

9-1-1995

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### Recommended Citation

C. Douglas Floyd, *The ALI, Supplemental Jurisdiction, and the Federal Constitutional Case*, 1995 BYU L. Rev. 819 (1995).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1995/iss3/7>

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# The ALI, Supplemental Jurisdiction, and the Federal Constitutional Case

*C. Douglas Floyd\**

## I. INTRODUCTION

The ALI's proposals for complex litigation reform, if enacted, would work a fundamental reallocation of power from the states to the federal judiciary. While the Institute's recommendations are in some sense "even handed," in that they contemplate federal-to-state transfer for the disposition of "complex litigation" in limited circumstances, such transfers are likely to be infrequent. Rather, the heart of the Institute's proposal for national coordination of federal and state cases involving common issues lies in its provision for removal from state to federal court of nondiverse state law-cases arising from the "same transaction, occurrence, or series of transactions or occurrences as an action pending in the federal court, [which] share a common question of fact with that action,"<sup>1</sup> followed by transfer and consolidation for disposition in a unified federal proceeding. The Institute's newly created Complex Litigation Panel is to determine whether removal should be permitted. In making that determination, the panel is to consider whether removal will "unduly disrupt or impinge upon state court or regulatory proceedings or impose an undue burden on the federal courts."<sup>2</sup> The panel is also to determine whether

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1. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 5.01(a) (1994) [hereinafter COMPLEX LITIGATION PROPOSAL].

2. *Id.* § 5.01(a)(2). Section 5.01(a) of the COMPLEX LITIGATION PROPOSAL provides in full:

(a) Except as otherwise provided by Act of Congress, the Complex Litigation Panel may order the removal to federal court and consolidation of one or more civil actions pending in one or more state courts, if the removed actions arise from the same transaction, occurrence, or series of transactions or occurrences as an action pending in the federal court, and share a common question of fact with that action. The Complex Litigation

transfer and consolidation of the removed cases is warranted, applying the same criteria applicable to the transfer and consolidation of purely federal cases—that is, whether “transfer and consolidation will promote the just, efficient, and fair conduct of the actions.”<sup>3</sup> If these criteria are satisfied, “the

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Panel shall evaluate whether to order removal and consolidation by reference to (1) the criteria set forth in § 3.01 to determine whether the transfer and consolidation of the cases is warranted and (2) consideration of whether removal will unduly disrupt or impinge upon state court or regulatory proceedings or impose an undue burden on the federal courts. When making its determination under subsections (a)(1) and (a)(2), the Complex Litigation Panel should consider factors such as

- a. the amount in controversy for the claims to be removed;
- b. the number and size of the actions involved;
- c. the number of jurisdictions in which the state cases are lodged;
- d. any special reasons to avoid inconsistency;
- e. the presence of any special local community or state regulatory interests;
- f. whether removal and consolidation will result in a change in the applicable law that will cause undue unfairness to the parties; and
- g. the possibility of facilitating informal cooperation or coordination with the state courts in which the cases are lodged.

If the standard is met, the Panel may order the cases removed, consolidated, and transferred pursuant to § 3.04.

3. *Id.* § 3.01(a)(2). Section 3.01 of the COMPLEX LITIGATION PROPOSAL provides in full:

(a) Actions commenced in two or more United States District Courts may be transferred and consolidated if:

- (1) they involve one or more common questions of fact, and
- (2) transfer and consolidation will promote the just, efficient, and fair conduct of the actions.

(b) Factors to be considered in deciding whether the standard set forth in subsection (a) is met include

(1) the extent to which transfer and consolidation will reduce duplicative litigation, the relative costs of individual and consolidated litigation, the likelihood of inconsistent adjudications, and the comparative burdens on the judiciary, and

(2) whether transfer and consolidation can be accomplished in a way that is fair to the parties and does not result in undue inconvenience to them and the witnesses.

In considering those factors, account may be taken of matters such as

- a. the number of parties and actions involved;
- b. the geographic dispersion of the actions;
- c. the existence and significance of local concerns;
- d. the subject matter of the dispute;
- e. the amount in controversy;
- f. the significance and number of common issues involved, including whether multiple laws will have to be applied to those issues;
- g. the likelihood of additional related actions being commenced in the future;
- h. the wishes of the parties; and

Panel may order the cases removed, consolidated, and transferred pursuant to § 3.04.<sup>4</sup> Removal of a case shall not be ordered if all of the parties and the state trial judge object,<sup>5</sup> and removal may be limited to particular claims or issues.<sup>6</sup> Cases in which a state is a party shall not be removed unless it consents.<sup>7</sup>

The range of potentially removable state law cases in which there is no, or incomplete, diversity of citizenship between the parties is vast. Thousands of asbestos, cigarette smoking, and other product liability and mass tort cases now litigated exclusively in state court, subject to state substantive and choice of law rules, will, under the ALI proposal, become subject to removal and transfer to a potentially distant federal district court for disposition by a federal judge and jury. Moreover, the Institute's controversial choice of law provision contemplates that the transferee federal district court will apply a uniform federal choice of law rule, designed, if feasible, to obtain the application of a single rule of law in tort and contract actions arising from many different states.<sup>8</sup> The effect of the Institute's proposal will thus be not only to require the

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i. the stages to which the actions already commenced have progressed.

(c) When the United States is exempted by Act of Congress from participating in consolidated proceedings in actions under the antitrust or securities laws, it shall have the right to be exempted from transfer and consolidation under this section.

(d) Transfer and consolidation need not be denied simply because one or more of the issues are not common so that consolidated treatment of all parts of the dispersed actions cannot be achieved. The interests of particular individual litigants can be considered when determining whether they have shown cause to be excluded from the consolidated proceeding, as provided in § 3.05(a).

4. *Id.* § 5.01(a). Section 3.04 of the COMPLEX LITIGATION PROPOSAL provides in full:

(a) Cases may be transferred to and consolidated in any district court in which the just and efficient resolution of the actions will be promoted and fairness to the individual litigants can be facilitated.

(b) When the just, efficient, and fair resolution of the actions will be promoted, the Complex Litigation Panel may designate more than one transferee court. The Panel should give great weight to the convenience to the litigants in assigning individual actions among multiple transferee courts.

5. *Id.* § 5.01(b).

6. *Id.* § 5.01(c).

7. *Id.* § 5.01(d).

8. *Id.* §§ 6.01(a)-6.03(a).

litigation of nondiverse state tort and contract cases in a federal court, but also to require the application of substantive rules of law that will, in many cases, differ significantly from the substantive rules that would have been applied by the courts from which the actions were removed.

The issues of federalism raised by the ALI proposal are self-evident. Basic principles of the constitutional allocation of power between federal and state courts counsel the exercise of caution, as well as searching debate, before such a far-reaching alteration of the historic division of judicial business between federal and state courts is adopted. Unfortunately, the Institute's proposal, and its proceedings, evidence little of the caution or deliberation that the subject requires. Federalism concerns are formally reflected in some of the criteria on which the decision to remove and transfer is to be based.<sup>9</sup> However, both the proposal's black letter and its comments and notes are driven overwhelmingly by the interests of efficiency, economy, and "fairness" that its proponents believe must be achieved where multiple cases involving common factual issues are pending in both federal and state courts, coupled with the determination that, in most cases, efficiency and economy can be achieved only by providing a mechanism for a unified disposition of all the cases in a single federal forum.

It is not too harsh to say that the Institute's discussion of the federalism concerns raised by its proposal is cavalier. The comments to the removal provision note that some federalism considerations, such as the presence of any "special local community or state regulatory interests," have been included in the laundry list of factors (dominated by efficiency considerations) that the Complex Litigation Panel may take into account in determining whether removal, transfer, and consolidation should be ordered. The comments also assert that federalism concerns are an "important element in deciding whether a particular grouping of cases could be handled better in the federal or the state courts."<sup>10</sup> However, the tone of the Institute's federalism discussion, and the weight it would give to federalism, in contrast to its overriding instrumental concerns, is best captured in the following passage:

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9. See *id.* § 5.01(a).

10. *Id.* § 5.01 cmt. d; see also *id.* § 5.01 intro. note at 219, cmt. c at 229-30.

The expansion of federal removal jurisdiction under § 5.01 to accommodate complex cases also is tailored to take account of general federalism concerns. Historically, as a matter of comity and federalism, federal courts have declined to exercise jurisdiction over certain cases deemed more appropriate for state court adjudication. Although the scope of abstention doctrines is uncertain, it generally reflects an exercise of judicial self-restraint motivated by a desire to avoid undue intrusion in matters properly within state competence. However, when Congress explicitly grants removal jurisdiction in order to provide an economical and fair forum for multiparty, multiforum disputes, it expresses a federal interest in these cases. To the extent that this expansion of removal jurisdiction might be viewed as undermining the states' traditional role in defining their own substantive law—particularly tort law—that prerogative is not constitutionally immune. Removal under this section fits within the scope of Article III jurisdiction and also may be justified as an exercise of Congress's Article I interstate commerce powers.<sup>11</sup>

The Reporter's Notes add:

The Supreme Court has rejected the argument that traditional state functions are exempt from the enumerated powers of Congress in Article I. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Most aspects of federalism are reflected in self-imposed judicial restraints, rather than as defined limits on Congressional power.<sup>12</sup>

The invocation of the abstention doctrines in this setting is curious, and illustrates the proposal's built-in federal court bias. Those doctrines are addressed to cases that already fall within an established grant of federal question or diversity jurisdiction; they consider the limited and exceptional circumstances in which the federal courts should postpone or decline to exercise that jurisdiction in favor of state proceedings involving the same or related issues. The issue before the Institute, however, was not whether the federal courts should decline an established grant of jurisdiction, but whether Congress should significantly enlarge existing jurisdictional

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11. *Id.* § 5.01 cmt. d.

12. *Id.* cmt. d, note at 236-37.

authorizations to permit the removal from state courts of nondiverse state law cases because they involve some factual overlap with a pending federal case filed by other parties. There should be no presumption in favor of the exercise of federal jurisdiction in that vastly altered setting.

Perhaps it is true that, absent the constraints of Article III, the Commerce Clause grants Congress the power to remove nondiverse state law tort and contract cases to federal court merely because they have some factual overlap with federal question or diversity cases then pending in federal court, and because overall judicial economy, efficiency, and consistency of result would be obtained—although this proposition is hardly as self-evident as the Institute would imply.<sup>13</sup> Perhaps it is also true that, having the power, Congress should exercise it, even though that would create unprecedented expansion of federal court jurisdiction to hear and determine nondiverse state law cases. The constraints of Article III remain.

On this subject the Institute's analysis is truncated. While it now appears settled that Congress may not employ its Article I powers to expand the Article III jurisdiction of the federal courts,<sup>14</sup> the Institute summarily asserts that its proposal for removal of nondiverse state law cases that arise from the same "transaction or occurrence" as a case then pending in federal court falls within the "supplemental jurisdiction" of the federal courts. The ALI supports its removal provision by analogy to the supplemental jurisdiction powers conferred by section 5.03.<sup>15</sup> In the comments to section 5.03, which broadly confers supplemental jurisdiction over claims "by or against any person that . . . arise[] from the same transaction, occurrence, or series of related transactions or occurrences as a claim that has been transferred [to the federal

13. See *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding that Congress's enactment of the Gun Free School Zones Act of 1990, forbidding possession of a firearm within a school zone, exceeded the authority of the Commerce Clause).

14. See *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 648 (1949) (Frankfurter, J., dissenting) (on the issue of Congress's Article I power to expand Article III jurisdiction, the concurring and dissenting opinions represented the majority); PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 473-78 (3d ed. 1988); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 3.4 (2d ed. 1994); CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* § 20, at 121 (5th ed. 1994).

15. COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 5.01 cmt. d at 234.

district court] pursuant to § 3.01, or removed pursuant to § 5.01,"<sup>16</sup> the Institute principally invokes the Supreme Court's decision in *United Mine Workers v. Gibbs*,<sup>17</sup>

a case that directly concerned only pendent jurisdiction but that has provided a starting point for analyzing ancillary jurisdiction<sup>18</sup> as well. In that case the Supreme Court upheld the lower court's assumption of jurisdiction over a state claim brought in conjunction with a federal question claim despite the lack of diversity of citizenship. The Court held that as a matter of constitutional power, pendent jurisdiction may be exercised whenever the state and federal claims "compris[e] but one constitutional 'case,'" which requires that the federal and state claims "derive from a common nucleus of operative

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16. *Id.* § 5.03. This section provides in full:

(a) A transferee court shall have subject-matter jurisdiction over any claim by or against any person that

(1) arises from the same transaction, occurrence, or series of related transactions or occurrences as a claim that has been transferred to it pursuant to § 3.01, or removed pursuant to § 5.01, or

(2) involves indemnification related to the same transaction, occurrence, or series of related transactions or occurrences as a claim that has been transferred or consolidated pursuant to § 3.01 or removed pursuant to § 5.01.

(b) The district court in its discretion may decline jurisdiction over any claim brought under subsection (a). In exercising its discretion, the court may consider factors such as:

(1) whether the subsection (a) claim would substantially predominate in terms of proof, the scope of the issues raised, or the comprehensiveness of the remedy;

(2) the degree to which the efficient and fair resolution of all the claims will be facilitated or impaired by the presence of the additional party or claim;

(3) the likelihood of jury confusion and the degree to which potential confusion can be alleviated by any of the claim coordinating procedures of § 3.06; and

(4) the degree to which accepting jurisdiction over the additional claim or party may intrude upon state interests or impose an undue burden on the federal court.

(c) Any claim brought under subsection (a) shall be treated in the same manner as a claim consolidated pursuant to § 3.01, and provisions such as nationwide service of process under § 3.08 and choice of law under §§ 6.01-6.08 shall be applicable.

17. 383 U.S. 715 (1966).

