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Pendent Jurisdiction Over Claims Arising Under Federal Law

By William H. Theis*

The doctrine of pendent jurisdiction has received increasing attention from the federal courts in recent years. The majority of cases in which the doctrine has been applied involve claims arising under state law. State law claims not independently within a court’s subject matter jurisdiction have entered the federal courts as “pendent” claims if sufficiently related to a claim within the federal court’s subject matter jurisdiction.1

Although receiving far less attention, a limited number of claims arising under federal law have also entered the federal courts through a variation of the pendent jurisdiction theory.2 That this mutation of pendent jurisdiction should exist may strike some as surprising and unnecessary. Although one may expect federal claims to have ready access to the federal courts, technical requirements on occasion bar a federal claim from a particular fed-

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eral court. The Supreme Court has given limited approval to the use of the doctrine of pendent jurisdiction as a means of access to the federal courts in some instances. The Court has not elaborated adequately, however, upon the full reach of this doctrine in these special cases. As a result, the decisions in this area have left the lower courts with insufficient guidance. The lower courts have generally reached commendable results. Nevertheless, the plasticity of the doctrine holds out false prospects for litigants and carries a potential for serious distortion unless the doctrine is applied in a considered and deliberate fashion that is attentive to its limiting factors.

This Article attempts to set forth a principled approach to the application of the pendent jurisdiction doctrine to federal claims. The Article first traces the development of the doctrine in cases involving state law claims, emphasizing judicial trends that can be extrapolated from recent decisions. The Article next examines the use of pendent jurisdiction to circumvent jurisdictional and procedural restrictions imposed on the power of the federal courts to adjudicate federal claims. The Article concludes that the judicial extension of the doctrine of pendent jurisdiction to claims arising under federal law is largely an unwarranted burden on the limited judicial resources of the federal courts and an unauthorized abrogation of congressional intent to limit the jurisdictional power of these courts.

**Pendent Jurisdiction Over State Law Claims**

Although the courts have declared that the principles governing pendent jurisdiction over state law claims are not the same as those involving pendent jurisdiction over federal claims, comparisons between the two are useful. The cases involving state law claims have exhibited an increasing concern that the judicial doctrine of pendent jurisdiction not conflict with the statutes conferring jurisdictional power on the federal courts. This theme has special importance for the application of pendent jurisdiction over federal claims.

United Mine Workers v. Gibbs

The contours of the modern pendent jurisdiction doctrine were set forth by the Supreme Court in United Mine Workers v. Gibbs.4 The plaintiff in Gibbs alleged a violation of federal labor relations law, claiming the defendant had conducted an illegal secondary boycott. A count under state law, alleging a civil conspiracy and a boycott illegal at common law, was appended to the federal claim.

Although the parties were not of diverse citizenship, the Supreme Court approved the exercise of pendent jurisdiction over the state law claim. The Court held that, once a federal court has jurisdiction over a substantial claim5 arising under federal law, it also has the power to decide a plaintiff’s related state law claims that arise out of a common nucleus of operative facts.6 If a plaintiff normally would be expected to try these claims together, the federal court may assert jurisdiction over all of them;7 convenience and fairness to the parties as well as considerations of judicial economy militate against dividing the plaintiff’s claims for separate treatment by federal and state courts.8 Because the plaintiff could have avoided these results by suing on both claims in state court, the Court implicitly encouraged resort to federal courts on federal law claims, even when, as in Gibbs, the federal jurisdiction was not exclusive.

Although a federal court has jurisdiction over pendent claims, Gibbs stressed that discretion must be exercised in determining whether or not to assert pendent jurisdiction. Wise discretion, counseled Gibbs, should forego the use of jurisdictional power in

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6. 383 U.S. at 725.
7. One commentator has suggested that a plaintiff may join claims that would be expected to merit joint trial even if they do not meet the common nucleus test. Baker, Toward an Expanded View of Federal Ancillary and Pendent Jurisdiction, 33 U. Pri. Law Rev. 759, 764-65 (1971). This suggestion does not seem to have received approval in later cases.
8. Although the Court found the exercise of pendent jurisdiction “particularly appropriate” when federal law may preempt the application of state law, 383 U.S. at 729, it did not rule that a possible preemption issue was a necessary condition for the exercise of pendent jurisdiction.
some instances. If the federal claims are disposed of early in the litigation or if the issues are so complicated that separate trials of federal and state issues might be required, the state claims should be dismissed without prejudice. The complexity or uncertainty of state law might also warrant a discretionary dismissal, without prejudice, of state law claims. Gibbs cautioned in general against excessive intrusion by a federal court into issues of state law unless it must decide substantial federal issues to which issues of state law are an appendage.

An analysis of Gibbs raises three unresolved questions: (1) what authority grants the federal courts power to exercise pendent jurisdiction; (2) what relationship exists between theories of pendent and ancillary jurisdiction; and (3) what consequences should attach to a violation of the Gibbs guidelines. All three questions have pertinence for an analysis of the doctrine of pendent jurisdiction over federal claims.

The Authority of the Federal Courts to Exercise Pendent Jurisdiction

The opinion in Gibbs stressed the desirability of allowing the federal courts to exercise pendent jurisdiction over state law claims, but provided little analysis for the propriety of the doctrine's existence. Because Congress, and not the Supreme Court, establishes the subject matter jurisdiction of the federal courts, one might expect the Court to offer evidence of congressional approval for the exercise of pendent jurisdiction. To establish that the Court may exercise pendent jurisdiction, consistent with the Constitution, avoids the jurisdictional question whether Congress has authorized such an exercise of judicial power. It might be reasoned that the two claims constitute a single "civil action," the jurisdictional phrase found in 28 U.S.C. section 1331. Gibbs did not

9. Id. at 726-27.
11. "Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, 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.'" 383 U.S. at 725 (emphasis by the Court).
12. 28 U.S.C. § 1331 (1976) provides: "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
make this conclusion explicitly, and perhaps the Court was mindful of the potential problems that might have arisen had it done so. If pressed alone, the state law claim surely would be a "civil action," but one neither arising under federal law nor asserted by one diverse citizen against another. Congress intended this type of claim to be heard in state court. It seems anomolous that a claim might be a "civil action" or only part of a "civil action," and consequently fall without or within the court's subject matter jurisdiction, as the pleader may declare.

Probably for this reason, the Court avoided a rigorous analysis of "civil action" and stressed the general policies of convenience, efficiency, and fairness to the parties that are embodied in the Federal Rules of Civil Procedure, which allow a liberal joinder of claims as well as other liberal procedural devices. Because Congress has a veto power over the Rules, it has, in a limited sense, approved the policies behind the Rules. Therefore, it could be argued that, even though Congress intended state court resolution of nondiverse state law claims as the normal course of events, Congress also intended that a federal court resolve state law claims in a federal case if the goals behind the Rules thereby would be advanced. The Court's analysis, however, was not so extended. Only in later cases has the Court made a more exacting inquiry into congressional intent.

13. 383 U.S. at 724.
15. The Court made no mention of 28 U.S.C. § 1338(b) which, according to the Reviser's Note, codified the Court's earlier decision on pendent jurisdiction, Hum v. Oursler, 289 U.S. 238 (1933). Perhaps, if the statute approved Hum's narrow interpretation of the doctrine of pendent jurisdiction, Gibbs flouted the will of Congress when it broadened the Hum test. On the other hand, the statute's "related claim" language might have signified an enlarging of the Hum test. If so, the statute's grant of pendent jurisdiction in patent, copyright, and trademark cases may have indicated an intent that the pendent jurisdiction not be extended to other classes of cases. The Court's failure to consider these issues is especially intriguing in light of its later statements that it may not tamper with the judicial gloss placed upon a statute when Congress has implicitly approved that gloss. See notes 44, 61-63 & accompanying text infra.
16. "While it is commonplace that the Federal Rules of Civil Procedure do not expand the jurisdiction of federal courts, they do embody "the whole tendency of our decisions . . . to require a plaintiff to try his . . . whole case at one time," . . . and to that extent emphasize the basis of pendent jurisdiction." 383 U.S. at 725 n.13.
17. See notes 40-67 & accompanying text infra.
The Relationship Between Pendent and Ancillary Jurisdiction

Gibbs also failed to clarify the circumstances under which a federal court may assert jurisdiction over a related state law claim not asserted by the plaintiff against the defendant. Earlier decisions had approved “ancillary” jurisdiction over state law claims arising out of the transaction that formed the original basis of the action. Ancillary jurisdiction has extended to compulsory counterclaims, intervention, impleader, and class actions. For purposes of ancillary jurisdiction, the meaning of “transaction” depends not on an immediate connection of occurrences, but on the “logical relationship” between the claims. The ancillary jurisdiction cases illustrate that the logical relationship test may be more


22. See, e.g., United States v. United Pac. Ins. Co., 472 F.2d 792 (9th Cir.), cert. denied, 411 U.S. 982 (1973); Schwab v. Erie Lackawanna R.R., 438 F.2d 62 (3d Cir. 1971); H.L. Peterson Co. v. Applewhite, 383 F.2d 430 (5th Cir. 1967); Stenler v. Burke, 344 F.2d 393 (6th Cir. 1965); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3rd Cir. 1962); Southern Milling Co. v. United States, 270 F.2d 80 (5th Cir. 1959); Dery v. Wyer, 265 F.2d 804 (2nd Cir. 1959); Waylander-Peterson Co. v. Great N. Ry., 201 F.2d 408 (8th Cir. 1953).

