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Arthur D Wolf*

I. INTRODUCTION

At least since the adoption of the Federal Rules of Civil Procedure in 1938, the trend in trial practice has been to encourage the joining of claims and parties in a single action so that related questions of law and fact may be adjudicated at the same time.[1] "Under the [Federal] Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encour aged."[2] Such liberal joinder rules promote the values of convenience and fairness to the parties as well as that of judicial economy Persons who have legal disputes among themselves no longer need to engage in multiple actions to resolve related controversies.

This altogether salutary trend in modern civil practice, which has eliminated a number of difficulties under older rules of practice, has in turn created a number of newer problems. One of those problems relates to the question of attorney fees, the subject of this article. Suppose, for example, the plaintiff asserts two distinct but related claims against a defendant. Assume further that the legislature has authorized the award of attorney fees to the prevailing party with respect to only one of those two claims. Now suppose the plaintiff wins the lawsuit but recovery is based on the claim which does not have an attorney fee provision. Is the plaintiff nonetheless entitled to counsel fees because they may be awarded

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1. *See generally* 6-7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1581-82, at 787-95, §§ 1651-52, at 260-68 (1971-72).

2. UMW v. Gibbs, 383 U.S. 715, 724 (1966) (footnote omitted).

under the other claim? The problem is particularly acute when one of the two claims rests on the assertion of a constitutional right. On many occasions, the United States Supreme Court and the highest state courts have admonished lower courts to decide non-constitutional claims before they resolve constitutional ones,[3] so that decisions of far reaching and important constitutional issues are not made unnecessarily

With enactment of the Civil Rights Attorney s Fees Awards Act of 1976,[4] these difficulties in awarding counsel fees in multi-claim litigation intensified. The 1976 Act authorizes state and federal courts to award counsel fees to the prevailing party in cases based on eight types of claims specified in the statute. The statutes covered by the 1976 Fees Act are the basic post-Civil War civil rights acts,[5] two recent antidiscrimination provisions,[6] and certain actions under the Internal Revenue Code.[7] A great deal of current civil rights and civil liberties litigation is initiated under one or more of these statutory provisions. Under present practice, it is also very common for plaintiffs to allege in their complaints additional claims based on federal or state law In some instances, the plaintiff may even seek to join additional defendants based on claims not within the original jurisdiction of the federal court.[8] These "pendent claim or pendent party cases create additional difficulties in the application of the 1976 Fees Act.[9]

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3. *E.g.*, Hagans Lavine, 415 U.S. 528 (1974); Burton United States, 196 U.S. 283 (1905); Donadio Cunningham, 58 N.J. 309, 277 A.2d 375 (1971); Binder Triangle Publications, Inc., 442 Pa. 319, 275 A.2d 53 (1971). Despite the settled rule, lower courts continue to decide constitutional questions when apparently dispositive non-constitutional grounds are available. *See* Ludtke Kuhn, 461 F Supp. 86 (S.D.N.Y. 1978); Webster Redmond, 443 F Supp. 670 (N.D. Ill. 1977).

4. Pub. L. No. 94-559, 90 Stat. 2641 (1976). *See generally* Derfner, *One Giant Step: The Civil Rights Attorney Fees Awards Act of 1976*, 21 ST. LOUIS U.L.J. 441 (1977).

5. 42 U.S.C. §§ 1981-83, 1985, & 1986 (1976). In the public law which enacted the Fees Act, these provisions are referred to as they appeared in the REVISED STATUTES, respectively, sections 1977 1978, 1979, 1980, and 1981, because title 42 has never been codified. H.R. REP NO. 1558, 94th Cong., 2d Sess. 4 n.5 (1976). *See also* Pub. L. No. 94-559, 90 Stat. 2641 (1976).

6. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to d-4 (1976); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-86 (1976).

7 The Fees Act covers only tax enforcement actions brought by the United States under the Code. *See generally* M. Derfner, The Civil Rights Attorney Fees Awards Act of 1976, at 17-18 (1979) (to be published by the Practicing Law Institute February 1980).

8. *E.g.*, Aldinger Howard, 427 U.S. 1 (1976); Moor County of Alameda, 411 U.S. 693 (1973).

9. For discussions of the relationship between pendent claim and pendent par-

This article will focus on the application of the Fees Act in the context of multi-claim litigation where the judgment rests on a claim not enumerated in the Act (the non-fee claim"), even though a violation of one of the covered statutes (the "fee claim") is alleged in the complaint. The subject is divided into two types of multi-claim cases: (1) Where the plaintiff's claims involve both constitutional and non-constitutional issues; and (2) where the plaintiff's claims involve only non-constitutional considerations. The article will also discuss the constitutional questions which the application of the Fees Act raises from both a federal and state court perspective. Finally some attention will be paid to the potential scope of the Fees Act in multi-claim litigation.

II. COVERAGE OF THE 1976 FEES AWARDS ACT

On October 19, 1976, President Ford, a few hours before the bill would have died by pocket veto, signed into law the Civil Rights Attorney s Fees Awards Act of 1976.[10] Although the bill did not generate a great deal of outside controversy as it moved through the National Legislature in the final days of the 94th Congress, it did create some turmoil inside the Congress. The bill passed the Senate only after a determined effort by the leadership and the chief senatorial sponsors to break a filibuster by equally determined opponents of the measure.[11] After passing the Senate

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ty jurisdiction, see Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV 127 (1977); Comment, *The Impact of Aldinger v. Howard on Pendent Party Jurisdiction*, 125 U. PA. L. REV 1357 (1978); Note, *The Concept of Law—Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered*, 87 YALE L.J. 627 (1978); Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases*, 62 VA. L. REV 194 (1976); Note, *Pendent Party Jurisdiction: The Demise of Doctrine?* 27 DRAKE L. REV 361 (1977-78).

10. Under the Constitution, the President has 10 days to veto bill, unless Congress has, in the interim, adjourned, in which case the bill automatically dies (the pocket veto). U.S. CONST. art. I, § 7, cl. 2. Although Congress adjourned on October 1, 1976, the bill, S. 2278, was not presented to President Ford for his signature until October 9, and thus the 10 days did not start running until then. M. Derfner, *supra* note 7, at 12-13.

11. Because of the filibuster, the Senate debated the measure from September 21 to September 29, 1976, the day the bill finally passed by a vote of 57-15. Derfner, *supra* note 7, at 10-11. Ordinarily such late in the session filibusters would be successful because of the need to complete the pending business, which usually piles up in the weeks immediately preceding an adjournment. In this case, Senate aides reported, Assistant Majority Leader Robert Byrd and the chief sponsors of the measure refused to withdraw the bill because of the impending retirement of Senator Philip Hart and of Senator Hugh Scott, both long time civil rights proponents. Indeed Senator Hart could no longer come to the Senate floor because of illness. Pur-

two days before the end of the session, it reached the House floor for final action only because the House leadership and sponsors were equally determined to move the bill.[12] The measure passed the House on October 1, 1976, the last day of the 94th Congress.[13]

The 1976 Fees Act authorizes the state and federal courts to award counsel fees to the prevailing party in litigation under cer tain specified sections of the United States Code.[14] The Act covers suits brought pursuant to sections 1981, 1982, 1983, 1985, and 1986.[15] Section 1981 prohibits, among other things, discrimination on the basis of race or color in the making and enforcing of contracts.[16] It is used regularly to challenge racial discrimination in employment, although it is not limited to the employment relationship.[17] Section 1982 forbids racial discrimination in the sale or rental of property and is employed to challenge housing discrimi-

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suant to the wishes of Senators Hart and Scott and as parting memorial to their dedicated service, the Senate leadership persisted in getting the bill passed.

12. The efforts to pass the bill in the House were equally dramatic as its journey through the Senate. On September 9, 1976, the House Judiciary Committee favorably reported H.R. 15460, the House counterpart to S. 2278 (the bill which eventually became Public Law number 94-559). *Id.* at 9. Because the House Rules Committee was no longer processing any bills, except emergency measures, at that point in September, the House leaders decided to place the bill on the Suspension Calendar, procedure which permits the expeditious consideration of non-controversial" measures. *Id.* at 12. When bill on the Suspension Calendar is considered on the floor of the House, no amendments are permitted and passage is achieved only by two-thirds vote. Because many measures were ahead of the attorneys fees bill on the suspension calendar, the House never reached it on those few days in September, 1976, when the House rules permitted votes on suspensions. When the Senate passed the bill on September 29, 1976 the House leaders realistically had only one option: ask the Rules Committee to meet specially and to give the bill rule so it could be brought to the floor for action. After flurry of telephone calls and with the necessary help from Speaker O'Neill, the Committee agreed to meet in the early evening of September 30th (the Republican members of the Rules Committee refused to attend, in part, because they did not like the timing in bringing the measure to the floor). With barely quorum present, the Committee approved resolution (the rule") permitting the House to consider the Senate bill. *Id.*

13. After bill passes both houses, it must be enrolled" and otherwise prepared for the signature of the President. In part because of backlog which occurs at the end of sessions of Congress, bills may not be sent to the White House for several days after passage. In this case, nine days elapsed before S. 2278 went to President Ford. *See* note 10, *supra*.

14. During the House debate, Representative Robert F Drinan, the floor manager for the bill, stated that it would be equally applicable in state courts as well as in federal courts. 122 CONG. REC. 35122 (1976). *E.g.*, Young Toia, 66 App. Div 2d 377 413 N.Y.S.2d 530 (N.Y. 1979).

15. 42 U.S.C. §§ 1981-83, 1985, 1986 (1976).

16. *E.g.*, Johnson Railway Express Agency, Inc., 421 U.S. 454 (1975).

17 *E.g.*, Tillman v. Wheaton-Haven Recreation Ass n, Inc., 410 U.S. 431 (1973) (admission to recreational facilities covered by the statute).

nation.[18] Section 1983 is by far the most widely used federal statute when attacking allegedly unconstitutional or otherwise illegal action taken "under color of state law It is used in a broad variety of civil rights and civil liberties cases,[19] and is not limited to litigation involving racial, ethnic, or gender-based discrimination.[20] Sections 1985 and 1986 provide a civil remedy for challenging conspiracies, both public and private, to deprive persons of the equal protection of the laws.[21] The scope of these provisons is presently in a state of flux.[22]

The Act extends also to Title VI of the Civil Rights Act of 1964[23] and Title IX of the Education Amendments of 1972.[24] Title VI of the Civil Rights Act of 1964 is a general prohibition against discrimination on the basis of race, color, or national origin" in any program or activity which receives federal financial assistance.[25] It reaches all recipients of federal funds, whether or not they are acting under color of law [26] Title IX of the Education Amendments of 1972, which was modeled after title VI, forbids certain federally assisted educational institutions from discriminating on the basis of sex, blindness, or severe visual impairment.[27] Finally certain lawsuits under the Internal Revenue Code are also brought within the purview of the statute by the Allen Amendment.[28]

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18. *E.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

19. *E.g.*, Village of Arlington Heights Metropolitan Hous. Dev Corp., 429 U.S. 252 (1977) (housing discrimination); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (dismissal of school teacher for exercising first amendment rights of free speech); Brown v. Board of Educ., 347 U.S. 483 (1954) (school segregation).

20. *E.g.*, Hutto Finney 437 U.S. 678 (1978); Young American Mini Theatres, 427 U.S. 50 (1976) (attack on local obscenity ordinance as overbroad and vague).

21. *E.g.*, Griffin Breckenridge, 403 U.S. 88 (1971).

22. *See, e.g.*, Great Am. Fed. Sav & Loan Ass v. Novotny, 99 S. Ct. 2345 (1979).

23. 42 U.S.C. §§ 2000d to d-4 (1976).

24. 20 U.S.C. §§ 1681-86 (1976).

25. 42 U.S.C. § 2000d (1976); *see, e.g.*, Regents of the Univ of Cal. Bakke, 438 U.S. 265 (1978); Hills Gautreaux, 425 U.S. 284 (1976).

26. 42 U.S.C. § 2000d (1976); *e.g.*, Laufman Oakley Bldg. & Loan Co., 408 F Supp. 489 (S.D. Ohio 1976).

27 *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979).

28. Senator James Allen led the filibuster in the Senate against the Fees Act. In part to terminate the extended debate over the bill, the chief sponsors agreed to support his amendment which authorized the award of attorney fees to the prevailing party in tax enforcement cases brought by the United States. Derfner, *supra* note 7 at 11.

III. CONSTITUTIONALITY OF THE FEES ACT AS APPLIED IN MULTI-CLAIM LITIGATION

The constitutionality of the 1976 Fees Act, as applied to multi-claim litigation discussed in this article, has not presented grave problems for the courts.[29] Since a great majority of the cases arising under the 1976 Act have involved state or local governmental defendants, the decided cases have focused on the validity of the Act in that context. Two principal grounds have been advanced to challenge the constitutionality of the Act: (1) The Act contravenes the eleventh amendment to the Constitution by intruding on state sovereign immunity and (2) the statute exceeds the delegated powers of Congress in permitting fees to be awarded to a plaintiff who prevails only on a state claim. Each of these contentions will be examined in turn.

A. *The Eleventh Amendment Contention*

State defendants have sought to challenge the statute on the basis of the eleventh amendment, which protects the sovereign immunity of the states against intrusions by private damage suits in the federal courts.[30] The United States Supreme Court rejected that attack on the Fees Act in *Hutto v. Finney* [31] In that suit, the plaintiffs, who had prevailed in litigation to correct unconstitutional conditions in the Arkansas prisons, moved for an award of attorney fees against the state officials for legal expenses at the trial and appellate levels. The Court held that the eleventh amendment does not bar an award of counsel fees. It affirmed the award for the work performed in the trial court based on the finding that the defendants had litigated in bad faith. For the legal services provided at the appellate level, the Court approved the award based on the 1976 Fees Act.[32]

First, the Court stated that eleventh amendment sovereign immunity does not extend to the payment of litigation costs by unsuccessful state officials. For years, the Court had permitted the

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29. *E.g.*, Seals Quarterly County Court, 562 F.2d 390 (6th Cir. 1977); Gagne v. Maher, 594 F.2d 336 (2d Cir.), *cert. granted*, 100 S. Ct. 44 (1979).

30. *See* Edelman Jordan, 415 U.S. 651 (1974). The Court has sought to draw line between impermissible retroactive monetary relief, as in *Edelman*, and permissible prospective relief even though it has direct and substantial impact on the state treasury Milliken Bradley 433 U.S. 267, 289 (1977); *accord*, Quern Jordan, 440 U.S. 332 (1979).

31. 437 U.S. 678 (1978).

32. *Id.* at 689.

assessment of costs against such officials notwithstanding the shield of the eleventh amendment.[33] Since attorney fees are part of the costs of the lawsuit,[34] the eleventh amendment imposes no bar to their award. Second, the Court held that the Congress, under section 5 of the fourteenth amendment, has the power to override the immunity conferred by the eleventh amendment.[35] The only question regarding any particular statute is whether Congress intended to do so. In *Hutto* the Court found sufficient expression of congressional intent in the legislative history of the 1976 Fees Act. Having determined that Congress intended to lift the bar of eleventh amendment immunity the Court upheld the award of counsel fees to the plaintiffs against state officials to be paid from the state treasury

The decision in *Hutto* did not address the eleventh amendment issue in the context of pendent claim cases. In *Hutto* the plaintiff asserted only constitutional claims. The lower federal courts, however, both before and after *Hutto* have rejected sover eign immunity defenses seeking to avoid fee awards against state officials.[36] These decisions have rejected the eleventh amendment defense whether the plaintiff prevailed on a federal statutory or state law ground.[37] The courts have not imposed a more stringent test of congressional intent to abrogate sovereign immunity in awarding fees on prevailing pendent claims, state or federal, than on prevailing constitutional claims.[38] Any doubt on the abrogation

33. Fairmont Creamery Co. Minnesota, 275 U.S. 70 (1927).

34. 42 U.S.C. § 1988 (1976).

35. It relied upon an earlier case, Fitzpatrick Bitzer, 427 U.S. 455 (1976), for the proposition that Congress, under section five, may abrogate state sovereign immunity In *Bitzer* male plaintiffs sued to enjoin state officials from discriminating on the basis of sex in the operation of retirement benefits plan. After they prevailed, the plaintiffs sought to recover their attorney fees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1976). The Court held that congressional power under section five may override eleventh amendment sovereign immunity. Lower courts disagree whether congressional exercise of other delegated powers, such as under the copyright and patent clause, is adequate to abrogate eleventh amendment immunity. *Compare* Mills Music, Inc. Arizona, 591 F.2d 1278 (9th Cir. 1979) (Congress has the authority to override) *with* Wihtol Crow, 309 F.2d 777 (8th Cir. 1962) (Congress does not have the power to override).

36. *E.g.*, Seals Quarterly County Court, 562 F.2d 390 (6th Cir. 1977); Gagne v. Maher, 594 F.2d 336 (2d Cir.), *cert. granted*, 100 S. Ct. 44 (1979).

37 *E.g.*, Seals Quarterly County Court, 562 F.2d 390 (6th Cir. 1977); Gagne v. Maher, 594 F.2d 336 (2d Cir.), *cert. granted*, 100 S. Ct. 44 (1979).

