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The Supreme Court has twice espoused the doctrine of pendent jurisdiction whereby a federal court may adjudicate a claim arising under state law which does not meet the ordinary federal jurisdictional requirements when that state claim is properly joined with a federal claim and both claims are based on a common core of facts.[1] Those two cases involved clearly federal claims of copyright infringement[2] and secondary boycott[3] to which were appended state claims of unfair competition and interference with contract rights respectively. In both cases, the joined claims were asserted by a single plaintiff against a single defendant between whom there was no diversity of citizenship.

Perhaps because of the parallelism of these two Supreme Court decisions, it has long been assumed that pendent jurisdiction is

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1. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) [hereinafter cited as UMW v. Gibbs]: Hurn v. Oursler, 289 U.S. 238 (1933).
2. Hurn v. Oursler, 289 U.S. 238 (1933).
3. UMW v. Gibbs, 383 U.S. 715 (1966).

available only in similar cases.[4] In recent years, however, some district courts and courts of appeals have expanded markedly the application of pendent jurisdiction. They have permitted the appending of claims by and against additional parties not involved in the federal claim,[5] and they have extended pendent jurisdiction to diversity cases.[6] It is the object of this article to examine the princi-

4. W. BARRON AND A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §23 (Wright ed. 1960); 3A J. MOORE, FEDERAL PRACTICE ¶ 18.07 [1] (2d ed. 1970); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §19 (2d ed. 1970) [hereinafter cited as WRIGHT, FEDERAL COURTS].

5. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971) (alternative ground). *See* Comment, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons not Party to the Jurisdiction-Conferring Claim*, 73 COLUM. L. REV. 153 (1973).

6. Decisions by U.S. circuits: Third Circuit: Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3d Cir. 1968); Greene v. Basti, 391 F.2d 892 (3d Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966); Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964); Fahrner v. Gentzsch, 355 F. Supp. 349 (E.D. Pa. 1972); Townsend v. Quality Court Motels, Inc., 338 F. Supp. 1140 (D. Del. 1972); Campbell v. Triangle Corp., 336 F. Supp. 1002 (E.D. Pa. 1972), *reconsidered and vacated* 56 F.R.D. 480; Obney v. Schmalzreid, 273 F. Supp. 373 (W.D. Pa. 1967); Newman v. Freeman, 262 F. Supp. 106 (E.D. Pa. 1966); Morris v. Gimbel Bros., Inc., 246 F. Supp. 984 (E.D. Pa. 1965); Fourth Circuit: Stone v. Stone, 405 F.2d 94 (4th Cir. 1968), *cert. den.* 409 U.S. 1000 (1972), *reh. den.* 409 U.S. 1118 (1973); Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967); Sixth Circuit: Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1970); General Research, Inc. v. American Employers' Ins. Co., 289 F. Supp. 735 (W.D. Mich. 1968); Wiggs v. City of Tullahoma, 261 F. Supp. 821 (E.D. Tenn. 1966); Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960); Seventh Circuit: Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966); Eighth Circuit: Hatridge v. Aetna Casualty & Surety Co., 415 F.2d 809 (8th Cir. 1969); Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967); Dixon v. Northwestern Nat'l Bank of Minneapolis, 276 F. Supp. 96 (D. Minn. 1967); Ninth Circuit: Aetna Casualty & Surety Co. v. Jeppeson & Co., 344 F. Supp. 1381 (D. Nev. 1972).

Contra authority in the post-*Gibbs* era exists: Third Circuit: Seyler v. Steuben Motors, Inc., 462 F.2d 181 (3d Cir. 1972) (distinguishes *Borror, Wilson,* and *Newman, supra.*); Olivieri v. Adams, 280 F. Supp. 428 (E.D. Pa. 1968) (distinguishes *Borror, Wilson,* and *Newman, supra*); Fifth Circuit: Redden v. Cincinnati, Inc., 347 F. Supp. 1229 (N.D. Ga. 1972); Robison v. Castello, 331 F. Supp. 667 (E.D. La. 1971); Lawes v. Nutter, 292 F. Supp. 890 (S.D. Tex. 1968); Campbell v. City of Atlanta, Fulton County, 277 F. Supp. 395 (N.D. Ga. 1967); Sixth Circuit: Ciaramitaro v. Woods, 324 F. Supp. 1388 (E.D. Mich. 1971) (distinguishes *Reybould* and *General Research, Inc., supra*); Seventh Circuit: Sherrell v. Mitchell Aero, Inc., 340 F. Supp. 219 (E.D. Wis. 1971); Ninth Circuit: Hymer v. Chai, 407

pal impediments which lie in the path of this latter extension of the doctrine of pendent jurisdiction.

THE DOCTRINE AS ESTABLISHED BY THE SUPREME COURT

The Supreme Court's decision in *Hurn v. Oursler*[7] is the foundation upon which the doctrine of pendent jurisdiction has been built. In that case, the plaintiff sued to enjoin the public production and performance of a play which he alleged infringed upon his own play existing in both copyrighted and uncopyrighted form. He also sought damages and an accounting. Plaintiff alleged further that the defendant's acts constituted unfair business practices and unfair competition. These latter allegations were of state law torts. The trial court found that there was no infringement of the copyrighted version of plaintiff's play and dismissed the remaining claims for lack of jurisdiction as they were not based upon violations of the copyright law and there was no diversity of citizenship between the parties.[8] The court of appeals affirmed,[9] and the Supreme Court affirmed with modifications.

The Court noted the confusion which existed among the lower courts as to the question of jurisdiction to entertain unfair competition claims along with copyright infringement claims and resolved the controversy in favor of pendent jurisdiction. The Court, perceiving the issue as one of the judicial power of the federal courts, quoted from *Osborn v. United States Bank*:[10]

> We think, then that 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.[11]

The Court later cautioned, however:

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

F.2d 136 (9th Cir. 1969). *See* Comment, *Pendent Jurisdiction in Diversity Cases*, 30 U. PITT. L. REV. 607 (1969) which discusses the developments in the Third Circuit.

7. 289 U.S. 238 (1933).
8. *Id.* at 240.
9. 61 F.2d 1031 (2d Cir. 1932).
10. 22 U.S. (9 Wheat.) 738, 823 (1824).
11. Hurn v. Oursler, 289 U.S. 238, 243 (1933).

> the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*; in the latter it may not do so upon the non-federal *cause of action*.[12]

For purposes of determining the bounds between state and federal jurisdiction under this test, the Court defined a cause of action as "'. . . the violation of but one right by a single legal wrong. . . .'"[13]

These various tests were found to be satisfied in *Hurn*. As to the copyrighted version of plaintiff's play, the allegations both of infringement and of unfair competition showed the violation of a single right—the right to protection of the copyrighted play. "Indeed, the claims of infringement and unfair competition so precisely rest upon identical fact as to be little more than the equivalent of different epithets to characterize the same group of circumstances."[14] Hence, they were but different legal theories asserted in support of the same cause of action.

In *United Mine Workers v. Gibbs*,[15] Mr. Justice Brennan, speaking for the Court,[16] criticized the *Hurn* approach as "unnecessarily grudging" and laid out a new foundation on which a greater edifice of federal pendent jurisdiction is being built. That case involved allegations of unlawful secondary boycotts under § 303 of the Labor Management Relations Act[17] and of actionable interference with contracts of employment and haulage under state law. The controversy arose out of a strike which shut down a coal mine at which plaintiff was the superintendent and from which he had a contract to haul coal. On appeal from an award of damages for interference with the employment relationship, the Supreme Court upheld the exercise of pendent jurisdiction over the state law claim but reversed on other grounds.

