisdiction over the nonfederal claim.[103] In enunciating this test in a pendent jurisdiction case, *Hurn* ignored the *Siler* approach and virtually adopted the standards developed in *Levering & Garrigues Co. v. Morrin*,[104] a *Gold-Washing* type case decided previously the same term. Thirty-three years after *Hurn*, *Gibbs* also embraced those standards.[105] Hence, an analysis of the *Levering* test is necessary to understand the *Gibbs* constitutional requirement.

1087, 1168-69, and important federal policies and Supreme Court decisions suggest that substantiality is not a constitutional standard. Matasar, *supra* note 1, 1438-46. Despite the argument that substantiality is constitutionally compelled, the dominant view is that substantiality is a constitutional component of pendent jurisdiction. *See, e.g.*, Sims v. Western Steel Co., 551 F.2d 811, 819 (10th Cir.), *cert. denied*, 434 U.S. 858 (1977); Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1193 (5th Cir. 1975); Smith v. Spina, 477 F.2d 1140, 1143 (3d Cir. 1973); Kletschka v. Driver, 411 F.2d 436, 450 (2d Cir. 1969).

[98] *See* Siler v. Louisville & N.R.R., 213 U.S. 175 (1909).

[99] *Id.* at 191.

[100] *See* Seid, *The Tail Wags the Dog*: Hagans v. Lavine *and Pendent Jurisdiction*, 53 J. URB. L. 1, 18 (1975).

[101] Siler v. Louisville & N.R.R., 213 U.S. 175, 191 (1909).

[102] *See, e.g.*, Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933); Hannis Distilling Co. v. Mayor of Baltimore, 216 U.S. 285, 288 (1910); Seid, *supra* note 100, at 15.

[103] Hurn v. Oursler, 289 U.S. 238, 246 (1933).

[104] 289 U.S. 103 (1933).

[105] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (citing *Levering*).

Levering held that a federal court is required to dismiss an action that pleads only an insubstantial federal question as its basis for jurisdiction; it held that such dismissals were required as a matter of federal judicial power:

> [J]urisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. . . . And the federal question averred may be plainly unsubstantial either because obviously without merit, or "because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."[106]

This test seems to outline two types of insubstantiality dismissals. The first consists of dismissals in cases in which the federal claim is

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[106] 289 U.S. at 105-06 (quoting Hannis Distilling Co. v. Mayor of Baltimore, 216 U.S. 285, 288 (1910)) (citations omitted). *Levering* held insubstantiality dismissals jurisdictional, as opposed to on the merits. *Id.* at 105. *Cf.* FED. R. CIV. P. 12(b)(6), 41(b) (dismissal for failure to state a claim upon which relief can be granted is decision on the merits of the claims).

The importance of the difference between jurisdictional and merits dismissals is not always apparent, but a simple example will illustrate it. Suppose that plaintiff asserts a claim that federal agents violated her constitutional rights by conducting an illegal search of her premises; suppose further that she joins with this a nonfederal claim for trespass. If the federal claim is dismissed as insubstantial, and insubstantiality is treated as jurisdictional, the federal court must dismiss the nonfederal claim as well, for it would have no power over that claim. The whole case must be dismissed because there is no federal ingredient in the case, and the case would not arise under federal law — there would be no constitutional case to which the nonfederal claim could be pendent. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824); *see also* United Mine Workers v. Gibbs, 383 U.S. 715, 725 n.12 (1966).

As *Gibbs* and *Moore* make clear, a federal court does not lose jurisdiction over a nonfederal claim merely because the federal claim is decided on the merits adversely to the plaintiff. *Id.* at 728-29. (although the federal question was decided against the plaintiff, the Court found jurisdiction over the nonfederal claim); Moore v. New York Cotton Exch., 270 U.S. 593, 609 (1926) (Supreme Court reached defendant's nonfederal counterclaim despite failure of plaintiff's federal claim). Neither does a federal court lose jurisdiction if the federal claim is not decided at all. *See* Hagans v. Lavine, 415 U.S. 528, 543, 550 (1974); Siler v. Louisville & N.R.R., 213 U.S. 175, 191 (1909) (avoiding federal constitutional questions and deciding case solely on nonfederal grounds). Thus, if the plaintiff's federal claim is dismissed for failure to state a claim upon which relief can be granted, FED. R. CIV. P. 12(b)(6), which is a decision on the merits of plaintiff's claim, FED. R. CIV. P. 41(b) ("any dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits"), the court would still be able to decide plaintiff's nonfederal claim. For a detailed discussion advocating making insubstantiality dismissals decisions on the merits as opposed to jurisdictional, see Matasar, *supra* note 1, at 1420-25.

based upon a frivolous allegation or in which the federal claim is obviously without merit.[107] The second consists of dismissals in cases in which the federal claim is barred by prior Supreme Court precedent.[108] Many insubstantiality dismissals rest on each ground.[109]

In the past, courts applied the *Levering* test strictly to bar claims which they considered doomed to failure on the merits, even though others might have disagreed and thought the question much closer.[110] These strict applications of *Levering* are probably incorrect uses of the substantiality doctrine. Today, the Supreme Court has called for more limited use of insubstantiality dismissals. Federal claims should not be dismissed as insubstantial unless "prior decisions inescapably render the claims frivolous,"[111] they are "patently without merit,"[112] or they are "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy."[113]

An excellent example of the Supreme Court's generous attitude to substantiality is provided by *Bell v. Hood*.[114] There, the Court reversed the insubstantiality dismissal of a claim for damages against federal agents who violated plaintiff's constitutional rights. The Court held such claims jurisdictionally substantial,[115] although the claims ultimately failed on the merits and were dismissed as failing to state a claim upon which relief could be granted.[116] The shift from the jurisdic-

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[107] Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933).

[108] *Id.* at 105-06.

[109] *See, e.g.*, Bailey v. Patterson, 369 U.S. 31, 33 (1962) (dismissed because federal claim precluded by previous decision of Supreme Court); Zucht v. King, 260 U.S. 174, 176-77 (1922) (same); Hannis Distilling Co. v. Mayor of Baltimore, 216 U.S. 285, 288 (1910) (same); Montana Catholic Mission v. Missoula County, 200 U.S. 118, 130 (1906) (dismissed because federal claim obviously without merit); Newburyport Water Co. v. Newburyport, 193 U.S. 561, 576 (1904) (same); Western Union Tel. Co. v. Ann Arbor R.R., 178 U.S. 239, 243-44 (1900) (same).

[110] *See, e.g.*, Rodriguez v. Ritchey, 556 F.2d 1185 (5th Cir. 1977) (en banc) (case dismissed as insubstantial despite finding by six of court's thirteen judges that claim was substantial), *cert. denied*, 434 U.S. 1047 (1978); Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976) (dismissing as insubstantial a claim which had succeeded on the merits in another circuit).

[111] Hagans v. Lavine, 415 U.S. 528, 538 (1974) (quoting Goosby v. Osser, 409 U.S. 512, 518 (1973)).

[112] Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 70 (1978) (quoting Hagans v. Lavine, 415 U.S. 528, 542-43 (1974)).

[113] Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974).

[114] 327 U.S. 678 (1946).

[115] *Id.* at 684.

[116] Bell v. Hood, 71 F. Supp. 813, 820-21 (S.D. Cal. 1947).

tional insubstantiality dismissal to dismissal on the merits was significant because once the Court concluded that the plaintiff's claim was not insubstantial, it permitted the lower court to exercise pendent jurisdiction.[117]

Given the direction of these recent Supreme Court decisions, substantiality should rarely, if ever, stand as a barrier to pendent jurisdiction. Although some recent cases suggest the continued vitality of substantiality dismissals,[118] it is apparent that most courts today rarely use insubstantiality to limit pendent jurisdiction.[119] Rather than engaging in hairsplitting analysis whether a federal claim is meritless as opposed to jurisdictionally insubstantial, courts rely either on the other *Gibbs* constitutional requirements or upon its discretionary standards to provide a basis for dismissing the nonfederal claims.

2. Common Nucleus of Operative Fact

The second *Gibbs* requirement for the exercise of pendent jurisdiction is that the nonfederal and federal claims must derive from a common nucleus of operative fact. This fact relatedness[120] requirement has proven the most significant of the *Gibbs* tripartite constitutional pendent power tests. Yet the requirement is not clearly understood and has been interpreted inconsistently by the courts. To assess these varied interpretations of the requirement, its genesis and policy must be discussed.

Following *Hurn*, a court could not exercise pendent jurisdiction unless it found virtual identity between the facts needed to prove the federal and nonfederal claims.[121] Significantly, this type of inquiry coincided with joinder procedures extant before adoption of the Federal Rules.[122] With narrow joinder opportunities, *Hurn*'s limited approach to pendent jurisdiction caused little procedural dislocation. But after the adoption of the Federal Rules, joinder greatly expanded.[123] Several scholars and judges, led by Judge Charles E. Clark of the Second Cir-

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[117] Bell v. Hood, 327 U.S. 678, 685 (1946).

[118] *See supra* note 109.

[119] *See supra* notes 110-12; *see also* Norman v. Reagan, 95 F.R.D. 476 (D. Or. 1982) (showing degree courts will permit meritless claims to escape jurisdictional dismissal).

[120] As used in this Article, fact relatedness refers to the degree that proof of separate claims for relief may be made with common evidence.

[121] *See supra* text accompanying notes 72-80.

[122] *See supra* note 81.

[123] *See supra* text accompanying notes 82-85.

cuit,[124] unsuccessfully asserted that the *Hurn* facts test was flexible, and could be expanded to encompass the new joinder possibilities of the Federal Rules.[125] The need to expand *Hurn* was critical to proponents of the Rules, for without expanding jurisdiction to match expanded joinder opportunities, the efficiency goals of the new rules would have been inhibited.

The Federal Rules tie joinder of claims and parties in most instances to a finding that the claims or parties arise out of the "same transaction or occurrence."[126] From the inception of the Rules, courts interpreted this transactional joinder test expansively to permit joinder upon even the loosest factual connection between claims.[127] Yet Judge Clark stopped short of advocating adoption of the transactional test for pendent jurisdiction. In deference to the *Hurn* formulation, he proposed that pendent jurisdiction focus on facts. Jurisdiction would be proper so long as the federal and nonfederal claims shared an "identity of operative facts"[128] or a "fundamental core" of facts.[129] Clark's operative facts test obviously called for some factual or evidentiary overlap in the nonfederal and federal claims. By reducing the need for fact identity it expanded *Hurn*, but it seemed stricter than the most liberal interpretations of the Federal Rules' transactional test.

In *Gibbs*, the Supreme Court embraced Clark's operative facts formulation, but gave no precise definition for its test. Rather, *Gibbs* contained contradictory cues which have led to various interpretations of the operative facts test. On the one hand, *Gibbs* specifically emphasized the expansion of joinder brought by the Federal Rules: "Under the

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[124] Judge Clark was the former Dean of the Yale Law School and had written extensively in the civil procedure field. *E.g.*, C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 71, at 462-66 (2d ed. 1947) (criticizing *Hurn* pendent jurisdiction test). He was also a principal draftsman of the Federal Rules of Civil Procedure. *See* Order of June 3, 1935, 295 U.S. 774 (1935).

[125] *See, e.g.*, Musher Found. v. Alba Trading Co., 127 F.2d 9, 12 (2d Cir.) (Clark, J., dissenting), *cert. denied*, 317 U.S. 641 (1942); Lewis v. Vendome Bags, Inc., 108 F.2d 16, 19 (2d Cir. 1939) (Clark, J., dissenting), *cert. denied*, 309 U.S. 660 (1940); *see also* C. CLARK, *supra* note 124, at 466.

[126] *See, e.g.*, FED. R. CIV. P. 13(a), 13(g), 14, 20.

[127] *See infra* text accompanying notes 210-34. Courts have held that a logical relationship may be found between two claims whenever joinder of those claims would lead to a savings in time and judicial effort. *E.g.*, Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633-34 (3d Cir. 1961).

[128] *See* Lewis v. Vendome Bags, Inc., 108 F.2d 16, 19 (2d Cir. 1939) (Clark, J., dissenting), *cert. denied*, 309 U.S. 660 (1940).

[129] *See* Musher Found. v. Alba Trading Co., 127 F.2d 9, 12 (2d Cir.) (Clark, J., dissenting), *cert. denied*, 317 U.S. 64 (1942).

Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[130] The opinion reinforced the Rules' policy by rejecting the *Hurn* factual identity test as too "grudging."[131] Together, these two parts of *Gibbs* suggest that the broad joinder encouraged by the Federal Rules should motivate pendent jurisdiction. On the other hand, the Court did not further this apparent goal by adopting the Rules' transactional test; rather, it used the common nucleus of operative fact approach, which appears more limited than the expansively interpreted transactional test.[132] The *Gibbs* test, while stated in a form apparently calling for some degree of evidentiary overlap, was motivated by a quest for "the broadest possible scope of action consistent with fairness."[133]

The difference between the *Gibbs* language and its underlying rationale has led to uncertainty in the application of the common nucleus test. Courts require varying degrees of factual overlap as a predicate to pendent jurisdiction, depending on their focus either on the literal meaning of "common nucleus of operative fact" or the obvious liberating intent of *Gibbs*.

Some courts, in disregard of the *Gibbs* rejection of *Hurn*'s grudging approach to pendent jurisdiction, have demanded near evidentiary identity between federal and nonfederal claims.[134] For example, in *Ferguson v. Mobil Oil Corp.*,[135] plaintiff alleged that his employer improperly

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[130] United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).

[131] *Id.* at 725.

[132] A *common* nucleus of operative *facts* seems to call for factual overlap between claims, i.e., that evidence proving one claim would help in proving the other claim. The transactional test, however, may be met even when there is little or no factual overlap between claims. *See* LASA Per L'Industria Del Marmo Societa Per Anzioni v. Alexander, 414 F.2d 143 (6th Cir. 1969); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633-34 (3d Cir. 1961); *infra* text accompanying notes 141-42, 221-31.

[133] United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).

[134] *See* Hales v. Winn-Dixie Stores, 500 F.2d 836, 847-48 (4th Cir. 1974); Beach v. KDI Corp., 490 F.2d 1312, 1319 (3d Cir. 1974); Gerlach v. Michigan Bell Tel. Co., 448 F. Supp. 1168, 1173 (E.D. Mich. 1978); Ferguson v. Mobil Oil Corp., 443 F. Supp. 1334, 1341 (S.D.N.Y. 1978), *aff'd mem.*, 607 F.2d 995 (2d Cir. 1979); Wilder v. Irvin, 423 F. Supp. 639, 642-43 (N.D. Ga. 1976); Fanning v. School Bd., 395 F. Supp. 18, 23 (W.D. Okla. 1975); Howmet Corp. v. Tokyo Shipping Co., 320 F. Supp. 975, 979 (D. Del. 1971); *cf.* Harper Plastics v. Amoco Chems. Corp., 657 F.2d 939, 946 (7th Cir. 1981) (citing common nucleus test, but apparently applying *Hurn* standard).

[135] 443 F. Supp. 1334 (S.D.N.Y. 1978), *aff'd mem.*, 607 F.2d 995 (2d Cir. 1979). As pointed out by another commentator, this case presents a classic example of an overly restrictive approach to the fact relatedness requirement of *Gibbs*. *See* Schenkier,

discharged him in violation of Title VII of the Civil Rights Act of 1964, and subsequently blacklisted him, in violation of state law. Although both claims related to the same event — the employer's decision to fire plaintiff - the- court found no common nucleus of operative fact because the proof of each claim would not be identical.[136]

In another case,[137] a school teacher sought to organize her co-workers. At a subsequent meeting with the school superintendent and principal, her activities were discussed. The meeting was taped without her knowledge and the tape was played at a school board meeting at which she was denied tenure. She attempted to discover the reason for the denial, and was told only that if the reason were revealed, her reputation would be ruined. She challenged the tenure denial under the Civil Rights Act and joined with that a state claim for slander. The court found that the state and federal claims arose from the same transaction, yet held that it could not exercise pendent jurisdiction over the slander claim because different proof would have been necessary for it than for the federal claim.[138]

The courts in these cases were calling for considerable factual overlap, amounting to near factual identity, as a prerequisite to pendent jurisdiction. Such an approach is rare. Most courts call for less than factual identity, requiring merely that some common element of proof, short of identity, exist between federal and nonfederal claims.[139] For example, in the school tenure case discussed above,[140] that the wrongful discharge and slander claims would not be proven by *identical* evidence would be irrelevant. Because the truth or falsity of the alleged slanderous remarks might affect the validity of the discharge, the claims would share a sufficient evidentiary nexus to permit pendent jurisdiction. At least as a practical implementation of the *Gibbs* language, an evidentiary overlap seems to capture the Court's intent much more closely than would a factual identity approach.

Some courts, in seeming derogation of *Gibbs*' language, but focusing on its intent, permit pendent jurisdiction whenever the nonfederal and

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supra note 5, at 269.

[136] *Ferguson*, 443 F. Supp. at 1342.

[137] Fanning v. School Bd., 395 F. Supp. 18, 23 (W.D. Okla. 1975); *see* Schenkier, *supra* note 5, at 270.

[138] *Fanning*, 395 F. Supp. at 23; *see also* Gerlach v. Michigan Bell Tel. Co., 448 F. Supp. 1169 (E.D. Mich. 1978).

[139] *See, e.g.*, Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1194 (5th Cir. 1975); Lewis v. Pennington, 400 F.2d 806, 816 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968); Corum v. Beth Israel Med. Center, 359 F. Supp. 909, 916 (S.D.N.Y. 1973).

[140] *See supra* text accompanying notes 136-38.

federal claims are transactionally related.[141] As discussed below, this generally means only that the claims must have a logical relationship to one another; trial of the nonfederal issue must lead to some efficiency in trial of the other issues between parties.[142]

The following hypothetical illustrates the operation of the transactional approach. Suppose that plaintiff is a welfare recipient. Under federal regulations plaintiff is required to divulge certain confidential information to a caseworker, but the caseworker may not delve into other personal matters. Suppose further that under state law the caseworker is not permitted to reveal confidential information to anyone else, but in fact does reveal this information.[143] Plaintiff then brings a two count federal complaint alleging a violation of federal privacy rights caused by the data collection and a violation of the state's law against publishing private information. Courts using either a factual identity or factual overlap theory probably would not exercise pendent jurisdiction,[144] since each count deals with different facts: the federal count deals with data collection and the state count deals with data publication. However, a transactional approach would find pendent power. Because the facts of collection would contribute to showing that the defendant had had information to disclose, and the facts of distribution would demonstrate the harm caused by the unwarranted data collection, trying the claims together would save time and effort.

Courts are confused as to which approach most clearly expresses the *Gibbs* intent.[145] At best, courts make case-by-case judgments of factual

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[141] *See, e.g.*, Nilsen v. City of Moss Point, Miss., 674 F.2d 379 (5th Cir. 1982); Martin v. Louisiana & A. Ry., 535 F.2d 892, 895 (5th Cir. 1976), *cert. denied*, 429 U.S. 1043 (1977); Kimbrough v. O'Neil, 523 F.2d 1057, 1063 (7th Cir. 1975) (Stevens, J., concurring), *aff'd*, 545 F.2d 1059 (1976) (en banc); Mas v. Perry, 489 F.2d 1396 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974); Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1970); New Watch-Dog Comm. v. New York City Taxi Drivers Union, Local 3036, 438 F. Supp. 1242, 1247 (S.D.N.Y. 1977).

[142] *See infra* text accompanying notes 226-31.

[143] *Cf.* Reyes v. Edmunds, 416 F. Supp. 649 (D. Minn. 1976).

[144] *Id.* at 651.

[145] The approach of the Eighth Circuit and United States District Courts for the districts of Iowa is typical of the lack of clarity in court definitions of common nucleus of operative fact. As is frequently true in pendent jurisdiction cases, the decisions of the Eighth Circuit do not clearly define how *Gibbs* is being applied; they give no precise meaning to common nucleus of operative fact. Nonetheless, the decisions are indicative of a useful approach to the policy and language of *Gibbs*, essentially finding that a small degree of factual overlap between federal and nonfederal claims can support pendent jurisdiction.

Reel v. Arkansas Dep't of Correction, 672 F.2d 693, 698 (8th Cir. 1982), typifies this sensible, but inarticulate view. Plaintiff, a state employee, leaked information to

relationships that may or may not be consistent with prior precedent. A clearly articulated standard would be preferable to this variability. These points are certain. First, any call for factual identity between federal and nonfederal claims is inappropriate, given the explicit rejection by *Gibbs* of the *Hurn* test.[146] Second, the equally explicit recognition of the expansion of joinder permitted by the Federal Rules indicates that a tie between the transactional standard of the Rules and the common nucleus test[147] ought to be made. Third, because *Gibbs* calls for common facts, it would be inappropriate not to require some overlap in proof between federal and nonfederal claims.[148] Given these

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various investigators, and consequently lost his job. When plaintiff was fired, his employer physically restrained him. Plaintiff brought a federal action alleging a first amendment right to leak information and a state law assault claim. The court held that the claims arose from a common nucleus of operative fact, although there was minor factual overlap between the claims. The court made little attempt to explain its reasoning.

Similarly, in Federal Prescription Serv. v. Amalgamated Meat Cutters, 527 F.2d 269, 274 (8th Cir. 1975), the court found that a federal damage claim alleging an improper secondary boycott arose from a common nucleus of operative fact with a nonfederal claim seeking property damage, even though elements of proof were different for each claim. *Cf.* Hatridge v. Aetna Casualty & Sur. Co., 415 F.2d 809 (8th Cir. 1969) (in pendent party case, wife's nonfederal claim for consortium arose from common nucleus of operative fact with husband's tort claim because a single incident sparked both claims; no discussion of degree of factual overlap). *But see* Osbahr v. H & M Constr., 407 F. Supp. 621, 623 (N.D. Iowa 1975) (federal claim for breach of contract might not arise from common nucleus of operative fact as a claim for a refund of purchase price, even though both claims were related to the same transaction). As in *Reel*, the court in the *Meat Cutters* case was satisfied with only a small degree of factual overlap.

These cases fail to add up to any definitive answer. Nonetheless, they suggest a bottom line approach for future cases; at most, a common nucleus of operative fact calls for a low level of factual overlap between nonfederal and federal claims. *See also* North Dakota v. Merchants Nat'l Bank & Trust Co., 634 F.2d 368, 370 (8th Cir. 1980); Koke v. Stifel, Nicolaus & Co., 620 F.2d 1340 (8th Cir. 1980); Oldhour v. Ehrlich, 617 F.2d 163, 167-68 n.7 (8th Cir. 1980); Eidschun v. Pierce, 335 F. Supp. 603 (S.D. Iowa 1971).