38. *E.g.*, Anderson Redman, 474 F Supp. 511 (D. Del. 1979) (action by state prisoners at Delaware Correctional Center to alleviate overcrowded conditions alleg-

question should be resolved in favor of awarding fees to prevailing plaintiffs because the legislation should be liberally construed.[39]

B. *The Delegated Powers Argument*

The other possible line of constitutional challenge would arise most starkly in those suits in which the case is disposed of on a state law ground to which the Fees Act does not expressly apply In these cases, fees are awarded because of the presence of an unresolved federal constitutional issue which has been pretermitted in favor of deciding the case on the non-fee claim. The argument would be that Congress does not have the power to authorize the award of fees when a plaintiff, asserting both constitutional and state law claims, prevails only on the latter. The issue may be divided into two parts: (1) When the multi-claim action is brought in federal court, and (2) when the action is brought in state court.

1. Federal Court Suits

Any discussion of the constitutionality of awarding fees to successful plaintiffs who prevail on non-fee state law claims must begin with the basis of federal court jurisdiction over such suits. In *United Mine Workers v. Gibbs* [40] the Supreme Court reformulated the test for exercising pendent jurisdiction over non-federal" claims upon the proposition that all of a plaintiff's related claims constitute one constitutional case " within the meaning of article III.[41] In *Gibbs*, the Supreme Court held that to exercise jurisdiction over pendent, non-federal claims, a federal court must find: (1) The federal claim asserted is sufficient to confer subject matter jurisdiction, and (2) both federal and non-federal claims derive from a common nucleus of operative fact."[42]

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edly in violation of constitutional and state law proscriptions); *see* Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977); Gagne Maher, 594 F.2d 336 (2d Cir.), *cert. granted*, 100 S. Ct. 44 (1979); *cf* Corpus v. Estelle, 605 F.2d 175 (5th Cir. 1979) (rejected the defendants argument that strict test of constitutionality should be applied in determining the scope of congressional power under section five of the fourteenth amendment to authorize fees for legal services rendered prior to the effective date of the act).

39. As the Court noted in *Hutto* "[t]he act could not be broader. 437 U.S. at 694. *See* note 166 *infra*.

40. 383 U.S. 715 (1966).

41. *See* text accompanying notes 59-77 *infra*. Commentators who believe *Gibbs* is unconstitutionally over-expansive may also find the Fees Act beyond congressional power. Note, *The Concept of Law—Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered*, 87 YALE L.J. 627 (1978).

42. 383 U.S. at 725.

The premise of *Gibbs* is that, if the litigation presents only one constitutional case under article III, Congress may give the federal courts the power "to decide all the questions in the case and to dispose of it on local or state questions only "[43] If Congress has the power under article III and the necessary and proper clause to give such jurisdiction to the federal courts, then it may also provide whatever remedies are necessary to encourage or facilitate the invocation of that jurisdiction by plaintiffs. To effectuate the jurisdictional grant, Congress may adopt appropriate means to facilitate the exercise of that jurisdiction.[44] When state law claims are properly joined to federal constitutional issues, it is appropriate for Congress to implement the sensitive judicially-created doctrine that non-constitutional claims should be decided first to avoid unnecessary constitutional decisionmaking. To advance both of those permissible goals, Congress may enact an attorney fee statute which authorizes fees to a plaintiff who prevails on the non-fee, state claim.

In addition, the constitutional claim, which provides the basis for federal court jurisdiction, is rooted in the fourteenth amendment and asserted through the remedial provision of section 1983.[45] Under section 5 of the fourteenth amendment, Congress may enact appropriate legislation, such as section 1983, to enforce the guarantees of that amendment.[46] Providing attorney fees when plaintiffs prevail on those constitutional claims is within the grant of power under section 5. The question here is whether that grant extends to the non-fee, state claim when Congress, recognizing the pendent jurisdiction doctrine and the policy of avoiding unnecessary constitutional decisions, authorizes the application of the Fees Act to the plaintiff who prevails on the state claim.

In defining the scope of congressional power under section 5, the Supreme Court has adopted the classic formulation articulated in *M'Culloch v. Maryland*[47] to determine the reach of other delegated powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are con-

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43. Siler v. Louisville & N.R.R., 213 U.S. 174, 191 (1909).

44. *See* Tennessee v. Davis, 100 U.S. 257 (1880).

45. 42 U.S.C. § 1983 (1976).

46. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick Bitzer, 427 U.S. 445 (1976).

47 17 U.S. (4 Wheat.) 316 (1819).

stitutional."[48] The attorney fee provision satisfies the applicable standards for legislating under section 5 so long as the non-fee, state claim properly relates to the federal constitutional claim. That relationship is satisfied through the application of the *Gibbs* two-pronged test of substantiality and common nucleus of operative fact.[49]

2. State Court Suits

The constitutional issue in state court litigation is similar to the claim regarding federal courts with the added wrinkle that the pendent jurisdiction argument, fully applicable in the federal courts, must be recast to fit the state court model. The adjustments, although distinctive, are not really major. Although Congress has authorized the state courts to hear federal constitutional claims, it recognizes that avoiding a decision on those claims is desirable if a non-constitutional ground is dispositive. To accomplish the dual goals of encouraging the advancement of constitutional rights and avoiding unnecessary decisions interpreting the Constitution, Congress may encourage state court plaintiffs to join potentially dispositive state claims to their constitutional claims. Providing attorney fees to the prevailing plaintiff is one reasonable means of accomplishing those twin goals.

It should also be borne in mind that under *Testa v. Katt*,[50] the state courts have a constitutional duty to adjudicate federal claims at least when they entertain similar state claims. To assist the state courts in meeting that duty Congress has the power to authorize counsel fees even on the state claim. In *Thiboutot v. State* [51] the Maine Supreme Judicial Court held that, although Congress did

48. Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) at 421).

49. Gagne Maher, 594 F.2d 336, 342 (2d Cir.), *cert. granted*, 100 S. Ct. 44 (1979); *accord*, Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977). *See generally* note 126 *infra*. In Corpus Estelle, 605 F.2d 175 (5th Cir. 1979) the court of appeals rejected the contention that, in determining the constitutionality of statute imposing fees on state officials, the court should apply strict standard for evaluating whether given means is plainly adopted to constitutional end. *Id.* at 177. Indeed the court suggested that the defendant must show unconstitutionality "beyond reasonable doubt" in attacking statute passed under section five of the fourteenth amendment. *Id.* at 180.

50. 330 U.S. 386 (1947). *But see* Chamberlain Brown, 223 Tenn. 25, 442 S.W.2d (1969) (Tennessee state courts are not obliged to entertain actions based on §§ 1983 and 1985 (3)).

51. 405 A.2d 230, 239 (Me. 1979), *cert. granted*, 48 U.S.L.W 3460 (Jan. 22, 1980) (No. 79-838).

not *require* the state courts to apply the 1976 Fees Act, Maine state courts should apply it as a matter of sound policy because of the desirability of uniform remedies throughout the nation in civil rights actions. In *Thiboutot*, the trial judge entered judgment for the plaintiffs without specifying whether it rested on state or federal grounds. The Maine Supreme Judicial Court stated that Congress had sufficient power under section 5 of the fourteenth amendment to authorize the award of such fees if a section 1983 claim is available as a basis for the judgment.

Furthermore, the plenary power of Congress to adjust the jurisdiction of state and federal courts with regard to cases and controversies within article III has been recognized from the beginning and has never been seriously questioned.[52] The exercise by state courts of the authority to award fees in this context may be viewed as one of the conditions Congress has placed on their power to adjudicate federal constitutional claims.[53]

IV NATURE OF THE PROBLEM

It frequently occurs that plaintiffs will seek to join all of their claims against the defendant in one action, in either federal or state court. For example, in *Lau v. Nichols*,[54] the plaintiffs, representing a class of Chinese school children, sued San Francisco public school officials in federal court to compel them to provide adequate bilingual education. The plaintiffs asserted several claims against the defendants based on the fifth, ninth, and fourteenth amendments to the United States Constitution, provisions of the state constitution, Title VI of the Civil Rights Act of 1964, and the Education Code of California. Similarly in *Southern Burlington County NAACP v. Township of Mount Laurel*,[55] the plaintiffs sued in state court to enjoin the defendant's zoning ordinance because it allegedly excluded low and moderate income housing. They as-

52. *See generally* note 185 *infra*.

53. Since "[t]he power of Congress to make exclusive [in the federal courts] any valid grant of jurisdiction has hardly been in issue, it would appear that Congress could properly condition state court exercise of authority over federal claims with an attorney fee provision. P BATOR, P MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 418 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

54. 414 U.S. 563 (1974).

55. 67 N.J. 151, 336 A.2d 713, *appeal dismissed, cert. denied*, 423 U.S. 808 (1975).

serted claims based on the equal protection clause of the state and federal constitutions and on the New Jersey zoning enabling statute. In *Washington v. Davis*,[56] the plaintiffs instituted a federal court action challenging, as racially discriminatory the hiring practices of the District of Columbia police department. They alleged claims based on the due process clause of the fifth amendment, section 1981 of title 42, and the District of Columbia Code.

In these illustrative cases, the plaintiffs challenged the defendants conduct on several grounds, each of which was adequate to support a judgment in plaintiffs favor. If the 1976 Fees Act had been public law at the time these cases were decided, it would have applied expressly to one or more, but not all of the claims alleged by the plaintiffs. If those law suits had terminated in favor of the plaintiffs on a ground or grounds not explicitly covered by the Fees Act, they would have presented the issue to which this article is addressed.

Congressional proponents of the Fees Act recognized that multi-claim litigation involving both fee and non-fee claims might be resolved on a ground not covered by the Act even though a covered claim was also available as a basis for disposing of the case. To deal with that question, the House Judiciary Committee included a footnote in its report which sought to address that issue and to give guidance to the courts when confronted with such cases.[57] It should be noted that the footnote in the House report is the only reference in the entire legislative history which speaks to that issue. Because of the importance of that text to our discussion, it is quoted in full here:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 [the House equivalent of the Senate bill which became the public law] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines* 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constittuional [*sic*] claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the substantiality test, *see Hagans v. Lavine, supra*; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney s fees may be allowed even

56. 426 U.S. 229 (1976).

57 H.R. REP *supra* note 5, at 4 n.7.

> though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a common nucleus of operative fact. *United Mine Workers v. Gibbs*, *supra* at 725.[58]

This language in the House Report addresses two distinct categories of cases which arise in multi-claim litigation. The first category encompasses those suits in which none of the claims involves a question of federal constitutional law That is, all of the claims involve issues of federal statutory or common law or issues arising under state law (constitutional, statutory or common). The first sentence of the footnote in the House Report, quoted above, was designed to address that type of case. The second category embraces those multi-claim lawsuits in which one or more but not all of the claims is based on a provision of the federal constitution. Because of the rule which requires that non-constitutional, dispositive claims be resolved before reaching the constitutional issue, in many cases the constitutional question will never be decided. The second and third sentences of the footnote seek to establish a rule of decision for this kind of case. This article will examine both categories of cases which arise in federal and state courts. The federal court decisions will be examined in part V and the state court cases in part VI.

V MULTI-CLAIM LITIGATION IN THE FEDERAL COURTS

A. *The Doctrine of Pendent Jurisdiction*

Any discussion of attorney fee awards in multiple claim cases in federal courts must begin with an examination of the pendent jurisdiction doctrine. The modern doctrine of pendent jurisdiction traces its lineage at least to *Osborn v. Bank of the United States*,[59] decided by the Supreme Court in 1824. In that case, the Bank of the United States sued Ohio officials in federal court to restrain them from collecting a tax levied on the bank by the Ohio legislature. Notwithstanding a federal court injunction restraining the enforcement of the state taxing act, the defendants seized $100,000 of the bank s assets to satisfy the assessment. The bank amended its complaint to seek recovery of the seized funds on the ground that

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58. *Id.*

59. 22 U.S. (9 Wheat.) 738 (1824). *See generally* C. WRIGHT, LAW OF THE FEDERAL COURTS § 19, at 72 (3d ed. 1976); Comment, *Pendent and Ancillary Jurisdiction: Towards Synthesis of the Two Doctrines*, 22 U CAL. L. A. L. REV 1263 (1975).

the statute taxing the bank was unconstitutional on the authority of *M'Culloch v. Maryland*.[60] Writing for the Court, Chief Justice Marshall expansively defined the scope of the arising under" jurisdiction of article III:

> 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 [Federal courts] jurisdiction of that cause, although other questions of fact or of law may be involved in it.[61]

Although the case may be read as raising no state law issues at all,[62] later decisions relied in part on the Marshall dicta to extend federal court jurisdiction to embrace claims separately grounded in state and federal law

In *Hurn v. Oursler* [63] for example, a leading case decided a few years before the adoption of the Federal Rules of Civil Procedure, the plaintiff sued to enjoin the defendants from producing a play which the plaintiff claimed infringed its copyright. The complaint alleged a violation of the federal copyright statute and a state unfair competition law The trial court dismissed the federal copyright claim on the merits and the state unfair competition claim for want of jurisdiction. The Supreme Court affirmed, but modified, the lower court judgment dismissing the state claim on the merits, not for want of jurisdiction. The Court distinguished, for federal

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60. 17 U.S. (4 Wheat.) at 316.

61. 22 U.S. (9 Wheat.) at 823.

62. In related case decided on the same day as *Osborn*, the plaintiff Bank apparently relied entirely on state law for its claims against the defendant based on assigned promissory notes. Bank of the United States Planters Bank of Ga., 22 U.S. (9 Wheat.) 904 (1924). Furthermore, in his dissenting opinion in *Osborn*, Justice Johnson characterized the complaint of the Bank as nothing more than traditional common law action for trespass or to recover illegally seized property both of which were governed by state, not federal law. Osborn Bank of the United States, 22 U.S. (9 Wheat.) at 871. Apparently Justice Johnson viewed the federal question (i.e., the unconstitutionality of the state law taxing the Bank) as entering the case only by way of replication by the Bank to defense based on the state statute. In later years, the Court held that the general federal question jurisdictional statute, enacted in 1875, did not authorize federal courts to entertain suits in which the federal question arose by way of rejoinder to an anticipated defense. Metcalf v. Watertown, 128 U.S. 586 (1888); *accord*, Louisville & N.R.R. Mottley 211 U.S. 149 (1908). The *Metcalf* opinion, however, did not address the scope of the arising under language in article III, the question to which the Marshall dicta is directed. *See* Railroad Co. Mississippi, 102 U.S. 135 (1880) (under the 1875 statute, the federal court has jurisdiction of case removed from state court where the federal question arises by way of the defense).

63. 289 U.S. 238 (1933).

jurisdictional purposes, cases in which state and federal grounds are asserted in support of a single cause of action from those suits in which the state and federal grounds constitute "two separate and distinct causes of action."[64] In *Hurn*, the Court held that the plaintiff had merely alleged two separate grounds, one based on federal law and the other on state law in support of a single cause of action. It concluded that the lower federal court had jurisdiction over the state and federal claims and should have decided both. The Court added, however that the federal court did not have pendent jurisdiction over the plaintiff's state unfair competition claim arising out of defendant's use of an uncopyrighted, unpublished version of the copyrighted play because this claim was separate and distinct" from the jurisdiction-conferring federal copyright claim. By tying federal jurisdiction over non-federal claims to the notion of a single cause of action," the Court created a rule which the lower federal courts struggled with following the decision in *Hurn* [65]

Adoption of the Federal Rules of Civil Procedure in 1938 laid the groundwork for a redefinition of the scope of the federal judicial power in cases involving federal and non-federal questions.[66] Among other things, the rules merged law and equity into one civil action,[67] provided for liberal joinder of claims and parties,[68] and effected other reforms aimed at litigating all claims among the parties in one law suit.[69] In 1966, the Supreme Court relied heavily on

64. *Id.* at 246. The Court abjured defining cause of action in terms of the facts necessary to establish the claim. *See generally*, Note, *The Concept of Law-Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered*, 87 YALE L.J. 627 (1978). It did, however, underscore 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. 289 U.S. at 246. Earlier in the opinion, the Court also found that the two grounds were dependent upon the same facts. *Id.* at 244. This focus on the facts would later provide, perhaps unwittingly the underpinning for the Court' reformulation of the pendent jurisdiction doctrine in requiring that the claims arise out of common nucleus of operative *fact*. UMW v. Gibbs, 383 U.S. 715, 725 (emphasis added).

65. "By the first third of the 20th century however, the phrase [cause of action] had become so encrusted with doctrinal complexity that the authors of the Federal Rules of Civil Procedure eschewed it altogether. Davis v. Passman, 99 S. Ct. 2264, 2272 (1979). *See generally* C. WRIGHT, *supra* note 59, § 19, at 73; Comment, *supra* note 59.

66. UMW Gibbs, 383 U.S. 715, 717 (1966).

67 "There shall be one form of action to be known as civil action. FED. R. CIV P 2.

68. *Id.* 18 (joinder of claims and remedies); *Id.* 20 (permissive joinder of parties); *Id.* 21 (misjoinder and non-joinder of parties).

