Problems of Judicial Power and Discretion in Federal Pendent Jurisdiction Cases

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PROBLEMS OF JUDICIAL POWER AND DISCRETION IN
FEDERAL PENDENT JURISDICTION CASES

The closely-related doctrines of pendent and ancillary jurisdiction allow federal courts to hear matters over which they ordinarily would not have subject-matter jurisdiction. When these doctrines apply and whether jurisdiction should be assumed, however, is not altogether clear. This Note examines pendent and ancillary jurisdiction in connection with the role of judicial discretion, and suggests guidelines to aid in the analysis of jurisdiction problems.

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I. INTRODUCTION

Under certain circumstances, federal courts may hear claims over which neither the Constitution nor Congress has granted them jurisdiction.1 The doctrines of pendent and ancillary jurisdiction confer power2 on the federal courts to adjudicate those claims that are sufficiently related to controversies arising under either federal question3 or diversity jurisdiction.4

The related doctrines of pendent and ancillary jurisdiction developed separately, and until relatively recently were considered to be independent theories.5 Ancillary jurisdiction, as it typically has been applied, refers to the federal court's power to hear collateral claims that arise from the same transaction or occurrence as that upon which a significant federal claim is based.6 Pendent jurisdiction, on the other hand, refers to the power of the federal courts to consider a state claim along with a substantial federal claim if both arise from a "common nucleus of operative fact."7 These definitions are still followed in most situations.8 Recently, however, it has become more difficult to draw significant distinctions between the two doctrines.9 Since the development of the history of pendent party jurisdiction,10 which in some situations gives the federal courts jurisdiction over pendent claims asserted against parties over whom no independent jurisdiction exists, perhaps no important differences between pendent and ancillary jurisdiction remain.11

Although federal courts have constitutional power over pendent and

2. Article III of the Constitution provides the federal courts with jurisdiction over cases based on federal questions and those based on diversity of citizenship of the parties. U.S. CONST. art. III, § 2.
3. Federal question cases are those arising under the Constitution or laws of the United States, or those involving admiralty claims. Id.
4. Article III provides for federal jurisdiction based on diversity of citizenship of the parties as well as on federal questions. See id.
6. See generally 13 WRIGHT & MILLER, supra note 1, § 3523.
8. See notes 62-63 infra and accompanying text.
10. See notes 64-76 infra and accompanying text. For a general discussion of pendent party jurisdiction, see Currie, Pendent Parties, 45 U. CHI. L. REV. 753 (1978); Fortune, Pendent Jurisdiction—The Problem of Pending Parties, 34 U. PITT. L. REV. 1 (1972); Garvey, The Limits of Ancillary Jurisdiction, 57 TEX. L. REV. 697 (1979); Minahan, supra note 5.
ancillary claims, the exercise of that power is typically discretionary. In most cases, the courts have exercised their discretion liberally in favor of hearing these claims. The United States Supreme Court has demonstrated a reluctance to extend federal jurisdiction beyond certain limits, however. Where these limits have been drawn is not entirely clear, but as a result of the recent trend toward the narrowing of federal jurisdiction, the lower federal courts' exercise of discretion with respect to pendent and ancillary claims may be similarly limited. This Note will examine the changes in the doctrines of pendent and ancillary jurisdiction that have taken place in recent years, and the effect of those changes on the federal courts' discretionary exercise of their jurisdictional power.

II. HISTORICAL BACKGROUND

A. Pendent Jurisdiction

Pendent jurisdiction initially allowed federal courts to adjudicate a plaintiff's state law claims that were incidental to claims arising under federal law. The principles underlying the doctrine first appeared in Osborn v. Bank of the United States, in which the presence of a question of state law was found insufficient to defeat federal jurisdiction. Chief Justice Marshall held that a federal court has the power to adjudicate

13. See 13 WRIGHT & MILLER, supra note 1, § 3567, at 455-56.
15. See generally notes 131-383 infra and accompanying text.
16. See Minahan, supra note 5, at 293.
17. 22 U.S. (9 Wheat.) 738 (1824); see C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 19 (3d ed. 1976); Note, supra note 11, at 629 n.15.

In Osborn, an act of Congress chartering the Bank of the United States provided that the Bank could "sue and be sued . . . in any Circuit Court of the United States." When the state of Ohio attempted to collect a tax that the Bank contended was unconstitutional, the Bank sought an injunction to prevent the collection of the tax. Chief Justice Marshall held that Congress' authorization of the Bank to "sue and be sued" granted the federal courts jurisdiction over all cases to which the Bank was a party. Because the Bank was itself a creation of federal law, questions regarding its powers to do business ultimately would also be based on federal law. Thus federal question jurisdiction would exist over any state law question that arose in connection with suits to which the Bank was party. The Chief Justice stated:

[When a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

22 U.S. (9 Wheat.) at 823. That the Constitution gives the federal courts jurisdiction over "cases" rather than over "questions" tends to support the proposition that the federal district courts cannot function properly without the power to decide all issues that arise in cases before them. See U.S. CONST. art. III, § 2; C. WRIGHT, supra, § 19.

both state and federal claims in cases in which the court's jurisdiction is predicated on the plaintiff's claim of a right arising under federal law, if the state claim is incidental to or necessary for a determination of the federal claim.\textsuperscript{19}

A further development of the theory of pendent jurisdiction took place in \textit{Siler v. Louisville & Nashville Railroad}.\textsuperscript{20} In \textit{Siler}, the Supreme Court allowed federal jurisdiction over state claims that were asserted in a case in which jurisdiction was based on a federal question,\textsuperscript{21} but unlike \textit{Osborn}, \textit{Siler} provided that the state claim over which the court may take jurisdiction need not be necessary to a resolution of the federal claim.\textsuperscript{22} More important, \textit{Siler} permitted the federal courts to decide a case entirely on state law grounds, without being required to adjudicate any of the federal claims asserted.\textsuperscript{23}

In \textit{Hum v. Oursler},\textsuperscript{24} the Supreme Court extended pendent jurisdiction

\begin{enumerate}
  \item[$19.$] \textit{Id.} at 820-21. \textit{Osborn} seems to support a theory of broad federal jurisdiction in that it appears to hold that an entity whose existence depends upon federal law may automatically sue or be sued in the federal courts. \textit{See id.} at 823. Other language in \textit{Osborn}, however, may indicate that the standard the Court used was based on the "source of law" theory, that a case arises under federal law if federal law creates the right sought to be enforced. \textit{See id.} The Court stated that "the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause." \textit{Id.} at 822. \textit{See Note, supra} note 11, at 638 n.70.
  \item[$20.$] 213 U.S. 175 (1909). A railroad company brought suit to enjoin the enforcement of an order of the state railroad commission setting maximum freight rates. The railroad contended that the order was invalid both because it was unauthorized by state statute and because it was in violation of the federal constitution. \textit{Id.} at 177, 190-91. The statute was alleged to violate Article IV, section 4, by vesting "legislative, executive and judicial powers of an absolute and arbitrary nature over railroad carriers in one body or tribunal, styled the railroad commission," \textit{id.} at 190-91, and the fourteenth amendment, in that the rates were alleged to have been so low as to be confiscatory. \textit{Id.} at 191.
  \item[$21.$] The state railroad commission argued that because no valid federal question was present the district court had no jurisdiction over the matter. Because the railroad's position was that the state commission had no power to fix the rates, the state contended that no state action was involved and that therefore the suit did not arise under the Constitution or laws of the United States. \textit{See id.} at 192-93.
  \item[$22.$] \textit{Id.} at 190-91; \textit{see Osborn v. Bank of the United States}, 22 U.S. (9 Wheat.) 738, 820 (1824). Because some of the federal questions raised were more than "merely colorable, and [were not] fraudulently raised for the purpose of attempting to give jurisdiction to a Federal court," they were sufficient to confer jurisdiction. 213 U.S. at 192.
  \item[$23.$] The Court stated:
    \begin{quote}
    The Federal questions . . . 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 decided the case on local or state questions only.
    \end{quote}
    213 U.S. at 191. The Court went on to consider only the state law question, preferring to resolve the case on state law grounds rather than consider federal constitutional questions unnecessarily. \textit{Id.} at 193; \textit{see Note, supra} note 11, at 629 n.15.
  \item[$24.$] 289 U.S. 238 (1933). Plaintiffs sought to enjoin defendants from producing or performing a play, alleging both the infringement of plaintiffs' copyright and a state law claim of unfair competition. \textit{Id.} at 239. The Court held that although the unfair competi-
to include state law issues that arose in conjunction with federal claims as long as the pendent claims were based on the same cause of action as a significant federal claim. 25 A difficulty with the Hurn standard, however, was that the meaning of "cause of action," which the Court did not define specifically, was subject to inconsistent interpretations. 26 Nevertheless, until the 1966 case of United Mine Workers v. Gibbs, 27 the Hurn test remained the basis for determining under what circumstances the federal courts could decide pendent state claims. 28

B. Ancillary Jurisdiction

Principles of ancillary jurisdiction similarly enable federal courts to assert jurisdiction over an entire case, and thus to decide collateral issues over which no independent jurisdiction exists. 29 Initially, ancillary jurisdiction referred to the courts' power to adjudicate claims of nonparties to property controlled by the court. 30 One of the first significant ancillary jurisdiction cases, Freeman v. Howe, 31 illustrated the necessity for a rule

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25. 289 U.S. at 245-46. The Court held that 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 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 federal cause of action. Id. (emphasis in original).

26. The Court's only reference to what might constitute a "cause of action" is its statement that "[t]he bill alleges the violation of a single right, namely, the right to protection of the copyrighted play. And it is this violation which constitutes the cause of action." Id. at 246. Because of the Hurn test's indefiniteness, no clear standard for defining a "cause of action" was ever developed by the lower federal courts. See C. Wright, supra note 17, § 19.


28. See C. Wright, supra note 17, § 19.

29. See Minahan, supra note 5, at 297-302.

30. See id. at 281-82.

31. 65 U.S. (24 How.) 450 (1861). In Freeman, a diversity case, a United States marshal seized some railroad cars under a writ of attachment. The mortgagees of the railroad successfully brought an action in state court to recover the cars. The Supreme Court on appeal held that the state court had no power to interfere with property controlled by the federal court, but that the mortgagees' claims were ancillary to the original federal action. See id. at 459-60.
allowing jurisdiction over such matters. In Freeman, the Supreme Court held that a party whose interests are affected when a federal court takes control over certain property may assert a claim to the property despite the lack of independent jurisdiction over that party. Later cases extended ancillary jurisdiction to include nonfederal matters that arose in suits to enforce judgments and orders.

In Moore v. New York Cotton Exchange, the Court broadened the ancillary jurisdiction theory to include counterclaims that involved neither diverse parties nor federal questions. Significantly, the Court held that the state law claim need not be exactly the same as the underlying federal claim; it only need arise from the same "transaction or occurrence" as the federal anchor claim. Ancillary jurisdiction was later expanded even further to balance the liberal joinder provisions of the new Federal Rules of Civil Procedure with federal jurisdictional requirements. As

32. See C. Wright, supra note 17, § 9.
33. 65 U.S. (24 How.) at 459-60.
35. 270 U.S. 593 (1926). The plaintiff contended that the defendant had violated the Sherman Act by failing to provide stock-ticker service. The defendant counterclaimed, alleging that the plaintiff was stealing the quotations of the defendant. Id. at 603. The Supreme Court held that ancillary jurisdiction over the counterclaim was proper, although the parties were nondiverse and no federal question was raised by the counterclaim. See id. at 609.
36. See id. at 610. The Court commented:

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.

Id. (citations omitted).
37. Id. The Court based its holding on the wording of Equity Rule 30, which states in part: "The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit." The Court stated that this part of the rule was sufficient to permit the counterclaim without proof of an independent basis for federal jurisdiction. For a discussion of Equity Rule 30 and the application of ancillary jurisdiction to compulsory counterclaims, see 3 J. Moore, Federal Practice ¶ 13.13 (2d ed. 1948). The Court further held:

"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.

270 U.S. at 610.
39. C. Wright, supra note 17, § 9, at 23; see Minahan, supra note 5, at 297-302. See
a result of this expansion, ancillary jurisdiction now exists with respect to cross-claims, compulsory counterclaims, interpleader, impleader, and intervention as of right. Ancillary jurisdiction thus evolved into a theory broader in its application than pendent jurisdiction, which, strictly defined, applies only to the joinder of state and federal claims.

C. United Mine Workers v. Gibbs and the Merger of Pendent and Ancillary Jurisdiction

The approach to pendent jurisdiction was broadened also, as a result of the Supreme Court's decision in United Mine Workers v. Gibbs. The Court held in that case that pendent jurisdiction was no longer limited to those state law claims that arose from the same cause of action as claims based on federal law. The federal courts were held to have the power to adjudicate state and federal claims that derive from a "common nucleus of operative fact" in such a manner that a plaintiff would "ordinarily be expected to try them all in one judicial proceeding." The Court justified the exercise of pendent jurisdiction in such situations on the grounds of "considerations of judicial economy, convenience and fairness to litigants."


40. FED. R. CIV. P. 13(g); see, e.g., LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969); Scott v. Fancher, 369 F.2d 842 (5th Cir. 1966); Glen Falls Indem. Co. v. United States, 229 F.2d 370 (9th Cir. 1956); Garvey, supra note 10, at 713.

41. FED. R. CIV. P. 13(a); see 6 WRIGHT & MILLER, supra note 1, § 1414 & n.55.

42. FED. R. CIV. P. 22; see State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

43. FED. R. CIV. P. 14; see, e.g., Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959); Garvey, supra note 10, at 702-03.

44. FED. R. CIV. P. 24(a); see Smith Petroleum Serv., Inc. v. Monsanto Chem. Co., 420 F.2d 1103 (5th Cir. 1970).

45. See Minahan, supra note 5, at 292-97.

46. 383 U.S. 715 (1966). A coal mining company closed a mine and laid off a number of union members. A short time later, a subsidiary of the company hired Gibbs as mine superintendent for a nearby mine it was planning to open. Gibbs also was given the contract to haul the coal. Union members forcibly prevented the mine from opening as scheduled; the UMW representative then caused a picket line to be established to prevent further violence. As a result, the mine did not open and Gibbs lost both his job as superintendent and the contract to haul the coal. He brought this action against the UMW, alleging a secondary boycott in violation of the Labor Management Relations Act and a state law claim of interference with contractual relations. Id. at 718-20.

47. See id. at 724-25. The Court noted that the Hurin rule limiting the application of pendent jurisdiction to claims arising from the same "cause of action" was "unnecessarily grudging." Id.

48. Id. at 725.

49. Id.

50. Id. at 726.
however, the Court also may have broadened the discretion of the federal courts to decline to hear those claims.\footnote{51} If the considerations of "judicial economy, convenience and fairness to litigants"\footnote{52} that the Court listed in Gibbs are not sufficiently strong in a particular case, the federal court may decline to hear the pendent claim to avoid unnecessary decisions of state law.\footnote{53} Gibbs thus sets forth a two-part test for federal jurisdiction over pendent claims: the federal courts have power over such claims if both the state and federal claims are based on common "operative facts,"\footnote{54} and the courts have the discretion to exercise that power as long as doing so can be justified by the considerations of judicial economy, convenience, and fairness, balanced by the need to avoid unnecessary decisions of state law.\footnote{55}

By rejecting the Hum test, according to which pendent jurisdiction could be asserted over only those state claims grounded on the same cause of action as a federal claim,\footnote{56} the Court in Gibbs narrowed the gap between the doctrines of ancillary and pendent jurisdiction;\footnote{57} the "same transaction or occurrence" test for ancillary jurisdiction set forth in Moore v. New York Cotton Exchange is substantially the same in principle as the Gibbs "common nucleus of operative fact" test for pendent jurisdiction.\footnote{58} The two doctrines still differ, however, in the sense that discretion, the second half of the Gibbs test, plays a less important role with respect to ancillary jurisdiction. From the time of the enactment of the Federal Rules of Civil Procedure, the federal courts have systematically expanded ancillary jurisdiction to include almost all related multiple-party

\footnotesize{\begin{itemize}
\item \footnote{51}{The Court stated that pendent jurisdiction is a "doctrine of discretion, not of plaintiff's right." \textit{id.}; see Minahan, \textit{supra} note 5, at 303.}
\item \footnote{52}{383 U.S. at 726.}
\item \footnote{53}{The Court stated that "[n]eedless decisions of state law should be avoided as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." \textit{id.} (footnote omitted). This principle also underlies the abstention doctrines, which are used under various circumstances to avoid federal constitutional decisions if the case may be resolved on the basis of state law, \textit{see, e.g.}, Railroad Comm’n v. Pullman Co., 312 U.S. 496 (1941); to avoid unnecessary conflict with a state’s administration of its affairs, \textit{see, e.g.}, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Burford v. Sun Oil Co., 319 U.S. 315 (1943); or to avoid resolution by a federal court of unsettled questions of state law, \textit{see, e.g.}, Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). \textit{But see} Meredith v. City of Winter Haven, 320 U.S. 228 (1943). Abstention also has been used as a ground for a federal court’s declining to exercise pendent jurisdiction. \textit{See Minnesota Public Interest Research Group v. Adams, 482 F. Supp. 170, 180-82 (D. Minn. 1979); notes 152-84 infra and accompanying text.}
\item \footnote{54}{383 U.S. at 725; \textit{see Comment, The Impact of Aldinger v. Howard on Pendent Party Jurisdiction}, 125 U. Pa. L. Rev. 1357, 1360 (1977).}
\item \footnote{55}{383 U.S. at 726; \textit{see Comment, supra} note 54, at 1360.}
\item \footnote{56}{\textit{See} notes 24-26 \textit{supra} and accompanying text.}
\item \footnote{57}{\textit{See Comment, supra} note 54, at 1366.}
\item \footnote{58}{\textit{See} notes 35-37 \textit{supra} and accompanying text.}
\end{itemize}}
PENDENT JURISDICTION

III. PENDENT PARTY JURISDICTION

A. The Origins of the Doctrine

The new theory of pendent party jurisdiction permitted the joining of nondiverse parties on nonfederal claims. This theory apparently developed from the following language in *Gibbs*:

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 . . . ". U.S. Const., Art. III, § 2, and their relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." 65

If an action against a nondiverse party was part of the same constitutional case, then, according to this language, pendent jurisdiction would include that party. In addition, if pendent and ancillary jurisdiction may be assumed to be essentially the same, then it would follow that if the latter theory permits federal jurisdiction over additional parties, pendent jurisdiction similarly would permit the joiner of such parties.