[146] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[147] *See supra* text accompanying notes 130-33.

[148] To the extent that the *Gibbs* pendent jurisdiction test is justified upon a judicial economy and convenience base, 383 U.S. at 726, it could be argued that pendent jurisdiction should be based upon a heavier evidentiary overlap between federal and nonfederal claims than the one advocated in this Article. *See* Schenkier, *supra* note 5, at 269. The argument fails for two reasons. First, it assumes that no savings are made in trial together of loosely related matters between the same two parties, when such savings are likely, *see, e.g.*, FED. R. CIV. P. 1, 18(a); Advisory Comm. Notes Rule 18(a), 28 U.S.C. (1976) (suggesting important economy concerns of Rules). Second, it sug-

starting points, the search for some factual overlap must be undertaken prior to granting pendent jurisdiction. But as the cases demonstrate,[149] a minimal overlap is sufficient to satisfy the common nucleus test.[150]

3. Ordinary Expectation of Trial Together

The third and last step in assessing the relationship between federal and nonfederal claims under *Gibbs* is determining if the claims would ordinarily be expected to be tried together:

> [S]tate and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then . . . there is *power* in federal courts to hear the whole.[151]

The meaning of *Gibbs*' expectation of trial requirement is even more problematic than the meaning of its common nucleus requirement. Courts and commentators have offered three explanations of how "ordinarily be expected to try" is to be read in conjunction with common nucleus: (1) that the use of "but if" between the two phrases means that a finding of *either* a common nucleus *or* an expectation of trial together would be sufficient to give pendent jurisdiction;[152] (2) that the court must find *both* a common nucleus of operative fact *and* an expectation of trial in one proceeding;[153] and (3) that "expected to try" has no independent significance and is really only an elaboration of the common nucleus language.[154]

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gests that pendent jurisdiction rests wholly on convenience concerns, when it in fact rests on much broader grounds. *See* Schenkier, *supra* note 5, at 274; *infra* text accompanying notes 248-57. As *Osborn* and its progeny make clear, pendent jurisdiction rests on preserving fairness to the parties and insuring access to a federal forum. *See* Schenkier, *supra* note 5, at 269; *supra* text accompanying notes 45-56, 248-57.

[149] *See supra* text accompanying notes 141-43, 145.

[150] Providing a precise definition for common nucleus of operative fact is probably unnecessary. Courts retain discretion to dismiss pendent claims that are within their power. *See infra* text accompanying notes 363-77. Thus, trial courts have an incentive to avoid dismissing pendent claims on a power basis because they can always exercise discretion to dismiss the nonfederal claims, and thereby make their decisions less susceptible of reversal.

[151] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[152] *See, e.g.*, Baker, *supra* note 5, at 764-84.

[153] *See, e.g.*, Tower v. Moss, 625 F.2d 1161, 1163 n.1 (5th Cir. 1980); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567, at 445 (1975) [hereafter 13 WRIGHT, MILLER & COOPER].

[154] Matasar, *supra* note 1, at 1457-58; *cf.* Trustees of Retirement Benefit Plan v. Equibank, N.A., 487 F. Supp. 58, 61 (W.D. Pa. 1980) (giving no independent signifi-

The predominant view of the *Gibbs* expectation of trial test is that it sets an independent requirement for pendent jurisdiction which must be fulfilled in addition to the common nucleus requirement.[155] If so,[156] several ambiguities in the language must be resolved in order to give the test any significance.

An initial ambiguity is that *Gibbs* does not explain its usage of "to try." The phrase may mean either the submission of facts and legal contentions to the judicial process (*bringing* claims together) or the actual adjudication of the claims (*hearing* claims together).[157] Under the former meaning, a court would focus only on whether the federal and nonfederal claims would ordinarily be expected to be joined together; using the latter meaning, a court would focus on whether the federal and nonfederal claims would ordinarily be expected to be adjudicated together by the same trier of fact.

In *Eidschun v. Pierce*,[158] one district court resolved this ambiguity by interpreting *Gibbs* to refer to the actual resolution of the federal and nonfederal claims before one trier of fact, rather than the joinder of the federal and nonfederal claims.[159] This holding, though linguistically possible, flies in the face of the Court's logic. As a threshold matter, *Gibbs* focused on jurisdictional power.[160] It is in that section of the opinion that the expectation of trial test was articulated.[161] *Gibbs* specifically addressed the actual adjudication of claims before one trier of fact in the portion of the opinion dealing with discretion.[162] Since jurisdic-

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cance to the expectation of trial test).

[155] 13 WRIGHT, MILLER & COOPER, *supra* note 153, § 3567, at 445; *see also* Tower v. Moss, 625 F.2d 1161, 1163 n.1 (5th Cir. 1980); Almenares v. Wyman, 453 F.2d 1075, 1083 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); Beverly Hills Nat'l Bank & Trust Co. v. Compania De Navegacione Almirante S.A., Panama, 437 F.2d 301, 306 (9th Cir.), *cert. denied*, 402 U.S. 996 (1971).

[156] The trend in the cases seems to indicate that the expectation of trial is not an independent barrier to pendent jurisdiction, but serves as a shorthand explanation of what *Gibbs* meant by common nucleus of operative fact. *See infra* text accompanying notes 175-78.

[157] *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 1256 (1976) (try means "to put to test or trial" or "to examine or investigate judicially").

[158] 335 F. Supp. 603 (S.D. Iowa 1971).

[159] *Id.* at 608 ("[I]t is . . . quite clear that . . . this Court would have expected, indeed demanded under Federal Rule of Civil Procedure 42(a), that [the federal and nonfederal claims] be tried in one judicial proceeding").

[160] 383 U.S. 715, 721-25 (1966).

[161] *Id.* at 725.

[162] *Id.* at 726-27. (discussing FED. R. CIV. P. 42(b) which allows consolidation or severence of claims); *see infra* Part IV (discussing discretion).

tional decisions are invariably made at the early stages of litigation,[163] interpreting "ordinarily be expected to try" to refer to the decision to adjudicate claims together — a decision which comes very late in litigation[164] — is inconsistent with *Gibbs*. Rather, it must be a reference to whether the federal and nonfederal claims ordinarily would be brought together.

Similarly, no matter which definition of "to try" is correct, the phrase "ordinarily be expected" is also ambiguous. Although the phrase is not clearly defined in *Gibbs*, Professors Wright, Miller, and Cooper suggest that it refers "to what res judicata would require if the claims were all federally created or all state created."[165]

This interpretation appears overdrawn,[166] for it either could lead to a defeat of important policies outlined by *Gibbs* or would make the expectation of trial component of the *Gibbs* test redundant.[167] To the extent that res judicata is coextensive or broader than common nucleus of operative fact, the approach of Professors Wright, Miller, and Cooper would not interfere with the *Gibbs* philosophy; it would allow pendent jurisdiction at least in cases having a common nucleus and possibly in others, avoiding the grudging *Hurn* approach.[168] However, to the extent that res judicata is narrower than common nucleus of operative fact, the reading of Professors Wright, Miller, and Cooper would be incorrect because it would undermine the Court's desire for broader jurisdiction than allowed under *Hurn*. In most state courts, res judicata bars only those claims contained within the same cause of action,[169]

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[163] 383 U.S. at 727.

[164] *See, e.g.*, FED. R. CIV. P. 42(a), (b) (allowing consolidation or severence of claims for trial).

[165] 13 WRIGHT, MILLER & COOPER, *supra* note 153, § 3567, at 445. *Gibbs* supports this interpretation of the expectation of trial test. The *Gibbs* Court cited Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927), a case tying "cause of action" to res judicata, and noted that the Federal Rules of Civil Procedure embody the tendency to require a plaintiff to try the whole case at one time "and to that extent emphasize the basis of pendent jurisdiction." 383 U.S. at 725 n.13.

[166] One court has specifically embraced this interpretation of the *Gibbs* expectation of trial test. Reyes v. Edmunds, 416 F. Supp. 649 (D. Minn. 1976) (dismissing state claim because it would not be barred by res judicata if omitted).

[167] *See infra* text accompanying notes 173-78.

[168] Such a view would, however, make independent fulfillment of the common nucleus component unnecessary. *See id.*

[169] Although the Restatement (Second) of Judgments has proposed a res judicata test that would encompass any *Gibbs* common nucleus claim, RESTATEMENT (SECOND) OF JUDGMENTS §§ 20, 24 (1980), a majority of states still employ the traditional res judicata test, *see supra* note 40, which bars only those claims contained within the same cause of action. *See, e.g.*, Phenix-Girard Bank v. Cobb, 416 So. 2d 748, 749 (Ala.

which generally is narrower than common nucleus of operative fact.[170] Tying the expectation of trial to the presence of federal and nonfederal claims in the same cause of action would confound the Court's reasoning,[171] because *Gibbs* emphatically rejected the cause of action standard as too grudging for a pendent jurisdiction test.[172]

Rejecting the res judicata approach leaves no readily apparent meaning for the "ordinarily be expected to try" phrase, other than conclusory judgments of the courts about the proclivities of litigants for joining separate matters. Nonetheless, as discussed below, *Gibbs* — at least as it has been interpreted by the courts — meant to adopt pre-

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1982); Norman v. Nichiro Gyogyo Kaisha, Ltd., 645 P.2d 191, 197 (Alaska 1982); Salt River Project v. Industrial Comm'n, 128 Ariz. 541, 543, 627 P.2d 692, 694 (1981); Uniroyal v. Board of Tax Review, 182 Conn. 619, 633, 438 A.2d 782, 789 (1981); Cappello v. Patrician Towers, No. 102, 1980, (Del. Jan. 14, 1981) (available on LEXIS, States Library, Del File); Davis v. Bruner, 441 A.2d 992, 994 (D.C. 1982); McNeal v. Paine, 249 Ga. 662, 663, 293 S.E.2d 331, 332 (1982); Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 401 (Iowa 1982); Lamb v. Lamb, 411 So. 2d 1, 2 (La. 1982); M.H. Gordon & Son v. Alcoholic Beverages Control Comm'n, 386 Mass. 64, 69-70, 434 N.E.2d 986, 989-90 (1982); Biloxi Dev. Comm'n v. Frey, 401 So. 2d 716, 718 (Miss. 1981); American Polled Herford Ass'n v. Kansas City, 626 S.W.2d 237, 241 (Mo. 1982); Coleman v. State, 633 P.2d 624, 629 (Mont. 1981), *cert. denied*, 455 U.S. 983 (1982); Gasper v. Flott, 209 Neb. 260, 263, 307 N.W.2d 500, 502 (1981); Horvath v. Gradstone, 97 Nev. 594, 596, 637 P.2d 531, 533 (1981); Durham v. Cutter, 121 N.H. 243, 246, 428 A.2d 904, 906 (1981); Romero v. New Mexico, 97 N.M. 569, 642 P.2d 172, 175 (1982); Zarcone v. Perry, 55 N.Y.2d 782, 782, 431 N.E.2d 974, 974 (1981), *cert. denied*, 456 U.S. 979 (1982); Johnson's Island v. Board of Township Trustees, 69 Ohio St. 2d 241, 431 N.E.2d 672, 674 (1982); Shell v. Walker, 305 N.W.2d 920, 922 (S.D. 1981); Bradshaw v. Kershaw, 627 P.2d 528, 531 (Utah 1981); Culinary Workers v. Gateway Cafe, Inc., 95 Wash. 2d 791, 794, 630 P.2d 1348, 1350 (1981) (modified mem. by 642 P.2d 403 (1982)); Rife v. Woolfolk, 289 S.E.2d 220, 221 (W. Va. 1982); Pike v. Markman, 633 P.2d 944, 947 (Wyo. 1981).

[170] *Compare* Hurn v. Oursler, 289 U.S. 238, 245-46 (1933) *with* United Mine Workers v. Gibbs, 383 U.S. 715, 723-25 (1966).

[171] Professors Wright, Miller, and Cooper's res judicata approach would not be inconsistent with *Gibbs* if res judicata were tied to the common nucleus test of *Gibbs*. The RESTATEMENT (SECOND) OF JUDGMENTS §§ 20, 24 (1980) takes this view. But, many states still adhere to the cause of action test, *see supra* note 169, and a federal court applying Wright, Miller, and Cooper's res judicata test might focus on state res judicata rules rather than the approach of the Restatement (Second). *See* Reyes v. Edmunds, 416 F. Supp. 649 (D. Minn. 1976). Even if the res judicata approach is taken, and is broadly applied to encompass claims sharing a common nucleus, the *Gibbs* common nucleus test would be rendered irrelevant. *See infra* text accompanying notes 173-78. Therefore, at present Professors Wright, Miller, and Cooper's view cannot be fully authorative.

[172] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

cisely such an open ended meaning.[173]

Despite the assertion of many courts and commentators that the *Gibbs* expectation of trial requirement is an independent barrier to pendent jurisdiction,[174] courts today generally either ignore the requirement altogether,[175] cite the language without analysis,[176] or subsume it in the more easily applied common nucleus test.[177] They have found that claims are expected to be tried together if they share a common nucleus of operative facts, and that they are not expected to be tried together if they do not share a common nucleus of operative facts. Consequently, the suggestion of Professors Wright, Miller, and Cooper that the expectation of trial requirement is independent amounts to saying that it is redundant: so long as claims share a common nucleus of operative fact, they are invariably expected to be tried together.[178]

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[173] The phrase has largely been ignored in the cases, with the effect that it has come to mean no more than the court is required to find that the federal and nonfederal claims are ordinarily permitted to be brought together by the Rules. *See infra* text accompanying notes 175-87.

[174] *See supra* text accompanying notes 153, 155.

[175] *See, e.g.*, Jackson v. Stinchcomb, 635 F.2d 462, 470-71 (5th Cir.), *cert. denied*, 449 U.S. 1125 (1981); Silva v. Vowell, 621 F.2d 640, 645 (5th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981); Louise B. v. Coluatti, 606 F.2d 392, 399 (3d Cir. 1979); Rosario v. Amalgamated Ladies Garment Cutters' Union, Local 10, 605 F.2d 1228, 1247 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); Ortiz v. United States, 595 F.2d 65, 71 (1st Cir. 1979).

[176] *See, e.g.*, Uptown People's Community Health Servs. Bd. v. Board of Comm'rs, 647 F.2d 727, 732 (7th Cir.), *cert. denied*, 454 U.S. 866 (1981); Tower v. Moss, 625 F.2d 1161, 1163 n.1 (5th Cir. 1980); Naylor v. Case & McGrath, 585 F.2d 557, 561 (2d Cir. 1978).

[177] *See, e.g.*, Trustees of Retirement Benefit Plan v. Equibank, N.A., 487 F. Supp. 58, 61 (W.D. Pa.) ("Do the state and federal claims derive from a common nucleus of operative fact, so that a plaintiff would ordinarily be expected to try both claims in one proceeding?"), *dismissed*, 639 F.2d 772 (3d Cir. 1980); New Watch-Dog Comm. v. New York City Taxi Drivers Union, Local 3036, 438 F. Supp. 1242, 1247 (S.D.N.Y. 1977).

[178] An alternative reading of cases treating the expectation of trial test in a conclusory fashion is that they have decided that any claims permitted by the Federal Rules are expected to be tried together. *Gibbs* supports this reading. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 n.13 (1966) (suggesting that the pendent jurisdiction doctrine should embody the movement to efficient litigation found in the Federal Rules). If this meaning is given to the expectation of trial component, it would read it out of the *Gibbs* test, because by definition claims may not be asserted together in federal court unless they may be joined under the Rules.

Defining "ordinarily be expected to try" either as those things permitted by the Rules to be joined together or as synonymous to those things sharing a common nucleus of operative fact would preclude defining it more narrowly than common nucleus. It would, however, make the expectation of trial requirement superfluous.

In contrast to this view, one commentator has suggested that if a litigant shows either that the federal and nonfederal claims share a common nucleus of operative fact *or* that they would be expected to be tried together, pendent jurisdiction is proper.[179] No court has adopted this view, and the view appears incorrect under *Gibbs*, although consistent with its language. Courts have uniformly concluded that claims sharing a common nucleus of operative fact are always expected to be tried together.[180] If this view is taken it would be unnecessary to make an independent analysis of the common nucleus and expectation of trial tests. If, however, a court concludes that claims would be expected to be tried together, but would not share a common nucleus, the common nucleus test would become irrelevant. It is highly unlikely that *Gibbs* would have created a common nucleus requirement if its only use would be duplicated by another requirement.[181] Accordingly, the expectation of trial should be seen neither as an independent nor as an alternative requirement; rather it is surplusage, used only to give content to the common nucleus test.

In sum, the *Gibbs* constitutional power test for pendent jurisdiction over a nonfederal claim ought to be applied as follows: a court must find that plaintiff has joined a substantial federal claim with a nonfederal claim in the same action; that the claims arise from a common nucleus of operative fact; and that the joinder is permissible under the Federal Rules of Civil Procedure.[182]

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[179] *See* Baker, *supra* note 5, at 764-65.

[180] *See supra* text accompanying notes 174-78.

[181] If one assumes that two claims might be heard together, even though not sharing a common nucleus of operative fact, but that the converse would never occur, *see supra* notes 175-77 and accompanying text, one would never attempt an independent assessment of the common nucleus requirement. Since jurisdiction could be predicated on fulfillment of either the common nucleus or expectation of trial together, and only the latter could exist without the former, one would need only to analyze the latter.

[182] The test outlined above is largely a synthesis of current pendent jurisdiction doctrine. It is not clear that this current dogma is accurate. It rests on the assumption that substantiality of the federal claim and factual relationships between the federal and nonfederal claims are constitutionally compelled. This assumption is questionable.

First, the substantial federal question requirement is a statutory doctrine, founded in the federal question jurisdiction statute of 1875. *See* Matasar, *supra* note 1, at 1432-38. Further, the requirement is inconsistent with Supreme Court precedent interpreting federal question jurisdiction under article III, § 2 of the Constitution. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Matasar, *supra* note 1, at 1438-41. Treating the requirement as constitutional is contrary to important federal policies. *Id.* at 1441-46.

Second, the *Gibbs* factual relationship component is inconsistent with several accepted forms of federal jurisdiction which permit factually unrelated claims to be

4. The Scope of the *Gibbs* Test

Thus far, this Article has analyzed the *Gibbs* pendent jurisdiction test as if it were applicable to any case or controversy arising under article III of the Constitution. In fact, *Gibbs* deals explicitly only with the use of pendent jurisdiction in a federal question case — one arising under the laws of or treaties made by the United States, or arising under the Constitution — yet it has wide applicability to other claims brought by plaintiffs.

In *Owen Equipment & Erection Co. v. Kroger*,[183] the Supreme Court declined to rule explicitly that *Gibbs* applies to types of article III jurisdiction other than federal question cases, such as diversity controversies.[184] However, the Court did state that "[it] is apparent that *Gibbs* delineated the constitutional limits of federal judicial power,"[185] strongly hinting that *Gibbs* should be applicable to all article III actions. Moreover, the constitutional basis of *Gibbs* — its interpretation of the word "case" — is equally applicable to other article III grants based upon the word "case."[186] The only real doubt is whether *Gibbs* applies to diversity controversies. Some decisions have suggested that there may be differences in meaning between case and controversy as used in article III.[187] These suggestions have generally been that controversy is narrower than case because case includes criminal matters and controversy does not.[188] This difference, however, has little to do with pendent jurisdiction. In civil matters, the scope of a diversity controversy is identical with a federal question case.[189] Hence, the *Gibbs*

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brought to federal court together. *See id.* at 1463-77. The factual relationship component is also inconsistent with the Supreme Court's traditional definition of case or controversy. *See id.* at 1477-91; *supra* note 63. The only constitutional requirement is that federal and nonfederal claims be part of one constitutional case as defined by lawfully adopted procedural rates. *See* Matasar, *supra* note 1, at 1477-91.

[183] 437 U.S. 365 (1978).

[184] *Id.* at 371 n.10.

[185] *Id.* at 371.

[186] U. S. CONST. art III, § 2: "The judicial Power shall extend . . . to all cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction . . . ." Some decisions suggest the applicability of *Gibbs* and its predecessors to admiralty cases. *See, e.g.*, Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) (suggesting applicability of pendent jurisdiction in admiralty); Joiner v. Diamond M Drilling Co., 677 F.2d 1035, 1041 (5th Cir. 1982).

[187] *See, e.g.*, Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 430-31 (1793).

[188] *See* Muskrat v. United States, 219 U.S. 346, 356-57 (1911) (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431-32 (1793)).

[189] *See* Ortiz v. United States, 595 F.2d 65, 70 (1st Cir. 1979) ("[E]ven if for some

standards should be applied to all exercises of pendent jurisdiction.

B. Ancillary Jurisdiction

Curiously, during the infancy of pendent jurisdiction, its standards went unacknowledged in ancillary jurisdiction cases. The ancillary jurisdiction doctrine developed independently of its sibling, with no direct link either to grandparent *Osborn* or to the *Siler/Hurn* line. While the early pendent cases looked solely to the factual relatedness of *plaintiff's* federal and nonfederal claims, the Supreme Court's earliest ancillary jurisdiction expositions[190] focused on the relationship of *defendant's* and *intervenor's* nonfederal claims to *property* in the possession of the federal court. As described in *Fulton Bank v. Hozier*:[191]

> The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.[192]

The *Fulton Bank* rule, even as extended by later cases,[193] proved too

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purposes controversies should be viewed as being 'less comprehensive' than cases, there is no precedent that they should be so viewed for pendent jurisdiction purposes. There is, moreover, some precedent for applying the *Gibbs* standards to 'controversies.' "); C. WRIGHT, *supra* note 23, § 12, at 53 ("The two terms can be used interchangeably"). The exercise of ancillary jurisdiction in diversity cases may undercut this conclusion somewhat. As discussed below, ancillary jurisdiction traditionally is used in cases when pendent jurisdiction might be inapplicable. *Compare infra* notes 221-31, 243-47 and accompanying text *with supra* notes 121-40 and accompanying text. Thus, at least in some contexts, supplemental jurisdiction in diversity cases may exceed that of federal question cases. Accordingly, one might assert that *Gibbs* could not be the constitutional limit on such controversies.

Despite this apparent anomaly, *Gibbs* should be viewed as setting constitutional limits in the diversity controversies. Any differences between broader pendent and ancillary jurisdiction may be attributed to an erroneously narrow reading of the *Gibbs* common nucleus test, *see supra* text accompanying notes 120-50, or to a failure to recognize statutory jurisdictional barriers which actually account for the differences in the cases. *See infra* text accompanying notes 290-360. Finally, it may well be that *Gibbs* did not set constitutional limits of any kind. *See* Matasar, *supra* note 1, at 1477-91. But until the Supreme Court so rejects *Gibbs*, that case should be read as applicable in all supplemental jurisdiction cases.

