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PENDENT PARTY JURISDICTION AND SECTION 1983: WHEN HAS CONGRESS "BY IMPLICATION NEGATED" JURISDICTION?

I. Introduction

Plaintiffs suing today under Section 1983 of Title 42 of the United States Code¹ face an uncertainty in the law that needlessly curtails their access to federal court.² In a typical case, Plaintiff has brought a section 1983 action against an Employee who, while acting under color of state law,³ has allegedly deprived Plaintiff of his constitutional rights.⁴ The Employee is judgment proof;⁵ Plaintiff therefore decides to sue the Employee's Employer as well, under the doctrine of respondeat superior.⁶ But, because of certain restrictions on section 1983 actions,⁷ Plaintiff cannot sue the Employer directly under section

1. 42 U.S.C. § 1983 (1982). Section 1983 provides that: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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.

Id.

For a discussion of the historical origins and current use of § 1983, see *infra* notes 45-107 and accompanying text. For an excellent summary of § 1983 actions, see 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE 2d §§ 3573-3573.2 (1984) [hereinafter cited as WRIGHT].

2. See *infra* notes 13-27, 234-81 and accompanying text.

3. As one of the elements of a § 1983 action, the plaintiff must prove that the person who deprived him of constitutional rights was acting under color of state law. See *infra* notes 51-54 and accompanying text. For a discussion of the meaning of the term "under color of state law," see *infra* notes 55-58 and accompanying text.

4. Deprivation of constitutional rights is one of the elements of a § 1983 action. See *infra* notes 51-53 and accompanying text.

5. The term "judgment proof" describes "all persons against whom judgments for money recoveries are of no effect; e.g., persons who are insolvent . . ." BLACK'S LAW DICTIONARY 759 (5th ed. 1979).

6. Respondeat superior is a form of vicarious or imputed liability. See W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 499 (5th ed. 1984) [hereinafter cited as PROSSER]. Under this doctrine, "a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." BLACK'S LAW DICTIONARY 1179 (5th ed. 1979). Specifically, the master is liable only when the servant has acted within the scope of his employment. See PROSSER, *supra* at 502. liability. See *infra* notes 92-107 and accompanying text.

1983. Plaintiff therefore sues the Employer under *state law*.⁸

Normally, Plaintiff would have to bring this state-law claim⁹ in the state courts.¹⁰ Under the doctrine known as pendent party jurisdiction,¹¹ however, a plaintiff bringing a federal claim in federal court can also bring a *state-law* claim in federal court against an entirely new party, if the state-law claim is sufficiently related to the federal claim.¹² Thus, Plaintiff could use pendent party jurisdiction to append his state-law claim against the Employer to his section 1983 claim against the Employee.

Tremendous uncertainty, however, surrounds the doctrine of pendent party jurisdiction.¹³ The doctrine originally developed in the

8. For examples of cases in which plaintiffs have used state-law respondeat superior claims against municipalities to substitute for § 1983 claims, see *infra* note 106.

9. As used in this Note, "nonfederal" or "state-law" refers to a claim that, considered independently, falls outside the scope of jurisdiction granted by article III, section 2 of the United States Constitution. A "federal" claim is one that falls within this scope. For a discussion of article III limitations on federal court jurisdiction, see *infra* notes 108-12 and accompanying text.

10. See *infra* notes 108-19 and accompanying text.

11. "Pendent party jurisdiction" has been defined as the doctrine that allows a party "who has asserted a federal claim against one party over which there is jurisdiction, . . . to join an entirely different party on the basis of a state-law claim over which there is no independent basis of federal jurisdiction." *Cheltenham Supply Corp. v. Consolidated Rail Corp.*, 541 F. Supp. 1103, 1105 n.3 (E.D. Pa. 1982). It is distinct from pendent jurisdiction, which allows a party to join a state-law claim against the *same* party against which it has federal claims. See *id.* For a discussion of pendent party jurisdiction, see *infra* notes 194-233 and accompanying text.

12. See *supra* note 11, *infra* notes 181-202 and accompanying text. Other limitations on the use of pendent party jurisdiction are discussed below. See *infra* notes 215-20 and accompanying text.

13. The confusion has been noted by both the courts, see e.g., *Grimes v. Chrysler Motors Corp.*, 565 F.2d 841, 844 (2d Cir. 1977) (*Aldinger* "makes it difficult to determine" when to allow pendent party jurisdiction); *Fritts v. Niehouse*, 604 F. Supp. 823, 828-30 (W.D. Mo. 1984) (courts in need of guidance), *aff'd*, 774 F.2d 1170 (8th Cir. 1985), and the commentators. See, e.g., Bagwell, *Federal Pendent Party Jurisdiction and Pendency in Diversity Cases*, 38 ALA. LAW. 333, 333 (1977) [hereinafter cited as Bagwell]; Note, *Unravelling the "Pendent Party" Controversy: A Revisionist Approach to Pendent and Ancillary Jurisdiction*, 64 B.U.L. REV. 895, 922-23 (1984) [hereinafter cited as *Unravelling*]; Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127, 142 (1977) [hereinafter cited as *Pendent Jurisdiction*]; Comment, *The Concept of Law-Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered*, 87 YALE L.J. 627, 647 n.112 (1978) [hereinafter cited as *Law-Tied Jurisdiction*]; Redish, Book Review, 85 COLUM. L. REV. 1378, 1398 (1985) [hereinafter cited as Redish]; Capra, *Pendent Parties, Pendent Claims: A Solution to the Gordian Knot*, Nat'l L.J., Oct. 4, 1982, at 22, cols. 1-2 [hereinafter cited as Capra].

lower federal courts¹⁴ and has never received explicit approval from the Supreme Court.¹⁵ As a result, many courts and some commentators have questioned its validity.¹⁶ Additional confusion has been caused by the nature of the few Supreme Court decisions that have addressed the issue of pendent party jurisdiction.¹⁷ In the first of these decisions, *Aldinger v. Howard*,¹⁸ the Court articulated a test to determine whether a particular use of pendent party jurisdiction was proper. This "*Aldinger* test" essentially requires a federal court to examine congressional intent: before exercising pendent party jurisdiction, a federal court must "satisfy itself . . . that Congress in the statutes conferring jurisdiction has not expressly or by implication negated [the] existence" of such jurisdiction.¹⁹

This test, according to many courts and legal scholars, is both vague²⁰ and illogical,²¹ and gives the lower federal courts little guidance as to exactly what kind of congressional activity will constitute the express or implied "negation" in question.²² Later Supreme

14. See *infra* notes 194-202 and accompanying text.

15. See *infra* notes 203-33 and accompanying text. See also *Onesti v. Thomson McKinnon Secs., Inc.*, 619 F. Supp. 1262, 1264 (N.D. Ill. 1985); *Knudsen v. D.C.B., Inc.*, 592 F. Supp. 1232, 1235 (N.D. Ill. 1984); *Bostedt v. Festivals, Inc.*, 569 F. Supp. 503, 505 (N.D. Ill. 1983).

16. See, e.g., *Ayala v. United States*, 550 F.2d 1196, 1200 (9th Cir.), cert. dismissed, 435 U.S. 982 (1978); *Bright v. City of New York*, No. 83 Civ. 7775-CSH (S.D.N.Y. Apr. 4, 1985) (available Jan. 1, 1986, on LEXIS, Genfed library, Dist file); *Pirrone v. North Hotel Assocs.*, 108 F.R.D. 78, 84 (E.D. Pa. 1985).

17. See *infra* notes 230-35 and accompanying text.

18. 427 U.S. 1 (1976). For a discussion of the facts and holding of *Aldinger*, see *infra* notes 208-25 and accompanying text.

19. *Aldinger*, 427 U.S. at 18. For a discussion of the analysis the federal courts should use to ascertain whether Congress has "negated" jurisdiction, see *infra* notes 282-362 and accompanying text.

20. See, e.g., *Fritts v. Niehouse*, 604 F. Supp. 823, 828 (W.D. Mo. 1984) ("extremely vague standard"), *aff'd*, 774 F.2d 1170 (8th Cir. 1985); Bagwell, *supra* note 13, at 344 (1977) ("exceptionally dull tool"); Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1401 (1983) ("vague") [hereinafter cited as Matasar, *Rediscovering*]; *Unravelling*, *supra* note 13, at 904 ("loose standard"); *Pendent Jurisdiction*, *supra* note 13, at 142 ("considerable uncertainty" in idea of implied negation).

21. See, e.g., Luneburg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211, 214 (1982) ("unconvincing rationale") [hereinafter cited as Luneburg]; Redish, *supra* note 13, at 1396 (*Aldinger* opinion "disregards logic").

22. See, e.g., *Fritts*, 604 F. Supp. at 828; Bagwell, *supra* note 13, at 333; Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C.D. L. REV. 103, 167 (1983) [hereinafter cited as Matasar, *Primer*]; *Unravelling*, *supra* note 13, at 913; *Pendent Jurisdiction*, *supra* note 13, at 142; Redish, *supra* note 13, at 1396-98; Capra, *supra* note 13, at 22, col. 3.

Court opinions have failed to provide clarification.²³ As a result, in the ten years since *Aldinger*, the lower federal courts have been left in a state of confusion and dissension over how to apply the test.²⁴

Because *Aldinger* itself was a section 1983 case,²⁵ the confusion surrounding its test had a particularly strong impact on section 1983 cases. Some courts have flatly held that pendent party jurisdiction is *never* available in a section 1983 case.²⁶ Others, citing to a perceived hostility toward the doctrine on the part of the Supreme Court, have taken an extremely conservative approach to the doctrine.²⁷

This Note maintains that such courts have interpreted the *Aldinger* test in a far more restrictive and unanalytic way than the Supreme

23. See *infra* notes 230-81 and accompanying text. For the purposes of this Note, the Court's only significant post-*Aldinger* opinion on pendent party jurisdiction is *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978), which is discussed below. See *infra* notes 226-29 and accompanying text. In addition, one might consider the brief dissenting opinion by Justice Rehnquist in *Symm v. United States*, 439 U.S. 1105 (1979), which is also discussed below. See *infra* note 349. Neither opinion has provided any additional guidance to the lower federal courts. See *Unravelling*, *supra* note 13, at 913, 922; *Capra*, *supra* note 13, at 24, col. 3 n.18.

Other important decisions are *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) ("neither pendent jurisdiction nor any other basis of jurisdiction may override the eleventh amendment['s]" bar on federal court suits against the states) and *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) (ancillary jurisdiction cannot override eleventh amendment). Because of these decisions, this Note considers only suits against municipal defendants, who generally receive no protection from the eleventh amendment. See *infra* note 79 and accompanying text.

24. See, e.g., *Unravelling*, *supra* note 13, at 913 ("courts have reached divergent conclusions about the propriety" of pendent party jurisdiction and "have rested their decisions on inconsistent and often confusing doctrinal approaches"). For a discussion of the variety of positions the federal courts have taken in the wake of *Aldinger* and *Owen*, see *infra* notes 234-81 and accompanying text.

25. See *Aldinger*, 427 U.S. at 3-4.

26. See, e.g., *Finch v. Mississippi State Medical Ass'n*, 585 F.2d 765, 780 (5th Cir. 1978); *McArthur v. Robinson*, 568 F. Supp. 393, 397 (E.D. Ark. 1983).

27. See, e.g., *Blake v. Pallan*, 554 F.2d 947, 957 (9th Cir. 1977) (*Aldinger* sent a negative signal; dismisses); *Onesti v. Thomson McKinnon Secs., Inc.*, 619 F. Supp. 1262, 1264 (N.D. Ill. 1985) (Supreme Court "has never expressly acknowledged the legitimacy" of doctrine; thus doctrine "is construed conservatively"); *Fritts v. Niehouse*, 604 F. Supp. 823, 828 n.9 (W.D. Mo. 1984) (*Aldinger* is "an expression of general disfavor for pendent party jurisdiction"; dismisses), *aff'd*, 774 F.2d 1170 (8th Cir. 1985); *Knudsen v. D.C.B., Inc.*, 592 F. Supp. 1232, 1235 (N.D. Ill. 1984); (doctrine was "negatively referred to in *Aldinger*"; dismisses); *Chas. Kurz Co. v. Lombardi*, 595 F. Supp. 373, 378, 381 (E.D. Pa. 1984) (reading *Aldinger* "as a whole," concludes "the strong presumption must be against exercising pendent party jurisdiction"; dismisses); *Bostedt v. Festivals, Inc.*, 569 F. Supp. 503, 505 (N.D. Ill. 1983) (Supreme Court "has never expressly approved of pendent party jurisdiction. In fact, the opposite is likely true"; dismisses); *Red Elk v. Vig*, 571 F. Supp. 422, 426 (D.S.D. 1983) (*Aldinger* "rejected the concept"; dismisses).

Court intended.²⁸ As background, Part II of the Note will discuss the history and current use of section 1983,²⁹ as well as tracing the history of the three doctrines—ancillary jurisdiction,³⁰ pendent jurisdiction³¹ and pendent party jurisdiction³²—under which the federal courts have traditionally exercised supplemental jurisdiction³³ over nonfederal claims. Part III will delineate the contours of the current dispute over the validity of pendent party jurisdiction, focusing particularly on section 1983 cases.³⁴ Part IV will reexamine the *Aldinger* test, and will describe the analysis a federal court must employ to determine if Congress has “expressly or by implication negated” jurisdiction.³⁵

The Note concludes that the Court intended the federal courts, on a case-by-case basis, to engage in traditional methods of statutory construction,³⁶ and that, in order to establish “negation,” the federal courts must find some *affirmative* congressional activity, beyond mere silence or a failure to include a category of parties, by which Congress has manifested its purpose to exclude such parties.³⁷ In other words, *Aldinger* always permits pendent party jurisdiction unless Congress has acted affirmatively to negate it.³⁸ Finally, in Part V, the Note applies the *Aldinger* test to two kinds of cases that arise frequently.³⁹ In the first, the pendent party is a private person or corporation that has not acted under color of state law;⁴⁰ in the second, the pendent party is a municipality that has been sued under the doctrine of *respondeat superior*.⁴¹

28. See *infra* notes 282-362 and accompanying text.

29. See *infra* notes 42-107 and accompanying text.

30. See *infra* notes 126-55 and accompanying text.

31. See *infra* notes 156-93 and accompanying text.

32. See *infra* notes 194-233 and accompanying text.

33. The term “supplemental jurisdiction” was coined by Richard Matasar. See Matasar, *Rediscovering*, *supra* note 20, at 1402 n.3; Matasar, *Primer*, *supra* note 22 at 104 n.3. The term refers collectively to ancillary, pendent, and pendent party jurisdiction. See Matasar, *Primer*, *supra* note 22, at 104 & n.3, 167. Other commentators have used the term “incidental jurisdiction.” See, e.g., Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935, 1935 (1982) [hereinafter cited as *A Closer Look*]; *Unravelling*, *supra* note 13, at 898.

34. See *infra* notes 234-81 and accompanying text.

35. See *infra* notes 282-362 and accompanying text.

36. See *infra* notes 282-88 and accompanying text.

37. See *infra* notes 289-349 and accompanying text.

38. See *id.*

39. See *infra* notes 363-427 and accompanying text.

40. See *infra* notes 366-401 and accompanying text.

41. See *infra* notes 402-27 and accompanying text.

II. Background Information: Section 1983, Federal Jurisdiction and Doctrines of Supplemental Jurisdiction

To apply the *Aldinger* test, a federal court must first consider the origins of the statute at issue and the parameters of federal jurisdiction. In this connection, this Part will discuss: (1) section 1983, focusing primarily on the available evidence of congressional intent with regard to providing a federal forum and allowing municipalities to be sued in federal court;⁴² (2) the limits on federal court jurisdiction;⁴³ and (3) the three doctrines—ancillary, pendent and pendent party jurisdiction—that permit expansion of federal jurisdiction.⁴⁴

A. Section 1983 Actions

As background to later discussion of pendent party jurisdiction in a section 1983 action, this Section presents the essential elements of section 1983,⁴⁵ before discussing the origins of the statute and the evidence of congressional intent.⁴⁶ This Section seeks to establish that: (1) a primary motivation behind section 1983's enactment was to create a federal forum;⁴⁷ and (2) the idea of federal suits against municipalities was not repugnant to the enacting Congress.⁴⁸

1. Current Practice Under Section 1983

In essence, section 1983⁴⁹ creates a remedy for the deprivation of constitutional rights by a person who acts "under color of" state law.⁵⁰ The action thus requires proof of two elements.⁵¹ First, a plaintiff must show that he was deprived of "rights, privileges, or immunities"⁵² granted by the Constitution or the laws of the United States.⁵³ Second, he must show that the person who deprived him

42. See *infra* notes 45-107 and accompanying text.

43. See *infra* notes 108-20 and accompanying text.

44. See *infra* notes 121-233 and accompanying text.

45. See *infra* notes 49-58 and accompanying text.

46. See *infra* notes 82-107 and accompanying text.

47. See *infra* notes 82-91 and accompanying text.

48. See *infra* notes 92-102 and accompanying text.

49. 42 U.S.C. § 1983 (1982). For the text of § 1983, see *supra* note 1.

50. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930 (1982); 13B WRIGHT, *supra* note 1, § 3573.2, at 203; see also 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS § 56 (2d ed. 1980) [hereinafter cited as ANTIEAU].

51. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); 13B WRIGHT, *supra* note 1, § 3573.2, at 203.

52. 42 U.S.C. § 1983 (1982).

53. 13B WRIGHT, *supra* note 1, § 3573.2, at 203.

of his rights was acting under color of state law.⁵⁴ Generally, a defendant is acting under color of state law if he is an officer or employee of the state and deprives the plaintiff of his rights, either while serving the state or by acting under the authority of his position.⁵⁵ Even if he abuses his power or exceeds his authority, he has still acted under color of state law.⁵⁶

In addition, private parties may be acting under color of state law if they act jointly with the state or a state official in such a way that they "may be appropriately characterized as 'state actors.'" ⁵⁷ Thus, if the private party enters into a conspiracy with a state agent, he may be held liable under section 1983.⁵⁸

Section 1343(3) of Title 28 of the United States Code⁵⁹ grants subject matter jurisdiction⁶⁰ to the federal courts over section 1983 claims.⁶¹ As discussed below,⁶² Congress originally conceived of section 1983 as a "uniquely federal remedy,"⁶³ through which a private person could find protection in federal court from actions of the state or its officials that deprived him of his federal rights.⁶⁴ Despite this original purpose, the Court has held that state courts also have

54. *Id.*

55. See 1 ANTIEAU, *supra* note 50, § 57, at 103-04.

56. *Monroe v. Pape*, 365 U.S. 167, 183-87 (1961), *overruled on other grounds*, *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); see 1 ANTIEAU, *supra* note 50, § 57, at 104; 13B WRIGHT, *supra* note 1, § 3573.1, at 199-200.

57. *Lugar*, 457 U.S. at 939; see 1 ANTIEAU, *supra* note 50, § 59, at 109; 13B WRIGHT, *supra* note 1, § 3573.2, at 210-11.

58. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 174 n.44 (1970); see 1 ANTIEAU, *supra* note 50, § 60, at 111; 13B WRIGHT, *supra* note 1, § 3573.2, at 211. In addition, a private party may be liable under § 1983, even if his actions did not amount to formal conspiracy, if he is a "willful participan[t] in joint activity with the state or its servants." 1 ANTIEAU, *supra* note 50, § 60, at 111. The private party can be liable even if the state official is immune. *Dennis v. Sparks*, 449 U.S. 24, 28-29 (1980).