18. The comments describe ancillary jurisdiction as permitting a court already "hearing a claim under federal question or diversity jurisdiction also to hear related claims brought by defendants or intervenors." COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 5.03 cmt. a at 257-58 (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978)).



fact" and be logically related so that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."<sup>19</sup>

The ALI proposal does not suggest, however, "that the jurisdiction proposed here is exactly coextensive with traditional ancillary and pendent jurisdiction caselaw[,] because the jurisdiction asserted in those contexts has been in single cases, whereas supplemental jurisdiction under § 5.03 is being extended over consolidated cases."<sup>20</sup>

The comments also briefly allude to another possible source of power for the removal of nondiverse state law cases. Noting that the effect of section 5.03's conferral of jurisdiction is to eliminate any requirement for complete diversity of all parties in the consolidated state law cases, the comments flatly assert that "[b]ecause complete diversity always has been deemed a statutory, rather than constitutional, limitation, see *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967), the decision to extend supplemental jurisdiction to this class of cases is constitutional."<sup>21</sup>

Neither *Gibbs*, nor *Tashire*, nor the historic development of modern supplemental jurisdiction doctrine as embodied in the 1990 supplemental jurisdiction statute<sup>22</sup> will carry the weight that the ALI has placed on them. That is not to say that the ALI proposal clearly is unconstitutional. The Institute's proposal is not foreclosed by the Supreme Court's previous decisions, because those decisions have had no occasion to address any similar enlargement of federal court jurisdiction. The proposal is, by definition, a radical departure from the limited scope of Congress's previous conferrals of federal jurisdiction under the constitutional "heads" of federal question and diversity jurisdiction—even as augmented by the new supplemental jurisdiction statute broadly authorizing the assertion of what previously were termed "pendent party" and "ancillary" jurisdiction in federal question cases. For the same reason, however, it is misleading for the Institute to imply, as it does, that its proposals are nothing more than routine applications of established concepts of pendent and ancillary

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19. *Id.* § 5.03 cmt. a at 258 (quoting *Gibbs*, 383 U.S. at 725) (footnote added).

20. *Id.* at 258-59.

21. *Id.* at 260.

22. 28 U.S.C. § 1367 (Supp. V 1993).

jurisdiction as they had developed before *Finley v. United States*,<sup>23</sup> even as revitalized by the enactment of the supplemental jurisdiction statute to overcome the pernicious effects of that decision.

## II. THE HISTORICALLY LIMITED SCOPE OF PENDENT AND ANCILLARY JURISDICTION

The emergence of the term "supplemental jurisdiction" to encompass all circumstances in which nonjurisdictional state law claims may be heard by a federal court because of their relationships with claims falling within the scope of Article III and the statutory grants of federal jurisdiction had the virtue of emphasizing similarities among the concepts of pendent claim, pendent party, and ancillary jurisdiction as they had evolved from *Osborn v. Bank of the United States*<sup>24</sup> to *Finley v. United States*.<sup>25</sup> At the same time, however, the use of a single term to refer to the exercise of jurisdiction in such widely varying contexts as the joinder of additional claims between parties already properly before the court under Federal Rule of Civil Procedure 18,<sup>26</sup> the joinder of claims by and against additional parties under Rule 20, the assertion of counterclaims and cross-claims under Rule 13, impleader under Rule 14, compulsory joinder under Rule 19, claims by and against intervenors under Rule 24, the claims of class members under Rule 23, and statutory and rule interpleader under 28 U.S.C. § 1335 and Rule 22, creates a powerful pressure to identify assertions of jurisdiction that differ significantly, both in their historical evolution and rationale, and in their potential to upset the constitutional allocation of power between federal and state courts. Thus, the adoption of the unified terminology has created a self-fulfilling prophecy that exercises of jurisdiction presenting fundamentally differing issues will be treated the same.

The supplemental jurisdiction proposal of the ALI Complex Litigation Project carries this tendency to its logical extreme by implicitly asserting that there is no principled difference between the joinder of additional state-law claims between two

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23. 490 U.S. 545 (1989).

24. 22 U.S. (9 Wheat.) 738 (1824).

25. 490 U.S. 545 (1989).

26. All subsequent references to "Rules" in the text refer to the Federal Rules of Civil Procedure.

parties already properly in federal court in a federal question case and the involuntary removal from state court of the claims of nondiverse state tort or contract plaintiffs simply because they arise from the same transaction as a pending federal case between different parties.

The 1990 Supplemental Jurisdiction Statute,<sup>27</sup> while endorsing the unified supplemental jurisdiction terminology, avoids some of its pitfalls by expressly providing that its conferral of supplemental jurisdiction extends only so far as the nonjurisdictional claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution,"<sup>28</sup> and by excluding, in diversity actions, claims by certain plaintiffs where "exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."<sup>29</sup> The drafters of the statute no doubt assumed that, in federal question cases, § 1367 would restore the exercise of pendent party jurisdiction as it had been recognized by most of the courts of appeals<sup>30</sup> prior to the Supreme Court's decision in *Finley*.<sup>31</sup> Nevertheless, *Finley* explicitly had left the constitutionality of

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27. 28 U.S.C. § 1367.

28. *Id.* § 1367(a).

29. *Id.* § 1367(b).

30. See, e.g., *Rodriguez v. Comas*, 888 F.2d 899 (1st Cir. 1989); *Giardiello v. Balboa Ins. Co.*, 837 F.2d 1566 (11th Cir. 1988); *Feigler v. Tidx, Inc.*, 826 F.2d 1435 (5th Cir. 1987); *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *Curtis v. Everette*, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974). But see, e.g., *Safeco Ins. Co. of America v. Guyton*, 692 F.2d 551 (9th Cir. 1982); *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed*, 435 U.S. 982 (1978). See generally 13B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3567.2 (2d ed. 1984); David P. Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753 (1978); William H. Fortune, *Pendent Jurisdiction—The Problem of "Pending Parties"*, 33 U. PITT. L. REV. 1 (1972); Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399 (1983); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849 (1992); Sidney Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U. L. REV. 245 (1980).

31. See H.R. REP. NO. 734, 101st Cong., 2d Sess., § 114, at 28 (1990) (explaining that the supplemental jurisdiction statute would "essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction"); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47-48 (1990) (recommending that Congress expressly authorize federal courts to exercise supplemental jurisdiction according to pre-*Finley* notions).

the exercise of such jurisdiction an unanswered question. Moreover, by its preservation of the statutory complete diversity requirement for claims by some plaintiffs in diversity cases, the statute avoided some of the expansion of federal jurisdiction that the ALI proposal now seeks to effect.

If labels are disregarded and one focuses instead on the historic circumstances in which the Supreme Court has endorsed the determination of nonjurisdictional claims by the federal courts because of their relationship with federal question or diversity claims properly before them, it becomes apparent that the foundation for the ALI's jurisdictional proposal is far less secure than its brief analysis would imply.

#### A. *Pendent Claim Jurisdiction*

In the *Osborn* case,<sup>32</sup> the Supreme Court considered the clearest case for the exercise of federal jurisdiction over non-federal questions. The United States Bank sued state officials, seeking initially to enjoin the enforcement of a franchise tax on the ground of the Bank's federal immunity, and subsequently, by an amended bill, to recover moneys that state officials had seized from the Bank in collection of the tax.<sup>33</sup> The Bank's initial claim asserted a federal immunity, but the subsequent claim appears to have been in the nature of trespass. The Supreme Court invited reargument on the question of the effect and constitutionality of the act of incorporation of the Bank, which granted the Bank the power to sue and be sued in any circuit court of the United States.<sup>34</sup> The defendants contended that if the Act did confer federal jurisdiction, it was unconstitutional because, in such suits, "several questions may arise . . . which depend on the general principles of the law, not on any act of Congress."<sup>35</sup> Chief Justice Marshall rejected this contention on the ground that federal law had created the Bank and authorized it to sue. Therefore, the Bank's authority to sue presented a federal question which was an "original ingredient" of every claim brought by the Bank, whether or not placed in issue by the defendant.<sup>36</sup>

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32. 22 U.S. (9 Wheat.) 738 (1824).

33. *Id.* at 739-42.

34. *Id.* at 804.

35. *Id.* at 819.

36. *Id.* at 822-24.

As to the state law questions that might arise in the case

[i]f this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn . . . . There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action, be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the Court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.<sup>37</sup>

The Court illustrated the point by referring to contracts cases in which the Bank's authority to sue was always potentially involved, even though that authority might not be challenged in a particular case, and even though a case might turn entirely on nonfederal questions.<sup>38</sup> The Court concluded that

[a] cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, . . . then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the partic-

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37. *Id.* at 819-20.

38. *Id.* at 824.

ular question involving the construction of the constitution or the law.<sup>39</sup>

Thus,

when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.<sup>40</sup>

Although *Osborn* at least potentially involved the assertion of what was until recently termed "pendent claim" jurisdiction with respect to the claim asserted in the amended bill, Chief Justice Marshall's focus was on a narrower question: whether federal jurisdiction over a single claim that would otherwise arise under federal law because it involved a federal question as an "original ingredient" should be held lacking because the final disposition of the claim also depended on questions of fact or state law. *Osborn* held, in effect, that in such circumstances, the entire claim, including incidental questions of state law, presents a single constitutional "case" that arises under federal law. This result could hardly have been viewed as an expansion of the scope of the "arising under" jurisdiction conferred by the Constitution. As Marshall emphasized, any other result would have meant, in effect, that jurisdiction in many cases that arise under federal law could never be exercised in an original form by the lower federal courts.<sup>41</sup>

Only a small step separated *Osborn* from the recognition of "pendent claim" jurisdiction in a line of cases<sup>42</sup> culminating in *Hurn v. Oursler*<sup>43</sup> and *United Mine Workers v. Gibbs*.<sup>44</sup> Those decisions upheld the power of the federal courts to hear state law claims because of their close relationship to a federal question claim asserted by the same plaintiff against the same defendant. In *Hurn*, which involved both a federal claim of copyright infringement of the plaintiff's play and a state claim of unfair competition based on the same facts, the Court sus-

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39. *Id.* at 821-22.

40. *Id.* at 823.

41. *Id.* at 822-23.

42. For a review of the cases leading to the recognition of "pendent claim" jurisdiction, see *Hurn v. Oursler*, 289 U.S. 238, 241-46 (1933).

43. 289 U.S. 238 (1933).

44. 383 U.S. 715 (1966).

tained the exercise of pendent jurisdiction where it concluded that the bill alleged a violation of only a "single right" such that "the claims of infringement and unfair competition so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances."<sup>45</sup> However, the Court stated that

the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character.<sup>46</sup>

The Court drew upon its previous decision in *Baltimore S.S. Co. v. Phillips*,<sup>47</sup> which had defined a cause of action for claim preclusion purposes in terms of whether there had been a violation of only "one right by a single legal wrong,"<sup>48</sup> in concluding that only a single cause of action was alleged by the complaint.<sup>49</sup> This conclusion—that a federal court clearly possessing federal question jurisdiction over a federal claim also should be entitled to entertain state law claims that would, within a single judicial system, be barred by normal rules of preclusion—hardly represented a significant expansion of the scope of the Article III "arising under" case. Moreover, as discussed below, a contrary result would unduly deter plaintiffs asserting multiple bases of recovery from availing themselves of the federal forum that Congress and the Constitution have authorized.

In *Gibbs*, the Court jettisoned *Hurn's* "single cause of action" formulation as "unnecessarily grudging."<sup>50</sup> Recognizing the difficulty of defining a single "cause of action," and that the *Hurn* test had been the source of "considerable confusion," the

45. 289 U.S. at 246.

46. *Id.* at 245-46 (holding that while there was jurisdiction over the federal and state law claims concerning the copyrighted version of the play, there was no jurisdiction over state law claims concerning an uncopyrighted version).

47. 274 U.S. 316 (1927).

48. *Id.* at 321.

49. 289 U.S. at 246-47.

50. 383 U.S. at 725.

Court expanded the focus from principles of preclusion to the Federal Rules' philosophy of attaining judicial economy by encouraging the broadest possible joinder of claims and parties consistent with fairness to the parties.<sup>51</sup> Consistent with this broad joinder philosophy, the Court concluded that

[p]endent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [federal law]," and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.<sup>52</sup>

In some respects, most notably in its equation of the scope of the "constitutional case" that arises under federal law with all claims arising from a "common nucleus of operative fact" such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding," the opinion in *Gibbs* lacked any clear foundation in previous authority and created additional ambiguities to replace those that led to the Court's rejection of *Hurn*. It is easy to read the opinion expansively, however, based on the Court's shift in focus from *Hurn*'s emphasis on the scope of preclusion to the Federal Rules' broad provisions for joinder of claims and parties. On this ground one might conclude that a single constitutional "case" within the jurisdiction of the federal courts should be found to exist whenever an action involves a single federal claim, and the joinder of nonjurisdictional state law claims is authorized by whatever joinder provisions the drafters of the Rules have chosen to adopt.<sup>53</sup>

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51. *Id.* at 724.

52. *Id.* at 725 (citations omitted).

53. Matasar, *supra* note 30, at 1479 ("Supplemental jurisdiction . . . is constitutionally permissible whenever the rules governing federal procedure permit the joinder in one action of jurisdictionally insufficient nonfederal claims or parties with a jurisdictionally sufficient federal claim.").



So far as the effect of the Federal Rules themselves is concerned, this position goes much too far, if only because the Rules Enabling Act provides that the Rules may not "abridge, enlarge or modify any substantive right,"<sup>54</sup> and the Rules state that they "shall not be construed to extend or limit the jurisdiction of the United States district courts."<sup>55</sup> The ALI proposal, however, contemplates that Congress is to enact its removal, consolidation, and supplemental jurisdiction provisions so that any constraints imposed by the Enabling Act or the Federal Rules are irrelevant. Nevertheless, it goes too far to read *Gibbs* as holding that any provision for the joinder of nondiverse state law claims to federal question or diversity claims that Congress, for reasons of efficiency, economy, and fairness may choose to adopt, necessarily establishes, for that reason alone, that those state law claims form part of a single constitutional case within the meaning of Article III.

Unless *Gibbs* is to be wholly divorced from its facts, historical antecedents, and language, it must be read with careful attention to its three most salient features: (1) that it involved the assertion of additional claims between two parties already properly in federal court on the basis of a claim falling within Article III, (2) that the Court, while rejecting *Hurn*, continued to insist on a close factual relationship between the jurisdictional and nonjurisdictional claims by requiring that both arise from a "common nucleus of operative fact," and (3) that the Court continued to require that *the "plaintiff's" claims* [be] such that he would ordinarily be expected to try them all in one judicial proceeding.<sup>56</sup>

Indeed, while *Gibbs*, in the context of claims between existing parties, appears to have shifted the focus from preclusion to procedural provisions for efficient joinder, that shift was more

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54. 28 U.S.C. § 2072(b) (1988).