69. FED. R. CIV P 13 (counterclaim and cross-claim); *Id.* 14 (third-party prac-

the modernization of the federal rules of practice when it reformulated the doctrine of pendent jurisdiction. In the seminal case of *United Mine Workers v. Gibbs* [70] the Court noted the difficulties experienced by the lower federal courts in applying the *Hurn* cause of action doctrine. Referring to the rules and the tendency of its earlier cases to require a plaintiff to join all related claims in one action, the Court held that jurisdiction, in an article III sense, exists if the relationship between the federal and state claims permits the conclusion that the entire action before the court comprises but one constitutional case. "[71]

After surmounting the constitutional objection to a more expansive view of pendent jurisdiction, the Court in *Gibbs* articulated the criteria by which to determine, in any given suit, whether the federal and state claims do indeed constitute one constitutional case. With the vagaries of cause of action undoubtedly in mind, the Court adopted a two-pronged test to determine when non-federal claims (those which do not have an independent basis for federal jurisdiction) may properly be asserted in federal court.[72] First, the federal claim which provides the inde-

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tice); *Id.* 15 (amended and supplemental pleadings); *Id.* at 22 (interpleader); *Id.* 24 (intervention); *Id.* 42 (consolidation).

70. 383 U.S. 715 (1966).

71. *Id.* at 725. Although the *Gibbs* opinion is vulnerable on several grounds, perhaps its most obvious flaw is the Court' reversal of the usual analysis which addresses statutory issues before examining constitutional questions. *See generally* Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV 262 (1968). Prior to determining the scope of the word case in article III, it should have studied the jurisdictional statute to see whether Congress intended to confer pendent jurisdiction and in what measure. If the statutory grant reached the state claim, only then would it be necessary to decide whether that grant was within the confines of article III. One commentator has suggested that *Aldinger* may have undermined *Gibbs* by requiring the plaintiff affirmatively to show that Congress intended in the jurisdictional statute to permit the assertion of the particular pendent claim in question. Aldinger Howard, 427 U.S. 1 (1976); Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV 127 (1977). The thrust of *Aldinger* as later amplified by the Court in Owen Equip. & Erection Co. Kroger, 437 U.S. 365 (1978), does not, in this author judgment, go quite that far. Rather *Aldinger* and *Kroger* appear to create presumption in favor of pendent jurisdiction which is rebutted by showing that Congress intended to exclude particular pendent claim or party from the scope of federal jurisdiction.

72. A lively debate has developed over whether the *Gibbs* test is two-pronged or three-pronged. It has arisen because Justice Brennan, after noting the substantiality and common nucleus factors, added: "[b]ut if, considered without regard to their federal or state character, plaintiff' claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in the federal courts to hear the whole. 383 U.S. at 725 (footnote omitted) (emphasis in original). Two distinguished commenta-

pendent basis for jurisdiction must have substance sufficient to confer subject matter jurisdiction."[73] Second, the federal and nonfederal claims must derive from a common nucleus of operative fact."[74]

Eight years later the Court clarified the first branch of the test by explicating more precisely what it meant by a claim of sufficient substance. In *Hagans v. Lavine*[75] the Court said this standard required only that the federal claim be one that is not obviously frivolous, or absolutely devoid of merit, or wholly insubstantial."[76] The relatively low quantum of "federalness" need-

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tors relying on the ordinarily be expected to try language, maintain that this element is cumulative to the other two factors. WRIGHT & MILLER, *supra* note 1, § 3567, at 445; *accord*, Note, *Pendent Party Jurisdiction: The Demise of Doctrine?* 27 DRAKE L. REV 361, 364-65 (1977-78). But other commentators are equally certain that *Gibbs* announced only two-pronged test, with the above quoted sentence serving as an alternative formulation. *E.g.*, Baker, *Toward Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U PITT. L. REV 759, 764-65 (1972); *accord*, Comment, *supra* note 59, at 1272. This author agrees with the view that *Gibbs* adopted two-pronged test simply because, in the critical sentence quoted above, Justice Brennan repeats the reference to the substantiality test, thus suggesting that the ordinarily be expected to try standard is alternative. In any event, as the legislative history of the Fees Act demonstrates, Congress adopted two-pronged test, based on its understanding of the *Gibbs-Hagans* line, for the purpose of awarding attorney fees, not to determine jurisdiction. Thus it makes no difference for present purposes what the Court really intended in *Gibbs*.

73. 383 U.S. at 725.

74. *Id.*

75. 415 U.S. 528 (1974).

76. *Id.* at 536-37 (quoting from line of its earlier decisions). When the defendant moves to dismiss the complaint because the federal question is "insubstantial" or "frivolous the court, in ruling on that motion, looks only to the plaintiff' allegations. Rosado v. Wyman, 397 U.S. 397 (1970). Thus the plaintiff need not demonstrate jurisdiction over the primary claim at all stages as prerequisite to resolution of the pendent claim. *Id.* at 405 (footnote omitted). This approach is little more than an application of the well-pleaded complaint" rule which the Court has applied to resolve subject matter jurisdiction questions. St. Paul Mercury Indem. Co. Red Cab Co., 303 U.S. 283 (1938) (jurisdictional amount); Metcalf v. Watertown, 128 U.S. 586 (1888) ("arising under questions); Mollan v. Torrance, 22 U.S. (9 Wheat.) 537 (1824) (diversity of citizenship). In each case, the Court held that jurisdiction depends on the state of things when the action is brought. Osborn Bank of the United States, 22 U.S. (9 Wheat.) at 824. That after vesting, it cannot be ousted by subsequent events. Mollan Torrance, 22 U.S. (9 Wheat.) 537 539 (1824); *accord*, Mosher v. City of Phoenix, 287 U.S. 29 (1932) ("Jurisdiction is thus determined by the allegations of the [complaint] and not by the way the facts turn out or by decision of the merits *Id.* at 30). In view of provision in the Judiciary Act of 1875, the rule might have been the other way that is, that federal court jurisdiction could be ousted by subsequent events. Judiciary Act of 1875, Ch. 137, 18 Stat. 470. Section five of the 1875 Act required dismissal of suit commenced in Federal court *at any time after* such suit is brought" if it does not really and substantially involve dispute or controversy properly within the jurisdiction of the court. *Id.* § 5 (empha-

ed to satisfy this minimal requirement led Justice Rehnquist in his dissent to characterize the standard as permitting jurisdiction whenever the "plaintiff is able to plead his claim with a straight face."[77]

B. *Pendent Jurisdiction and the 1976 Fees Act*

Although the *Gibbs* case involved a state claim pendent to a federal statutory claim[78] and *Hagans* involved a federal statutory

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sis added); *see* Gold-Washing & Water Co. Keyes, 96 U.S. 199 (1877) (dictum) (federal court suit may be dismissed if it later appears that disposition of the case does not depend upon the construction of federal law or the Constitution). Even though that language remained in the United States Code until 1948, when it was removed as unnecessary the Supreme Court nonetheless adhered to the well-pleaded complaint" rule through those years. HART & WECHSLER, *supra* note 53, at 837

The Supreme Court has also held, however, that other jurisdictional attacks, such as the absence of justiciable controversy (*e.g.*, standing to sue or mootness), remain open throughout the litigation and are subject to later developments. *E.g.*, County of Los Angeles v. Davis, 440 U.S. 625 (1979) (mootness). The Court apparently has not reconciled these disparate rules regarding challenges to federal court jurisdiction, except to advance the suggestion in *Rosado*, that substantiality differs from mootness because of the timing element. 397 U.S. at 403. A distinction between the two categories of cases may be drawn along constitutional lines. Cases involving attacks on the jurisdictional amount, for example, do not implicate article III limitations, but merely congressional policy judgments. In contrast, defense that the action is not case or controversy *i.e.*, justiciability within the meaning of article III implicates the scope of the constitutional grant of power. But even that distinction loses its force when it is recalled that federal courts, which are created by act of Congress, must look to the statute as the warrant for their authority· certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. Cary Curtis, 44 U.S. (3 How.) 236, 245 (1845).

77 415 U.S. at 564. Because he thought the jurisdiction-conferring constitutional claim was so weak and insubstantial, Justice Rehnquist quipped that "this seems to be classic case of the statutory tail wagging the constitutional dog. *Id.* Indeed some of the earlier precedents required that the federal question be real and substantial, which seemed to impose something more than the minimal test of *Hagans*. McCain DesMoines, 174 U.S. 168, 181 (1899). The formulation in *McCain* derived from the general federal question jurisdictional statute, enacted in 1875, which authorized the federal trial courts to dismiss an original suit or remand removed suit to the state court if "it shall appear to the satisfaction of said [federal] court, at any time after such suit has been brought or removed thereto, that such suit does not *really and substantially* involve dispute or controversy properly within the jurisdiction of said [federal] court. The Judiciary Act of 1875, Ch. 137 § 5, 18 Stat. 470, 472 (emphasis added). Although this provision was omitted from the 1948 recodification of the Judicial Code as unnecessary the federal courts continued to apply the substantiality test after 1948. HART & WECHSLER, *supra* note 53, at 837 (quoting from the legislative history of the recodification). Perhaps that omission underlays Justice Harlan observation that the standard is maxim more ancient than analytically sound. Rosado Wyman, 397 U.S. 397, 404 (1970).

78. 383 U.S. at 715.

claim pendent to a federal constitutional claim,[79] the standard under the 1976 Fees Act does not draw any distinctions among the different types of cases which might arise under the pendent jurisdiction doctrine.[80] The 1976 Act adopts the two-pronged *Gibbs* test, employed to determine pendent jurisdiction, only as a rule for the courts to apply in awarding fees in multi-claim litigation involving a federal constitutional issue. Whether the non-constitutional issue has an independent jurisdictional basis is totally ir relevant for purposes of awarding counsel fees. Thus, fees may be awarded if the plaintiff prevails on a non-fee claim, whether it arises out of state law or federal statutory or common law so long as it is properly joined with a federal constitutional claim.

The significance of this point should not be underestimated because it is not uncommon for non-constitutional claims in multi-claim litigation to have an independent jurisdictional base. Nothing in the legislative history of the Fees Act indicates that Congress attributed any significance to the reality that some non-constitutional claims could stand alone as a basis for federal court jurisdiction. Congress adopted the pendent jurisdiction test for fee awards to accommodate the congressional policy of promoting private enforcement of the civil rights acts and the judicial policy of not unnecessarily deciding federal constitutional issues.[81] In this sense, it may be said that "the House report strikes a sensible and reasonable balance between two important federal policies."[82]

C. *Multi-Claim Litigation Not Involving Constitutional Issues*

When conduct is challenged as violative of one of the statutes covered by the Fees Act and no constitutional claim is involved, it is not uncommon for the plaintiff to assert additional federal or state claims which do not have attorney fee provisions. The question arises whether counsel fees may be awarded when the case is decided on the non-fee claim. With respect to the scope of federal court jurisdiction, the *Gibbs-Hagans* doctrine applies to allow the plaintiff to join claims which do not have an independent basis of jurisdiction.[83] In *Gibbs*, the Supreme Court authorized the

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79. 415 U.S. at 528.

80. Pub. L. No. 94-559, 90 Stat. 2641 (1976).

81. Gagne Maher, 594 F.2d 336 (2d Cir.), *cert. granted*, 100 S. Ct. 44 (1979); *see* White v. Beal, 447 F Supp. 788 (E.D. Pa. 1978).

82. Southeast Legal Defense Group Adams, 436 F Supp. 891, 895 (D. Or. 1977).

83. 415 U.S. at 528; 383 U.S. at 715.

joinder of a state law claim, which could not otherwise be brought in federal court, to a federal statutory claim which was properly in the federal court.[84] In *Hagans* the Court, relying on *Gibbs* approved the joinder of a dependent federal statutory claim to an independent (jurisdiction-conferring) constitutional claim.[85] Thus, so long as the plaintiff can satisfy the two criteria of the *Gibbs-Hagans* test, she may join other federal and state claims which do not have independent jurisdictional bases.

The first sentence of footnote 7 in the House Report seeks to provide a governing standard for determining whether fees should be awarded in this category of cases when the judge, or jury decides the case on the non-fee claim.[86] In these cases, since no constitutional question is involved, the court is free to decide the case on any or all grounds. It may give complete relief on one ground, pretermitting decision on the other claims. If the plaintiff, however, prevails on a non-fee claim alone, she "is entitled to a determination of the [fee] claim for the purpose of awarding counsel fees."[87] Because the fee claim does not involve any constitutional

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84. 383 U.S. at 715.

85. 415 U.S. at 528.

86. H.R. REP *supra* note 5, at 4 n.7

87 *Id.* The first sentence of the footnote relies on Morales Haines, 486 F.2d 880 (7th Cir. 1973), *remanded*, [1974] EQ. OPPTY. IN HOUS. (P-H) ¶ 13,677 at 14,383 (N.D. Ill. 1974), as authority to support the policy requiring the judge to decide the fee claim covered by the Act if the judge is inclined to dispose of the case on the non-fee claim (in cases where neither claim involves constitutional question). In *Morales*, black plaintiff sued local officials to enjoin ban on the construction of federally subsidized housing, alleging racial and economic discrimination in violation of constitutional and statutory proscriptions. The trial judge held that the construction ban constituted "financial discrimination in violation of the equal protection clause. *Id.* at 881. He made no finding of racial discrimination, denying the plaintiff any damages or attorney fees. *Id.* at 882. On appeal, the Seventh Circuit held that the district court should have decided the racial discrimination claim because plaintiff' request for damages and counsel fees depended on it. *Id.* It remanded the case for that determination, which the judge ultimately made in the plaintiff' favor by awarding damages and fees. [1974] EQ. OPPTY. IN HOUS. (P-H) ¶ 13,677 at 14,383 (N.D. Ill. 1974). Technically, the trial court should never have decided the constitutional claim before addressing the statutory claims. If that traditional path had been followed, the question in *Morales* would not have arisen because at least two of the statutory claims were "fee-claims. The Supreme Court eventually disapproved that part of *Morales* which relied on the private attorney general" exception to the American Rule forbidding attorney fees unless unauthorized by statute. Alyeska Pipeline Serv. Corp. Wilderness Soc y, 421 U.S. 240, 270 n.46 (1975). In any event, the congressional purpose, in referencing *Morales*, is to give the plaintiff the right to decision on her fee claim whenever the trial court may dispose of the case on non-fee ground. *See* Save Our Sound Fisheries Ass Callaway 429 F Supp. 1136 (D.R.I. 1977) (in deciding the case on the merits, the court found it unnecessary to determine whether it had jurisdiction of claims based

issue, it may be decided without violence to the federal policy against deciding constitutional questions when non-constitutional grounds are dispositive.[88] No cases have been decided under the 1976 Fees Act which invoke this branch of the fee-non-fee problem.

An interesting line of decisions is developing, however, which is related to this category of cases. *Bunn v. Central Realty of Louisiana*[89] is illustrative. In this case, the plaintiff sued the defendant for racial discrimination in housing, basing his claims on section 1982 and the Federal Fair Housing Act.[90] The district court found discrimination, but did not indicate which statutory provision the defendant violated. The judge denied plaintiff's motion for counsel fees because under the Federal Fair Housing Act only plaintiffs who are not financially able to assume said attorney s fees may recover them.[91]

The court of appeals reversed the denial of attorney fees. It held that the district court should have awarded them under the 1976 Fees Act because the plaintiff had alleged and proved a violation of section 1982, one of the statutes covered by the legislation. Following the legislative history and its prior decisions under the 1976 Act, the court further held that counsel fees should ordinarily be awarded unless special circumstances render the award unjust.[92] Even though the Fair Housing Act denies fees to a plaintiff

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on two environmental statutes; when the prevailing plaintiff applied for counsel fees, however, the court then decided the jurisdictional question under the environmental laws because they were the only claims under which the plaintiff could recover its attorney fees).

88. Southeast Legal Defense Group Adams, 436 F Supp. 891, 895 (D. Or. 1977). It should be noted that, even though the fee may technically be awarded on the basis of the covered" claim, the plaintiff may still be able to recover fee for the time spent on the non-fee claim. *See generally* note 130 and accompanying text *infra*. Because of the "interrelated nature of the claims, it may be difficult in some cases to isolate the time spent on the "fee-claim. Lund v. Affleck, 442 F Supp. 1109, 1114 (D.R.I. 1977). Where there is no indication at all in the statute authorizing fee award nor in its legislative history that Congress intended to encourage joinder of fee and non-fee claims, the courts will exclude from the attorney fee computation the amount of time devoted to, for example, non-covered state law ground. *E.g.*, Baughman Wilson Freight Forwarding Co., 583 F.2d 1208 (3d Cir. 1978) (plaintiff who was successful on Sherman Act antitrust claim cannot recover counsel fees for time spent on related state law claim).

89. 592 F.2d 891 (5th Cir. 1979); *accord*, Dillon v. A.F.B.I.C. Dev. Corp., 597 F.2d 556 (5th Cir. 1979).

90. 592 F.2d at 892.

91. 42 U.S.C. § 3612(c) (1976).