59. 28 U.S.C. § 1343(3) (1982). Section 1343 provides that:

The district courts shall have original jurisdiction of any civil 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 the United States

Id.

60. For a definition of "subject matter jurisdiction," see *infra* note 109. For a discussion of the limits on the subject matter jurisdiction of the federal courts, see *infra* notes 108-20 and accompanying text.

61. See 13B WRIGHT, *supra* note 1, § 3573, at 189.

62. See *infra* notes 82-91 and accompanying text.

63. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

64. See *infra* notes 82-91 and accompanying text.

jurisdiction over section 1983 claims; this jurisdiction is concurrent⁶⁵ with federal court jurisdiction.⁶⁶ The Supreme Court has been unwilling to recognize a preference on the part of plaintiffs for a federal forum⁶⁷ and, in several recent opinions, has progressively restricted access to federal court under section 1983.⁶⁸ Thus, when a plaintiff using pendent party jurisdiction in a section 1983 action argues that it is more convenient and efficient to bring all his claims in federal court, he may meet the argument that he could achieve the same economy in state court.⁶⁹

A plaintiff attempting to sue a municipality⁷⁰ under section 1983 faces additional hurdles. First, in *Monroe v. Pape*,⁷¹ the Supreme Court held that municipalities were not "persons" under section 1983 and therefore could not be defendants in a section 1983 suit.⁷² Upon reconsideration of the legislative history to section 1983, however, the Court later reversed this decision, in *Monell v. Department of Social Services*.⁷³ The Court qualified this reversal with dictum⁷⁴

65. For a definition of "concurrent jurisdiction," see *infra* notes 119-20 and accompanying text.

66. *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980).

67. See, e.g., *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). For a discussion of the current debate over whether the courts should curtail a § 1983 plaintiff's ability to choose a federal forum, see *infra* note 91. According to one commentator, because of restrictive Supreme Court decisions and an increasingly conservative federal bench, many civil rights plaintiffs have begun to view state courts as more sympathetic to their claims, and therefore prefer to litigate in state court. See Steinglass, *The Emerging State Court Sec. 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 386-99 (1984) [hereinafter cited as Steinglass, *State Court Sec. 1983 Actions*]; Steinglass, *Lawyers Looking to State Courts to Litigate Sec. 1983 Cases*, Nat'l L.J. Feb. 18, 1985, at 42, col. 2.

68. See, e.g., *Daniels v. Williams*, 106 S. Ct. 662 (1986) (negligent act of state official causing unintentional deprivation of life, liberty, or property does not implicate due process clause); *Migra v. Warren City School Bd. of Educ.*, 465 U.S. 75 (1984) (federal court must give res judicata effect to state court judgment); *Hudson v. Palmer*, 468 U.S. 517 (1984) (when state affords plaintiff civil remedy for intentional deprivation of property by state official, no denial of due process has occurred); *Parratt v. Taylor*, 451 U.S. 527 (1981) (when state affords plaintiff civil remedy for negligent deprivation of property by state official, no denial of due process has occurred), *overruled*, *Daniels*, 106 S. Ct. 662 (1986); *Allen v. McCurry*, 449 U.S. 90 (1980) (state court's determination of issues will collaterally estop § 1983 plaintiff from raising those issues in federal court).

69. See, e.g., *Aldinger*, 427 U.S. at 18. One of Congress' primary motivations in enacting § 1983, however, was to grant civil rights plaintiffs a federal forum. See *infra* notes 85-91 and accompanying text.

70. For the sake of simplicity, in this Note the term "municipality" refers to municipalities, municipal corporations, cities, counties, towns, townships, boroughs, and villages.

71. 365 U.S. 167 (1961).

72. *Id.* at 187. R.S. § 1979 is the same statute as § 1983. See *id.* at 168.

73. 436 U.S. 658, 663, 665 (1978).

74. Because the Court in *Monell* found that the City of New York had established

stating that a section 1983 plaintiff could not sue a municipality under a theory of respondeat superior.⁷⁵ Instead, the Court said, a plaintiff suing a municipality must at a minimum show that the municipality's employees acted under a "governmental 'custom'"⁷⁶ or "policy,"⁷⁷ although the custom need not have "received formal approval through the body's official decisionmaking channels."⁷⁸ Second, although a municipality is not shielded from federal court jurisdiction by the eleventh amendment, and thus may be liable in federal court for compensatory damages,⁷⁹ it is immune from punitive damages.⁸⁰ The first hurdle in particular creates a significant restriction on a plaintiff's ability to recover any compensation for his injury.⁸¹

a "custom" or "policy" that had in fact caused the plaintiffs' injuries, *see Monell*, 436 U.S. at 690, the Court was able to rule in favor of the plaintiffs, *see id.* at 703, without considering the question of whether a municipality could be held liable "solely because it employs a tortfeasor—or, in other words, . . . on a *respondeat superior* theory." *Id.* at 691 (emphasis in original). Thus the Court's statements on respondeat superior went beyond the issue the Court needed to resolve in order to decide the case. Statements that go beyond the question presented and are not essential to the decision are "dicta." *See* *Technograph Printed Circuits, Ltd. v. Packard Bell Elec. Corp.*, 290 F. Supp. 308, 317 (C.D. Cal. 1968).

Justice Stevens concurred in part specifically to note that the part of the decision concerning respondeat superior was dictum. *See Monell*, 436 U.S. at 714 (Stevens, J., concurring in part) (opinion "merely advisory and . . . not necessary to explain the Court's decision"); *see also* 1 ANTIEAU, *supra* note 50, § 95, at 174; Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 935-36 & n.8 (1979) [hereinafter cited as *Section 1983 Municipal Liability*].

The Court, however, has subsequently made *Monell's* "custom or policy" requirement the holding of the court. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

75. *Monell*, 436 U.S. at 663 n.7, 691-95.

76. *Id.* at 691.

77. *Id.* at 690.

78. *Id.* at 691. The Court emphasized that § 1983 imposes liability on a "person" who "causes" a deprivation of civil rights. *Id.* at 691-92. The Court reasoned that § 1983 could therefore not "be easily read to impose liability vicariously." *id.* at 692, and that a "governmental 'custom'" or "policy" was the minimum necessary to establish that the municipality had "caused" the deprivation. *Id.* at 692-95.

79. *See id.* at 690 n.54; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

80. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

81. Despite the fact that the *Monell* Court's original opinion on respondeat superior was "merely advisory," *see supra* note 74 and accompanying text, the Court later held that the custom or policy requirement was the law. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). In addition, the federal courts have held that because of the reasoning of *Aldinger* and the custom or policy requirement of *Monell*, a plaintiff cannot sue a municipality under state law on a theory of respondeat superior and append the state-law claim to a § 1983 claim against the municipal employee. *See, e.g., Szumny v. Village of Addison*, No. 85-C-5149, slip op. (N.D. Ill. Oct. 9, 1985) (available Jan. 11, 1986, on LEXIS, Genfed library, Dist file); *Christensen v. Phelan*, 607 F. Supp. 470, 472-73 (D. Colo. 1985); *Arancibia*

2. Historical Origins of Section 1983

The statutes now codified at 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) are "direct descendants"⁸² of section one of the Civil Rights Act of 1871,⁸³ enacted by the forty-second Congress, and commonly known as the Ku Klux Klan Act.⁸⁴ As its popular name suggests, the Civil Rights Act of 1871 was directed primarily at the excesses of the Ku Klux Klan against newly-freed blacks in the South.⁸⁵ The debates that led up to its enactment reveal that many of the members of the forty-second Congress perceived an inability or unwillingness of state law-enforcement and judicial officers to uphold the law against the Klan.⁸⁶ Thus, one of the motivating factors for creating section 1983, and granting the federal courts jurisdiction over the action, was the perception that state courts did not provide an adequate remedy for people injured by the tortious acts of private citizens.⁸⁷

This perceived inadequacy was only one motivating factor, how-

v. Berry, 603 F. Supp. 931, 936 (S.D.N.Y. 1985); *McCaw v. Frame*, 499 F. Supp. 424, 426 (E.D. Pa. 1980); *La Rocco v. City of New York*, 468 F. Supp. 218, 221 (E.D.N.Y. 1979).

82. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 n.7 (1972).

83. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871). The substantive and jurisdictional components of section one were separated in 1874, when Congress codified federal law in the Revised Statutes. See *Lynch*, 405 U.S. at 543 n.7.

84. See 13B WRIGHT, *supra* note 1, § 3573, at 194.

85. Sections two through four of the Act "dealt primarily with" the purpose of "suppressing Ku Klux Klan violence in the Southern States." *Monell*, 436 U.S. at 665. Section one, which is now § 1983, had a broader purpose, not only providing "a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of law, they . . . may be deprived of rights to which they are entitled under the Constitution . . ." CONG. GLOBE, app. 42d Cong., 1st Sess., 68 (1871) (statement of Rep. Shellabarger), *reprinted in THE RECONSTRUCTION AMENDMENTS' DEBATES* 493 (A. Avins ed. 1967) [hereinafter cited as DEBATES].

86. As one member of Congress characterized the situation:

The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws annulled, the criminal goes free, the persecuted looks in vain for redress. This condition of affairs extends to counties and States; it is in many places the rule, and not the exception.

CONG. GLOBE, 42d Cong., 1st Sess. 379 (1871) (statement of Rep. Coburn), *reprinted in STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS—PART 1* 618 (B. Schwartz ed. 1970); see *id.*, at 458 (1871) (statement of Rep. Sherman), *reprinted in DEBATES*, *supra* note 85, at 487-88; *id.* at 320-22 (statement of Rep. Stoughton), *reprinted in DEBATES*, *supra* note 85, at 499-501.

87. See *Aldinger*, 427 U.S. at 33-34 (Brennan, J., dissenting); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds*, *Monell v. Department of Social Servs.* 436 U.S. 658 (1978).

ever. The Civil Rights Act of 1871 was part of a larger movement, after the Civil War, to expand federal power over the states.⁸⁸ This movement included the passage of the thirteenth, fourteenth and fifteenth amendments to the Constitution, as well as the enactment of several Civil Rights Acts in the 1860's and 1870's and the grant of general federal question jurisdiction in 1875.⁸⁹ As the Supreme Court later observed:

The predecessor of § 1983 was . . . an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.⁹⁰

The role section 1983 played in this alteration in the federal system again shows that granting access to a federal forum was at the heart of Congress' enactment of section 1983.⁹¹

88. See, e.g., *Aldinger*, 427 U.S. at 31 (Brennan, J., dissenting); *Mitchum v. Foster*, 407 U.S. at 238-39, 13B WRIGHT, *supra* note 1, § 3573, at 194; *Matasar, Primer*, *supra* note 22, at 109.

89. See *supra* note 88.

90. *Mitchum v. Foster*, 407 U.S. at 238-39.

91. See *supra* notes 85-90 and accompanying text. Today, debate has arisen over whether, relative to the federal courts, the state courts are less competent at adjudicating constitutional issues. Compare R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 185 (1985) (federal court judges and processes superior) [hereinafter cited as POSNER] and M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 2-3 (1980) (same) and Neuborne, *The Myth of Purity*, 90 HARV. L. REV. 1105-30 (1977) (state courts less competent to decide constitutional issues) and Sheran, *State Courts and Federalism in the 1980's*, 22 WM. & MARY L. REV. 789, 790-91 (1981) (state courts have not dealt effectively with civil rights issues) with P. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 629-35 (1981) (questioning notion that state courts are less competent in handling constitutional cases) and Steinglass, *State Court Sec. 1983 Actions*, *supra* note 67, at 398-99 ("the myth of federal court superiority should not lead lawyers to make . . . reflexive choices [that] are inconsistent with today's reality") and *Unravelling*, *supra* note 13, at 933 & n.201 (attacking, and noting Supreme Court rejection of, position that federal courts are superior).

Similar debate has arisen over whether state courts are more biased than the federal courts. Compare Redish, *supra* note 13, at 1390-91 (state judges subject to "subtle but significant" pressures from state governments) with POSNER, *supra*, at 187 (state courts "can be trusted to protect the innocent of whatever race") and Bator, *Congressional Power Over the Jurisdiction of Federal Courts*, 27 VILL. L. REV. 1030, 1037 (1982) (state courts equally charged with vindication of federal rights than federal counterparts).

Today, considerable debate surrounds the question of what the enacting Congress intended with regard to municipal liability.⁹² This debate has focused on the rejection of an amendment to the bill that became the Civil Rights Act of 1871, commonly known as the Sherman amendment.⁹³ The Sherman amendment would have imposed liability on a municipality for any injury occurring within its borders that was caused by private persons "riotously and tumultuously assembled,"⁹⁴ even when the municipality could have done nothing to prevent the injury.⁹⁵ The House of Representatives rejected the Sherman amendment,⁹⁶ and a conference committee revised the amendment to eliminate municipal liability except in those cases in which the plaintiff was unable to execute a judgment against the person who had caused the injury.⁹⁷ The House rejected this version as well, apparently because opponents believed that the Constitution prohibited the federal government from imposing an obligation on municipalities to keep the peace.⁹⁸ The House refrained from passing the amendment until it had discarded municipal liability altogether, in favor of imposing liability on persons who had known of a conspiracy to deprive a person of constitutional rights and had failed to prevent it.⁹⁹

92. The Supreme Court has expressed different views on the issue. See *infra* notes 100-05 and accompanying text. Several commentators have disagreed with the Court's current position on the import of Congress' rejection of the Sherman amendment. See, e.g., 1 ANTEAU, *supra* note 50, § 95, at 174; Section 1983 Municipal Liability, *supra* note 74, at 970.

93. The amendment was to be added as a separate section, at the end of the Civil Rights Act of 1871. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871). Its current version appears at § 1986 of Title 42 of the United States Code. 42 U.S.C. § 1986 (1982). Two versions of the amendment passed the Senate but not the House of Representatives. See *infra* notes 96-99 and accompanying text. Several authorities have criticized each of the Court's two interpretations of the rejection of the Sherman amendment. For critics of the first interpretation, which concluded that municipalities were not "persons," see, for example, Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 152-55 (1972); Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1491-94 (1977); Note, *Damage Remedies Against Municipalities For Constitutional Violations*, 89 HARV. L. REV. 922, 925 (1976). For authorities criticizing the second interpretation, which precluded using respondeat superior against a municipality, see *supra* note 92.

94. CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871), reprinted in Monell, 436 U.S. at 702 (appendix to opinion of the Court).

95. See Monell, 436 U.S. at 668, 692 n.57.

96. *Id.* at 666.

97. See *id.* at 668-69.

98. See *id.*

99. See *id.* at 668-69. This version is now codified at § 1986 of Title 42 of the United States Code. 42 U.S.C. § 1986 (1982).

As discussed above, the Court originally held that the rejection of the Sherman amendment demonstrated that Congress meant to exclude municipalities from the scope of section 1983.¹⁰⁰ Upon later reconsideration, however, the Court overruled itself, holding that the rejection of the Sherman amendment could not be equated with a refusal to impose *any* form of civil liability on municipalities.¹⁰¹ Focusing directly on the language of section one of the Civil Rights Act, the Court held that Congress did in fact intend to include municipalities as "persons" under that section.¹⁰² Nevertheless, the Court thought the rejection of the Sherman amendment indicated that Congress was disinclined to impose liability on municipalities on a theory of vicarious liability.¹⁰³ The Court therefore stated¹⁰⁴ that a plaintiff could not sue a municipality under section 1983 under the theory of respondeat superior.¹⁰⁵

Because of the Court's refusal to permit respondeat superior liability, plaintiffs have sought to use pendent party jurisdiction to append a state-law claim based on a theory of vicarious liability against a municipality.¹⁰⁶ Such attempts have met with little success in the federal courts, because the courts hold that the reasoning of *Aldinger* precludes this use of pendent party jurisdiction.¹⁰⁷

B. The Limited Nature of Federal Court Jurisdiction

A fundamental characteristic of the federal courts is that their power to adjudicate cases is limited.¹⁰⁸ The federal courts may hear only cases that are within their subject matter jurisdiction.¹⁰⁹ The

100. See *Monroe v. Pape*, 365 U.S. 167, 187-91 (1961), *overruled on other grounds*, *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). R.S. § 1979 is the same statute as § 1983. See *id.* at 169.

101. See *Monell*, 436 U.S. at 664-83.

102. See *id.* at 683-91.

103. See *id.* at 691-95.

104. The Court's language on the issue of the vicarious liability of municipalities was originally dictum. See *supra* note 74 and accompanying text.

105. 436 U.S. at 694-95.

106. See, e.g., *Szumny v. Village of Addison*, No. 85-C-5149, slip op. (N.D. Ill. Oct. 9, 1985) (available Jan. 11, 1986, on LEXIS, Genfed library, Dist file); *Christensen v. Phelan*, 607 F. Supp. 470, 472 (D. Colo. 1985); *Arancibia v. Berry*, 603 F. Supp. 931, 936 (S.D.N.Y. 1985); *Locust v. Degiovanni*, 485 F. Supp. 551 (E.D. Pa. 1980).

107. See, e.g., *Molina v. Richardson*, 578 F.2d 846 (9th Cir.), *cert. denied*, 439 U.S. 1048 (1978); *Locust v. Degiovanni*, 485 F. Supp. 551 (E.D. Pa. 1980).

108. See *Owen*, 437 U.S. 365, 374 (1978); 13 WRIGHT, *supra* note 1, § 3522, at 60; *Matasar, Primer, supra* note 22, at 106.

109. 13 WRIGHT, *supra* note 1, § 3522, at 78. "Subject matter jurisdiction" has been defined as a "court's competence to hear and determine cases of the general class to which proceedings in question belong; the power to deal with the general

limits of federal court subject matter jurisdiction arise from two separate sources. First, article III of the United States Constitution specifies nine categories of cases that the federal courts may hear.¹¹⁰ Most of these nine categories fall into two general types of jurisdiction: (1) federal question jurisdiction, which includes cases "arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority";¹¹¹ and (2) diversity jurisdiction, which includes controversies between parties of different political allegiance, such as citizens of different states.¹¹²

The second source is Congress:¹¹³ the federal courts lack the power granted by the Constitution until Congress acts affirmatively to grant that power.¹¹⁴ Although the courts have held different views on the relationship between the constitutional and congressional limits on federal court power,¹¹⁵ the weight of authority is that Congress may

subject involved in the action." BLACK'S LAW DICTIONARY 1278 (5th ed. 1979). The concept should be distinguished from "in personam jurisdiction," which has been defined as the "[p]ower which a court has over the defendant's person and which is required before a court can enter a . . . judgment" affecting the defendant's rights. *Id.* at 766. The burden of persuasion for establishing a federal court's subject matter jurisdiction rests with the party invoking jurisdiction. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 612 n.28 (1979); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

110. Article III provides that:

The [federal] judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

111. U.S. CONST. art. III, § 2. For a discussion of the meaning of "arising under," see 13B WRIGHT, *supra* note 1, § 3562.

112. See U.S. CONST. art. III, § 2. For a discussion of diversity jurisdiction, see 13B WRIGHT, *supra* note 1, §§ 3601-3608.

113. See 13 WRIGHT, *supra* note 1, § 3521, at 52-60; *id.* § 3526, at 227-30.

114. See, e.g., *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) (federal court jurisdiction "is further limited to those subjects encompassed within a statutory grant of jurisdiction"); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (federal court power is "dependent for its distribution . . . entirely upon the action of Congress, who possess the sole power of creating the tribunals . . . and of investing them with jurisdiction"); *White v. Fenner*, 29 F. Cas. 1015 (C.C.D.R.I. 1818) (No. 17,547) (although Congress must grant full power under article III, article III is not self-executing).