The Court reformulated the doctrine of pendent jurisdiction as follows:

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12. *Id.* at 245-46.
13. *Id.* at 246, quoting from Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927).
14. Hurn v. Oursler, 289 U.S. 238, 246 (1933).
15. 383 U.S. 715 (1966).
16. On the question of pendent jurisdiction, the Court was unanimous. The Chief Justice did not participate, however.
17. 29 U.S.C. § 187 (1964).

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ," U.S. Const., Art. III, § 2, and 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. [citation omitted] The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in the federal courts to hear the whole.[18] [footnotes omitted]

Having thus established the basis for pendent jurisdiction, the Court added that it ". . . is a doctrine of discretion, not of plaintiff's right . . .[and that the] power need not be exercised in every case in which it is found to exist."[19] "Its justification lies in considerations of judicial economy, convenience and fairness to litigants. . . ."[20]

Questions of Applicability to Diversity Cases

The reference in *Gibbs* to judicial economy, convenience and fairness to litigants, together with the retraction of the strict single cause of action limitation of *Hurn*, has led some lower federal courts to apply pendent jurisdiction in diversity cases.[21] Some significant differences exist, however, between the doctrine of pendent jurisdiction as applied in *Hurn* and *Gibbs* and as applied in a diversity case. First, both *Hurn* and *Gibbs* were federal question cases, and, as will be discussed, there may be strong federal interests in asserting pendent jurisdiction in cases arising under federal law which do not exist in diversity cases arising under state law.[22] Second, the doctrine of pendent jurisdiction, as stated by the Supreme Court, is expressly premised on the presence of a "substantial federal question" sufficient to confer jurisdiction on the court.[23] Such a question is not present in a suit based solely upon diversity. The third, and perhaps most important difference, is made apparent

18. UMW v. Gibbs, 383 U.S. 715, 725 (1966).
19. *Id.* at 726.
20. *Id.*
21. *See* note 6, *supra.*
22. *See* Olivieri v. Adams, 280 F. Supp. 428, 430 (E.D. Pa. 1968); Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 34 U. Pitt. L. Rev. 1 (1972).
23. UMW v. Gibbs, 383 U.S. 715, 725 (1966); Hurn v. Oursler, 289 U.S. 238, 243, 245-46 (1933). See text at note 18, *supra.* This may be simply a result of the fact that those cases involved federal questions.

by considering the circumstances inherent in the use of pendent jurisdiction in any diversity case.

Pendent jurisdiction might be invoked in a diversity case in three situations: first, where two or more plaintiffs sue a single defendant on separate claims, but one plaintiff has the same citizenship as the defendant;[24] or where one plaintiff sues two or more defendants on several liabilities and diversity is lacking as to one defendant;[25] second, where several plaintiffs assert separate claims against a defendant of diverse citizenship but one of the claims is for less than $10,000;[26] and third, where both diversity of citizenship and the minimum amount in controversy are lacking as to one of several independent claims. It will be seen that in all of these situations, as in federal question cases, the use of pendent jurisdiction will permit the federal court to adjudicate some claims which would not be cognizable in that court if sued upon separately; but in the diversity case, the exercise of pendent jurisdic-

24. *E.g.*, Obney v. Schmalzreid, 273 F. Supp. 373 (W.D. Pa. 1967) (Suit was brought by a foreign guardian of a Pennsylvania minor for personal injuries to the minor and by the minor's parents for medical expenses paid on account of the minor's injuries. There was no diversity between the parents and defendant, but pendent jurisdiction was allowed.); Olivieri v. Adams, 280 F. Supp. 428 (E.D. Pa. 1968) (Pendent jurisdiction denied as to parents' claims for damages in suits by foreign guardians for personal injuries to minors); Lawes v. Nutter, 292 F. Supp. 890 (S.D. Tex. 1968) (Plaintiff who lacked diversity as to defendant was not permitted to join his claim for personal injuries with a wrongful death claim by the foreign administrator of plaintiff's wife's estate).

25. *E.g.*, Campbell v. Triangle Corporation, 336 F. Supp. 1002 (E.D. Pa.) *reconsidered and vacated*, 56 F.R.D. 480 (1972).

As for claims by multiple plaintiffs against multiple defendants as to some of whom diversity is lacking, *see* Seyler v. Steuben Motors, Inc., 462 F.2d 181 (3d Cir. 1972) (pendent jurisdiction denied); Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964) (pendent jurisdiction asserted as alternative ground); Sherrell v. Mitchell Aero, Inc., 340 F. Supp. 219 (E.D. Wis. 1971) (consolidation refused); Newman v. Freeman, 262 F. Supp. 106 (E.D. Pa. 1966) (pendent jurisdiction applied to father's claim for medical expenses and loss of services joined with claim by foreign guardian for personal injuries to the child).

26. *E.g.*, Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969) (pendent jurisdiction denied as to wife's $7,500 claim for loss of consortium joined with husband's claim of $75,000 for personal injuries); Hatridge v. Aetna Casualty & Surety Co., 415 F.2d 809 (8th Cir. 1969) (pendent jurisdiction applied as to wife's claim for $9,999.99 for loss of consortium—alternative ground). As for a single plaintiff suing multiple defendants, *see e.g.*, Stone v. Stone, 460 F.2d 64 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972) (pendent jurisdiction applied).

tion will always entail joinder of an additional plaintiff or defendant who is not a party to any claim which meets federal jurisdictional requirements, either because he is not diverse from his opposing party or because the separate and distinct claim by or against him does not satisfy the minimum amount in controversy.

It is this inevitable joinder of parties which raises doubts as to the propriety of exercising pendent jurisdiction in diversity cases. If the party joined on the non-federally qualified claim is not of diverse citizenship from his opposing party, there is a direct confrontation with the rule of complete diversity. Even if he is of diverse citizenship, if the claim to which he is a party does not meet the minimum amount in controversy requirement, there is an apparent conflict with the rule against aggregation of separate and distinct claims of multiple parties.

The impact of these latter two rules upon the availability of pendent jurisdiction will be considered separately.

A. Complete Diversity

Article III of the Constitution gives Congress the power to define the jurisdiction of the lower federal courts.[27] Since the Judiciary Act of 1789,[28] Congress has chosen to give the federal courts jurisdiction over actions between a citizen of one state and a citizen of another state.[29]

From its first construction of the general diversity statute in 1806,[30] the Supreme Court has repeatedly stated that all of the parties on one side of a controversy must be citizens of a different state or states from all of the parties on the other side.[31] This is the rule of complete diversity.

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27. "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. The power to create inferior courts has been construed to include the authority to give them so much of the federal judicial power as Congress sees fit. *See* Cary v. Curtis, 44 U.S. (3 How.) 235 (1845); C. WRIGHT, FEDERAL COURTS § 10.

28. 1 Stat. 73 (1789).

29. The current provision is 28 U.S.C. § 1332(a) (1970):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

30. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

31. *E.g.* Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Sweeney v. Carter Oil Co., 199 U.S. 252 (1905).

The following discussion will proceed on the assumption that pendent jurisdiction is being sought solely because of lack of diversity of citizenship as to one of several joined claims.