92. The strong presumption in the 1976 legislation authorizing fees to prevailing plaintiff is based in part on Supreme Court decisions. Northcross v. Memphis

who can afford them, the Fifth Circuit said that ability to pay does not qualify as special circumstances under the 1976 legislation. *Bunn* and the related cases in this line of precedent hold that, even though one or more of the plaintiff's claims may be covered by other fee provisions, the courts should apply the more liberal standards of the 1976 Fees Act whenever the plaintiff prevails on a claim covered by it.[93]

D *Multi-Claim Litigation Involving Constitutional Issues*

The second category of cases to be explored involves those in which one or more of the plaintiff's claims rest upon a right secured or protected by the United States Constitution, while other claims are non-constitutional in nature. These cases are, of course, limited to those suits in which the defendants are public officials or other persons acting under color of state law [94] Although each of the statutory provisions covered by the 1976 Fees Act might be available in some state action cases, section 1983 is the most frequently invoked of these provisions when challenging the constitutionality of conduct taken under color of state law Because of its breadth and frequency of invocation, this discussion will focus on that provision of the civil rights laws.

The archetypal section 1983 case is a suit in which welfare recipients are challenging a local or state eligibility rule denying them some benefit as violative of the Federal Social Security Act (and implementing regulations) and of the equal protection or due

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Bd. of Educ., 412 U.S. 427 (1973); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).

93. *See* note 89 *supra*. *See also* Hughes Repko, 578 F.2d 483 (3d Cir. 1978); Wharton Knefel, 562 F.2d 550 (8th Cir. 1977). *Cf* Johnson Snyder, 470 F Supp. 972 (N.D. Ohio 1979) (violation of Fair Housing Act and 1866 Civil Rights Act); White Ed Miller & Sons, Inc., 457 F Supp. 148 (D. Neb. 1978) (discharge from employment due to race). *Contra*, Crumble Blumenthal, 549 F.2d 462 (7th Cir. 1977).

94. Although this article has assumed that the rule contained in the second and third sentences of footnote seven of the House Report would apply only in actions asserting constitutional claims against public officials or other persons acting under color of law it may be that the rule will also apply to actions against private persons under § 1985(3). *See* note 58 *supra; see* text accompanying note 21 *supra*. The argument would proceed something like this: T the extent that the scope of the fourteenth amendment rights is one element of § 1985(3) claim, as some courts have held, then the determination of that element would involve the decision of constitutional" question within the meaning of the second and third sentences of footnote seven. *See* note 57 *supra*. In such instances, the court should pretermit that determination if the case can be disposed of on wholly non-constitutional ground.

process clause of the fourteenth amendment.[95] In earlier years, the typical case involved a private company attacking a state agency rate-fixing order as violating state law and the fourteenth amendment.[96] It has long been the rule that, in such instances, the federal courts should decide the non-constitutional federal or state claims before reaching the constitutional issues.[97] "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."[98]

To date, the federal cases decided under the Fees Act have involved non-constitutional claims arising from both state and federal sources. The rule of decision for awarding attorney fees set out in the House Report does not distinguish between dispositive claims based on state or federal law For purposes of awarding attorney fees in this type of multi-claim litigation involving a federal constitutional issue, the House Report lumps together the cases involving non-constitutional federal claims with those rooted in state law What the report does do, however, is adopt as the rule of decision the test for pendent jurisdiction, formulated by the Supreme Court in the *Gibbs* and *Hagans* cases to determine when federal court plaintiffs may attach to their jurisdiction-conferring claims other contentions, either state or federal, which do not have an independent basis of jurisdiction.

1. Related Federal Claims

Before discussing the key cases that have been decided under the Act on this point, it is important to note one other consideration that affects the application of the pendent jurisdiction doctrine to the award of counsel fees under the 1976 Act. Many suits against non-federal governmental officials and others acting under color of state law are based on section 1983, a remedial provision

95. *E.g.*, Rosado Wyman, 397 U.S. 397 (1970); Hagans v. Lavine, 415 U.S. at 528.

96. Siler v. Louisville & N.R.R., 213 U.S. 175 (1909).

97 *Id.*, *accord*, Cincinnati Vester, 281 U.S. 439, 448-49 (1930); Township of Hillsborough Cromwell, 326 U.S. 620, 629 (1946). State courts have embraced the same rule when deciding federal constitutional issues in their tribunals. *E.g.*, Donadio Cunningham, 58 N.J. 309, 277 A.2d 375 (1971) (constitutional question is not to be decided unless absolutely imperative in the disposition of the litigation"); Binder v. Triangle Publications, Inc., 442 Pa. 319, 275 A.2d 53 (1973) (constitutional issues should not be resolved if it is not essential to determination of the case).

98. Burton United States, 196 U.S. 283 (1904); *accord*, 415 U.S. at 528 (non-constitutional federal statutory ground); Siler Louisville & N.R.R., 213 U.S. 175 (1909) (non-constitutional state law ground).

which authorizes suits for the deprivation of rights, privileges, or immunities secured by the Constitution and laws. "[99] The recent decision of the Supreme Court in *Chapman v Houston Welfare Rights Organization*[100] makes it perfectly plain that this provision is not the source of any rights, but is merely a remedial device to give plaintiffs a right of action for certain violations committed by persons acting under color of state law Although on numerous occasions in the past the Court has assumed that the phrase and laws" in section 1983 creates a private right of action for the violation of any federal statute,[101] five of the justices in *Chapman* apparently believed that the question was not yet settled.[102]

In contrast, the federal and state appellate courts expressly addressing that question have uniformly held that section 1983 au-

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99. 42 U.S.C. § 1983 (1976).

100. 441 U.S. 600 (1979).

101. *E.g.*, Edelman Jordan, 415 U.S. 651 (1974); Hagans v. Lavine, 415 U.S. at 528; Rosado Wyman, 397 U.S. 397 (1970); Citv of Greenwood Peacock, 384 U.S. 808 (1966). *But cf* Great Am. Fed. Sav & Loan Ass n Novotny 99 S. Ct. 2345 (1979).

102. Justice Stevens, writing for himself, the Chief Justice and Justices Rehnquist, Blackman, and Powell, was willing only to accept without deciding that the petitioners are correct in asserting that § 1983 provides cause of action for all federal statutorv claims. 441 U.S. at 617 In his concurring opinion (for himself, the Chief Justice, and Justice Rehnquist), Justice Powell held that and laws was "intended as no more than shorthand reference to the equal rights legislation enacted by Congress. *Id.* at 624. In contrast, four justices (Justice White concurring, and Justice Stewart, for himself, Justice Brennan, and Justice Marshall, dissenting) stated their view that § 1983 does embrace, as general matter, federal statutorv rights. *Id.* at 672. In footnote (from which Justices Brennan and Marshall disassociated themselves), of his dissenting opinion, Justice Stewart stated: "When state official is alleged to have violated federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983. *Id.* at 673 n.2. That statement became the premise for Justice Stewart' majority opinion in Great Am. Fed. Sav & Loan Ass v. Novotnv 99 S. Ct. 2345 (1979) (§ 1985(3) which derives from the same post Civil War statute as § 1983, does not provide remedy for certain violations of Title VII of the Civil Rights Act of 1964). Whether the *Novotny* decision will provide the basis for limiting the reach of § 1983 when federal statutorv rights are involved is, of course, unclear at this point. In dictum several years ago, the Court indicated that rights created bv Title II of the Civil Rights Act of 1964 (public accommodations) could not be asserted through § 1983 because Congress intended title II to be the exclusive remedv Adickes S.H. Kress & Co., 398 U.S. 144, 150 n.5 (1970). *But see* United States Johnson, 390 U.S. 563 (1968) (title II mav be the source of rights to enforce 18 U.S.C. § 241 (1976), the criminal counterpart of § 1983). In Gagne Maher, 594 F.2d 336 (2d Cir.), *cert. granted*, 100 S. Ct. 44 (1979), and Thiboutot State, 405 A.2d 230 (Me. 1979), *cert. granted*, 48 U.S.L.W 3460 (Jan. 22, 1980) (No. 79-838), the Supreme Court presently has the opportunitv to address the question whether and to what extent § 1983 reaches statutory claims.

thorizes private suits based on federal statutes against persons acting under color of state law [103] The legislative history of the 1976 Act indicates that Congress was well aware of these lower court decisions. Representative Robert Drinan, the floor manager of the bill in the House, stated: "Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights."[104] Similarly the Senate Report noted the availability of section 1983 in suits redressing violations of the Federal Constitution or laws."[105] The legislative history also contains several indirect references to the authority under section 1983 to initiate suits based on federal statutory violations.[106] Thus, in those circuits where section 1983 has

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103. Tongol Usery 601 F.2d 1091 (9th Cir. 1979) (action by beneficiaries of federal unemployment compensation law challenging the legality of federal regulation forbidding states to waive recoupment of overpaid benefits); Chase McMasters, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978) (action by tribal Indian against local officials for refusing to connect her property to water and sewer lines in violation of federal statute; in dictum, the Court suggested that § 1983 may not cover all federal statutes); Gonzalez Young, 560 F.2d 160 (3d Cir. 1977) (action by welfare recipient, based on Social Security Act, that state defendants illegally denied her emergency assistance); Sanders Conine, 506 F.2d 530 (10th Cir. 1974) (action by person in custody against state officials alleging violation of the federal extradition statute); Blue Craig, 505 F.2d 830 (4th Cir. 1974) (action by welfare recipients, under Social Security Act, challenging the failure of public officials to reimburse their transportation expenses in seeking medical assistance); Gomez Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969) (action by migrant workers against state officials and private persons for violating the Wagner-Peyser Act which provides standards for wages and working conditions); Bomar Keyes, 162 F.2d 136 (2d Cir. 1947) (action by school teacher alleging unlawful dismissal because of her federal jury service, based on provision in an Act to codify revise, and amend the laws relating to the judiciary of 1911, Pub. L. No. 61-475, § 275, 36 Stat. 1165 (formerly codified at 28 U.S.C. § 411)); Thiboutot State, 405 A.2d 230 (Me. 1979), *cert. granted*, 48 U.S.L.W 3460 (Jan. 22, 1980) (No. 79-838) (action challenging state welfare regulation reducing method of calculating payments as violative, *inter alia*, of federal welfare regulations); *see* Bond Stanton, 555 F.2d 172, 174 (7th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) (in deciding whether fees should be awarded under the 1976 Act in an action based on the Social Security Act, the Court noted congressional intent "that the [Fees] Act extend to statutory claims asserted under § 1983"); Randall v. Goldmark, 495 F.2d 356 (1st Cir. 1974) (per curiam) (the Court assumed that § 1983 created private right of action for violations of the Social Security Act). *Contra*, Wynn Indiana State Dep't of Pub. Welfare, 316 F Supp. 324 (N.D. Ind. 1970) (action by welfare recipients based on Social Security Act may not be brought pursuant to § 1983).

104. 122 CONG. REC. 35122 (1976) (At that point in the debate, Rep. Robert Drinan cited with approval the decision in Blue Craig, 505 F.2d 830 (4th Cir. 1974)).

105. S. REP NO. 1011, 94th Cong., 2d Sess. 4, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5911-12.

106. *See* 122 CONG. REC. 35128 (1976) (remarks of Rep. John Seiberling, the

been held to authorize suits based on statutory rights, the courts would not have to apply the two-pronged test set out in the House Report to award counsel fees because the plaintiff would have prevailed on a claim arising under section 1983, a statute expressly covered by the Fees Act.

The early decisions under the Fees Act followed this reasoning. In *Gary W v. Louisiana*,[107] the plaintiffs represented a class of children no longer in the custody of their parents, either because of a court order or because the parents had voluntarily permitted the state to assume custody The suit attacked the conditions at the residential facilities to which the children had been assigned, especially those located beyond the borders of Louisiana. The plaintiffs rested their claims upon the equal protection clause of the fourteenth amendment and the Social Security Act through which the state received funds for the proper care of the foster children. The plaintiffs moved for an award of attorney fees after the suit concluded in their favor based upon a federal statutory claim.

Similarly in *La Raza Unida v. Volpe* [108] an organization of Mexican-Americans sued state and federal officials to enjoin the construction of a highway which would displace them from their homes. The plaintiff alleged several claims based on the federal constitution, federal statutes, and state law The district court issued a preliminary injunction based on a federal statutory claim which was affirmed on appeal. After the appellate decision, the plans for the highway "laid largely dormant."[109] The plaintiff then moved for an award of attorney fees. In both *Gary W* and *La Raza Unida*, the district courts held that section 1983 authorized private suits to enforce federal statutory rights, and that Congress intended the 1976 Fees Act to cover such suits. Counsel fees were awarded in both instances. Decisions subsequent to these cases have followed this approach, although not always expressly [110]

It may be, however that the Supreme Court will eventually hold: (1) Section 1983 does not create a right of action for violations

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chief sponsor of similar bill, in support of S. 2278); 122 CONG. REC. 33312-14 (1976) (remarks of Sen. Edward M. Kennedy, one of the Senate floor leaders for the bill).

107 429 F Supp. 711 (E.D. La. 1977).

108. 440 F Supp. 904 (N.D. Cal. 1977).

109. *Id.* at 906.

110. *E.g.*, Gates Collier, 559 F.2d 241 (5th Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

of federal statutory rights; or (2) it covers only equal rights legislation enacted by Congress [111] or (3) it does not even cover "equal rights statutes which contain a detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims."[112] At such time, or in those circuits where section 1983 has been so limited, the courts will need to follow a three-step process in awarding fees under the Act where federal constitutional and statutory claims are joined together in one action. First, the court will have to decide whether the statute which allegedly is the source of the plaintiff's claim provides, expressly or impliedly a right of action.[113] Second, it must decide whether it has jurisdiction over that claim, either through the pendent jurisdiction doctrine or by an independent grant in the Judicial Code. Third, if the court disposes of the case on the non-constitutional statutory ground, then it will have to apply the two-pronged test for awarding fees set out in the House Report (whether or not the statutory claim rests on an independent jurisdictional ground).

2. Related State Claims

(a) *Background*

Frequently a plaintiff will seek to join a state claim to her federal constitutional claim in a federal court. Over 70 years ago, the Supreme Court, without reference to the *Osborn* case, to article III, or to the jurisdictional statute, approved the practice in *Siler v. Louisville & Nashville Railroad*.[114] In that case, the plaintiff railroad company sued to enjoin a maximum rate order of the Kentucky Railroad Commission, alleging that it violated several provisions of the federal Constitution and exceeded the authority conferred upon the Commission by the state enabling statute. The lower federal court ruled for the plaintiff based on its consitututional claims.

The Supreme Court affirmed the judgment below solely on

111. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 624 (1979) (Powell, J., concurring).

112. Great Am. Fed. Sav. & Loan Ass Novotny, 99 S. Ct. 2345, 2349 (1979).

113. *See generally* Cort Ash, 422 U.S. 66 (1975). *Compare* Cannon v. University of Chicago, 441 U.S. 677 (1979) *with* Touche Ross & Co. Redington, 99 S. Ct. 2479 (1979) *and* Transamerica Mortgage Advisors, Inc. (TAMA) Lewis, 100 S. Ct. 242 (1979).

114. 213 U.S. 175 (1909).

the basis of the state law ground, which the trial court did not reach, rather than to unnecessarily decide the various constitutional questions appearing in the record."[115] It held that federal courts, once they acquire jurisdiction over a suit, had the right to decide all the questions in the case and may dispose of the litigation on local or state questions only "[116] Foreshadowing the holding in *Hurn*[117] the Court noted in dictum that the trial court could also have disposed of the case on the state law ground even though it decided the federal questions adversely to the party raising them."[118] Through the years, the principles of *Siler* have not been disturbed. As noted earlier in discussing *Gibbs* the only adjustment has been to expand federal jurisdiction by liberalizing the test for joining pendent claims.

(b) *Application of the Rule*

Because state claims are not covered expressly by the Fees Act, it becomes necessary to determine whether and under what circumstances counsel fees may be awarded in the *Siler*-type case in which a state law claim is joined to a federal constitutional claim. As previously noted, the House Report provides that fees may be awarded in cases like *Siler* where the court disposes of the suit on the state law ground, while pretermitting the federal constitutional issues. Congress adopted the two-pronged test of pendent

115. *Id.* at 193. Over 20 years earlier, the Court had adopted similar approach when state law and federal constitutional questions arise by way of defense in suits removed from state to federal court. Santa Clara County Southern P.R.R., 118 U.S. 394 (1886). "These questions [involving fourteenth amendment claims] belong to class which this court should not decide unless their determination is essential to the disposal of the case in which they arise. *Id.* at 410. In *Santa Clara*, the Court pretermitted the constitutional questions, deciding the case on state law grounds in favor of the defendant.

116. 213 U.S. at 191. It appears that *Siler* was the first case in which the Supreme Court squarely addressed the issue whether, in an original suit filed in federal court based on federal question jurisdiction, the plaintiff may append related state claim and have judgment on it. Much earlier, however, the Court had approved such practice in cases removed from state court to federal trial court. *See* Railroad Co. v. Mississippi, 102 U.S. 135 (1880). Perceiving no distinction between original and removed suits for jurisdictional purposes, federal circuit court could, in 1887, confidently assert: "It is the settled law of the supreme court that, when case is presented involving federal question, the jurisdiction of the court attaches to the whole case, and is not limited to the mere decision of that single federal question. Omaha Horse Ry Cable Tram-Way Co., 32 F 727 729 (D. Neb. 1887) (footnote omitted).

