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PENDENT JURISDICTION: THE IMPACT OF HAGANS AND MOOR

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Since Chief Justice Marshall gave the doctrine of pendent jurisdiction its genesis in *Osborn v. Bank of the United States,*[1] the doctrine has been increasingly developed and expanded by the federal judiciary[2] and by Congress.[3] The doctrine's expansion began in *Siler v. Louisville & Nashville Railroad,*[4] wherein Justice

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[1]22 U.S. (9 Wheat.) 738, 823 (1824). The Supreme Court concluded that when a question to which the judicial power is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved. This statement has come to mean that a federal court has *power* to decide any question of state law necessary to the adjudication of a federal question. Professor Wright notes that functional justification of the *Osborn* rule finds support in the constitutional language of article III, section 2, which grants jurisdiction over "cases" rather than over "questions." *See* C. WRIGHT, LAW OF THE FEDERAL COURTS § 19, at 63 (2d ed. 1970). Consequently, in disposing of claims which are within a federal court's original subject matter jurisdiction, the court may exercise pendent jurisdiction over related claims of which it could not take cognizance if the related claims were independently presented. In other words, a federal court acquires jurisdiction over a case or controversy in its entirety.

[2]*See generally* United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 175 (1933); Siler v. Louisville & N.R.R., 213 U.S. 175 (1909).

[3]28 U.S.C. § 1338(b) (Supp. 1974) states:

> The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.

[4]213 U.S. 175 (1909). In *Siler* a state order regulating rates was attacked as unauthorized by state law and as unconstitutional under federal law. Preferring to avoid a decision on the constitutional question, the Court held the state regulation invalid on state grounds. *Id.* at 191. The Court cautioned, however, that the federal question must not merely be colorable or fraudently set up for the purpose of acquiring federal jurisdiction. *Id.* at

Peckham held that when a good faith substantial federal question is presented, a federal court may dispose of the case on state grounds without deciding the federal question. Later, in *Hurn v. Oursler,*[5] the Court extended pendent jurisdiction to allow a federal court, purely for reasons of procedural convenience, to decide the state issue first. Although the *Hurn* doctrine was an attempted solution to the piece-meal litigation generated by the limited jurisdiction of the federal courts, the imprecision of *Hurn*'s "cause of action" standard created many difficulties in application.[6] The confusion arising from the *Hurn* standard was seemingly resolved by the United States Supreme Court in *United Mine Workers v. Gibbs.*[7] Justice Brennan, writing for a unanimous Court, discarded *Hurn*'s "cause of action" test and, instead, stated that pendent jurisdiction exists whenever the state and federal claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."[8] Subsequent cases have generally

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192. *See* Pennsylvania Mutual Life Ins. Co. v. Austin, 168 U.S. 685, 695 (1897). It should be noted that under the *Siler* rule, federal courts need not first decide the federal issues but may resolve the case on state grounds; this is not a rule of necessity but one of judicial self-restraint. Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[5]289 U.S. 238 (1933). Plaintiffs alleged that defendant's play incorporated ideas from two plays written by them, only one of which had been copyrighted. *Hurn* reasoned that if a plaintiff presented "two distinct grounds," one state and one federal, in support of a single cause of action, the federal court had jurisdiction over the entire case. But if the plaintiffs' assertions amounted to "two separate and distinct causes of action," there was jurisdiction only over the federal cause. *Id.* at 245-46. In applying this standard, the Court held that the state law of unfair competition with regard to the copyrighted play was within the federal court's jurisdiction.

[6]*See* Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938); Note, *The Doctrine of* Hurn *and the New Judicial Code,* 37 IOWA L. REV. 406 (1952).

[7]383 U.S. 715 (1966). In *Gibbs,* members of a local union had forcibly prevented the opening of a mining operation with which plaintiff had a contract as a mining superintendent and hauling contractor. Gibbs sued the union in federal court and alleged that it had brought pressure on his employer to discharge him. He asserted both a federal claim under section 303 of the Taft-Hartley Act, 29 U.S.C. § 187 (1970), and a state claim of unlawful conspiracy to interfere with his employment contract.

[8]383 U.S. at 725. *Gibbs* concluded that *Hurn*'s approach was unnecessarily grudging. The standard enunciated in *Gibbs* resolved the question of judicial *power* to hear the claims. To be sure, *Gibbs* did not suggest that this power be exercised in every case; indeed, the Court carefully distinguished between the *power* to decide related claims and the discretionary *exercise* of that

read *Gibbs* as broadening the scope of pendent jurisdiction; commentators, however, have disagreed as to the desirability of this development.[9] Nevertheless, two important considerations have surfaced from the *Gibbs* decision. The first concerns the measure of caution with which federal courts should approach the exercise of pendent jurisdiction so as to avoid needless decisions of state law.[10] The second relates to whether pendent jurisdiction refers only to the joinder of state and federal claims when the same parties are involved or whether *Gibbs'* broad language includes the joinder of "pendent parties"[11] over whom the trial court has no independent jurisdiction.

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power. The discretion to hear the related claims depends on considerations of judicial economy, convenience, and fairness to litigants and should be used to avoid needless decisions of state law. Thus, it is clear that the discretionary inquiry is separate from the question of whether the court has jurisdiction to hear all claims. *Id.* at 726.

[9]*Compare* Note, UMW v. Gibbs *and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1969), *with* Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968).

[10]383 U.S. at 726. The argument in favor of great caution was based upon considerations of comity and the desire to avoid needless friction between the state and federal judiciaries in order to promote justice between the parties by procuring for them a more certain reading of applicable law. *Id.* Some courts and commentators have felt this consideration to be the principal argument against the exercise of pendent jurisdiction. *See* Shulman & Juegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 408 (1936); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 232-33 (1948); Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018, 1043-44 (1962). *See also* Strachman v. Palmer, 177 F.2d 427, 431 (1st Cir. 1949) (Magruder, J., concurring).

[11]A pendent party is a party implicated in the litigation only with respect to a pendent claim and not with respect to any claim as to which there is an independent basis for federal jurisdiction. *See generally* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 779 (1972); Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 34 U. PITT. L. REV. 1 (1972); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968); Comment, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of* United Mine Workers v. Gibbs *Extended to Persons Not Party to the Jurisdiction-Conferring Claim*, 73 COLUM. L. REV. 153 (1973); Note, UMW v. Gibbs *and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1969); Note, *The Federal Jurisdictional Amount Requirement and Joinder of Parties Under the Federal Rules of Civil Procedure*, 27 IND. L.J. 199 (1952); Note, *Pendent Jurisdiction: An Expanding Concept in Federal Court Jurisdiction*, 51 IOWA L. REV. 151, 162 (1965); Note, *Discretionary Factors in the Exercise of Pendent Jurisdiction: A Setback in the Second Circuit*, 64 NW. U.L. REV. 557, 563 (1969); Note, *The Municipality, Section 1983 and Pendent Jurisdiction*, 5 VALPARAISO U.L. REV. 110, 119 (1970).

Recently, the Supreme Court has been confronted with both issues. The Court has decided the issue of when a trial court may prefer to decide questions of state law,[12] but has not concluded the question of pendent parties.[13] In *Hagans v. Lavine,*[14] the Court discussed the federal courts' constitutional power to adjudicate pendent claims and the dependency of such power on the presence of a substantial jurisdiction-granting claim. Further, the Court examined the discretionary exercise of that power when the federal courts are confronted with the necessity of determining initially a state claim or a federal constitutional claim. The Court, in *Moor v. County of Alameda,*[15] discussed without deciding whether the federal judicial power extends to pendent claims involving pendent parties when the entire action before the court comprises but one constitutional case as defined in *Gibbs.*[16] *Moor*'s flirtation with the pendent parties concept was directed only to the power issue,[17] while, in *Hagans,* both the power and the discretionary exercise of that power were reexamined. This Article will explore the ramifications of these two current decisions and their impact upon the expansive jurisdiction of the federal courts.

I. Hagans: An Expansion of Gibbs?

The petitioners[18] in *Hagans* were recipients of public assistance under the federal-state Aid to Families with Dependent Children (AFDC) program.[19] The suit challenged a provision of

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[12]Hagans v. Lavine, 94 S. Ct. 1372 (1974).

[13]Moor v. County of Alameda, 411 U.S. 693 (1973), *noted in* 2 Fordham Urban L.J. 109 (1973).

[14]94 S. Ct. 1372 (1974). *Hagans* also presented the procedural problem as to when a three-judge court is to be convened pursuant to 28 U.S.C. § 2281 (1970) in the situation in which a single-judge district court initially determines the question of substantiality and then adjudicates a nonconstitutional claim.

[15]411 U.S. 693 (1973).

[16]*Id.* at 713.

[17]*Id.* The Court concluded that it was not appropriate to resolve the power dilemma since, even assuming arguendo the existence of power to hear the claim, the district court did not err as a matter of legitimate discretion in refusing to exercise pendent jurisdiction over the claims against Alameda County.

[18]Petitioners brought a class action on behalf of themselves and their infant children, and as representatives of other similarly situated AFDC recipients. 94 S. Ct. at 1375.

[19]42 U.S.C. §§ 601, 603, 604 (1970).

New York law permitting the state to recoup prior unscheduled rent payments from subsequent AFDC grants.[20] The recipients had received state funds over and above the usual monthly grants to prevent their evictions for nonpayment of rent. The state sought to recover these expenditures by reducing the petitioners' normal monthly grants over the succeeding months. Petitioners claimed[21] that the regulations allowing recoupment violated the fourteenth amendment's equal protection clause and contravened the Social Security Act, which governs AFDC benefits.[22] The equal protection claim alleged that the recoupment regulations discriminated against AFDC recipients who were potential victims of eviction by forcing them to live below the subsistence level provided to all other persons. These regulations, it was urged, applied a standard in determining petitioners' grant levels which was entirely different from the standard, based on income resources and exemptions from levy, applicable to all other persons.[23] The statutory challenge was that the state's recoupment plan was contrary to federal law because it was assumed, contrary to fact, that the funds extended to a recipient to satisfy a current emergency rent need would remain available to him as income during the six-month recoupment period.[24]

The district court found the equal protection claim substantial and held that the statutory-supremacy claim could properly be considered due to the doctrine of pendent jurisdiction. The court, after a hearing, declared the New York recoupment regulation contrary to federal law and enjoined its enforcement.[25] The

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[20]94 S. Ct. at 1376.

[21]Injunctive and declaratory relief was sought pursuant to 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 2201 (1970). Jurisdiction was invoked under 28 U.S.C. §§ 1343(3), (4) (1970). Originally, the petitioners sought to convene a three-judge court pursuant to 28 U.S.C. § 2281 (1970) to consider the constitutional claims, but withdrew the request. Pursuant to the parties' stipulation, the case was tried before a single judge on the issue of the claimed statutory conflict question only. 94 S. Ct. at 1393 n.11.

[22]42 U.S.C. §§ 602(a)(7), (10) (1970).

