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ALDINGER v. HOWARD: AT THE CROSSROADS OF PENDENT PARTY JURISDICTION AND SECTION 1983 LIMITS ON SUABLE "PERSONS"

Rampant growth of the federal caseload has generated a new awareness of jurisdictional limitations found in article III of the Constitution.[1] Theoretically, the federal courts, being courts of limited jurisdiction, may only hear claims over which Congress, pursuant to article III, has conferred subject matter jurisdiction.[2] However, the well established doctrines of pendent and ancillary jurisdiction provide that the federal courts may, in certain circumstances, entertain nonfederal claims not otherwise within their statutory jurisdiction. These judicially created doctrines have expanded the scope of federal jurisdiction upon the premise that article III confers jurisdiction over "cases" and not "questions," "claims," or "causes of action" and that the actual parameters of these "cases" are undefined.[3]

Pendent jurisdiction allows a plaintiff to join both federal and nonfederal *claims* against the same defendant in his original complaint.[4] Ancillary jurisdiction, a broader concept, allows joinder of nonfederal claims filed by original parties subsequent to the original complaint, as in the case of compulsory counterclaims, and by or against additional *parties* whose presence would otherwise deprive the court of its jurisdiction.[5] The two doc-

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1. U.S. CONST. art. III, § 2 provides in relevant part: "The judicial Power shall extend to all *Cases* . . . arising under this Constitution, the Laws of the United States, and Treaties . . . *with such Exceptions, and under such Regulations as Congress shall make.*" (emphasis added).

2. Lockerty v. Phillips, 319 U.S. 182 (1943); Kline v. Burke Constr. Co., 260 U.S. 226 (1922); Sheldon v. Sill, 49 U.S. (8 How. 440) 453 (1850).

3. Aldinger v. Howard, 427 U.S. 1, 13-14 (1976).

4. The doctrine of pendent jurisdiction is securely rooted in American jurisprudence. *See, e.g.,* Hagans v. Lavine, 415 U.S. 528 (1974); Rosado v. Wyman, 397 U.S. 397 (1970); United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

Congress has given at least partial approval to the doctrine by the enactment of: (1) 28 U.S.C. § 1338(b) (1970) (providing for the extension of federal patent jurisdiction to joined state claims of unfair competition when related to a substantial claim under the copyright, patent, plant variety protection or trademark laws); and (2) 28 U.S.C. § 1441 (c) (1970) (providing for the extension of federal removal jurisdiction to a state claim joined with a removable federal claim).

See generally 3A MOORE'S FEDERAL PRACTICE ¶ 18.07 [1.-1] to [1.-5] (1974); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 19, at 72-77 (3d ed. 1976) [hereinafter cited as WRIGHT]; Shakman, *The New Pendant Jurisdiction of the Federal Courts,* 20 STAN. L. REV. 262 (1968); Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,* 62 COLUM. L. REV. 1018 (1962).

5. *See* WRIGHT, *supra* note 4, § 9, at 21; Fortune, *Pendent Jurisdic-*

trines are further distinguished in that each sprung from a historically distinct line of precedent and was justified by a different underlying rationale.[6]

Numerous lower court decisions have upheld the extension of pendent *claim* jurisdiction to nonfederal claims involving additional *parties* under the designation of pendent *party* jurisdiction.[7] In general, justification for pendent *party* jurisdiction has been based upon a broad reading of *United Mine Workers v. Gibbs.*[8] *Gibbs* upheld the power of a district court to grant relief on a plaintiff's state claims against the same defendant

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tion—The Problem of "Pendenting Parties," 34 U. PITT. L. REV. 1, 12-13 n.34 (1972).

In WRIGHT, *supra* note 4, § 9, at 23, the incorporation of ancillary jurisdiction into the Federal Rules is discussed:

> Ancillary jurisdiction permits courts to hear compulsory counterclaims, under Rule 13(a), and to bring in additional parties to respond to a compulsory counterclaim under Rule 13(h) . . . . Cross claims, under Rule 13(g), are ancillary. Impleader of a third party defendant under Rule 14 falls within ancillary jurisdiction. . . . Ancillary jurisdiction is available in interpleader, under Rule 22. Intervention as of right, under Rule 24(a), comes within the Court's ancillary jurisdiction. . . .

See generally 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction § 3523 (1969); Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction,* 33 U. PITT. L. REV. 759 (1972).

6. *See* notes 41-54 and accompanying text *infra.*

7. *See, e.g.,* Bowers v. Moreno, 520 F.2d 843, 846-48 (1st Cir. 1975) (federal question jurisdiction extended to a related state tort claim involving additional defendants); Florida E. Coast Ry. Co. v. United States, 519 F.2d 1184, 1193-96 (5th Cir. 1975) (federal question jurisdiction extended to state tort claim against individual defendants joined with a federal tort claim against the United States); Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), *cert. denied,* 416 U.S. 995 (1974) (federal question jurisdiction over civil rights claims against prison officials extended to state tort claim against prisoner); Schulman v. Huck Finn, Inc., 472 F.2d 864, 866-67 (8th Cir. 1973) (patent jurisdiction extended to state unfair competition claims against defendants against whom patent claims had been dismissed); Almenares v. Wyman, 453 F.2d 1075, 1083-85 (2d Cir. 1971) (federal question jurisdiction over civil rights claims extended to joined federal claim not meeting the $10,000 jurisdictional amount asserted against additional defendant); Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d 800, 809-10 (2d Cir. 1971) (admiralty jurisdiction over claim against shipper extended to state contract claim against shipper's trucking agent). *Contra,* Moor v. Madigan, 458 F.2d 1217, 1221 (9th Cir. 1972) (refusing to extend federal jurisdiction over civil rights claim against individuals to state tort claim against county); Hymer v. Chai, 407 F.2d 136, 137 (9th Cir. 1969) (dismissing a plaintiff's claim for loss of consortium which was under the $10,000 jurisdictional amount when joined in spouse's diversity action for damages in excess of $10,000).

8. 383 U.S. 715 (1966). *Gibbs* involved an action brought in federal district court for compensatory and punitive damages based on alleged violations of a section of the Labor Management Relations Act of 1947, 29 U.S.C. § 187 (1970). Joined with the federal claim was a state claim for conspiracy to interfere with contract relations. In Moor v. County of Alameda, 411 U.S. 693, 713 (1973), the Court said: "numerous decisions throughout the courts of appeals since *Gibbs* have recognized the existence of judicial power to hear pendent claims involving pendent parties where 'the entire action before the court comprises but one constitutional "case" as defined in *Gibbs.*'" (footnote omitted).

when both state and federal claims arise from a "common nucleus of operative fact" and can therefore be viewed as a single constitutional "case."[9] Under *Gibbs*, the power to exercise pendent *claim* jurisdiction is discretionary and is based upon considerations of judicial economy, convenience, and fairness to the parties,[10] which may apply equally to pendent *party* jurisdiction. In the *Gibbs* opinion, the Court referred to the liberal policy of joinder of both *claims* and *parties* underlying the Federal Rules of Civil Procedure.[11] As a result, although factually *Gibbs* dealt only with joinder of *claims*, more than one court has concluded that there is no principled difference between joinder of *claims* and joinder of *parties*.[12]

The advantages afforded by pendent *party* jurisdiction are especially evident within the context of civil rights actions. Actions brought under section 1983 of the Civil Rights Act of 1871[13] have added greatly to the burden of the federal caseload[14]

9. The *Gibbs* Court found that:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ,' U.S. Const., Art. III. § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court . . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

383 U.S. at 725-26 (footnotes and citations omitted).

10. 383 U.S. at 726.