117 289 U.S. at 238.

118. *Id.*

jurisdiction for application of the Fees Act in this context.[119] But unless the defendant failed to move to dismiss for lack of jurisdiction, the court, by the time the case concluded, will have already applied those standards in taking jurisdiction over the state claim at the outset of the litigation. Thus, if the court enters judgment for the plaintiff on the state claim, the award of fees should follow automatically because the court has already applied the *Gibbs-Hagans* test. That is, the district judge will have determined that the plaintiff's constitutional claim is not insubstantial" and that the constitutional and state claims arise out of a common nucleus of operative fact."[120]

In an early and leading *Siler*-type case under the Fees Act, the United States Court of Appeals for the Sixth Circuit essentially followed that line of reasoning. In *Seals v. Quarterly County Court*[121] black plaintiffs sued to enjoin an at-large system of apportionment for seats on the Quarterly Court, the elected governing body for counties in Tennessee. The plaintiffs alleged that the plan diluted minority voting strength in violation of the fourteenth and fifteenth amendments to the United States Constitution. The district court dismissed the complaint for failure to state a claim, a judgment which was reversed by the court of appeals.[122] When the trial judge again dismissed the complaint on the merits after remand, the court of appeals again reversed.[123] On this occasion, the appellate court reserved decision on the constitutional questions to permit the plaintiffs to attack the validity of the apportionment plan based on state law as interpreted by a recent decision of the Tennessee Supreme Court. On the second remand, the district judge invalidated the plan based on state law but ruled against the plaintiffs on their federal constitutional claims. The court also denied request for an award of counsel fees.

The plaintiffs took their third appeal to the Sixth Circuit, this time on the attorney fee issue. First, the court held that the district judge should not have decided the federal constitutional issue because the state law ground was dispositive. Second, it recognized the difficulty of the attorney fee issue, but noted the explicit language in the House Report addressing that question:

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119. H.R. REP *supra* note 5, at 4 n.7· *see generally* text accompanying notes 78-82 *supra*.

120. UMW Gibbs, 383 U.S. at 725.

121. 562 F.2d 390 (6th Cir. 1977).

122. 496 F.2d 76 (6th Cir. 1974).

123. 526 F.2d 216 (6th Cir. 1975).

> Nonetheless, the language [of the House Report] appears to us to be a clear-cut indication that Congress considered the exact problem with which we are now confronted and provided an express indication as to how the general language of the 1976 statute was intended to be applied. Under such circumstance (relatively rare in this court's experience), we, of course, follow congressional intent.[124]

It then proceeded to apply the two-pronged test, noting that it had already discussed that issue in its opinion on the second appeal. The court thus repeated its previous holding that the plaintiffs constitutional claims were substantial" and that the federal and state claims arose out of a common nucleus of operative fact."[125] Having made that determination, as it were for the second time, it held that attorney fees were appropriate under the 1976 Act. The court remanded the case for the third time to the district judge to assess the amount of the fees.

Despite the certainty with which the court of appeals reached its conclusion based entirely on the legislative history of the Act, one commentator has observed that "it is unlikely that Congress intended the fee provision to be used in this manner "[126] That obser vation does not take full account of the legislative history relied on by the Sixth Circuit, especially the references to the *Gibbs* case in footnote 7 of the House Report. In relying on the *Gibbs* standards for pendent jurisdiction, the Congress recognized that state claims are properly within the parameters of the pendent jurisdiction doctrine as well as federal statutory claims under *Hagans* The *Seals* court found that reference to be a clear-cut indication that Congress intended the courts to award fees to prevailing plaintiffs in the *Siler*-type case.[127] Any suggestion that Congress did not so intend is a misreading of the legislative history

The United States Court of Appeals for the Eighth Circuit has followed the *Seals* case in *Siler*-type litigation. In *Kimbrough v. Arkansas Activities Association*,[128] a black high school student sued to enjoin the defendant association from preventing him from playing football. The student alleged that the eligibility rule of the association violated the equal protection and due process clauses of

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124. 562 F.2d at 394.

125. *Id.* at 392.

126. Lipson, *Beyond Alyeska—Judicial Response to the Civil Rights Attorney Fees Act*, 22 ST. LOUIS U.L.J. 243, 248-49 n.35 (1978).

127 562 F.2d at 394.

128. 574 F.2d 423 (8th Cir. 1978).

the fourteenth amendment, and section 1981 of title 42. In granting a preliminary injunction, the district court held that, because the defendant's eligibility rule was ambiguous, the plaintiff was not barred from playing football. Deciding the case on this state" law ground, the judge did not reach the plaintiff's federal constitutional or statutory claims. It denied, however, the plaintiff's request for counsel fees because the plaintiff did not prevail on a claim covered by the 1976 Act.

On appeal, the Eighth Circuit reversed the denial of counsel fees. It applied the two-pronged test of substantiality and common nucleus set out in *Seals* and in the House Report, which the court said contained an unambiguous expression of congressional intent."[129] With regard to these standards, the court of appeals noted that the district court had implicitly made the appropriate determinations because it disposed of the case on a non-federal ground. Thus *Kimbrough*, like *Seals*, applied the Fees Act in a relatively automatic fashion because the two-pronged test had already been satisfied when the district court asserted jurisdiction over the non-federal claim and decided the case on that ground.

While the United States Courts of Appeals for the Sixth and Eighth Circuits have followed the congressional rule,[130] one district court has deviated from it. In *Martin v. Hancock*,[131] the plaintiff sued three Minneapolis police officers under section 1983 for illegal arrest, unreasonable force in making the arrest, and failing to keep a police dog under control. The jury found for the plaintiff on the last claim and awarded him $2,500. The judge denied a request for counsel fees, characterizing the case as "no

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129. *Id.* at 427.

130. 574 F.2d at 423; 562 F.2d at 390. A more subtle question, which will not be explored at length in this article, is whether the court, in calculating the counsel fee to be awarded the plaintiff, should include the time spent on the constitutional issue even though it did not provide basis for the judgment. There is dictum in Brown Bathke, 588 F.2d 634, 637 n.5 (8th Cir. 1978), which states that the trial judge should include such time otherwise the plaintiff would be penalized for asserting constitutional right. Putting aside those multi-claim cases involving constitutional rights, the defendants have argued unsuccessfully for per se rule which would forbid compensating the plaintiff for legal services on claims which do not support the judgment. Although the courts have rejected an absolute rule, they have stated that *"the degree to which counsel prevailed in the lawsuit* has become factor in determining the appropriate amount of attorneys fees to be awarded. Jones Diamond, 594 F.2d 997 1027 (5th Cir. 1979) (emphasis in original); *accord*, Brown Bathke, 588 F.2d at 634 (so long as claim is not "frivolous, the plaintiff may receive some compensation for the legal work underlying it); *cf* Dawson Pastrick, 600 F.2d 70 (7th Cir. 1979) (plaintiff need not prevail on all issues to recover fees).

131. 466 F Supp. 454 (D. Minn. 1979).

more than a common law negligence dogbite case, clothed as a section 1983 constitutional claim."[132] That holding misreads the legislative history of the Act, for nowhere does it give the court discretion to pick and choose among the kind of violations protected by section 1983 for which fees may be awarded. But more important for our purposes here, even if the claim upon which the jury returned its verdict is properly characterized as a common law negligence claim, the Fees Act would still be applicable because the plaintiff alleged a section 1983 constitutional claim which the judge could find to be "not insubstantial, and arose out of a common nucleus of operative fact."[133]

On the other hand, cases like *Martin*[134] lend some support to the fears expressed by the defendant in *Seals* (and in *Siler* and *Gibbs*) that the federal courts will now become the forum for "purely state litigation whenever the defendants have acted under color of law [135] The Sixth Circuit in *Seals* rejected that argument because it believed the two-pronged test provided a sufficient safeguard.[136] But if Justice Rehnquist is right that all the plaintiff need do is plead his [constitutional] claim with a straight face,"[137] then perhaps those safeguards will not deter the "federalizing" of nearly

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132. *Id.* at 456; *cf* Zarcone Perry, 581 F.2d 1039, 1044 (2d Cir. 1978) (in affirming denial of attorney fees in case where judge ordered vendor arrested and handcuffed for serving putrid" coffee, the court of appeals characterized the plaintiff' case as an essentially private injury echoing the district judge description of it as "basically tort action for false arrest and imprisonment couched in the language of the constitutional right to due process. Zarcone Perry, 438 F Supp. 788, 790 (E.D.N.Y. 1977)). T the extent that cases like *Zarcone* and Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979), have denied prevailing plaintiff an award of attorney fees because the damage remedy was sufficient to attract competent counsel, those decisions are contrary to the legislative history of the Fees Act. "Of course, it should be noted that the mere recovery of damages should not preclude the awarding of counsel fees. H.R. REP *supra* note 5, at 8; *accord*, Sargeant Sharp, 579 F.2d 645 (1st Cir. 1978). For critical discussion of the *Zarcone* case, see Note, *The Civil Rights Attorney Fees Awards Act of 1976*, 52 ST. JOHN S L. REV 562, 579-83 (1978).

133. That the case ultimately may be decided by jury should not obscure the analysis. The question whether pendent jurisdiction exists is legal issue to be decided, if raised by the defendant, by the judge at an early stage in the litigation. Thus, at the time the jury returns verdict for the plaintiff, the court will have already applied the two-pronged test, or if not, the defendant will have waived it. Rosado Wyman, 397 U.S. 397 (1970); Mollan Torrance, 22 U.S. (9 Wheat.) 537 (1824).

134. 466 F Supp. at 454.

135. 562 F.2d at 394.

136. *See generally* note 132 *supra* and accompanying text.

137 415 U.S. at 564 (Rehnquist, J., dissenting).

all claims against state or local officials or others acting under color of law [138]

(c) *Abstention*

Before concluding this discussion, one other problem should be noted. When the state claim, which is pendent to a federal constitutional claim, involves an unsettled or novel question, the federal court may be required to abstain" from deciding it while the parties repair to the state court for a definitive ruling on the state law issue.[139] If the state court decision disposes of the case (or even if it does not), the question arises whether the federal plaintiff may recover counsel fees for the expense of the legal ser vices rendered in the state proceeding or in the federal proceeding prior to the abstention order Although no case has been found which explicitly addresses this point under the 1976 Fees Act, the decision in *Chance v. Board of Examiners*[140] does, without much discussion, examine part of the problem. The *Chance* litigation challenged as unconstitutional the selection procedures for supervisory employees in the New York City school system. The plaintiffs

138. Although this discussion has focused on the award of fees in pendent claim cases arising under § 1983, word should be said about so-called pendent party suits, matter which the Supreme Court has characterized as subtle and complex question with far-reaching implications. Moor County of Alameda, 411 U.S. 693, 715 (1973). *See generally* note 9 and accompanying text *supra*. Many of the pendent party problems under § 1983, thought to be created by Aldinger Howard, 427 U.S. 1 (1976), have largely disappeared in the wake of Monell Dep't of Social Servs., 436 U.S. 658 (1978). It is possible, however, that some problems linger in the post-*Monell* world. Assume, for example, that plaintiff asserts § 1983 constitutional claim against one defendant and pendent state or federal claim against both defendants. Assume further that the plaintiff prevails on the pendent claim. May the plaintiff now recover counsel fees against both defendants? Since the legislatively determined rule of decision under the Fees Act is directed only at *claims*, the answer would seem to be yes. *See* Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979) (in an action by an "illegal" alien challenging the calculation and reduction of welfare benefits, fees were awarded against state as well as county officials based on pendent claim, even though the plaintiff asserted no independent basis of jurisdiction against the state defendant). So long as one claim raises constitutional question and the other is non-constitutional in nature, the two-pronged test would apply even though the constitutional claim is asserted against only one defendant. The premise of the Fees Act, as it was of *Gibbs*, is that the entire litigation (pendent claims, pendent parties, and all) constitutes one constitutional case, and the Fees Act should be applied accordingly

139. Railroad Comm Pullman Co., 312 U.S. 496 (1941). The federal plaintiff may, of course, reserve the federal questions for later decision by the federal court after completion of the state proceeding. England Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

140. 561 F.2d 1079 (2d Cir. 1977).

prevailed in the early stages of the law suit and received their counsel fees. The later stages of the litigation focused on the nature and scope of permanent prospective relief. Ultimately the parties offered the district judge two alternative plans for resolving the relief question and disposing of the litigation. Neither option raised any federal constitutional issue, but the plan approved by the district court raised serious issues under state law The court of appeals reversed the district court judgment on the ground that the resolution of the state law questions should be determined by the state courts. It ordered the district judge not to decide the state law issues, remitting the parties to the state courts to contest any permanent plan put into effect by the defendants.[141] After remand, the plaintiffs moved for their counsel fees under the 1976 Act. The district court denied an award because the plaintiffs did not "prevail" in light of the court of appeals direction to relinquish jurisdiction over that part of the case.[142]

In addition to the *Chance* case, closely analogous authority is available. In *Brown v. Bathke* [143] an unmarried teacher brought suit in federal court against public school officials for dismissing her from her job when she became pregnant. After she prevailed on her procedural due process claim, she moved for an award of attor ney fees under the 1976 Act, including the cost of legal assistance in proceedings before a state human rights agency and in the state courts.[144] The federal judge made a partial award for the cost of legal services at the state level, which the court of appeals affirmed without much discussion, except to note that a prevailing plaintiff under the 1976 Act may recover counsel fees for services provided "in other related proceedings."[145]

Similarly in *Carey v New York Gaslight Club Inc.* [146] the plaintiff filed a complaint with the United States Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, alleging racial discrimination in the refusal of the defendant to hire her as a waitress. Under the federal statute, the EEOC is required to refer the complaint to the state civil

141. *Id.*

142. 472 F Supp. 1238 (S.D.N.Y. 1979).

143. 588 F.2d 634 (8th Cir. 1978).

144. It is unclear from the opinion how the state proceedings began. The plaintiff may have filed discrimination complaint with the state human rights agency, or she may have filed one with the federal agency, which in turn deferred to the state forum.

145. 588 F.2d at 638.

146. 598 F.2d 1253 (2d Cir.), *cert. granted*, 100 S. Ct. 204 (1979).

rights agency if it provides comparable remedies as the federal law In this case, the EEOC referred Ms. Carey s complaint to the appropriate New York agency which eventually found discrimination. Shortly before the New York appellate court affirmed the agency order [147] the plaintiff filed suit in the federal court seeking an award of attorney fees incurred before the state agency The district judge denied the application, which the court of appeals reversed. It held that the attorney fees provision in title VII, which applies to any action or proceeding under the statute, authorizes an award for the legal services rendered before the state agency to which the plaintiff was required to go under the law [148] The key statutory words or proceeding," upon which the court of appeals in *Carey* relied, are also found in the 1976 Fees Act, which employs the same phrase, any action or proceeding."[149]

In contrast, a district judge has refused to award counsel fees for legal services rendered in related state proceedings. In *Burchett v. Bower* [150] the plaintiff commenced an action in federal court to restrain state officials from transferring him back to prison from a state mental health hospital where he had been sent for treatment. The plaintiff claimed that the defendants should not affect the transfer without giving him a hearing on the question whether the medical treatment has been completed. The district judge awarded the plaintiff counsel fees under the 1976 Act for prevailing on his section 1983 claim in the federal court. The judge, however refused to make any award for the related state proceedings on the ground that he had no way of evaluating the legal services rendered in the other forum.

While title VII required the plaintiff in *Carey* to proceed through the state agency it is not clear from the decisions in *Brown* and *Burchett* why those plaintiffs made appearances in state forums. In any event, the results in *Brown* and *Carey* rest on a firmer footing than the decision in *Burchett* and should be applied to fee claims under the 1976 Act by federal plaintiffs who are required by the abstention doctrine to litigate at least part of their lawsuit in state court. There is no principled difference, for attor ney fee purposes, between the plaintiff who is compelled to seek a

147. New York Gaslight Club, Inc. New York State Human Rights Appeal Bd., 59 App. Div 2d 852, 399 N.Y.S.2d 158 (1977), *leave to appeal denied*, 43 N.Y.2d 648, 403 N.Y.S.2d 1026, 374 N.E.2d 630 (1978).

148. 42 U.S.C. § 2000e-5(k) (1976).

149. *Id.* § 1988.

150. 470 F Supp. 1170 (D. Ariz. 1979).

state remedy because of a statutory requirement, as in *Carey* and the plaintiff who must do so because of a judicially-created rule, as in abstention cases. Allowing recovery for the cost of the state proceeding, especially if it disposes of the litigation, is based on the same considerations which moved Congress to permit fees under the 1976 Act on a pendent state claim actually litigated in the federal court. The congressional judgment seeks to accommodate the judicially-created rule requiring the resolution of cases on nonconstitutional grounds whenever possible to avoid deciding constitutional questions.[151] Applying that determination to the judicially-created doctrine of abstention serves precisely the same values which Congress expressly recognized in the Fees Act.

The rule in *Burchett* refusing to award fees because the federal judge cannot evaluate the services rendered in the state tribunal, is unsupportable. Apart from those cases where the judge does precisely that for legal services provided before federal administrative agencies,[152] the district judge operates under a similar disability in evaluating fee claims for pre-trial work, most of which is performed without the presence of the judge. Yet it would hardly be an appropriate rule to limit attorney fees to "in-court" legal assistance. Here, as elsewhere, the judge must rely on sworn testimony scrutinized with care by the opposing counsel through the normal operation of the adversary system.