[23]94 S. Ct. at 1391 n.8.

[24]*Id.* at 1376 n.3.

[25]*Id.* at 1377. On appeal, the Court of Appeals for the Second Circuit found jurisdiction for the section 1983 action under 28 U.S.C. § 1343(3) (1970), but ordered a remand to the district court to determine whether the recoupment of prior advance rent payments from current grants was a "reduction in grant" which triggered the fair hearing procedures under New York statutory law. *See* Hagans v. Wyman, 462 F.2d 928 (2d Cir.

Court of Appeals for the Second Circuit, on the second appeal, reversed on the basis that the district court lacked jurisdiction to entertain the statutory claim because the constitutional claim was insubstantial.[26] The Supreme Court reversed the court of appeals and held that, since a substantial constitutional issue was pleaded under 42 U.S.C. section 1983, the district court properly invoked the doctrine of pendent jurisdiction in determining the nonconstitutional statutory-supremacy claim.[27]

A. Substantiality Doctrine—A Power Test

The threshold question presented to the *Hagans* Court concerned the application of the substantiality doctrine: was petitioners' equal protection claim challenging the state's recoupment regulation such a substantial constitutional claim under section 1983 as to confer jurisdiction on the district court to pass on it and the statutory-supremacy claim? Although the doctrine as a statement of jurisdictional principles affecting the power of a federal court to adjudicate constitutional claims had been criticized,[28] the Court in *Hagans* recognized the doctrine's authority and declined to disavow its application to petitioners' claims. Justice White, writing for the six-man majority, examined the historical development of the substantiality doctrine, which has legal signficance not only in regard to a pendent claim but also as to the potential jurisdiction under 28 U.S.C. section 2281 of a three-judge court.[29] The *Hagans* Court relied upon the construction of the doctrine as developed under section 2281. In that context, the Court cited the import of the doctrine to be that a claim will be constitutionally insubstantial only if prior decisions inescapably render the claim frivolous or so clearly unsound as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.[30] However,

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1972). On remand, the district court upheld its prior decision. 94 S. Ct. at 1377 n.4.

[26]Hagans v. Wyman, 471 F.2d 347 (2d Cir. 1973).

[27]94 S. Ct. at 1379.

[28]*See* Rosado v. Wyman, 397 U.S. 397, 404 (1970) (characterized as "more ancient than analytically sound"); Bell v. Hood, 327 U.S. 678, 683 (1946).

[29]28 U.S.C. § 2281 (1970).

[30]94 S. Ct. at 1379. *See Ex parte* Poresky, 290 U.S. 30, 32 (1933), *quoting from* Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910). *See also* Goosby v. Osser, 409 U.S. 512, 518 (1973); Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933); McGilvra v. Ross, 215 U.S. 70, 80

previous decisions that merely render a claim doubtful or of questionable merit do not render it insubstantial for the purpose of invoking section 2281.[31]

Petitioners in *Hagans* had brought their suit under 42 U.S.C. section 1983[32] which authorizes a civil action to redress a deprivation, under color of any state regulation, of any right secured by the Constitution. Given the presence of a sufficient constitutional claim under section 1983 to support jurisdiction, section 1343(3)[33] would confer upon the district court jurisdiction to entertain the constitutional claim to which supremacy claims could append. The majority in *Hagans*, relying upon district court rulings on similarly drafted state recoupment provisions,[34] held that the equal protec-

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(1909). *Cf.* Bailey v. Patterson, 369 U.S. 31, 33 (1962); Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904).

[31] 94 S. Ct. at 1379, *quoting from* Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910).

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983 (1970).

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> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> (3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

28 U.S.C. § 1343(3) (1970).

[34] Of the three district court opinions cited by the Court, all had determined that similarly drafted state recoupment provisions were not rationally related to the purpose of the AFDC program and were invalid. *See* Holloway v. Parham, 340 F. Supp. 336 (N.D. Ga. 1972) (equal protection and due process challenge to a state statute mandating recoupment from future grants for past unlawful payments held to be invalid after a determination that the claim was substantial enough to convene a three-judge court); Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971) (district court held to have subject matter jurisdiction over a challenge to an Oregon regulation recouping overpayments from current grants); Cooper v. Laupheimer, 316 F. Supp. 264 (E.D. Pa. 1970) (upon holding equal protection claim substantial, court found

tion claim tendered by the petitioners was neither so frivolous nor so insubstantial as to be beyond the district court's jurisdiction.[35] The complaint, therefore, alleged a deprivation, under color of state law, of a constitutional right within sections 1983 and 1343(3). Further, the cause of action alleged was considered not so patently without merit as to justify a dismissal for want of jurisdiction whatever might be the ultimate decision on the merits of the federal claim.[36] The Court cited the admonition of *Bell v. Hood*[37] that jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which a litigant could actually recover, since failure to state a proper cause of action necessitates a judgment on the merits, not a dismissal for want of jurisdiction. *Bell* also warned that the question whether a complaint states a cause of action is one of law to be decided after, not before, the court assumes jurisdiction over the controversy.[38]

The dissenters in *Hagans* were unpersuaded.[39] Justice Powell concluded that the majority opinion was founded upon an error in the exercise of discretionary responsibility and, as such, unnecessarily extended *Gibbs* to "encompass matters of state law whenever an imaginative litigant can think up a federal claim, no matter how insubstantial, that is related to the transaction giving rise to the state claim."[40] Justice Powell's dissent was

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Pennsylvania recoupment statute invalid as inconsistent with the Social Security Act).

[35]94 S. Ct. at 1380.

[36]*Id.* at 1381. *See also* Oneida Indian Nation v. County of Oneida, 94 S. Ct. 772, 777 (1974).

[37]327 U.S. 678, 682 (1946).

[38]*Id.* The petitioners in *Bell* brought a suit to recover damages from agents of the Federal Bureau of Investigation. The complaint alleged jurisdiction founded upon federal questions arising under the Constitution or laws of the United States pursuant to 28 U.S.C. § 41(1) (1970). Petitioners claimed that damages were suffered as a result of the respondent agents' imprisoning the petitioners and subjecting their premises to search and their possessions to seizure in violation of the fourth and fifth amendments. The district court, sua sponte, dismissed the suit for want of jurisdiction on the ground that the action did not arise under the Constitution of the United States. The Ninth Circuit affirmed on the same ground. 150 F.2d 96 (9th Cir. 1945). The Supreme Court, in reversing, held that the district court had jurisdiction. 327 U.S. at 685. *See* Gully v. First Nat'l Bank, 299 U.S. 109, 112-13 (1936); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199-200 (1920).

[39]Justices Rehnquist and Powell and Chief Justice Burger dissented.

[40]94 S. Ct. at 1386.

seemingly also directed at the substantiality doctrine's *power* test since he stated, without explanatory comment, that the jurisdiction-granting claim was a meritless constitutional claim.[41] Consequently, it is unclear whether the main thrust of his dissent was focused upon the court's jurisdiction, *i.e.*, power, or upon the court's discretionary exercise of that power.[42]

Justice Rehnquist's dissent, in which Justice Powell and Chief Justice Burger joined, was twofold. It was argued, first, that the equal protection claim was too insubstantial to establish jurisdiction under section 1343(3) and, secondly, that the doctrine of pendent jurisdiction was inappropriately invoked. A weighty argument, in the dissenters' view, was that the presence of federal questions should not induce federal courts to expand their limited jurisdiction.[43] It was urged that considerations of convenience and judicial economy might justify hearing claims when genuine federal questions, as contrasted with weak claims asserted only to secure jurisdiction, were before the court; however, the dis-

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[41] *Id.*

[42] Since Justice Powell also joined the dissent authored by Justice Rehnquist, one can assume that Justice Powell was concerned both with the substantiality of the equal protection claim upon which *jurisdiction* rested and the *appropriateness* of entertaining the pendent claims. *Accord*, Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933) (the Court stated that "jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial").

[43] The dissenters recalled that Congress, by requiring a minimum dollar amount for federal question jurisdiction, 28 U.S.C. § 1331 (1970), made a legislative decision to leave certain claims solely to the state courts. 94 S. Ct. at 1390.

When Congress raised the jurisdictional amount to $10,000 in 1958, the stated purpose of the amendment was to

> make jurisdiction available in all *substantial* controversies where other elements of Federal Jurisdiction are present. The jurisdictional amount should not be so high to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies.

REPORT OF THE COMMITTEE ON JURISDICTION AND VENUE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, U.S. CODE CONG. & ADMIN. NEWS, 85th Cong., 2d Sess. 3101 (1958) (emphasis added). Recently, the Supreme Court announced in Snyder v. Harris, 394 U.S. 332, 339-40 (1969), that the congressional purpose was to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction. It should be noted that the doctrine of ancillary jurisdiction under diversity jurisdiction pursuant to 28 U.S.C. § 1332 (1970) is the corollary to the doctrine of pendent jurisdiction. *See* C. WRIGHT, *supra* note 1, § 9, at 19-21.

senters felt that such considerations ought to be subordinated to the policies of comity and federalism when the nonjurisdiction-granting pendent claims constitute the "real body" of the case.[44] A substantial federal claim was lacking, Justice Rehnquist concluded, because a "conceivable rational basis" existed for the state legislature to recoup the payments paid to petitioners over and above their normal monthly entitlement.[45] Justice Rehnquist found it necessary to distinguish or reconcile prior lower federal court decisions[46] which held that similar constitutional challenges to state welfare recoupment statutes were substantial. Justice Rehnquist cited *Levering & Garrigues Co. v. Morrin*[47] for the proposition that a claim is insubstantial when it is "obviously without merit."[48] However, the dissenters did not respond to the majority's application of the rule of *Ex parte Poresky*[49] and *Hannis Distilling Co. v. Baltimore*[50]—that claims are "constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous."[51]

B. Unanswered Jurisdictional Issues

At issue in *Hagans* was a pendent statutory-supremacy claim which involved an alleged conflict between a state regulation and federal law. In that respect, *Hagans* differed from *Gibbs*, which had dealt with federal jurisdiction over a *state* claim when the

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[44]94 S. Ct. at 1390. *See also* Younger v. Harris, 401 U.S. 37, 44 (1971) (discussion of current views relevant to comity and federalism).

[45]94 S. Ct. at 1392. The three-member dissent cited Dandridge v. Williams, 397 U.S. 471 (1970), to buttress its platitude that courts have largely discredited attacks on legislative decisions concerning the apportionment of limited state welfare funds. 94 S. Ct. at 1392. The majority responded, through Justice White, who was also in the majority in *Dandridge*, by axiomatically stating that *Dandridge* evinced no intention to suspend the operation of the equal protection clause in the field of social welfare. *Id.* at 1380.

[46]In passing, Justice Rehnquist dismissed the notion that Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971), was persuasive in holding that a claim attacking a recoupment regulation came within sections 1983 and 1343(3), since the opinion did not elaborate on the court's reasons for so finding. The other cases cited by the majority in *Hagan* to support the existence of a jurisdictional prerequisite of substantiality were not discussed in the dissenting opinion. *See* cases cited note 34 *supra*.