As long as the original claim is within the court’s subject matter jurisdiction, the third-party claim need not meet original subject matter jurisdiction requirements. Once a third-party defendant is impleaded, however, the original plaintiff must meet the jurisdictional requisites if he or she desires to assert a claim against the third-party defendant. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). On the other hand, a third-party defendant desirous of asserting a claim against the original plaintiff may use ancillary jurisdiction to dispense with normal jurisdictional requisites. See Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970); 59 Ky. L.J. 506 (1970); 49 N.C.L. Rev. 503 (1971). For further discussion of these issues, see Notes, Ancillary Jurisdiction in Third-Party Practice—Rule 14, 51 NW. U.L. REV. 334 (1956); Note, Rule 14 Claims and Ancillary Jurisdiction, 57 VA. L. REV. 265 (1971).


inclusive than Gibbs' common nucleus test. Further, ancillary jurisdiction has not been limited to federal question cases. Diversity cases have often provided an independent basis for ancillary claims. The same policies identified in Gibbs that support the exercise of pendent jurisdiction are present in the ancillary jurisdiction cases, and the Court did not seem to disapprove those cases. However, by establishing a common nucleus test and making no effort to integrate it with the previous law, Gibbs left open two possibilities: (1) ancillary jurisdiction would continue to be available as before under the logical relationship test; or (2) ancillary jurisdiction would be available, but only under the common nucleus test.

More importantly, the Court gave no guidance as to whether the Gibbs limitations on discretion should apply in the exercise of ancillary jurisdiction. Because the ancillary jurisdiction doctrine had developed before Erie Railroad Co. v. Tompkins, the Court had exhibited little reluctance to decide ancillary claims so long as power to decide those claims existed. Even in the post-Erie era, when the ancillary claim must be assessed under state law, the defensive, reactive nature of the typical ancillary claim will often require the full exercise of jurisdictional power if the goals of convenience and fairness to the parties are to be advanced. Moore v. New York Cotton Exchange suggests that a counterclaim within a federal court's ancillary jurisdiction may be adjudicated even though the federal claim has received summary dispo-

25. In the leading case of Freeman v. Howe, 65 U.S. (24 How.) 450 (1860), the original plaintiff's prejudgment attachment of the property prompted the mortgagee's efforts to protect his interest in the property. The federal court was said to have ancillary jurisdiction, but the competing claims to the property could not be construed to arise from a common nucleus of operative fact.

26. See id.


28. The Court later signified a preference for the former standard, see note 64 & accompanying text infra, but simultaneously refused to state whether there is a principled difference between pendent and ancillary jurisdiction, see note 66 infra.

29. 304 U.S. 64 (1938). The Court in Erie held that in nonfederal claim diversity suits, the federal courts would apply state law and not develop an independent body of federal common law.


31. See Schwab v. Erie Lackawanna R.R., 438 F.2d 62, 72 (3d Cir. 1971). The Third Circuit in Schwab, reversing the lower court's discretionary refusal to consider third-party claims that might have produced jury confusion, suggested the use of separate trials. This is a practice, however, which Gibbs would seem to disapprove. See 383 U.S. at 727.

32. 270 U.S. 593 (1926).
sition. The plaintiff in *Moore* alleged a violation of federal antitrust law, arguing that the defendant's restrictions on the dissemination of market quotations involved an impermissible restraint of trade. The defendant counterclaimed for an injunction against the plaintiff's misappropriation of the market quotations in question. On a preliminary motion, the trial court denied relief to the plaintiff, but entered an injunction on the counterclaim.33 Although the counterclaim raised a state law claim and the parties were not of diverse citizenship, the Supreme Court approved the exercise of subject matter jurisdiction over the counterclaim. The Court rationalized this exercise of "ancillary" jurisdiction as a means of making more effective the judgment rendered against the plaintiff. Unless so restrained, the plaintiff might have continued to misappropriate what he had been unable to attain by legal process.34

Unless *Gibbs* is taken as giving the most general of suggestions, *Moore* might seem wrong. *Gibbs* states that once the court has terminated the federal question with minimal effort, it should dismiss the pendent state law claim.35 In a case like *Moore*, however, not to grant complete relief would work an injustice on the defendant, who has prevailed on the issues giving the court its jurisdiction.

**Consequences of a Failure to Exercise Discretion in Assuming Federal Jurisdiction**

It is unclear whether the discretion guidelines of *Gibbs* carry much force even in cases of pendent jurisdiction that rigidly fit the *Gibbs* mold. Notwithstanding all the cautionary language about wise use of discretion, the courts of appeals have been loath to reverse an exercise of admitted power that offends the *Gibbs* guidelines.36 A litigant who has unsuccessfully opposed the exercise

34. 270 U.S. at 727.
35. 383 U.S. at 610.
of pendent jurisdiction and has then lost on the merits as well will find it difficult to demonstrate prejudice arising from a clear abuse of Gibbs discretion. If issues are raised regarding the merits, the appellate court will usually consider itself competent to resolve these issues. If the appellate court wishes to instruct the lower court on the subtleties of Gibbs, reversal is not needed.\textsuperscript{37} For the appellate court to reverse merely prolongs a resolution of the controversy on the merits.

\textit{Gibbs} might be especially misleading if it is construed to require that the claim conferring jurisdiction on the court should always be considered first on the merits as a precondition to the wise use of discretion. \textit{Siler v. Louisville & Nashville Railroad Co.},\textsuperscript{38} decided long before \textit{Gibbs}, stated that a federal court may decide issues of state law even though it refuses to adjudicate the federal claim. As long as the federal claim is substantial enough to confer jurisdiction, the court may proceed to a consideration of the state law claim, rendering no decision on the merits of the constitutional claim. \textit{Siler} manifests the federal courts’ historic desire to avoid, if possible, the determination of federal constitutional issues.\textsuperscript{39} Because constitutional pronouncements have permanence, they should be rendered only when necessary. If state law can give relief to the plaintiff, a federal court should avoid deciding the merits of the constitutional claim.

\textbf{Post-Gibbs Developments}

The Supreme Court has shown a recent willingness to limit the extension of the judicial doctrine of pendent jurisdiction where such an extension would conflict with the will of Congress. In three recent cases the Court has discerned a congressional intent that pendent jurisdiction not allow a claimant to circumvent the jurisdictional requirements established for the federal courts.

The two general federal jurisdictional statutes require a minimum “amount in controversy”\textsuperscript{40} before a claim may be heard in federal court. These statutes have been interpreted to allow a single plaintiff to aggregate his or her claims against a single defen-

\textsuperscript{37} See Kavit v. A.L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974).
\textsuperscript{38} 213 U.S. 175 (1909).
\textsuperscript{40} 28 U.S.C. §§ 1331, 1332 (1976).
dant.41 Multiple plaintiffs with separate interests, however, may not aggregate claims against a single defendant. Unless their interests are joint and undivided, each plaintiff is obliged to allege a claim exceeding the jurisdictional amount.42

One means of avoiding the rule prohibiting aggregation of claims would be to assert that one plaintiff’s claim exceeding the jurisdictional amount is the “primary” claim, and the other insufficient claims are pendent claims. In Zahn v. International Paper Company,43 the Court rejected such an application of the pendent jurisdiction doctrine and required each member of the class, not merely the class representatives, to state a claim exceeding the $10,000 amount in controversy requirement.44 In large part, the Court justified its position by reliance on an indirect form of legislative approval of the Court’s earlier interpretations of the statutory language “amount in controversy.” The Court concluded that reenactment of these statutes with changes only in the minimum value of the required “amount in controversy” indicated congressional approval of the nonaggregation rule and that to allow this rule to be circumvented by the doctrine of pendent jurisdiction would frustrate congressional intent. Thus, the Court reasoned, although Congress may have a general policy in favor of convenience, efficiency, and fairness, as reflected in the Federal Rules, Congress has declared, at least implicitly, that this general policy must give way when a party’s related claim is not large enough to enter federal court in its own right.45

A more direct expression of legislative intent was held to frustrate expansion of pendent jurisdiction in a later case, Aldinger v.