[190] *E.g.*, Freeman v. Howe, 65 U.S. (24 How.) 450 (1861).

[191] 267 U.S. 276 (1925).

[192] *Id.* at 280.

[193] *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (dicta) (ancillary jurisdiction to protect prior federal court judgment; indicating ancillary jurisdiction in

limited to permit efficient federal litigation. It failed to provide a basis for ancillary jurisdiction over other types of defendant or intervenor claims not seeking property already in federal possession — *e.g.*, counterclaims,[194] cross-claims,[195] third-party claims[196] — many of which involve wholly in personam disputes. Accordingly, in 1926 in *Moore v. New York Cotton Exchange*,[197] the Supreme Court expanded its basis for ancillary jurisdiction to encompass compulsory counterclaims.

In *Moore*, plaintiff alleged that defendant's failure to permit plaintiff to use quotations on the price of cotton, while providing such information to other companies, violated antitrust laws. Plaintiff sought an order that it was entitled to the price quotations. Defendant alleged that plaintiff wrongfully pirated such information and sought to enjoin plaintiff's actions. The Supreme Court permitted the exercise of ancillary jurisdiction over the defendant's nonfederal counterclaim because it arose from the same transaction as the plaintiff's federal claim, despite the fact that plaintiff's claim failed on the merits.[198]

Moore's facts might have encouraged a narrow construction of its holding. First, the counterclaim was equitable, calling only for an injunction. Second, without granting defendant the injunction, defendant's victory on the merits of the federal claim would have been hollow. Third, the Court provided a gloss on the same transaction requirement, noting specifically that the claims were so closely intertwined and logically related that the failure of the plaintiff's claim in itself provided the foundation for the defendant's claim.[199] These three factors might have made a transactional ancillary jurisdiction test quite narrow.

Had federal procedural rules governing joinder remained as stringent as they were when *Moore* was decided,[200] this limited construction of *Moore* might have prevailed. With narrow joinder opportunities an ex-

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class action context of claims by unnamed class members); Pacific R.R. v. Missouri Pac. Ry., 111 U.S. 505 (1884) (ancillary jurisdiction to reexamine final federal judgments); Dietzsch v. Huidekoper, 103 U.S. 494 (1880) (same); *see also* Dewey v. West Fairmont Coal Co., 123 U.S. 329 (1887) (underlying breach of contract action; court exercises ancillary jurisdiction over a new nondiverse party added to a counterclaim for recovering a fraudulent conveyance.)

[194] *See* FED. R. CIV. P. 13(a), (b).

[195] *See* FED. R. CIV. P. 13(g).

[196] *See* FED. R. CIV. P. 13(h), 14.

[197] 270 U.S. 593 (1926).

[198] *Id.* at 609.

[199] *Id.* at 610 ("So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim that it only needs the failure of the former to establish a foundation for the latter . . . .").

[200] *See supra* note 81 and accompanying text.

pansive reading of *Moore* would have gained little. However, the adoption of the Federal Rules of Civil Procedure created much broader opportunities for joinder of claims and parties, and cases decided subsequent to the Rules' adoption did not give *Moore* a restrictive reading. Rather, they read "transaction" broadly to authorize jurisdiction over almost any logically related claims offered by defendants or intervenors.[201] Because the Rules keyed joinder in several instances directly to a transactional standard similar to *Moore*[202] — requiring a joined claim to arise from the same transaction or occurrence as the plaintiff's claim — these courts could pay lip service to *Moore*[203] while broadening

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[201] *See* C. WRIGHT, *supra* note 23, § 9, at 2-24, 30 ("Following the lead of the Moore case, the federal courts . . . employed the concept of ancillary jurisdiction.").

[202] *See infra* note 203; FED. R. CIV. P. 13(a) ("A pleading shall state as a counterclaim any claim . . . the pleader has against any opposing party, if it arises out of the *transaction or occurrence* that is the subject matter of the opposing party's claim . . . ."); FED. R. CIV. P. 13(g) ("A pleading may state as a cross-claim any claim by one party against a co-party arising out of the *transaction or occurrence* that is the subject matter either of the original action or of a counterclaim therein . . . ."); FED. R. CIV. P. 13(h) ("Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20."); FED. R. CIV. P. 14(a) ("[T]he third-party, shall make . . . his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants . . . ."); FED. R. CIV. P. 14(a) ("The third-party defendant may . . . assert any claim against the plaintiff arising out of the *transaction or occurrence* that is the subject matter of the plaintiff's claim against the third-party plaintiff.") (emphasis added); FED. R. CIV. P. 14(a) ("The plaintiff may assert any claim against the third-party defendant arising out of the *transaction or occurrence* that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert . . . his counterclaims and cross-claims . . . .") (emphasis added); FED. R. CIV. P. 20 ("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 occurence* and if any question; of law or fact common to all these persons will arise in the action.") (emphasis added); FED. R. CIV. P. 20(a) ("All persons may be joined in one action as defendants, if there is asserted against them jointly, severally, or in the alternative, any right to relief 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 defendants will arise in the action.") (emphasis added); FED. R. CIV. P. 24(a) ("[A]nyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the . . . *transaction* which is the subject of the action and he is so situated that the disposition of the action may as practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.") (emphasis added).

[203] The Federal Rules purposely track *Moore*. *See* Advisory Committee Note 5, FED. R. CIV. P. 13, 28 U.S.C. (1976) (citing Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 412-15 (1936) (favorably ana-

its test.[204]

Since *Moore*, the Supreme Court has refrained from elaboration of the constitutional limits to ancillary jurisdiction.[205] Commentators and lower federal courts, however, generally citing *Moore*, regard most joinders made pursuant to the Federal Rules of Civil Procedure as within ancillary jurisdiction,[206] and in strong dictum, the Supreme Court en-

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lyzing *Moore*)).

[204] *Compare* LASA Per L'Industria Del Marmo Societa Per Anzioni v. Alexander, 414 F.2d 143 (6th Cir. 1969) *with* Moore v. New York Cotton Exch., 270 U.S. 593 (1926).

[205] In fact, in recent years the Court has not made a decision *permitting* a lower court to exercise ancillary jurisdiction, let alone a decision enunciating standards for making determinations of constitutional power to do so. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Aldinger v. Howard, 427 U.S. 1 (1976); Zahn v. International Paper Co., 414 U.S. 291 (1973).

[206] Professors Wright, Miller, and Cooper have stated that a present consensus exists that ancillary jurisdiction extends to most of the joinder devices available under the Federal Rules of Civil Procedure. *See* 13 WRIGHT, MILLER & COOPER, *supra* note 153, § 3523, at 66-70. These include: *Rule 13(a)* — *see, e.g.*, Valencia v. Anderson Bros. Ford, 617 F.2d 1278 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981) (compulsory counterclaims within ancillary jurisdiction); United States *ex rel.* D'Agostino Excavators v. Heyward Robinson Co., 430 F.2d 1077 (2d Cir. 1970) (same), *cert. denied*, 400 U.S. 1021 (1971); *Rule 13(b)* — *see, e.g.*, Marks v. Spitz, 4 F.R.D. 348 (D. Mass. 1945) (permissive counterclaims for set-offs within ancillary jurisdiction); *Rule 13(g)* — *see, e.g.*, Amco Constr. Co. v. Mississippi State Bldg. Comm'n, 602 F.2d 730, 732 (5th Cir. 1979) (cross-claims within ancillary jurisdiction); LASA Per L'Industria Del Marmo Societa Per Anzioni v. Alexander, 414 F.2d 143 (6th Cir. 1969) (same); *Rule 13(h)* — *see, e.g.*, Bauer v. Uniroyal Tire Co., 630 F.2d 1287 (8th Cir. 1980) (addition of new party to counterclaim or cross-claim within ancillary jurisdiction); H.L. Peterson Co. v. Applewhite, 383 F.2d 430 (5th Cir. 1967) (same); *Rule 14(a)* — *see, e.g.*, Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959) (impleader within ancillary jurisdiction); Sheppard v. Atlantic States Gas Co., 167 F.2d 841, 845 (3d Cir. 1948) (same); *Rule 14* — *see, e.g.*, Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1205 (5th Cir. 1975) (claims by third party defendant against third party plaintiff within ancillary jurisdiction); Noland Co. v. Graver Tank & Mfg. Co., 301 F.2d 43, 50 (4th Cir. 1962) (same); *Rule 14* — *see, e.g.*, Revere Cooper & Brass v. Aetna Casualty & Sur. Co., 426 F.2d 709 (5th Cir. 1970) (claims by third party defendant against original plaintiff within ancillary jurisdiction); Finkel v. United States, 385 F. Supp. 333, 336 (S.D.N.Y. 1974) (same); *Rule 14* — *see, e.g.*, Taylor v. Collins, 545 F. Supp. 459 (E.D. Mich. 1982) (claims by plaintiff against third party defendant within ancillary jurisdiction when underlying claim was based on federal question jurisdiction). *But see* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (claims by plaintiff against third party defendant outside ancillary jurisdiction when underlying claim was based on diversity jurisdiction); *Rule 14* — *see, e.g.*, Hyman-Michaels Co. v. Swiss Bank Corp. 496 F. Supp. 663 (N.D. Ill. 1980) (plaintiff's compulsory counterclaim to claim by third party defendant within ancillary jurisdiction), *aff'd sub nom.* Evra Corp. v. Swiss Bank Corp. 677 F.2d 951 (7th Cir. 1982);

dorsed this view. In *Owen Equipment & Erection Co. v. Kroger*,[207] the Court cited with approval several lower court opinions in which "the exercise of ancillary jurisdiction over nonfederal claims [was] upheld in situations involving impleader, cross-claims or counterclaims"[208] on the authority of *Moore* and its derivatives.[209] Accordingly, this broadened transactional test must be treated as an important component of the test for constitutional limits to ancillary jurisdiction.

1. Defining the Same Transaction or Occurrence

As with pendent jurisdiction, the test for ancillary jurisdiction — the same transaction or occurrence — appears straightforward. But this test, like the pendent jurisdiction test, has proven difficult to apply. Courts agree only that the words should have a liberal interpretation to further the purposes of the Federal Rules.[210] Courts have adopted one of four possible approaches to determining the meaning of the same transaction or occurrence: (1) are the issues of fact and law raised by the underlying claim and the joined claim largely the same?; (2) would res judicata bar a subsequent suit on the joined claim?; (3) would substantially the same evidence support or refute the underlying claim and the joined claim?; and (4) is there any logical relationship between the underlying claim and the joined claim?[211] Under each approach, an affirmative answer means that the claims arise from the same transaction or occurrence, and for most purposes means that the nonfederal claim is

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Rule 24(a) — *see, e.g.*, Gaines v. Dixie Carriers, 434 F.2d 52 (5th Cir. 1970) (intervention as of right within ancillary jurisdiction); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 540 (8th Cir. 1970) (same).

[207] 437 U.S. 365 (1978).

[208] *Id.* at 375. The Court went on to say that certain types of assertions of ancillary jurisdiction seemed necessary to enable federal courts "to protect legal rights or effectively to resolve an entire logically entwined lawsuit," *id.* at 377, especially when ancillary claims are made by "a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court." *Id.* at 376.

[209] *Id.* at 375 n.18; *see also* LASA Per L'Industria Del Marmo Societa Per Anzioni v. Alexander, 414 F.2d 143, 146-47 (6th Cir. 1969) (cross-claims) (citing *Moore* as source of same transaction test); H.L. Peterson Co. v. Applewhite, 383 F.2d 430, 433 (5th Cir. 1967) (counterclaims) (relying explicitly on *Moore*); Dery v. Wyer, 265 F.2d 804, 807-08 (2d Cir. 1959) (impleader) (relying on *Moore* as cognate rule for counterclaims); *cf.* Phelps v. Oaks, 117 U.S. 236, 241 (1886) (intervention) (relying on predecessors of *Moore*).

[210] 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1410, at 40 (1971) [hereafter 6 WRIGHT & MILLER].

[211] *Id.* § 1410, at 42.

within the ancillary jurisdiction of the court.[212] This Article outlines each of these four approaches.

The factual identity approach. Courts using this approach, which is similar to the *Hurn*[213] test,[214] call for near factual identity between the underlying claims and the joined claim.[215] This factual identity approach should be rejected because it is inconsistent with *Moore v. New York Cotton Exchange*,[216] which has come to stand for a much broader test.[217] Hence, this test ought not to be used to prohibit ancillary jurisdiction.

The res judicata approach. Courts using this formulation focus on whether, in the absence of a rule mandating the result, the relationship between the underlying claim and the joined claim is such that the joined claim would be barred by res judicata if omitted.[218] There are

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[212] *See id.* § 1410, at 42-43. *But see* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978) (no ancillary jurisdiction over plaintiff's nonfederal claim against a third party defendant, despite fact that claim arose from same transaction as original claim); Kentucky Natural Gas Corp. v. Duggins, 165 F.2d 1011, 1015 (6th Cir. 1948); HART & WECHSLER, *supra* note 5, at 1078 (suggesting that ancillary jurisdiction cannot be extended to nonfederal claims made by a party indispensible under Federal Rule of Civil Procedure 19).

[213] Hurn v. Oursler, 289 U.S. 238 (1933).

[214] *See supra* text accompanying notes 68-93.

[215] *See* Connecticut Indem. Co. v. Lee, 168 F.2d 420, 423 (1st Cir. 1948); Nachtman v. Crucible Steel Co., 165 F.2d 997, 999 (3d Cir. 1948); Industrial Equip. & Marine Serv. v. M/V Mr. Gus, 333 F. Supp. 578, 581 (S.D. Tex. 1971); *see also* Whigham v. Beneficial Fin. Co., 599 F.2d 1322, 1323 (4th Cir. 1979) (citing fact identity as one four possible tests).

[216] 270 U.S. 593, 610 (1926):

> "Transaction" is a word of flexible meaning. . . . Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations . . . does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim.

[217] *See* 6 WRIGHT & MILLER, *supra* note 210, § 1410, at 44; *supra* text accompanying notes 197-204 (discussing development of the *Moore* standard). It might be argued that at its narrowest, *Moore* requires a very close factual connection between the underlying and the joined claim. However, this interpretation of *Moore* has not been adopted, and today much looser factual connections may be made under the *Moore* test. *See supra* text accompanying notes 198-99.

[218] *See* Beach v. KDI Corp., 490 F.2d 1312, 1321 n.16 (3d Cir. 1974); Big Cola Corp. v. World Bottling Co., 134 F.2d 718, 723 (6th Cir. 1943); Iron Mountain Sec. Storage v. American Specialty Foods, 457 F. Supp. 1158, 1162 (E.D. Pa. 1978); Agostine v. Sidcon Corp., 69 F.R.D. 437, 442 (E.D. Pa. 1975); Weber v. Weber, 44 F.R.D. 227, 230 (E.D. Pa. 1968).

two significant problems with this approach that make it unsuitable as a constitutional limitation on ancillary jurisdiction: first, res judicata is not generally a bar to claims omitted by a defendant in the absence of a rule to that effect;[219] and second, tying ancillary jurisdiction to res judicata may make the federal rule subject to vagaries of state law.[220] Hence, the res judicata approach also should not be used to prohibit ancillary jurisdiction.

The substantial identity of evidence approach. Courts using this test make a high degree of evidentiary overlap between proof needed to make out the underlying claim and proof needed to make out the joined claim a prerequisite to finding the same transaction or occurrence.[221] This method is analogous to that used by many courts applying the *Gibbs* common nucleus of operative facts test,[222] and seems faithful to the *Moore* limitation that a decision on one claim will affect disposition of the joined claim.[223] However, the approach is subject to criticism as being too restrictive of ancillary jurisdiction. In most instances a court using it would not have jurisdiction over any case in the absence of common evidentiary points. For example, when a plaintiff sues to void a contract because of fraud in its inducement and the defendant counterclaims for performance or breach of contract, little evidentiary overlap between the two claims is likely to occur. Yet "there is no sound reason why two suits should be required, or even permitted to resolve what essentially is one controversy between the parties."[224] Moreover, this approach is inconsistent with several cases that have sensibly per-

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[219] *See* 6 C. WRIGHT & A. MILLER, supra note 210, § 1410, at 45. This conclusion rests on the position taken in the Restatement of Judgments on the effect of a failure to interpose a counterclaim: "Where the defendant does not interpose a counterclaim although he is entitled to do so, *he is not precluded thereby* from subsequently maintaining an action against the plaintiff on the cause of action which could have been set up as a counterclaim." RESTATEMENT OF JUDGMENTS § 58 (1942) (emphasis added). In the comments to the section, the Restatement makes plain that the rule would apply only "[i]n the absence of a statute or rule of court otherwise providing." *Id.* § 58 comment a; *accord* RESTATEMENT (SECOND) OF JUDGMENTS § 22 (1982).

[220] *See* 6 WRIGHT & MILLER, *supra* note 210, § 1410, at 45.

[221] *See* Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620, 625 (D.C. Cir. 1975); Cannizzaro v. Bache, Halsey, Stuart Shields, Inc., 81 F.R.D. 719, 722 (S.D.N.Y. 1979); Sun Shipbuilding & Dry Dock Co. v. Virginia Elec. & Power Co., 69 F.R.D. 395, 397 (E.D. Pa. 1975); Annis v. Dewey County Bank, 335 F. Supp. 133, 137 (D.S.D. 1971); Non-Ferrous Metals v. Saramar Aluminum Co., 25 F.R.D. 102, 105 (N.D. Ohio 1960).

[222] *See supra* notes 139-40 and accompanying text.

[223] *See supra* note 199 and accompanying text.

[224] 6 WRIGHT & MILLER, *supra* note 210, § 1410, at 45.

mitted ancillary jurisdiction even when there has been almost no overlap between the underlying and joined claims.[225]

The logical relationship approach. The hallmark of this approach is its flexibility. "[It] allows the courts to apply [ancillary jurisdiction] to any claim that from an economy or efficiency perspective could be profitably tried with the main claim."[226] Courts using this test permit ancillary jurisdiction to serve judicial economy and party convenience. Even if there is only minimal evidentiary overlap between the underlying claim and the joined claim, ancillary jurisdiction may be exercised if some savings in time or trial efficiency can be found.[227]

The logical relationship test has been called, with good reason, the one compelling guideline for finding the same transaction or occurrence.[228] It permits joinder whenever any fairness or efficiency is served. It goes a long way toward fulfilling the promise of the Federal Rules for "the broadest possible scope of action consistent with fairness."[229]

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[225] *See, e.g.*, Crouse-Hinds Co. v. Internorth Inc., 634 F.2d 690, 700 (2d Cir. 1980) (finding ancillary jurisdiction over counterclaim seeking to enjoin a planned merger with a nonparty company when main claim alleged various violations of federal securities law); *In re* Penn Cent. Transp. Co., 419 F. Supp. 1376, 1383-84 (E.D. Pa. 1976) (in railroad reorganization proceedings, trustee's counterclaim alleging illegal conversion of funds by a partnership ancillary to partner's claim for amounts due on a rental agreement); G & M Tire Co. v. Dunlop Tire & Rubber Corp., 36 F.R.D. 440, 441 (N.D. Miss. 1964) (counterclaim for an amount due on a promissory note ancillary to plaintiff's conspiracy claim); Princess Fair Blouse v. Viking Sprinkler Co., 186 F. Supp. 1, 4 (M.D.N.C. 1960) (insurance broker's claim for balance due on insurance premiums ancillary to main claim against installer of sprinkler system and its insurer for alleged faulty installation); Baltimore & O.R.R. v. Thompson, 80 F. Supp. 570, 572-74 (E.D. Mo. 1948), *aff'd*, 180 F.2d 416 (8th Cir. 1950) (permitting counterclaim for an accounting of profits on west to east trips of railroad; main claim sought an account on east to west trips).

[226] 6 WRIGHT & MILLER, *supra* note 210, § 1410, at 46-47 (the one test that Professors Wright and Miller find compelling); *see* Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193, 1199 (10th Cir. 1974) (calling the logical relationship approach the "most controlling test").

[227] *See, e.g.*, City of Cleveland v. Cleveland Elec. Illuminating Co., 570 F.2d 123, 126-27 (6th Cir. 1978); Albright v. Gates, 362 F.2d 928, 929 (9th Cir. 1966) (permitting jurisdiction over counterclaim when main claim by plaintiff is slander regarding sale of oil securities and counterclaim is for price paid for securities); cases cited *supra* note 225; *see also* Peterson v. United Accounts, 638 F.2d 1134, 1137 (8th Cir. 1981); Cochrane v. Iowa Beef Processors, 596 F.2d 254, 265-66 (8th Cir.) (Bright, J., dissenting), *cert. denied*, 442 U.S. 921 (1979); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633-34 (3d Cir. 1961).

[228] 6 WRIGHT & MILLER, *supra* note 210, § 1410, at 46 (quoting Rosenthal v. Fowler, 12 F.R.D. 388, 391 (S.D.N.Y. 1952)).

[229] United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).

The logical relationship approach is superior to the other tests noted above,[230] and ought to be used to define same transaction or occurrence.[231] It is consistent with the Supreme Court's articulation of the test for ancillary jurisdiction set forth in *Moore*.[232] It also has apparently become the dominant theory justifying exercises of ancillary jurisdiction by lower federal courts.[233] Even more importantly, its flexibility insures that defendants and intervenors will be able to have their entire legal dispute handled in one forum without the costs and risks associated with splitting claims between state and federal courts.[234]

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[230] *See supra* text accompanying notes 213-25.

[231] The Supreme Court has not clearly articulated the meaning of logical relationship. In Moore v. New York Cotton Exch., 270 U.S. 593, 610 (1926), it spoke of such a relationship in very narrow terms: when the defeat of the underlying claim would lead to the success of the joined claim. And, in Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978), the Court seemed to endorse this approach, citing *Moore* and apparently conditioning use of ancillary jurisdiction to cases containing a logical dependency between federal and nonfederal claims, i.e., cases in which resolution of the nonfederal claim depends, at least in part, on resolution of the underlying federal claim. *Id.* at 376.

Although this factual dependency approach to a logical relationship would indicate that the Court holds a relatively narrow view of permissible joinder, this assumption is belied by the Court's approving citation later in *Kroger* of types of ancillary jurisdiction such as cross-claims and intervention as of right that broadly permit ancillary jurisdiction and joinder in situations of no logical dependency. *Id.* at 375 n.18; *see also supra* text accompanying notes 208-09 and cases cited therein.