A number of federal courts in cases after *Gibbs* have reached this conclusion. The considerations of judicial economy, convenience, and fair-

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59. See Minahan, supra note 5, at 299-302.
60. See id. at 302.
61. See id. at 313-16.
62. See id. at 280; Comment, Limiting Federal Ancillary and Pendent Jurisdiction in Diversity Cases, 64 IOWA L. REV. 930, 941-42 (1979).
63. See cases cited note 85 infra; Currie, supra note 10, at 754.
64. C. WRIGHT, supra note 17, § 19; see, e.g., Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971).
65. 383 U.S. at 725 (footnote omitted) (emphasis in original).
66. See Comment, supra note 11, at 1281.
ness raised in *Gibbs* were the primary bases for the first pendent party jurisdiction cases. In these cases, the assumption apparently was made that under *Gibbs* the federal courts had constitutional power over pendent parties. Only the Ninth Circuit consistently has refused to acknowledge the validity of the pendent party doctrine, stating categorically that "[j]oinder of claims, not joinder of parties, is the object of the doctrine." The Supreme Court did not initially address the question of the federal court's power over pendent parties. In *Moor v. County of Alameda*, the Court applied the second half of the *Gibbs* two-part power/discretion test, finding that the district court, in its discretion, could have declined to exercise pendent jurisdiction over an additional claim against a nonfederal party. The Court apparently assumed the existence of constitutional power over such claims; the language of the opinion seemed to support the general proposition that *Gibbs* could be extended to pendent parties. Specifically, the Court commented that "numerous decisions throughout the courts of appeals since *Gibbs* have recognized the existence of judicial power to hear pendent claims involving pendent parties where "the entire action before the court comprises but one constitutional "case"" as defined in *Gibbs*." The court stated further that "the exercise of federal jurisdiction over claims against parties as to whom there exists no independent basis for federal jurisdiction finds substantial analogues in the joinder of new parties under the well-established doctrine of ancillary jurisdiction." Thus it seemed likely that the Court eventually

F.2d 41 (5th Cir. 1968); Princess Cruises Corp., Inc. v. Bayly, Martin & Fay, Inc., 373 F. Supp. 762 (N.D. Cal. 1974); Comment, *supra* note 54, at 1360 n.22.
69. *See* Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809 (2d Cir. 1971).
The court stated:

[With the decision in United Mine Workers v. Gibbs . . . the Court abandoned such an "unnecessarily grudging" approach [as the *Hum* test] to the question of power to hear the pendent claim, and turned instead to a mode of analysis which focuses upon the relationship between the facts underlying the state and federal claims.]

*Id.*

72. 411 U.S. 693 (1973). This was a civil rights case, brought under sections 1983 and 1988 of title 42, in which the plaintiff sued several law enforcement officers. The plaintiff asserted an additional pendent claim based on vicarious liability against the county since governmental immunity had been abrogated by state statute.
73. *Id.* at 710-17.
74. *Id.* at 713-14.
75. *Id.* at 713.
76. *Id.* at 714.
would approve the exercise of jurisdiction over pendent parties.

**B. Aldinger v. Howard: A More Restrictive Approach**

In *Aldinger v. Howard,* the Court, while acknowledging that the federal courts had constitutional power over pendent parties, placed some restrictions on pendent party cases. The plaintiff, a county employee, had been discharged from her job because she was living with her boyfriend. She brought a federal civil rights action against her employer, the county treasurer, under section 1983 and a state law claim against the county. The district court dismissed the suit against the county because there were no independent grounds for federal jurisdiction over the county, since at that time a county was not considered a "person" under section 1983. The Supreme Court ultimately affirmed this holding.

Despite a number of earlier lower court decisions and the Supreme Court's own dictum in *Moor,* which stated that *Gibbs* formed the theoretical basis for pendent party jurisdiction, the court in *Aldinger* stated that *Moore v. New York Cotton Exchange,* not *Gibbs,* was the "decisional bridge" between pendent and ancillary jurisdiction. Thus the Court,

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77. 427 U.S. 1 (1976).
78. See id. at 14.
79. See Comment, supra note 54, at 1362; notes 89-90 infra and accompanying text.
80. 427 U.S. at 3.
81. See id. at 3-5. Her federal claim was also grounded on 42 U.S.C. § 1983 (1976).
82. See 427 U.S. at 5.
83. Id. At the time of this decision, governmental subdivisions were not considered to be suable as "persons" under section 1983. See *Monroe v. Pape,* 365 U.S. 167 (1961). In 1978, however, the Supreme Court concluded that *Monroe* had been decided incorrectly; the legislative history of section 1983 was found to contain no intent to confer immunity on municipalities. *Monell v. Department of Social Servs.,* 436 U.S. 658 (1978). Therefore the narrow holding of *Aldinger,* that a state law claim against a municipality may not be made pendant to a section 1983 action, is no longer valid.
84. 427 U.S. at 5.
86. See 411 U.S. at 713-14.
87. 427 U.S. at 12. The plaintiff asserted that because the *Gibbs* "common nucleus of operative fact" test and the *Moore* "same transaction" test were so closely related, the doctrines of pendent and ancillary jurisdiction were essentially the same, id., but the Court declined to decide whether there were any "'principled' differences between pendent and ancillary jurisdiction; or if there are, what effect *Gibbs* had on such differences." Id. at 13. Ancillary jurisdiction originally was premised on the idea that a nonfederal party, in the interest of fairness, should not be allowed to come into federal court to assert any claim he
while acknowledging pendent party jurisdiction to be a possible hybrid of the two theories, was able to distinguish *Gibbs* and at the same time diminish its significance as a justification for the use of pendent party jurisdiction. The Court held that the test for pendent party jurisdiction involves not only a determination that the federal court has constitutional power over the claim, but “that Congress in the statutes conferring jurisdiction has not expressly or by implication negated” federal jurisdiction. In *Aldinger*, the Court found that Congress had impliedly negated federal jurisdiction over the county by its failure to include counties as “persons” in section 1983. In other words, *Aldinger* meant that under no circumstances could a county be a pendent party in a section 1983 action, regardless of the presence of the *Gibbs* discretionary factors of “judicial economy, convenience and fairness to litigants.” The element of discretion is therefore eliminated if a court finds that Congress has not intended to confer jurisdiction over the pendent party.

The *Aldinger* test for pendent party jurisdiction seems on its face to be one involving power only: the power of federal courts to adjudicate the pendent claim exists if granted by Article III and if not expressly or impliedly negated by Congress. *Gibbs* having been distinguished and determined to be inapposite, the Court did not address the matter of discretion at all. The Court declined to rule on the general validity of pendent party jurisdiction, limiting *Aldinger* to section 1983 cases; therefore, the extent to which discretion may be an element of the pendent claim might have to property in the custody of the court. See notes 29-34 supra and accompanying text. By combining this notion, that ancillary jurisdiction extends to nonfederal parties, with the *Gibbs* holding that pendent jurisdiction applies to any claims arising from a common nucleus of operative fact, one might logically assume that federal jurisdiction should be asserted over nonfederal parties against whom a claim is brought that originates from the same operative facts as a federal claim. The *Aldinger* Court, however, by concluding that *Moore*, which involved a counterclaim by a party already properly in federal court, was the link between the two doctrines, appeared to discount the close relationship between ancillary and pendent party jurisdiction. See Comment, supra note 54, at 1366-67.

88. 427 U.S. at 18. Although it distinguished *Gibbs*, the Court apparently continued to approve the *Gibbs* test for constitutional power. See id. at 9.

89. *Id.* at 18.

90. See note 83 supra.

91. Comment, supra note 54, at 1362.

92. *Id.* The *Aldinger* test for jurisdictional power involves not only constitutional power, as in *Gibbs*, but congressional approval. Without both, jurisdictional power over pendent parties is not present. Discretion cannot come into play until both of the power requirements are satisfied. Under *Aldinger*, a federal court would never be able to hear on a discretionary basis state law claims asserted against a municipality in conjunction with a section 1983 suit because no power to do so was conferred by Congress. But see note 83 supra.

93. 427 U.S. at 18; note 87 supra.

94. See 427 U.S. at 14.

95. *Id.* at 18.

96. *Id.*
dent party situation is not entirely clear. If, as the Court appeared to suggest in *Aldinger*, *Gibbs* does not provide the real theoretical basis for pendent party jurisdiction, the justification for allowing the federal courts to exercise discretion over pendent parties, assuming the presence of both constitutional and statutory power, is no longer apparent.

Nevertheless, the Court's comment regarding the circumstances under which pendent party jurisdiction might be appropriate seemed to allow some room for discretion. The Court noted:

When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal court may all of the claims be tried together.

Rather than eliminating discretion, the Court seems to have added at least one more discretionary factor, that of the availability of an alternative forum, to the original *Gibbs* considerations. In his dissent in *Aldinger*, Justice Brennan argued that *Gibbs* was the proper basis for pendent party jurisdiction and assumed that the matter of discretion was a logical part of the analysis:

To recognize that the addition of parties under the pendent jurisdiction of the federal courts will sometimes alter the balance of "judicial economy, convenience and fairness," or sometimes threaten to embroil federal courts in the resolution of uncertain questions of state law, and thereby make the exercise of this discretionary jurisdiction inappropriate, is only to speak to the question of the proper exercise of judicial discretion in the circumstances and does not vitiate the *Gibbs* analysis or its application to the question of pendent-party jurisdiction.

It is apparent, nevertheless, that *Aldinger* has impliedly limited the ex-

97. See id. at 12-13.

98. It has been suggested that *Gibbs* was, in fact, incorrect, and that the *Gibbs* "fact-tied" jurisdictional test, based as it is on whether the claims alleged arose from common operative facts and whether the facts of the case are such as to give rise to the discretionary considerations of fairness, convenience, and judicial economy, allows the federal courts to decide claims over which no constitutional power was ever intended. See Note, supra note 11, at 641-48. *Aldinger*, on the other hand, may have given rise to a theory of "law-tied" pendent jurisdiction, based on the notion that Article III confers on the federal courts only limited jurisdiction, and that, additionally, the courts must examine the extent to which Congress has conferred jurisdiction in each case. See id. at 646. If, as has been suggested, *Gibbs* created an unconstitutionally broad test for power over pendent claims, the question arises whether the more restrictive requirements of *Aldinger* also restrict the courts' exercise of discretion. *Gibbs* itself may have a statutory basis even under the law-tied pendent jurisdiction theory. Another commentator has said that even though *Gibbs* did not specifically discuss the statutory basis for pendent jurisdiction, Congress impliedly approved it by means of 28 U.S.C. § 1131. That statute, which provides for federal jurisdiction over civil actions arising under the laws of the United States, would presumably include state law claims closely related to federal claims. See Currie, supra note 10, at 754.

99. 427 U.S. at 18 (emphasis in original) (footnote omitted).

100. Id. at 20-21.
exercise of discretion to the extent that it increases the burden of proving jurisdictional power.

C. Pendent Parties in Diversity Cases: Owen Equipment and Erection Co. v. Kroger

In Owen Equipment and Erection Co. v. Kroger, the Court further attempted to define the limits of the power of the federal courts over pendent parties. In this case, based on diversity jurisdiction, the plaintiff, a citizen of Iowa, brought a wrongful death action against the defendant, a citizen of Nebraska. The defendant then impleaded a nondiverse third party. The plaintiff amended her complaint to name the third party, whom she did not know at the time to be nondiverse, as an additional defendant. The district court thereafter granted the original defendant's motion for summary judgment, and the third party became the sole defendant. The district court denied the new defendant's motion to dismiss, and the Court of Appeals for the Eighth Circuit affirmed, holding that under Gibbs, the court had the power to adjudicate the claim because it arose from the same operative facts as the claim against the original defendant.

The Supreme Court reversed the decision of the Court of Appeals, stating that the court had misunderstood Gibbs. Gibbs "delineated the constitutional limits of federal jurisdictional power," the Court said, but, citing both Aldinger and Zahn v. International Paper Co., went on to

102. Id. at 367.
103. Id. at 367-68.
104. Id. at 368-69.
105. Id. at 368.
106. Id. at 368 & n.3.
107. Id. at 369.
108. Id.
109. Id. at 370.
110. Id. at 371.

111. 414 U.S. 291 (1973). In Zahn, the Court held that each member of the class in a diversity class action must satisfy the $10,000 jurisdictional amount required by 28 U.S.C. § 1331(a); class members whose claims amounted to less were not allowed to aggregate their claims with other class members' claims. The Court in Owen stated that Aldinger and Zahn both demonstrated that the satisfaction of the Gibbs "common nucleus of operative fact" test "does not end the inquiry" into whether jurisdictional power exists over nonfederal claims. 437 U.S. at 373. Zahn, in turn, was based on Snyder v. Harris, 394 U.S. 332 (1969), in which the Court held that the claim of each party, in which a separate interest is at stake, constitutes a separate "matter in controversy" which, according to section 1332, must be greater than $10,000. One author has suggested that the statutory "civil action" could easily include more than one "matter in controversy." See Currie, supra note 10, at 756. If this is correct, then Zahn arguably is inconsistent with Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), in which the Supreme Court construed the diversity statute then in effect as requiring complete diversity between parties. Cases subsequent to Strawbridge extended the rule to nonjoint interests, see, e.g., Peninsular Iron Co.
point out that "[c]onstitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited not only by the provisions of Article III of the Constitution, but also by Acts of Congress."112 The Court of Appeals had applied the Gibbs "common nucleus of operative fact" test in Owen, an ancillary jurisdiction case,113 but the Supreme Court suggested that this test, if not invalid, might have been incomplete: the relation of the third-party complaint to the original lawsuit must involve not "mere factual similarity, but logical dependence."114 In Owen, the plaintiff's claim against the impleaded third party, because it was considered to be separate from and independent of the original complaint, was found to constitute an entirely new claim rather than an ancillary one.115

v. Stone, 121 U.S. 631 (1887), meaning that a single matter in controversy might include a number of separate claims, and that because there was nevertheless only one matter in controversy, the presence of a nondiverse party would cause the dismissal of the entire suit. See Currie, supra note 10, at 759. If, on the other hand, the claims of multiple, nonjoint parties constitute separate matters in controversy, only the nondiverse parties would be dismissed. By holding that the court had no power to hear the claims of absent class members, the Court in Zahn apparently decided that these claims were not part of the same cause of action. Id. at 757. The implication seems to be that the statutory "civil action" does not include pendent parties. The problem is that this conclusion may be inconsistent with the Strawbridge rule. Id. at 761. The author contends that the Court has not carefully considered interpretations of the statutory language of section 1332 that led to the conclusion that "civil action" should be construed broadly. Id. at 766. Had the Owen Court relied specifically on the extended Strawbridge rule rather than on the narrow holdings of Snyder and Zahn, taking into consideration the fact that section 1332 does not explicitly require complete diversity, and that "civil action" could be interpreted to include claims brought against additional, nonfederal parties, it might have been able to find statutory as well as constitutional power over the nondiverse pendent party.