[47]289 U.S. 103 (1933).

[48]94 S. Ct. at 1392.

[49]290 U.S. 30 (1934).

[50]216 U.S. 285 (1910).

[51]94 S. Ct. at 1379.

pendent claim constituted a matter of *state* law.[52] This did not cause the *Hagans* Court difficulty since it had earlier dealt with a similar pendent statutory-supremacy claim in *Rosado v. Wyman.*[53] In *Rosado,* a New York welfare regulation was challenged as being in conflict with the Social Security Act and the equal protection clause. The Court held that the district court had properly exercised pendent jurisdiction over the statutory claim. It was unnecessary, therefore, to determine whether the nonconstitutional statutory claim satisfied the jurisdictional amount requirement of section 1331 or qualified under section 1343(3).[54] The same issue confronted the Court in *Hagans,* that is, whether section 1343, wholly aside from the pendent jurisdiction rationale, could sustain jurisdiction to entertain and decide a supremacy or nonconstitutional statutory claim which alleged deprivation of rights. As in *Rosado,* this problematic jurisdictional issue was to remain unresolved.[55]

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[52]*See* Justice Powell's dissenting opinion in which this point is dicussed. 94 S. Ct. at 1386-87. *See also* C. WRIGHT, *supra* note 1, § 19, at 65.

[53]397 U.S. 397 (1970). A three-judge district court, pursuant to 28 U.S.C. § 2281 (1970), convened to adjudicate a constitutional challenge to provisions of New York's welfare law but dissolved itself when the constitutional claim became moot. The case was remanded to a single judge to consider a second nonconstitutional claim that the state welfare regulation was contrary to the Social Security Act. Justice Harlan, writing for the majority, emphasized that mootness, like insubstantiality, is not a threshold jurisdictional defect; as such, mootness did not affect the district court's constitutional *power* to hear the nonconstitutional claim. *Id.* at 404. *See* Hurn v. Oursler, 289 U.S. 238 (1933); Moore v. New York Cotton Exch., 270 U.S. 593 (1926). In short, mootness of the jurisdiction-conferring question is not a jurisdictional defect in a federal court's power to hear related pendent claims, whether statutory or state. 397 U.S. at 404.

[54]397 U.S. at 405 n.7. In Hague v. CIO, 307 U.S. 496, 518-32 (1939), Justice Stone articulated a distinction between those actions that may be commenced under section 1343(3), which requires no jurisdictional amount, and those that must be brought pursuant to section 1331 which requires that the jurisdictional amount be met. He concluded, in a separate opinion, that section 1343(3) includes suits in which the subject matter is one incapable of valuation, while resort to section 1331 must be had and the amount in controversy test satisfied when the party is claiming a property right that can be given a dollar amount. *Id.* at 530. *Contra,* Lynch v. Household Finance Corp., 405 U.S. 538 (1972). Justice Stewart, writing for the majority in *Lynch,* held that section 1343(3) is not limited to personal liberties, but includes property rights as well. *Lynch* expressly rejected Justice Stone's distinction. The Court reasoned that neither the language nor legislative history of section 1343(3) distinguished between personal and property rights. *Id.* at 542-43.

[55]94 S. Ct. at 1377 n.5. Section 1983 proscribes deprivation of rights, privileges, or immunities secured by the *Constitution and laws.* Section

Prior cases had suggested that a supremacy conflict question was itself a constitutional matter within the meaning of section 1343(3).[56] In *Swift v. Wickham,*[57] the Court recognized that "a suit to have a state statute declared void and to secure the benefits of a federal statute with which the state law is allegedly"[58] in conflict could not succeed unless there was ultimate resort to the Constitution's supremacy clause. Thus, petitioners in *Hagans* pleaded that the "secured by the Constitution" language of section 1343(3) should be construed to include supremacy clause claims. However, because the statutory supremacy claim was properly appendable to the equal protection claim's jurisdictional basis, the *Hagans* Court did not feel compelled to speak to that issue.

Similarly, petitioners urged that section 1983 authorized suits for vindication of rights under the "laws" of the United States and that their suit had been brought to vindicate statutory rights secured under the Social Security Act within the meaning of section 1343(4).[59] They contended that section 1343 should be construed to invest federal trial courts with jurisdiction to hear *any* suit authorized by 1983. Merely because prior decisions of the Court had either assumed that jurisdiction existed in welfare regulations suits under section 1343, or so stated without analysis, the *Hagans* Court refused to be bound by such conclusory findings. In none

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1343(3) vests jurisdiction in the district courts to redress deprivation of rights secured by the Constitution or by acts of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

[56]*See* Connecticut Union of Welfare Employees v. White, 55 F.R.D. 481, 486 (D. Conn. 1972). *But cf.* Swift & Co. v. Wickham, 382 U.S. 111 (1965), in which it was held that for purposes of applying the three-judge court statute, 28 U.S.C. § 2281 (1970), a supremacy conflict claim between federal and state law was not so substantial a constitutional claim as to require the invocation of a three-judge court.

[57]382 U.S. 111 (1965).

[58]*Id.* at 125. In Townsend v. Swank, 404 U.S. 282, 286 (1971), it was determined that AFDC laws, which are promulgated by state legislatures or agencies and which do not conform to federal HEW regulations or the Social Security Act, will be invalidated under the supremacy clause, U.S. CONST. art. VI, § 2.

[59]94 S. Ct. at 1377 n.5. *See also* Rosado v. Wyman, 397 U.S. 397, 405 n.7 (1970); King v. Smith, 392 U.S. 309, 312 n.3 (1968); Herzer, *Federal Jurisdiction Over Statutorily-Based Welfare Claims,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 16-18 (1970); Note, *Federal Jurisdiction Over Challenges to State Welfare Programs,* 72 COLUM. L. REV. 1404, 1405-35 (1972); Note, *Federal Judicial Review of State Welfare Practices,* 67 COLUM. L. REV. 84, 109-15 (1967).

of the prior cases had the Court squarely faced these jurisdictional issues, nor did it squarely decide them in *Hagans*.[60]

Another procedural issue relevant to interpretation and application of section 2281 created discord in *Hagans*. Although petitioners had originally sought to convene a three-judge court to consider the equal protection claim, the case was tried before the single-judge district court on the statutory conflict question only.[61] The dissenters, believing that the main purpose of petitioners' equal protection claim was to secure jurisdiction for the more promising supremacy clause claim, asserted that the district court should have declined to exercise pendent jurisdiction over the supremacy claim and should have referred the equal protection claim to a three-judge court. The district court's failure to do so, they concluded, was an abuse of discretion under the *Gibbs* directive.[62]

As a matter of judicial convenience, time, and energy, the retention and decision of the statutory claim by the single-judge district court was viewed by the majority in *Hagans* as accurately reflecting the "recent evolution of three-judge court jurisprudence."[63] *Rosado* was instructive. In *Rosado*, the Court had cautioned that even if the constitutional claim had not been mooted, the most appropriate course might have been to remand to the

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[60] 94 S. Ct. at 1377 n.5.

[61] *Id.* at 1393 n.11. Congressional reaction to *Ex parte* Young, 209 U.S. 123 (1908), was one of the factors leading to the adoption of the three-judge court concept. *See* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964); Note, *The Three-Judge District Court: Scope and Procedure under Section 2281*, 77 HARV. L. REV. 299 (1963); Note, *The Three-Judge District Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L.J. 1646 (1963). Since its adoption in 1910, the three-judge court statute has gone through several amendments. Today, for section 2281 to be applicable, a state statute or regulation must be under attack, a state officer must be a party defendant, and it must be alleged that the statute or regulation is violative of the United States Constitution. *See* Goosby v. Osser, 409 U.S. 512 (1973); Swift & Co. v. Wickham, 382 U.S. 111 (1965); Bailey v. Patterson, 369 U.S. 31 (1962).

[62] 94 S. Ct. at 1393. Under 28 U.S.C. § 1253 (1970), if the three-judge court had been convened, as the dissent contended should have occurred, and had decided the statutory claim, appeal would have been direct to the Supreme Court. But, because the single judge decided the pendent claim, appeal lay to the Court of Appeals.

[63] 94 S. Ct. at 1382. *See* Rosado v. Wyman, 397 U.S. 397 (1970); Swift & Co. v. Wickham, 382 U.S. 111 (1965). *But see* Brotherhood of Eng'rs v. Chicago R.I. & P.R.R., 382 U.S. 423 (1966); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960).

single-judge district court for determination of the statutory claim, thereby conserving the time of two federal judges "at a time when district court calendars are overburdened."[64] It was, of course, clear that once the substantiality of the constitutional claim was established, if the single judge had rejected the statutory claim, a three-judge court would have been necessary to consider the constitutional issue. But to require a three-judge court to hear a claim, only to have it immediately sent back for adjudication of the statutory claim by the single-judge district court, was considered a grossly inefficient usage of judicial machinery, especially if it were apparent that the single judge's decision could resolve the case.

C. The Siler *Doctrine: Discretion to Avoid Needless Constitutional Decisionmaking*

Having crossed the hurdle of federal judicial power to invoke jurisdiction, the *Hagans* Court was compelled to reconcile the discretionary factors that predominate in pendent jurisdiction and constitutional construction. *Gibbs'* emphasis indicated that pendent jurisdiction is a matter of discretion, not of right.[65] Moreover, the exercise of that discretion is to be considered in light of the policy objectives underlying the doctrine. *Gibbs* instructed a court to utilize its power when judicial economy, convenience, and fairness to the litigants will be served. To be sure, the question of power will ordinarily be resolved by the pleadings, but the issue of discretion is one which remains open throughout the litigation. Warnings were sounded in *Gibbs* that federal courts ought to avoid needless decisions of state law; however, when a state claim is closely tied to questions of federal policy, the argument for exercise of pendent discretion is particularly strong.[66]

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[64]397 U.S. at 403. The controlling issue in *Rosado* was whether the mooting of the constitutional claim prior to decision by the three-judge court removed not only the obligation but destroyed the *power* of a federal court to adjudicate the pendent claim. It was held that the court retained *power* to adjudicate the pendent claim. The mootness consideration affected only discretion not power. *Id.* at 402-03.

[65]383 U.S. at 726.

