NOTES

DEVELOPING A UNIFIED APPROACH TO PENDENT AND ANCILLARY JURISDICTION: A *MERGER* MADE IN HEAVEN

INTRODUCTION

A longstanding and fundamental principle of our judicial system is that federal courts are limited in their subject-matter jurisdiction.[1] The confines of federal subject-matter jurisdiction are grounded in article III of the United States Constitution and in the Judiciary Act of 1789.[2] Under the Constitution, only Congress has the power to grant jurisdiction to the federal courts over certain categories[3] of cases, leaving the state courts as courts of general jurisdiction. Although the Federal Rules of Civil Procedure[4] provide for liberal joinder of claims and parties, thereby increasing the potential scope of an action, the Rules themselves do not expand federal subject-matter jurisdiction.[5] The Federal Rules provide no jurisdictional source, only procedural authorization for multi-claim and multi-party litigation. Nevertheless, federal courts continue to hear state claims lacking independent bases of jurisdiction, in part to effectuate certain joinder rules which were enacted to promote judicial economy, fairness, and convenience to the litigants. The supplemental source of jurisdictional power to hear such state claims lies in the judicial doctrines of ancillary, pendent, and pen-

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1. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: Civil § 3522 (2d ed. 1984) [hereinafter WRIGHT AND MILLER]; *see, e.g.*, Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) (Marshall, C.J.).

2. U.S. CONST. art. III, § 2, cl. 2; Judiciary Act, 1 Stat. 73 (1789).

3. The two most important and widely used congressional grants of jurisdiction are 28 U.S.C. § 1331 (Supp. 1976) (general federal question) and 28 U.S.C. § 1332(a) (Supp. 1976) (diversity of citizenship).

4. The Federal Rules of Civil Procedure were adopted in 1938 and amended several times since 1938. *See* 308 U.S. 642 (1939); 308 U.S. 645 (1939); 329 U.S. 839 (1947); 335 U.S. 919 (1949); 341 U.S. 959 (1951); 368 U.S. 1009 (1961); 374 U.S. 861 (1963); 383 U.S. 1029 (1966); 389 U.S. 1121 (1968); 398 U.S. 977 (1970); 401 U.S. 1017 (1971).

5. FED. R. CIV. P. 82 provides in pertinent part: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."; *See* Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 397, 416 (1976) (Professor Goldberg takes the view that the Rules have in fact expanded the jurisdictional tests used).

dent-party jurisdiction.

Generally, to resolve a controversy completely and fairly, courts invoke ancillary jurisdiction to hear a plaintiff's or a defendant's nonfederal claim otherwise confined to state court, if the nonfederal claim arises out of the same transaction as and bears a logical relationship to the federal claim.[6] Like ancillary jurisdiction, courts invoke pendent jurisdiction to hear claims outside the scope of federal jurisdiction. Pendent jurisdiction, however, is generally restricted to allowing a plaintiff to append to a federal law claim a related state law claim if both claims arise from the same operative facts and are asserted against one defendant, to promote judicial economy, convenience, and fairness to the litigants.[7] Pendent-party jurisdiction, recently acknowledged by the United States Supreme Court as a valid jurisdictional concept,[8] is that doctrine extending pendent jurisdiction to permit parties to assert related state law claims against nonparties to the federal claim.

Although the doctrines of pendent and ancillary jurisdiction evolved as different standards with different purposes, modern jurisprudence suggests their synthesis.[9] Specifically, three United States Supreme Court decisions evince a merger of these doctrines.[10] Some courts,[11] commentators,[12] and even law school casebook writers[13] have replaced the labels "pendent" and "ancillary" with comprehensive terms such as "incidental" and "supplemental" jurisdiction, to show that the policy and principles behind both doctrines are the same and can be adapted to answer any question of such jurisdiction. This note adopts a unified approach to incidental jurisdiction issues, an approach embodying all Supreme Court and congressional concerns of functional efficiency and federalism.

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6. *See infra* text accompanying notes 24-32.

7. *See infra* text accompanying notes 54-56.

8. *See* Aldinger v. Howard, 427 U.S. 1 (1976).

9. *See infra* text accompanying notes 48-88.

10. *See* United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966); Aldinger v. Howard, 427 U.S. 1 (1976); and Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978).

11. *See, e.g.*, International Philanthropic Hosp. Found. v. United States, 621 F.2d 402, 404 (Ct. Cl. 1980).

12. *See, e.g.*, Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983); Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935 (1982).

13. *See, e.g.*, R. MARCUS & E. SHERMAN, COMPLEX LITIGATION - ADVANCED CIVIL PROCEDURE 63 (1985).

Part I of this note traces the historical development and rationale of pendent and ancillary jurisdiction, and outlines the framework of the modern synthesized approach to applying such jurisdiction. Part I concludes by proposing that the Supreme Court has worked toward a single three-part test applicable to any incidental jurisdiction question.

In the spirit of this doctrinal merger, Part II of this note develops the theory that federal courts should abandon the current conclusory test that categorically requires an independent basis of federal jurisdiction for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b). A similar argument is made for permissive counterclaims pursuant to Federal Rule of Civil Procedure 13(b). Part II concludes by suggesting that courts should instead apply the three-part test on a case-by-case basis, exercising their discretionary power implicit in this source of jurisdiction.

I. The Doctrines: Pendent and Ancillary Jurisdiction

The doctrines of ancillary and pendent jurisdiction developed with distinct purposes to accommodate different types of cases,[14] yet both doctrines effectively extended federal jurisdiction to claims otherwise confined to state courts. This section first traces the historical development of the traditional doctrines and then, through a brief analysis of recent United States Supreme Court cases, demonstrates their synthesis and unified application to any incidental jurisdiction issue.

A. Historical Development of the Traditional Ancillary and Pendent Jurisdiction Doctrines

1. Ancillary Jurisdiction

In 1860, the Supreme Court first applied the doctrine of ancillary jurisdiction in *Freeman v. Howe*,[15] and justified its application by the necessity of providing a fair and immediate remedy for claims to property in the control of the federal court.[16] In this di-

14. *See infra* text accompanying notes 43-48.

15. 65 U.S. (24 How.) 450 (1860).

16. *Id.* at 460. The Court stated that:

> [A] bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby *prevent injustice*, . . . is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference

versity action to recover debts, Freeman, a United States Marshal, attached certain railroad cars owned by the defendant, pursuant to a federal writ of attachment. The defendant's mortgagees subsequently filed a state replevin action against Freeman to recover the railroad cars, and a local sheriff seized the property on their behalf.[17] The Supreme Court ruled against the mortgagees, in favor of Freeman, holding that once property is within the federal court's control, it cannot be made the subject of a state court proceeding.[18] In the interest of fairness to the nondiverse mortgagees and to adjudicate completely the issues presented in the main claim, the Court held that the nondiverse mortgagees' claims were ancillary to the main claim.[19] As such, the Court extended federal equity jurisdiction over the nondiverse claimants, allowing them to file an equitable bill to restrain or regulate the legal disposition in federal court without regard to their citizenship.[20]

Most lower courts had read *Freeman* as limited to cases where a federal court had control over property involving nonfederal claimants.[21] The Supreme Court itself reaffirmed this narrow construction and application of ancillary jurisdiction in 1925, stating that "no controversy can be regarded as dependent or ancillary unless it has a direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit."[22] Just one year later, however, the Supreme Court expanded the application of ancillary jurisdiction by abandoning the requirement that a federal court must have control over certain property interests.[23]

In *Moore v. New York Cotton Exchange*,[24] the Court extended ancillary jurisdiction to support a compulsory counterclaim lacking an independent basis of jurisdiction.[25] Plaintiff Moore sued the

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to the citizenship . . . of the parties.

Id. (emphasis added).

17. *Id.* at 453.

18. *Id.* at 457.

19. *Id.* at 460.

20. *Id.*

21. *See, e.g.*, Wabash R.R. v. Adelbert College, 208 U.S. 38 (1908) (possession of property by federal court with proper jurisdiction withdraws jurisdiction from all other courts on issues relating to the property); *In Re* Tyler, 149 U.S. 164 (1893) (state tax liability for property in possession of federal court is decided by that court).

