PENDENT AND ANCILLARY JURISDICTION
OF UNITED STATES FEDERAL
DISTRICT COURTS*

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PART I
INTRODUCTION

Pendent and ancillary jurisdiction play a significant role in the allocation of business between state and federal courts since they determine whether federal judicial competence extends beyond a plaintiff's jurisdiction-conferring claim, to other claims which may be asserted under the Federal Rules of Civil Procedure—counterclaims, cross-claims, third-party claims, and numerous others. If these claims are not supported by an independent basis for federal jurisdiction, such as diversity of citizenship, an issue of competence is present. The doctrines of pendent and ancillary jurisdiction extend federal jurisdiction to claims which have a certain factual relationship to the subject matter of the plaintiff's complaint. If such claims, which will hereafter be referred to as "auxiliary claims,"

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1. Claims may also be asserted by means of interpleader, intervention, initial joinder of claims, claims by and against third-party defendants, etc. See text at note 80 infra for a discussion of various joinder devices under the federal rules.

2. Federal courts are of limited jurisdiction. U.S. Const. art. 3, § 2. To be considered in federal court, the controversy must be between citizens of different states or must involve questions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. §§ 1332(a), 1331(a) (1970). Furthermore, unless subject to special jurisdictional statutes, such as 28 U.S.C. § 1343 (1970), dealing with civil rights cases, or 28 U.S.C. § 1337 (1970), involving interstate commerce, the amount in controversy must exceed ten thousand dollars. 28 U.S.C. §§ 1331(a), 1332(a) (1970).

3. The term auxiliary is introduced here in the interest of brevity and should not be confused with the "auxiliary jurisdiction" of equity. See, e.g., J. Story, Commentaries on Equity Pleadings § 472 (8th ed. 1870). Story divided equity jurisdiction into three categories: concurrent, exclusive, or auxiliary.
were not given ancillary or pendent treatment, they would have to be brought in a state court. The doctrines thus provide a mechanism for inclusion of certain non-federal claims within federal jurisdiction.

It is apparent that we are at a turning point in the evolution of pendent and ancillary jurisdiction. Heretofore the doctrines have been treated as separate and distinct. As generally formulated, ancillary jurisdiction extends to any claim which arises from the same "transaction or occurrence" as the plaintiff's jurisdiction-conferring claim.4 Pendent jurisdiction has applications in cases arising under the Constitution and laws of the United States, where it allows a plaintiff to "pendent" an auxiliary state claim to his federal claim if both arise from a "common nucleus of operative facts."5 In the past decade, the doctrine of pendent jurisdiction has found new applications in diversity cases and in cases involving "pendent parties."6 These new developments,7 when viewed in historical context, make it evident that we are close to a merger of the doctrines.

As will be developed in Part II, the doctrines were historically distinct. Each performed its own limited and necessary function. The great turning point in their evolution was marked by the promulgation of the Federal Rules of Civil Procedure in 1938. Thereafter, as developed in Part III, the doctrines of pendent and ancil-

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5. Pendent jurisdiction exists over claims which arise from the same nucleus of operative facts as the jurisdiction-conferring federal question claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) [hereinafter cited as Gibbs]. See Wright, supra note 4, § 19, at 64.

6. In federal question cases, pendent jurisdiction has found application to the state claims of a second plaintiff who is not a party to the jurisdiction-conferring claim. In diversity cases, a similar "pendenting" of parties has occasionally circumvented the complete diversity rule, and, more frequently, the jurisdictional amount requirement. See text at note 121 infra. See generally Bratton, Pendent Jurisdiction in Diversity Cases—Some Doubts, 11 San Diego L. Rev. 296 (1974); Comment, Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons Not Party to the Jurisdiction-Conferring Claim, 73 Colum. L. Rev. 153 (1973); Note, Pendent Jurisdiction and Minimal Diversity, 59 Iowa L. Rev. 176 (1973). For applications of pendent jurisdiction in Admiralty, see Landers, By Sleight of Rule: Admiralty Unification and Ancillary and Pendent Jurisdiction, 51 Tex. L. Rev. 50 (1972). Additional citations to current periodical articles are gathered at note 121 infra.

lary jurisdiction took on entirely new dimensions. The courts utilized these preexisting doctrines as a vehicle for circumventing limitations on the scope of federal jurisdiction. That, in essence, is what the modern doctrines of pendent and ancillary jurisdiction are all about. In the interest of judicial economy, convenience, and fairness to litigants, the federal courts have proceeded to adjudicate claims which, if presented alone, would clearly fall outside their jurisdiction.

PART II
ANCILLARY AND PENDENT JURISDICTION
IN OUR FORMATIVE ERA

Before the promulgation of the Federal Rules of Civil Procedure, the doctrines of pendent and ancillary jurisdiction were separate and distinct. Ancillary jurisdiction facilitated the fair, orderly, and reasonably efficient administration of justice, and it enabled the courts to protect the integrity of the separate federal judicial system. Pendent jurisdiction, in contrast, was a product of our federal system in which federal courts could hear cases arising under the Constitution and laws of the United States. In such cases, pendent jurisdiction was historically pertinent to a determination of whether and to what extent the federal courts could adjudicate state claims.

A. EARLY HISTORY OF ANCILLARY JURISDICTION

Applications of the doctrine of ancillary jurisdiction in cases which were decided before Moore v. New York Cotton Exchange⁸ in 1926, make it evident that the doctrine had two branches. In the first, more familiar branch, the doctrine was applied to the claims of non-parties to property which was in control of a federal court. An overemphasis of this line of property cases leads to the questionable view that ancillary jurisdiction was initially invoked sparingly as a matter of necessity and in the interest of narrow policy considerations.⁹ In the second branch of the doctrine, ancillary treatment

⁸. 270 U.S. 593 (1926). In Moore v. New York Cotton Exchange, by upholding jurisdiction over a compulsory counterclaim, the Supreme Court substantially broadened the doctrine of ancillary jurisdiction. See text at note 90 infra.

⁹. Ancillary jurisdiction was characterized as "the child of necessity and sire of confusion" in an early note. Note, Federal Practice: Jurisdiction of Third-Party Claims, 11 Okla. L. Rev. 326, 329 (1958). Most commentators have agreed. See generally Wright, supra note 4, §§ 7, 9; C. Wright & A. Miller, Federal Practice and Procedure, § 1659 (1972) [hereinafter cited as Wright & Miller].
was given to a wide variety of claims which did not involve prop-
erty within judicial custody. In these latter cases lies the precursor
of today's expanded concept of ancillary jurisdiction.10
A. (1) Claims to property within federal judicial custody. At the
time of the creation of the federal judicial system it was well es-
tablished in equity that any person who claimed an interest in prop-
erty that was under judicial custody could intervene and have his
claim adjudicated.11 The adequacy of the intervener's remedy at
law did not preclude equity from adjudicating the claim which was
considered dependent, supplementary, and ancillary to the original
bill.12 Equity was therefore competent to adjudicate the claim even
though there would have been no subject matter jurisdiction had
the claim been presented alone.

The experience of equity provided a basis upon which federal
courts could deal with the problem of judicial competence presented
by the assertion of claims to property within their custody.18 In
the federal context, however, the problem took on new dimensions.
If the third-party property claimant was of non-diverse citizenship
and his claim did not involve a federal question, was the federal
court competent to adjudicate the claim? In the alternative, could
the third party obtain relief through application to a state court?

10. See text at note 108 infra.
11. For an explanation of traditional approaches to the claim of a non-
party to property within judicial custody, see Krippendorf v. Hyde, 110 U.S.
276 (1884). The Court's inquiry was called an examination pro interesse
suo.
12. Id. at 285.
13. The examination of the third-party's claim to property is but one
example of experience to which the courts looked. One can see precursors
of other aspects of the doctrine of ancillary jurisdiction in the following:
It is upon a ground somewhat analogous, that the circuit courts are
held to have jurisdiction in cases of cross-bills, and injunction bills,
touching suits and judgments already in those courts; for such bills
are treated not strictly as original bills, but as supplementary or
dependent bills, and so properly within the reach of the court.  

Clarke v. Mathewson, 37 U.S. (12 Pet.) 164, 172 (1838) (Story, J.). The
historical origins of ancillary jurisdiction are made apparent by the Court's
frequent citation to treatises on equity. See, e.g., Root v. Woolworth, 150
U.S. 401, 410-12 (1893). Indeed, an examination of practice and procedure
in equity will reveal a number of concepts and practices which lay at the
foundation of early applications of ancillary jurisdiction. See, e.g., J. Story,
Commentaries on Equity Pleadings §§ 338, 428-29 (8th ed. 1870); J. Story,
Commentaries on Equity Jurisprudence §§ 64-66, 71, 73 (11th ed. 1873);
J. Pomeroy, 1 Equity Jurisprudence § 181, at 257 (5th ed. 1941). "[W]hen
a court of equity has jurisdiction . . . for any purpose, it may retain the
cause for all purposes . . . and may thus establish purely legal rights and
grant legal remedies which would otherwise be beyond the scope of its au-
thority." Id. The old line of cases still has vitality. See United States
These problems were resolved in a straightforward line of decisions. Although there were earlier relevant decisions, the often cited case of Freeman v. Howe resolved the issues by declaring state courts powerless to interfere with the process of a federal court. Furthermore, in response to counsel's misapprehension that a federal court would lack competence to adjudicate the claims of a nondiverse third party to property within judicial custody, the Court went on to state, in obiter dictum, that:

The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court . . . is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.

Some years later, in Krippendorf v. Hyde, the Supreme Court reaffirmed Freeman's dictum as "logically necessary" to the opinion. The Court emphasized that since the property claimants were deprived of the "ordinary means of redress by suits for restitution in State courts" it was

but common justice to furnish them with an equal and adequate remedy in the court itself which maintains control of the property; and, as this may not be done by original suits, on account of the nature of the jurisdiction as limited by differences of citizenship, it can only be accomplished by the exercise of the inherent and equitable powers of the court in auxiliary and dependent proceedings incidental to the cause in which the property is held, so as to give to the claimant . . . the opportunity to assert and enforce his right.