Finally in abstention cases, where the state court decision resolves the dispute, the appropriate procedure for recovering counsel fees would be for the plaintiff to ask the federal court, as the plaintiff did in *Carey* to make the award. Of course, the plaintiff always has the option under the abstention doctrine to submit the entire case, including the federal claims, to the state court for final adjudication.[153] Since the 1976 Act authorizes the state court to award attorney fees,[154] a prevailing plaintiff would petition the state judge to make the award. If the state judgment rests on a state ground, then the state court would apply the two-pronged test of substantiality and common nucleus adopted by the Congress for such purposes.[155]

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151. *See* text accompanying notes 114-38 *supra*.

152. *E.g.*, Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977).

153. England Medical Examiners, 375 U.S. 411 (1964).

154. *See* text accompanying notes 187-89 *infra*.

155. *See* text accompanying notes 190-208 *infra*.

3. Cases Misapplying the Rule

A third line of decisions in multi-claim cases involving constitutional issues embraces those where the courts unnecessarily applied the two-pronged test to determine fee awards. The first case was *Southeast Legal Defense Group v Adams*[156] where the plaintiff sued to enjoin state and federal officials from locating a highway Mt. Hood Freeway through Portland, Oregon. They asserted twelve claims based on six federal statutes, including section 1983, and the fifth and fourteenth amendments. The court preliminarily enjoined the defendants from building the highway because they had failed to comply with the Federal Aid Highway Act which required a hearing before determining highway location. Although the defendants abandoned the project, they appealed the district court judgment. The court of appeals dismissed the appeal as moot.[157] The district court then dismissed the remainder of the plaintiffs claims as moot, and denied their request for counsel fees.

The plaintiffs noted their appeal from the denial of fees, and, during its pendency Congress enacted the 1976 Fees Act. The court of appeals then remanded the case for reconsideration of the counsel fee request in light of the new Act.[158] On remand, the district court applied the two-pronged test in footnote 7 of the House Report to reach the proper result.[159] Finding the requisite substantiality and common nucleus of operative fact, the district judge awarded counsel fees to the plaintiffs. It was, however, unnecessary to invoke those standards because the federal statutory claim, upon which the court entered a preliminary injunction, is embraced by section 1983, a statute covered by the Fees Awards Act.[160] It must be recalled that, under the Act, the two-pronged

156. 436 F Supp. 891 (D. Or. 1977).

157. Unreported order of Ninth Circuit Court of Appeals dated September 13, 1976. 436 F Supp. at 894.

158. *Id.*

159. The court rejected the fee claim against the federal defendants because the Fees Act does not specifically provide for recovery against the United States as required. *Id.* at 893 (citing 28 U.S.C. § 2412 (1976)).

160. The district court' analysis is somewhat confusing because, having applied the two-pronged test in order to assert jurisdiction over the pendent statutory claims, it then noted that it was not necessary to decide whether § 1983 extends to violations of federal statutes. *Id.* at 894 n.6. That reasoning is flawed because the plaintiff' right of action, as distinguished from the jurisdiction of the federal court to hear it, must derive from some source. It must come either from the statute itself as an express or implied claim for relief or from § 1983. *See* note 113 *supra*. If the district court did imply right of action under the Federal Aid Highway Act, then that

test is to be applied only when the non-constitutional claim is *not* covered by the statute.

Similarly the United States Court of Appeals for the First Circuit unnecessarily applied the two-pronged analysis in *Lund v. Affleck*,[161] which involved three cases consolidated for purposes of determining whether counsel fees should be awarded. In one suit, unwed mothers challenged a state welfare regulation which denied benefits if a man lived in the house, whether or not he furnished any monetary support for the family In the second case, a minor pregnant female challenged a state welfare regulation which provided higher benefits for adult pregnant women. The plaintiff in the third case sued to enforce an earlier consent decree which provided for the proper care and treatment of incarcerated juveniles. In all three cases, the plaintiffs instituted the litigation under section 1983, alleging constitutional and statutory violations, and all were concluded on non-constitutional grounds.

The district court applied the two-pronged test to determine whether fees should be awarded, noting that it had already applied that test in at least one of the consolidated cases to determine jurisdiction at an earlier stage of the litigation. As in the *Adams* case, however, it was unnecessary to apply the two-pronged standard for attorney fee purposes because the non-constitutional claims, upon which the judgments on the merits rested, were within the scope of section 1983.[162] The district court did not fully appreciate that the *Gibbs-Hagans* criteria adopted by Congress is to be applied only when the non-constitutional claim is *not* covered by the Fees Act.[163] In a short, uncritical opinion, the court of appeals affirmed the judgment and approved the analysis of the district judge.

The district court in *Affleck* applied the two-pronged test apparently because it read footnote 7 in the House Report as casting "some doubt" on the view that section 1983 provides a remedy for federal statutory claims.[164] If the footnote is read in isolation from

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claim would be non-fee claim, making appropriate the application of the two-pronged test. But the opinion is not clear. Perhaps the court' failure to separate jurisdictional issues from rights of action lead it to misapply the two-pronged standard for awarding attorney fees. For similar error in analysis, see White Beal, 447 F Supp. 788 (E.D. Pa. 1978).

161. 587 F.2d 75 (1st Cir. 1978).

162. In fairness to the district court, it appears that the First Circuit Court of Appeals has never expressly held that § 1983 includes all or most federal statutory claims, although it has made that assumption on numerous occasions. *E.g.*, Randall Goldmark, 495 F.2d 356 (1st Cir. 1974).

163. 415 U.S. at 528; 383 U.S. at 715.

164. 442 F Supp. 1109, 1114 (D.R.I. 1977).

the rest of the legislative history and if the citation to *Gibbs* is ignored, it is possible to reach that conclusion. As noted above, however, the legislative history is crystal clear that Congress was fully aware that "Section 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights."[165] Had the district judge and the court of appeals in *Affleck* examined the legislative history of the Act more carefully they might well have concluded that Congress intended the courts to give an expansive reading of [section] 1983 and the Fees Act."[166]

Although the courts in *Adams* and *Affleck* improperly applied the two-pronged test to non-constitutional claims under section 1983 for attorney fee purposes, there are some instances when such post-judgment evaluation is arguably appropriate. The most obvious circumstance is when the district judge (or on occasion, an appellate court) has not, either expressly or impliedly applied the *Gibbs-Hagans* pendent jurisdiction doctrine because the case concluded at an early stage of the litigation. The legislative history of the 1976 Act is clear that attorney fees may be awarded if a case brought under a covered statute terminates in the plaintiffs favor prior to the entry of an order after a full evidentiary hearing.[167] Cases settled by consent decree, for example, are eligible for counsel fees.[168] When multi-claim litigation under section 1983 involving constitutional and non-constitutional claims terminates by consent judgment, the court, upon plaintiff's motion for counsel fees, must determine whether jurisdiction exists over the action prior to the award of fees. In such instances, the court is applying the two-pronged test for jurisdictional purposes as a prerequisite to awarding attorney fees to the plaintiff. Thus, it may fairly be said that, under these special circumstances, the court should apply the

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165. 122 CONG. REC. 35122 (1976); *see id.* at 33312-14.

166. 442 F Supp. at 1114. The courts have held that the Fees Act should be liberally construed. 562 F.2d at 393; Mid-Hudson Legal Servs., Inc. G & U, Inc., 578 F.2d 34, 37 (2d Cir. 1978). "The Act itself could not be broader. 437 U.S. at 694.

167 H.R. REP *supra* note 5, at 7; S. REP *supra* note 105, at 5, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5912-13.

168. Even if the plaintiff does not obtain formal decree and even if formal judgment of dismissal is entered for the defendant, the plaintiff may nonetheless be entitled to fees if the lawsuit acted as catalyst" for changing the defendant' practices. *E.g.*, Ross Horn, 598 F.2d 1312 (3d Cir. 1979). *Cf* Tobeluk Lind, 589 P 2d 873 (Alaska Sup. Ct. 1979) (plaintiffs could not recover their fees because, the court found, their suit was not the catalyst for the defendant' remedial action).

test at the time of awarding fees even though the non-constitutional claims are clearly within the scope of section 1983.

Gagne v. Maher[169] fully illustrates the point. In that case, a class of welfare recipients challenged the method of calculating aid to families with dependent children which was employed by the defendant officials. The plaintiffs attacked the methodology on constitutional (equal protection and due process) and statutory (Social Security Act) grounds. Before trial, the parties entered into a consent decree. Upon application for fees, the district judge applied the two-pronged analysis in disposing of the counsel fee issue. The court of appeals affirmed the fees award, approving the district court's application of the *Gibbs-Hagans* standards for pendent jurisdiction. Although the court erroneously described the statutory right of action as a non-fee claim, it did appropriately inquire into the jurisdictional prerequisite for the lawsuit, thus providing a basis upon which to award fees in settled cases.[170]

4. Exhaustion of Remedies

Although the Supreme Court has not required plaintiffs who assert constitutional claims through section 1983 to exhaust their state administrative[171] or judicial[172] remedies before invoking the

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169. Gagne v. Maher, 594 F.2d 336 (2d Cir.), *cert. granted*, 100 S. Ct. 44 (1979); *see* White v. Beal, 447 F Supp. 788 (E.D. Pa. 1978).

170. In *White*, the plaintiffs sued state welfare officials for refusing to reimburse the cost of eyeglasses. They alleged violations of the due process and equal protection clauses of the fourteenth amendment, and of the Social Security Act, basing their claims on § 1983. In an earlier judgment, the district court enjoined the defendants from continuing to deny payments as violation of the Social Security Act. White v Beal, 413 F Supp. 1141 (E.D. Pa. 1976), *aff'd*, 555 F.2d 1146 (3d Cir. 1977). Upon plaintiffs motion for their counsel fees, the trial judge referred to the statutory violation as non-fee claim even though it was brought into the suit through § 1983, statute covered by the Fees Act. Unlike *Gagne*, however, it was unnecessary in *White* to apply the two-pronged test for fee purposes because the plaintiff prevailed on claim covered by the statute after full adjudication. *But see* Cook v. Ochsner Foundation Hosp., 559 F.2d 270, 273 n.6 (5th Cir. 1977) (1976 Fees Act not applicable if consent decree based only on federal statutory claim for which court implied right of action) (dictum). *Cf* Barrett Kalinowski, 458 F Supp. 689 (M.D. Pa. 1978) (preliminary consent decree based in part on state law over which the judge ultimately declined jurisdiction; in determining whether the plaintiff is prevailing party under the 1976 Act, the court cannot consider the pendent state claims) (dictum).

171. McNeese Board of Educ., 373 U.S. 668 (1963).

172. Monroe v. Pape, 365 U.S. 167 (1961). Although plaintiff asserting constitutional claim through § 1983 against state officials need not exhaust state judicial remedies, the federal district court may be required to apply the abstention doctrine.

jurisdiction of the federal court, it has not yet addressed that question with regard to federal statutory claims asserted through section 1983. Indeed, as noted earlier the Court is yet to hold that section 1983 provides a remedy for all statutorily created claims.[173] In a recent district court opinion, the judge did require the plaintiff to exhaust state administrative remedies in that context. In *Harris v. Campbell*,[174] an emotionally disturbed child, through his mother, brought suit against state and local officials for failing to provide him with an equal educational opportunity The plaintiff alleged violations of the federal Education for All Handicapped Children Act of 1975,[175] the Rehabilitation Act of 1973,[176] the equal protection clause of the fourteenth amendment, section 1983, and various provisions of state law The district court held that the plaintiff must first exhaust his state administrative remedies under the Handicapped Children Act before bringing suit in federal court. The judge further held that the other federal claims are premature and that the dismissal of the federal claims precluded the exercise of pendent jurisdiction over the state claims. The issue of attorney fees under the 1976 Act was not discussed.

As in the abstention area, no case has been located which discusses the application of the 1976 Fees Act to cases where exhaustion of state remedies is required. Similarly as in the abstention area, closely analogous authority under Title VII of the Civil Rights Act of 1964 is available. Examination of the leading case, *Carey v. New York Gaslight Club Inc.* [177] will not be repeated here as it was adequately discussed in the preceding section. Suffice it to say here that fees under the 1976 Act should be available when the federal plaintiff is required to exhaust her state or local administrative remedies as a prerequisite to bringing an action in federal court. The reasons which support that conclusion under title VII, as interpreted in *Carey* and which were discussed in connection with abstention, are equally applicable here. The legislative history

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Harrison v. NAACP 360 U.S. 167 (1959); *see* notes 139-55 *supra*. The Court has not addressed the exhaustion issue in the context of the other statutes covered by the 1976 Fees Act, except to note in dictum that exhaustion of federal administrative remedies is not required in suits brought under Title IX of the Education Amendments of 1972. Cannon University of Chicago, 441 U.S. 677, 706-07 n.41 (1979).

173. *See* text accompanying notes 100-02 *supra*.

174. 472 F Supp. 51 (E.D. Va. 1979).

175. *Id.* at 52.

176. *Id.* at 55.

177 598 F.2d 1253 (2d Cir.), *cert. granted*, 100 S. Ct. 204 (1979).

states,[178] and the courts have affirmed,[179] the view that the 1976 Act should be construed as title VII has been interpreted. Indeed, the key language of the 1976 Act is identical to the relevant words of title VII. In such cases, the courts should follow the *Carey* case in claims arising under the 1976 Act where the plaintiff is required to exhaust her administrative remedies. Consequently if a plaintiff, in that circumstance, prevails before the state or local administrative agency or failing there, prevails upon returning to the federal court, attorney fees should be awarded for the expenses incurred before the state or local agency

VI. MULTI-CLAIM LITIGATION IN STATE COURT

A. *Background*

It is instructive to review a selection of the state court cases apart from the federal court cases for several reasons. It underscores that the assertion of federal rights in state court is still, as it was in the beginning, a very viable alternative to the federal forum. Recent scholarly literature has reflected the increasing use of the state courts to litigate federal rights, both constitutional and statutory [180] So-called public interest" litigants especially have begun to rethink their reflexive view that the vindication of federal rights is best suited to a federal forum.[181] The recent series of door-closing" decisions by the Supreme Court has accelerated the trend away from the federal courts toward the state courts.[182] His-

178. H.R. REP *supra* note 5, at 6-8; S. REP *supra* note 105, at 4-6, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5911-13.

179. *See, e.g.*, Brown Bathke, 588 F.2d 634 (5th Cir. 1978); King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

180. *E.g.*, Stafford Muster, 582 S.W.2d 670 (Mo. Sup. Ct. 1979); Kurtz City of Waukesha, 91 Wis. 2d 103, 280 N.W.2d 757 (Sup. Ct. 1979); *see generally* Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV 311 (1976); Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV 533 (1976). This shift away from the federal courts toward the state courts should please those writers who have severely criticized the scope of *Gibbs*. *See, e.g.*, Shakman, *supra* note 71, Note, *The Concept of Law—Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered*, 87 YALE L.J. 627 (1978).

181. *See generally* Brown, *Public Interest Litigation in the States—A Foster Home for Federal Orphans?* 12 SUFFOLK L. REV 1184 (1978); Comment, *Protecting Fundamental Rights in State Courts: Fitting State Peg to Federal Hole*, 12 HARV C.R.-C.L.L. REV 63 (1977).

182. *E.g.*, Warth v. Seldin, 422 U.S. 490 (1975) (standing); Younger Harris, 401 U.S. 37 (1971) (equitable restraint); Snyder Harris, 394 U.S. 332 (1969) (jurisdictional amount). *See generally* notes 180 & 181 *supra*.

torically the state courts were perceived in fact and in theory as the primary protectors of federal rights,[183] partly because of their independent source of power and partly because the federal courts had, in our early history very limited jurisdiction over federal questions. Also, the application of the Fees Act in state courts add a few extra wrinkles which justifies separate treatment.

It should be noted initially that state courts have concurrent jurisdiction with federal courts over federal claims.[184] The plaintiff who believes her federal statutory or constitutional rights have been violated may institute an action either in state or federal court, unless Congress otherwise provides by giving either trial court exclusive jurisdiction.[185] Apart from the option of the plaintiff to utilize the state forum, the Supreme Court has held that the state courts are obligated under the Supremacy Clause to entertain federal claims, at least when the state courts entertain similar suits under state law [186]

The essential difference between multi-claim litigation in the

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183. "In the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV L. REV 1362, 1401 (1953).

184. "Concurrent jurisdiction has been common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule. Charles Dowd Box Co. v Courtney 368 U.S. 502, 507-08 (1962) (footnote omitted); *accord* Chaflin Houseman, 93 U.S. 130 (1876); Williams Horvath, 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976); Board of Trustees Holso, 584 P.2d 1009 (Wyo. Sup. Ct. 1978). *See generally* THE FEDERALIST, No. 82.

185. *Compare* 28 U.S.C. § 1334 (1976) (bankruptcy jurisdiction exclusive in federal courts) *with id.* § 1331(a) (1976) (federal question jurisdiction for cases involving less than $10,000 exclusive in state courts). *See generally* HART & WECHSLER, *supra* note 53 at 418-38.