1. The Constitutional Question

The power of the federal courts to entertain non-federal[32] claims must be found, if at all, in Article III of the Constitution.[33] The Supreme Court has found that power in the authority granted to hear certain *cases* by that article. If, as the decision in *Gibbs* indicates, the Court's definition of a constitutional "case" includes all claims which "derive from a common nucleus of operative fact"[34] so as to extend federal jurisdiction to related state claims in federal question suits, it is difficult to deny the same jurisdiction to hear related non-diverse claims in a diversity suit. It is the factual basis of the claims, not their legal source or party involvement, which defines the constitutional case under this test.

One might argue that "controversies . . . between Citizens of different States . . ."[35] is a more restrictive concept than "[c]ases . . . arising under . . . the Laws of the United States . . ."[36] in that it specifically relates to the parties rather than to the source of the claims asserted. But the Supreme Court's approval of minimal diversity in statutory interpleader actions makes it clear that the usual requirement of complete diversity between all adverse parties is the result of statutory construction and not constitutional

32. The term "non-federal" claims is used to denote all claims which do not independently satisfy federal jurisdictional requirements. A claim is non-federal in this sense, although it arises under federal law, if it does not involve the requisite amount in controversy.

33. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. U.S. CONST. art. III, § 2.

34. UMW v. Gibbs, 383 U.S. 715, 725 (1966).

35. U.S. CONST. art. III, § 2.

36. *Id.*

imperative.[37] Thus, the presence of some non-diverse, adverse parties in a diversity action is not constitutionally fatal to jurisdiction.

The conclusion seems inescapable that, from a constitutional standpoint, the term "controversy" is broad enough to permit inclusion in a single suit of multiple related claims some of which do not exist between diverse parties. This is but another way of describing pendent jurisdiction.

2. Statutory Considerations

As stated earlier, the rule of complete diversity has been derived from the statutes conferring general diversity jurisdiction upon the federal courts.[38]

There are, of course, exceptions to the complete diversity requirement. One of these is statutory interpleader under 28 U.S.C.A. § 1335(a).[39] But since it is a legislatively created excep-

37. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967).

38. *See* text at note 31, *supra.*

39. The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

This is an instance when a state court may be unable to obtain personal jurisdiction over all of the adverse claimants, and hence be unable to protect the stakeholder from double liability. *See* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916). Because the federal courts are permitted nationwide service of process in statutory interpleader cases (28 U.S.C. § 2361), they have a unique role to play in assuring fairness to the stakeholder in such circumstances.

The American Law Institute proposes to make use of this unique attribute of federal jurisdiction by giving the district courts original and removal jurisdiction of actions in which all of the parties "necessary for just adjudication" are not subject to the authority of a single state court. *See* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §§ 2371, 2373 (1969) [hereinafter cited as ALI STUDY].

tion, its very existence reinforces the position that § 1332, the general diversity provision, requires complete diversity. Furthermore, the Supreme Court has asserted that interpleader actions pursuant to Rule 22,[40] by contrast, do depend upon complete diversity.[41]

The provisions of 28 U.S.C. § 1941(c)[42] for removal to federal courts of entire cases when only one of several separate and independent claims is within the original jurisdiction of the district courts is another instance where less than complete diversity is acceptable for federal jurisdiction. Indeed, it can be viewed as a Congressional adoption of the doctrine of pendent jurisdiction as it expressly permits trial in the district courts of non-federal claims.[43] However, this provision is another Congressionally mandated exception to the ordinary rule of § 1332. It may also be distinguished because it concerns removal jurisdiction rather than original jurisdiction, and pendent jurisdiction has always been regarded as a doctrine of original jurisdiction.[44]

The practice with regard to class actions might be thought to support the existence of pendent jurisdiction in diversity actions. One of the acknowledged attributes of a proceeding under Rule 23 is that a large group of persons with state-created claims involving common questions of law or fact may invoke the jurisdiction of the federal courts, despite the fact that some members of the class have the same citizenship as the opposing party, so long as the citizenships of the named representatives are completely

40. The word "Rule" is used in this article to refer to the Federal Rules of Civil Procedure.

41. *See* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 528-29 n.3 (1967).

42. Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. 28 U.S.C. § 1941(c) (1970).

43. In fact, it goes beyond the pendent jurisdiction concept of *Gibbs* because it allows removal of state claims which are unrelated to the federal claim. This result has been sustained on the basis of minimal diversity. Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D. N.Y. 1965). This section and the questions of constitutionality and statutory construction which it raises are discussed in C. WRIGHT, FEDERAL COURTS § 39.

44. *See* UMW v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 238 (1933).

diverse from the opponent's.[45] This is, in actuality, appending non-diverse claims to proper diversity claims, but, in theory, it is not. Theoretically, complete diversity is preserved by the simple expedient of looking only to the citizenship of the representatives as if they were the only parties in interest.[46] This same reference to the citizenship of the representative for jurisdictional purposes has been made in cases involving trustees[47] and executors[48] suing for the ultimate benefit of non-diverse beneficiaries or legatees, although there is a backing away from this practice in these cases because of the potential for collusive creation of diversity jurisdiction.[49] The point is that even in representative actions obeisance is paid to the complete diversity rule of § 1332.

A strong argument for pendent jurisdiction in diversity cases may be found in the exercise of ancillary jurisdiction in such cases.[50] In fact, the *Hurn* decision relied in part on the decision in *Moore v. N.Y. Cotton Exchange*,[51] which concerned ancillary jurisdiction over a non-federal counterclaim. The Court went so far as to say that the two questions cannot be distinguished in principle.[52]

This is true as to hearing additional claims between the original parties, whether they are joined claims or are compulsory counterclaims or cross-claims When parties are already before the court to litigate certain factual and legal issues, it is eminently reasonable to permit them to settle before that court, in one trial if possible, all of the claims existing between or among themselves involving those same issues. Furthermore, these circumstances are within the language of § 1332 since they involve only parties over

45. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). Some doubt may have been cast upon this settled proposition by the recent decision in Zahn v. Int'l Paper Co., — U.S. —, 94 S. Ct. 505 (1973), which said that the claim of every member of the class must meet the $10,000 minimum amount requirement. As the dissenters suggest in *Zahn*, it is difficult to understand why the ultimately constitutional requirement of diversity may be satisfied by reference to the citizenship of the representatives only, but the purely statutory requirement of a minimum amount in controversy may not. *Zahn* at 516. The present practice might be preserved by invoking the concept of minimal diversity in class actions.

46. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921).

47. *E.g.*, Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1870).

48. *E.g.*, Childress v. Emery, 21 U.S. (8 Wheat.) 641, 669 (1923).

49. *E.g.*, Bass v. Texas Power & Light Co., 432 F.2d 763 (5th Cir. 1970), *cert. denied*, 401 U.S. 975 (1970). *See* 28 U.S.C. § 1359 (1970).

50. Pendent jurisdiction is distinguished from ancillary jurisdiction on the basis that pendent claims are original claims included in plaintiff's complaint while ancillary claims are asserted in subsequent pleadings and usually by other parties.

51. 270 U.S. 593 (1926).

52. Hurn v. Oursler, 289 U.S. 238, 242 (1933).

whom the court originally had jurisdiction and do not affect the pre-existing diversity of citizenship.[53]

However, new parties may be added to the litigation through counterclaims,[54] cross-claims,[55] third-party complaints,[56] or intervention.[57] If these new parties are not of diverse citizenship from their opposing parties and the claims asserted by or against them do not arise under federal law, then there is a question of federal jurisdiction to entertain these claims.