22. Fulton National Bank v. Hozier, 267 U.S. 276, 280 (1925).

23. Moore v. New York Cotton Exchange, 270 U.S. 593 (1926).

24. *Id.*

25. *Id.* at 610. The defendant sought injunctive relief under state unfair trade practice

New York Cotton Exchange (Exchange) under the federal antitrust laws in federal district court. In response, the Exchange filed a state law compulsory counterclaim pursuant to former Equity Rule 30, a claim which "arose out of the same transaction which [was] the subject matter of the suit."[26] Although the district court did not have control over any property, the Supreme Court affirmed the district court's retention of the defendant's counterclaim even though the Court dismissed Moore's federal antitrust claim on the merits.[27] The Court reasoned that "so close is the connection between the case . . . stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish the foundation for the latter . . . ."[28] Thus, the Court effectively adopted a *transactional test* for future application of the ancillary doctrine. Moreover, the phrase "same transaction" was to be interpreted flexibly: "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."[29] To date, this test remains unchanged.[30]

The *Moore* Court stressed fairness to the defendant, by providing an immediate forum to the party involuntarily before the court, as the primary rationale for allowing the defendant's counterclaim to stand.[31] Although the Court conserved judicial time and resources by not requiring the defendant to seek injunctive relief in state court, it never mentioned judicial economy as a rationale for supporting the counterclaim with ancillary jurisdiction.[32] To

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law.

26. *Id.* at 609. The particular rule at issue in *Moore*, Federal Equity Rule 30, provided in pertinent part: The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit . . . ." Equity Rules of 1912, 226 U.S. 627 (1912).

27. *Moore*, 270 U.S. at 609.

28. *Id.* at 610.

29. *Id.* at 609-10.

30. *See, e.g.*, Revere Copper & Brass, Inc. v. Aetna Casualty & Sur. Co., 426 F.2d 709 (5th Cir. 1970).

31. *Moore*, 270 U.S. at 610. *See* Shulman and Jagerman, *Some Jurisdictional Limits on Federal Procedure*, 45 YALE L.J. 393 (1936) (discussing the predominant role that "fairness" played in the development of ancillary jurisdiction).

32. *Moore*, 270 U.S. at 610. Although the Court could easily have required plaintiff Moore to seek the injunction in state court, it adjudicated the claim in the interest of fairness. The overriding concern was not judicial economy or convenience, but to provide an immediate forum for a defending party haled into court involuntarily. *See* Shulman and Jagerman, *supra* note 31, at 413. *See also* Comment, *Pendent and Ancillary Jurisdiction: Toward a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263, 1266-67 (1975).

summarize, the ancillary doctrine developed primarily to provide defending parties with an immediate forum, and to completely and fairly adjudicate logically related claims.

2. *Pendent Jurisdiction*

The doctrine of pendent jurisdiction predates ancillary jurisdiction by over thirty-five years. In the doctrine's formative stages, the Supreme Court first applied pendent jurisdiction in *Osborne v. Bank of the United States*[33] in 1824. In keeping with the Supreme Court's activist jurisprudence of that era, Chief Justice Marshall concluded:

> We think, then, that when a question to which the judicial power of the Union is extended by the constitution . . . forms an ingredient of the original cause, it is in the power of Congress to give to the Circuit Courts jurisdiction of that cause, although other questions of law or fact may be involved in it.[34]

In 1909, the Supreme Court extended this principle to justify resolving a state claim to avoid reaching a federal constitutional claim in *Siler v. Louisville & Nashville Railroad.*[35] In a 1933 decision, *Hurn v. Oursler*,[36] the Court again expanded the power established by Chief Justice Marshall in *Osborne* to resolve a state claim after it dismissed the federal claim on the merits. What became known as the "doctrine of *Hurn v. Oursler*," before being labeled "pendent,"[37] was based on two prior Supreme Court decisions: *Moore* and *Siler*. But *Hurn* involved neither the avoidance of a

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33. 22 U.S. (9 Wheat.) 738 (1824).

34. *Id.* at 823.

35. 213 U.S. 175 (1909). In *Siler*, plaintiffs challenged the constitutionality of a Kentucky statute establishing a railroad commission, and also brought a state law claim attacking the validity of rate schedules. The Supreme Court held that the court could properly adjudicate the state claim even if it decided plaintiff's constitutional claim adversely, or, as actually happened in the case, declined to rule on the federal constitutional question. *Id.* at 191 (citations omitted). The Court pointed out that this result was based on the traditional policy of avoiding constitutional questions whenever possible. *Id.* at 193.

36. 289 U.S. 238 (1933). In deciding *Hurn*, the Supreme Court relied heavily on its decision in *Siler*.

37. The first use of the term "pendent" jurisdiction in a reported federal case occurred in Best & Co. v. Miller, 67 F. Supp. 809 (S.D.N.Y. 1946), *aff'd*, 167 F.2d 374 (2d Cir.), *cert. denied*, 335 U.S. 818 (1948). Until then, courts referred to the principle as the "*Hurn v. Oursler* doctrine," and limited its application to cases involving federal copyright infringement claims and related state unfair competition claims. *See, e.g.*, Zalkind v. Schuman, 139 F.2d 895 (2d Cir. 1943), *cert. denied*, 322 U.S. 738 (1944).

constitutional question as in *Siler* nor the application of a procedural rule as in *Moore*. Therefore, *Hurn* established a new and broader principle for pendent jurisdiction that emphasized judicial economy as its underlying rationale.

Hurn involved a single plaintiff asserting both a federal copyright claim and a related state claim based on unfair competition against a single defendant.[38] In reversing the district court's dismissal of the state claim for lack of jurisdiction, the Supreme Court held that the district court should have adjudicated both claims because the state claim was "inseparable from the statutory wrong."[39] To promote judicial economy and convenience to the litigants, the Court, in an opinion by Justice Sutherland, held that federal courts could invoke pendent jurisdiction "when two distinct grounds in support of a *single cause of action* are alleged, only one of which presents a federal question."[40] Justice Sutherland's conflicting definitions of the new single cause of action test in *Hurn* undoubtedly contributed to the confusion among lower courts trying to apply the test, causing them to develop their own interpretations.[41] Later characterized by the Supreme Court as an "unnecessarily grudging"[42] approach to pendent jurisdiction, the single cause of action standard could never be interpreted as broadly as the transactional test developed for the ancillary doctrine in *Moore*.

The traditional pendent and ancillary doctrines differed in underlying policy and rule, as well as in their application to accommodate different situations. Courts applied ancillary jurisdiction in cases like *Moore* where a separate state claim arose out of the same

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38. *Hurn*, 289 U.S. at 239.

39. *Id.* at 242.

40. *Id.* at 246 (emphasis added). The limited view of *Hurn* was codified in 1948: "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 trademark laws." 28 U.S.C. § 1338(b) (1970).

41. In *Hurn*, Justice Sutherland defined "single cause of action" as existing when all legal rights are based on "identical facts." 289 U.S. at 246. Later in the opinion, he stated that a single cause of action exists when there is a "violation of but one right by a single legal wrong." *Id.* (quoting Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927)). Based on these differing definitions, lower courts formed their own standards, which tended to emphasize fact-relatedness or similarity of proof. *See, e.g.*, Dann v. Studebaker-Packer Corp., 288 F.2d 201, 215 (6th Cir. 1961) ("[S]ubstantially identical facts . . . ."); Errion v. Connell, 236 F.2d 447, 454 (9th Cir. 1956) ("[S]ame set of facts . . . ."); Musher Foundation, Inc. v. Alba Trading Co., 127 F.2d 9, 10 (2d Cir.) ("[S]ubstantial identity between the proof . . . ."), *cert. denied*, 317 U.S. 641 (1942).

