BYU Law Review

Volume 1990 | Issue 1 Article 5

3-1-1990

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I. INTRODUCTION

Until *Finley v. United States*,[1] the received wisdom[2] on supplemental jurisdiction[3] seemed securely moored. Virtually everyone[4] acknowledged the soundness of the Supreme Court's expansion of pendent claim jurisdiction[5] in *United Mine Workers v. Gibbs*.[6] The contours of ancillary jurisdiction—the joinder

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The tentative recommendations of the Federal Courts Study Committee, which were published on December 22, 1989, are in accord with this Article's proposal. The Committee has recommended that Congress overrule *Finley* by codifying pendent claim, pendent party, and ancillary jurisdiction. Federal Courts Study Committee, *Tentative Recommendations for Public Comment* 69 (Dec. 22, 1989).

1. 109 S. Ct. 2003 (1989).

2. *See* Wright, *The Wit and Wisdom of Bernie Ward*, 61 TEX. L. REV. 13, 25 (1982) ("The received wisdom is a conclusion that has been so long and often uttered that we accept it as true, albeit with a nagging doubt.").

3. Most commentators believe that there is no meaningful distinction between pendent and ancillary jurisdiction. The literature has come to refer to these jurisdictional bases as supplemental jurisdiction. *See, e.g.*, Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34; Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399 (1983) [hereinafter Matasar I]; Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983) [hereinafter Matasar II].

4. *But see* Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968).

5. The doctrine of pendent claim jurisdiction allows a plaintiff to join to a federal claim a factually related state claim in the absence of diversity.

6. 383 U.S. 715 (1966).

of jurisdictionally insufficient claims added after the plaintiff files the complaint—were similarly well-defined and essentially settled. There was disagreement only concerning pendent party jurisdiction which permits a court with jurisdiction over a federal question to hear a factually related state claim involving an additional, nondiverse defendant. Even here, although there was a split of authority, most courts[7] and commentators[8] approved of pendent party jurisdiction in appropriate circumstances.

Finley, however, has ended that repose. In *Finley* the Supreme Court held that a federal court, in a Federal Tort Claims Act (FTCA)[9] suit against the United States, may not exercise pendent party jurisdiction over an additional, nondiverse defendant.[10] The Supreme Court reached this result on grounds that no federal statute affirmatively grants to the federal courts the jurisdictional authority to hear pendent party claims in FTCA suits.[11] Although the Court's explicit holding is limited to the FTCA, its rationale undoubtedly signals an end to pendent party jurisdiction. More critically, the Court, despite its protests to the contrary,[12] has also undermined the viability of pendent claim and ancillary jurisdiction.

Supplemental jurisdiction, therefore, is arguably dead and surely expiring. This article proposes, in light of *Finley*, that Congress resurrect pendent and ancillary jurisdiction by codifying them. Codification of these doctrines is important for two

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7. Although the lower court decisions do not fall into any single pattern, see 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567.2, at 156 (2d ed. 1984) [hereinafter WRIGHT, MILLER & COOPER], most courts, prior to *Finley*, recognized pendent party jurisdiction, at least when the federal claim was within the federal court's exclusive jurisdiction. *See, e.g.*, Feigler v. Tidex, Inc., 826 F.2d 1435 (5th Cir. 1987); Independent Bankers Ass'n v. Marine Midland Bank, 757 F.2d 453, 464 (2d Cir. 1985) (Agreeing that the district court "had power to exercise pendent party jurisdiction over the state claim."); *cert. denied*, 476 U.S. 1186 (1986). Lykins v. Pointer, Inc. 725 F.2d 645 (11th Cir. 1984); FDIC v. Otero, 598 F.2d 627, 630-31 (1st Cir. 1979); Ortiz v. United States, 595 F.2d 65 (1st Cir. 1979). *But see* Lovell Mfg. v. Export-Import Bank of the United States, 843 F.2d 725, 732 (3d Cir. 1988) (expressing strong reservations about the availability of pendent party jurisdiction); Safeco Ins. Co. v. Guyton, 692 F.2d 551, 555 (9th Cir. 1982) ("This circuit historically has been hostile to the concept of pendent party jurisdiction.").

8. *See, e.g.*, Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753 (1978); Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 34 U. PITT. L. REV. 1 (1972); Freer, *supra* note 3; Matasar II, *supra* note 3.

9. 28 U.S.C. § 1346(b) (1982).

10. 109 S. Ct. 2003 (1989).

11. *Id.* at 2008-10.

12. *Id.* at 2010 ("The *Gibbs* line of cases was a departure from prior practice, and a departure that we have no intent to limit or impair."). *See infra* note 65.

reasons. First, pendent claim, pendent party, and ancillary jurisdiction jointly serve to promote a central tenet of the Federal Rules of Civil Procedure, that the unit of litigation should be the transaction as it occurred in the world.[13] In so doing, pendent and ancillary jurisdiction foster judicial efficiency and party and witness convenience by creating one sensible litigation package.

Second, the federal courts' exercise of supplemental jurisdiction makes more attractive the use of federal courts to decide federal questions.[14] Because most federal questions enjoy concurrent jurisdiction, a plaintiff with both federal and related state claims usually may choose to sue either in state or federal court. Without the doctrines of pendent and ancillary jurisdiction, however, plaintiffs who wish to raise all federal and state claims arising out of a single occurrence and resolve all related claims of the defendants in a single proceeding, frequently will have only one choice—state court. The existence of pendent and ancillary jurisdiction has made the federal courts available for the adjudication of legal controversies involving both federal and state claims.

There are, however, countervailing considerations. Routine employment of the doctrines by the lower courts has not been cost-free. Because the doctrines traditionally have been thought to permit a federal court to adjudicate state law claims over which the court has no express statutory jurisdiction, their use raises federalism concerns. These concerns magnify when a federal court decides state law claims that far outdistance their federal counterparts in novelty, complexity, or importance. Moreover, when jurisdictionally insufficient state law claims overrun a lawsuit, they may greatly increase a federal district court's work on a particular case. Taken as a whole, the claims adjudicated by federal courts on a supplemental basis contribute substantially to its workload.

Congress nonetheless can take these considerations into account and still preserve the core of supplemental jurisdiction. Congress for example can reduce the federal courts' workload,

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13. *See* Hazard, *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628 (1988).

14. *See Finley*, 109 S. Ct. at 2021 (Stevens, J., dissenting); Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1, 4 (1985) (contending that another rationale for pendent jurisdiction is that the courts "are effectuating Congress's decision to provide the plaintiff with a federal forum for litigating a jurisdictionally sufficient claim"); Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U.L. REV. 245, 246 (1980).

albeit only minimally, by expressing concern with how federal courts are currently exercising their discretion over supplemental claims. Presently, although lower courts in the exercise of their discretion may dismiss supplemental claims over which they have power, they rarely do.[15] This article proposes that Congress, while granting to federal courts the statutory power to hear supplemental claims, should strongly encourage them to dismiss pendent and ancillary state claims when a federal suit is primarily a state law suit because of the complexity, importance, or novelty of state law claims. Such an approach, if followed, would enable the federal courts to maintain their principal role in the development of federal constitutional and statutory law, while acknowledging the state courts' own role in the development of their legal doctrine. Moreover, the spillover benefit of returning significant state claims to the state courts will be to reduce, although probably only in a small way, a federal court's docket.

The remainder of this article is divided into three parts. Part II analyzes *Finley* and explores its implications. Part III describes and evaluates the options available to Congress in light of *Finley* and recommends that Congress codify, with some modifications, the law of supplemental jurisdiction. Part IV concludes by briefly summarizing the action Congress should take to resurrect the supplemental jurisdiction doctrine undermined by *Finley*.

II. The Implications of *Finley*

A. *The Prior Landscape*

Prior to *Finley*, the Supreme Court had established an analytic framework for analyzing pendent claim, pendent party, and ancillary jurisdiction.[16] Before taking jurisdiction over a supplemental claim, a federal district court had to satisfy itself that the claim was factually related to the jurisdictionally sufficient claim, that Congress neither expressly nor impliedly had negated jurisdiction over the supplemental claim, and that the exercise of sound discretion favored jurisdiction.[17]

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15. *See infra* note 134 and accompanying text.

16. Others have traced the historical development of these doctrines. *See, e.g.*, Matasar II, *supra* note 3.

17. *See, e.g.*, Jones v. Intermountain Power Project, 794 F.2d 546, 551 (10th Cir. 1986); Ambromovage v. United Mine Workers, 726 F.2d 972, 989-91 (3d Cir. 1984);

This framework evolved principally through three opinions. The first opinion, *United Mine Workers v. Gibbs*[18] laid the foundation. Paul Gibbs had become involved in a rivalry between the United Mine Workers (UMW) and the Southern Labor Union over representation of miners in the southern Appalachian coal fields.[19] Gibbs supported the Southern Labor Union. In the ensuing organization struggle, however, the UMW prevailed and Gibbs apparently paid for his misplaced loyalty; he lost his job and was unable to find work in the region.[20] Gibbs later filed an action in federal district court contending that the UMW caused his misfortunes by engaging in a secondary boycott in violation of section 303 of the Labor Management Relations Act.[21] Additionally, Gibbs raised a separate claim that the UMW's conduct amounted to an illegal conspiracy under state law.[22]

Because diversity was lacking, the case raised the issue of pendent claim jurisdiction and the breadth of an earlier decision, *Hurn v. Oursler*.[23] In *Hurn*, the Supreme Court held that a federal court could exercise pendent claim jurisdiction when the state and federal claims are "little more than the equivalent of different epithets to characterize the same group of circumstances."[24] Because Hurn's federal claim for copyright infringement and his state claim for unfair competition were identical in that they alleged a single wrong and required the same evidentiary showing, the Supreme Court found no jurisdictional bar to reaching the state claim, even though there was no diversity between the parties.[25]

The *Gibbs* Court regarded *Hurn's* demand that the federal and state claims be essentially identical as "unnecessarily grudging."[26] It expanded substantially the parameters of pendent claim jurisdiction by articulating a two-pronged test. Under the

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United States *ex rel.* Hoover v. Franzen, 669 F.2d 433, 439-40 (7th Cir. 1982); Ortiz v. United States, 595 F.2d 65 (1st Cir. 1979); *see also*, Matasar II, *supra* note 3, at 167-78; Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935 (1982).