[232] Moore v. New York Cotton Exch., 270 U.S. 593, 610 (1926) (ancillary jurisdiction depends upon logical relationship).

[233] There is now an immense body of decisions accepting this test of logical relation as controlling under the present rule. Most other decisions, though not stating such a test in terms, seem entirely consistent with it. Indeed the very fewness of cases, and these from inferior courts, where counterclaims that meet the test of logical relation have been held not [within the same transaction rule] is itself instructive.

C. WRIGHT, *supra* note 23, § 79, at 529 (footnotes omitted).

[234] Unlike a plaintiff, who typically may choose the forum within which to litigate all claims, a defendant or an intervenor is generally forced to litigate claims in the court chosen by the plaintiff. If the plaintiff chooses a federal court, and if the defendant's or intervenor's claims are nonfederal, such claims could not be litigated together with plaintiff's unless the court were to exercise ancillary jurisdiction. Failure to exercise such jurisdiction would be both costly and potentially unfair to the defendant. *See supra* notes 33-42 and accompanying text. In recognition of these facts, the Supreme Court has indicated liberal ancillary jurisdiction for claims made by defendants or intervenors. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978); *infra* text accompanying notes 338-49.

2. The Constitutional Limits of Ancillary Jurisdiction: The Reconciliation of the Pendent and Ancillary Doctrines

The Supreme Court has not yet outlined definitive constitutional guidelines for the exercise of ancillary jurisdiction. Although the *Moore* transactional relationship test is embedded in the Federal Rules,[235] and most federal courts today permit ancillary jurisdiction when the nonfederal claim arises from the same transaction or occurrence as the federal claim,[236] one cannot be certain if that test states *constitutional* limits on federal power.

The Supreme Court has refrained from endorsing this or any other view. Nonetheless, the Court may in fact have already adopted a constitutional test for ancillary jurisdiction: the standard enunciated in *Gibbs*. As stated by the Court in *Kroger*, pendent and ancillary jurisdiction are but "two species of the same generic problem"[237] for which "*Gibbs* delineated the constitutional limits."[238] Following this line of reasoning, several courts and commentators have stated that *Gibbs*, if it sets any constitutional limits, sets them for both pendent and ancillary jurisdiction.[239] This view should not be seen as radical; nor should the signals

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[235] *See supra* notes 127, 201-03 and accompanying text.

[236] For some types of joinder involving transactionally related claims, ancillary jurisdiction may not be used. For example, class members with less than $10,000 in controversy may not be permitted to join with class members having over $10,000 in controversy in a diversity class action, Zahn v. International Paper Co., 414 U.S. 291, 300-01 (1973), nor may plaintiff in a diversity case bring a transactionally related claim against a third-party defendant. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978). *Kroger* and *Zahn* both turn on interpretations of congressional limitations on federal jurisdiction and therefore are not decisions on constitutional power to exercise ancillary jurisdiction. *See infra* text accompanying notes 285-92, 309-15.

[237] 437 U.S. at 370.

[238] *Id.* at 371.

[239] *See, e.g.*, United States *ex rel.* Hoover v. Franzen, 669 F.2d 433, 439-40 (7th Cir. 1982); Ortiz v. United States, 595 F.2d 65, 68 (1st Cir. 1979); Amoco Oil v. Local 99, Int'l Bhd. of Elec. Workers, 536 F. Supp. 1203, 1220-21 (D.R.I. 1982); Potter v. Rain Brook Feed Co., 530 F. Supp. 569, 572-73 (E.D. Cal. 1982); Irwin v. Calhoun, 522 F. Supp. 576, 579-80 (D. Mass. 1981); Philipson v. Long Island R.R., 90 F.R.D. 644, 645 (E.D.N.Y. 1981); Klupt v. Blue Island Fire Dep't, 489 F. Supp. 195, 198 (N.D. Ill. 1980); Trustees of the Retirement Benefit Plan v. Equibank, N.A., 487 F. Supp. 58, 60 (W.D. Pa.), *dismissed*, 639 F.2d 772 (1980); HART & WECHSLER, *supra* note 5, at 921; Bratton, *Pendent Jurisdiction in Diversity Cases — Some Doubts*, 11 SAN DIEGO L. REV. 296, 303 (1974); Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753, 754 (1978); Mattis & Mitchell, *The Trouble with* Zahn*: Progeny of* Snyder v. Harris *Further Cripples Class Actions*, 53 NEB. L. REV. 137, 185 (1974); Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws*, 70 COLUM. L. REV. 423, 435 (1970); Shakman, *supra* note 5, at 268-69; Comment, Ald-

given by the Court in *Kroger* be seen as a departure. Rather, unification of pendent and ancillary jurisdiction is long overdue and historically sound, for the original separation of the doctrines was fortuitous, and even then was a separation more in name than fact.

The Supreme Court's early distinction between pendent and ancillary jurisdiction — making pendent jurisdiction applicable only in cases involving near identity of federal and nonfederal claims, and making ancillary jurisdiction available generally whenever such claims were transactionally related — was curious given the doctrines' common ancestor, *Osborn*, which permitted federal courts to decide all issues in a constitutional case or controversy.[240] Both pendent and ancillary jurisdiction rest on this elemental understanding of *Osborn*, and that case provides no basis for favoring one doctrine over the other. The differing treatment of pendent and ancillary jurisdiction rests on a fundamentally false assumption that ancillary jurisdiction is more necessary than pendent jurisdiction.

Because few, if any, federal cases consist solely of federal issues,[241] *Osborn* is said to be a decision of necessity.[242] Hence, supplemental ju-

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inger v. Howard *and Pendent Jurisdiction*, 77 COLUM. L. REV. 127, 133-35 (1977); Comment, *The Expanding Scope of Federal Pendent Jurisdiction*, 34 TENN. L. REV. 413, 418 (1967); Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of the Two Doctrines*, 22 UCLA L. REV. 1263, 1271-87 (1975). *But see* Matasar, *supra* note 1, at 1477-91 (suggesting that *Gibbs* sets no constitutional limits of any kind).

[240] *See supra* text accompanying notes 45-50.

[241] Although the Constitution gives Congress broad legislative authority to enact substantive law and procedures for the trial of federal actions, *see* U.S. CONST. art. I, § 8, and Congress would have power to federalize almost every part of a lawsuit in a federal court, Congress has not exercised such broad powers. Doubtless any attempt to do so would have been quite difficult, as many unanticipated questions of substance and procedure may arise during a lawsuit. To fill such gaps, Congress has explicitly directed federal courts to decide some matters by reference to state law. For example, in the Judiciary Act of 1789, Congress provided that when no federal substantive provision or procedural rule is applicable, a federal court should borrow both state substantive law, *see* Rules of Decision Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92, and state procedural rules, *see* Process Act of Sept. 29, 1789, ch. 21, 1 Stat. 93. Today, federal procedural law is governed by the Federal Rules of Civil Procedure, but Congress still generally directs federal courts to borrow state substantive law. The Rules of Decision Act, as codified, provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1976); *see also* 42 U.S.C. § 1988 (Supp. V 1981) (state law applied to fill gaps in federal civil rights litigation).

[242] HART & WECHSLER, *supra* note 5, at 922 (describing *Osborn*'s holding as virtually a prerequisite for a court to function as a court).

risdiction might be seen as serving an overriding federal judicial administrative purpose: giving a federal court sufficient ability to render justice by allowing it to reach all questions necessary to resolving the case between parties. Given this rationale, bifurcation of pendent and ancillary jurisdiction might be explicable: the fact patterns of early pendent and ancillary cases led courts to ascribe a necessity purpose to ancillary jurisdiction in its pristine *Freeman v. Howe* form but only a convenience justification for pendent jurisdiction of the *Hurn* variety. Use of the former would be encouraged as closer to *Osborn*'s purpose and use of the latter would be discouraged as an unwarranted expansion of federal judicial power.

Some support exists for this conventional wisdom. For example, in *Freeman v. Howe*, the Supreme Court did extend ancillary jurisdiction as "virtually a matter of necessity."[243] In that case, mortgagees of certain railroad cars brought a state replevin action against Freeman, a United States marshal who had attached the cars to secure judgment in a previously filed federal diversity suit. Plaintiffs prevailed at trial, but the Supreme Court reversed, holding that the state court was powerless to interfere with property within the control of the federal court. In response to the mortgagees' argument that they would be remediless, since they were not diverse to the federal property holder, the Court noted that the federal court would have had ancillary power over the mortgagees' claims. The Court reasoned that the mortgagees could have intervened in the federal action to preserve their rights.[244]

Similarly, there is a reasonable argument that pendent jurisdiction rests on a less compelling rationale. *Siler*, for example, is said to lack a necessity element,[245] and is supposedly supported only by the twin policies of avoiding federal constitutional questions and avoiding multiple lawsuits.[246] *Hurn* is said to have even less justification, resting solely on "the single policy against piecemeal litigation,"[247] a pure convenience rationale.

This traditional view of the differences between pendent and ancillary jurisdiction, while facially appealing, cannot survive deeper analysis. Upon reflection, any supposed differences between pendent and an-

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[243] C. WRIGHT, *supra* note 23, at 28.

[244] Professor Wright views the outcome in *Freeman* as necessary: "Unless the federal court has ancillary jurisdiction to hear the claims of all persons to the property, regardless of their citizenship, some persons would be deprived of any forum in which to press that claim." *Id.* at 29.

[245] *See* HART & WECHSLER, *supra* note 5, at 922.

[246] *Id.*

[247] *Id.*

cillary jurisdiction are overshadowed by their similarities. The *Freeman v. Howe* necessity was not nearly so great as that of *Osborn*, in which the Court was concerned with the ability of federal courts to function as courts. Absent authority to decide all aspects of a case, the *Osborn* Court reasoned that it could not function effectively.[248] In *Freeman v. Howe*, ancillary jurisdiction over the outsider's claim was irrelevant to the court's functioning once it was decided that state courts could not tamper with property in federal control. The necessity was one of providing a forum to the outsider. Such necessity is more akin to fairness than to judicial administration. When *Freeman* is seen in this light, its supposed similarity to *Osborn* diminishes and its difference from pendent cases is reduced.

When *Siler* and *Hurn* are recast in a more sympathetic light, their similarity to ancillary jurisdiction's rationale is magnified. *Siler* rests not only upon convenience; it also rests on the longstanding federal policy of avoiding constitutional questions whenever possible.[249] Hence, at least when a pendent case involves a federal constitutional claim joined with a nonfederal claim, important concerns of judicial administration call for extending jurisdiction over the nonfederal claim.

Moreover, it is wrong to think of *Siler* and *Hurn* as mere convenience cases. One person's convenience is another person's fairness. As any first year law student could testify, the line between convenience/efficiency and fairness is not clear. Broad joinder rules are not only convenient, they are also fair. Such joinder reduces transaction costs and permits litigants to know all of their adversary's claims against them. Furthermore, broad pendent jurisdiction avoids potential penalties, such as res judicata and collateral estoppel,[250] faced by a plaintiff who chooses to vindicate federal rights in a federal court rather than a state court.[251] Hence, pendent jurisdiction may also be seen to rest on

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[248] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822-23 (1824); *see* C. WRIGHT, *supra* note 23, at 103.

[249] *See* Hagans v. Lavine, 415 U.S. 528, 543 (1974) (given a constitutional and statutory claim over which the Court had jurisdiction, "[t]he latter was to be decided first and the former not reached if the statutory claim was dispositive"); Ashwander v. TVA, 297 U.S. 288, 341, 345-48 (1936) (Brandeis, J., concurring) (setting forth six prudential rules for avoiding constitutional decisions); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 441 (1821) (if issue is settled by state law, "it will be unneccessary, and consequently improper, to pursue any inquiries . . . respecting the power of Congress in the case").

[250] *See supra* notes 39-42 and accompanying text.

[251] Broad joinder would give parties an unencumbered choice of a federal forum, fulfilling important congressional policies in the grant of federal jurisdiction. *See* Schenkier, *supra* note 5, at 248; *supra* text accompanying notes 25-31.

fairness grounds — different from those of *Freeman v. Howe* — but important nonetheless.

By stripping away the purported divergent purposes of pendent and ancillary jurisdiction, one can discover their commonalities. These are reinforced when ancillary jurisdiction's quasi-necessity rationale is viewed from a wider modern perspective. *Moore v. New York Cotton Exchange*[252] and its progeny demonstrate that ancillary jurisdiction today rests on no necessity rationale similar to *Freeman*'s lack of an alternative forum; rather, as Professor Wright says, ancillary jurisdiction does "those things that are merely procedurally convenient."[253] To view efficient joinder as merely convenient is myopic. Yet, Professor Wright's conclusion demonstrates that the ties between pendent and ancillary jurisdiction are far closer than is ordinarily supposed.

Both Congress[254] and the Supreme Court[255] recognize that streamlining federal litigation is a significant element in the administration of justice.[256] In times of ever-burgeoning federal dockets,[257] producing

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[252] 270 U.S. 593 (1926).

[253] C. WRIGHT, *supra* note 21, at 30.

[254] Congress has long embraced the virtue of reducing litigation costs by streamlining litigation. *See* Act of Aug. 23, 1842, ch. 187, § 6, 5 Stat. 516, 518 (permitting rulemaking "so as to prevent delays, and to promote brevity and succinctness in . . . proceedings, therein, and to abolish all unnecessary costs and expenses"); The Judicial Courts Act of Mar. 2, 1793, ch. 22, § 7, 1 Stat. 333, 335 (permitting courts to make rules "as shall be fit and necessary for the advancement of justice," especially to preventing delays in proceedings).

[255] The Supreme Court promulgated and adopted the Federal Rules of Civil Procedure in 1938, providing for virtually limitless joinder. *See* FED. R. CIV. P. 18(a) ("A party asserting a claim . . . may join . . . as many claims . . . as he has against an opposing party."). The Court has described its procedural rules as "entertaining the broadest possible scope of action consistent with fairness." United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).

[256] Giving federal courts sufficient jurisdiction to determine an entire legal dispute increases judicial efficiency in cases that would be split between state and federal courts in the absence of supplemental jurisdiction. Although there are no data demonstrating the effects of supplemental jurisdiction, it is at least a plausible hypothesis that some litigants will choose to split their action, risking res judicata and collateral estoppel, rather than give up their right to a federal forum. In such cases, making the federal forum available to hear the whole dispute will decrease the overall judicial costs of multiple proceedings. Even in cases in which the entire legal dispute would be brought in state court, the federal system gains by giving it parity with the state courts. In these situations, the cost of foregoing a federal forum for federal rights can be avoided. While not essential to efficiency, such cases at least give litigants an equal choice, thereby maintaining their satisfaction with the overall judicial system.

[257] The increase in the number of cases heard by the federal judiciary in the last 25 years is enormous. In the United States District Courts, in 1960, 59,284 civil cases

more efficient federal litigation is a boon to both state and federal judicial systems. While those concerns are not now necessary to federal jurisdiction, they support judicial efficiency's important place in our jurisprudence.

No justification exists for separate tests for ancillary and pendent jurisdiction at the constitutional level.[258] Both doctrines owe their existence solely to the words "case" and "controversy" contained in article III, section two of the Constitution.[259] The Constitution makes no distinction between claims made by plaintiffs and claims made by defendants, and there is little reason to believe that any difference would support a broader definition of case concerning a defendant's claim.[260] Finally, even a cursory view of pendent and ancillary cases shows that they are moving closer together, and in practice are treated very much alike.[261] Since *Gibbs*, the trend in pendent cases has been toward a

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were filed; in 1981, 180,576 civil cases were filed. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 200 (1981). Filings in the United States Courts of Appeals have increased about 500% since 1962, from 4,823 in 1962 to 26,362 in 1981. *Id.* at 185; *see also* Levin, *Adding Appellate Capacity to the Federal System: A National Court of Appeals or an Inter-Circuit Tribunal*, 39 WASH. & LEE L. REV. 1, 4 (1982). In 1951, 1353 cases were docketed with the Supreme Court, ADMIN. OFFICE OF THE U.S. COURTS, REPORTS OF PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES AND ANNUAL REPORT OF THE DIRECTOR 197 (table A-1) (1956). In 1981, 5144 cases were on the court's docket. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 345 (chart A-1) (1981). In response to these trends, Congress authorized the appointment of 117 new district court judges and 35 new court of appeals judges. Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629, codified at 28 U.S.C. §§ 44, 133 (Supp. V 1981).

[258] One commentator has noted that "[t]he rationale for pendent jurisdiction suggests that it is distinct from ancillary jurisdiction, notwithstanding the fact that they both utilize a 'transactional' analysis." Schenkier, *supra* note 5, at 283. He concludes that pendent jurisdiction "developed as a device designed to promote judicial economy and convenience," *id.* at 278, but ancillary jurisdiction developed "to promote convenience and economy *as well as fairness* to defendants." *Id.* at 277 (emphasis added). These purported differences are vastly overstated. *See supra* text accompanying notes 241-57. Moreover, the commentator is imprecise; he does not identify with particularity whether these perceived differences are in the constitutional or statutory power for the exercise of jurisdiction. There is little to suggest the former, since the commentator identifies *Osborn* as the launching point for both doctrines. Schenkier, *supra* note 5, at 261. However, the commentator's point that the doctrines may be different at the statutory level is well-taken. *See infra* text accompanying notes 250-343.

[259] *See supra* text accompanying notes 15-16, 45-56.

[260] The older cases of the Supreme Court specifically go out of their way to equate the definition of case for plaintiffs and defendants. *See, e.g.*, Tennessee v. Davis, 100 U.S. 257, 264 (1880); Cohens v. Virginia, 19 U.S. (8 Wheat.) 264, 379 (1821).

[261] A factual relationship between federal and nonfederal claims is apparently the

transactional test similar to that in ancillary jurisdiction. Both doctrines have edged toward a logical relationship test. The de facto constitutional bridge has been built, and pendent and ancillary jurisdiction once again share a common constitutional standard.

Although the Supreme Court has thus far refused to delineate the differences, if any, between pendent and ancillary jurisdiction,[262] the Court recently has indicated that pendent and ancillary jurisdiction are really two species of the same generic question and that *Gibbs* sets the constitutional limits on jurisdiction of either kind.[263] Given this indication by the Court of things to come, it is likely that *Gibbs'* common nucleus standard and ancillary jurisdiction's transactional relationship/logical relationship test will merge, making fulfillment of the *Gibbs* standard the constitutional predicate for all exercises of pendent and ancillary jurisdiction.[264]

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most significant constitutional prerequisite to the exercise of both pendent and ancillary jurisdiction. *See supra* text accompanying notes 120-50, 205-34. But, pendent and ancillary cases currently are treated much differently on the statutory and discretionary levels. *See infra* text accompanying notes 338-52 (suggesting more expansive ancillary than pendent jurisdiction). Although the Supreme Court apparently has adopted a factual relationship test as the *sine qua non* of all exercises of supplemental jurisdiction, it is questionable whether that test effectively permits jurisdiction. *See* Matasar, *supra* note 1, at 1463-77.

[262] *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 n.8 (1978); Aldinger v. Howard, 427 U.S. 1, 13 (1976) (refusal to state "whether there are any 'principled' differences between pendent and ancillary jurisdiction' or, if there are, what effect *Gibbs* had on such differences").

[263] *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978).

[264] One court has already apparently adopted the *Gibbs* pendent jurisdiction standards to govern ancillary jurisdiction. In a case involving a third party indemnity claim (which is an ancillary claim), the court in Stamford Bd. of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70 (2d Cir. 1982) stated the following test for jurisdiction:

> Federal jurisdiction to hear a case like this must satisfy a two-prong test. First, there must be power to hear the state claim, which depends on whether it arises out of "a common nucleus of operative facts" as the main federal claim. Second, it is then within the federal court's sound discretion as to whether the policies of "judicial economy, convenience, and fairness to litigants" are furthered . . . .

Id. at 72; *see also* Joiner v. Diamond M Drilling Co., 677 F.2d 1035, 1041 (5th Cir. 1982) (adopting operative facts test in ancillary cases).

The conclusion that *Gibbs* sets constitutional limits is suspect because several types of ancillary jurisdiction fit neither the common nucleus nor the transactional test. For example, *Freeman v. Howe* and its progeny do not require that various claimants to a piece of property have claims arising from a logically related transaction. *See* Matasar, *supra* note 1, at 1463-65; *cf.* 28 U.S.C. § 1335 (1976) (interpleader requires no factual nexus between claims to property). Similarly, in set-off cases, which have been held to

Although this Article has devoted much of its space to the probable constitutional limits to pendent and ancillary jurisdiction, recent cases[265] indicate other limitations on federal jurisdiction over nonfederal claims. This Article next examines the statutory limits to pendent and ancillary jurisdiction.

III. Statutory Limits to Pendent and Ancillary Jurisdiction

A. *The Post* Gibbs *Era*

Prior to and immediately following *Gibbs*, several courts held that pendent jurisdiction was permissible only if the parties to the nonfederal claim were also parties to the federal claim.[266] As the *Gibbs*

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be within the ancillary jurisdiction of the federal courts, *see, e.g.*, Marks v. Spitz, 4 F.R.D. 348 (D. Mass. 1945), the nonfederal claim must by definition arise from different facts than the federal claim. *See* Matasar, *supra* note 1, at 1474-75. In at least five other classes of federal cases — receivership, aggregation of amounts in controversy, bankruptcy, attorney fee claims, and cases removed under 28 U.S.C. § 1441(c) (1976) — there is no requirement of a factual connection between federal and nonfederal claims. *Id.* at 1465-77. Therefore, the *Gibbs* factual relationship test is not constitutionally compelled. *Id.* at 1477-91.

Despite these seeming deviations, the thrust of current law is toward uniform application of a *Gibbs*-like standard, applying a liberal transactional test to determine a common nucleus of operative fact to all exercises of pendent and ancillary jurisdiction. *See, e.g.*, Revere Copper & Brass v. Aetna Casualty & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970) (for ancillary jurisdiction purposes, a logical relationship exists if a claim "*arises* out of the same aggregate of operative facts as the original claim").

[265] Recently, the Court has pointed to a constitutional barrier to pendent jurisdiction beyond *Gibbs*: the eleventh amendment. In Pennhurst State School & Hosp. v. Halderman, 52 U.S.L.W. 4155 (U.S. Jan. 23, 1984), the Court held that the eleventh amendment precludes federal jurisdiction over a state law injunctive claim against a state officer, despite the fact that the claim would otherwise be within pendent jurisdiction. *Id.* at 4162-64. The holding appears to overrule the results of a long-line of pendent jurisdiction cases beginning with Siler v. Louisville & N.R.R., 213 U.S. 175 (1909). *See Pennhurst*, 52 U.S.L.W. at 4176 n.52 (Stevens, J., dissenting). The Court recognized that its holding would lead to inefficiency by causing plaintiffs to split claims between state and federal courts, but held that considerations of economy and convenience must fall in a confrontation with the Constitution. *Id.* at 4164. Further discussion of *Pennhurst* is beyond the scope of this Article.