Courts generally agree that ancillary jurisdiction applies to such claims when asserted as compulsory counterclaims,[58] cross-claims,[59] or third-party complaints,[60] despite the lack of diversity or $10,000 amount in controversy. Such universal agreement is difficult to gainsay. Furthermore, it is unnecessary to refute these authorities in order to maintain the position that pendent jurisdiction is unavailable in diversity cases, for these are all instances of responses made by parties already brought within the jurisdiction of the court after satisfaction of ordinary jurisdictional requirements.[61] Once presence of the original parties in a federal court has been justified, it seems appropriate to hold that the court's jurisdiction over the controversy before it includes the authority to do complete justice *between them* in regard to the matters to be tried, although it may require the presence of other persons. In this sense, the presence of the additional parties is truly ancillary to the original controversy.

So far as counterclaims and cross-claims are concerned, the Federal Rules of Civil Procedure require that an original party be in-

53. It may be significant that in *Hurn* and *Gibbs* the non-federal claims were also asserted between the original parties.
54. FED. R. CIV. P. 13(a), (b), & (h).
55. FED. R. CIV. P. 13(g) & (h).
56. FED. R. CIV. P. 14.
57. FED. R. CIV. P. 24.
58 *See* cases cited in 3 J. MOORE, FEDERAL PRACTICE ¶ 13.39, n.22 (2d ed. 1972); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1436, n.83 (1971) [hereinafter cited as WRIGHT & MILLER].
59. *See* cases cited in WRIGHT & MILLER § 1436, n.84.
60. *See* cases cited in 3 J. MOORE, FEDERAL PRACTICE ¶ 14.26, n.6 (2d ed. 1972); WRIGHT & MILLER § 1444, nn.69 & 70.
61. Cross-claims cannot be asserted between co-plaintiffs except in response to counterclaim or a claim by a third-party defendant or intervener. For distinction between pendent jurisdiction and ancillary jurisdiction, *see* note 50, *supra*.

cluded as a counter-defendant or cross-defendant.[62] This makes it clear that these additional claims are an integral part of and necessary to the complete resolution of (*i.e.*, ancillary to) the controversy between the original parties which is already before the court. This essential relationship to the existing controversy between the original parties is not so clear as to third-party complaints, but may exist by virtue of the nature of the third-party claim which is dependent upon the determination of the claim between the original parties and results in reimbursement to the defendant for liability incurred to the plaintiff.[63] When, on the other hand, additional non-diverse plaintiffs or defendants are joined in a complaint simply because their claims or liabilities derive from a "common nucleus of operative fact", their presence is not ordinarily "truly ancillary" in the same sense, in that they are not essential to the complete resolution of the controversy *between the diverse parties.*

Intervention, the fourth means of injecting new parties into an existing suit, presents a different situation. It entails the assertion of a claim or defense by a new party on his own behalf and on his own initiative rather than being brought in by the original parties. For that reason, the question of whether the intervener's presence is truly ancillary involves other considerations.

The generally accepted rule is that ancillary jurisdiction applies to claims of intervention as of right under Rule 24(a), but not to permissive intervention under Rule 24(b).[64]

According to Rule 24(a), one has a right to intervene:

> (1) [W]hen a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

If a statute of the United States confers an unconditional right to intervene there can be no question but that the court has jurisdiction over the claim regardless of diversity or amount since that is a specific statutory exception to the general jurisdictional provision.

As to persons coming within subdivision (2) of the rule, however, there is no such pat answer. If the intervener asserts a joint

62. FED. R. CIV. P. 13(h).
63. *See* WRIGHT & MILLER § 1446.
64. *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 24.18[1] (2d ed. 1969); WRIGHT & MILLER § 1917.

right, or a defense to a joint liability, his claim is not simply ancillary to the original controversy, rather it is part of it. In such a case, the intervener must fairly be regarded as an original party for purposes of determining whether the suit is properly in federal court. The same regard should be given to the intervener's citizenship whenever he is found to be indispensable to the determination of the original controversy, whether his interest is joint or several in relation to the original parties. The result is essentially a finding that he should have been an original party. When, however, his original joinder would have defeated federal jurisdiction, to permit ancillary jurisdiction over his claim or defense would be to violate through indirection the jurisdictional limitations on joinder of parties. The cases generally hold that the court loses jurisdiction in these circumstances.[65]

Anomalously, the courts have generally invoked ancillary jurisdiction to permit an intervener as of right under Rule 24(a)(2) who does not meet the ordinary jurisdictional requirements but who is not indispensable to come into court without disturbing the court's jurisdiction.[66] Since he may be prejudiced as a practical matter by disposition of the action in his absence, it is plausible to regard his claim or defense as ancillary to the original controversy. Further, because he did not have to be joined as a party originally, it is possible to disregard the fact that he could not have been joined.[67]

The Federal Rules of Civil Procedure, however, appear to preclude the exercise of ancillary jurisdiction under Rule 24(a)(2).

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65. *See* cases cited in WRIGHT & MILLER § 1917, n.65. The opinion of the Supreme Court in Wichita R.R. & Light Co. v. Public Utils. Comm'n, 260 U.S. 48 (1922), implies that this is the correct rule. Argument was made that the intervention of a non-diverse defendant destroyed jurisdiction. Chief Justice Taft said:

> Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties. . . . The Kansas Company, while it had an interest and was a proper party, was not an indispensable party.

Id. at 54.

66. *See* excellent discussion in WRIGHT & MILLER § 1917.

67. *See* Drumwright v. Texas Sugarland Co., 16 F.2d 657 (5th Cir. 1927), *cert. denied*, 294 U.S. 749 (1927), in which a non-diverse plaintiff was dismissed from a foreclosure action and then permitted to return to the action by way of intervention.

This for the reason that the language of Rule 24(a)(2) was purposely made parallel to that of Rule 19(a) defining persons to be joined if feasible, with the apparent intent of allowing conditionally necessary or indispensable parties to bring themselves into a law suit when the original parties have seen fit to omit them.[68] But such conditionally necessary or indispensable parties should not be permitted to intervene without meeting the general jurisdictional requirements, because Rule 19(a) indicates that these people should have been original parties.[69] Allowing them to intervene by assertion of ancillary jurisdiction is a subversion of the jurisdictional limitations of § 1332.

Rule 19 makes the point clearly. Rule 19(a) requires joinder of persons described therein (and in Rule 24(a)(2)) only if their joinder "will not deprive the court of jurisdiction over the subject matter of the action." Rule 19(b) provides that if such persons cannot be made parties, the court must decide whether to go on without them or to dismiss the action entirely.[70] In other words, the rule concedes that these omitted persons cannot be made part of the action when their presence would destroy diversity and that the only determination left for the court in such a case is whether in equity and good conscience it can proceed without them. To allow such persons to slip in through the back door by way of intervention is pure subterfuge.

Nevertheless, there is good authority for this result in the early Supreme Court decisions on ancillary jurisdiction which were based upon a necessity for federal jurisdiction in order to avoid injustice to absent interested parties.[71] But those cases involved interests in property which was in the custody or under the con-

68. Advisory Committee's Note, 39 F.R.D. 109, 110 (1966).

69. (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. FED. R. CIV. P. 19(a).