18. 383 U.S. 715 (1966).
19. *Id.* at 718.
20. *Id.* at 718-20.
21. 29 U.S.C. § 187 (1982).
22. *Gibbs*, 383 U.S. at 720.
23. 289 U.S. 238 (1933).
24. *Id.* at 246.
25. *Id.* at 247.
26. *Gibbs*, 383 U.S. at 725.

first prong, the federal court must have constitutional power under article III to exercise pendent jurisdiction. That power exists when the claimant raises a substantial federal question and both the state and federal claims derive from a "common nucleus of operative fact" so that the claimant would "ordinarily be expected to try them all in one judicial proceeding."[27] *Gibbs*' second prong deals not with power, but with the district court's discretion to exercise that power. The district court may decide not to hear the pendent state claims when "considerations of judicial economy, convenience, and fairness to the litigants" do not favor trying the federal and state claims together, the state claims predominate over the federal claims, or the state claims' novelty or complexity cuts in favor of state court adjudication.[28]

The second case in the supplemental jurisdiction framework is *Aldinger v. Howard*.[29] In *Aldinger*, the Supreme Court applied the same framework to pendent party jurisdiction, but added a statutory prong to *Gibbs*' test. The plaintiff in *Aldinger* was fired from her position in the county treasurer's office. Later she filed suit against the county treasurer and commissioners under section 1983,[30] the federal civil rights statute. At that time municipal corporations were immune from liability under section 1983,[31] so Aldinger was not able to bring a federal claim against the county. Instead, she named the county as defendant under a state law theory.[32]

Adopting the *Gibbs* approach to pendent claims, the Supreme Court found article III power to adjudicate the pendent party claims. The Court, however, distinguished between pendent claim and pendent party jurisdiction in ways that the Court thought justified different treatment. Factually, the Court noted, pendent party jurisdiction differs from pendent claim jurisdiction by bringing into the lawsuit an entirely new, nondiverse party.[33] The Court also held there are important legal differences. With respect to pendent claim jurisdiction, Congress had generally been "silent on the extent to which the defendant,

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27. *Id.*

28. *Id.* at 726-27.

29. 427 U.S. 1 (1976).

30. 42 U.S.C. § 1983 (1982).

31. 427 U.S. at 16 (citing Monroe v. Pape, 365 U.S. 167, 187-91 (1961)). Later, the Supreme Court overruled *Monroe* in Monell v. Department of Social Serv., 436 U.S. 658, 701 (1978).

32. 427 U.S. at 4-5.

33. *Id.* at 14-15.

already properly in federal court under a statute, might be called upon to answer nonfederal questions."[34] In contrast, the Court held that Congress had expressed itself on whether a plaintiff suing for a violation of section 1983 can join an additional defendant, excluded from liability under section 1983, under some state law theory. Because section 1983 excludes counties from liability, the Court held that Congress had impliedly declined to extend pendent jurisdiction over the county.[35]

In effect, *Aldinger* supplemented the *Gibbs* approach by adding a statutory inquiry. The *Aldinger* Court required a lower court to consider not only whether it has constitutional power to exercise jurisdiction over a pendent party and whether as a discretionary matter the court should do so, but also whether "Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."[36] The Court suggested in dictum that this inquiry would not necessarily result in the denial of jurisdiction over pendent parties. Other cases might call for a different result, as, for example, when "the grant of jurisdiction to a federal court is exclusive."[37]

Left uncertain after *Aldinger* was whether the statutory search required for pendent party jurisdiction is also applicable to pendent claim and ancillary jurisdiction. In *Owen Equipment & Erection Co. v. Kroger*,[38] the Supreme Court answered affirmatively.[39] The issue in *Kroger* was whether the plaintiff could amend her complaint and pursue a claim against a third-party defendant. Amending her complaint had destroyed diversity jurisdiction, since Kroger and the third-party defendant Owen were both citizens of Iowa. Kroger, however, had successfully argued in the district court and the court of appeals that the federal court should take ancillary jurisdiction over her claim against Owen, because Owen was already present in the suit by virtue of defendant's third-party claim against Owen, and Kroger's claim against Owen arose out of the same core of facts as her claim against the original defendant.[40]

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34. *Id.* at 15.
35. *Id.* at 15-16.
36. *Id.* at 18.
37. *Id.*
38. 437 U.S. 365 (1978).
39. Most courts and commentators read *Kroger* in this way. *See, e.g.*, the sources cited in *supra* note 17.
40. 437 U.S. at 369.

The Supreme Court, however, reversed. In so doing, it acknowledged again that *Gibbs* delineated the constitutional test for hearing all supplemental claims, regardless of whether they are of a pendent or ancillary nature.[41] Constitutional power, however, is merely the first hurdle. Additionally, the Court explained that because the federal judiciary's power is limited by acts of Congress as well as by article III, a federal district court also must have statutory power to hear any nonfederal claim. The Court reasoned that in this regard article III is not self-executing. Beyond the *Gibbs* constitutional test, therefore, the federal court must apply *Aldinger*'s statutory contribution by determining whether Congress has expressly or impliedly negated the exercise of jurisdiction over the particular nonfederal claim.[42]

Under that test, although Kroger's claim against Owen met the constitutional hurdle, it did not satisfy the legislative examination. To allow ancillary jurisdiction over a claim by a plaintiff against a nondiverse third-party defendant would flout Congress' intent to require complete diversity between the parties. A plaintiff could easily defeat the statutory requirement of complete diversity by "the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."[43]

The Court distinguished other situations in which ancillary jurisdiction traditionally had been allowed. In contrast to Kroger's claim against the third-party defendant, 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 a federal court."[44] With impleader, cross-claims, com-

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41. *Id.* at 370 ("[T]he Court of Appeals was correct in perceiving that *Gibbs* and this case are two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?").

42. *Id.* at 372-73.

43. *Id.* at 374.

44. *Id.* at 376. The Court articulated a second rationale for distinguishing Kroger's claim from other claims that are within the lower courts' ancillary jurisdiction. The Court noted that in contrast to impleader claims, for example, Kroger's claim against Owen was not logically dependent upon the resolution of Kroger's original claim against OPPD, the original defendant. Other commentators, however, have observed that as an overall justification for ancillary jurisdiction, this logical dependence reasoning is flawed. For instance, compulsory counterclaims or cross-claims are not necessarily logically dependent on resolution of the plaintiff's claim, yet are recognized as being within the

pulsory counterclaims, and intervention of right, there is no fear that claimants have connived to get themselves into federal court and sidestepped Congress' strict diversity requirement since the case is already properly in federal court.

Finley's predecessors, therefore, provided an established framework for approaching all supplemental jurisdiction problems. Jointly, *Gibbs*, *Aldinger*, and *Kroger* required a lower court to undertake three separate inquiries: a constitutional inquiry, a statutory inquiry, and a discretionary balancing of a variety of factors.

B. The Finley *Opinion*

In *Finley*, the Supreme Court turned this analytic framework on its head and in the process took the breath away from all forms of supplemental jurisdiction. Finley's husband and children were killed when a plane in which they were flying struck electric transmission wires during its approach to a San Diego airfield. Finley sued the utility company in the state court, but when she learned that the Federal Aviation Administration may have been responsible, she brought an action against the United States under the FTCA. Moreover, because 28 U.S.C. section 1346(b) provides that federal courts have exclusive jurisdiction over such actions, Finley brought this action in the federal court. She later sought to append a state law tort claim against the utility company.[45]

The Supreme Court, however, held that Finley must bring her state law claim in state court, even though this meant that she could sue both defendants only by bringing two lawsuits.[46] The holding resulted from the Court's rejection of the *Aldinger* statutory test. This unwinding of settled doctrine, if not inevitable, was predictable. Commentators already had begun to voice doubts about the statutory inquiry articulated in *Aldinger* and *Kroger*.[47] Indeed, the signs were all about. More than a hundred

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federal courts' ancillary powers. *See, e.g.*, Freer, *supra* note 3, at 70; Matasar II, *supra* note 3, at 171-72.

45. 109 S. Ct. at 2005.

46. *Id.* at 2010.

47. *See* Freer, *supra* note 3; Matasar II, *supra* note 3, at 167-68 ("But the better view is that for any exercise of pendent or ancillary jurisdiction, a court must attempt to discern the express or implied intent of Congress."); Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 355 (1988) [hereinafter Redish I] ("The pendent and ancillary forms of jurisdiction . . . seem to exceed the confines of congressional con-

years earlier, the Court had stated that as "regards all courts of the United States inferior to [the Supreme Court], two things are necessary to create jurisdiction. . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. . . . To the extent that such action is not taken, the power lies dormant."[48] In *Aldinger* and *Kroger*, the Court had wrongly defined its project as looking for evidence that Congress had precluded the use of pendent or ancillary jurisdiction. But a federal district court needs more than that. Because the lower federal courts are courts of limited jurisdiction, possessing only the authority given to them by the Constitution and Congress,[49] those courts require congressional authority to exercise jurisdiction over supplemental claims.

This is the first premise in *Finley*'s analysis.[50] The *Finley* Court's second premise is that Barbara Finley's joinder of a nondiverse defendant under a state tort theory stands on less secure footing than joinder of a pendent claim against a defendant properly before the court because a federal question is raised.[51] Writing for the majority, Justice Scalia contrasted pendent party jurisdiction from pendent claim jurisdiction by noting, "[o]ur cases show . . . that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly."[52]

Two points should be emphasized about *Finley*'s second premise. First, without inquiring whether Congress had indeed done so, Justice Scalia was willing to take as settled that sometime in the past Congress had supplied the district courts with authority to exercise jurisdiction over pendent claims and certain ancillary claims against existing parties to the suit.[53] Second, however, Scalia was not willing to assume that Congress

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stitutional statutes."); Redish, Book Review, 85 COLUM. L. REV. 1378, 1396 (1985) [hereinafter Redish II] ("[W]ith one narrow exception, pendent claim jurisdiction is no more authorized by congressional statute than is pendent party jurisdiction."); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 560 (1985) (supplemental jurisdiction "is, at most, implicit in a legislative grant of jurisdiction").

48. Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867) (cited in *Finley*, 109 S. Ct. at 2006).

49. C. WRIGHT, THE LAW OF FEDERAL COURTS § 7, at 22 (4th ed. 1983).

50. 109 S. Ct. at 2005-06.

51. *Id.* at 2006-07.

52. *Id.* at 2007. *See infra* note 64 and accompanying text.

53. 109 S. Ct. at 2006 n.1.

had supplied the jurisdictional authority with respect to "additional claims by or against different parties,"[54] apparently because bringing new parties into a suit is jurisdictionally more suspect than bringing new claims. Concerning claims by or against different parties, a lower court must find an affirmative grant of jurisdiction by Congress.[55]

Having supplanted *Aldinger*'s search for a negative signal from Congress with a demand for affirmative statutory authority, it was then easy for the Court to find an absence of congressional approval under the FTCA for pendent party jurisdiction. That Act confers jurisdiction over civil actions on claims against the United States. "It does not say," the Court observed,

> 'civil actions on claims that include requested relief against the United States,' nor 'civil actions in which there is a claim against the United States'—formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions.[56]

Thus, the Court found that the plain language of the FTCA does not lend itself to finding that Congress had authorized pendent party jurisdiction.

The Court also rejected Finley's contention that changes made in 1948 to the FTCA were intended to broaden the scope of the statute to permit jurisdiction over pendent parties. Finley's argument focused on Congress' 1948 revision of Title 28,[57] which included changing the FTCA's jurisdictional grant from authority to hear "any claim against the United States" to "exclusive jurisdiction of civil actions on claims against the United States."[58] But the Court belittled Finley's claim, finding "no suggestion, much less a clear expression, that the minor rewording at issue here imported a substantive change."[59] Indeed, the Court explained that the rewording in 1948 was simply stylistic, designed to pattern language in Title 28's jurisdictional statutes

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54. *See id.* at 2010 ("All our cases . . . have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.").

55. *Id.* at 2009-10 (rejecting Finley's attempts to find an affirmative grant); *id.* at 2010 (Blackmun, J., dissenting) (reading majority opinion to require an affirmative grant for pendent party jurisdiction); *id.* at 2019 (Stevens, J., dissenting) (same).

56. *Id.* at 2008.

57. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869.

58. *See* 109 S. Ct. at 2009.