44. Id. at 301.
45. Id. This author has previously pointed out a flaw in the Court’s reasoning. See Theis, Zahn v. International Paper Co.: The Non-Aggregation Rule in Jurisdictional Amount Cases, 35 La. L. Rev. 89, 95 (1974). The Supreme Court’s reliance on implied congressional intent may well be an erroneous interpretation of Congress’ silence when the area concerned is one in flux rather than one involving a settled or consistent application of law. Where the field of law under discussion is in a state of tension, congressional silence may mean nothing more than that Congress wishes the courts to work out a solution. Cf. Rogers, Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws, 14 Hous. L. Rev. 611, 622-29 (1977) (examining the consideration given legislative silence following an initial interpretation of a statute when a charge is made that the original interpretation was erroneous).
The plaintiff in *Aldinger* sued several county employees in federal court for violation of federal civil rights. At the time *Aldinger* was decided, the employer county could not be liable for a violation of federal law, but might have been held liable on a state law claim. The plaintiff therefore argued that the state law claim against the employer was pendent to the federal claims against the employees because they all arose from a common nucleus of operative fact. Plaintiff thus attempted to make the county employer a "pendent party." The *Aldinger* Court exploited *Gibbs* failure to analyze the statutory basis for the exercise of pendent jurisdiction. *Gibbs* had not engaged in statutory analysis, charged *Aldinger*, because Congress "had said nothing . . . [to] offer guidance on the kind of elusive question addressed in . . . *Gibbs* . . . ." The Court went on to state that courts should hesitate to extend pendent jurisdiction beyond the jurisdictional limits marked out by Congress, especially when the plaintiff can obtain an efficient resolution of his or her claims in state court by joinder of parties; implying that congressional approval of the statutory provision for liberal joinder of parties contained in the Federal Rules should carry little weight. The Court nevertheless predicated its decision on evidence that Congress "expressly or by implication negated" the claimed expansion of pendent jurisdiction, concluding that congressional intent negated the assertion of pendent jurisdiction over the state


47. In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court held municipal governments were not "persons" within the meaning of 42 U.S.C. § 1983 (1976). In *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978), the Court significantly qualified its statements regarding municipal liability. On the facts of *Aldinger*, it is unclear whether a plaintiff would now be able to sustain a federal cause of action against a governmental employer under 42 U.S.C. § 1983.


49. 427 U.S. at 13-14.

50. Id. at 15. See also *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F.2d 890, 894 (4th Cir. 1972).


52. See 427 U.S. at 14-15.

53. Id. at 18 (emphasis added).

54. To frame the inquiry as was done in the quoted language presupposes that, as noted in the previous discussion of *Gibbs*, see text accompanying notes 13-17 supra, Congress, through its approval of the Rules, approves of the exercise of pendent jurisdiction whenever statutory procedures present the opportunity for its application.
law claim against the county. The Court reasoned that Congress had expressly refused to create a federal cause of action against the county; therefore, it must have intended that the county not be brought into federal court through an application of pendent jurisdiction.\footnote{55} Congress provided that the federal courts have jurisdiction over civil rights claims\footnote{56} and, by implication, negated pendent jurisdiction over a state law claim unless a federal claim had been stated against the same defendant.

The Court’s explication of legislative intent in \textit{Aldinger} reflects its earlier confusion about the effect of congressional approval of the Rules. Although Congress may have intended to deny a cause of action to a plaintiff alleging a federal claim against a state municipality,\footnote{57} Congress did not negate pendent jurisdiction over state law claims against a party exempted from federal liability. The jurisdictional statute makes a positive, predictable statement: federal courts have jurisdiction over federal causes of action. Because Congress created no cause of action against the county, it understandably made no statement about cognate causes of action that the proposed cause of action would have complemented. It should require a strong declaration to conclude that federal courts do not have jurisdiction over related state law claims. If a grant of jurisdiction is also a denial of pendent jurisdiction over all claims not explicitly within that grant of jurisdiction, pendent jurisdiction would seldom be available. Had Congress intended to exclude from federal courts state as well as federal claims against the county, it would have prohibited diversity jurisdiction over such state law claims. In fact, it took no such action, and the Court had approved such diversity jurisdiction only shortly before \textit{Aldinger}.\footnote{58}

The Court made its most recent pronouncement regarding the scope of the doctrine of pendent jurisdiction in \textit{Owen Equipment \& Erection Co. v. Kroger}\footnote{59} and has once again restricted the use of the doctrine of pendent jurisdiction as a means of expanding the

\footnote{55} “Parties such as counties, whom Congress \textit{excluded} from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3), can argue with a great deal of force that the scope of that ‘civil action’ over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them back within that power merely because the facts also give rise to an ordinary civil action against them under state law.” 427 U.S. at 17 (emphasis in original).
\footnote{57} See note 47 \textit{supra}.
\footnote{58} See \textit{Moor v. County of Alameda}, 411 U.S. 693 (1973).
\footnote{59} 437 U.S. 365 (1978).
jurisdiction of the federal courts. The plaintiff in *Kroger* brought a
diversity action in federal court. The defendant impleaded a third-
party defendant against whom the plaintiff asserted a claim. All of
the claims arose out of a common nucleus of operative fact, but the
plaintiff was not diverse from the third-party defendant. The Court disapproved the use of ancillary jurisdiction because the
plaintiff would then circumvent the Court's early holding in *Straw-
bridge v. Curtiss* that a plaintiff must be diverse from all defen-
dants. In the Court's view, more than circumvention of *Straw-
bridge* was at stake. Congress had never disapproved the *Strawbridge* construction of the diversity statute, and thus Con-
gress was understood to have intended that a plaintiff must be di-
verse from all defendants. To allow the claim against the nondi-
verse third-party defendant to enter the federal court under the
doctrine of ancillary jurisdiction would ignore the will of Con-
gress. As in *Zahn*, the Court refused to countermand the implied
congressional approval of its prior decisions.

Two significant points may be noted in *Kroger*. The Court im-
plied that ancillary claims must meet the logical relationship test
and not the common nucleus test. Moreover, in *Kroger* the logical
relationship test proved less inclusive than the common nucleus
test. The Court asserted that the plaintiff's claim against the third-
party defendant had no logical dependence on the original claim
because the third party's liability was not dependent on the origi-
nal defendant's liability, even though both claims arose out of a
common nucleus of operative fact. This analysis would seem to
preclude ancillary jurisdiction over a plaintiff's claim against a
third-party defendant even when the primary claim is a federal
question, underscoring the uncertainty created by the Court's re-

60. Until trial, the third-party defendant appeared to be diverse from the original
plaintiff. Then, claiming that it was a citizen of the same state as the original plaintiff, the
third-party defendant sought dismissal on the grounds that the statute of limitations had run. The court of appeals applied pendent jurisdiction to counter the third-party defen-
dant's inequitable conduct.

61. 7 U.S. (3 Cranch) 267 (1806).

62. Most of the lower courts had reached the same result. See, e.g., Kenrose Mfg. Co.
v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972). But see Mas v. Perry, 489 F.2d 1386 (5th
Cir. 1974).

63. For detailed criticism of *Kroger*, see Garvey, *The Limits of Ancillary Jurisdiction*,

64. 437 U.S. at 376.

65. Under this rationale, the *Aldinger* case might have been decided without any spe-
cific inquiry into the congressional intent underlying the Civil Rights Act. The plaintiff's
fusal to distinguish between or to consolidate ancillary and pendent jurisdiction. 66

Significantly, the Court in Kroger suggested that an analysis of the applicability of ancillary jurisdiction might consider the congressional goal of an efficient, fair disposition of related claims. 67 Only the limitation the Court perceived from congressional acceptance of Strawbridge precluded the application of ancillary jurisdiction in Kroger. This suggestion is consistent with the unstated rationale underlying Gibbs: absent contrary indication, Congress would approve of the adjudication of state law claims in a federal case in federal court if the goals behind the Rules would thereby be advanced. 68 It further supports the Aldinger Court's indication that the expansion of pendent jurisdiction will be limited only where there is a "negative indication" that congressional intent may be subverted. 69

Zahn, Aldinger, and Kroger all emphasize congressional intent as a limit on pendent jurisdiction, strongly adhering to the principle that the Court may not retreat from its prior interpretations of statutes where reenactment of the statutes signifies congressional approval of judicial interpretation. More comprehensive principles defining the scope of the doctrine of pendent jurisdiction have yet to appear. As a consequence, the cases developing the doctrine of pendent jurisdiction over federal claims have proceeded in an undisciplined fashion.

claim against the employer in Aldinger did not meet the logical relationship test of ancillary jurisdiction as set forth in Kroger. Jurisdiction over the claim thus could have been denied. The Aldinger Court, however, stressed that "pendenting a party" might be possible in other contexts, particularly where the primary claim was one over which the federal courts have exclusive jurisdiction such as the Federal Tort Claims Act, 28 U.S.C. § 1346 (1976). 427 U.S. at 18. See Ortiz v. United States, 595 F.2d 65 (1st Cir. 1979). In fact, a number of lower courts had approved "pendent party" jurisdiction in federal question cases. See, e.g., Schuman v. Huck Finn, Inc., 472 F.2d 864 (8th Cir. 1973); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2nd Cir. 1971). Kroger's dictum, however, makes these holdings suspect.