115. Compare *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816) (article III is "manifestly designed to be mandatory upon the legislature") and *Eisentrager v.*

restrict this power even further than the limits set by the Constitution,¹¹⁶ but may not expand it beyond those limits.¹¹⁷

In contrast to the federal courts, the state courts are courts of general jurisdiction.¹¹⁸ This means that as long as Congress has not provided that the federal courts have exclusive jurisdiction, a state court is presumed to have power to adjudicate any claim, even if that claim is also within the province of the federal courts.¹¹⁹ Such overlapping of jurisdiction is known as concurrent jurisdiction.¹²⁰

Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949) (even without congressional grant, Constitution compels exercise of jurisdiction in some federal court over cases arising under Constitution, laws or treaties of United States), *rev'd on other grounds*, 339 U.S. 763 (1950); and Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States Be Preserved?*, 18 A.B.A. J. 499, 503 (1932) with *Palmore v. United States*, 411 U.S. 389, 401 (1973) (Congress not "required to invest" federal courts with "all the jurisdiction it was authorized to bestow under Art. III") and *City of Greenwood v. Peacock*, 384 U.S. 808, 833 (1966) (Congress has power "to provide that all federal issues, be tried in the federal courts [or] . . . in the courts of the States") and *Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962) (Constitution authorized but did not obligate Congress to create federal courts, and once created federal courts remain subject to jurisdictional curtailment) and *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-34 (1922) (effect of article III provision is not to vest jurisdiction in the federal courts but to delimit cases and controversies over which Congress can confer jurisdiction) and *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850) (Constitution has defined upper limit of judicial power, but has not prescribed how much of it shall be exercised). See generally 13 WRIGHT, *supra* note 1, § 3526, at 230-35.

116. *E.g.*, *Palmore v. United States*, 411 U.S. 389, 401 (1973); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845). See generally 13 WRIGHT, *supra* note 1, § 3526, at 232-33 & n.18. In fact, Congress has never granted federal courts the full power available under the Constitution. See 13 WRIGHT, *supra* note 1, § 3526, at 230. Until 1875, Congress did not make a general grant of federal question jurisdiction, see Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875) (codified at 28 U.S.C. § 1331 (1982)), instead creating specialized statutes directed at particular types of cases. *E.g.*, 28 U.S.C. § 1343(3) (1982) (statute granting jurisdiction over § 1983 cases); see 13B WRIGHT, *supra* note 1, § 3561, at 4. Moreover, even after granting jurisdiction over general federal questions, Congress imposed a requirement that such cases involve a minimum amount in controversy, see 13B WRIGHT, *supra* note 1, § 3561.1, at 5, and did not abolish this requirement until 1980. Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369 (1980); see 13B WRIGHT, *supra* note 1, § 3561.1, at 5.

117. See, *e.g.*, *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (congressional "statute cannot extend the jurisdiction beyond the limits of the constitution"); *cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding congressional act granting Supreme Court original jurisdiction over case not within constitutional grant of original jurisdiction to be unconstitutional); see also 13 WRIGHT, *supra* note 1, § 3526, at 229 & n.6.

118. See 13 WRIGHT, *supra* note 1, § 3522, at 60.

119. For a discussion of exclusive jurisdiction, see 13 WRIGHT, *supra* note 1, § 3527.

120. For a discussion of concurrent jurisdiction, see 13 WRIGHT, *supra* note 1, § 3527.

C. Forms of Supplemental Jurisdiction

Early in the history of the federal courts, the limited nature of their jurisdiction created a difficult problem: when a case contained some claims within the limits of federal court jurisdiction and some without, did the federal court have power to adjudicate the nonfederal claims?¹²¹

121. The question first arose in 1824, in the case of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and indeed poses a dilemma. On the one hand, a rule absolutely barring a federal court from hearing nonfederal claims could effectively eviscerate the ability of a federal court to function at all. See, e.g., *Owen*, 437 U.S. at 377 ("Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to . . . effectively resolve an entire, logically entwined lawsuit"); *Osborn*, 22 U.S. (9 Wheat.) at 818, 821; 13B WRIGHT, *supra* note 1, § 3567, at 107 ("a court of original jurisdiction could not function . . . unless it had power to decide all the questions that the case presents"); *id.* § 3523, at 85 (without ancillary jurisdiction, a "federal court neither could dispose of the principal case effectively nor do complete justice in the dispute that is before the tribunal"); *Pendent Jurisdiction*, *supra* note 13, at 131.

State and federal claims are sometimes so closely related that the inability to decide both simultaneously would mean an incomplete remedy under the claim the court did adjudicate. See, e.g., *Osborn*, 22 U.S. (9 Wheat.) at 820. Moreover, an absolute bar would diminish efficiency and convenience in the court system as a whole. *Aldinger*, 427 U.S. at 35 (Brennan, J., dissenting); 13 WRIGHT, *supra* note 1, § 3523, at 95.

Plaintiffs with federal claims of exclusive jurisdiction would be forced to split their cases between federal and state court, and the inefficiency of piecemeal litigation would result. See *Morrow v. District of Columbia*, 417 F.2d 728, 738 (D.C. Cir. 1969) ("important policy of having one single expeditious resolution of a dispute has thus led to the doctrine of ancillary jurisdiction and analogous practices"); 13 WRIGHT, *supra* note 1, § 3523, at 86; Green, *Federal Jurisdiction Over Counterclaims*, 48 Nw. U.L. REV. 271, 271 (1953) [hereinafter cited as Green]. But see *Unravelling*, *supra* note 13, at 942.

Even if jurisdiction over the federal claims were concurrent, a defendant might choose to remove the case to federal court, again forcing the plaintiff to split his claims. Section 1441(c) of Title 28 of the United States Code allows a defendant to remove any federal claims in a case to federal court, whether or not the plaintiff acquiesces. See 28 U.S.C. § 1441(c) (1982). Thus even a plaintiff who brought suit in state court could be forced to split his case if the defendant chose to remove the federal claims. See Matasar, *Primer*, *supra* note 22, at 113 n.42. And, even when jurisdiction is concurrent and the plaintiff is able to bring the entire suit in state court, there is still another cost to the federal system, for the congressional intent that federal courts interpret issues of federal law would be undermined. See, e.g., *Aldinger*, 427 U.S. at 31-35 (Brennan, J., dissenting); see also 13 WRIGHT, *supra* note 1, § 3523, at 104; Redish, *supra* note 13, at 1391. Finally, an absolute bar on extending federal court jurisdiction would diminish a plaintiff's unrestricted choice between federal and state courts, and thwart congressional intent to provide that choice. See Matasar, *Primer*, *supra* note 22, at 113 & n.42.

On the other hand, if extended too far, a doctrine permitting federal courts to adjudicate nonfederal claims would undermine the constitutionally- and congress-

The courts, in wrestling with this question, have developed three doctrines of supplemental jurisdiction:¹²² ancillary jurisdiction,¹²³ pendent jurisdiction¹²⁴ and pendent party jurisdiction.¹²⁵

1. Ancillary Jurisdiction

Ancillary jurisdiction allows a federal court to decide certain types of claims when they are incidental to another claim that is properly within the court's jurisdiction.¹²⁶ Under current law, many courts hold that ancillary jurisdiction supports a nonfederal claim whenever the two claims arise out of the same transaction or occurrence.¹²⁷

sionally-imposed limits on federal court jurisdiction. See *Unravelling*, *supra* note 13, at 932-33; *supra* notes 109-21 and accompanying text. In addition, an expansive use of pendent party jurisdiction would impinge greatly on the power of the state courts. See *Onesti v. Thomson McKinnon Secs., Inc.*, 619 F. Supp. 1262, 1264 (N.D. Ill. 1985); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262, 262 (1968); *Unravelling*, *supra* note 13, at 933-34 & n.203. Some authorities believe that the federal docket is already overburdened, and argue that a doctrine that permits any further extension of jurisdiction should be curtailed. See, e.g., POSNER, *supra* note 91, at 129-30, 318-19. But see Green, *supra*, at 279 (additional burden will be slight).

122. See 13 WRIGHT, *supra* note 1, § 3523, at 82; *id.* § 3567, at 109; *id.* § 3567.2, at 153. For the origin of the term supplemental jurisdiction, see *supra* note 33.

123. For a definition and discussion of ancillary jurisdiction, see *infra* notes 126-55 and accompanying text.

124. For a definition and discussion of pendent jurisdiction, see *infra* notes 156-93 and accompanying text.

125. For a definition and discussion of pendent party jurisdiction, see *infra* notes 194-233 and accompanying text. Numerous authorities have raised doubts about the validity of making a conceptual distinction among these doctrines, see, e.g., Matasar, *Primer*, *supra* note 22, at 105, 117, 152-53, and have asserted that the courts should apply the *Aldinger* test to ordinary pendent claims. See, e.g., *United States ex rel. Hoover v. Franzen*, 669 F.2d 433, 439-40 (7th Cir. 1982); Luneburg, *supra* note 21, at 244; Matasar, *Primer*, *supra* note 22, at 178; *Pendent Jurisdiction*, *supra* note 13, at 135; *Law-Tied Jurisdiction*, *supra* note 13, at 632-33, 646-48; Redish, *supra* note 13, at 1396; Capra, *supra* note 13, at 22, col. 3. But see Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U.L. REV. 245, 259 (1980) (pendent claim jurisdiction should not be rejected as usurpation of congressional authority simply because pendent party jurisdiction has been rejected). Similarly, some commentators have asserted that the courts should apply the *Aldinger* test to ancillary jurisdiction claims. See, e.g., 13 WRIGHT, *supra* note 1, § 3523, at 102-03; Luneburg, *supra* note 21, at 244; Matasar, *Primer*, *supra* note 22, at 178; Redish, *supra* note 13, at 1397-98. Nevertheless, the courts continue to adhere to this tripartite framework. See Matasar, *Primer*, *supra* note 22, at 117-18.

126. See *Federman v. Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 810 (2d Cir. 1979); see also 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN, J. WICKER, MOORE'S FEDERAL PRACTICE, ¶ 0.90[3], at 828.1 (2d ed. 1986) [hereinafter cited as MOORE]; 13 WRIGHT, *supra* note 1, § 3523, at 82.

127. See 1 MOORE, *supra* note 126, ¶ 0.90[3], at 830-31; 3 MOORE, *supra* note 126, ¶ 13.36, at 13-219; 13 WRIGHT, *supra* note 1, § 3523, at 95 & n.32.

These courts have borrowed the concept of "same transaction or occurrence" from the Federal Rules of Civil Procedure, which have defined some types of claims—such as compulsory counterclaims¹²⁸ and cross-claims¹²⁹—by whether they arise out of the same transaction or occurrence as the plaintiff's primary claim.¹³⁰ Thus, courts using a "same transaction or occurrence test" have held that any claim that meets the test for the Federal Rules will also meet the test for ancillary jurisdiction.¹³¹

In addition, the courts have found ancillary jurisdiction over claims that are "logically dependent" on the main claim.¹³² Under this test, courts have, again referring to the Federal Rules, routinely exercised jurisdiction over claims based on impleader¹³³ or

128. See, e.g., *Moore v. New York Cotton Exchange*, 270 U.S. 593, 606-09 (1926); see also, 3 MOORE, *supra* note 126, ¶ 13.15[1], at 13-96 & nn.4 & 6; 13 WRIGHT, *supra* note 1, § 3523, at 106-07 & n.59. A "counterclaim" has been defined as "a claim presented by a defendant in opposition to or deduction from the claim of the plaintiff." BLACK'S LAW DICTIONARY 315 (5th ed. 1979). Counterclaims are "either compulsory (required to be made) or permissive (made at option of defendant)." *Id.* A counterclaim is "compulsory" if it arises out of the same transaction or occurrence as the plaintiff's claim and does not "require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." See FED. R. CIV. P. 13(a). Ancillary jurisdiction supports claims against new parties joined under Federal Rule of Civil Procedure 13(h). 13 WRIGHT, *supra* note 1, § 3523, at 107-08 & n.60. For a definition of "permissive counterclaims," see *infra* note 137.

129. See, e.g., *Transcontinental Underwriters Agency v. American Agency Underwriters*, 680 F.2d 298, 299 n.1 (3d Cir. 1982); see also 3 MOORE, *supra* note 126, ¶ 13.36, at 13-219 & n.1; 13 WRIGHT, *supra* note 1, § 3523, at 109. The Federal Rules of Civil Procedure define a cross-claim as a claim "by one party against a co-party" that arises out of the same transaction or occurrence "that is the subject matter either of the original action or of a counterclaim therein" FED. R. CIV. P. 13(g).

130. See FED. R. CIV. P. 13(a); *id.* 13(g).

131. See 13 WRIGHT, *supra* note 1, § 3523, at 95 n.32. Under the Federal Rules of Civil Procedure, certain types of claims contain, as part of their definition, a requirement that they arise out of the same transaction or occurrence as another claim in the suit. For example, under the Federal Rules, counterclaims are considered compulsory only when they arise out of the same transaction or occurrence as the opposing party's claim. See FED. R. CIV. P. 13(a). The courts have held that any claim that meets the definition of a compulsory counterclaim is automatically supported by ancillary jurisdiction. See, e.g., *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 633-34 (3d Cir. 1961); *Hoosier Cas. Co. v. Fox*, 102 F. Supp. 214, 226-27 (N.D. Iowa 1952).

132. See *Owen*, 437 U.S. at 375 n.18; 13 WRIGHT, *supra* note 1, § 3523, at 96.

133. See, e.g., *Agrashell, Inc. v. Bernard Sirota Co.*, 344 F.2d 583 (2d Cir. 1965); see also 3 MOORE, *supra* note 126, ¶ 14.26, at 14-108 & n.6; *id.*, ¶ 14.26, at 14-111 & n.14; 13 WRIGHT, *supra* note 1, § 3523, at 109-11 & n.65. "Impleader" is the procedure by which a party brings a new party into the action on the ground that the new party "is or may be liable to [the party who joins him] for all or part of the plaintiff's claim against him." See FED. R. CIV. P. 14(a). Ancillary

interpleader,¹³⁴ and claims of intervenors as of right.¹³⁵ Under this logical dependence reasoning, the courts have also held that ancillary jurisdiction supports any claim necessary to execute or protect federal judgments.¹³⁶

The courts have not, however, extended ancillary jurisdiction to those claims that the Federal Rules do not define as arising out of the same transaction or occurrence, *i.e.*, permissive counterclaims,¹³⁷ permissive intervention¹³⁸ or claims of indispensable parties.¹³⁹ The

jurisdiction will also support claims brought by the impleaded party directly against the plaintiff. See 3 MOORE, *supra* note 126, ¶ 14.27[2], at 14-117 to -118. When a plaintiff, however, asserts a claim against an impleaded party directly, ancillary jurisdiction will not support it. *Owen*, 437 U.S. at 375-77; 3 MOORE, *supra* note 126, ¶ 14.27[1], at 14-116.

134. 13 WRIGHT, *supra* note 1, § 3523, at 113 & n.67. "Interpleader" is the procedure that permits a person, "[w]hen two or more persons claim the same thing (or fund) of [his], and he, laying no claim to it himself, is ignorant which of them has a right to it, and fears he may be prejudiced by their proceeding against him to recover it," to "join such claimants as defendants and require them to interplead their claims so that he may not be exposed to double or multiple liability." BLACK'S LAW DICTIONARY 733 (5th ed. 1979).

135. *Owen*, 437 U.S. at 375 n.18 (dictum); 1 MOORE, *supra* note 126, ¶ 0.90[3], at 831-32; 3B MOORE, *supra* note 126, ¶ 24.18[1], at 24-198 to -199, -200. An "intervenor" is "a person who voluntarily interposes in an action or other proceeding with the leave of the court." BLACK'S LAW DICTIONARY 736 (5th ed. 1979). An intervenor "as of right" is an intervenor: (1) to whom "a statute of the United States confers an unconditional right to intervene"; or (2) who "claims an interest relating to the property or transaction which is the subject of the action and [who] is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless [his] interest is adequately represented by existing parties." FED. R. CIV. P. 24(a). For a definition of "permissive intervention," see *infra* note 138.

136. 1 MOORE, *supra* note 126, ¶ 0.90[3], at 829; *cf.* 13 WRIGHT, *supra* note 1, § 3523, at 82-86 & n.9.

137. 3 MOORE, *supra* note 126, ¶ 13.19[1], at 13-124 to 13-126; 13 WRIGHT, *supra* note 1, § 3523, at 108-09. The courts make one exception to this rule, holding that ancillary jurisdiction supports permissive counterclaims in the form of set-offs. See 3 MOORE, *supra* note 126, ¶ 13.19[1], at 13-126; 13 WRIGHT, *supra* note 1, § 3523, at 109. A "permissive counterclaim" is a "claim against an opposing party *not* arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(b) (emphasis added). For a definition of "compulsory counterclaim," see *supra* note 128.

138. 3B MOORE, *supra* note 126, ¶ 24.18[1], at 24-200; 13 WRIGHT, *supra* note 1, § 3523, at 113. Intervention is "permissive" when: (1) "a statute of the United States confers a *conditional* right to intervene"; or (2) the intervenor's "claim or defense and the main action have a question of law or fact in common." FED. R. CIV. P. 24(b) (emphasis added). For a definition of "intervenor" and "intervenor as of right," see *supra* note 135.

139. 3A MOORE, *supra* note 126, ¶ 19.04[2.—2], at 19-64 & n.1; 13 WRIGHT, *supra* note 1, § 3523, at 109-112 & n.66. An "indispensable party" is a person "without whose presence no adequate judgment can be entered determining rights of parties before a court," or who has "such an interest in the controversy that

courts have never limited ancillary jurisdiction to cases involving pendent claims—courts have frequently used the doctrine to assert power over pendent *parties* as well.¹⁴⁰

At first glance, these rules may seem arbitrary, and in fact, a number of commentators have questioned whether any rational basis supports such a complicated scheme.¹⁴¹ The complexity arises from the piecemeal development of the doctrine, as well as the variety of justifications courts have offered for exercising ancillary jurisdiction.¹⁴²

The doctrine first arose in the context of *in rem* disputes.¹⁴³ In 1926, however, the Court expanded ancillary jurisdiction in the case of *Moore v. New York Cotton Exchange*,¹⁴⁴ and since then, the

the court cannot render a final decree without affecting [his] interests." BLACK'S LAW DICTIONARY 696 (5th ed. 1979).

140. See, e.g., *Bauer v. Uniroyal Tire Co.*, 630 F.2d 1287, 1290 n.2, (8th Cir. 1980); 13 WRIGHT, *supra* note 1, § 3523, at 107-09. The only limitation the Supreme Court has placed on the use of ancillary jurisdiction to support claims against new parties is its prohibition against plaintiffs using the doctrine to bring claims directly against new parties. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

141. See, e.g., 13 WRIGHT, *supra* note 1, § 3523, at 115; Green, *supra* note 121, at 284-89.

142. See *infra* notes 143-55 and accompanying text.

143. *In rem* disputes are defined as "proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*." BLACK'S LAW DICTIONARY 713 (5th ed. 1979) (emphasis in original). In *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1861), generally considered the leading ancillary jurisdiction case, see, e.g., 13 WRIGHT, *supra* note 1, § 3523, at 87, the federal court had jurisdiction over several railroad cars that a United States marshal had seized from a railroad company. 65 U.S. (24 How.) at 453. The marshal had obtained writs of attachment from the federal court. *Id.* In response, the mortgagees of the railroad sued in state court to replevy the railroad cars. *Id.* The state court granted the mortgagees a writ of replevin, under which the county sheriff took possession of the railroad cars. *Id.*

On appeal, the Supreme Court held that the state court had improperly interfered with the power of the federal court over the property. *Id.* The mortgagees had argued that such a ruling would leave them remediless. *Id.* at 460. The Court disagreed, holding that the mortgagees could intervene in the federal proceeding with their state-law claim to the property and that the federal court could properly take jurisdiction over their claim. See *id.* The Court asserted that when a nonfederal claim is filed "to restrain or regulate" a federal court judgment, it could be considered "ancillary and dependent," and therefore within the jurisdiction of the court. *Id.*

After *Freeman*, the courts generally restricted its principle to *in rem* cases. See, e.g., *Fulton Nat'l Bank v. Hozier*, 267 U.S. 276, 280 (1925); 13 WRIGHT, *supra* note 1, § 3523, at 88-89 & n.16. Professors Wright, Miller, and Cooper note that as late as 1925, the Court continued to maintain that ancillary jurisdiction could support only claims related to property at least constructively under the court's control. See *id.* at 93.