112. 437 U.S. at 372.
113. Id. at 369.
114. Id. at 376.
115. See note 111 supra. An analysis of the facts of Owen, however, can lead to the conclusion that ancillary jurisdiction would have been appropriate. The plaintiff's decedent was electrocuted when a crane belonging to the defendant Owen came in contact with an electrical power line belonging to a power company, OPPD. The plaintiff brought the original action against OPPD, a Nebraska corporation, alleging negligence in the operation and maintenance of the power line. OPPD impleaded Owen for contribution, claiming that the accident was the result of Owen's negligence. The plaintiff amended her complaint to include a negligence claim against Owen, which she believed was also a Nebraska corporation. After the complaint against OPPD was dismissed on OPPD's motion for summary judgment, Owen disclosed that it was actually an Iowa corporation. See 437 U.S. at 367-69. Despite the lack of diversity between Owen and the plaintiff, arguably jurisdictional power existed with respect to the claim against Owen, even under the Court's "logical dependence" requirement. OPPD could not have recovered contribution from Owen unless it could have proved that Owen was jointly liable, along with OPPD, for the death of the plaintiff's decedent. In addition, Owen's liability to the plaintiff depended on the same proof as OPPD's claim against Owen. See Garvey, supra note 10, at 702-03, 712-14.
In addition to finding the claim to be independent rather than ancillary, the Court held that to permit a plaintiff to circumvent the complete diversity requirement of section 1332116 by bringing an action directly against an impleaded nondiverse third party117 would violate the intent of Congress and the rule imposed by Aldinger.118 As in Aldinger, the Court did not rule on the validity of pendent party jurisdiction generally, nor did it address directly the question of discretion. In dictum, however, it appeared to impose limitations similar to those implied by Aldinger, stating:

It is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of the federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction. But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff’s cause of action against a citizen of the same State in a diversity case.119

This statement would seem to mean that the requirements for jurisdictional power in a pendent party as predicated on diversity, that is, the existence of both power120 under Article III, and compliance with the complete diversity requirement of section 1332, diminish considerably the significance of the Gibbs discretionary considerations. Courts may still have the discretion not to exercise pendent party jurisdiction if the power requirements are met but the Gibbs considerations are not present; however, the presence of those considerations will not defeat the requirement of complete diversity.121

Owen has been criticized for imposing a complete ban on the exercise of jurisdiction over nondiverse third-party defendants.122 Rule 14(a) of the Federal Rules of Civil Procedure permits a defendant to implead only “a person not a party to the action who is or who may be liable to him for all or part of the plaintiff’s claim against him.”123 That is, a defendant may bring into an action those persons against whom he could make a claim for contribution or indemnity. Consequently, one could expect the third-party complaint to be logically dependent upon the original suit. However, this kind of “logical dependence,” which the

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116. See note 115 supra and accompanying text.
117. See also Parker v. W.W. Moore & Sons, Inc., 528 F.2d 764, 766 (4th Cir. 1975).
118. 437 U.S. at 373-75.
119. Id. at 377.
120. The Court stated that Gibbs “delineated the constitutional limits of federal judicial power.” Id. at 371. As in Aldinger, the “common nucleus of operative fact” test was assumed to be valid, as far as it went. See id. at 369.
121. See id. at 377.
122. See Garvey, supra note 10, at 702.
123. FED. R. CIV. P. 14(a).
Court considered crucial in Owen,\textsuperscript{124} is seldom found in other situations in which ancillary jurisdiction is routinely permitted, such as those involving cross-claims, counterclaims, or intervention.\textsuperscript{125}

The Court also based its decision, in part, on the fact that the plaintiff, rather than the defendant, had chosen the federal forum.\textsuperscript{126} Considerations of "fairness" thus might be applied only to a defendant who was brought into federal court unwillingly, rather than to a plaintiff who could have foreseen jurisdictional problems and avoided them by bringing the action in state court.\textsuperscript{127} Nevertheless, it has been suggested that the Gibbs approach remains the most reasonable one: all claims arising from the same transaction should be recognized as potentially ancillary, and the court should then determine, taking into consideration the issues of fairness and judicial economy, whether the exercise of that jurisdiction is appropriate.\textsuperscript{128} In fact, the lower federal courts have generally continued to cite Gibbs as the basis for pendent party jurisdiction, often construing Owen and Aldinger as narrowly as possible.\textsuperscript{129} Although those two decisions have added an additional obstacle to proving the existence of jurisdictional power,\textsuperscript{130} the lower courts have by no means eliminated Gibbs or the notion of discretion from consideration in pendent party cases.

IV. THE ROLE OF DISCRETION AFTER OWEN AND ALDINGER

The Supreme Court so far has declined to rule on the general theoretical validity of pendent party jurisdiction,\textsuperscript{131} although it has imposed significant limitations on jurisdictional power over pendent parties.\textsuperscript{132} Despite these limitations, the question of judicial discretion remains significant, not only in pendent party but in pendent and ancillary jurisdiction cases. Pendent jurisdiction, as described in Gibbs, commonly is exercised in the lower federal courts.\textsuperscript{133} The use of ancillary jurisdiction

\textsuperscript{124} See 437 U.S. at 376.
\textsuperscript{125} Garvey, supra note 10, at 703.
\textsuperscript{126} The Court pointed out:

The nonfederal claim here was asserted by the plaintiff, who voluntarily chose to bring suit upon a state-law claim in a federal court. By contrast, ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in federal court. A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations.

437 U.S. at 376 (footnote omitted).
\textsuperscript{127} See Garvey, supra note 10, at 710-11.
\textsuperscript{128} Id. at 711.
\textsuperscript{129} See generally notes 221-383 infra and accompanying text.
\textsuperscript{130} See generally notes 77-121 supra and accompanying text.
\textsuperscript{131} See Aldinger v. Howard, 427 U.S. 1, 18 (1976).
\textsuperscript{132} See notes 77-121 supra and accompanying text.
\textsuperscript{133} 13 WRIGHT & MILLER, supra note 1, § 3567, at 455-57.

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is commonplace under the Federal Rules of Civil Procedure.\textsuperscript{134} Even pendent party jurisdiction, despite the uncertain status that has resulted from the Supreme Court's cautious approach, appears relatively frequently. As might be expected, the factors that the courts use to decide whether the exercise of jurisdiction is appropriate, although based essentially upon the Gibbs considerations of fairness, judicial economy, and convenience,\textsuperscript{135} tend to vary considerably according to the parties involved and the causes of action asserted. For this reason an examination of the circumstances under which courts have decided to exercise their jurisdiction may be useful.

\textbf{A. Pendent Jurisdiction}

The issue of pendent jurisdiction has appeared in a wide variety of circumstances. The Gibbs test for pendent jurisdiction can be fairly called "fact-tied"\textsuperscript{136} because it is, of course, the factual setting of each case that will dictate whether pendent jurisdiction may be appropriate. If the facts of a particular case fit into the Gibbs discretionary considerations of judicial economy, convenience, and fairness, the court generally will exercise its jurisdiction over the pendent claim.\textsuperscript{137}

\textbf{1. Applications of Specific Factors}

In Gibbs, the Court discussed other factors in addition to the commonly-cited considerations listed above. These factors are whether the federal claims are dismissed before trial,\textsuperscript{138} whether state claims substantially predominate,\textsuperscript{139} whether the state claim is closely related to questions of federal policy,\textsuperscript{140} whether the state claim involves unsettled questions of state law,\textsuperscript{141} and whether jury confusion is likely to result.\textsuperscript{142} Courts have used all of these factors in a variety of ways. Often, the matter of discretion is accorded little discussion, and jurisdiction will be exercised or denied on a rather conclusory basis. For this reason, the standards do not seem to be especially well-developed\textsuperscript{143} or consistently

\textsuperscript{134} See notes 38-45 \textit{supra} and accompanying text.


\textsuperscript{136} See Note, \textit{supra} note 11, at 641-42.

\textsuperscript{137} See 13 WRIGHT & MILLER, \textit{supra} note 1, \S\ 3567, at 455-56.

\textsuperscript{138} 383 U.S. at 726.

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{Id.} at 727.

\textsuperscript{141} See \textit{Id.} at 726.


applied.

Some courts attempt to explain their exercise of discretion in greater detail, however. In *Roxse Homes, Inc. v. Adams*, the district court discussed at substantial length the matters it considered in deciding whether to exercise jurisdiction over a state law claim. The plaintiffs in that case brought an action against the Secretary of Transportation and three state officials to enjoin the construction of a road, alleging violations of the National Environmental Policy Act and the Massachusetts Environmental Policy Act. After determining that it had jurisdictional power over the state law claims, the court considered several "prudential" factors. It found particularly significant the questions of whether separate state and federal trials would produce inconsistent outcomes, whether the consolidation of all of the claims would result in the most

Coluatti, 606 F.2d 392 (2d Cir. 1979), a group of state employees who had been fired for allegedly receiving welfare benefits to which they were not entitled, brought an action against state officials, claiming violations of federal and state disclosure laws and violations of their right to due process. The trial court dismissed the first claim on the ground that no substantial federal question existed, and the due process claim on the ground that no termination hearing was required. The Court of Appeals reversed, holding that the confidentiality claim could be made pendent to the constitutional privacy claim. This holding is unusual because the "pendent" claim and the claim to which it was made pendent were both based on federal law. The court explained its decision as follows:

District courts possess a degree of discretion in determining whether to exercise jurisdiction over pendent claims. Even where pendent state claims are involved, however, considerations of economy and convenience generally favor the adjudication of pendent claims where there is no resulting unfairness to the litigants. Where pendent federal claims are involved, the extent of a district court's discretion to refuse to exercise pendent jurisdiction is more limited since most of the factors that might weigh against exercising jurisdiction over state claims do not apply. Specifically, state-federal comity is not a consideration; there is no need to defer to the state courts' expertise since federal courts have at least as much experience in deciding federal questions; and, although federal decisions on state issues are, in effect, only tentative, federal decisions of federal issues suffer from no similar defect. Thus there appears to be little reason in most cases to refuse, as a matter of discretion, to exercise pendent jurisdiction over a federal claim especially when doing so would avoid the need to reach a constitutional issue.

*Id.* at 400-01 n.12 (emphasis in original) (citations omitted). Although the court cited a number of factors commonly used as a basis for the exercise of pendent jurisdiction, it found that those factors that militate against a federal court's hearing state law claims are not present when the pendent claim is federal. However, it failed to recognize a fact that the concurring opinion took pains to emphasize: if a federal question is present, a claim based upon it is not a pendent claim at all, and any discussion of pendent jurisdiction is simply irrelevant. *Id.* at 402-03 (Rosenn, J., concurring). *Louise B.* is illustrative of the unusual interpretations that can result from a misunderstanding of the pendent jurisdiction theory.

145. *Id.* at 403-06.
148. 83 F.R.D. at 402-06.
149. *Id.* at 404.
efficient use of judicial resources, and whether the federal court should consider unsettled questions of state law.

a. Pendent Jurisdiction and the Abstention Doctrines

In Gibbs, the Court stated that the presence of unsettled questions of state law that arise in connection with a pendent claim may be a factor weighing strongly in favor of the dismissal of the claim. The reason for this approach is the same as that underlying the abstention doctrines, which is that principles of comity and federalism dictate that, as a rule, the state courts should have the right to adjudicate exclusively state law matters. Because the Gibbs factor of unsettled state law questions bears this similarity to the abstention doctrines, confusion may arise when courts decide to dismiss claims based on unsettled state law questions.

The abstention doctrines may be applied in several situations. In Pullman abstention, a federal court may decline to hear a case in which the constitutionality of a state law may be dispositive of the case. In Burford abstention, the court refrains from unnecessary interference with a state’s administration of its own affairs. This type of abstention is usually applied when the state has devised a comprehensive regulatory scheme to handle a particular matter. On occasion, federal courts also have been asked to abstain when no constitutional question or no extensive state regulatory system is present, but when the case may be resolved by a decision on an unsettled state law question. The courts generally have held that the mere presence of such a question is by itself an insufficient basis for abstention. Gibbs advises, however, that “[n]eedless decisions of state law should be avoided.” As a result, a court might find some justification for declining to exercise jurisdiction over a pendent state law claim, even in cases in which abstention might be inappropriate because of the lack of a constitutional question or a lack of pervasive state regulation.

In Roxse Homes, the court acknowledged the presence of a number of unsettled state law questions that arose in conjunction with the pendent

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150. Id. at 404-05.
151. Id. at 405-06.
152. See 383 U.S. at 727.
153. See generally C. Wright, supra note 17, § 52.
157. See Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943); C. Wright, supra note 17, § 52.
158. 383 U.S. at 726.
PENDENT JURISDICTION

Nevertheless, the court decided that the existence of an unsettled state law question was an unsufficient reason for declining to exercise jurisdiction over the pendent claim. This was especially true in light of the availability of a procedure by which the federal court could avoid deciding unsettled state questions by certifying them to the state court while maintaining jurisdiction over the main action. In a Minnesota Federal District Court decision with almost identical facts, however, the court reached the opposite conclusion. In *Minnesota Public Interest Research Group v. Adams* (MPIRG), as in *Roxse Homes*, the plaintiffs brought suit against the Secretary of Transportation and a group of state officials, alleging violations of the national Environmental Policy Act and two state environmental statutes. Rather than certifying the state law questions to the state supreme court, however, the district court simply declined to exercise pendent jurisdiction over those claims. The court stated that, although it had the power to hear the claims, it “concluded that its discretion is best exercised by declining to assume jurisdiction over the pendent state claims” on the ground that “principles of abstention, comity and primary jurisdiction have compelled the conclusion that the discretion vested in the Court under *Gibbs* should be employed to dismiss the pendent claims.” Because of the state’s “regulatory mechanism” for the issuance of highway construction permits, and its concern with its own environmental policies, principles of primary jurisdiction required the federal court to defer to the expertise of the state agencies.” Relying also on the theory of *Burford* abstention, the court decided that, because the pendent claim involved a “state policy in an area in which Minnesota has expressed a paramount concern . . . sound judicial administration requires this court to refrain from exercising jurisdiction over the state law claims.”

In its conclusion, the court stated that it had decided to dismiss the pendent claims in accordance with the discretionary power conferred by

159. 83 F.R.D. at 405-06.
160. See id. at 406.
161. See id.
163. Id. at 173.
164. The uniform Certification of Questions Law Act, MINN. STAT. § 480.061 (1980), provides that the highest state court may answer questions of state law certified to it by a federal court or by the highest appellate court or the intermediate appellate court of another state. Id. § 480.061(1).
165. See 482 F. Supp. at 182.
166. Id. at 180.
167. Id.
168. Id.
169. Id. at 182.
170. Id.
171. Id.
172. Id.
Gibbs. 173 Citing Moor v. County of Alameda, 174 a pendent party case, the court commented that the presence of an unsettled state law question could serve as a factor in a court’s decision to decline jurisdiction over a pendent claim. 175 The MPIRG court cited Housatonic River v. General Electric Co., 176 an abstention case, as authority for its statement that an unsettled state law issue should be determined by a state regulatory system created especially to handle such issues if state policies could be disrupted by a federal court’s consideration of those issues. 177

The problem with the MPIRG decision is that it confuses two different doctrines; it is not entirely clear whether the court actually based its decision not to exercise pendent jurisdiction on Burford abstention, as the above quotation implies, or upon the theoretically related statement in Gibbs that “[n]eedless 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.” 178

By failing to distinguish clearly between abstention and pendent jurisdiction theories, the MPIRG court may have created unnecessary confusion concerning the weight to be accorded to the presence of unsettled state law questions. A court that wished to decline jurisdiction over a pendent state law claim involving such issues arguably could do so simply by relying on the Gibbs guidelines; the presence of the “special” or “exceptional” circumstances normally required by the abstention doctrines 179 thus would be unnecessary.

On the other hand, one could argue that if the factors necessary for either Pullman or Burford abstention are not present, a court should have no discretion at all to dismiss a pendent claim merely because it involves unsettled state law issues. The Supreme Court’s statement in Meredith v. City of Winter Haven 180 that “the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction” 181 is in a sense difficult to reconcile with the Court’s later determination in Gibbs that the presence of an unsettled state law question is a factor to be given considerable weight in a decision to dismiss a pendent claim. 182 Gibbs does not say, however, that unsettled state law

173. Id.
175. 482 F. Supp. at 182.
177. 482 F. Supp. at 182.
178. 383 U.S. at 726.
179. See Baggett v. Bullitt, 377 U.S. 360, 387 (1964); Herald Co. v. McNeal, 553 F.2d 1125, 1128-29 (8th Cir. 1977); Augustin v. Mughal, 521 F.2d 1215, 1216-17 (8th Cir. 1975).
180. 320 U.S. 228 (1943).
181. Id. at 234.
182. See 383 U.S. at 726-27.
questions must always be dismissed; it is apparent that the Court intended a balancing of the basic needs for judicial economy, convenience, and fairness against the necessity of allowing state courts to make decisions concerning state law. Particularly in those cases in which a certification procedure is available, it may be difficult to justify the dismissal of a pendent claim for the sole reason that the underlying state law question has not been decided by a state court.