Courts also face statutory limits to their supplemental jurisdiction. *See, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Aldinger v. Howard, 427 U.S. 1 (1976); Zahn v. International Paper Co., 414 U.S. 291 (1973); *infra* Part III. Moreover, even if a court has constitutional and statutory power, the court must not abuse its discretion in exercising supplemental jurisdiction. *See infra* Part IV.

[266] *See, e.g.*, Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir.), *cert. denied*, 379

common nucleus test became more widely understood, other courts expanded pendent jurisdiction to allow nonfederal claims either by new plaintiffs[267] or against new defendants.[268] Such cases permitted pendent party jurisdiction — a nonfederal claim against or by a new party — if any plaintiff had a proper federal claim against any defendant and the nonfederal claim was factually related to the federal claim.

These cases rationalized pendent party jurisdiction as encompassed by the statement of *Gibbs* that federal judicial power extends to any nonfederal claim that is part of the same constitutional case as a federal claim properly before the trial court.[269] Federal and nonfederal claims are part of the same constitutional case when they share a common nucleus of operative fact.[270] Ancillary jurisdiction also rests on the presence of nonfederal and federal claims within the same constitutional case.[271] Under ancillary jurisdiction, claims are part of the same case when they arise from the same transaction or occurrence.[272] Under the transactional standard new parties may be added to the litigation of a nonfederal claim.[273] The *Gibbs* common nucleus test and the ancillary

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U.S. 929 (1964); Rumbaugh v. Winfrede R.R., 331 F.2d 530 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964); New Orleans Pub. Belt R.R. v. Wallace, 173 F.2d 145 (5th Cir. 1949); Pearce v. Pennsylvania R.R., 162 F.2d 524 (3d Cir.), *cert. denied*, 332 U.S. 765 (1947); Gautreau v. Central Gulf S.S. Corp., 255 F.Supp. 615 (E.D. La. 1966).

[267] *See, e.g.*, Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971); Hatridge v. Aetna Casualty & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966); Townsend v. Quality Court Motels, 338 F. Supp. 1140 (D. Del. 1972); Campbell v. Triangle Corp., 336 F. Supp. 1002 (E.D. Pa. 1972); Newman v. Freeman, 262 F. Supp. 106 (E.D. Pa. 1966).

[268] *See, e.g.*, Florida E. Coast Ry. v. United States, 519 F.2d 1184 (5th Cir. 1975); Schulman v. Huck Finn, Inc., 472 F.2d 864 (8th Cir. 1973); Leathers Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968), *aff'd in part, rev'd in part*, 460 F.2d 64 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972); Connecticut Gen. Life Ins. Co. v. Craton, 405 F.2d 41 (5th Cir. 1968); Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968).

[269] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[270] *Id.*; *see supra* text accompanying notes 120-50. Although *Gibbs* also seems to make substantiality and the expectation of trial together constitutional requirements, in practice neither presents a major hurdle to pendent jurisdiction. *See supra* text accompanying notes 94-119, 151-82. The common nucleus test is the only significant constitutional predicate to pendent jurisdiction. *See supra* text accompanying note 182.

[271] *See supra* text accompanying notes 44-56.

[272] *See supra* text accompanying notes 205-09.

[273] *See, e.g.*, Freeman v. Howe, 65 U.S. (24 How.) 450 (1861) (addition of new party by intervention); Bauer v. Uniroyal Tire Co., 630 F.2d 1287 (8th Cir. 1980) (addition of new party under rule 22); Gaines v. Dixie Carriers, 434 F.2d 52 (5th Cir.

jurisdiction transactional relationship test are basically synonymous.[274] Hence, case, as used in *Gibbs*, may consist both of joinder of claims and parties. Courts perceived a strong policy justification for this expansion of *Gibbs*:

> [I]t would be an unjustifiable waste of judicial and professional time — indeed, a travesty on sound judicial administration — to allow plaintiff to try his [federal and state claims against certain codefendants] in Federal court but to require him to prosecute a claim involving precisely the same facts against [a new codefendant] in a State court. . . .[275]

The rationale and justification announced by these courts rest on the assumption that the constitutional requirements of *Gibbs* or ancillary jurisdiction are the only barrier to a federal court exercising power over a nonfederal claim. But this approach ignores the role of Congress in setting jurisdictional limits for federal courts.[276] Accordingly, some courts slowed the *Gibbs* expansion, rejecting pendent party jurisdiction based solely upon fulfillment of constitutional criteria, and recognizing that statutory power must also determine the propriety of pendent parties.[277] These courts, especially the Ninth Circuit, reasoned that federal courts should be wary of using court-created jurisdictional doctrines to reach a party when no claim against that party is within a grant of federal jurisdiction made by Congress.[278]

In the years after *Gibbs*, the Supreme Court twice acknowledged the "subtle and complex question" presented by pendent party jurisdiction,

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1970) (addition of new party by intervention); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531 (8th Cir. 1970) (addition of new party by intervention); H.L. Peterson Co. v. Applewhite, 383 F.2d 430 (5th Cir. 1967) (addition of new party under rule 13(a)); Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959) (addition of new party by impleader).

[274] *See supra* text accompanying notes 120-50, 210-34.

[275] Schulman v. Huck Finn, Inc., 472 F.2d 864, 866 (8th Cir. 1973) (quoting Schulman v. Huck Finn, Inc., 350 F. Supp. 853, 858 (D. Minn. 1972)).

[276] *See supra* text accompanying notes 17-19.

[277] The Ninth Circuit refused to follow the movement to pendent party jurisdiction, and limited *Gibbs* to the claims context. *See* Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972), *aff'd in part, rev'd in part sub nom.* Moor v. County of Alameda, 411 U.S. 693 (1973); Hymer v. Chai, 407 F.2d 136 (9th Cir. 1959).

[278] *See* Moor v. Madigan, 458 F.2d 1217, 1221 (9th Cir. 1972) (court noted that lower court correctly followed *Hymer v. Chai*, particularly in light of discretionary factors involved), *aff'd in part, rev'd in part sub nom.* Moor v. County of Alameda, 411 U.S. 693 (1973); Hymer v. Chai, 407 F.2d 136, 137 (9th Cir. 1969) ("[T]he [pendent jurisdiction] doctrine . . . was not designed to permit a party without a federally cognizable claim to invoke federal jurisdiction by joining a different party plaintiff asserting an independent federal claim growing out of the same operative facts.").

but refused to rule whether such jurisdiction was permissible.[279] Not until 1976, in *Aldinger v. Howard*,[280] did the Court attempt to reconcile the expansive logic of *Gibbs* with apparently limited congressional jurisdictional grants.

B. Recognition of Statutory Limits to Pendent and Ancillary Jurisdiction

Prior to addressing the pendent party question directly, the Supreme Court twice indirectly voiced its views on the role of Congress in setting limits to expansive joinder permitted by the Federal Rules. A review of both cases suggests the Court's general approach to finding congressional intent, especially when Congress has not explicitly stated its views.

In the first case, *Snyder v. Harris*,[281] a named plaintiff brought a diversity class action damage suit pursuant to rule 23(b)(3) of the Federal Rules of Civil Procedure. The named plaintiff's individual claim was for less than $10,000; no class member's claim exceeded that amount. Plaintiff argued that by combining the claims of all unnamed class members, the amount in controversy would be greater than $10,000. The Court held that although the claims were permissible under Rule 23, they could not be aggregated because to do so would undermine congressional intent to require an amount in controversy for actions brought under the diversity statute.[282] The Court also pointed to an uninterrupted string of judicial opinions construing the amount in controversy requirement as forbidding aggregation of independent claims by several plaintiffs.[283] Furthermore, the Court held that rule 82 of the Federal Rules of Civil Procedure, which states that the Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts," barred using the class action rule to undermine implicit congressional intent to retain the strict amount in controversy requirement, even for class action cases.[284]

Snyder dealt with the limited situation of aggregation when no plaintiff class member had a jurisdictionally sufficient federal claim. *Zahn v.*

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[279] *See* Philbrook v. Glodgett, 421 U.S. 707, 720 (1975); Moor v. County of Alameda, 411 U.S. 693, 715 (1973).

[280] 427 U.S. 1 (1976).

[281] 394 U.S. 332 (1969).

[282] 28 U.S.C. § 1332 (Supp. V 1981).

[283] Snyder v. Harris, 394 U.S. 332, 336-37 (1969).

[284] *Id.* at 337-38. The opinion asserted the primacy of congressional intent, even if unstated, over judicial desires for economy and efficiency. *Id.* at 339-40.

International Paper Co.[285] picked up where *Snyder* left off. In *Zahn*, the named plaintiffs also sought damages in rule 23(b)(3) class action diversity suit. Unlike *Snyder*, each named plaintiff had over $10,000 in controversy. On the authority of *Supreme Tribe of Ben-Hur v. Cauble*,[286] in which the Supreme Court indicated that claims by nondiverse class members are ancillary to claims made by a diverse representative, the plaintiffs argued that the claims of class members with less than $10,000 in controversy could be made ancillary to the named plaintiff's claims. The Court held that the unnamed members' claims could not be joined because to do so would violate implied congressional intent in the diversity statute to prohibit aggregation of separate parties' claims to meet the $10,000 amount in controversy requirement.[287]

Snyder and *Zahn* give important insight into the Supreme Court's theory of how implied congressional views might create statutory limits to federal jurisdiction. Both cases point to *judicially created* limits on a jurisdictional statute.[288] Both cases then point to congressional failure to override those decisions.[289] In both cases, the Court found congressional inactivity to be a statement of its implied intent to retain the judicial gloss on its statute, even in a new situation.

Neither *Snyder* nor *Zahn* directly discussed either ancillary or pendent jurisdiction or the role of Congress in adding requirements additional to those imposed by *Gibbs*. Subsequently, the Court addressed those issues with more clarity. In *Aldinger v. Howard*,[290] the Court made its first halting attempt to assert congressional primacy in pendent and ancillary jurisdiction determinations. There, plaintiff had been hired in 1971 by the treasurer of Spokane County, Washington.

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[285] 414 U.S. 291 (1973).

[286] 255 U.S. 356 (1921).

[287] Zahn v. International Paper Co., 414 U.S. 291, 301 (1973). The Court reasoned that the rule against aggregation of claims had long been in effect, *id.* at 294-95, and that Congress must have known of this rule. Therefore, the Court argued, successive reenactments of the diversity statute, without overriding the Court's long-standing aggregation rules, indicated an implicit acceptance by Congress of the rules. *Id.* at 300. The Court noted that *Snyder v. Harris* had been correctly applied. *Id.* at 301.

[288] *Id.* at 304-05 (Brennan, J., dissenting); Snyder v. Harris, 394 U.S. 332, 336, 338 (1969). The rules against aggregation are founded in decisions of the Supreme Court supposedly interpreting jurisdictional statutes. *See* Thomson v. Gaskill, 315 U.S. 442 (1942); Pinel v. Pinel, 240 U.S. 594 (1916); Troy Bank v. Whitehead & Co., 222 U.S. 39 (1911). Yet none of these jurisdictional statutes explicitly contained a rule dealing with aggregation of claims.

[289] Zahn v. International Paper Co., 414 U.S. 291, 301 (1973); Snyder v. Harris, 394 U.S. 332, 339 (1969).

[290] 427 U.S. 1 (1976).

After two months, she received a letter from him informing her that she was being terminated, despite her excellent job performance, because she was living with her boyfriend. Consequently, plaintiff brought a federal civil rights claim against various officials and the county.[291] She also brought pendent state claims against them under *Gibbs*. The district court dismissed the civil rights claim against the county because the county could not be sued under the then current interpretation of the civil rights statute.[292]

The dismissal of the section 1983 claim against the county turned the county into a pendent party because the only remaining claim against it was a state claim and there was no diversity between it and the plaintiff. Although plaintiff contended that the *Gibbs* constitutional power test and the acknowledged ancillary jurisdiction practice of permitting joinder of new parties on nonfederal claims supported pendent party jurisdiction, the district court dismissed the action against the county. The Ninth Circuit affirmed in accordance with its long-held views.[293]

The Supreme Court affirmed. First, the Court outlined the history of the pendent and ancillary jurisdiction doctrines, but refused to rule whether the doctrines were identical. It assumed for the purposes of the case that *Gibbs* governed exercises of pendent party jurisdiction,[294] and stated that *Gibbs* and its ancestors had merely discussed constitutional limits to pendent jurisdiction in attempting to ascertain congressional views on the joinder.[295] The Court then suggested that this was acceptable in *Gibbs* because nothing in the applicable statutory jurisdictional grants suggested any limitations on joining new claims against a party already properly in federal court.[296] But, the Court noted that this reasoning would be faulty in a pendent party case that is "both factually and legally different" from *Gibbs*.[297]

The Court's factual distinction began with the assumption that it should be more difficult to join an entirely new party to a nonfederal claim over which there is no independent basis of jurisdiction than to

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[291] Plaintiff claimed a deprivation of property without due process under color of state law. She was dismissed from her job pursuant to a state statute and she received no hearing, despite her request for one.

[292] Aldinger v. Howard, 427 U.S. 1, 4-5 (1976) (citing 42 U.S.C. § 1983 (Supp. V 1981)); *see also* Monroe v. Pape, 365 U.S. 167, 187-91 (1961) (holding that municipalities are not "persons" who may be sued under § 1983).

[293] Aldinger v. Howard, 513 F.2d 1257 (9th Cir. 1975).

[294] Aldinger v. Howard, 427 U.S. 1, 13 (1976).

[295] *Id.* at 13-14.

[296] *Id.*

[297] *Id.* at 14-15.

make a party already in federal court answer a related nonfederal matter.[298] The Court did not explain why this assumption should be made. Although the Court believed that pendent party jurisdiction in *Aldinger* would have promoted judicial efficiency, as did the pendent claim jurisdiction of *Gibbs*,[299] the Court nonetheless suggested that pendent parties

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[298] *Id.* at 14. The Court suggested that "the addition of a completely new party would run counter to the well-established principle that federal courts . . . are courts of limited jurisdiction . . . ." *Id.* at 15. The Court did not explain, however, why the addition of a new *party* ordinarily outside of federal jurisdiction would be any more offensive to limited jurisdiction than would the addition of a new *claim* ordinarily outside federal jurisdiction.

[299] *See id.* at 14-15 ("True, the same consideration of judicial economy would be served insofar as plaintiff's [claims against pendent parties] 'are such that he would ordinarily be expected to try them all in one judicial proceeding . . . .' ") (citing United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)). The court apparently believed that pendent party jurisdiction serves economy in a way similar to pendent claim jurisdiction. One commentator, however, has contended that adding new parties, as opposed to additional claims, undermines judicial efficiency:

> Adding a new party creates practical difficulties within an adversarial system of justice. Adversarial litigation works more smoothly the more closely it resembles the traditional bipolar model. When a party is added, the court must ensure that the new point of view is heard and protected. The procedural burden on the court increases geometrically with the addition of each party, because each issue — including those already before the court — must be litigated from another perspective. The addition of a claim, in contrast, increases the judicial burden arithmetically, because each new claim will simply be one more point of contention between parties already at hand.
>
> Adding a party also invites procedural disputes. For example, parties may contest other restrictions on judicial power, such as requirements of personal jurisdiction, service of process, and venue. These disputes waste resources on procedural wrangles. The goals of convenience and judicial economy may thus be less threatened by exercising jurisdiction over a state claim than over a state party.

Note, *Theory of Incidental Jurisdiction*, *supra* note 8, at 1946 (footnotes omitted).

The commentator's reasoning is flawed, however. It assumes that the addition of a new party requires additional work by the court to "ensure that the new point of view is heard and protected." *Id.* This is because "each issue . . . must be litigated from another perspective." *Id.* Although these assumptions are true in some cases, they are overstated and do not correspond to litigation reality, in which co-parties are often represented by common counsel and share defenses, points of view, and information. The commentator also assumes that the addition of additional parties will lead to procedural disputes. Although this assumption may be true in some cases — especially if a party brings a unique problem to the litigation — it may be false in others which proceed as smoothly with additional parties as without them. One must assume that the drafters of the Federal Rules of Civil Procedure believed in the utility of liberal joinder of parties as well as claims, despite the fear of complex procedural wrangles. *See* FED.

run counter to the limited jurisdiction of federal courts, whereas pen-

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R. CIV. P. 20(a). Moreover, if procedural disputes will erupt in the joined lawsuit, nothing suggests that they would not also erupt in any other lawsuits subsequently filed. The commentator points specifically to personal jurisdiction and service of process disputes, in both of which the federal standards frequently track those of the states. *See* FED. R. CIV. P. 4(c)(2)(C)(i) (state service of process rules), 4(e) (state jurisdictional provisions). Little efficiency would be created by shifting them from one court to another, and in fact such shifting might lead to duplication of parties' and courts' efforts, especially where a single court could handle similar procedural issues in one proceeding.

Finally, the commentator's position suffers fundamentally from its unnaturally limited view of convenience and judicial economy. It focuses solely on the perspective of the court trying the original lawsuit, ignoring effects on the parties to that suit, and on courts in alternative fora where new litigation would likely be fostered in the absence of joinder. Even if the addition of a new party to an ongoing lawsuit might incrementally increase burdens in that suit, forcing an additional lawsuit rather than permitting joinder would not be justifiable if such a move would increase burdens upon the parties and the judicial system as a whole.

It is possible that prohibiting joinder would prove more costly than adding parties to an ongoing litigation. For example, assuming that a plaintiff's claims against a new party are factually related to claims raised in the lawsuit against others, if plaintiff is not permitted to join the new party, plaintiff could be forced to trying identical evidentiary matters twice. In an *Aldinger*-type case, plaintiff would have to litigate her wrongful discharge twice: once against the officials and once against the county. She could not use collateral estoppel to prevent a second retrial of that issue, for the findings in the first suit could not bind the new party. *See* Hansberry v. Lee, 311 U.S. 32 (1940). Moreover, even though she could not bind the nonparty defendant to an adverse factfinding in the first-tried suit, she could be bound by such a finding. *See* Blonder-Tongue Laboratories v. University of Ill. Found., 402 U.S. 313 (1971). To the extent that the state court reaches judgment first, she would be deprived of her federal forum choice, a result inconsistent with long-held congressional policy. *See supra* notes 25-31, 39-42 and accompanying text.

Forbidding joinder in such cases would increase judicial time spent considering similar or duplicative evidence and finding facts concerning such evidence. It could also frustrate congressional intent. Not only would this be costly to plaintiff, it would also be inefficient for the judicial system as a whole. More importantly, it could disrupt relationships between the state and federal systems, because it could lead to inconsistencies between the decision of the court hearing the original case and the decision of the court in the second suit.

Adding a new party not otherwise subject to federal jurisdiction does place a burden on that new party. This has led the Court to conclude that defendants should receive favored treatment after being added to a lawsuit. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978). But in view of the potential costs to the plaintiff and judicial system as a whole if addition is not permitted, one might conclude that the balance favors adding the new party. At any rate, these objections spring more from a fairness considerations, *see id.*, than from concerns of judicial efficiency.

Thus, contrary to the assumptions of the commentator, failure to extend jurisdiction to parties probably is not based on efficiency grounds. *See* Aldinger v. Howard, 427

dent claims do not.[300] Again the Court gave no explanation for this conclusion, noting only that plaintiff could efficiently sue the nonfederal defendant, as well as the federal defendant, in state court.[301]

The majority opinion also distinguished *Aldinger* from *Gibbs* on legal grounds: in *Gibbs*, Congress was silent about the extent of claims plaintiff could bring against a defendant already present in federal court, but in *Aldinger*, Congress addressed the appropriate party in a nonfederal claim brought pendent to a federal civil rights claim.[302] The Court noted that Congress gave federal courts civil rights jurisdiction only over those civil actions authorized by law.[303] It next pointed out that the county defendant was excluded from liability under section 1983,[304] and that therefore a claim against the county was not authorized by law. Thus, *Aldinger* asserted it could be argued with "a great deal of force that the . . . statutory jurisdiction should not be so broadly read as to bring [the county] *back* . . . ."[305] The Court concluded that pendent party jurisdiction in the case was "without the statutory jurisdiction of the district court."[306]

U.S. 1, 14-15 (1976). Rather, as indicated by the Court in *Aldinger*, the rejection of additional parties is tied closely to notions of limited jurisdiction. *Id.* at 14. As discussed below, however, the Court's reasoning is equally suspect. *See infra* text accompanying notes 321-25.

[300] *Aldinger*, 427 U.S. at 14-15 (1976).

[301] *Id.* It is unclear why the availability of a state forum, which could have heard both the federal and nonfederal issues in *Aldinger*, made pendent jurisdiction any less available in that case than in a *Gibbs*-type case. In many pendent claim cases, federal and nonfederal claims may be brought either in state or federal court, *see supra* text accompanying notes 31, 39-42 (outlining concurrent federal jurisdiction and the consequence of not permitting pendent jurisdiction), yet in those cases pendent jurisdiction would be available. Hence, *Aldinger* does not adequately make a factual distinction between pendent claim and party cases.

[302] *Aldinger*, 427 U.S. at 15-16.

[303] *Id.* at 16 (quoting 28 U.S.C. § 1343 (1976) (current version at 28 U.S.C. § 1343 (Supp. V 1981))). Under § 1343, the federal courts are given jurisdiction over a wide variety of causes of action created by other congressional legislation.

[304] *Id.* The Court based its conclusion on Monroe v. Pape, 365 U.S. 167 (1961), which excluded municipalities from § 1983 liability. *Monroe* was overruled in Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978). Despite this, the Supreme Court has stated that *Aldinger*'s holding on the importance of congressional intent was "in no way qualified" by *Monell*. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 n.12 (1978).

[305] *Aldinger*, 427 U.S. at 17.