55. FED. R. CIV. P. 82. See *Mississippi Publishing Co. v. Murphree*, 326 U.S. 438, 445-46 (1946).

56. 383 U.S. at 725 (emphasis added). To read *Gibbs* as endorsing the constitutionality of any provision for joinder of jurisdictional with nonjurisdictional claims that Congress may choose to adopt ignores the fact that *Gibbs* simply had no occasion to address the scope of the constitutional case where the joinder of claims by or against additional parties, plaintiff or defendant, is at issue. This reading also ignores the fact that even as to claims between existing parties, Rule 18 authorizes the joinder of any claims that one party may have against another, regardless of the presence or absence of any factual relationship between them. That joinder provision clearly exceeds the scope of pendent jurisdiction endorsed by *Gibbs*, which requires that the claims arise from a common nucleus of operative fact.

apparent than real. *Hurn's* "single right" definition of a single cause of action for claim preclusion purposes was undoubtedly confusing and difficult to apply, leading to uncertain and inconsistent results. This alone provided ample basis for its rejection. But as *Gibbs'* "common nucleus" test has come to be equated in subsequent decisions with the "same transaction or occurrence" language prevalent in the Federal Rules,<sup>57</sup> the modern concept of a single "cause of action" for claim preclusion purposes has likewise evolved to the same standard,<sup>58</sup> leaving the doctrine of pendent claim jurisdiction, as reformulated in *Gibbs*, closely tied to the scope of preclusion that would be accorded within a single system of courts. Thus, in the case of pendent claim jurisdiction, *Gibbs'* reference to claims that a plaintiff would "ordinarily be expected to try . . . in one judicial proceeding," is closely tied to the scope of modern preclusion doctrine, just as was *Hurn* in its time.

### B. Ancillary Jurisdiction

The ALI proposal defines ancillary jurisdiction as a doctrine "which permits a court hearing a claim under federal question or diversity jurisdiction also to hear related claims brought by defendants or intervenors."<sup>59</sup> The comments proceed on the widely shared premise that the holding of *Gibbs* regarding the assertion of pendent claim jurisdiction between parties already properly before the court "has provided a starting point for analyzing ancillary jurisdiction as well."<sup>60</sup> Similarly, the comments assert that "the standard for asserting supplemental jurisdiction set out in this section [5.03] effectively codifies current doctrine, which utilizes a transaction formula

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57. See, e.g., *Ambromovage v. United Mine Workers of America*, 726 F.2d 972, 990 (3d Cir. 1984) ("Any counterclaim based on the same 'transaction or occurrence' as the underlying federal claim necessarily has a 'common nucleus of operative fact' with that claim."); *Revere Cooper & Brass Inc. v. Aetna Casualty & Sur. Co.*, 426 F.2d 709, 714-15 (5th Cir. 1970) (holding that the "same transaction" standard is satisfied when an ancillary claim "bears a logical relationship to the aggregate core of operative facts which constitutes the main claim"); see also JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.12, at 66 (2d ed. 1993).

58. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1980); see also *Gonzalez v. Banco Central Corp.*, 27 F.3d 751, 756 (1st Cir. 1994); *Threshermen's Mut. Ins. Co. v. Wallingford Mut. Ins. Co.*, 26 F.3d 776, 781 (7th Cir. 1994); *C.D. Anderson & Co. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987).

59. COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 5.03 cmt. a at 257-58.

60. *Id.* at 258.

for evaluating whether to assert ancillary or pendent jurisdiction.<sup>61</sup>

This pivotal equation of pendent claim and ancillary jurisdiction neglects the significantly differing historic rationale and development of those doctrines, and, consequently, reads too much into the decisions of the Supreme Court and lower federal courts sustaining the exercise of jurisdiction over nondiverse state law claims asserted by or against persons who were not parties to the original federal proceedings. In particular, the ALI proposal disregards that ancillary jurisdiction over claims by and against additional parties has, from its inception, permitted the resolution of nonjurisdictional claims on the ground, not simply that they arise from the same transaction as claims already pending before the federal court, but because the nonjurisdictional claims are logically dependent on the pending claims.

The foundation case in the development of ancillary jurisdiction is *Freeman v. Howe*.<sup>62</sup> In *Freeman*, the Supreme Court held that a state court had no power to interfere, by writ of replevin, with property attached by a federal marshall as security for a judgment in a federal diversity action. The Court rejected the contention of the plaintiffs in the state replevin action that, unless the writ were allowed, they would be without a remedy, because they were not diverse from the defendant in the federal action. Rather, the court recognized that the controlling

principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but *ancillary and dependent*, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.<sup>63</sup>

Similarly, in *White v. Ewing*,<sup>64</sup> the receiver of an insolvent corporation was permitted to sue nondiverse debtors to collect on their notes, many of which were for less than the

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61. *Id.*

62. 65 U.S. (24 How.) 450 (1860).

63. *Id.* at 460 (emphasis added).

64. 159 U.S. 36 (1895).

jurisdictional amount. The Court held that in the actions for collection on the notes,

the court proceeds upon its own authority to collect the assets of an estate, with the administration of which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation, over which it has by an original bill obtained jurisdiction. In this particular, the jurisdiction of the Circuit Court does not materially differ from that of the District Court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted.<sup>65</sup>

In *Fulton National Bank v. Hozier*,<sup>66</sup> the Court rejected the invocation of ancillary jurisdiction because there was no logical dependency between the claim of a nondiverse intervenor and the proceedings then pending in federal court to administer the assets of an insolvent partnership. The proposed intervenor, a citizen of Georgia, alleged that he had paid money to the partnership to be used for purchase of stocks, and that the partnership had deposited his check in its account with the Fulton National Bank, also a citizen of Georgia. When the partnership failed, the bank offset the funds against partnership notes held by the bank. The proposed intervenor prayed that the bank be made a party and be required to pay the sum in question to him or to the receivers, and that he ultimately receive a judgment against the receivers for the amount. The lower courts held that the federal district court had jurisdiction over the intervention as a "dependent controversy."<sup>67</sup> The Supreme Court reversed. It held that, as between the receivers and the bank, the bank had the superior claim, and that the real controversy was thus between the proposed intervenor and the bank, both of whom were Georgia citizens. This controversy was not within the ancillary jurisdiction of the court:

We are of opinion that in no proper sense was the petition dependent or ancillary to the cause instituted for the purpose of administering the assets of Imbrie & Company. Consequently, the trial court could not entertain it.

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65. *Id.* at 40.

66. 267 U.S. 276 (1925).

67. *Id.* at 279.

The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has [a] direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.<sup>68</sup>

The case before the court was not of that character because the receivers had no interest in the amount in question, and the controversy was therefore unrelated to the receivership proceeding.<sup>69</sup>

In *Moore v. New York Cotton Exchange*,<sup>70</sup> a case frequently cited to support a broad construction of ancillary jurisdiction based on a transactional relationship,<sup>71</sup> the Supreme Court sustained the exercise of jurisdiction over a nondiverse compulsory counterclaim that arose out of the same transaction as the plaintiff's antitrust claim against the defendant. The plaintiff alleged that the defendant had violated antitrust laws by refusing to supply it with quotations on the prices of cotton traded on the exchange. The counterclaim alleged that the plaintiff, having been refused permission to use the quotations, had misappropriated them.<sup>72</sup> The Supreme Court held that although the district court had properly dismissed the plaintiff's bill for failure to state a claim under the antitrust laws, the court continued to have jurisdiction over the counterclaim ancillary to the original bill. The Court did not focus on the constitutionality of the exercise of such jurisdiction. Rather, the Court assumed the propriety of the exercise of ancillary jurisdiction over a compulsory counterclaim. After concluding that the antitrust claim was sufficiently substantial to fall within the jurisdiction of the district court, the Court regarded the case as turning on whether, under the compulsory counterclaim provision of then Equity Rule 30, the counterclaim arose out of the same transaction as the plaintiff's action.<sup>73</sup> In holding that it did, the Court stated:

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68. *Id.* at 280.

69. *Id.* at 281.

70. 270 U.S. 593 (1926).

71. See, e.g., Richard H. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 143-44 (1983).

72. 270 U.S. at 602.

73. *Id.* at 608-09.

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

*So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter; but the relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant from continuing to obtain by stealthy appropriation what the court had held it could not have by judicial compulsion.*<sup>74</sup>

*Moore* is commonly viewed as a case sustaining the exercise of "ancillary" jurisdiction over compulsory counterclaims.<sup>75</sup> Because of its emphasis on the "same transaction" language of the compulsory counterclaim rule, *Moore* could be viewed as having based the constitutionality of all forms of ancillary jurisdiction on the existence of a transactional relationship between the jurisdictional and nonjurisdictional claims. This, however, reads far too much into *Moore*. In the first place, the Court's opinion was not addressed to the constitutional issue, but simply proceeded on the assumption that no independent basis for jurisdiction over a compulsory counterclaim was required. More importantly, *Moore* was a particularly obvious case for the exercise of supplemental jurisdiction, because, like the pendent claim jurisdiction sustained in *Gibbs*, it involved the assertion of claims based on essentially identical operative facts between parties already properly before the federal court. Additionally, the exercise of jurisdiction over the counterclaim was so dependent on the resolution of the main claim that "it only need[ed] the failure of [the main claim] to establish a foundation for [the counterclaim]."<sup>76</sup>

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74. *Id.* at 610 (emphasis added) (citations omitted).

75. See 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523 (2d ed. 1984).

76. 270 U.S. at 610.

*Moore* thus combined attributes of the transactional relationship that undergirds pendent claim jurisdiction and the logical dependence that historically has sustained ancillary jurisdiction.<sup>77</sup> Moreover, its result was necessary to permit a party already properly in federal court fully to defend itself without suffering the risk of potentially inconsistent results in separate proceedings. *Moore* thus provides only weak support for the conclusion that the existence of a transactional relationship alone is sufficient to support the exercise of supplemental jurisdiction over nonjurisdictional claims by or against nonparties to a federal action.

In the years following *Moore*, the lower federal courts expanded the concept of ancillary jurisdiction to encompass a wide variety of claims in cases not involving the jurisdiction of a federal court over property or funds subject to its control. These included Rule 13(a) compulsory counterclaims,<sup>78</sup> Rule 13(g) cross claims,<sup>79</sup> additional Rule 13(h) parties on counterclaims and cross claims,<sup>80</sup> Rule 24(a) claims by and against

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77. See Harry Shulman & Edward C. Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 413 (1936) ("The reasons for the rule of the *Moore* case, apart from considerations of convenience and efficiency, which presumably have nothing to do with the question of power, are apparently to be found in the adumbrations of ancillary or auxiliary jurisdiction, of the equity doctrine of complete relief and of the doctrine that a court which has acquired possession of property has, by that possession, jurisdiction to adjudicate claims against that property.") (emphasis added).

78. See, e.g., *Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1226 (7th Cir. 1982) (holding that a counterclaim that arises out of the same transaction or occurrence as the original action is compulsory and falls under the court's ancillary jurisdiction); *Plant v. Blazer Fin. Serv., Inc.*, 598 F.2d 1357, 1359 (5th Cir. 1979) ("[A] compulsory counterclaim falls within the ancillary jurisdiction of the federal courts even if it would ordinarily be a matter for state court consideration."); see also *McCaffrey v. Rex Motor Transp., Inc.*, 672 F.2d 246, 248 (1st Cir. 1982) (stating that while compulsory counterclaims fall within the federal courts' ancillary jurisdiction, permissive counterclaims under Rule 13(b) do not). See generally 6 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1414 (2d ed. 1990).

79. See, e.g., *Transcontinental Underwriters Agency v. American Agency Underwriters*, 680 F.2d 298, 299 n.1 (3d Cir. 1982) (recognizing that a cross-claim arising between nondiverse parties does not destroy jurisdiction but falls under ancillary jurisdiction.); *LASA Per L'Industria Del Marmo Societa per Azioni v. Alexander*, 414 F.2d 143, 146 (6th Cir. 1969) (same); *Scott v. Fancher*, 369 F.2d 842, 844 (5th Cir. 1966) (same). See generally 6 WRIGHT ET AL., *supra* note 78, § 1433.

80. See, e.g., *H.L. Peterson Co. v. Applewhite*, 383 F.2d 430, 433 (5th Cir. 1967) (holding that ancillary jurisdiction exists over additional nondiverse parties brought into an action under a Rule 13 counterclaim); *United Artists Corp. v. Masterpiece Prods., Inc.*, 221 F.2d 213, 217 (2d Cir. 1955) (same). See generally 6 WRIGHT ET AL., *supra* note 78, § 1436.

intervenor as of right<sup>81</sup> (a result now unfortunately reversed in diversity cases by the 1990 supplemental jurisdiction statute<sup>82</sup>), and Rule 14 claims of derivative liability against third-party defendants.<sup>83</sup> With the exception of Rule 13(h) claims against additional parties, these assertions of jurisdiction either involved claims by or against parties already properly before the court, or, as in the early property cases, claims by or against new parties, the disposition of which had a dependent relationship to the claims already before the federal court. In the case of Rule 24(a) claims by and against intervenors as of right, for example, the basis for claiming a right to intervene is that the disposition of the action before the court "may as a practical matter impair or impede the applicant's ability to protect" his interest in the property or transaction that is the subject of the pending action.<sup>84</sup> A simple transactional relationship is not enough. Indeed, the courts have rejected the exercise of ancillary jurisdiction over the claims of Rule 24(b) permissive intervenors even though the claims present questions in common with the claims before the court.<sup>85</sup>

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81. See, e.g., *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 789-93 (2d Cir. 1980) (upholding ancillary jurisdiction over a claim against a Rule 24(a) intervenor), *cert. denied*, 449 U.S. 1080 (1981); *Lenz v. Wagner*, 240 F.2d 666, 669 (5th Cir. 1957) (stating that no independent basis of federal subject matter jurisdiction was needed for either an intervening plaintiff or defendant under Rule 24(a)). See generally 7C CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1917 (2d ed. 1986). Under the former rule, indispensable parties under Rule 19 did not fall within the federal courts' ancillary jurisdiction. See, e.g., *Chance v. County Bd. of Sch. Trustees*, 332 F.2d 971, 973-74 (7th Cir. 1964) (holding that there was no jurisdiction over indispensable parties when joining them to the action would destroy diversity). See generally 7 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1610 (2d ed. 1986).

