EXPANDED RECOGNITION IN WRITTEN LAWS OF ANCILLARY FEDERAL COURT POWERS: SUPPLEMENTING THE SUPPLEMENTAL JURISDICTION STATUTE

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I. INTRODUCTION

The ancillary powers of the Article III federal district courts encompass far more than adjudicatory authority over factually interdependent civil claims initially presented within cases or controversies. Ancillary powers are used to facilitate civil case settlement agreements extending to matters well beyond any claims initially presented for adjudication. Ancillary powers are employed later in civil actions to adjudicate civil claims presented only after initial adjudicatory powers have been exercised. And, ancillary powers are exercised to resolve matters collateral to civil claim resolution, but necessary for the courts to function successfully. At least some ancillary federal district court adjudicatory powers, involving factually interdependent civil claims, are now recognized in the "supplemental jurisdiction" statute, 28 U.S.C. § 1367, enacted in 1990. The law codifies earlier U.S. Supreme Court precedents on pendent and ancillary jurisdiction. It has been used primarily to govern initial ancillary adjudicatory authority over state law civil claims without independent jurisdictional bases (hereinafter "nonfederal claims") that arise from "a common nucleus of operative facts" as the civil claims with independent subject matter jurisdictional bases (hereinafter "federal claims"). The statute does not speak to other ancillary powers. Federal courts are quite baffled at times regarding these other powers. A new § 1367 could provide at least some clarity on the ancillary powers where there has been uncertainty and confusion. While the statute has received mixed reviews on what it addresses, many ancillary powers remain unaddressed in § 1367 as well as in other statutes and court rules. This silence is unfortunate because there has been, and there remains, too much uncertainty and confusion over both the forms and the exercises of these other ancillary powers.

Section 1367 should be amended to encompass more fully ancillary federal district court powers, a task facilitated by the 1994 U.S. Supreme Court decision in *Kokkonen v. Guardian Life Insurance Company of America*.[1] In *Kokkonen* the Court established a framework for viewing all ancillary powers, declaring that "ancillary jurisdiction" had two separate "heads": jurisdiction over "factually interdependent" claims and jurisdiction allowing courts to "function successfully."[2] Section 1367 now provides, at best, only some guidelines for the ancillary powers over factually interdependent claims.

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1. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).
2. *Id.* at 379-80.

Further guidance is needed, including some articulation of the differences in the varying forms of ancillary powers. This article will urge amendments to § 1367 to expand its reach to cover all ancillary powers, thereby limiting uncertainty and confusion and providing much needed guidance.[3]

Before exploring possible changes to § 1367, we first review the case precedents leading to § 1367; the supplemental jurisdiction statute itself and its failure to address all forms of ancillary power; the later views of the American Law Institute and others on the statute; the decision in *Kokkonen*; and, contemporary illustrations of the uncertainty and confusion over the ancillary powers that remain unaddressed in § 1367.

II. THE SUPPLEMENTAL JURISDICTION STATUTE

A. The Precursors to the Legislation

By codifying certain pendent and ancillary jurisdiction case precedents within § 1367, Congress in 1990 provided guidelines to the Article III federal district courts on some of their ancillary adjudicatory powers. The guidelines were distilled from more than a century of precedents. Yet long before § 1367, much broader ancillary powers were employed by the Article III federal courts. These broader ancillary powers extended beyond the initial adjudicatory authority now found within § 1367 over nonfederal claims that are factually related to federal claims.[4] Once recognized as pendent or ancillary claims that would ordinarily be expected to be tried "in one judicial proceeding,"[5] on factually related claims, § 1367 now speaks of "supplemental" claims. Some factually related claims, as well as other forms of ancillary powers, however, remain outside the express ambit of § 1367.

One of the early precedents on ancillary federal district court powers was the 1860 U.S. Supreme Court decision in *Freeman v. Howe*.[6] There the Court

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3. To date, the legal commentators, Congress and the American Law Institute have not gone beyond some factually interdependent claims in discussing § 1367 reform. *See, e.g.*, Peter Raven-Hansen, *The Forgotten Proviso of § 1367(b) (And Why We Forgot)*, 74 IND. L.J. 197, 197 (1998) (upon reviewing the discussion, finding the speakers "have left nothing new for anyone to say about supplemental jurisdiction").

4. Civil claims in these settings often are distinguished by the characterizations of nonfederal claims and federal claims, with the former including factually interdependent claims. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 n.11 (1978). These terms can be confusing since federal claims can include claims grounded on state law as long as there is diversity of citizenship jurisdiction under a statute such as 28 U.S.C. § 1332 (2000) (discussing general diversity).

5. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

6. Freeman v. Howe, 65 U.S. (24 How.) 450, 460-61 (1860).

recognized federal adjudicatory authority over "ancillary and dependent" claims under state law presented by an intervenor who did not meet the diversity of citizenship requirements.[7] In doing so, the Court clarified misunderstandings arising from earlier rulings on ancillary powers wherein only original plaintiffs were mentioned.[8] It extended ancillary adjudicatory powers beyond civil claims presented by original plaintiffs. In 1926, the Court in *Moore v. New York Cotton Exchange*[9] recognized that similar ancillary adjudicatory power could be exercised over a factually related counterclaim even though there was "no independent basis of jurisdiction."[10] Seven years later in *Hurn v. Oursler*,[11] the Court set forth some general principles on such ancillary adjudicatory powers. Hurn had sued Oursler in a federal court for copyright infringement, alleging Oursler's play infringed upon Hurn's copyrighted work. In addition to a federal copyright claim, Hurn presented state law claims based on unfairness.[12] The federal trial court found no copyright infringement and then concluded it could not resolve the state law claims as they were outside the general diversity statute. The Supreme Court reversed, in part, finding that

> where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, [i.e., has an independent basis of jurisdiction] and . . . where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*. . . .[13]

The Court acknowledged that there were conflicting precedents, resulting in confusion.[14] This demonstrated "the importance of attempting to formulate some rule on the subject."[15] The chosen rule was based upon a distinction "between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case

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7. *Freeman*, 65 U.S. (24 How.) at 460 (precedent limiting ancillary powers to original parties "was probably not intended").

8. The complete diversity requirement of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, (1806) continues under the present general diversity statute, 28 U.S.C. § 1332 (2000), though minimal diversity is all that is needed under one special diversity statute, 28 U.S.C. § 1335 (2000) (certain interpleader actions).

9. Moore v. New York Cotton Exch., 270 U.S. 593 (1926).

10. *Id.* at 608..

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

12. *Id.* at 239 (citing "unfair business practices and unfair competition").

13. *Id.* at 246.

14. *Id.* at 240-41.

15. *Id.* at 241.

where two separate and distinct causes of action are alleged, one only of which is federal in character."[16] Only in the former could there be exercised ancillary federal court adjudicatory power. In *Hurn*, the federal copyright ground was accompanied by a state unfairness ground, forming one cause of action because the two grounds "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances."[17] By contrast, a state law claim in *Hurn* that Oursler's play infringed upon an "uncopyrighted version" of a play by Hurn was deemed a "separate and distinct" cause of action.[18]

The *Hurn* analysis, involving distinct grounds and distinct causes of action, proved difficult to apply and caused continuing confusion.[19] In 1966, in *United Mine Workers of America v. Gibbs*, the Court shed the analysis in *Hurn* because it had been "the source of considerable confusion"[20] and endorsed a "pendent" jurisdiction analysis.[21] In *Gibbs*, the Court said that pendent jurisdiction,

> in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made," . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case."[22]

The Court elaborated, saying that "if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole."[23] The Court looked to the Federal Rules of Civil Procedure on joinder, finding their impulse is to promote "judicial economy and fairness to parties,"[24] although recognizing the rules "do not expand the jurisdiction of federal

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16. *Id.* at 246.

17. *Id. See also id.* at 240 ("same acts" which are "inseparable").

18. *Id.* at 248.

19. *See, e.g.*, Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349 (1988) ("The [*Hurn*] test for determining when a federal court had jurisdiction over such state-law claims was murky, however, and the lower courts experienced considerable difficulty in applying it") and George B. Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 45 (1963) (ancillary jurisdiction is "the child of necessity and the sire of confusion").

20. *Gibbs*, 383 U.S. at 724.

21. *Id.* at 725-29.

22. *Id.* at 725.

23. *Id.*

24. *Id.* at 724.

courts."[25] The Court elaborated, saying the rules "embody 'the whole tendency . . . to require a plaintiff to try his . . . whole case at one time' . . . and to that extent emphasize the basis of pendent jurisdiction."[26] In *Gibbs*, all the civil claims were subject to ancillary adjudicatory powers because they were found to "derive from a common nucleus of operative fact."[27] These ancillary powers were then found to have been properly employed under the guidelines recognized for discretionary exercises of these powers.[28]

Ancillary adjudicatory powers over factually related nonfederal claims were again addressed in 1976 in *Aldinger v. Howard*.[29] There the Court was asked whether the *Gibbs* precedent allowed pendent-party jurisdiction, extending beyond nonfederal claims between existing parties who were all already subject to some independent federal jurisdictional basis, to include new parties over whom there was no independent jurisdictional basis.[30] The Court held that *Gibbs* could extend to such claims so long as the trial court could "satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."[31] However, the Court held that in the case before it, the factually related claims against a new party, a county, though arising out of a "common nucleus of operative fact,"[32] could not be adjudicated in a federal civil action against others who were sued under 42 U.S.C. § 1983. The Court reasoned that the county was expressly insulated from § 1983 liability because it was not a "person" under the statute[33] and thus Congress "by implication" had foreclosed any use of ancillary adjudicatory powers over the county.[34]

In 1989 in *Finley v. United States*,[35] the Court again restricted pendent-party jurisdiction. In that case a widow sued a utility company and the City of

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25. *Id.* at 725 n.13.

26. *Id.*

27. *Id.* at 725, 728-29. For a review of the relationship between the varying pronouncements in *Gibbs*, *see* Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399 (1983).

28. *Gibbs*, 383 U.S. at 728-29. The *Gibbs* guidelines were codified and placed in § 1367 in 1990. 28 U.S.C. 1367(c). The guidelines are now said by the U.S. Supreme Court to involve considering at every stage of litigation "the values of judicial economy, convenience, fairness, and comity." City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 173 (1997).

29. Aldinger v. Howard, 427 U.S. 1 (1976).

30. *Id.* at 6.

31. *Id.* at 18.

32. *Id.* at 14-19.

33. *Id.* at 16.

34. *Id.* at 19.