186. Testa Katt, 330 U.S. at 386. In an earlier case, the Court permitted New York court to decline the exercise of jurisdiction over claim under the Federal Employers Liability Act for an otherwise valid excuse. Douglas New York, N.H. & H.R.R., 279 U.S. 377, 388 (1929). In *Douglas*, state statute allowed nonresidents to sue foreign companies only in certain cases, among which Douglas complaint did not number. Relying on *Douglas*, Florida appellate court recently affirmed the dismissal of claim based on § 504 of the Rehabilitation Act of 1973 (forbids discrimination against handicapped persons in federally assisted programs), in part, because it believed the Florida courts lacked sufficient power to provide the plaintiff with an adequate remedy It held that no Florida court can undertake responsibility for federal statute without concern for its own power to effectuate judgment. Zorick Tynes, 372 So.2d 133, 138 (Fla. Dist. Ct. App. 1979). Although the plaintiff in *Zorick* prevailed on state law ground, he was unable to obtain attorney fees because of the dismissal of the § 504 claim, which could have provided basis for counsel fees through § 1983.

state courts and in the federal courts is that the state courts do not need to rely on concepts such as pendent jurisdiction in order to adjudicate all the claims in the case. Since every state has trial courts of general jurisdiction, unlike the federal courts which have limited jurisdiction, the plaintiff may plead every available claim in the state court without fear of dismissal because the court lacks jurisdiction, or because the state law claims are more appropriately litigated in the state forum. Of course, state joinder rules are fully applicable and the multi-claim plaintiff must comply with them. But other than those rather narrow limitations, the state court plaintiff has, it may fairly be said, almost no difficulty asserting all available claims against the defendant.

Because state courts have concurrent jurisdiction over federal claims, it follows that they also have the power to apply all federal remedial statutes which may assist the state court in granting full relief.[187] It appears that all state courts award costs to the prevailing party at the conclusion of the law suit, and under the 1976 Fees Act, attorney fees are deemed to be a part of the costs."[188] Also, Congress intended the state courts to apply the Fees Act in cases properly brought before them. Representative Drinan, the floor manager in the House, stated: "This bill would authorize State and Federal Courts to award counsel fees in actions brought under specified sections of the United States Code relating to civil and constitutional rights."[189]

B. *The New York Cases*

Most of the reported cases applying the 1976 Fees Act in state court have arisen in New York. There are only a relatively few cases in other jurisdictions.[190] Thus, for illustrative purposes, we

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187. *E.g.*, Sullivan Little Hunting Park, Inc., 396 U.S. 229 (1969). T the extent that state court must, under *Testa* or other constitutional or statutory compulsion, entertain federal claim, the state court must provide all remedies authorized by Congress, including attorney fees. 330 U.S. at 386; *see generally* Note, *The Enforceability and Proper Implementation of § 1983 and the Attorney Fees Awards Act in State Courts*, 20 ARIZ. L. REV 743 (1978).

188. 42 U.S.C. § 1988 (1976). Thus, at minimum, if state court allows costs to prevailing party for claim based on state law then it must, under *Testa*, award counsel fees as part of the costs to party who prevails on claims to which the 1976 Fees Act extends. 330 U.S. at 386.

189. 122 CONG. REC. 35122 (1976).

190. *E.g.*, Fairbanks Correctional Center Inmates Williamson, 600 P.2d 743 (Alaska 1979); Thorpe Durango School Dist. No. 9-R, 591 P.2d 1329 (Colo. Ct. App. 1978), *cert. granted*, No. 78-068 (Colo. Sup. Ct. March 19, 1979); Board of Trustees v. Holso, 584 P.2d 1009 (Wyo. Sup. Ct. 1978).

will focus on the New York decisions. In *Young v Toia*,[191] the plaintiff sought a declaration of unconstitutionality and an injunction against the enforcement of a provision in the state social services act known as the work rule. That provision required recipients of public assistance to work a prescribed number of days per week. The impact of the law was to cause recipients to work for pay far below the minimum wage. The plaintiff challenged the work rule on the basis of state and federal law including constitutional grounds. The trial court invalidated the provision based on two provisions of the state constitution. It denied attorney fees under the 1976 Act on the ground that the Act does not apply to state courts.[192]

The New York Supreme Court, Appellate Division, Fourth Department, reversed the denial of counsel fees and remanded for an evaluation of the amount due. First, it held, referring to Representative Drinan's floor statement, that the Fees Act does apply to state court proceedings. Then, it rejected the contention that the Act should be declared inapplicable because the trial judge decided the case on state law grounds. The court noted that section 1983, in the context of this case, grants substantially the same rights as the state constitutional provisions relied on by the trial court.[193] Without further discussion, the court reversed the lower court judgment and remanded the case for a determination of the amount of counsel fees.

While the court in *Young* reached the correct result, its reasoning ignored the proper interpretation of the statute announced in the *Seals* case. *Seals*, following the footnote in the House Report, held that courts must apply the pendent jurisdiction test in order to award counsel fees when the decision rests on a claim not covered by the Act and one of the claims in the case is a federal constitutional question asserted pursuant to section 1983. By citing *Seals*, the appellate division apparently recognized the appropriate test for the application of the Fees Act. For some unexplained reason, however, it then failed to apply the test to the facts and claims in the case before it so as to produce a sound result.[194]

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191. 66 App. Div 2d 377, 413 N.Y.S.2d 530 (1979).

192. *Id.* at 378, 413 N.Y.S.2d at 531.

193. *Id.* at 380, 413 N.Y.S.2d at 532.

194. On the same day as *Young* was decided, the appellate division also announced its decision in Ashley Curtis, 67 App. Div 2d 828, 413 N.Y.S.2d 528 (1979), where plaintiff, pursuant to Article 78 and § 1983, successfully prevented termination of her welfare benefits by state and local officials. The appellate division

In sharp contrast, the New York Supreme Court, Appellate Division, Second Department, accurately stated the appropriate test for awarding fees but reached the wrong result in *Bess v. Toia*.[195] In that case, Mrs. Bess son was shot and killed. Because she did not have adequate additional funds to pay for the funeral expenses, she used her monthly rent and food allowance provided under state law to pay the undertaker When she applied to the social services agency for an emergency grant of rent and food money for herself and her surviving children, the agency denied Mrs. Bess request. It then granted her a $275 rent advance upon her signing a recoupment agreement providing for repayment of that advance in equal installments over the next six months, to be deducted from her regular monthly subsistence grants.[196]

Pursuant to article 78 of the New York Civil Practice Law and Rules (CPLR), the plaintiff challenged the denial of burial assistance and the recoupment provision as violating state and federal law including the equal protection clause of the fourteenth amendment.[197] The court found that the defendant local department of social services maintained a policy of denying any burial assistance where the cost of the funeral exceeded $650. If the cost was less than that amount, the department would reimburse the recipient for the full cost of the funeral. The trial judge held that this policy violated a provision of the state Social Services Law and denies equal treatment to welfare recipients who cannot bury their dead "[198] He added: "The distinction made and the division created among welfare recipients of equal need is a most insidious type of invidious discrimination."[199] Because the court ordered the local defendants to pay the plaintiff $650, it did not address the attack on the validity of the recoupment provision. It also denied the plaintiff's request for attorney fees without any discussion.

On appeal, the appellate division held that the 1976 Fees Act

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reversed the denial of fees as to the § 1983 relief obtained against the local officials, but affirmed it as to the state officials because the relief rested on state law By ignoring the congressionally-established rule of decision regarding such claims, the appellate court failed to apply the appropriate analysis, and thus reached the wrong result. For an even more inscrutable decision denying fees in similar social security benefits case, see Gayton v. Shang, 97 Misc. 2d 780, 400 N.Y.S.2d 1016 (Sup. Ct. 1978).

195. 66 App. Div 2d 844, 411 N.Y.S.2d 651 (1978).

196. 93 Misc. 2d 140, 141, 402 N.Y.S.2d 706, 707 (Sup. Ct. 1977).

197. *Id.*

198. 93 Misc. 2d at 142, 402 N.Y.S.2d at 708.

199. *Id.* at 144, 402 N.Y.S.2d at 709.

is fully applicable in state courts, even absent any express state authorization. It then held that the case does not involve any "bona fide section 1983 claim because it is simply an article 78 proceeding of the CPLR.[200] With regard to the trial court's discussion of the equal protection claim, the appellate court held that it was wholly unnecessary to the result and is of dubious constitutional validity "[201] Recognizing the availability of the pendent jurisdiction test for fees as announced in *Seals* and *Kimbrough*, the court stated that the facts alleged by Mrs. Bess do not raise a substantial" constitutional claim.[202] Alternatively the court held that fees under the 1976 Act may be awarded in the discretion of the trial judge and the plaintiff did not show any abuse of that discretion.[203]

The appellate division, while recognizing the applicable legal principles under the 1976 Act for awarding fees when the case is disposed of on a non-fee claim, nonetheless misapplied the settled test. By requiring the plaintiff to show that its constitutional claim under section 1983 was substantial," the court ignored the holding of the United States Supreme Court in *Hagans* [204] the case to which the legislative history of the Fees Act expressly refers.[205] In *Hagans*, while acknowledging that federal jurisdiction attaches only to substantial" federal questions, the Court adopted a much more minimal test of substantiality than might have appeared from some of its older decisions.[206] The federal court is without jurisdiction only if the claim is "wholly insubstantial, obviously frivolous," or "absolutely devoid of merit."[207] The court makes that determination by looking solely to the plaintiff's complaint, not to any later developments in the case.[208] This minimal test of federal

200. 66 App. Div 2d at 844-45, 411 N.Y.S.2d at 653.

201. *Id.*

202. *Id.*

203. This alternative ground appears inconsistent with the congressionally-approved standard that prevailing plaintiff should ordinarily recover an attorney fee unless special circumstances would render such an award unjust. Newman Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968); S. REP *supra* note 105, at 4, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5911. 12; H.R. REP *supra* note 5, at 6.

204. 415 U.S. 528 (1974).

205. H.R. REP *supra* note 5, at 4 n.7.

206. *See* note 77 *supra*.

207. 415 U.S. at 536-37 (citations omitted) (quoting from earlier Supreme Court cases). In dissent, Justice Rehnquist protested that the new formulation allowed jurisdiction so long as the plaintiff "is able to plead his claim with straight face. *Id.* at 564.

208. *See* note 76 *supra*.

court jurisdiction is the one adopted by the Congress to resolve the attorney fee issue in multi-claim litigation involving constitutional issues when the decision rests on a non-fee claim. The appellate division misapplied that rule in the *Bess* case.

Although the reported state decisions constitute a relative handful when compared to the federal cases, we should expect that, as public interest litigants increasingly use the state forums, more cases will be decided there under the Fees Act. In such instances, the plaintiffs must be careful to present their fee claims in precise and careful terms so that the state judges are absolutely certain about their authority to award fees and the proper test to be applied. Nothing can replace careful analysis, however and the decisions in New York illustrate the ease with which courts can commit error in applying a statute with comprehensive and explicit legislative history "[209]

VII. POTENTIAL SCOPE OF THE RULE

It is clear that, based on the legislative history of the 1976 Fees Act, the reach of the statute is potentially very broad. The most expansive use of the Act is arguably in multi-claim litigation involving non-federal governmental officials or others acting under color of state law Creative pleading by plaintiffs could very well sweep within the scope of the Act cases which might not, at first blush, be covered by the statute.

A. *Non-Constitutional Federal Statutory Claims*

One of the most obvious avenues for an expansive application of the Fees Act is through the use of section 1983. Unless the Supreme Court overrules or modifies the unanimous view of the courts of appeals, plaintiffs may bring all federal statutory claims against persons acting under color of law through the remedial device of section 1983. Although this article does not address single claim litigation, it is clear that statutory claims alone may be instituted under section 1983. If there should be a jurisdictional problem in the federal courts,[210] then the plaintiff may litigate in the

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209. *See* note 126 *supra* at 269.

210. *E.g.*, Chapman Houston Welfare Rights Organization, 441 U.S. 600 (1979). Even if § 1983 is construed to cover all federal statutory claims, the question of jurisdiction still remains. The *Chapman* case cuts off the use of § 1343 to secure jurisdiction over § 1983 statutory-based claims unless the underlying statute is one providing for equal rights or for the protection of civil rights. 28 U.S.C. § 1343(3), (4) (1976). After *Chapman*, many statutory claims will not fit the Court' re-

state courts.

There is a wide range of civil rights provisions in federal statutes which could provide a basis for many suits against non-federal governmental officials. The United States Code contains approximately eighty antidiscrimination provisions, which cover a wide range of activities.[211] While they vary in the groups to whom protection is given, most are directed at recipients of federal funds. Such statutory provisions could provide the basis for suits against public officials and entities through section 1983 to achieve compliance with the statutory proscriptions.[212] In addition many federal statutes which provide funds for a wide variety of purposes create rights for beneficiaries who do not fall within traditionally protected categories such as race, color, religion, sex, or national origin.[213] If these claims are enforced through the remedial device of section 1983, attorney fees would be available under the 1976 Act. When the whole range of federal statutory rights is examined for the private claims that may be available through section 1983, the litigation potential and the concomitant coverage of the Fees Act are enormous.

B. *Non-Constitutional State Claims*

The second major area of potentially expansive use of the Fees Act is in multi-claim litigation when the state claims are joined with federal constitutional claims, either in state or in federal

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strictive definition. Consequently alternative bases of jurisdiction will have to be found if the plaintiff desires to litigate her claims in federal court. Without extended discussion, there are at least two jurisdictional possibilities: (1) pendent jurisdiction under § 1343 (assuming the plaintiff is already asserting constitutional claim through § 1983); and (2) general federal question jurisdiction under § 1331(a) (which requires $10,000 minimum amount in controversy· in 1978, the House of Representatives passed bill which would have eliminated the $10,000 requirement and abolished diversity of citizenship jurisdiction. H.R. 9622, 95th Cong., 2d Sess. (1978), 124 CONG. REC. H1,553-61, H1,569-70 (daily ed. Feb. 28, 1978)).

211. UNITED STATES GENERAL ACCOUNTING OFFICE, A COMPILATION OF FEDERAL LAWS AND EXECUTIVE ORDERS FOR NONDISCRIMINATION AND EQUAL OPPORTUNITY PROGRAMS (1978) (staff study).

212. *See, e.g.*, Southeastern Community College v. Davis, 99 S. Ct. 2361 (1979) (section 504 of the Rehabilitation Act of 1973, which provides certain protections for handicapped persons in federally assisted programs). *See generally* Lipson, *supra* note 126.

213. *See, e.g.*, Coalition for Block Grant Compliance HUD, 450 F Supp. 43 (E.D. Mich. 1978) (action against federal and local officials under the Housing and Community Development Act of 1974, Pub. L. No. 94-375, 90 Stat. 633, to enjoin dispensing federal funds to community which fails to identify the housing assistance needs of persons expected to reside within that community).

court. Recent district court litigation under section 1983 involving police misconduct illustrates the potential. In *Murray v. Murphy* [214] the plaintiff brought suit in federal court against the City of Philadelphia, two of its police officers, and their supervisors for misconduct allegedly violating the federal constitution, federal civil rights statutes, and state tort law In denying the defendants motion to dismiss, the court permitted the plaintiff to maintain his action on all the claims, both constitutional and non-constitutional. Even if the plaintiff ultimately prevails only on the state tort law claim, he will be entitled to attorney fees under the 1976 Act. In jurisdictions where the standards for recovery against official misconduct under state tort law are less restrictive than under section 1983, plaintiffs would be well advised to follow the approach of the *Murray* case and other recent suits pursuing that course.[215]

Although not without mixed blessings, litigating these multiclaim suits in state court may provide additional benefits. Take, for example, the increasing number of cases in state courts which challenge two areas of traditional state concern: (a) The validity of financing public school education through the property tax system; and (b) exclusionary land use regulation by local municipalities. In *Robinson v. Cahill*,[216] the plaintiffs challenged the validity of the New Jersey property tax system which supported its public schools. They asserted claims based on the equal protection clauses of the state and federal constitutions as well as provisions in the state constitution relating to public education and real property tax assessment. In the trial court, the plaintiffs prevailed on both their federal and state constitutional claims. The New Jersey Supreme Court, however, in affirming the lower court judgment, relied solely on the state constitution.[217] Similarly in *Southern Burlington County NAACP v. Township of Mount Laurel*,[218] the plaintiffs sued to enjoin the defendant's zoning ordinance as repugnant to the equal protection clauses of the state and federal constitutions and the New Jersey zoning enabling statute. Again the trial court utilized both state and federal constitutional provisions to invalidate the ordinance, but the New Jersey Supreme Court placed its affirmance on state law alone.[219]

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214. 441 F Supp. 120 (E.D. Pa. 1977).

215. *E.g.*, M.C.I. Concord Advisory Bd. Hall, 457 F Supp. 911 (D. Mass. 1978); Santiago City of Philadelphia, 435 F Supp. 136 (E.D. Pa. 1977).

216. 62 N.J. 473, 303 A.2d 273 (1973).

217. *Id.* at 490-501, 303 A.2d at 282-87.