82. 28 U.S.C. § 1367(b).

83. See, e.g., *Rogers v. Aetna Casualty & Sur. Co.*, 601 F.2d 840, 843 n.4 (5th Cir. 1979) ("[Ancillary jurisdiction] recognizes the power of a federal court, once proper subject matter jurisdiction of the main claim has been established, to adjudicate as incident thereto a related claim based wholly upon state law asserted by the defendant against a nondiverse impleaded third-party defendant."); *Stemler v. Burke*, 344 F.2d 393, 395-96 (6th Cir. 1965) (holding that no independent basis of federal subject matter jurisdiction is needed over a third-party defendant so long as there is an independent basis for jurisdiction between the original parties). See generally 6 WRIGHT ET AL., *supra* note 78, § 1444.

84. FED. R. CIV. P. 24(a).

85. See, e.g., *Blake v. Pallan*, 554 F.2d 947, 956-57 (9th Cir. 1977) (refusing to extend ancillary jurisdiction over the state law securities claims of California's corporations commissioner, a permissive intervenor, even though California's securities statutes are modeled, to a degree, after the federal securities statutes at issue in the original complaint); *Hougen v. Merkel*, 47 F.R.D. 528, 530 (D. Minn. 1969) (denying ancillary jurisdiction over permissive intervenor's claims even though the



Similarly, in the case of Rule 14 impleader, a claim may be asserted against a nonparty "who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff"<sup>86</sup>—that is, a claim whose existence turns not simply on a transactional relationship (and which in fact may involve no transactional relationship), but on the liability of a third party that is dependent on the resolution of the underlying action.

The concept of ancillary jurisdiction in its modern form came before the Supreme Court in *Owen Equipment & Erection Co. v. Kroger*,<sup>87</sup> in which the Court refused to sanction the claim of the original plaintiff in a diversity action against a nondiverse third-party defendant who had been properly impleaded by the original defendant under Rule 14. The drafters of the ALI proposal doubtless had *Owen* in mind when they asserted that the *Gibbs* test "has provided a starting point for analyzing ancillary jurisdiction as well."<sup>88</sup> In fact, however, to the extent *Owen* addresses the underlying concept of ancillary jurisdiction at all, it stresses the concept of logical dependence that has supported the doctrine from its inception.

In equating the exercise of pendent claim jurisdiction under *Gibbs* with the exercise of ancillary jurisdiction, the ALI proposal draws support from *Owen*'s observation that "the 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?"<sup>89</sup> But to say that both ancillary and pendent jurisdiction are concerned with the assertion of jurisdiction over nondiverse state law claims, and that the problems they pose are closely related, is not to say that ancillary and pendent jurisdiction are identical. More importantly, *Owen* itself explicitly declined to determine "whether there are any 'principled' differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences."<sup>90</sup>

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intervenor was a passenger in a car accident that was at the heart of the original parties' personal injury action). See generally 7C WRIGHT, *supra* note 81, § 1917.

86. FED. R. CIV. P. 14(a).

87. 437 U.S. 365 (1978).

88. COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 5.03 cmt. a at 258.

89. 437 U.S. at 370.

90. *Id.* at 370 n.8 (quoting *Aldinger v. Howard*, 427 U.S. 1, 13 (1976)).

The decision in *Owen* was ultimately based on the Court's determination that to permit the original plaintiff to assert a claim against a nondiverse third-party defendant would be contrary to the statutory complete diversity requirement. It thus failed the "second prong" of supplemental jurisdiction analysis, which requires not only constitutional power, but statutory authorization for a federal court to hear a nondiverse state law claim supplemental to its jurisdiction over federal question or diversity claims.<sup>91</sup> The Court therefore had no occasion to address whether *Gibbs*' "common nucleus of operative fact" formulation provided a sufficient constitutional basis for assertions of supplemental jurisdiction over state law claims by and against additional nondiverse parties to a federal action. The Court simply proceeded on the "assumption" that there was constitutional power to hear the claim at issue.<sup>92</sup>

While *Owen* therefore does not establish that *Gibbs* sanctions the ALI's proposed removal jurisdiction, *Owen*'s discussion of ancillary jurisdiction is consistent with the historical antecedents of that doctrine in emphasizing the dependency of ancillary claims on those before the federal court, rather than simply their transactional relationship with the federal diversity claims. Distinguishing the plaintiff's claim against the third-party defendant from impleader, counterclaims, and cross-claims in which the assertion of ancillary jurisdiction historically had been upheld, the Court observed that

the nonfederal claim in this case was simply not ancillary to the federal one in the same sense that, for example, the impleader by a defendant of a third-party defendant always is. A third-party complaint depends at least in part upon the resolution of the primary lawsuit. *Its relation to the original complaint is thus not mere factual similarity but logical dependence.* The respondent's claim against the petitioner, however, was entirely separate from her original claim against OPPD, since the petitioner's liability to her depended not at all upon whether or not OPPD was also liable. Far from being an ancillary and dependent claim, it was a new and independent one.<sup>93</sup>

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91. See, e.g., *Aldinger v. Howard*, 427 U.S. 1, 15-17 (1976).

92. 437 U.S. at 371.

93. *Id.* at 376 (emphasis added) (citations omitted).

The Court further distinguished the assertion of ancillary jurisdiction over claims by *defending* parties haled into court against their will from the claims of plaintiffs against such parties, reasoning that

[i]t is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve *an entire, logically entwined lawsuit*. Those practical needs are the basis of the doctrine of ancillary jurisdiction.<sup>94</sup>

In sum, although not addressed to the issue of constitutional power, the Supreme Court's decision in *Owen* recognized that the relationship that historically had sustained the exercise of ancillary jurisdiction over nonjurisdictional claims by and against additional parties had been one of logical dependence or the necessity to resolve an entire lawsuit between parties already properly before the court, rather than simply the factual overlap and considerations of judicial economy that undergird the ALI proposal.

### C. *Pendent Party Jurisdiction*

The concept of pendent party jurisdiction refers to the exercise of jurisdiction over nondiverse state law claims by or against additional plaintiffs or defendants that have a transactional relationship to jurisdictional claims by or against other plaintiffs or defendants.<sup>95</sup> Pendent party claims therefore are properly joined under Federal Rule 20, but do not necessarily possess the relationship of logical dependence that historically has characterized the exercise of ancillary jurisdiction over claims of impleader, interpleader, or by or against intervenors of right.

By contrast to its decisions sustaining the exercise of pendent claim and ancillary jurisdiction, the Supreme Court's decisions before the enactment of the 1990 supplemental jurisdiction statute evidenced a cautious approach to the significant

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94. *Id.* at 377 (emphasis added).

95. See 13B WRIGHT ET AL., *supra* note 30, at 151 (stating that pendent party jurisdiction exists if "there is federal question jurisdiction—or admiralty jurisdiction or jurisdiction because the United States is a party—of a claim against one party, that carries with it pendent jurisdiction of a closely related state claim against another party").

expansion of federal jurisdiction at the expense of the states that the exercise of pendent party jurisdiction entails. While the Court's decisions were ultimately resolved on statutory grounds that were partially obviated by the 1990 statute, and which would be eliminated in both federal question and diversity cases by the ALI proposal, the Court's decisions clearly cannot be read as an endorsement of the ALI's casual assumption that a single constitutional case falling within the scope of Article III may be found whenever nonjurisdictional claims by or against additional parties arise from the "same transaction" as claims properly before a federal court.

The first of the Court's pendent party decisions, *Moor v. County of Alameda*,<sup>96</sup> was a civil rights action in which the plaintiff asserted claims under 42 U.S.C. § 1983 and state law against local law enforcement officers and the county. After concluding that the § 1983 claim against the county could not be maintained on a theory of vicarious liability, the Court considered whether plaintiff's state law claims against the county could be entertained pendent to the district court's jurisdiction over the federal claims against the officers. The Supreme Court ultimately concluded that, even on the assumption that the district court had constitutional power to exercise such jurisdiction under *Gibbs*, the district court had not abused its discretion in declining to do so because of the difficulty of the state law questions and the likelihood of jury confusion.<sup>97</sup> Accordingly, the Court found it unnecessary to resolve the scope of the constitutional power of the federal courts over such pendent claims. In so doing, the Court voiced an emphatic note of caution that is neither noted nor emulated in the ALI proposal.

The Court initially observed that although there existed, as in *Gibbs*, "a common nucleus of operative fact" between the jurisdictional and nonjurisdictional claims,

there is a significant difference between *Gibbs* and these cases. For the exercise of pendent jurisdiction over the claims against the County would require us to bring an entirely new party—a new defendant—into each litigation. *Gibbs*, of course, involved no such problem of a "pendent party," that is, of the addition of a party which is implicated in the litigation only with respect to the pendent state law claim and not also

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96. 411 U.S. 693 (1973).

97. *Id.* at 715-16.

with respect to any claim as to which there is an independent basis of federal jurisdiction.<sup>98</sup>

The Court went on to observe that virtually all of the circuits except the Ninth had, since the decision in *Gibbs*, accepted the exercise of pendent party jurisdiction based on the existence of a common nucleus of operative facts.<sup>99</sup> It also noted that

the exercise of federal jurisdiction over claims against parties as to whom there exists no independent basis for federal jurisdiction finds substantial analogues in the joinder of new parties under the well-established doctrine of ancillary jurisdiction in the context of compulsory counterclaims under Fed. Rules Civ. Proc. 13(a) and 13(h), and in the context of third-party claims under Fed. Rule Civ. Proc. 14(a).<sup>100</sup>

Rather than endorse the exercise of such jurisdiction, however, the Court cautioned:

Whether there exists judicial power to hear the state law claims against the County is, in short, *a subtle and complex question with far-reaching implications*. But we do not consider it appropriate to resolve this difficult issue in the present case, for we have concluded that even assuming, *arguendo*, the existence of power to hear the claim, the District Court, in exercise of its legitimate discretion, properly declined to join the claims against the County in these suits.<sup>101</sup>

The Court similarly refused to resolve this "subtle and complex question with far-reaching implications" in *Aldinger v. Howard*,<sup>102</sup> in which it rejected a similar effort to assert a pendent claim against a county on the ground that the exercise of such jurisdiction would be contrary to the limited scope of jurisdiction over § 1983 claims conferred by Congress,<sup>103</sup> which, as § 1983 was then interpreted, excluded claims against counties.<sup>104</sup> Reviewing its previous decisions sustaining pendent claim jurisdiction, including *Gibbs*, the Court observed that

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98. *Id.* at 713 (footnote omitted).

99. *Id.* at 713-14; *see also* sources cited *supra* note 30.

100. 411 U.S. at 714-15 (footnotes omitted).

101. *Id.* at 715 (emphasis added).

102. 427 U.S. 1 (1976).

103. *Id.* at 17-19.

104. *See* *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled by* *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

[n]one of them . . . adverted to the separate question, involved in the instant case, of whether a nonfederal claim could *in turn* be the basis for joining a party over whom no independent federal jurisdiction exists, simply because that claim could be derived from the "common nucleus of operative fact" giving rise to the dispute between the parties to the federal claim.<sup>105</sup>

While the Court in *Aldinger* noted that its ancillary jurisdiction decisions had involved the joinder of additional parties, those cases were also distinguishable because "[t]he doctrine of ancillary jurisdiction . . . is bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests."<sup>106</sup> The Court found it unnecessary to decide whether its decisions had eliminated any "principled distinction" between pendent claim and ancillary jurisdiction, in view of the Court's ultimate decision of the case on statutory grounds. The Court cautioned, however, that there was a significant difference between the situation addressed in *Gibbs* and the question presented by *Aldinger*:

From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact." True, *the same considerations of judicial economy would be served insofar as plaintiff's claims "are such that he would ordinarily be expected to try them all in one judicial proceeding . . ."* But the addition of a completely new party would run counter to the well-established principle that federal

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105. 427 U.S. at 9.

106. *Id.* at 11.

*courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.*<sup>107</sup>

The Court then proceeded to resolve the case by noting that, unlike previous decisions, it was not addressing the issue of supplemental jurisdiction in the face of congressional silence. Rather, Congress had addressed itself to the jurisdictional issue, and, by implication, had excluded the exercise of supplemental jurisdiction over § 1983 claims against counties.<sup>108</sup> Having reached this conclusion, the Court again cautioned that "[i]f the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim," and that "the question of pendent-party jurisdiction is 'subtle and complex,' and we believe that it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction."<sup>109</sup>

In its most recent consideration of pendent party jurisdiction in *Finley v. United States*,<sup>110</sup> the Court once again scrupulously avoided the issue of constitutional power. Rather, in a much-criticized result,<sup>111</sup> the Court concluded that pendent party jurisdiction over state law claims against additional nondiverse parties in an action against the United States under the Federal Tort Claims Act was improper absent express statutory authorization, despite the fact that the federal district courts possessed exclusive jurisdiction over the FTCA suit, and the entire controversy could therefore be resolved only in federal court. Once again, the Court noted the fundamental difference between the pendent party situation and the pendent claim jurisdiction involved in *Gibbs*, and simply assumed, without deciding, that the exercise of such jurisdiction, had it been authorized by Congress, would have been constitutional.<sup>112</sup> In

107. *Id.* at 14-15 (emphasis added) (citations omitted).

108. *Id.* at 16-19.

109. *Id.* at 18.

110. 490 U.S. 545 (1989).

111. See, e.g., Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3, 8 (1992) ("I believe that *Finley* was an unfortunate decision . . ."); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 465-66 (1991) (calling the *Finley* decision a "radical" departure from previous supplemental jurisdiction decisions).