42. United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966).

transaction as the main claim, relying on the notion that ancillary jurisdiction encompassed an entire *controversy*. Counterclaims, crossclaims, and third-party claims could fairly comprise an entire controversy.[43] Ancillary jurisdiction developed primarily to achieve fairness, especially to a defending party involuntarily in court, and to completely resolve an entire controversy.[44]

On the other hand, the primary rationale underlying pendent jurisdiction was judicial economy.[45] Typically, courts applied pendent jurisdiction under *Hurn* in federal question cases in which a plaintiff asserted a state claim against the same defendant. *Hurn* insisted that pendent jurisdiction did not embrace separate causes of action, only separate grounds supporting a single cause of action.[46] Under *Hurn*, courts did not permit adding *parties* because that necessarily amounted to asserting a separate cause of action.[47] In addition, courts did not apply pendent jurisdiction to diversity actions, primarily because diversity cases involve only state law issues. Thus, the goal of avoiding piecemeal litigation, which supports retention in *federal* court of the related state law claim in federal question cases, was less compelling in diversity cases. Absent questions of federal law, a state court could, and perhaps should, decide both claims.[48]

B. Merger of Ancillary and Pendent Jurisdiction

In *United Mine Workers of America v. Gibbs*,[49] the United States Supreme Court signaled that the pendent and ancillary doc-

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43. *See infra* note 86 and accompanying text.

44. Fundamental fairness to a defending party was the primary reason for a court to deem a nonfederal claim ancillary. *See Moore*, 270 U.S. 593, 610 (1926).

45. Pendent jurisdiction was applied to prevent forcing a plaintiff to bring suits in both state and federal court to completely adjudicate one factual controversy. *See, e.g.*, Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018, 1030 (1962) [hereinafter Note, *Evolution and Scope of Pendent Jurisdiction*].

46. *See supra* text accompanying notes 38-40.

47. *See, e.g.*, Wojtas v. Village of Niles, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); Rumbaugh v. Winifrede R.R., 331 F.2d 530 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964); Pearce v. Pennsylvania, 162 F.2d 524 (3d Cir.), *cert. denied*, 332 U.S. 765 (1947); Rosenthal & Rosenthal, Inc. v. Aetna Casualty and Surety Co., 259 F. Supp. 624 (S.D.N.Y. 1966).

48. *See* Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262, 265-66. *But see*, Note, *Evolution and Scope of Pendent Jurisdiction*, 62 COLUM. L. REV. 1018, 1043-44 (1962).

49. 383 U.S. 715 (1966).

trines were destined to merge into a single standard applicable to both types of cases. Liberalizing the test for pendent jurisdiction, the *Gibbs* Court replaced the "unnecessarily grudging"[50] single cause of action test set forth in *Hurn* with a more flexible and functional test resembling the *transactional* approach taken in *Moore* for ancillary jurisdiction.[51] In *Gibbs*, the Supreme Court held that the district court had constitutional power to hear the plaintiff's state law claim against the defendant union because the state claim arose from the same operative facts as the plaintiff's federal claim.[52]

Before defining the new two-part test for pendent jurisdiction, the Court stressed that since the adoption of the Federal Rules of Civil Procedure, "the impulse [has been] toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies [have been] strongly encouraged."[53] The Court then announced the following test: First, federal courts have constitutional power to exercise pendent jurisdiction whenever a substantial federal claim exists and the federal and state claims "derive from a common nucleus of operative fact [such that] if considered without regard to their state or federal character, a plaintiff . . . would ordinarily be expected to try them all in one proceeding . . . ."[54] Second, once constitutional power exists under part one, part two renders its application a matter of discretion for the court. Such discretion should be exercised in consideration of whether retaining or dismissing the state claim would promote "judicial economy, fairness, and convenience to the litigants."[55] *Gibbs* was the first case to in-

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50. *Id.* at 725.

51. Writing for a unanimous Supreme Court, Justice Brennan determined that the power of the federal courts to adjudicate state claims in federal question cases "exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority . . . ,' and the relationship between that claim and the state claim permits the conclusion that the entire action comprises but one constitutional 'case.'" 383 U.S. 715, 725 (citation omitted).

52. *Id.* at 724-25.

53. *Id.* at 724.

54. *Id.* at 725.

55. *Id.* at 726. The Court went on to discuss certain factors that district courts should consider in this discretion component of the test. *Id.* at 726-27. What follows is the author's attempt to comprehensively list the factors that courts consider. Specific factors in favor of retaining state claims include: (1) whether federal jurisdiction is exclusive, such that only in federal court may plaintiff try her entire case; (2) the likelihood of prejudice to the parties in state court; (3) the existence of federal preemption over the state claim; (4) whether the state statute of limitations on plaintiff's state claim has elapsed; and (5) the existence of

corporate a *fairness* policy into the pendent doctrine, a rationale that until then justified only ancillary jurisdiction.[56]

Lower courts took advantage of their new freedom under *Gibbs*, and subsequently applied the pendent doctrine in diversity cases,[57] and in both federal question and diversity cases wherein the nonfederal claim was asserted by or against a *nonparty* to the federal claim.[58] The development of the latter category, "pendent-party" cases, eventually facilitated the ancillary and pendent merger by demonstrating that the practice of invoking jurisdiction to support state claims *and* parties was not limited to traditional ancillary cases. A minority of jurisdictions, however, refused outright any such extension of *Gibbs*.[59]

The Supreme Court squarely faced the pendent-party issue in *Aldinger v. Howard*.[60] In this civil rights action for wrongful discharge of employment, plaintiff Aldinger sued her employer, the sheriff, other county officials, and the county itself. She also filed related state claims against all defendants.[61] When the district

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overriding federal policy concerns. Specific factors weighing against the exercise of jurisdiction include: (1) maintaining comity between the federal and state judiciaries; (2) whether the particular state law underlying the claim is novel or unclear; (3) the likelihood of jury confusion due to the differences in federal and state law; (4) whether the state law issues actually predominate; and (5) dismissal of the federal claim, especially if dismissed for jurisdictional reasons. *See id.* at 726-27; Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968).

56. Prior to *Gibbs*, a plaintiff could not make a request for pendent jurisdiction based on fairness because she had chosen the federal forum. A court rarely permitted a pendent claim based on reasons of fairness to the plaintiff; the traditional criteria were judicial economy and convenience. *See* Note, *supra* note 55, at 665-67. Since *Gibbs*, however, both the pendent and ancillary theories consider judicial economy, convenience, *and* fairness. *Compare, e.g.*, Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969) (ancillary case), *with* Jacobson v. Atlantic City Hospital, 392 F.2d 149, 154 (3d Cir. 1968) (pendent case).

57. *See, e.g.*, Stone v. Stone, 405 F.2d 94 (4th Cir. 1968) (diversity) *cert. denied*, 409 U.S. 1000 (1972); Jacobson v. Atlantic City Hospital, 392 F.2d 149, 154 (3d Cir. 1968) (diversity). *But see*, Olivier v. Adams, 280 F. Supp. 428, 430 (E.D. Pa. 1968).

58. *See, e.g.*, Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971) (pendent-party); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971) (pendent-party).

59. The United States Court of Appeals for the Ninth Circuit has consistently refused to recognize pendent-party jurisdiction, and it is unlikely that they ever will. For example, although the Supreme Court recognized pendent-party jurisdiction in 1976, the Ninth Circuit refused to apply it one year later in a compelling case in which the federal claim fell within the exclusive jurisdiction of the federal courts. Ayala v. U.S., 550 F.2d 1196 (9th Cir. 1977). In *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969), the Ninth Circuit emphasized that "[j]oinder of claims, not joinder of parties, is the object of the [pendent] doctrine." *Hymer*, 407 F.2d at 137. *See also*, Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972).

60. 427 U.S. 1 (1976).

61. *Id.* at 5.

court dismissed the federal claims against the county due to the county's immunity from suit under 42 U.S.C. § 1983 and 28 U.S.C. § 1343,[62] the only claims remaining against the county were state claims, which the lower court dismissed for lack of jurisdiction.[63] The United States Court of Appeals for the Ninth Circuit affirmed.[64] Distinguishing *Gibbs* as "factually and legally different,"[65] the Supreme Court also affirmed, over Justice Brennan's discerning dissent.[66] Although the Court denied jurisdiction based on the particular facts in *Aldinger*, it affirmed the "pendent-party" doctrine as a valid jurisdictional concept for the first time.[67]

Characterizing the pendent-party issue as "a subtle and complex question with far-reaching implications,"[68] and "quite another thing" from pendent claim jurisdiction,[69] the *Aldinger* Court modified *Gibbs* and fashioned a test emphasizing the congressional intent in the underlying federal jurisdictional statute. In pendent-party situations, therefore, *Aldinger* requires that once a court determines under *Gibbs* that the federal and state claims derive from a common nucleus of operative fact, the power to hear pendent-party claims exists if "Congress, in the statute conferring [federal] jurisdiction has not expressly or by implication negated its exis-

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62. Plaintiff brought this action under 42 U.S.C. § 1983 (1976 and Supp. IV 1980), which provides in pertinent part that "no person shall . . . deprive any citizen of rights, privileges, or immunities . . . ." 28 U.S.C. § 1343(3) grants original jurisdiction over civil rights cases to the federal district courts. At the time *Aldinger* arose, the Supreme Court had interpreted § 1983 as excluding municipalities from suit under the Civil Rights Act. Monroe v. Pape, 365 U.S. 167, 187-91 (1961). Specifically, the Court had interpreted the word "person" under the Act as excluding "municipalities." *Monroe*, 365 U.S. at 187-91. Since 1978, however, municipalities have been held amenable to suit under 42 U.S.C. § 1983 (1976 and Supp. IV 1980). *See* Monell v. New York City Dep't of Social Services, 436 U.S. 658, 690 (1978).