11. "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." 383 U.S. at 724.

12. *See, e.g.*, Almenares v. Wyman, 453 F.2d 1075, 1083 (2d Cir. 1971) ("The doctrine of pendent jurisdiction is sufficiently broad to support a claim within the limits of *Gibbs* against a person not a party to the primary, jurisdiction-granting claim."); Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d 800, 810-11 (2d Cir. 1971) ("The constitutional rationale which underlies the doctrine of ancillary jurisdiction in the context of Rule 13(a) and Rule 14 may be applied to support the conclusion that a federal court has the power to hear a related state claim against a defendant not named in the federal claim . . . ."); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627, 629 (2d Cir. 1971) ("Although the pendent claim in *Gibbs* did not include a party not named in the federal claim, Mr. Justice Brennan's language and the common sense considerations underlying it seem broad enough to cover that problem also.").

13.
> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970) (emphasis added).

14. Complaints filed under section 1983 after the post-war period

in spite of the fact that judicial interpretation has excluded municipal corporations and other public corporations from the class of suable defendants under the Act.[15] Because section 1983 actions may not be brought against public corporations, such as counties and municipalities, plaintiffs have been unable to join both individual and corporate defendants in one federal action.[16] Litigants seeking to sue both individual and corporate defendants have been forced to either bring their actions in state court, or to shoulder the burden of dual litigation by suing individual defendants in federal court and corporate defendants in state court. However, if valid, pendent party jurisdiction would allow a plaintiff to sue individual defendants under section 1983 and to join his factually related state claims against corporate defendants in the same federal action.

Pendent party jurisdiction clashed with congressional limits on section 1983 suable defendants in *Aldinger v. Howard.*[17] In *Aldinger* the Supreme Court was presented with the general issue of whether pendent party jurisdiction is a valid extension of a district court's article III power. The *Aldinger* majority concluded that pendent party jurisdiction was not available to circumvent the restrictions on section 1983 suable "persons,"

> were infinitesimal until Monroe v. Pape was decided in 1960 [sic, 1961]. Then the deluge began. In fiscal 1960 there were 280 cases brought under section 1983; in fiscal 1970, 3,586. Thus, between 1960 and 1970 there has been a rise of 1,100 percent compared to a rise in the same decade of 45 percent in civil cases generally. There was another significant increase in fiscal 1971, when 4,609 section 1983 cases were brought, 1,023 more than the previous year.

Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Caseload*, 1973 LAW AND THE SOC. ORD. 557, 563 (1973). *See generally* P. BATER, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973); H. FRIENDLY, FEDERAL JURISDICTION, 75-107 (1973); Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A. J. 1051 (1972).

15. City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973); Monroe v. Pape, 365 U.S. 167 (1961). For discussion of these cases see notes 25-31 and accompanying text *infra*. *But cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (§ 1983 action against a *private* corporation dismissed on other grounds).

16. A typical situation is where the acts of a corporate official or agent violate a plaintiff's constitutional rights. For example, when city police officers illegally break and enter into a plaintiff's home, the plaintiff may want to sue both the individual police officers and the city which employs them. Suing a corporation for the acts of its agents may be desirable for several reasons: (1) individual defendants may be judgment proof, thus making it necessary to reach the "deep pocket" of the corporation; (2) holding corporations responsible for the acts of their agents may deter unconstitutional conduct; and (3) placing the responsibility on a particular individual may be impossible. *See* Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U.L. REV. 770, 782 (1975); Kates and Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 136-40 (1972) [hereinafter cited as *Kates and Kouba*].

17. 427 U.S. 1 (1976).

however, the majority declined to decide the broader issue of whether pendent party jurisdiction may exist in other factual situations. Relying upon an examination of the relationships of pendent and ancillary jurisdiction to article III, the majority offered several vague guidelines for determining the outermost reaches of federal jurisdiction. Yet, although the majority ostensibly rested its decision on both article III and statutory grounds, an analysis of *Aldinger* reveals that the majority's decision can, perhaps, best be explained as a continuation of the Burger Court's policy of limiting the scope of federal jurisdiction.[18]

FACTS AND DISTRICT COURT RULING

In 1971, Aldinger filed her complaint in the United States District Court for the Eastern District of Washington seeking damages, an injunction, and declaratory relief stemming from her alleged wrongful dismissal from a clerical position in the Spokane County Treasurer's office. Aldinger claimed that two months after she was hired she received a letter from Howard, the Spokane County Treasurer, informing her that, although her job performance had been excellent, her employment would be terminated because she allegedly was living with her boyfriend. Howard's action was predicated upon a state statute authorizing the revocation of appointments "at pleasure" of the appointing officer.[19]

Aldinger brought her civil rights action under 42 U.S.C. §§ 1983 and 1988[20] against Howard, his wife, the county commissioners, and Spokane County, a public corporation. Jurisdiction over the federal claims against the individual defendants was premised upon 28 U.S.C. § 1343.[21] State claims against the county

18. *See* text accompanying notes 96-100 *infra*.
19. WASH. REV. CODE § 36.16.070 (1973).
20. 42 U.S.C. § 1988 (1970) provides that:

The jurisdiction in civil criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.

21. 28 U.S.C. § 1343 (1970) provides in relevant part that:

The district courts shall have original jurisdiction of *any civil*

were asserted pursuant to a state statute abolishing immunity of public corporations and providing for vicarious liability for the tortious conduct of their officials.[22] The district court dismissed all claims against the county for lack of subject matter jurisdiction.[23]

THE DECISION OF THE NINTH CIRCUIT

On appeal, Aldinger contended: (1) that her complaint stated valid federal claims against the county under sections 1983 and 1988, and thus fell within the district court's section 1343(3) jurisdiction; and (2) that the dismissal of her federal claims against the county did not preclude the district court from exercising pendent jurisdiction over her state claims. The Ninth Circuit Court of Appeals affirmed the dismissal as to all claims against the county holding that both of Aldinger's contentions were foreclosed by precedent.[24]

As to Aldinger's first contention, that a public corporation is suable under sections 1983 and 1988 in a state where governmental tort immunity has been abolished, the Ninth Circuit applied the rule of *Moor v. County of Alameda.*[25] *Moor* in turn had followed *Monroe v. Pape.*[26] *Monroe*, a civil rights action

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action authorized by law to be commenced by any person:

. . . .

> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of United States . . . .

Id. (emphasis added).

Aldinger also included 28 U.S.C. § 1331, the jurisdiction implementing statute for article III federal question cases, in her jurisdictional statement. Since § 1343 provides original jurisdiction over a § 1983 cause of action regardless of the amount in controversy, the inclusion of the § 1331 jurisdictional allegation in petitioner's complaint appears unnecessary. However, the Supreme Court has sustained an action directly under the fourth amendment for damages meeting the § 1331 jurisdictional amount. *See* note 100 *infra*. Petitioner did not argue the point, though, and neither the court of appeals nor the Supreme Court reached the question. 427 U.S. at 4 n.3.

22. WASH. REV. CODE § 4.08.120 (1973).

23. The district court's order of dismissal is not reported.

24. Aldinger v. Howard, 513 F.2d 1257 (1975).

25. 411 U.S. 693 (1973), *aff'g in part and rev'g in part*, Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972).

26. 365 U.S. 167 (1961). The *Monroe* Court faced two important policy considerations: (1) the probability of a flood of federal litigation if the "under color of State law" clause of section 1983 were extended to actions by officials which exceeded their legal authority; and (2) the anamoly of denying a plaintiff access to a federal forum in a civil rights action merely because the official actions complained of were equally offensive to state law. Justice Douglas wrote the opinion for the majority of six in what appears to have been a compromise decision. *See* Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1207-08 (1971) [hereinafter cited as *Developing*]. *Compare*

for damages which was brought against the city of Chicago and thirteen Chicago policemen, held that, based upon a reading of the legislative history of section 1983,[27] suable defendants under the act did not include municipal corporations.[28]

In *Moor*, which was also a civil rights action for damages, the plaintiffs attempted to circumvent the holding in *Monroe* by arguing that under section 1988 state law claims could be asserted against the county of Alameda. The Court in *Moor* held that section 1988 was limited to incorporation of state *remedies* and did not incorporate state *causes of action* into federal jurisdiction.[29]

Although urged to distinguish *Monroe* and *Moor* on their facts, and limit their holdings to actions for monetary damages, the Ninth Circuit in *Aldinger* held that any contention that the scope of suable defendants under section 1983 might vary according to the relief sought was eliminated by *City of Kenosha v. Bruno*.[30] In *Bruno*, a section 1983 action for injunctive relief against a municipal corporation was dismissed upon a finding that the legislative history of section 1983 was devoid of any evidence of intent to give the act a bifurcated interpretation.[31]

Monroe with Justice Douglas' dissents in City of Kenosha v. Bruno, 412 U.S. 507, 517 (1973) and Moor v. County of Alameda, 411 U.S. 693, 722-25 (1973).

27. *See generally* CONG. GLOBE, 42d Cong., 1st Sess. 317-832, app. 335 (1871).

28. "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used to include them." Monroe v. Pape, 365 U.S. 167, 191 (1961).

29. 411 U.S. 693, 700. The decision in *Moor* rests on several considerations:

(1) "[§] 1988 instructs federal courts as to what law to apply in causes of actions arising under federal civil rights acts. But we do not believe that the section, without more, was meant to authorize the wholesale importation into federal law of state causes of action—not even one purportedly designed for protection of federal civil rights." *Id.* at 703.

(2) "[T]he statute expressly limits the authority granted federal courts to look to the common law, as modified by state law, to instances in which that law 'is not inconsistent with the Constitution and the laws of the United States.'" *Id.* at 706.

(3) "[§] 1983 is unavailable to these petitioners insofar as they seek to sue the County. And § 1988, in light of the express limitation contained within it, cannot be used to accomplish what Congress clearly refused to do in enacting § 1983." *Id.* at 710.

The first consideration above seems less tenable than the second and third in light of two court of appeals decisions which upheld the application of state survivorship statutes to actions under § 1983 based upon their reading of § 1988. *See* Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961); Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961). *Moor* acknowledged the two cases but failed to adequately distinguish them from the application of a state cause of action for vicarious liability of municipalities with which it was confronted. 411 U.S. 693, 702 n.14. *See Kates and Kouba, supra* note 16, at 131, 156-57.

30. 412 U.S. 507 (1973).

31. *Id.* at 513. In *Bruno*, the Court returned to its analysis of the legislative history of § 1983: "We find nothing in the legislative history

As to Aldinger's contention that the district court should exercise pendent party jurisdiction over the county, the Ninth Circuit applied its earlier decision in *Hymer v. Chai*.[32] The *Hymer* decision refused to extend pendent jurisdiction to the claims of a party over whom no independent basis of federal jurisdiction existed concluding that "[j]oinder of claims, not joinder of parties, is the object of the doctrine."[33]

The decisions in *Hymer* and in *Aldinger* ran against the vast majority of decisions in other circuits. Jurisdiction of pendent party claims in federal question cases had been exercised without regard to citizenship or amount in controversy by the First, Second, Third, Fifth, and Eighth Circuits.[34] Likewise the Third, Fourth, Sixth, Eighth, and Tenth Circuits had applied pendent party jurisdiction in diversity cases where, as in *Hymer*, a claim involving an additional party failed to meet the jurisdictional amount.[35] Only the Seventh Circuit had agreed with the Ninth in refusing to exercise pendent party jurisdiction under any circumstances.[36] In *Moor*, the Court took judicial notice of the disagreement among the courts of appeals but chose to avoid the issue.[37] In *Aldinger*, the Court granted certiorari to resolve the

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discussed in *Monroe*, or in the language actually used by Congress to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them." *Id.*

32. 407 F.2d 136 (9th Cir. 1969). *Hymer* involved a notably different factual situation from that in *Aldinger*. *Hymer*, a diversity action for personal injuries, held that a plaintiff's wife could not join her claim for loss of consortium with her husband's claims without meeting the $10,000 jurisdictional amount.

33. *Id.* at 137. *Accord*, Moor v. Madigan, 458 F.2d 1217 (9th Cir. 1972) (rejecting pendent party jurisdiction over state tort claims against a county when joined in a § 1983 action against a deputy sheriff); Kataoka v. May Department Stores Co., 115 F.2d 521 (9th Cir. 1940) (rejecting an attempt to join the claim of a plaintiff whose presence would destroy diversity of citizenship).

34. Bowers v. Moreno, 520 F.2d 843, 846-48 (1st Cir. 1975); Florida E. Coast Ry. Co. v. United States, 519 F.2d 1184, 1193-96 (5th Cir. 1975); Curtis v. Everette, 489 F.2d 516, 519-20 (3rd Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); Schulman v. Huck Finn, Inc., 472 F.2d 864, 866-67 (8th Cir. 1973); Almenares v. Wyman, 453 F.2d 1075, 1083-85 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972).

35. Niebur v. State Farm Mut. Auto Ins. Co., 486 F.2d 618, 621 (10th Cir. 1973); Nelson v. Keefer, 451 F.2d 289, 291 (3rd Cir. 1971); F. C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917, 919-20 (6th Cir. 1970); Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 816-17 (8th Cir. 1969); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968), *cert. denied*, 409 U.S. 1000 (1974).