112. 490 U.S. at 549.

the course of its opinion, the Court described the cases in which ancillary jurisdiction over claims by or against additional parties had been sustained in quite narrow terms:

While in a narrow class of cases a federal court may assert authority over such a claim "ancillary" to jurisdiction otherwise properly vested—for example, when an additional party has a claim upon contested assets within the court's exclusive control, or when necessary to give effect to the court's judgment—we have never reached such a result solely on the basis that the Gibbs test has been met.<sup>113</sup>

The 1990 supplemental jurisdiction statute was enacted against this backdrop of reluctance by the Supreme Court to sanction the use of pendent party jurisdiction by analogy to *Gibbs*.<sup>114</sup> As previously noted, that statute, while retaining many of the constraints of the complete diversity requirement that the ALI now proposes to eliminate in state law cases,<sup>115</sup> broadly endorses the exercise of pendent party jurisdiction in federal question cases where the pendent claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."<sup>116</sup> While the drafters of the statute expressed a strong preference for the exercise of pendent party jurisdiction based on a transactional relationship of the kind that had been endorsed by almost all of the courts of appeals before *Finley*,<sup>117</sup> the statute itself simply removes the "lack of statutory authorization" barrier that *Finley* had

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113. *Id.* at 551 (emphasis added) (citations omitted).

114. 28 U.S.C. § 1367.

115. *But see* Free v. Abbott Lab., 51 F.3d 524 (5th Cir. 1995) (holding that "under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement"); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963, 982 (1991) (stating that the § 1367(b) exceptions "do not preclude supplemental jurisdiction over claims by a nondiverse plaintiff joined subsequently under Rule 20").

116. 28 U.S.C. § 1367(a). The Ninth Circuit has held that the exercise of supplemental jurisdiction under § 1367 is mandatory, unless one of the statute's specific exceptions applies. *Executive Software North America, Inc. v. United States Dist. Ct.*, 24 F.3d 1545, 1556 (9th Cir. 1994). The court of appeals stated that "unless a court properly invokes a section 1367(c) category in exercising its discretion to decline to entertain pendent claims, supplemental jurisdiction must be asserted." *Id.*

117. See H.R. REP. NO. 734, *supra* note 31, at 27-29; REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 31.



erected, leaving the ultimate constitutionality of that exercise to be resolved. The ALI proposal starkly raises that question.

### III. JURISDICTION IN CLASS ACTIONS

Despite the Supreme Court's failure explicitly to endorse the constitutionality of pendent party jurisdiction based solely on the existence of a transactional relationship between jurisdictional and nonjurisdictional claims, the Court could be argued implicitly to have done so in decisions dealing with the state law claims of nondiverse class members. In the leading decision, *Supreme Tribe of Ben Hur v. Cauble*,<sup>118</sup> diverse "Class A" members of an Indiana fraternal benefits association brought a federal class action against the association, seeking to enjoin an allegedly unlawful use of the funds of the association in connection with a reorganization involving the creation of a new category of "Class B" members. The action resulted in a judgment sustaining the reorganization.<sup>119</sup> Indiana citizens who were members of Class A then commenced a state court action seeking to relitigate the same questions.<sup>120</sup> The Supreme Court held that the federal court had ancillary jurisdiction to restrain the state court's relitigation of the questions it had previously resolved.

The Court rejected the contention that the Indiana members of Class A could not be bound by the judgment in the previous federal class action because they were not of diverse citizenship from the defendant in that action. Rather, the Court held that the district court had jurisdiction to resolve their claims ancillary to its jurisdiction over the claims of the diverse members of Class A. In reaching this conclusion, the Court relied on *Stewart v. Dunham*.<sup>121</sup> *Stewart* had involved a bill in equity by a diverse creditor seeking to set aside a conveyance of a stock of merchandise. Following removal of the action, nondiverse co-claimants were permitted to intervene on the ground that the federal court had already acquired jurisdiction over the controversy, and the court therefore possessed ancillary jurisdiction over the claims of the other creditors asserting rights in the same property.<sup>122</sup>

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118. 255 U.S. 356 (1921).

119. *Id.* at 358-59.

120. *Id.* at 357.

121. 115 U.S. 61 (1885).

122. *Id.* at 64.

In *Ben Hur*, the Supreme Court concluded that the principle of *Stewart* "controls this case."<sup>123</sup> The Court noted that

[i]t is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system, and were in use in English chancery.

Owing to the number of interested parties and the impossibility of bringing them all before the court, the original suit was peculiarly one which could only be prosecuted by a part of those interested suing for all in a representative suit. Diversity of citizenship gave the District Court jurisdiction. Indiana citizens were of the class represented; their rights were duly represented by those before the court. The intervention of the Indiana citizens in the suit would not have defeated the jurisdiction already acquired. *Stewart v. Dunham*. Being thus represented, we think it must necessarily follow that their rights were concluded by the original decree.<sup>124</sup>

Although *Ben Hur* is commonly viewed as holding that only the named class representatives must satisfy the diversity of citizenship requirement in a federal class action based on state law, the case, on its facts, addressed a much narrower question. *Ben Hur* involved a "true" class action which sought to enjoin a disposition of the funds of the association in which all members of Class A were alleged to have a joint interest.<sup>125</sup> The case thus stood directly in the line of cases sustaining the exercise of ancillary jurisdiction over competing claims to property when some of the claims were already properly before the federal court for disposition, as in *Freeman v. Howe*.<sup>126</sup> As the Supreme Court specifically noted:

The subject-matter [of the suit] included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.<sup>127</sup>

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123. 255 U.S. at 365.

124. *Id.* (citation omitted).

125. *Id.* at 361.

126. 65 U.S. (24 How.) 450 (1860).

127. *Ben Hur*, 255 U.S. at 367.

In *Snyder v. Harris*<sup>128</sup> and *Zahn v. International Paper Co.*,<sup>129</sup> the Supreme Court held that the enlargement of the scope of permissible federal class actions effected by the 1966 amendments to Rule 23 did not alter the long-standing rules of aggregation applicable to the determination of the amount in controversy. Thus, absent some recognized basis for aggregation, each member of a class in a federal class action must satisfy the jurisdictional amount requirement despite possible impairment of the judicial economy sought by Rule 23.<sup>130</sup>

While the decisions ascribed significant weight to the interests of federalism that would be impaired by a contrary rule, which would transfer jurisdiction over "numerous local controversies involving exclusively questions of state law"<sup>131</sup> to the federal courts, *Snyder* and *Zahn* have no direct applicability to the constitutionality of the ALI proposal because they rested solely on statutory grounds that may be altered by Congress.

Nonetheless, the decisions are significant in their apparent continued recognition of the class action diversity rule of *Ben Hur*, despite its apparent inconsistency with the results in *Snyder* and *Zahn*.<sup>132</sup> In *Snyder*, the Court observed that

Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no non-diverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State.<sup>133</sup>

Despite its narrow origins under the principle of *Freeman v. Howe*, the class action diversity rule has been read broadly to apply to all federal class actions in which jurisdiction is based on diversity of citizenship.<sup>134</sup> These actions go well beyond class actions under Rule 23(b)(1), which might be thought to lie within the principle of *Freeman v. Howe* and *Supreme Tribe of Ben Hur v. Cauble* because the interests of absentees

128. 394 U.S. 332 (1969).

129. 414 U.S. 291 (1973).

130. See *Snyder*, 394 U.S. at 336-38.

131. *Id.* at 340.

132. See Currie, *supra* note 30, at 757, 763 (arguing that *Zahn* implicitly rejected pendent party jurisdiction based solely on the existence of a factual relationship with jurisdictional claims, whereas *Ben Hur* accepted it).

133. 394 U.S. at 340 (citation omitted).

134. See 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1755 (2d ed. 1986).

or the parties before the court are likely, as a practical matter, to be prejudiced by separate adjudications.<sup>135</sup> Amended Rule 23(b)(3) extends to class actions unknown to equity in 1789, based solely on the existence of common questions of law and fact which "predominate" over individual questions, where a class action is determined to be "superior" to the prosecution of individual actions for the resolution of the controversy.

To the extent one assumes that the constitutionality of the exercise of jurisdiction over the claims of absent, nondiverse members of a class is established, and that this jurisdiction is an application of the concept of supplemental jurisdiction,<sup>136</sup> that result might be thought generally to support the concept of pendent party jurisdiction based on a transactional relationship between jurisdictional and nonjurisdictional claims, an issue discussed further below.

#### IV. JURISDICTION BASED ON MINIMAL DIVERSITY

The ALI proposal adds another string to its supplemental jurisdiction bow by invoking the concept of "minimal diversity" to support removal of nondiverse state law claims by or against new parties based on a transactional relationship with claims then pending in federal court.<sup>137</sup> Based on the Supreme Court's interpleader decision in *State Farm Fire & Casualty Co. v. Tashire*,<sup>138</sup> this argument posits that the complete diversity requirement is, in all cases, purely statutory in origin, and that so long as any two adverse parties are not co-citizens, the exercise of diversity jurisdiction falls within Article III.<sup>139</sup>

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135. See, e.g., *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992) (recognizing that failure to certify a class action in this securities law action would prejudice members of certain subclasses who have interests in a limited fund), *cert. dismissed*, *Hart Holding Co. v. Drexel Burnham Lambert Group, Inc.*, 113 S. Ct. 1070 (1993); *In re Bendectin Products Liab. Litig.*, 749 F.2d 300, 305-06 (6th Cir. 1984) (certification of a class action was proper when there was a limited fund at issue, and individual litigation might prejudice, as a "practical matter," the interests of subsequent litigants in the fund). See generally 7A WRIGHT ET AL., *supra* note 134, §§ 1772-74.

136. One could argue instead that the class action rule rests on the concept that, as in actions by a trustee, only the named class representative is the "real party in interest" whose citizenship must be considered in determining diversity. However, this argument runs contrary to the Supreme Court's refusal to aggregate the claims of class members. See Currie, *supra* note 30, at 762.

137. COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 5.03 cmt. a at 260.

138. 386 U.S. 523 (1967).

139. See Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 29 (1986).

*Tashire* involved an interpleader action commenced by an insurance company against potential claimants to a limited insurance fund. While some claimants were of diverse citizenship from others, and the insurer was of diverse citizenship from the claimants,<sup>140</sup> not all of the claimants were diverse from each other. In this setting, the Supreme Court raised the issue of its subject matter jurisdiction, and concluded that the action fell within the federal interpleader statute and the scope of Article III.

As to statutory authorization, the Court noted that 28 U.S.C. § 1335 "has been uniformly construed to require only 'minimal diversity,' that is, diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be co-citizens."<sup>141</sup> As to the constitutionality of the statute, the Court stated that "in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."<sup>142</sup> In support of its holding, the Court referred in a footnote to cases considering the removal of a "separate and independent claim or cause of action" under 28 U.S.C. § 1441(c), the *Ben Hur* case sustaining the maintenance of a class action even though some class members were not of diverse citizenship from the defendant, cases sustaining intervention by co-citizens, and cases in the lower federal courts sustaining federal interpleader based on minimal diversity.<sup>143</sup>

The historic provision—now repealed—for removal of an entire action based on the presence within that action of a "separable," and, after 1948, a "separate and independent," controversy between diverse parties<sup>144</sup> might suggest the constitutionality of federal jurisdiction based on the presence of any two adverse parties of diverse citizenship. However, none of the Supreme Court's decisions addressing removal under that provision in cases involving multiple defendants claimed to be alternatively or jointly responsible for a plaintiff's injuries

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140. 386 U.S. at 525-27.

141. *Id.* at 530.

142. *Id.* at 531.

143. *Id.* at 531 n.7.

144. See generally 14A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3724 (2d ed. 1985).

considered the constitutionality of federal jurisdiction based on minimal diversity.<sup>145</sup> The Court's first consideration of that issue came in *Tashire* in the context of federal interpleader. Commentators have questioned the constitutionality of § 1441(c), both in federal question<sup>146</sup> and diversity<sup>147</sup> cases. In any event, nothing in § 1441(c) suggests the constitutionality of removal to a federal court of a state law case *no part* of which arises under federal law or is between diverse citizens.

Two points about *Tashire* are of central importance in evaluating its relevance to the ALI's proposal. First, interpleader cases such as *Tashire*, in which multiple claimants, some diverse and some not diverse from each other, are asserting mutually inconsistent claims to the same stake, fall within the direct line of the Supreme Court's ancillary jurisdiction cases emanating from *Freeman v. Howe*.<sup>148</sup> The claims at issue are not simply transactionally related (indeed, they may not be transactionally related). Rather, their relationship is one of logical dependence. The federal interpleader statute requires the deposit of the stake or its equivalent with the federal court,<sup>149</sup> and authorizes the injunction of both federal and state court proceedings affecting the property outside the interpleader.<sup>150</sup> Thus, on its facts, *Tashire* cannot be read as strong support for the ALI's expansion of supplemental jurisdiction to reach nondiverse state law claims by and against nonparties to a federal action merely because those claims have some factual overlap with claims asserted in a suit then pending in federal court.

Second, even broadly read, *Tashire* cannot support the proposition that Article III extends to any suit in which voluntary or involuntary joinder of parties is authorized by a federal statute or procedural rule, and any two parties in the suit are of diverse citizenship. Most obviously, as *Tashire* recognizes, the diverse parties must at a minimum be "adverse."<sup>151</sup> Arti-

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145. See, e.g., *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951); *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939); *City of Gainesville v. Brown-Crummer Inv. Co.*, 277 U.S. 54 (1928); *Geer v. Mathieson Alkali Works*, 190 U.S. 428 (1903); *Connell v. Smiley*, 156 U.S. 335 (1895); *Barney v. Latham*, 103 U.S. 205 (1880).

146. See 14A WRIGHT ET AL., *supra* note 144, at 402-03.

147. See Michael D. Moberly et al., *Penetrating the Thicket: Pendent Party Removal Jurisdiction in the Ninth Circuit*, 30 IDAHO L. REV. 1, 25-26 (1993).

148. 65 U.S. (24 How.) 450 (1860).

149. 28 U.S.C. § 1335(a)(2) (1988).

150. 28 U.S.C. § 2361 (1988).

151. 386 U.S. at 531.

cle III of the Constitution extends federal jurisdiction only to "[c]ontroversies . . . between Citizens of different States,"<sup>152</sup> not to any case in which two parties of diverse citizenship may be found. *Tashire* thus fell within the constitutional grant because the interests of all of the claimants were potentially adverse to each other.