144. 270 U.S. 593 (1926). In *Moore*, the plaintiff sued in federal court on the

federal courts have continued the expansion.¹⁴⁵ One factor contributing to the expansion was the liberalization of joinder rules effectuated by the promulgation, in 1938, of the Federal Rules of Civil Procedure.¹⁴⁶ The Federal Rules did not in themselves alter the law on subject matter jurisdiction, and in fact Rule 82 explicitly prohibits them from doing so.¹⁴⁷ Nevertheless, by replacing the former rules of joinder with more liberal standards, the Federal Rules provided litigants with the opportunity to join many more claims and parties in one lawsuit.¹⁴⁸ The Federal Rules thus increased the demand for and usefulness of ancillary jurisdiction.¹⁴⁹

In the 1978 case of *Owen Equipment & Erection Co. v. Kroger*,¹⁵⁰ however, the Court checked the expansion of ancillary jurisdiction, by making it explicit that the doctrine was available only to a party who is in a defensive "posture,"¹⁵¹ or, as the Court described it, a party who has been "haled into court against his will, or . . . whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."¹⁵² According to the Court, a plaintiff could not reasonably demand ancillary jurisdiction when it was he who had chosen the federal forum "and must thus accept

basis of a federal question—a claim arising out of the Sherman Act. *Id.* at 602, 604. The defendant brought a state-law compulsory counterclaim. *Id.* at 603. The claim was compulsory under the Equity Rules of 1912, because it arose out of the same transaction. *See id.* at 609-10. The court did not have *in rem* jurisdiction; nevertheless, the Supreme Court held that the court had power to hear the state-law counterclaim, even after dismissing the federal claim on the merits. *Id.* at 608-09; *see Matasar, Primer, supra* note 22, at 116-17. The Court reasoned that the connection between the federal and nonfederal claims was so close "that it only needs the failure of the former to establish a foundation for the latter," and noted that if the federal court were unable to decide the counterclaim, "the relief afforded by the dismissal of the [plaintiff's claim] is not complete." 270 U.S. at 610. The Court in *Moore* thus effectively dispensed with the prior practice of limiting ancillary jurisdiction to *in rem* cases and changed the focus of the analysis to the logical relationship between the claims. *See Matasar, Primer, supra* note 22, at 142.

145. *See* 13 WRIGHT, *supra* note 1, § 3523, at 94.

146. *See id.*

147. *See id.*; *see also* FED. R. CIV. P. 82 (Federal Rules neither create nor withdraw jurisdiction).

148. *See* 13 WRIGHT, *supra* note 1, § 3523, at 94-95.

149. *Id.*

150. 437 U.S. 365 (1978). For a discussion of the facts and holding of *Owen*, *see infra* notes 226-29 and accompanying text.

151. *See Owen*, 437 U.S. at 373, 376.

152. *Id.* Even before *Owen*, the courts had generally limited ancillary jurisdiction to claims asserted by defensive parties. *See Owen*, 437 U.S. at 375 n.18; 3 MOORE, *supra* note 126, ¶ 14.27[1], at 14-116. Thus, the plaintiff's attempt to use ancillary jurisdiction in *Owen* was an attempt to expand the doctrine beyond its recognized limits.

its limitations."¹⁵³ The Court then analyzed the case as a pendent party jurisdiction case.¹⁵⁴ Hence, the Court made it clear that parties that are not in a defensive posture, such as plaintiffs, must turn to the doctrine of pendent jurisdiction.¹⁵⁵

2. Pendent Jurisdiction

Like ancillary jurisdiction, pendent jurisdiction permits a federal court to adjudicate nonfederal claims when they are sufficiently related to a federal claim already before the court.¹⁵⁶ The law on pendent jurisdiction, however, differs from that of ancillary jurisdiction in several ways,¹⁵⁷ which arise primarily from the fact that the two doctrines developed from separate lines of cases.¹⁵⁸

In *Osborn v. Bank of the United States*,¹⁵⁹ the original ancestor of pendent jurisdiction,¹⁶⁰ the Supreme Court held that a federal court with jurisdiction over a case can hear all questions—even state-

153. *Id.*

154. See *infra* notes 226-29 and accompanying text.

155. See *infra* note 157. For a discussion of pendent jurisdiction, see *infra* notes 156-93 and accompanying text.

156. "Pendent jurisdiction" has been described as the doctrine that "permits a plaintiff, in appropriate circumstances, to join with his federal claim a related state claim over which the court has no independent basis of subject matter jurisdiction." *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615, 622 n.13 (S.D.N.Y. 1979).

157. The Second Circuit has contrasted pendent and ancillary jurisdiction as follows:

Pendent jurisdiction . . . applies to state law claims which are joined in the complaint with federally cognizable claims and which are asserted by the original plaintiff against the original defendant It is the combination of state and federal claims in a complaint that gives rise to the doctrine of pendent jurisdiction. On the other hand, when, subsequent to the filing of the complaint, a party *other than the original plaintiff* injects state claims into a controversy as counterclaims, cross-claims, or third-party claims, such claims fall within the court's ancillary jurisdiction rather than its pendent jurisdiction.

Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798, 810 (2d Cir. 1979) (emphasis added). Thus, ancillary jurisdiction has traditionally been reserved for parties in a defensive "posture," *Owen*, 437 U.S. at 376, while pendent jurisdiction is available for plaintiffs. See *Corporacion Venezolana*, 477 F. Supp. at 622 n.13.

158. See *supra* notes 143-49, *infra* notes 159-93 and accompanying text.

159. 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, a federal statute incorporated the Bank of the United States and gave it the right to sue and be sued in the circuit courts of the United States. See *id.* at 817. The Bank sued a state tax auditor under the federal statute, seeking to enjoin the auditor from collecting a tax on the Bank under state law. See *id.* at 739-40. The defendants argued that because the case involved several issues of state law, it did not "arise under a law of the United States," and that the court therefore lacked jurisdiction. See *id.* at 819.

160. See, e.g., 13B WRIGHT, *supra* note 1, § 3567, at 106.

law questions—that are necessary to decide the matter.¹⁶¹ As the Court expressed it:

[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 of law may be involved in it.¹⁶²

Osborn's holding has been characterized as one of necessity: it is seen as compelled because if a federal court were confined to deciding only some of the issues raised by a case, as a practical matter it could not function as a court.¹⁶³ Indeed, as Chief Justice John Marshall observed in his opinion for the Court, “[t]here is scarcely any case, every part of which depends upon” federal law.¹⁶⁴

The Court moved beyond the notion of necessity in the case of *Siler v. Louisville & Nashville Railroad*.¹⁶⁵ In *Siler*, the Supreme Court held that the existence of federal questions in the case gave a federal court jurisdiction, regardless of the presence of a state-law claim.¹⁶⁶ More important, the Court held that the federal court could decide the case *solely* on the state-law question:

[H]aving properly obtained [jurisdiction], that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.¹⁶⁷

161. 22 U.S. (9 Wheat.) at 822. The court held that “[t]hose other questions cannot arrest the proceedings.” *Id.*

162. *Id.* at 823.

163. *See, e.g.*, *Federman v. Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 808 & n.16 (2d Cir. 1979); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 922 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*]; 13B WRIGHT, *supra* note 1, § 3567, at 107.

164. 22 U.S. (9 Wheat.) at 820.

165. 213 U.S. 175 (1909), *overruled on other grounds*, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (eleventh amendment bars adjudication of pendent claims against states and their officials). In *Siler*, the plaintiff, a railroad company, brought suit in a federal circuit court under several provisions of the Constitution and under state law. *See* 213 U.S. at 176-77, 190-91. The plaintiff sought to enjoin a state commission from regulating its rates. *See id.* The state commission argued that not only did the circuit court lack jurisdiction over the state-law claim, but also that the very existence of a state-law claim in the case acted to deprive the court of jurisdiction over the federal claims as well. *Id.* at 183, 192. The court rejected both parts of the argument. *Id.* at 191-93.

166. *Id.* at 191.

167. *Id.* In fact, the Court stated that it is “much better” to decide the case on the state-law issue, “rather than to unnecessarily decide the various constitutional

The Court then affirmed on the basis of the *state-law* claim alone.¹⁶⁸

Such a holding was not, strictly speaking, a matter of necessity to preserve the circuit court's ability to function as a court. The court could have just dismissed the state-law claim and decided the case on the basis of the constitutional claims alone, for the two claims were not inextricably interwoven like the claims in *Osborn*.¹⁶⁹ As the Court acknowledged, "[t]he various questions are entirely separate from each other."¹⁷⁰ The decision thus brought pendent jurisdiction away from the idea that it was to be used only when necessary. The Court focused instead on policy concerns: it wanted to avoid unnecessarily addressing constitutional questions¹⁷¹ and creating piecemeal litigation.¹⁷²

After *Siler* had broadened the rationale for pendent jurisdiction, the question of when a state-law claim might be considered part of the whole "case" became more pressing.¹⁷³ The Court addressed this issue in *Hurn v. Ourslor*,¹⁷⁴ creating a relatively stringent test, based on the concept of "cause of action."¹⁷⁵ The Court distinguished between two kinds of cases: (1) cases in which the federal and nonfederal claims were "two distinct grounds" of one cause of action; and (2) cases in which the federal and nonfederal claims were "two separate and distinct causes of action."¹⁷⁶ The Court held that only in the former type of case could a court exercise pendent jurisdiction.¹⁷⁷

Because "cause of action" was an ill-defined concept, the lower

questions appearing in the record." *Id.* at 193. The Court continues to implement this policy of avoiding constitutional questions. *See, e.g., Hagans v. Lavine*, 415 U.S. 528 (1974).

168. 213 U.S. at 198.

169. *See* 13B WRIGHT, *supra* note 1, § 3567, at 108.

170. 213 U.S. at 193.

171. *See supra* note 167.

172. *See* HART & WECHSLER, *supra* note 163, at 922; 13B WRIGHT, *supra* note 1, § 3567, at 108, 111.

173. *See* 13B WRIGHT, *supra* note 1, § 3567, at 107-10.

174. 289 U.S. 238 (1933), *overruled*, *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). In *Hurn*, the plaintiffs were the authors of a play, which appeared in two versions: one copyrighted, the other not. Under federal law, plaintiffs sought to enjoin the defendants from infringing the copyrighted version. The plaintiffs also brought a state-law claim to enjoin the defendants' unfair competition in the copyrighted version of the play, and a similar state-law claim to enjoin unfair competition in the uncopyrighted version. 289 U.S. at 239. The trial court dismissed the federal claim on the merits and the two state-law claims for lack of jurisdiction. *Id.* at 239-40. The court of appeals affirmed. *Id.* at 240.

175. *Id.* at 245-46.

176. *Id.*

177. *Id.* Thus, the Court held, only the state-law claim for the copyrighted version of the play was supported by pendent jurisdiction. *Id.* at 248.

courts found the *Hurn* test unworkable and tended to apply it in an overly restrictive way.¹⁷⁸ In 1966, the Court therefore altered this "unnecessarily grudging" test.¹⁷⁹ *United Mine Workers v. Gibbs*¹⁸⁰ rejected the *Hurn* "cause of action" test in favor of a test essentially based on the factual relationship between the federal and nonfederal claims.¹⁸¹ The Court created a two-step analysis;¹⁸² the first step focusing on the *power* of the court to hear the claim, the second, on the court's *discretion* to refuse a claim over which it had power.¹⁸³

Under the first step, which the Court later called the "constitutional" part of the analysis,¹⁸⁴ a court must find that the case satisfies three requirements.¹⁸⁵ First, the federal claim must be "substantial."¹⁸⁶ Second, the federal and nonfederal claims must arise from

178. See 13B WRIGHT, *supra* note 1, § 3567, at 112; Matasar, *Primer, supra* note 22, at 120. Similarly, today, because the *Aldinger* test involves the poorly-defined concept of congressional "negation," see *supra* notes 20-23, *infra* note 230 and accompanying text, the lower federal courts are applying the *Aldinger* test in an overly restrictive manner. See *infra* notes 231-81 and accompanying text.

179. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), *overruled on other grounds*, *Rosado v. Wyman*, 397 U.S. 397 (1970) (jurisdiction over primary claim not a prerequisite to resolution of pendent claim; mootness of primary claim does not bar pendent jurisdiction).

180. 383 U.S. 715 (1966).

181. *Id.* at 725.

182. See 13B WRIGHT, *supra* note 1, § 3567, at 113.

183. See *id.*

184. See *Owen*, 437 U.S. at 371.

185. Some debate has arisen over whether *Gibbs* imposes three requirements or two. The issue revolves around whether the "common nucleus" requirement and the requirement that a plaintiff "ordinarily be expected to try" the claims in one proceeding should be read as: (1) redundant, see, e.g., Matasar, *Primer, supra* note 22, at 134-39; (2) alternative, see, e.g., Baker, *Toward a More Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759 (1975) [hereinafter cited as Baker]; or (3) cumulative. See, e.g., 13B WRIGHT, *supra* note 1, § 3567.1, at 116 & n.8. According to the first view, the "expected to try" requirement is merely a rephrasing of the "common nucleus" test, and adds nothing substantive to the decision. See Matasar, *Primer, supra* note 22, at 134-39; Matasar, *Rediscovering, supra* note 20, at 1457-58. The second view finds only two requirements in this language, because it sees the "common nucleus" and "expected to try" requirements as alternative (*i.e.*, satisfaction of *either* of the two would be sufficient). See Baker, *supra*, at 764-84. Under the third view, the two requirements are cumulative (*i.e.*, each must be satisfied independently), and hence the *Gibbs* test for whether a court has power to adjudicate a nonfederal claim contains three requirements. See, e.g., 13B WRIGHT, *supra* note 1, § 3567.1, at 116; *Unravelling, supra* note 13, at 901-02 & n.32. Most courts adhere to this "cumulative" view, see 13B WRIGHT, *supra* note 1, § 3567.1, at 116 & n.8; Matasar, *Primer, supra* note 22, at 135 & n.155, at least in theory. One commentator has noted that in practice, many courts "either ignore the requirement altogether, cite the language without analysis, or subsume it in the common nucleus test." Matasar, *Primer, supra* note 22, at 138.

186. *Gibbs*, 383 U.S. at 725. See *Bell v. Hood*, 327 U.S. 678 (1946); *Graf v. Elgin, Joliet & E. Ry.*, 697 F.2d 771, 775 (7th Cir. 1983).

a "common nucleus of operative fact."¹⁸⁷ Finally, the claims must be related in such a way that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding."¹⁸⁸

Under the second step, a federal court may exercise its discretion to dismiss pendent claims even though it has power to hear them.¹⁸⁹ In exercising this discretion, the Court said, the federal courts should consider the factors of "judicial economy, convenience and fairness to the litigants."¹⁹⁰

The lower federal courts greatly expanded their use of pendent jurisdiction under the *Gibbs* test, rarely dismissing pendent claims for discretionary reasons.¹⁹¹ As a part of this expansion, federal courts began exercising jurisdiction over state-law claims that drew an additional party into the suit.¹⁹² This practice became known as "pendent party jurisdiction."¹⁹³

3. Pendent Party Jurisdiction

Unlike ancillary and pendent jurisdiction, which the Supreme Court initiated,¹⁹⁴ pendent party jurisdiction first developed in the lower federal courts.¹⁹⁵ The Supreme Court has yet to rule definitively on its validity,¹⁹⁶ although it has consistently checked the growth of the doctrine each time it has considered it.¹⁹⁷

187. 383 U.S. at 725.

188. *Id.*

189. *Id.* at 726.

190. *Id.* In addition, the courts should ordinarily dismiss state-law claims when the federal claims have been dismissed before trial, or if the state-law claims "substantially predominate," or if trying the claims together would be likely to cause jury confusion. *Id.* at 726-27.

191. 13B WRIGHT, *supra* note 1, § 3567.1, at 144.

192. *See infra* notes 198-202 and accompanying text.

193. *See* 13B WRIGHT, *supra* note 1, § 3567.2, at 145-46.

194. *See supra* notes 142-45, 159-93 and accompanying text.

195. *See* 13B WRIGHT, *supra* note 1, § 3567.2, at 148-52.

196. *See infra* notes 203-33 and accompanying text.

197. In *Moor v. County of Alameda*, 411 U.S. 693 (1973), *overruled*, *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) (local school board not immune from § 1983 action), and *Philbrook v. Glodgett*, 421 U.S. 707, 720 (1975), the Court avoided deciding any issue concerning pendent party jurisdiction. *See infra* notes 203-07 and accompanying text. In *Aldinger v. Howard*, 427 U.S. 1 (1976), the Court checked the expansion of the doctrine by imposing an additional step in the analysis, involving an examination of congressional intent. *See infra* notes 215-20 and accompanying text. In *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978), the Court reaffirmed its decision to impose the additional step, and precluded the use of pendent party jurisdiction in a diversity case to overcome the requirement of complete diversity. *See infra* notes 226-29 and accompanying text.

After the case of *United Mine Workers v. Gibbs*,¹⁹⁸ the federal courts generally became more liberal in their use of pendent jurisdiction.¹⁹⁹ Some courts began to take jurisdiction over pendent claims even when such claims involved parties who were not part of the original suit.²⁰⁰ Many of these courts drew support from the language in *Gibbs* indicating that, under the Federal Rules of Civil Procedure, "joinder of claims, parties and remedies is strongly encouraged."²⁰¹ Other courts declined to use pendent jurisdiction for such claims.²⁰²

The Supreme Court explicitly avoided ruling on the validity of pendent party jurisdiction in two cases that arose in the 1970's. In *Moor v. County of Alameda*²⁰³ and *Philbrook v. Glodgett*,²⁰⁴ the Court noted that the issue was "subtle and complex"²⁰⁵ and disposed of the cases on either discretionary or prudential grounds.²⁰⁶ A year after *Philbrook*, the Court was faced with a case that forced it to confront the pendent party issue directly. This case was *Aldinger v. Howard*.²⁰⁷

In *Aldinger*, the plaintiff brought suit in federal court under section 1983, alleging that she had been dismissed from a position with the office of the treasurer of Spokane County, Washington, in violation of her constitutional rights.²⁰⁸ The action named the County and several of its officials as defendants.²⁰⁹ The district court dismissed Aldinger's claim against the County, and the Ninth Circuit affirmed, restating its longstanding ban on pendent party jurisdiction.²¹⁰

198. 383 U.S. 715 (1966).

199. 13B WRIGHT, *supra* note 1, § 3567.2, at 144.

200. *Id.* at 146-51.

201. *Gibbs*, 383 U.S. at 724 (emphasis added).