59. *Id.*

after the terminology used in Rule 2 of the Federal Rules of Civil Procedure,[60] and had nothing to do with extending the scope of the jurisdictional grant.[61]

The Supreme Court thus found no statutory authority in the FTCA for pendent parties. As noted, it acknowledged the inefficiency of its decision; because FTCA claims against the Government may be brought only in federal court, "the efficiency and convenience of a consolidated action will sometimes have to be foregone in favor of separate actions in state and federal courts."[62] The Court believed, however, that the limits of federal jurisdiction compelled the outcome.

C. Finley's *Implications*

Finley's effects travel well beyond its holding that pendent party jurisdiction is lacking in suits filed pursuant to the FTCA. At a minimum, its holding and rationale should preclude federal courts in the future from adjudicating any pendent party claims. Presumably all instances of pendent party jurisdiction involve a party as to whom Congress has not expressly conferred subject-matter jurisdiction on the federal courts. Otherwise, the doctrine would be unnecessary.[63]

All nine Justices surely would agree with this reading. Just as clearly, Justice Scalia's own language in his majority opinion reaches further. "Our cases show," Scalia contended, "that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read ju-

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60. FED. R. CIV. P. 2 ("[T]here shall be one form of action to be known as 'civil action.' ").

61. 109 S. Ct. at 2009-10. The legislative history explaining these changes is contained at H.R. REP. No. 308, 80th Cong., 1st Sess., App. A114-A125 (1947) (Reviser's Notes).

62. 109 S. Ct. at 2010.

63. *Id.* at 2011 (Blackmun, J., dissenting) (acknowledging that "all instances of asserted pendent-party jurisdiction will by definition involve a party as to whom Congress has impliedly 'addressed itself' by not expressly conferring subject-matter jurisdiction on the federal courts") (quoting Aldinger v. Howard, 427 U.S. 1, 23 (1976) (Brennan, J., dissenting)).

Lower courts already have begun to read *Finley* in this way. *See, e.g.*, Iron Workers Mid-South Pension Fund v. Terotechnology Corp., 891 F.2d 548, 551 (5th Cir. 1990) ("The Supreme Court held in *Finley* that while pendent-party jurisdiction may pass constitutional muster, it has not been congressionally authorized."); Staffer v. Bouchard Transp. Co., 878 F.2d 638, 643 n.5 (2d Cir. 1989) (Citing *Finley* and observing that "pendent-party jurisdiction apparently is no longer a viable concept.").

risdiction statutes broadly."[64] But the assertion that taking jurisdiction over additional parties requires a more exacting statutory search than adding claims against existing parties undermines previously established case law regarding the federal courts' ancillary jurisdiction over third-party claims, compulsory counterclaims and cross-claims against additional parties, and claims raised by intervenors of right. With regard to those claims, just as with pendent party claims, it is doubtful that a search for an affirmative jurisdictional grant by Congress will bear fruit.[65] On this straightforward reading, *Finley* creates a crazy quilt of ancillary jurisdiction, where previously there was discernible design.

At this point one might wonder whether something has gone awry. Indeed it has. But the problem is not with *Finley*'s demand that lower courts find affirmative congressional approval before exercising pendent party jurisdiction. *Finley* is absolutely correct that a district court must have both constitutional and statutory authority to adjudicate a claim for relief. The problem, rather, is with the *Finley* Court's desire to limit its approach to the joinder of additional parties, and to leave undisturbed the joinder of jurisdictionally deficient claims. Justice Scalia grudgingly acknowledged that statutory authorization is as necessary for joinder of claims as for joinder of parties. He was unwilling, however, to unsettle the apple cart there:

> As we noted at the outset, our cases do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred. The *Gibbs* line of cases was a departure from prior practice, and a departure that we have no intent to limit or impair.[66]

But there is no principled basis for holding the line here. The *Finley* majority wrongly asserted that adjudicating a jurisdictionally insufficient claim against a new party is a more questionable extension of federal jurisdiction than adjudicating a jurisdictionally insufficient claim against an existing party. The new party, of course, is greatly burdened by being haled into the suit. That intrusion, however, at best raises fairness concerns

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64. 109 S. Ct. at 2007.

65. Already one district court has found that *Finley* precludes taking ancillary jurisdiction over third-party claims. *See* Community Coffee Co. v. m/s Kriti Amethyst, 715 F. Supp. 772 (E.D. La. 1989).

66. *Id.* at 2010; *see supra* note 12 and accompanying text.

under the due process clause,[67] not concerns about a federal court's jurisdiction.[68] If adjudicating a jurisdictionally insufficient claim against a new party is unlawful, so is adjudicating a jurisdictionally insufficient claim against a party already in the suit. Both adjudicate a state law matter that is beyond the limits of federal court subject-matter jurisdiction. Therefore, because they exceed our state-federal balance in the same measure, both should rise or fall together.[69]

The search for affirmative congressional authorization is neither more nor less pertinent to pendent party claims than to all of pendent and ancillary jurisdiction. Notwithstanding Justice Scalia's unwillingness to limit or impair pendent claim and ancillary jurisdiction, *Finley*'s premises create a wedge for chipping away at those doctrines. The remaining issue is whether a case can be made for upholding these previously settled areas.

D. The Search for Congressional Approval

There are three possibilities to consider in searching for affirmative congressional authorization. First, Congress may have expressly provided for supplemental jurisdiction in the jurisdiction statutes. Second, Congress may have provided for supplemental jurisdiction in a more oblique manner. Its intent may be derived not so much from the language of any particular statute but from pertinent legislative history. Third, although Congress itself may have failed to authorize supplemental jurisdiction, its silence in the face of consistent judicial development of the doctrine arguably may constitute ratification.

1. No explicit authority

With one narrow exception, congressional authorization of supplemental jurisdiction cannot be discerned from the plain language of any jurisdiction statute. We should not be surprised.

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67. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

68. Matasar II, *supra* note 3, at 169 n.326.

69. In dissent, Justice Stevens, joined by Justices Brennan and Marshall, acknowledged the implications of *Finley*. Stevens criticized the *Finley* majority on grounds that "[i]f the Court's demonstration were controlling, *Gibbs* [and the Court's other supplemental jurisdiction cases] were incorrectly decided." 109 S. Ct. at 2019 (Stevens, J., dissenting). Other commentators also have contended that jurisdiction over pendent parties is neither more nor less troubling than other recognized forms of supplemental jurisdiction. *See, e.g.*, Freer, *supra* note 3; Matasar II, *supra* note 3, at 167-69; Redish II, *supra* note 47, at 1396.

If the search were straightforward, the doctrines of pendent and ancillary jurisdiction would be superfluous.

The narrow exception is 28 U.S.C. section 1338, the jurisdiction statute governing copyright, patent, plant variety protection, and trademark suits. In subsection (b), Congress has authorized jurisdiction over a state claim for "unfair competition when joined with a substantial and related claim" raised pursuant to the federal laws listed in section 1338.

2. *No implied authority based on legislative history*

Moreover, congressional authorization cannot be gleaned from legislative history. Only once, in 1948, has Congress ever deliberated on pendent and ancillary jurisdiction, and its 1948 action cannot be read generally to sanction supplemental jurisdiction. As noted previously in discussing the *Finley* case, in 1948 Congress comprehensively revised Title 28, the Judicial Code.[70] With respect to the jurisdictional statutes, Congress for the most part only tinkered.[71] Congress, however, made one major jurisdictional change, by substantially amending section 1338 to add subsection (b).[72] The Reviser of the Judicial Code, William W. Barron, explained that adding subsection (b) was designed to codify the Supreme Court's holding in *Hurn v. Oursler*,[73] the decision permitting state unfair competition claims in federal copyright act suits.[74] Absolutely nothing in the legislative history suggests, and no one has ever argued, that the enactment of subsection (b) was intended to codify pendent ju-

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70. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869.

71. *See* S. REP. No. 1559, 80th Cong., 2d Sess. 2 (1948) ("[G]reat care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval."); J. MOORE, MOORE'S COMMENTARY ON THE U.S. JUDICIAL CODE ¶ 0.03(21), at 134 (1949) ("The few changes of substance that have been made are in the direction of expanding federal jurisdiction. Yet these are, on the whole, slight in character."); Barron, *The Judicial Code 1948 Revision*, 8 F.R.D. 439, 441-43 (1949); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216 (1948) ("In substance, though the bill advances many changes in existing provisions, it envisages no major alteration in the present distribution of judicial power between national and state courts. If there is need . . . for searching re-examination of the bases of the district court jurisdiction, it will survive enactment of this draft.").

72. Barron, *supra* note 71, at 441-42 (described by Reviser as one of the major changes of law in Title 28).

73. 289 U.S. 238 (1933).

74. *See* H.R. REP. No. 308, 80th Cong., 1st Sess., App. A119 (1947) (Reviser's Notes); *accord* Barron, *supra* note 71, at 442.

risdiction in areas other than trademark and copyright law.[75] Barron himself cautioned that the "statutory confirmation of the jurisdiction of federal courts in cases like these should not be regarded either as an extension or limitation of ancillary [or pendent] jurisdiction in other cases or under other circumstances."[76] Indeed, Professor Herbert Wechsler, prior to section 1338(b)'s enactment, harshly criticized the drafters for their unwillingness to grapple with the broader questions surrounding pendent jurisdiction.[77]

By its action in 1948, therefore, Congress demonstrated that it knows how to authorize, in precise language, jurisdiction over state law claims. The 1948 amendment to section 1338 undercuts Justice Scalia's contention in *Finley* that the courts may read jurisdictional statutes broadly to confer authority to hear pendent and ancillary claims.[78] Indeed, because Congress does not appear to have addressed supplemental jurisdiction either expressly or impliedly on any other occasion before or after

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75. Somewhat unclear is why Congress bothered to codify *Hurn v. Oursler* at all, since, as William Barron, the Chief Reviser of Title 28 of the U.S. Code on Judiciary and Judicial Procedure, noted, lower courts were uniform in following *Hurn*. *See* H.R. REP. No. 308, *supra* note 74, at App. A119. Most commentators believe that Congress enacted section 1338(b) to relax the test for pendent claim jurisdiction in copyright, patent, and trademark litigation from *Hurn's* strict "identity" standard to a more flexible rule. *See, e.g.*, J. MOORE, *supra* note 71, ¶ 0.03(24), at 150 (noting that the state claim "need not involve the identical facts, as some courts have insisted on. It suffices if there is real factual or legal relation."); Note, *Judicial Code of 1948*, 37 GEO. L.J. 394, 402-03 (1949).

A second related question is why Congress codified pendent claim jurisdiction only in instances where the federal question is founded on the copyright, patent, or trademark laws. No answer is found in the legislative history, but the answer here is probably two-fold. First, the codification is arguably the paradigm example of the drafters' conservatism. As noted, the drafters did not seek to alter the federal jurisdiction in any major way, see *supra* note 71, and the most firmly established case on pendent jurisdiction was the Supreme Court's explicit pronouncement in *Hurn*. Second, although by no means the only area where pendent claim jurisdiction had been invoked, copyright, patent, and trademark litigation was clearly the most frequently invoked area. *See* Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018, 1031 (1962) [hereinafter Columbia Note]; Note, *The Proposed Revision of the Federal Judicial Code*, 60 HARV. L. REV. 424, 431 (1947) [hereinafter Harvard Note]. The drafters may have believed that they were addressing the bulk, if not all, of the issues surrounding pendent jurisdiction.