36. Hampton v. City of Chicago, 484 F.2d 602, 611 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); Drennan v. City of Lake Forest, 356 F. Supp. 1277, 1279-80 (N.D. Ill. 1972).

37. Moor v. County of Alameda, 411 U.S. 693, 715 (1973). The Court upheld dismissal of the county on discretionary grounds without reaching the issue of whether it had the power to hear the pendent party claims against the county.

conflict among the circuits.[38]

THE OPINION OF THE SUPREME COURT

Delivering the opinion of the majority, Mr. Justice Rehnquist proposed at the outset to resolve the previously unanswered question of "whether the doctrine of pendent jurisdiction extends to confer jurisdiction over a party as to whom no independent basis of federal jurisdiction exists."[39] Since the appellate courts have generally relied on *United Mine Workers v. Gibbs* to justify the extension of pendent jurisdiction to the pendent party situation, Mr. Justice Rehnquist focused on the historical precedent for that case.[40]

The Synthesis of Pendent Jurisdiction

In 1824, *Osborn v. Bank of the United States*[41] presented the Court with the issue of whether a federal court could exercise federal question jurisdiction over a controversy which also involved issues of state law. Chief Justice Marshall found that, as a practical matter, if a court of original jurisdiction did not have such power it could not function. *Siler v. Louisville & Nashville R.R. Co.*[42] expanded *Osborn* to include the power to resolve a case presenting both issues of state and federal law on purely state grounds, even without reaching the federal questions. In 1926, *Moore v. N.Y. Cotton Exchange*,[43] reflecting the

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

39. *Id.* at 2-3.

40. The *Aldinger* Court discussed the historical evolution of pendent and ancillary jurisdiction. *Id.* at 6-13. For additional authorities see notes 4 & 5 *supra*.

41. 22 U.S. (9 Wheat.) 738 (1824). *Osborn*, although noting that the scope of Supreme Court review of a state court decision was properly limited to issues of federal law, upheld the exercise of federal jurisdiction, based on a statute authorizing the Bank of the United States to sue in federal court, over a dispute involving matters of "general" law in the determination of the legality of a state-imposed tax on the federal bank:

> [W]hen 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 the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in it.

Id. at 823.

42. 213 U.S. 175, 191 (1909). *Siler* involved a state statute establishing a railroad commission and regulating railroad rates which was challeged as being violative of both federal and state law. The *Siler* Court ruled on the state claim without deciding the federal question.

43. 270 U.S. 593, 608-10 (1926). *Moore* relied on Binderup v. Pathe Exch., 263 U.S. 291, 305-06 (1923) for its distinction between dismissal on the merits and dismissal for want of jurisdiction:

> A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court

Siler rationale, sustained jurisdiction over a state based counterclaim which arose out of the same "transaction" as the plaintiff's federal antitrust claim even though it had dismissed the federal claim on the merits.

Drawing upon *Osborn*, *Siler*, and *Moore*, *Hurn v. Oursler*[44] extended the concept of pendent jurisdiction to allow joinder of a plaintiff's state unfair competition claim with his federal copyright claim solely on the consideration of convenience to the parties.[45] *Hurn* proposed a rigid "single cause of action" test for the application of pendent jurisdiction which required a distinction "between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character."[46] The former was held to be a proper situation for an exercise of pendent jurisdiction and the latter not.

The Court reexamined *Hurn* in *Gibbs* and rejected the "single cause of action" test as "unnecessarily grudging" in light of the more flexible "case . . . or controversy" requirement of

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and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, and not upon the absence of it. Jurisdiction as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit.

Moore's "same transaction" test was derived from former Equity Rule 30, Fed. Equity R. of 1972, (now embodied in Fed. R. Civ. P. 13(a)(1)) which provided in relevant part: "[t]he answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit . . . so as to enable the court to pronounce a final judgment in the same suit both on the original and the cross claims."

44. 289 U.S. 238 (1933). *Hurn* extended the holding in Moore v. N.Y. Cotton Exch., 270 U.S. 593, 609-10 (1926) to joinder of a federal and a state claim brought by a single plaintiff, although *Moore* was factually different in that it dealt with joinder of plaintiff's federal claim with defendant's compulsory state counterclaim: "We think the question there [in *Moore*] and the one here, in principle, cannot be distinguished. That a statement of the particular counterclaim there was required by the rule is not material, since the federal jurisdiction can neither be extended nor abridged by a rule of court." 289 U.S. at 242.

45. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966); WRIGHT, *supra* note 4, § 19 at 73.

46. 289 U.S. at 246. The *Hurn* test was formulated before the merger of law and equity in the Federal Rules. Its unwieldy application is best illustrated by the *Hurn* Court's application of the test to the facts. The Court upheld jurisdiction over the state claim of unfair competition with regard to the copyrighted version of the play because it was found to be a separate ground for patent infringement. However, the *Hurn* Court declined to extend federal jurisdiction over the state claim of unfair competition for the uncopyrighted versions of the play since it was found to involve a separate cause of action.

article III,[47] which, the Court found, is broad enough to encompass both federal and nonfederal claims arising from the same "common nucleus of operative fact."[48] Yet, although *Gibbs* adopted a more flexible standard for pendent jurisdiction, factually *Gibbs* and its predecessors dealt only with joinder of nonfederal *claims* brought by parties already before the court asserting valid federal claims. Unlike *Aldinger*, none of the foregoing cases dealt with the separate issue of joinder of *parties* over whom no independent basis of federal jurisdiction exists. However, paralleling the growth of pendent jurisdiction, a historically distinct line of cases dealing with joinder of parties developed under the name of ancillary jurisdiction.

The Synthesis of Ancillary Jurisdiction

The inception of ancillary jurisdiction has been traced to *Freeman v. Howe*.[49] In 1860, *Freeman* held that parties claiming property which had come under the control of a federal court could litigate their claims in a federal forum regardless of citizenship. This followed from the *Freeman* Court's initial determination that state court interference with property already under the federal court's control must be prohibited to protect the district court's jurisdiction and was necessary to provide all claimants with a forum in which to press their claims.[50] The claims of parties lacking diversity of citizenship were entertained "ancillary" to the federal court action which had taken control of the property.

Stewart v. Dunham[51] utilized a rationale similar to that in *Freeman*. In *Stewart*, the Court held that once a diversity action had been properly removed to a district court, the subsequent addition of new parties as co-complainants could not deprive the court of its jurisdiction over the matter even though their addition at the outset would have destroyed diversity jurisdiction.

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47. United Mine Workers v. Gibbs, 383 U.S. 715, 724-25 (1966). The *Gibbs* Court focused on the practical overlay of facts which would be necessary to meet the article III "case" requirement while the *Hurn* Court clung to traditionally obscure definitions of what constitutes a cause of action.