202. *See, e.g.*, *Hampton v. City of Chicago*, 484 F.2d 602, 611 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972), *aff'd in part, rev'd in part sub nom.* *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Hymers v. Chai*, 407 F.2d 136, 137 (9th Cir. 1969); *Williams v. United States*, 405 F.2d 951 (9th Cir. 1969).

203. 411 U.S. 693 (1973).

204. 421 U.S. 707 (1975).

205. *Moor*, 411 U.S. at 715; *Philbrook*, 421 U.S. at 720.

206. In *Moor*, the Court held only that the district court had not abused its discretion in dismissing the pendent party. 411 U.S. at 716-17. In *Philbrook*, the Court dismissed an appeal by the pendent party because the district court's exercise of pendent party jurisdiction over him had "resulted in no adjudication on the merits that could not have been just as properly made without the [pendent party], and ha[d] resulted in no issuance of process against [him] which he ha[d] properly contended to be wrongful before this Court." 421 U.S. at 722.

207. 427 U.S. 1 (1976); *see* 3A MOORE, *supra* note 126, ¶ 20.07[5.—1], at 20-77.

208. 427 U.S. at 3.

209. *Id.* at 4.

210. *Id.* at 5.

The Supreme Court affirmed,²¹¹ but explicitly limited its decision to the narrow issue presented by the facts.²¹² Hence, the Court refrained from eradicating the doctrine entirely.²¹³ The Court held that when a litigant sought to use pendent jurisdiction to join a new *party* to the suit, and Congress had addressed the issue of federal court jurisdiction over such a party, the two-part test delineated in *Gibbs* was only the first part of the analysis.²¹⁴

The *Gibbs* test, as the Court later made explicit,²¹⁵ determined only whether the *Constitution* permitted the extension of jurisdiction to a pendent claim.²¹⁶ It was also necessary to determine whether *Congress*, which like the Constitution limits federal court jurisdiction,²¹⁷ permitted such an extension.²¹⁸ In the words of the Court, "[b]efore it can be concluded that [pendent party] jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."²¹⁹

Under *Aldinger*, then, the analysis involves three inquiries: (1) whether article III of the Constitution has given the federal court power to hear the claim (the "constitutional" analysis); (2) whether Congress has expressly or implicitly negated jurisdiction (the "statutory" analysis); and (3) whether the court should exercise its discretion to use its power to hear the claim (the "discretionary" analysis).²²⁰

In his opinion for the Court, Justice Rehnquist took care to limit this new rule to pendent party cases in which the federal claim arose out of section 1983.²²¹ Stating that "[f]or purposes of . . . this case . . . it [is] quite unnecessary to formulate any general, all-encompassing jurisdictional rule," he declined to decide "whether there are any 'principled' differences between pendent and ancillary ju-

211. *Id.* at 19.

212. *See id.* at 18; *Grimes v. Chrysler Motors Corp.*, 565 F.2d 841, 844 (2d Cir. 1977).

213. *Id.* at 13, 18; *see also Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1360 (7th Cir. 1985) (Posner, J., separate opinion).

214. 427 U.S. at 14-16.

215. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 (1978).

216. *See id.*

217. *See supra* notes 113-17 and accompanying text.

218. *Aldinger*, 427 U.S. at 13-16 (emphasis added).

219. *Id.* at 18.

220. *See, e.g., Amoco Oil Co. v. Local 99, Int'l Bhd. of Elec. Workers, AFL-CIO*, 536 F. Supp. 1203, 1221 (D.R.I. 1982).

221. *See Weinberger v. Kendrick*, 698 F.2d 61, 76 (2d Cir. 1982), *cert. denied sub nom. Lewy v. Weinberger*, 464 U.S. 818 (1983); *Grimes v. Chrysler Motors Corp.*, 565 F.2d 841, 844 (2d Cir. 1977).

risdiction; or, if there are, what effect *Gibbs* had on such differences.”²²² In addition, he noted that “[o]ther statutory grants and other alignments of parties and claims might call for a different result.”²²³

The Court applied its newly-formulated test to sections 1343(3) and 1983, the statutes at issue in *Aldinger*, and held that Congress had indeed “expressly or by implication negated” jurisdiction over a municipality such as Spokane County.²²⁴ The Court therefore affirmed the dismissal of *Aldinger*’s claim.²²⁵

Two years later, in *Owen*, the Court applied the *Aldinger* test again, this time construing section 1332 of Title 28 of the United States Code, the statute conferring diversity jurisdiction.²²⁶ In *Owen*, Kroger brought a state-law tort claim in federal court on the basis of diversity of citizenship. The defendant impleaded Owen Equipment & Erection Co. as a third-party defendant and Kroger amended her complaint to assert a state-law claim against Owen. During trial, Kroger discovered that she and Owen were not diverse, and Owen moved to dismiss the case. The district court denied this motion and the court of appeals affirmed, holding that *Gibbs* permitted the retention of jurisdiction.²²⁷

The Supreme Court reversed and, analyzing the case as a pendent party case, held that Congress had negated jurisdiction over claims between nondiverse parties in a suit based upon section 1332.²²⁸ The Court reasoned that Congress’ reenactment of section 1332 after the Court had construed it to require complete diversity showed both congressional ratification of the requirement and congressional intent to exclude nondiverse parties from the coverage of section 1332.²²⁹

According to several authorities, neither *Aldinger* nor *Owen* has provided the lower federal courts with a clear idea of what “negation” is or how to determine whether Congress has “negated” pendent party jurisdiction.²³⁰ As a result, considerable uncertainty

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

223. *Id.* at 18.

224. *Id.* at 16-19. For a detailed discussion of the analysis the Court employed to determine that Congress had negated jurisdiction, see *infra* notes 282-362 and accompanying text.

225. *Id.* at 19. For a more in-depth discussion of the Court’s analysis in *Aldinger*, see *infra* notes 311-42 and accompanying text.

226. 437 U.S. 365, 373-75 (1978).

227. *Id.* at 367-69.

228. *Id.* at 373-77.

229. *Id.* at 373-74. For a more in-depth discussion of the Court’s analysis, see *infra* notes 343-49 and accompanying text.

230. See *supra* notes 20-23 and accompanying text.

has persisted in the years since the Court issued these decisions.²³¹ After discussing the consequential confusion in the lower federal courts,²³² this Note will attempt to clarify the *Aldinger* test and describe in detail the process a court should go through to determine if Congress has negated jurisdiction.²³³

III. The Current Dispute

Because of the lack of guidance afforded by *Aldinger* and *Owen*,²³⁴ the federal courts have continued to develop divergent approaches to the use of pendent party jurisdiction in section 1983 cases.²³⁵ Thus, pendent party jurisdiction has become "embattled"²³⁶ and, alternatively characterized as "nascent"²³⁷ and "moribund,"²³⁸ continues to provoke controversy.

The various approaches taken by the lower federal courts may be divided into two classes: (1) those courts that never reach the question of how to apply the *Aldinger* test;²³⁹ and (2) those courts that do reach the test.²⁴⁰

A. Courts That Fail to Reach the *Aldinger* Test

Most federal courts never reach the *Aldinger* analysis, escaping it on the basis of a number of different rationales.²⁴¹ In the Ninth Circuit, for example, the court of appeals continues to adhere to the position that pendent party jurisdiction is unconstitutional, and thus holds that the doctrine is unavailable no matter what federal statute gives rise to the federal claim.²⁴²

231. See *supra* notes 17-24 and accompanying text.

232. See *infra* notes 234-81 and accompanying text.

233. See *infra* notes 282-362 and accompanying text.

234. See *supra* notes 21-23, 230-31 and accompanying text.

235. See *infra* notes 239-81 and accompanying text.

236. *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 187 (7th Cir. 1984).

237. *Williams v. Bennett*, 689 F.2d 1370, 1379 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

238. *Padilla v. d'Avis*, 580 F. Supp. 403, 410 (N.D. Ill. 1984), *aff'd sub nom. Jones v. City of Chicago*, 787 F.2d 200 (7th Cir. 1986).

239. See *infra* notes 241-46 and accompanying text.

240. See *infra* notes 247-81 and accompanying text.

241. See *infra* notes 242-46 and accompanying text.

242. The Ninth Circuit maintained its absolute ban both before the Supreme Court's *Aldinger* decision, see, e.g., *Aldinger v. Howard*, 513 F.2d 1257 (9th Cir. 1975), *aff'd*, 427 U.S. 1 (1976); *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972), *aff'd in part, rev'd in part sub nom. Moor v. County of Alameda*, 411 U.S. 693 (1973); *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969), and after. See, e.g., *Carpenters S. Cal. Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999 (9th Cir. 1984); *Safeco Ins. Co. of Am. v. Guyton*, 692 F.2d 551 (9th Cir. 1982); *Ayala v. United*

District courts in other circuits²⁴³ have similarly avoided the *Aldinger* analysis. Some of these courts simply assert that they will skip over the "statutory" stage of the analysis and go directly to the "discretionary" stage, and then dismiss the pendent party for discretionary reasons.²⁴⁴ Other courts merely cite to the precedent

States, 550 F.2d 1196 (9th Cir. 1977), *cert. dismissed*, 435 U.S. 982 (1978).

Despite the frequent invocation of this rule, the district courts of the Circuit have occasionally broken it. *See, e.g.,* Potter v. Rain Brook Feed Co., 530 F. Supp. 569, 574 (E.D. Cal. 1982) (court of appeals "has yet to articulate its constitutional objections to pendent party theory" and neither "that court nor the Supreme Court [has] identified a precedential or doctrinal basis upon which to distinguish pendent claim from pendent party claim jurisdiction on constitutional grounds"); Jacobs v. United States, 367 F. Supp. 1275 (D. Ariz. 1973).

Moreover, in the case of Traver v. Mehriy, 627 F.2d 934, 939 (9th Cir. 1980), even the court of appeals, though without acknowledging it, permitted the use of pendent party jurisdiction. The dispute in *Traver* arose out of a misunderstanding in a bank between the plaintiff, a bank customer attempting to make a withdrawal, and one of the defendants, a bank operations officer named Meshriy. 627 F.2d at 937. When the plaintiff attempted to storm out of the bank, Meshriy alerted the bank's security guard, an off-duty police officer named Gibson. *Id.* Gibson, his gun drawn, blocked the plaintiff's exit, and held him for approximately half an hour. *Id.* Under § 1983, the plaintiff sued Gibson (a state actor) directly, and the bank, on a theory of vicarious liability. *Id.* at 936, 938. In addition, the plaintiff sued Gibson, the bank and Meshriy under state tort law, asserting that pendent jurisdiction supported these nonfederal claims. *Id.* at 938. The court of appeals affirmed the district court's refusal to dismiss the pendent claims, *id.* at 939, and held that the jury had based its verdict in favor of the plaintiff on the state-law claims alone. *Id.*

Although the court of appeals never mentioned pendent party jurisdiction, it in fact allowed the use of it by affirming the exercise of jurisdiction over Meshriy. It is true that the claim against the bank was an ordinary pendent claim, because the plaintiff had asserted a federal § 1983 claim against the bank, which was "tenuous, but not frivolous," *id.* at 939, and therefore sufficient to support a pendent claim. *See supra* note 186 and accompanying text. With regard to Meshriy, however, there was *no* § 1983 claim at all. *See* 627 F.2d at 939. Thus, by affirming the exercise of jurisdiction over Meshriy, the court was in effect permitting the use of pendent party jurisdiction. *See Moore*, 754 F.2d at 1360 (Posner, J., separate opinion) (characterizing *Traver* as case allowing pendent party jurisdiction).

Nevertheless, after *Traver*, the court of appeals and many district courts have continued to assert that the circuit maintains its absolute ban on the doctrine. *See, e.g.,* Carpenters S. Cal. Admin. Corp. v. D & L Camp Constr. Co., 738 F.2d 999, 1000 (9th Cir. 1984); Safeco Ins. Co. of Am. v. Guyton, 692 F.2d 551, 555 (9th Cir. 1982); Munoz v. Small Business Admin., 644 F.2d 1361, 1365-66 (9th Cir. 1981); Nunnelley v. County of Douglas, 622 F. Supp. 124, 126 (D. Nev. 1985); Langford v. Gates, 610 F. Supp. 120, 122 n.1 (C.D. Cal. 1985); Miletich v. Raley's, 593 F. Supp. 124, 125 (D. Nev. 1984).

243. The other circuits either: (1) have expressly allowed for pendent party jurisdiction in a § 1983 case, *see infra* notes 264-81 and accompanying text; or (2) have not, since *Aldinger*, ruled on the issue of whether pendent party jurisdiction is available in a § 1983 claim. *See infra* note 247.

244. *See, e.g.,* Musikiwamba v. ESSI, Inc., 760 F.2d 740 (7th Cir. 1985); Williams v. Bennett, 689 F.2d 1370, 1379-80 (11th Cir. 1982), *cert. denied*, 464 U.S. 932

of another lower federal court and, without offering any rationale for following a non-binding decision, choose to rule in the same way.²⁴⁵ Still others, asserting that the doctrine is disfavored and that the courts should therefore use it sparingly, dismiss pendent claims for "policy" reasons.²⁴⁶

B. Courts That Do Reach the *Aldinger* Test

A smaller group of courts reaches the *Aldinger* test.²⁴⁷ These courts may be further subdivided into: (1) those courts that apply the test in such a way that they will invariably dismiss the pendent party;²⁴⁸ and (2) those courts that undergo a full process of statutory construction.²⁴⁹

The first class of courts holds that the *Aldinger* test is simply a form of the canon of statutory construction known as *expressio unius est exclusio alterius*.²⁵⁰ In its simplest form, this "much

(1983); *Hall v. Board of Educ.*, No. 85-C-6544, slip op. (N.D. Ill. Aug. 19, 1985) (available Jan. 13, 1986, on LEXIS, Genfed library, Dist file); *Pitt v. City of New York*, No. 82 Civ. 3349, slip op. (S.D.N.Y. Dec. 7, 1984) (available Jan. 11, 1986, on LEXIS, Genfed library, Dist file); *Padilla v. d'Avis*, 580 F. Supp. 403, 410 (N.D. Ill. 1984), *aff'd sub nom. Jones v. City of Chicago*, 787 F.2d 200 (7th Cir. 1986); *Red Elk v. Vig*, 571 F. Supp. 422, 426 n.6 (D.S.D. 1983).

245. *See, e.g., Onesti v. Thomson McKinnon Secs., Inc.*, 619 F. Supp. 1262, 1264 (N.D. Ill. 1985); *Arancibia v. Berry*, 603 F. Supp. 931, 936 (S.D.N.Y. 1985); *Becerra v. United States*, No. L-83-11, slip op. (S.D. Tex. Mar. 3, 1984) (available Jan. 13, 1986, on LEXIS, Genfed library, Dist file).

246. *See, e.g., Savas v. Sheehan*, No. 86-C-1531, slip op. (N.D. Ill. Jun. 10, 1986) (available Sept. 18, 1986, on LEXIS, Genfed library, Dist file). One court, after finding that Congress had been completely silent in the statute on the issue of pendent party claims, simply appraised the case "in the light of [the historical] . . . development" of pendent party jurisdiction. *See Fritts v. Niehouse*, 604 F. Supp. 823, 828 (W.D. Mo. 1984), *aff'd*, 774 F.2d 1170 (8th Cir. 1985).

247. This class of courts includes the few circuit courts that have held that pendent party jurisdiction is at last theoretically available in a § 1983 case, *i.e.*, (1) the Seventh Circuit, *see infra* notes 264-79 and accompanying text; (2) the Eleventh Circuit, *see infra* note 281; and (3) possibly the Fifth Circuit, *see infra* note 280, as well as the circuits that have not had an opportunity since *Aldinger* to decide a § 1983 case involving pendent party jurisdiction. These circuits are the First, Second, Third, Fourth, Sixth, Eighth, Tenth and the District of Columbia Circuit.

248. For a discussion of courts that apply the *Aldinger* test in this way, *see infra* notes 250-57 and accompanying text.

249. For a discussion of courts that engage in a full analysis, *see infra* notes 261-81 and accompanying text.

250. *See, e.g., Szumny v. Village of Addison*, No. 85-C-5149, slip op. (N.D. Ill. Oct. 9, 1985) (available Jan. 11, 1986, on LEXIS, Genfed library, Dist file); *Stephenson v. Esquivel*, 614 F. Supp. 986, 994 (D.N.M. 1985); *Bright v. City of New York*, No. 83 Civ. 7775-CSH, slip op. (S.D.N.Y. Apr. 14, 1985) (available Jan. 11, 1986, on LEXIS, Genfed Library, Dist file); *Neilan v. Value Vacations, Inc.*, 603 F. Supp. 1227, 1232 (S.D.N.Y. 1985); *Bostedt v. Festivals, Inc.*, 569 F.

maligned"²⁵¹ canon permits the inference that the mere inclusion of certain categories by the legislative body indicates legislative intent to exclude all other categories.²⁵² Thus, the canon allows a court to draw an inference about congressional intent from what is essentially congressional silence.²⁵³

The courts applying the canon in the context of pendent party jurisdiction read *Aldinger* to hold that whenever Congress has not explicitly included a party within a jurisdiction-granting statute, it has necessarily negated jurisdiction over that party by implication.²⁵⁴ Of course, in pendent party jurisdiction cases, the plaintiff will almost invariably be seeking to join a party over whom Congress has failed to confer express jurisdiction.²⁵⁵ It follows that these courts,

Supp. 503, 506-07 (N.D. Ill. 1983); *McArthur v. Robinson*, 568 F. Supp. 393, 397 (E.D. Ark. 1983). Several commentators have also read *Aldinger* to impose an *expressio unius* test. See, e.g., *Comment, Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 938 (1979); Capra, *supra* note 13, at 23, col. 3. For a definition of the canon, see *infra* note 252.

251. Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L. J. 611, 637 n.136; see also F. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234 ("[f]ar from being a rule, it is not even lexicographically accurate") [hereinafter cited as DICKERSON]; K. LEWELLYN, *THE COMMON LAW TRADITION* 521-35 (1960) (for every canon there is equal and opposite canon); Posner, *Statutory Interpretation—In the Classroom and in the Court*, 50 U. CHI. L. REV. 800, 805-17 (1983) (Court's use of *expressio unius* canon may show that "judicial use of the canons . . . is hopelessly opportunistic"); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 874-75 (1930) ("first comment on the rule is that it is not true"); Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 415 (1985) (*expressio unius* "has generated the most hostile antipathy among some commentators"); Sneed, *The Art of Statutory Construction*, 62 TEX. L. REV. 665, 682-83 n.82 (1983) (canons viewed with "disfavor, if not derision").

252. The canon has been defined as the "maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another Under this maxim, if [a] statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

253. Cf. Foy, *Some Reflections on Legislation, Adjudication, and Implied Rights of Action in the Federal Courts*, 71 CORNELL L. REV. 501, 521 & n.62 (1986) (stating that inference from legislative "silence" is "an application of the principle *expressio unius*"). A proponent of the *expressio unius* approach might argue that the canon does *not* allow an inference from "silence," but rather from Congress' act of failing to include something. The Court, however, and several commentators have characterized this act of "failing to include" as silence. See *id.*; Murphy, *Sidetracking the FELA: The Railroads' Property Damage Claims*, 69 MINN. L. REV. 349, 366-67 (1985); see also *infra* note 302.