35. Finley v. United States, 490 U.S. 545 (1989).

San Diego on state law grounds after her husband and children were killed when a plane crashed into power lines.[36] She also sued the United States under the Federal Tort Claims Act, alleging that the negligence of a federal agency contributed to the crash.[37] In holding there was no pendent-party jurisdiction over the nonfederal claims against the utility company and the city, the Court said that "with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly."[38] The Court acknowledged that in some settings, federal district courts may have ancillary powers over pendent-parties.[39] Such powers were available, for example, to a court where necessary to give effect to a court decree or to dispose of property within its exclusive control.[40] In refusing to recognize ancillary powers, as in *Aldinger*, the Court in *Finley* emphasized legislative intent.[41] It found that no congressional act supplied pendent-party jurisdiction over the widow's nonfederal claims. The Court also noted that its precedents had never held that ancillary powers over factually related nonfederal claims were always available.[42]

The judicial precedents leading to § 1367 do not provide clear guidelines for exercises of ancillary adjudicatory powers over factually related nonfederal claims that are free of "confusion"[43] or that display "an entirely consistent approach."[44] They do suggest that the *Gibbs* precedent generally permits,

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36. *Id.* at 546.

37. *Id.*

38. *Id.* at 549.

39. *Id.* at 550 (where statutes expressly authorize such powers).

40. *Id.* at 551. The Court cited two civil cases where the trial court may find it appropriate to exercise jurisdiction over pendent parties "when necessary to give effect to the court's judgment." *Id. See* Local Loan Co. v. Hunt, 292 U.S. 234, 238-39 (1934) (stating that the claim in the second suit against the employer based on a pre-bankruptcy assignment of wages is "ancillary and dependent" to employee's bankruptcy in first suit). The Court cited two other cases where "an additional party has a claim upon contested assets within the court's exclusive control." *Finley*, 490 U.S. at 551. *See* Krippendorf v. Hyde, 110 U.S. 276, 282 (1884) (explaining that where one creditor seeks debt recovery by attaching in federal court the alleged debtor's property held by a third person, the federal court may adjudicate claims involving the property presented by the third party and by other creditors of the same debtor, as they are "ancillary and dependent, supplementary merely to an original suit out of which" the claims arose; such proceedings involve "the inherent and equitable powers of the court in auxiliary and dependent proceedings incidental to the cause in which the property is held").

41. *Finley*, 490 U.S. at 552-56 (explaining that the relevant statute allowing suits against the United States does not include private defendants and its subject matter jurisdiction statutory partner mentions only suits against the United States, meaning suits against no one else).

42. *Id.* at 551.

43. *Hurn*, 289 U.S. at 240-41.

44. *Finley*, 490 U.S. at 556 (stating, "[a]s we noted at the outset, our cases do not display an entirely

under the federal constitution, ancillary adjudicatory power over a nonfederal claim that is factually related to a claim over which an independent subject matter jurisdiction basis is, or has been, recognized already. And, they recognize that such power is subject to congressional veto.[45] As well, they recognize that through statute, possible exercises of ancillary powers over pendent parties can require that factually related nonfederal claims do a little more than satisfy the *Gibbs* common nucleus test[46] or can be recognized by Congress in "an affirmative grant of pendent-party jurisdiction."[47] Thus, while the Federal Rules of Civil Procedure, effective only after opportunity for congressional review, continually maintain their "impulse" to promote "judicial economy and fairness to parties,"[48] the decisional precedents prior to § 1367 anticipate that under federal statutes "the efficiency and convenience of a consolidated action [involving all factually related claims] will sometimes have to be foregone in favor of separate actions in state and federal courts."[49]

B. The History and Language of the Statute

Within the Judicial Improvements Act of 1990,[50] Congress codified many of the precedents on ancillary adjudicatory powers over factually related nonfederal claims in § 1367,[51] though it employed a new term, "supplemental jurisdiction," and overrode the decision in *Finley*. At the time, some legal scholars anticipated significant problems, many of which could have been avoided had Congress followed a more traditional legislative process. Since then, problems have surfaced and criticisms of § 1367 have continued.[52]

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consistent approach with respect to the necessity that jurisdiction [over factually interdependent claims] be explicitly conferred").

45. *Id.* at 556 (acknowledging that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress").

46. *Id.* at 551.

47. *Id.* at 553-55.

48. *Gibbs*, 383 U.S. at 724.

49. *Finley*, 490 U.S. at 555-56.

50. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

51. While speaking only to subject matter jurisdiction over "claims" rather than to powers over issues that are exercised at anytime during the course of, or even after a judgment in, a civil action, fortunately § 1367 covers all "related" claims rather than only claims that "derive from a common nucleus of operative fact" per *Gibbs*. 28 U.S.C. § 1367(a), *Gibbs*, 353 U.S. at 725. *Cf.* Wendy Collins Perdue, *The New Supplemental Jurisdiction Statute—Flawed But Fixable*, 41 EMORY L.J. 69, 70 (1992) (preferring "common nucleus" language rather than the broader language now in § 1367(a)).

52. Among the early critics were Professors Thomas C. Arthur and Richard D. Freer. *See* Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991) [hereinafter Arthur & Freer, *Burnt Straws*]; Richard D. Freer,

The Judicial Improvements Act was designed to alleviate excessive costs and delays in federal litigation. The relevant Senate Report identified two main problems with the Article III federal court system: scarcity of resources and spiraling court costs.[53] The report cited a 1987 survey showing that 71% of Americans believed the overall cost of a lawsuit was too high.[54] In addition, it found many federal courts were uncertain about the boundaries of ancillary powers over factually related claims.[55] The Senate Report suggested that the supplemental jurisdiction proposal in Title I of the Act provided a means to promote greater efficiency and clarity.[56] Senator Grassley asserted that allowing federal courts to resolve civil claims outside their original subject matter jurisdiction, but factually related to claims within such jurisdiction, allowed the courts to "deal economically—in single rather than multiple litigations—with related matters."[57] In addition to supplemental jurisdiction, the Act expanded the number of federal district judges, provided additional protections for intellectual property rights, and established the National Commission on Judicial Discipline and Removal.[58]

The remaining legislative record for the 1990 Judicial Improvements Act almost exclusively embodies reports and discussions about the additional

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Compounding Confusion and Hampering Diversity: Life After Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991) [hereinafter Freer, *Compounding Confusion*]. Other academics joined the debate in the pages of that journal. *See* Rochelle Cooper Dreyfuss, *The Debate Over § 1367: Defining the Power to Define Federal Judicial Power*, 41 EMORY L.J. 13 (1992); Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31 (1992); Perdue, *supra* note 51; Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85 (1992). Later works on § 1367 are referenced in John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 936-43 (1998) [hereinafter Oakley, *Prospectus*]. Professor Oakley reviews the major debated statutory questions in Oakley, *Prospectus*, *supra*, at 936-45.

While most critics have focused on the failure of § 1367 to promote fully or intelligently the goals of intersystem judicial economy and efficiency and consistency of result, at least one critic finds the law carries the "potential to upset the constitutional allocation of power between federal and state courts." C. Douglas Floyd, *The ALI, Supplemental Jurisdiction, and the Federal Constitutional Case*, 1995 BYU L. REV. 819, 827.

53. S. REP. NO. 101-416, at 1-2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

54. *Id.* at 6.

55. *Id.* at 28.

56. *Id.* at 29 (fills the statutory gap noted in the *Finley* case).

57. 136 CONG. REC. S17,580 (daily ed. Oct. 27, 1990) (statement of Sen. Grassley).

58. *See id.* 905-18 (statement of Sen. Biden). Many believed the changes to be rather benign. Senator Grassley noted that "[t]he changes proposed by this amendment today, however, represent only those consensus items that enjoyed unanimous support among study committee members. Taken individually, these changes are quite modest. Collectively, I believe these changes will substantially improve the administration of justice in the Federal system." *Id.* at S17 (statement of Sen. Grassley).

judgeships. As the only senator to mention Title I, Senator Grassley described it as containing "a number of noncontroversial and somewhat technical recommendations of the Federal Courts Study Committee."[59] The Senate Judiciary Committee did not specifically discuss the proposed § 1367 and the Senate passed it as part of the larger omnibus legislation.[60] At the time, legal scholars complained they had little opportunity to review and critique the proposal.[61] While acknowledging there had been Federal Court Study Committee hearings, some argued that the proposed § 1367 was significantly different than the proposals discussed at those hearings.[62] Later, the Reporter for the Federal Judicial Code Revision Project (Project) of the American Law Institute (ALI) noted problems caused by the "hurried circumstances" under which § 1367 was passed.[63]

C. The Aftermath

1. Difficulties in Interpretation

With the passage of § 1367, critics predicted that troublesome and unintended consequences would follow.[64] Professors Thomas Arthur and Richard Freer were among the early critics. They concluded that the statute, as a whole, would encourage rather than reduce civil litigation expense and delay.[65] For instance, they found the class action language may have inadvertently abrogated the ruling in *Zahn v. International Paper*[66] that

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59. *Id.* at S17, 578 (statement of Sen. Grassley).

60. Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007, 1013 n.34 (1991) [hereinafter Arthur & Freer, *Close Enough*].

61. *See id.* at 1013; Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 SETON HALL LEGIS. J. 157, 159 (1994) (arguing that Congress's lack of oversight during the drafting process led to a statute with "undesirable effects").

62. Arthur & Freer, *Close Enough*, *supra* note 60, at 1013 n.35.

63. THE AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 1, at 21 (1997) [hereinafter ALI TENTATIVE DRAFT NO. 1]. The Judicial Improvements Act of 1990 is comprehensively reviewed by the Reporter, John Oakley, in John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735 (1991).

64. *See* Arthur & Freer, *Close Enough*, *supra* note 60, at 1008-09. *But see* Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 78 MARQ. L. REV. 973, 1038 (1995) (praising the drafters of § 1367 for doing "an admirable job of creating, in a lucid fashion, an organized and useful codification" of "pendent, ancillary and pendent-party jurisdiction").

65. Arthur & Freer, *Close Enough*, *supra* note 60, at 1012.

66. Zahn v. Int'l Paper Co., 414 U.S. 291 (1973).

disallows in diversity jurisdiction "claims by class members that do not satisfy the amount in controversy requirement."[67] Further, they characterized the statutory approach to factually related claims involving intervenors as yielding "confusion."[68]

Other scholars joined in dissent. While acknowledging the new statute provided some clarity, Professor Martin Redish found that § 1367 was "plagued with problems, ambiguity, and controversy."[69] Professor John Oakley, now the reporter for the ALI Project, advocated greater coordination between state and federal court jurisdiction in light of the "unclear" jurisdictional rules within the statute that were "subject to manipulation."[70]

In defense of § 1367, its drafters,[71] Professors Stephen Burbank, Thomas Rowe, and Thomas Mengler, wrote a series of essays.[72] They found that § 1367 clarifies and alters the decision in *Finley v. United States*,[73] thereby promoting more efficient adjudication of cases under the Federal Tort Claims Act.[74] They said this alone justifies the statute.[75] They admitted that "[t]he statute is concededly not perfect,"[76] but found that it provides "basic

67. Arthur & Freer, *Close Enough*, *supra* note 60, at 1008. The federal circuits have since split on whether § 1367 overrides *Zahn*. *See, e.g.*, Rosmer v. Pfizer Inc., 263 F.3d 110, 117 (4th Cir. 2001) ("§ 1367 plainly does not require that *all* class members must independently meet the amount in controversy requirement of § 1332.") and *In re* Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995) ("[U]nder § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement."), *aff'd* by an equally divided court *sub nom* Free v. Abbott Labs., 529 U.S. 333 (2000).