The MPIRG court may have reached a correct decision for the wrong reasons. If Burford abstention had been proper, discretion under Gibbs might be irrelevant; conversely, if the state law question had been one not previously addressed by the state court, but abstention nevertheless was inappropriate, perhaps Gibbs could not justify a refusal to exercise pendent jurisdiction unless factors favoring its exercise were found to be absent.

b. Inconsistent Results and Judicial Economy

The Roxse Homes case contained a thoughtful discussion of the question of whether separate state and federal trials are likely to produce inconsistent results. Although this issue was not specifically raised in Gibbs, an argument based on Pullman abstention also appeared in a case decided by the same court that decided MPIRG. In Mrs. A.J. v. Special School Dist. No. 1, 478 F. Supp. 418 (D. Minn. 1979), the court assumed pendent jurisdiction over the state law claim, stating that “[a]bstention is not proper where the resolution of the state law issues would not change the nature of the constitutional claim, or obviate the need to determine the constitutional claim.” 478 F. Supp. at 424 n.6. The court assumed pendent jurisdiction over the state law claim, commenting also that “the propriety of abstention is theoretically distinct from the well established federal policy of refraining from constitutional adjudication where a nonconstitutional pendent claim is dispositive of the case . . . .” 478 F. Supp. at 424-25 n.6.

183. See id.
184. The abstention issue has appeared in other pendent jurisdiction cases. In Yaretsky v. Blum, 456 F. Supp. 653 (S.D.N.Y. 1978), the plaintiffs, residents of certain health care facilities, brought an action to contest the state’s transfer procedures, alleging that these procedures violated their due process rights. Id. at 654. They also alleged that certain memoranda issued by the state health department were not rules according to state law. Id. at 655. The state contended that the court should abstain from hearing the latter claim according to the principles of Pullman abstention. Id. at 656. The court held Pullman to be inapplicable, however, because a resolution of the state law question would not eliminate the necessity of a federal constitutional decision, and because the state courts’ expertise was not necessary. Id. Having determined abstention to be inappropriate, the court, citing Gibbs, assumed pendent jurisdiction over the state claim. Id.

185. 83 F.R.D. at 404. The court noted:

The total procedural system, state and federal, provides opportunities to resolve conflicts, and it is at least a defensible proposition that outcomes legally recognized as conflicting should not occur if all parties exercise their procedural rights. Nevertheless, because of either the costs of review or the risks of unforeseen procedural shoals, conflicting outcomes are possible in practice. Moreover, outcomes that intricate analysis shows to be consistent may nonetheless create a disturbing appearance of conflict. An appearance of inconsistency may be created even when federal and state claims are adjudicated in one action, but ordi-
it is an aspect of the fairness consideration. The *Roxse Homes* court pointed out that inconsistent results are particularly likely to occur, for example, if statutes of limitations or other state and federal procedures differ from each other:

Though having generally common objectives, NEPA and MEPA, as well as the precedents applying them, create different requirements, both substantive and procedural. Outcomes determining that a given course of conduct satisfies the requirements of one of these statutes but not the other are more likely to give the appearance of inconsistent adjudications, rather than consistent adjudications based on different state and federal regulations, if the actions are tried in different courts than if they are tried together.\textsuperscript{187}

If jurisdiction over the state claims is denied, the plaintiff will be required to bring them in state court. To avoid the problems that holding two separate trials will be likely to create,\textsuperscript{188} the plaintiff might decide to bring the entire suit, rather than just the state claims, in state court.\textsuperscript{189} The result of this decision can lead to a relinquishing of the possibility of a definitive federal court ruling on a federal matter.\textsuperscript{190}

The problem of inconsistent results is closely related to the issue of judicial economy.\textsuperscript{191} Even if the results of state and federal trials were likely to be the same, judicial resources might be employed unnecessarily

\textsuperscript{186}See 383 U.S. at 725-27.

\textsuperscript{187}83 F.R.D. at 404.

\textsuperscript{188}In addition to the possibility of issue or claim preclusion, these problems include expense, delay, and contradictory holdings. See id. at 405.

\textsuperscript{189}A plaintiff would be precluded from bringing his entire suit in state court in a number of situations in which the federal courts have exclusive jurisdiction over the federal claim. Claims of this type include those arising under the Federal Tort Claims Act, the federal antitrust laws, and the patent and copyright laws. The fact that a plaintiff would be foreclosed from having such claims heard at all unless they were brought in federal court would require that plaintiff to litigate two separate actions if federal jurisdiction over the related state claims was declined. The Supreme Court in Aldinger v. Howard, 427 U.S. 1, 18 (1976), mentioned this problem as a factor favoring the exercise of pendent party jurisdiction. The argument can be applied with equal force to ordinary pendent jurisdiction. See McGowan v. Williams, 481 F. Supp. 681, 684-85 (N.D. Ill. 1979).

\textsuperscript{190}See Comment, supra note 54, at 1363. This situation can cause difficulties, particularly in civil rights cases brought under section 1983. These cases involve claims of unconstitutional actions by states, and state courts frequently have been accused of ineffectiveness in fashioning remedies when the state is the defendant. If, however, the action is divided between the state and federal court, instead of being brought entirely in state court, the plaintiff runs the risk of preclusion by the result of whichever action first reaches judgment. Id. at 1363-64; see notes 194-99 infra and accompanying text.

to adjudicate essentially the same matters. As the *Roxse Homes* court pointed out,

The interests of justice are best served by avoiding the commitment of resources to duplicative trials. Among the reasons are these: First, justice priced high may be beyond the means of both parties. Second, the potential burden of high cost may fall differently on the parties and coerce an "agreed" disposition that is at odds with declared entitlements. Third, in both state and federal court systems, overloaded dockets are a perennial problem; requiring duplicative trials wastes scarce resources that are sorely needed in the administration of justice.

The court noted that principles of res judicata and collateral estoppel might operate to prevent the relitigation of issues in many cases; nevertheless, the results of the application of these doctrines might be uncertain. Normally a party who loses the first lawsuit will be barred from relitigating the same issues in a second suit. This rule is subject to a number of exceptions, however, especially if the suit involves multiple parties. Furthermore, the rules of preclusion vary among the states and between the state and federal systems. Therefore res judicata and collateral estoppel may not always be relied upon to prevent either duplication of judicial efforts or inconsistent results. In cases in which it is apparent that these problems will arise, *Gibbs* provides a strong argument in favor of the exercise of pendent jurisdiction.

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193. 83 F.R.D. at 405.

194. Res judicata is the principle according to which a valid final judgment on the merits bars any subsequent actions between the same parties based on the same claims. 1B J. MOORE, FEDERAL PRACTICE ¶ 0.405[1], at 621 (2d ed. 1974). Collateral estoppel bars relitigation of the same issues by the same parties, whether or not the cause of action in a later suit is the same as that in the first. See RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977).

195. 83 F.R.D. at 405.


198. For example, the Minnesota Supreme Court has formulated a rule according to which the determination in the first suit of a party's nonnegligence may be used against a person not a party to the first suit in a subsequent attempt by the latter to obtain contribution. Hart v. Cessna Aircraft Co., 276 N.W.2d 166 (Minn. 1979). This rule, so far, is unique to Minnesota; if an action involving similar facts were to be split between a Minnesota court and a federal court, the confusion already generated by *Hart* would probably increase.

199. The Supreme Court has stated that the district courts have broad discretion in applying collateral estoppel principles. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 (1979).
c. Dismissal of the Federal Claim Prior to Trial

Occasionally the federal claim to which a state claim is made pendent will be dismissed before trial, raising the issue of whether the state claim also should be dismissed. Gibbs states that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."200 Some courts have taken this statement to mean that the state claim must be dismissed if the federal claim is dismissed prior to trial.201 Others have concluded that it is simply a guide to the exercise of discretion.202 It is clear that jurisdictional power over pendent claims must be present before the court has any discretion to exercise;203 no such power exists unless the federal claim is substantial.204 Therefore a state claim that is pendent to an insubstantial federal claim must be dismissed along with the federal claim because the court never had any power to decide it.205 Gibbs says that state claims "should" be dismissed even if the federal claims that are dismissed before trial are "not insubstantial in a jurisdictional sense."206 This statement sounds mandatory, yet a court that has acquired power over pendent state claims by virtue of the substantiality of the federal questions raised hardly can be said to have lost that power because of the dismissal of the federal claim.207 The Supreme Court has held that a federal court retained its power over pendent issues after the dismissal of a federal question for mootness.208 If jurisdictional power exists, under Gibbs the court has the discretion to hear the pendent claim,209 although the Gibbs court definitely discouraged the exercise of pendent jurisdiction if the federal claims already have been dismissed.210 Other factors, how-

200. 383 U.S. at 726.
205. See, e.g., Crane Co. v. American Standard, Inc., 603 F.2d 244, 254 (2d Cir. 1979); Ancarrow v. City of Richmond, 600 F.2d 443, 448 (4th Cir. 1979), cert. denied, 444 U.S. 992 (1979); Doe v. Klein, 599 F.2d 338, 341 (9th Cir. 1979); Neiger v. Sheet Metal Workers Int'l Ass'n, 470 F. Supp. 622, 630 (W.D. Mo. 1979).
206. 383 U.S. at 726.
207. An argument could be made, however, that the federal court's power over the pendent claim is so tied to its power over the federal anchor claim that if the federal claim is no longer before the court, the court has no continuing power over the additional, nonfederal claim.
209. 383 U.S. at 726-27; see text accompanying notes 54-55 supra.
ever, could weigh against the dismissal of the pendent claim.211

The Court of Appeals for the Eighth Circuit recently has stated that this matter is purely discretionary. In Koke v. Stifel, Nicolaus & Co.,212 the plaintiff’s federal securities claim, which the court acknowledged to be substantial,213 was dismissed because the two-year statute of limitations had run.214 A pendent claim based on common-law fraud also was dismissed, but the court noted that “the dismissal of the federal securities claim before trial, standing alone, did not compel dismissal of the state fraud claim.”215 If the federal claim is substantial, giving rise to jurisdictional power, the retention of jurisdiction over the state claim is more than likely discretionary.216 Such claims will be dismissed, however, unless some unusual circumstances are present.217

To find unusual circumstances, courts probably would require a showing that the plaintiff would suffer undue hardship if the pendent claims were dismissed. In Koke, the court suggested that important factors would include the difficulty of the state law claim, the burden on judicial resources, the amount of judicial time and effort already expended on the claim, and the availability of a state forum.218 Because the plaintiff in Koke was not foreclosed from bringing her claim in state court, and in fact had already filed a state claim, the court, influenced by considerations of comity,219 determined that the dismissal would cause the plaintiff no unnecessary injury.220 Normally the dismissal of the pendent claim under such circumstances will be without prejudice, and the plaintiff whose federal claim has already failed may bring the dismissed state action in state court.

B. Pendent Party Jurisdiction

Courts often apply the same discretionary considerations in pendent party cases as those used in pendent jurisdiction cases.221 Nevertheless, some courts have sought to circumvent the Supreme Court’s recent limi-

211. See Kuhn v. National Ass'n of Letter Carriers, 528 F.2d 767, 771 n.6 (8th Cir. 1976).
212. 620 F.2d 1340 (8th Cir. 1980).
213. Id. at 1346.
214. Id.
215. Id.
216. See id.
218. 620 F.2d at 1346 (citing Kuhn v. National Ass'n of Letter Carriers, 528 F.2d 767 (8th Cir. 1976)).
219. Id. at 1346-47.
220. See id. at 1347.
tations on jurisdictional power over pendent parties by employing extremely broad discretion. 222 Other courts, while acknowledging the presence of jurisdictional power over pendent parties, nevertheless have dismissed claims against them. 223 A decision to dismiss some claims frequently is based upon consideration of the Gibbs factors, 224 but courts also have used other justifications. This section will examine the discretionary factors applied in pendent party cases after Owen and Aldinger in an attempt to determine whether, and to what extent, those decisions have affected the discretionary exercise of pendent party jurisdiction.

1. Exclusive Federal Jurisdiction over the Anchor Claim

In many cases, the federal district courts have exclusive subject matter jurisdiction over the federal anchor claim. 225 Under these circumstances, a stronger argument can be made in favor of the exercise of jurisdiction over pendent parties than could be advanced in cases in which the plaintiff could obtain a remedy in a state court. 226 The Aldinger Court stated in dictum that "when the grant of jurisdiction to a federal court is exclusive... the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal court may all of the claims be tried together." 227 This statement has served as the basis for a number of district courts' decisions to exercise pendent party jurisdiction. 228

a. Cases Brought Under the Federal Tort Claims Act

The Aldinger Court cited Federal Tort Claims Act cases as an example of those that might involve the appropriate use of pendent party jurisdiction. 229 Under this statute, all tort claims against the United States must be brought in federal court. 230 A plaintiff who brings such an action and who wishes to join an additional party over whom no independent federal jurisdiction exists and, in addition, seeks to assert a nonfederal claim against that party must rely upon the doctrine of pendent party jurisdiction to do so. 231 Because tort claims often involve multiple parties, the

224. See 383 U.S. at 726-27.
225. See notes 229-307 infra and accompanying text.
227. Id. (emphasis in original).
231. See notes 64-76 supra and accompanying text.
issues of pendent jurisdiction and pendent party jurisdiction appear frequently in Federal Tort Claims Act cases. In those circuits that recognize pendent party jurisdiction, the trend appears to be that the district courts will exercise their discretion in favor of adjudicating state law claims asserted against nonfederal parties.

The *Aldinger* Court apparently intended the existence of exclusive jurisdiction under the Federal Tort Claims Act to be a discretionary factor that the district courts should consider in deciding whether to exercise pendent party jurisdiction. It has been so applied in many of the cases that have been decided since *Aldinger*. In a few cases, however, it has been used as a means of establishing jurisdictional power over pendent parties.

In *Maltas v. United States*, the plaintiff brought a negligence action against the United States under the Federal Tort Claims Act, individually and as executrix of the estate of her husband, who was killed while working on a construction project on government property. In addition, the plaintiff sought damages against seven corporate defendants based on breach of warranty and strict products liability. The United States cross-claimed against some of the corporate defendants and impleaded the decedent’s employer. Its claims were premised upon contractual indemnification provisions and principles of contribution and indemnity. One of the corporate defendants then requested dismissal of the nonfederal claims for lack of subject matter jurisdiction, raising the issue of whether pendent party jurisdiction was appropriate.

The court held that it had the power to hear the pendent party claims brought in conjunction with a Federal Tort Claims Act case. Its decision was based upon several considerations. First, the federal courts have

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232. At this time, only the Ninth Circuit has refused to accept the doctrine of pendent party jurisdiction, and has consistently held that no constitutional power exists with respect to pendent parties. See *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), *cert. dismissed*, 435 U.S. 982 (1978); *Aldinger v. Howard*, 513 F.2d 1257 (9th Cir. 1975), *aff’d*, 427 U.S. 1 (1976); *Moore v. Madigan*, 458 F.2d 1217 (9th Cir. 1972), *aff’d sub nom.* *Moor v. County of Alameda*, 411 U.S. 693, *rehearing denied*, 412 U.S. 963 (1973); *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969); *Williams v. United States*, 402 F.2d 951 (9th Cir. 1969). In *Ayala*, the court stated that it was “not bound by new dictum in *Aldinger*” and declined to acknowledge the theory until such time as the Supreme Court had made a more definite statement on the issue. 550 F.2d at 1200.

233. See notes 237-95 *infra* and accompanying text.

234. See notes 99-100 *supra* and accompanying text.

235. See notes 237-307 *infra* and accompanying text.

236. See id.


238. Id. at 543-44.

239. Id. at 544.

240. Id.

241. Id. at 542.

242. Id. at 544.
exclusive subject matter jurisdiction over actions brought under the Act. Furthermore, the Act provides the courts with the power to hear "any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff." According to the court, this language demonstrated Congress' intent that the extent of the United States' tort liability be determined in a single action. Second, the factual situation in Maltais was found to have satisfied the Gibbs constitutional requirement of claims arising out of a common nucleus of operative fact. Third, the court pointed out that "under the Federal Tort Claims Act pendent-party jurisdiction would not necessarily bring parties before a federal court that would not otherwise be subject to federal jurisdiction." The court's analysis, although initially convincing, is flawed in several respects. If the nonfederal parties were properly before the court on the basis of ancillary jurisdiction, they would not be true pendent parties; the

243. Id. at 547. The Maltais court, having found jurisdictional power over the additional defendants, went on to address the discretionary matters:

Some of the myriad factors which a federal court should take into account when called upon to exercise pendent jurisdiction over additional claims or parties include considerations of judicial economy, convenience, and fairness to litigants, the character of the federal and nonfederal claims presented, the law to be applied, and the possibility of jury confusion. Thus, if the federal claim supporting a pendent claim is insubstantial, a court may refuse to exercise jurisdiction over the nonfederal claim.