48. *Id.* at 725.

49. 65 U.S. (24 How.) 450 (1860). *Freeman* was a diversity action in which the United States marshall seized certain railroad cars by attachment. Mortgagees of the railroad commenced an action in state court. The Supreme Court held, however, that a state court could not interfere with the federal court's disposition of the property already under its control.

50. WRIGHT, *supra* note 4, § 19, at 21-22. *Cf.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (holding that a federal court has jurisdiction to do those acts necessary to effectuate and protect its judgment from relitigation in a state court).

51. 115 U.S. 61 (1885).

In *Fulton National Bank of Atlanta v. Hozier*,[52] the Court established the general rule that only after federal jurisdiction had been exercised over an action or property could a federal court entertain ancillary claims by intervention. Yet one year later, *Moore v. N.Y. Cotton Exchange*[53] expanded the concept to reach beyond intervening claims to property to include the power to hear a defendant's nonfederal counterclaim after dismissing the plaintiff's federal claim even where the nonfederal counterclaim did not involve property within the federal court's control. *Moore*, shifted the rationale underlying the ancillary jurisdiction cases from that of the necessity of providing all claimants with their day in court to considerations of convenience and the avoidance of multiple suits arising from the same "transaction."[54]

Merger of the Doctrines of Pendent and Ancillary Jurisdiction

On certiorari, Aldinger argued that the development of the doctrines of pendent and ancillary jurisdiction evidenced an erosion of historical distinctions with the two doctrines becoming conceptually indistinguishable. One factor bearing on Aldinger's assertion is the move from necessity to convenience as the underlying rationale for both doctrines. Since *Moore* dealt with joinder of different parties' claims it has been considered an ancillary jurisdiction case. However, the *Moore* case presented no "principled" difference to the *Hurn* Court from the joinder of a plaintiff's federal and nonfederal claims against a single defendant to avoid a multiplicity of actions.[55] Also, the development of the "common nucleus of operative fact" test in *Gibbs* more closely resembles the same "transaction" test in *Moore* than the obtuse "single cause of action" test in *Hurn*. Lastly, the *Gibbs* Court's reference to the liberal policies of joinder of both *claims* and *parties* in the Federal Rules of Civil Procedure indicates that the underlying concerns in each situation are the same —namely convenience and efficiency. Thus Aldinger proposed that, because her state claim against the county arose from the

52. 267 U.S. 276, 280 (1925). *Hozier* was a bankruptcy proceeding in which a plaintiff intervened seeking to reach assets of the bankruptcy creditor which had been deposited in a bank before bankruptcy proceedings ensued. The Court held that it lacked jurisdiction over the claims against the third party bank and, since the assets in question had not come within the federal court's control, ancillary jurisdiction was not available over the claims against the third party bank.

53. 270 U.S. 593 (1926) (this same case is discussed in terms of its effect on the development of pendent jurisdiction in notes 43 & 44 and accompanying text *supra*).

54. *See* WRIGHT, *supra* note 4, § 19, at 22-23.

55. Hurn v. Oursler, 289 U.S. at 242. See note 44 *supra*.

same "common nucleus of operative fact" as her federal claims against individual defendants, it satisfied the *Gibbs* test for pendent *claim* jurisdiction, and because the Federal Rules and ancillary jurisdiction provide for liberal joinder of *parties*, the district court had the power to hear her whole case.[56]

The *Aldinger* majority, although recognizing *Moore* as the "decisional bridge" between the doctrines,[57] declined "to formulate any general, all-encompassing jurisdictional rule."[58] Avoiding the issue initially addressed, the Court instead distinguished the holding in *Gibbs*.

The Aldinger Court's Reconsideration of Gibbs

The *Aldinger* majority differentiated *Gibbs* from the case at hand on both factual and legal grounds. The factual difference noted was that in *Gibbs* the defendant was already in federal court on a substantial federal claim when forced to answer the plaintiff's state claim, whereas in *Aldinger* the plaintiff sought to force a defendant into federal court who would not otherwise be there.[59] Acknowledging that considerations of convenience and efficiency apply to both situations, the *Aldinger* majority stressed that Aldinger was not precluded from bringing her whole action in state court, concluding that where convenience and efficiency are available at the state level such considerations carry less weight at the federal level.[60]

The legal difference noted between *Aldinger* and *Gibbs* lies in the different statutory grants of subject matter jurisdiction invoked in each case. *Aldinger*, the majority stated, posed an issue not presented in *Gibbs* or its predecessors: whether the statutory grant of subject matter jurisdiction which supports the petitioner's federal claim is indicative of congressional intent to limit the federal court's power over appended nonfederal claims involving new parties.[61] Although faced with congressional silence on the scope of action conferred by section 1331, the juris-

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56. Aldinger v. Howard, 427 U.S. 1, 12-13 (1976). *Accord*, Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of the Two Doctrines*, 22 UCLA L. REV. 1263 (1975).
57. 427 U.S. at 12.
58. *Id.* at 13.
59. *Id.* at 14.
60. *Id.* at 15-16. Considerations such as efficiency and convenience are not the only considerations relevant to the presence or absence of jurisdiction, especially in light of the well established principle that the federal courts are courts of limited, as opposed to general, jurisdiction. *See* Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (4th Cir. 1972).
61. 427 U.S. at 16. "[W]hether by virtue of the grant of subject-matter jurisdiction, upon which petitioner's principal claim . . . rests, Congress has addressed itself to the party as to whom jurisdiction pendent to the principal claim is sought." *Id.*

dictional statute in *Gibbs*, the majority found evidence of congressional intent to limit the scope of action brought under section 1343(3), the jurisdictional statute in *Aldinger*. This deduction was arrived at by reading section 1343, which authorizes original jurisdiction over *"any civil action authorized by law,"* in light of the narrowly construed cause of action conferred by section 1983 against natural "persons."[62] The majority reasoned that, since Congress had expressly excluded counties from liability under section 1983, and, implicitly, from the grant of jurisdiction in section 1343, the scope of a "civil action" over which section 1343 confers original jurisdiction should not be so broadly read as to bring the county back into federal court under the doctrine of pendent party jurisdiction.[63]

The holding in *Aldinger* was expressly limited to avoid any "sweeping pronouncements" upon the existence of pendent party jurisdiction in other factual contexts. The rule only extends to assertions of pendent party jurisdiction over a municipal corporation when joined with section 1983 claims against a municipal officer where any independent basis of federal jurisdiction over the claims involving the municipal corporation, such as diversity of citizenship, is lacking.[64] As a general guideline, though, the Court suggested that the following test be applied to all other pendent party situations: first, a federal court must look to the statutory grants of federal jurisdiction for express or implied congressional intent to limit such jurisdiction; second, a court should turn to the general contours of article III to determine whether the entire action may be viewed as a single constitutional "case."[65]

The Dissent

The *Aldinger* minority attacked the decision on several

62. *Id.* at 16-17. "[A]s against a plaintiff's claim of *additional* power over a 'pendent party,' the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress." *Id.* at 17.