63. *Aldinger*, 427 U.S. at 5.

64. *Id.*

65. *Id.* at 14.

66. *Id.* at 19-37 (Brennan, J., dissenting); *see infra* note 70.

67. *Aldinger*, 427 U.S. at 18. The Court stressed that its decision was a narrow one:

> There are, of course, many variations in the language which Congress has employed to confer jurisdiction upon the federal courts, and we decide here only the issue of so-called "pendent-party" jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result.

Id. The Court mentioned, in dicta, that a suit wherein the grant of federal jurisdiction is exclusive is an example of what might constitute an appropriate case for pendent-party jurisdiction in the future. *Id.*

68. *Id.* at 18.

69. *Id.* at 14.

tence."[70] Once a court fulfills the power component of the pendent-party doctrine, it may, in its discretion, dismiss the state party's claim to promote judicial economy, fairness, and convenience to the litigants.[71] In discussing whether this new jurisdictional concept was more *pendent-based* or more *ancillary-based,* the Court interestingly stated that "given the complexities of the many manifestations of federal jurisdiction, together with the countless factual permutations under the Federal Rules, there is little profit in attempting to decide . . . whether there are any principled differences between pendent and ancillary jurisdiction."[72] The Court's recognition of a pendent and ancillary merger was under way.

Two years later, the Supreme Court applied the *Aldinger* "pendent-party" test, which is an extension of the *Gibbs* "pendent" test, to the "ancillary" case of *Owen Equipment and Erection Co. v. Kroger.*[73] This conjunctive application of the pendent, pendent-party, and ancillary doctrines most clearly signaled their synthesis.

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70. *Id.* at 18. In analyzing the congressional intent behind the civil rights jurisdictional statute, the Court determined that because counties were "*excluded* from liability in § 1983," Congress could not have intended "to *bring them back* within that power" under § 1343 (3), and that § 1343 (3) "should not be so broadly read" as to circumvent the scope of federal jurisdiction defined by Congress. *Id.* at 17 (emphasis added). Thus, the Court concluded that Congress had by implication declined to extend federal jurisdiction over a party such as the county. Forcefully rejecting the majority's conclusion that Congress intended to preclude jurisdiction under these statutes, the dissent (Brennan, Marshall & Blackmun, JJ.) correctly stated: "That result is demonstrably untenable. . . . It wholly disregards the congressional intent and policy in enacting . . . § 1983. For, to an extent perhaps unparalled in our history, the post-Civil War Civil Rights Act had as a focal point the provision that claims brought under those Acts should be entertained in federal judicial forums." *Id.* at 22, 31. The dissent carefully noted that *federal* immunity for municipalities under § 1983 was in no way an indication that Congress intended to preclude *state* claims against municipalities. To the contrary, although there were no federal civil rights and duties imposed on municipalities, legislative history specifically shows that federal courts were proper forums to enforce *state* duties against municipalities, which, "by reason of prejudice, passion, neglect, intolerance or otherwise" were not enforced in state forums. *Id.* at 33.

71. *Id.* at 14 (citing *Gibbs,* 338 U.S. at 725). It is interesting to note that the legal community has interpreted the effect that *Aldinger* has had on *Gibbs* differently. Some commentators go so far as to read *Aldinger* as pronouncing a test separate and distinct from *Gibbs;* when faced with a pendent-party issue, congressional intent controls as the dispositive factor for exercising jurisdiction. *See* Comment, *Aldinger v. Howard and Pendent Jurisdiction,* 77 COLUM. L. REV. 127 (1977). Other commentators read *Aldinger's* requirement of ascertaining "no intent to preclude" as the first and foremost inquiry to determine whether constitutional jurisdictional power exists; only if the *Aldinger* requirement is met should a court then apply the traditional *Gibbs* two-part test. *See* Note, *Supreme Court Says No to Pendent Parties - At Least This Time,* 38 U. PITT. L. REV. 415 (1977).

72. *Aldinger,* 427 U.S. at 13.

73. 437 U.S. 365 (1978).

In *Kroger*, a federal diversity action, plaintiff Kroger sued the Omaha Public Power District (OPPD) for negligence in the wrongful death of her husband.[74] OPPD impleaded Owen Equipment and then successfully moved for summary judgment.[75] Plaintiff Kroger amended her complaint to assert a state negligence claim directly against Owen, the third-party defendant.[76] At trial, it was disclosed that Owen and Kroger were citizens of the same state, and thereupon, Owen moved to dismiss for lack of diversity jurisdiction.[77] The United States Court of Appeals for the Eighth Circuit upheld the district court's denial of that motion to dismiss.[78] It held that under *Gibbs*, the district court had the jurisdictional power, in its discretion, to adjudicate the claim which arose from the "core of 'operative facts' giving rise to both the [plaintiff's original] claim against OPPD, and OPPD's claim against Owen."[79] Furthermore, the appeals court determined that the district court properly exercised its discretion in retaining the state claim, because Owen initially had concealed its true citizenship.[80]

The Supreme Court reversed. Stating that the Eighth Circuit correctly recognized that the issue presented in *Gibbs*, albeit a pendent case, was the same issue presented at bar, that is, "[u]nder what circumstances may a federal court hear a state-law claim arising between citizens of the same state,"[81] the Eighth Circuit's analysis nevertheless fell short of completely addressing the permissible scope of a federal court's jurisdictional power.[82] The *Kroger* Court cautioned that since *Aldinger*, federal courts are required to look beyond the "common nucleus of operative fact" test to ascertain whether Congress has expressly or impliedly limited their jurisdiction: "Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited not only by the provisions of Article III of the Constitution, but by Acts of Congress."[83]

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74. *Id.* at 367.
75. *Id.* at 367-68.
76. *Id.*
77. *Id.* at 369.
78. 558 F.2d 417 (8th Cir. 1977).
79. *Id.* at 424.
80. *Id.* at 420.
81. *Kroger*, 437 U.S. at 370.
82. *Id.* at 372.
83. *Id.* (citations omitted).

In examining case law to ascertain congressional intent, the *Kroger* Court determined that the general diversity statute, which conferred original jurisdiction, has consistently required *complete diversity* of citizenship.[84] While acknowledging situations in which complete diversity has not been required—cases involving impleaded parties, crossclaims, or counterclaims—the Court distinguished Kroger's claim.[85] In those situations, the procedural rules themselves require that the state claim, even if asserted against a nonfederal party, bear at least a logical relationship to the main claim.[86] Kroger's claim, however, "far from being an ancillary and dependent claim, was a new and independent one."[87]

In addition, the Court distinguished the *offensive posture* in which the plaintiff's claim was asserted from the typical *defensive posture* in which claims traditionally supported by ancillary jurisdiction are asserted.[88] The Court implicitly determined that when offensive parties like Kroger attempt to stretch the contours of federal jurisdiction, courts should be more hesitant to comply:

> A plaintiff cannot complain if ancillary jurisdiction does not encompass all of [her] possible claims in a case such as this

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84. *Id.* at 373 (citing, *inter alia*, Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)). The Court stated: "Congress has established the basic rule that diversity jurisdiction exists under § 1332 only where there is *complete* diversity of citizenship. . . . To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command." *Id.* at 377 (emphasis added). The Constitution, however, permits Congress to extend federal judicial power to actions involving minimal diversity—those in which diversity exists between any two adverse parties. *See* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967) (statutory interpleader, 28 U.S.C. § 1335 (1940)).