Beyond this, it cannot be true that whenever a suit between citizens of diverse citizenship is commenced in federal court, Congress is free to authorize the voluntary or involuntary joinder to that suit of any other suit between co-citizens regardless of the relationship of that suit to the action in which diversity of citizenship is present. This would authorize, for example, the joinder, without any independent jurisdictional basis, of factually unrelated lawsuits by one diverse and one nondiverse plaintiff against a common defendant, simply because the suits present a common question of law. Thus, it seems apparent that there must be, at a minimum, some significant factual interrelationship between the diverse and nondiverse claims before they may constitutionally be joined in federal court as part of one "controversy" under the rubric of "minimal diversity."

Ultimately, there is no reason to conclude that the relationship required to join a nondiverse state law claim by or against one party with a diversity claim asserted by or against another party is any different than the relationship constitutionally required to permit a nondiverse state law claim by or against one party to be joined to a federal question claim by or against another party as an exercise of supplemental jurisdiction. Article III authorizes the federal courts to hear "cases" that "arise under" federal law, and "[c]ontroversies . . . between Citizens of different States." Putting aside the possibility of drawing ephemeral distinctions between a single constitutional "case" and a single constitutional "controversy," the issue in each instance is whether the nonjurisdictional claims at issue form part of a single constitutional case all of which "arises under" federal law or is "between" diverse citizens, respectively.

The ALI's proposal thus ultimately draws no additional strength from its invocation of the concept of minimal diversity. The ultimate issue is whether, given a constitutional basis, be it a federal question or diversity of citizenship, for the exercise

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152. U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

of federal jurisdiction over some claim in the action, nondiverse state law claims by or against others are so closely related to the jurisdictional claim that they form a part of the same "arising under" or diversity "case." The ALI answers this question by asserting that the mere existence of a transactional relationship between the jurisdictional and nonjurisdictional claims is, in all settings, sufficient to make them part of the same constitutional case.

#### V. THE ALI PROPOSAL AND THE CONSTITUTIONAL CASE

In an argument going well beyond the ALI proposal, one commentator has suggested that even *Gibbs*' "common nucleus of operative fact" formulation is not constitutionally required, and that a single constitutional "case" or "controversy" may be found whenever the joinder of nondiverse state law claims is authorized by the rules of joinder adopted from time to time for the federal courts.<sup>153</sup>

Even if it had merit as an original matter, this suggestion diverges so far from the situations in which the federal courts have upheld the exercise of supplemental jurisdiction in any of its forms that the Supreme Court is unlikely to accept it as a basis for upholding legislation embodying the ALI proposal. Viewed without regard to precedent and history, moreover, the suggestion is fundamentally antithetical to the constitutionally limited jurisdiction of the federal courts. The suggestion would authorize, for example, the exercise of supplemental jurisdiction over completely unrelated nondiverse state law claims between two parties properly before the court on a federal question claim, simply because the joinder of that claim is authorized by Rule 18, or the exercise of supplemental jurisdiction over the nondiverse state law claim of a permissive intervenor in a diversity action, simply because that claim shared a common question of law with the claims of the parties already before the court.

The mysterious origin and ambiguity of the Supreme Court's reference to "one constitutional case" in *Gibbs* no doubt contributed to the emergence of this suggestion. The Court stated that "[p]endent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [federal law]' and the relationship between that claim and the state claim

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153. Matasar, *supra* note 30, at 1409-10, 1463, 1477-89.



permits the conclusion that the entire action before the court comprises but one constitutional 'case.'<sup>154</sup> If the word "constitutional" is ignored, it is easy to conclude that, so long as any federal question (or diversity) claim within the jurisdiction of the federal courts may be found, the federal court's jurisdiction extends to all aspects of the "same case"—defined by generally applicable rules of joinder. Thus, it has been argued that, once a statutory basis for jurisdiction over one of several originally asserted claims has been found, Congress should be held to have delegated to the judiciary the power to flesh out the entire litigative unit through definition of the scope of the "civil action" referred to in sections 1331 and 1332 of the Judicial Code.<sup>155</sup> This implied delegation of the power to define the scope of a "civil action" is said to constitute a "separate, second endeavor" involving a "different part" of the jurisdictional statutes than that defining the subject matter of the jurisdiction-conferring claims.<sup>156</sup>

To the extent it is relevant to the constitutional issue, however,<sup>157</sup> this analysis gives insufficient weight to the fact that the supplemental jurisdiction issue turns, not on whether there is a single proceeding that could be asserted within a unified court system, but whether there is a single "case," *all* of which may properly be said to arise under federal law or to be "between" citizens of different states. Article III of the Constitution extends the jurisdiction of the federal courts, not to any "litigation unit," some part of which arises under federal law, but only to "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."<sup>158</sup> Similarly, Article III does not apply to all consolidated proceedings in which citizens of different states are parties, but only to "Controversies . . . between Citizens of different States."<sup>159</sup>

Thus, in its reference to a single "constitutional" case, *Gibbs* must be taken to refer to a case the nonfederal and federal aspects of which are so related that the entire case, not

154. 383 U.S. 715, 725 (1966) (citation omitted).

155. Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 55-61.

156. *Id.* at 56, 59.

157. *See id.* at 56-57 (equating the scope of the "civil action" under 28 U.S.C. §§ 1331, 1332 with the scope of the constitutional case).

158. U.S. CONST. art. III, § 2, cl. 1.

159. *Id.*

simply some part of it, may properly be viewed as being "between" diverse citizens, or as "arising under" federal law. Rules which authorize joinder on the basis of efficiency and fairness within a unified court system are addressed to an issue that is unrelated both to the nature of the suit as determined by the character of its parties or its subject matter, and to the policies that underlie the categorical grants of jurisdiction set out in Article III. For that reason, procedural rules of efficient joinder should not provide the yardstick by which the constitutionality of an assertion of federal court jurisdiction should be measured.

Of course, the ALI proposal does not adopt the view that any joinder authorized by procedural rules forms part of the same constitutional case for the purpose of evaluating the constitutionality of the exercise of supplemental jurisdiction. Rather, it adopts the single "transaction or occurrence" standard of relatedness, which it claims derives from *Gibbs*. Ultimately, however, the ALI proposal suffers from the same fallacy as the more expansive suggestion that a single "constitutional case" arising under federal law, or between diverse citizens, is whatever the rule drafters say that it is.

This flaw may be seen both in the evolution of the "same transaction or occurrence" test for supplemental jurisdiction, and in the justifications advanced for the ALI proposal. Notably, the ALI did not adopt as its standard for the assertion of pendent party jurisdiction the "common nucleus of operative fact" formulation of *Gibbs* itself. Perhaps because the origins and meaning of that standard were unclear, many federal courts soon came to equate it with the "same transaction or occurrence" standard so prevalent in the joinder provisions of the federal rules,<sup>160</sup> which in turn echoed the language of *Moore v. New York Cotton Exchange*,<sup>161</sup> dealing with the compulsory counterclaim provision of former Equity Rule 30.<sup>162</sup>

While the "same transaction or occurrence" language of the Federal Rules is hardly self-defining and has received a variety of interpretations by the lower federal courts,<sup>163</sup> the preferred modern interpretation is that claims are sufficiently related to satisfy the "same transaction" standard if they have a "logical

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160. See FRIEDENTHAL ET AL., *supra* note 57.

161. 270 U.S. 593 (1926).

162. See *supra* text accompanying notes 70-76.

163. See FRIEDENTHAL ET AL., *supra* note 57; 13 WRIGHT ET AL., *supra* note 75, at 107-15.

relationship" such that some judicial economy will be achieved by their joinder, even if they involve factual and legal differences.<sup>164</sup> This is a liberal standard, developed with reference to the policies of efficiency and fairness within a single system of courts. It takes no account, explicitly or implicitly, of the limited jurisdiction conferred on the federal courts by the Constitution. Nor does it address whether all the claims so joined can, in some meaningful sense, be said to "arise under" federal law or to be "between Citizens of different States," even though they themselves are neither, because of their close relationship to other claims that do lie within the jurisdiction of the federal courts.

The ALI has thus proffered a procedurally oriented test for supplemental jurisdiction that developed with little or no regard for the considerations of federalism on which that test should primarily depend. And, because the "same transaction" test is focused on instrumental concerns of efficiency and fairness within a single system of courts, it has received an extremely broad and liberal interpretation by the federal courts, in stark contrast to repeated decisions of the Supreme Court emphasizing that the jurisdictional authorizations of the federal courts should be narrowly construed.<sup>165</sup>

The policy reasons advanced by the ALI to support its supplemental jurisdiction proposal also reflect its proceduralist, rather than federalist, origins. Some weight is accorded to the interests of federalism. However, federalism concerns emerge principally in connection with the discretionary considerations that the Complex Litigation Panel may take into account in determining whether removal and consolidation should be ordered in a particular case, rather than with respect to the scope of the power to order removal and consolidation.<sup>166</sup> The overriding policy underlying the ALI proposal, including its removal and supplemental jurisdiction provisions, is not wheth-

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164. See 13 WRIGHT ET AL., *supra* note 75, at 94-96.

165. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374-75 (1978) (holding that pendent jurisdiction cannot subvert diversity requirements since "federal courts are courts of limited jurisdiction" and "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded"); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107-09 (1941) (narrowly construing the removal statute based on legislative history "indicating the Congressional purpose to narrow the federal jurisdiction on removal").

166. See COMPLEX LITIGATION PROPOSAL, *supra* note 1, § 5.01 cmt. c at 229; *id.* cmt. d at 235.

er the nondiverse state law cases it embraces may properly be said to "arise under" federal law or to be "between Citizens of different States," as the Constitution requires, but whether the efficiency and fairness considerations that underlie the transactionally based joinder provisions of the Federal Rules will be furthered if removal is permitted.<sup>167</sup> In this way, the ALI proposal comes very close to saying that whenever joinder based on efficiency considerations would be desirable within a single system of courts, there can be no constitutional objection to it.

In other settings involving the interpretation of Article III, the Supreme Court has rejected the contention that considerations of efficiency should determine the boundaries of federal court jurisdiction. In rejecting the argument, in *Pennhurst State School & Hospital v. Halderman*,<sup>168</sup> that the actions of state officers in violation of state law could be enjoined under the doctrine of *Ex parte Young*,<sup>169</sup> despite the bar of the Eleventh Amendment, the Supreme Court held that the potential for achieving judicial economy by the exercise of pendent jurisdiction over such claims could not enlarge the scope of federal judicial power. The Court concluded that considerations of judicial economy, convenience, and fairness to litigants "cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State."<sup>170</sup> Rather, "[t]hat a litigant's choice of forum is reduced 'has long been understood to be a part of the tension inherent in our system of federalism.'"<sup>171</sup>

The result in *Pennhurst* has been justly criticized.<sup>172</sup>

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167. See *id.* § 3.01 cmt. a at 39 ("Cases should be joined for common treatment only when consolidation furthers fairness and efficiency goals."); *id.* § 5.01 cmt. a at 222 ("The removal jurisdiction provided for in this section is designed to foster consolidation and more efficient and fair treatment of related claims thereby."); *id.* § 5.03 cmt. b at 261 (explaining that this section gives "statutory authorization" to exert jurisdiction over "transactionally related claims," giving a transferee court the "ability to exert control over [an] entire controversy in an effort to achieve the most efficient, economical, and fair resolution of the dispute").

168. 465 U.S. 89 (1984).

169. 209 U.S. 123 (1908).

170. 465 U.S. at 120, 123.

171. *Id.* (quoting *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring in result)).

172. See, e.g., George D. Brown, *Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61

That criticism, however, is more appropriately directed to the Court's understanding of the scope of the Eleventh Amendment itself,<sup>173</sup> and to the potential that *Pennhurst's* holding will force litigants possessing federal claims to litigate in state court to obtain a comprehensive disposition of their claims and undermine the policy of constitutional avoidance,<sup>174</sup> than to the conclusion that considerations of judicial economy and convenience cannot determine or enlarge the scope of Article III.<sup>175</sup> The fundamental underpinning of the ALI proposal, by contrast, is that just such considerations of judicial economy and convenience do, in themselves, determine the scope of Article III, without any additional requirement that the nondiverse state law cases engrossed by its removal and consolidation provision "arise under" federal law or involve disputes "between" citizens of different states, or significantly impair the federal courts' ability to exercise jurisdiction over cases that do.

The ALI proposal stands in marked contrast to the limited view that Congress and the Supreme Court historically have taken of the power of the federal courts to enjoin state court proceedings based on their factual overlap with parallel litigation then pending in federal court. The Anti-Injunction Act,<sup>176</sup> although a statutory rather than a constitutional restraint, reflects suppositions about the proper allocation of power between the federal and state courts that were shared by the Framers of the Constitution. From the beginning, the Act has been interpreted to preclude federal injunctions of parallel state proceedings involving nondiverse state law claims based solely on their substantial factual identity or overlap with pending federal proceedings. In *Kline v. Burke Construction*

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(1984).

173. See Shapiro, *supra* note 172, at 71-76.

174. See, e.g., Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643, 663-64 (1985); John P. Dwyer, *Pendent Jurisdiction and the Eleventh Amendment*, 75 CALIF. L. REV. 129, 153-67 (1987); see also *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1969).

175. See Chemerinsky, *supra* note 174, at 660 ("No matter how great the efficiency justifications for pendent jurisdiction, it cannot be allowed if not authorized by the Constitution and the federal question jurisdiction statute."); Dwyer, *supra* note 174, at 153.

176. 28 U.S.C. § 2283 (1988).

Co.<sup>177</sup> the Supreme Court, pertinently to the issues raised by the ALI proposal, observed that

a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.<sup>178</sup>

Although a statutory restraint, the Anti-Injunction Act reflects the Framers' understanding of the proper constitutional boundaries of federal court jurisdiction as well. In *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*,<sup>179</sup> Justice Black described the origins of the Act in the following terms:

[F]rom the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. *Understandably this dual court system was bound to lead to conflicts and frictions.* Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and "to prevent needless friction between state and federal courts," it was necessary to work out lines of demarcation between the two systems.<sup>180</sup>

Justice Black concluded by recognizing the constitutional underpinnings of the Act: "[S]ince the statutory prohibition against such injunctions *in part rests on the fundamental constitutional independence of the States and their courts*, the

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177. 260 U.S. 226 (1922).