63. *Id.* at 17. The Court's reluctance to allow indirectly that which is directly prohibited was consistent with the earlier decisions which followed Monroe v. Pape, 365 U.S. 167 (1961). *See* City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973); and discussion in notes 23-28 and accompanying text *supra*.

64. 427 U.S. at 17 n.12.

> All that we hold is that where the asserted basis of federal jurisdiction over a municipal corporation is not diversity of citizenship, but is a claim of jurisdiction pendent to a suit brought against a municipal officer within § 1343, the refusal of Congress to authorize suits against municipal corporations under the cognate provisions of § 1983 is sufficient to defeat the asserted claim of pendent party jurisdiction.

Id.

65. *Id.* at 17-18.

grounds.[66] Primarily, the dissent disagreed with the factual and legal distinctions drawn by the majority between *Aldinger* and *Gibbs*. Factually, the dissent argued that, since article III deals with subject matter jurisdiction, not *in personam* jurisdiction, the same principles applied by the *Gibbs* Court to pendent state claims should apply in *Aldinger* regardless of whether joinder of the state claim involves additional parties.[67] The majority's statutory distinctions were considered equally untenable since neither section 1331 nor section 1343 is, on its face, addressed to the propriety of the exercise of pendent jurisdiction.[68]

The dissent criticized the majority's jurisdictional test as being capable, at one level, of invalidating every exercise of pendent party jurisdiction which, by definition, will "involve a party as to whom Congress has impliedly 'addressed itself' by not expressly conferring subject-matter jurisdiction on the federal courts."[69] The majority's application of the test to the facts drew the harshest criticism. Although agreeing with the majority's conclusion that the legislative history of section 1983 indicates a clear intent not to impose *federal* liability upon political subdivisions of the states, the dissent argued that such a conclusion in no way indicates a concomitant aversion to *state* imposed liability such as Aldinger sought to invoke.[70]

ANALYSIS

The majority opinion in *Aldinger* relies on a number of tenuous assumptions and distinctions. The opinion's shortcom-

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66. Mr. Justice Brennan, joined by Mr. Justice Marshall and Mr. Justice Blackmun, dissented. The dissenting opinion was written by Mr. Justice Brennan, who, coincidentally, authored the majority opinion in *Gibbs*.

67. Gibbs concerned a state-law claim jurisdictionally pendent to one of federal law, but no reason appears why the identical principles should not equally apply to pendent state law claims involving the joinder of additional parties. In either case the Art. III question concerns only the subject matter and not the *in personam* jurisdiction of the federal courts. In either case the question of Art. III power in the federal judiciary to exercise subject matter jurisdiction concerns whether the claims asserted are such as "would ordinarily be expected to [be tried] in one judicial proceeding," and the question of discretion addresses "considerations of judicial economy, convenience and fairness to litigants."

427 U.S. at 20-21 (footnote omitted).

68. The purely jurisdictional statute involved in this case, 28 U.S.C. § 1343(3), in no way speaks to the issue of pendent party jurisdiction in respect to joinder of defendants under pendent state law claims. On its face that statute speaks only to jurisdiction over civil actions "authorized by law to be commenced by any person," and plainly does not address the question of what parties shall be joined as defendants.

427 U.S. at 23-24.

69. *Id.* at 22-23.

70. *Id.* at 24.

ings may be explained, in part, by the majority's conscious effort to avoid establishing any general jurisdictional rule. However, the opinion leaves several crucial issues unresolved rendering the underlying constitutional rationale of questionable validity.

As emphasized by the dissent, the weakest assumption relied on by the majority is that the legislative history of section 1983 dictated the outcome in *Aldinger*. Although the opinion did not discuss the legislative history of section 1983, by citing *Moor* and *Bruno* for the proposition that a county is not a suable "person" within section 1983, the majority indicated that the earlier judicial interpretation of the act applied.[71] Just as the Ninth Circuit had done, the majority generalized that, after *Monroe*, section 1983 actions could not be maintained against municipal corporations for any purpose.[72] Yet *Monroe*, *Moor*, and *Bruno* only dealt with the scope of the federal cause of action created by section 1983; none of them confronted the separate issue of a federal court's power to hear pendent party claims.

The original section 1983, entitled "*An act to enforce the Provisions of the Fourteenth Amendment* . . . ," was ratified during the Reconstruction Era following the Civil War.[73] The purpose of the act was primarily to provide a federally enforcible remedy against acts of terrorism by the Ku Klux Klan, because the states had shown an unwillingness and inability to provide adequate protection on their own.[74] The original bill which was passed by the House was comparable to its present day form, however, the Senate tacked on what is known as the Sherman Amendment.[75] The Sherman Amendment was notably broader than the original provisions, proposing to impose liability on any "county, city, and parish" where citizens suffered violations of their constitutional rights.[76] The House's eventual rejection of

71. *Id.* at 16. For strong argument that Monroe v. Pape, 365 U.S. 167 (1961) should have been distinguished on its facts see *Kates and Kouba, supra* note 16, at 147-56.

72. 427 U.S. at 16.

73. Act of April 20, 1871, 17 REV. STAT. 13, ch. 22 § 1.

74. *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972); Monroe v. Pape, 365 U.S. 167, 251-52 (1961) (Frankfurter, J., dissenting).

75. CONG. GLOBE, 42d Cong., 1st Sess. 663 & 749 (1871).

76. The Sherman Amendment appeared in two forms. The first version provided that if certain enumerated offenses against property or persons were committed to deprive any person of rights conferred by the Constitution and laws of the United States that:

> [I]n every such case *the inhabitants of the county, city, or parish* in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense . . . . And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, or any person in said *county, city, or parish*, and the said county, city, or, parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principle or ac-

the Sherman Amendment has consistently been cited as evidence that Congress did not intend to impose liability under section 1983 upon the political subdivisions of the states.[77] It is clear from a reading of the legislative history that congressional rejection of the Sherman Amendment was based on two central concerns: (1) underlying doubts as to the constitutionality of such an act;[78] and (2) the undesirable prospect of imposing liability on local governmental units regardless of fault or the ability to prevent the unlawful activity.[79] Yet, Congress in no way intended to restrict liability which the states themselves imposed.[80] It does not follow that the same motivations behind congressional rejection of *federally imposed liability* apply with equal force to negate a federal court's jurisdiction to hear claims based on *state imposed liability*. Indeed, the majority did not say that diversity jurisdiction would be unavailable to support a state claim against a county when joined with a section 1983 claim against an individual.[81]

The majority assumed that the narrow scope of section 1983

> cessory in such riot in an action in any court of competent jurisdiction.

CONG. GLOBE, 42 Cong., 1st Sess. 663 (1871) (emphasis added).

In response to harsh criticism from the House, a second version was drafted which lessened governmental liability:

> And *any payment of any judgment*, or part thereof *unsatisfied*, recovered by the plaintiff in such action, *may if not satisfied by the individual defendant . . . be enforced against such county, city or parish. . . .* And such county, city or parish, so paying, shall also be subrogated to all plaintiff's rights under such judgment.

