Entire Case Removal Under 1441(c): Toward a Unified Theory of Additional Parties and Claims in Federal Courts

*Marilyn J. Ireland**

I. INTRODUCTION

Society has become increasingly complex and individual lives increasingly interrelated as technology has provided the means for rapid communication and travel. Unfortunately, another result of these advancements is that disputes have also become more complex and less local in nature. A state court may be unable to resolve an entire dispute that crosses state lines. If the dispute is to be economically resolved in a single action, a federal court may be the only reasonable forum. In recognition of the fact that a complicated life-style produces complicated disputes, the Federal Rules of Civil Procedure contain liberal joinder provisions so that a federal court may, in a single proceeding, resolve multiple claims against multiple parties.[1] Where a dispute arises between many people interlocked in a single complicated transaction or related series of transactions, justice is also served by bringing the entire problem before a single court.

Our federal system of government may prevent the single resolution of a complex dispute in a federal court. In the United States, sovereignty is divided between the state and federal governments. Congress, by statute, has provided that certain issues should properly be left to the states.[2] Even more basic than a statute is the Constitution itself, which limits the role of the federal government, including the federal courts. The states and the federal government are sovereigns within their respective spheres—which are determined by the Constitution. The method of division is by subject matter. In article III, the Constitution enumerates the kinds of cases that a federal court may hear based upon the issue or subject matter of the dispute.[3] These powers are also subject to congressional limita-

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*Professor of Law, Washington University. J.D., University of Chicago, 1969.

[1]FED. R. CIV. P. 13 to 25.

[2]*See, e.g.*, Zahn v. International Paper Co., 414 U.S. 291 (1973) (interpreting 28 U.S.C. § 1332 (1970)).

[3]U.S. CONST. art. III, § 2 provides:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and

tion.[4] Issues that are not constitutionally or congressionally within the subject matter jurisdiction of the federal courts must be resolved in the state court.

Constitutional limits on federal jurisdiction make it impossible for federal courts to resolve all complex problems. However, if a federal court has the power to resolve a dispute, it may constitutionally resolve the entire case.[5] Incidental matters may be "brought along" into the federal forum. In recent decisions,[6] the United States Supreme Court has expanded the constitutional definition of a "case" so that some claims and parties secondary to an action properly before a federal court may be brought into the proceedings. The expansion of the scope of an entire federal case reflects an expansion in the scope and complexity of disputes. Unfortunately, the court's definition of the constitutional scope of "case" has evolved in a complex patchwork, without any unifying theory. To date, there is no single definition of an entire constitutional case.

Each judicial expansion of the scope of a case is isolated to a particular constitutional grant of subject matter jurisdiction. The decisions are reconcilable, but this has never been done authoritatively. One rule governs federal question cases that "arise under the Constitution, laws and treaties of the United States."[7] In *United Mine Workers v. Gibbs*,[8] the Court held that an "entire case" under this rule included all logically connected claims that arose from a common nucleus of facts:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which

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maritime Jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and Citizens of another State;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[4]*See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[5]*See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Moore v. New York Cotton Exchange, 270 U.S. 593 (1926).

[6]*See, e.g.*, State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967); United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

[7]The general grant of federal question jurisdiction is 28 U.S.C. § 1331(a) (1970), *as amended* by Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

[8]383 U.S. 715 (1966).

> shall be made, under their Authority . . ." U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if . . . a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[9]

Another base of federal subject matter jurisdiction granted to the federal courts is the power to hear diversity cases between "citizens of different states" or between a citizen of a state and foreign nationals.[10] In *State Farm Fire & Casualty Co v. Tashire*,[11] the Supreme Court considered whether "minimal diversity" is consistent with article III and held that once two adverse parties from different states are present other persons may be constitutionally brought into the proceedings. The "minimum diversity" rule of *Tashire* must be considered in the context of the case's facts. *Tashire* was an interpleader case, arising under the Federal Interpleader Act,[12] which includes not only a minimum diversity jurisdictional provision but also joinder provisions that require a relationship between the diverse claims. The adverse claims against a single fund in *Tashire* were all separate causes of action arising from an automobile accident. Each injury was a separate wrong involving a different legal right. But all injuries were interrelated factually and resulted in multiple claims against a single, limited insurance fund.

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[9] *Id.* at 725 (emphasis added) (citations omitted).

[10] The general grant of diversity jurisdiction is 28 U.S.C. § 1332(a) (1970):

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

[11] 386 U.S. 523 (1967). The Court in *Tashire* did not apply 28 U.S.C. § 1332 (1970), but rather another diversity statute, 28 U.S.C. § 1335 (1970).

[12] 28 U.S.C. § 1335 (1970). This statute provides:

> (a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more . . . if
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> (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property . . . .

Where the very basis of subject matter jurisdiction in federal court turns upon the fact that the main claim is between diverse citizens, it is understandable that the joinder of additional *parties* should present the primary constitutional problem. In *Tashire*, the Court held that not all parties in a diversity case need to be diverse, but it did not state any rule governing the necessary relationship between claims. Similarly, where jurisdiction is based upon the existence of a federal issue the joinder of state *claims* presents the different question. In *Gibbs*, which did not deal with the joinder of parties, the Supreme Court approved the joinder of related state claims even though the basis of federal jurisdiction was the federal nature of the dispute. What the Supreme Court has not answered are the less obvious questions. What parties may be joined as part of a state action "brought along" as part of an "entire" federal question case? How related must the claims of nondiverse parties be in order to be part of an "entire" diversity case?

If the scope of a constitutional "case" is the same regardless of the particular grant of federal subject matter jurisdiction, then *Gibbs* applies in diversity cases as well as in federal question cases and permits non-diverse parties to bring only those claims that are logically related to the main diverse claims. Furthermore, *Tashire* governs the joinder of parties in federal question cases, as well as in diversity cases. A party may constitutionally join or be joined in a federal lawsuit although his or her claim, taken alone, is not within the court's subject matter jurisdiction. Under a unified theory then, all parties may be "brought along" as secondary to the main action, but each claim against each party must meet the *Gibbs* test of relatedness.