66. Notwithstanding the dictum about the scope of ancillary jurisdiction, Kroger had refused to address whether there was any principled difference between pendent and ancillary jurisdiction. 437 U.S. at 370 n.8. Accord, Aldinger v. Howard, 427 U.S. 1, 13 (1976).

67. 437 U.S. at 377.

68. See notes 10-17 & accompanying text supra.

69. See notes 53-54 & accompanying text supra.
Pendent Jurisdiction Over Federal Claims

Romero: An Inauspicious Beginning

Romero v. International Terminal Operating Co.\(^7\) was the first case to consider the use of pendent jurisdiction over federal law claims. Romero, a Spanish seaman and a crew member of a Spanish vessel, sustained a shipboard injury in United States waters. He brought suit in federal district court against the Spanish owner of the vessel as well as against the American companies providing stevedoring services for the vessel. Two sets of claims were asserted, one against the vessel owner under the Jones Act and another against both the owner and the American stevedoring companies for violations of general maritime law.

Any discussion of Romero must proceed from the premise that Romero's strategic objective was to obtain a jury trial on all of his claims. The Jones Act specifically allowed him that option as to claims under that Act.\(^7\) The claims against his employer arising under general maritime law would not normally call for jury trial. Historically, admiralty had proceeded without jury trial and the Jones Act granted only a limited modification of this tradition. Clearly, the claims under general maritime law were within the court's admiralty jurisdiction under 28 U.S.C. section 1333, but for the same reason were not subject to jury trial. Romero asserted that these admiralty claims arose under federal law and were within the court's subject matter jurisdiction conferred by 28 U.S.C. section 1331. Although they were governed by maritime law, they also arose under federal law in the more general sense required by section 1331.\(^7\) Because the claims were "on the law side" of the court, they could be tried by jury.\(^7\)

Although the Supreme Court rejected Romero's federal question argument,\(^7\) ruling that it had jurisdiction over the maritime

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\(^7\) 358 U.S. 354 (1959).
\(^7\) See American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) (Holmes, J.) ("A suit arises under the law that creates the cause of action.").
\(^7\) 358 U.S. at 380. To appreciate the force of this argument, one must recall the unquestioned doctrine that, when diversity of citizenship between the parties exists, the plaintiff may characterize maritime claims as within the court's diversity jurisdiction, 28 U.S.C. § 1332, and, trying the claims "on the law side," seek trial by jury. See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955); Seas Shipping Co. v. Sieracki, 328 U.S.
law claims under section 1333, the Court declared in a remarkably casual manner that the general maritime law claims against the employer could be pendent to the Jones Act claim: 75

[T]he District Court may have jurisdiction [over the general claims] "pendent" to its jurisdiction under the Jones Act. Of course the considerations which call for the exercise of pendent jurisdiction of a state claim related to a pending federal cause of action . . . are not the same when, as here, what is involved are related claims based on the federal maritime law . . . . [A] district judge has jurisdiction to determine whether a cause of action has been stated if that jurisdiction has been invoked by a complaint at law rather than a libel in admiralty, as long as the complaint also properly alleged a claim under the Jones Act. We are not called upon to decide whether the District Court may submit to the jury the "pendent" claims . . . in the event that a cause of action be found to exist. 76

In a later part of the opinion, however, the Court concluded that Romero had not stated a cause of action against his employer, either under the Jones Act or under general maritime law. 77

85 (1946). Indeed, Romero argued that his claims against the American companies were just such diversity claims and therefore merited trial by jury. The lower court accepted this theory, but dismissed because the presence of the Spanish employer destroyed the complete diversity required by Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Romero's remaining argument, which the Court rejected, thus could be stated briefly: just as admiralty claims enter the Court under § 1333 but could also enter under § 1332 and be tried by a jury, so also admiralty claims enter under § 1333 but could also enter under § 1331 and be tried by a jury.

75. The Court gave no consideration to the converse situation in which the Jones Act claim might be pendent to the general maritime law claims. On the facts of the case, this characterization would be academic unless one were to argue that Romero should have no jury trial as to any of his claims. To characterize either claim as pendent to the other would seem equally permissible. If convenience and efficiency mandate trial of all claims by a single fact finder rather than a conclusion that the Jones Act claim was pendent to the maritime claim would be as persuasive as the contrary conclusion reached in Romero. Because Congress mandated jury trial for Jones Act claims, should the plaintiff so desire, any judicial limitation of this right would have been most unusual, notwithstanding a judicial appraisal of convenience and efficiency. As noted earlier, congressional intent strongly shapes the use of pendent jurisdiction. See notes 45, 50-53, 62-63 & accompanying text supra.

76. 358 U.S. at 380-81 (emphasis added). The lower court had, as a matter of discretion, refused to exercise even admiralty jurisdiction since plaintiff had remedies against his employer which he might seek from the Spanish consul in New York. 142 F. Supp. 570, 574 (S.D.N.Y. 1956). Although on review the Court ruled that it had jurisdiction over the claims in admiralty, it proceeded to rule that United States law could not be applied. 358 U.S. at 384. It evidently dismissed the action because Spanish law gave an administrative remedy that an American court would be incompetent to provide.

77. 358 U.S. at 384-85. The Court remanded the claims against the American stevedoring companies. Id.
The Court's conclusion that pendent jurisdiction might be appropriate for federal, and not only state, claims did not provide any guidelines for determining when pendent jurisdiction over federal claims should be exercised. Arguably, the pendent claim in *Romero* was a separate cause of action, which, under the then prevailing test for pendent jurisdiction over state law claims, would have foreclosed jurisdiction. Under the standard later announced in *Gibbs*, however, a court in its discretion may assert pendent jurisdiction over state law claims sharing a "common nucleus of operative fact" with a substantial federal claim. Because the ship accident provided a common nucleus of fact giving rise to all of Romero's claims, *Romero* probably falls within the *Gibbs* standard for pendent jurisdiction over state law claims. The rationale of *Gibbs*, however, is not necessarily applicable to pendent jurisdiction over federal claims. In *Romero*, for example, the "appended" admiralty claim was clearly within the federal court's subject matter jurisdiction; no added efficiency could result from the use of pendent jurisdiction. Plaintiff's entitlement to jury trial was the real issue in the case; and, although the Court concluded that the maritime claims could be pendent, it refused to commit itself to jury trial for the pendent claims, the only significant consequence of such a characterization.

*Romero* does not elucidate a dichotomy between power and discretion like that later developed in *Gibbs*. Specifically, the disposition a federal court should make of a pendent federal claim if it dismisses the primary claim at an early stage of the litigation is unclear. In *Romero* itself, the Court decided, virtually simultaneously, that neither claim stated a cause of action against the employer. Perhaps federal courts should not shy away from deciding pendent federal claims. The federal courts have a special competence in deciding questions of federal law and need not exhibit the same circumspection required to avoid unnecessary decisions of state law issues. The pendent claims in *Romero* not only raised issues of federal law, but also fell within the district court's jurisdiction in any event. Moreover, decision of the pendent claim required little or no effort additional to that expended on the

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78. See generally The Rolph, 299 F. 52 (9th Cir. 1924).
80. See note 6 & accompanying text supra.
primary claim.\textsuperscript{81}

Romero takes a very tentative step in authorizing the development of an analogue to the traditional pendent jurisdiction doctrine. Its application is narrow and so enveloped in the obscurities of admiralty law that general principles may be elusive or even nonexistent. The Court's major guidance in this area is negative: the doctrine in pendent federal claim cases is "not the same" as that developed in pendent state claim cases.\textsuperscript{82}

\textbf{Jurisdictional Amount and The Pendent Federal Claim}

The major development of the doctrine of pendent jurisdiction over federal claims has occurred in cases in which a federal claim, insufficient to meet the federal amount in controversy requirement, has been characterized as "pendent" to another jurisdictionally sufficient claim. By using the pendent jurisdiction doctrine in these cases, the courts have often made decisions based on the jurisdictionally insufficient claims in order to avoid deciding principal claims that involve constitutional issues.