68. *See* Arthur & Freer, *Close Enough*, *supra* note 60, at 1011.

69. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1817 (1992).

70. John B. Oakley, *The Future Relationship of California's State and Federal Courts: An Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL. L. REV. 2233, 2236 (1993).

71. Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 216 (1991).

72. *See, e.g.*, Thomas D. Rowe, Jr. et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991) [hereinafter Rowe et al., *Coda*]; Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991) [hereinafter Rowe et al., *A Reply*].

73. *Finley*, 490 U.S. at 556 (holding that plaintiffs suing the federal government under the Federal Tort Claims Act could not join a private party defendant unless the plaintiff could show an independent federal jurisdiction base).

74. 28 U.S.C. § 1346(b) (2000).

75. Rowe et al., *A Reply*, *supra* note 72, at 945.

76. *Id.* at 961.

guidance."[77] They placed trust in the federal courts "to interpret the statute sensibly."[78]

In contemplating § 1367, the drafters did not consider inclusion of all ancillary federal district court powers, including those that help the courts function successfully. In seeking to implement a noncontroversial recommendation of the Federal Courts Study Committee, the drafters sought to craft a statute that did not involve such complex business that it would be "too prolix and baroque for everyday use and application by practitioners and judges."[79] Congressional omission of other ancillary powers from § 1367 may also be partially attributable to the state of U.S. Supreme Court precedents in 1990. The broader perspective in the *Kokkonen* precedent came some time later. Omission may also have been grounded on a desire for common law development. Whatever the reasons, the continuing failure to include all forms of ancillary powers in § 1367 is unfortunate as confusion and uncertainty continue. Since *Kokkonen* was decided in 1994, its view of the two heads of ancillary jurisdiction has been significantly overlooked. Federal lawmakers have failed to seize the opportunity to promote more fully the primary goals of § 1367, namely judicial economy, clarity and the reduction of unnecessary costs in civil litigation, by amending the statute to reflect more fully the *Kokkonen* analysis.

2. *The American Law Institute Proposals*

Since *Kokkonen*, the ALI has examined § 1367 through its Federal Judicial Code Revision Project. In 1994, it asked Professor John Oakley to draft "a prospectus for a project to revise the Judicial Code, for possible enactment by Congress."[80] Professor Oakley initially proposed that the ALI "undertake on a modular and serial basis to reform (1) supplemental and diversity jurisdiction; (2) venue and transfers of venue; and (3) removal jurisdiction and procedure."[81] Since then Professor Oakley has overseen the ALI discussion of possible § 1367 reforms.[82]

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77. *Id.*

78. *Id.*

79. *Id.* One question of interpretation recently decided by the U.S. Supreme Court involved the relationship of § 1367(d) to a state defendant given the Eleventh Amendment. Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002) (holding that § 1367 does not toll a statute of limitations for claims against nonconsenting states that are filed in federal court and later dismissed).

80. ALI TENTATIVE DRAFT NO. 1, *supra* note 63, at xv; Oakley, *Prospectus*, *supra* note 52, at 861.

81. ALI TENTATIVE DRAFT NO. 1, *supra* note 63, at xvi.

82. While the ALI Council tentatively decided in 1995 "to proceed with the project along the general

Early on, Professor Oakley identified several areas ripe for amendment. He expressed concern with both the scope of supplemental jurisdiction and with the standards for its discretionary use.[83] On scope, Professor Oakley proposed that law reformers better consider the "claim specific" way in which the federal district courts determine subject matter jurisdiction.[84] While statutes typically grant subject matter jurisdiction over certain types of actions, he found that federal district courts typically adjudicate on a "claim-specific rather than action-specific basis, with the law of supplemental jurisdiction functioning in the background."[85] Professor Oakley also urged that there be greater limitations on the judicial discretion under § 1367 over certain factually related nonfederal claims, including "compulsory counterclaims, cross-claims, claims by intervenors as of right, and claims for indemnity or contribution from third parties," as there should be no invitation to discard longstanding U.S. Supreme Court precedents.[86] But, he supported continuing "discretion in the exercise of what used to be called 'pendent' jurisdiction along the lines discussed in the leading case of *United Mine Workers of America v. Gibbs*."[87] Finally, Professor Oakley urged that supplemental jurisdiction be expanded to embrace additional parties and that the exercise of supplemental jurisdiction be "more-or-less presumptive in federal-question litigation."[88]

Professor Oakley's suggestions within the ALI Project have changed over time in response to input from ALI members. Thus, as a result of the 1997 Annual Meeting, Professor Oakley revised a draft of suggested changes.[89] A new draft, now approved, retains the "claim-specific" concept,[90] but eliminates certain proposals involving discretionary exercises of supplemental jurisdiction.[91]

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lines . . . proposed in the prospectus," since then the preferred approach and its particulars have changed after consultations with ALI members. *Id.* at xvi-xvii. The Institute approved on May 14, 1998, Tentative Draft No. 2. THE AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT TENTATIVE DRAFT NO. 2 (Apr. 14, 1998) [hereinafter ALI TENTATIVE DRAFT NO. 2] (approving black-letter and comments, but not annotations). The Project history is recounted in John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 IND. L.J. 25, 27-44 (1998).

83. *Id.* at xxii.
84. *Id.* at xvii.
85. ALI TENTATIVE DRAFT NO. 1, *supra* note 63, at xviii.
86. *Id.* at xix.
87. *Id.*
88. *Id.* at xx.
89. ALI TENTATIVE DRAFT NO. 2, *supra* note 82, at xxiii.
90. *Id.* at xv.
91. *Id.* at xxiii. A draft was adopted by the Institute on May 14, 1998.

The ALI proposals on § 1367, like the statute itself, fail to acknowledge all forms of ancillary federal district court powers. The omission is deliberate, as the Institute at the outset limited Professor Oakley's work to "clarification and rectification of the 'technical' provisions of the law governing federal jurisdiction," directing him to avoid "politically divisive 'macro' topics."[92]

In more theoretical writings, Professor Oakley has described Article III federal district court subject matter jurisdiction as encompassing three tiers: the constitutional tier, the statutory tier, and the decisional tier.[93] The interaction of these tiers is said to form a laminate that is interwoven and overlapping, with the courts simultaneously employing all tiers in determining jurisdictional issues. This description fits all forms of ancillary federal district court power. All ancillary powers can be viewed with a similar laminate. And they all are guided chiefly by concerns for judicial economy, efficiency and justice. These similarities are not politically divisive.

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92. ALI TENTATIVE DRAFT NO. 1, *supra* note 63, at xv. Professor Oakley, in response to input from Institute members, included thoughts on both technical and theoretical changes. *Id.* at xxii-xxiii. For an interesting critique of the ALI work, *see* Floyd, *supra* note 52, at 844 ("The relationship that historically had sustained the exercise of ancillary jurisdiction over nonjurisdictional claims by and against additional parties had been one of logical dependence or the necessity to resolve an entire lawsuit between parties already properly before the court, rather than simply the factual overlap and considerations of judicial economy that undergird the ALI proposal."). A recent Indiana Law Journal symposium also commented on the Tentative Drafts. *See* Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 IND. L.J. 5 (1998) (proposing that among the broad changes considered for § 1367, the drafters should reassess the limited scope of supplemental jurisdiction in diversity cases); Arthur D. Wolf, *Comment on the Supplemental—Jurisdiction Statute: 28 U.S.C. § 1367*, 74 IND. L.J. 223 (1998) (recommending that the drafters consider whether or not the discretionary exercise of supplemental jurisdiction under § 1367 is an unconstitutional delegation of Congress's power to determine jurisdiction of lower federal courts); David L. Shapiro, *Supplemental Jurisdiction: A Confession, an Avoidance, and a Proposal*, 74 IND. L.J. 211 (1998) [hereinafter Shapiro, *A Confession*] (recounting the unexpected results of the *Finley* decision and arguing that refinement of the current supplemental jurisdiction statute is better left to the courts) [hereinafter Shapiro, *A Confession*]; Peter Raven-Hansen, *The Forgotten Proviso of 1367(b) (And Why We Forgot)*, 74 IND. L.J. 197 (1998) (arguing that the limitations of § 1367(b) to cases "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332" is an underused judicial tool to exercise supplemental jurisdiction over several types of cases, including "plaintiffs who are claimed against from asserting essentially defensive counterclaims, cross-claims or third-party claims against nondiverse parties"); Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 IND. L.J. 181 (1998) (proposing that, as an alternative to the *Strawbridge v. Curtiss* complete diversity requirement, the drafters should urge a requirement for a "substantial core (or 'freestanding') diversity claim; once jurisdiction is attached to this claim, the Federal Rules of Civil Procedure would operate routinely").

93. ALI TENTATIVE DRAFT NO. 1, *supra* note 63, at 36-43.

To counter the complexity, "often to the point of bafflement,"[94] of integrating the tiers on ancillary adjudicatory powers over some factually related civil claims, the ALI has set forth a revised § 1367.[95] If there is also "bafflement" with respect to the other ancillary powers, where the tiers are similarly integrated and there exist no political divisions, should further revisions to § 1367 be pursued? Perhaps not, if any changes to § 1367 would necessarily entail a "complex business," making any revision "too prolix and baroque for everyday use and application by practitioners and judges."[96] While we find that all ancillary federal district court powers present issues of great complexity, we also find that the supplemental jurisdiction issues now addressed in § 1367 are no less complex than other ancillary power issues. We find there is comparable "bafflement" about all forms of ancillary power so that revisions seeking at least "to perpetuate rather than repudiate" the decisional tier would be helpful.[97] And, we find such revisions can be readily accomplished through use of the analysis in *Kokkonen*. We next explore more fully the varying forms of ancillary federal district court power; illustrate bafflements; and, suggest how the analysis in *Kokkonen* provides a helpful base for statutory revisions which perpetuate, yet do not repudiate, the decisional tier on all ancillary federal district court powers.

III. GAPS IN THE SUPPLEMENTAL JURISDICTION STATUTE: THE OTHER HEAD OF ANCILLARY JURISDICTION

A. The Two Heads of Ancillary Jurisdiction

Beyond initial adjudicatory authority over factually related nonfederal claims now addressed in § 1367, the U.S. Supreme Court has long recognized other forms of ancillary federal district court powers. In 1994, in *Kokkonen v. Guardian Life Insurance Co. of America*, these powers were nicely described.[98] The case involved parties who settled a federal diversity action. While the trial judge heard the agreement and dismissed the case under the civil procedure

94. *Id.* at 43.

95. ALI TENTATIVE DRAFT NO. 2, *supra* note 82, at 1-4. Professor Oakley also reviews the major statutory and policy questions arising under the present § 1367 in Oakley, *Prospectus*, *supra* note 52, at 936-45. Professors Edward Hartnett and John B. Oakley authored a recent colloquy on whether the revised ALI proposal touches the *Owen Equipment* case ruling. Colloquy, *Supplemental Jurisdiction, the ALI, and the Rule of the* Kroger *Case*, 51 DUKE L.J. 647 (2001).