76. Barron, *supra* note 71, at 442; *accord* Columbia Note, *supra* note 75, at 1032 n.74 ("Section 1338(b) clearly did not purport to apply to other than the specifically mentioned cases, nor did it intend to limit the authority of nonstatutory precedents in other areas.").

77. Wechsler, *supra* note 71, at 232; *accord* Harvard Note, *supra* note 75, at 431.

78. *See Finley*, 109 S. Ct. at 2007 (suggesting that with the "addition of only claims," it is appropriate to read jurisdiction statutes broadly).

1948,[79] the evidence clearly cuts against expansive readings of the jurisdiction statutes.

Professor Richard Freer nonetheless has recently attempted to locate a statutory grant of pendent and ancillary jurisdiction.[80] Freer's argument is particularly worthy of attention because it appears to have won acceptance among Justices Stevens, Brennan, and Marshall, who relied on Freer's position in their *Finley* dissent.[81] Freer contends that congressional authorization is contained in those portions of the jurisdiction statutes granting power over a "civil action." He argues that Congress, in adopting without defining that language, delegated to the federal courts the task of defining "civil action," and that the Supreme Court subsequently has defined this phrase to include pendent and ancillary claims permitted under the joinder provisions of the Federal Rules of Civil Procedure. Freer concludes that Congress' reenactment without revision of the pertinent jurisdictional statutes indicates its ratification of the Supreme Court's interpretation.[82]

Although Professor Freer's argument is imaginative, it is also fundamentally flawed. Congress' adoption of the term "civil action" does not appear to have had any jurisdictional significance. Congress adopted the language of "civil action," not in 1940 as Freer mistakenly contends,[83] but in 1948 as part of the comprehensive revision of Title 28.[84] There is literally nothing in the 1948 legislative history to suggest that Congress, by the choice of "civil action," granted expansive powers to the federal courts to define the scope of their own subject-matter jurisdic-

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79. Freer, *supra* note 3, at 59 n.146.

80. *See* Freer, *supra* note 3.

81. In his *Finley* dissent, Justice Stevens, joined by Brennan and Marshall, cited Freer's article and scolded the majority for rejecting "reliance on the plain meaning of the words 'civil action'—which after all might explain the assertion of pendent claim as well as pendent-party jurisdiction." 109 S. Ct. 2018-19 n.25 (Stevens, J., dissenting). In fairness to Professor Freer, Justice Stevens grossly misrepresented Freer's position in terming it a 'plain meaning' argument.

82. *See* Freer, *supra* note 3, at 56-58. For a similar argument, see Schenkier, *supra* note 14, at 259.

83. *See* Freer, *supra* note 3, at 56-57 & n.128. Professor Freer cites for his authority Act of April 20, 1940, Pub. L. No. 76-463, 54 Stat. 143, (*repealed by* Act of June 15, 1948, Pub. L. No. 80-773, § 2680 subsection 39, 62 Stat. 869, 1005). But that legislation merely extended diversity jurisdiction to include not only suits between citizens of different states, but also "citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory." It says absolutely nothing about civil actions.

84. *See, e.g.*, Act of June 25, 1948, Pub. L. No. 80-773, §§ 1331-1332, 62 Stat. 869, 930 (codified as amended at 28 U.S.C. §§ 1331-1332 (1982)).

tion. Instead, the legislative history reveals Congress chose the phrase, "civil action," solely for the purpose of conforming the language of Title 28's jurisdiction statutes to the language of Rule 2 of the Federal Rules of Civil Procedure.[85] Rule 2 announces an end to the forms of action and a merging of law and equity into just one form of action, the civil action.[86] As important as the merger of law and equity has been for modern civil procedure, no one has ever read Rule 2 to expand the scope of the district courts' subject-matter jurisdiction. Indeed, Rule 82 of the Federal Rules of Civil Procedure advises that the Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ."[87] Thus, because adoption of Rule 2 by the Supreme Court in 1938 had no jurisdictional significance, it is wrong to attribute any jurisdictional significance to Congress' simple act of adopting the language of Rule 2.[88] As Justice Scalia suggested in *Finley*, the 1948 revision of Title 28 "is more naturally understood as stylistic."[89]

Moreover, Freer's claim also runs counter to the canon of statutory interpretation that, by including only one instance, the legislature means to exclude all others.[90] As noted previously, in the same 1948 revision, Congress amended one of the jurisdiction statutes, section 1338, to confer jurisdiction over a particular type of pendent claim. Although as a general matter, the interpretive canon, *expressio unius est exclusio alterius*, is open to criticism,[91] it is hardly plausible to contend that Congress so obliquely delegated to the federal courts the power to define their own jurisdiction by using the term, "civil action," when it

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85. *See, e.g.*, H.R. REP. No. 308, 80th Cong., 1st Sess., App. A114 (1947) (Reviser's Notes) (In the section governing federal question jurisdiction, words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to "conform with Rule 2 of the Federal Rules of Civil Procedure"); *id.* at App. A115 (In the section governing diversity jurisdiction, the same revision was made for same reason).

86. FED. R. CIV. P. 2. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, §§ 1041-45 (2d ed. 1987) [hereinafter WRIGHT & MILLER].

87. FED. R. CIV. P. 82.

88. See discussion in text accompanying *supra* notes 57-61. Indeed, Professor Moore, a member of the Advisory Committee, in providing a "resume of changes" in his *Commentary*, neglects even to mention the adoption of the phrase "civil action" as an important change. *See* J. MOORE, *supra* note 71, § 0.03(12), at 81-97.

89. 109 S. Ct. at 2010.

90. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 234 (1975).

91. *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 282 (1985) ("The canon *expressio unius est exclusio alterius* is also based on the assumption of legislative omniscience. . . .").

expressly authorized a certain type of supplemental jurisdiction in section 1338 of the same act.

Finally, no significance should be attributed—as Professor Freer does—to Congress' occasional reenactment of the main jurisdiction statutes after the Supreme Court's more recent supplemental jurisdiction decisions. Nowhere in the case law does one find a court, least of all the Supreme Court, basing its pendent and ancillary authority on the term "civil action" as used in the jurisdiction statutes, or on any other statutory term. Indeed, prior to *Finley* most courts believed that express statutory authority for the exercise of pendent and ancillary jurisdiction was unnecessary.[92] In reenacting the jurisdiction statutes, Congress surely should not be regarded as ratifying a statutory interpretation by the courts, in the absence of any such interpretation.[93]

3. *No authority by legislative inaction*

A final point to consider is whether congressional silence about supplemental jurisdiction carries any weight. The argument runs as follows: since Congress has never overturned the Supreme Court's decisions on pendent and ancillary jurisdiction and has never even considered overturning those decisions, that inaction, by itself, constitutes affirmative ratification.

Whether congressional inaction can ever constitute ratification is currently a hotly debated topic among commentators.[94] Some commentators[95] have attributed significance to congres-

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92. *See, e.g.*, Aldinger v. Howard, 427 U.S. 1, 13 (1976) (*Gibbs* and its lineal ancestors posed no "need for a further inquiry into the underlying statutory grant of federal jurisdiction or a flexible analysis of concepts such as 'question,' 'claim,' and 'cause of action,' because Congress had not addressed itself by statute to this matter"). That view was shared by commentators. *See, e.g.*, F. JAMES & G. HAZARD, CIVIL PROCEDURE, § 2.7, at 61-62 (3d ed. 1985) [hereinafter JAMES & HAZARD] (ancillary and pendent jurisdiction are results of "decisional law rather than statute").

93. Even if the Court had been misinterpreting the term "civil action" to permit the exercise of supplemental jurisdiction, inferring anything based on legislative reenactment is problematic unless the legislative history indicates that Congress specifically considered the issue as it was reenacting the statute. *See, e.g.*, R. POSNER, *supra* note 91, at 282-83; Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988) ("Generally, when the Court finds meaning in Congress' inaction, it points to specific legislative consideration of the issue.").

94. *See, e.g.*, Eskridge, *supra* note 93; Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2 (1988); Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

95. *See, e.g.*, Eskridge, *supra* note 93; Farber, *supra* note 94.

sional silence when it is clear that Congress was aware of the Court's decisions.[96] Others, however, have argued that silence should never constitute ratification because Congress can act only by passing legislation and because approval of the status quo is only one of many possible explanations for silence. Congressional failure to overturn a precedent may just as likely represent disagreement, ineptitude, unawareness, indifference, or political cowardice.[97]

It is unnecessary for purposes of this article to resolve this jurisprudential debate. Putting aside whether congressional inaction ever can carry weight, commentators and courts nonetheless agree that when there is no evidence that Congress is aware of the Court's interpretation, no significance should be attributed to congressional silence.[98] Rarely is Congress aware of procedural issues,[99] and that is certainly true for the supplemental jurisdiction cases.[100] Additionally, whether or not there is any theoretical merit to the legislative inaction argument, there are presently five justices on the Court who have rejected its validity, apparently under all circumstances. In *Patterson v. McLean Credit Union*,[101] the Court rejected the notion that Congress' failure to overturn a precedent represents affirmative congressional approval of the Court's interpretation. "Congress may legislate," the Court reminded, "only through the passage of a bill which is approved by both Houses and signed by the President."[102] The *Patterson* Court's remarks are particularly compelling here, where Congress has enacted no pertinent legislation for which there are interpretations to subsequently ratify.

Thus, the search for affirmative congressional approval of pendent claim and ancillary jurisdiction has proven, with the narrow exception of 28 U.S.C. section 1338, as unavailing as the *Finley* Court's search for pendent party authorization. The rationale of *Finley*, applied to the ostensibly settled areas of pen-

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96. For cases in which the Supreme Court has attributed significance to legislative silence, see the cases collected in Eskridge, *supra* note 93, at 125-26.

97. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting).

98. *See* Eskridge, *supra* note 93, at 69; Farber, *supra* note 94, at 10-11.

99. *See* Farber, *supra* note 94, at 10 ("For example, in an area like civil procedure, to which Congress is quite inattentive, silence means little.").

100. Other than in 1948, there is no indication that Congress has ever discussed the issue, much less been aware of the main cases. *See supra* note 79 and accompanying text.

101. 109 S. Ct. 2363 (1989).

102. *Id.* at 2371-72 n.1.

dent claim and ancillary jurisdiction, indicates that those doctrines lack constitutionally required statutory authorization. Congress thus has an opportunity to write on a clean slate.

III. The Alternatives After *Finley*

In dealing with *Finley*'s aftermath, Congress has three options. First, Congress could abolish any vestiges of pendent and ancillary jurisdiction remaining after *Finley*. Second, Congress instead could take the position that the doctrines of pendent claim, pendent party, and ancillary jurisdiction are a beneficial feature of the federal procedural system. Believing that *Finley* really only eliminates pendent party jurisdiction, Congress could overrule the most obvious implication of *Finley* by codifying pendent party jurisdiction. Third, Congress could take the same favorable position on supplemental jurisdiction. Believing, however, that *Finley* seriously undermines all of supplemental jurisdiction, Congress could overrule *Finley* by codifying pendent claim, pendent party, and ancillary jurisdiction. In the following sections, this paper proposes that Congress pursue the third option.