70. (b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. FED. R. CIV. P. 19(b).

71. *See* Krippendorf v. Hyde, 110 U.S. 276 (1884); Freeman v. Howe, 65 U.S. (24 How.) 450 (1860).

trol of a federal court,[72] so that no state court could protect the absent party's interest. Rule 24(a)(2) is not so limited to instances of "exclusive" federal jurisdiction,[73] but it is premised on the need to protect the unrepresented interests of an absent person.

It is the prejudicial impact of a judgment rendered in the absence of the "dispensable" intervener of right which makes his claim or defense truly ancillary to the controversy between the original parties. But the claim or defense of an intervener who is indispensable is certainly no less ancillary to the original controversy. The inconsistent treatment of the two persons must be explained upon some other basis.

The basis of distinction is the one previously alluded to, *i.e.*, the difference between those who *must* be original parties and those who *should* be if feasible. When the intervening party is indispensable the court lacks jurisdiction not only over his claim or defense but also over the claims and defenses of the original named parties.[74] Hence, there is no existing controversy over which the court has jurisdiction and to which the intervener's claim or defense may be ancillary. When, on the other hand, the intervener is merely conditionally necessary to the determination of the controversy between the original parties, the court has jurisdiction over a pending suit to which it may attach intervener's claim or defense.

The difference then is fundamentally between jurisdiction over the original claims and over additional, subsequent claims or de-

72. As late as 1925, the Supreme Court said,

> [N]o controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.

Fulton Nat'l Bank of Atlanta v. Hozier, 267 U.S. 276, 280 (1925).

73. Prior to the 1966 amendment, Rule 24(a) provided in part for intervention of right ". . . when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." It was during that era that the link between intervention of right and ancillary jurisdiction was forged.

Prof. Moore even concedes ancillary jurisdiction over permissive intervention in in rem actions. *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 24.18[1] (2d ed. 1969).

74. Under the revised Rule 19, there is no real absence of jurisdiction over the original claim and parties, there is simply a decision to decline jurisdiction. *See* note 70, *supra*.

fenses. This is the same point of distinction between pendent and ancillary jurisdiction, the former applying only to claims asserted in the complaint and the latter applying only to those asserted in subsequent pleadings or procedures. Thus the accepted applications of ancillary jurisdiction do not lead inevitably to the invocation of pendent jurisdiction in diversity cases. The requirement of complete diversity as to the original claims and parties still stands.

The cases refusing ancillary jurisdiction over claims in intervention as of right by indispensable parties because it would constitute an improper circumvention of the jurisdictional limitation on joinder of original claims and parties are impressive authority for rejection of the doctrine of pendent jurisdiction in diversity cases, for the same jurisdictional limitations are avoided when pendent jurisdiction is invoked in a diversity case. In fact, the evasion is even more blatant in the case of pendent jurisdiction because it is used to permit actual original joinder. Acceptance of the doctrine of pendent jurisdiction where diversity is lacking as to the pendent claims is nothing less than a rejection of the rule of complete diversity.

On a similar rationale, the courts almost unanimously require a permissive intervener under Rule 24(b)(2)[75] to satisfy the ordinary jurisdictional requirements.[76] Professor Moore has explained the result in this way:

> However, where intervention is sought to present a claim or defense in an *in personam* action and the only basis therefor is a common question of law or fact, there is no reason to permit the intervener's rights to be litigated if they could not have been, had the intervener been joined as an original party plaintiff or defendant. Procedurally, it may be desirable to permit the intervention and perhaps Congress should act to allow joinder where there is jurisdiction over one of the claims. But, until Congress acts, it would constitute an undue expansion of federal jurisdiction to dispense with independent jurisdictional requirements.[77]

In summary, then, there is a consistent interpretation of § 1332 and its predecessor general diversity provisions as requiring complete diversity between plaintiffs and defendants. The only exceptions to this rule as to original actions are statutory, indicating a

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75. (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . .

Ancillary jurisdiction exists as to intervention under Rule 24(b)(1) by virtue of the statutory right. This constitutes another statutory exception to the requirement of complete diversity.

76. *See* WRIGHT & MILLER § 1917, note 58, *supra.*

77. *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 24.18[1] (2d ed. 1969).

Congressional acquiescence in the judicial construction of § 1332. The apparent exception of class actions is nothing more than an application of the general rule to the representatives as the parties litigant. As to non-original claims or defenses in intervention, although they be truly ancillary, the rule of complete diversity does apply if the intervention is permissive only, or if the intervener would be an indispensable party, because intervention is merely delayed joinder and should meet the original tests for jurisdiction. Ancillary jurisdiction is accorded to claims of intervention as of right by nonindispensable parties although this seems inconsistent with Rule 19.

Thus one is led to the conclusion that so long as the Supreme Court persists in its interpretation of the general diversity statute as requiring all parties on one side of the dispute be completely diverse from all parties on the opposing side, pendent jurisdiction is not appropriate as to claims by or against non-diverse persons.

3. Policy Considerations

In dealing with the issue of pendent jurisdiction, the courts are confronted with an apparent clash between the fact that the federal courts are courts of limited jurisdiction whose powers have been specifically prescribed by Congress and the desire to achieve judicial economy, convenience and fairness to parties despite confining jurisdictional limitations. The Supreme Court has said that the justification for the doctrine of pendent jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants."[78] These same considerations led the Court to approve ancillary or dependent jurisdiction over the claims of non-diverse parties in actions in rem so that in disposing of property in the control of the federal court the rights of all interested persons could be protected.[79] Ancillary jurisdiction also has been invoked when necessary to preserve the effectiveness of the court's judg-

78. UMW v. Gibbs, 383 U.S. 715, 726 (1966).

79. *E.g.*, Krippendorf v. Hyde, 110 U.S. 276 (1884); Freeman v. Howe, 65 U.S. (24 How.) 450 (1860).

> The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, 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. Freeman v. Howe, *supra* at 460.

ment.[80] Those early decisions blossomed into the modern doctrine of ancillary jurisdiction so plainly rooted in considerations of judicial economy, convenience and fairness to parties.[81]

Whenever two claims exist which arise out of a single transaction or occurrence and depend for their proof on essentially the same facts, the judicial economy in having a single trial in one court rather than two trials in different courts is patent. Likewise, a single trial is more convenient for the witnesses who need appear only once and for the party who is prosecuting or defending both claims and who need appear in, pay for and endure the anxiety of only one trial. On the other hand, the non-diverse defendant would only have to defend once in any event and might be inconvenienced by having to appear in a federal court more distant from his home than the appropriate state court. As for fairness, trial of the combined claims avoids the risk of inconsistent determinations of fact or law which might result in double liability[82] or a loss of contribution or indemnity to defendant,[83] or in failure of the plaintiff to recover against either of two defendants at least one of whom must logically be liable.

It is to achieve these advantages that the Federal Rules of Civil Procedure encourage liberal joinder of claims, parties and remedies.[84] But the Rules themselves provide that they "shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."[85] The question becomes whether the full accomplishment of judicial economy, convenience and fairness to parties is inconsistent with the limits of federal jurisdiction.