96. Rowe et al., *A Reply*, *supra* note 72, at 961.

97. ALI TENTATIVE DRAFT NO. 1, *supra* note 63, at 45.

98. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

rule on voluntary dismissals, the judge did not incorporate, or even mention, any of the settlement terms in the dismissal order. The settlement provided that Kokkonen return to Guardian certain documents relating to his work as an insurance agent for Guardian.[99] When Kokkonen allegedly violated the terms of the settlement, Guardian sought judicial enforcement. While the lower courts ordered the documents returned, the Supreme Court, in a unanimous decision, reversed, finding there was no subject matter jurisdiction in the federal district court.[100] It said: "Neither the Rule nor any provision of law provides for jurisdiction of the court over disputes arising out of an agreement that produces the stipulation"[101] of voluntary dismissal. In the absence of a statutory basis for subject matter jurisdiction, the Court noted its case precedents recognized "ancillary jurisdiction . . . for two, separate, though sometimes related purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent . . . and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."[102] In the case, neither purpose was applicable, though the district court likely would have been able to exercise ancillary jurisdiction "if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal."[103]

The *Kokkonen* analysis demonstrates the gaps in the current supplemental jurisdiction statute. The Judicial Improvements Act, through the new § 1367, was intended to promote the consolidation of factually related claims in a single federal case in order to improve judicial efficiency while reducing civil litigation expenses. Yet, the Act does not address ancillary enforcement power that would have been available in *Kokkonen* under a different court order on the very same settlement. Similarly, explicit statutory recognition of the ancillary powers necessary for federal courts to function successfully would promote greater efficiency and economy as well as educate parties, lawyers and judges about the types and exercises of judicial powers that extend beyond initial adjudicatory authority. Clarification is necessary as much confusion remains today, especially over the second head of ancillary jurisdiction that involves successful court functioning. Amendments to § 1367 that are in line

99. *Id.* at 377.
100. *Id.*
101. *Id.* at 378.
102. *Id.* at 379-80.
103. *Id.*

with the *Kokkonen* analysis would help reduce existing "bafflement" and promote uniformity, while also perpetuating existing decisional tiers.

B. The Baffling Uncertainties Surrounding Ancillary Jurisdiction

In the absence of written guidelines in § 1367 or elsewhere, there are uncertainties about ancillary federal district court jurisdiction extending beyond initial adjudicatory power over factually interdependent claims. Some of this uncertainty is attributable to confusion over terminology.[104] Before the supplemental jurisdiction statute was enacted, both "ancillary" jurisdiction and "pendent" jurisdiction, including "pendent-claim jurisdiction" and "pendent-party jurisdiction," were the terms chiefly employed in judicial precedents to describe initial ancillary power over "factually interdependent" claims. These terms were never authoritatively defined.[105] Since 1990, federal courts have continued to refer to "ancillary," "pendent," "pendent-claim" and "pendent-party" jurisdiction and use pre-1990 cases when initially adjudicating factually related claims. Perhaps this is because § 1367 is viewed as mostly codifying earlier precedents.[106] Often, courts today make no express reference to § 1367 or to the phrase "supplemental" jurisdiction. Even the U.S. Supreme Court in *Kokkonen* employed terms other than supplemental jurisdiction in describing ancillary adjudicatory powers over factually related claims.[107] In apparent

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104. Reliance on general ancillary powers alone, without any attempt to distinguish their varying forms, would only serve to obscure analysis. *See, e.g.*, Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 207 (1958) (discussing the best approach to inherent judicial power analysis).

105. *See, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 n.8 (1978) ("No more than in *Aldinger* . . . is it necessary to determine here "whether there are any 'principled' differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences."); Finley v. United States, 490 U.S. 545, 549 (1989).

> We may assume, without deciding, that the constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction . . . . Our cases show, however, that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.

106. *See, e.g.*, *Kokkonen*, 511 U.S. at 379-80; Herrick Co. v. SCS Communications, Inc., 251 F.3d 315 (2d Cir. 2001); and Rosmer v. Pfizer Inc., 263 F.3d 110, 113-29 (4th Cir. 2001).

107. In *Kokkonen*, the Court did not mention 28 U.S.C. § 1367 when finding there was no factually interdependent claim within "ancillary jurisdiction," 511 U.S. at 380, after describing how the trial court had employed its "inherent power" and the appellate court had referenced "inherent supervisory power" in recognizing that enforcement authority was available to the insurer, *id.* at 377. After *Kokkonen*, the Supreme Court has referenced *Kokkonen* in speaking of ancillary jurisdiction involving factually interdependent claims, again without citing to 28 U.S.C. § 1367 or mentioning supplemental jurisdiction. Peacock v. Thomas, 516 U.S. 349, 355-56 (1996); *see also* City of Chicago v. Int'l Coll. of Surgeons, 522

recognition of contemporary uncertainties about appropriate terminology, the ALI considered, for awhile, a proposal to revive and clarify distinctions between pendent and ancillary claims, providing detailed definitions for each.[108] Yet even without further amendment, the current supplemental jurisdiction statute at least provides an opportunity for a singular approach to initial adjudicatory power, though today § 1367 does not define or otherwise speak to other ancillary powers. Here too there is "bafflement" and a similar need for a singular source.

Under *Kokkonen*, there are ancillary powers necessary for courts to function successfully, including powers to "manage" court proceedings, to "vindicate" judicial authority, and to "effectuate" court decrees.[109] Not infrequently, these powers, though employed, go unmentioned. Additionally, uncertainties, prompted by the little guidance provided in written laws or elsewhere on the discretion during the exercise of these powers, trigger at times standardless discretionary judicial acts.[110] Some uncertainties can be traced to continuing disagreements within the U.S. Supreme Court over the ancillary powers appropriate for successful court functioning. The Justices have struggled, for example, with locating "acts which occurred in connection with" civil litigation that might prompt the ancillary vindication powers[111] and with articulating the circumstances when statutes or court rules may "limit the exercise" of such powers.[112] Yet much uncertainty could be reduced by broadening § 1367 to encompass all forms of ancillary power, even if generally described. This expansion should not make the statute overly complicated or

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U.S. 156, 171-72 (1997) (referring to "pendant jurisdiction" even after referencing § 1367).

108. ALI TENTATIVE DRAFT NO. 1, *supra* note 63, at 5 provides:

> 1. a pendent claim is a claim for relief, other than a freestanding claim, that is joined in the complaint in a civil action and is part of the same case or controversy as a freestanding claim to which the pendent claim has been joined in the complaint;
>
> 2. an ancillary claim is a claim for relief, other than a freestanding claim or a pendent claim, that has been joined to the same civil action and is part of the same case or controversy as a freestanding claim.

That proposal has been eliminated by the adoption of ALI Tentative Draft No. 2. ALI TENTATIVE DRAFT NO. 2, *supra* note 82, at 1.

109. *Kokkonen*, 511 U.S. at 380.

110. Chambers v. Nasco, Inc., 501 U.S. 32, 68 (1991) (Kennedy, J., dissenting).

111. *Id.* at 76 (noting apparent disagreement with the majority on whether prelitigation acts of bad faith in a contract setting can trigger sanctions in the trial court).

112. *Compare id.* at 47-48 n.12 (declaring the Court has never classified the inherent powers doctrine by tiers, founded on the types of congressional authority available to limit the doctrine, and finding "no need to do so now") *with id.* at 64 (Kennedy, J., dissenting) ("Despite the Court's suggestion to the contrary . . . our cases recognize that Rules and statutes limit the exercise of inherent authority.").

"too prolix and baroque for everyday use."[113] It will promote needed clarity to a confusing body of terms and precedents and should not be "politically divisive."[114]

Congress should also distinguish between the different heads of ancillary jurisdiction in § 1367 because it can help guide trial courts on the types of procedures that must be used. For instance, in *Kokkonen*, assuming that the settlement agreement had been incorporated into the final decree, the trial court would have been able to proceed upon an alleged breach in any one of four ways: criminal contempt, coercive civil contempt, compensatory civil contempt, or contract enforcement. The type of proceeding is important because it determines the "applicability of federal constitutional protections."[115] However, determining whether proper procedures were employed is increasingly difficult because "in the codified laws of contempt . . . the 'civil' and 'criminal' labels . . . have become increasingly blurred."[116] As well, at times, trial courts do not clearly express the intentions underlying the procedures they employ when examining court orders that are disobeyed. Differentiations between varying ancillary powers in § 1367 would sensitize all to the importance of articulating goals when alleged violations of court orders are judicially explored.

If the court's main goal in examining Kokkonen's acts is to vindicate its own authority, then the "function successfully" prong of *Kokkonen* and criminal contempt procedures seem most appropriate. The need for correlation between the goal(s) sought and the character of the proceeding is well-established.[117] The U.S. Supreme Court thus has distinguished between criminal and civil contempt proceedings by stating: "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."[118] When a trial court mischaracterizes the nature of a contempt hearing and employs deficient procedures, challenges may be made.[119]

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113. *See supra* note 70.

114. *See supra* note 81.

115. Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 630 (1988).

116. *Id.* at 631.

117. *Id.* ("The question of how a court determines whether to classify the relief imposed in a given proceeding as civil or criminal in nature, for the purposes of applying the Due Process Clause and other provisions of the Constitution, is one of long standing, and its principles have been settled at least in their broad outlines for many decades.").

118. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911).

119. *Hicks*, 485 U.S. at 631 (noting that the challenger may have to show error by "the clearest proof").

One effective way for the trial court to vindicate its authority upon violation of a court order is to jail the charged party in criminal contempt for a determinate time. Here, the complainant often effectively becomes a quasi-prosecutor, describing how the charged party's defiance undermines the authority of the court. The private party moving for criminal contempt often receives no individual gain. As the U.S. Supreme Court has acknowledged, though: "if the proceeding is for criminal contempt and the [punishment] is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience."[120]

By contrast, the goal of coercive civil contempt effectuates a court's decree. Like criminal contempt, a court may send an errant party to jail upon finding disobedience. However, the jail time is a "conditional penalty," for compliance with the court's order will prompt release. As a result, those in contempt "carry the keys of their prison in their own pockets."[121] The chief purpose of coercive civil contempt is to resolve issues in an individual case, not to aid the court as an institution.

Compensatory civil contempt is meant to benefit primarily those harmed by violations of court orders (and perhaps other misconduct in litigation). It is used where the benefits sought involve compensation for the harm caused by the violations rather than future compliance with the court orders. Surely, in some instances one harmed may seek both compensatory and coercive civil contempt remedies.

Although federal district courts can secure compliance with their orders through coercive civil contempt, they may also use Federal Rule of Civil Procedure 69 at times. Under Rule 69, on enforcement of judgments, courts may order that "in aid of the judgment or execution, the judgment creditor or a successor in interest . . . may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held."[122] The process to enforce judgments for the payment of money is usually governed by state law.[123]

If amendments to § 1367 went beyond the general analytical structure set forth in *Kokkonen*, a revised statute could also address a few troublesome uncertainties. Consider, for example, the ancillary power issue in *Kokkonen*

120. *Id.* at 635-36 (quoting *Gompers*, 221 U.S. at 443).