II. The Power of the Federal Judiciary: A Unified Theory in Outline

A unified definition of the scope of a constitutional "case" for all purposes is not foreclosed by existing authority and is supported by the unified approach of 28 U.S.C. § 1441(c)[13] as drafted by Congress and applied by the courts. "Entire case" removal jurisdiction is persuasive authority for cases that are not removed to a federal court but rather originate there. There is no separate constitutional grant of removal jurisdiction. Instead, removal of a lawsuit to federal

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[13]28 U.S.C. § 1441(c) (1970) provides:

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

See Iowa Homestead Co. v. Des Moines Navigation Co., 8 F. 97, 101 (S.D. Iowa 1881).

court by a defendant is one method of invoking the federal court's power to hear the subject. The case thus comes to the federal court indirectly, but jurisdiction arises not because of the removal, but because the subject matter of the suit may constitutionally be brought in federal court. A removal case may be an indirect means of obtaining federal question jurisdiction or diversity jurisdiction. The power of the federal court to hear a removed diversity case, for example, is based upon the identical constitutional grant that governs any other diversity case in federal court.[14]

Since removal jurisdiction is an indirect form of federal question and diversity jurisdiction, section 1441(c) provides an analytical framework from which a unified theory of additional claims and parties may be deduced. This statute covers both federal question and diversity jurisdiction. It therefore stands at a crossroad between the separately developing constitutional principles governing the scope of the federal question and diversity jurisdiction. It also contains broad statutory authority for "bringing along" parties and claims for which there are no independent bases of federal jurisdiction.

"Entire case" removal jurisdiction under section 1441(c) is only one of many federal jurisdiction rules that govern cases in which there are multiple parties and claims. Common law doctrines such as ancillarity and pendency also permit secondary matters to be litigated with the main claim. Related ancillary claims against additional parties may be "brought along," even though the added parties lack diversity.[15] Similarly, claims related to a main federal question are permitted when they meet the test of pendency.[16] Pendency and ancillarity are separate doctrines that indirectly outline the scope of a constitutional "case." A merger of these two doctrines would result if the scope of a constitutional "case" were clearly and uniformly established.[17]

A unified theory of "entire case" removal jurisdiction under section 1441(c) could help resolve open questions concerning the scope of the federal question and diversity jurisdiction of the federal courts. In *State Farm Fire & Casualty Co. v. Tashire*,[18] the Supreme

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[14]Removal jurisdiction cannot extend beyond its original source of jurisdiction. *See, e.g.*, Home Life Ins. Co. v. Dunn, 86 U.S. (19 Wall.) 214 (1874); Bushnell v. Kennedy, 76 U.S. (9 Wall.) 387 (1869).

[15]*See, e.g.*, Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961); Phelps v. Oaks, 117 U.S. 236 (1886).

[16]Note, *Rule 14(a) and Ancillary Jurisdiction: Plaintiff's Claim against Non-diverse Third-party Defendant*, 33 WASH. & LEE L. REV. 796 (1976); 1970 WASH. U. L.Q. 511.

[17]*See* Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759 (1972). *See also* 22 U.C.L.A. L. REV. 1263 (1975).

[18]386 U.S. 523 (1967). "[T]his Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on

Court expanded the constitutional scope of diversity jurisdiction by recognizing minimal diversity as a sufficient basis for a claim in federal court. The limits of the minimal diversity rule have yet to be tested. Similarly, in *United Mine Workers v. Gibbs*,[19] the Supreme Court extended the doctrine of pendency in federal question cases, thereby opening the door to a conceptual merger of pendent and ancillary jurisdiction in the form of pendent party jurisdiction.[20] Pendent party jurisdiction may be defined as the "bringing along" of the plaintiff's related claims over parties who are not a part of the main federal lawsuit. For example, a plaintiff may raise a federal claim against one defendant and a related state claim against a second defendant. The constitutionality of original pendent party jurisdiction remains doubtful. However, the limits of minimal diversity and the constitutionality of pendent party jurisdiction have already been harmoniously resolved in removal cases.[21]

Jurisdiction over joined claims and parties has evolved separately in federal question, diversity, and removal cases. However, analytically, there is no reason to treat the constitutional grant of authority over joined claims and parties differently on the basis of original jurisdiction. Practically, differences should be dealt with through statutory interpretation and judicial discretion in order to avoid a continuation of the undue complexities now encountered in defining the constitutional power of the federal courts.

III. Added Parties: Toward a Unified Theory

In both diversity and federal question cases, the law permits the "bringing along" of some matters that, when viewed separately, would fall outside the constitutional grant of authority of the federal courts. In diversity cases, the power of the federal courts over non-diverse parties was once doubted, but it is now clearly established.[22] Section 1332,[23] the most general provision, is

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diversity, so long as any two adverse parties are not co-citizens." *Id.* at 531. *See* Bratton, *Pendent Jurisdiction in Diversity Cases—Some Doubts*, 11 San Diego L. Rev. 296, 303-04 (1974); 59 Iowa L. Rev. 179, 188 (1973); 7 Rut.-Cam. L.J. 603 (1976).

[19]383 U.S. 715 (1966).

[20]*See generally* Aldinger v. Howard, 427 U.S. 1 (1976); Philbrook v. Glodgett, 421 U.S. 707 (1975); Moor v. County of Alameda, 411 U.S. 693 (1973); 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).

[21]*See, e.g.*, Bowman v. Home Fed. Sav. & Loan Ass'n, 521 F.2d 704 (7th Cir. 1975); Northside Iron & Metal Co. v. Dobson & Johnson, Inc., 480 F.2d 798 (5th Cir. 1973); Hermann v. Braniff Airways, Inc., 308 F. Supp. 1094 (S.D.N.Y. 1969).

[22]*See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

[23]28 U.S.C. § 1332 (1970).

more limited than the constitutional grant on which it is based. In an early case, *Strawbridge v. Curtiss*,[24] the Supreme Court held that there is diversity jurisdiction under section 1332 only when each and every plaintiff resides in a state other than each and every defendant; this is the so-called rule of "complete diversity." The *Strawbridge* complete diversity rule rests on statutory construction; it is not constitutionally mandated. Section 1335,[25] another diversity statute governing interpleader, requires only that any two adverse parties be diverse. The presence of other non-diverse parties does not, constitutionally or under section 1335, preclude federal jurisdiction over the dispute. Minimum diversity as defined in section 1335 was upheld in *State Farm Fire & Casualty Co. v. Tashire*.[26] The minimum diversity rule permits non-diverse parties and their claims to be "brought along" as incidental to matters properly pending in federal court.