A. Alternative 1: Abolishing Supplemental Jurisdiction

There are three plausible grounds for abolishing pendent and ancillary jurisdiction. The first ground is based on a growing sense that the federal court system is presently taxed to the limit.[103] Those who agree with this perception might argue that eliminating all state claims for which there is presently no statutory basis of jurisdiction would be an effective way to reduce the workload of the federal judiciary. The federal courts could then devote more time to federal question cases that are particularly complex or that require a national perspective, thereby enhancing the overall quality of justice in those cases. Although there are no empirical statistics on how many federal lawsuits carry with them pendent and ancillary claims,[104] one could reasonably

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103. *See, e.g.*, R. Posner, *supra* note 91, at 59-116. *But see* Galanter, *Reading the Language of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983); Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 Wis. L. Rev. 921.

104. Presently, there is no easy way to acquire this information. One possibility in the future is through the designation sheet all plaintiffs must complete when filing their complaints. The designation sheet requires the plaintiff to identify the statutory basis of

surmise that most federal question suits have pendent and ancillary claims. Thus, arguably a substantial chunk of the federal court's civil suit workload could be eliminated by abolishing pendent and ancillary jurisdiction.[105]

Abolishing supplemental jurisdiction, however, will also have the unhappy outcome of discouraging litigants from bringing their federal question suits in federal courts. State courts have concurrent jurisdiction with federal courts over most, though certainly not all, claims arising under federal law.[106] Since most state courts have liberal joinder rules, litigants can usually litigate in state court a complete controversy—all of the related state and federal claims held by the parties to the suit. If Congress were to abolish supplemental jurisdiction, state courts would generally be the only available forum for packaging the variety of state and federal claims that often comprise a complex lawsuit.

To be sure, there are many reasons why a plaintiff chooses a particular forum. Resolving all factually related claims together is only one of a variety of factors the litigant considers. Yet this is an important consideration. Avoiding piecemeal litigation is so valuable to many litigants that if supplemental jurisdiction were abolished, more federal question cases of great complexity or national scope would be filed in state court than are presently filed there. How many more we do not know. But eliminating supplemental jurisdiction is not a sensible route to decreasing the federal workload because it will likely have the deleterious effect of significantly reducing the workload on issues the federal courts are meant to decide.

A second ground for abolishing supplemental jurisdiction is

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jurisdiction, and when the basis is federal, the federal question raised; however, the sheet does not require the plaintiff to declare whether there are any pendent state claims when jurisdiction is based on a federal question. The Administrative Office of the U.S. Courts could begin to gather these statistics on pendent claims by producing a designation sheet that calls for such information. Even then, this method would only produce statistics about pendent claims at the time of filing, not those that are raised later by amendment. There may never be any easy way to gather information on ancillary claims, since parties and claims are often added later in litigation.

105. It could be contended, however, that in federal question cases, the additional time expended processing transactionally related state claims is not significant.

106. Claims within the exclusive jurisdiction of the federal courts include those under the federal antitrust laws, 15 U.S.C. §§ 15, 26 (1988); bankruptcy laws, 28 U.S.C. § 1334 (1982 & Supp. V 1987); patent, trademark, and copyright laws, 28 U.S.C. § 1338(a) (1982); securities law, 15 U.S.C. § 78aa (1988); and Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982 & Supp. V 1987).

unsound for the same reason. Some commentators argue that because an efficient packaging of litigation is possible in state court, the doctrines of pendent and ancillary jurisdiction are an unnecessary luxury in federal court.[107] But supplemental jurisdiction, particularly pendent jurisdiction, is only unnecessary if we are unconcerned about providing an efficient, convenient federal forum for the litigation of federal claims. This second ground for abolishing supplemental jurisdiction overlooks that the doctrines of pendent and ancillary jurisdiction not only promote judicial efficiency and litigant convenience, but also effectuate Congress' decision to provide the plaintiff with a federal forum for litigating federal questions.[108]

With respect to both of the first two grounds, there is an additional consideration as well. Not all federal questions may be brought in state, as well as federal, court.[109] If supplemental jurisdiction were abolished, litigants with exclusive federal questions and related state claims would have two options. They could split their causes of action between federal and state court, or they could choose to sue in only one forum and forsake either their federal or state claims. Neither option is desirable. Forcing a litigant to split one legal controversy between two courts is inefficient for the judicial system and the litigants. The alternative of depriving litigants of the practical means to litigate all of their colorable claims is inconsistent with the goals of any rational procedural system.[110]

Finally, a third ground for abolishing supplemental jurisdiction deserves brief consideration. One might argue that supplemental jurisdiction should be eliminated because state, not federal, courts should be adjudicating the rights and obligations of persons under state law, particularly when the state claims predominate or raise unsettled or complex issues of state law.[111] Arguably, this federalism concern is intensified when speaking about complicated or undecided state issues since there is no appeal to the state court system of a state issue that has been wrongly decided in the federal system.[112] However, concern that

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107. *See, e.g.*, Shakman, *supra* note 4.

108. *See* Schenkier, *supra* note 14 (responding to Shakman's article).

109. *See supra* note 106.

110. *See* Finley v. United States, 109 S. Ct. 2003, 2021 (Steven, J., dissenting) (criticizing the inefficiency and unfairness of rejecting pendent party jurisdiction in contexts of exclusive federal jurisdiction).

111. *See* Shakman, *supra* note 4, at 265.

112. *Id.* at 266.

federal courts should avoid deciding significant state claims should be handled not by abolishing supplemental jurisdiction entirely, but by emphasizing the federal district court should exercise its discretion in appropriate cases to decline jurisdiction over novel or complex state law claims. Exercising discretion in these circumstances pays deference to federalism and comity considerations, while preserving the efficiency of a federal forum.

The policies in favor of supplemental jurisdiction thus outweigh any of the countervailing considerations articulated above. The doctrines of pendent claim, pendent party, and ancillary jurisdiction ensure a convenient and efficient federal forum for the litigation of federal questions. If the federal courts are to play a dominant role in the promotion of constitutional values and the construction of federal statutes, those doctrines should be promoted, not abolished.

B. Alternative 2: Codifying Only Pendent Party Jurisdiction

Although the *Finley* Court acknowledged that its logic undermines all of supplemental jurisdiction, not simply pendent party jurisdiction, Justice Scalia wrote that "[t]he *Gibbs* line of cases was a departure from prior practice," but "a departure we have no intent to limit or impair."[113] It might be argued, therefore, that to preserve supplemental jurisdiction and thereby to ensure the viability of the federal judiciary as an important player on federal questions, Congress need only codify pendent party jurisdiction. In effect, since the *Finley* Court appears adamant about applying stare decisis to its cases on pendent claim and ancillary jurisdiction, Congress need overrule only *Finley*'s express implications.

One can only speculate how the Supreme Court will apply stare decisis in this area in the future. Indeed, as it stands now, Justice Scalia may be able to deliver on his resolve not to "limit or impair" *Gibbs* and the ancillary jurisdiction. In *Finley* four Justices joined his opinion and four other Justices were outraged that the Court had cut back at all on supplemental jurisdiction. No one presently on the Court seems inclined to inflict any more damage.

The principle of stare decisis, however, when fairly applied at some point down the road may not permit the Supreme Court to maintain the status quo on supplemental jurisdiction. As the

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113. 109 S. Ct. at 2010.

Court reaffirmed this term in *Patterson v. McLean Credit Union*,[114] stare decisis does not preclude the overruling of a prior decision when an intervening change in the law, through either the growth of judicial doctrine or further action by Congress, removes or weakens "the conceptual underpinnings from the prior decision"[115] or "where the later law has rendered the decision irreconcilable with competing legal doctrines or policies."[116] The same policies that generally support the principle of stare decisis warrant overruling a precedent when it is fundamentally inconsistent with later law. In *Patterson*, the Supreme Court explained that stare decisis is intended to promote confidence in the law and legal decisionmaking; stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."[117] Confidence in the law, however, erodes when prior decisions are maintained despite the development of new learning that clearly undercuts the rationale of the prior decisions.

Finley has indeed announced new learning that undercuts *Gibbs*, *Kroger*, and the Court's prior supplemental jurisdiction cases. *Finley* demands that federal courts look for affirmative statutory authorization to adjudicate supplemental claims. At most, the earlier Supreme Court cases required the federal courts to see if Congress had precluded the adjudication of supplemental claims. The rift between the theoretical approaches of *Finley* and the Court's earlier precedents is massive and irreconcilable. Moreover, when one considers the scope of the error, it is impossible to justify any deference to the earlier precedents in light of *Finley*. The mistakes in *Gibbs* and *Kroger* are not ones of simple statutory misinterpretation, but of noninterpretation. *Finley* leads us to conclude that the federal courts have engaged in a systematic, unconstitutional grabbing of subject-matter jurisdictional power, which is constitutionally reserved for Congress.[118] Overlooking that kind of power grab in a federalist sys-

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114. *Id.* at 2363.

115. *Id.* at 2370.

116. *Id.* at 2371.

117. *Id.* at 2370 (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

118. The Court's expansion of subject matter jurisdiction beyond statutory limits is as serious a usurpation of legislative power as the federal judiciary's refusal to exercise statutorily authorized jurisdiction, which Professor Redish contends violates separation of powers. *See* Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Redish I, *supra* note 47, at 355 (doctrines of pendent and ancillary jurisdiction "might ultimately suffer from the same separation-of-powers

tem is as problematic as overlooking *Swift v. Tyson*[119] was for the *Erie* Court.[120]

Finally, one cannot reconcile Justice Scalia's reluctance to consider whether the federal courts have authority over supplemental claims with the Court's traditional fervor regarding issues of subject-matter jurisdiction. Indeed, the rules and case law on subject-matter jurisdiction are draconian. Unlike every other rule of civil procedure, parties cannot waive lack of subject-matter jurisdiction either by express consent, by conduct, or by estoppel.[121] The federal courts, whether at the trial or appellate level, are obliged to notice lack of subject-matter jurisdiction on their own motions.[122] A federal court can and must dismiss a case for lack of subject-matter jurisdiction at any stage of the judicial proceeding. Those of us who fretted about poor Mrs. Mottley in first-year civil procedure know that the Supreme Court itself has dismissed cases on jurisdictional grounds that had travelled for years through the federal judicial system without so much as a jurisdictional quibble.[123]

The rigor of these rules, aberrational in their strictness, is attributable to the sense that whether a federal court has constitutional and statutory jurisdiction to hear a claim goes to the heart of our federalist structure.[124] In light of our federalism, it is inconceivable that the Supreme Court, if presented with the question in the future, could countenance the systematic exercise of jurisdiction over state law claims in the absence of statutory authority. But there is no reason to test the validity of that assertion. Because supplemental jurisdiction is good for the federal system, Congress should avoid the costs of litigation over *Finley* and supplemental jurisdiction's possible demise by codifying it.

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defect as judge-made abstention"), *cf.* Freer, *supra* note 3, at 56 ("It is simply unthinkable that the Court would countenance an expansion of jurisdiction by judicial fiat.").

119. 41 U.S. (16 Pet.) 1 (1842).

120. Erie R.R. Co. v. Tompkins 304 U.S. 64 (1938).

121. C. WRIGHT, *supra* note 49, at 23.

122. FED. R. CIV. P. 12(h)(3).

123. *See* Louisville & N.R. Co. v. Mottley, 211 U.S. 149 (1908); Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804).