85. *Kroger*, 437 U.S. at 375.

86. *Id.* at 376. *See, e.g.*, FED. R. CIV. P. 13(a) (compulsory counterclaims) ("[A]ny claim which . . . *arises out of the transaction or occurrence that is the subject matter* of the opposing party's claim . . . ."); FED. R. CIV. P. 13(g) (cross-claims) ("[A]ny claim by one party against a co-party *arising out of the transaction or occurrence that is the subject matter* either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action."); FED. R. CIV. P. 14(a) (impleader) ("[The] third-party plaintiff may [implead] a person not a party to the action who *is or may be liable to him for all or part of the plaintiff's claim* against him. . . . The third-party defendant may also assert any claim against the plaintiff *arising out of the transaction or occurrence that is the subject matter* of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant *arising out of the transaction or occurrence that is the subject matter* of the plaintiff's claim against the third-party plaintiff . . . .") (emphasis added).

87. *Kroger*, 437 U.S. at 376. The dissent pointed out that plaintiff Kroger's claim was *not* a new and independent one. Rather, she "merely sought to assert against Owen a claim arising out of the same transaction that was already before the court." *Id.* at 381 (Brennan, J., dissenting).

88. *Id.* at 373.

> one, since it is [she] who has chosen the federal rather than the state forum and must thus accept its limitations. '[T]he efficiency plaintiff seeks so avidly is available without question in state courts.'[89]

Observing *Gibbs, Aldinger,* and *Kroger* conjunctively, three clear judicial considerations emerge beyond whether a nonfederal claim is sufficiently factually and legally related to the main claim. First, the court must determine whether the nonfederal claim is asserted by or against a *nonparty* to the federal claim. If not asserted by or against a nonparty to the federal claim, the court should apply the discretionary factors enumerated in part two of the *Gibbs* test and retain or dismiss the claim in furtherance of judicial economy, fairness, and convenience.[90] If, however, the nonfederal claim is asserted by or against a nonparty to the federal claim, the court must examine two additional factors which comprise the new second level of analysis before reaching the discretionary factors test set out in *Gibbs,* which then becomes the third level of analysis. The two additional considerations comprising the second level of analysis, derived directly from *Aldinger* and *Kroger,* are: (1) whether a federal question or diversity of citizenship conferred jurisdiction over the main claim (congressional intent); and (2) whether the posture of the party invoking ancillary or pendent jurisdiction is offensive or defensive. Courts must examine these two factors in light of each other. In diversity cases, nondiverse defensive parties may assert state claims against the original offensive party if the claim bears a logical relationship to the main claim—a more restrictive requirement than the "common nucleus of operative fact" test. That is, the state claim must depend not only upon the source, but also upon the resolution of the main federal claim.[91] No theory of incidental jurisdiction, however, will support a nondiverse offensive party's state claim, at least when raised in the "first degree."[92] *Kroger* dispositively forecloses this

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89. *Id.* at 376 (quoting Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (4th Cir. 1972)).

90. *See supra* text accompanying note 55.

91. FED. R. CIV. P. 14(a) procedurally requires that this transactional relationship exist. FED. R. CIV. P. 20(a)(2) permitting joinder of parties also requires that the transactional relationship exist.

92. For purposes of this note, "first degree" refers to the first claim asserted between the third-party defendant and the original plaintiff. The plaintiff cannot assert a state claim against a nondiverse third-party defendant under *Kroger.* It is unclear whether the nondiverse third-party defendant can assert a claim directly against the plaintiff, but there seems to be no logical reason drawn from the *Kroger* rationale to invalidate this claim, because the

possibility.

In federal question cases, the answers are not as clear cut. Federal question cases are brought pursuant to many different federal laws. Congress has placed jurisdictional limits in some of these statutes, such as rendering certain parties immune from liability. Thus, no overall rule governing the jurisdictional scope of federal statutes exists. In addition to showing a transactional claim relationship, these offensive parties must show that Congress did not intend to preclude the exercise of jurisdiction over their state claim against a nonfederal party.[93]

Thus, the test for incidental jurisdiction in its entirety is actually a three-part test. The first part is the "common nucleus of operative fact" constitutional test from *Gibbs*. The second part is the "congressional intent/posture" test for nonfederal parties derived from *Aldinger* and *Kroger*. The third part is the "discretionary factors" test from *Gibbs*.

II. Incidental Jurisdiction Over Intervention and Counterclaims

Courts can apply the three-part analysis set forth above to support permissive intervention with incidental jurisdiction in appropriate cases. To a more theoretical and less practical extent, courts can similarly apply the three part test to support permissive counterclaims. Due to the parallel between the requirements of certain joinder rules and the transactional test for ancillary jurisdiction, courts began to routinely apply the ancillary doctrine to support joined claims and parties that, standing alone, could not exist in federal court. *Moore v. New York Cotton Exchange* established that ancillary jurisdiction supports compulsory counter-

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third-party's claim against the plaintiff does not present the same risk of collusion to circumvent the complete diversity requirement. In addition, because the plaintiff controls the choice of forum (offensive), the third-party defendant is an involuntary party "who should not be saddled with the rules that inhibit him from effectively defending himself." First Federal Savings & Loan Ass'n v. Aetna Life and Casualty Co., No. 80 C 0787, (N.D. Ill. Nov. 9, 1981) (LEXIS, Genfed Library, Dist file). Assuming the validity of the third-party defendant's claim against the plaintiff, the plaintiff's state claim back against the third-party defendant would be a claim raised in the "second degree." For a persuasive argument that this claim should be permitted, see Stephens, *Ancillary Jurisdiction: Plaintiffs' Claims Against Nondiverse Third-Party Defendants*, 14 Loy. U. Chi. L.J. 419, 439-40 (1983).

93. *See, e.g.*, Usery v. Brandel, 87 F.R.D. 670, 681 (W.D. Mich. 1980) (intervention); New York State Ass'n for Retarded Children v. Carey, 438 F. Supp. 440, 444-45 (E.D.N.Y. 1977) (third-party defendant).

claims under the old Equity Rules;[94] *Phelps v. Oaks*[95] established that ancillary jurisdiction supports interventions of right. Ancillary jurisdiction has also been held to support impleaded claims[96] and cross-claims.[97]

A different set of rules developed in cases involving permissive intervention and permissive counterclaims, however, requiring an independent basis of jurisdiction to maintain these claims and parties in federal court.[98] This approach seems out of line with the Supreme Court's most recent pronouncements and its implicit adoption of a three-part test when faced with incidental jurisdiction questions. Ancillary jurisdiction indeed logically and reasonably supports compulsory counterclaims and intervention as of right, because the procedural rules under which these claims and parties are joined explicitly embody the factual and transactional relationship required in both traditional ancillary and pendent doctrines.[99] But it is not axiomatic that either of these joinder rules should define the parameters of incidental jurisdiction. The formula implicit in these general rulings is that ancillary jurisdiction extends to nonfederal intervention and counterclaims *if and only if* they are Rule 24(a) claims and Rule 13(a) parties. Two undesirable consequences flow from this type of rule: (1) a preoccupation with interpreting case facts, at times disingenuously, to fit or fail the Rules;[100] and (2) foreclosure of a court's option to exercise

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94. *See supra* text accompanying notes 24-29.

95. Phelps v. Oaks, 117 U.S. 236 (1886). In *Phelps*, the Court stated:

> And this need not arrest or interfere with the jurisdiction of the court, already established by the plaintiffs against the tenant in possession. For such proceedings should be treated as incidental to the jurisdiction thus acquired, and auxiliary to it, as in like cases, in equity, one interested in the subject-matter, though a stranger to the litigation, may be allowed to intervene *pro interesse suo* [according to his interest].

Id. at 241 (emphasis added).

96. *See, e.g.*, H.L. Peterson Co. v. Applewhite, 383 F.2d 430, 433 (5th Cir. 1967); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

97. *See, e.g.*, LASA Per L'Industria Del Marmo Soc. Per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969); Scott v. Francher, 369 F.2d 842, 844 (5th Cir. 1966).

98. *See infra* text accompanying notes 101-104.