In *United Mine Workers v. Gibbs,* the Supreme Court went directly to the Constitution as the source of the judicial "power" to entertain pendent state law claims.[86] Thus they relegated the statutory grants of federal claim jurisdiction to the role of determining whether the case could get into federal court in the first place. This willingness to deal with state law issues when they are connected with matters of federal concern reaches back to *Osborn v. U.S. Bank,*[87] where the Court said:

80. *E.g.,* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).
81. *See* WRIGHT, FEDERAL COURTS § 9; Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts,* 33 F.R.D. 27 (1963).
82. *See, e.g.,* Borror v. Sharon Steel Co., 327 F.2d 869 (3d Cir. 1964).
83. *Cf.* Hipp v. U.S., 313 F. Supp. 1152 (E.D.N.Y. 1970) (Federal Tort Claims Act).
84. FED. R. CIV. P. 18-20, 23-24, 42. *See* UMW v. Gibbs, 383 U.S. 715, 725 n.13 (1966).
85. FED. R. CIV. P. 82.
86. 383 U.S. 715, 725 (1966).
87. 22 U.S. (9 Wheat.) 738 (1824).

> We think, then, that 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.[88]

This authority to hear entire cases is necessary in order to assure the ability of the federal courts to engage in construction of federal law, "a subject of vital importance to the government."[89]

What the Supreme Court has indicated in *Osborn* is that the federal courts have a unique interest and, so far as the federal government is concerned, a vital role in the interpretation and application of federal law. That special interest will not readily be forsworn. Of course Congress has provided that this jurisdiction will, as to ordinary federal questions, be shared concurrently with the states;[90] but when a litigant has properly chosen to bring his case to a federal forum, the federal court should not hesitate to take it.

Given this justifiable preference for a federal forum for federal questions, considerations of judicial economy, convenience and fairness to parties do indeed weigh heavily in favor of extending pendent jurisdiction to related state law claims even when they are asserted by or against persons not parties to the federal claim.[91] Otherwise parties seeking those advantages would be forced to resort to the state courts to achieve them, taking the federal questions with them. In cases like *Hurn* or *Gibbs* where the federal jurisdiction over the federal claim is exclusive so that the litigants cannot take their entire case to a state forum, the argument for pendent jurisdiction over the non-federal claims is even stronger, as the only alternative possible is dual trials with all of the attendant waste and potential prejudice.[92]

There is no such vital federal concern in providing the forum for diversity cases.[93] Indeed, serious debate exists as to whether

88. *Id.* at 821.
89. *Id.* at 820.
90. 28 U.S.C. § 1331 (1964).
91. *See* Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 34 U. PITT. L. REV. 1, 5-14 (1972); Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968).
92. *See, e.g.*, Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970) (Federal Tort Claims Act).
93. There may be federal defenses or other federal law issues in such

the federal courts should entertain diversity jurisdiction at all.[94] Congress, while retaining diversity jurisdiction, has acted in recent years to restrict its availability.[95] The American Law Institute has proposed still further reduction in the availability of general diversity jurisdiction.[96] The Supreme Court has evolved the doctrine of abstention to avoid deciding novel or difficult questions of state law.[97] And the complete diversity rule has long functioned to divert state-law cases to the state judicial systems.

With so much history evidencing a policy to avoid unnecessary determination of state-law issues in the federal courts when they are not bound up with federal issues, one is compelled to question the wisdom of renouncing the complete diversity rule—in the guise of adopting pendent jurisdiction in diversity cases. The considerations of judicial economy, convenience and fairness to parties which weigh so heavily in favor of pendent jurisdiction in federal question cases, hardly seem to counterbalance the burden and inconvenience to the federal courts in having to wrestle with problems of state law in instances of only state concern and the possible unfairness to the parties through incorrect interpretation or applications of state laws. This is especially so since the ordinary economy, convenience and fairness of a single trial of identical issues, which is the apparent purpose of pendent jurisdiction, are generally available through joinder of claims in the state courts.[98]

Unfortunately, a party with a federally cognizable claim may persist in his choice of a federal forum for that claim, leaving the other related claims for state court adjudication. The obvious result is dual trials and judicial dis-economy. But that may be a price worth paying in order to retain the complete diversity rule which will ordinarily cause the entire controversy to be taken to a state court. Likewise, the inconvenience which occurs from an insistence on dual trials in distinct forums should not unduly concern the federal court.

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cases, but they are presumably the exception. Furthermore, the Supreme Court has not interpreted these to bring a case within the federal question jurisdiction. Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911).

94. Citations to contending authorities are collected in C. WRIGHT, FEDERAL Courts § 23, nn.16-18.

95. *E.g.*, the raising of the jurisdictional amount to $10,000, 28 U.S.C. § 1332(a), 72 Stat. 415 (1958). *See also* 28 U.S.C. § 1332(c), 72 Stat. 415 (1958), 78 Stat. 445 (1964); 28 U.S.C. § 1441(b), 62 Stat. 937 (1948).

96. ALI STUDY § 1302.

97. *See* C. WRIGHT, FEDERAL COURTS § 53.

98. More than one-half of the states have adopted the Federal Rules of Civil Procedure, and many of the other states have liberal joinder rules as well. Availability of service of process on foreign defendants is gener-

It is to avoid possible unfairness due to separate trials of related claims that the federal courts may justly contemplate exercising pendent jurisdiction. But a plaintiff who is precluded from prosecuting in a single federal suit two related claims against a diverse and a non-diverse defendant may remove the prejudice by taking both his claims to a state court. The same self-help is available to him when the prejudice is due to the inability of another party plaintiff to join the suit because of lack of diversity.

Self-help is likewise available to the omitted non-diverse person, plaintiff or defendant who "claims an interest relating to the property or transaction which is the subject of the action and . . . is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest . . . ."[99] It is in just such circumstances that the federal courts invoke ancillary jurisdiction to permit intervention as of right by the prejudiced party.[100] Should he prove to be an "indispensable" party under Rule 19(b), the same prejudice is avoided by the resulting dismissal of the entire action.[101] The same invocation of Rule 19(b) should protect the defendant who finds himself in federal court and "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [an absent, non-diverse party's] claimed interest."[102]

Hence, the problem of potential unfairness due to inability to join claims by or against non-diverse parties may be dealt with by the federal courts in either of two ways. They may make freer use of Rule 19(b) so as to force the bringing of all related claims in state courts, where interests in convenience will likely induce joinder of the claims if rules on compulsory joinder do not compel it, or they may invoke pendent jurisdiction.[103] The first alternative results in fewer state law claims in federal courts, and the

ally co-extensive in state and federal courts. FED. R. CIV. P. 4(a) and (f). Where a party suffers demonstrable discrimination at the hands of a state court he may have a remedy through review by the Supreme Court.

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

100. *See* text accompanying notes 64-67, *supra.*

101. *See* text accompanying note 65, *supra.*

102. FED. R. CIV. P. 19(a).

103. *See generally* Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262, 270-86 (1968). The author suggests that the broad test of *Gibbs* is unsupported in precedent or in policy and argues that pendent jurisdiction should be exercised only where the court will necessarily decide the pendent claim or where there is a demonstrated need for it in order to avoid injustice.

second opens the federal courts to more parties and more issues. The former choice seems clearly to be more consistent with the recent congressional attempts to restrict federal diversity jurisdiction. In either event, the interests of judicial economy, convenience and fairness to the parties are substantially served. The actual choice made will inevitably depend upon the decision-maker's view of the value or need for an "unbiased" federal forum for controversies between citizens of different states.