124. *See* C. WRIGHT, *supra* note 49, at 23 ("Such a harsh rule could hardly be defended as a sensible regulation of procedure, and can only be justified by the delicate problems of federal-state relations that are involved.").

C. Alternative 3: Codifying Supplemental Jurisdiction

Congress' best alternative, therefore, is to codify pendent claim, pendent party, and ancillary jurisdiction. In pursuing that option, Congress must decide whether to codify supplemental jurisdiction as it was generally understood by the lower courts prior to *Finley* or to modify certain features. With respect to pendent jurisdiction, the soundest approach is for Congress to grant to federal district courts the plenary power to adjudicate pendent claims and parties, while encouraging courts to depart in appropriate cases from their current practice of hearing all pendent claims within their power. With respect to ancillary jurisdiction, the proper resolution is more problematic, in part because the doctrine of ancillary jurisdiction is internally inconsistent, and in part because fixing it depends on whether Congress intends to eliminate diversity jurisdiction.[125] The following subsections describe the status of the three doctrines prior to *Finley* and recommend modifications where appropriate.

1. Pendent claim jurisdiction

As noted previously, *Gibbs* established that the federal courts have power to exercise pendent jurisdiction over a state claim whenever the plaintiff has raised a substantial federal question, the state claim arises from the same nucleus of operative fact as the federal question, and the state and federal claims are such that they would be expected ordinarily to be litigated together in one judicial proceeding. Although one can find some aberrations in the case law,[126] lower courts have been reasonably consistent in applying the power wing of *Gibbs* to enhance judicial efficiency and to ensure the proper place of the federal courts as the adjudicators of federal rights.[127] By and large, the

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125. Despite continuing criticism by judges and commentators of diversity jurisdiction, *see* Freer, *supra* note 3, at 46 n.64, 76 n.220 (citing articles and books criticizing diversity jurisdiction); Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97; Congress has done nothing to limit it.

The Federal Courts Study Committee is recommending that Congress abolish diversity jurisdiction. *See* Federal Courts Study Committee, *Tentative Recommendations for Public Comment*, at 9 (Dec. 22, 1989).

126. *See, e.g.*, Mason v. Richmond Motor Co., 625 F.Supp. 883, 887 (E.D. Va. 1986) ("Not only must the facts be at the *nucleus* of both State and federal claims, the facts common to each case must be the *operative* facts.") (emphasis in original).

127. 13B WRIGHT, MILLER & COOPER, *supra* note 7, § 3567.1, at 117 (2d ed. 1984) ("The question of power, under the two tests laid down in *Gibbs*, has not given subsequent courts much difficulty.").

lower courts have followed *Bell v. Hood*[128] and found a federal question to be substantial unless it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."[129] To meet the "common nucleus" test, the lower courts have fostered efficiency by requiring only a loose factual connection between the federal and related state claims, typically a transactional connection.[130] Moreover, the federal courts have appropriately ignored *Gibbs'* language regarding the expectation of joint adjudication as mere surplusage.[131]

In sum, the question of jurisdictional power over pendent claims has not given lower courts much difficulty, and courts and commentators generally have been satisfied with the *Gibbs* Court's articulation. Congress accordingly should codify *Gibbs'* power prong by requiring that a substantial federal question be raised and that the state and federal claims arise out of the same transactions or occurrences. The choice of "transaction or occurrence" language, rather than *Gibbs'* language of factual overlap, is intended to have no substantive effect, but will be consistent with the "transaction or occurrence" language contained in the Federal Rules of Civil Procedure.[132]

Gibbs, as noted, also established that federal courts need not exercise their power over pendent claims. *Gibbs* told district courts to look to "considerations of judicial economy, convenience and fairness to litigants" in exercising their discretion.[133] Moreover, courts were cautioned to avoid deciding state claims when the tail was wagging the dog:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties,

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128. 327 U.S. 678 (1946).

129. *Id.* at 682-83; *See also* Matasar II, *supra* note 3, at 127-28 (most courts today rarely use insubstantiality to limit pendent jurisdiction).

130. 13B WRIGHT, MILLER & COOPER, *supra* note 7, § 3567.1, at 117 ("loose factual connection"); *See, e.g.*, Frye v. Pioneer Logging Mach., Inc., 555 F. Supp. 730, 732 (D.S.C. 1983); Mid-State Food Dealers Ass'n v. City of Durand, 525 F. Supp. 387, 392 (E.D. Mich. 1981).

131. *See* Matasar II, *supra* note 3, at 138 (courts "either ignore the requirement" or "cite the language without analysis").

132. The arising "out of the transaction or occurrence" language found in FED. R. CIV. P. 13(a), 13(g), & 20 requires a logical relationship test which is basically the equivalent of the "common nucleus of operative fact" test articulated in *Gibbs*, 383 U.S. at 725. *See* Moore v. New York Cotton Exch., 270 U.S. 593, 609 (1926); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961).

133. 383 U.S. at 726.

> by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.[134]

For the most part, with the exception of cases in which the federal question has been dismissed pretrial, this advice in *Gibbs* has been overlooked.[135] Typically, lower courts have dismissed pendent state claims only when the federal questions have been dismissed prior to trial and the court has concluded that there would be no judicial efficiency in retaining the state claim.[136] When the federal questions have withstood pretrial challenge, however, most courts have retained the state claims regardless of their complexity, novelty, or predominance. Thus, while considerations of judicial efficiency have guided lower courts, most courts have ignored *Gibbs'* advice on comity.

Congress should encourage the courts to dismiss pendent claims in the interests of federalism and comity as well as judicial efficiency. Ignoring principles of federalism and comity is misguided because it carries the potential of straining state-federal relations without advancing any legitimate goals of the federal system. Federal courts should refrain from embracing law suits that, although stating some plausible or nonfrivolous federal question, are in reality state law suits. Federal courts should also be reluctant to decide pendent state claims on the cutting edge when the federal questions are garden variety and not ex-

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134. *Id.* at 726-27.

135. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 2.13, at 72 (1985) [hereinafter FRIEDENTHAL, KANE & MILLER] ("most courts have exercised their discretion to hear a pendent claim if the power to do so is found to exist; only a few courts have used their discretion to dismiss pendent claims").

136. There was some confusion for many years over *Gibbs'* statement that "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." 383 U.S. at 726. Last term, the Supreme Court in Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988), clarified in dictum that the *Gibbs'* remark was not intended to be mechanically applied. "The statement simply recognizes," the Court explained, "that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims."

clusively federal. The only plausible objection to consistent implementation of *Gibbs'* advice on comity is that dismissing the pendent claims in these instances may lead the plaintiff to go to state court to litigate his or her federal claims, as well as the state claims. This paper has shown that, as a general matter, requiring litigants routinely to take their related federal and state claims to state court to avoid piecemeal litigation will diminish the importance of the federal judiciary. But no intrusion should be felt on the federal courts' primary role in administering the development of federal constitutional and statutory law in circumstances where the significant claims raised are state, not federal, claims. Indeed, the federal procedural system should be designed to encourage those suits to be litigated in state court.

Of course, the task of balancing the factors relevant to the sound exercise of pendent jurisdiction—federal court preeminence, federalism, comity, and judicial efficiency—is not necessarily an easy one. Moreover, encouraging courts to dismiss pendent claims when appropriate is not meant to be a license to clear the deck of state claims, but a tool for balancing federalism interests. A federal district court will have to weigh sensitively the significance, dominance, or novelty of the state law claims against the importance of the federal questions, and to dismiss only when the calculus points clearly to state court. Often the district court will not be able to make that calculation until the litigation has advanced substantially. In those circumstances, the district court additionally will have to factor in the inefficiency of dismissing the pendent claims after the court and litigants have expended so much time and expense.[137]

Because the court closest to the action, the district court, will always be in a better position than the appellate courts to balance factors of judicial efficiency, federalism, comity, and federal court preeminence, the exercise of trial court discretion should be, as it is now, virtually unreviewable on appeal. One might object here that given the difficulty of this balancing and

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137. The Supreme Court in Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988), provided an alternative to dismissal in instances when a case has been removed to federal court. In *Cohill* the Court held that a federal court has discretion to remand a case to state court when the case was removed on federal question grounds and when the federal question has been dismissed by pretrial motion. *Id.* at 350-51. Congress should additionally codify *Cohill* by amending the removal statute, 28 U.S.C. §§ 1441-1447 (1982 & Supp. V 1987), to reflect the district court's powers after *Cohill*.

with so much at stake, it is better to restrict or perhaps even eliminate the district court's discretion to dismiss state claims, rather than entrust it with so much unreviewable power.

There should be little reason, however, to distrust discretion here more than anywhere else. The discretion required of district judges regarding pendent jurisdiction issues is not qualitatively more demanding than many other discretionary decisions district judges routinely make. Nor does the exercise of such discretion carry more importance for the well-being of a litigant than many other discretionary decisions. The Federal Rules of Evidence provide abundant discretionary power to trial judges in critical contexts.[138] The same is true for Rules 16[139] and 26[140] of the Federal Rules of Civil Procedure, which both encourage district judges, without the guidance of detailed rules, to actively manage the pretrial phase of a case.[141] Indeed, Rule 16 encourages district judges to take on the highly discretionary role of mediator in facilitating settlement.[142] Much of this authority is largely unreviewable.

Broad discretionary power, in sum, permeates our procedural rules. That expansive authority has been given to district judges on the belief that flexible rules will enable judges to engage in sensitive case-by-case adjudication and that people charged with implementing the law will do so in a responsible way.[143] At bottom, the drafting policy underlying the federal evidence and procedural rules is that rules should be drafted with the adroit, fair-minded judge in mind, not under the specter of the incompetent or biased judge.

One who questions trial court discretion, therefore, must take on the entire corpus and philosophy of procedural law, not just whether district courts should have discretion to dismiss pendent state claims. Even so, it might be argued that placing the burden upon those who attack trial court discretion should not relieve the defender of discretion from addressing the accu-

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138. *See* Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989).

139. FED R. CIV. P. 16.

140. FED. R. CIV. P. 26.

141. For the classic defense, see Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981). For the classic critique, see Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

142. *See* FED. R. CIV. P. 16(a)(5).

143. *See* Mengler, *supra* note 138, at 465-66.

mulated data. Indeed, there is evidence to give one pause. Presently, the lower courts are sharply divided over whether it is appropriate to exercise pendent jurisdiction in employment discrimination cases arising under Title VII of the Civil Rights Act of 1964[144] and the Age Discrimination in Employment Act (ADEA).[145] The pendent claims typically are for breach of the oral or written employment contract. Those courts that have dismissed the pendent claims have done so for two reasons. First, some courts, applying *Aldinger*'s statutory inquiry, have found that because the remedies available under Title VII and the ADEA are more limited than those available under state contract law, Congress in enacting Title VII and the ADEA impliedly precluded pendent claims in suits under those statutes.[146] Second, some courts have held that because the validity of a claim for breach of an at-will employment contract is an unsettled area of state law, federalism and comity demand that the pendent claims be dismissed.[147]

What one may reasonably conclude from a limited sample of reported cases is always problematic.[148] Moreover, what one

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144. For courts denying pendent jurisdiction in Title VII cases, see Redenbaugh v. Valero Energy Corp., 603 F. Supp. 138 (W.D. Tex. 1985); Mongeon v. Shellcraft Indus., Inc., 590 F. Supp. 956 (D. Vt. 1984); Frye v. Pioneer Logging Mach., Inc., 555 F. Supp. 730 (D.S.C. 1983); Bennett v. Southern Marine Mgmt. Co., 531 F. Supp. 115 (M.D. Fla. 1982); Lim v. International Inst. of Metro. Detroit, Inc., 510 F. Supp. 722 (E.D. Mich. 1981). For courts permitting pendent claims in Title VII cases, see Jones v. Intermountain Power Project, 794 F.2d 546 (10th Cir. 1986); Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524 (11th Cir. 1983); Yousef v. Borman Foods, Inc. 667 F. Supp. 443 (E.D. Mich. 1987).