[306] *Id.* The Court's conclusion is unsettling because it does not adequately explain why jurisdiction was any more lacking in *Aldinger* than in *Gibbs*. *Aldinger* indicates that congressional legislation excluded the county from federal litigation. However, in *Gibbs* it was equally clear that the pendent claim, which was within neither federal

Aldinger qualifies the exercise of pendent jurisdiction in two ways. First, joining a new party to a nonfederal claim presents a more serious obstacle to pendent jurisdiction than joining a nonfederal claim against a party already subject to federal jurisdiction.[307] Second, "[b]efore it can be concluded that . . . jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."[308]

Two years after *Aldinger*, the Court again addressed the role of Congress in establishing requirements for ancillary and pendent jurisdiction in *Owen Equipment & Erection Co. v. Kroger*.[309] James Kroger, an Iowa citizen, was electrocuted when the boom of a steel crane next to which he was walking came too close to a high-tension electric power line. His estate brought a diversity wrongful death action against the Omaha Public Power District (OPPD), a Nebraska corporation. OPPD, pursuant to rule 14(a) of the Federal Rules of Civil Procedure, impled Owen Equipment & Erection Co., claiming Owen's negligence was the proximate cause of Kroger's death. Plaintiff then amended its complaint to add Owen, which it believed to be a Nebraska corporation, as a defendant. OPPD won a summary judgment, leaving Owen as the only defendant. During trial Owen revealed that its principal place of business was in Iowa, thereby destroying diversity. Nonetheless, the district court continued to exercise jurisdiction and the jury returned a verdict for Kroger.[310] The Eighth Circuit upheld ancillary jurisdiction over Owen on the basis of the *Gibbs* common nucleus test.[311]

The Supreme Court reversed. As in *Aldinger*, the Court rejected *Gibbs* as the sole test for pendent or ancillary jurisdiction,[312] reemphasizing that "[c]onstitutional power is merely the first hurdle that

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question nor diversity jurisdiction, was without the statutory jurisdiction of the district court. Despite the Supreme Court's belief that it was distinguishing *Gibbs*, legal or factual distinctions are hard to find. *See* Aldinger v. Howard, 427 U.S. 1, 20 (1976) (Brennan, J.,dissenting).

[307] *Aldinger*, 427 U.S. at 18.

[308] *Id.*

[309] 437 U.S. 365 (1978).

[310] *Id.* at 369.

[311] Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 424 (8th Cir. 1977), *rev'd*, 437 U.S. 365 (1978).

[312] Once again, the Court refused to decide if *Gibbs* set the appropriate constitutional limit for both pendent and ancillary jurisdiction, although it assumed this to be the case. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370-71 (1978).

must be overcome in determining that a federal court has jurisdiction," for "the jurisdiction of the federal courts is limited . . . also by Acts of Congress."[313] The Court explained that the exercise of ancillary jurisdiction by the trial court violated the complete diversity requirement[314] because it allowed plaintiff to bring a claim against Owen which plaintiff could not have brought in the absence of supplemental jurisdiction.[315]

Both *Aldinger* and *Kroger* suggest statutory barriers to adding parties outside of federal jurisdiction, but give little specific guidance on how to discover the precise contours of these barriers. Moreover, the cases do not definitively eliminate either pendent party or ancillary jurisdiction over new parties. As stated in *Aldinger*: "[t]here are . . . many variations in the language which Congress has employed to confer jurisdiction upon the federal courts . . . . Other statutory grants and other alignments of parties and claims might call for a different result."[316] The vague contours of *Aldinger* and *Kroger* caused disarray among the lower courts. This Article next outlines various approaches to the search for implied congressional intent and proposes guidelines for applying the illusory *Aldinger* and *Kroger* tests.

C. *Ramifications of* Aldinger *and* Kroger

After *Aldinger* and *Kroger* a federal court may not exercise pendent or ancillary jurisdiction over a new party merely upon fulfillment of the *Gibbs* common nucleus test or any other factual relationship test. The court must also satisfy itself that Congress has neither expressly nor impliedly prohibited the jurisdiction.

Uncertainty remains whether a court need determine congressional intent in a pure pendent claim case such as *Gibbs*. Some courts in pendent claim cases continue to apply *Gibbs* without regard to congressional intent.[317] But the better view is that for any exercise of pendent or ancillary jurisdiction, a court must attempt to discern the express or implied intent of Congress.[318] All federal jurisdiction is subject both to

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[313] *Id.* at 372.

[314] *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

[315] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

[316] Aldinger v. Howard, 427 U.S. 1, 18 (1976).

[317] *See* Loveridge v. Dreagoux, 678 F.2d 870, 876 (10th Cir. 1982); Joiner v. Diamond M Drilling Co., 677 F.2d 1035, 1041-43 (5th Cir. 1982); Ray v. TVA, 677 F.2d 818, 824-25 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 788 (1983); Spivey v. Barry, 665 F.2d 1222, 1227-28 (D.C. Cir. 1981).

[318] *See* Note, *Theory of Incidental Jurisdiction*, *supra* note 8; *infra* cases cited in

constitutional and congressional jurisdictional grants. For a court to ignore congressional intent is inconsistent with our governmental system, which separates legislative and judicial power. Congress is the branch that controls the jurisdiction of such courts. Hence, even in *Gibbs*-type cases, courts must search for congressional intent.

This quest for congressional intent is largely a quest for implied intent. Congress has expressed its views on the propriety of pendent or ancillary jurisdiction only infrequently.[319] Thus, the major problem for courts applying *Aldinger* and *Kroger* is discovering when implied congressional intent creates a jurisdictional limitation. Courts must ask a most imponderable question: what would Congress think about an issue to which it has given no express thought?

Neither *Aldinger* nor *Kroger* fully develops a general rule for discovering hidden congressional intent.[320] While the two cases outline some relevant factors, they do little to illuminate the darkness surrounding the cases. First, although the rationale is unclear,[321] *Aldinger* states that adding a new party not otherwise subject to federal jurisdiction to a nonfederal claim makes the exercise of federal jurisdiction more problematic than adding a nonfederal claim against a party already before the court.[322] The Court's stance is possibly supportable on two bases: (1) joinder of a new party might prove inefficient by forcing that party to participate in litigation that would not be pressed in the absence of pendent party jurisdiction;[323] and (2) joinder of a new party is a greater jurisdictional intrusion into states' rights than joinder of a new claim.

Both views rest on spurious reasoning. Any assumption that a plaintiff would not begin litigation against a proposed federal defendant in

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notes 329, 351-53.

[319] *See, e.g.*, 28 U.S.C. § 1338(b) (1976) (district courts have original jurisdiction of "any civil action asserting a claim of unfair competition [under nonfederal law] when joined with a substantial and related claim under [federal] copyright, patent, plant variety protection or trade-mark laws"); *cf.* 28 U.S.C. § 1441(c) (1976) (making an entire case removable from state court 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").

[320] The Court has written in a limited fashion and avoided laying down sweeping tests for finding whether Congress intended supplemental jurisdiction. Aldinger v. Howard, 427 U.S. 1, 18 (1976).

[321] *See supra* text accompanying notes 298-301, 307.

[322] *See* Aldinger v. Howard, 427 U.S. 1, 18 (1976).

[323] Thus, the reasoning might run, Congress impliedly would not want to foster increased litigation by giving access to federal courts that might not otherwise be available. Any other efficiency rationale for the *Aldinger* rule is difficult to reconcile both with the opinion and with conventional notions of efficiency. *See supra* note 301.

state court merely because that defendant could not be added to an ongoing federal action pursuant to ancillary or pendent jurisdiction is unfounded. An equally plausible hypothesis is that such a plaintiff either would split parties and claims between the state and federal courts or litigate the whole case in state court.[324] Similarly, it is irrelevant to the question of limited federal jurisdiction whether one joins a party or a claim ordinarily outside of federal jurisdiction. Limited jurisdiction deals with the proper balance between state and federal courts.[325] It is difficult to see why the addition of a new party outside federal jurisdiction would be any more intrusive on state power than the addition of a new claim.[326] In either event, the federal court would be exercising power over a judicial matter ordinarily solely within a state's power. The constitutional test for case or controversy makes no distinction between parties and claims.[327]

Second, *Aldinger* suggested that when the federal court's jurisdiction is exclusive — as with the Federal Tort Claims Act[328] — pendent party jurisdiction might be more justifiable than when the federal court has concurrent jurisdiction with state courts. This is a sensible view, for when the federal claim is within the exclusive jurisdiction of a federal court the parties can achieve judicial efficiency *only* in the federal court,[329] because only there could both claims be tried.[330]

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[324] *See supra* notes 34-42 and accompanying text.

[325] *See* C. WRIGHT, *supra* note 23, § 1, at 2; *supra* text accompanying notes 15-31.

[326] There is an intrusion on the new party who is brought into the federal litigation. Unlike a pendent claim, which adds only a marginal additional burden to a party already involved in litigation, bringing in a new party creates burdens against that party that would not be present absent the litigation. These concerns, however, deal with fairness to that party, not with limited federal jurisdiction. *See infra* notes 344-49 and accompanying text. Before deciding to preclude jurisdiction because of this fairness concern, a court must also take into account fairness to the other parties and the effect that failure to permit joinder would have on the judicial system as a whole.

[327] *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (three-part constitutional test for case, addressing only relationships between federal and nonfederal claims); Tennessee v. Davis, 100 U.S. 257, 264 (1880) ("A case consists of the right of one party as well as the other . . . ."); Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861) (suggesting that a new party could bring nonfederal claim into ongoing federal litigation); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818, 823 (1824) (case determined by rules setting joinder; all parts of case within federal power); *see supra* text accompanying notes 15-16, 43-56.

[328] 28 U.S.C. § 1346(b) (1976 & Supp. V 1981).

[329] Aldinger v. Howard, 427 U.S. 1, 18 (1976).

[330] Several cases have followed this approach. *See, e.g.*, Ortiz v. United States, 595 F.2d 65 (1st Cir. 1979) (Tort Claims Act); Dumansky v. United States, 486 F. Supp. 1078 (D.N.J. 1980) (Tort Claims Act); Southeastern Lumber Mfrs. Ass'n v. Walthour

Despite the obvious appeal of this approach, it suffers from too simplistic a view of the purposes of pendent and ancillary jurisdiction, assuming that both doctrines are concerned solely with judicial efficiency. Yet, the doctrines serve much broader purposes: ensuring the proper functioning of a federal court,[331] assuring fairness to parties,[332] and protecting their unencumbered ability to choose a federal forum for the litigation of a federal claim.[333] Although the Court's preference for pendent jurisdiction when federal jurisdiction is exclusive furthers these purposes, the Court's presumption against jurisdiction in concurrent jurisdiction cases ignores long expressed congressional desire to preserve a true choice between state and federal courts.[334] Instead, the Court's rule fosters litigation of federal claims in state court to achieve efficiency made unavailable in federal court and increases the risk that federal claims will be barred without a plenary federal review as a result of litigation on the nonfederal claims in state court.[335]

Agency, 486 F. Supp. 781 (N.D. Ga. 1980) (ERISA); Wood v. Standard Prods. Co., 456 F. Supp. 1098 (E.D. Va. 1978) (Tort Claims Act). *But see In re* Investors Funding Corp. of N.Y. Sec. Litig., 523 F. Supp. 550 (S.D.N.Y. 1980) (SEC rule 10b-5; pendent parties without federal cause of action denied jurisdiction). This approach assumes that the state courts permit broad joinder of state and federal claims and parties and that the state will perform its obligation to hear federal claims. *See* Testa v. Katt, 330 U.S. 386 (1947).

[331] *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); *supra* text accompanying notes 240-42.

[332] *See* Freeman v. Howe, 65 U.S. (24 How.) 450 (1861); *supra* text accompanying notes 243-48.

[333] *See* Schenkier, *supra* note 5, at 248; *supra* text accompanying note 31.

[334] It might be argued that exclusive jurisdiction contains an explicit direction by the Congress to use federal courts, whereas concurrent jurisdiction does not. The argument is fallacious. Although exclusive federal jurisdiction explicitly shows congressional desire of having federal claims heard only by a federal court, there is no congressional direction concerning nonfederal claims. Additionally, even in cases of exclusive federal jurisdiction, some federal claims may be heard in state courts. *See, e.g.*, Lear, Inc. v. Adkins, 395 U.S. 653 (1969) (state court had authority to consider patent validity despite exclusive federal jurisdiction over such claims).

[335] Parties faced with a choice between a state court in which they can litigate their entire legal dispute, and a federal court in which they can litigate only part of their dispute, have a strong incentive to choose the state court, especially in light of the res judicata consequences of splitting the dispute. *See supra* notes 40, 42.

It is also somewhat ironic that the Court has established a rule favoring supplemental jurisdiction in cases of exclusive federal jurisdiction. In exclusive jurisdiction cases, the law currently is uncertain whether a state judgment on an evidentiary matter in a state suit parallel to an evidentiary matter between the same parties in a federal suit will have any estoppel effect. *See* Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir. 1955) (Hand, J.) (suggesting no estoppel in such a situation), *cert. denied*, 350

Third, the Court in *Kroger* indicated that the context in which a nonfederal claim is asserted is crucial to determining if jurisdiction is proper.[336] The *Kroger* context test has two variables: (1) whether resolution of the nonfederal claim is logically dependent upon resolution of the federal claim;[337] and (2) whether the nonfederal claim is made by a plaintiff or by a defendant.[338]

As with its other tests, the Court did not clearly explain the relationship between the context of federal litigation and the implied views of Congress on the permissibility of pendent or ancillary jurisdiction. While the need to exercise federal jurisdiction over logically dependent nonfederal claims is exceptionally pressing,[339] ancillary and pendent jurisdiction long ago expanded beyond jurisdictional necessity.[340] Given the factual relationship requirement for ancillary jurisdiction,[341] and the ever-broadening scope of nonmutual collateral estoppel,[342] it is likely

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U.S. 825 (1956). It might be argued that there would be less need, not more, for supplemental jurisdiction in this situation. I do not argue for this position; I only suggest it as a way of reinforcing the Court's overly simplistic preference for supplemental jurisdiction in cases of exclusive, rather than concurrent, jurisdiction.

[336] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375-76 (1978).

[337] The Court suggested that when resolution of the nonfederal claim "depends at least in part upon the resolution of the primary lawsuit," ancillary jurisdiction is more permissible than when there is no logical dependency, because cases with a logical dependency have traditionally been accepted as within a federal court's ancillary jurisdiction. *Id.*

[338] *Id.* (plaintiffs' assertions of nonfederal claims should be less favorably treated than similar claims made by "a defending party haled into court against his will, or by another person whose rights might be irretrievably lost"). The Court rationalized this limitation because claims by defendants and intervenors traditionally have been accepted under ancillary jurisdiction, and because plaintiffs, who seek efficient litigation of their whole case, can achieve that efficiency in state court. *Id.*

[339] *See* Moore v. New York Cotton Exch., 270 U.S. 593 (1926); *supra* text accompanying notes 197-204

[340] *See supra* text accompanying notes 210-25, 252-53.

[341] *See supra* text accompanying notes 210-25.

[342] *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (offensive collateral estoppel by a plaintiff not a party to prior litigation against a defendant who was a party to that litigation); Blonder-Tongue Laboratories v. University of Ill. Found., 402 U.S. 313 (1971) (defensive collateral estoppel by a defendant not a party to prior litigation against a plaintiff who was a party to that litigation). In the context of pendent jurisdiction, these collateral estoppel doctrines make it possible that a party who could not be joined in the federal action might use that federal action as a basis for collateral estoppel in a subsequently filed case. In *Aldinger*, for example, the county might have been able to preclude the plaintiff from suing it later in state court if the plaintiff had lost her first federal action against the individuals. Thus, although there would be no logical dependency between the federal and nonfederal claims, the estoppel doctrines

that even claims lacking a logical *dependence* have a sufficient logical *relationship* that findings on one claim might affect litigation of the other claim.[343]

Similarly, the Court offered no support for its assumption that Congress would prefer defendants' claims over those made by plaintiffs. The Court supposed that the rule was based upon fairness: defendants are haled into court against their will, whereas plaintiffs have choices where to litigate, so more expansive ancillary or pendent jurisdiction should be available to defendants.[344] Hence, defendants ought to be able to litigate their claims in federal court, because otherwise they could not litigate their claims together in any single forum.[345] As a corollary to this assumption, any plaintiff in a case of concurrent jurisdiction could litigate claims efficiently in state court.[346] From these assumptions the Court concluded that Congress would impliedly prohibit plaintiff's nonfederal claims.

The problems with this analysis are legion. First, the Court's plaintiff/defendant dichotomy ignores situations in which defendants may have caused the barriers to efficient litigation by removing their cases from state to federal court.[347] Second, the opinion takes no account of

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might make their factual relationship sufficiently important to create incentives to keep the claims together.

In Kremer v. Chemical Constr. Corp., 456 U.S. 461, 484-86 (1982), the Supreme Court held that a federal title VII employment discrimination claim would be barred by a prior state court determination of similar claims. The case is indicative of the strong possibility of preclusion raised when a litigant splits claims between state and federal courts. *Cf.* Migra v. Warren City School Dist. Bd. of Educ., 52 U.S.L.W. 4151 (U.S. Jan. 23, 1984) (federal § 1983 action may be precluded by prior adjudicated state action). "It . . . would be wrong to minimize the effect of res judicata or of collateral estoppel on the federal claims, if the related state claims sought to be joined are subsequently adjudicated in state court." Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U.L. REV. 777, 814 (1983).

[343] *See supra* notes 34-42 and accompanying text; *supra* note 342.

[344] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978).

[345] *Id.*

[346] *Id.*

[347] *See, e.g.*, 28 U.S.C. §§ 1441-1443 (1976) (giving defendants various rights to remove cases). One commentator, brushing aside the Court's failure to acknowledge that defendants may sometimes take the offensive, has suggested that this part of the Court's test be read as a preference for the party in the defensive, rather than offensive posture and that a party's posture be determined by reference to who had the choice of forum. Note, *Theory of Incidental Jurisdiction*, *supra* note 8, at 1943-45. Although there is some case support for the commentator's position, *see, e.g.*, Hyman-Michaels Co. v. Swiss Bank Corp., 496 F. Supp. 663 (N.D. Ill. 1980), *aff'd sub nom.* Evra

other situations in which Congress has given plaintiffs opportunities to use federal courts or procedures that are unavailable to defendants.[348] These situations, together with the policy of free choice, suggest no congressional preference for defendants' claims. Third, the Court ignores important factors motivating pendent and ancillary jurisdiction, such as ensuring effective functioning of the federal courts and preserving free choice of a federal forum,[349] relying instead wholly upon efficiency and convenience as the bases for supplemental jurisdiction.[350] Finally, the Court fails to explain why the context of *Gibbs* permitted a plaintiff to make a nonfederal claim, whereas the context of *Kroger* and *Aldinger* did not. For jurisdictional purposes, what greater intrusion on state judicial power is found in taking jurisdiction over a plaintiff's claim normally outside of federal power than in taking such a claim made by a defendant?

Some courts have looked beyond the specific factors outlined by *Ald-*

Corp. v. Swiss Bank Corp., 673 F.2d 951 (7th Cir.) (plaintiff's compulsory counterclaim to a third-party defendant's claim within ancillary jurisdiction; distinguishing *Kroger* on the basis that plaintiff was actually in the position of a defending party), *cert. denied*, 103 S. Ct. 377 (1982), the Supreme Court has not adopted this view. Moreover, despite the Court's notion that Congress would not permit those who could achieve efficiency in state court to use pendent or ancillary jurisdiction, some courts, permit ancillary jurisdiction by defendants who remove claims from state to federal court. *See, e.g.*, Hill v. Rolleri, 615 F.2d 886, 889 (9th Cir. 1980) (defendant impled third party defendant, removed to federal court, and settled claims with plaintiff; court maintained ancillary jurisdiction over third-party complaint); Federal Deposit Ins. Corp. v. Otero, 598 F.2d 627, 631 (1st Cir. 1979) (court had discretion to hear defendant's state law counterclaim even after defendant removed case to federal court); Kaib v. Pennzoil Co., 545 F. Supp. 1267, 1270 (W.D. Pa. 1982). *But see* Burleson v. Coastal Recreation, 595 F.2d 332, 335-37 (5th Cir. 1978) (not permitting defendant's claim after removal).

[348] For example, plaintiffs may choose to litigate their claims in federal court whenever their well pleaded complaint raises an issue of federal law, whereas defendants may not litigate their defenses or counterclaims in federal court — even if they raise federal issues — unless federal issues are also raised by plaintiffs. *See* Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908). Similarly, at times plaintiffs are given an absolute right to designate the court in which they will litigate, unfettered by defendants' ability to remove the action. *See* 28 U.S.C. § 1441(b) (1976) (precluding a defendant from removing diversity cases filed in the state in which defendant is a citizen); 28 U.S.C. § 1445 (1976) (making certain federal question cases nonremovable).

[349] *See* Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861) (fairness); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (proper functioning of federal courts); Schenkier, *supra* note 5, at 269 (free choice); *supra* text accompanying notes 31, 248-61.

[350] This has the consequence of undervaluing plaintiff's need for a federal forum for the entire legal dispute. *See supra* notes 34-42 and accompanying text.

inger and *Kroger* for finding implied intent. For example, although *Snyder*, *Zahn*, and *Kroger* do not say so explicitly, a few courts have held that ancillary jurisdiction is inapplicable to plaintiff's attempts to join nonfederal parties whenever the underlying action is based upon diversity.[351] Others have stated that when plaintiff joins pendent nonfederal claims with federal claims, and the nonfederal claims permit more extensive remedies than the federal claims, jurisdiction is improper.[352] Similarly, some courts have held that when Congress creates federal statutory rights and calls for an expedited determination of those rights, if granting pendent jurisdiction over a nonfederal claim would delay determination of the federal claim, Congress has impliedly negated pendent or ancillary jurisdiction over the nonfederal claim.[353]

Each of these doctrines is helpful in developing a scheme for finding congressional intent.[354] Yet each incompletely explains how to discern

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[351] *See, e.g.*, National Ins. Underwriters v. Piper Aircraft Corp., 595 F.2d 546 (10th Cir. 1979); Alco Fin. Servs. v. Treasure Island Motor Inn, 82 F.R.D. 735 (N.D. Ill. 1979); *see also* Note, *Theory of Incidental Jurisdiction*, *supra* note 8, at 1951. As a corollary to this rule, at least one other court suggests that the mere presence of a federal base claim is sufficient to permit jurisdiction. *See* Taylor v. Collins, 545 F. Supp. 459 (E.D. Mich. 1982) (federal claims against some defendants; defendants impled third party defendant not diverse to plaintiff; plaintiff permitted to bring nonfederal claim against third party defendant).