Perhaps the most important question is who should make this choice. Congress has the authority to prescribe the jurisdiction of the lower federal courts.[104] But the courts interpret those prescriptions, and in doing so have created the doctrines of ancillary and pendent jurisdiction as well as the rule of complete diversity.

The answer to the question may be indicated by *Snyder v. Harris*.[105] The majority, over strong dissent, took the position that only Congress could change the long established rule against aggregation of separate and distinct claims:

> Where Congress has consistently re-enacted its prior statutory language for more than a century and a half in the face of a settled interpretation of that language, it is perhaps not entirely realistic to designate the resulting rule a "judge-made formula."
>
> . . . .
>
> If there is a present need to expand the jurisdiction of [the federal] courts we cannot overlook the fact that the Constitution specifically vests that power in Congress, not in the courts.[106]

If the Court would not alter the non-aggregation rule which it traced back to 1832, it is doubtful that it would abrogate the complete diversity rule in which Congress has acquiesced since 1806.[107]

B. Amount in Controversy

From the very beginning Congress has imposed an amount in controversy requirement on federal diversity jurisdiction.[108] The purposes of such a limitation are to lessen federal interference in what are matters of primarily state concern and to reduce the caseload of the federal courts.[109] However, since the same require-

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104. *See* note 27, *supra*.
105. 394 U.S. 332 (1969).
106. *Id.* at 339, 341-42.
107. Congress has shown itself to be capable of making exceptions when it desires. *See* 28 U.S.C. § 1335 (1958).
108. The Judiciary Act of 1789 first set the amount at $500. 1 Stat. 73, 78 (1789). It was subsequently raised to $2,000 in 1887. 24 Stat. 552 (1887). It was raised again to $3,000 in 1911. 36 Stat. 1087, 1091 (1911). The current jurisdictional amount is $10,000 as codified in 28 U.S.C. § 1332 (1958).
109. Note, *The Federal Jurisdictional Amount and Rule 20 Joinder of Parties: Aggregation of Claims*, 53 MINN. L. REV. 94 (1968).

ment is imposed on general federal question cases today,[110] it appears that the primary objective of the amount in controversy limitation is to relieve the federal court dockets.[111]

This policy obviously is advanced by the universal refusal to permit several plaintiffs asserting separate claims, each below the jurisdictional minimum, to aggregate their claims.[112] Since none of them could sue in a federal court individually, no good reason appears to permit them to sue there as a group. Certainly, the federal courts have no greater interest in hearing these claims just because of their numerousness. In *Snyder v. Harris*,[113] the Supreme Court recently reaffirmed this traditional prohibition against aggregation of separate claims even as to class actions. That case held that the individual claims of the class members could not be aggregated to achieve the jurisdictional amount, at least where none of the claims of the named representatives met the $10,000 minimum.

The same non-aggregation principle has been applied to prevent a plaintiff with a lesser claim from getting into federal court by joining with another plaintiff having a claim above the jurisdictional minimum.[114] But this is a very different situation from ordinary aggregation and should be distinguished from it. First, at least one of the properly joined separate claims qualifies for federal jurisdiction. Hence, it may stay in the federal court and there will be no reduction in the caseload as is intended by the non-aggregation rule. Second, there will now be at least two trials of the same issues—one in the federal court on the larger claim and one in the state court on the smaller claim. The result

110. 28 U.S.C. § 1331 (1964).

111. The most often quoted statement of Congressional intent behind the current amount in controversy requirement is:

> [T]hat the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies. S. REP. No. 1830, 85th Cong., 2d Sess. 3-4 (1958).

112. *See* C. WRIGHT, FEDERAL COURTS § 36.

113. 394 U.S. 332 (1969).

114. *E.g.*, Zahn v. Int'l Paper Co., — U.S. —, 94 S. Ct. 505 (1973); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); and cases cited in 1 W. BARRON & H. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 24, n.56.3 (Wright ed. 1960).

is that the burden on the federal court is not substantially reduced, while the burden on the judicial system as a whole is doubled. In addition, there is the possibility of inconsistent determinations on identical questions of law and fact. In the case of strict aggregation, on the other hand, the entire litigation is simply shifted from the federal court to the state court with no apparent cost to judicial efficiency. Third, proceeding to try the larger claim will necessarily inject the federal court into a matter of state concern anyway, so the court might as well "go whole hog."[115]

These considerations of judicial economy and convenience to the parties have been leading more and more federal courts to invoke the doctrine of pendent jurisdiction so as to try large and small related claims in a single action.[116] The Supreme Court's decisions in *Clark v. Paul Gray, Inc.*[117] and *Snyder v. Harris*[118] were impediments in the path of this judicial development, but the recent decision of *Zahn v. International Paper Co.*[119] appears to have struck it a death blow.

In *Clark v. Paul Gray, Inc.*,[120] numerous individuals, co-partnerships and corporations joined in bringing suit to enjoin the enforcement of a California statute which imposed licensing fees of $15 per car on automobiles driven or towed into the state for purposes of sale. The plaintiffs were engaged in such business. The bill of complaint alleged generally, and the trial court found, that the amount involved "in this litigation" was in excess of $3,000,

115. *See*, Zahn v. Int'l Paper Co., — U.S. —, 94 S. Ct. 512 (1973) (dissenting opinion).

116. Decisions by U.S. Circuit: Third Circuit: Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968); Greene v. Basti, 391 F.2d 892 (3d Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966); Townsend v. Quality Court Motels, Inc., 338 F. Supp. 1140 (D. Del. 1972); Morris v. Gimbel Bros., Inc., 246 F. Supp. 984 (E.D. Pa. 1965); Fourth Circuit: Stone v. Stone, 405 F.2d 94 (4th Cir. 1968), *cert. denied*, 409 U.S. 1000 (1972), *reh. denied*, 409 U.S. 1118 (1973); Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967); Sixth Circuit: Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1970); General Research, Inc. v. American Employers' Ins. Co., 289 F. Supp. 735 (W.D. Mich. 1968); Wiggs v. City of Tullahoma, 261 F. Supp. 821 (E.D. Tenn. 1966); Raybould v. Mancini-Fattore Co., 186 F. Supp. 235 (E.D. Mich. 1960); Seventh Circuit: Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905 (N.D. Ill. 1966); Eighth Circuit: Walstad v. Univ. of Minn. Hosps., 442 F.2d 634 (8th Cir. 1971) (dubious application); Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969); Lucas v .Seagrave Corp., 277 F. Supp. 338 (D. Minn. 1967); Dixon v. Northwestern Nat'l Bank of Minneapolis, 276 F. Supp. 96 (D. Minn. 1967); Ninth Circuit, Aetna Cas. & Sur. Co. v Jeppeson & Co., 344 F. Supp. 1381 (D. Nev. 1972).

117. 306 U.S. 583 (1939).

118. 394 U.S. 332 (1969).

119. — U.S. —, 94 S. Ct. 505 (1973).

120. 306 U.S. 583 (1939).

the then jurisdictional amount. The Supreme Court raised the jurisdictional issue sua sponte and proceeded to dismiss the suit as to all plaintiffs-appellees except Paul Gray, Inc. The Court accepted the allegations in the bill of complaint indicating that Paul Gray, Inc. would pay more than $3,000 per year in statutory fees.