In a related line of cases, in which federal courts had custody of property through the appointment of a receiver, the Supreme Court had the opportunity to consider variations of the Freeman facts. It was held that federal courts were competent to adjudicate both the claims of third persons to property held by the court

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15. 65 U.S. (24 How.) 450 (1860).
16. Id. at 460.
17. 110 U.S. 276 (1884).
18. Id. at 281.
19. Id. at 281-82.
20. In addition to obtaining custody of property by direct action and through the appointment of receivers, there were other situations involving trusts in which the court was deemed to be in custody of property. Memphis Sav. Bank v. Houchens, 115 F. 96 (8th Cir. 1902).
and the counterclaims of the receiver against such third persons. Furthermore, jurisdiction was held to extend to a claim against a third party which was initiated by the original plaintiff. In each case, the auxiliary claim related to property in the custody of the court, and the rationale was similar to that found in Freeman and Krippendorf. In rem jurisdiction was not relied upon.

Although the courts continuously used the language of equity pleadings in determining that a claim was dependent and ancillary, the rules of equity pleading were not considered dispositive:

23. Central Union Trust Co. v. Anderson County, 268 U.S. 93, 96 (1925) (action in equity to foreclose mortgage; Court qualified the holding by stating that the claim, "in justice to the parties before the court, ought to be determined in the principal suit").

24. In exercising subject matter jurisdiction over the claims of third persons to property within its custody, the federal courts did not rely upon the concept of in rem jurisdiction. Had the actions been deemed to be in rem, all persons having an interest in the property would be deemed parties with right to intervene; judicial competence would not have been an issue.

Had the actions been deemed to be in rem, the third-party property claimants could have been bound by the courts' disposition of the property even if they did not appear. However, in these ancillary cases the federal courts did not purport to determine the rights of third parties. See New Orleans Land Co. v. Leader Realty, 255 U.S. 266 (1921).


No one, for instance, would hesitate to say, that according to the English chancery practice a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet, this court has decided many times that when a bill is filed in the Circuit Court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another State, if he were a party to the judgment.

Id.
was almost in retrospect that the Court acknowledged that their decisions had allocated jurisdiction, and that the rules of equity pleading had not in fact been followed. 26

Although the property cases generally support the proposition that ancillary jurisdiction was initially a doctrine of necessity, 27 it is more accurate to realize that much broader policy considerations were present. Fairness to the third party was the prime concern. The courts were also concerned with granting complete relief to the original parties, the avoidance of multiplicity of actions, and the protection of the integrity of the federal judicial system.

A. (2) Claims which did not involve property within judicial custody. In a wide variety of cases federal courts exercised ancillary jurisdiction over auxiliary claims that did not relate to property within judicial custody. It is difficult to identify a common denominator by which all these claims may be collectively identified. Generally, however, in the cases discussed below, the courts were dealing with auxiliary claims which were closely related to a matter which was pending before the court or which had already been litigated before the court.

Root v. Woolworth 28 illustrates the exercise of ancillary jurisdiction in order to effectuate a prior decree. The federal court was presented with a claim some twenty years after having declared that title to certain real estate belonged to one Morton. 29 Morton's successors in interest and estate filed a bill in order to carry the former decree into execution, praying that the defendant be enjoined from asserting any right, title, or interest in the subject property. 30 The defendant objected to the jurisdiction of the court on the grounds that there was no diversity of citizenship, and that the bill was a proceeding in a court of equity in the nature of an ejectment bill for which the plaintiff had a speedy and adequate remedy at law. 31 The latter assertion was presumably made for the purpose of requiring the plaintiff to file an original bill

26. See note 25 supra.
27. The third-party property claimant would not technically be bound by a federal court's determination that his property was to be sold. New Orleans Land Co. v. Leader Realty, 255 U.S. 266, 267-68 (1921). As a practical matter, however, the federal court's action could be prejudicial. And since a state court would be powerless to interfere with the federal court's custody, the property claimant would not have an alternate forum in which to seek immediate relief.
28. 150 U.S. 401 (1893).
29. Id. at 403.
30. Id.
31. Id. at 410.
in the nature of an ejectment action which, in turn, would have been defective for lack of diversity. With extensive citation to Story's *Equity Pleadings*, the Court found the bill to be "clearly a supplemental and ancillary bill, such as the [trial] court had jurisdiction to entertain." In other cases, ancillary jurisdiction was exercised over a claim to enjoin relitigation of questions in state court and claims that sought the construction of prior judgments or orders. A writ of mandamus was found to be ancillary, as were several claims to set aside a fraudulent conveyance made by the judgment debtor. In each case, the claim was entertained without an independent basis for federal jurisdiction.

In several cases, federal courts exercised ancillary jurisdiction over claims which sought to attack or to disturb a prior judgment of the court. These included claims to set aside judgments on the ground of fraud, claims to enjoin either the prosecution of an action at law or the enforcement of a judgment, and claims to determine the rights of a purchaser at a court-ordered foreclosure sale. Although federal adjudication of these claims was not

32. The Court stated that: "If the bill . . . could be properly considered as an ejectment bill, the [defendant's] objection . . . would be fatal to the proceedings." *Id.*
33. *Id.*
35. In *Cincinnati I. & W. R.R. v. Indianapolis Union Ry.*, 270 U.S. 107, 117 (1926), the Court found it to be well settled that where a bill in equity is necessary to have a construction of an order . . . or to explain, enforce or correct it, a bill . . . may be entertained by the court entering the decree, even though the parties interested for want of diverse citizenship could not be entitled by original bill in the federal court to have the matter there litigated.
36. *Labette County Comm'r v. United States ex rel. Moutten*, 112 U.S. 217 (1884) (judgment creditors' writ to command city officials to levy tax sustained as with ancillary jurisdiction notwithstanding that city officials not party to previous judgment).
39. See, e.g., *Sherman Nat'l Bank v. Shubert Theatrical Co.*, 247 F. 256 (2d Cir. 1917); *Hill v. Kuhlman*, 87 F. 498, 499 (5th Cir. 1898); *Cortes Co. v. Thannhauser*, 9 F. 226 (2d Cir. 1881).
always a matter of necessity, since alternate relief was available in a state court, the exercise of ancillary jurisdiction is hardly questionable. Indeed, as Chief Justice Marshall once observed: "[T]he jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised."48

Early applications of the doctrine of ancillary jurisdiction were accurately summarized in 1909:

A bill in equity dependent upon a former action of which the federal court had jurisdiction may be maintained in a national court in the absence of both these attributes [diversity of citizenship and federal questions]: (1) To aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; (3) or to enforce or obtain an adjudication of liens upon or claims to property in the custody of the court in the original suit.44

These cases are qualitatively distinguishable from the modern applications of the doctrine where ancillary jurisdiction is asserted over all claims which arise from the same transaction or occurrence as the primary jurisdiction-conferring claim.45 In retrospect, there is certainly nothing surprising in the early cases. If an independent federal judiciary was to be able to administer justice in a fair, orderly, and reasonably efficient manner, it was essential that the courts be empowered to adjudicate a limited class of auxiliary claims. It is in this sense that the doctrine was a "child of necessity."

B. EARLY HISTORY OF PENDENT JURISDICTION.

Until quite recently the doctrine of pendent jurisdiction was confined to cases arising under the Constitution and laws of the

42. For example, in Root v. Woolworth, 150 U.S. 401 (1893) (see text at note 28 supra), the claimant had an adequate remedy at law in an action in ejectment. In Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921), the claimants, instead of seeking an order restraining the defendants from proceeding in state court, could have urged the binding effect of the previous federal decision in the state court. Ancillary claims to set aside a fraudulent conveyance need not be entertained in federal court, as the judgment creditor had the opportunity to seek relief directly in state proceedings. On the other hand, even these instances contain factors which weigh heavily in favor of exercising federal jurisdiction.


44. Loy v. Alston, 172 Fed. 90, 94-95 (8th Cir. 1909).

45. See text at note 107 infra.
United States. Historically, the doctrine addressed issues that were not present when jurisdiction was founded upon diversity of citizenship.

The paradigm case in which pendent jurisdiction was applied involved a prayer for injunctive relief to restrain state officials from taking action under a state statute. The plaintiff would allege that the statute violated the federal Constitution and that the activities complained of were violative of state law, either statutory or constitutional. There were thus two separate grounds—one state and one federal—supporting the prayer for injunctive relief.

Historically, the doctrine of pendent jurisdiction has been responsive to several questions raised in the paradigm: First, assuming that federal jurisdiction has been properly invoked because of the presence of a substantial federal question, is the federal court competent to adjudicate the state ground for relief? Secondly, if the court has power to adjudicate the state ground, what rules govern the order of decisionmaking as between the state and federal ground? The second question has two elements: (a) May the federal court dispose of the case on the state ground and not decide the federal question? (b) If the court determines that the plaintiff will not prevail on the merits of the federal ground, must the state ground be dismissed for lack of jurisdiction, or is the court competent to grant relief on the state ground?

In *Osborn v. Bank of the United States* Chief Justice Marshall addressed the assertion that the case did not arise under a law of the United States, “because several questions may arise in it, which depend on the general principles of the law, not on any act of congress”:

> If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn. There is scarcely any case, every part of which depends upon the constitution, laws or treaties of the United States.

> . . . A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or

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46. Pendent jurisdiction has recently found applications in diversity cases. See text at note 152 infra.
47. 22 U.S. (9 Wheat.) 737 (1824).
48. Id. at 819.
law of the United States, and sustained by the opposite construc-
tion . . . then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. . . . On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. 49

Although Osborn has been questioned, 50 it did establish two related propositions with respect to federal judicial competence in cases arising under the Constitution or laws of the United States. First, federal jurisdiction is not defeated by the presence of questions of state law, and second, federal jurisdiction extends to the whole case rather than to the adjudication of the federal question only.

From the standpoint of the evolution of pendent jurisdiction, Osborn is important since it focused upon the question of whether a federal court is competent to decide questions of state law in cases in which judicial power is predicated upon the federal character of the plaintiff's claim. The decision did not, however, identify the variety of state questions that could be disposed of as "incidental" to the resolution of the case. Strictly construed, Osborn merely provides authority for the federal court's adjudication of those questions of state law that must be decided in order to resolve the federal questions.