121. *Id.* at 633 (quoting Penfield Co. v. SEC, 330 U.S. 585, 593 (1947)).

122. FED. R. CIV. P. 69(a).

123. *Id.*

itself. If "the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal,"[124] would the Supreme Court have recognized that federal district court power to inquire into the duty to return the insurance files better originated within the first or the second head of ancillary jurisdiction, assuming that such pigeonholing is important? The distinction seems important to us, as civil claim adjudicatory procedures prompted by initial complaints differ significantly from the procedures appropriate when courts seek to function successfully, as through contempt proceedings. At first blush, the second head seems most appropriate for an inquiry into the duty of Mr. Kokkonen to return the files to Guardian, since the court needs to "effectuate its decrees" in order for it to "function successfully."[125] Yet upon further thought, might not the first head be more appropriate since the district court would be involved in the "disposition . . . of claims that are, in varying respects and degrees, factually interdependent?"[126] But for the presentation of the initial claims in the federal district court, no settlement would have occurred; the settlement resolved all controversies in the court over the claims initially presented. Furthermore, judicial inquiry into Kokkonen's failure to turn over insurance files may be mainly prompted by the desires of Guardian rather than by judicial concerns about successful court functioning. As a result, private contract enforcement proceedings might follow. Here, there may again be a settlement which may not involve—or even be made known to—the district judge. Such a settlement would then terminate the proceedings yet again upon a voluntary dismissal—saying little about successful court functioning and making the appearance of a criminal contempt prosecutor very unlikely.[127]

If the first head of ancillary jurisdiction is more appropriate for the insurance file issue in *Kokkonen*, additional questions arise. For example, are the adjudicatory procedures germane to civil claims initially presented different from those presented, and perhaps, only arising long after traditional joinder laws have operated, as when settlements are arranged that effectively

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124. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 381 (1994).

125. *Id.*

126. *Id.* A similar question seemingly can arise with a motion for an attorney's fee award based upon civil litigation misconduct. *See, e.g.*, John G. Phillips & Assoc. v. Brown, 757 N.E.2d 875, 879-80 (Ill. 2001) (for purposes of timing of appeals, such a motion presents a claim which is "inextricably interwoven with the case" in which the motion is made).

127. The appointment of an independent prosecutor seems required as the alleged contempt by Mr. Kokkonen is indirect (outside the trial judge's presence), thus prompting the need for judicial fact finding following an adversarial hearing.

prompt wholly new civil claims,[128] or when postjudgment filings add new civil claims wholly dependent upon the judgments earlier rendered?[129]

C. Differentiating Between Ancillary Federal District Court Powers

Under *Kokkonen*, one head of ancillary jurisdiction involves "factually interdependent claims," while the other concerns judicial authority necessary for courts to "function successfully," including powers used for management, vindication, and decree effectuation.[130] While the former was codified in § 1367, with supplemental jurisdiction chiefly replacing, and somewhat modifying, the earlier decisional tier embodying initial pendent and ancillary adjudicatory power, the latter remains largely guided by precedents. We urge that § 1367 be amended[131] to speak, at least generally, to both heads of ancillary jurisdiction. We believe the failure, to date, to speak in written law is founded chiefly on inattention to the framework in *Kokkonen* rather than on any flaws in the framework, on any lack of need, on any projected drafting difficulty, or on any concerns about politically divisive topics. The *Kokkonen* analysis provides needed clarification on the scope of all ancillary powers as well as guidance on their exercise.

Under *Kokkonen*, the two heads of ancillary jurisdiction serve distinct, but related, purposes. In order to promote judicial efficiency and economy, adjudicatory authority over factually interdependent claims generally

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128. *See, e.g.*, CAL. CIV. PROC. CODE § 664.6 (West 2002) ("[T]he court, upon motion, may enter judgment pursuant to the terms of the settlement [agreement]."); Kirby v. S. Cal. Edison Co., 93 Cal. Rptr. 2d 223, 225 (Cal. Ct. App. 2000) (describing the statute as providing for "a summary procedure"); Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367 (1996) (settlement in state court of federal law claims that were within exclusive federal court adjudicatory authority). *Compare* United States v. Peterson, 268 F.3d 533, 534-65 (7th Cir. 2001) (plea bargain in criminal case in which defendant agrees to pay restitution for losses in crimes charged and for losses in similar acts which were not charged; where later agreement on the amount can not be reached, under the bargain the restitution amount is determined by the court at sentencing upon considering the collected details of defendant's wrongful conduct presented by the probation office).

129. Consider, for example, prevailing party cost recovery clauses in contracts or in statutes (as 42 U.S.C. § 1988 (2000)) that trigger rights only upon judgment entries. *See, e.g.*, Raintree Health Ctr. v. Ill. Human Rights Comm'n, 672 N.E. 2d 1136, 1148 (Ill. 1996) ("[C]ourts frequently award attorney fees without discovery . . . and without holding evidentiary hearings," at least where affidavits, detailed billing worksheets and responses thereto are submitted.).

130. *Kokkonen*, 511 U.S. at 379-80.

131. While some separation of powers concerns reasonably may be raised with congressional rather than judicial rulemaking initiatives on these other ancillary federal district court powers, we believe Congress is competent, and in the best position, given its earlier response to *Finley*, to adopt general guidelines. *See infra* Section IV-A.

encompasses civil claims involving private remedies resolved under substantive state laws. Authority promoting successful court functioning furthers the general public interest in the just, speedy and inexpensive determinations sought when civil actions are presented and resolved. Though their purposes vary somewhat in practice, both heads could fit nicely within § 1367. Ancillary jurisdiction relating to both factually interdependent claims and successful court functioning permit federal district courts to resolve all matters that would "ordinarily be expected" to be resolved in "one judicial proceeding."[132] Their close relationship will be illustrated later through a review of how all major forms of ancillary federal district court powers can encompass issues involving recoveries of attorneys' fees. The examples also demonstrate how easily uncertainties can arise regarding the two heads of ancillary jurisdiction.

1. A Broader View of Factually Interdependent Claims

Section 1367 states that the federal district courts have "supplemental jurisdiction over all other claims that are *so related* to claims in the action within such original jurisdiction that they form part of the *same case or controversy*."[133] Seemingly, the statute speaks to the first head of ancillary jurisdiction in *Kokkonen*, encompassing adjudicatory authority to dispose of "factually interdependent" claims.[134]

With such factually interdependent claims, there are important distinctions, however, that now go unnoted in § 1367.[135] The U.S. Supreme Court in *Gibbs* encouraged a broad expanse for such claims, finding that earlier limitations involving claims that arise from "the same group of circumstances" as in the federal claims were "unnecessarily grudging."[136] Instead, the Court stated:

> The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then,

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132. United Mine Workers v. Gibbs, 383 U.S. at 715, 725 (1966).

133. 28 U.S.C. § 1367(a) (2000) (emphasis added).

134. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 379-80 (1994).

135. *See* Matasar, *supra* note 27, at 1447-63 (exploring the "common nucleus" and "ordinary expectations" language of *Gibbs*).

136. *Gibbs*, 383 U.S. at 724-25.

> assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[137]

Thus, in addition to nonfederal claims involving the very same circumstances as the federal claims, factually interdependent claims also include nonfederal claims with fewer factual ties to federal claims, as long as one "would ordinarily be expected to try" all claims in one judicial proceeding.[138]

In *Kokkonen*, the Court alludes to this broader reading of factually interdependent claims when it says that civil claims can be factually interdependent "in varying respects and degrees."[139] Further, the Court recognizes that factually interdependent claims may be heard together because it is "particularly efficient that they be adjudicated together."[140]

The current supplemental jurisdiction statute seemingly embodies jurisdiction over claims under this broader reading of factually interdependent claims because it covers related claims, not simply claims suitable for initial adjudication because they "derive from a common nucleus of operative fact" per *Gibbs*.[141] The statute encompasses all claims that are sufficiently related, thus apparently including factually related claims that are presented long ago after the "claims in the action" (the federal claims) within "original jurisdiction" have been resolved.[142] Thus, the statute speaks to claims within both initial and later adjudicatory authority.

After *Gibbs*, but before *Kokkonen*, the U.S. Supreme Court had also ruled that ancillary power over factually interdependent claims, even those arising from "the same group of circumstances," is less available when the claims involve "parties not named in any claim that is independently cognizable by the federal court," for such claims are fundamentally different.[143] Beyond factual

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137. *Id.* at 725 (footnote omitted).

138. *See also* Peacock v. Thomas, 516 U.S. 349, 355 (1996) (quoting Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978)) ("The basis of the doctrine of ancillary jurisdiction is the practical need 'to protect legal rights or effectively to resolve an entire, logically entwined lawsuit.'"). Much legal commentary is in accord. *See, e.g.*, William A. Fletcher, *"Common Nucleus of Operative Fact" and Defensive Set-off: Beyond the Gibbs Test*, 74 IND. L.J. 171, 171 (1998) (arguing the constitutional test for supplementary jurisdiction is broader than the "common nucleus of operative fact" test of *Gibbs*, referencing earlier and agreeable academic works).

139. *Kokkonen*, 511 U.S. at 379-80.

140. *Id.* at 380.

141. *Gibbs*, 383 U.S. at 725.

142. *Compare* Perdue, *supra* note 51, at 70 (preferring "common nucleus of operative fact" language for § 1367) *with* Floyd, *supra* note 52, at 877 (preferring an even narrower range of supplemental claims to be covered in § 1367, since federalism as well as efficiency should matter).

143. Finley v. United States, 490 U.S. 545, 549 (1989) (footnote omitted) ("Our cases show, however, that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume

relatedness (or "mere factual similarity") and considerations of "the convenience of the litigants" and of "judicial economy,"[144] ancillary power over a new adverse party also requires "an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim."[145]

The federal civil procedure rule on impleader serves to illustrate both how a factually related nonfederal claim can arise from a differing group of circumstances as well as how explorations into postures and particular jurisdictional statutes can limit the availability of ancillary power over a new party even when convenience and economy are promoted. Federal Rule of Civil Procedure 14(a) permits a defendant, as a third-party plaintiff, to implead a "person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."[146] For the court to entertain such a third-party claim, the district court must find some basis for subject matter jurisdiction, since Rule 14(a) itself cannot extend subject matter jurisdiction.[147] In many settings, the third-party claims are nonfederal, thus falling outside any independent jurisdictional basis. Professors Wright, Miller and Kane, in their widely used Federal Practice treatise, suggest, however, that ancillary jurisdiction is usually available. They write:

> Because defendant's right of action against the third-party under rule 14 must be based on the same aggregate of facts that constitute plaintiff's claim, it follows that a court having jurisdiction over plaintiff's claim needs no additional jurisdictional ground to determine a third-party claim springing out of the same core of facts.[148]

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that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.").

144. *Id.* at 552 (citing *Kroger*, 437 U.S. at 376-77).