Even before *Tashire*, a jurisdictional concept adopted by the courts permitted resolution of related claims even if the claims brought in new parties.[27] In order to provide a single forum for adjudication of an entire controversy that arose from a single transaction, federal courts have taken jurisdiction of compulsory counterclaims, cross claims, claims against impleaded third parties, and intervenors of right.[28] The doctrine of ancillarity, recognized in *Moore v. New York Cotton Exchange*,[29] stems from an earlier line of cases in which the Court recognized the validity of federal jurisdiction over non-diverse parties whenever federal jurisdiction was necessary in order to provide an opportunity for non-diverse parties to assert their interests in the subject matter of a controversy pending in federal court.

The doctrine of ancillarity permits the court to hear an entire case even though there is no independent basis of jurisdiction over added parties or added claims. In diversity cases, *Tashire* held that

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[24]7 U.S. (3 Cranch) 267 (1806).

[25]28 U.S.C. § 1335 (1970).

[26]386 U.S. 523 (1967). *See also* Chaffee, *Interpleader in the United States*, 41 YALE L.J. 1134 (1932); Miller, *Promoting Judicial Economy Through the Extension of Interpleader to the Tortfeasor in the Mass Tort Area*, 17 WAYNE L. REV. 1241 (1971).

[27]*See* Fulton Bank v. Hozier, 267 U.S. 276, 280 (1925); Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393 (1936); 71 HARV. L. REV. 874 (1958).

[28]*See* Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961) (compulsory counterclaims); Phelps v. Oaks, 117 U.S. 236 (1886) (intervention of right); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962) (impleader); R.M. Smythe & Co. v. Chase Nat'l Bank, 291 F.2d 721 (2d Cir. 1961) (cross-claims).

[29]270 U.S. 593 (1926). *See also* Wichita R.R. & Light Co. v. Public Utils. Comm'n, 260 U.S. 48 (1922); Phelps v. Oaks, 117 U.S. 236 (1886); Freeman v. Howe, 65 U.S. (24 How.) 450 (1860).

non-diverse parties to the original claim may also be part of an entire constitutional "case." *Tashire* can thus be seen as an extension of the doctrine of ancillarity to include original non-diverse parties as well as parties who come into the lawsuit after it is filed.

In federal question cases, another court-made extension of federal judicial power enables the court to hear non-federal aspects of the controversy. Pendent jurisdiction in federal question cases, however, evolved separately from ancillarity. In addition to a number of specific legislative grants of jurisdiction, 28 U.S.C. § 1331[30] establishes the right of a litigant to a federal forum in cases arising under federal law. *Hurn v. Oursler*[31] recognized that the power of the federal judiciary extended beyond the mere authority to decide the federal issue; it also included the right to decide other non-federal theories of recovery when they were coupled with the federal ground. In *United Mine Workers v. Gibbs*,[32] the Supreme Court refined and extended the principle of pendent jurisdiction to cover all areas of controversy between litigants whenever there is a common nucleus of operative facts between federal and non-federal claims and whenever the related claims would "ordinarily be expected" to be tried in the same proceeding.[33] The expansive interpretations of ancillary and pendent jurisdiction have begun to merge, with the "common nucleus" test of pendency stated in *Gibbs* being based on the same factors as the transactional test that governs ancillarity.[34] Under the authorities governing to date, ancillary claims may be entertained regardless of the relationship between the parties to the subsidiary claim.[35] Federal pendent claims against additional parties, termed "pendent party jurisdiction," have not yet been sanctioned by the Supreme Court.

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[30]28 U.S.C. § 1331 (1970), *as amended by* Act of Oct. 21, 1976, Pub. L. No. 94-574, §2, 90 Stat. 2721.

[31]289 U.S. 238 (1933).

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

Id. at 245-46.

[32]383 U.S. 715 (1966).

[33]*Id.* at 725.

[34]*See* note 17 *supra* and accompanying text.

[35]*See, e.g.*, Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961); Phelps v. Oaks, 117 U.S. 236 (1886); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); R.M. Smythe & Co. v. Chase Nat'l Bank, 291 F.2d 721 (2d Cir. 1961).

In *Aldinger v. Howard*,[36] the Supreme Court was presented with the "pendent party" issue. The plaintiff stated a claim under state law for deprivation of her rights upon dismissal from her county job, as well as a federal claim under 42 U.S.C. § 1983[37] against the county and several of its officers, asserting federal jurisdiction under 28 U.S.C. § 1343.[38] Claiming that the state legislature had waived the county's defense of sovereign immunity, the plaintiff sought to assert pendent jurisdiction over the state claim and to include the claim against the county as a "pendent party" claim. The Supreme Court dismissed the claim against the county, relying primarily upon an interpretation of the particular statutes involved, stating, "[I]t would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such [pendent party] jurisdiction. . . . Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Article III permits it, but that Congress in the statutes conferring jurisdiction has not . . . negated its existence."[39]

The Court, in stating its constitutional reservations, has been unduly reticent. In section 1441(c), Congress has authorized the federal courts to adjudicate pendent party claims in removal cases. Section 1441(c) makes no distinction, such as that suggested by Justice Rehnquist in *Aldinger*, between the "bringing along" of claims and the "bringing along" of parties. It broadly states that the "entire case" may be removed. Yet, in *Barney v. Latham*,[40] the Supreme Court held that additional parties as well as additional claims might be removed under an earlier version of section 1441(c).[41] In *Barney*, the diverse controversy consisted of a request for an accounting as to land sales. The plaintiff had also joined a non-diverse party, a land company that had acquired title to certain lands without consideration and against which the plaintiff sought a

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[36]427 U.S. 1 (1976).

[37]42 U.S.C. § 1983 (1970).

[38]28 U.S.C. § 1343(3) (1970) grants jurisdiction "[t]o redress the deprivation, under color of any State law . . . 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."

[39]427 U.S. at 18.

[40]103 U.S. 205 (1880).

[41]Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470 (current version at 28 U.S.C. § 1441(c) (1970)):

> [E]ither party may remove said suit [in which there is a controversy between citizens of different States] into the circuit court of the United States . . . . And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States . . . then either one or more of the plaintiffs or defendants . . . may remove said suit . . . .

determination of its ownership. The Court reversed a lower court's remand of the removal petition.