In \textit{Rosado v. Wyman},\textsuperscript{83} the plaintiffs challenged a New York statute regulating the disbursement of welfare benefits and requested consideration of their claims by a three judge district court.\textsuperscript{84} The plaintiffs first alleged that the statute deprived them of equal protection. They also asserted that the statute conflicted with the federal Social Security Act, in violation of the supremacy clause of the Constitution. Although raising a constitutional issue, the second claim was considered statutory in nature. The single federal judge to whom their case had been assigned issued a temporary restraining order and called for the convocation of a three judge court on which he would serve with two other judges. After the three judge court had convened and heard arguments, the New York Legislature amended the statute in question. The three judge court then dismissed the equal protection claim on mootness grounds; but instead of dismissing the statutory claim as well, the court remanded it to the single judge for disposition.\textsuperscript{85}

\textsuperscript{81} See text accompanying notes 32-35 \textit{supra}.
\textsuperscript{82} 358 U.S. at 380-81.
\textsuperscript{83} 397 U.S. 397 (1970).
\textsuperscript{85} 397 U.S. at 400.
Appellants urged that, although the three judge court had jurisdiction over constitutional challenges to state statutes, the court's limited jurisdiction under section 1343 did not extend to a claim that a state statute conflicted with a federal statute violating the supremacy clause. Appellants asserted that, although the courts have jurisdiction without regard to amount in controversy over claims of constitutional deprivation, statutory claims do not present constitutional questions in the narrow sense of section 1343. Thus, they asserted that each plaintiff must satisfy the amount in controversy requirement in 28 U.S.C. section 1331 for that individual's statutory claim to come within the jurisdiction of the district court.

An earlier decision of the Supreme Court had approved, without elaboration, the use of pendent jurisdiction to circumvent jurisdictional deficiencies. The statutory claim was considered pendent to the constitutional claim; thus, neither claim was subject to a jurisdictional amount requirement. Rosado approved this case as settled doctrine, thus using pendent jurisdiction to pursue the traditional policy of avoiding the decision of a constitutional issue. At the same time, however, the Court subverted the policy behind the amount in controversy requirement, a policy that limited the application of pendent jurisdiction over state law claims three years later in Zahn.

The Rosado court then carefully examined whether the pendent statutory claim should be litigated once the primary claim had been dismissed. Because the Court had already avoided the constitutional issue through mootness, it did not need to employ pendent jurisdiction to avoid a constitutional pronouncement. Two factors guided the Court's exercise of discretionary power in deciding whether to hear the pendent claim: prior investment of judicial

87. This argument was sustained in Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979).
89. The appellants also asserted that the three judge court had jurisdiction over constitutional claims only, and not over statutory claims, even those exceeding $10,000 in accordance with § 1331. See Swift v. Wickham, 382 U.S. 111 (1965).
90. See King v. Smith, 392 U.S. 309, 312 n.3 (1968) (three judge court had decided both the constitutional and the statutory claim on the merits).
91. 397 U.S. at 402.
92. See notes 43-45 & accompanying text supra.
93. See notes 32-34, 38-39 & accompanying text supra.
resources in the case and the character of the pendent claim.\textsuperscript{94} Because considerable effort had been invested in the case before the constitutional claim became moot, and because “the statutory question is so essentially one of federal policy that the argument for exercise of pendent jurisdiction is particularly strong,”\textsuperscript{95} the Rosado court heard the statutory claim. Finally, the Court saw no difficulty in the single judge exercising jurisdiction over the pendent statutory claim remanded to him by the three judge court. Rather, the Court thought it was a wise use of discretion for the three judge court not to decide the pendent claim but to remit it to the single judge. Thus the three judge court need not dismiss after the primary claim becomes moot, but commits no abuse in requesting one judge to perform the task of three.

In Hagans v. Lavine\textsuperscript{96} the Court again demonstrated its willingness to employ the doctrine of pendent jurisdiction to avoid constitutional issues.\textsuperscript{97} Moreover, it suggested that, by their nature, pendent claims do not fall within the discretion guidelines announced in Gibbs for state law claims. In Hagans the single district court judge scrutinized a constitutional claim and decided that it was substantial enough to confer jurisdiction. The single judge then proceeded to examine the statutory claims, anticipating the type of remand from the three judge court approved in Rosado.

On review, the Supreme Court made no substantive disposition of the constitutional claim. It merely ruled that the claim was not “unsubstantial,”\textsuperscript{98} thereby conferring jurisdiction over the entire case, including the pendent statutory claim. Although the primary claim was not unsubstantial in a jurisdictional sense, it did not necessarily state a cause of action.

The Court looked to the historic practice, originating in

\textsuperscript{94} 397 U.S. at 403.
\textsuperscript{95} Id. at 404 (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966)).
\textsuperscript{97} The court has recently ruled that “statutory” claims, if pressed alone, must meet the requirement of § 1331 and may not enter federal court under § 1343. See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979). It is likely that such claims will continue to be heard as pendent claims inasmuch as Chapman did not overrule Hagans. Moreover, Congress has recognized, if not approved, the Hagans line of cases. See Maher v. Gagne, 100 S. Ct. 2570, 2576 & n.15 (1980); Silva v. Vowell, 621 F.2d 640 (5th Cir. 1980); Oldham v. Ehrlich, 617 F.2d 163, 166-67 (8th Cir. 1980); Holley v. Lavine, 605 F.2d 638, 646-47 (2d Cir. 1979), cert. denied, 100 S. Ct. 1843 (1980); Shands v. Tull, 602 F.2d 1156, 1159 (3d Cir. 1979). But see Lopez v. Arraras, 606 F.2d 347 (1st Cir. 1979) (dicta).
\textsuperscript{98} 415 U.S. at 536-43.
JURISDICTIONS OVER CLAIMS

Siler,99 whereby pendent state claims have been considered in order to avoid constitutional claims. The Court found that Gibbs did not purport to overturn Siler.100 Moreover, the discussion of discretion in Gibbs centered upon "considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts ...."101—considerations the Court found "wholly irrelevant"102 in a case involving pendent federal claims. Thus, even if the three judge court had considered and denied the constitutional claim for failure to state a cause of action, it might designate a single judge to decide the pendent statutory claim. The federal nature of the pendent claim makes federal disposition unquestionably appropriate even though the claim does not meet the amount in controversy requirement.

Although the Hagans court permitted pendent jurisdiction even when the primary claim was dismissed, it reinforced the theme introduced in Rosado that a three judge court should normally refuse to consider the pendent claim if single judge consideration is also available. In Hagans, the Court approved the single judge's anticipation of a remand when such a remand is the normal, desirable course of action.103 Single judge treatment, of course, freed two judges for other tasks. Moreover, it eliminated direct Supreme Court review.104

The dissenters in Hagans argued that although the constitutional claim might have been substantial enough to confer jurisdiction, it should have been resolved on the merits against the plaintiffs, leaving the statutory claim to be dismissed under the Gibbs guidelines.105 Although, as the dissenters acknowledged, Gibbs expressed concern for needless decisions of state law, the federal court should also be loathe to decide cases not meeting the jurisdictional amount when Congress has decided that those cases are best left to the state courts. In the dissenters' view, the "not insub-

100. 415 U.S. at 547.
101. Id. at 548.
102. Id.
103. Id. at 543-44. If the single judge should deny the statutory claim, the three judge court would then be obliged to decide the constitutional claim. It is unclear whether the latter court would be bound by the single judge's decision. See Murrow v. Clifford, 502 F.2d 1066 (3d Cir. 1974); Doe v. Lukhard, 493 F.2d 54 (4th Cir. 1974).
105. 415 U.S. at 550-65 (Powell & Rehnquist, JJ., dissenting).
"substantial" test for jurisdiction would eliminate very few constitutional claims and, consequently, few pendent statutory claims, unless the Court were to insist upon the more rigid standards in Gibbs for exercise of discretion. Hagans would allow plaintiffs to avoid easily the jurisdictional amount in controversy requirement. According to the dissenters, colorable constitutional issues should be decided, not avoided, so that statutory claims might be appropriately resolved in state courts.\textsuperscript{106}

In contrast to its opinion in Hagans, the Court two years earlier in Perez v. Ledema\textsuperscript{107} had indicated a narrower view of pendent jurisdiction. The plaintiffs in Perez attacked the constitutionality of both a Louisiana state statute and a local ordinance that had been the bases of obscenity prosecutions against the plaintiffs. A three judge court was convened, but without the aid of pendent jurisdiction it had no power to consider local ordinances.\textsuperscript{108} Nevertheless, because the ordinance's operation gave rise to a common nucleus of operative fact with the primary statutory claim, the three judge court decided the entire case, ruling the ordinance unconstitutional.\textsuperscript{109} The Supreme Court, however, without mentioning Rosado, held the three judge court had no authority to pass upon the local ordinance and reversed.\textsuperscript{110} The Court thus implied that pendent jurisdiction was appropriate only to avoid constitutional issues, not to multiply them through the consideration of municipal ordinances, hundreds of which may overlap with a given state statute. Had the Court ruled otherwise, it would have created the potential for more intrusive forays into constitutional decisionmaking.\textsuperscript{111}