The next step in the evolution of pendent jurisdiction was taken in 1909 in Siler v. Louisville & N.R. Co., 51 where a railroad company sought an injunction to restrain the Kentucky Railroad Commission from enforcing an order by which the Commission had set maximum rates for the transportation of commodities. 52 The plaintiff asserted two separate grounds—one state and one federal—in support of its prayer for injunctive relief. 53 It was argued that, under a proper construction of the state statute, the Commission was without power to enter the order, and that, even if there was power, the order violated the interstate commerce and due process

49. Id. at 819-22.
50. Osborn represented an extended position as to the federal question requirement since the only potential federal question present was the authority of the United States to establish a national bank. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 470-71 (1957) (Frankfurter, J., dissenting).
51. 213 U.S. 175 (1909).
52. Id. at 176-77.
53. Id. at 177.
clauses of the federal Constitution. Jurisdiction was invoked on the ground that the case arose under the Constitution of the United States. Without considering the federal ground for relief, the trial court granted the prayer for an injunction on the theory that the state statute did not authorize the Commission to set maximum rate schedules.

In affirming the trial court’s disposition of the case the Supreme Court developed pendent jurisdiction beyond Osborn in two ways. In terms of judicial competence, Siler allowed the adjudication of a different variety of state claim than was considered in Osborn, where the state questions were disposed of as incidental to, or as necessary to, the resolution of the federal question. In Siler, the question of whether the Commission had statutory power to set maximum rates was purely a matter of state law. The legal questions involved in the two grounds for relief were entirely distinct and each ground provided a separate and self-sufficient basis for granting the injunction. Although Siler, and numerous decisions which followed, extended the federal judicial power to a new variety of state claims, the decision added a qualification: “[T]he Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction.”

In addition to resolving the question of judicial power, the Siler decision reached the equally important conclusion that a federal court may dispose of the case on the state ground without reaching the federal question. This approach, of course, served the Court’s traditional avoidance of constitutional issues, though perhaps at the expense of comity. However, this view does provide the federal court with a measure of flexibility, and, to some extent,

54. Id.
55. Id. at 191.
56. Id. at 193.
59. Id. at 193.
60. The Supreme Court of Kentucky had not construed the statute. Id. at 194.
it foreshadowed the current notion that pendent jurisdiction is a doctrine of discretion.  

Taken together, Osborn and Siler support the propositions that, in federal question cases, judicial competence extends to the whole case, and that the court may, in its discretion, grant the relief prayed for on state grounds without reaching the jurisdiction-conferring federal questions. The question yet to be resolved was whether the court could grant relief on the state ground, if it had already determined that the plaintiff would not prevail on the federal ground.

In Hurn v. Oursler the plaintiff sought to enjoin the defendant from producing a play called “The Spider” on the grounds of copyright infringement and unfair competition. The trial court determined that “The Spider” did not infringe upon the plaintiff’s play, thus disposing of the federal ground for relief on the merits. The court then dismissed the unfair competition claim, which was a state ground for relief, for lack of jurisdiction.

The Supreme Court found that the trial court had erred in dismissing the state unfair competition claim for lack of jurisdiction. In concluding that federal jurisdiction extended to determination of the state claim, the Court relied upon both Osborn and Siler, and quoted the following typical statement of the rule:

> [I]f the bill presented a substantial controversy under the Constitution of the United States, and the requisite amount was involved, the jurisdiction extended to the determination of all questions, including questions of state law, and irrespective of the disposition made of the federal questions.

Although some commentators disagree, Hurn seems to follow from the Siler decision. The order of decision, between state and

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61. The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decide the case on local or state questions only.

This court has the same right, and can, if it deems it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit.

Id. at 191 (citations omitted).


63. Id. at 239.

64. Id. at 239-40.

65. Id. at 247.

federal grounds, should not be dispositive of the question of judicial competence. Under *Hum*, if the federal question is substantial, the court is vested with the power to determine state questions whether or not the plaintiff prevails on the merits of the federal question, and for that matter whether or not the court even decides the federal claim.

*Hum* is significant for an additional reason. For the first time, the Court attempted to articulate a test by which it identified the precise variety of state claims that could be adjudicated in federal court when jurisdiction is predicated upon the presence of a federal question. The *Hum* court stated:

But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action.67

*Hum*'s cause of action test spawned a great deal of confusion which culminated in a new approach under the *United Mine Workers v. Gibbs*68 decision some thirty years later.

In the pre-Gibbs era, pendent jurisdiction was thus limited to cases arising under the Constitution and laws of the United States. When federal jurisdiction was predicated upon the presence of a federal question, the doctrine identified the variety of state claims which could be adjudicated.

C. EARLY DISTINCTIONS BETWEEN PENDENT AND ANCILLARY JURISDICTION

If one pauses to consider the doctrines of pendent and ancillary jurisdiction as they existed before their rapid expansion, it should be clear that each dealt with a separate problem. Ancillary jurisdiction was broad and sweeping—it applied regardless of whether the court's jurisdiction was invoked on diversity or federal question grounds. It allowed the courts to insure that their process was not

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abused to the injury of third persons; it provided a mechanism by
which the court could enforce and construe its prior judgment and
prevent the relitigation of issues previously decided. It allowed the
court to deal with claims that arose out of, or were derived from,
proceedings in the court. Ancillary jurisdiction is thus appropriate
for any court, state or federal, in the sense that to administer jus-
tice in a fair, orderly, and reasonably efficient manner it is essential
that the court be able to determine a limited class of auxiliary
claims.

Pendent jurisdiction, on the other hand, was the unique pro-
duct of a federal system which allowed national courts to hear cases
arising under the Constitution and laws of the United States. In
such cases, the doctrine enabled federal courts not only to deter-
mine incidental questions of state law, but to adjudicate the case
purely upon a parallel state ground for relief. Indeed, as we have
seen, once federal jurisdiction had been successfully invoked, the
court could proceed to decide the state ground for relief even
though it had previously determined that the plaintiff would not
prevail on the federal ground.

PART III

REMOLDING ANCILLARY & PENDENT JURISDICTION

The modern, expanded concepts of ancillary and pendent juris-
diction are a product of the sweeping reform of federal procedure
which commenced with amendments to the Federal Equity Rules
in 1912 and culminated in the adoption of the Federal Rules of
Civil Procedure in 1938. Prior to 1938 the federal courts engaged
in the difficult task of operating under several different procedural
systems. In actions at law the federal courts conformed their pro-

69. As explained by one commentator:
It was not until the new Equity Rules were promulgated in 1912
that equity procedure was thoroughly modernized. These rules
borrowed extensively from the reformed English practice, which
had swept away all distinctions between law and equity, and had
made procedure distinctly subservient to the demands of the sub-
stantive law.
2 MOORE'S FEDERAL PRACTICE ¶ 2.03, at 316 (2d ed. 1948) [hereinafter cited as Moore].
70. The Federal Rules of Civil Procedure were promulgated by the Su-
preme Court in 1938 under authority of the Enabling Act, 28 U.S.C. § 2072
(1934).
71. See text at notes 72 and 73 infra for an articulation of the first
two procedural systems. Cases in admiralty provided a third procedural
system applied in federal courts:
Prior to 1966 procedure in admiralty cases was different than in
"civil actions." Conformity to state procedure was never required
procedure to state practice, which, at various times, ranged from common law pleadings to relatively enlightened code pleadings. Uniform rules of procedure promulgated by the Supreme Court governed actions in equity. Although there were significant differences in the procedures applied in equity and at law, both procedural systems contained rigid rules restricting the joinder of parties and the joinder of causes of action. Piecemeal litigation was further encouraged by a narrow definition of "cause of action." Cases and controversies were artificially fractured into multiple causes of action which, in turn, could not be procedurally joined in a single judicial proceeding.

The 1938 Federal Rules of Civil Procedure embodied a complete reformation of the older procedural systems. Actions at law and in equity were merged; the rules were made applicable to the new "civil action." Code and common law pleadings were discarded in admiralty, where the federal courts from the first were free to apply the procedure historically associated with courts of admiralty. Although the Supreme Court had rulemaking power in admiralty matters since 1792, the first set of admiralty rules was not promulgated until 1844. This was superseded by the Admiralty Rules of 1920, which, as amended, remained in effect until 1966. In that year admiralty cases were brought within Civil Rules, and treated as civil actions, with certain minor variations for admiralty and maritime claims identified as such.

WRIGHT, supra note 4, § 63, at 261. See also 2 MOORE, supra note 69, ¶ 1.03, at 195-96. The application of ancillary and pendent jurisdiction in admiralty and the effect of unification thereon is the subject of a recent article. Landers, By Sleight of Rule: Admiralty Unification and Ancillary and Pendent Jurisdiction, 51 Tex. L. Rev. 50 (1972). Pendent jurisdiction in admiralty is also explored in Note, Pendent Jurisdiction in Admiralty, 18 WAYNE L. Rev. 1211 (1972).


73. The Supreme Court first promulgated procedural rules governing Equity in 1822. See 2 MOORE, supra note 69, ¶ 2.03, at 315.


75. Prosser, for example, concluded that the chief reason for restrictive judicial constrictions of the Field Code's liberal joinder provisions "was the retention of the common law notion that the same 'cause of action' must affect all of the joined defendants." W. PROSSER, LAW OF TORTS, § 44, at 262 (3d ed. 1964). After noting that the new rules do not use the term "cause of action," Moore's treatise concludes that "[t]his can only mean the draftsmen, by use of the phrases 'claim' or 'claim for relief', hoped that such different expressions in lieu of 'cause of action' would give the courts freedom to escape from the morass of decisions concerning a cause of action; and would adopt a pragmatic treatment of what we may for convenience still refer to as a cause of action." 2 MOORE, supra note 69, ¶ 2.06, at 359 (citations omitted).

76. FED. R. Civ. P. 2.
in favor of notice pleadings\textsuperscript{77} and broad pretrial discovery.\textsuperscript{78} The ill-defined but narrow concept of cause of action was avoided by the substitution of a broader term "claim."\textsuperscript{79} More significantly, from the standpoint of the development of ancillary and pendent jurisdiction, the new rules facilitated the adjudication of complex cases which involved multiple parties and multiple claims. This was accomplished by removing obstacles to the joinder of claims\textsuperscript{80} and the joinder of parties,\textsuperscript{81} and by allowing for counterclaims,\textsuperscript{82}

\textsuperscript{77} In relevant part Fed. R. Civ. P. 8 merely required that a complaint contain, "a short and plain statement of the claim showing that the pleader is entitled to relief . . ." Typically Code states would require a petition to state, "facts constituting a cause of action," while states which adhered to common law pleadings were preoccupied with conforming pleadings to a "form of action" and the narrowing of issues through extensive pleadings.