178. *Id.* at 230.

179. 398 U.S. 281 (1970).

180. *Id.* at 286 (emphasis added) (citation omitted) (quoting *Oklahoma Packing Co. v. Gas Co.*, 309 U.S. 4, 9 (1940)).

exceptions should not be enlarged by loose statutory construction."<sup>181</sup>

Two of the exceptions to the current version of the Act are of primary importance in connection with the ALI proposal: that for injunctions "expressly authorized by Act of Congress," and that for injunctions "necessary in aid of [the District Court's] jurisdiction."<sup>182</sup> As to the former, Congress has not authorized an injunction of a nondiverse state law suit simply because some of its parties might also be involved in a pending federal action, let alone, as the ALI proposes, simply because the state suit may involve some factual overlap with a pending federal proceeding. Rather, Congressionally authorized injunctions have been designed to effectuate a federal court's jurisdiction over cases that have been properly filed in or removed to the court.<sup>183</sup>

The interpretation given the "in aid of jurisdiction" exception to the Anti-Injunction Act is also pertinent to the issues raised by the ALI proposal, because that interpretation reflects an understanding of the scope of the federal "case" in aid of which the injunction may issue. In *Atlantic Coast Line*, the Court gave this exception a very narrow construction, limiting it not simply to cases involving parallel litigation, but to cases in which the grant of an injunction is "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."<sup>184</sup> The Court concluded that the case before it in *Atlantic Coast Line* was not of that character because "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts."<sup>185</sup>

In the years since *Atlantic Coast Line*, federal courts have been called upon to apply the Anti-Injunction Act and its "in aid of jurisdiction" exception in cases presenting difficulties very similar to those addressed by the ALI proposal, in which complex litigation involving many of the same parties and

181. *Id.* at 287 (emphasis added).

182. 28 U.S.C. § 2283 (1988).

183. *See* *Mitchum v. Foster*, 407 U.S. 225, 232-35 & nn.12-17 (1972); BATOR ET AL., *supra* note 14, at 1324-26. *See generally* 17 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4224 (2d ed. 1988).

184. 398 U.S. at 295.

185. *Id.*

issues was pending in both federal and state courts. Notwithstanding that purely procedural considerations of efficiency and economy would clearly have called for restraint of the parallel state proceedings, the courts generally have held that an injunction of the state proceedings is not appropriate until a settlement of the federal action has actually been reached or is imminent.<sup>186</sup> In such circumstances, the federal action begins to resemble a dispute over limited funds within the control of the federal court of the kind that historically has provided a basis for ancillary jurisdiction.

In *In re Baldwin-United Corp.*,<sup>187</sup> for example, the Second Circuit sustained a federal court injunction preventing the attorneys general of fifty states from instituting proceedings seeking restitution under state law on behalf of their citizens on account of the same transactions that were the subject of over one-hundred federal securities lawsuits against twenty-six defendants which had been transferred and consolidated for pretrial proceedings in the federal district court. The federal injunction was issued before the institution of any state proceedings, and so the Anti-Injunction Act was technically inapplicable. In upholding the injunction under the All Writs Act,<sup>188</sup> however, the Second Circuit analogized the issue to that presented by the "in aid of jurisdiction" exception to the Anti-Injunction Act, drew upon cases construing the Act, and implied that the result would have been the same even if state

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186. Compare *Standard Microsystems Corp. v. Texas Instruments, Inc.*, 916 F.2d 58 (2d Cir. 1990) (reversing injunction granted to federal antitrust plaintiff against the prosecution of state antitrust litigation subsequently instituted by the defendant) and *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) ("mandatory" Rule 23(b)(1) class action decertified on the ground that it implicitly precluded class members from litigating their state court actions on issues of liability and punitive damages), cert. denied, 459 U.S. 988 (1982) with *Carlough v. Amchem Products Co.*, 10 F.3d 189 (3d Cir. 1993) (affirming injunction of state class action by members of federal class action for asbestos related tort damages to protect federal court's ability to effectuate a pending settlement of the federal action) and *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989) (affirming injunction of state court actions by members of federal class after federal judgment had been entered on a settlement because the state actions would destroy the federal settlement that had been worked out over a period of years) and *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985) (affirming federal court injunction of threatened break-away state proceedings prior to entry of federal judgment where federal securities action was on the verge of settlement).

187. 770 F.2d 328 (2d Cir. 1985).

188. 28 U.S.C. § 1651 (1988).



proceedings had been commenced at the time the federal injunction was issued.<sup>189</sup>

The court first considered the validity of the injunction as to actions against eighteen of the twenty-six defendants that were on the verge of settlement. In these actions, settlement agreements had been signed and preliminarily approved by the court, and fairness hearings had been scheduled. The proposed settlements provided for release of all of the settling plaintiffs' federal and related state claims on account of the transactions in question. The district court approved the injunction against supplemental state proceedings seeking "restitution" on behalf of members of the federal class on the ground that such litigation would frustrate the settlements that had already been reached. Absent an injunction preventing the attorneys general from seeking additional recovery on account of the same claims that were released by the federal settlements, the federal court's "flexibility and authority to decide" the case before it would be seriously impaired.<sup>190</sup>

The existence of multiple and harassing actions by the states could only serve to frustrate the district court's efforts to craft a settlement in the multidistrict litigation before it. The success of any federal settlement was dependent on the parties' ability to agree to the release of any and all related civil claims the plaintiffs had against the settling defendants based on the same facts. If states or others could derivatively assert the same claims on behalf of the same class or members of it, there could be no certainty about the finality of any federal settlement. Any substantial risk of this prospect would threaten all of the settlement efforts by the district court and destroy the utility of the multidistrict forum otherwise ideally suited to resolving such broad claims.

... In effect, unlike the situation in the *Kline v. Burke Construction Co.* line of cases, the district court had before it a class action proceeding so far advanced that it was the virtual equivalent of a res over which the district judge required full control.<sup>191</sup>

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189. 770 F.2d at 335-36.

190. *Id.* at 335 (quoting *Atlantic Coast Line*, 398 U.S. at 295).

191. *Id.* at 337. In *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993), the Third Circuit followed the reasoning of *Baldwin-United* and its previous decision in *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 821 (1989), in holding that the federal district court had properly enjoined a state class action by members of a federal "opt-out" class action for asbestos-related tort damages to protect the feder-

The court also concluded that the injunction was proper as to actions against the eight defendants who had not yet entered settlement agreements, given the fact that settlement negotiations were ongoing and there was "a substantially significant prospect that these [eight] defendants will settle in the reasonably near future."<sup>192</sup> However, should it appear that "prompt settlement was no longer likely," the court indicated that the injunctions should be lifted, because the pendency of duplicative federal and state court litigation in and of itself ordinarily provides no basis for a federal injunction.<sup>193</sup>

If, as the previous discussion suggests, the boundaries of federal authority are not properly based on purely procedural considerations of efficiency and judicial economy, the question remains how the limits of the federal constitutional case should be discerned. While the answer is hardly self-evident, the question that should be asked is different than the one the ALI has posed. The ALI has asked what rules of removal, transfer, and consolidation would optimally promote efficiency, judicial economy, and consistent outcomes in multiple cases involving the same subject matter. Its answers to these questions are not beyond debate on their own terms. But the relevant question is not whether judicial economy and efficiency of the kind that would be desirable within a unified court system will be achieved. Rather, it is whether the kinds of removal and consolidation that the ALI would authorize can fairly be said to have been within the contemplation of the Framers.

The answer to this question poses considerable difficulty, if only because it is a question for which there is no apparent historical analogue. One might be tempted to look to the joinder provisions and procedural devices employed by courts of equity to achieve the entire resolution of controversies and avoid a multiplicity of actions at the time of adoption of the Constitution. Such devices would include interpleader, class actions, and the "bill of peace."<sup>194</sup> However, it would be difficult to

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al court's ability to effectuate a pending settlement of the federal action. Unlike *In re Real Estate Title*, the class members could preserve their right to litigate in a forum of their choice by availing themselves of the opportunity to opt out of the federal action. *Carlough*, 10 F.3d at 204. The court's decision was strongly influenced by the fact that the state action was, in essence, a challenge to the validity of the federal action, rather than an independent assertion of the class members' rights.

192. 770 F.2d at 338.

193. *Id.*

194. See generally ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 149-98,

find in this history any clear foundation for the ALI's proposal for the federal courts' control over purely state law tort claims for damages based on nothing more than a transactional relationship with claims then pending in federal court.

For example, the scope of "true" class actions recognized in equity was obviously much narrower than those endorsed by amended Rule 23 in 1966.<sup>195</sup> While the historical equitable class action analogy might support the existence of "ancillary" jurisdiction over conflicting claims to property such as those at issue in *Ben-Hur*, it would do nothing to establish the propriety of federal jurisdiction based on the predominance of common questions of fact under Rule 23(b)(3), let alone to support removal of nonjurisdictional claims that have not been certified as part of a federal class action based on the existence of some factual overlap, as the ALI has proposed.

In any event, like the inquiry based on modern conceptions of efficient procedure, the historic inquiry based on the division of judicial business between courts of law and equity in England would appear to reflect policies that have limited relevance to the allocation of judicial business by subject matter and the character of the parties effected by Article III of the Constitution.<sup>196</sup>

Are there then no meaningful guideposts from which the answer to the important constitutional question posed by the ALI's proposal can be found? At a minimum, the history and circumstances of the Supreme Court's decisions upholding the exercise of "supplemental" jurisdiction over nonjurisdictional claims by and against additional parties is an important consideration which appears to have been given little attention or weight by the drafters of the ALI proposal. Those decisions have adopted a cautious approach to the expansion of federal jurisdiction, and have affirmatively endorsed supplemental jurisdiction over additional parties only in cases in which more than a simple transactional relationship between the federal and state claims existed. Thus, as previously discussed, the Supreme Court has sustained the exercise of ancillary jurisdic-

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200-03, 214-15 (1950); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 1172-1181 (14th ed. 1918).

195. See FED. R. CIV. P. 23 advisory committee's note for 1966 Amendments.

196. See CHAFEE, *supra* note 194, at 170-75, 193, 198 (reviewing conflicting authorities regarding the appropriateness of an equitable bill of peace based on multiplicity of tort damages actions alone; assuming that the appropriateness of an equitable remedy does not obviate limitations on federal jurisdiction).

tion when the prosecution of separate federal and state actions would impair the federal court's ability to effectuate its judgment, would involve the prosecution of conflicting claims to property or funds within the control of the federal court, or would prevent an existing party from fully defending itself in a single proceeding. Lower courts have readily extended supplemental jurisdiction to other settings in which the disposition of claims by or against additional parties is logically dependent on or intertwined with the litigation before the federal court.<sup>197</sup>

This suggests that the focus of analysis in determining the scope of supplemental jurisdiction should not be on intersystem judicial economy, but on the need for supplemental jurisdiction to permit the federal courts properly to exercise jurisdiction in the categories of cases enumerated by Article III. This approach would embrace the assumption that the Framers would not have intended Article III's categorical authorizations of jurisdiction to be so limited that they would result in ineffective judgments, prevent parties already before the court from fully and adequately defending themselves in a single proceeding, or, as a practical matter, prejudice the rights of absentees in the specific subject matter of the arising under or diversity case already before the court.

Such an approach would not lead to the conclusion that supplemental jurisdiction is narrowly appropriate only where "necessary" or "indispensable" to the exercise of the jurisdiction explicitly conferred by Article III. It would, however, require a determination that the pendency of parallel state litigation between nondiverse parties would have a significant impact on the ability of the federal courts properly to exercise the jurisdiction assigned to them by the Constitution and authorized by Congress before supplemental jurisdiction could be sustained. Thus, the exercise of pendent claim jurisdiction under *Gibbs* would be sustained on the ground that, even though it is not necessary to permit the federal courts to exercise federal question jurisdiction, a contrary result would, as a practical matter, unduly impair the exercise of that jurisdiction by forcing litigants to state court to obtain the entire disposition of their claims.<sup>198</sup>

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197. See *supra* text accompanying notes 163-64.

198. See Arthur R. Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1, 4 (1985); Schenkier, *supra* note 30, at 247-48 (arguing that judicial economy does not provide a sufficient rationale for pendent claim or pendent party jurisdic-

No similar justification closely tied to the "heads" of federal jurisdiction undergirds the ALI's proposal, which is based on considerations of judicial economy and "convenience" that are at odds with the approach historically taken to defining the limited subject matter jurisdiction of the federal courts. Consequently, the proposal entails a comparatively vast expansion of federal jurisdiction at the expense of the states.

A second consideration given little weight by the ALI is that, at the time the Constitution was adopted, litigation was conceived in essentially bipolar terms, involving the assertion of individual rights between identifiable parties having concrete, adverse interests.<sup>199</sup> Joinder of claims and the assertion of claims on a class basis were authorized in restricted situations.<sup>200</sup> For example, class actions were appropriate when the class asserted a common title or right.<sup>201</sup> As the kinds of joinder authorized by modern procedural rules have dramatically expanded to achieve efficiency rather than federalism objectives, it becomes more and more difficult to say that any type of joinder authorized by an evolving system of procedure should be viewed as establishing a sufficiently close connection between the jurisdictional and nonjurisdictional claims to justify their classification as one "arising under" or diversity case.

Under the ALI proposal, for example, a nondiverse breach of warranty claim by a Missouri farmer against a Missouri manufacturer of farm equipment properly would be removed and consolidated with a diversity action raising similar claims by California farmers against the same manufacturer, simply because all had purchased similar equipment from the same defendant. No matter how one looks at the question, it is difficult to believe that the Framers would not have been sur-

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tion, which should be based instead on the need to ensure plaintiffs a true choice between federal and state court on their federal question claims).

199. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282, 1285-88 (1976) ("Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.").

200. See generally 6A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1581 (2d ed. 1990); 7 WRIGHT ET AL., *supra* note 81, § 1651.