\textsuperscript{106} Id. at 552, 565.
\textsuperscript{107} 401 U.S. 82 (1971).
\textsuperscript{109} There is some confusion as to whether the three judge court issued a declaratory judgment of the ordinance's unconstitutionality or merely expressed its view in dictum. In any event, the single judge issued a declaratory judgment that the ordinance was unconstitutional. Even if the view is taken that only the single judge issued a judgment as to the ordinance, the Court's holding refutes a possible argument that it had pendent appellate jurisdiction over the single judge's order. For a comparison, see Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979) (discussed in the text accompanying notes 165-67 infra).
\textsuperscript{110} The Court also found inappropriate the relief given against the state statute. Relying on the companion case of Younger v. Harris, 401 U.S. 37 (1971), it ruled that the court's relief interfered with a pending criminal prosecution. 401 U.S. at 84-85.
\textsuperscript{111} See Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D. Wash. 1967) (three judge court), aff'd, 390 U.S. 598 (1968), in which the Court refused to allow adults to challenge involuntary blood transfusions given to them without statutory author-
Abney v. United States serves as another example that when the Court is not attempting to avoid the decision of constitutional issues, it has taken a narrower view of pendent jurisdiction over federal law claims. In Abney the defendants in a federal criminal case moved to dismiss the indictment, arguing that a retrial would expose them to double jeopardy. In allowing an interlocutory appeal on this issue, the Court stressed the exceptional nature of a double jeopardy claim. Congressional policy against piecemeal appeals is embodied in the statutory requirement of a "final decision." The Court nevertheless reasoned that, if the protection against double jeopardy is to have full meaning, a defendant should have the opportunity to raise his or her argument before trial. Without ever mentioning the phrase "pendent jurisdiction," the Court refused to consider the merits of the defendants' additional argument that the indictment failed to state an offense:

That a defendant may seek immediate appellate review of... his double jeopardy claim is based on the special considerations... which justify a departure from the normal rule of finality. Quite obviously, such considerations do not extend beyond the claim of former jeopardy and encompass other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss.

Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeal prior to conviction and sentence.

The court reaffirmed its commitment to this position in United States v. MacDonald, in which it refused to consider an interlocutory appeal of a speedy trial claim that the court of appeals had deemed pendent to a double jeopardy claim.

ity. The adults in King County argued that they should be able to join a challenge brought by juveniles against a specific state statute applicable to juveniles only.

114. 431 U.S. at 663.
116. Symm v. United States, 439 U.S. 1105 (1979), aff'g 445 F. Supp. 1245 (S.D. Tex. 1978), does appear to extend jurisdiction over a pendent party in violation of Aldinger, see notes 46-58 supra, as charged by Justice Rehnquist in his dissent. 439 U.S. at 1110 (Rehnquist, J., dissenting). Justice Rehnquist observed that the pendent party was virtually identical with the governmental entity. Id. at 1110.
A few recent cases have chosen to expand on the more liberal jurisdictional principles of *Rosado* and *Hagans* rather than adopt the more restrictive approaches of *Perez* and *Abney*. In *Network Project v. Corporation for Public Broadcasting*, the plaintiff brought an action in federal district court, alleging that various federal officials had censored public broadcast programming. The complaint alleged both violations of the federal statute establishing the Corporation for Public Broadcasting and violations of first amendment rights. The lower court dismissed all claims; but the court of appeals reversed, ruling that the district court had jurisdiction over the statutory claim under 28 U.S.C. section 1337, which confers jurisdiction over claims arising under laws regulating interstate commerce. Section 1337 has no amount in controversy requirement, but does not allow jurisdiction over constitutional claims. Nonetheless, the court concluded that the constitutional claim, without meeting the amount in controversy requirement, could be pendent to the statutory claim. Further, even if the primary claim were dismissed at an early stage in the litigation, it would be an abuse of discretion to dismiss the constitutional claim. Quoting from *Hagans*, the court stated that pendent federal claims ordinarily should not be dismissed under the guidelines for discretion set forth in *Gibbs* for state law claims. The Court

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119. At the time suit was filed, 28 U.S.C. § 1331 (1976) had not been amended to dispense with a jurisdictional amount in controversy requirement in actions against federal officials. *Network Project* refused to decide whether the defendants were federal officials within the meaning of amended § 1331. 561 F.2d at 972 n.70. See National Treasury Employees Union v. Campbell, 589 F.2d 669, 677 (D.C. Cir. 1978) (an alternative holding that the amendment to § 1331 is retroactive).

120. "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337 (1976).

121. The lower courts have given a broad reading to § 1337. See, e.g., Finnerty v. Cowen, 508 F.2d 979, 983 (2d Cir. 1974).

122. 561 F.2d at 968-72.
found it was particularly appropriate for pendent federal claims to be adjudicated in federal courts, and that only unusual circumstances should prevent this result.123

The decision in Project Network is puzzling because it seems to conflict with the desire to avoid constitutional issues, and instead allows the constitutional question to come in as pendent to a statutory claim.124 The court's statement as to the proper exercise of discretion is an unwarranted extension of Hagans. Had the court dismissed the constitutional claim, the plaintiff could have refiled in the Superior Court of the District of Columbia, the court of general jurisdiction for the District of Columbia.125 Even assuming there is some importance in having federal adjudication of federal issues, the superior court might have addressed the pendent federal claim and thus freed the district court, a court of limited jurisdiction, to determine major constitutional challenges.

Although discretionary dismissal may have fragmented the litigation and discouraged resort to the district court for resolution of the statutory claim within its jurisdiction under section 1337, a federal court under Gibbs may validly discourage such resort when the plaintiff has a primary claim which is "substantial" for jurisdictional purposes, but nonetheless is a substantively weak claim. Because in these cases the Gibbs guidelines on discretion would discourage resort to federal court when the pendent claim involves state law and is appropriate for state courts, Gibbs should also discourage resort to federal court when the pendent claim is so small that it belongs in state court, even though it may raise issues of federal law. Otherwise, the plaintiff may indirectly accomplish a prohibited result through artful pleading of the primary claim.126

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123. Id. at 971.

124. In the other cases cited in note 118 supra, the pendent claims did not raise constitutional issues. To that extent, those cases are not as objectionable as Network Project. Nonetheless, the pendent claims did not meet the jurisdictional amount requirement imposed by Congress and did not avoid the decision of constitutional issues. But see Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836, 840-41 (4th Cir. 1974).

125. The Supreme Court's opinions have given increasing recognition to the dignity of article I courts in the District of Columbia. See Palmore v. United States, 411 U.S. 389 (1973).

126. The recent amendment of 28 U.S.C. § 1331 should eliminate the need for pendent jurisdiction in most of the cases cited in note 118 supra, because plaintiffs need not allege a jurisdictional amount in controversy against federal officials. The District of Columbia court refused to interpret this amendment in Network Project. 561 F.2d at 972 n.70. But see National Treasury Employees Union v. Campbell, 589 F.2d 669, 677 (D.C. Cir. 1978). The amendment would also supersede Connecticut Union Welfare Employees v. White, 357 F.
Recent Developments in the Lower Courts

Courts have hesitated to allow the exercise of pendent jurisdiction when they have lacked independent jurisdiction over a federal claim for some reason other than inadequacy of jurisdictional amount. Convenience and fairness to the parties are laudatory goals; however, they are not absolutes, and contrary signals from Congress may force these goals into subordinate positions. When Congress has designated a claim not merely for federal court treatment, but for treatment by a particular federal court, it doubtless had specific goals in mind, and it probably valued these goals more highly than the general goals supporting the exercise of pendent and ancillary jurisdiction. Similarly, if Congress has granted federal jurisdiction over a claim, but only on certain conditions, it probably intended other goals to predominate.