Although *Barney* was a diversity case, arising under a superseded removal statute that dealt only with diversity removal of an "entire case," the current statute applies to separate and independent controversies no matter what the base of original jurisdiction may be. Additional parties may be "brought along" under section 1441(c) if the main claim is based on a federal question. In *Bowman v. Home Federal Savings & Loan Association*,[42] a class of plaintiffs sought an injunction in state court against two defendant savings and loan companies that were not fulfilling their statutory duty to provide home mortgage financing. One of the defendants was federally chartered. Federal jurisdiction over the separate and independent claim against the federally chartered defendant rested on 28 U.S.C. § 1337[43] because the claim had arisen under a congressional act relating to commerce. Because this claim could properly be brought in federal court, the federally chartered defendant exercised its option to remove under section 1441(c). The Seventh Circuit Court of Appeals upheld removal of the entire lawsuit, including the claim against the non-diverse state institution, even though there was no original subject matter jurisdiction over this defendant.[44] Thus, in the *Bowman* class action, the Seventh Circuit permitted removal of claims against an additional defendant over whom original subject matter jurisdiction was lacking.

Similarly, the related, yet separate and independent, claims of additional plaintiffs may be removed under section 1441(c). Recently, a district court upheld removal jurisdiction over the claims of additional plaintiffs in a class action suit. In *Lowenschuss v. Gulf & Western Industries, Inc.*,[45] the district court denied remand of a class action suit in which the claims of some, but not all, members of the plaintiff class met the jurisdictional amount statutorily required for diversity of citizenship. The court upheld "entire case" jurisdiction under section 1441(c) because the separate and independent claims of the named plaintiff provided a base for original jurisdiction.

The problem in *Bowman* was essentially one of pendent party jurisdiction because the additional related claim was asserted by the plaintiff against an additional defendant. The problem in

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[42]521 F.2d 704 (7th Cir. 1975).

[43]28 U.S.C. § 1337 (1970) provides in part: "The district courts shall have original jurisdiction of . . . any Act of Congress regulating commerce . . . ."

[44]521 F.2d at 706.

[45]419 F. Supp. 342 (E.D. Pa. 1976). *See* Biechele v. Norfolk & W. Ry., 309 F. Supp. 354 (N.D. Ohio 1969). *But see*, Rosack v. Volvo of America Corp., 421 F. Supp. 933 (N.D. Cal. 1976).

Lowenschuss might more properly be called ancillarity, since the claims were brought by additional plaintiffs. In both cases, the courts upheld jurisdiction over additional claims and parties, even though Bowman was based on federal question jurisdiction, while *Lowenschuss* relied on diversity jurisdiction. The similar outcomes in these cases demonstrate the constitutional irrelevance of distinctions between pendency and ancillarity and between the scope of a case that arises from a federal question rather than diversity jurisdiction. Jurisdiction in removal cases does not turn upon whether the additional party is plaintiff or defendant, nor upon the particular jurisdictional base of the independent claim, but rather upon the broad scope of the removal statute.

Lowenschuss closely paralleled *Zahn v. International Paper Co.*,[46] but reached a contrary result. *Zahn*, also a diversity case, was a class action against an industrial polluter in which some, but not all, of the plaintiff property owners met the statutory amount-in-controversy requirement. In *Zahn*, the Supreme Court denied jurisdiction over related parties and claims by statutory construction of section 1332(a) and held that the doctrine of ancillarity would not be applied to permit the "bringing along" of class members whose separate but related claims failed to meet the jurisdictional amount. Interpreting the statutory phrase "matter in controversy" to preclude aggregation of separate and district claims, the Court upheld the dismissal of those claims which failed to individually meet the statutorily required amount in controversy. In other words, *Zahn* held that the concept of ancillarity could not be applied to supply jurisdiction over those class members who did not meet the jurisdictional amount of $10,000 required by section 1332. *Lowenschuss* and *Zahn* are not reconcilable under any view of constitutional principles that make distinctions between the scope of federal question and diversity jurisdiction, between ancillary and pendent claims, or between added parties andadded claims. Rather, the contrary outcome in each case results from statutory construction.[47]

The ancillarity issue in *Zahn* was identical to the "pendent party jurisdiction" issue in *Aldinger*. In both *Zahn* and *Aldinger*, the problem was the "bringing along" of additional parties, not merely additional claims. The rejection of "entire case" jurisdiction over

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[46]414 U.S. 291 (1973). *See generally* Mattes & Mitchell, *The Trouble with Zahn: Progeny of Snyder v. Harris Further Cripples Class Actions*, 53 NEB. L. REV. 137, 140, 159, 164-65, 169, 194 (1974); Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum—A Post Snyder v. Harris Analysis*, 22 AM. U. L. REV. 79 (1972); *see also* Snyder v. Harris, 394 U.S. 332 (1969).

[47]*Compare* Zahn v. International Paper Co., 414 U.S. 291 (1973), *with* Lowenschuss v. Gulf & W. Indus., Inc., 419 F. Supp. 342 (E.D. Pa. 1976).

parties in *Zahn* and *Aldinger* turned on a narrow interpretation of *original* jurisdiction statutes. Similarly, the acceptance of "entire case" jurisdiction over parties in *Bowman* and *Lowenschuss* turned on the broad statutory grant of *removal* jurisdiction under section 1441(c).[48] Since there is no direct constitutional grant of removal jurisdiction, it being rather an indirect form of original jurisdiction, the constitutional scope of removal cannot be broader than the bases of original jurisdiction from which it springs.

In view of Justice Rehnquist's reservations in *Aldinger* concerning the constitutionality of "bringing along" claims when doing so would involve new parties, the constitutionality of the removal cases might well be questioned. However, the Federal Interpleader Act provides for such jurisdiction[49] and is constitutional.[50] Removal jurisdiction statutes have contained "entire-case" provisions for many years, including the 1866 statute discussed in *Barney*.[51] The tacit acceptance of "entire-case" removal for so many years supports its constitutionality.[52]

The constitutional grant of judicial authority recognizes subject matter jurisdiction over "cases" and "controversies," not over parties.[53] Confusion arises because diversity turns upon the citizenship of the parties. However, diversity is a species of subject matter jurisdiction, not personal jurisdiction. The question is not the power of the federal court to act with respect to the parties before it, but rather, the power of the court to deal with the subject matter of the suit.

Diversity establishes jurisdiction over the claim at issue, not over the parties to the dispute. Diversity jurisdiction illustrates the supremacy of the federal government over interstate matters. The constitutional grant of diversity jurisdiction in federal courts provides a federal forum for the resolution of disputes that cross state boundaries.[54] The constitutional grant, therefore, runs to the "con-

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[48]*Cf.* Green, *Jurisdiction of U.S. District Courts in Multiple-Claim Cases*, 7 VANDERBILT L. REV. 472 (1959): "The difference between original and removal jurisdiction results from the fact that Congress conferred more of the constitutional jurisdiction when providing for removal." *Id.* at 490.