\textsuperscript{78} Fed. R. Civ. P. 26-37. Under the new rules pleadings serve a narrow notice function. Liberal provisions for pretrial discovery provided a means for ascertaining facts and the narrowing of issues.

\textsuperscript{79} The court in Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959) commented as follows:

To understand the basic theory of Rule 14 it is necessary to remember that in the Federal Rules of Civil Procedure the word "claim" has a somewhat broader connotation than that which prior to the Rules pertained to a "cause of action." "It is used to denote the aggregate of operative facts which give rise to a right enforceable in the courts." (Citation omitted).

\textit{See also note 75 supra.}

\textsuperscript{80} Fed. R. Civ. P. 18(a) was amended in 1966; as promulgated in 1938 the section read as follows:

(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many as either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

\textsuperscript{3A} Moore, supra note 69, ¶ 20.01[1], at 2712.

\textsuperscript{81} Fed. R. Civ. P. 20(a) was amended in 1966; as promulgated in 1938 it read as follows:

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

\textsuperscript{3A} Moore, supra note 69, ¶ 20.01[1-1], at 2712.

\textsuperscript{82} Fed. R. Civ. P. 13(a) and (b).
cross-claims,\textsuperscript{83} impleader,\textsuperscript{84} and intervention.\textsuperscript{85} In the interest of securing the "just, speedy, and inexpensive determination of every action,"\textsuperscript{86} the new rules embodied a rather enlightened approach. One significant hurdle, however, lay in the path of the federal courts' successful implementation of the new rules.

Since federal courts are of limited jurisdiction, procedural convenience, fairness to litigants, and administrative efficiency would not necessarily be the sole determinatives of the scope of litigation. Historically there has been, and continues to be, a distinction between the question of whether claims and parties may be joined and the question of whether, given such joinder, a federal court is competent to adjudicate the claims. Joiner is governed by procedural rules. Judicial competence is derived from constitutional and statutory provisions. In recognition of this distinction the new federal rules provided that, "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ."\textsuperscript{87} Given this admonition, it remained to be asked whether the federal courts would be deemed competent to adjudicate the various claims which could be presented under the new rules.\textsuperscript{88} By way of illustration, on a cross-claim between two defendants which involved a matter governed by state law, would the federal courts require the two defendants to be of diverse citizenship and the claim to meet the statutory jurisdictional amount requirements, as a prerequisite to adjudication? To the extent that the federal courts would require all claims which could be asserted under the new rules to qualify for federal adjudication as if they were asserted alone, the rules would be handicapped from the standpoint of achieving their objective of administrative efficiency. The doctrines of ancillary and pendent jurisdiction, as we know them today, are a by-product of the tensions produced when courts of limited jurisdiction strived to implement a modern procedural system.

\textsuperscript{83} Fed. R. Civ. P. 13(g).
\textsuperscript{84} Fed. R. Civ. P. 14.
\textsuperscript{86} Fed. R. Civ. P. 1.
\textsuperscript{87} Fed. R. Civ. P. 82.
\textsuperscript{88} Shulman & Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L.J. 393 (1936) [hereinafter cited as Shulman]. This article was written two years before promulgation of the federal rules. The writers identified and discussed some of the jurisdictional questions raised by liberalized rules as to impleader, counterclaims, and cross-claims. See also Goldberg, The Influence of Procedural Rules on Federal Jurisdiction, 28 Stan. L. Rev. 397 (1976).
Between 1938 and 1965 the doctrine of ancillary jurisdiction was seized and remolded into a vehicle which allowed the federal courts to adjudicate a wide variety of claims which, if presented alone, would not have been within federal competence. After the Supreme Court revitalized and expanded the doctrine of pendent jurisdiction in *United Mine Workers v. Gibbs* the lower federal courts grasped the new pendent jurisdiction in an attempt to expand their jurisdiction beyond the already extended positions allowed by ancillary concepts.

A. ANCILLARY JURISDICTION APPLIED TO NEW FEDERAL RULES OF PROCEDURE

The foundation for the expansion of ancillary jurisdiction was actually laid by the Supreme Court several years before the promulgation of the Federal Rules of Civil Procedure in *Moore v. New York Cotton Exchange*. Plaintiff Moore sought a decree adjudging the New York Cotton Exchange to have been violating the Sherman Act and an order restraining the defendant exchange from refusing to install a ticker whereby quotations would be furnished to plaintiff's place of business. The defendant counterclaimed for an order restraining the plaintiff from purloining and distributing quotations. After dismissing the plaintiff's complaint on the ground that it failed to allege facts sufficient to establish a claim under the Sherman Act, the trial court granted the injunctive relief prayed for in the counterclaim. In the Supreme Court the plaintiff argued that relief should not have been granted on the counterclaim since "(1) the court, having dismissed the bill for lack of jurisdictional facts, should have dismissed the counterclaim also, there being no independent basis for jurisdiction . . . [and] (2) . . . the counterclaim does not arise out of any transaction which is the subject matter of the suit. . . ."

The Court found that the plaintiff had stated a substantial federal question, thereby invoking federal jurisdiction, and that the counterclaim was compelled by Equity Rule 30. Quoting this rule in part, the Court stated:

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90. 270 U.S. 593 (1926).
91. Id. at 603.
92. Id.
93. Id. at 607.
94. Id. at 607-08. The plaintiff also asserted that the decree of the trial court, "is not justified by the allegations of the counterclaim or the proof." Id. at 608.
95. Id. at 609.
The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set up any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims. 96

In determining that the counterclaim was compulsory under the rule the Court reasoned:

"Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. 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, as, for example, that appellant is unlawfully getting the quotations, 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. 97

The Court then concluded:

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; but the relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant from continuing to obtain by stealthy appropriation what the court had held it could not have by judicial compulsion. 98

In result, the Court allowed the adjudication of a claim which was not independently cognizable by the federal court. The basis of the Court's holding cannot be unambiguously fathomed from the opinion. 99 The claims were transactionally related and the counter-

96. Id.
97. Id. at 610 (citations omitted).
98. Id. at 610.
99. The opinion has been the subject of a great deal of discussion. See, e.g., Shulman, supra note 88, at 412-13; Note, The Ancillary Concept and the Federal Rules, 64 Harv. L. Rev. 968, 971 (1951).
claim was compulsory. Are both features essential to the opinion? Was there an additional controlling element which consisted of the particular relationship between the claims? Not only were the claims transactionally related, but the determination of the primary, jurisdiction-conferring claim established “a foundation for” the counterclaim. In effect, the claims in Moore were reciprocal. Plaintiff wanted defendant to provide quotations. Defendant refused and sought to enjoin plaintiff from purloining quotations. The determination that defendant’s refusal to supply quotations was not violative of the Sherman Act established a foundation for the counterclaim. Since plaintiff could not obtain the quotations as a matter of right, the plaintiff should not be allowed to obtain them by illegal means.

Notwithstanding the difficulty in identifying the Court’s rationale, the Moore decision did become the cornerstone of modern applications of ancillary jurisdiction to “transactionally” related claims. Under the new rules Moore provided direct authority for the assertion of jurisdiction over compulsory counterclaims. Over the years since the decision, the courts have had no difficulty in extending Moore’s rationale to the many other transactionally related claims which may be presented under the new procedural rules. Rule 14, which deals with third-party practice, provides an illustration of how the limits of federal jurisdiction were pushed outward after the promulgation of the new rules.

Traditionally the federal courts had required that a claim asserted against a third-party defendant be supported by an independent basis for jurisdiction. After the new rules took effect,

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100. See 3 Moore, supra note 69, ¶ 13.13, at 13-297-310 (discussion of Equity Rule 30 and the application of ancillary jurisdiction to compulsory counterclaims).

101. In its present form, Rule 14 permits a defending party, as third-party plaintiff, to implead a person who is “not a party to the action who is or may be liable to him for all or part of plaintiff’s claim against him.” In turn the third-party defendant is allowed to assert transactionally related claims against both the third-party plaintiff and the plaintiff. The plaintiff may assert transactionally related claims against the third-party defendant. Fed. R. Civ. P. 14. As originally drafted Rule 14 also allowed the impleader on the ground that the third-party defendant was liable to the plaintiff. Impleader on such grounds is today permitted only in Admiralty cases. Fed. R. Civ. P. 14(c) 3 Moore, supra note 69, ¶ 14.01, at 438 & n.1.

the federal courts slowly and methodically asserted jurisdiction over the various claims permitted under Rule 14 even though, if asserted alone, the claims would not have been within the competence of the federal court.\footnote{103} Today, after close to four decades of dealing with the jurisdictional problem presented in third-party practice, it is generally held that all Rule 14 claims are ancillary with one exception.\footnote{104} A crumbling majority view does not recognize the claim of the plaintiff against the third-party defendant as ancillary.\footnote{105} With the dissolution\footnote{106} of this view we will have made a complete circle—from the pre-1938 insistence that third-party claims be supported by an independent basis for jurisdiction to the


105. The majority view was recently reaffirmed in Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc., 512 F.2d 890 (4th Cir. 1972). The court offered the following rationale in declining ancillary jurisdiction:

Several supporting reasons have been advanced by courts holding the majority view on this question. Among them are that: (1) plaintiff should not be allowed, by an indirect route, to sue a co-citizen under diversity jurisdiction when he is not permitted to sue that party directly; (2) the majority rule prevents collusion between plaintiff and defendant to obtain federal jurisdiction over a party who would otherwise not be within the court's reach; (3) the rule which generally does not require diversity as between plaintiff and third-party defendant proceeds on the assumption that the plaintiff is seeking no relief against the third-party defendant; and (4) federal dockets are so overcrowded that the federal courts should not reach out for state law based litigation [footnotes omitted].


extended position under which all transactionally related third-party claims are declared ancillary.