99. The accepted view is that of the United States Court of Appeals for the Third Circuit: "[T]he issue of the existence of ancillary jurisdiction and the issue as to whether a counterclaim is compulsory are to be answered by the same test." Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633-34 (3d Cir. 1961). *See also* 3 MOORE'S FEDERAL PRACTICE ¶ 13.13, 60-81 (2d ed. 1984).

100. *See, e.g.*, U.S. v. Heyward-Robinson Co., 430 F.2d 1077, 1087-88 (2d Cir. 1970) (Friendly, J., concurring); By-Prod Corp. v. Armen Berry Corp., 668 F.2d 956 (7th Cir. 1982).

incidental jurisdiction over permissive intervention and counterclaims where facts and circumstances so warrant. The incidental jurisdiction doctrines encompass more area than Rules 24(a) and 13(a). Courts should, therefore, discard the present axiom which per se requires an independent basis of jurisdiction for Rule 24(b) parties and Rule 13(b) claims, and apply the three-part test on a case-by-case basis.

A. Jurisdiction Over Intervention

Categorical rules of incidental jurisdiction have developed without Supreme Court precedent for Rule 24(a) intervention of right and Rule 24(b) permissive intervention. The general jurisdictional rule regarding intervention is that Rule 24(a) intervention of right is supported by pendent or ancillary jurisdiction, while Rule 24(b) permissive intervention requires an independent basis of jurisdiction.[101] Procedurally, a nonparty may intervene as of right pursuant to Rule 24(a) in two instances: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, *unless it is adequately protected by existing parties.*[102] Under Rule 24(b), a nonparty may be permitted to intervene at the court's discretion, if the applicant's claim or defense and the main action have a question of law or fact in common.[103] Given that the exacting requirements under Rule 24(a) coincide with the transactional test of ancillary jurisdiction, the rule supporting such intervenors with ancillary jurisdiction makes sense. As one court has stated, "[i]ntervention under section (a) is permitted without consideration of jurisdiction only because, due to the demanding standard for intervention as of right, ancillary jurisdiction is always pre-

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101. *See, e.g.*, Curtis v. Sears, Roebuck Co., 754 F.2d 781, 783 (8th Cir. 1985); Bank v. Apollo, 508 F.2d 995, 1000 (7th Cir. 1975); Beach v. K.D.I. Corp., 490 F.2d 1312, 1319-20 (3d Cir. 1974); Warren G. Kleban Engineering Corp. v. Caldwell, 490 F.2d 800, 802 (5th Cir. 1974); Francis v. Chamber of Commerce of United States, 481 F.2d 192, 195 n.6 (4th Cir. 1973); Babcock & Wilcox v. Parsons Corp., 430 F.2d 531, 540 (8th Cir. 1970); 3B MOORE'S FEDERAL PRACTICE 24.18[1], 753 (2d ed. 1983); 7C C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 1917 (1986).

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

103. FED. R. CIV. P. 24(b).

sent."[104] On the other hand, because of the relaxed standard of permissive intervention, the majority of jurisdictions categorically exclude such claims from the ambit of incidental jurisdiction. But what courts have perhaps overlooked in fashioning a categorical rule is that the simple presence or absence of "adequate representation" often determines whether a party may intervene as of right under Rule 24(a)(2) or permissively under Rule 24(b)(2).

Permissive intervenors may possess claims or defenses that are equally or even more related to the main claim than claims possessed by intervenors of right. In fact, two applicants for intervention may possess identical claims or defenses and one applicant may qualify under Rule 24(a)(2) as an intervenor of right while the other applicant qualifies only as a permissive intervenor under Rule 24(b)(2), depending on whether the person's interest is "adequately represented" by existing parties to the suit. The judicially developed rule requiring an independent basis of jurisdiction to support permissive intervenors is inappropriate because the exercise of such jurisdiction does not turn on whether one is "adequately represented" by existing parties.

In *Blake v. Pallan*,[105] the United States Court of Appeals for the Ninth Circuit affirmed the lower court's dismissal of a permissive complaint-in-intervention because the applicant failed to allege an independent basis of federal jurisdiction, and consequently, the court lacked subject-matter jurisdiction.[106] In *Blake*, a California corporation's commissioner sought to intervene as plaintiff on behalf of investors in a federal class action alleging violations of federal securities laws and pendent state claims based on California securities and fraud laws.[107] After determining that the commissioner did not satisfy the requirements of Rule 24(a) intervention of right, the court found that his complaint and the main action indeed had questions of law or fact in common, sufficient to procedurally authorize permissive intervention. Nevertheless, because the commissioner asserted only state securities law violations, the court of appeals summarily dismissed for lack of an independent basis of federal jurisdiction.[108]

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104. Usery v. Brandel, 87 F.R.D. 670, 681 (W.D. Mich. 1980).
105. 554 F.2d 947 (9th Cir. 1977).
106. *Id.* at 956-57.
107. *Id.* at 950-51.
108. *Id.* at 957.

The court grounded its decision simply on the majority rule, citing to several circuit courts of appeals and treatises.[109] It ultimately bottomed its rationale on Rule 82, which requires that the federal rules "shall not be construed to extend or limit the jurisdiction . . . of the district courts," implying that supporting permissive intervenors but not intervenors of right with incidental jurisdiction is an affront to Rule 82.[110] In accordance with the majority of jurisdictions, the court in *Blake* erroneously allowed the intervention of right Rule 24(a) to delineate the outer limits of incidental jurisdiction over intervenors.[111]

E.E.O.C. v. Boeing Co.[112] provides a recent illustration of a district court applying the categorical jurisdictional rule regarding permissive intervention. Although the court probably reached the correct jurisdictional conclusion, it did so for the wrong reason. *Boeing* involved pilots who sought to intervene in an age discrimination suit under both Rules 24(a)(2) and 24(b)(2).[113] After deciding that the pilots could not intervene as of right, the court summarily discussed the jurisdictional requirements accompanying permissive intervention, holding that "the pilots must first establish an independent basis for federal subject-matter jurisdiction over their claims."[114] Because the pilots did not present an independent basis of jurisdiction, the court denied their motion to intervene.[115]

The court should have applied the three-part test to determine whether incidental jurisdiction was appropriate under these facts. Assuming that the pilots' claims and the federal claim derived from a common nucleus of operative fact, the analysis would have focused on the second-part factors, because a nonparty to the federal claim sought to join and assert nonfederal claims against an existing party.[116] In this federal question case, the court should have examined two key factors: (1) whether Congress intended to limit jurisdiction in the statute conferring original jurisdiction in

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109. *See supra* note 101.

110. *Blake*, 554 F.2d at 956.

111. The requirements under FED. R. CIV. P. 24(b)(2) of factual or legal commonality present a persuasive reason for courts to abolish the rule that categorically excludes permissive intervenors from the scope of incidental jurisdiction.

112. 109 F.R.D. 6 (W.D. Wash. 1985).

113. *Id.* at 8.

114. *Id.* at 11.

115. *Id.*

116. *Id.* at 9.

this case; and (2) the posture of the party seeking to intervene. The Age Discrimination in Employment Act (ADEA)[117] conferred original jurisdiction in this case.[118] That statute provides that once the E.E.O.C. files its complaint, "the right of any person to bring an action shall terminate."[119] Thus, the pilots sought to intervene to assert claims that Congress had clearly precluded. The motion to intervene, then, should have been denied for lack of subject-matter jurisdiction because Congress intended to preclude federal jurisdiction, not simply because the pilots were Rule 24(b) permissive intervenors.

In *Usery v. Brandel,*[120] however, a district court refused to adhere to such categorical analysis. Instead, in a well-reasoned opinion based on the underlying principles of the pendent and ancillary doctrines, the court held that such jurisdiction could be asserted over permissive intervenors.[121] In *Usery,* nine migrant farm laborers working on a "sharecropper" basis sought to intervene in a suit brought by the Secretary of Labor to enforce minimum wage and hour and child labor provisions of the Fair Labor Standards Act against a large Michigan farmer. The workers supported the farmer's claim that he was exempt from the Act because the workers were "independent contractors," not "employees."[122] The court found the workers entitled to both intervention of right and permissive intervention, and further found that ancillary jurisdiction could be asserted over *both* types of intervenors.[123] In reviewing and summarizing the rationale of the ancillary doctrine, the court stated:

> [Ancillary jurisdiction] is a limited exception to the rule that federal district courts have only such jurisdiction as is provided, in terms, by the Constitution or a statute. It may be employed when a federal court is presented with issues or parties so closely related to a matter over which it has jurisdiction as to be part of a single Article III "case." . . . It operates only where there is a tight nexus with a subject matter

117. 29 U.S.C. § 621 (1978).