Exclusive Jurisdiction

Vesting exclusive jurisdiction over a claim in one court would seem to preclude another court from asserting pendent jurisdiction over that claim.\footnote{127} For example, although state courts may determine issues of patent law, Congress has made an express declaration that federal courts have exclusive jurisdiction over redress for patent infringement.\footnote{128} A state court thus should not exercise jurisdiction over a patent infringement claim that is pendent to state law claims arising out of a common nucleus of operative facts.\footnote{129} The need for convenience and efficiency in the state courts should not subvert exclusive federal jurisdiction, particularly in cases in which a federal court may promote convenience and efficiency by itself asserting pendent jurisdiction over the state law claims related to the federal claim of patent infringement.\footnote{130}

\footnote{Supp. 1378 (D. Conn. 1973), which made a claim against a federal official pendent to a claim against a state official.}

\footnote{127. Cf. City of Rochester v. Bond, 603 F.2d 927 (D.C. Cir. 1979) (exclusive jurisdiction to review FAA “order” may not be evaded by framing district court action as claim “arising under” Environmental Protection Act) (numerous cases collected).}

\footnote{128. 28 U.S.C. § 1338(a) (1976).}


Cases arising out of the “price freeze” in the early 1970’s provide further guidance on the relationship between exclusive jurisdiction and pendent federal claims. Suppliers of natural gas had written clauses into their customers’ contracts stipulating that the suppliers could automatically pass on to their customers price increases for gas sold to the customers. The price freeze stayed the operation of these “escalator” clauses pending examination of the clauses by the Federal Power Commission (FPC) for consistency with the Economic Stabilization Act (ESA). Exclusive jurisdiction to review decisions of the FPC lay in the courts of appeals.\textsuperscript{131} Cases arising under ESA, however, are within the exclusive jurisdiction of the district courts and are appealable through an expedited process to the Temporary Emergency Court of Appeals (TECA).\textsuperscript{132} When the FPC found the escalator clauses consistent with the ESA and allowed the suppliers to charge under these clauses for gas already delivered as well as for future deliveries, the customers faced a dilemma: their case fit under either the FPC review statute or the ESA jurisdictional statute or perhaps both, and the two statutes gave exclusive jurisdiction to two different courts. The customers brought suit in both the District of Columbia Court of Appeals and a district court, whose proceedings were reviewed by TECA.

Both the District of Columbia Court of Appeals\textsuperscript{133} and the TECA\textsuperscript{134} held that only the TECA could review the argument that the FPC ruling violated ESA. The court of appeals could not exercise pendent jurisdiction over ESA claims, an area exclusively within the TECA’s power. Moreover, the TECA also held that a claim committed exclusively to the jurisdiction of the regular courts of appeals could not be heard by the TECA.\textsuperscript{135} Thus, exclusive jurisdiction was entirely incompatible with the exercise of pendent jurisdiction.

The District of Columbia Court of Appeals originally had sug-

\textsuperscript{131} 16 U.S.C. § 8251(b) (1976).
\textsuperscript{133} Connecticut Mut. Group v. FPC, 498 F.2d 993 (D.C. Cir. 1974); accord, Coastal States Mktg., Inc. v. New England Petroleum Corp., 604 F.2d 179 (2d Cir. 1979). But see, St. Mary’s Hosp. v. Ogilvie, 496 F.2d 1324 (7th Cir. 1974) (ESA allegations raised in answer but not complaint).
\textsuperscript{135} Id. at 935; accord, Spinetti v. Atlantic Richfield Co., 522 F.2d 1401 (Temp. Em. Ct. App. 1975).
gested that it must exercise its exclusive jurisdiction only when the issues were "cleanly severable." If the issues were not cleanly severable, the TECA should decide the entire case. Because it determined that the issues were not cleanly severable, the court of appeals dismissed even the retroactive rate-making claim. The TECA, however, regarded the issues as severable and deferred to the court of appeals' exclusive jurisdiction. When the TECA refused to decide the entire case, the court of appeals had no choice but to accept the retroactive rate-making issue for decision.

The court of appeals' decision to decline jurisdiction over exclusive ESA claims was proper. Congress granted the TECA exclusive jurisdiction to ensure speedy and consistent resolution of legal issues which, if left to review by the individual circuits, might have produced uncertainty and delay as well as disruption of the nation's economy. However, the TECA's exercise of pendent jurisdiction over FPC claims would have accorded with the intent of Congress. Resolution of these allegedly pendent issues would have been accomplished by a court of equal dignity and expertise. Moreover, in a case in which the issues are not cleanly severable, separate review could produce chaos if the two courts disagree on a single issue having multiple facets. Even in a case with cleanly severable issues, separate review can be wasteful of limited judicial resources. Approval of the rate increase by the TECA, for example, would be uneconomical if the court of appeals disapproved the increase on other grounds.

The TECA's decision not to hear the rate-making claim, however, can be supported as a wise exercise of discretion. The TECA has been given a limited jurisdiction so that its judges, who already have full time duties on the courts of appeals, may decide special cases with dispatch. These judges must jealously guard against encroachment upon their severely limited resources. Although it might be convenient to the parties in a dispute to have a single "case" decided at one time, to do so might prejudice resolution of other cases that unquestionably are entirely within the jurisdiction of the TECA. The TECA also need not concern itself with encouraging the parties to resort to that forum. This rationale for the exercise of pendent jurisdiction has no application when the par-

137. Id.
138. Id. at 998.
ties must have their ESA claims reviewed by the TECA.

The Court in *Hagans* had indicated a similar attitude, stating that it was a wise use of discretion for the three judge court not to consider the pendent statutory claim, but to allow the single judge to determine the merits of that claim. With the limited resources of the federal judiciary, decisionmaking by one judge rather than three was more economical.

*Denton v. Schlesinger* exemplifies a recurring setting in which a court declines to use pendent jurisdiction to circumvent a federal court's exclusive jurisdiction. The plaintiff military officers in *Denton* sought injunctive relief in the district court to reinstate themselves into the military service. To their claims for equitable relief, they asserted pendent claims for back pay, each seeking more than $10,000. Because the Court of Claims has exclusive jurisdiction over non-tort claims against the government in excess of $10,000, the Ninth Circuit refused to exercise jurisdiction over the pendent claims. In addition, the Court of Claims had the power to grant the special injunctive relief sought by plaintiffs.

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139. See notes 96-104 supra.
140. See generally *Powell v. United States*, 300 U.S. 276 (1937); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932); *Pittsburgh & W. Va. Ry. Co. v. United States*, 281 U.S. 479 (1930). All of these cases refused to assert jurisdiction over claims related to claims for review of orders made by the ICC, the latter claims being reviewable by three judge courts. The Chicago Junction Case, 264 U.S. 258 (1924), had approved just such review and appears indistinguishable from the cases cited earlier. Although the cases subsequent to *Chicago Junction* spoke in terms of a lack of power, they probably represent a realization that three judge review for all aspects of a case requires too great a commitment of judicial resources. In these cases however, no statutory mechanism provided for the single judge review possible in *Hagans*. There is an extended discussion of this question in *Kurland, The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harv. L. Rev. 817, 841-45 (1960).
141. 605 F.2d 484 (9th Cir. 1979).
142. See, e.g., *Giordano v. Roudebush*, 617 F.2d 511 (8th Cir. 1980); *Cook v. Arentzen*, 582 F.2d 870 (4th Cir. 1978); *Polos v. United States*, 556 F.2d 903 (8th Cir. 1977); *Whelan v. Brinegar*, 538 F.2d 924 (2d Cir. 1976); *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969); *Larsen v. Hoffman*, 444 F. Supp. 245 (D.D.C. 1977). See also *Drennan v. Harris*, 606 F.2d 846 (9th Cir. 1979). Cf. *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980) (doctrine of pendent jurisdiction may not be used to assert jurisdiction over Tucker Act claim of $331,607.89 when waiver of sovereign immunity is expressly conditioned on an amount in controversy of $10,000 or less).
145. 28 U.S.C. § 1491 (Supp. II 1978) (allows the Court of Claims, which lacks general
thus making disposition of the claims by that tribunal particularly desirable.\textsuperscript{146}

Cases involving nonremovable claims, the functional equivalent of claims within exclusive jurisdiction, reach similar results. In \textit{Gamble v. Central of Georgia Railway},\textsuperscript{147} the widow of a deceased railroad worker brought a Federal Employer's Liability Act (FELA) claim\textsuperscript{148} against the employer railroad company in state court. By statute, such claims are not removable.\textsuperscript{149} The defendant railroad then brought an indemnity claim against the property owner on whose land the fatal injury occurred. The railroad and property owner were of diverse citizenship. The property owner sought removal of the entire case to a federal court, relying on 28 U.S.C. section 1441(c), which permits removal of an entire case so long as a removable claim is "separate and independent" from a nonremovable claim. Although the claims were "separate and independent" within the narrow meaning of the removal statute, these claims also arose out of a common nucleus of operative fact. Examining the FELA legislative history in some detail, the Fifth Circuit concluded that FELA claims originally brought in state court could never be removed, notwithstanding section 1441(c).\textsuperscript{150} Congress intended the plaintiff to have the sole choice of forum; no notions of convenience, even those expressed in a statute of seemingly general application to nonremovable causes of action, could countermand that legislative direction.\textsuperscript{151}


146. See A.L. Rowan & Son, General Contractors, Inc. v. HUD, 611 F.2d 997, 1000-01 (5th Cir. 1980).
147. 486 F.2d 781 (5th Cir. 1973).
150. 486 F.2d at 785.
151. The Fifth Circuit noted that the lower court might retain jurisdiction over the}
Exhaustion of Administrative Remedies

Given the importance attached to the exhaustion of administrative remedies, a federal court should not exercise pendent jurisdiction over a claim for which administrative remedies have not been exhausted. In *Humana of South Carolina, Inc. v. Califano*, the plaintiff, a proprietary hospital providing medicare services to some of its patients, objected to federal regulations establishing the rate of return on the supplier’s equity that could be recovered as a reasonable cost for medicare services. The plaintiff complained that these regulations improperly deprived the hospital of deserved compensation from 1966, when the regulations were first promulgated, until and beyond the date of filing in 1975. It was clear that all claims arising after 1973 must undergo administrative review in the Department of Health, Education and Welfare. Until the administrative remedies were exhausted, these claims were barred from the district court. The plaintiff contended, however, that the federal courts had jurisdiction to consider his pre-1973 claims, and should as a matter of convenience review his entire case, including post-1973 claims.