Id. at 749.

77. *See* City of Kenosha v. Bruno, 412 U.S. 507, 512 (1973); Moor v. County of Alameda, 411 U.S. 693, 699-700 (1973); Monroe v. Pape, 365 U.S. 167, 172-74 (1961).

The Supreme Court's use of the legislative history of § 1983 has been criticized by a number of commentators. *See Kates and Kouba, supra* note 16, at 132-34; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1, 5-36 (1974); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 945-51 (1976); [hereinafter cited as *Remedies*]; Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1488-89 (1969); *Developing, supra* note 26, at 1205-07; 45 UMKC L. REV. 29, 47-52 (1976); 8 VAL. L. REV. 215, 229-34 (1974).

The holdings of *Monroe, Moor*, and *Bruno* may not retain their validity for long. In response to these and several other Supreme Court decisions narrowing the scope of actions under § 1983, Senators Edward W. Brooke and Charles McC. Mathias, Jr. and Congressman Parren J. Mitchell have introduced a bill entitled "The Civil Rights Improvements Act of 1977" which would provide, among other things, that the term "person" in § 1983 would include "any individual, State, municipality, or any agency or unit of government of such State or municipality." S. 35, 95th Cong., 1st Sess. (1977). H.R. 4514, 95th Cong., 1st Sess. (1977).

78. *See* Moor v. County of Alameda, 411 U.S. 693, 708 (1973).

79. *See* City of Kenosha v. Bruno, 412 U.S. 507, 517-20 (1973) (appendix to opinion of Douglas, J. dissenting in part).

80. Aldinger v. Howard, 427 U.S. 1, 25-30 (1976) (Brennan, J. dissenting).

81. *Id.* at 17 n.12. *See* note 64 *supra*.

should control the scope of jurisdiction conferred by section 1343.[82] The only explanation offered in support was that section 1983 is one of the "*civil actions authorized by law*" over which original jurisdiction is conferred by section 1343.[83] Since the decision hinged on this interrelationship between a federal cause of action and a federal jurisdictional statute, it is puzzling that no further rationale was offered. Although section 1343 confers federal jurisdiction over section 1983 actions, that jurisdictional grant is not limited to section 1983 actions.[84] Since section 1983 creates a federal cause of action for civil rights grievances and does not restrict the right of the states to create their own causes of action it is not clear that section 1983 limitations should control the broad jurisdictional grant of section 1343 which gives the federal courts the power to hear "*any civil action authorized by law.*"

Another unexplained assumption relied on by the majority is that joinder of *parties* requires stricter statutory scrutiny than joinder of *claims.* In distinguishing *Gibbs* and its predecessors the majority concluded that:

> [n]one of them posed the need for a further inquiry into the underlying statutory grant of federal jurisdiction insofar as a flexible analysis of concepts such as "question," "claim," and "cause of action," because Congress had not addressed itself by statute to this matter. In short, Congress had said nothing about the scope of the word "Cases" in Art. III which would offer guidance on the kind of elusive question addressed in *Osborn* and *Gibbs*: whether and to what extent jurisdiction extended to a parallel state claim against the existing federal defendant.[85]

If, in the jurisdictional statute considered in *Gibbs*, Congress had said nothing to offer guidance as to whether the scope of a constitutional "case" is broad enough to encompass pendent *claims*, it is equally arguable that Congress has been silent as to the existence of pendent *party* jurisdiction as presented in *Aldinger.*[86] Sections 1343 and 1983, when read together, do not in-

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82. 427 U.S. at 23-24. Mr. Justice Brennan made the same assumption in his concurring opinion in City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973). For a discussion of the historical relationship of 42 U.S.C. § 1983 and 28 U.S.C. § 1343 see 8 VAL. L. REV. 215, 229-34 (1974) (arguing that § 1343 confers jurisdiction on federal courts for direct actions under the Constitution and is not limited in scope to actions under § 1983). *See also* 45 UMKC L. REV. 29, 52-54 (1976).
83. 427 U.S. at 16-17.
84. *See* 28 U.S.C. § 1343 (1970).
85. 427 U.S. at 13-14.
86. The argument has been made that implicit in the holding of United Mine Workers v. Gibbs, 383 U.S. 715 (1966), is the notion that Congress has in fact conferred upon the federal courts the whole range of article III power by granting original jurisdiction over all "civil actions" in § 1331, the federal question statute. One thing is certain—Congress has not expressly disapproved the holding in *Gibbs*. *See* Note,

dicate a congressional attitude toward pendent *party* jurisdiction any more than section 1331, the federal jurisdictional statute in *Gibbs*, indicates a congressional attitude toward pendent *claim* jurisdiction. Although sections 1343 and 1983 do not expressly confer federal jurisdiction over parties such as Spokane County, neither does section 1331 expressly confer federal jurisdiction over claims arising under state law. Thus the statutory distinctions relied upon by the majority are not discernible and lend little support to its conclusion.

Equally unclear is the significance of the *Aldinger* majority's factual distinction between *Gibbs* and *Aldinger*. The majority stressed that *Aldinger*, unlike *Gibbs*, presented an inconvenience to a defendant who would not otherwise be in federal court.[87] However, the majority overlooked the underlying purpose behind section 1983—*to provide plaintiffs with a federal forum for civil rights grievances*.[88] Although pendent party jurisdiction would force a defendant into federal court, the refusal to exercise pendent party jurisdiction may, as a practical matter, force plaintiffs with civil rights grievances into state court in order to achieve the convenience and efficiency of suing both individual and corporate defendants in one action. Since *Gibbs* was justified, in part, by concerns of federalism arising from the defendant's contention that the state law claims against him had been preempted by federal law,[89] it is arguable that similar concerns inhere in *Aldinger* because it is in the interests of federalism to provide unimpeded access to the federal courts for civil rights grievances.

The refusal to allow Aldinger to sue both defendants in one federal action runs against another underlying concern in *Gibbs*. The *Gibbs* test required that a plaintiff's claims be so related that "if considered without regard for their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . . ."[90] Reflecting the rationale for res judicata and collateral estoppel, the *Gibbs* doctrine was aimed at the promotion of judicial economy and fairness to the parties.[91] The decision in *Aldinger* does not reflect those same concerns. Since recent decisions have re-

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Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases, 62 VA. L. REV. 194, 197, 202-03 nn. 47 & 49 (1976).

87. 427 U.S. at 14.

88. *See* text accompanying note 74 *supra*.

89. United Mine Workers v. Gibbs, 383 U.S. 715, 729 (1966). "[T]he question whether the permissible scope of the state claim was limited by the doctrine of pre-emption afforded a special reason for the exercise of pendent jurisdiction; the federal courts are particularly appropriate bodies for the application of pre-emption principles."

90. *Id.* at 725.