[66]*Id.* at 727. The majority in *Hagans* stated that considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts were wholly irrelevant when the pendent claim was federal rather than state. 94 S. Ct. at 1385. In Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), a seaman filed suit in federal court claiming damages under the Jones Act, 46 U.S.C. § 688 (1970), and under general maritime law of the United States, for unseaworthiness of the ship, maintenance, cure, and negligence. It was held that

Pendent jurisdiction has been recognized to extend over federal claims which lack an independent jurisdictional basis as well as over state claims. The Court's members are not in disagreement over the application of the *Gibbs* rationale in either of these circumstances.[67] The dissenters in *Hagans* extolled the *Gibbs* admonition that pendent claims which substantially predominate over the jurisdiction-granting claim should be dismissed to avoid needless decisions and to avoid expanding federal jurisdiction.[68] Characterizing the pendent claims in *Hagans* as not meriting the federal court's time, the dissenters argued that the petitioners should have asserted their supremacy claim in a state court. Absent from the dissent's discretionary considerations was the *Gibbs* articulation that the need for the exercise of pendent jurisdiction is "particularly strong" when the pendent is closely tied to questions of federal policy.[69] Supremacy clause claims and Social Security Act interpretation can hardly be more closely tied to questions of federal policy. Unquestionably, federal courts have more familiarity and expertise with the controlling principles in a constitutional claim, even if denominated statutory, arising under the supremacy clause. The precedents of *King v. Smith*,[70] *Rosado*, and *Dandridge v. Williams*[71] all involved jurisdictional claims arising under the Constitution and pendent claims which raised statutory-supremacy issues. In each case, the Supreme Court decided the supremacy claim first without resort to the jurisdiction-granting constitutional claim. As Justice Harlan stated in *Rosado*, there are special reasons for the exercise of pendent jurisdiction when a supremacy clause claim is alleged, because the pendent statutory question is essentially one of federal policy and the federal courts are par-

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the district court had jurisdiction over the pendent maritime claims. The Court reasoned:

> Of course the considerations which call for the exercise of pendent jurisdiction of a state claim related to a pending federal cause of action within the appropriate scope of the doctrine are not the same when, as here, *what is involved are related claims based on the federal maritime law.* We perceive no barrier to the exercise of "pendent jurisdiction" in the very limited circumstances before us.

358 U.S. at 380-81 (emphasis added).

[67]94 S. Ct. at 1390.

[68]*Id.* at 1390 n.7.

[69]383 U.S. at 726.

[70]392 U.S. 309 (1967).

[71]397 U.S. 471 (1970).

ticularly appropriate bodies for the application of pre-emption principles.[72]

When confronted with the discretionary choice whether to adjudicate initially the constitutional issue or the pendent claim, most federal courts abstain on the former if the statutory or state claim is dispositive of the question. The Supreme Court in *Siler* announced the doctrine that as long as the federal question is not utilized as a mere vehicle to confer jurisdiction, a federal court has the power to decide all the questions in the case, even if it fails to resolve the federal issues and decides the case solely on the nonjurisdiction-granting claim.[73] The purpose of the *Siler* doctrine was to articulate that when a case can be decided without reference to questions arising under the Constitution, then that course should be pursued and not be abandoned without important reasons.[74] Cases since *Siler* have adhered to this discretionary doctrine of judicial restraint and have avoided constitutional adjudication when not absolutely essential to disposition of a case.[75]

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[72]397 U.S. at 404.

[73]213 U.S. at 191. The railroad had brought suit to enjoin the enforcement of a Kentucky railroad commission rate order which provided maximum rates on the transportation of commodities. The railroad contended that the rate order was unconstitutional, the rates being so low as to be confiscatory. Additionally, it was asserted that the rate order was in conflict with the commerce clause. The nonfederal claim asserted that the railroad commission lacked the power to make the rate order in question. *Id.* at 177. Ruling on the nonfederal claim, the *Siler* Court, after construing the state statute, held that the railroad commission had no authority to make the tariff rates. *Id.* at 198.

[74]*Id.* at 193. *See, e.g.*, Williamson v. United States, 207 U.S. 425 (1907); Burton v. United States, 196 U.S. 283, 295 (1904); Pennslyvania Mutual Life Ins. Co. v. Austin, 168 U.S. 685, 694 (1897); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 154 (1896); Horner v. United States, 143 U.S. 570, 576 (1891).

[75]*Accord,* Hillsborough v. Cromwell, 326 U.S. 620, 629 (1946); Cincinnati v. Vester, 281 U.S. 439, 448-49 (1930); Waggoner Estate v. Wichita County, 273 U.S. 113, 116-17 (1927); Chicago G.W.R.R. v. Kendall, 266 U.S. 94, 97-98 (1924); David v. Wallace, 257 U.S. 478, 482-85 (1922); Louisville & N.R.R. v. Greene, 244 U.S. 522, 527 (1917); Greene v. Louisville & Interurban R.R., 244 U.S. 499, 508-09 (1917); Ohio Tax Cases, 232 U.S. 576, 586-87 (1914); Louisville & N.R.R. v. Garrett, 231 U.S. 298, 303-04, 310 (1913); *cf.* Altantic Coast Line v. Daughton, 262 U.S. 413, 421-26 (1923); Southern R.R. v. Watts, 260 U.S. 519, 525-31 (1923). *But see* Sterling v. Constantin, 287 U.S. 378, 393-94, 396 (1932).

Probably the most celebrated opinion emulating the doctrine was authored by Justice Brandeis in Ashwander v. TVA, 297 U.S. 288 (1936) (Brandeis, J., concurring). Justice Brandeis artfully expressed the judicial self-limita-

The *Hagans* majority was mindful of the well-recognized *Siler* doctrine, but was challenged by the dissent for making a contemporary application of the *Siler* trappings to pendent jurisdiction since *Gibbs* had omitted citation to *Siler*. The majority did not interpret this omission as a purported rebuff to the doctrine's application or as an indication of a preference for pendent decisionmaking over constitutional decisionmaking,[76] since *Hurn* had earlier unmistakenly reaffirmed the *Siler* doctrine.[77] Moreover, the Court in *Gibbs* was not confronted with a constitutional jurisdiction-conferring claim. Nonetheless, the *Hagans* dissenters were unpersuaded that *Siler* had application when the constitutional claim was pleaded in order to confer jurisdiction. If *Siler* were applied in such a case, the pendent claim would become a preferred ground for decisionmaking only because the Court wished to avoid the claim over which Congress granted jurisdiction in the first place. Avoidance of a decision on the constitutional claim, it was feared, could itself become an independent basis for hearing the pendent claim.[78] In short, the dissent would have preferred to have the constitutional claim submitted to a three-judge district court in each instance rather than to have a single judge pass on the statutory pendent claim. It was argued that such a procedure would avoid expanding federal jurisdiction.

It is submitted that the dissent's analysis is improvident and untenable. First, it confused the power factor with discretionary factors; *Siler* only admonished against needless constitutional decisions in relation to the latter. The policy of avoiding a decision on the constitutional claim is not an independent jurisdictional basis for hearing the pendent claim. Rather, the jurisdictional basis for deciding the pendent claim depends upon the presence of a substantial constitutional claim. The concern that a colorable constitutional claim may confer jurisdiction should be directed to the power consideration of substantiality and not toward the consideration of discretion to exercise the power. In short, the dissenting opinion exhibits a dislike for the characterization of the

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tion by stating that the Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed. *Ashwander*'s authority was founded on *Siler*. For excellent critiques of Justice Brandeis' opinion, see A. Bickel, The Least Dangerous Branch 119, 144 (1962); P. Kurland, Felix Frankfurter on the Supreme Court 346, 349-51 (2d ed. 1970).

[76] 94 S. Ct. at 1384.

[77] *Id.* at 1384 n.13.

[78] *Id.* at 1388 n.4.

pleaded equal protection claim as sufficiently substantial to confer power on the trial court to dispose of the case by the exercise of discretionary considerations over the pendent claim. Secondly, the dissent would have the federal courts decide constitutional issues first and thereby avoid the exercise of discretion over pendent claims. This would establish a priority for constitutional decisonmaking and would abrogate the long-established *Siler* policy of judicial self-limitation. The result, of course, would be to increase colossally the use of three-judge district courts and the resort to constitutional decisionmaking.

II. Pendent Parties: The Courts of Appeal Favor Joinder

As has been noted previously, the *Gibbs* extension of pendent jurisdiction has attracted wide acceptance; it was hoped that the discretion reposed in federal courts would be exercised wisely to promote the just, speedy, and inexpensive determination of every action.[79] Following *Gibbs*, commentators,[80] and the majority of the circuit[81] and district[82] courts confronted with the issue of

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[79]3A J. Moore, Federal Practice ¶ 18.07 [1.-4], at 1952 (2d ed. 1974). *See* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1585, at 800 (1971). *But cf.*, Shakman, *supra* note 11, at 286.

[80]*See* note 11 *supra.*

[81]Second Circuit: Astro-Honor, Inc. v. Grosset & Dunlop, Inc., 441 F.2d 627 (2d Cir. 1971); Leather's Best, Inc. v. The Mormaclynx, 451 F.2d 800, 809-10 (2d Cir. 1971); Almenares v. Wyman, 453 F.2d 1075, 1083-85 (2d Cir. 1971). Third Circuit: Nelson v. Keefer, 451 F.2d 289, 291 (3d Cir. 1971); Jacobson v. Atlantic City Hospital, 392 F.2d 149, 153-54 (3d Cir. 1968); Wilson v. American Chain & Cable Co., 364 F.2d 558, 564 (3d Cir. 1966); Borror v. Sharon Steel Co., 327 F.2d 165, 172-74 (3rd Cir. 1964). Fourth Circuit: Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Rumbaugh v. Winifrede R.R., 331 F.2d 530 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964). Fifth Circuit: Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971); Connecticut Gen. Life Ins. v. Craton, 405 F.2d 41, 48 (5th Cir. 1968). Sixth Circuit: Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122, 1128 (6th Cir. 1970); F.C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917, 919-20 (6th Cir. 1970). *But cf.* Patrum v. City of Greensburg, 419 F.2d 1300, 1302 (6th Cir. 1969). Seventh Circuit: *Contra*, Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964). Eighth Circuit: Hartridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 816-17 (8th Cir. 1969). Ninth Circuit: *Contra*, Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969); Williams v. United States, 405 F.2d 951, 955 (9th Cir. 1969).