118. *Boeing,* 109 F.R.D. at 8.

119. *Id.* at 9 (quoting 29 U.S.C. § 626(c)(1) (1978)).

120. 87 F.R.D. 670 (W.D. Mich. 1980).

121. *Id.* at 681.

122. *Id.* at 673-74.

123. *Id.* at 675-77. The intervenors did not specify in their application for intervention whether they applied as intervenors of right or permissive intervenors. Because of this omission, the court analyzed this case under both sections of Rule 24.

> properly in federal court. That is, the ancillary claim must bear a logical relationship to the aggregate core of operative facts which constitutes the main claim. . . . The applicant's claim falls squarely within the contours of the rationale for exercising ancillary jurisdiction.[124]

The *Usery* court acknowledged that the majority of jurisdictions have authoritatively stated that ancillary jurisdiction may not be relied upon to support permissive intervention, only intervention of right. The court agreed that intervention of right raises no jurisdictional issue because the demanding standard of Rule 24(a) ensures that ancillary jurisdiction is always present.[125] In contrast,

> [t]he laxer standard of Rule 24(b)(2) - 'a question of law or fact in common' provides no such guarantee, and applications under its terms must consequently be examined for a jurisdictional basis. *It does not follow, however, that permissive intervention can never arise in circumstances where there is a 'tight nexus' with a subject matter properly in federal court.* Accordingly, to the extent that it is the effective basis for ancillary jurisdiction over interventions of right, ancillary jurisdiction may properly be exercised if the facts of a particular application for permissive intervention so warrant.[126]

The *Usery* court's logic is compelling. It rejects outright the spurious, albeit prevailing view that permissive intervention automatically requires an independent basis of jurisdiction and can never be grounded on incidental jurisdiction, opting instead for a flexible case-by-case approach.

The court, relying on the Supreme Court's jurisdictional mandates under *Gibbs*, *Aldinger*, and *Kroger*, considered four key factors in the instant case rendering the exercise of ancillary jurisdiction over permissive intervenors as proper: (1) the primary case was before the court on a federal issue; (2) the intervenors' legal claims and underlying facts could not be more related to those of the principal cause; (3) the court's order would dispose of the intervenors' interests; and (4) there was no other forum to litigate the issues.[127] The court continued:

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124. *Id.* at 680 (quoting Revere Copper & Brass, Inc. v. Aetna Casualty and Surety Co., 426 F.2d 709, 714 (5th Cir. 1970)).

125. *Id.* at 681.

126. *Id.* (emphasis added).

127. *Id.*

> Such a permissive intervention enhances the efficacy of the federal decree. It does not burden the federal courts unduly, for its operation is permissive and may be easily restricted. It does not lend itself to a possible collusion to confer federal jurisdiction which could exist in diversity cases, because federal question jurisdiction cannot so easily be manufactured.[128]

The court reasoned that because the doctrine of ancillary jurisdiction long predates the Federal Rules of Civil Procedure, its exercise cannot be thought to "extend" the jurisdiction of federal district courts by operation of Rule 24.[129] Granting jurisdiction over permissive intervention in a case such as *Usery* is, therefore, no more of an affront to Rule 82 than when intervention of right is granted without an independent basis of jurisdiction. In fact, as the *Usery* court concluded, "[p]erhaps more honor is paid to the paramount command of Fed. R. Civ. P. 1: that the Federal Rules 'be construed to secure the just, speedy, and inexpensive determination of every action.' "[130]

More recently, in *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*,[131] a federal district court, applying the three-part test, granted the State of Texas' motion to permissively intervene as a party plaintiff. Relying heavily on *Aldinger's* "pendent-party" analysis as "instructive on the question of the necessity of independent federal jurisdiction,"[132] the court went on to apply the three-part test.

The court first concluded that under *Gibbs*, the main federal claim and the third-party state claim constituted one constitutional "case" because both claims derived from a "common nucleus of operative fact."[133] Second, the court examined the jurisdictional statute under which the main federal claim was brought to determine whether Congress intended to preclude the third party from a federal forum, and concluded that the federal civil rights statute revealed no such intent to preclude the state as a party.[134] In addi-

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128. *Id.* (quoting United States v. Local 638, Enterprise Ass'n, 347 F. Supp. 164, 168 (S.D.N.Y. 1972)).

129. *Usery*, 87 F.R.D. at 681.

130. *Id.* (quoting FED. R. CIV. P. 1).

131. 543 F. Supp. 198 (S.D. Tex. 1982).

132. *Id.* at 214.

133. *Id.* at 214-16.

134. *Id.* at 215. The court distinguished *Aldinger* from the instant litigation with respect to the "congressional intent" component because the statute upon which federal jurisdiction was based in *Aldinger* specifically excluded the third-party as a defendant. In con-

tion, the court examined the posture of the third party and distinguished this willing plaintiff from *Aldinger*, "where the target third-party was an unwilling defendant."[135] An unwilling defendant differed, the court continued, from a "willing plaintiff seeking merely to assert a claim against defendants already properly before the court."[136] Third, under *Gibbs*, the court concluded that "judicial economy would best be served by allowing intervention . . . in this proceeding which has been pending for over one year."[137]

Usery and *Fishermen's Association* provide persuasive reasoning for abolishing the judicial rule that permissive intervention always requires an independent basis of federal jurisdiction.

B. Jurisdiction Over Counterclaims

In a related context, some courts have challenged the long-standing judicial rule that while ancillary jurisdiction supports compulsory counterclaims, permissive counterclaims necessarily require an independent basis of subject-matter jurisdiction.[138] This challenge can be traced to the merger of pendent and ancillary jurisdiction and it appears to be based on part one of the three-part test. In essence, some courts argue that the *common nucleus of operative fact* test, which is the starting point for any incidental jurisdiction question,[139] potentially covers more situations than the *transactional* test.[140] Therefore, permissive counterclaims, which by definition do not arise out of the same transaction or occurrence as the main claim,[141] may nevertheless be supported by incidental

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trast, the court continued, the federal civil rights statutes in the case at bar are aimed at protecting the same basic legal and societal rights which the State of Texas sought to defend. *Id.*

135. *Id.* at 215.

136. *Id.*

137. *Id.*

138. *See, e.g.*, United States v. Heyward-Robinson Co., 430 F.2d 1077, 1080-81 (2d Cir. 1970) (Friendly, J., concurring); Ambromovage v. United Mine Workers of America, 726 F.2d 972 (3d Cir. 1984).

139. *See, e.g.*, Curtis v. Sears, Roebuck Co., 754 F.2d 781 (8th Cir. 1985) ("So long as the *pendent or ancillary* claim arises out of a common nucleus of operative fact, the federal courts have power to decide it . . . ."). *Id.* at 785 (emphasis added).

140. *See* cases cited *supra* note 138.

141. FED. R. CIV. P. 13(a), which authorizes compulsory counterclaims, provides in pertinent part: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." FED. R. CIV. P. 13(b), which authorizes permissive counterclaims, provides: "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or oc-

jurisdiction if both claims derive from a common nucleus of operative fact.

This contention is theoretically sound. As a practical matter, however, it probably serves more as a reminder to courts that the joinder rules do not define the outer limits of incidental jurisdiction. Courts faced with nonfederal claims and parties, that are joined pursuant to a procedural rule that requires the claim to bear a logical relationship to the federal claim, automatically support the nonfederal claim with ancillary or pendent jurisdiction. But courts should not foreclose the exercise of incidental jurisdiction just because a claim or party is joined pursuant to a procedural rule that does not require such logical dependence.[142] The determination in each case should follow from a principled analysis, not a categorical conclusion.