91. *Id.* at 723.

jected the mutuality requirement of collateral estoppel,[92] a litigant pressing section 1983 claims in federal court may face a serious disadvantage when proceeding against a corporate defendant on a vicarious liability theory in state court. If the plaintiff wins in federal court, he will of course be forced to prove the same issues in state court; but if the plaintiff loses in his federal action, the state defendant may be able to raise collateral estoppel in the state action.

The majority did take notice that the elements of efficiency, convenience and fairness to the parties were equally present in *Aldinger* and *Gibbs*, yet the opinion indicates that when, as in *Aldinger*, such factors are available in state courts having concurrent jurisdiction over the federal claims, they carry little weight.[93] Conversely, where the federal claims fall within the exclusive jurisdiction of the federal courts, the majority indicates that a stronger argument can be made for joinder of pendent party claims.[94] However, as the dissent implies, such a distinction appears more relevant to the *discretion* of the court than to the *power* to entertain pendent party actions.[95]

CONCLUSION

The *Aldinger* decision does not rest firmly upon the grounds set forth by the majority. The majority's insistence that judicial expansions of federal jurisdiction must yield to the will of Congress follows logically from a reading of article III. Yet the majority has failed to adequately explain why pendent party jurisdiction is less justifiable than pendent claim jurisdiction.

Perhaps the best explanation for the holding in *Aldinger* is that it fits into a decisional trend toward limiting access to the federal courts.[96] The Burger Court has consistently restricted federal jurisdiction in recent decisions on standing,[97] jurisdictional amounts in class actions,[98] and the scope of federal habeas

92. *E.g.*, Blonder-Tongue Lab., Inc. v. Univ. of Ill. Foundation, 402 U.S. 313 (1971).
93. Aldinger v. Howard, 427 U.S. 1, 14-15 (1976).
94. *Id.* at 18.
95. *Id.* at 35-37.
96. *See* Askin, *Limiting Access to Federal Courts*, 33 GUILD PRAC. 130 (1976); Goldberg and Schwartz, *Narrowing Access to Justice*, 5 STUDENT LAW. 34 (1977); Note, *Zahn - The Freeze on Federal Jurisdiction*, 1975 WASH. U. L. Q. 447.
97. Simon v. E. Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).
98. Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) (holding that ancillary jurisdiction was not available to support the claims of members of a class in a class action who did not individually claim in excess of $10,000).

corpus review.[99] As stated at the outset, the federal caseload has grown rapidly in recent years, especially in the civil rights field. In response, the Burger Court has made the federal courts inaccessible to civil rights litigants suing public corporations under section 1983, and unattractive to litigants with claims against both individuals and public corporations. Ironically, *Aldinger* is not likely to effect any real reduction in the caseload because litigants have discovered a new means for bringing public corporations into federal court for constitutional violations—suing directly under the Constitution.[100]

The direct effect of *Aldinger* upon the development of pendent party jurisdiction is bound to be minimal.[101] The Court's avoidance of the issue of pendent party power leaves the

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99. Stone v. Powell, 428 U.S. 465 (1976).

100. *See* City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973) (Brennan, J., dissenting); Bivens v. Six Fed. Narcotics Agents, 403 U.S. 388 (1971) (sustaining a direct action for damages under the fourth amendment against federal officers); Stepp v. Avoyelles Parish School Bd., 545 F.2d 527 (5th Cir. 1977) (acknowledging *Aldinger* while sustaining a direct action under the Constitution against a school board); Skehan v. Board of Trustees, 501 F.2d 31, 44 (3d Cir. 1974) (holding that even though the defendant was not a "person" under § 1983 that allegations of fourteenth amendment violations causing damages in excess of $10,000 were sufficient to meet § 1331 jurisdictional requirements); Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976) (sustaining a direct action against a municipality under the fourteenth amendment and § 1331 when joined with a § 1983 action against individuals). *See also Remedies, supra* note 77, at 952-60; 36 MD. L. REV. 123, 127-52 (1976). *Contra*, Livingood v. Townsend, 422 F. Supp. 24 (D. Minn. 1976) (refusing to allow a direct action against a municipality due to *Aldinger*). *But cf.* McDonald v. Illinois, 557 F.2d 596 (7th Cir. 1977) (affirming the dismissal of a direct action against a county on eleventh amendment grounds).

101. The following cases have cited Aldinger v. Howard, 427 U.S. 1 (1976), for a variety of reasons: Stepp v. Avoyelles Parish School Bd., 545 F.2d 527 (5th Cir. 1977) (upholding direct action under the Constitution against a school board while acknowledging that *Aldinger* had precluded a § 1983 action against the board); Tully v. Mott Supermarkets, Inc., 540 F.2d 187 (3d Cir. 1976) (citing *Aldinger* as latest discussion of *Gibbs*, in exercising discretionary dismissal of a state claim joined with a federal claim which had been dismissed for lack of standing); Livingood v. Townsend, 422 F. Supp. 24 (D. Minn. 1976) (refusing to apply a § 1331 direct action under the Constitution against a municipality due to the *Aldinger* decision); Carlo C. Gelardi Corp. v. Miller Brewing Co., 421 F. Supp. 237 (D.N.J. 1976) (applying *Aldinger* in the context of a *Gibbs* joinder of claims situation); Hupart v. Board of Higher Ed., 420 F. Supp. 1087 (S.D.N.Y. 1976) (dismissing state claims against the school board brought pendent to civil rights claims against individuals); Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976) (upholding a direct action under the Constitution and § 1331 against a municipality); Haber v. County of Nassau, 418 F. Supp. 1120 (E.D.N.Y. 1976) (dismissing pendent state claims against the county); Rende v. Rizzo, 418 F. Supp. 96 (E.D. Pa. 1976) (dismissed with leave to amend complaint for lack of specificity in action joining claims under § 1983 and direct action under Constitution against individual defendants); Regan v. Sullivan, 417 F. Supp. 399 (E.D.N.Y. 1976) (dismissing pendent state claims against individual defendants after ruling that federal claims under § 1983 and the Constitution were barred by statute of limitations); Vargas v. Correa, 416 F. Supp. 266 (S.D.N.Y. 1976) (upheld pendent state claim against a municipality when joined with a § 1983 claim against prison guard. This case was decided after the circuit court decision in *Aldinger* but before the Supreme Court decision).

lower courts free to apply the doctrine in contexts other than section 1983 actions. However, several inferences may be drawn from the opinion. First, the Court has evidenced a reluctance to deny the existence of pendent party jurisdiction, although indicating that pendent party jurisdiction faces greater obstacles than pendent claim jurisdiction.[102] Second, the Court has indicated that special attention must be given to the relevant federal statutes.[103] Lastly, considerations of efficiency and fairness will be weighed according to the availability of an alternative forum for all claims.[104] Without a more definitive statement on the subject, one thing is certain: the conflict among the circuits is sure to continue.

Wallace J. Wolff

102. 427 U.S. at 18.
103. *Id.*
104. *Id.* at 15.