[82]District courts favoring joinder of pendent parties include Eidschum v. Pierce, 335 F. Supp. 603, 609-10 (S.D. Iowa 1971); Thomas v. Old Forge Coal Co., 329 F. Supp. 1000 (M.D. Pa. 1971); Newman v. Freeman, 262 F. Supp. 106, 107-09 (E.D. Pa. 1966); Johns-Manville Sales Corp. v. Chicago Title & Trust Co., 261 F. Supp. 905, 907-08 (N.D. Ill. 1966); Morris v. Gimbel Bros., 246 F. Supp. 984 (E.D. Pa. 1965).

joinder of parties suggested the acceptability of the joinder of additional parties implicated in the litigation only with respect to the pendent claim, but not as to any claim upon which there existed an independent basis of federal jurisdiction. The rule in favor of nonjoinder—either of the claim of an additional plaintiff against the defendant or of a separate claim against a new defendant—developed prior to *Gibbs*. This rule against joinder assumed that pendent jurisdiction was operative only with respect to the joinder of claims, an approach consistent with *Hurn*'s more restrictive *power* concept. A claim asserted by or against additional parties against whom there was no independent jurisdiction-granting claim would thus have been considered a separate cause of action under the *Hurn* test.[83]

Although *Gibbs* was not a case in which joinder of additional parties was at issue, there is dictum which suggests that the Supreme Court might sanction the liberalization of the nonjoinder approach. In *Gibbs*, Justice Brennan, using the Federal Rules of Civil Procedure as the standard, stated that the trend in the federal courts was "towards entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, *parties* and remedies is strongly encouraged . . . ."[84] Thus, a more expansive rule of joinder could apply to both federal question and diversity jurisdiction[85] as long as the claims derived from the same common nucleus of operative facts and would ordinarily have been expected to be tried in one proceeding. *Gibbs* seems to say that if this special relationship were met, power would be established in the federal court to join pendent parties

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District courts favoring nonjoinder include Ridden v. Cincinnati, Inc., 347 F. Supp. 1229, 1231 (N.D. Ga. 1972); Payne v. Mertens, 343 F. Supp. 1355, 1358 (N.D. Ga. 1972); Barrows v. Faulkner, 327 F. Supp. 1190 (N.D. Okla. 1971); Letmate v. Baltimore & O.R.R., 311 F. Supp. 1059, 1060-62 (D. Md. 1970); Tucker v. Shaw, 308 F. Supp. 1, 9-10 (E.D.N.Y. 1970); Hall v. Pacific Maritime Ass'n, 281 F. Supp. 54, 61 (N.D. Cal. 1968); Rosenthal & Rosenthal, Inc. v. Aetna Cas. & Sur. Co., 259 F. Supp. 624, 630-31 (S.D.N.Y. 1966).

[83]Comment, *Federal Pendent Subject Matter Jurisdiction*, *supra* note 12, at 155. *See* New Orleans Pub. Belt. R.R. v. Wallace, 173 F.2d 145 (5th Cir. 1949); Note, *Pendent Jurisdiction: An Expanding Concept in Federal Court Jurisdiction*, 51 IOWA L. REV. 151, 162 (1965).

[84]383 U.S. at 724 (emphasis added).

[85]However, if joinder of a nondiverse party to a pendent claim would defeat complete diversity, a preference for complete diversity should be maintained. *See, e.g.*, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). *But cf.* 28 U.S.C. § 1335 (1970) (complete diversity is not required for statutory interpleader).

in the interest of exercising discretion in favor of judicial economy, convenience, and fairness.[86]

A. Moor*'s Flirtation with the Joinder of Pendent Parties*

In *Moor v. County of Alameda,*[87] the Court held that the district court had not erred as a matter of discretion in refusing to exercise pendent jurisdiction, but failed to resolve the question of whether the district court had the *power* to allow joinder of a party over whom there was no independent jurisdiction as to the pendent claim. Petitioners Moor and Rundle, pursuant to 42 U.S.C. sections 1983 and 1988,[88] commenced a suit for damages against Alameda County and its sheriff. A pendent state claim

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[86]One commentator has suggested that since pendent jurisdiction is a concept of subject matter jurisdiction over claims, not personal jurisdiction over parties, the court should concern itself with the relation of the jurisdiction-granting claim to the pendent claim. Fortune, *supra* note 11, at 5, 12. *But see* Robinson v. Penn Central Co., 484 F.2d 553, 555 (3d Cir. 1973), wherein the doctrine of pendent jurisdiction was applied in the personal jurisdiction context. *Robinson* considered the validity of service of process under extraterritorial service authorized by a federal statute for purposes of a pendent state claim. Judge Gibbons, speaking for the Third Circuit, noted that once a defendant is properly before the court by virtue of a federal extraterritorial service provision it does not offend due process that he has become subject to the court's ultimate judgment over pendent claims. *Contra,* Ratner v. Scientific Resources Corp., 53 F.R.D. 325, 328 (S.D. Fla. 1971).

Professor Fortune argues that when a court cannot fully adjudicate the claims over which it has jurisdiction, the court is compelled by considerations of judicial economy and fairness to join the additional parties. This follows the factors outlined in *Gibbs. Id.* at 12. *See also* Freeman v. Howe, 62 U.S. (24 How.) 450 (1860). Professor Fortune argues forcibly in favor of the joinder of claims against pendent parties in federal question cases but is against joinder in diversity jurisdiction cases when the jurisdiction results from the chance location of the parties' residence and when there is no presumption of special competency in the federal court over the issues to be tried. Given the vast experience acquired by the federal district courts under the *Erie* doctrine, Professor Fortune's concern for competence in interpreting state law claims seems less viable. In addition, why would a federal court be more competent to decide state law questions appended to federal question jurisdiction claims than to decide state claims joined to diversity jurisdiction claims?

The need for a state court to adjudicate the pendent claim is particularly encouraged if the state law issue is one of first impression. Wechsler, *supra* note 10, at 233.

[87]411 U.S. 693, 717 (1973).

[88]Jurisdiction was asserted under 28 U.S.C. § 1343 (1970). In petitioner's complaint, causes of action were asserted also under 42 U.S.C. §§ 1981, 1986 (1970), but these sections were not argued on appeal. 411 U.S. at 693 n.4.

was also filed under California's vicarious liability statute.[89] Petitioners argued that the district court had authority, under pendent jurisdiction, to hear the alleged state law claims against the County.[90] Relying on *Monroe v. Pape*,[91] which held that a municipality is not a "person" within the meaning of section 1983, the district court in *Moor* considered the civil rights claim barred and held that the County was not a "citizen" of California for purposes of diversity jurisdiction. Likewise, it held that it would be inappropriate to exercise pendent jurisdiction over the state claim for vicarious liability. The case was dismissed by the district court, and the dismissal was affirmed by the Ninth Circuit.[92] The dismissal was then reversed by the Supreme Court, which held that Alameda County possessed a sufficiently independent corporate character to be considered a citizen for purposes of diversity jurisdiction.[93] However, as to the joinder of pendent parties, the Court reasoned that, in view of the unsettled question of state law and the likelihood of jury confusion due to special defenses under California law, the district court did not abuse its discretion in refusing to hear the pendent claims.[94] If the sub-

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[89]California Tort Claim Act of 1963, CAL. GOVT. CODE § 815.2(a) (West 1963).

[90]Petitioner Moor alleged that, since he was a citizen of Illinois, diversity jurisdiction was present over the state law claim. Petitioner Rundle was a California citizen and thus was unable to assert jurisdiction based on diversity of citizenship. 411 U.S. at 696 n.4.

[91]365 U.S. 167, 187-91 (1961). In *Monroe*, the Court held that 42 U.S.C. § 1983 was intended to provide private parties a cause of action for abuse of official authority which resulted in the deprivation of constitutional rights.

[92]458 F.2d 1217 (9th Cir. 1972), *aff'g*, 331 F. Supp. 492 (N.D. Cal. 1971). *Moor* and *Rundle* were consolidated for purposes of appeal.

[93]The *Moor* decision effectively reverses earlier Ninth Circuit decisional law holding that counties were not citizens for diversity purposes. *See* Miller v. County of Los Angeles, 341 F.2d 964 (9th Cir. 1965); Lowe v. Manhattan Beach City School Dist., 222 F.2d 258 (9th Cir. 1955).

There was no doubt that a state is not a citizen for purposes of diversity jurisdiction. *See* Minnesota v. Northern Sec. Co., 194 U.S. 48, 63 (1904); Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894). However, a political subdivision of a state is a citizen for diversity purposes unless it is the arm or alter ego of the state. *See* Bullard v. City of Cisco, 290 U.S. 179 (1933); Loeb v. Columbia Township Trustees, 179 U.S. 472, 485-86 (1900); Chicot County v. Sherwood, 148 U.S. 529, 533-34 (1893); Lincoln County v. Luning, 133 U.S. 529 (1890); Cowles v. Mercer, 74 U.S. (7 Wall.) 118 (1869).

[94]411 U.S. at 716. Since *Moor* also held that Alameda County was a citizen of California for purposes of diversity jurisdiction, the state law claim against the County for vicarious liability was before the district court on remand. *Id.* at n.36.

stantial element of discretion, inherent as it is in the doctrine of pendent jurisdiction, had been exercised in favor of joinder, the County could have been brought in as an additional defendant.[95]

In *Moor,* both the district court and the Ninth Circuit ruled that the exercise of pendent jurisdiction was inappropriate as a matter of both judicial *power* and *discretion.*[96] Although the Supreme Court concluded that it was inappropriate to resolve the power issue since the state claim was assertable under diversity jurisdiction, Justice Marshall, writing for the majority, suggested that the joinder of pendent parties might be an acceptable extension of *Gibbs.* The Court was mindful of the *Gibbs* power test —that a federal court has jurisdiction if a substantial federal claim and the pendent claim derive from a common nucleus of operative facts and ordinarily would be expected to be tried in one proceeding—and stated that petitioners' complaints alleged substantial federal causes of action. It was noted, moreover, that there was no dispute as to whether the federal and state claims could be said to have involved "a common nucleus of operative fact."[97] These statements are characteristically similar to a finding, pursuant to the *Gibbs* power test, that power did exist to join these claims even though it would have constituted the joinder of pendent parties over which there existed no independent jurisdiction. In addition, it must be remembered that *Gibbs* proclaimed that joinder of claims, parties, and remedies is strongly encouraged,[98] particularly when important federal interests, such as civil rights, are involved. Retention of jurisdiction over state tort claims appended to a civil rights claim might have the effect of giving greater impetus to the federal policy.

B. Liberalized Joinder: Analogues to the Federal Rules of Civil Procedure

Moor acknowledged that the exercise of federal jurisdiction over claims against parties over whom no independent federal jurisdiction existed was analogous to joinder of new parties under ancillary jurisdiction in the context of compulsory counterclaims and third party claims under rules 13(a), 13(h), and 14(a) of

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[95]The County was not directly suable in federal court, at least by petitioner Rundle, since the requisite diversity would have been lacking.

[96]94 S. Ct. at 713.

[97]*Id.* at 712.

[98]383 U.S. at 724.

the Federal Rules of Civil Procedure.[99] *Gibbs* also had relied on the joinder rules to support pendent jurisdiction.[100] District courts were authorized to utilize the doctrine 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 . . . ."[101]

The early leading case in the expansion of federal jurisdiction was *Moore v. New York Cotton Exchange*,[102] in which the Court upheld federal jurisdiction over a defendant's state law counterclaim. Plaintiff alleged that the defendant cotton exchange had monopolized the cotton price quotations in violation of antitrust laws. The defendant's counterclaim against the company, of which Moore was president, alleged that, in obtaining the quotations, the company had violated a state law. The counterclaim lacked independent jurisdiction and could not have been brought in the federal court absent *Moore*'s "transaction or occurrence" test.[103]

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[99]411 U.S. at 714-15. *See* FED. R. CIV. P. 13(a), 13(h), 14, 18-21. Cases relevant to compulsory counterclaim and joinder are: H.L. Peterson Co. v. Applewhite, 383 F.2d 430, 433-34 (5th Cir. 1967); Albright v. Grates, 362 F.2d 928 (9th Cir. 1966); Union Paving Co. v. Downer Corp., 276 F.2d 468, 471 (9th Cir. 1960); United Artists Corp. v. Masterpiece Prod., Inc., 221 F.2d 213, 216-17 (2d Cir. 1955); Markus v. Dillinger, 191 F. Supp. 732, 735 (E.D. Pa. 1961). *Cf.* Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329 (1887); Moore v. New York Cotton Exchange, 270 U.S. 593, 608-09 (1926). Cases relevant to third-party claims are as follows: Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843, 844 (3d Cir. 1962); Southern Milling Co. v. United States, 270 F.2d 80, 84 (5th Cir. 1959); Dery v. Wyer, 265 F.2d 804, 807-08 (2d Cir. 1959); Waylander-Peterson Co. v. Great Northern R.R., 201 F.2d 408, 415 (8th Cir. 1953). *See also* 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 424 (C. Wright ed. 1961).