254. See *supra* note 251.

255. See *Aldinger*, 427 U.S. at 23 (Brennan, J., dissenting) As Justice Brennan expressed it, the test could be viewed as "meaningless," since it could be "capable of application to *all* cases, because all instances of asserted pendent-party jurisdiction will by definition involve a party as to whom Congress has impliedly 'addressed

unless they provide for exceptions, can almost never exercise pendent party jurisdiction. Moreover, by applying an *expressio unius* test, these courts are disregarding not only the fact that the canon has long been held in disfavor,²⁵⁶ but also, as demonstrated below, that the Court did not intend the lower federal courts to use such a test.²⁵⁷

Under a subtler version of the *expressio unius* test, a failure to include a category of parties creates only a *presumption* that Congress has negated jurisdiction.²⁵⁸ This "presumption" form of the canon allows for a theoretical possibility of pendent party jurisdiction;²⁵⁹ however, as shown below, this form of the *expressio unius* test also diverges from the Court's intention in *Aldinger* and *Owen*.²⁶⁰

Other federal courts have held that, to determine if Congress has negated jurisdiction over a certain category of parties under *Aldinger*, a court should go through a full process of statutory construction in each case.²⁶¹ To aid in their analysis, these courts look primarily

itself" by not expressly conferring subject-matter jurisdiction on the federal courts." *Id.* (emphasis in original). There is one possible exception to this rule: cases brought under 28 U.S.C. § 1338(b), a statute in which Congress expressly provided for pendent jurisdiction over any "civil action asserting a claim of unfair competition," when it is joined with "a substantial and related claim under copyright, patent, plant variety protection or trademark laws." 28 U.S.C. § 1338(b). The statute does not explicitly grant jurisdiction over claims involving pendent *parties*, although nothing in its language would seem to limit its scope to pendent claims. A court using a rigid *expressio unius* approach could thus hold that Congress, by expressly providing for jurisdiction over "claims," it implicitly rejected jurisdiction over "parties." A more reasonable reading, however, would grant jurisdiction over parties as well as claims, and thus would create a minor exception to the utter eradication of pendent party jurisdiction that the *expressio unius* test would effectuate.

256. See *supra* note 251.

257. Cf. *Potter v. Rain Brook Feed Co.*, 530 F. Supp. 569, 579 (E.D. Cal. 1982). In this pendent party case, brought under FELA, the court stated that "[p]roperly read, *Aldinger* and *Kroger* call for more than congressional silence before a court can properly conclude that pendent or ancillary jurisdiction has been expressly or impliedly foreclosed." *Id.*; see also *infra* notes 285-349 and accompanying text.

258. See *Chas. Kurz Co. v. Lombardi*, 595 F. Supp. 373, 378 (E.D. Pa. 1984); *Unravelling*, *supra* note 13, at 930-47; *Capra*, *supra* note 13, at 23, col. 3.

259. The presumption of negation can occasionally be overcome. See *Chas. Kurz Co.*, 595 F. Supp. at 379-80 (implying that "indication from Congress" could overcome presumption, and stating, without support, that "[t]he exceptional cases where the presumption may be overcome will primarily involve those situations in which the proposed pendent party is necessary or indispensable to the resolution of a valid pendent claim"); *Capra*, *supra* note 13, at 23, col. 3 (presumption overcome if "Congress has expressed some affirmative intent to include non-federal parties on a pendent-party basis").

260. See *infra* notes 314-17 and accompanying text.

261. See, e.g., *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 n.5 (11th

at the legislative history,²⁶² and generally allow jurisdiction if they find Congress has been silent.²⁶³

On the circuit court level, a trend may have started toward a more liberal use of pendent party jurisdiction in section 1983 actions.²⁶⁴ The Seventh Circuit, for example, was originally inhospitable to the doctrine, not only in section 1983 cases, but generally.²⁶⁵ Even before *Aldinger*, its courts were unwilling to exercise pendent party jurisdiction.²⁶⁶ After *Aldinger*, they became even less willing, often expressing a perception that the Supreme Court was hostile to the doctrine and would soon reject it completely,²⁶⁷ and noting that the Seventh Circuit in particular regarded pendent party jurisdiction with disfavor.²⁶⁸

Cir. 1985); *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511, 518 (7th Cir. 1985); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1359-61 (7th Cir. 1985) (Posner, J., separate opinion); *Barnes v. Hinsdale Hosp.*, No. 85-C-4268, slip op. (N.D. Ill. Dec. 9, 1985) (available Jan. 13, 1986 on LEXIS, Genfed library, Dist file); *Irwin v. Calhoun*, 522 F. Supp. 576, 581-82 (D. Mass. 1981); cf. *Potter v. Rain Brook Feed Co.*, 530 F. Supp. 569, 579 (E.D. Cal. 1982) (FELA case).

262. See, e.g., *Moore*, 754 F.2d at 1359-61; *Irwin v. Calhoun*, 522 F. Supp. 576, 581 (D. Mass. 1981).

263. See, e.g., *Moore*, 754 F.2d at 1359, *Calhoun*, 522 F. Supp. at 580; cf. *Potter*, 530 F. Supp. at 579.

264. See *infra* notes 265-81 and accompanying text.

265. See *infra* notes 266-67 and accompanying text.

266. See, e.g., *Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *Wojtas v. City of Niles*, 334 F.2d 797 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); *Drennan v. City of Lake Forest*, 356 F. Supp. 1277 (N.D. Ill. 1972).

267. See, e.g., *Thomas v. Shelton*, 740 F.2d 478, 487 (7th Cir. 1984) (“[a]lthough pendent party jurisdiction is not dead . . . neither is it in the best of health”); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 187 (7th Cir. 1984) (questioning whether pendent party jurisdiction “retains any vitality” and calling it an “embattled concept”); *Graf v. Elgin, Joliet & E. Ry.*, 697 F.2d 771, 775 (7th Cir. 1983) (noting “current judicial hostility”); *Knudsen v. D.C.B., Inc.*, 592 F. Supp. 1232, 1235 (N.D. Ill. 1984) (doctrine “has never been expressly approved of” by Court “and in fact was negatively referred to in *Aldinger*”); *Bostedt v. Festivals, Inc.*, 569 F. Supp. 503, 505 (N.D. Ill. 1983) (asserting Court “has never expressly approved of” doctrine and that “opposite likely is true”).

268. See, e.g., *Johnson v. Miller*, 680 F.2d 39, 41 (7th Cir. 1982) (questioning whether “anything survives of pendent party jurisdiction in this Circuit”); *Knudsen*, 592 F. Supp. at 1235 (doctrine has “generally met with disfavor in this Circuit” and “with certain . . . exceptions, there is no pendent party jurisdiction in this Circuit”); *Harris v. Beynon*, 570 F. Supp. 690, 692 (N.D. Ill. 1983) (may be “no room at all” for pendent party jurisdiction “in this Circuit under any circumstances”); *Martin v. County of Kendall*, 561 F. Supp. 726, 730 (N.D. Ill. 1983) (“our Court of Appeals has all but closed the door on pendent party jurisdiction as a whole”); *Ragusa v. City of Streator*, 95 F.R.D. 527, 529 (N.D. Ill. 1982) (court of appeals has “made its point of view on the undesirability” of pendent party jurisdiction “very plain indeed”).

In *Moore v. Marketplace Restaurant, Inc.*,²⁶⁹ however, the Seventh Circuit extended tentative recognition to pendent party jurisdiction in a section 1983 case.²⁷⁰ In *Moore*, after a dispute between the plaintiffs and the owner of the Marketplace Restaurant led to the plaintiffs' wrongful arrest, the plaintiffs brought section 1983 and state-law claims against the arresting officers and the owner.²⁷¹ The Seventh Circuit affirmed the dismissal of the section 1983 claim against the restaurant owner, but not against the arresting officers.²⁷² The court therefore addressed the issue of whether the district court should retain the owner as a pendent party.²⁷³

While admitting that "[t]he 'pendent parties' concept has . . . wobbly constitutional foundations,"²⁷⁴ Judge Posner pointed out that in *Aldinger* the Court had expressly left open the question of "whether the concept retains vitality."²⁷⁵ Asserting that he could not see "why, once an overbroad reading of *Aldinger* . . . is rejected, pendent party jurisdiction, if available in other federal-question cases, should not be available in a section 1983 case,"²⁷⁶ Judge Posner held for the court²⁷⁷ that the district court could take jurisdiction of the pendent party claim against the owner.²⁷⁸

Thus, *Moore* may indicate a Seventh Circuit trend towards more liberal use of pendent party jurisdiction, at least in cases in which the party to be joined is not a municipality.²⁷⁹ The Fifth²⁸⁰ and

269. 754 F.2d 1336 (7th Cir. 1985).

270. *Id.* at 1359-61.

271. *Id.* at 1339.

272. *Id.* at 1339-40, 1353, 1356, 1361.

273. *See id.* at 1353-54, 1359-61.

274. *Id.* at 1359.

275. *Id.* at 1360.

276. *Id.* at 1360-61.

277. Although Judge Coffey, who wrote the opinion of the court on the other issues in *Moore*, believed that pendent party jurisdiction was not permissible on the facts, *see* 754 F.2d at 1352-54, Judges Posner and Gibson agreed that it was permissible. *See id.* at 1359-61. Thus, Judge Posner's opinion, holding pendent party jurisdiction permissible in a section 1983 case, is the decision of the court. *See Savas v. Sheehan*, No. 86-C-1531, slip op. (N.D. Ill. Jun. 10, 1986) (available Sept. 19, 1986, on LEXIS, Genfed library, Dist file).

278. *Moore*, 754 F.2d at 1359.

279. *See id.* at 1360-61.

280. In *Finch v. Mississippi State Medical Ass'n*, 585 F.2d 765 (5th Cir. 1978), the Fifth Circuit had stated flatly that *Aldinger* completely precludes "federal jurisdiction over pendent parties in a § 1983 suit." *Id.* at 780 (emphasis in original). In a recent § 1983 case, however, the court of appeals stated in a footnote that on remand the district court would "not be foreclosed from considering" the doctrine of pendent party jurisdiction. *See Coon v. Ledbetter*, 780 F.2d 1158, 1165 n.3 (5th Cir. 1986). Yet the court failed to offer any analysis or to overrule *Finch* explicitly. *See id.* Although one district court from the Tenth Circuit has followed

Eleventh²⁸¹ Circuits may be experiencing similar trends.

IV. Determining When Congress Has Negated Jurisdiction

As is demonstrated below, *Aldinger* and *Owen* show that the Court did not intend the lower federal courts to use the *expressio unius* test in either its simple²⁸² or presumption²⁸³ forms, but rather intended them to use an in-depth process of statutory construction.²⁸⁴ This process entails: (1) construing the language of the statute in question in an attempt to ascertain if there is any *affirmative* evidence (beyond a mere "failure to include") of *actual* congressional intent to negate jurisdiction;²⁸⁵ (2) employing a wide range of extrinsic aids to construction;²⁸⁶ and (3) using a case-by-case approach.²⁸⁷ Each element of this approach can be derived from the language of *Aldinger* and the example the Supreme Court set in its own application of the test in both *Aldinger* and *Owen*.²⁸⁸

Finch after the *Coon* decision, see *Steele v. Stephan*, 633 F. Supp. 950 (D. Kan. 1986), research has revealed no cases since *Coon* in which the district courts of the Fifth Circuit have had an opportunity to respond to *Coon's* footnote.

281. The Eleventh Circuit has only recently held that the doctrine is available in a § 1983 case. In 1982, the last time the Circuit had a § 1983 case involving pendent party jurisdiction, the court of appeals held that it "need not resolve the issue" because the "exercise of pendent party jurisdiction is a discretionary decision reserved to the district court," and it concluded that the district court had "acted within its discretion." *Williams v. Bennett*, 689 F.2d 1370, 1379-80 (11th Cir. 1982), cert. denied, 464 U.S. 932 (1983). The court described the doctrine as "nascent," see *id.* at 1379, and "tenuous." See *id.* at 1380. Moreover, in 1984, while allowing pendent party jurisdiction in a Federal Tort Claims Act case, the Court "recogniz[ed] that the Supreme Court has significantly circumscribed the power of federal courts to exercise pendent party jurisdiction." See *Lykins v. Pointer, Inc.*, 725 F.2d 645, 647 (11th Cir. 1984).

Then, in *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985), the court of appeals implicitly allowed the use of pendent party jurisdiction in a § 1983 case. See *id.* at 1443 n.5. The district court had dismissed the pendent party claims solely because it had already dismissed the federal claims. See *id.* at 1439. The court of appeals reversed the district court on its dismissal of the federal claims, and remanded, instructing the lower court "to consider whether the ends of justice and the interests of judicial economy will best be served by [the pendent party's] continued presence in this lawsuit." *Id.* at 1443 n.5.

282. For a discussion of the simple form of the *expressio unius* test, see *supra* notes 250-57 and *infra* notes 289-306, 311-49 and accompanying text.

283. For a discussion of the "presumption" form of the *expressio unius* test, see *supra* notes 258-60; *infra* notes 307-10 and accompanying text.

284. See *infra* notes 289-362 and accompanying text.

285. See *infra* notes 289-349 and accompanying text.

286. See *infra* notes 350-58 and accompanying text.

287. See *infra* notes 359-62 and accompanying text.

288. See *infra* notes 289-349 and accompanying text.

A. The Need to Establish an Affirmative Manifestation of Actual Congressional Intent to Negate Jurisdiction

That the Court intended the lower courts to find an *affirmative* manifestation of congressional intent to negate jurisdiction, as opposed to using a form of the *expressio unius* test, may be discerned, first of all, in the language of *Aldinger*.²⁸⁹ First, the Court explicitly stated that it was not "lay[ing] down any sweeping pronouncement" upon the exercise of pendent party jurisdiction.²⁹⁰ Yet, in its simplest form,²⁹¹ an *expressio unius* test would require the exclusion of all parties who are not expressly included within the scope of a statute,²⁹² and pendent party jurisdiction—by definition—almost always applies *only* to parties who are not so expressly included.²⁹³ Thus, if the *Aldinger* test created an *expressio unius* test, *Aldinger* would essentially require the exclusion of *all* pendent parties, and the Court would have effectively eradicated the doctrine.²⁹⁴ Furthermore, since according to most commentators the *Aldinger* test also applies to ordinary pendent claim jurisdiction and ancillary jurisdiction,²⁹⁵ an

289. See *infra* notes 288-309 and accompanying text. Further support for the proposition that the Court intended the lower courts to find an *affirmative* manifestation of congressional intent may be found in the way the Court applied the *Aldinger* test in *Aldinger* and *Owen*. See *infra* notes 311-49 and accompanying text.

290. *Aldinger*, 427 U.S. at 18.

291. See *supra* notes 250-55 and accompanying text.

292. See *supra* notes 255-57 and accompanying text.

293. If the statute expressly covered a party, there would be no need to use pendent party jurisdiction, for the party could sue or be sued directly under the statute. See *supra* notes 255-57 and accompanying text. It is true that Congress may have created one exception to the rule that pendent party jurisdiction applies only to parties that have not been expressly included in a statute: in 28 U.S.C. § 1338(b), Congress expressly granted pendent jurisdiction in intellectual property cases, and as discussed above, see *supra* note 255, presumably over pendent parties as well. In itself, this one statute does not significantly change the impact of the *expressio unius* test on pendent party jurisdiction.

The statute does raise the argument, however, that its very existence implies that Congress has negated jurisdiction over pendent claims or parties in all cases that do not involve intellectual property. In other words, if Congress expressly provided for pendent jurisdiction in intellectual property cases, why did it not do so in other statutes, such as § 1983? This argument is merely a broader use of the *expressio unius* test, and in this broader context, the test's weaknesses are particularly noticeable. Congress has enacted innumerable statutes long before the advent of pendent jurisdiction. For example, it enacted § 1983 in 1871, see *supra* notes 82-84 and accompanying text, while pendent party jurisdiction did not begin to develop until after the *Gibbs* case, which was decided in 1966. See *supra* notes 180, 198-202 and accompanying text.

294. See *Aldinger*, 427 U.S. at 23 (Brennan, J., dissenting); Bagwell, *supra* note 13, at 344; Matasar, *Primer*, *supra* note 22, at 176.

295. See *supra* note 125 and accompanying text.

expressio unius reading of *Aldinger* would effectively destroy pendent and ancillary jurisdiction as well.²⁹⁶ A more "sweeping pronouncement" would be hard to imagine.

Further support for the conclusion that the Court did not intend to impose an *expressio unius* test is found in the fact that the Court explicitly stated that pendent party jurisdiction might be permissible under "other statutory grants,"²⁹⁷ such as the Federal Torts Claim Act.²⁹⁸ Since the *expressio unius* test in its standard form would essentially exclude *all* pendent parties,²⁹⁹ the Court could not logically have imposed such a test and have simultaneously allowed for the possibility of pendent party jurisdiction under another statutory grant.

Even further support is found in the precise words with which the Court formulated the *Aldinger* test. These words suggest that the Court had in mind something more than mere silence to establish congressional negation of jurisdiction.³⁰⁰ The test, as framed by the Court, states that a federal court *cannot* exercise pendent party jurisdiction if Congress has "expressly or by implication negated" it.³⁰¹ The Court could have framed the test differently, to state that a court *can* exercise pendent party jurisdiction if Congress has "expressly or by implication" *validated* it. The two constructions would each create a different test: the former requires Congress to make at least some affirmative act to negate jurisdiction; the latter requires Congress to make an affirmative act to validate it. The Court's choice of the former construction, then, indicates that the Court intended the test to require something affirmative, beyond mere silence, to establish a negation of jurisdiction.³⁰²

296. See *Luneburg*, *supra* note 21, at 244; *Matasar, Primer*, *supra* note 22, at 176; *Pendent Jurisdiction*, *supra* note 13, at 135, 147-52; *Redish*, *supra* note 13, at 1396. One might argue that courts would not have to use an *expressio unius* test in ancillary and pendent claim jurisdiction cases, on the ground that these doctrines are less drastic than pendent party jurisdiction. It is true that in *Aldinger* Justice Rehnquist said that "there is a more serious obstacle" to the exercise of pendent jurisdiction if a new party is involved. *Aldinger*, 427 U.S. at 18. Nevertheless, it is hard to see how that fact would justify using an *expressio unius* test in pendent party cases and another approach in ancillary and pendent claim cases. In all three types of cases, the question is whether Congress has acted to limit federal court jurisdiction over the claim at issue. See *Matasar, Primer*, *supra* note 22, at 176-78.

297. See *Aldinger*, 427 U.S. at 18.

298. 28 U.S.C. § 1346 (1982); see *Aldinger*, 427 U.S. at 18.

299. See *supra* notes 287-94 and accompanying text.

300. See *infra* note 301-02 and accompanying text.

301. See *Aldinger*, 427 U.S. at 18.

302. An advocate of the *expressio unius* approach might argue that the "failure to include" a party is "something affirmative" and not mere silence. The Court

In addition, the Court made several references to the kind of analysis it intended the courts to employ. These references, especially when considered cumulatively, indicate that the Court did not envision an *expressio unius* test, but rather a fuller process of statutory construction. For example, the Court said that “[r]esolution of a claim of pendent-party jurisdiction . . . calls for *careful attention* to the relevant statutory language.”³⁰³ Such “careful attention” would hardly be necessary if all the federal court had to do was to determine whether Congress had expressly included a party within the scope of the statute. The Court made similar references to a full process of statutory construction by stating that the statute should be “construed,”³⁰⁴ that “deductions”³⁰⁵ may be drawn, and that its decision was a “fair reading”³⁰⁶ of the statutes.