Id. at 549. The court indicated that a court may decline jurisdiction over a nonfederal claim, but substantiality of the federal claim is clearly a prerequisite to a finding of jurisdictional power. In Gibbs, the Supreme Court stated that such power exists if, "assuming substantiality of the federal issues," the plaintiff would be expected to try all claims in the same proceeding. 383 U.S. at 725. In Maltais, however, substantiality apparently was considered to be a discretionary factor.

244. 439 F. Supp. at 547.

245. Id.

246. Id. The court also noted that both the federal and state claims arose from a common nucleus of operative fact, but it did not point out that this is the threshold constitutional requirement for a finding of jurisdictional power. Id. at 547-48; see Aldinger v. Howard, 427 U.S. 1, 13-14 (1976); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

247. 439 F. Supp. at 548. The court also noted that under the Federal Tort Claims Act, the United States could implead a third party on a claim for contribution or indemnity, and that if some of the corporate defendants had not been named in the plaintiff's complaint, the United States probably would have impleaded those corporations. Id. Because the United States opposed the demand of one of the defendants for dismissal of the pendent claims, it was apparent that the United States was attempting to protect its cross-claims against the corporate defendants. Id. The court stated that "the ultimate monetary liability of the United States cannot be determined with finality in a single lawsuit unless all the parties to this action are properly brought before this Court." Id. The court also commented that "it would be permissible for plaintiff to amend her complaint against all seven corporate defendants if the United States had brought them into this action by third-party complaint." Id. This was the situation that the Supreme Court later found impermissible in the context of diversity jurisdiction in Owen Equip. and Erection Co. v. Kroger, 437 U.S. 365 (1978). See notes 101-30 supra and accompanying text.
theory of pendent party jurisdiction need not be raised at all if the parti-
ses are otherwise subject to federal jurisdiction. Furthermore, in apply-
ning the pendent party theory, the court seems to have used an apparently
discretionary factor, the lack of an alternative forum, as a basis for a find-
ing of jurisdictional power. As stated above, the court relied on the exclu-
sive federal jurisdiction conferred by the Act as one of the bases for jurisdic-
tional power over the "pendent" parties. The inclusion within this grant of jurisdiction of the power to hear all tort claims by or against the United States was held to constitute evidence of Congress' intent that the United States' liability under the Act be decided in one lawsuit.

However, dictum in Aldinger, which the Maltais court cited in support of its statutory power argument, indicates that the lack of an alter-
native forum was instead intended to be a discretionary factor that courts should consider in determining whether jurisdiction should be exercised, once both statutory and constitutional power are established. The Ald-
ing Court stated that "the argument of judicial economy and conven-
ience can be coupled with the additional argument that only in a federal
court may all of the claims be tried together." Judicial economy and convenience are two of the discretionary considerations set forth in Gibb.

It would appear, then, that by discussing that alternative fo-
rum factor along with the well-established Gibbs considerations, the Court demonstrated its intent that this factor also be used as a discretion-
ary consideration.

Courts that have considered pendent party claims brought in conjunc-
tion with actions under the Federal Tort Claims Act frequently have con-
cluded, as did the Maltais court, that jurisdiction both could and should be exercised over such claims. These courts' analyses of the

248. 439 F. Supp. at 549.
249. Id. at 547.
250. Id.
251. 427 U.S. at 18.
252. 383 U.S. at 726.
253. See, e.g., Ortiz v. United States, 595 F.2d 65 (1st Cir. 1979); Dick Meyers Towing
er., Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978) (per curiam), cert. denied, 440

In Kack v. United States, 570 F.2d 754 (8th Cir. 1978), in which the plaintiff at-
ttempted to assert state law claims against an additional party in an action brought under the Federal Tort Claims Act, the court cited C. Wright, Handbook of the Law of Federal Courts § 19 (2d ed. 1970) in support of its conclusion that pendent jurisdiction may be used only with respect to claims rather than parties. 570 F.2d at 757. In a later district court case brought under the Act, Ausland v. United States, 488 F. Supp. 426 (N.D.S.D. 1980), the court sought to avoid the Eighth Circuit's precedent in Kack, first by pointing out that in a later edition of the treatise upon which the Kack court relied, the author acknowledged the increasing use of pendent party jurisdiction, see C. Wright, Handbook of the Law of Federal Courts § 19 (3d ed. 1976), and second, by noting that the Eighth Circuit had, in fact, approved the use of pendent party jurisdiction in two
bases of power and discretion, however, tend to be more closely aligned with Gibbs than with Aldinger, and developed a liberal approach to the problem despite Aldinger. Several recent cases demonstrate this tendency.

In Pearce v. United States,254 the court held that it had jurisdictional power over the claims asserted against pendent parties, which were raised in conjunction with claims brought against the United States under the Federal Tort Claims Act. The court based its conclusion in part on a Tenth Circuit decision, Transok Pipeline Co. v. Dark,255 in which, as in Maltais, the fact that only in federal court could all of the claims be tried at once256 was used as a basis for statutory jurisdictional power.

earlier cases, Schulman v. Huck Finn, Inc., 472 F.2d 864 (8th Cir. 1973), and Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969). Both of these cases were decided before Owen and Aldinger. The Ausland court had no difficulty avoiding the Aldinger jurisdictional limitations, however, commenting only that "the Court in Aldinger v. Howard... refused to exercise jurisdiction because of statutory provisions not applicable here." 488 F. Supp. at 429. Relying on Hatridge and Schulman, the court decided that pendent party jurisdiction both could and should be exercised, stating:

The analysis in Hatridge and Schulman convinces this court that it has discretion to assert jurisdiction over all the claims in this lawsuit, and that the footnote in Kack should not be read as mandating an opposite conclusion.

The next question to be determined is whether this discretion should be exercised. The court concludes that it should. This conclusion is based primarily on considerations of judicial economy and convenience of the parties. As noted by the Supreme Court in Aldinger, . . . the case can be tried only in a federal court if it is to be tried together rather than in separate actions. Id. at 430 (emphasis in original). The Ausland court, while more or less ignoring Aldinger's jurisdictional tests, correctly determined that the Aldinger dictum regarding the exercise of jurisdiction in Federal Tort Claims Act cases was a discretionary factor related to the considerations of judicial economy and fairness.

254. 450 F. Supp. 613 (D. Kan. 1978). The plaintiff, a citizen of Kansas, was injured in a car accident, and was admitted to a hospital in Shawnee Mission, Kansas, where he remained for several hours without treatment. He was then transferred to a veterans' hospital in Kansas City, Missouri, where he allegedly remained for over 15 hours without treatment. The plaintiff claimed damages for both hospitals' negligence in failing to treat him, which allegedly resulted in the aggravation of his injuries. Id. at 614. The action against the veterans' hospital, which was operated by the Veterans Administration, was brought under the Federal Tort Claims Act. The private hospital brought a motion to dismiss the negligence claim against it for lack of subject matter jurisdiction. Id.

255. 565 F.2d 1150 (10th Cir. 1977). A pipeline company brought an action to condemn an easement for the underground storage of natural gas under an Oklahoma statute. A federal statute authorized the condemnation of property allotted in severalty to Indians in the same manner as lands owned in fee. Two of the defendant land owners were not Indians, but were cotenants with restricted Indians. Id. at 1151. The non-Indian defendants contended that the federal court had no jurisdiction over them because the statute referred only to the condemnation of land allotted to Indians. Id. at 1154.

256. Id. at 1155. Before discussing discretionary considerations, the court sought to justify the finding of jurisdictional power over the non-Indian defendants, citing the Aldinger dictum:

The federal claims must, however, be substantial. In our case the claims quite clearly arise out of the same factual nucleus and normally a condemnor would seek to have all interests in the property adjudicated in one action. Fur-
The *Pearce* court, however, found some of its implied statutory power in the provision of the Act that states that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." This provision, the court said, may be read as encouraging the joinder of pendent parties. Having found jurisdictional power, the court went on to consider certain discretionary matters. In doing so, it attempted to distinguish *Aldinger* in several respects. The first distinction was based upon the fact that all of the claims in *Pearce* could be litigated only in federal court. Additionally, the state and federal claims asserted in *Pearce* were based upon the same theories, since the United States' liability under the Federal Tort Claims Act is determined according to state law. The court noted, perhaps inaccurately, that "[w]ithout doubt a significant factor under-
lying the result in Aldinger is that different standards of proof were required to sustain the plaintiff's state and federal claims."265 Furthermore, the defendants in Pearce were alleged to be joint tortfeasors, a fact that under some circumstances could result in a loss of the defendants' contribution rights if the claims were tried separately.266 The Pearce court relied on the following language:

The case of a joint tort-feasor made a defendant in a case under the Federal Tort Claims Act is peculiarly appropriate for the application of the principle of 'the conservation of judicial energy and the avoidance of multiplicity of litigation' because the 'plaintiff's claims are such that he would ordinarily be expected to try them all in one proceeding.'267

This language obviously is derived from Gibbs.268 Once again, however, the concepts of jurisdictional power and judicial discretion seem to have become confused. According to Gibbs, jurisdictional power exists if the claims arise from a common nucleus of operative fact such that the plaintiff would be expected to try them all in the same proceeding269—meaning that the court has the power to hear the whole "case."270 The

not seem to be the focus of the Aldinger Court's discussion. First, if the county had not been dismissed from the action, its liability would have been determined under state law, while that of the other defendants would have been considered with respect to section 1983. If a party is sued on the independent basis of diversity of citizenship, the standards of proof would also be different from that required in section 1983 cases. As long as the court has jurisdiction over all parties, the presence of different theories of law in the same action does not necessarily require the dismissal of parties or claims, although the possibility of jury confusion is one of the factors cited in Gibbs as weighing in favor of dismissal. 383 U.S. at 727. Clearly the result in Aldinger, however, was based upon the Court's interpretation of Congress' intent that municipalities were to be immune from liability under section 1983, and that therefore a plaintiff should not be permitted to assert common-law pendant claims against them in federal court. See 427 U.S. at 17. The real basis for the Court's decision is that "the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." 427 U.S. at 15.

265. 450 F. Supp. at 620.
266. Id. at 620-21 (quoting Hipp v. United States, 313 F. Supp. 1152, 1155 (E.D.N.Y. 1970)).
267. Id. at 620 (quoting Hipp v. United States, 313 F. Supp. 1152, 1155 (E.D.N.Y. 1970)).
268. See 383 U.S. at 725; notes 46-50 supra and accompanying text.
269. 383 U.S. at 725.
270. See Baker, Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction, 33 U. Pitt. L. Rev. 759, 764-65 (1972). According to Professor Baker, the meaning given the word "case" by the Gibbs Court may be ascertained by the grammatical construction of the court's test for jurisdictional power, which is as follows:

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.

383 U.S. at 725 (emphasis added in part). Professor Baker states that the first of the three
conclusion that may be inferred from the above statement in *Pearce*, however, is that the discretionary factor of judicial economy always will be significant whenever jurisdictional power, based on the presence of common claims that the plaintiff would be expected to try together, is found to exist. Following this logic, once such power is determined to be present, a court would be almost compelled to exercise its power over pendent claims or parties, at least if no countervailing factors were present, because of the significance given the consideration of judicial economy in *Gibbs* and subsequent cases.

b. Other Statutes Conferring Exclusive Federal Jurisdiction

The *Aldinger* dictum has provided courts with authority for upholding pendent party jurisdiction, not only in actions brought under the Federal Tort Claims Act, but in those arising under other federal statutes granting exclusive jurisdiction to the federal courts. In *Morse Electro Products Corp. v. S.S. Great Peace*,271 a case arising under federal admiralty jurisdiction,272 the court found that the exercise of pendent party jurisdiction was not only possible but appropriate.273 As in *Maltais*, the basis for the court's finding that the jurisdictional requirements of *Aldinger* had been satisfied appeared to be that admiralty jurisdiction is exclusively federal:

requirements is applicable in all situations, but that the latter two are alternative requirements. In other words, as long as the federal claim is substantial, jurisdictional power exists over pendent claims in cases in which *either* the state and federal claims derive from a common nucleus of operative fact, or in cases in which the plaintiff would be expected to try all claims in the same lawsuit. *Baker, supra*, at 764-65. The third requirement is the one that clearly establishes the relationship between pendent jurisdiction and the liberal joinder provisions of the Federal Rules of Civil Procedure. Professor Baker notes that the *Gibbs* Court's intent in this regard is obvious from the footnote to the third requirement, which states in part that

[w]hile it is commonplace that the Federal Rules of Civil Procedure do not expand the jurisdiction of the federal courts, they do embody "the whole tendency of our decisions . . . to require a plaintiff to try his . . . whole case at one time," . . . and to that extent emphasize the basis of pendent jurisdiction. 383 U.S. at 725 n.13 (citation omitted). *Gibbs* states, essentially, that a federal court has the power to try an entire "‘case’—a ‘case’ within the ordinary expectations of litigants as measured by the Federal Rules of Civil Procedure”—whenever a substantial claim is present. *Baker, supra*, at 765.

271. 437 F. Supp. 474 (D.N.J. 1977). The plaintiff was the consignee of a large number of tape recorders shipped from Japan aboard the S.S. Great Peace. The plaintiff failed to receive most of the goods due to a misdelivery to an unknown thief, and brought an action for damages against the carrier under the federal court's admiralty jurisdiction. In addition, the plaintiff sought to join as pendent parties a terminal operator, a customs broker, and two trucking companies. A number of cross-claims were also filed among the defendants. *Id.* at 478-81.


273. 437 F. Supp. at 485. The court implicitly acknowledged the hybrid nature of pendent party jurisdiction by referring to the nonfederal claims as involving pendent jurisdiction and to the claims against nonfederal parties as involving ancillary jurisdiction. *Id.* at 484-85.
This Court is convinced that the prohibition set forth in *Aldinger* should not and would not be extended to admiralty cases of misdelivery. The primary claim arising out of the bill of lading is within exclusive federal admiralty jurisdiction. Clearly, only in a federal court could all of the claims be tried together. There is no indication whatever that Congress implicitly or explicitly has determined that the parties sought to be joined in this action should not be joined. The *Aldinger* requirements for the exercise of ancillary jurisdiction having been met, the Court is free to exercise ancillary as well as pendent jurisdiction in this case.

The Court will exercise its discretion to permit both the pendent and ancillary claims, it being in the interests of judicial economy and fairness, and in order to resolve all matters arising out of the same constitutional case for purposes of Article III.274

Because the basis of the *Owen* and *Aldinger* decisions apparently was a perceived need to limit the jurisdiction of the federal courts, the Supreme Court addressed only the issue of jurisdictional power over nonfederal parties.275 Consequently, some lower courts apparently have treated the *Aldinger* dictum as a loophole that automatically permits a finding of Congressional approval of, or at least a lack of objection to, the use of pendent party jurisdiction in cases in which the federal claim may be heard only in a federal court. A finding of both constitutional power and statutory power, in the sense that no congressional disapproval may be inferred, is necessary before the court’s discretion may be exercised.276 By viewing the *Aldinger* dictum as a basis for statutory power over pendent parties rather than a discretionary factor related to the *Gibbs* considerations of judicial economy and convenience, a court may easily overcome both jurisdictional hurdles and then employ the *Gibbs* factors as it deems appropriate—often in favor of the exercise of pendent party jurisdiction.

A rather extreme and unusual example of a district court’s broad approach to pendent party jurisdiction may be found in *Wood v. Standard Products Co.*277 A fisherman employed by defendant Standard Products Co. incurred a fish slime infection in his hand, and received treatment from a Dr. Beatley, who was employed under a contract with the United States Public Health Service.278 The plaintiff’s condition did not improve, and ultimately his hand and part of his forearm were amputated.279 He sought damages from the United States as the employer of Dr. Beatley under the Federal Tort Claims Act280 and from the ship-

274. 437 F. Supp. at 485.
275. See notes 77-130 supra and accompanying text.
278. *Id.* at 1099.
279. *Id.*
owner under the Jones Act and general maritime tort law. In addition, he brought a pendent claim for medical malpractice against Dr. Beatley individually.