[49]*See* 28 U.S.C. § 1335 (1970).

[50]*See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

[51]Act of July 27, 1886, c. 288, 14 Stat. 306, *quoted in* Barney v. Latham, 103 U.S., at 209-10.

[52]*See* J. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE ¶ 0.03(37), at 253 (1949).

[53]For example, ancillary jurisdiction is sometimes seen as a subdivision of diversity jurisdiction, since added parties need not be diverse parties. It is equally true, however, that ancillary claims need not raise a federal issue.

[54]In part because of the heavy caseload in federal courts, diversity has been questioned as a useful statutory base of federal jurisdiction. *See* Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347 (1976); Eisenberg,

troversy," not to the citizen. The *Strawbridge* rule requiring complete diversity obscured this important principle for a period of time. Implicit in *Strawbridge* was the theory that federal jurisdiction could be "destroyed" by joinder of a non-diverse party. As a constitutional principle, this theory was rejected by the Supreme Court in *Tashire*. There, the Court upheld jurisdiction over the entire lawsuit because the interpleader statute constitutionally required only minimum diversity between adverse parties.

The emphasis upon the claim rather than the parties places the constitutional principles governing diversity and federal question jurisdiction are in symmetry. The presence or absence of particular parties may be relevant in determining whether the claim is or is not within the jurisdiction of a federal court, but the jurisdiction itself attaches to the claim, not to the parties.

Under this theory, the reticence of federal courts to exercise pendent party jurisdiction seems to be without a constitutional basis. The view that diversity jurisdiction attaches to the claim accords with *Tashire*, which upheld the bringing along of parties in a diversity case. Similar logic suggests commensurate authority in federal question cases. Accordingly, section 1441(c) is not constitutionally infirm merely because it provides for entire case removal, even when this means adjudication of claims by or against parties who would not otherwise be in federal court.

IV. Added Claims: Toward a Unified Theory

Jurisdiction over an "entire case," including related claims, can also be reconciled under a unified constitutional theory regardless of the jurisdictional base of the main claim. In *United Mine Workers v. Gibbs*,[55] the Supreme Court held that there is but one constitutional "case" if the claims of the parties are interrelated and stem from a common nucleus of operative facts. However, the grant of authority in section 1441(c) contains no such limitation. It authorizes the "bringing along" of all joined claims that would not otherwise be within federal jurisdiction. The discretion of the federal judge to remand portions of the litigation makes it less likely that the constitu-

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Congressional Authority to Restrict Lower Federal Courts, 83 Yale L.J. 498, 514 (1974); Frank, *Let's Keep Diversity Jurisdiction*, 9 Forum 157 (1973). Whatever may be the outcome of this debate over a general diversity statute, in complex litigation involving many parties diversity serves a valid federal objective of assuring a national forum for cases so national in scope that no local forum can resolve the whole dispute. The specific grant of diversity jurisdiction in interpleader cases, 28 U.S.C. § 1335 (1970), may be the forerunner of other similar diversity grants so that federal courts can concentrate upon truly national disputes.

[55]383 U.S. 715 (1966).

tional limits will be approached in any particular case.[56] This discretion, however, arguably is not sufficient for resolution of the constitutionality of a removal provision that applies to unrelated as well as related claims.

One commentator, Professor Lewin, writing before *Gibbs* expanded the test of pendency, questioned the constitutionality of section 1441(c).[57] By the statute's terms, only "separate and independent" claims may be the basis of a removal to federal court. In *American Fire & Casualty Co. v. Finn*,[58] the court held that separate and independent claims means "entirely unrelated," independent claims. Lewin concluded that no claim could meet both the test of "separate and independent" and also be a part of the same constitutional "case": "[A] 'separate and independent' non-federal claim is not constitutionally within the jurisdiction of the federal courts."[59] Applying the narrow test of *Hurn v. Oursler*[60] for a constitutional "case," Lewin noted that the statute seemingly permitted removal only of unconstitutional claims:

> Between the claim held to be within the pendent jurisdiction in *Hurn v. Oursler* and the claim excluded [in *Finn*] there is room for divergence of opinion as to what other joined non-federal claims would be close enough to the federal cause of action to satisfy constitutional requirements. Nevertheless it is clear at least that some connection between the claims must exist in addition to procedural joinder. And whatever criteria be adopted, certainly the "separate and independent" claims referred to in Section 1441(c) cannot be deemed to constitute a single cause of action. For that reason the "entire case" within Section 1441(c) cannot be considered as one case within the meaning of Article III, Section 2.[61]

Lewin cannot be faulted for failing to predict the looseness of the *Gibbs* "common nucleus" test later adopted to replace *Hurn*.

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[56]*See* Duvall, *Removal—The "Separate and Independent Claim,"* 7 OKLA. L. REV. 385, 391 (1954). *See also* Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 426 (1953); Moore & VanDercreek, *Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim Under Section 1441(c)*, 46 IOWA L. REV. 489 (1961).

[57]Lewin, *supra* note 56, at 434.

[58]207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954). The court held that the federal claim must be totally separate, not merely separable. The federal claim must be so independent of the other claim as to constitute a separate wrong.

[59]Lewin, *supra* note 56, at 434.

[60]289 U.S. 238 (1933).

[61]Lewin, *supra* note 56 at 434-35.

Logically, a separate claim under *Hurn* and *Finn* could still be factually related to the main claim such that one "would ordinarily be expected to try them all in one judicial proceeding." Some claims therefore, may meet both the statutory separateness test and the constitutional relatedness test. Lewin, however, did correctly recognize that section 1441(c) would be unconstitutional if applied to totally unrelated claims.[62]

Section 1441(c) provides that if a separate and independent cause of action arising under federal law is joined with a non-federal claim, defendant may remove the "entire case" to federal court. If a common nucleus of operative facts underlies both the federal and non-federal claims, no constitutional problem arises, for in *Gibbs* the Supreme Court held that such a logical connection produces only one constitutional "case." Implied in this analysis is the proposition that where two totally unrelated claims are joined, two separate constitutional "cases" exist, and federal question jurisdiction over one such "case" would not provide a sufficient constitutional basis for federal jurisdiction over the unrelated claim. Applying a narrow *Hurn* test, Lewin recognized that section 1441(c) had to be limited to a single constitutional case. If *Gibbs* marks the outside limits of a constitutional case, section 1441(c) exceeds the limits of the Constitution whenever it sanctions removal of an unrelated non-federal claim with a separate and independent federal question.[63]