There have been parallel developments with respect to the application of ancillary jurisdiction to the claims permitted under other rules of procedure; today the law is in large part settled:

The following statements probably represent a present consensus, although there is no unanimity as to any of them. Ancillary jurisdiction permits courts to hear transactionally related counterclaims, most typically compulsory counterclaims under Rule 13(a), and to bring in additional parties to respond to these counterclaims under Rule 13(h). On the other hand, permissive counterclaims, under Rule 13(b) as well as additional parties related thereto, require independent jurisdictional grounds. The only exception to this rule is when the permissive counterclaim takes the form of a set-off, in which case ancillary jurisdiction will be available. Cross-claims under Rule 13(g) are ancillary. Similarly, impleader of a third-party defendant under Rule 14 falls within ancillary jurisdiction... Ancillary jurisdiction does not apply to absent indispensable parties under Rule 19 or to the joinder of pendent parties under Rule 20. ... Ancillary jurisdiction is available to interpleader proceedings under Rule 22. Finally, intervention as of right under Rule 24(a) comes within the court's ancillary jurisdiction, but permissive intervention under Rule 24(b) does not.\footnote{107}

As framed by commentators and lower federal courts, the doctrine of ancillary jurisdiction now extends to any claim which arises from the same transaction or occurrence as a claim over which the court has jurisdiction. In determining whether claims are transactionally related courts have used several different tests: Do the claims involve similar issues of fact and law? Will the same evidence tend to support or refute both claims? Will the adjudication of the primary claim have a res judicata effect upon the ancillary claim? Are the claims logically related?\footnote{108}

Regardless of which test is formally applied, the boundaries of federal ancillary jurisdiction tend to be located by the application of practical criteria that identify a group of claims which, from an efficiency standpoint, arguably should be adjudicated in one pro-

\footnote{107. 13 \textit{WRIGHT \& MILLER}, \textit{supra} note 9, § 3523, at 66-70 (footnotes omitted).}

\footnote{108. 6 \textit{WRIGHT \& MILLER}, \textit{supra} note 9, § 1410, at 142-48. Each test is discussed at length; the authors opt for the "logical related" approach, first articulated in Moore v. New York Cotton Exchange, quoted in the text at note 98 \textit{supra}. For further discussion of when claims are transactionally related, see \textit{Revere Copper \& Brass, Inc. v. Aetna Cas. \& Sur. Co.}, 426 F.2d 709, 715 (5th Cir. 1970).}
ceeding. The federal courts embrace ancillary claims with open arms. Given the requisite degree of factual relatedness, ancillary claims are simply adjudicated.\textsuperscript{109} This rather mechanical exercise of ancillary jurisdiction should be contrasted with the judicial hesitance to determine pendent claims.\textsuperscript{110}

From the perspective offered four decades after the promulgation of the new federal rules, it is quite evident that the doctrine of ancillary jurisdiction played the primary role in the process by which federal courts reaped the benefits of a modern procedural system. Without it, or some other similar doctrine, jurisdictional limitations would have prevented the federal courts from effectively adjudicating cases and controversies which involved multiple parties and multiple claims.

B. REMOLDING OF PENDENT JURISDICTION.

The doctrine of pendent jurisdiction has undergone considerable development since the 1920's when \textit{Hurn v. Oursler}\textsuperscript{111} was decided. The Supreme Court has abandoned \textit{Hurn}'s cause of action conceptualism and substituted a more practical test for determining when federal question jurisdiction permits the adjudication of related state claims. The lower federal courts have seized what they construe to be a more liberal approach to pendent state claims and have concluded that federal competence extends beyond historical boundaries.

In \textit{United Mine Workers v. Gibbs},\textsuperscript{112} the Supreme Court again considered a case in which plaintiff asserted two separate grounds, one state and one federal, in support of a claim for relief. The

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\textsuperscript{109} Consider a counterclaim by way of illustration. Upon determining that the counterclaim arises from the same transaction or occurrence as the subject matter of the opposing party's claim, three consequences automatically follow: First, the counterclaim is deemed compulsory; second, ancillary jurisdiction is deemed applicable; and, finally, the court adjudicates the claim. In the vast majority of cases the courts do not engage in an expressed reasoned discussion on the question of whether ancillary jurisdiction should be exercised. \textit{See}, e.g., \textit{Annis v. Dewey County Bank}, 335 F. Supp. 133 (D.S.D. 1971) and \textit{Waltham Indus., Inc. v. Thompson}, 53 F.R.D. 93 (D. Conn. 1971). \textit{Cf. Cole v. Lane}, 67 F.R.D. 615 (D.S.C. 1975) (convenience and economy considered in connection with determination of transactional relatedness). Perhaps ancillary jurisdiction should be exercised only if the counterclaim is of the "reciprocal" variety seen in \textit{Moore v. New York Cotton Exchange}. \textit{See} text at note 98 supra.

\textsuperscript{110} Before exercising pendent jurisdiction the federal courts expressly consider whether or not the claim should be adjudicated. \textit{United Mine Workers v. Gibbs}, 383 U.S. 715 (1966).

\textsuperscript{111} 289 U.S. 238 (1933) (discussed in text at note 62 supra).

\textsuperscript{112} 383 U.S. 715 (1966).
federal claim was under section 303 of the Labor Management Relations Act; the state claim, in tort, was under the common law of Tennessee.\textsuperscript{113} In the course of concluding that the district court had properly exercised jurisdiction over the state claim, the Supreme Court was critical of Hurn’s “unnecessarily grudging”\textsuperscript{114} approach which allowed the exercise of jurisdiction only if state and federal claims were “little more than the equivalent of different epithets to characterize the same group of circumstances.”\textsuperscript{115} Discarding the Hurn approach, the Court stated:

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 [made in the complaint] 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 the federal courts to hear the whole (footnotes omitted).\textsuperscript{116}

In addition to sounding the death knell of Hurn’s cause of action test and providing a more practical and broader definition of pendent jurisdiction, the Gibbs decision is equally significant for having gone beyond the traditional competence issue and declared pendent jurisdiction to be a “doctrine of discretion, not of plaintiff’s right.”\textsuperscript{117} The opinion states that pendent jurisdiction’s “justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims. . . .”\textsuperscript{118} Indeed, the Court’s approach to pendent jurisdiction starts from the perspective that, “needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.”\textsuperscript{119} Gibbs thus developed pendent jurisdiction by providing a

\begin{itemize}
  \item \textsuperscript{113} Id. at 717-18.
  \item \textsuperscript{114} Id. at 725.
  \item \textsuperscript{115} Id. at 724.
  \item \textsuperscript{116} Id. at 725 (citations omitted).
  \item \textsuperscript{117} Id. at 728.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id.
\end{itemize}
broader definition of pendent power, by declaring the doctrine to be of discretion, and by identifying the criteria which control the exercise of discretion.120

In the post-Gibbs era the most significant development in the evolution of pendent jurisdiction has been the practice by which lower federal courts have extended jurisdiction to claims asserted by and against "pendent parties"—parties who are implicated only on the pendent claim. Before examining this practice, which has been marked by a barrage of periodical articles,121 two tangential matters should be dealt with. First, it is now clear that the pendent doctrine is not restricted to the pendenting of state claims. Courts routinely pendent federal claims, which fail to meet statutory jurisdictional amount requirements, to constitutional claims which qualify for federal adjudication under a special jurisdictional statute.122

120. In addition to the factors mentioned above, the Court found the following relevant to the exercise of discretion: (1) whether the federal claims are dismissed before trial; (2) whether state claims substantially predominate in terms of proof or remedy; (3) whether the state claim is closely tied to questions of federal policy; and (4) the likelihood of jury confusion. Id. at 726-27. See 13 WRIGHT & MILLER, supra note 9, § 3567, at 451-54 (discussion of factors to be weighed in exercise of discretion).


The pendenting of federal claims raises the question of whether a federal district court should exercise its discretion favorable to the determination of the federal pendent claim, or whether, notwithstanding the federal nature of the claim, the court should freely decline jurisdiction absent the presence of judicial economy, convenience, and fairness to litigants. Second, the term "pendent" has applied to situations where judicial competence of the trial court is not at issue. This may be seen in "pendenting" of maritime claims to claims under the Jones Act, and in discussions of issues related to the convening of a three-judge court in cases in which federal supremacy clause claims are "pendented" to constitutional claims. The pendenting of maritime claims and the so-called pendenting of supremacy clause claims, in three-judge court cases, do not involve questions of district court competence. Let us now turn to a consideration of pendent parties.

B. (1) Pendent Parties in Federal Question Cases. In the context of federal question cases, there are two variations of pendenting parties: (1) A single plaintiff is allowed to pendent state and federal claims even though the state claim is asserted against a second defendant who is not a party to the jurisdiction-conferring federal claim, and, (2) a second plaintiff is allowed to pendent a state claim
to the federal claim of his co-plaintiff even though the second plaintiff is not a party to the federal claim. A substantial number of courts have exercised jurisdiction over such claims notwithstanding the pendent of parties. To these courts the interests of convenience and economy emphasized in Gibbs support the exercise of federal jurisdiction over factually related claims. The presence of a federal claim provides the source of power for the adjudication of the pendent party claim. A minority of courts led by the Ninth Circuit, has refused to pendent parties on the theory that pendent jurisdiction applies to claims and not parties.

In 1973 with the circuits thus divided, the Supreme Court had the opportunity to resolve the dispute in a case appealed from the Ninth Circuit. The Court, however, chose to avoid the “subtle and complex question with far reaching implications” by “assuming, arguendo” that the trial court had had the power to adjudicate the claim. This assumption allowed the Court to affirm the district court’s refusal to hear the pendent claim as a proper exercise of discretion. In a 1975 case, the Supreme Court was presented with the pendent party issue under circumstances in which the “assuming, arguendo” escape hatch was unavailable. Yet, the Court managed to parry by dismissing the appeal of the pendent party.

The Supreme Court’s reluctance to take a position on the pendent party issue understandably led to confusion and skittishness in the lower federal courts. The Ninth Circuit, in the face of dis-

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128. See, e.g., Aldinger v. Howard, 513 F.2d 1257 (9th Cir. 1975), aff’d, 426 S. Ct. 2413 (1976); Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969) (a much criticized pre-Gibbs decision). See also Hampton v. City of Chicago, 404 F.2d 602, 611 (7th Cir. 1968), cert. denied, 405 U.S. 917 (1974); Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964) (pre-Gibbs).


130. Id. at 713-15.

131. Philbrook v. Glodgett, 421 U.S. 707, 721 (1975). The Court stated: We are left therefore with a “subtle and complex question with far-reaching implications” going to the jurisdiction of the District Court over the Secretary [pendent party], which was resolved by the District Court in favor of jurisdiction, but that has been inadequately briefed by the Secretary, [Supreme Court Rule] 40(g).
District court decisions pendeting parties, reaffirmed its stand that pendent jurisdiction applies to "claims and not parties." The Seventh Circuit, which had previously refused to pendeting parties, found it a "complex and difficult jurisdictional question." In contrast, the Fifth Circuit, which had allowed the pendeting of parties for several years, declared it "not necessary . . . to reaffirm the full reach of" prior decisions. The Eighth Circuit, and several district courts, continued to pendeting parties.