The court stated that pendent party jurisdiction could be used to join Dr. Beatley in the action only if the claim against him could be considered pendent to one of the three federal claims. It found that the claim could not be made pendent to the Jones Act claim on the ground that prior case law limited such actions to those against the shipowner or the ship, even though no such limitations were imposed by the language of the Jones Act itself. The allegation under general maritime law was that the ship was unseaworthy because the plaintiff had not been provided with proper gloves. The statute that confers maritime jurisdiction is worded broadly, giving the federal courts original jurisdiction over any "civil case of admiralty or maritime jurisdiction." The court noted, further, that pleadings in admiralty traditionally had been liberally interpreted. On these grounds, the court held that a claim brought under the general maritime statute could serve as the anchor claim for a state tort action against an additional party. The court acknowledged that the maritime claim was based on an allegation of unseaworthiness, while the state tort claim against Dr. Beatley was grounded upon medical malpractice, and that "the facts relating to liability are thus disparate." Nevertheless, it found the exercise of pendent party jurisdiction to be appropriate on the following grounds:

The facts relating to damages . . . are identical. Only because of the malpractice did the initial infection, caused by the absence of gloves, result in harm to plaintiff for which he here seeks compensation. Thus judicial economy and efficiency are served by the exercise of pendant party jurisdiction here.

The court found that the claim against Dr. Beatley could be made

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283. 456 F. Supp. at 1099.
284. Id. at 1100.
285. Id. The court stated that "[t]his limitation . . . is at least as explicit as the supposed congressional limitation in 42 U.S.C. § 1983 claims against counties recognized in Aldinger yet abandoned two (2) years later in Monell v. Dept. of Social Services of City of New York." Id. (citation omitted).
286. Id.
287. 28 U.S.C. § 1333 (1976) provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled." Id.
288. 456 F. Supp. at 1103 (citing Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971)).
289. Id.
290. Id.
291. Id.
pendent to the Federal Tort Claims Act as well, basing its decision on the Aldinger dictum, the language of the Act, and prior decisions favoring the exercise of jurisdiction in Federal Tort Claims Act cases.

Having determined that jurisdiction over the malpractice claim against Dr. Beatley was possible, the court went on to decide that the exercise of its jurisdiction was appropriate. The court's reasoning, however, appears to have been based on a thoroughly confused reading of Gibbs. The court seemed to say that because all claims in the case supposedly arose from a common nucleus of operative fact, its discretion should be exercised in favor of assuming jurisdiction over the claim against the pendent party. Gibbs, however, states quite explicitly that the presence of state and federal claims deriving from a common nucleus of operative fact is the test for constitutional power.

The court was justified in finding the Federal Tort Claims Act to have been an appropriate anchor for the malpractice claim against Dr. Beatley, since Dr. Beatley was said to have been the United States' agent, and both the claim against the United States and that asserted against the doctor were based on the doctor's alleged malpractice. With respect to the maritime claim upon the ship's alleged unseaworthiness, however, the court addressed the Aldinger issue of statutory power without first considering whether constitutional power, as defined in Gibbs, was present. The court noted that "only by allowing pendant party jurisdiction can all claims arising out of Dr. Beatley's alleged negligence in the treatment of the plaintiff be tried in one forum."

The maritime claim based on the ship's unseaworthiness, however, did not arise out of the doctor's negligence, which occurred well after the plaintiff's initial injury. In its discussion of discretion, the court stated that "whether Dr. Beatley was negligent is the operative factor in the Federal Tort Claims Act claim and it is central to the general maritime and Jones Act claims." The court clearly considered the unseaworthiness claim and the malpractice claim to have arisen from a common nucleus of operative fact, yet it did not discuss this threshold issue, which is essential to a finding of constitutional power, in conjunction with its

292. Id. at 1104.
294. 456 F. Supp. at 1104. The language upon which the court relied was the provision stating that "[t]he United States shall be liable . . . to the same extent as a private individual under the circumstances." 28 U.S.C. § 2674 (1976).
295. 456 F. Supp. at 1104.
296. Id.
297. See id. at 1103.
298. 383 U.S. at 725.
299. See id.; notes 46-49 supra and accompanying text.
300. 456 F. Supp. at 1103.
301. Id. at 1104.
jurisdictional power finding. To say that those two claims arose from a common nucleus of operative fact is, in any event, to give that term an extraordinarily generous interpretation. 303 Even granting that the statute conferring general maritime jurisdiction upon the federal courts might not impliedly preclude jurisdiction over state claims against additional parties, the Wood court, by assuming the existence of jurisdictional power, appears to have made a leap of faith that is difficult to justify after a careful reading of Gibbs and Aldinger.

In cases in which federal jurisdiction is exclusive, it is apparent that the district courts will not often hesitate to exercise pendent party jurisdiction. 304 The wide range of justifications presented indicates a need for

303. A common nucleus of operative fact has been found to exist in many cases in which the connection between the anchor claim and the pendent claim has been somewhat tenuous. See 13 Wright & Miller, supra note 1, § 3567, at 445 & n.28. In cases in which the claims are found to be completely independent, however, the court has no power to hear the pendent claim. *Id.* at 446-47 & n.29.

Merely because both the state and federal claims arose from the same event does not necessarily mean that they derive from a common nucleus of operative fact. If the claims involve different theories of recovery and elements of proof, the relationship between the claims may well be insufficient to confer jurisdictional power over the state law claim. *See* Wilder v. Irvin, 423 F. Supp. 639, 642-43 (N.D. Ga. 1976). In *Wilder,* a farmer was ejected without a hearing from a state-run farmer's market for violating certain rules. He nevertheless returned to the market to sell produce and was arrested on charges of criminal trespass. He brought an action in federal court under 42 U.S.C. §§ 1983, 1985 (1976), alleging that his civil rights had been violated as a result of his having been evicted from the market without a hearing. In addition, he alleged causes of action under two Georgia statutes for malicious prosecution and false imprisonment arising from his arrest for trespass. The court held that it had no jurisdiction over the pendent state claims because they did not share a common nucleus of operative fact with the federal civil rights claims:

*A trial on the state claim would inject new issues and a large amount of facts unrelated to the other portion of the case involving the federal claim. The state claim will certainly not be proven by the evidence that will be offered on behalf of the federal claim. The subject matter of the state and federal claims are not closely enough related and the Court finds that a "common nucleus of operative facts" does not exist. Id.* at 643. The same could be said with respect to the maritime and malpractice claims asserted in *Wood.* The elements of proof and theories of recovery involved in the unseaworthiness claim obviously were different from and unrelated to those of the medical malpractice claim, even though both arose as a result of the plaintiff's having incurred a fish slime infection.

304. Occasionally, however, a court will decline to exercise its jurisdiction even though it finds that both constitutional and statutory power may be present. Crabtree Invs., Inc. v. Aztec Enterprises, Inc., 483 F. Supp. 211 (M.D. La. 1980), involved an action brought under the Securities and Exchange Act and rule 10b-5, over which the federal courts have exclusive jurisdiction. 15 U.S.C. § 78aa (1976). Nevertheless, the court declined to exercise jurisdiction over a state law claim brought by (rather than against) a party over whom the court had no independent jurisdiction. 483 F. Supp. at 218. The court found:

Most likely, Congress did not intend to *deny* or to *allow* parties with state law claims closely related to a 10b-5 action to assert them in federal court which has exclusive jurisdiction over 10b-5 claims. While Congress did not expressly or impliedly deny pendent or pendent party jurisdiction in 10b-5 cases, this is not...
clear standards, however.305 In many of these cases, the *Aldinger* dictum is used as a basis for establishing statutory jurisdictional power, even though it is more logical to view it as a *Gibbs*-type discretionary factor.306 This is because no express finding of congressional approval is necessary for statutory power to exist. Under *Aldinger* and *Owen*, the federal courts lack statutory power only when Congress has indicated that jurisdiction over nonfederal parties would be inappropriate. Consequently the courts are free to exercise their discretion at the point at which a determination is made that Congress has not in some manner limited their jurisdiction. Moreover, despite the apparently stringent power requirement of *Aldinger*, the courts, as a practical matter, may have considerable leeway in determining whether statutory power is present.307 In those cases in

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essential to this decision because after considering the discretionary factors listed above, the exercise of pendent party jurisdiction would be inappropriate. *Id.* at 218 (emphasis in original). The court took into consideration six factors: judicial economy, fairness to the litigants, convenience to the parties and witnesses, whether the federal courts had exclusive jurisdiction over the federal claim, whether unsettled questions of state law were present, and whether the combination of claims would unduly complicate the case for the jury. *Id.* at 217. The court considered the most important factor under the circumstances of this case to be the fact that the party seeking to be joined had already filed several actions in state court, one of which already had been brought to judgment. Considerations of judicial economy, convenience, and fairness thus dictated that the pendent party claims be dismissed. *Id.* at 218.

305. Some courts have accurately applied the *Aldinger* and *Gibbs* standards and nevertheless have been able to justify the exercise of pendent party jurisdiction without confusing the concepts of power and discretion. For example, in Southeastern Lumber Mfrs. Ass'n, Inc. v. Walthour Agency, Inc., 486 F. Supp. 781 (N.D. Ga. 1980), in which the trustees of an employee benefit plan brought an action against certain other fiduciaries under ERISA and attempted to assert a state law claim against an accounting firm for accounting malpractice, the court correctly analyzed the requirements of both *Gibbs* and *Aldinger*. First, it found that it had constitutional power over the entire case because all claims arose from a common nucleus of operative fact such that the plaintiff would be expected to try them together. *Id.* at 783-84. Second, it determined that the statute conferring federal jurisdiction over ERISA claims, 29 U.S.C. § 1132 (1976), did "not contemplate that the parties sought to be made pendent should be excluded." 486 F. Supp. at 784 (emphasis in original). Because jurisdiction over most types of ERISA cases is exclusively federal, and because it is granted "without respect to the amount in controversy or the citizenship of the parties," 29 U.S.C. § 1132(f) (1976), the court interpreted the statute "as indicating the intent of Congress that federal courts develop the law surrounding ERISA plans and that the federal forum be the exclusive one for redress of violations of ERISA." 486 F. Supp. at 784. Finally, the court citing the *Aldinger* dictum, decided that its discretion should be exercised in favor of asserting jurisdiction over the pendent parties. The court listed as factors in its decision the *Gibbs* considerations of judicial economy, convenience and fairness, the lack of an alternative forum in which the entire case could be heard, and the possibility of inconsistent judgments if the different issues were tried separately. *Id.* The court's discussion is simple and direct, and may provide a good model for an analysis in cases in which the federal courts have exclusive jurisdiction over the anchor claim.

306. *See* notes 99-100 supra and accompanying text.

307. *Note*, *Pendent Party Jurisdiction: The Demise of a Doctrine?*, 27 *Drake L. Rev.* 361, 365-66 (1978); *see*, *e.g.*, Dick Myers Towing Serv., Inc. v. United States, 577 F.2d 1023 (5th
which the statute conferring jurisdiction is silent about claims against additional parties and there exists no relevant legislative history or judicial interpretations, the courts often use the Aldinger dictum as the missing justification, even though no express justification seems to be necessary.

2. Pendent Party Jurisdiction in Diversity Cases

In pendent party cases that arise under the federal courts’ diversity jurisdiction, the discretion of the district courts concerning the exercise of jurisdiction may have been virtually eliminated by the Supreme Court’s decision in Owen. The Court emphasized that the rule of complete diversity established in Strawbridge v. Curtiss would continue to be strictly construed. As a result, under no circumstances, despite a demonstrated need for judicial economy or convenience, may a plaintiff circumvent the requirement of complete diversity by using ancillary jurisdiction to sue directly a nondiverse party impleaded by the original defendant.

Although the Owen decision follows Aldinger in requiring a consideration of the congressional intent underlying the statute conferring jurisdiction...
tion, it differs from Aldinger in its omission of the element of discretion from its jurisdictional test. Under Aldinger, pendent party jurisdiction may be exercised if three factors are present: constitutional power, statutory power, and considerations favoring the discretionary exercise of jurisdiction. According to Owen, on the other hand, if jurisdiction is predicated on diversity of citizenship, the only issues are whether constitutional power exists and whether the diversity statute places limitations on that power. Because the diversity statute always has been interpreted narrowly, the analysis ends once the presence of a nondiverse pendent party has been established.

Diversity jurisdiction, in fact, is one of the few forms of federal jurisdiction in which the joinder of parties, as opposed to claims, has been specifically limited. In most statutes that confer federal question jurisdiction, Congress has expressed no particular intent either to favor or to restrict the joinder of pendent parties. When no such intent is apparent, the district courts may interpret the statute in any way that might reasonably justify a decision to accept or deny jurisdiction. No such flexibility appears to be present in diversity cases.

In accordance with Owen, the lower federal courts generally have continued to reject any broadening of diversity jurisdiction that might result from the application of the pendent party doctrine. The Owen decision has made it apparent that the Supreme Court will not permit diversity jurisdiction to be expanded beyond its present limits.

a. Extension of Owen to Other Ancillary Claims

If the results of the Owen decision are limited to those unusual situa-

313. See 437 U.S. at 373.
314. See id. at 377.
315. See 427 U.S. at 18; Comment, supra note 62, at 951.
317. See 437 U.S. at 373; Comment, supra note 62, at 951.
318. See C. Wright, supra note 17, at § 24.
319. See Comment, supra note 62, at 951.
320. See Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv. L. Rev. 963, 993-94 (1979). Recently, Congress has considered abolishing diversity jurisdiction altogether. See H.R. 9622, 95th Cong., 2d Sess., § 1(b) (1978). Numerous arguments have been presented in favor of this proposal, one of which is that it will remove some of the substantial confusion surrounding pendent party jurisdiction. See Rowe, supra, at 993. If diversity jurisdiction is abolished Owen-type cases will no longer occur, and pendent party jurisdiction will remain an issue only in federal question cases.
321. See notes 304-07 supra and accompanying text.
322. See note 307 supra and accompanying text.
324. See Comment, supra note 62, at 960.
tions in which a plaintiff who originally chose the federal forum attempts to bring an action directly against a party properly impleaded by the original defendant, the impact of the case may be relatively insignificant. If, however, the Strawbridge rule as strictly interpreted by the Owen Court is applied beyond the facts of Owen to other types of ancillary claims in general, the effect could be to abrogate to a substantial degree the liberal joinder provisions of the Federal Rules of Civil Procedure. The Owen Court pointed out in dictum, however, that “in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit.” Those practical needs are the basis of the doctrine of ancillary jurisdiction. It is therefore unlikely that the Court would deliberately place further restrictions on joinder under the Federal Rules. Nevertheless, the limitations on ancillary jurisdiction imposed by Owen have been interpreted by some of the lower federal courts in situations unrelated to the highly unusual factual circumstances of that case.

Owen has been applied, for example, in cases in which a plaintiff has sought to join one or more nondiverse parties in an action in which there is at least one diverse defendant. Even prior to Owen, the long-standing requirement of complete diversity had prohibited the direct joinder of nondiverse defendants in the context of ordinary ancillary jurisdiction. Although some plaintiffs have attempted to use the pendent party theory in an attempt to circumvent the diversity requirement, it is now apparent that the joinder of nondiverse defendants as pendent parties will not be permitted.