Moreover, the language in *Aldinger* shows that the Court intended the lower courts to ascertain *actual* congressional intent, as opposed to positing a “presumption” of negation based on congressional silence.³⁰⁷ First, nothing in the opinion supports such a use of a presumption. Throughout *Aldinger*, and *Owen* for that matter, the Court never once spoke in terms of “presumptions.”³⁰⁸ And again, the Court’s choice of words for the *Aldinger* test—stating that pendent party jurisdiction is permissible unless Congress has negated it, as opposed to stating that pendent party jurisdiction is impermissible unless Congress has validated it³⁰⁹—suggests that if any presumption is to be drawn from congressional silence, it must be the presumption that pendent party jurisdiction is permissible.³¹⁰

The way the Court employed its test, in both *Aldinger* and in *Owen*, also suggests that the Court intended the lower federal courts

in *Aldinger*, however, did not view a “failure to include” in this way, and in fact equated it with silence. See *Aldinger*, 427 U.S. at 14-16. In discussing *Gibbs* and *Osborn*, the Court stated that Congress had been “silent” in those cases, and that it was therefore unnecessary to address the question of congressional negation. 427 U.S. at 15-17. But the statutes at issue in *Gibbs* and *Osborn* just as surely omitted the state-law claims sought to be appended in those cases as did the statute at issue in *Aldinger*. See *Aldinger*, 427 U.S. at 20 (Brennan, J., dissenting). Thus, the Court viewed “failure to include” as equivalent to “silence,” and required something more to establish congressional negation.

303. 427 U.S. at 17 (emphasis added).

304. *Id.*

305. *Id.*

306. *Id.* This use of the phrase “fair reading” echoes writings on traditional statutory construction. See, e.g., Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947) [hereinafter cited as Frankfurter].

307. See *infra* notes 308-11 and accompanying text.

308. See *Owen*, 437 U.S. 365 (1978); *Aldinger*, 427 U.S. 1 (1976).

309. See *supra* notes 300-02 and accompanying text.

310. See *id.*

to engage in an in-depth analysis of the statute and to find some affirmative manifestation of congressional intent, beyond the mere "failure to include" a party that would suffice to satisfy an *expressio unius* test. Although the Court did not put a label on the process it was using, the two opinions indicate that the Court was emphatically not using any form of the *expressio unius* test in either case.³¹¹ The Court's analysis entails several steps,³¹² with the apparent use of *expressio unius* reasoning occurring in the last step.³¹³

In the first step, the Court found it necessary to consider the possibility of congressional limitation on the use of pendent party jurisdiction,³¹⁴ because Congress had "addressed itself to the party" the plaintiff sought to join.³¹⁵ Next, the Court looked to the language of the jurisdictional statute, section 1343, to ascertain whether Congress had "wanted to grant this sort of jurisdiction to the federal courts."³¹⁶ The Court found that section 1343 granted jurisdiction only over a civil action "*authorized by law*,"³¹⁷ and interpreted the word "law" as a reference to section 1983.³¹⁸ Therefore, the Court reasoned, section 1343 should be construed in light of the scope of section 1983.³¹⁹

The Court then incorporated the extensive interpretation of section 1983 found in *Monroe v. Pape*³²⁰ to establish that Congress had excluded counties from the scope of section 1983.³²¹ Then, because of section 1343's reference to section 1983, the Court stated that counties should be excluded from the scope of section 1343 as well.³²² Finally, the Court reasoned that, because Congress had implicitly excluded counties from the jurisdictional statute, the substantive statute should "not be so broadly read as to bring them *back* within [the] power" of the federal courts, through the use of pendent party jurisdiction.³²³ Hence, the Court held, Congress had negated jurisdiction.³²⁴

311. See *infra* notes 312-49 and accompanying text.

312. See *infra* notes 314-24 and accompanying text.

313. See *infra* notes 325-28 and accompanying text.

314. *Aldinger*, 427 U.S. at 15-16.

315. *Id.* at 16 (emphasis in original).

316. *Id.* at 17.

317. *Id.* at 16 (emphasis in original).

318. *Id.*

319. *Id.*

320. 365 U.S. 167, 187-91 (1961).

321. 427 U.S. at 16.

322. *Id.* at 16-17.

323. *Id.* at 17 (emphasis in original).

324. *Id.* at 18-19.

This last step may seem like an *expressio unius* test, since the Court appears to be saying that whenever Congress has essentially left a party "off the list" of the substantive statute, a court should find that Congress intended to leave the party off the list of the jurisdictional statute as well.³²⁵ The context of the entire opinion, however, reveals that it was not the simple fact that Congress had failed to include municipalities that led the Court to find that Congress had negated jurisdiction.³²⁶ Nor did the Court base its ultimate holding on the presumption that Congress had negated jurisdiction.³²⁷ Instead, the Court looked for and found indications that Congress actually and affirmatively opposed the inclusion of municipalities.³²⁸

First, in distinguishing *Aldinger* from *Gibbs* and its predecessor, *Osborn v. Bank of the United States*,³²⁹ the Court repeatedly emphasized that in both of those cases, Congress had been "silent" on the question of joining state-law claims.³³⁰ Yet, in both *Gibbs* and *Osborn*, Congress had in fact "failed to include" the state-law claims within the scope of the statutes at issue.³³¹ Had the *Aldinger* Court been using an *expressio unius* test, this "failure to include" would have meant that Congress *had* negated jurisdiction in those cases.³³² Yet the Court expressly stated that there was no such negation in *Gibbs* and *Osborn*.³³³ This statement indicates that the Court required something more, beyond a mere "failure to include," to establish negation, *i.e.*, it indicates that the Court was not using an *expressio unius* test.³³⁴

Moreover, the Court expressly contrasted *Aldinger* with *Gibbs* and *Osborn*,³³⁵ asserting that *Aldinger* "must be decided, not in the context of congressional silence or tacit encouragement, but in quite

325. For a discussion of the two forms of the *expressio unius* test, see *supra* notes 251-60 and accompanying text.

326. See *infra* notes 329-49 and accompanying text.

327. See *supra* notes 307-10 and accompanying text.

328. See *infra* notes 329-49 and accompanying text.

329. 22 U.S. (9 Wheat.) 738 (1824). For a discussion of *Osborn* and its relationship to *Gibbs*, see *supra* notes 159-93 and accompanying text.

330. *Aldinger*, 427 U.S. at 13-16.

331. See Matasar, *Primer*, *supra* note 22, at 158, 169.

332. See Capra, *supra* note 13, at 22, col. 3.

333. 427 U.S. at 13-16.

334. See *supra* notes 329-33 and accompanying text. Although it is true that *Gibbs* and *Owen* were pendent *claim* cases, not pendent *party* cases, there does not seem to be any logical ground to apply a different rule in pendent claim cases. See *supra* note 125.

335. 427 U.S. at 13-16.

the opposite context.”³³⁶ This “opposite context” can only be a reference to the evidence of congressional intent set forth in the extensive analysis of the legislative history of section 1983 found in *Monroe v. Pape*,³³⁷ since the *Aldinger* Court at that point cited to the very pages in *Monroe* in which the *Monroe* Court had gone through this analysis.³³⁸ In *Monroe*, the Court had concluded that, far from merely omitting municipalities from section 1983 coverage, Congress had been “so antagonistic” to the idea of municipal liability in federal court, that the Court was certain that Congress could not have included them within the purview of section 1983.³³⁹ In *Aldinger*, then, the Court was aware of this “antagonism” and referred to it specifically. Since the Court also stated that *Aldinger* differed from *Gibbs* because *Aldinger* did not involve a statute in which Congress had been silent, the Court must have considered this “antagonism” to be an affirmative manifestation of actual congressional intent to negate any jurisdiction over municipalities.³⁴⁰ Consequently, the Court based its finding of congressional intent to negate on neither pure silence nor a presumption about congressional intent based on that silence.³⁴¹ In other words, the court was using neither form of the *expressio unius* test, but instead based its conclusion on affirmative evidence that Congress actually did not want municipalities in federal court.³⁴²

Similarly, in *Owen*, the Court did not hold pendent party jurisdiction to be negated until it had found affirmative evidence of congressional intent to negate it. In *Owen*, the Court employed a rule of statutory construction known as the “reenactment rule.”³⁴³ Under this rule, a court may find that Congress has approved a

336. *Id.* at 15-16.

337. 365 U.S. at 187-91. The *Aldinger* Court relied on *Monroe's* analysis because at the time of *Aldinger*, the Court had not yet overruled *Monroe's* analysis with its decision in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

338. 427 U.S. at 16 & n.11.

339. 365 U.S. at 187-91.

340. See *Kostka v. Hogg*, 560 F.2d 37, 43-44 (1st Cir. 1977) (noting that “the [Supreme] Court ultimately based its decision on the affirmative policy against federal court imposition of liability on political subdivisions, which policy the Court found in the Civil Rights Act of 1871” and concluding that “*Aldinger* . . . read § 1983 and § 1343 as evidencing an intention to preclude the creation of municipal liability for conduct that could constitute a federal constitutional violation”).

341. See *supra* notes 335-40 and accompanying text.

342. See *id.*

343. *Owen*, 437 U.S. at 373-74. The term “reenactment rule” is derived from Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities,”* 64 B.U.L. REV. 737, 755 (1982) [hereinafter cited as Grabow].

judicial interpretation of a statute when Congress reenacts the statute without amending it to overrule the judicial gloss.³⁴⁴ The Court had long interpreted the diversity statute³⁴⁵ to require complete diversity between the parties.³⁴⁶ Congress had reenacted the diversity statute several times without undoing this judicial interpretation,³⁴⁷ and the Court explicitly relied on this fact in its analysis.³⁴⁸ Thus, the Court in *Owen* based its conclusion that Congress had negated jurisdiction between nondiverse parties on an affirmative manifestation of congressional opposition to such jurisdiction.³⁴⁹

344. The canon has been described as the presumption under which "[i]f the legislature enacts again a statute which had long continued executive construction . . . it can be said that the legislature has adopted that construction." BLACK'S LAW DICTIONARY 1150-51 (5th ed. 1979). It should be noted that although several authorities on statutory construction view a failure on the part of Congress to amend a statute to correct a judicial interpretation as mere silence, *see, e.g.,* DICKERSON, *supra* note 251, at 181, these commentators distinguish an affirmative *re-enactment* of a statute, and consider it far more probative of congressional intent. *See id.* at 182.

345. In *Owen*, the original basis for federal jurisdiction was diversity of citizenship. *See supra* note 226 and accompanying text. The statute providing for diversity jurisdiction is § 1332 of Title 28 of the United States Code. 28 U.S.C. § 1332 (1982). For a discussion of diversity jurisdiction, see 13B WRIGHT, *supra* note 1, §§ 3601-08.

346. *See Owen*, 437 U.S. at 373 n.13.

347. 28 U.S.C. § 1332 (1982).

348. *See* 437 U.S. at 373.

349. *See supra* notes 343-48 and accompanying text. In an attempt to gain further illumination on what type of analysis the Court intended the lower federal courts to use, one might also consider the brief dissenting opinion of Justice Rehnquist in *Symm v. United States*, 439 U.S. 1105 (1979) (Rehnquist, J., dissenting). In *Symm*, the district court had enjoined *Symm*, a county official in charge of voter registration, from using a discriminatory questionnaire that violated the twenty-sixth amendment of the United States Constitution. *See* 439 U.S. at 1106-07. The jurisdictional basis was a federal statute that granted jurisdiction over cases arising out of the twenty-sixth amendment. *See id.* at 1106 & n.2. The Supreme Court, on direct appeal, summarily affirmed. *See id.* at 1105. Justice Rehnquist dissented, because he believed that the Court lacked jurisdiction over *Symm*. *See id.* at 1105.

After stating that he thought the jurisdictional statute failed to grant jurisdiction over state officials, *id.* at 1107, Justice Rehnquist noted that it was "conceivable that the District Court based its injunction against *Symm* on some unarticulated, hybrid concept of pendent-party jurisdiction." *Id.* at 1108. Although Justice Rehnquist then used an approach that might look like an *expressio unius* test, *see id.*, the framework of his analysis belies such a conclusion. Justice Rehnquist first found that the jurisdictional statute did not cover *Symm*. *Id.* Then, as a second step, he considered pendent party jurisdiction, under which, he said, he "must carefully inquire" into "the statutory grant of jurisdiction to the District Court." *Id.* at 1109. If Justice Rehnquist had been using an *expressio unius* test, he would not have had to undergo a full second step of the analysis, or "carefully inquire"—he would have known *immediately*, from his first step, that pendent party jurisdiction was impermissible. In fact, any resemblance to the *expressio unius* test that the analysis bears is most likely attributable to its author's cursory treatment of it. In

B. The Need to Employ a Wide Range of Aids to Construction

The Court's language and example in *Aldinger* and *Owen* also show that the Court intended the lower federal courts to consult a broad range of materials that might show a manifestation of congressional intent.³⁵⁰ Within this range, the Court expressly included the jurisdiction-granting statute³⁵¹ and, if the jurisdictional statute referred to it, the substantive statute.³⁵² In addition, by its application of the test in *Aldinger* and *Owen*, the Court indicated that many other forms of congressional action should be included in the analysis.³⁵³ The Court considered the legislative history of the substantive statute³⁵⁴ and, to determine general congressional attitudes towards extending jurisdiction, it considered other statutes relating to federal jurisdiction.³⁵⁵

The Court also considered policy factors, such as judicial economy, convenience to the plaintiff and fairness to the parties.³⁵⁶ These factors do not immediately appear to pertain to an analysis of congressional intent, and indeed, under *Gibbs*, they would fall under the *discretionary* part of the analysis.³⁵⁷ Under traditional methods of statutory construction, however, a court may consider such policy factors, on the assumption that Congress would be unlikely to enact statutes that would be uneconomical, inconvenient or unfair.³⁵⁸ Thus, the Court's consideration of these factors merely indicates further that the Court was engaging in traditional statutory construction.

any event, the Court refused to join in Justice Rehnquist's approach. *See id.* at 1105.

350. The range is characterized as "wide" because the Court included some materials that most authorities on statutory interpretation would exclude, for example, legislative history. *See, e.g.,* DICKERSON, *supra* note 251, at 195-96; Grabow, *supra* note 343, at 738-40; Fisher & Harbison, *Trends in the Use of Extrinsic Aids in Statutory Interpretation*, 3 VAND. L. REV. 586, 587 (1950); Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A. J. 535, 538 (1948); Frankfurter, *supra* note 306, at 543.

351. *Owen*, 437 U.S. at 373, 374; *Aldinger*, 427 U.S. at 16.

352. *Aldinger*, 427 U.S. at 16-17.

353. *See id.* at 16-18.

354. *See id.* at 16 n.11; *id.* at 17 n.12.

355. *See id.* at 17 n.12; *id.* at 18.

356. *Owen*, 437 U.S. at 376-77; *Aldinger*, 427 U.S. at 18.

357. *See supra* notes 189-90 and accompanying text.

358. *See, e.g.,* Frankfurter, *supra* note 306, at 539 ("it is not lightly to be presumed that Congress sought to infringe on 'very sacred rights.' This improbability will be a factor in determining whether the language, though it should be so read if standing alone, was used to effect such a drastic change") (footnote omitted); *see also* Green, *supra* note 121, at 281 (trial convenience not an excuse for enlarging jurisdiction, but such considerations may be used as aid in interpretation).

C. The Need to Use a Case-by-Case Approach

The basis for a case-by-case approach is also found in the language and example of the Supreme Court's decisions. In *Aldinger*, the Court explicitly said that it was "unnecessary to lay down any sweeping pronouncement upon the existence or exercise of [pendent party] jurisdiction."³⁵⁹ Thus, by refusing to set a comprehensive rule, either on pendent party jurisdiction or supplemental jurisdiction in general, the Court left the lower federal courts free to use a case-by-case approach. In addition, the Court set an example for a case-by-case approach by confining *Aldinger* strictly to its facts. The Court explicitly stated that "[o]ther statutory grants and other alignments of parties and claims might call for a different result."³⁶⁰

In short, the Court's approach was to attempt, on a case-by-case basis, to determine Congress' actual intent with respect to the use of pendent party jurisdiction over a certain party. In making this determination, it considered statutes, legislative history and other manifestations of Congress' intent.³⁶¹ Before holding that Congress had negated jurisdiction, the Court established affirmative evidence of that negation.³⁶² The lower federal courts should do the same.

V. Applying the *Aldinger* Test: Two Hypothetical Cases

Today, section 1983 cases involving pendent parties commonly fall into two categories: (1) cases in which the pendent party is a private party who did not act under color of state law;³⁶³ and (2) cases in which the pendent party is a municipality and the plaintiff is attempting to use the doctrine of respondeat superior.³⁶⁴ This Part of

359. *Aldinger*, 427 U.S. at 18.

360. *Id.*; see also *Pendent Jurisdiction*, *supra* note 13, at 140.

361. See *supra* notes 282-357 and accompanying text.

362. See *id.*

363. See, e.g., *Coon v. Ledbetter*, 780 F.2d 1158, 1160, 1162, 1165 n.3 (5th Cir. 1986); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985); *Williams v. Bennett*, 689 F.2d 1370, 1379 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *Traver v. Meshriy*, 627 F.2d 934, 939 (9th Cir. 1980); *Fishman v. De Meo*, 590 F. Supp. 402 (E.D. Pa. 1984).

364. See, e.g., *Coon*, 780 F.2d at 1160; *Bibbo v. Mulhern*, 621 F. Supp. 1018, 1030 (D. Mass. 1985); *Nunnolley v. County of Douglas*, 622 F. Supp. 124, 126 (D. Nev. 1985); *Christensen v. Phelan*, 607 F. Supp. 470, 471-72 (D. Colo. 1985); *Arancibia v. Berry*, 603 F. Supp. 931, 936 (S.D.N.Y. 1985); *Martin v. County of Kendall*, 561 F. Supp. 726, 730 n.12 (N.D. Ill. 1983); *McCaw v. Frame*, 499 F. Supp. 424, 426 (E.D. Pa. 1980). A third, but less common category of § 1983 cases involving pendent parties is that of cases in which a second *plaintiff*, usually the spouse of a § 1983 plaintiff, attempts to append nonfederal claims against the § 1983 defendant. See e.g., *Thomas v. Shelton*, 740 F.2d 478, 481 (7th Cir. 1984); *Bright v. City of New York*, No. 83 Civ. 7775-CSH, slip op. (S.D.N.Y.

the Note will apply the *Aldinger* test to each of these types of cases.³⁶⁵

A. Private Parties

Assume that S, the person who will be the pendent party, maliciously tells Deputy M to arrest Plaintiff on the basis of a fabricated charge.³⁶⁶ While on duty, Deputy M arrests Plaintiff at home without first obtaining an arrest warrant.³⁶⁷ Later, the prosecutor drops the charges, and Plaintiff decides to sue. First, Plaintiff brings a section 1983 action against Deputy M, for depriving him of his constitutional rights while acting under color of state law.³⁶⁸ Plaintiff would also like to sue S, for instigating the incident, but he knows that he probably cannot sue S under section 1983, because in his jurisdiction "providing false information to an arresting officer is not, by itself, sufficient to state a claim . . . under § 1983."³⁶⁹ Plaintiff therefore decides to sue S under state tort law. Plaintiff realizes he could bring both the section 1983 claims and the nonfederal claims in state court,³⁷⁰ but he believes the federal courts are superior and more receptive to civil rights plaintiffs.³⁷¹ Plaintiff therefore brings both claims in federal

Apr. 4, 1985) (available Jan. 13, 1986, on LEXIS, Genfed library, Dist file); *Fritts v. Niehouse*, 604 F. Supp. 823, 824 (W.D. Mo. 1984), *aff'd*, 774 F.2d 1170 (8th Cir. 1985); *Clark v. City of Chicago*, 595 F. Supp. 482, 488-89 (N.D. Ill. 1984); *Red Elk v. Vig*, 571 F. Supp. 422, 425-26 (D.S.D. 1983); *Walters v. Village of Oak Lawn*, 548 F. Supp. 417, 419-20 (N.D. Ill. 1982).