With the circuits divided, the Supreme Court finally faced the "subtle and complex" pendeting party issue in Aldinger v. Howard. The Ninth Circuit Court of Appeals had refused to allow plaintiff Aldinger to pendeting a state claim asserted against Spokane County to a civil rights claim under § 1983 which was asserted against the County Treasurer. Jurisdiction was grounded upon 28 U.S.C. § 1343. Surprisingly, in light of earlier dicta, a divided Supreme Court affirmed.

The Court focused upon the jurisdiction-conferring statute and framed the issue as follows:

[W]hether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner's principal claim against the treasurer rests, Congress has addressed itself to the party as to whom jurisdiction pendeting to the principal claim is sought.


134. Mandley v. Trainor, 523 F.2d 415, 419 n.2 (7th Cir. 1975).

135. See cases gathered in note 127 supra.

136. Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1195 (5th Cir. 1975).

137. Reserve Mining Co. v. EPA, 514 F.2d 492, 522 n.55 (8th Cir. 1975).


139. 96 S. Ct. 2413 (1976) [hereinafter cited as Aldinger].

140. Id. at 2415.

141. Id.


143. Aldinger at 2415.

144. Id. at 2421.
The Court reasoned that the statutory grant of jurisdiction found in § 1343, "should be construed in light of the scope of the cause of action as to which federal judicial power has been extended by Congress."[145] Looking at § 1983, the Court saw that Congress had excluded counties from liability.[146] Reasoning that the jurisdictional statute "should not be so broadly construed as to bring" the county within federal jurisdiction, the Court concluded that Congress "has by implication declined to extend federal jurisdiction over a party such as Spokane County."[147]

The Court's per se denial of pendent treatment to claims asserted against a county which is vicariously liable for the civil rights violations of its officials under state law is questionable.[148] And, from the perspective of the development of pendent jurisdiction the decision leaves a great many problems unresolved.

In the context of civil rights cases, the Court did not determine whether or not parties other than municipalities could be properly within the reach of pendent jurisdiction—the case can be limited to its facts thereby precluding only the pendency of municipalities. Furthermore, the claim against the county may be properly litigated in federal court under the federal question jurisdictional statute[149] under the rationale employed in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.[150] The Court did not address the question of whether jurisdiction could be predicated on the federal question statute.[151]

Issues of pendent parties under the federal question diversity and admiralty grants of jurisdiction were not addressed by the Court. The majority carefully limited the decision to civil rights cases.

B. (2) Pendent Jurisdiction in Diversity Cases. The Third Circuit, in its own words

...has taken the lead in recognizing diversity jurisdiction over an entire lawsuit in tort cases presenting closely related claims based, in principal part at least, on the same

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145. Id.
146. Id.
147. Id. at 2422.
148. For critical discussion of Aldinger, see text at note 193 infra.
151. The issue was not before the Court. Aldinger at 2415 n.3.
operative facts and normally litigated together, even though one of the claims, if litigated alone, would not satisfy a requirement of diversity jurisdiction.\textsuperscript{152}

Although commentators and courts were initially receptive to the application of pendent jurisdiction in diversity cases, the state of the law in this area is highly unsettled.\textsuperscript{153} The doctrine has been frequently used to circumvent the statutory minimum jurisdictional amount\textsuperscript{154} requirement. And, in a few isolated cases, pendent jurisdiction has allowed the adjudication of a claim between co-citizens, thus circumventing the complete diversity rule.\textsuperscript{155}

Statutory jurisdictional amount requirements have been avoided in two factual variations.\textsuperscript{156} (1) Two plaintiffs assert separate factually related claims against a single defendant. It has been held that a claim for less than the jurisdictional amount asserted by one plaintiff may be pended to the jurisdictionally sufficient claim asserted by the other plaintiff. (2) A single plaintiff asserts separate factually related claims against two defendants. It has been held that a claim for less than the jurisdictional amount asserted against one defendant may be pended to the jurisdictionally sufficient claim asserted against the other defendant.

Before one overgeneralizes the degree to which pendent jurisdiction may be properly invoked to cure deficiencies in the jurisdictional amount in diversity cases, two points should be made. First, many of the cases at the circuit level which have allowed such pendentning have involved special considerations: the claims have been asserted by or against family relatives.\textsuperscript{157} An American Law Insti-


\textsuperscript{153} See periodicals cited at note 6 supra.


\textsuperscript{155} See text at note 157 infra.

\textsuperscript{156} See cases gathered in note 157 infra.

\textsuperscript{157} Family relationships: Mas v. Perry, 489 F.2d 1396 (5th Cir. 1974) (claims by husband and wife against landlord, dictum); Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971) (parents and son); Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969) (claims of husband and wife pendent); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968) (mother asserts claims against daughter-in-law and grandson); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966) (father and son). Other special circumstances: F.C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917 (6th Cir. 1970) (arguably a special circumstance case as it involved claims against three insurance companies); Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1970). See also 13 Wright & Miller, supra note 9, § 3567, at 457 n.53.
tute proposal would extend judicial competence to such claims. In conclusion that each member of the class had to have a claim for more than the jurisdictional amount, and that, therefore, the action could not be maintained on behalf of persons with lesser claims, the Court stated:

This distinction and rule that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement were firmly rooted in prior cases dating from 1832, and have continued to be the accepted construction of the controlling statutes. The rule has been applied to forbid aggregation of claims where none of the claimants satisfies the jurisdictional amount. It also requires dismissal of those litigants whose claims do not satisfy the jurisdictional amount, even though other litigants assert claims sufficient to invoke the jurisdiction of the federal court.

In the wake of Zahn, courts and commentators are concluding that pendent jurisdiction may not be used to circumvent the jurisdictional amount requirement in diversity cases. In a few reported cases, pendent jurisdiction has also been applied to circumvent the complete diversity rule of Strawbridge

160. Id. at 292.
161. Id. at 294-95 (citations omitted).
163. 1 Moore, supra note 69, ¶ 0.97[3], at 956 (2d ed. 1976) and 13 Wright and Miller, supra note 9, § 3567, at 457-58.
This development, however, has been questioned or rejected by most courts which have had the opportunity to consider the pendenting of a claim between co-citizens. We are thus in the midst of a remolding of pendent jurisdiction which commenced a decade ago with the Gibbs decision. The general shape of the new doctrine is clearly evident: Judicial power is defined in terms of factual relatedness, power is to be exercised as a matter of discretion, and the doctrine is founded upon the interests of economy, convenience, and fairness to litigants. From the perspective offered in 1977 the eventual scope and application of the new doctrine is not entirely clear, particularly with respect to pendent parties in diversity cases.

C. WHAT DISTINCTIONS CAN BE DRAWN BETWEEN MODERN PENDENT AND ANCILLARY CONCEPTS?

Both ancillary and pendent jurisdiction have undergone considerable expansion in the past few decades. Ancillary jurisdiction has developed into a broad and sweeping mechanism by which all transactionally related claims can be adjudicated in one federal proceeding. Once the Supreme Court freed pendent jurisdiction of the constraints imposed by "cause of action" analysis, the pendent doctrine, too, was substantially broadened. In their expanded form the doctrines are very similar—both extend federal judicial competence beyond a plaintiff's jurisdiction-conferring claim to other factually related claims which are not independently cognizable in federal court. And the exercise of jurisdiction over ancillary and pendent claims is a matter of discretion.

In the remolding process the doctrines of pendent and ancillary jurisdiction grew closer and closer together and many of the criteria by which the doctrines could be distinguished have disappeared. Pendent jurisdiction was historically confined to federal

165. 7 U.S. (3 Cranch) 159 (1806) (no diversity if any plaintiff is citizen of the same state as any defendant). In State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967), it was made clear that the complete diversity rule of Strawbridge was not constitutionally mandated.

question cases, while ancillary jurisdiction applied regardless of the ground for federal jurisdiction.\textsuperscript{167} The pendenting of parties in diversity and admiralty cases has abrogated this distinction.\textsuperscript{168} Historically, pendent jurisdiction applied only if there was an identity of parties on the pendent claim and the jurisdiction-conferring claim, while ancillary jurisdiction was not so restricted.\textsuperscript{169} Today's pendent party practice has eliminated this distinction. There does, however, remain a basis for differentiating between the doctrines.

C. (1) \textit{Differences between the types of auxiliary claims to which the doctrines of pendent and ancillary jurisdiction apply.} Two characteristics are unique to the claims which currently receive pendent treatment. First, pendent jurisdiction, even in the pendent party context, always involves the pendenting together of claims asserted by the plaintiff.\textsuperscript{170} If the auxiliary claim is asserted by someone other than the plaintiff,\textsuperscript{171} ancillary jurisdiction is the appropriate doctrine.\textsuperscript{172} Second, pendent auxiliary claims are inevitably asserted by the plaintiff against an original party defendant.\textsuperscript{173} If the plaintiff asserts an auxiliary claim against someone other than the original defendant,\textsuperscript{174} such as a party impleaded under Rule 14 by the plaintiff in response to a counterclaim of the

\begin{itemize}
\item \textsuperscript{167} See text at Part II C supra.
\item \textsuperscript{168} Diversity cases: see text at Part III B(2) supra. Admiralty cases: see text at notes 124-26 supra.
\item \textsuperscript{169} The identity of parties was a characteristic of the Osborn, Siler, Horn, and Gibbs line of cases discussed in Part II B supra. Most of the ancillary cases which were discussed in Part II A supra involved claims asserted either by or against persons who were not parties to the action on any claim other than the auxiliary claim.
\item \textsuperscript{170} See text at Part III B(1) and Part III B(2).
\item \textsuperscript{171} Such claims would include third-party claims asserted by the defendants, counterclaims by the defendants, and cross-claims between defendants. Fed. R. Civ. P. 13 & 14.
\item \textsuperscript{172} See text at note 107 supra. Compulsory counterclaims, cross-claims, and third-party claims are generally held to be within the ancillary jurisdiction of the federal courts.
\item \textsuperscript{173} Only one exception has been noted—a case in which the court applied the pendent label to a claim asserted by the plaintiff in an amended complaint against a party impleaded by the defendant. Saalfrank v. O'Daniel, 390 F. Supp. 45 (N.D. Ohio 1974). In such circumstances, however, the majority of courts find ancillary jurisdiction to be the appropriate doctrine. See text at note 104 supra and cases cited in note 106 supra.
\item \textsuperscript{174} Illustrations of auxiliary claims asserted by the plaintiff against parties other than the original defendant would include cross-claims between plaintiffs involving the subject matter raised in a counterclaim. Fed. R. Civ. P. 13(g). Third-party claims asserted by the plaintiff under Fed. R. Civ. P. 14, could include a claim asserted by the plaintiff against a third-party impleaded by the defendant, or a claim asserted by the plaintiff against a third-party impleaded by the plaintiff.
\end{itemize}
defendant, ancillary jurisdiction is again the appropriate doctrine.\textsuperscript{175}

Pendent treatment is thus given only to those auxiliary claims which are asserted by the plaintiff against an original party defendant. All other auxiliary claims are classified as ancillary.