Some lower federal courts have recognized this problem. Many mention, almost as if the conclusion were foregone, that the separate claims are related and therefore removable.[64] The Fifth Circuit Court of Appeals concluded that a claim may be brought along under section 1441(c) only if it arises out of the same transaction or series of transactions as the separate and independent federal cause of action with which it is joined.[65]

Other courts have justified removal of the "entire case" by

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[62]*See also* Duvall, *supra* note 56. Currie recognizes that the restrictive *Finn* test leaves little room for the operation of the doctrine of pendency under § 1441(c). In *Finn*, the separate and independent claim statutorily required for removal must meet a test of independence, while *Gibbs* creates a constitutional requirement of a common nucleus of operative facts. Few claims meet one test without also meeting the other. D. Currie, Federal Jurisdiction 125 (1976). *See also* C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3724 (1976).

[63]*See* Currie, *supra* note 62, at 125; Duvall, *supra* note 56, at 391.

[64]*See, e.g.*, Bowman v. Home Fed. Sav. & Loan Ass'n, 521 F.2d 704 (7th Cir. 1975) (a federal question case). Courts use similar language in diversity cases. *See, e.g.*, Northside Iron & Metal Co. v. Dobson & Johnson, Inc., 480 F.2d 798 (5th Cir. 1973); Hermann v. Braniff Airways, Inc., 308 F. Supp. 1094 (S.D.N.Y. 1969).

[65]*See* American Fire & Cas. Co. v. Finn, 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954).

terming non-federal additional claims "pendent."[66] Strictly speaking, of course, the term "pendent" is a misnomer. Jurisdiction over the "entire case" rests not upon the common law pendency doctrine, but rather on the statutory grant under section 1441(c). If, however, the *Gibbs* definition of pendency is the same as the constitutional definition of "case or controversy," the jurisdiction principle implied in these "cases" appears clear. Section 1441(c) cannot be construed constitutionally to permit the exercise of federal question jurisdiction over a totally separate non-federal case.

The simple symmetry between pendency and section 1441(c), suggested in these lower court decisions, becomes less clear when the analysis shifts from federal question to diversity jurisdiction.[67] The addition of a non-diverse claim in a diversity case presents the same analytic difficulty as the joinder of a non-federal claim to a federal one. Because article III lists federal question and diversity jurisdiction in series, the constitutional scope of both should be construed similarly. If policy reasons are added to constitutional construction, there is a strong argument that the constitutional scope of federal question jurisdiction should be broader, not narrower, than the scope of diversity jurisdiction. After two centuries of united national government, concern as to parochial state tribunals has lessened.[68] Indeed, diversity as a general source of access to the federal courts is disfavored by reformists who seek to limit or even abolish diversity as a general grounds for federal court jurisdiction. Strangely, the minimum diversity rule stated in *Tashire* apparently opens such a broad scope for section 1441(c) "entire case" removal in diversity cases, while *Gibbs* suggests a narrower constitutional interpretation in federal question removal cases.[69] Although there is no basis in the language of the Constitution for the discrepancy between federal question and diversity entire-case removal, unless *Gibbs* applies to diversity as well as to federal question cases, the scope of diversity removal cases is currently broader than federal question removal cases. There is also no policy reason for a rule that gives a federal court less authority in a federal question case than it

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[66]*See, e.g.*, Lomax v. Armstrong Cork Co., 433 F.2d 1277 (5th Cir. 1970); Methodist Home & Hotel Corp. v. United States, 291 F. Supp. 595 (S.D.Tex. 1968).

[67]The problem of apparent lack of symmetry is discussed in 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 105 (rev. ed. C. Wright 1960). *See also* Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 MINN. L. REV. 1, 26, 31, 37 (1961-62).

[68]*See, e.g.*, CURRIE, *supra* note 62, at 114; ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 105-08 (1969).

[69]*See* Duvall, *supra* note 56; Lewin, *supra* note 56; Moore & VanDercreek, *supra* note 56.

would have solely because the parties happened to reside in different states.

There is a need in all cases for a unified definition of the scope of a constitutional "case," or at least a definition in which federal question is not the stepchild of diversity. The apparent discrepancy is most troubling because of its obviousness in removal cases. Section 1441(c) applies an equal rule in diversity and removal cases, yet may be unconstitutionally broad in federal question cases due to *Gibbs*. Professor Wright, quite practically, concludes that minimum diversity will exist in most cases, even those that involve a federal question.[70] Professor Cohen recognized the problem and suggests one solution: "Where removal is effected under section 1441(c) on the basis of properly joined unrelated claims, removal can be justified only on the argument that the *constitutional* frontier of the pendent jurisdiction concept encompasses factually unrelated as well as related claims."[71] In an attempt to impose symmetry, Moore argues backwards from the *Tashire* diversity decision to conclude that *Gibbs* does not invalidate 1441(c) in federal question cases.[72] Moore a priori rejects the proposition that the scope of a federal question "entire case" is narrower than the scope of a diversity case. The problem, of course, is not that diversity, or even minimum diversity, may exist where there is no federal question, nor that a federal question may be present when diversity is totally lacking. Rather, the constitutional scope of both diversity and federal question cases should be the same.

The synthesis between the constitutional scope of federal question and diversity jurisdiction that logic demands is already occurring under section 1441(c). However, the courts have not broadened the definition of a federal question "entire case" to include unrelated claims. This position would undermine *Gibbs*' authority in establishing the boundaries defining a constitutional "case." Lower federal courts have been understandably reluctant to do this; instead, they appear to apply *Gibbs'* reasoning to diversity as well as federal question "entire case" removals.[73] Just as there are limits on the scope of a constitutional "case" in federal question cases, there should also be limits on diversity cases. The courts have historically relied upon the artificial complete diversity rule in *Strawbridge* as a sufficient check on the scope of a diversity case.[74]

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[70]C. WRIGHT, LAW OF FEDERAL COURTS 148 (3d ed. 1976).

[71]Cohen, *supra* note 67, at 26.

[72]1A MOORE'S FEDERAL PRACTICE ¶ 0.163[3], at 254-55 (2d ed. 1974).