145. *Finley*, 490 U.S. at 551. (Citing *Kroger*, 437 U.S. at 373). *See also* U.S.I. Properties Corp. v. M.D. Constr. Co., 230 F.3d 489, 499 (1st Cir. 2000) (noting that such an examination is required when the new party is joined in a postjudgment proceeding seeking to establish the new party's liability for the judgment).

146. The provision states, in pertinent part:

> When a Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer.

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

147. FED. R. CIV. P. 82.

148. *See* 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1444 (2d ed. 1990).

Such claims are seemingly factually related, but often involve differing groups of circumstances. Consider general diversity lawsuits arising from automobile accidents. Often, third-party defendants are insurance companies who defend claims found within ancillary jurisdiction. Even though contracts between insurers and insureds involve differing circumstances than accidents between the plaintiffs and defendants, normally one expects that both the accident claims and the insurance coverage claims will be adjudicated in one judicial proceeding. Further, neither Professors Wright, Miller, nor Kane, nor any other distinguished commentators or judges, have ever suggested that posture or the specific jurisdictional statute employed in commencing the civil action should limit such ancillary jurisdiction.

Assuming a direct action is permitted against an insurer, Federal Rule of Civil Procedure 14 also allows the original plaintiff to "assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff" (*i.e.*, the original defendant).[149] Yet, here, even though the claim is factually interdependent, there is no ancillary jurisdiction under § 1367(b), which codified the decision in *Owen Equipment and Erection Co. v. Kroger*.[150] Posture and the goals within the general diversity statute foreclose ancillary jurisdiction.[151]

While certain types of factually interdependent claims are explicitly recognized in the joinder provisions of Federal Rule of Civil Procedure 14 and in other rules on joinder,[152] not all factually related claims subject to joinder are so recognized. Some unrecognized types may prompt very differing inquiries into posture and Congressional intent as to ancillary jurisdiction and thus lead to differing assessments of ancillary federal court powers. Consider, for example, claims involving attorneys' fee recoveries that often are unrecognized in written federal civil procedure laws.

Factually interdependent claims for attorneys' fees can include pendent claims, as where plaintiffs pursuing federal question claims (*e.g.*, civil rights)

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

150. Owen Equip. Co. v. Kroger, 437 U.S. 365 (1978).

151. *Id.* at 377 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934), the court declares that the policy underlying the complete diversity requirement of 28 U.S.C. § 1332 requires strict construction). While the original defendant did not bring suit under the general diversity statute, the original plaintiff did, and allowing that plaintiff to sue a nondiverse third-party defendant would undercut the requirement that all plaintiffs be diverse from all defendants.

152. *See, e.g.*, FED. R. CIV. P. 13(a) (compulsory counterclaims); FED. R. CIV. P. 13(g) (cross-claims); and, FED. R. CIV. P. 24(a) (interventions as of right).

arising out of private employment disputes simultaneously pursue factually related state law claims (*e.g.*, employment contract or civil rights) for which attorneys' fees are available to prevailing parties. They can also include some ancillary claims, as where original defendants pursue factually related state law claims against third-party defendants (*e.g.*, insurance contracts) for attorneys' fees. Less frequently discussed, and thus recognized, are attorneys' liens presented by attorneys for claimants against defendants to secure payments from the defendants for the legal services rendered to the claimants. An Illinois statute, operative in federal district courts,[153] is demonstrative in that it allows attorneys to initiate liens in pending civil actions on claims "placed in their hands by their clients for suit" in order to cover the fees, expenses and costs involved in pursuing the claims; it then permits trial courts to adjudicate rights and enforce liens.[154] Such liens are factually related to the pending civil claims since the attorney's work must be done in, or in anticipation of, the pending lawsuit. Comparably, non-lien presentations of requests for attorneys' fee awards by attorneys against clients (past or present)[155] or perhaps others[156] may be recognized within ancillary federal district court jurisdiction.

Similarly, there may be factually interdependent claims that involve clients seeking to avoid paying attorney's fees to their attorneys because of poor legal

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153. *See, e.g.*, Musikoff v. Jay Parrino's The Mint, L.L.C., 796 A. 2d 866 (N.J. 2002) (discussing the certification issue under the state attorney's lien act to the state high court for resolution).

154. 770 ILL. COMP. STAT. ANN. 5/1 (2002). The statute provides in pertinent part:

> Attorneys at law shall have a lien upon all claims, demands and causes of action . . . which may be placed in their hands by their clients for suit or collection . . . for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such suits, claims, demands or causes of action, plus costs and expenses . . . . Such lien shall attach to any verdict, judgment or order entered . . . from and after the time of service of the notice. On petition filed by such attorneys or their clients any court of competent jurisdiction shall . . . adjudicate the rights of the parties and enforce the lien.

A case illustrating the operation of the statute is *People v. Philip Morris, Inc.*, 759 N.E.2d 906 (Ill. 2001).

155. *See, e.g.*, *In re* Private Counsel Agreement, 1999 WL 1022131 (E.D. Tex. 1999) (employing the *Gibbs* factually related claims analysis, the court finds: "Every federal appeals court addressing the issue has concluded that as a general matter an attorney's fees dispute meets the relatedness test for supplemental jurisdiction." *Id.* at 3. Yet the court recognizes there is no supplemental jurisdiction over a fee dispute involving an attorney who voluntarily withdraws from representation for fee nonpayment); *Kalyawongsa v. Moffett*, 105 F.3d 283, 286-88 (6th Cir. 1997) (reviewing cases wherein supplemental jurisdiction is exercised over attorneys' fees disputes, not involving common funds and arising under state contract laws, that are factually related "to the main action"). *Id.* at 287.

156. *See, e.g.*, Venegas v. Mitchell, 495 U.S. 82 (1990) (stating that attorneys may be assigned, and can pursue directly postjudgment, their civil rights clients' statutory rights to attorneys' fees from defending parties). *Compare* Flannery v. Prentice, 28 P.3d 860 (Cal. 2001) (holding that the state statute allowing "prevailing party" to seek reasonable attorneys' fees read to vest ownership of fees in counsel for winning party in California Fair Employment and Housing Act claim, in absence of any attorney-client agreement).

work performed in the very civil actions in which these fee disputes are presented, and in which attorneys' fee awards may also be requested by the attorneys. Further, two or more attorneys for a single client in a pending federal civil action may themselves litigate, in that very action, any disputes over distributions of attorneys' fees. For example, an earlier retained, but now dismissed, contingency fee attorney may seek some fee recovery from a present contingency fee attorney.

For many of these factually interdependent civil claims involving attorneys' fees, there are no federal civil procedure rules or other written federal laws on joinder. And there is no indication in § 1367 of either ancillary jurisdiction or of the guidelines on their use.

2. *Ancillary Powers Needed for Courts to Function Successfully*

a. *The Power to Effectuate Decrees*

To function successfully, federal courts can employ ancillary powers to "effectuate" decrees. In *Kokkonen*, the Supreme Court indicated that federal district courts could police civil case settlement agreements incorporated into court judgments or otherwise specifically retained for possible later jurisdiction.[157] Such oversight often occurs through contempt proceedings, similar to oversights of judgments founded on judge or jury decisions.

The limits on such ancillary power are unclear. It is apparent, however, that the power to effectuate decrees is usually limited to a proceeding against someone adjudged liable earlier in a court order. It does not extend to others who may be responsible for failures of compliance with court orders. In *Peacock v. Thomas*,[158] a worker successfully sued his former insolvent employer under ERISA for recovery of pension benefits. While the case was on appeal, and prior to judgment execution, a company officer settled company accounts with creditors, including an $80,000 debt owed to that officer. When the worker was unable to execute the judgment later, he sued the company officer for the entire judgment amount. The U.S. Supreme Court, while acknowledging *Kokkonen*, found its analysis inapplicable.[159] The company officer was not involved in the original judgment and was not found liable in a court order. The Court explained that it had never authorized the exercise of

157. *Kokkonen*, 511 U.S. at 380-82.
158. Peacock v. Thomas, 516 U.S. 349 (1996).
159. *Id.* at 356, 359.

ancillary power in a later proceeding to impose an obligation to pay an earlier judgment on a person not earlier deemed liable for that judgment.[160] Thus, the Court limited decree effectuation to the parties and their privies.[161]

When effectuating decrees, issues of attorneys' fees must sometimes be resolved. Thus, a civil case settlement agreement prompting a judgment can require certain payments by a defendant to a plaintiff. Upon an alleged breach, a later judicial inquiry involving compensatory civil contempt can include a plaintiff's request for fees tied to the enforcement efforts, where the settlement expressly provided for such fee recovery. Similarly, where an agreement on an earlier-noticed attorneys' lien is incorporated into a judgment, with later dispute resolution and court enforcement possible, an issue as to the reasonableness of the fees requested can arise later, where the agreement was to pay only reasonable fees. Finally, a civil case judgment may prompt a general fee award founded on civil litigation misconduct that later requires enforcement where, for example, disputes arise over the reasonableness of the fees sought for defending against the acts of litigation misconduct.

b. The Power to Vindicate Authority

Disobedience of court orders which do not resolve civil claims or cases (*e.g.*, failure of a witness, party, or attorney to appear at hearings or at discovery proceedings) may be addressed through the ancillary power to vindicate judicial authority. Similarly, vindication authority may be used where there is no court order, but where there is disrespect or some other wrongful conduct during civil litigation. Such vindication can be pursued even in a setting where there is no applicable statute, court rule or other written law.

When vindicating authority, issues regarding attorneys' fees may arise. For example, federal district courts must usually find bad faith before assessing

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160. *Id.* at 359. The Court did not address whether ancillary jurisdiction would have been permitted had the worker "intended merely . . . to preserve and force payment of the ERISA judgment by voiding fraudulent transfers" of the judgment debtor's assets. *Id.* at 357 n.6.

161. *See, e.g.*, U.S.I. Prop. Corp., 230 F.3d at 498 ("[W]here a postjudgment proceeding presents an attempt simply to collect a judgment duly rendered by a federal court, even if chasing after the assets of the judgment debtor now in the hands of a third party, the residual jurisdiction stemming from the court's authority to render that judgment is sufficient to provide for federal jurisdiction over the post-judgment claim . . . . However, where that postjudgment proceeding presents a new substantive theory to establish liability directly on the part of a new party, some independent ground is necessary to assume federal jurisdiction over the claim, since such a claim is no longer a mere continuation of the original action.").

Postjudgment proceedings involving new parties but relating to judgment collection can include proceedings involving "attachment, mandamus, garnishment," and the avoidance of fraudulent conveyances. *Peacock*, 516 U.S. at 356, 357 n.6.

attorneys' fees for litigation misconduct, assuming absence of an applicable written law.[162] While such a fee award usually operates on behalf of a civil litigant and against an adverse party or an attorney, and thus benefits private interests, a major goal behind such an award typically involves the general public interest in according proper respect to judges and judicial proceedings.