[100]383 U.S. at 724-25.

[101]*Id.* at 725. *Gibbs* cited FED. R. CIV. P. 2, 18-20, and 42 for the proposition that the rules tend toward the broadest possible scope of action in which the joinder of claims, parties, and remedies is strongly encouraged. 383 U.S. at 724 n.10.

[102]270 U.S. 593 (1926). The defendant was exonerated at the trial for the alleged antitrust violation and received a judgment on the state counterclaim. The Supreme Court affirmed on both issues. Authorization for deciding the state law claim was pursuant to Equity Rule 30, rule 13's predecessor.

[103]

> Two classes of counterclaims thus are provided for: (a) one "arising out of the transaction which is the subject matter of the suit," which must be pleaded, and (b) another "which might be the subject of an independent suit in equity" and which may be brought forward at the option of the defendant. We are of the opinion that this counterclaim comes within the first branch of the rule . . . .

Moore's formulation was cited by the Supreme Court in *Hurn*, and again in *Moor*,[104] as a substantial source of pendent jurisdiction.

Rule 13(a) states that a counterclaim must be alleged in the pleading if, at the time of the pleading, the pleader has a claim against any opposing party and it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim.[105] Rule 13(h) permits persons other than those made parties to the original action to be made parties to a counterclaim or cross-claim in accordance with rules 19 and 20.[106] The *raison d'etre* of rule 13 is to allow claims to be joined in order to expedite

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> The bill sets forth the contract with the Western Union and the refusal of the New York exchange to allow appellant to receive the continuous cotton quotations, and asks a mandatory injunction to compel appellees to furnish them. The answer admits the refusal and justifies it. The counterclaim sets up that, nevertheless, appellant is purloining or otherwise illegally obtaining them and asks that this practice be enjoined. "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim.

270 U.S. at 609-10.

[104]411 U.S. at 715 & n.31. The American Law Institute has suggested that the *Moore* test should be incorporated in its proposed section 1313(a), since it is also consistent with *Gibbs*. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 207-12 (1969). *Contra*, Shakman, *supra* note 11, at 272. Shakman is critical of the broad standard of pendent jurisdiction announced in *Gibbs* because it would place many cases in the federal courts that would otherwise be decided in state court. This in turn would reduce the concurrent jurisdiction of the state courts over most federal law questions and would divert state law questions from the state court having the greater interest in and knowledge of such inquiries. *Id.* at 286.

[105]6 C. WRIGHT & A. MILLER, *supra* note 79, §§ 1409-19.

[106]*Id.* §§ 1434-36.

the resolution of all controversies between the parties in one suit.[107] However, rule 13(h) only authorizes a court to join additional persons in order to adjudicate a counterclaim or cross-claim that already is before the court or one that is being asserted at the same time as the joinder of the additional party is sought.[108] Persons brought into an action under rule 13(h) as parties to a compulsory counterclaim will come within the ancillary subject matter jurisdiction of the court.[109] Since the compulsory counterclaim must involve the same transaction or occurrence as the original action, it is, by definition, closely related to the jurisdiction-granting claim. The joinder of the party will be without regard to citizenship, and his joinder will not be deemed to destroy the jurisdiction of the court. The purposes of ancillary and pendent jurisdiction, and the liberal joinder policy of rule 13, are in accord that as many related claims as possible should be settled within the scope of a single action.[110] Arguably, the *Gibbs* power test, which focuses upon claims deriving from the same common nucleus of operative facts, is characteristically similar to the transaction or occurrence consideration under rule 13. Each approach directs the courts to concern themselves with the relationships of the claims to each other, irrespective of the joinder of parties, at least with regard to whether judicial power exists to join the claims. Once judicial power is established, the question remaining is whether the discretionary exercise of that power would further economy, convenience, or fairness to the litigants—considerations not unlike those that buttress rule 13(h).

Support for joinder is also present, by analogy, in rule 14(a), which allows the impleading of a third-party defendant who may be liable to the defendant for all or part of the plaintiff's claim. The great weight of authority agrees that impleader does not create subject matter jurisdiction problems because ancillary jurisdiction,

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[107] *Id.* § 1403, at 13.

[108] *Id.* § 1435, at 188. This is not to be confused with rule 14 which exclusively concerns the addition of third parties who may be liable to the defendant third-party plaintiff for part or all of the damages claimed by the original plaintiff. Under rule 14, moreover, additional parties may be added for the purpose of asserting a new claim that may not be related to the original claim.

[109] 6 C. WRIGHT & A. MILLER, *supra* note 79, § 1436, at 191-92.

[110] But, a different result may be reached in a diversity action when there is an attempt to add parties to adjudicate a permissive counterclaim under rule 13(h). If diversity will be destroyed, joinder will not be permitted since a permissive counterclaim does not arise out of the same transaction or occurrence, and therefore cannot be ancillary or pendent. *Id.* § 1436, at 192-93.

which is independent of rules governing third-party practice, authorizes the joinder of the third-party defendant.[111] The Second Circuit noted this in *Dery v. Wyer*,[112] and observed that rule 14 does not extend jurisdiction but merely sanctions an impleader procedure which rests upon the broad conception that a claim is comprised of a set of facts giving rise to rights flowing both to and from a defendant. Indeed, rule 82 provides expressly that the rules shall not extend or limit the court's jurisdiction. One district court has reasoned that the ancillary nature of the claim is not to be determined by whether the pleader must or may assert a claim under rules 13 and 14, but is to be determined by considering the relationship of the claim to the transaction that is the subject of the main suit.[113] In sum, under rule 14, if a defendant's right of action against a third-party defendant is based on the same aggregate of facts that constitute plaintiff's claim, the court has ancillary power to adjudicate the third-party claim, because it has subject matter jurisdiction over the plaintiff's claim.[114] Therefore, no independent jurisdictional basis is required if diversity of citizenship or federal question jurisdiction exists between the original parties.

It has been suggested by Professor Moore that the post-*Gibbs* standard of joinder should be one of convenience, similar to the standard in rules 18 to 20 for joinder of claims and parties.[115] Rule 18(a) states that a party asserting a claim for relief may join, either independently or in the alternative, as many claims, legal, equitable, or maritime, as it has against an opposing party.[116] Unlike the original rule,[117] rule 18(a) permits the joinder of claims

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[111]*See, e.g.*, Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959); Sheppard v. Atlantic States Gas Co., 167 F.2d 841, 845 (3d Cir. 1948); Williams v. Keyes, 125 F.2d 208 (5th Cir.), *cert. denied*, 316 U.S. 699 (1942); 1 W. BARRON & A. HOLTZOFF, *supra* note 99, § 424; 3 J. MOORE, *supra* note 79, ¶ 14.26; 6 C. WRIGHT & A. MILLER, *supra* note 79, § 1444.

[112]265 F.2d 804, 808 (2d Cir. 1959).

[113]Heintz & Co. v. Provident Tradesmens Bank & Trust Co., 30 F.R.D. 171, 173-74 (E.D. Pa. 1902).

[114]United States v. Joe Grasso & Son, 380 F.2d 749 (5th Cir. 1967); Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959).

[115]*See* 3A J. MOORE, *supra* note 79, ¶ 18.07[1.-4].

[116]This applies only to the joinder of claims.

[117]Rule 18(a) as originally promulgated in 1937 did not authorize unlimited joinder of claims but was subject to the rules on parties. Joinder under the original rule was held permissible if, under rule 20(d), the claims arose out of the same transaction, occurrence, or series of transactions or

of multiple parties once the parties are properly joined even though the claims arise from distinct transactions and do not involve questions of law or fact common to all the parties. Rule 18(a) only deals with joinder of claims during the pleading stage and not as a matter of trial convenience. Under rule 42(b) the court is given discretion to order separate trials of claims or issues. If the pendent claim and the additional party would complicate issues, rule 42(b)'s provision for separate jury trial or severance under rule 21(h) is available. Neither rule, however, affects the court's power to join claims or parties. Therefore, there are no restrictions, other than the requirements of subject matter jurisdiction, on claims—be they original claims, counterclaims, cross-claims, or third-party claims—that may be joined in actions brought in federal court. The permissive joinder of parties under rule 20(a) operates independently of rule 18(a). After the parties are properly joined under rule 20(a)[118] as to one claim, additional claims, related or unrelated, may be joined even if against fewer than all the parties. Rule 20(a) instructs that a party may properly join any other party only if the claims against the joined party arise out of the same transaction or occurrence or involve a common question of law or fact. Hence, it is clear that the rule 20(a) "same transaction and common question of law and fact" test does not limit the claims assertable under rule 18(a). Conversely, rule 18(a)'s joinder of claims test in no way restricts joinder of parties rule 20(a).

Rule 82 provides that the Federal Rules of Civil Procedure shall not be construed to extend or limit the federal court's juris-

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occurrences and there was a common question of law or fact. Federal Housing Administration v. Christianson, 26 F. Supp. 419 (D. Conn. 1939). *See* Advisory Committee Note, 39 F.R.D. 86-87 (1966).

The 1966 amendment was intended to overrule *Christianson* and make clear that a properly joined party asserting a claim might join as many additional claims as he has against an opposing properly joined party. 3A J. MOORE, *supra* note 79, ¶ 18.04 [3.-2].

[118]Consider also rule 19 which provides for joinder of indispensable parties who are subject to service of process. Such parties *shall* be joined if: (1) complete relief cannot be accorded those already parties, (2) the indispensable party claims an interest relating to the subject of the action and failure to join may impair his ability to protect his interest, or (3) failure to join may leave any party to the suit subject to a substantial risk of incurring multiple or inconsistent obligations. FED. R. CIV. P. 19(a). Failure to join an indispensable party permits the court to order: (1) that the party be added if he is subject to process, (2) that the action be dismissed, or (3) that the action be allowed to continue in his absence. *See* 7 C. WRIGHT & A. MILLER, *supra* note 79, § 1604, at 35. After the indispensable party is

diction.[119] Since the original parties and claims give the trial court subject matter jurisdiction over the case or controversy in its entirety, decisional law is clear that the court's disposition of nonjurisdictional related claims is ancillary or pendent to its powers to resolve the whole of the controversy. The liberal joinder rules countenance this sound judicial policy. It cannot be argued, therefore, that the use of the joinder rules to join pendent parties is an extension of jurisdiction; the courts' ancillary or pendent jurisdiction already extends over the claims relevant to the pendent parties. To argue otherwise would be to limit both the rules of joinder and the courts' jurisdiction in contravention of the rule 82 mandate.