[73]*See, e.g.*, Texas Employers Ins. Ass'n v. Finn, 150 F.2d 227 (5th Cir. 1945); United States v. P.J. Carlin Constr. Co., 254 F. Supp. 637, 639 (E.D.N.Y. 1966).

[74]*See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

In applying a "rational connection" test to determine which additional claims should be retained in a diversity removal cases under section 1441(c), the lower courts have refined the minimum diversity rule.[75] In *Twentieth Century Fox Film Corp. v. Taylor*,[76] decided before *Tashire*, the district court granted removal under section 1441(c) even though only one of two defendants was diverse from the plaintiff, thereby meeting the minimum diversity requirement of *Tashire*. However, rather than utilizing the broadest scope of "entire case" removal, the district court elected against such a liberal approach. Instead, it removed the separate and independent claims against the diverse party and all related claims against the non-diverse party, but it remanded an unrelated claim against the non-diverse party. Clearly, the court had the statutory discretion to remove the "entire case," but because the unrelated claim presented a different constitutional "case" for which there was no basis for federal jurisdiction, it would have been an abuse of discretion for the court to do so.

The outcome in *Twentieth Century Fox* does not undermine the minimum diversity rule, but rather, complements it. Indeed, the case was cited with approval by Justice Fortas in *Tashire*[77] in which the Court held that a non-diverse claim is not within the jurisdiction of a federal court simply because it is attached to a totally unrelated diverse claim.[78] *Tashire* dealt with joinder of parties, not joinder of claims, and conflicts with *Gibbs* only to the extent that it failed to cite an obvious limitation on the holding. The puzzling breadth of *Tashire* arises only because the Court did not resolve an issue that was not before it. Silence on the issue of joinder of claims in *Tashire* is not a holding that all such joinders are proper. This reasoning reconciles the minimum diversity rule with the *Gibbs* definition of a constitutional "case."

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[75]*See, e.g.*, Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 523 F.2d 433 (6th Cir. 1975); Northside Iron & Metal Co. v. Dobson & Johnson, Inc., 480 F.2d 798 (5th Cir. 1973).

[76]239 F. Supp. 913 (S.D.N.Y. 1965). *See also* United States Indus., Inc. v. Gregg, 348 F. Supp. 1004, 1011 (D. Del. 1972); Griebel v. J.I. Case Credit Corp., 285 F. Supp. 621, 624 (D. Minn. 1968).

[77]386 U.S. at 531 n.7.

[78]If the "entire case" is read to mean all logically related claims, as *Gibbs* suggests, a constitutionally valid interpretation of § 1441(c) will include a test of the relationship between joined claims. Since *Gibbs* is subject to increasingly liberal interpretation, this approach need not unduly limit the operation of § 1441(c). *See* Green, *Jurisdiction of U.S. District Courts in Multiple-Claim Suits*, 7 VAND. L. REV. 472, 489-93 (1954). Green concludes that the courts have construed statutes strictly, but that the article III grant itself is a liberal one. The "expectation" test of *Gibbs* appears sufficient to cover the range of cases which commentators urge should be removable. 1A MOORE'S FEDERAL PRACTICE ¶ 0.163[3], at 253-54 (2d ed. 1974); C. WRIGHT, LAW OF FEDERAL COURTS 158-59 (3d ed. 1976).

Before *Tashire*, some courts took the view that a finding of a "separable" totally diverse case was a constitutional requisite for circumventing the *Strawbridge* decision.[79] The seemingly nonsensical provision of section 1441(c) that the "entire case" can be removed only if part of it is separate and independent arose from the need, under *Strawbridge*, to achieve complete diversity as to one portion of the case. Section 1441(c) and earlier removal statutes were, indeed, drafted around the supposed constitutional limitation imposed by the complete diversity rule[80] of *Strawbridge*. The test of "separateness" of claims in *Strawbridge* differed from the much broader *Gibbs* "common nucleus of operative facts" test and more closely approximated the *Hurn* test.[81] Because the narrow test of "separate and independent" is written into the statute, most litigation and comment have centered on the scope of that test. This issue has become constitutionally relevant in diversity cases since *Tashire*. It has not been relevant in federal question cases since *Gibbs* expanded the narrow *Hurn* rule.[82]

The historical need to circumvent *Strawbridge*, embodied in section 1441(c), has resulted in varying definitions of "case" for diversity and federal question purposes. The post-*Tashire* need is to search for an inclusive definition of constitutional "case" under article III. A definition of the outer limits of the "entire case" that may be brought before a federal court under section 1441(c) would not only benefit litigants in removal cases, but could also help to clarify the meaning of *Tashire*. "Minimum diversity," in itself, is a minimal guide.

V. A Unified Theory: Some Theoretical Applications

"Entire case" jurisdiction may extend to the joinder of parties or to the joinder of claims. It may have a common law source, such as ancillarity and pendency, or it may be based on a statute, such as 28 U.S.C. § 1441(c).[83] The basis of original jurisdiction over the main claim may be federal jurisdiction or diversity. The case

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[79]*See* Lewin, *supra* note 54, at 432.

[80]*See* Currie, *supra* note 62, at 475; Cohen, *supra* note 67, at 24-25. "There may . . . be constitutional limits even to the partial diversity theory . . . . Thus it may be argued that Congress could not call disparate, *unconnected* litigation a 'case' and assert federal jurisdiction merely because of some diversity of citizenship in parties to the disconnected parts." *Id.* (emphasis in original).

[81]*See* Currie, *supra* note 62, at 123-25.

[82]*Compare* United Mine Workers v. Gibbs, 383 U.S. 715 (1966), *with* Hurn v. Oursler, 289 U.S. 238 (1933). *See also* Reeves v. Beardall, 316 U.S. 283 (1942); Moore, *supra* note 52, at § 0.03(37); Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 Harv. L. Rev. 657 (1968).

[83]28 U.S.C. § 1441(c) (1970).

may be brought originally in federal court or may be removed to federal court by the defendant if he does not reside in the forum state. Under a unified theory, the consitutionality of jurisdiction over additional claims and parties depends upon the definition of the scope of the main controversy. "Case or controversy" should be similarly defined in federal question cases and in diversity cases.

A plaintiff may constitutionally raise a federal question claim against a defendant and may add a related claim over which the court does not have original jurisdiction. Because the claim is related, there is jurisdiction over it under the unified theory and under *United Mine Workers v. Gibbs.*[84] If plaintiff raises a diverse claim in federal court against a single defendant and adds a non-diverse claim, jurisdiction over the second claim is constitutional.[85] The second claim might not meet the statutory amount in controversy,[86] but this impediment is statutory, not constitutional. The added claim meets the constitutional test of diversity and, if related to the main claim, it also meets the *Gibbs* test. *Gibbs* defines the constitutional scope of a controversy and should not be limited to federal question cases.