The Court pointed out that each plaintiff maintained its own separate business, and thus there was no joint common interest in the subject matter of the action. It then stated the "familiar rule" against aggregation of "separate and distinct demands" in a single, and continued:

> Proper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved. Otherwise an appellate court could be called on to sustain a decree in favor of a plaintiff who had not shown that his claim involved the jurisdictional amount, even though the suit was dismissed on the merits as to the other plaintiffs who had established the jurisdictional amount for themselves.[121]

The result of the *Clark* case, in light of the retention of the adequate claim by Paul Gray, Inc., might be viewed as a refusal to apply the doctrine of pendent jurisdiction to separate claims by multiple parties. The Court actually characterized each separate and distinct claim as a "separate controversy"[122] for purposes of determining the jurisdictional amount. The quoted passage from the Court's opinion highlights the Court's insistence that each plaintiff who seeks to enjoy a federal forum for his individual claim should come within the federal jurisdictional limits.

On the other hand, it must be pointed out that the Court did not consider the doctrine of pendent jurisdiction in its opinion. Indeed, as enunciated in *Hurn v. Oursler*,[123] the doctrine could not apply where there were two distinct causes of action asserted between the same parties. It would have been unthinkable to apply it to claims between different parties.[124] After *Gibbs*, however, the unthinkable has been thought.

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121. *Id.* at 590.
122. *Id.* at 589.
123. 289 U.S. 238 (1933). *See* text accompanying notes 7-14, *supra.*
124. Another possible point on which to distinguish the *Clark* case is the fact that it was a common question of law, *i.e.*, the constitutionality of the California statute as applied to their various business operations, which held the plaintiffs' claims together. The subsequent *Gibbs* formu-

Whatever the vulnerability of *Clark* to historical distinguishments might be, its significance has been enhanced by the recent decisions of *Snyder v. Harris*[125] and *Zahn v. International Paper Co.*,[126] in which the majority opinions made extended reference to it.

Snyder involved review of two attempted class action suits in which a single plaintiff sued on behalf of herself or himself and others similarly situated. In neither case did the sole representative have a claim for $10,000, but each representative sought to aggregate the several claims of the class members to achieve the jurisdictional amounts. The Court refused to permit aggregation, saying:

> Aggregation has been permitted only (1) in cases in which a single plaintiff seeks to aggregate two or more claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest.[127]

If the Court defines aggregation to include all attempts to assert claims which individually fall below the jurisdictional minimum, then this purportedly inclusive enumeration of proper applications of aggregation precludes aggregation, or pendent jurisdiction, in the situation under discussion—where one plaintiff's claim meets the jurisdictional amount requirements and another's does not. That this is the Court's definition is confirmed by its decision in *Zahn.*

In *Zahn,* suit had been instituted by a group of Vermont land owners on behalf of themselves and 200 others owning land fronting on Lake Champlain. They sought damages from International Paper Company, a New York corporation, for allegedly polluting the lake and injuring the surrounding properties. The suit was brought as a diversity action, under 28 U.S.C. § 1332(a). The claim of each of the named plaintiffs met the $10,000 jurisdictional amount, but the District Court found that not every individual member of the class had suffered damages in excess of $10,000. On the authority of *Snyder v. Harris,* the District Court dismissed the class action saying that it had no jurisdiction over the lesser claims and that no class of homeowners with claims in excess of $10,000 could be adequately defined.[128] The Second Circuit af-

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lation of the pendent jurisdiction doctrine emphasizes a "common nucleus of operative fact" from which the joined claims must arise.

125. 394 U.S. 332 (1969).
126. — U.S. —, 94 S. Ct. 505 (1973).
127. 394 U.S. 332, 335 (1969).
128. Zahn v. Int'l Paper Co., 53 F.R.D. 430 (D. Vt. 1971).

firmed in a divided opinion.[129] The Supreme Court affirmed as well.

The majority's opinion in *Zahn* is based on the the decision in *Snyder* and adds little to it by way of analysis. It does make it clear, however, that the non-aggregation rule is not limited to class actions and that it prevents appending lesser claims to sufficient ones:

> "The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase 'matter in controversy.'" [Snyder v. Harris, 394 U.S. 332, 336 (1969)]
> . . . .
> This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.[130]

It seems in the present state of the law, pendent jurisdiction is not available to permit joinder of individual claims below the jurisdictional minimum with related larger ones. This conclusion is reinforced by the fact that the three dissenting Justices in *Zahn* strongly asserted a theory of ancillary or pendent jurisdiction.[131]

CONCLUSION

While there are no constitutional barriers to the exercise of pendent jurisdiction in diversity cases, there are some high hurdles of statutory construction and history to overcome. The two principal impediments are the complete diversity requirement and the rule against aggregating individual claims.

Courts have been able to avoid these obstacles by the exercise of ancillary jurisdiction when the non-diverse or inadequate claims are presented after the courts' jurisdiction has been properly invoked originally. Thus they will entertain compulsory counter-

129. Zahn v. Int'l Paper Co., 469 F.2d 1033 (2d Cir. 1972).
130. — U.S. —, 94 S. Ct. 505, 511 (1973).
131. *Id.* at —, 94 S. Ct. at 512 (dissenting opinion). The dissent also points out the anomaly that only the citizenship of the representatives will be considered to establish diversity which is fundamentally a constitutional requirement, but all of the class members must satisfy the jurisdictional amount requirement which is purely statutory. *Id.* at —, 94 S. Ct. at 516.

claims, cross-claims, third-party complaints, and claims in intervention which relate to the same transaction or occurrences as the original claim, even though diversity or the jurisdictional amount or both are lacking as to these non-original claims. The result is justified as promoting the interests of judicial economy, convenience and fairness to the parties. The ordinary jurisdictional limitations in regard to citizenship and amount in controversy are circumvented by holding that they apply to and are satisfied with respect to the original claims alone; once the court has acquired jurisdiction of a federally cognizable action, it may proceed to adjudicate the entire controversy.

Attempts to attain the same judicial economy, convenience and fairness to parties through use of pendent jurisdiction in diversity cases will be frustrated, because the rationale which avoids the applications of citizenship and amount in controversy limitations to ancillary claims leads to a direct confrontation between those limitations and pendent claims. Pendent claims are original claims. Therefore, they are subject to the restrictions on original federal diversity jurisdiction. Any other result is obvious sleight of hand.

To permit appending of claims between non-diverse parties is nothing short of overruling the complete diversity rule. Appending claims below the jurisdictional amount to larger ones, on the other hand, might have been supported by distinguishing such a case from one of strict aggregation, *i.e.*, where none of the joined claims individually meets the minimum amount requirements. But the Supreme Court has apparently precluded that approach by its decision in *Zahn v. International Paper Co.*,[132] that the claim of every member of the class in a Rule 23(b)(3) action must meet the jurisdictional amount. Furthermore, the Court stated that if change in the non-aggregation rule were to be made, it would have to be made by Congress. Presumably the Court would leave it to Congress also to alter the even more venerable complete diversity rule.

Appealing arguments can be made for pendent jurisdiction in diversity actions, especially to avoid potential unfairness to parties. They must now be made to Congress rather than the courts.

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132. — U.S. —, 94 S. Ct. 505 (1973).

133. The American Law Institute has proposed a limited application of pendent jurisdiction in diversity cases when multiple claims are made by members of the same family living in the same household. ALI STUDY § 1301(e). This is a recurring fact pattern in the cases to date which have invoked pendent jurisdiction, but no suitable reason can be given for so restricting the proposal. As written it creates difficult problems of interpretation. *See* Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 20-21 (1968).