C. Circuit Law Governing Joinder of Pendent Parties: Illustrative Cases

The recent trend in the federal courts is to favor joinder of pendent parties. Some earlier authority had suggested that the doctrine of pendent jurisdiction applied only if the same parties were involved in both the federal and state claims.[120] Since this authority largely relied on a pre-*Gibbs* standard, it is suspect today. The Seventh and Ninth Circuits are the leaders militating against the view that pendent or ancillary jurisdiction is expansive enough to allow joinder of pendent parties when independent jurisdiction is absent over the claim against or on behalf of the pendent party. A reading of the decisional law makes it clear that the circuit courts are not determining the permissibility of joinder on the basis of whether or not the main claim is based on diversity of citizenship jurisdiction or federal question jurisdiction.[121]

The Seventh Circuit in *Wojtas v. Village of Niles*,[122] an action brought against police officers under the federal civil rights statutes and against the Village for false arrest and false imprisonment under state law, held that the district court lacked

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joined pursuant to rule 19, rule 18(a) permits additional claims, whether related or not, to be asserted against any or all parties.

[119]Venue and personal jurisdiction over the defendants must still be satisfied.

[120]*See* Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); Kataoka v. May Dep't Stores Co., 115 F.2d 521 (9th Cir. 1940).

[121]*But see* Fortune, *supra* note 11, wherein the author argues that the distinction should be made. *See* note 86 *supra*.

[122]334 F.2d 797 (7th Cir. 1964). *See also* Fields v. Fidelity Gen. Ins. Co., 454 F.2d 682 (7th Cir. 1971) (no abuse of discretion to dismiss pendent state claims in an action alleging, inter alia, violation of federal security law).

jurisdiction over the claims against the Village. The court applied the *Hurn* "cause of action" test. Since both diversity and federal question jurisdiction were lacking over the state tort claims, extension of pendent jurisdiction over these nonjurisdictional claims would have required joinder of the pendent party, the Village of Niles. Under the narrow "cause of action" test announced in *Hurn*, a determination of lack of jurisdiction was a logical result. But, given *Gibbs'* broader pendent power test and the joinder provisions of the rules, it was a questionable holding.

The Ninth Circuit, in cases decided since *Wojtas*, has likewise concluded that federal courts lack the power to entertain pendent claims over pendent parties. In *Hymer v. Chai*,[123] a diversity suit, a motorcyclist brought personal injury and property damage claims against a motorist in connection with an intersection collision. The wife of the plaintiff motorcyclist filed a claim for loss of consortium. The *Hymer* court, in refusing to apply the pendent or ancillary jurisdiction concept, held that the trial court lacked jurisdiction over Mrs. Chai's claim because it did not meet the jurisdictional amount required by 28 U.S.C. section 1332(a). Pendent jurisdiction, said the court in *Hymer*, had as its object joinder of claims, not joinder of parties; it was not designed to permit a party without a federally cognizable claim to invoke federal jurisdiction by joining a different party plaintiff who would assert an independent federal claim growing out of the same operative facts.[124] For these propositions, Judge Hufstedler, writing for the court, cited two pre-*Gibbs* cases, *Hurn* and *Kataoka v. May Department Stores Co.*[125] The *Hymer* court reasoned that it was bound by *Kataoka*, a case decided twenty-nine years before *Gibbs*, and the narrow limits of pendent jurisdiction advanced therein.

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[123]407 F.2d 136 (9th Cir. 1969).

[124]*Id.* at 137.

[125]115 F.2d 521 (9th Cir. 1940). In *Kataoka*, a negligence suit was brought against a corporation and an employee, jointly and severally, as joint tort-feasors. Plaintiff's finger had been injured in defendant's department store escalator and it was clipped off when Goddard, an agent of the department store, attempted to free the finger. The parties' basis for being in federal court was diversity. However, diversity was lacking because Goddard, characterized as the real party defendant, and the plaintiff were citizens of the same state. *Id.* at 522. The court relied upon *Hurn*, and held that pendent jurisdiction was inapplicable.

Section 1301(e) of the 1969 ALI study would codify the pendent jurisdiction principles but only in diversity cases in which the plaintiff invoking jurisdiction is not a citizen of the state where the action was commenced.

The Ninth Circuit has applied the same reasoning to a state claim appended to a federal tort claim. The plaintiff in *Williams v. United States*[126] brought an action for damages for injuries suffered while he was a federal prisoner housed in a county jail. The district court dismissed claims against the individual defendants, who were state or county employees, because no independent jurisdictional ground was pleaded. This occurred after the federal claims were dismissed on procedural considerations. The Ninth Circuit held that under the circumstances the district court did not abuse its discretion in not exercising power to entertain the state claims.[127]

Writing for the Eighth Circuit in *Hartridge v. Aetna Casualty & Surety Co.*,[128] Judge (now Justice) Blackmun criticized the Ninth Circuit's restrictive approach in *Hymer*. *Hartridge* was a diversity action concerning the liability of an insurer for injuries sustained when a bus overturned. Plaintiff's wife asserted a claim for loss of consortium. The court held that, although *Gibbs* concerned claims possessed by a single plaintiff, the decision clearly indicated that "there is power in federal courts to hear the whole."[129] After deciding that the joinder of the pendent party's claim came within the *Gibbs* power test, the court asserted that such a policy of joinder avoided forum shopping and multiple actions, tended to reduce costs for litigants, and avoided the waste of already heavily burdened judicial time.[130] These policy considerations underscored the need for a broad reading of the *Gibbs* pendent discretion criteria.

A distinction in approach is apparent in *Wojtas*, *Hymer*, and *Williams*. *Wojtas* and *Hymer* addressed the critical issue of judicial power, while *Williams* was concerned with whether there was an abuse of discretion in not exercising that power. *Wojtas*, a pre-

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See ALI, *supra* note 104, §§ 1301(e), 1302. This could not have aided Mrs. Chai because she was a resident of Hawaii. 407 F.2d at 138 n.6.

[126]405 F.2d 951, 955 (9th Cir. 1969); Federal Tort Claim Act, 28 U.S.C. § 2674 (1970), 28 U.S.C. § 1346 (1970). It was alleged that all the named defendants, the County of San Diego, members of the Board of Supervisors, and the sheriff, owed a duty to plaintiff under 18 U.S.C. § 4042 (1970), as it defines the duties of the Bureau of Prisons.

[127]*Id.* at 955. *See also* Sykes v. United States, 290 F.2d 555, 556 (9th Cir. 1961).

[128]415 F.2d 809, 816-17 (8th Cir. 1969).

[129]*Id.* at 816. *See also* Morris v. Gimbel Bros., 246 F. Supp. 984 (E.D. Pa. 1965) (involving a claim for loss of consortium).

[130]*Id.* at 817.

Gibbs case, and *Hymer*, a post-*Gibbs* case, stand alone against the *Gibbs* trend which recognizes the existence of judicial power to hear pendent claims involving pendent parties when the entire action before the court comprises but one constitutional case as defined by *Gibbs*.[131] It is obvious from the Supreme Court's calculated caution in *Moor* that the federal courts might avoid a direct ruling on the power issue by merely assuming the existence of power to hear the claim and then declining to exercise discretion to invoke the power. This manner of procedure would rarely give rise to a finding of reversible error since the trial court has substantial discretion and rarely will be held to have abused it. Because the *Gibbs* directives relevant to discretion—judicial economy, convenience, and fairness to the litigants—are so pervasive, few courts will be reversed for an abuse of discretion for refusal to entertain the pendent claims. This is clear even in those circuits in which it has been held that judicial power exists to adjudicate pendent claims over pendent parties.[132]

Some of the early cases which considered the proper coordination of diversity and federal question jurisdictional requirements with the provisions of the Federal Rules of Civil Procedure favoring liberal joinder of claims and parties were labor law decisions of the Fourth and Fifth Circuits. The plaintiff in *Rumbaugh v. Winifrede Railroad*[133] was a discharged railroad employee who brought a claim for breach of the duty of fair representation against the union, a claim of wrongful discharge against the employer, and a claim alleging conspiracy in the procurement of his discharge by the union. The Fourth Circuit, in a pre-*Gibbs* decision, held that the alleged breach of the union's duty of fair representation presented a substantial claim arising under federal law, and thus, assumption of pendent jurisdiction over the em-

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[131] 411 U.S. at 713.

[132] *See* Patrum v. City of Greensburg, 419 F.2d 1300, 1302 (6th Cir. 1969) (action brought against a policeman and the city to recover for illegal arrest and beating). The Sixth Circuit has held that judicial power exists to join claims when pendent parties assert nonjurisdictional granting claims. *See* Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1960) (affirming the district court in asserting pendent jurisdiction over twenty-four defendants whose claims against insurer for business losses resulting from a fire were less than the $10,000 jurisdictional amount). *See, e.g.*, F.C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917 (6th Cir. 1970).

[133] 331 F.2d 530 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964). Jurisdiction was under the Railway Labor Act § 151, 45 U.S.C. § 151 *et seq.* (1970) and 28 U.S.C. § 1331 (1970). The district court dismissed the complaint for lack of subject matter jurisdiction.

ployee's nonfederal claims of wrongful discharge was proper.[134] Although no independent jurisdiction over the employer for the state claim of wrongful discharge was alleged, it was held that the pendent claim permitted joinder of the employer within the court's pendent jurisdiction.[135]

In *Connecticut General Life Insurance Co. v. Craton*,[136] which arose in the Fifth Circuit, an action was brought by a union and its individual members against the employer and its insurance carrier to determine rights to insurance coverage arising out of a collective bargaining agreement. The action was brought under the aegis of section 301 of the Labor Management Relations Act.[137] The threshold question presented was whether, when a union and individual union members seek relief against an insurance carrier, not their employer, such an action was a suit for violation of a contract between an employer and labor organization as required by section 301 of the LMRA. The Fifth Circuit found it unnecessary to determine whether section 301 was sufficiently broad to encompass such an action because it held that the district court had the power, under the *Gibbs* rationale, to join the insurance carrier.

Pennsylvania requires by statute that all redresses of wrongs be sought in a single suit.[138] This may have influenced the Third Circuit's approach,[139] since it allowed joinder of pendent parties in *Jacobson v. Atlantic City Hospital*[140] in which the state, New

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[134]Plaintiff's grievance was that the union, as the local bargaining representative, discriminated against him by refusing him membership, by failing to protect his employment rights, and by wrongfully procuring his discharge by filing false charges with the employer. 331 F.2d at 532. The wrongful discharge claim was cognizable at common law for breach of contract. *Id.* at 539.