The result has been the same even in cases in which the attempted joinder of a nondiverse party has occurred after removal by a defendant from state to federal court. Owen has been used as a justification for prohibiting joinder under such circumstances despite the significance the Owen Court placed on the plaintiff’s choice of the federal forum in that case. If, instead, it is the defendant who by removing the case has

325. See id. at 959.
326. 437 U.S. at 377.
327. See Currie, supra note 10, at 766.
329. See C. WRIGHT, supra note 17, §§ 24, 71.
330. See generally notes 308-22 supra and accompanying text.
331. See 437 U.S. at 377.
333. See cases cited note 332 supra.
334. See 437 U.S. at 376.
chosen to litigate it in federal court, arguably Owen is less persuasive author- 
ity for precluding the treatment of nondiverse defendants as pendent parties. One writer, in criticizing Owen, has suggested that a logical exten-
tion of Owen might result in the prohibition of any use of ancillary jurisdiction over claims brought by a defendant who removes the case to federal court.335

Owen is not necessary, however, as a basis for prohibiting the direct joinder of nondiverse parties, since this procedure was already prohibited by the Strawbridge rule; claims against such parties have never been considered ancillary.336 Owen merely emphasizes that the complete diversity requirement will be strictly enforced.

b. Extension of Owen to Permissive and Compulsory Counterclaims

Owen also has been cited as authority in cases involving permissive and compulsory counterclaims. In U.S. General, Inc. v. City of Joliet,337 the court discussed at length a pleading, which it characterized as a “legal bouillabaisse,”338 that the defendants had filed against the plaintiffs and certain additional parties.339 After sorting out the allegations, the trial court determined that it should be considered a permissive counterclaim.340 Because it alleged state law claims based on malicious prosecution or abuse of process, while the original claim arose from the defendant’s alleged failure to issue certain building permits, the counterclaim could not be considered compulsory.341 The additional defendants named in the counterclaim were nondiverse. Since a permissive counterclaim must be based upon independent jurisdictional grounds, the defendant’s counterclaim was dismissed.342

The court apparently considered these reasons insufficient, however, since it went on to comment that even if the counterclaim could have been considered compulsory, application of the principles of Owen and Aldinger would have led to its dismissal.343 This statement could perhaps be considered either a misinterpretation of, or an overreaction to, the rules that those cases set forth. First, additional parties unquestionably may be brought into an action under Rule 13(h)344 to respond to a coun-

335. See Garvey, supra note 10, at 708, 710-11.
336. See C. Wright, supra note 17, § 24, at 95-96.
337. 598 F.2d 1050 (7th Cir. 1979).
338. Id. at 1051.
339. Id.
340. Id. at 1053.
341. FED. R. CIV. P. 13(a) defines a compulsory counter-claim as one that “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.”
342. 598 F.2d at 1054.
343. See id. at 1054-55.
344. FED. R. CIV. P. 13(h) states: “Persons other than those made parties to the origi-
terclaim if their joinder is appropriate under Rules 19 or 20.345 Such parties will automatically come within the court's ancillary jurisdiction as long as the counterclaim is compulsory.346 Had the defendant's counterclaim in U.S. General satisfied the compulsory counterclaim requirements of Rule 13(a), the defendant could have joined the additional parties to respond to the counterclaim.347 The Owen Court specifically distinguished the situation before it from those cases involving impleader, cross-claims, or counterclaims.348 Noting that the context of Owen's claim was "quite different from the kinds of nonfederal claims that have been viewed in other cases as falling within the ancillary jurisdiction of the federal courts,"349 the Court pointed out that the claim asserted by Owen was "simply not ancillary."350 Parties properly joined under Rules 13(a) and (h) are considered to be within the court's ancillary jurisdiction;351 however, Owen, should not be read as authority for the proposition that ancillary jurisdiction may no longer be exercised with respect to counterclaims asserted against nondiverse parties properly joined under the Federal Rules.352

The U.S. General court, citing Gibbs, appeared to consider the exercise of ancillary jurisdiction under the Federal Rules to be discretionary in the same fashion as the assertion of pendent jurisdiction is considered to be discretionary according to Gibbs.353 Ancillary jurisdiction, however, as it is applied under the Rules, has not been subject to the same discretionary considerations as has pendent jurisdiction.354 If the U.S. General court intended to say that under Owen and Gibbs the district courts have the discretion to deny ancillary jurisdiction in connection with parties properly joined to respond to a compulsory counterclaim, it was simply incorrect.355

c. Pendent Party Jurisdiction in Diversity Cases After Owen

A few courts have favored the exercise of pendent party jurisdiction in diversity cases after Owen. Even in those cases, however, the courts ac-

345. See C. Wright, supra note 17, § 79, at 395. Joinder under Rule 13(h) involves a more remote connection than other forms of ancillary jurisdiction, but nevertheless continues to be considered permissible, even though it probably is at least as tenuously connected to the main claim as the pendent party was in Owen.

346. See id.

347. See id.

348. 437 U.S. at 375-76.

349. Id. at 376.

350. Id.

351. See C. Wright, supra note 17, § 79, at 394.

352. See 437 U.S. at 377.

353. 598 F.2d at 1054.

354. See notes 59-61 supra and accompanying text.

355. See id.
knowledged that the complete diversity requirement could not be avoided through the use of this theory. In United Pacific Insurance Co. v. Capital Development Board,356 the plaintiff, a Washington corporation engaged in selling performance bonds, brought a declaratory judgment action against an Illinois state agency and a contractor, an Illinois corporation, to determine whether certain performance bonds, which the plaintiff refused to honor, had been forged.357 Because the state agency was determined to be an alter ego of the state,358 the court had no independent jurisdiction over the agency, since a state is not a "citizen" for the purposes of diversity jurisdiction.359 The agency was deemed to be an indispensable party under Rule 19,360 however. The agency contended that since joinder was required but would result in the destruction of complete diversity, the entire action should be dismissed.361 Nevertheless, the court permitted joinder of the agency for the rather obvious reason that because the state agency was not a citizen, it could not be a cocitizen of the plaintiff; thus the complete diversity requirement would not be defeated by the joinder of the agency.362 The reason for the court’s lengthy discussion of pendent party jurisdiction is not apparent. Although the court stated that the agency could not be joined as a pendent party,363 in fact there was no reason for the court to discuss the pendent party theory at all; the case involved nothing more than the joinder of parties under Rule 19. Nevertheless, the court’s remarks are interesting in that they seem to demonstrate an inclination to read Owen and Zahn v. International Paper Co.364 very narrowly. The court commented:

The Zahn and Kroger [Owen] decisions cannot be read so broadly as to throw a blanket prohibition over the use of pendent party jurisdiction in diversity cases. Rather, we believe that those cases stand for the more limited rule that pendent party and ancillary jurisdiction should not be used to defeat the amount in controversy and complete diversity requirements of 28 U.S.C. § 1332.365

In Ayer v. General Dynamics Corp.,366 the court gave Owen a similar interpretation. A bank, the holder of mortgage on an airplane, brought an action in a New York state court against the guarantor, Ayer, to enforce

357. Id. at 541-42.
358. Id. at 542.
359. Id.; see Postal Tel. Cable Co. v. Alabama, 155 U.S. 482 (1894).
360. 482 F. Supp. at 544; see FED. R. CIV. P. 19.
361. 482 F. Supp. at 544.
362. Id. at 546.
363. Id. at 545.
365. 482 F. Supp. at 546.
his personal guarantee. Ayer impleaded the manufacturer of the airplane, seeking indemnity; the manufacturer counterclaimed and removed that action to federal court. The bank's action against Ayer was later dismissed and the third-party action was severed and continued. Ayer attempted to join as plaintiffs in the indemnity action two Peruvian corporations that he controlled. Ayer also controlled a third corporation, whose principal place of business was New York. The manufacturer moved for dismissal of the third-party complaint on the ground that the corporations were indispensable parties. Since the New York corporation and the bank, the original plaintiff, were citizens of the same state, the question was raised whether the third-party claim was ancillary to the bank's original claim against Ayer. The Magistrate found that no independent jurisdictional ground was necessary because Ayer's claim against the manufacturer was for indemnification; the claim was thus ancillary. Furthermore, the Magistrate determined that the theory of ancillary jurisdiction was "flexible enough" to permit the New York corporation to be joined on a separate count.

The district court noted that the joinder of the New York corporation would have destroyed complete diversity, but that there was complete diversity as between the manufacturer and the third-party plaintiffs if the severed actions were considered separately; thus joinder of the New York corporation would be permissible. Although this determination apparently was sufficient to resolve the issue, the court went on to cite the statement in Owen that "Congress did not intend to confine the jurisdiction of the federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit" as support for its conclusion that ancillary jurisdiction would have been proper even if the actions had not been severed. Although the court never referred to the New York corporation as a pendent party, it is apparent that the pendent party theory was the basis for this statement. The court stated that certain "equitable considerations" distinguished the case before it from Owen. These considerations were that in

367. Id. at 116.
368. Id.
369. Id. at 117.
370. Id.
371. Id.
372. Id. at 120.
373. Id. at 120-21.
375. 82 F.R.D. at 121.
376. See id.
377. 437 U.S. at 373.
378. See 82 F.R.D. at 121.
379. Id.
Ayer it was the party seeking dismissal that chose the federal forum, and the determination that the claim for indemnity was unquestionably ancillary. Most interestingly, the court commented that it found itself "constrained to exercise whatever discretion it has to permit joinder of [the New York corporation] so that this 'entire, logically entwined lawsuit' may proceed, and '[i]n view of the ease with which disposition of all claims can be made herein in this one action.'" The court evidently had concluded that a certain amount of discretion over ancillary claims is possible. Although the court cited Owen in support of its position, Owen also says that "neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case." Owen clearly permits no such discretion over ancillary claims insofar as its exercise could defeat the requirement of complete diversity. The Ayer court therefore would have been incorrect in permitting the discretionary joinder of the New York corporation had the third-party action not been severed from the main claim.

3. Pendent Parties and the Amount in Controversy Requirement

Pendent party jurisdiction also has been used unsuccessfully as a means of attempting to avoid the $10,000 amount in controversy requirement of section 1332(b). The Supreme Court held in Zahn v. International Paper Co. that in a class action, those members of the class whose claims amount to less than $10,000 may not aggregate those claims to reach the statutory requirement. The majority opinion did not address the issue of whether the parties whose claims could not be aggregated could nevertheless be brought into the action on a theory of ancillary jurisdiction. Justice Brennan pointed out in his dissent that the use of ancillary jurisdiction in class actions brought under Rule 23(b)(3) would be no less appropriate than its application to compulsory counterclaims, intervention, cross-claims, or impleader.

Zahn has been described as "puzzling" because it did not consider the ancillary jurisdiction question, even though ancillary jurisdiction had been used to avoid the amount in controversy requirement in other situations. Nevertheless, the fact that certain cases upon which the Court relied in Zahn did not involve class actions leads to the conclusion that

380. See id. at 122.
381. See id.
382. Id.
383. 437 U.S. at 377.
386. Id. at 300.
387. Id. at 306 (Brennan, J., dissenting).
388. C. WRIGHT, supra note 17, § 36, at 142.
389. See 14 WRIGHT & MILLER, supra note 1, § 3704, at 426-27 & n.47.
the Court did not intend to limit the rule established in Zahn only to class actions. Subsequent decisions in nonclass action cases have not only followed Zahn, but have relied upon Owen to prohibit the circumvention of the amount in controversy requirement by means of pendent party jurisdiction. Two recent cases may be used as examples of this approach.

In National Insurance Underwriters v. Piper Aircraft Corp., the plaintiff, which had issued insurance on an airplane, sought to recover payment as subrogee of the insured from the airplane’s manufacturer. The insured hired an attorney to represent it in an action against the manufacturer based on the malfunction and resulting destruction of the plane. The plaintiff then agreed to release its subrogation rights to the insured for $7,000. The insured, in turn, agreed to settle with the manufacturer for about $12,000. An agent of the insured gave a check for $7,000, payable to the plaintiff, to the attorney, to whom the manufacturer’s insurance company also gave a settlement check. The attorney gave the latter check to the insured, which soon filed for bankruptcy, but the plaintiff never received the $7,000 check.

The plaintiff brought a diversity action in which it alleged several alternative claims. It sought, among other relief, $11,000, the amount it had originally paid its insured, from the manufacturer; $7,000 from the manufacturer’s insurer, or $7,000 from the attorney. The defendants contended that the court lacked subject matter jurisdiction over the $7,000 claim because it did not meet the amount in controversy requirement of section 1332(b). The plaintiff, however, argued that pendent party jurisdiction gave the court the power to hear the claims against the insurance company and the attorney. The court applied the Owen analysis and concluded that pendent party jurisdiction was inappropriate, stating that “just as congressional intent would be circumvented by allowing a plaintiff to bring suit against a nondiverse impleaded defendant, the intent is circumvented by allowing a plaintiff to bring one diversity claim in excess of the minimum amount and join several other

390. See C. WRIGHT, supra note 17, § 36, at 142.
391. The amount in controversy requirement now applies only in cases arising under the federal courts’ diversity jurisdiction. The requirement was recently abolished for federal question cases. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980).
392. See notes 393-409 infra and accompanying text.
393. 595 F.2d 546 (10th Cir. 1979).
394. Id. at 547.
395. Id.
396. Id.
397. Id.
398. Id.
399. Id. at 547-48.
400. Id.
defendants by asserting $7,000 claims.\textsuperscript{401} In \textit{Alco Financial Services v. Treasure Island Motor Inn, Inc.},\textsuperscript{402} claims for rent due on leased air conditioning equipment were asserted against six defendants.\textsuperscript{403} Although complete diversity existed between the plaintiff and the defendants, the claim against one of the defendants was for only $8,918.\textsuperscript{404} The plaintiff argued that the Gibbs tests for pendent jurisdiction could be used to include the claim against the sixth defendant in the action against the other five.\textsuperscript{405} As in \textit{National Insurance Underwriters}, however, the court concluded, without much analysis, that \textit{Aldinger, Owen,} and \textit{Zahn} required the dismissal of that claim because it failed to satisfy independently the amount in controversy requirement.\textsuperscript{406}

This conclusion seems to be consistent with the Supreme Court's statement in \textit{Owen} that even considerations of judicial economy and convenience could not overcome the Strawbridge rule and permit the extension of ancillary jurisdiction to a claim against a nondiverse pendent party.\textsuperscript{407} Interpretations of section 1332(b), however, do not provide quite as strong authority for the extremely narrow reading of that provision\textsuperscript{408} as does the consistently restrictive judicial interpretation placed upon the complete diversity requirement. Under limited circumstances, aggregation has been permitted, as in cases in which a single plaintiff has two or more claims against a single defendant, or in which several plaintiffs assert claims regarding a common and undivided interest.\textsuperscript{409} Even after \textit{Zahn}, a few courts, distinguishing the \textit{Zahn} situation, have permitted the aggregation of claims.\textsuperscript{410} \textit{Aldinger} and \textit{Owen}, however, obviously have provided additional ammunition for opponents of aggregation: a party who is sued on a claim for less than ten thousand dollars and over whom there is no other basis for federal jurisdiction may be regarded as a pendent party; if so, the \textit{Aldinger} requirement of statutory power must be met.

In cases in which complete diversity is an issue, the continued acceptance of the Strawbridge rule makes a finding of legislative intent to limit diversity relatively simple. The legislative intent behind the aggregation rules is not clear, however, and despite the apparently definitive holding of \textit{Zahn}, the law is in fact so unsettled that perhaps \textit{Zahn} should not pre-

\textsuperscript{401} Id. at 550.
\textsuperscript{402} 82 F.R.D. 735 (N.D. Ill. 1979).
\textsuperscript{403} Id. at 736. The "pendent" party allegedly was the principal of one of the diverse defendants. Id. at 736 n.2.
\textsuperscript{404} Id. at 736.
\textsuperscript{405} Id. at 737.
\textsuperscript{406} Id.
\textsuperscript{407} See 437 U.S. at 377.
\textsuperscript{408} See C. Wright, supra note 17, § 36.
\textsuperscript{409} See id. § 36, at 139.
clude the use of pendent party jurisdiction as a device for the aggregation of claims.411

In cases involving aggregation, as in those based upon diversity, the element of judicial discretion apparently does not enter into the consideration of whether a pendent party may be brought into a lawsuit. If courts continue consistently to interpret Zahn as precluding aggregation in the same manner as Owen is said to preclude avoidance of the Strawbridge rule, the Gibbs discretionary factors will be entirely irrelevant to the issue of pendent party jurisdiction in such cases.

V. SUGGESTED STANDARDS

A. Pendent Jurisdiction

The Gibbs decision led to a liberal approach to pendent jurisdiction by most of the lower federal courts. Once a party had established that the state law claim arose out of a common nucleus of operative fact with a substantial federal claim, the courts became relatively free to decide whether they should exercise their jurisdiction. Although Gibbs lists a number of factors that courts should consider in making this decision,412 inconsistency in the application of these factors has resulted in a lack of predictability in many situations. It is safe to say that in most cases in which constitutional power is found to exist, courts will exercise their discretion in favor of hearing pendent claims. Because those matters committed to the discretion of a trial court are seldom questioned on appeal, it is important at the outset to be able to establish a basis for predicting which factors a court may rely upon, and the manner in which those factors may be applied. This is difficult, of course, because of the subjective aspects of any such decisions, but the following general guidelines are suggested.

Both the language of Gibbs413 and the historical development of the pendent jurisdiction doctrine414 make it apparent that in most cases, the question of whether jurisdiction should be exercised should be resolved in favor of the federal court hearing the claim. The factors listed in Gibbs that favor the dismissal of such claims should be viewed as exceptions to the general rule that federal courts may properly adjudicate state law claims that are sufficiently related to substantial federal questions. Only when considerations of judicial economy, convenience, and fairness are insufficient to overcome such factors as the need to avoid federal decisions of unsettled state law questions or the possibility of jury confusion should a court decline to hear a pendent claim.