In both of the examples above, we may assume that the plaintiff brought the lawsuit originally in federal court. If the plaintiff had begun state proceedings instead, the defendant could have removed the case to federal court.[87] Removal jurisdiction is only constitutionally as broad as original jurisdiction.[88] A defendant can remove both the main claim and the related additional claim, but there is no jurisdiction over an unrelated claim under section 1441(c) due to the *Gibbs* limitation.

Of course, the plaintiff's added claim may itself have a constitutional base of jurisdiction, but the claim may still not be proper in federal court because of statutory or common law limitations. Federal courts are courts of limited jurisdiction. They are limited not only by the Constitution, but also by statute and judicial decisions. Ancillarity and pendency apply only to related claims. Section 1441(c) removal is not so limited.[89] The court-made ancillarity and

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[84]383 U.S. 715 (1966); *see* 28 U.S.C. § 1335 (1970). Hurn v. Oursler, 289 U.S. 238 (1933), has been expanded by *Gibbs*; Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), has been expanded by State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

[85]*See* note 26 *supra* and accompanying text.

[86]28 U.S.C. § 1332 (1970).

[87]*See* notes 76-77 *supra* and accompanying text.

[88]*See* note 78 *supra* and accompanying text.

[89]28 U.S.C. § 1441(c) (1970) provides:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-

pendency doctrines need not extend to the constitutional limits of relatedness. In this sense, removal jurisdiction is broader than original jurisdiction, but not because of the Constitution.[90] Rather, the distinction is statutory. Congress could constitutionally grant original jurisdiction over additional diversity and federal question claims without regard to the amount of the claim. It merely has not chosen to do so.

Jurisdiction over added parties can also be explained by a unified constitutional theory of "entire case" jurisdiction. If all claims against all parties meet the logical relationship test of *Gibbs*, jurisdiction is proper in a federal court unless limited by statute or common law. A plaintiff may constitutionally bring related claims against two defendants, even though only one of the defendants is diverse to the plaintiff. The constitutional test of diversity is minimal diversity—that is, diversity between two or more adverse parties.[91] Due to statutory interpretation, however, the federal courts do not have original jurisdiction under section 1332 unless diversity is complete.[92] This statutory limit applies only to original, not removal, cases. Under section 1441(c), a diverse defendant can remove the "entire case," including a plaintiff's claim against a non-diverse codefendant.[93] As long as the claims against the two defendants are "separate and independent," section 1441(c) permits removal.

Pendent party jurisdiction may be subject to statutory and common law limitations, but under a unified theory it is constitutional. If plaintiff sues defendant *A*, raising a federal question, it is constitutional for a federal court to hear a related claim against defendant *B*. The two claims are so interrelated that they are actually one constitutional "case." This does not mean that a federal court has jurisdiction over pendent-party cases, because there must be a statutory or common law basis for federal jurisdiction. Section 1441(c) permits the removal of the entire case, including pendent-party claims. The Supreme Court has not recognized a statutory or

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removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

[90]*See* note 78 *supra*.

[91]State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

"[T]his Court and the lower courts have concluded that article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."

Id. at 531. *See* Bratton, *Pendent Jurisdiction in Diversity Cases—Some Doubts*, 11 SAN DIEGO L. REV. 296, 303-04 (1974); 59 IOWA L. REV. 179, 188 (1973); 7 RUT.-CAM. L.J. 603 (1976).

[92]Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

[93]*See* notes 76-77 *supra* and accompanying text.

common law grant of original pendent-party jurisdiction.[94] Congress did provide for original jurisdiction over non-diverse parties in statutory interpleader cases,[95] and the Supreme Court upheld it in *State Farm Fire & Cas. Co. v. Tashire.*[96] Similarly, if Congress were to provide for the addition of parties to federal question cases, the statute would be constitutional. Any other outcome would unevenly define "cases and controversies" under the Constitution.

A unified theory of the scope of a federal "case" permits a simple resolution of constitutional issues. Joinder of claims and parties can, for policy reasons, easily be limited by statute or by rule. Congress and the Supreme Court have the authority to limit the scope of complex litigation as needed without resorting to constitutional principles that differ due to haphazard resolution of individual cases. If the Supreme Court had intended to establish different definitions of a constitutional case for federal question and diversity purposes, it easily could have said so in *Gibbs* or *Tashire.*

VI. Conclusion

The constitutional principles governing federal question and diversity cases only *appear* to differ, with *Tashire* governing diversity jurisdiction and joinder of parties, and *Gibbs* governing federal question jurisdiction and joinder of claims. Neither case is complete in itself. Under a unified interpretation of federal jurisdiction, the basis of federal jurisdiction is not important, but whether a "case or controversy" under article III is defined consistently is important. *Tashire* governs joinder of parties, including a plaintiff's claims against "pendent parties" in federal question cases. A unified theory of federal "entire case" jurisdiction follows. Such a unified theory, in fact if not in law, already governs removal cases.

The plenary scope of "entire case" removal under section 1441(c) extends to the constitutional limits of "bringing along" matters which, viewed separately, are not within a federal court's jurisdiction. Lower courts have permitted the removal of claims, even when new parties are thereby brought before the court. Pendent party jurisdiction is not unconstitutional in removal cases.[97] Instead, in applying section 1441(c), lower federal courts have refused to "bring along" unrelated claims, even in diversity cases.[98] Section 1441(c) is thereby limited, by judicial discretion if not by constitutional principles, to a definition of "entire case" which agrees with both *Tashire* and *Gibbs.*

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[94]Aldinger v. Howard, 427 U.S. 1 (1976).

[95]28 U.S.C. § 1335 (1970).

[96]386 U.S. 523 (1967).

[97]*See* notes 40-45 *supra* and accompanying text.

[98]*See* notes 64-66 & 75 *supra* and accompanying text.

The Supreme Court left open the question of a unified theory in *Aldinger v. Howard*:[99] "[T]here is little profit in attempting to decide . . . whether there are any 'principled' differences between pendent and ancillary jurisdiction . . . ."[100] There is also little profit in leaving the doctrines in their current unprincipled state.

[99]427 U.S. 1 (1976).
[100]*Id.* at 13.