[135]*See, e.g.*, Stone v. Stone, 405 F.2d 94 (4th Cir. 1968).

[136]405 F.2d 41, 48 (5th Cir. 1968); *see, e.g.*, Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971) (state law tort claim may be joined with action for violation of civil rights under section 1983).

[137]29 U.S.C. § 185 (1970).

[138]PA. STAT. ANN. § 1625 (1957) (relating to parent and child: "two rights of action shall be redressed in only one suit, brought in the names of the parent and child.").

[139]The Third Circuit has characterized itself as having taken the lead in recognizing diversity jurisdiction over an entire lawsuit in tort cases presenting closely related claims. Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971).

[140]392 F.2d 149 (3d Cir. 1968). The court interpreted the New Jersey Death Act which limited the amount of recovery to $10,000. The action was a malpractice suit against the hospital and two physicians who had attended

Jersey, did not adhere to a similar unity-of-claims approach. *Wilson v. American Chain & Cable Co.*[141] is representative of the Third Circuit approach. The plaintiffs in this diversity action alleged injuries to a child and sought consequential damages sustained by the child's father as a result of defendant's negligent design of a riding rotary lawnmower. The district court dismissed the father's claim, but the court of appeals held the father's claim ancillary to the son's claim which met the jurisdictional amount requirement.

Although the Second Circuit belatedly joined the trend favoring pendent jurisdiction over pendent party claims, its three major opinions, all authored by Judge Friendly, concerned three significant areas of the law—welfare, admiralty, and copyright. In *Astor-Honor, Inc. v. Grosset & Dunlop, Inc.*,[142] plaintiff, a book publisher, sued William F. Buckley, Jr., and his publisher for an alleged violation of copyright law. The complaint also asserted against Grosset & Dunlop a state claim of conspiracy to infringe Astor's copyright. The district court, in dismissing the state claim for lack of subject matter jurisdiction, had held that pendent jurisdiction did not extend to parties not subject to the jurisdiction-conferring claim.[143] The Second Circuit, however, reversed and held that since the pendent claim met *Gibbs'* "sufficient relationship" test, that is, since the claims derived from a common nucleus of operative fact, the court had judicial power to exercise discretion in hearing the pendent claim. The court indicated that it matters not that, in the exercise of the power, jurisdiction is extended over a pendent party who is not otherwise subject to suit in that forum. In *Leather's Best, Inc. v. The Mormaclynx*,[144] an unprecedented admiralty case, the Second Circuit held that the

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the plaintiff during hospitalization. The Third Circuit held that subject matter jurisdiction under section 1332 was present and, hence, judicial power to exercise discretion over the pendent parties and claims was not lacking.

[141]364 F.2d 558 (3d Cir. 1966). These claims were of the kind which the Pennsylvania statute required to be redressed in a single suit. *See, e.g.*, Borron v. Sharon Steel Co., 327 F.2d 165, 172-74 (3d Cir. 1964) (recognizing pendent power when diversity of citizenship existed in a survival action by permitting an accompanying wrongful death action when diversity was lacking to be appended to it).

[142]441 F.2d 627 (2d Cir. 1971). The complaint alleged that Buckley had contracted with plaintiff to publish a book. Buckley later contracted with Bantam Books, a wholly-owned subsidiary of Grosset & Dunlop, Inc. *Id.* at 628.

[143]The authority for this pre-*Gibbs* narrowness could be found in Wasserman v. Perugini, 173 F.2d 305, 306 (2d Cir. 1949).

[144]451 F.2d 800 (2d Cir. 1971).

district court, vested with admiralty jurisdiction over the shipper's claim against the vessel and its owner for breach of a contract of carriage, had judicial power to entertain a state tort claim against the vessel owner's subsidiary. The shipper had sought damages against the vessel, the vessel owner, and the owner's wholly-owned subsidiary for the value of cargo lost while in the custody of the subsidiary after it had been discharged from the deck of the vessel. In *Leather's Best,* the court reasoned that since the rules of civil procedure and admiralty jurisdiction were merged in 1966, the constitutional rationale underlying ancillary jurisdiction under rules 13 and 14 of the Federal Rules of Civil Procedure was supportive of the conclusion that a federal court had the power to hear related state claims against pendent parties not named in the federal claim, regardless of whether the claim arose in admiralty or civil jurisdiction.[145] Finding that the facts underlying the state tort claim against the subsidiary and the federal claims against the vessel owner were identical, the court in *Leather's Best* concluded that power to hear the pendent claims against the pendent party existed and discretion to exercise the power was appropriate.[146]

The gravity of the Second Circuit's opinion in *Almenares v. Wyman*[147] will hopefully not be overshadowed by the Supreme Court's decision in *Hagans.* In both, substantial constitutional deprivations were alleged to have resulted from state application of welfare payments. Appended to each jurisdiction-conferring claim were claims alleging violation of the supremacy clause—conflicts between HEW regulations and state action. In *Almenares,* the pendent supremacy claim against the state welfare commissioner was deemed cognizable under *Gibbs. Almenares* differed in two respects from *Hagans.* First, it held that the district court

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[145]*Id.* at 810-11. The court noted that the effect of merger upon the pre-merger admiralty requirement of independent jurisdiction for impleader has not been resolved conclusively. The court did not perceive the requirement of independent jurisdiction in the pre-merger admiralty impleader rule 56 to have constitutional underpinnings. *Id.* at 810 n.12. *See* 3 J. MOORE, *supra* note 79, ¶ 14.50; 6 C. WRIGHT & A. MILLER, *supra* note 79, § 1465. Prior to the merger rules, maritime jurisdiction did not recognize compulsory counterclaims or ancillary jurisdiction. 451 F.2d at 810 n.11.

[146]*Id.* at 811. *See, e.g.,* Ryan v. J. Walter Thompson Co., 453 F.2d 444, 446 (2d Cir. 1971).

[147]453 F.2d 1075 (2d Cir. 1971). The jurisdiction-conferring claim alleged that the termination of welfare payments violated the due process clause. Jurisdiction was based on 28 U.S.C. § 1343(3). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970).

had *power* to hear the statutory-supremacy claim[148] and, secondly, that a class action could be appended to an action brought by an individual even if the federal basis of jurisdiction did not go to the class action.[149] The effect of *Almenares* was to permit the pendent statutory claim to proceed as a class action, unlike the result in *Rosado* which required that both the constitutional and statutory claims be maintained as a class action. *Almenares* allowed adjudication of claims of a class of individuals who, in the absence of the exercise of pendent jurisdiction, could not themselves have invoked the federal court's jurisdiction.[150] The holding was limited, however, to actions brought under rule 23(b)(2) which involve relief common to the class.[151]

It is true, as these cases illustrate, that the broadening of pendent discretion to incorporate the joinder of pendent parties grants jurisdiction over both the pendent claim and party to a federal forum which would otherwise lack subject matter jurisdiction. However, since personal jurisdiction over the pendent party is still a prerequisite, whether suit is in federal or state court, the exercise of pendent discretion, and the joinder of all claims and parties in one forum and in one civil action, promotes the purpose of the Federal Rules of Civil Procedure—to secure the just, speedy, and inexpensive determination of every action.

III. Concluding Observations

Those circuits that have addressed themselves to the question of the joinder of pendent parties have construed *Gibbs* broadly so as to allow pendent jurisdiction over claims of pendent parties not otherwise subject to the federal courts' jurisdiction. These courts do not seem reluctant to allow the joinder of either pendent defendants or pendent plaintiffs, although the argument in favor

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[148] 453 F.2d at 1082.

[149] *Id.* at 1083-84. The *Almenares* court decided that rule 23 does not preclude such a result. Because this was a federal claim appended to another federal claim, there was no problem of coordination of federal regulation of national applicability and thus the pendent claim was suited for decision in a federal forum.

[150] *Id.* at 1084.

[151] Judge Friendly's opinions are particularly interesting since he is not known as an advocate of broader federal jurisdiction. Indeed, he has often been in the forefront in American jurisprudence cautioning in favor of judicial restraint and against an expansionist view in jurisdictional matters. *See generally* H. Friendly, Federal Jurisdiction: A General View (1973) *reviewed in* 87 Harv. L. Rev. 1082 (1974).

of joinder of pendent plaintiffs are stronger. This should not be viewed as an unreasonable extension of *Gibbs* since it fully comports with the liberal policy of joinder of claims and parties under the Federal Rules of Civil Procedure. Moreover, given *Gibbs'* lucid reformulation of the doctrine from its narrow antecedent in *Hurn,* the joinder of pendent parties, whose claims arise out of the same operative facts as the jurisdiction-conferring claim, allows a court to adjudicate the whole of the controversy and at the same time avoids piecemeal and multiple litigation. This approach recognizes that substantial economy can flow from a unification of claims in one suit; it reduces costs to the litigant and prevents duplication in the courts.

Some inconvenience, however, may exist. The federal trial courts, of course, must shoulder the burden of adjudicating additional pendent party claims. However, if the doctrine's discretionary considerations remain flexible, the trial court is in the best position to determine whether or not judicial time, economy, and convenience will best be served by the exercise of the power. Flexibility and substantial discretion are critical if pendent party claims are to be manageable. If joinder would create manageability problems, it is within the trial court's discretion not to exercise the power.

As has been noted, no delineation has been recognized by the lower federal courts between diversity and federal question jurisdiction in relation to the limitations of pendent power over joinder of pendent party claims. It is submitted that no such anomaly should be compelled. It can hardly be asserted that federal courts lack competence to adjudicate state law claims appended to diversity jurisdiction claims, themselves matters of state law, but are competent when the state law claims are appended to federal question jurisdiction claims. Given the daily experience of the federal trial courts in applying the doctrine of *Erie Railroad v. Tompkins,*[152] such fears are ill-founded.

Contrary to the dissent in *Hagans,* neither the substantiality doctrine nor the *Gibbs* power test was expanded by the majority. The decision reached in *Hagans* was a logical result in light of the competing policy issues of judicial restraint in both *Siler* and *Gibbs.* The result was merely to give more credence and reverence to the long-accepted *Siler* doctrine that courts should only as a last resort decide constitutional issues. If the application of this doctrine necessitates initial adjudication of a pendent claim,

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[152]304 U.S. 64 (1938).

whether federal or state, in order to dispose of the case without resort to constitutional decisionmaking, then this approach is favored. *Gibbs* did not present the dilemma because no constitutional issue was presented. To decide first the pendent claim, which is itself a federal claim although nonjurisdiction-conferring, does not subvert judicial power nor disengender the discretionary exercise of that power. As *Gibbs* and *Rosado* proclaimed, if the pendent claim is closely tied to questions of federal policy then the argument for exercise of jurisdiction is particularly strong. This is equally true for state pendent claims that implicate important areas of federal interest such as civil rights, welfare, admiralty, labor law, and securities regulation.