C. (2) Differences with respect to the exercise of discretion. Assuming that a federal court has competence to adjudicate a particular auxiliary claim, does it make any difference whether the claim is classified pendent rather than ancillary?

The question must be answered in the affirmative since the courts act very differently when dealing with pendent claims vis-a-vis ancillary claims. The term “pendent” invokes the Gibbs two-step approach to dealing with auxiliary claims. First, the court determines whether it has power to decide the claim. Second, the court formally exercises its discretion as to whether the auxiliary claim should be allowed. The exercise of discretion involves an expressed consideration of the Gibbs admonitions that “needless decisions of state law should be avoided” and that a “federal court should hesitate to exercise jurisdiction over state claims” if not justified by considerations of “judicial economy, convenience, and fairness to litigants.”\textsuperscript{176} The exercise of discretion over pendent claims thus involves an ad hoc balancing of interests; the court should adjudicate the pendent claim only if fairness, convenience, and economy outweigh the policy of avoiding needless decisions of state law.

Ancillary practice sharply differs since the courts do not invoke the Gibbs policy against needless determinations of state law. Once an ancillary claim is found to be transactionally related to the jurisdiction-conferring claim, the courts affix a procedural label such as compulsory counterclaim, cross-claim, or third-party claim. The affixation of the procedural label carries the claim forward to adjudication without an ad hoc inquiry into the propriety of federal determination of the particular auxiliary claim.\textsuperscript{177} Ancillary practice thus either ignores all consideration of whether the auxiliary claim is appropriately adjudicated in federal court, or jurisdictional and discretionary factors are merged into the consideration of transactional relatedness.\textsuperscript{178}

\textsuperscript{175} See text at note 107 supra.
\textsuperscript{176} Gibbs, supra note 12, at 726.
\textsuperscript{177} See note 109 supra.
\textsuperscript{178} Note, Rule 14 Claims and Ancillary Jurisdiction, 57 Va. L. Rev. 265, 283-84 (1971) (author suggests that few courts have applied a Gibbs approach to ancillary claims and that with respect to ancillary claims the courts concurrently consider jurisdictional and discretionary factors to-
The bifurcated approach to the exercise of discretion on whether to allow auxiliary claims is exemplified in a recent case in which both ancillary and pendent claims were presented.\textsuperscript{179} Plaintiff alleged that the defendant had violated provisions of the federal truth in lending statute and that, in addition, state law had been violated by the levy of excessive finance charges.\textsuperscript{180} The defendant counterclaimed for the unpaid balance on the underlying account.\textsuperscript{181} The plaintiff's state claim (excessive finance charges) was properly classified as pendent to the jurisdiction-conferring\textsuperscript{182} truth in lending claim. Defendant's counterclaim if compulsory, would have been classified as ancillary. Applying the Gibbs approach to the exercise of discretion, the court had no difficulty in declining to hear the pendent state claim:

\[T\]his Court's experience with an ever-increasing number of truth in lending suits has impelled the considered view that merely pendent state law claims should not be routinely allowed in such cases lest state law questions disproportionately burden the docket. \ldots Although the federal forum may be at least equally appropriate for pursuit of federal truth in lending remedies \ldots Congress could not have intended a concomitant, wholesale federal review of those ordinary state law debtor-creditor controversies lacking jurisdictional foundations in 28 U.S.C. § 1332 \ldots.\textsuperscript{183}

The court was acutely aware that counterclaims could not be disposed of by the application of the Gibbs style of analysis:

The question of ancillary jurisdiction over defendant's state law counterclaim does not neatly correspond to the balancing process involved in assuming or declining to take jurisdiction of the pendent claim. If the debt counterclaim is thought to arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim," Rule 13(a), Fed. R. Civ. P., it is compulsory and therefore entertained even without independent jurisdictional basis \ldots to effectuate Rule 13(a)'s design "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters" (citations omitted).\textsuperscript{184}

\textsuperscript{181} Id. at 2.
\textsuperscript{182} Jurisdiction was grounded upon 15 U.S.C. § 1640(e) (1970).
\textsuperscript{183} Id. at 2-3.
\textsuperscript{184} Id. at 3.
In order to avoid adjudication of the counterclaim the court found that it did not arise from the same transaction or occurrence as did the truth in lending claim. In reaching this conclusion, the court considered both discretionary and jurisdictional factors.

The differences in approach to the exercise of discretion may be further highlighted by considering whether a federal court may appropriately require that the auxiliary claim be tried separately from the jurisdiction-conferring claim. In Gibbs the Supreme Court contemplated that a pendent claim should be dismissed if pretrial procedures revealed a likelihood of jury confusion or if it appeared that a state claim constituted the "real body of [the] case." In contrast, many lower federal courts assume that it is appropriate to grant a separate trial on a third-party ancillary claim. The granting of separate trials on ancillary claims is inconsistent with the objective of avoiding multiplicity of actions and is therefore questionable. However, this practice does exemplify the tendency of federal district courts to mechanically exercise their power to adjudicate ancillary claims.

The modern doctrines of ancillary and pendent jurisdiction may therefore be differentiated only in terms of the type of auxiliary claim to which they apply—pendent jurisdiction is restricted to auxiliary claims asserted by a plaintiff against an original defendant. And there is an important consequence of labeling—only

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185. The federal rules permit granting of separate trials "in furtherance of convenience or to avoid prejudice, or when . . . [it] will be conducive to expedition and economy. . . ." Fed. R. Civ. P. 42(b). Also see Fed. R. Civ. P. 20(b), which permits separate trials in multi-party cases.

186. Gibbs at 727.

187. See, e.g., Baker v. Moors, 51 F.R.D. 507, 510 (W.D. Ky. 1971); Lankford v. Ryder Truck System, Inc., 41 F.R.D. 430, 432 (D.S.C. 1967). These cases fail to distinguish between when the third-party claim is independently cognizable, as in United States v. Yellow Cab Co., 340 U.S. 543, 556 (1951), in which case a separate trial would be clearly appropriate, and situations in which the third-party claim is within the power of the federal court on ancillary theories. In the latter case, the policy of avoiding multiplicity of actions is frustrated by ordering separate trials. Dismissal of the ancillary claim would be more appropriate absent unusual circumstances in which fairness to the litigants required federal adjudication of the ancillary claim.

188. One could argue that the doctrines are distinguishable on the basis of the required relationship between a jurisdiction-conferring claim and the auxiliary claim. Pendent jurisdiction requires the claims to arise from the "same nucleus of operative facts." See text at note 116 supra. Ancillary jurisdiction requires that the claims arise from the same "transaction or occurrence." See text at note 100 supra. However, both doctrines essentially look at the factual relatedness between the claims. As such this presents a very nebulous potential source of differentiation. See Note, Rule 14 Claims and Ancillary Jurisdiction, 57 Va. L. Rev. 265, 283 (1971).
pendent jurisdiction involves an expressed ad hoc consideration of whether the interests of fairness, convenience, and economy outweigh the principle that needless decisions concerning state law should be avoided.

PART IV
OBSERVATIONS IN AFTERMATH OF DOCTRINAL REMOLDING

Having undergone a period of rapid development, the doctrines of pendent and ancillary jurisdiction are in need of refinement. Ancillary jurisdiction must still meet unresolved problems in the area of third-party practice and intervention; and pendent jurisdiction must deal with the problems of pendent parties. The loose ends need to be tied. In a broader context, however, the current state of the law really does need more fundamental attention. Current ancillary practice is far, far too receptive to auxiliary claims; and the Supreme Court's recent attention to the pendent party question seems to present us with a very substantial step in the wrong direction.

A. Ancillary Jurisdiction

Our comparison of pendent and ancillary jurisdiction in the last section revealed that the doctrines could be differentiated in terms of the type of claims to which they applied and by the manner in which the district courts exercise discretion on the question of whether a particular claim should be adjudicated. A question which does need to be addressed is whether there is any justification for the current bifurcated approach to the exercise of discretion. Alternately stated, the query concerns whether or not there is any reason for singling out the plaintiff's auxiliary claims against a defendant for the unique Gibbs treatment. As we have seen, plaintiff's other auxiliary claims, and all such claims asserted by and against other parties, receive the ancillary classification and thus are adjudicated without consideration of the Gibbs admonition against needless decisions of state law.

The fact that we have arrived at two different approaches to the exercise of discretion is readily explained—the doctrines evolved from two separate lines of cases and the doctrines generally continue to be viewed as separate and distinct.\(^{189}\) This explanation does not serve, however, as justification for a continued disparity between approaches to what has become the same basic question:

\(^{189}\) See text at Part II C supra.
whether federal judicial power should be exercised over a claim which is factually related to a matter which is properly before the court. There is nothing intrinsic to the "pendent" auxiliary claims which supports the unique Gibbs inclination to avoid decision on state law. Nor is there any reason why the federal courts should be so receptive to ancillary auxiliary claims. Indeed, one can argue that the rules would be just as logical if the approaches to discretion were reversed.190

Reasons may be offered in support of the exclusive application of either approach to the exercise of discretion, but there is no identifiable reason for concurrently having two approaches to the same basic questions. Dual approaches are inconsistent with the fundamental premise of legal reasoning that similar cases should be decided in the same way. If we yield to logic and symmetry a single approach to the exercise of discretion would be adopted.