In *Ambromovage v. United Mine Workers of America,*[143] the plaintiffs, beneficiaries of the Anthracite Health and Welfare Fund (Fund) sued the United Mine Workers of America (Union) for failure to collect royalties owed to the Fund from certain coal mine operators.[144] The complaint alleged four theories of recovery: two pursuant to the federal Taft-Hartley Act; one under the federal common law; and one pendent state trust law claim.[145] The appellate court held that because the Union controlled the Fund, this control imposed a fiduciary duty upon the Union to the Fund beneficiaries to collect the unpaid royalties.[146] The Union pleaded a set-off counterclaim based on outstanding loans made by the Union to the Fund. The district court found the Union liable for approximately $7.5 million, but, finding that the loans to the Fund by the Union totaling over $13 million were available to offset the Union's liability, entered judgment for the Union.[147] The district court had denied plaintiffs' motion to dismiss the counterclaim for lack of subject-matter jurisdiction because, although it was a permissive counterclaim, it was pleaded to offset the plaintiffs' judgment and, therefore, fell within the *set-off exception* to the general

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currence that is the subject matter of the opposing party's claim."

142. *See supra* note 86 and accompanying text.

143. 726 F.2d 972 (3d Cir. 1984). In reviewing the procedural history of this case, the court noted that this was the fourth time it had addressed some aspect of this litigation, "which is now in its twenty-first year." *Id.* at 975.

144. *Id.* at 974.

145. *Id.* at 977.

146. *Id.* at 975.

147. *Id.*

permissive counterclaim rule.[148]

The Third Circuit affirmed the lower court's exercise of jurisdiction over the counterclaim, but on entirely different grounds.[149] Acknowledging that the Union's counterclaim lacked independent jurisdictional grounds, the court held that the existence of ancillary or pendent jurisdiction "does not turn on the characterization of a counterclaim as 'permissive' or 'compulsory,' "[150] but rather on the jurisdictional test propounded in *Gibbs* and, later, in *Aldinger* and *Kroger*. The Third Circuit's conclusion that the permissive set-off counterclaim was within the jurisdiction of the federal court was "not based on the adoption of the defensive set-off exception; instead, it [was] based on the application of the general legal principles governing ancillary and pendent jurisdiction to the facts of this case."[151] The court observed that the Supreme Court's recent cases exploring the limits of those doctrines reflect an effort to resolve the tension between the constitutional and congressional limits placed on federal jurisdiction, and the judicial reality that multiple claims are most efficiently disposed of in a single proceeding, "at least where a 'common nucleus of operative fact' underlies those claims."[152] The court continued:

> Where there is a series of claims based on the same facts, including at least one state and one federal claim, ancillary or pendent jurisdiction is necessary to avoid presenting the parties with the 'Hobson's choice' of litigating the same facts twice or losing their right to a federal forum to decide the federal claims. Ancillary and pendent jurisdiction are necessarily limited, on the other hand, by the principles of federalism which underlie the constitutional and statutory limits on federal jurisdiction.[153]

To reconcile these competing policies, the Third Circuit adopted the three-part analysis set forth above to determine whether to exercise pendent or ancillary jurisdiction. The first part is the constitutional test of whether the federal and state claims derive from a common nucleus of operative fact.[154] After restating

148. *Id.* at 976.
149. *Id.*
150. *Id.*
151. *Id.* at 988-89.
152. *Id.* at 989.
153. *Id.*
154. *Id.* (citing United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966)).

that *Moore v. New York Cotton Exchange* established that compulsory counterclaims fall within the scope of ancillary jurisdiction, the court reasoned why it is not axiomatic, since *Gibbs*, that permissive counterclaims are necessarily excluded from such jurisdiction:

> Any counterclaim based on the same 'transaction or occurrence' as the underlying federal claim necessarily has a 'common nucleus of operative fact' with that claim. *It does not follow, however, that Fed.R.Civ.P. 13(a) defines the outer limits of ancillary or pendent jurisdiction. Several transactions may share an intersection of 'operative facts' and [it is] recognized that the two tests - 'same transaction or occurrence' and 'common nucleus of operative fact' need not map the same landscape.*[155]

The court held that the "common nucleus" test was met in the present case because the set-off loans grew out of the relationship between the Union and the Fund, which was the subject-matter of the plaintiffs' main claims.[156]

Regarding the concerns that comprise the second level of the test, the court found no congressional or postural barriers to exercising jurisdiction in this case.[157] Applying the "congressional intent/posture" test to the facts in *Ambromovage*, the court concluded that no federal policy required restraint in exercising federal jurisdiction, such as the government immunity limitation in *Aldinger*, and the complete diversity requirement in *Kroger*.[158] Both *Aldinger* and *Kroger* concentrated on what each court saw as an attempt by an offensive party to circumvent a statutory policy limiting federal jurisdiction.[159] Moreover, in examining posture, *Ambromovage* is unlike *Aldinger* and *Kroger* because the defendant, and not the plaintiff who chose the federal forum, was raising the ancillary claim. The court found it significant that "[no] plaintiff is . . . attempting to 'manufacture' federal jurisdiction in any

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Recognizing that the doctrines of pendent and ancillary jurisdiction have merged, the court stated that "as we see it, *Gibbs* provides the unifying principle which limits the extent of federal jurisdiction over both pendent and ancillary claims." *Id.*

155. *Id.* at 990 (emphasis added). The court concluded that the determination that a nonfederal counterclaim is permissive within the meaning of Rule 13 is not dispositive of whether there is federal jurisdiction over that counterclaim. *See, e.g.*, Note, *The Res Judicata Implications of Pendent Jurisdiction*, 66 CORNELL L. REV. 608, 614 n.25 (1981).

156. *Id.* at 991-92.

157. *Id.* at 992.

158. *Id.*

159. *Id.* at 991. *See supra* text accompanying notes 60-89.

sense."[160] The court found that under part two of the test, therefore, exercising jurisdiction over the permissive counterclaim would not violate any policy limiting federal jurisdiction.[161]

Finally, applying the discretionary factors set forth in *Gibbs*, the court determined that there were no prudential reasons of judicial economy, fairness, and convenience that would require the court to decline jurisdiction.[162] As such, the Third Circuit concluded that pendent or ancillary jurisdiction properly supported the permissive counterclaim.[163]

CONCLUSION

Modern jurisprudence strongly suggests that the doctrines of pendent and ancillary jurisdiction have merged into a single comprehensive standard, applicable and adaptable to any incidental jurisdictional question. Many courts recognize this doctrinal merger, some more directly than others. Still, nearly all courts are reluctant to analyze the question as a single issue of "incidental" jurisdiction, and relentlessly hold on to the terms "pendent" and "ancillary." This practice is most likely attributable to the Supreme Court's retention of those terms in its most recent opinions, although the clear message expressed and implied in those opinions is merger. Although the use of terminology may be insignificant in itself, the consequences of using the pendent and ancillary labels have led courts to erroneously restrict their substantive analysis of the jurisdictional question.

Relying on the Supreme Court's pronouncements in *Gibbs*,

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160. *Id.*

161. Arguably, because *Ambromovage* was a traditional bipolar case, it would not run into problems raised by third-party practice, which led to the development of the second part of the test.

162. *Ambromovage*, 726 F.2d at 992. The court concluded that the district court did not abuse its discretion in exercising jurisdiction over the ancillary claim, holding that because "the defensive set-off is only determined if the plaintiff wins on the underlying claim, adjudicating the set-off claim places little additional strain on judicial resources." *Id.*

163. Two further comments regarding the Third Circuit's analysis deserve mention. First, the court noted that the three separate components of the test need not be performed by federal courts in the order that they were presented in the case. In fact, the Third Circuit stated that courts should make every effort to resolve jurisdictional issues without deciding constitutional questions. Second, although the court declined to adopt the unifying term "incidental jurisdiction," it conceded that the traditional pendent and ancillary terms indeed overlap and are often interchangeable. *Id.* at 989, n.49 (citing Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935 (1982)).

Aldinger, and *Kroger*, this note suggests that the Court has worked toward a three-part test applicable in all incidental jurisdiction settings. The Supreme Court has never addressed the jurisdictional requirements for permissive intervention and permissive counterclaims lacking an independent jurisdictional basis. If ever squarely faced with the issue, however, the Court should apply the three-part test set forth above. That test comprehensively embodies the Supreme Court's primary concerns in *Gibbs*, *Aldinger*, and *Kroger*, preserving federalism while promoting judicial efficiency and fairness in multi-claim and multi-party litigation.

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