201. See, e.g., *Knowles v. War Damage Corp.*, 171 F.2d 15, 17 (D.C. Cir. 1948) (requiring a "common and undivided interest in the subject matter" of the litigation for a class action to be maintained), *cert. denied*, 336 U.S. 914 (1949); see also FED. R. CIV. P. 23 advisory committee's note for 1966 Amendments; 7A WRIGHT ET AL., *supra* note 134, § 1751 (explaining that many early procedural codes required a common or general interest in the subject matter of the action for a class action to be maintained).

prised—even shocked—to learn that the Missouri farmer's claim was part of the same "diversity case" as the California action.

Perhaps the strongest historical support for the ALI proposal lies in the long-standing assumption that nondiverse claims of class members lie within the subject matter jurisdiction of the federal courts, provided the named class representative and the defendant are of diverse citizenship. From this, it may be argued, it is only a small step to recognize supplemental jurisdiction for claims joined on the basis of a transactional relationship under Federal Rule 20. However, the class action rule arose in an era when "true" class actions were recognized only in limited circumstances. *Ben Hur* itself involved conflicting claims to funds, a circumstance that historically had supported the exercise of ancillary jurisdiction. Moreover, even if one is unwilling to call the constitutionality of amended Rule 23(b)(3) into question, as such a narrow historical approach would, it is a significant additional step to conclude that any and all individual claims involuntarily joined or consolidated on the basis of a transactional relationship alone form part of the same constitutional arising under or diversity case.

In the context of Rule 23(b)(3) a number of affiliating circumstances make it more defensible to view all of the claims in the same light, including the fact that common issues do not simply exist, but have been determined to "predominate," and the fact that the members of the class have been accorded the right to exclude themselves from the action to pursue their own litigation in state court. Thus, the claims are more easily viewed as forming part of a single constitutional case, and recognition of federal jurisdiction over such claims poses less of a threat to state sovereignty. These are not, however, completely satisfactory responses, and logical consistency might well lead to the conclusion that, if the ALI proposal exceeds the bounds of the constitutional arising under or diversity case, so does the Rule 23(b)(3) common question class action to the extent it adjudicates the purely state law claims of nondiverse class members.

It must also be recognized that, before *Finley*, most of the courts of appeals had upheld the exercise of "pendent party" jurisdiction in cases involving both multiple plaintiffs<sup>202</sup> and

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202. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); *Wilson v. American Chain & Cable Co.*, 364 F.2d 558 (3d Cir.

multiple defendants<sup>203</sup> properly joined under Rule 20. Few of those cases contain any careful consideration of the constitutional issue posed by the exercise of pendent party jurisdiction.<sup>204</sup> Rather, they simply assumed, without analysis, that the *Gibbs* test applied equally in both pendent claim and pendent party contexts—an assumption belied by the Supreme Court's reasoning in *Moor*, *Aldinger*, and *Finley*. Moreover, most of the cases involved claims by plaintiffs against defendants alleged to be jointly or alternatively liable for plaintiffs' injuries. In that setting, the possibility of inconsistent results in federal and state courts creates the prospect that the plaintiff might recover no compensation at all, even though one of the defendants clearly was responsible for the plaintiffs' injuries.<sup>205</sup> Thus, actions against multiple defendants seeking to assign joint, several, or alternative responsibility for a single wrong could be argued to be part of a single arising under or diversity case where the claims against some, but not all, of the defendants fall within Article III, because the resolution of the jurisdictional claims may well depend upon the outcome of the nonjurisdictional claims. Moreover, as in the case of pendent claim jurisdiction, a contrary result could unduly deter plaintiffs possessing federal question or diversity claims from availing themselves of the forum that the Constitution has authorized and that Congress has accorded to them.<sup>206</sup>

By contrast, the removal, transfer, and consolidation proposed by the ALI would relate, in many cases, to individual claims by multiple plaintiffs against a single defendant alleged to have manufactured a product that injured them all. In such

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1966).

203. See, e.g., *Grinter v. Petroleum Operation Support Serv.*, 846 F.2d 1006 (5th Cir. 1988), *cert. denied*, 488 U.S. 969 (1988); *Lykins v. Pointer, Inc.*, 725 F.2d 645 (11th Cir. 1984); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *Bowers v. Moreno*, 520 F.2d 843 (1st Cir. 1975); *Curtis v. Everette*, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Almenares v. Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972).

204. See, e.g., *Lykins v. Pointer, Inc.*, 725 F.2d 645 (11th Cir. 1984); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971); *Connecticut Gen. Life Ins. Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968). *But see* *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980) (examining pendent party jurisdiction in light of the limits of Article III, and addressing minimal diversity under *Tashire*).

205. See *Fortune*, *supra* note 30, at 7.

206. See *Schenkier*, *supra* note 30, at 281.

cases, each claim stands on its own footing. The argument for supplemental jurisdiction is therefore more tenuous.<sup>207</sup>

## VI. THE ALI PROPOSAL AND PROTECTIVE JURISDICTION

Casual acceptance of the ALI's proposed enlargement of removal and supplemental jurisdiction would be ironic in view of the controversy that has surrounded the concept of "protective jurisdiction"—a controversy that remains unresolved.<sup>208</sup> In its broadest form, the protective jurisdiction theory posits that "in any case for which Congress has the constitutional power to prescribe federal rules of decision and thus confer 'true' federal question jurisdiction, it may, without so doing, enact a jurisdictional statute, which will provide a federal forum for the application of state statute and decisional law."<sup>209</sup> In its narrower version, the theory suggests that

where Congress has "an articulated and active federal policy regulating a field, the 'arising under' clause of Article III . . . permits the conferring of jurisdiction on the national courts of all cases in the area—including those substantively governed by state law." In such cases, the protection being offered is not to the suitor, as in diversity cases, but to the "congressional legislative program."<sup>210</sup>

The broad form of the protective jurisdiction theory rests on the objectionable premise that a particular category of litigants needs the protection of a federal forum to ensure the impartial application of state law—a premise inconsistent with

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207. See Schenkier, *supra* note 30, at 286-87 (arguing that pendent party jurisdiction should not extend to additional plaintiffs asserting state law claims). The current and historic operation of § 1441(c) authorizing removal of an entire action based on the presence of a "separate and independent" or, formerly, a "separable" controversy, could similarly be upheld on the ground that some defendants would refuse to exercise their right of removal unless other defendants allegedly liable to the plaintiff would also be before the removal court, and on the ground that, under the rationale stated in the text, the plaintiff could originally have sued all the defendants in federal court. See *supra* notes 144-47 and accompanying text.

208. See *Mesa v. California*, 489 U.S. 121, 136-37 (1989) (a purely jurisdictional statute cannot support "arising under" jurisdiction; declining to adopt protective jurisdiction theory); *Verlinden V.B. v. Central Bank of Nigeria*, 461 U.S. 480, 491-92 (1983). See generally *BATOR ET AL.*, *supra* note 14, at 983-89; *WRIGHT*, *supra* note 14, at 121-24.

209. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 473 (1957) (Frankfurter, J., dissenting).

210. *Id.* at 476 (citation omitted) (quoting Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 192 (1953)).



the Constitution's recognition of the need for such protection only in actions between citizens of different states and in certain other specifically enumerated categories of cases in which Article III jurisdiction is defined in terms of party status rather than subject matter. In its narrower form, protective jurisdiction finds a somewhat more secure foundation in the "arising under" provision of Article III, because of the perceived necessity to protect a federal legislative program.

Although the ALI's reliance on its supplemental jurisdiction theory tends to obscure the point, the proposal ultimately is driven by the determination that there is a need to "protect" the ALI's vision of the proper functioning of both federal and state judiciaries. However, even assuming the validity of the protective jurisdiction theory in some form, it provides no support for the ALI's removal, consolidation, and supplemental jurisdiction provisions. The ALI does not suggest that its proposal is justified by the necessity to protect any particular category of litigants from state court bias. Moreover, the ALI has deliberately avoided any recommendation for the enactment of legislation establishing (or authorizing the federal courts to fashion) federal substantive rules of decision for the multiparty, multiforum litigation that is the subject of the proposal's concern.<sup>211</sup> Rather, the ALI recommends the adoption of a choice-of-law rule designed, if feasible, to lead to the application of the law of a single state to the removed, transferred, and consolidated proceedings.<sup>212</sup>

The operation of a federal "legislative program" of a sort is implicated by the ALI's proposal, namely, the jurisdictional and procedural provisions establishing the federal court system and governing its operations. Even assuming that the exercise of protective jurisdiction on this ground could survive the objection that an enlargement of Article III cannot be based on the need to "protect" the limited grants of jurisdiction contained in Article III itself,<sup>213</sup> however, an equally basic objection remains: at bottom, the ALI proposal is not grounded on any

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211. COMPLEX LITIGATION PROPOSAL, *supra* note 1, at 3 (recommending a purely "procedural solution" to the problems addressed); *id.* at 305-09 (same).

212. *See id.* §§ 6.01, 6.03.

213. *See* Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169, 196-206 (1990) ("If the Court has been reluctant to endorse the theory of protective jurisdiction even when an article [sic] I legislative purpose is present, there can be little hope that the Court will endorse this theory for a 'purely' jurisdiction-conferring statute.").

determination that federal jurisdictional authority over the nondiverse state law cases whose removal and consolidation it authorizes would be necessary, or even significantly helpful, to permit the federal courts to hear and determine federal question and diversity cases that do fall within the scope of Article III. Nor is the proposal based on the conclusion that removal and consolidation is necessary to ensure that a litigant possessing a federal question or diversity claim will enjoy unimpeded access to a federal forum, or that a defendant in the federal action otherwise will be unable fully and fairly to defend itself, or that the rights of absentees will be practically prejudiced by the disposition of the subject matter of the federal action. Rather, the ALI's recommendation is simply grounded in the determination that overall intersystem judicial economy and consistency of result will be enhanced if the nondiverse state law cases whose removal and transfer it authorizes are heard and resolved together with cases involving the same subject matter then pending in federal court.<sup>214</sup>

This is far different than saying that, absent such removal and consolidation, the ability of the federal courts to conduct the judicial business that the Constitution entrusts to them would be defeated or significantly impaired. This is illustrated, for example, by the Proposal's "reverse removal" provisions providing for the transfer of federal cases to state court for consolidated disposition in limited circumstances.<sup>215</sup> If impairment of the federal courts' ability to discharge Article III business, rather than purely instrumental concerns of judicial economy, were the foundation for the ALI proposal, the reverse removal provision would impede rather than promote the protection of the federal interest at stake.

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214. See, e.g., COMPLEX LITIGATION PROPOSAL, *supra* note 1, at 217-19 ("In order to maximize the ability to achieve a fair and efficient resolution of the entire controversy and to avoid redundant and duplicative litigation, possibilities for intersystem consolidation should be considered seriously."); *id.* § 5.01 cmt. a at 223 ("In most cases, removal and consolidation of transactionally related claims sharing common questions of fact will promote judicial efficiency . . ."); see also *id.* at 7, 16-17; *id.* § 3.01, § 3.01 cmt. a, § 3.01 cmt. c at 44-47; *id.* § 3.04, § 3.04 cmt. a at 86; *id.* § 5.01, § 5.01 cmt. a, § 5.01 cmt. a note, § 5.01 cmt. b, § 5.01 cmt. c at 229-30; *id.* § 5.03, § 5.03 cmt. a, § 5.03 cmt. a note, § 5.03 cmt. b, § 5.03 cmt. b note.

215. See *id.* at 165-68; *id.* § 4.01; *id.* cmt. a at 179-80; *id.* cmt. e at 186-87.

## VII. CONCLUSION

The imperatives of judicial economy and consistent outcomes in mass tort and other complex litigation have gained immense force in recent years as multiple federal and state actions involving overlapping subject matter and parties have become more prevalent, imposing large and increasing burdens on the federal and state judiciaries. It is, therefore, not surprising that proposals such as that of the ALI, promising to rationalize this untidy landscape, reduce litigation burdens, increase judicial efficiency, and achieve consistent outcomes, have gained significant individual and institutional support.

These same pressures and imperatives, however, have created an unfortunate tendency to brush aside obstacles arising from our federal system of government and dual system of courts, on the ground that they take inadequate account of modern litigation realities inconceivable at the time the Constitution was adopted. They also have created a powerful temptation to finesse objections based on the limited categories of subject matter jurisdiction authorized for the federal courts by Article III, by broadly equating—without significant precedential or historical support—the scope of the federal arising under or diversity “case” with any system of joinder that enlightened proceduralists might wish to adopt to achieve the efficient, comprehensive, and consistent disposition of litigation.

The fundamental objection to the ALI’s removal, consolidation, and supplemental jurisdiction provisions is that they are based ultimately on the overriding policy of achieving the efficient disposition of litigation among two separate systems of courts, rather than on any principled attempt to identify those categories of nondiverse state law cases that, because of their impact on the federal courts’ ability fully and fairly to adjudicate federal question or diversity cases properly before them, should be subject to congressional control under the Constitution.

Expanded beyond its immediate context, where the federal courts’ power to entertain pendent claims may be essential to the full effectuation of the constitutional and statutory grants of federal question jurisdiction, *Gibbs*’ efficiency-based “common nucleus of operative fact” formulation of the constitutional case lacks any clear support in the language or history of the Constitution, and conflicts with the limited role given consider-

ations of intersystem judicial economy in determining the scope of Article III.

This is not to say that congressional authority to enlarge the scope of federal subject matter jurisdiction is, or should be, narrowly confined by a requirement that the determination of related state law claims be "indispensable" or even "necessary" to the disposition of a federal question or diversity case. At the least, however, the power of the federal courts to entertain nondiverse state law claims should be reasonably grounded on a determination that, absent such an exercise of supplemental jurisdiction, the power of the federal courts to entertain and dispose of federal question and diversity cases properly before them will be affected significantly. Thus, pendent claim jurisdiction and pendent party jurisdiction against defendants alleged to be jointly, severally, or alternatively liable for a plaintiff's injuries would be sustained on the ground that the exercise of supplemental jurisdiction in such circumstances is necessary to ensure that a plaintiff possessing a diversity or federal question claim will enjoy unimpeded access to a federal forum. This approach, however, would shift the focus of analysis from considerations of intersystem judicial economy alone, on which the ALI proposal is based, to the policies underlying the limited and categorical grants of subject matter jurisdiction contained in Article III, in which the limits of federal jurisdiction ultimately must be found.