[352] *See, e.g.*, Deutsch v. Carl Zeiss, Inc., 529 F. Supp. 215 (S.D.N.Y. 1981) (Congress impliedly negated pendent jurisdiction over state claims joined with Federal Age Discrimination Act claims because state remedies broader than federal remedies); Douglas v. American Cyanamid Co., 472 F. Supp. 298 (D. Conn. 1979) (same); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Colo. 1977) (same); *see also, e.g.*, Kleiner v. First Nat'l Bank of Atlanta, 97 F.R.D. 683, 688 n.6 (N.D. Ga. 1983) (state claims impermissibly joined with federal Truth-In-Lending Act class action claim, because state remedies unlimited and federal statute contains limitation on damages); Brame v. Ray Bills Fin. Corp., 85 F.R.D. 568, 593 (N.D.N.Y. 1979) (same).

[353] *See, e.g.*, Bennett v. Southern Marine Management Co., 531 F. Supp. 115, 117-18 (M.D. Fla. 1982) (title VII); Jong-Yul Lim v. International Inst., 510 F. Supp. 722 (E.D. Mich. 1981) (same). *But see* Goodman v. Board of Trustees, 511 F. Supp. 602 (N.D. Ill. 1981) (concluding jurisdiction would be proper).

[354] A rule automatically barring diversity plaintiffs from adding nondiverse defendants provides a simple and manageable scheme for pendent jurisdiction in a variety of contexts, and is in accord with congressional intent in not violating the complete diversity requirement. Focusing on the differences between federal and nonfederal remedies or on the need for expedited federal action serves important functions as well; such inquiries directly address the consequences of specific congressional actions for pendent or ancillary jurisdiction. As such, these additional attempts at elucidating congressional implied intent are valuable additions to *Kroger* and *Aldinger* because they attempt to relate the question of jurisdiction directly to some congressional act.

implied intent,[355] and each suffers from a narrow vision of the purposes of ancillary and pendent jurisdiction, especially by failing to give

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[355] Despite recent helpful approaches to discerning congressional implied intent, *see supra* text accompanying notes 353-55, none of the three rules adverted to sets forth a fully satisfactory method for finding the intent as to pendent or ancillary jurisdiction. For instance, an automatic bar to pendent jurisdiction in diversity cases might run contrary to the purposes of diversity jurisdiction if it induces plaintiff to litigate against the diverse defendant in the defendant's home state to achieve efficiency unavailable in federal court. At least in part, Congress has given diversity jurisdiction to avoid prejudice to outsiders. *See* United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809); Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 329 (1977). While it could be forcefully argued that the addition of a nondiverse defendant or a nondiverse additional plaintiff would eliminate any prejudice to an out-of-state plaintiff, this assumption may be incorrect. The factfinder could still prefer the resident's claims and defenses over other claims in the suits. Additionally, when defendant removes a diversity case to federal court, defendant creates barriers to plaintiff litigating an entire case. In those situations plaintiff's claims against a nondiverse defendant might be proper as a matter of fairness to the plaintiff despite the apparent *Kroger* barrier. *See supra* text accompanying notes 309-15, 336-50.

As to cases involving joinder of a nonfederal claim containing more extensive remedies than the federal claim, courts have held that the joinder precludes hearing the nonfederal claim because it would permit the federal court to make an award otherwise outside of its power. That observation is true, but the conclusion is unrelated to congressional intent, for the failure to permit the nonfederal claim altogether might induce the federal litigant to forego the federal forum, *see supra* note 42, and this would run counter to the free forum choice policy of Congress. Catania, *supra* note 342, at 802 (denying pendent jurisdiction in such contexts "would contravene both the underlying purpose of federal question jurisdiction and one of the rationales for pendent jurisdiction: encouraging the use of federal courts as the forum for vindication of federal claims"); *see supra* note 31. The conclusion that the more limited relief available for the federal claim precludes a federal court from hearing a pendent state claim is questionable. Catania, *supra* note 342, at 795-96 ("reliance on remedial differences to infer congressional intent to negate the exercise of pendent jurisdiction . . . is a misapplication of the *Aldinger* test and ignores the underlying rationale of pendent jurisdiction"). *Gibbs* itself seems contrary to this theory, because the state claim encompassed relief on facts to which the federal claim was inapplicable, yet the Court in *Gibbs* did not preclude pendent jurisdiction on this basis. Neither have courts adequately tied the need for an expedited federal hearing to the pendent or ancillary jurisdictional intent of Congress. *Id.* at 806 ("The argument that the courts give is essentially without merit."). First, the cases make no assessment of the purpose of Congress in requiring an expedited hearing. If Congress intended such a hearing for plaintiff's benefit, then might not plaintiff have the ability to waive the right? *Id.* ("If . . . plaintiff chooses to join his claims and forego certain procedural advantages, that is the plaintiff's prerogative."). Moreover, if the failure to permit pendent jurisdiction in these cases might induce litigation of the federal claim in state court, *see supra* note 42, once again one must question whether Congress would prefer an expedited hearing over free choice. The rules advocated by courts for finding implied congressional intent do not fully address the subject, but are merely the initial step in proper statutory analysis.

credence to the value of allowing parties an unencumbered choice of federal forum.

Despite this general myopia, a few courts have expressly noted the failure to give adequate value to choice. These courts have held that when a failure to exercise pendent claim, pendent party, or ancillary jurisdiction would discourage litigants from bringing their federal claims to federal court, and would encourage litigation in a state court that could exercise jurisdiction over the entire legal dispute,[356] ancillary or pendent jurisdiction over the nonfederal claim is appropriate because Congress would not impliedly negate its use.[357] To properly assess implied congressional intent, this analysis must be made in every pendent or ancillary case.[358]

At their worst, the principles for determining implied congressional intent developed in the *Aldinger/Kroger* line of cases are tautological. They suggest that when Congress has not provided jurisdiction over a particular claim or party, Congress has impliedly negated pendent or ancillary jurisdiction over the claim or party. By definition, any nonfederal claim would be barred by congressional intent. The Supreme Court's recognition in *Aldinger* and *Kroger* that *Gibbs* is still good law[359] mandates rejection of this broad tautological test for implied intent.

One is left instead with a laundry list of factors to consider: (1) whether a nonfederal claim or nonfederal party is being added to the litigation; (2) whether jurisdiction over the federal claim is exclusive or concurrent; (3) whether the nonfederal claim is logically dependent upon resolution of the federal claim; (4) whether the nonfederal claim is asserted by a plaintiff or a defendant; (5) whether the federal claim is based on diversity; (6) whether the nonfederal claim permits more extensive remedies than the federal claim; (7) whether the federal claim is

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[356] *See supra* note 42.

[357] *See, e.g.*, Potter v. Rain Brook Feed Co., 530 F. Supp. 569 (E.D. Cal. 1982); DeMaio v. Consolidated Rail Corp., 489 F. Supp. 315 (S.D.N.Y. 1980) (FELA actions joined with pendent party). *But see* Cheltenham Supply Corp. v. Consolidated Rail Corp., 541 F. Supp. 1103 (E.D. Pa. 1982) (rejecting approach to congressional intent based upon effect on plaintiff's forum choice). The major problem with this view is that it invariably leads to the exercise of jurisdiction. It fails adequately to address other critical questions such as the federalism/comity consequences of the jurisdiction. *See infra* note 360.

[358] As outlined below, *see infra* note 360, analyzing the effect on forum choice of failure to exercise pendent or ancillary jurisdiction is only the first step in making a supplemental jurisdiction decision.

[359] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 371 (1978); Aldinger v. Howard, 427 U.S. 1, 14 (1976).

one calling for an expedited determination; and finally (8) whether failure to exercise pendent or ancillary jurisdiction would inhibit the free choice of a federal forum.

The Supreme Court has not yet clarified how these factors combine to determine congressional implied intent. Although it is beyond the scope of this Article to chart precisely how these factors interrelate,[360]

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[360] I intend to analyze the proper application of implied congressional jurisdictional factors in a future article on the supplemental jurisdiction doctrine. I pause here only briefly to sketch some of that analysis.

To determine implicit congressional views, one must begin with a theory of congressional purpose in making various jurisdictional grants. For example, Congress has expanded federal question jurisdiction, at least in part, to permit federal litigants unencumbered access to federal courts. *See supra* text accompanying notes 25-31. This forum choice philosophy is reinforced by the recent decision to amend 28 U.S.C. § 1331 (1976 & Supp. V 1981) (as amended by the Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486 § 2(a), 94 Stat. 2369), to eliminate an amount in controversy for federal question cases. Thus, the first postulate for determining implied statutory supplemental jurisdictional intent is that Congress means to ensure free choice of a federal forum.

Despite this first postulate, in Aldinger v. Howard, 427 U.S. 1 (1976), the Supreme Court refused to exercise pendent party jurisdiction, forcing plaintiff to choose between splitting her claims between state and federal courts, and incurring a substantial risk of issue preclusion, *see supra* note 40, or litigating her whole claim in state court, and thereby losing the free choice of a federal forum, *see supra* note 42.

Congress has also given both implicit and explicit jurisdictional directions to the Court by suggesting situations in which a federal court should refrain from exercising its power. *See* 28 U.S.C. § 2283 (1976) (enjoining state proceedings explicitly prohibited); *see also* Younger v. Harris, 401 U.S. 37 (1971) (implicit recognition of same principle); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) (interpreting appeals statute to preclude federal appellate jurisdiction when there is an adequate and independent state ground). Each of these instances indicates a strong congressional policy to avoid undue interference by the federal government with important state functions. These policies make up a second postulate for determining Congress' implied statutory supplemental jurisdictional intent: federalism/comity concerns.

In United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), however, the Supreme Court treated these federalism/comity concerns as discretionary matters unrelated to federal supplemental jurisdictional power. *See infra* Part IV. These concerns go to the heart of federal jurisdiction and ought to be addressed prior to the exercise of discretion.

Finally, pendent and ancillary jurisdiction have been justified on a convenience and economy rationale. *Gibbs*, 383 U.S. at 726. These concerns are of import to Congress, *see* Judicial Courts Act of May 2, 1793, ch. 23, § 7, 1 Stat. 333, 335, and underlie the current Federal Rules of Civil Procedure, *see* FED. R. CIV. P. 1. They constitute a third jurisdictional postulate.

These three postulates make up the starting point of any decision on the implied views of Congress on pendent and ancillary jurisdiction. They must be combined with contextual factors to determine congressional intent. When the decision not to exercise

the following observations may be made. The most important step in determining congressional views about pendent and ancillary jurisdiction is one the Supreme Court has not yet taken: a court must determine the purpose of the jurisdictional grant before assessing whether ancillary or pendent jurisdiction should be granted. Similarly, a court must determine the potential impact on congressional jurisdictional purpose of a failure to exercise supplemental jurisdiction. Only after completing these steps should a court look at the other factors outlined above.

Zahn, *Aldinger*, and *Kroger* erect a substantial barrier — the search for express or implied congressional limits — to some assertions of pendent and ancillary jurisdiction. Doubts have been expressed concerning the applicability of these cases to a pure *Gibbs* pendent case, or to a pure ancillary jurisdiction case,[361] but the better view is that all assertions of pendent or ancillary jurisdiction require not only constitutional but statutory power.[362] The courts, following *Kroger* and *Aldinger*, have enunciated several factors that give rise to implied congressional intent, but have applied them inconsistently. Nonetheless, the *Aldinger/Kroger* principle has become an important barrier to the assertion of supplemental jurisdiction. Even though each of the currently enunciated congressional intent factors alone may lack certainty or consistency, together they suggest the beginning of an analytical framework for discerning intent.

IV. Another Barrier to the Exercise of Pendent and Ancillary Jurisdiction — Discretion

As *Gibbs* makes clear, even if a federal court has power to exercise pendent jurisdiction over a nonfederal claim, that "power need not be exercised in every case in which it is found to exist."[363] Because "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right,"[364] its

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pendent or ancillary jurisdiction will frustrate neither free choice nor efficiency, Congress would be less inclined to allow jurisdiction. Similarly, when there would be a clear federalism/comity impact, jurisdiction would be unlikely. However, when failure to exercise jurisdiction will erode free choice, will create inefficiency and inconvenience, or will not affect a state's prerogatives, jurisdiction should be presumed. Only after this analysis is made should the other contextual factors listed above, *see supra* text accompanying notes 321-53, be used. These factors should be given no more than discretionary weight.

[361] *See supra* note 317 and accompanying text.

[362] *See supra* note 318 and accompanying text.

[363] United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

[364] *Id.* The Court in *Gibbs* spoke only of pendent claim jurisdiction as a doctrine of

use should be limited to those situations when "considerations of judicial economy, convenience and fairness to litigants"[365] indicate a need for expanded federal jurisdiction. "[I]f these are not present a federal court should hesitate to exercise jurisdiction" over nonfederal claims.[366]

Gibbs outlines several considerations which ought to guide a court in its decision to exercise pendent jurisdiction. These fall loosely into two types: federalism/comity concerns and fairness concerns. "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties . . . ."[367]

The federalism/comity considerations embody the Court's concern that a federal court should not, without an adequate justification, invade the province of the states by deciding state law issues. The federal court's need to decide the nonfederal issue must be balanced against the desire not to impinge on state sovereignty. The Court specifically outlines the following factors to weigh in the balance:

> —Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.[368]
>
> —[I]f it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.[369]
>
> —Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.[370]

In addition to these explicit federalism/comity criteria, courts have also identified another comity concern: pendent jurisdiction should be denied when the state issue is complex or involves an unresolved issue of state law.[371]

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discretion. Given the current substantial overlap between ancillary and pendent jurisdiction, *see supra* text accompanying notes 222-45, it is probably correct to say that ancillary jurisdiction should also be a doctrine of discretion. Nonetheless, a review of most ancillary jurisdiction cases would reveal only a handful recognizing a discretionary aspect to the jurisdiction. Courts automatically exercise ancillary jurisdiction over matters if they have power. *See infra* text accompanying notes 390-409 for a further discussion of this issue.

[365] United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

[366] *Id.*

[367] *Id.*

[368] *Id.*

[369] *Id.* at 726-27.

[370] *Id.* at 727.

[371] *See* Moor v. County of Alameda, 411 U.S. 693, 716 (1973); Bricklayers Fringe Benefit Funds v. North Perry Baptist Church, 590 F.2d 207, 209 (6th Cir.), *cert.*

Each factor has important consequences to the proper allocation of jurisdiction between state and federal courts. If a case concerns solely matters of state law because federal claims have been dismissed, there is little or no federal interest in maintaining power over those claims. Similarly, if the state claims predominate over the federal claims, if the state claims comprise the bulk of the litigation, or if the state claims are difficult or unclear, federal interests pale against potential losses to the states of their powers.

Two other important policies concerning proper federal court functioning may be found in *Gibbs* and other pendent cases. First, *Gibbs* commands that a court exercise pendent jurisdiction whenever decision on the state issue is tied to the federal issue.[372] Second, the exercise of pendent jurisdiction is warranted when a decision on a nonfederal claim will permit a federal court to avoid a constitutional issue contained in the federal claim.[373] Both policies reflect situations in which federalism/comity concerns are outweighed by important federal interests. When a federal issue is closely tied to the nonfederal issue, and an incorrect decision on the nonfederal issue might have serious consequences to a decision on the federal issue, federal interests loom much larger than state interests. When resolution of a case on nonfederal grounds might avoid a difficult federal constitutional issue, the cost to the state of a federal decision on the state issue would be slight in comparison to an erroneous or ill-conceived constitutional decision.

Beyond these federalism/comity considerations, the Supreme Court also notes that the discretionary exercise of pendent jurisdiction rests on fairness to the litigants. Accordingly, it outlines two fairness factors that ought to influence the exercise of that discretion. First, "[f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court . . . ."[374]

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denied, 444 U.S. 834 (1979); REA Express v. Travelers Ins. Co., 554 F.2d 1200, 1201 (D.C. Cir.), *cert. denied*, 434 U.S. 858 (1977); Blake v. Pallan, 554 F.2d 947, 958 (9th Cir. 1977); Nottleson v. A.O. Smith Corp., 423 F. Supp. 1345, 1348 (E.D. Wis. 1976), *modified*, 643 F.2d 445 (7th Cir. 1981); Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975, 979 (E.D. Pa. 1973); Raza Unida Party v. Bullock, 349 F. Supp. 1272, 1285 n.50 (W.D. Tex. 1972), *aff'd in part, vacated and remanded in part*, 415 U.S. 767 (1974).

[372] United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966) ("There may . . . be situations in which the state claim is so closely tied to questions of federal policy [such as where the federal law may preempt the state's law] that the argument for exercise of pendent jurisdiction is particularly strong.").

[373] *See* Hagans v. Lavine, 415 U.S. 528 (1974); Siler v. Louisville & N.R.R., 213 U.S. 175 (1909).

[374] United Mine Workers v. Gibbs, 383 U.S. 715, 726 n.15 (1966) (quoting Strach-

Decisions of state law should be avoided "to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."[375] Second, "there may be reasons independent of jurisdictional considerations, such as likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial."[376]

Given the myriad discretionary factors outlined in *Gibbs*, it is not surprising that federal courts do not consistently exercise their discretion in pendent jurisdiction cases. Moreover, despite the Supreme Court's assertion that pendent and ancillary jurisdiction are part of the same doctrine,[377] it remains unclear whether courts apply any discretionary criteria at all in ancillary jurisdiction cases.

A. Pendent Jurisdiction Cases

The *Gibbs* discretionary standards are used frequently in pendent cases to dismiss nonfederal claims within federal power.[378] A sampling of those cases shows the following noncontroversial uses: (1) courts dismiss nonfederal claims when they predominate the action brought to the court;[379] (2) courts dismiss nonfederal claims when a decision on

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man v. Palmer, 177 F.2d 427, 431 (1st Cir. 1949) (Magruder, J., concurring)).

[375] *Id.* at 726. Several lower courts have applied this test. *See, e.g.*, Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 458 (7th Cir.), *cert. denied*, 103 S. Ct. 177 (1982); Financial Gen. Bankshares v. Metzger, 680 F.2d 768, 772-73 (D.C. Cir. 1982); Ruiz v. Estelle, 679 F.2d 1115, 1159 (5th Cir. 1982); Joiner v. Diamond M Drilling Co., 677 F.2d 1035, 1044 n.28 (5th Cir. 1982); Jones v. Fitch, 665 F.2d 586, 593 (5th Cir. 1982); Gregory v. Mitchell, 634 F.2d 199, 202 (5th Cir. 1981); REA Express v. Travelers Ins. Co., 554 F.2d 1200, 1201 (D.C. Cir.), *cert. denied*, 434 U.S. 858 (1977); Houlihan v. Anderson-Stokes, Inc., 434 F. Supp. 1324, 1329-30 (D.D.C. 1977); Rundle v. Madigan, 331 F. Supp. 492, 495 n.5 (N.D. Cal. 1971), *aff'd sub nom.* Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972), *aff'd in part, rev'd in part sub. nom.* Moor v. County of Alameda, 411 U.S. 693 (1973)..

[376] United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966); *see* Price v. Franklin Inv. Co., 574 F.2d 594, 607 (D.C. Cir. 1978); Marchwinski v. Oliver Tyrone Corp., 461 F. Supp. 160, 173 (W.D. Pa. 1978); Maltais v. United States, 439 F. Supp. 540 (N.D.N.Y. 1977).

Gibbs also indicates that the district court's discretion to dismiss nonfederal claims "remains open throughout the litigation." 383 U.S. at 727. Even if litigation has been completed, dismissal of a nonfederal claim might be merited, although the court should take into account the course of completed litigation. *Id.*

[377] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978).

[378] *See* 13 WRIGHT, MILLER & COOPER, *supra* note 153, § 3567, at 462 (and cases cited therein).

[379] *See, e.g.*, Nolan v. Meyer, 520 F.2d 1276, 1280 (2d Cir.), *cert. denied*, 423 U.S. 1034 (1975); Kavit v. A.L. Stamm & Co., 491 F.2d 1176, 1180 (2d Cir. 1974); Merritt

them would confuse trial on the federal claim in the case;[380] and (3) courts exercise jurisdiction over nonfederal claims to serve important federal interests, such as insuring the supremacy of federal law that preempts state provisions.[381]

There is little debate over the propriety of these exercises of discretion. However, the most widely used and misunderstood of the *Gibbs* discretionary factors — its direction that a federal court should dismiss nonfederal issues when the federal claim is dismissed before trial[382] — presents much more of a problem. Several courts hold that early federal dismissals lead automatically to dismissal of nonfederal claims. These courts understandably treat such dismissals as a matter of power, not of discretion, for *Gibbs* explicitly states: "Certainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well."[383]

It is incorrect, however, to read this language as requiring automatic dismissal of nonfederal claims whenever federal claims are dismissed on the merits. *Gibbs* discusses federal claim dismissal in the portion of the

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v. Colonial Foods, 499 F. Supp. 910, 915 (D. Del. 1980); Kiss v. Tamarac Utils., 463 F. Supp. 951 (S.D. Fla. 1978); O'Brien v. Continental Ill. Nat'l Bank & Trust Co., 443 F. Supp. 1131 (N.D. Ill. 1977), *aff'd in part, rev'd in part*, 593 F.2d 54 (7th Cir. 1979); Hendrickson v. Wilson, 374 F. Supp. 865, 877 (W.D. Mich. 1973); Winterhalter v. Three Rivers Motors Co., 312 F. Supp. 962 (W.D. Pa. 1970).

[380] *See, e.g.*, Moor v. County of Alameda, 411 U.S. 693, 716-17 (1973); *supra* cases cited in note 376.

[381] *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 721 (1966); Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1045 n.13 (11th Cir. 1982); Curtis v. Taylor, 625 F.2d 645, 650 n.8 (5th Cir.), *modified*, 648 F.2d 946 (5th Cir. 1980); Almenares v. Wyman, 453 F.2d 1075, 1085 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); Hages v. Aliquippa & S.R.R., 427 F. Supp. 889, 894 (W.D. Pa. 1977); United States *ex rel.* Mandel Bros. Contracting Corp. v. P.J. Carlin Constr. Co., 254 F. Supp. 637 (E.D.N.Y. 1966).