Ancillary power to vindicate judicial authority was employed in *Chambers v. Nasco, Inc.*[163] where the U.S. Supreme Court reiterated that, pursuant to its inherent power, a federal district court could assess attorneys' fees when a party or an attorney acted during civil litigation either in willful disobedience of a court order[164] or in bad faith, vexatiously, wantonly, or for oppressive reasons.[165] Such assessments may even be made when a party's or an attorney's relevant acts could have been addressed through sanctions in some way under a written court rule or statute, but where the written laws were not fully "up to the task"[166] and no written laws limited the ancillary power.[167] Yet, where there are adequate written laws on point, only they should be employed in vindication proceedings.[168]

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162. At times, written laws require conduct approaching the bad faith needed in common law ancillary vindication power settings. *See, e.g.*, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (prevailing defendants receive attorneys' fees under 42 U.S.C. § 1988 only upon a finding "that the plaintiff's action was frivolous, unreasonable, or without foundation").

163. Chambers v. Nasco, Inc., 501 U.S. 32 (1991).

164. *Id.* at 45 (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258 (1975).

165. *Chambers*, 501 U.S. at 45-46 (citing *Alyeska*, 421 U.S. at 258-59). The inherent federal court power to sanction an attorney in the absence of "a violation of a court order" may not require a finding of bad faith where the attorney's acts were "not undertaken for the client's benefit." United States v. Seltzer, 227 F.3d 36, 41-42 (2d Cir. 2000). Bad faith conduct may include, however, reckless acts "when combined with an additional factor, such as frivolousness, harassment, or an improper purpose." Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001).

166. *Chambers*, 501 U.S. at 50.

167. *Id.* at 47 (holding that inherent federal court power may be limited by statute or court rule as federal courts are created by Congress). *See, e.g., id.* at 51 (citing Bank of Nova Scotia v. United States, 487 U.S. 250, 254-55 (1988) (where the clear mandate of a criminal procedure rule limited supervisory power)). *But see* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.2.3 (Hornbook Series, Student ed. 1986) (recognizing "negative inherent powers" doctrine disallows legislative override at least where written laws would directly and substantially impair judicial authority to adjudicate cases and conduct other necessary business).

168. *Chambers*, 501 U.S. at 50 ("Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power.").

c. *The Power to Manage Proceedings*

For a federal district court to function successfully, it must be able, at times, to exercise powers to manage its proceedings. While the Federal Rules of Civil Procedure seek to promote "the just, speedy, and inexpensive determination of every action,"[169] additional ancillary management powers to avoid unnecessary delays or expense are essential. As the Supreme Court noted in *Link*, "the district court's ability to take action in a procedural context may be considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[170] As courts manage their proceedings, issues of attorneys' fees sometimes must be resolved.

One of the tools available for managing the ever-increasing workloads in the federal district courts is the special master. Special masters may be appointed under Federal Rule of Civil Procedure 53 in order to assist a federal judge in the administration of a complex or lengthy civil action.[171] For instance, a master can be appointed to oversee class action discovery,[172] to assist in the enforcement of a final judgment embodying a broad injunction,[173] or to help determine difficult issues on damages.[174] The reference of masters is limited to case settings involving exceptional conditions.[175] The compensation of a master is set by the court, which may order it paid by any of the parties or out of a fund within the subject matter of the civil action.[176] If the party ordered to pay refuses, "the master is entitled to a writ of execution against the delinquent party."[177]

While masters may be attorneys, the procedures for their fee assessments should differ significantly from the procedures for attorneys' fees assessments in other ancillary power settings. A fee assessment for a master reflects the

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169. FED. R. CIV. P. 1.

170. Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962).

171. FED. R. CIV. P. 53(b).

172. Aird v. Ford Motor Co., 86 F.3d 216 (D.C. Cir. 1996).

173. Reed v. Cleveland Bd. of Educ., 607 F.2d 737 (6th Cir. 1979) (appointing special master to oversee the implementation of a desegregation plan).

174. S. Agency Co. v. LaSalle Casualty Co., 393 F.2d 907 (8th Cir. 1968) (an accounting firm was appointed as a special master to assist in assessing damages in a case involving a breach of an insurance agency agreement).

175. FED. R. CIV. P. 53(b).

176. FED. R. CIV. P. 53(a). *See, e.g.*, David I. Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L.J. 141 (1985).

177. FED. R. CIV. P. 53(a).

cost of obtaining assistance for the court, aiding all involved in the civil action. As the court said in *Aird v. Ford Motor Company*[178] after reviewing Federal Civil Procedure Rule 53 and inherent authority, a district court "enjoys broad discretion to allocate [fees]"[179] and a "court's ability to manage its docket and enforce the discovery rules . . . may depend greatly on its power to allocate the costs of reference as it deems appropriate."[180]

IV. NEW SUPPLEMENTAL JURISDICTION STATUTE

A. Who Should Write It?

There is much to be said for assigning Congress the task of filling in the ancillary power gaps, given § 1367 and the broad authority of Congress pursuant to its Article III powers to define the subject matter jurisdiction of the federal district courts.[181] In another context, Professor Fink has observed: "Supplemental jurisdiction is the unused weapon in Congress' arsenal to solve national litigation problems in the federal courts."[182] Yet, is Congress in the best position to lawmake?

We think so.[183] Congress should supplement § 1367, using Supreme Court precedents, especially the 1994 decision in *Kokkonen*. Professor Oakley recognized the value of statutory guidance on supplemental jurisdiction in an ALI draft in which he wrote:

> By swiftly supplying comprehensive statutory authority for the exercise of supplemental jurisdiction, present § 1367 prevented the seepage of authority to adjudicate supplemental state-law claims in the pendent-party, exclusive-federal-jurisdiction context of *Finley* from becoming a ruinous flood, depleting a reservoir of long-accumulated precedent permitting

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178. *Aird*, 86 F.3d at 225.

179. *Id.* at 221.

180. *Id.* at 222 (citing *Ex parte* Peterson, 253 U.S. 300, 314-15 (1920) (agreeing with district judge's decision to appoint an auditor to help define the matters in issue)).

181. Of course, congressional action should proceed cautiously. As a drafter of § 1367 has noted: "Wooden interpretive approaches with heavy emphasis on plain language—whatever the apparent legislative intent—increase the possibility that any gap or ambiguity will have unintended consequences (be they fortunate or otherwise)." Thomas D. Rowe, Jr., *1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 IND. L.J. 53, 56 (1998).

182. Howard P. Fink, *Supplemental Jurisdiction—Take It to the Limit!*, 74 IND. L.J. 161, 169 (1998) (discussing how the elimination of § 1367(b) would give federal courts more power to resolve certain types of mass tort and complex business cases).

183. *Cf.* Shapiro, *supra* note 92, at 218 (urging that detailed refinements of § 1367 should be left to the courts).

> federal courts to achieve the fair and efficient, holistic disposition of complex, multi-claim and multi-party litigation.[184]

A similar congressional initiative could promote better exercises of the "function successfully" forms of ancillary federal district court powers. Even Professor David L. Shapiro, who urges that refinements of federal subject matter jurisdiction generally are "best left to 'common law' development," declares that Congress should enact "a law establishing the principle of supplemental jurisdiction, and then . . . leave all or most of the details to be worked out by the courts."[185] We think general statutory guidelines on all forms of ancillary federal court powers should be established, with the details to be worked out in common law rulings. Regardless of who speaks, however, more should be said in written laws about ancillary federal court powers.

B. What Should Be Said?

The major difficulty with § 1367 today is its failure to address both heads of ancillary jurisdiction, making it more difficult for the Article III federal courts to work out the details. We propose new statutory guidelines on the scope of ancillary powers and on the discretion to hear claims and other matters under the factually interdependent and function successfully heads of ancillary jurisdiction. These guidelines should be included in a broader § 1367 and not in several distinct statutes. Section 1367 should then become the primary resource employed by judges, lawyers and others exploring ancillary federal district court powers.

Too often today, the lack of statutory guidelines, especially for the "function successfully" ancillary powers, contributes to limited recognition of discretionary federal district court authority. For example, in *In re Novak*,[186] a federal appeals court determined that in the absence of federal rules or statutes, the district court lacked the power to compel a nonparty insurer to participate in a settlement conference though the insurer was directing the defenses to the claims. It said there was no available inherent power because

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184. ALI TENTATIVE DRAFT NO. 2, *supra* note 82, at 16.

185. Shapiro, *supra* note 92, at 218. In proposing an expansion of § 1367, we agree with Professor Shapiro that such an effort should (and we believe it can) "avoid the growing disposition to make the jurisdictional charter of the federal courts resemble the murkier provisions of the Internal Revenue Code." *Id.* at 220. Should only the broad parameters of the entire realm of ancillary jurisdiction be deemed suitable for congressional initiative, we hope the following suggestions will be employed by the federal courts who fill in the gaps.

186. *In re* Novak, 932 F.2d 1397, 1407-08 (11th Cir. 1991).

the attendance of the nonparty insurer was not necessary to obtain a settlement,[187] although it seems clear that an insurer's attendance at a settlement conference would often aid the parties in reaching resolution. To function successfully, federal courts should be encouraged to employ very helpful, as well as absolutely necessary, powers.

U.S. Supreme Court precedents, as well as the history of § 1367 in combatting confusion, support statutory clarification of ancillary federal district court powers since uncertainties have arisen. In its absence, many may follow Justice Scalia, who observed that federal district courts "possess only that power authorized by Constitution and statute . . . which is not to be expanded by judicial decree."[188] While federal legislation certainly cannot extend federal judicial powers beyond those constitutionally permitted, Congress can and should clarify the scope of ancillary powers when uncertainties arise, as Congress did with some factually interdependent claims when it enacted § 1367 in 1990.

A common criticism of Professor Oakley's first draft of a revised § 1367 was that it was too unwieldy for practical use.[189] As a result, Professor Oakley altered his approach to § 1367 revisions "in order to achieve greater economy of exposition."[190] A revision of § 1367 that incorporates the two heads of ancillary jurisdiction can be economical and need not be "prolix and baroque."[191] An amendment could employ the analysis in *Kokkonen*,[192] with limited explanations of the varying forms of ancillary powers. A new § 1367 statute could provide greater guidance while maintaining the flexibility and discretion necessary for the federal district courts to resolve factually related claims and to determine issues efficiently and fairly in order to function successfully.

To reinforce the practice-oriented structure of § 1367, the statute should delineate between the varying forms of factually interdependent claims and between the ancillary powers allowing courts to function successfully, namely, the effectuation, vindication, and management powers. These delineations should prompt lawyers and judges to consider the goals, and thus the appropriate procedures, of any exercises of ancillary power. In particular, a

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187. *Id.* at 1408 (while inherent power was unnecessary as to insurance adjuster Novak because his presence could be secured by an order against his principal, the defendant/insured, it would be different where there was tension (*e.g.*, as to insurance policy coverage) between the insured and the insurer).

188. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

189. *See* ALI TENTATIVE DRAFT NO. 2, *supra* note 82, at ix.

190. *Id.* at xviii.