145. For courts denying pendent jurisdiction in ADEA cases, see Shirley v. Brown & Williamson Tobacco Co., 608 F. Supp. 78 (E.D. Tenn. 1984); Ritter v. Colorado Interstate Gas Co., 593 F. Supp. 1279 (D. Colo. 1984); James v. Kid Broadcasting Corp., 559 F. Supp. 1153 (D. Idaho 1983); Deutsch v. Carl Zeiss, Inc., 529 F. Supp. 215 (S.D.N.Y. 1981). For courts permitting pendent claims in ADEA cases, see Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 499 (D. Del. 1977); Fellows v. Medford Corp., 431 F. Supp. 199 (D. Or. 1977).

146. *See, e.g.*, Mongeon v. Shellcraft Indus., Inc., 590 F. Supp. 956, 958-62 (D. Vt. 1984). *But see* Jones v. Intermountain Power Project, 794 F.2d 546, 549-53 (10th Cir. 1986) (rejecting rationale as applied to Title VII); Ritter v. Colorado Interstate Gas Co., 593 F. Supp. 1279, 1282-83 (D. Colo. 1984) (rejecting rationale as applied to ADEA).

147. *See, e.g.*, Ritter v. Colorado Interstate Gas Co., 593 F. Supp. 1279, 1284-85 (D. Colo. 1984); Mongeon v. Shellcraft Indus., Inc., 590 F. Supp. 956, 961 (D. Vt. 1984); *cf.* Buethe v. Britt Airlines, 749 F.2d 1235, 1240-41 (7th Cir. 1984) (noting that, in addition to pretrial dismissal of federal question, "[a]nother factor arguing against the retention of this state law claim . . . is the fact that the claim raises issues of first impression in Indiana").

148. *Cf. Rule 11 in Transition: The Report of the Third Circuit Task Force on*

concludes may depend as much on your faith in federal judges as on anything else. One might infer that the cases indicate faithful adherence to the Supreme Court's pronouncements in *Gibbs*, *Aldinger*, and *Kroger*. One might just as easily infer, however, that because federal courts have typically not dismissed other types of factually related pendent claims, this line of civil rights cases is suspicious.[149]

In any event, one should not throw the baby out with the bath water. If the cases demonstrate an unjustified judicial animosity to employment discrimination litigants, then Congress should seek to address that discrete problem here and anywhere else. Indeed, codification along the lines proposed and the passage of time may well resolve this troubling line of cases. Codification of pendent jurisdiction generally will moot one of the stated rationales of these cases, that congressional intent precludes the exercise of pendent jurisdiction in Title VII and ADEA cases. The inevitable development of state employment law over time should moot the other rationale, that federalism and comity require dismissal of pendent state claims in Title VII and ADEA litigation. Until that time, however, dismissal of pendent employment contract claims on grounds that they raise important state policy questions is entirely consistent with the goals of federalism and *Gibbs*.

As this paper has contended, a rule absolutely forbidding the dismissal of state claims that are within the district court's pendent powers ignores legitimate applications of federalism and comity. Congress should enact a provision that strongly encourages trial courts to take into account principles of federalism, comity, judicial efficiency, and federal preeminence when deciding to retain or dismiss pendent state claims. The desired effect of such legislation will be the exercise of sound discretion in dismissing pendent state claims when a suit filed as a federal question suit is predominantly a state law suit.

2. *Pendent party jurisdiction*

Prior to *Finley*, the most unsettled area of supplemental jurisdiction was pendent party jurisdiction.[150] *Aldinger* had left

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Federal Rules of Civil Procedure 11, at xiii (1989) (Professor Stephen B. Burbank, Reporter) (finding that published decisions are not a reliable indicator of Rule 11 activity).

149. *See supra* note 135 and accompanying text.

150. *See* FRIEDENTHAL, KANE & MILLER, *supra* note 135, § 2.13, at 75.

much unanswered as to when a federal court could exercise power over pendent parties. Its cautious attitude was read by some lower courts as a signal to be reticent in adjudicating claims over pendent parties. But most courts continued, even after *Aldinger*, to allow the joinder of pendent parties, particularly if federal jurisdiction was exclusive.[151]

Congress should overturn *Aldinger*'s and *Finley*'s antipathy to pendent party jurisdiction. The benefits derived from permitting the joinder of a factually related state claims against an additional defendant are identical to the benefits derived from joining related state claims against existing defendants. The *Finley* Court itself recognized those benefits.[152] Litigants are able to pursue their federal claims in federal courts without being compelled by law in the case of exclusive federal questions, or by practicality in the case of concurrent federal questions, to send off the rest of their litigation package to state court or to abandon entirely the state portion of the package. Hence, duplicative judicial effort in the state and federal courts is avoided.

Congress should codify pendent party jurisdiction on exactly the same terms as pendent claim jurisdiction. Lower courts should have power over pendent parties when the claimant raises a substantial federal question against one defendant and the state claim against a second nondiverse defendant arises from the same transaction or occurrence as the federal question. Additionally, in exercising their discretion, lower courts should consider the same factors that are pertinent to pendent claims.

3. *Ancillary jurisdiction*

Since *Kroger* was decided in 1978, the doctrine of ancillary jurisdiction has become mostly settled. Lower courts have generally agreed on what claims are within the district court's ancillary powers. The courts have been uniform in asserting power over compulsory counterclaims against existing and âdditional parties, cross-claims against existing and additional parties, impleader claims against third-party defendants, claims by third-party defendants that are transactionally related to the subject matter of the original claim, and claims by intervenors of right.[153] Lower courts, moreover, have agreed on what claims are

151. *See id.*

152. 109 S. Ct. at 2010.

153. FRIEDENTHAL, KANE & MILLER, *supra* note 135, § 2.14, at 77-78.

not within their ancillary powers. For example, courts have refused to exercise ancillary jurisdiction in diversity suits over claims by plaintiffs against parties to be joined if feasible under Federal Rule of Civil Procedure 19 and claims by plaintiffs against third-party defendants. In both diversity and federal question suits, courts have declined to exercise ancillary jurisdiction over permissive counterclaims and claims by permissive intervenors.[154]

Although the doctrine of ancillary jurisdiction seems settled, the consensus is that some details of the doctrine are highly problematic. Ancillary jurisdiction has been described as the product of "wavering evolution rather than progressive development," and as "internally inconsistent."[155] Writing on a clean slate, Congress will have several options to consider. One option, of course, is for Congress to codify ancillary jurisdiction as it existed prior to *Finley*, warts and all. However, given the consensus that the inconsistencies are severe, this seems an unattractive alternative. A second option is to explore the structure of the doctrine and to reevaluate it.

Looming ahead of the second option, however, is a tortuous path. Because the problem areas of the ancillary doctrine revolve around the complete diversity requirement, rethinking an-

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Additionally, some courts have exercised ancillary jurisdiction over permissive counterclaims in the form of set-offs to a contract action. *See, e.g.*, Ambromovage v. United Mine Workers, 726 F.2d 972 (3d Cir. 1984); Curtis v. J.E. Caldwell & Co., 86 F.R.D. 454 (E.D. Pa. 1980). Although this counterclaim by definition is not transactionally related to plaintiff's claim, ancillary jurisdiction over a set-off has been defended on grounds that it promotes the policy against multiplicity of actions by resolving in one forum the parties' contractual grievances up to the value of plaintiff's claim and that it would not result in a substantial extension of federal subject matter jurisdiction. *See* 6 WRIGHT & MILLER, *supra* note 85, § 1422, at 122. The efficiencies here though are highly dubious, and no unfairness would result if codification of ancillary jurisdiction forced these contract claims into state court.

154. FRIEDENTHAL, KANE & MILLER, *supra* note 135, § 2.14, at 78; Miller, *supra* note 14 at 6, 10. There is moreover some authority for denying intervention of right when the intervenor could be classified as an indispensable party under Rule 19(b) of the Federal Rules of Civil Procedure. 7A WRIGHT & MILLER, *supra* note 86, § 1917, at 601-02. Described as an historical anomaly, it is doubtful whether this exception survived the 1966 amendments to Rule 19. *See* Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1087 n.126 (1985); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 365-66 (1967); McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 719 n.82 (1976).

155. JAMES & HAZARD, *supra* note 92, § 2.7, at 61-62; *see also* Champlin, *Extension of Federal Subject Matter Jurisdiction: The Need for a Functional Approach* 26 WAYNE L. REV. 1437, 1440 (1980).

cillary jurisdiction depends on coming to terms with diversity jurisdiction. If present consternation over the federal workload prefigures the abolition of diversity jurisdiction, then the doctrine of ancillary jurisdiction could be simple and straightforward. Federal courts would have the power to exercise ancillary jurisdiction over all claims, by or against existing parties to the suit, arising out of the same transactions or occurrences described by plaintiff's federal questions. Ancillary power over all transactionally-related claims would ensure that a federal court could provide litigants with a sensible, efficient forum for litigating federal questions and curtail piecemeal litigation among the state and federal systems. Granting power to the federal courts over all claims transactionally related to the federal question, as noted earlier, would place federal courts on a par with their sister state courts in their ability to avoid duplicative, related litigation by resolving an entire controversy.

If instead diversity jurisdiction is not soon or perhaps ever to be abolished, then we are stuck in the inconsistent quagmire of settled ancillary doctrine. To find our way out, we need to focus on the two threads that presently tie together most claims within the federal court's ancillary powers. First, ancillary claims that are within the court's powers must arise out of the same transaction as the subject matter of the plaintiff's original complaint; and, second, their joinder must not seriously undermine the requirements of complete diversity. Both policies described in broad brush appear reasonable enough. The transaction focus produces the efficiencies discussed earlier. The diversity focus seeks to ensure, in the words of *Kroger*, that a plaintiff will not defeat the complete diversity requirements "by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."[156] *Kroger* seeks to prevent federal courts from adjudicating exclusively state court suits.