[382] United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

[383] *Id.* On its face, *Gibbs* seems to call for mandatory dismissal of any nonfederal claim whenever the federal claim is dismissed before trial; accordingly, several courts have read *Gibbs* to require automatic dismissal of nonfederal claims as soon as federal claims are dismissed. *E.g.*, Kim v. Cochenour, 687 F.2d 210, 211 n.3 (7th Cir. 1982); Bowers v. DeVito, 686 F.2d 616, 619 (7th Cir. 1982); Tarpley v. Greene, 684 F.2d 1, 4 (D.C. Cir. 1982); Bumpus v. Clark, 681 F.2d 679, 687 (9th Cir. 1982); Uniformed Firefighters Ass'n v. City of New York, 676 F.2d 20, 23 (2d Cir.), *cert. denied*, 103 S. Ct. 84 (1982); Mid-America Regional Bargaining v. Will County Carpenters Dist. Council, 675 F.2d 881, 883 n.4 (7th Cir.), *cert. denied*, 103 S. Ct. 132 (1982); Tinker v. DeMaria Porsche-Audi, Inc., 632 F.2d 520, 523 (5th Cir. 1980); Hupp v. Gray, 500 F.2d 993, 997-98 (7th Cir. 1974); Nash & Assocs. v. Lum's of Ohio, Inc., 484 F.2d 392, 395-96 (6th Cir. 1973).

opinion dealing with discretion, not power.[384] The Supreme Court itself indicated in *Rosado v. Wyman*[385] that an early disposition of a federal claim does not require dismissal of nonfederal claims.[386] Following *Rosado*, federal courts increasingly have found power to retain nonfederal claims even after federal claims are dismissed,[387] especially when the federal court has expended time and energy on resolving the federal claim and it would be wasteful to force duplication of such effort on the state claims.[388] This approach has also been applied to permit federal courts to retain nonfederal claims after a federal claim has been dismissed to prevent a statute of limitations, which would apply if plaintiff were forced to refile in state court, from barring plaintiff's nonfederal claim.[389]

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[384] The discussion appears after the Court discusses pendent power, United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), after it states that pendent jurisdiction is a doctrine of discretion, not of right, and after it specifically says that dismissals in this context should be made even though the federal claims are "not insubstantial in a jurisdictional sense." *Id.* at 726.

[385] 397 U.S. 397 (1970).

[386] *Id.* at 404 (permitting exercise of jurisdiction over nonfederal claim after federal claim dismissed as moot).

[387] *See, e.g.*, Ferguson v. Flying Tiger Line, 688 F.2d 1320, 1321 n.1 (9th Cir. 1982); IMFC Professional Servs. v. Latin Am. Home Health, 676 F.2d 152 (5th Cir. 1982); North Dakota v. Merchants Nat'l Bank & Trust Co., 634 F.2d 368, 371 (8th Cir. 1980); Lentino v. Fringe Employee Plans, 611 F.2d 474, 479 (3d Cir. 1979); Arizona v. Cook Paint & Varnish Co., 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); Brunswick v. Regent, 463 F.2d 1205 (5th Cir. 1972); Springfield Television v. City of Springfield, 462 F.2d 21, 23-24 (8th Cir. 1972); Gray v. International Ass'n of Heat & Frost Insulators, 447 F.2d 1118, 1120 (6th Cir. 1971); Kleiner v. First Nat'l Bank of Atlanta, 97 F.R.D. 683, 688-90 (N.D. Ga. 1983).

[388] *See* United States v. Kember, 685 F.2d 451, 455 (D.C. Cir.), *cert. denied*, 103 S. Ct. 73 (1982); IMFC Professional Servs. v. Latin Am. Home Health, 676 F.2d 152, 159 (5th Cir. 1982); Lentino v. Fringe Employee Plans, 611 F.2d 474, 479 (3d Cir. 1979); Transok Pipeline Co. v. Darks, 565 F.2d 1150, 1155 (10th Cir. 1977) (state claims decided after federal claims settled because "[i]t would be a shocking waste of time and money now to require . . . relitigat[ion] in the state court"), *cert. denied*, 435 U.S. 1006 (1978) ; Gray v. International Ass'n of Heat & Frost Insulators, 447 F.2d 1118, 1120 (6th Cir. 1971).

[389] *See, e.g.*, Henson v. Columbus Bank & Trust Co., 651 F.2d 320, 325 (5th Cir. 1981); North Dakota v. Merchants Nat'l Bank & Trust Co., 634 F.2d 368, 370 (8th Cir. 1980); Koke v. Stifel, Nicolaus & Co., 620 F.2d 1340, 1346-47 (8th Cir. 1980); Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798, 809 (2d Cir. 1979); O'Brien v. Continental Ill. Nat'l Bank & Trust Co., 593 F.2d 54, 63-65 (7th Cir. 1979); Kuhn v. National Ass'n of Letter Carriers, 528 F.2d 767, 771 n.6 (8th Cir. 1976); Meyerhofer v. Empire Fire & Marine Ins. Co., 74 F.R.D. 151, 154 (S.D.N.Y. 1977); McLaughlin v. Campbell, 410 F. Supp. 1321, 1326 (D. Mass. 1976); Knuth v. Erie-Crawford Dairy Coop. Ass'n, 326 F. Supp. 48, 57 (W.D. Pa. 1971), *modified*,

B. Ancillary Jurisdiction Cases

As a threshold matter, it is unclear whether the *Gibbs* discretionary factors apply at all in ancillary jurisdiction cases.[390] Few ancillary jurisdiction cases have considered whether a judge may dismiss nonfederal ancillary claims and parties as matter of discretion.[391] Hence, for most purposes, once a federal court exercises ancillary jurisdiction, it will retain nonfederal claims.

This general view is inappropriate. The comity/federalism and fairness considerations that motivated the *Gibbs* discretionary standards apply with equal force in ancillary cases. There is little difference in the impact on state sovereignty if a claim ordinarily outside federal jurisdiction is made by a plaintiff or is made by a defendant.[392] In either event, federal jurisdiction should be justified. The failure to address discretion in ancillary cases may be mitigated, at least in part, because strong fairness[393] and judicial economy[394] reasons exist for ancillary jurisdiction. Moreover, the Supreme Court's tests for statutory barriers to supplemental jurisdiction might indicate the Court's tacit views of the proper exercise of discretion in ancillary cases.[395] Nonetheless, to place

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463 F.2d 470 (3d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973). Despite this trend, some courts apparently still erroneously assume that dismissal of the federal claim before trial requires dismissal of the nonfederal claim. *See, e.g.*, Kurzawa v. Mueller, 545 F. Supp. 1254, 1263 (E.D. Mich. 1982); Strandridge v. City of Seaside, 545 F. Supp. 1195, 1199 (N.D. Cal. 1982).

[390] *Gibbs* was addressed solely to the propriety of pendent claim jurisdiction. As detailed above, *see supra* text accompanying notes 45-59, 67-93, 190-204, ancillary jurisdiction developed separately from pendent jurisdiction and none of the early ancillary cases focused on discretion. Although it might be argued that the *Gibbs* discretionary tests are inapposite in ancillary cases, pendent and ancillary jurisdiction have generally moved toward unity. *See supra* text accompanying notes 240-61. *Compare supra* text accompanying notes 120-50 *with supra* text accompanying notes 210-34. The two doctrines are now considered by the Supreme Court as "generically" similar. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978).

[391] *See, e.g.*, Stamford Bd. of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70, 72 (2d Cir. 1982) (explicitly holding the *Gibbs* discretionary test applicable in an ancillary jurisdiction case); Harris v. Steinham, 571 F.2d 119 (2d Cir. 1978); Schwab v. Erie L.R.R., 48 F.R.D. 442 (W.D. Pa. 1970).

[392] *See supra* text accompanying notes 336-51.

[393] *See* Freeman v. Howe, 65 U.S. (24 How.) 450 (1861); *supra* text accompanying note 248.

[394] *See* Moore v. New York Cotton Exch., 270 U.S. 593 (1926); *supra* text accompanying notes 252-53.

[395] In Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978), the Court held that the context in which ancillary claims were asserted was important for assessing their validity. *Id.* at 375-76. Context included assessments of whether those claims were

ancillary jurisdiction on an equal footing with pendent jurisdiction and ensure proper decisionmaking in ancillary cases, courts should exercise discretion in such cases according to the *Gibbs* standards.

Despite the general attempt by courts facing ancillary questions to avoid most of the *Gibbs* discretionary standards, several federal courts have assessed retention of state claims in light of a disposition before trial of the federal claims. Some have retained nonfederal claims,[396] reasoning that so long as the federal claim which was dismissed was properly within federal jurisdiction, the court had power to retain the nonfederal claim.[397] These decisions, unlike those in pendent cases over-

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logically dependent on resolution of the underlying federal claims in the litigation and whether the ancillary claims were made by the plaintiff or by the defendant. These two contextual factors relate to notions of fairness and judicial economy. A preference for defendants' claims recognizes that defendants are haled into court against their wills and that they would unfairly be denied a chance to litigate their whole case in one forum if ancillary jurisdiction were denied. *See id.* at 376. This contextual factor might be read as a shorthand for suggesting that ancillary jurisdiction rests in part on fairness. Similarly, the preference expressed in *Kroger* for a logical dependency can be seen as recognition that when there is such a relationship, great savings in judicial time and effort can be made by permitting the claims, for in such a situation, the decision on the ancillary claim "depends at least in part upon the resolution of the primary lawsuit." *Id.* Again, the *Kroger* test might be seen as a shorthand for saying that ancillary jurisdiction fulfills judicial economy goals.

[396] *See, e.g.*, Moore v. New York Cotton Exch., 270 U.S. 593, 608-09 (1925) (compulsory counterclaim); Stamford Bd. of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70, 72 (2d Cir. 1982) (third-party claim); Fairview Park Excavating Co. v. Al Monzo Constr. Co., 560 F.2d 1122 (3d Cir. 1977) (cross-claims); Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1204 n.2 (5th Cir. 1975) (rule 14(a); Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193 (10th Cir. 1974) (compulsory counterclaim); Kenney v. Landis Fin. Group, 376 F. Supp. 852 (N.D. Iowa 1974) (compulsory counterclaim).

[397] *See, e.g.*, Moore v. New York Cotton Exch., 270 U.S. 593, 608-09 (1925) (having found sufficient substance in primary claim to dismiss on the merits, jurisdiction over counterclaim permissible); Fairview Park Excavating Co. v. Al Monzo Constr. Co., 560 F.2d 1122, 1125 (3d Cir. 1977) ("[O]nce a district court judge has properly permitted a cross-claim . . . the ancillary jurisdiction that results should not be defeated by a decision on the merits adverse to the plaintiff on the plaintiff's primary claim."); Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1204 n.2 (5th Cir. 1975) ("Settlement of the main claim did not require dismissal of the ancillary claim."); Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193, 1199 (10th Cir. 1974) ("And if the counterclaim is held to be compulsory, it is settled that the court has ancillary jurisdiction to decide it even though the plaintiffs' claim be dismissed."); Kenney v. Landis Fin. Group, 376 F. Supp. 852, 854 (N.D. Iowa 1974) ("[a]lthough plaintiff's complaint has been dismissed, the court has ancillary jurisdiction over defendant's counterclaim . . . .").

coming apparent automatic dismissal language in *Gibbs*,[398] have not attempted to justify continued federal jurisdiction.[399] They have neither focused on extensive federal time investments nor shown any fairness reason, such as a pressing state statute of limitations, for retaining the nonfederal claim. Without such findings, there would be little reason for continued federal jurisdiction at the expense of the states. Thus, these cases may reach the correct result, but only by erroneous analysis.

In contrast to these indiscriminate exercises of ancillary jurisdiction, other courts have acted carelessly by dismissing nonfederal claims automatically after federal claims were dismissed.[400] These courts generally merely cite *Gibbs* and conclude that a dismissal of the federal claim necessitates or at least counsels strongly for dismissal of the nonfederal claim.[401] They fail to make the same sensitive analysis of the issues of federal time investment and fairness made in pendent cases.[402]

The failure of most courts exercising ancillary jurisdiction to recognize that the doctrine inherently is discretionary prevents rational and consistent decisionmaking. This sometimes leads courts to strained decisions finding no power to exercise ancillary jurisdiction, when a discretionary analysis would be more intellectually accurate. For example, federal courts have ancillary jurisdiction over compulsory counter-

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[398] *See supra* text accompanying notes 385-89.

[399] In Stamford Bd. of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70 (2d Cir. 1982), however, the court properly analyzed its retention of the nonfederal claim. Noting specifically that the question of retaining nonfederal claims after federal claims are disposed of depends upon "the policies underlying incidental jurisdiction," *id.* at 72 n.3, the court went on to detail reasons why the dismissal of the nonfederal claims "would neither be wise judicial administration nor fair to the parties," *id.* at 72. Similar attention was given to these criteria in Joiner v. Diamond M Drilling Co., 677 F.2d 1035, 1041-43 (5th Cir. 1982), but there the court reached a different conclusion.

[400] *See, e.g.*, Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798 (2d Cir. 1979) (counterclaim); Propps v. Weihe, Black & Jeffries, 582 F.2d 1354, 1355 n.2 (4th Cir. 1978) (rule 14); *see also* Putnam v. Williams, 652 F.2d 497, 502 (5th Cir. 1981) (preferred practice); McDonald v. Oliver, 642 F.2d 169, 172 (5th Cir. 1981) (district court lost jurisdiction when underlying claim was dismissed); Rosario v. American Export-Isbrandtsen Lines, 531 F.2d 1227, 1233 n.17 (3d Cir. 1976).

[401] Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798, 811 (2d Cir. 1979) ("The stipulation of settlement also *necessitates* dismissal of [the] remaining cross-claims . . . this being the recommended procedure when the jurisdiction-conferring claim is dismissed prior to trial.") (citing *Gibbs*) (emphasis added); Propps v. Weihe, Black & Jeffries, 582 F.2d 1354, 1355 n.2 (4th Cir. 1978) ("there is nothing gained by retaining jurisdiction in the case where there is no independent ground for jurisdiction"). *But see* Joiner v. Diamond M Drilling Co., 677 F.2d 1033, 1043 (5th Cir. 1982) (making careful assessment before dismissing claims).

[402] *See supra* text accompanying notes 385-89.

claims, but not over permissive counterclaims.[403] Consequently, some courts have strained to classify what would ordinarily be deemed compulsory counterclaims as permissive counterclaims to avoid jurisdiction. For example, while a number of courts correctly have found defendant's counterclaims for an amount due to be compulsory to a plaintiff's Truth-in-Lending Act[404] claim,[405] others have found such counterclaims permissive, despite their transactional relationship to plaintiff's federal claims.[406] The latter courts reason that the state law counterclaims would best be left to state courts so as not to undermine substantive congressional purposes underlying the federal claim or so as not to take unwarranted jurisdiction over essentially state matters.[407] These

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[403] *Compare* Baker v. Gold Seal Liquors, 417 U.S. 467, 469 n.1 (1974) (compulsory counterclaim), Moore v. New York Cotton Exch., 270 U.S. 593 (1926) (same), *and* Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633 (3d Cir. 1961) (same) *with* Aldens, Inc. v. Packel, 524 F.2d 38, 52 (3d Cir. 1975) (permissive counterclaim), *cert. denied*, 425 U.S. 943 (1976), Clark v. Universal Builders, 501 F.2d 324, 341 (7th Cir.) (same), *cert. denied*, 419 U.S. 1070 (1974), *and* Newburger, Loeb & Co. v. Gross, 365 F. Supp. 1364, 1367 (S.D.N.Y. 1973) (same), *aff'd in part, rev'd and remanded in part*, 563 F.2d 1057 (2d Cir. 1977). This jurisdictional distinction between compulsory and permissive counterclaims is generally accepted. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); 6 WRIGHT & MILLER, *supra* note 210, § 1414, at 69. *But see* United States v. Heyward-Robinson Co., 430 F.2d 1077, 1088 (2d Cir. 1970) (Friendly, J., concurring), *cert. denied*, 400 U.S. 1021 (1971) ("conventional view is wrong"); Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 28-31 (1963); Green, *Federal Jurisdiction Over Counterclaims*, 48 NW. U.L. REV. 271, 282-85 (1953).

[404] 15 U.S.C §§ 1601-1613, 1631-1646, 1661-1677 (1982).

[405] *See, e.g.*, Plant v. Blazer Fin. Servs., 598 F.2d 1357 (5th Cir. 1979); Kenney v. Landis Fin. Group, 376 F. Supp. 852 (N.D. Iowa 1974); Alpert v. U.S. Indus., Inc., 59 F.R.D. 491, 499 (C.D. Cal. 1973); Rodriguez v. Family Publ. Serv., Inc., 57 F.R.D. 189, 193 (C.D. Cal. 1972). Even a cursory analysis shows that an alleged violation of the Lending Act's standards, which deal with the written terms of a loan, bears *some* relationship to a failure to pay back the loan. *See supra* text accompanying notes 226-31 (describing logical relationship test). At the very least, the same parties and the fact of a loan agreement will be involved.

[406] *See, e.g.*, Valencia v. Anderson Bros. Ford, 617 F.2d 1278 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981); Whigham v. Beneficial Fin. Co., 599 F.2d 1322 (4th Cir. 1979); Agostine v. Sidcon Corp., 69 F.R.D. 437 (E.D. Pa. 1975); *cf.* Peterson v. United Accounts, Inc., 638 F.2d 1134, 1136 (8th Cir. 1981) (Fair Debt Collection Practices Act).

[407] Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1291 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981) ("TILA claims could not be expeditiously resolved if courts were entangled in the state law issues raised by debt counterclaims."); Whigham v. Beneficial Fin. Co., 599 F.2d 1322, 1324 (4th Cir. 1979) ("To let the lender use the federal proceedings as an opportunity to pursue private claims against the borrower would . . . involve the district courts in debt collection matters having no

courts as easily could have rested their refusals to exercise ancillary jurisdiction on discretionary federalism/comity grounds.[408] A decision based explicitly on discretion would be superior to a questionable power decision inconsistent with other holdings.[409]

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federal significance."); Agostine v. Sidcon Corp., 69 F.R.D. 437, 442 (E.D. Pa. 1975); *cf.* Kleiner v. First Nat'l Bank of Atlanta, 97 F.R.D. 683, 688 n.6 (N.D. Ga. 1983) ("Federal policy suggests that federal courts should be reluctant to exercise their discretion to decide state claims pendent to TILA actions. Federal truth in lending legislation was not intended to subject the law of lender-borrower relations to wholesale federal court scrutiny.").

[408] *See supra* text accompanying notes 363-77.

[409] In addition to constitutional, statutory, and discretionary barriers to supplemental jurisdiction, a court must also obtain personal jurisdiction and venue over parties against whom nonfederal claims are raised. Usually, neither venue nor personal jurisdiction are troublesome in this context.

Venue rarely raises problems for courts exercising pendent or ancillary jurisdiction. It is generally held that where ancillary or pendent jurisdiction permits joinder of a nonfederal claim or party without satisfaction of independent jurisdictional prerequisites, it is also unnecessary to satisfy venue provisions for that claim or party. *See* Haile v. Henderson Nat'l Bank, 657 F.2d 816, 822 n.6 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); Lesnik v. Public Indus. Corp., 144 F.2d 968, 974-77 (2d Cir. 1944); Brandt v. Olson, 179 F. Supp. 363, 371-72 (N.D. Iowa 1959). Although some cases reject this position and require that venue provisions be satisfied, *see, e.g.*, Lewis v. United Air Lines Transp. Corp., 29 F. Supp. 112 (D. Conn. 1939); King v. Shepherd, 26 F. Supp. 357 (W.D. Ark. 1938), "it would seem that if procedural convenience is enough to avoid the constitutional limitations on the jurisdiction of the federal court, it would suffice also to dispense with the purely statutory requirement as to venue." C. WRIGHT, *supra* note 23, § 9, at 32.

Personal jurisdiction is rarely a problem. A new party brought into federal court pursuant to ancillary or pendent party jurisdiction must be served in accordance with Federal Rule of Civil Procedure 4, which ordinarily requires in-state service, FED. R. CIV. P. 4(f), unless out of state service is permitted by the law of the state within which the court sits. FED. R. CIV. P. 4(c)(2)(C)(i), 4(e), 4(f). Thus, for most purposes, pendent and ancillary jurisdiction raise no new problems for personal jurisdiction.

However, when a federal statute permits out-of-state service for the federal claim, *see, e.g.*, 28 U.S.C. §§ 1391(e), 2361 (1976), but such service would not be permitted for the nonfederal claim, it is not clear if service on the federal claim is sufficient to obtain personal jurisdiction on the nonfederal claim. The better view is that if the nonfederal claim is sufficiently related to a federal claim to come with pendent or ancillary jurisdiction, obtaining personal jurisdiction for the federal claim is sufficient "to bring the party into court to respond to both claims." C. WRIGHT, *supra* note 23, § 9, at 32 n.31; *see* Note, *Ancillary Process and Venue in the Federal Courts*, 73 HARV. L. REV. 1164, 1175-78 (1960). *But see* Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 VILL. L. REV. 56 (1965).

CONCLUSION

Limited federal jurisdiction could present a serious barrier to fair and efficient litigation of federal claims in the absence of the supplemental jurisdiction doctrines. In *Osborn v. Bank of the United States*,[410] the Supreme Court eroded this barrier by providing federal courts power to decide all questions in an article III case or controversy. Yet the common heritage of *Osborn* did not prevent the bifurcation of federal courts' treatments of nonfederal claims made by plaintiffs from those made by defendants and intervenors. Thus was born the grudging pendent jurisdiction and the more liberal ancillary concept.

Today, pendent and ancillary jurisdiction are once again heading toward unity, at least at the stage of the constitutional power of federal courts over nonfederal claims and parties. Hence, the *Gibbs* common nucleus test and the ancillary jurisdiction transactional standard have both become searches for logical relationships between federal and nonfederal claims. This is as it should be, for the words "case" and "controversy" in the Constitution ought to have the same meaning for claims by plaintiffs and claims by others.

This is not to say that courts must give identical treatment to all nonfederal claims. Differences in the context of litigation may suggest important reasons for differentiating between claims, and the tests for statutory power and discretion legitimately may be used to define differences between pendent and ancillary jurisdiction.

Despite the need to clearly describe these differences, great confusion exists in the precise contours of statutory and discretionary limitations to pendent and ancillary jurisdiction.[411] Much of this confusion stems from the impossibility, or at least the delphic nature, of trying to know what Congress believes about something to which Congress has given no thought. In fact, standards the courts have developed for making decisions on implied congressional intent have little to do with values Congress thinks about. Rather, the standards — whether new nonfederal claims or new federal parties are being added, whether plaintiff or defendant is making the claim, whether claims are logically dependent — relate to fairness or comity concerns, very similar to those expressed in *Gibbs*.[412] This suggests that the supposed statutory intent standards may merely be new variables in the calculus of discretion.

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[410] 22 U.S. (9 Wheat.) 738 (1824).

[411] *See supra* Part IV.

[412] United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966); *see supra* text accompanying notes 363-67.

Until courts synthesize statutory and discretionary factors with precise formulas, pendent and ancillary jurisdiction will continue to receive varying treatments. Those of us who must use the concepts are left with the disparate strands and inconsistent concepts outlined in this Article. Until more exacting guidance is given, this primer serves as a compass for finding one's way in the maze created by ad hoc decisionmaking.