Setting the interest of symmetry aside, there are more important reasons for changing the current ancillary practice whereby federal courts routinely adjudicate auxiliary claims without engaging in an ad hoc inquiry into the question of whether the interests of convenience, fairness, and efficiency require the determination of a claim which is not independently within federal jurisdictional power. Current ancillary practice is inconsistent with Gibbs and may be justified only when judged solely from the perspective of the aggregate judicial efficiency of state and federal courts. This perspective allows one to build upon the proposition that all transactionally related claims should be determined in one judicial proceeding. Given that objective, once a complaint has been filed in federal court, the determination of whether or not to adjudicate an auxiliary claim is really a choice between producing or precluding multiplicity of actions. From an aggregate efficiency perspective, a federal court should determine all claims which are transactionally related to a claim which is properly before the court.191

190. The tests could be reversed in the interest of removing an impediment to the plaintiff's free choice of the federal forum. If ancillary's mechanical approach were applied to the plaintiff's pendent claim, this interest would be better served than under current practice in which the plaintiff's pendent claim is freely declined with the result that plaintiff's factually related claims could be adjudicated in one proceeding only in state court. Except in removal cases, this interest does not weigh against the application of the Gibbs approach to ancillary claims.

191. A recent case in which this line of reasoning was expressed is Gravitt v. Southwestern Bell Tel. Co., 396 F. Supp. 948, 951 (W.D. Tex. 1975). The case is distinguishable since it was before the federal court on removal under 28 U.S.C. § 1441 (1970). The court notes that under this statute, a federal court in its discretion may "remand matters not otherwise
The problem with this rationale is quite simple: Administrative efficiency may not be the sole determinative of the limits of federal jurisdiction. Couched in the language of Gibbs, two other factors are equally important: fairness to litigants and convenience to the parties and to the court. Furthermore, the efficiency rationale ignores the limited nature of federal jurisdiction which is reflected in the Gibbs admonition that needless decisions of state law should be avoided. This admonition was recently reaffirmed by the Supreme Court when they quoted the following statement from a recent Third Circuit ancillary jurisdiction case:

The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction. Especially is this true where, as here, the efficiency plaintiff seeks so avidly is available without question in the state courts.\(^{192}\)

In addition to the arbitrary nature of the bifurcated approach to discretion and to the unreasoned exercise of jurisdiction over ancillary claims, there are other considerations which militate against a continuation of current ancillary practice. From the perspective of the docket-laden federal district courts, current ancillary practice is not desirable to the extent that it results in federal adjudication of claims that would be declined under a balancing Gibbs approach. And, from the perspective of the state judiciary, the current ancillary practice is barren of any consideration of comity.

I therefore conclude that the Gibbs approach to the exercise of jurisdiction over auxiliary claims should be generalized and applied to all ancillary claims. Federal district courts should no longer mechanically adjudicate cross-claims, counterclaims, and third-party claims which are not independently cognizable simply because such claims are factually related to a claim over which the court has jurisdiction. With respect to each and every auxiliary claim, whether it be labeled as pendent or ancillary, the federal courts should engage in an ad hoc weighing of the interests of economy, convenience, and fairness against the policy that needless decisions of state law should be avoided.

Such an approach would be in sharp contrast to present practice, but it would make excellent sense. At a time when a great

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deal is being said about the crowded federal docket, the extension of Gibbs to ancillary claims should be most welcome since it would provide the courts with an added degree of control over the complexity of the cases with which they deal.

B. PENDENT JURISDICTION

Judged from the perspectives of fairness, convenience, and efficiency, the Supreme Court's decision in Aldinger v. Howard is unsound. By its per se denial of jurisdictional power to pendent a state claim against a municipality to a civil rights claim against a municipal official, the Court precluded a Gibbs style of inquiry into these important interests.

The strength and utility of the Gibbs approach to the problem of identifying the limits of federal jurisdiction lies in its ad hoc inquiry into the circumstances of each case. It is certainly true that Gibbs' expansion of federal jurisdiction by substituting a factual relatedness test for the cause of action mumbleings of Hum was desirable. But, in hindsight, the new emphasis upon the discretionary nature of the assumption of pendent jurisdiction was to have equal, if not more, impact upon the allocation of jurisdiction between state and federal courts. The discretionary nature of the assumption of pendent jurisdiction is referable to the limited nature of federal jurisdiction. Under Gibbs, the expansion of pendent power was to be constrained by the admonition against needless decisions of state law. Thus conceived the pendent doctrine admirably performs two quite contradictory objectives: (1) Federal judicial power is extended in the interest of fairness, convenience, and efficiency to claims which are factually related to a claim over which the court has jurisdiction, and (2) the limited nature of federal jurisdiction is preserved and protected by the discretionary nature of the pendent doctrine. To the extent that an ad hoc inquiry is necessary or desirable in order to safeguard the interests of parties or of the judicial system, Aldinger represents a mistake since it precludes such analysis.

There were two other alternatives to the per se denial of jurisdiction open to the Aldinger Court—neither was discussed. The Court could have held that the exercise of pendent party jurisdiction was constitutionally objectionable—something which no commentator has seriously contended; or it could have found that jurisdictional power existed over the pendent party claim as a matter

194. The Hum case is discussed in text at note 56 supra.
of constitutional and statutory construction and then declined to exercise such jurisdiction as a matter of discretion. Under this latter course, which I feel would have been preferable, the Court could have refined the criteria which guides such discretion. Further, the Court could have reaffirmed a strong policy against needless determinations of questions of state law—particularly, if they wished, in civil rights cases. Such an approach would have preserved flexibility and federal courts would have remained free to assume pendent party jurisdiction where fairness demanded.

The Supreme Court’s implicit rejection of this alternative is particularly unfortunate in light of lower federal court opinions which previously addressed the pendent party issue in the context of civil rights cases. The lower courts had clearly demonstrated a great reluctance to adjudicate pendent claims against municipalities. Since the federal district and circuit courts had been exercising their discretion in a manner assumedly in accord with the inclinations of the Justices of the Supreme Court, there was no necessity to opt for a per se denial of jurisdiction. Furthermore, lower federal court decisions clearly indicate that there will be cases in which pendent party jurisdiction should be exercised over a municipality. Under statutes in several states, municipalities are vicariously liable for the civil rights violations of their employees. The liability of both the municipality and the official will thus involve an identity of disputed facts as to the acts and omission of the employee, but the defenses available to the municipality may differ from those of the individual official. To the extent that the defenses available to the municipality are unsettled under local law, or to the extent that they would create jury confusion, it is certainly appropriate to decline pendent jurisdiction. Where there are no such difficulties, however, the federal court which is litigating the civil rights cause of action against municipal officials should be able to adjudicate the related state action against the municipality.

By failing to adopt a Gibbs style of approach, the Court


lost a great deal of flexibility. Under *Aldinger* the lower federal courts will find it more difficult to administer justice in a fair and efficient manner

*Aldinger* may be questioned on still another ground. The approach elected by the Court introduces several complex and subtle questions, the consequence of which is to place the civil rights plaintiff in an untenable position. Given the fact that the plaintiff may not join his civil rights claim against the municipal official to a state claim against the municipality and litigate both actions in federal court, the plaintiff has two basic alternatives. He may bring two actions—the civil rights claim in federal court and the state claim in state court—or he may bring both actions in state court.197 Under the first alternative, the plaintiff incurs additional expense due to prosecuting two separate actions. A more subtle consequence of the multiplicity of actions is the risk of inconsistent adjudications or the risk that collateral estoppel will be successfully invoked in the second action with respect to issues fully and fairly litigated in the first action.198 The plaintiff who desires to litigate his civil rights complaint in federal court must thus pay a considerable price: costs attributed to multiplicity of actions, risks of inconsistent adjudications, and uncertainties with respect to applications of collateral estoppel. The majority in *Aldinger* took some solace from the fact that state courts provided plaintiff a forum in which all his actions could be litigated in one proceeding. This view, however, ignores the strong federal policy of providing the civil rights

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197. In a note to his dissent in *Aldinger*, Justice Brennan stated: “The Court today appears to decide *sub silentio* a hitherto unresolved question by implying that § 1983 claims are not claims exclusively cognizable in federal court but may also be entertained by state courts. . . . This is a conclusion with which I agree.” *Aldinger* at 2430 n.17.


plaintiff with a federal forum. As Justice Brennan pointed out in his dissent:

To say that the suitor has available a state forum in which conveniently to litigate both his claims . . . is patently to ignore the real issue, for it is painfully obvious that this does not result in a neutral choice by the suitor among available forums; rather it imparts a fundamental bias against utilization of the federal forum owing to the deterrent effect imposed by the needless requirement of duplicate litigation if the federal forum is chosen.199

Although the Court in Aldinger did not generally address the pendent party issue, restricting its decision to the civil rights cases, it is clear that the Court has embarked upon a course of analysis which will involve considering pendent party issues in the context of particular statutory grants of jurisdiction. It is to be hoped that in federal question, diversity, and admiralty cases, the Court will not forego, as they did in Aldinger, the alternative of holding that the federal courts have an extremely broad power to determine auxiliary claims. Such an approach will allow the Court to further refine the discretionary aspects of the Gibbs approach by identifying the criteria relevant to the exercise of discretion. There is certainly no necessity that the Court reach identical results with respect to each statute.200 Yet, it is only through a Gibbs style of analysis that the Court may continue to define the limits of federal jurisdiction with a flexibility focused on fairness to litigants. The discretionary nature of the Gibbs exercise of jurisdiction is uniquely suited to a consideration of the innumerable complex and subtle questions raised by pendent party practice.

CONCLUSION

Although historically separate and distinct, the doctrines of pendent and ancillary jurisdiction have evolved in a common direction. Each is now pertinent to the question of whether and to what extent federal courts may adjudicate claims which, though not independently cognizable, are factually related to a claim within the courts’ jurisdiction. To the extent that the modern doctrines inconsistently deal with the same basic subject matter, we ought to speed

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199. Aldinger at 2430 (dissenting opinion).
up the evolutionary process and develop a single unitary approach to all such auxiliary claims. I suggest this be accomplished by extending the Gibbs admonition against needless decisions on questions of state law to all ancillary claims. If this were accomplished, the doctrines of pendent and ancillary jurisdiction would have merged for all practical purposes.