The playing out of these two policies, however, has not been entirely consistent. Some choices seem right, such as the decision about permissive intervention. Because permissive intervenors are eligible to intervene when their claims or defenses raise a common question of fact, often their interests arise out of the same transaction or occurrence as stated in plaintiff's com-

156. Owens Equip. & Erection Co. v. Kroger, 437 U.S. at 374.

plaint.[157] Thus, the exclusion of permissive intervenors from the class of claims within the court's ancillary power cannot be explained on transactional grounds. Instead, permissive intervenors are excluded on grounds that taking ancillary jurisdiction over their claims could conceivably obliterate the complete diversity requirement.[158] One example of an end-around diversity would be where two claimants with transactionally-related claims—one of them diverse from the defendant, the other not—seek to bring their suit in federal court by having the diverse plaintiff sue and the nondiverse plaintiff intervene on grounds that its claim raises a common factual question. Ancillary jurisdiction over the permissive intervenor would permit the two claimants to evade the complete diversity requirements and accomplish somewhat later what they could not do at the time of filing.[159]

Concern about undermining the complete diversity requirement has also been used as the justification for denying ancillary jurisdiction in diversity suits over Rule 19 parties to be joined if feasible.[160] In *Acton Co. v. Bachman Foods, Inc.*,[161] for example, the First Circuit applied *Kroger*'s rationale in refusing to exercise ancillary jurisdiction over a compulsory party. Acton had entered into an agreement under which Acton or its subsidiary, ACIM, would purchase Bachman Foods. However, Acton reneged. Sometime later its subsidiary, ACIM, but not Acton, filed a diversity suit against Bachman seeking a declaration that the agreement was unenforceable. Bachman then moved to dismiss under Rule 19 on grounds that Acton was an indispensable party and could not be joined as a plaintiff because Acton shared the same citizenship as Bachman. In response, ACIM argued that the court could take ancillary jurisdiction and join Acton as a co-plaintiff.

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157. *See* FRIEDENTHAL, KANE & MILLER, *supra* note 135, § 2.14, at 78.

158. 7C WRIGHT, MILLER & KANE, *supra* note 86, § 1917, at 468.

159. For the same reason, the refusal to take ancillary jurisdiction over Rule 20 permissive plaintiffs and defendants, joined after the filing of the complaint, is also sound. The absolute diversity requirement would be made a mockery if plaintiffs could evade the diversity requirement by amending their complaints and adding nondiverse, permissive plaintiffs or defendants.

160. A second explanation is purely historical. The necessary and indispensable parties doctrine developed before the doctrine of ancillary jurisdiction had reached its zenith and became cemented in doctrinal stone. JAMES & HAZARD, *supra* note 92, § 10.17, at 553-54; Freer, *supra* note 154, at 1102.

161. 668 F.2d 76 (1st Cir. 1982).

The district court dismissed the suit, and the First Circuit affirmed. Applying *Kroger*, the court held that allowing Acton as co-plaintiff to bring its action against a non-diverse defendant would be to permit ACIM and Acton jointly to create diversity jurisdiction simply by omitting Acton from the original complaint and then waiting for Acton to be joined under Rule 19.[162]

Yet while the *Kroger* rationale may explain some Rule 19 cases,[163] it cannot explain them all. It does not explain, for instance, a case like *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*[164] In *Helzberg's*, a shopping center operator, Valley West, leased space to Helzberg's, a jeweler. Subsequently, Valley West leased other space in the same shopping center to Lord's, another jeweler. Helzberg's then sued Valley West in federal court, alleging that the lease to Lord's violated a noncompetition clause in its lease with Valley West. Helzberg's sought an injunction from the court prohibiting Valley West from effectuating its lease with Lord's.

In this scenario, Helzberg's, rather than desiring Lord's participation in the suit, may be opposed to joinder for fear that Lord's involvement will prevent settlement between Helzberg's and Valley West. In contrast, Valley West or Lord's or both may well have a strong interest in Lord's involvement which may be substantially impaired without Lord's joinder. The *Helzberg's* scenario illustrates that there are Rule 19 joinder situations in which there is no threat that a plaintiff is seeking to evade the diversity requirements. Indeed, *Helzberg's* suggests that there are circumstances in which a plaintiff sometimes files in federal court to avoid litigating a complete controversy, not to accomplish it in a devious way. Ancillary jurisdiction, if applied to these circumstances, could ensure complete justice without undermining *Kroger*'s allegiance to complete diversity.[165]

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162. *Id.* at 79-80.

163. *See also* U.S.I. Properties Corp. v. M.D. Constr. Co., 860 F.2d 1 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 2064 (1989)); H.D. Corp. of Puerto Rico v. Ford Motor Co., 791 F.2d 987 (1st Cir. 1986); Travelers Indem. Co. v. Dingwell, 691 F. Supp 503 (D. Me. 1988); H & H Int'l Corp. v. J. Pellechia Trucking, Inc., 119 F.R.D. 352 (S.D.N.Y. 1988).

164. 564 F.2d 816 (8th Cir. 1977). The jurisdictional problem in *Helzberg*'s was actually a personal jurisdiction problem, not a subject-matter problem.

165. There are, of course, other examples where plaintiff either has no interest in bringing a claim against a necessary party defendant, *see, e.g.*, U.A.W. Local 1500 v. Bristol Brass Co., 123 F.R.D. 431, 434 (D. Conn. 1989) ("Since Bristol is insolvent, there is no relief to be recovered from it"), or has no claim against the necessary party. *See,*

Some commentators have argued that the *Kroger* rationale itself is seriously flawed.[166] They have questioned whether a plaintiff would ever risk laying back and waiting for defendants to implead under Rule 14 or move to join under Rule 19 parties against whom the plaintiff wanted to assert claims.[167]

These commentators may be right that there are not many such plaintiffs. But *Acton* reveals that there are indeed devious plaintiffs set on finding ways to get into federal court. And if there is some sense to the *Kroger* rationale, then the federal courts' exercise of ancillary jurisdiction over intervenors of right in diversity suits should raise the same concerns. A plaintiff may choose to sue only one of two potential defendants, knowing that the second nondiverse defendant will qualify as an intervenor of right, and that intervention of right will carry with it ancillary jurisdiction. Or a plaintiff, like ACIM in *Acton*, might sue a defendant and await the intervention by right of co-plaintiff Acton. In both these cases, Professor Freer notes "the plaintiff is achieving indirectly what he could not achieve directly."[168] Yet the courts are uniform in exercising ancillary jurisdiction over intervenors of right in diversity suits. Indeed, in *Kroger* itself, the Supreme Court signaled its approval of ancillary jurisdiction over claims by intervenors of right.[169]

The above illustrations are intended to show the difficulties that loom ahead in codifying ancillary jurisdiction if diversity jurisdiction is retained. Codifying ancillary jurisdiction as it presently exists will cement in doctrinal stone some internal incoherence. Trying instead, however, to codify a coherent structure will require substantial reworking.

Assuming diversity jurisdiction is retained, one possibility,

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e.g., Haas v. Jefferson Nat'l Bank, 442 F.2d 394 (5th Cir. 1971). Indeed, the Supreme court's most recent foray into Rule 19, Martin v. Wilks, 109 S. Ct. 2180 (1989), involves a circumstance where the plaintiffs, a class of black employees, have claims against their employer, but clearly not against the necessary party defendants, the white employees. The black employees' action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), while properly filed against their employer, would not lie against their fellow white employees.

166. *See, e.g.*, Garvey, *The Limits of Ancillary Jurisdiction*, 57 TEX. L. REV. 697 (1979).

167. *See id.* at 703-05.

168. Freer, supra note 3, at 73. *See also* Berch, *The Erection of a Barrier Against Assertion of Ancillary Claims*, 1979 ARIZ. ST. L.J. 253, 258-60; Garvey, *supra* note 165, at 708-09.

169. Owen Equip. & Erection Co. v. Kroger 365, 375 n.18 (1978) (citing Phelps v. Oaks, 117 U.S. 236, 241 (1886)).

though certainly not the only one, is for Congress to focus consistently on *Kroger*'s overarching goal. At its heart, the *Kroger* Court sought to preclude a plaintiff from evading the complete diversity requirement. Some have instead criticized *Kroger* as a naked antidiversity suit.[170] So be it. But however you describe the decision in instances where its rationale currently applies, *Kroger* forces a plaintiff to bring its state claims in state court when prefiling investigation reasonably reveals or suggests that there are possibly nondiverse persons out there, against whom the plaintiff wants to assert claims. *Kroger*'s net effect is the reduction of the federal court's diversity docket and the shifting of more entirely state law claims to state court. In all respects this result should strike us as laudable.

Codification of ancillary jurisdiction should narrowly address *Kroger*'s focus by authorizing the federal courts to take ancillary jurisdiction over all transactionally related claims by or against existing parties to the civil action, except when original jurisdiction is based on diversity and exercising ancillary jurisdiction over a related claim would permit a plaintiff or encourage other plaintiffs to evade the complete diversity requirement. Congress could authorize a federal district court to deny jurisdiction over a related claim when the court held that exercising jurisdiction in this context would encourage plaintiffs to defeat the complete diversity requirement "by the simple expedient" of naming only those parties of diverse citizenship and waiting for other desired parties to join or be joined in the suit.[171]

The statutory language chosen should focus on this concern. It should also provide the lower courts with the flexibility both to establish bright line tests for certain joinder contexts, such as permissive intervention and the *Kroger* circumstance, and to develop more flexible standards for other contexts, such as compulsory joinder or intervention of right. The statute should permit the district court the latitude to inquire, given the nature of the controversy and the relationship of the parties, whether or not the plaintiff is arguably seeking to evade complete diversity. *Acton* and *Helzberg's* demonstrate that such flexibility is necessary if ancillary jurisdiction is both to allow for the sensible

170. Freer, *supra* note 3, at 75.

171. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 and n.17 (1978).

packaging of controversies in federal court and to pay homage to the complete diversity requirement.

Statutory language generally authorizing ancillary jurisdiction but prohibiting a court from exercising ancillary jurisdiction in a diversity suit—for example, when "inconsistent with the complete diversity requirement of section 1332"—might well both expand in some directions and restrict in other directions the claims that are currently within the court's ancillary powers. In federal question suits, ancillary powers would be expanded. All transactionally related claims would be within the court's ancillary powers. In diversity cases, some Rule 19 parties that are presently excluded might be joined. Some claims by intervenors of right that are now within the court's ancillary powers might be excluded, where it appeared that the plaintiff and intervenor as co-plaintiff had manipulated jurisdiction.

Whatever turn codification takes, it should include granting district courts the discretionary authority to dismiss ancillary claims on the same basis as pendent claims and parties. Although there has been some controversy over whether federal courts possess any discretion to dismiss ancillary claims, the better view is to consider the courts' discretion regarding ancillary claims as identical to their discretion regarding pendent claims and parties.[172] Thus, the *Gibbs* factors of efficiency and comity should be equally pertinent to a court's exercise of ancillary jurisdiction.

IV. Conclusion

In *Finley v. United States*, the Supreme Court stripped the lower courts of authority over pendent parties and jeopardized their power over other supplemental claims and parties. The Supreme Court accomplished all this in one fell swoop through its simple demand that Congress first supply the lower courts with authority over supplemental claims before the courts adjudicate such claims.

Congress should quickly fill the void by enacting legislation granting authority to the federal courts to exercise pendent claim, pendent party, and ancillary jurisdiction. The legislation necessary to codify pendent jurisdiction should straightforwardly track the power and discretion prongs of *Gibbs*. The ap-

172. 13 Wright, Miller & Cooper, *supra* note 7, § 3523, at 105-06; Miller, *supra* note 14, at 7.

propriate legislation for ancillary jurisdiction may depend on whether Congress addresses the perennial problem of diversity jurisdiction. If Congress does not eliminate diversity jurisdiction, codifying ancillary jurisdiction should focus on promoting a sensible litigation package without encouraging litigants to evade the complete diversity agreement.