In Gibbs, the Court stated that a federal court should avoid unneces-

411. See C. Wright, supra note 17, § 36, at 142.
412. See notes 46-50 supra and accompanying text.
413. See 383 U.S. at 726-27.
414. See notes 138-220 supra and accompanying text.
sary decisions of state law, and that this might be the most important reason for declining to exercise pendent jurisdiction. This consideration also seems to be the source of some confusion, because it is related to the abstention doctrines by the underlying factors of comity and federalism. Some distinctions may be drawn, however. It is important to note that the abstention doctrines, while discretionary, are usually applied only in those unusual circumstances in which a resolution of an unsettled state law question would make a federal constitutional decision unnecessary, or when a pervasive state regulatory scheme is present. Furthermore, considerable doubt remains whether abstention is appropriate at all, if the only reason for it would be to avoid a decision relating to a difficult or unsettled state law question. Pendent jurisdiction, in contrast, involves the decision by a federal court of a state law question arising in conjunction with a federal claim. If an unsettled question of state law appears in connection with a pendent claim, Gibbs says that it may, or even should, be dismissed.

The argument thus may be made that the broad discretion given the federal courts by Gibbs permits a court to dismiss a pendent claim in circumstances under which abstention might be inappropriate. Nevertheless, the notion that a court has the discretion to dismiss a pendent claim for no other reason than it is based on an undecided state law claim is inconsistent with the established rule that the presence of such a question is usually an insufficient basis for a court's decision to abstain from hearing a claim. Many of the post-Meredith abstention cases provide strong authority for the proposition that a court's discretion does not extend so far as to permit the dismissal of a state law claim merely because it is unsettled. Gibbs should be read as meaning that only when countervailing factors are weak or absent should the presence of an unsettled state law question lead to dismissal of a claim, just as abstention is usually inappropriate absent a federal constitutional question or pervasive state regulation.

The problem of inconsistent results that could arise from the separate trials of state and federal claims is an important consideration that favors the exercise of pendent jurisdiction. Whenever the circumstances are such that the state court trial of the dismissed claim could lead to substantially different results from those of the trial on the related federal

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415. See 383 U.S. at 726.
416. See id. at 726 n.15.
417. See notes 152-84 supra and accompanying text.
418. See id.
419. See Meredith v. City of Winter Haven, 320 U.S. 228 (1943); C. Wright, supra note 17, § 52, at 225.
420. 383 U.S. at 726-27.
421. See Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943).
422. See C. Wright, supra note 17, § 52, at 225-26.
423. See notes 185-99 supra and accompanying text.
claim, it will be necessary to consider to what extent principles of collateral estoppel might prevent relitigation of the same issues. The effects of collateral estoppel might differ, however, according to whether the state or federal trial was held first; therefore the possible preclusive effects of collateral estoppel should not be relied upon to solve the inconsistency problem.

In cases in which the dismissal of the state claim is likely to produce either inconsistent results or duplicative trials, any argument in favor of the federal court's retaining jurisdiction over the claim must be based upon the Gibbs Court's clearly-expressed concern for fairness to litigants and judicial economy. The expense and inconvenience of two trials on similar issues often will be an unreasonable burden to impose upon a party; the duplication of judicial resources may be difficult to justify absent other considerations. Unless the party urging dismissal of the claim is able to present compelling arguments based on considerations sufficient to counter the need for judicial economy and fairness to litigants, the court generally should hear the pendent claim.

A factor that weighs against the exercise of pendent jurisdiction is the dismissal of the federal anchor claim before trial. The Gibbs Court strongly recommended that under such circumstances the pendent claim also should be dismissed, but dismissal cannot be said to be mandatory. Nevertheless, it appears that most courts will dismiss these pendent claims routinely, unless to do so would result in some substantial hardship to the plaintiff. If, for example, the plaintiff had no state forum available in which the state claim could be tried as where a state statute of limitations had run during the pendency of the federal proceedings, a court may be hesitant to dismiss the claim. The argument based on judicial economy, however, is no longer relevant when there will be no federal trial; similarly, no problem with inconsistent verdicts can arise. Fairness to litigants is likely to be a persuasive consideration only when dismissal of the pendent claim will deprive the plaintiff of a forum in which it can be heard. Thus the recommendation in Gibbs, while not a directive, appears to be a recognition that many of the considerations that would otherwise favor federal adjudication of a state law claim are not likely to be present if the anchor claim is dismissed before trial.

The decision of a court to hear a pendent claim, therefore, is based upon a balancing of the factors listed in Gibbs and discussed above. The

424. See id.
425. See id.
427. See notes 200-20 supra and accompanying text.
428. 383 U.S. at 726.
429. See notes 207-09 supra and accompanying text.
430. See id.
factors are not weighted equally, however, and *Gibbs* does not provide a complete guide to their application. The general trend, which is consistent with the language of *Gibbs*, continues toward the liberal exercise of pendent jurisdiction. The factors that weigh most heavily in favor of jurisdiction over pendent claims seem to be the need to avoid excessive, duplicative, or inconsistent litigation, and the policy of ensuring that a party is not deprived of some forum in which his claims may be heard. Against these considerations may be balanced the presence of unsettled state law questions and the dismissal of the federal claim before trial, neither of which should be regarded as determinative.

**B. Pendent Party Jurisdiction**

The limits of pendent party jurisdiction are not yet apparent. The *Aldinger* Court did not actually prohibit its use, yet indicated that its application may be narrower than that of pendent jurisdiction.\(^{431}\) The new limitation that *Aldinger* specifically imposed is one of jurisdictional power: unless constitutional power as defined by *Gibbs* is present and express or implied prohibition by Congress of the exercise of jurisdiction over additional parties is absent, the court has no power to hear claims brought by or against pendent parties. Only after jurisdictional power is established does the matter of discretion become significant. The distinction between the issues of power and discretion, however, have become blurred in many post-*Aldinger* cases. Some lower federal courts, recognizing that the statutory power requirement could restrict the use of pendent party jurisdiction, seem to have treated findings of statutory power as discretionary matters, particularly in those cases in which neither the approval nor the disapproval of Congress is apparent in either the statute conferring jurisdiction or its history.\(^{432}\) In some cases, the courts have used the *Gibbs* factors of judicial economy, convenience, and fairness to litigants as the basis for a finding of statutory jurisdictional power. As a result, the application of pendent party jurisdiction in these cases actually appears to be broader than it was before *Aldinger*.

This approach, however, is probably incorrect because it fails to recognize that the finding of jurisdictional power is simply not a discretionary matter. It is essential to avoid confusion of the power and discretion issues; this confusion has resulted in a broadening, in some cases, of the pendent party doctrine to an extent considerably beyond that which the Supreme Court intended.\(^{433}\) The following basic analysis of a pendent party case in the context of federal question jurisdiction is therefore suggested.

The threshold question is whether the court has constitutional power

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432. See notes 221-307 supra and accompanying text.
433. See notes 271-301 supra and accompanying text.
over the pendent party. The *Aldinger* Court did not rule specifically on the issue of what is needed for such power, although it hinted that the *Gibbs* common nucleus of operative fact test might not be entirely appropriate as a basis for joining pendent parties.\(^4\)\(^3\)\(^4\) In its later decision in *Owen*, however, the Court apparently assumed that the *Gibbs* requirement for constitutional power was the test that must be met before the matter of statutory power may be considered.\(^4\)\(^3\)\(^5\) The *Gibbs* test, however, apparently was modified in *Owen* to the extent that the relationship between the claims asserted against a pendent party must involve not just "factual similarity but logical dependence"\(^4\)\(^3\)\(^6\) upon the federal claims. This modification nevertheless seems to have been largely ignored by the lower courts, which generally have continued to use the common nucleus of operative fact test as they would in a pendent jurisdiction case.

Second, the court must find that Congress has not in some manner negated the exercise of jurisdiction over nonfederal parties. In *Aldinger*, for example, since counties had been sheltered from liability by not being considered "persons" under section 1983, the Court found that Congress by implication had negated the joinder of a county as a pendent party.\(^4\)\(^3\)\(^7\) This analysis may present difficulties, because statutes conferring federal jurisdiction over a particular type of action often are silent with respect to the joinder of nonfederal parties. Some courts have attempted to find in the pertinent statutes some express or implied approval of pendent party jurisdiction. *Aldinger*, however, does not require such approval; it requires only a lack of disapproval.\(^4\)\(^3\)\(^8\) If a statute is silent and nothing in its legislative history or judicial interpretations indicates that Congress would have found pendent party jurisdiction objectionable in connection with the statute, then under *Aldinger* the federal court has statutory power.\(^4\)\(^3\)\(^9\) Therefore, use of the discretionary factors to justify a finding of statutory power is not only confusing but unnecessary.

The problem with using a discretionary factor such as judicial economy as a basis for statutory power is illustrated by *Pearce v. United States*.\(^4\)\(^4\)\(^0\) In that case the court held that an intention to grant statutory power over pendent parties could be inferred from the Federal Tort Claims Act, because that statute, which provides that all claims against the United States should be resolved at the same time, favors the eco-

\(^{434}\) See 427 U.S. at 14.
\(^{435}\) See 437 U.S. at 372.
\(^{436}\) Id. at 376.
\(^{437}\) 427 U.S. at 17.
\(^{438}\) See id. at 18.
\(^{439}\) See id.; notes 88-93 supra and accompanying text.
nomical use of judicial energy. The difficulty with the court's analysis is that the truly discretionary aspect of pendent party jurisdiction is virtually lost: if judicial economy is significant enough to result in a finding of statutory power, it probably will be significant enough as a discretionary factor that a court, following the Gibbs analysis, would almost invariably choose to exercise its power. A court's discretion thus actually may be weakened by the misapplication of discretionary factors to the statutory jurisdictional power analysis.

Not until both constitutional power and lack of statutory disapproval are established does the court have the discretion to decide whether jurisdiction should be exercised. It is apparent that the Gibbs factors are properly used as the basis of judicial discretion in the context of pendent party jurisdiction, and the Aldinger Court has provided the factor of exclusive federal jurisdiction as an additional consideration. This factor should not be mistaken for a means to justify a finding of statutory power. First, the language of Aldinger makes it apparent that this factor was intended to be a discretionary consideration. Second, no such justification seems to be necessary when the statute does not in some manner negate the use of pendent party jurisdiction.

Aldinger might not be as restrictive as it appears. The only element that distinguishes it from Gibbs is the requirement of statutory as well as constitutional power. Only in those few cases in which some inference of congressional disapproval of the joinder of pendent parties can be raised might there actually be a greater restriction upon a court's ability to hear all matters connected with a case.

Pendent party cases arising under the courts' diversity jurisdiction and those involving the aggregation of claims to satisfy the amount in controversy requirement present different problems. The basic analysis to be applied is the same as that applied in cases arising under federal question jurisdiction, but the result, under Owen, may be that pendent party jurisdiction may rarely be appropriate in such cases. Because section 1332 always has been interpreted as requiring complete diversity, and recent decisions indicate that claims may not be aggregated, the analysis generally will end with a finding that the court has no statutory power to join a nondiverse pendent party or one whose claim does not independently meet the amount in controversy requirement. Discretion as it is applied in federal question cases thus will be largely irrelevant in diver-

441. See id. at 619.
442. See notes 268-70 supra and accompanying text.
443. See 427 U.S. at 18.
444. See id.
445. See id. at 15.
446. See notes 308-411 supra and accompanying text.
447. See C. Wright, supra note 17, § 24, at 95.
ity or aggregation cases. Although the Owen Court seemed to consider significant that it was the plaintiff who chose the federal forum and who therefore should have been prepared to accept its limitations, this issue apparently was not to be a discretionary consideration—in other words, even if the party seeking to join a nondiverse party had been brought into federal court involuntarily the result probably would have been the same. The Owen Court stated specifically that discretionary considerations would be insufficient to overcome the complete diversity requirement.

While Owen clearly precludes the use of pendent party jurisdiction as a method of circumventing the complete diversity requirement, it should not be read as placing additional limitations upon the joinder provisions of the Federal Rules of Civil Procedure. Owen itself presented highly unusual facts, and perhaps should be limited only to those situations in which a plaintiff attempts to sue directly a nondiverse third party who has been impleaded by the defendant. Since the Court indicated that it did not intend to limit the use of ancillary jurisdiction under the Federal Rules to apply Owen much beyond its facts would be to extend that decision too far. It is clear that Owen does not prohibit the use of ancillary jurisdiction in connection with compulsory counterclaims, cross-claims, impleader, or intervention, as long as no attempt is made to bring a direct action against a nondiverse party not otherwise subject to federal jurisdiction. Therefore, in a diversity case in which pendent jurisdiction appears to be an issue, it is always necessary to establish whether the rule of complete diversity will be avoided by any means not traditionally permitted under the theory of ancillary jurisdiction.

The same general analysis should be applied in cases involving the aggregation of claims. Although Zahn addressed the aggregation question only with respect to class actions, courts in later decisions, using the reasoning of Aldinger and Owen, have extended the Zahn rule beyond the class action situation. Attempts by litigants to draw analogies between aggregation and ancillary jurisdiction under the Federal Rules apparently have been unpersuasive, and the lower courts seem to be following unquestioningly the Supreme Court's "dogmatic pronouncement" that multiple plaintiffs with separate claims may not aggregate them to satisfy the jurisdictional amount requirement. Zahn is broader than Owen: Zahn apparently places an unequivocal ban on the

449. See notes 308-09 supra and accompanying text.
450. See 437 U.S. at 376.
451. Id. at 377.
452. See id. at 375.
453. See id. at 375 & n.18.
454. See C. Wright, supra note 17, § 36, at 142.
455. Id. § 36, at 141.
456. See id. § 36, at 141-42.
aggregation of separate and distinct claims, while Owen seems to prevent the evasion of the complete diversity requirement only by a plaintiff who attempts to sue directly an impleaded nondiverse third party. Ancillary jurisdiction under the Federal Rules remains more or less intact, even though its use might also result in the joinder of a nondiverse party.

Because of the Supreme Court's strict interpretations of the complete diversity and amount in controversy requirements, attempts to join additional parties who do not meet these requirements are very likely to be unsuccessful. Appeals to a court's discretion to hear a pendent party claim would be ineffective: discretion is irrelevant because of the Court's finding that under section 1332 the federal courts have no power to hear pendent party claims. In diversity cases in which a pendent party is sought to be joined, care therefore must be taken to distinguish the situation from Owen; joinder will be allowed only under traditional ancillary jurisdiction. Because at least a few courts seem to have had difficulty distinguishing the Owen situation from ordinary ancillary jurisdiction issues, the procedural differences and the uniqueness of Owen's facts must be emphasized. When aggregation is sought, however, there appears to be no such means of avoiding Zahn; a finding of statutory power over the party whose claims would be aggregated is probably impossible under current interpretations of that case.

VI. CONCLUSION

The evolution of pendent and ancillary jurisdiction initially demonstrated the increasing willingness of the federal courts to hear nonfederal matters that arose in conjunction with claims over which the courts had been granted jurisdiction. Although pendent and ancillary jurisdiction are still liberally applied, the Supreme Court recently seems to have retreated from the more expansive approach to federal jurisdiction by imposing certain restrictions upon the use of pendent party jurisdiction. The extent of these restrictions, however, has not yet been fully explained.

The matter of jurisdiction over nonfederal claims and parties, since these limitations were imposed, involves a number of complex issues. Among these issues is the distinction between the federal courts' power to hear such claims and their discretion over whether to exercise that power. This distinction can be significant, yet it is often either ignored or misunderstood. This Note has examined the power-discretion question and its treatment by the lower federal courts since the Owen and Aldinger decisions, and has suggested general analyses of pendent and pendent party jurisdiction cases in the context of the decided cases.

It is suggested that any analysis begin with the recognition that the issue of discretion, although seldom addressed or explained, may be just as significant as the more frequently discussed question of jurisdictional power. Unfortunately, courts often fail to explain the reasons for their
decisions to accept or to decline to hear a nonfederal claim; others might apply discretionary considerations, probably incorrectly, to the jurisdictional power analysis. Either approach tends to compound the uncertainty already present in a difficult and confusing area of the law of federal jurisdiction. This Note accordingly has recommended a careful examination in all cases of the discretionary considerations that should be applied, and the relative weight to be given to each. Such an analysis may be helpful both in understanding the theory and in advocating a position in a particular case. When the question of pendent party jurisdiction appears in a diversity case, on the other hand, the court seldom has much discretion, but the analysis need not end there. Ancillary jurisdiction, although not a discretionary matter, is nevertheless susceptible of a liberal interpretation under the Federal Rules of Civil Procedure, and, despite Owen, often permits the joinder of nonfederal parties.

The state of the law is still unsettled. The Supreme Court has yet to define the limits of pendent party jurisdiction in federal question cases, while the abolition of diversity jurisdiction, if accomplished, will ultimately result in the elimination of the problem raised and not satisfactorily resolved in Owen. Until some standards are established, no real consistency is likely. The type of analysis suggested in this Note, however, might be useful as an aid to the establishment of some general guidelines.