191. Rowe et al., *A Reply*, *supra* note 72, at 961.

192. *Kokkonen*, 511 U.S. at 379-80.

new § 1367 would enable all to "be able to understand clearly and in advance the tools that are available to them in ensuring swift and certain compliance with valid court orders."[193]

As noted, there are varying forms of "factually interdependent" nonfederal claims within ancillary federal district court powers. Nonfederal claims may be initially presented for adjudication with federal claims as long as all claims arose from "the same group of circumstances."[194] Such nonfederal claims are now recognized by all as addressed in § 1367. Yet there are other nonfederal claims, with lesser factual ties, that may also be presented. These nonfederal claims, often presented later, may be adjudicated if all claims "would ordinarily be expected" to be tried "in one judicial proceeding."[195] Seemingly, such lesser-connected nonfederal claims also include claims grounded on liens attaching to later judgments that are presented early in the civil action and to many claims for attorneys' compensation,[196] including those derived from contingency fee pacts between personal injury claimants and their lawyers.

"Factually interdependent" nonfederal claims with lesser factual ties to the federal claims initially presented for adjudication may also include the claims for civil claim settlement enforcement recognized in *Kokkonen*. Here, any adjudication may come long after the federal claims were resolved. But ancillary power is nevertheless appropriate because of efficiency concerns and reasonable party and judicial expectations.

Beyond ancillary adjudicatory powers over the varying forms of "factually interdependent" claims, ancillary federal district court powers involving effectuation, vindication and management warrant some explicit mention in § 1367. As to the enforcement powers necessary to function successfully, § 1367 could follow *Kokkonen* to indicate that in order for a trial court to enforce a settlement agreement, it may include "the terms of the settlement contract . . . in the order . . . or, what has the same effect, retain jurisdiction over the settlement contract."[197] In addition, language should be added to § 1367 to indicate there are other opportunities for ancillary enforcement powers, as when there is disobedience to judgments founded on bench or jury

193. Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 636 (1985).

194. *See, e.g., Kokkonen*, 511 U.S. at 375.

195. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

196. While there is federal judicial power to hear factually-related nonfederal claims involving attorneys' fees, there is also broad discretion on whether or not such power should be exercised. *See, e.g.*, Ryther v. KARE II, 976 F. Supp. 853, 857 (D. Minn. 1997) (factors guiding this discretion include court's familiarity with subject matter; court's responsibility to protect its officers; convenience; and, whether there is a compelling reason for the federal court to decline to act, as where state law precedents are unclear).

197. *Kokkonen*, 511 U.S. at 381-82.

trials or to collateral orders involving vindication or management efforts. Many of these ancillary enforcement proceedings may have many comparable procedures, usually involving contempt hearings.[198]

As to the management powers necessary to "function successfully," § 1367 should address only one of the two types of court management. A "judicial administration" or "superintending control" management order often involves an administrative undertaking by a Chief or Presiding Judge related to the day-to-day management of the trial court.[199] These orders involve such matters as calendaring, judicial assignments, and office or hiring procedures. They do not fit within § 1367. Other court management orders, dealing with the management of a pending case, were noted in *Kokkonen*.[200] These case management orders can involve such matters as the appointment of a special master, the use of a federal magistrate judge, or the assignment of a trial court judge. They fit within § 1367.

Finally, as to ancillary vindication powers,[201] the U.S. Supreme Court decision in *Cooter & Gell v. Hartmarx Corporation*[202] provides useful guidelines. There the Court discussed the Federal Civil Procedure Rule 11 postjudgment sanctioning authority for civil litigation misconduct involving written presentations. The appellate court had said that

> because Rule 11 sanctions served to punish and deter, they secured the proper functioning of the legal system "independent of the burdened party's interest in recovering its expenses." Accordingly . . . such sanctions must "be available in appropriate circumstances notwithstanding a private party's effort to cut its losses and run out of court."[203]

The Supreme Court agreed that the district court's power to vindicate its authority transcends the interests of the individual parties and extends beyond the time of party involvement in a civil action. New language in § 1367 could limit the narrow interpretations occasionally given ancillary vindication powers, as when they are applied only in active cases. Even where a case is

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198. Procedures may differ, for example, where there is a constitutional or statutory right to trial of factual issues by a jury.

199. *See, e.g.*, OHIO CONST. art. IV, § 5(A)(1) (supreme court "general superintendence" power to be "exercised by the chief justice" in accordance with supreme court rules); ILL. CONST. art. VI, § 16 ("[G]eneral administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice" in accordance with court rules.).

200. *Kokkonen*, 511 U.S. at 380.

201. *Id.*

202. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990).

203. *Id.* at 390 (quoting Danik, Inc. v. Hartmarx Corp., 875 F.2d 890, 895 (D.C. Cir. 1989)).

dismissed, its filing "puts the machinery of justice in motion," at times "burdening the courts and individuals alike with needless expense and delay."[204] So, notwithstanding a dismissal of all claims presented for adjudication, ancillary vindication power may be exercised.

C. Coordination With Other Written Laws

In any revisions to § 1367 there must be coordination with other written laws as well as proper regard for judicial precedents. Several other statutes, as well as a number of Federal Rules of Civil Procedure, seemingly address ancillary federal district court powers to hear "factually interdependent" claims and to "function successfully." For example, one federal statute, 28 U.S.C. § 1927, allows courts to assess excessive costs, expenses and attorneys' fees on attorneys who multiply proceedings "unreasonably and vexatiously."[205] And, Federal Rules of Civil Procedure 11 and 37 provide for monetary assessments when deficient civil litigation papers are presented, though they contain standards very different from each other,[206] from § 1927, and from the ancillary vindication power case precedents.[207]

While coordination of an amended § 1367 with existing statutes and rules is important, comprehensive cross-references seem neither necessary nor feasible. Indeed, one major criticism of the current § 1367(b) is its "use of specified joinder rules of the Federal Rules of Civil Procedure as the basis for restricting the scope of supplemental jurisdiction in diversity cases."[208] By specifically mentioning certain rules or statutes, § 1367 may restrict jurisdictional exercises under other written laws, a form of *expressio unius est*

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204. *Id.* at 398.

205. 28 U.S.C. § 1927 (1994). The statute provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

206. *Compare* FED. R. CIV. P. 11(c)(2) (stating that nondiscovery sanctions are limited to those "sufficient to deter repetition"), *and* FED. R. CIV. P. 37(b)(2) (stating that the court "shall" order payment of "reasonable expenses, including attorney's fees" for discovery-related misconduct).

207. *See, e.g.*, Chambers v. Nasco, Inc., 501 U.S. 32, 33 (1990) (stating that inherent power extends to full range of litigation abuses, but willful, bad faith, or similar acts are needed for power to be used).

208. ALI TENTATIVE DRAFT NO. 2, *supra* note 82, at 17. *See also* John B. Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes*, 69 TENN. L. REV. 35, 37 (2001) ("Union of rules and statutes in current law of supplemental jurisdiction" is not a healthy one.).

exclusio alterius.[209] And consider, for example, supplemental jurisdiction to enforce civil claim settlements in diversity cases under the principles of *Kokkonen* where there is no joinder at all. We suggest that a new § 1367 should reference only generally the range of ancillary federal district court powers, without mentioning any particular joinder laws. The structure of *Kokkonen* would work well.

The new ancillary jurisdiction provisions we propose for § 1367 should be general and should complement, rather than supercede, existing rules and statutes. Some existing rules and statutes touching differing forms of ancillary federal district court powers do reveal some unnecessary duplication and unfortunate omissions. Once the general structure of ancillary jurisdiction is set out in a new § 1367, amendments to related written civil procedure laws should follow.

For example, Federal Rule of Civil Procedure 69 now seemingly provides guidance on ancillary powers over certain "factually interdependent" claims and on the enforcement prong of the "function successfully" ancillary power. The rule specifically provides for the enforcement of a judgment by a writ of execution as well as for opportunities to undertake related discovery.[210] Yet the rule is incomplete. *Kokkonen* makes it quite clear that a federal district court may only enforce terms of a settlement if the terms are set out, or at least referenced, in the final judgment.[211] Federal district courts seemingly remain confused today on the technique(s) for recognizing such future enforcement power.[212] Recognition of the proper technique in Rule 69 would help to eliminate uncertainty.[213]

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209. Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) (applying canons of statutory interpretation to interpret the pleading requirements of Federal Rule of Civil Procedure 9(b)).

210. FED. R. CIV. P. 69.

211. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 381 (1994).

212. *See, e.g.*, Jessup v. Luther, 277 F.3d 926, 929 (7th Cir. 2001) (finding it unusual that a settlement agreement was submitted to and approved by the district judge though ancillary enforcement power was not retained and wondering whether the trial judge was merely "a kibitzer"); Consumers Gas & Oil v. Farmland Ind., 84 F.3d 367, 371 (10th Cir. 1996) (holding that though district court reserved "continuing jurisdiction" over a settlement, where only some settlement terms are set forth in a court order, other terms may not be subject to enforcement proceedings). *Compare* Schaefer Fan Co. v. J&D Mfg., 60 U.S.P.Q. 2d 1194 (Fed. Cir. 2001) (establishing that enforcement jurisdiction is proper where trial judge manifests "intent to retain jurisdiction" over settlement) *with* O'Connor v. Colvin, 70 F.3d 530, 532 (9th Cir. 1995) ("Even a district court's expressed intention to retain jurisdiction is insufficient to confer jurisdiction if that intention is not expressed in the order of dismissal.").

213. There are other questions which might also be considered. *See, e.g.*, Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905 (N. D. Iowa 2002) (indicating circumstances requiring personal jurisdiction over nonresident judgment debtor when federal court enforces judgment of some other court).

V. CONCLUSION

Ancillary federal district court powers embody more than adjudicatory authority over "factually interdependent" civil claims initially presented within cases or controversies. Ancillary powers are used to facilitate civil case settlement agreements encompassing claims never presented for adjudication, as well as to adjudicate some disputes over settlement agreements long after final judgments. While certain ancillary powers are now recognized in the "supplemental jurisdiction" statute, 28 U.S.C. § 1367, the range of the statute is quite limited. It chiefly codifies earlier precedents on pendent and ancillary jurisdiction that primarily address initial ancillary adjudicatory authority over state law civil claims without independent jurisdictional bases that arise from the same "common nucleus of operative facts" as the civil claims having independent subject matter jurisdictional bases. Section 1367 should provide clarity for all federal court ancillary powers, eliminating much uncertainty and confusion.

Section 1367 should be amended to encompass more fully ancillary adjudicatory and nonadjudicatory federal court authority. This task is facilitated by the 1994 decision in *Kokkonen v. Guardian Life Insurance Company of America*. A reformulated statute should speak for the first time to the ancillary nonadjudicatory powers necessary for courts to function successfully, including management, vindication, and certain enforcement powers. And, it should better recognize the differences between initial and later ancillary adjudicatory powers over nonfederal civil claims that are factually related to federal civil claims. In the absence of congressional action, judicial decisions should better recognize and differentiate the varying forms of ancillary federal district court powers.