365. For the analysis of private parties, see *infra* notes 366-401 and accompanying text. For the analysis of municipalities, see *infra* notes 402-27 and accompanying text.

366. The facts for this hypothetical case are based loosely on the facts of *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985).

367. Absent exigent circumstances, an at-home arrest effectuated without a warrant violates the fourth amendment to the United States Constitution. *Payton v. City of New York*, 445 U.S. 573 (1980).

368. The two elements of a § 1983 claim are: (1) that the defendant deprived the plaintiff of a constitutional right; and (2) that the defendant acted under color of state law. See *supra* notes 51-58 and accompanying text. Here: (1) Deputy M has deprived Plaintiff of his fourth amendment rights, see *supra* note 366 and accompanying text; and (2) since he committed this deprivation while "on duty," Deputy M has acted under color of state law. See *supra* notes 54-58.

369. See *Moore*, 754 F.2d at 1352.

370. State courts have concurrent jurisdiction with federal courts over § 1983 claims, see *supra* notes 65-66 and accompanying text, and as courts of general jurisdiction, see *supra* notes 118-19 and accompanying text, presumably may hear Plaintiff's nonfederal claims.

371. For a discussion of the debate over whether federal courts are superior or more receptive than state courts, see *supra* note 91 and accompanying text.

court, using the doctrine of pendent party jurisdiction to append the state-law claims.³⁷²

Assuming that this case meets the "constitutional" test of *United Mine Workers v. Gibbs*³⁷³—that is: (1) the federal claim is substantial; (2) the federal claims arise out of a "common nucleus of operative fact"; and (3) Plaintiff would ordinarily be expected to try the two claims together³⁷⁴—the federal court must next determine whether the claim meets the "statutory" test of *Aldinger*.³⁷⁵ In other words, the federal court must determine whether Congress has "expressly or by implication negated" jurisdiction over S.³⁷⁶

To do so, the court must try to establish what Congress' *actual* intent toward parties like S would have been.³⁷⁷ The court should look at *any* possible manifestation of that intent,³⁷⁸ remembering always that it must find an *affirmative* manifestation of intent to exclude such parties, not simply a failure to include them.³⁷⁹

The court should start with the jurisdictional statute in question—usually section 1343³⁸⁰—and should read that statute in conjunction with the scope of section 1983.³⁸¹ Section 1343 is completely silent on the issue of private parties who do not themselves act under color of state law, but who induce a state official to violate a person's constitutional rights.³⁸² Nor does the language of section

372. For a definition and discussion of pendent party jurisdiction, see *supra* notes 11, 194-233 and accompanying text.

373. See *supra* notes 215-16 and accompanying text.

374. See *supra* notes 184-88 and accompanying text.

375. See *supra* notes 215-20 and accompanying text.

376. See *id.*

377. See *supra* notes 307-10 and accompanying text.

378. See *supra* notes 350-58 and accompanying text.

379. See *supra* notes 289-349 and accompanying text.

380. See *supra* notes 59-61 and accompanying text. As an alternative to § 1343, some plaintiffs have used § 1331 of Title 28 of the United States Code, 28 U.S.C. § 1331 (1982), as the jurisdictional basis for their § 1983 claims. See, e.g., *Irwin v. Calhoun*, 522 F. Supp. 576 (D. Mass. 1981).

381. See *supra* notes 316-19 and accompanying text.

382. See *Aldinger*, 427 U.S. at 23-24 (Brennan, J., dissenting). Because § 1343 speaks of "deprivations" rather than potential defendants, one might argue that it permits jurisdiction over "any" civil action authorized by law—which would include state tort actions when such a tort action was commenced to "redress" a deprivation of constitutional rights under color of state law, even if the tortfeasor was not the person who was acting under color of state law.

Such a reading, however, is at odds with the Supreme Court's reading of this language in *Aldinger*. See *supra* notes 317-19 and accompanying text. The Court there said that the "any civil action authorized by law" language was a reference to § 1983 in particular, and that it meant that § 1343 must be read in conjunction with § 1983. See *id.* The sentence structure of § 1983 is different from that of § 1343, and precludes the interpretation just offered. Section 1983 refers, not to the

1983, aside from mere failure to include such parties, reveal any congressional intent to negate jurisdiction over such parties.³⁸³ Since a mere failure to include a party is not sufficient to manifest congressional intent to negate jurisdiction,³⁸⁴ the language of section 1983 fails to establish negation.

A federal court should therefore consider other sources of congressional intent.³⁸⁵ It could next consider the legislative history to section 1983's predecessor, section one of the Civil Rights Act of 1871,³⁸⁶ and the legislative history of other sections of the Act—in particular section two,³⁸⁷ which made a conspiracy to deprive a person of constitutional rights a crime.³⁸⁸ In all these debates, however, Congress failed to show any “antagonism” toward the idea of federal suits against private parties who, without actually conspiring, induce state officials to deprive a person of constitutional rights.³⁸⁹ It is true

“deprivation,” but specifically to the *defendant*: “Every *person* who, under color of [state law] subjects . . . any citizen of the United States . . . to the deprivation of [constitutional] rights, . . . shall be liable . . .” 42 U.S.C. § 1983 (1982) (emphasis added). By thus referring directly to the type of defendant who may be sued, this language prevents one from reading § 1343 as a manifestation of congressional intent to allow jurisdiction over state tort law actions used to redress violations of § 1983.

But this language merely prevents one from establishing affirmative evidence that Congress intended to *allow* actions against private parties—it does *not*, as required, *see supra* notes 283-349 and accompanying text, manifest affirmative intent to *negate* jurisdiction over such actions. The language of the two statutes is thus effectively neutral.

383. Similarly, the language of § 1983 itself merely states that a person who *does* act under color of state law “shall be liable.” *See* 42 U.S.C. § 1983 (1982). It is silent about persons who do *not* act under color of law when committing the deprivation.

384. *See supra* notes 283-349 and accompanying text.

385. *See supra* notes 350-58 and accompanying text.

386. *See supra* notes 82-83, 353-54 and accompanying text.

387. Act of Apr. 20, 1871, § 2, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985 (1982)). In *Aldinger*, the Supreme Court considered the legislative history of the Sherman amendment, *see supra* notes 92-107, 337-42 and accompanying text, which was not actually legislative history to § 1983. Section 1983 derives from only section one of the Civil Rights Act. The Sherman amendment, on the other hand, was to be added as a separate section to the Civil Rights Act. *See Monell*, 436 U.S. at 665-66. Because the *Aldinger* test itself provides little guidance to the lower federal courts, *see supra* notes 20-22 and accompanying text, this Note has considered the Supreme Court's application of its test as evidence of the process the Court intended the federal courts to use. *See supra* notes 312-49 and accompanying text.

388. *See* Act of Apr. 20, 1871, ch. 21, § 2, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1985 (1982)). Section 1985 requires a conspiracy between at least two actors. *See* 42 U.S.C. § 1985 (1982).

389. In *Aldinger*, the Court had found congressional “antagonism” toward the notion of suing municipalities in federal court. *See supra* notes 335-42 and accompanying text. In the debates on section two, however, there was no such antagonism. *See infra* note 391.

that the forty-second Congress enacted statutes that contained particular limitations, and that the legislative history contains discussions that support these limitations.³⁹⁰ It would be unjustified, however, to conclude from these discussions that Congress was antagonistic toward the idea of *any* federal court action against a person who failed to meet the requirements of the statutes, even when there is a separate basis of jurisdiction, such as pendent party jurisdiction.

To the contrary, the debates on sections one and two show, if anything, that the proponents of the bills were in reality deeply committed to the goal of halting the private actions of the Ku Klux Klan, and refrained from enacting a statute directly addressing this private conduct only because of constitutional constraints.³⁹¹ Moreover, in the debates, members of Congress repeatedly stressed that section one was remedial, and therefore the constitutional provisions authorizing it should be "liberally and beneficently construed."³⁹² Thus, it seems reasonable to conclude that the proponents of sections one and two, far from being antagonistic to the idea, would have welcomed a jurisdictional doctrine that allowed a federal court to hear claims against private parties.

A federal court can also consider policy factors.³⁹³ In this connection the federal court could note that as a policy matter, the courts have historically been less concerned with suits in federal court against ordinary citizens than against municipalities and other forms of government.³⁹⁴ Another set of policy factors a court might consider is convenience and judicial economy.³⁹⁵ Here, it would be particularly convenient and economical to try the claims against S and Deputy M together, because, far more than simply being related by a common nucleus of operative fact,³⁹⁶ the two claims will both involve an examination of S's and Deputy M's actions, motivations and interaction on the night of Plaintiff's arrest, and will therefore

390. These limitations are the under color of state law requirement contained in § 1983, *see supra* notes 54-58, and the requirement of a conspiracy between two people contained in § 1985. *See supra* note 388.

391. *See, e.g.,* CONG. GLOBE, 42d Cong., 1st Sess. 444 (1871) (statement of Rep. Butler), *reprinted in* DEBATES, *supra* note 86, at 530-31.

392. *See* CONG. GLOBE, 42d Cong., 1st Sess. 68 (1871) (statement of Rep. Shellabarger), *reprinted in* DEBATES, *supra* note 85, at 493.

393. *See supra* notes 356-58 and accompanying text.

394. *See Moore*, 754 F.2d at 1359. For a discussion of the Court's concern with subjecting municipalities to federal court suits, *see supra* notes 92-107 and accompanying text.

395. *See supra* notes 356-58 and accompanying text.

396. By definition, all pendent party claims must arise out of the same nucleus of operative fact as the federal claim. *See supra* notes 184-93 and accompanying text.

most likely entail introducing the same witnesses and evidence. Although Plaintiff could bring both claims in state court and achieve the same economy,³⁹⁷ forcing Plaintiff into state court would thwart congressional intent to provide a federal forum for section 1983 plaintiffs,³⁹⁸ as well as disserving the congressional interest in having federal courts interpret federal law, and giving plaintiffs an unrestricted choice of forum.³⁹⁹

In sum, the evidence of congressional intent, if anything, supports the inference that Congress would have allowed federal courts to exercise pendent party jurisdiction over private individuals and corporations that did not act under color of state law, but induced a state official to violate a person's constitutional rights.⁴⁰⁰ Since no evidence shows that Congress affirmatively intended to negate federal jurisdiction over such private parties, the federal court should find pendent party jurisdiction permissible.⁴⁰¹

B. Municipalities

Now assume that all the facts from the preceding hypothetical case⁴⁰² are the same, except that Plaintiff decides to sue, not S, but Deputy M's employer, the County.

Plaintiff knows that Deputy M was not acting pursuant to a "custom" or "policy" established by the County, and therefore realizes that he cannot sue the County directly under section 1983.⁴⁰³ Again, Plaintiff decides to use pendent party jurisdiction, by bringing a state-law respondeat superior claim against the County, and appending it to the section 1983 claim against Deputy M.⁴⁰⁴ Assume again that Plaintiff can satisfy the three prongs of the "constitutional" test of *Gibbs*.⁴⁰⁵

397. See *supra* notes 67-69 and accompanying text.

398. See *supra* notes 82-91 and accompanying text.

399. See *supra* note 121. It is true that the congressional interests in providing a federal forum to § 1983 plaintiffs and having federal courts interpret federal law were implicated in *Aldinger* itself, and that the Supreme Court, while it did not discuss these interests, presumably found them insufficient to overcome other indications of congressional intent to negate jurisdiction in that case. Nevertheless, since *Aldinger* calls for a case-by-case approach, and because in a different factual setting such other indications may be weaker or absent, a court should consider these congressional interests as part of the analysis.

400. See *supra* notes 380-99 and accompanying text.

401. See *supra* notes 289-349 and accompanying text.

402. See *supra* notes 366-72 and accompanying text.

403. See *supra* notes 70-78 and accompanying text.

404. For a discussion of how pendent party jurisdiction functions, see *supra* notes 11, 194-225 and accompanying text.

405. See *supra* notes 184-88 and accompanying text.

Most federal courts would automatically dismiss the state-law claim against the County.⁴⁰⁶ They would rule that *Aldinger* held that pendent party jurisdiction can never be used against a municipality in a section 1983 case when the theory of liability is respondeat superior.⁴⁰⁷ These courts reason that, although in *Monell* the Court overruled the underlying premise of *Aldinger*, and now holds that municipalities *are* persons, it nevertheless maintains that municipalities cannot be sued under the doctrine of respondeat superior.⁴⁰⁸ Moreover, the Supreme Court has explicitly said that even after *Monell*, *Aldinger's* requirement that a federal court examine congressional intent is still good law.⁴⁰⁹ Thus, since the Court, in *Monell*, found evidence of congressional intent to negate jurisdiction when the pendent party is a municipality and the plaintiff is using respondeat superior,⁴¹⁰ a federal court can never use pendent party jurisdiction when the party to be appended is a municipality sued under respondeat superior.⁴¹¹ In short, according to this view, the combination of *Aldinger* and *Monell* compels a federal court to dismiss the claim automatically, without analyzing congressional intent.

In answer to this argument, one could contend that the combination of *Monell* and *Aldinger* simply does *not* have the same impact on municipalities sued under respondeat superior that *Monroe v. Pape* and *Aldinger* had on all municipalities before the Court overruled *Monroe's* premise that municipalities were not "persons."⁴¹² *Monell* now stands in the place of *Monroe*: it states only that Congress did not include municipalities within the purview of section 1983 when a plaintiff sues them under respondeat superior.⁴¹³ But there has been no Supreme Court decision to stand in the place of *Aldinger*, *i.e.*, a decision that holds that the legislative history discussed in *Monell* also shows Congress' affirmative intent to exclude such municipalities from federal court jurisdiction entirely. Since *Aldinger* calls for a case-by-case analysis of congressional intent,⁴¹⁴ a federal court should arguably reexamine congressional intent with respect

406. See *supra* note 81.

407. See, e.g., *Molina v. Richardson*, 578 F.2d 846, 847-48 (9th Cir. 1977), *cert. denied*, 439 U.S. 1048 (1978); *Szumny v. Village of Addison*, No. 85-C-5149, slip op. (N.D. Ill. 1985) (available Jan. 11, 1986, on LEXIS, Genfed library, Dist file); *McCaw v. Frame*, 499 F. Supp. 424, 426 (E.D. Pa. 1980).

408. See *supra* notes 100-05 and accompanying text.

409. See *Owen*, 437 U.S. 365, 372 n.12.

410. See *supra* notes 103-05 and accompanying text.

411. See, e.g., *McCaw*, 499 F. Supp. at 426.

412. See *infra* notes 413-15 and accompanying text.

413. See *Monell*, 436 U.S. at 691-95.

414. See *supra* notes 359-60 and accompanying text.

to the particular facts of each case. It is true that combined impact of *Aldinger* and *Monell* leave the federal courts little room to adopt such a position, and that the two decisions signify that the Court would be likely to hold against any plaintiff who raised such an argument. Nevertheless, unless or until the Court makes such a ruling, the lower courts can analyze the evidence of congressional intent regarding respondeat superior claims against municipalities to see if this evidence also amounts to an affirmative manifestation of congressional intent to negate pendent party jurisdiction.⁴¹⁵

If a federal court engaged in such an analysis, moreover, it would not be a foregone conclusion that it would find that the evidence amounts to congressional negation, since a number of authorities have found, with some justification, the Court's reasoning in *Monell* to be unpersuasive.⁴¹⁶ In *Monell*, the Court focused on the language in section 1983 that made liable only a "person" who "shall subject, or cause to be subjected," any person to the deprivation of constitutional rights.⁴¹⁷ This choice of words, the Court said, indicated that Congress only wanted to hold liable those people who actually *caused* a deprivation; the fact that Congress, with the phrase "or cause to be subjected," specifically provided "that A's tort became B's liability if B 'caused' A to subject another to a tort suggest[ed] that Congress did not intend § 1983 liability to attach where such causation was absent."⁴¹⁸

The phrase "or cause to be subjected," however, could equally suggest that Congress was trying to convey its *lack* of concern with a direct causal connection, by explicitly including one type of indirect causation. Furthermore, under the doctrine of respondeat superior, an employer *is* held to have "caused" the tort: in the nineteenth century, the doctrine was in part based on the notion that "he who acts through another, acts himself."⁴¹⁹

The *Monell* Court's second basis for its holding that Congress did not intend to impose respondeat superior liability upon municipalities was Congress' rejection of the Sherman amendment.⁴²⁰ The

415. See *supra* notes 289-362 and accompanying text.

416. See, e.g., 1 ANTIEAU, *supra* note 50, § 94, at 174 (no "adequate justification in . . . legislative history . . . for excusing local governments for the civil right[s] deprivations of the employees they have chosen, tested, trained and controlled"); *Section 1983 Municipal Liability*, *supra* note 74, at 970 ("by relying on the rejection of the Sherman amendment," Supreme Court "simply repeated the mistake for which it rightly condemned the decision in *Monroe v. Pape*").

417. See *Monell*, 436 U.S. at 691-92.

418. *Id.* at 692.

419. See *Section 1983 Municipal Liability*, *supra* note 74, at 940.

420. See *Monell*, 436 U.S. at 692 n.57, 693-94.

Court's reasoning is equally unpersuasive here.⁴²¹ The Sherman amendment would have imposed liability on a municipality for *any* deprivation that occurred within its borders.⁴²² Section 1983, in marked contrast, imposes liability only when the defendant can be held, at least by way of legal fiction, to have "caused" the deprivation.⁴²³ Thus, it is theoretically possible that a federal court could find that neither the language nor legislative history of section 1983 contains manifestations of affirmative congressional intent to negate pendent party jurisdiction over a respondeat superior claim against a particular municipality.⁴²⁴

It is undeniable that the case for permitting a respondeat superior claim against the County is quite tenuous, especially when compared to the case for permitting a claim against the private party, discussed above.⁴²⁵ Nevertheless, since a federal court must go through the *Aldinger* analysis on a case-by-case basis,⁴²⁶ it is possible that in some cases a federal court would find that Congress would have granted it jurisdiction over a particular municipality.⁴²⁷

VI. Conclusion

In their current practice, most federal courts have diverged from the original test for determining when Congress has negated jurisdiction as formulated and applied by the Supreme Court in *Aldinger* and *Owen*. Most courts fail even to reach the test and the question of how to apply it. Among those courts that do reach the test, most, by using the *expressio unius* canon, interpret it in a manner so restrictive that they effectively eliminate pendent party jurisdiction. But, as Justice Frankfurter once wrote, the canons of statutory construction cannot save the courts from the "anguish of judgment" inherent in the process of statutory construction.⁴²⁸ He wrote that "[s]uch canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements."⁴²⁹ It is this process that the courts must embrace.

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421. See Section 1983 Municipal Liability, *supra* note 74, at 942-47.

422. See *supra* notes 94-95 and accompanying text.

423. See Section 1983 Municipal Liability, *supra* note 74, at 943.

424. See *supra* notes 413-24 and accompanying text.

425. For an analysis of whether courts should use pendent party jurisdiction over a private party, see *supra* notes 366-402 and accompanying text.

426. See *supra* notes 359-60 and accompanying text.

427. See *supra* notes 413-16 and accompanying text.

428. See Frankfurter, *supra* note 306, at 544.

429. *Id.*