The court rejected that argument, finding that Congress intended to foreclose review by the courts until the administrative review had been completed, even when the administrative review
was unlikely to give the plaintiff relief. Thus, the federal court had no jurisdiction to consider the post-1973 claims, even under a theory of pendent jurisdiction. Moreover, the court of appeals directed the lower court to retain the pre-1973 claims, but to stay consideration of those claims until the administrative process had been completed for post-1973 claims. The statutory demand for administrative review not only foreclosed pendent jurisdiction, but also affected the jurisdictionally sufficient claim that was not directly subject to administrative review.

Similarly, in West v. United States the plaintiffs brought a diversity action against medical equipment suppliers for injury to their son. The defendants brought a third-party action against the boy's doctor. The doctor was an employee of the United States Public Health Service, which was substituted as a third-party defendant. The plaintiffs consequently sought to implead the United States as a third-party defendant, but failed to file an administrative claim with the Public Health Service, a prerequisite to suing the federal government. Specifically relying on Kroger, the court held that this failure deprived the court of jurisdiction over the plaintiffs' claim against the government and could not be cured by the pendent jurisdiction doctrine.

**Forms of Relief**

Although the concept of jurisdiction normally is restricted to the question of power to hear a case, several courts have construed jurisdiction to include the power to grant a particular form of relief. Because this interpretation of the term "jurisdiction" has thus far received only limited acceptance, few cases have employed pendent jurisdiction to provide an otherwise unavailable remedy.

155. 590 F.2d at 1078.
156. Id. at 1085. But see Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3d Cir. 1980).
157. The Court's subsequent decision in Califano v. Yamasaki, 442 U.S. 682 (1979), is consistent with the analysis in Humana. The court in Yamasaki approved class relief only for those members of the class who met the exhaustion requirements of 42 U.S.C. § 405(g) (1976). 442 U.S. at 704, 706. A pendent jurisdiction analysis would have supported the argument that only the named representatives of the class need have exhausted remedies. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).
158. 592 F.2d 487 (8th Cir. 1979).
159. 28 U.S.C. §§ 2401(b), 2675(a) (1976).
160. 592 F.2d at 491-92.
In *Florida Medical Association, Inc. v. HEW*, the Fifth Circuit refused to use pendent jurisdiction to circumvent detailed statutory requirements for a grant of injunctive relief. Plaintiffs had obtained a temporary restraining order to prevent publication of a list of medicare payments made to its members. After extending the order, the district court entered "an ancillary writ of injunction," even though it did not make the determinations necessary to support a preliminary injunction. The Fifth Circuit reversed, noting that pendent jurisdiction contemplates two separate, but related, claims. In this case, the plaintiffs had only one claim, for which the lower court granted a remedy unknown to the Federal Rules of Civil Procedure. The federal courts cannot employ pendent jurisdiction to "abandon the Rules whenever they prove procedurally inconvenient." Otherwise, federal courts might "promulgate an *ad hoc* procedural code whenever compliance with the Rules proves inconvenient."

In *Jaffee v. United States*, the plaintiff brought a class action on behalf of all soldiers who had been ordered to witness an atomic blast in 1953. He sought an injunction to compel the government to warn and provide medical care for the soldiers. In addition, he sought money damages for himself. The trial court dismissed the class action claim, and the plaintiff sought interlocutory review.

On review, the Third Circuit found the request for a medical warning to be truly injunctive in nature and the valid subject of an interlocutory appeal. Insofar as the request sought medical treatment, however, it also encompassed a claim for damages, for which an interlocutory appeal normally is not available. None-
theless, because the court had appellate jurisdiction over part of the order, the court held it could consider the whole,\textsuperscript{169} a ruling inconsistent with \textit{Abney v. United States}.\textsuperscript{170}

On the merits, the court approved an injunction to warn endangered members of the class because the Administrative Procedure Act\textsuperscript{171} waived sovereign immunity for relief other than damages.\textsuperscript{172} The court did not grant monetary damages, however, because “this reading of the statute would imply a waiver of sovereign immunity in damage suits whenever a plaintiff could append equitable relief to his monetary claims. That result would conflict with . . . Congressional intent . . . .”\textsuperscript{173} The court thus gave effect to Congress’ carefully formulated plans to give equitable relief, but to deny claims for money damages.\textsuperscript{174} Because the government had immunity from such a claim,\textsuperscript{175} pendent jurisdiction could not pierce the immunity;\textsuperscript{176} the convenience and fairness to the parties that might result from consolidated disposition of related claims should not confer a form of relief that the plaintiff could never receive, either in the district court or in the Court of Claims.\textsuperscript{177}

\begin{footnotes}
\item 169. 592 F.2d at 715.
\item 170. See notes 112-14 & accompanying text \textit{supra}.
\item 171. 5 U.S.C. § 702 (1976).
\item 172. 592 F.2d at 719. \textit{Accord}, Sheenan v. AAFES, 619 F.2d 1132 (5th Cir. 1980). But see \textit{Estate of Watson v. Blumenthal}, 586 F.2d 925 (2d Cir. 1978).
\item 173. 592 F.2d at 719.
\item 174. A converse situation arises when the Court of Claims is asked to give equitable relief. The Court of Claims may employ principles derived from equity, but it may not give equitable relief. \textit{See Alabama Hosp. Ass’n v. Califano}, 587 F.2d 762 (5th Cir. 1979). The recent grant of authority to the Court of Claims to correct records, 28 U.S.C. § 1491 (Supp. II 1978), only emphasizes the jurisdictional limitations that Congress has imposed on the power to grant equitable relief that even pendent jurisdiction cannot circumvent.
\item 177. Federal courts have often disclaimed a full range of equitable powers for themselves when they sit “in admiralty.” \textit{See, e.g., Swift & Co. Packers v. Compania Colombiana Del Caribe}, 339 U.S. 684 (1950). It is unclear whether a party might characterize a claim for equitable relief as pendent or ancillary to an admiralty claim. \textit{See Beverly Hills Nat’l Bank & Trust Co. v. Compania De Navegacione Almirante S.A.}, 437 F.2d 301 (9th Cir.), \textit{cert. denied}, 402 U.S. 996 (1971) (pendent equitable claim arising under state law). For a comprehensive survey and analysis of the authorities, see Robertson, \textit{Admiralty Procedure and Jurisdiction after the 1966 Unification}, 74 Mich. L. Rev. 1628, 1637-45, 1659-63 (1977). If Congress had ever expressed approval of this self denial, pendent jurisdiction would be inappropriate. In any event, the courts may be in the process of asserting full equity powers and thereby rendering the propriety of pendent jurisdiction irrelevant. \textit{See Fino v. Protection Maritime Ins. Co.}, 559 F.2d 10 (1st Cir. 1979).
\end{footnotes}
Conclusion

The Supreme Court’s suggestion in *Romero* unleashed the possibility of pendent jurisdiction over federal law claims. This suggestion has reached full realization in cases that circumvent the amount in controversy requirement to avoid decision of constitutional issues. If Congress should ever amend section 1331 to dispense entirely with a jurisdictional amount, it would remove the principal occasion for the use of the doctrine. In almost all other cases, pendent jurisdiction over federal law claims has been rejected, and rightfully so. Convenience, efficiency, and fairness to the parties are attractive goals. When, however, Congress has imposed special jurisdictional requirements on the federal courts, the judiciary should be reluctant to upset the more particularized goals that have displaced the general goals found in the Federal Rules of Civil Procedure. *Romero* has generated and will continue to generate controversies better left unopened. Congressional limitations on the jurisdictional power of the federal courts caution against the unwarranted expansion of the doctrine to encompass claims arising under federal law.

178. The present version of 28 U.S.C. § 1331(a) (1976) requires no amount in controversy in an action against a federal defendant. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1311 (April 1964 Draft) would eliminate the amount in controversy requirement in all federal question cases.