218. *See* note 55 *supra*.

219. 67 N.J. at 174, 336 A.2d at 725.

In both cases, the decision of the state supreme court placed the judgments beyond the reviewing power of the United States Supreme Court, an advantage some public interest litigants consider critical.[220] At the same time, because of the presence of the fourteenth amendment allegations asserted through section 1983, the plaintiffs retain the benefit of the 1976 Fees Act, so long as the federal constitutional claim meets the test of substantiality and both state and federal claims arise out of a "common nucleus of operative fact."[221]

In neither case could the defendant ask the state trial judge to exercise discretion to dismiss the state claims because they substantially predominate, a power which federal judges may exercise under *Gibbs* when such cases are filed in federal court: "Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."[222] If the *Robinson* and *Mount Laurel* cases had been filed in federal court, the district judge might well have exercised her discretion to dismiss the state law claims.[223] The broad power exercised by state courts of general jurisdiction gives the plaintiff a great advantage to join a wide range of claims, both state and federal, which even under the liberal rule of the *Gibbs-Hagans* line might not survive a federal court action litigated to judgment.[224]

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220. If the state court judgment rests on state ground, review in the Supreme Court is not available unless the defendant officials are somehow challenging the validity of the state law on federal grounds (a very unlikely possibility). Even if the state court judgment rests on both state and federal law, review may still be precluded because of the doctrine of "independent and adequate state ground, *e.g.*, Fox Film Corp. Muller, 296 U.S. 207 (1935), unless the state court did not intend to rest its decision independently on state law. Delaware Prouse, 440 U.S. 648, 652 (1979). In contrast, if the same case were instituted in federal trial court with the state claims pendent to the federal claims, the Supreme Court would, of course, not be barred by the independent and adequate state ground doctrine from reviewing the entire case. *See* text accompanying notes 59-77 *supra*. *E.g.*, 383 U.S. at 715. "Coming before the court in this way, we are not confined in our review of the decision of the lower [federal] court within the same limits that we would be if the case were here on error from the judgment of state court. Fallbrook Irrigation Dist. Bradley, 164 U.S. 112, 154 (1896). Indeed, if the federal claim is of constitutional dimensions, the Supreme Court has admonished the federal courts to decide the state claims first. *E.g.*, Siler v. Louisville & N.R.R., 213 U.S. 175 (1909).

221. On occasion, prior decision of the Supreme Court may undermine the attempt by the plaintiff to satisfy even the minimal test of substantiality set forth in *Hagans*. 415 U.S. at 528. For example, current litigation challenging school finance systems based on the property tax will have to confront the impact of San Antonio School Dist. Rodriguez, 411 U.S. 1 (1973).

222. 383 U.S. at 727.

223. *See, e.g.*, Moor County of Alameda, 411 U.S. 693 (1973).

224. *Id. See also* Schweiker Gordon, 442 F Supp. 1134 (E.D. Pa. 1977);

Finally a few state court decisions have created one disadvantage in wrongful death, civil rights type actions brought against non-federal governmental officials. In two recent appellate decisions in California[225] and Colorado,[226] the courts held that constitutionally-based claims for relief under section 1983 and under state wrongful death statutes merge so as to extinguish the section 1983 claim. In the California case, this merger doctrine precluded the plaintiff from securing equitable relief under section 1983 because the state wrongful death statute provided only a damage remedy [227] Interestingly enough, the California court said that, if the case had been filed in federal court, a different result would have been reached.[228] In federal court, the appellate tribunal said that the plaintiff could seek both equitable and legal relief under section 1983 and damages under the state wrongful death statute.[229] This holding would seem to run counter to the well-settled rule that "the law should produce uniform decisions within each state regardless whether an action is brought in a state or a federal court."[230] While that rule has been black letter law in diversity cases since *Erie Railroad v. Tompkins*,[231] the Supremacy Clause would make it equally applicable to federal question suits.[232]

VIII. SUMMARY AND CONCLUSION

The Civil Rights Attorney s Fees Awards Act of 1976 is a broad direction from the Congress to state and federal courts, allowing prevailing plaintiffs, among others, to recover their counsel fees in a wide range of civil rights and civil liberties litigation. In

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Jones v. McElroy 429 F Supp. 848 (E.D. Pa. 1977). In each of these cases, the federal trial judge dismissed some or all of the pendent state claims.

225. Alvarez Wiley 71 Cal. App. 3d 599, 604-05, 139 Cal. Rptr. 550, 553-54 (1977).

226. Jones Hildebrant, 191 Colo. 1, 8, 550 P.2d 339, 344 (1976), *cert. dismissed*, 432 U.S. 183 (1977).

227 Alvarez Wiley, 71 Cal. App. 3d 599, 605, 139 Cal. Rptr. 550, 553 (1977).

228. *Id.*, 139 Cal. Rptr. at 553.

229. *Id.*

230. Warner Perrino, 585 F.2d 171, 174 (6th Cir. 1978); *see* 330 U.S. at 393; *cf.* 28 U.S.C. § 1652 (1976) ("rules of decision act); 42 U.S.C. § 1988 (1976) (comparable rules of decision act for certain civil rights cases); Robertson Wegmann, 436 U.S. 584, 592 (1978) (federal court must ordinarily apply state survival statute in § 1983 action).

231. Erie R.R. Co. Tompkins, 304 U.S. 64 (1938).

232. U.S. CONST. art. VI, cl. 2; *see* Sullivan Little Hunting Park, Inc., 396 U.S. 229, 238 (1969). *See also* note 230 *supra*.

the context of multi-claim litigation which includes claims based on one or more of the statutes covered by the Act, the Congress has recognized that modern rules of pleading allow plaintiffs to join other related claims which are not covered by the Act. A dilemma arises because the court may enter judgment for the plaintiff on a non-fee claim even though there may be merit to one of the claims covered by the statute. In such cases, if the plaintiff could not recover counsel fees, she might well forego joining all available claims, thus defeating a strong policy for "joinder of claims, parties, and remedies."[233]

In addition, the dilemma has an extra dimension when one of the plaintiff's claims rests on a federal constitutional ground. In such cases, the judicially created rule directs the courts to dispose of the case, whenever possible, on the non-constitutional claim, which may be one not covered by the Fees Act. Recognizing these problems which inhere in many multi-claim suits, the Congress provided a rule of decision in the legislative history of the Act. It essentially divided the multi-claim cases into two categories: (1) Where only non-constitutional claims are alleged; and (2) where both constitutional and non-constitutional claims are asserted. For the first category it directed the courts to decide the fee claim for counsel fee purposes even if the court were inclined to dispose of the case on the non-fee ground. In the second category it directed the courts to apply the two-pronged test for pendent jurisdiction as the basis for awarding fees when the plaintiff prevails on the non-fee claim.

The policy reasons undergirding the congressionally established rule of decision for the first category of cases do not appear to raise any particular difficulties. A judge s disposition to resolve the plaintiff's lawsuit on the non-fee claim should not foreclose the plaintiff from recovering counsel fees. Requiring the court to decide the claim covered by the 1976 Fees Act to determine whether attorney expenses should be awarded does not impose substantial additional burdens on the court or the parties. In a few cases, it may mean deciding a question of first impression under the applicable federal statute, or requiring additional briefs and argument. Those burdens would be present in any event were the plaintiff to rest her case solely on the statutory ground covered by the Act.

The congressional rule governing the second category of cases (multi-claim litigation involving constitutional questions when the

233. 383 U.S. at 724 (footnote omitted).

disposition rests on a non-constitutional ground to which the Fees Act does not apply) does raise important policy judgments. Why should plaintiffs be able to recover their counsel fees when they prevail on claims not expressly covered by the 1976 Fees Act? It is instructive to examine those reasons briefly First, the rule enhances the "jurisprudential policy of avoiding unnecessary decisions of constitutional questions without penalizing plaintiffs who join non-constitutional claims.[234] If fees could not be awarded to plaintiffs in such circumstances, they might well forego their non-constitutional claims so as to insure recovery of counsel fees. In such instances, the courts would be compelled to decide critical and in some cases far-reaching questions of constitutional dimension. That unsalutary result would rightly subject the Congress to criticism for lacking sensitivity to a judicially created rule which is sufficiently sound to merit full congressional support.

Second, the considerations of convenience, judicial economy and fairness, which moved the Court in *Gibbs* to interpret liberally the case limitation in article III, are equally applicable here. Because attorney fees are so high, plaintiffs, and especially their attorneys, do not lightly engage in litigation unless there is some promise of recovering counsel fees. If such fees are not available when a multi-claim case involving a fee-claim is decided on a non-fee ground, the plaintiff might forego joining non-fee to fee claims. If the plaintiff prevails, that result might not be particularly detrimental. But if they lose on the covered claim, it might lead to the filing of a second suit in state court, for example. That train of events would undermine the values of economy convenience, and fairness which benefit all parties, as well as subject the plaintiff unnecessarily to defenses based on a statute of limitations,[235] or on res judicata.[236] Those issues are sufficiently serious and complex to

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234. Lund Affleck, 442 F Supp. 1109, 1113 (D.R.I. 1977), *aff'd*, 587 F.2d 75 (1st Cir. 1978); *accord*, 588 F.2d at 637 n.5 (dictum).

235. *Cf* Owen Equip. & Erection Co. Kroger, 437 U.S. 365, 376 n.20 (1978) (state rules of limitation govern plaintiff' subsequent state court suit after unsuccessful attempt to invoke federal court jurisdiction).

236. *E.g.*, Woods Exploration & Producing Co. Aluminum Co. of Am., 438 F.2d 1286, 1315 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (after judgment in related federal suit, the doctrine of res judicata bars subsequent state court action (1) which alleges state claim arising out of the same facts as the litigated federal claim; or (2) if the plaintiff was afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings under *Gibbs*); *accord*, International Ass n of Machinists & Aerospace Workers Nix, 512 F.2d 125, 131-32 (5th Cir. 1975) (applying the principles of *Woods Exploration* to

persuade policymakers to encourage plaintiffs to avoid those potential pitfalls. That is precisely the judgment which Congress has made here.

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defense based on collateral estoppel). Brady TWA, Inc., 274 A.2d 146 (Del. Super. Ct.), *aff'd*, 282 A.2d 620 (Del. 1971) (state court action based on state claims, which were or could have been litigated in earlier federal court action under pendent jurisdiction doctrine, are barred by res judicata); *accord*, McCann Whitney 25 N.Y.S.2d 354 (Sup. Ct. 1941); *see* Hughes v. TWA, Inc., 336 A.2d 572, 575-77, (Del. Sup. Ct.), *cert. denied sub nom.* Summa Corp. TWA, Inc., 423 U.S. 841 (1975) (after judgment in related federal suit, the doctrine of res judicata does not bar subsequent state court action which alleges state claim arising out of the same facts as the federal claim (1) where the earlier federal suit was dismissed on jurisdictional grounds, not on the merits and (2) where the federal judge would have dismissed the pendent state claim under the discretionary power authorized in *Gibbs*); *cf.* Grubb Public Utils. Comm n, 281 U.S. 470, 479 (1930) (action between the same parties in federal court barred by prior state court judgment regarding matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end"); Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions*, 78 COLUM. L. REV 610 (1978). *See generally* RESTATEMENT (SECOND) OF JUDGMENTS, § 61.1, at 155, 160-61, 178-79 (Tent. Draft No. 5, 1978). *But see* Atlantic C.L.R. Co. Engineers, 398 U.S. 281, 294-96 (1970) (a plaintiff has the option of joining state claim as pendent to federal claim in federal suit under *Gibbs* or of pursuing the state claim in separate action in state court). Although the holding of the Fifth Circuit in the *Woods Exploration* case appears inconsistent with the opinion in *Atlantic C.L.R.*, the court of appeals never mentioned that aspect of *Atlantic C.L.R.* The Fifth Circuit did examine the *Atlantic C.L.R.* decision for its teachings on the question whether prevailing party in the completed federal suit may secure an injunction against the subsequent state court proceedings, notwithstanding the anti-injunction statute, 28 U.S.C. § 2283 (1976). The court of appeals held that § 2283 authorizes federal court to enjoin state court suit which is precluded under the doctrine of res judicata (the so-called relitigation principle). 438 F.2d at 1312. That holding also appears inconsistent with *Atlantic C.L.R.* It should be noted that the question whether the res judicata effect is to be determined by state or federal law is another unresolved issue in this complex area of the law *Compare* Southwest Airlines Co. Texas Int'l Airlines, Inc., 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) (federal law applies) *with* Hughes TWA, Inc., 336 A.2d 572 (Del. Sup. Ct.), *cert. denied sub nom.* Summa Corp. TWA, Inc., 423 U.S. 841 (1975) (state law applies). Although the Supreme Court has apparently never addressed that question when the earlier federal suit involves "federal question jurisdiction, it has examined the issue in diversity cases. HART & WECHSLER, *supra* note 53, at 843-44. If the jurisdiction of the federal court is based on the citizenship of the parties, the state court need only give that res judicata effect to the prior federal judgment that it would give to comparable judgment of its own courts, even though the effect given is considered "federal question for purposes of Supreme Court review Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130 (1874). *But see* Metcalf Watertown, 128 U.S. 585 (1888) (action by an assignee of federal court judgment to enforce that judgment does not arise under the Constitution or laws of the United States to permit invocation of federal trial court jurisdiction). Of course, if the federal suit has not yet proceeded to judgment, none of these difficulties arises because the parties are still free to conduct parallel litigation on the same or similar claims in state court. Kline v. Burke Constr. Co., 260 U.S. 226, 228 (1922).

Third, the inability of the courts to award fees in these circumstances might well deter plaintiffs from using a federal forum to vindicate federal constitutional and statutory rights. If the impetus behind the *Gibbs* rule itself springs in part from a desire to permit plaintiffs to assert their federal rights in a federal court,[237] the authorization in the Fees Act may be viewed as reinforcing that altogether salutary policy While it is true that state and federal courts have concurrent jurisdiction over federal claims, the Supreme Court has quoted with approval the observation of two distinguished commentators that the federal courts are "the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[238] At a minimum, the plaintiff should have a genuine choice whether to file her complaint in state or federal court, unrestrained by considerations, such as attorney fee awards, that have nothing to do with the merits of the litigation.

Finally the 1976 Fees Act authorizes an award of counsel fees to plaintiffs who prevail" through out-of-court settlements even though there has not been a full evidentiary hearing on the merits. "If the litigation terminates by consent decree, for example, it would be proper to award counsel fees."[239] The lower federal courts have regularly awarded fees in such circumstances.[240] If plaintiffs may recover their fees from the courts when no decision is made on any of their claims because the case is settled, then it is appropriate to allow fees when judgment is entered on one of those claims even if it is not covered by the Act. The argument in support of fees in these two types of cases would appear equally strong, and that was the congressional judgment. To rule otherwise would encourage defendants to litigate cases to death, knowing that, even if they lose, they will not have to pay the plaintiff's attorney fees if the ultimate judgment rests on the non-fee claim. It does little for crowded dockets, in both state and federal courts, to encourage unnecessarily extended and protracted litigation.

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237. *See* HART & WECHSLER, *supra* note 53, at 922-23.

238. F FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928) (quoted in Steffel Thompson, 415 U.S. 452, 464 (1974)) (emphasis added by Supreme Court).

239. H.R. REP *supra* note 5, at 7 *See also* S. REP *supra* note 105, at 5, *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908, 5912-13.

240. *E.g.*, Gagne Maher, 594 F.2d 336, 339-40 (2d Cir.), *cert. granted*, 100 S. Ct. 44 (1979); King v. Greenblatt, 560 F.2d 1024, 1026-27 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977).

The courts, both state and federal, have generally followed the congressional directive, even when they were not fully aware of it. There are instances, however, when the rule has been misapplied, leading to an erroneous analysis or result or both. Part of the problem may be that counsel and courts are not fully aware of the legislative history and the early judicial precedents applying it. Furthermore, the adoption by Congress of the standards used to determine pendent jurisdiction may have misled state and federal judges to apply it to inappropriate cases. Despite these deviations, the courts have generally applied it in the expansive manner intended by Congress.

The broad scope of the congressionally determined rule of decision is such that the Fees Act may in fact be available in a much wider range of cases than the precedents since the Act indicate. This is so for several reasons: (1) The scope of section 1983 which extends to federal constitutional and statutory claims; (2) the availability of state as well as federal courts for instituting multi-claim litigation involving federal and state questions; (3) the expansive nature of the pendent jurisdiction doctrine; and (4) the liberal joinder rules extant in most American jurisdictions. These factors, singularly or in combination, will provide the basis for applying the 1976 Fees Awards Act in an ever-widening circle of litigation, especially in those lawsuits where the defendants are persons acting under color of state law It is not improbable to suggest that with a little bit of creative thinking, many (and maybe most) suits involving state action will be covered by the Fees Act. In this sense, as one knowledgeable observer noted, the statute can have as dramatic an impact upon the establishment and enforcement of basic civil and constitutional rights in this country as any civil rights legislation since Reconstruction."[241] It is not necessary to stretch the Act and its legislative history beyond their natural import to conclude that such an expansive use is well within the parameters set by the Congress.

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241. Derfner, *supra* note 4, at 441.