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COMMENTARY

FINLEY v. UNITED STATES: UNSTRINGING PENDENT JURISDICTION

Wendy Collins Perdue*

SHORTLY after *Erie Railroad v. Tompkins*¹ was decided, then Professor Felix Frankfurter wrote President Roosevelt stating: “I certainly didn’t expect to live to see the day when the Court would announce, as they [sic] did on Monday, that it itself has usurped power for nearly a hundred years. And think of not a single New York paper—at least none that I saw—having a nose for the significance of such a decision.”² This sentiment captures my reaction to the Court’s recent decision in *Finley v. United States*.³

Finley involves so-called “pendent-party” jurisdiction.⁴ Barbara Finley’s husband and two of her children had been killed when the airplane they were traveling in struck electric transmission lines during its approach to a San Diego airfield. Ms. Finley brought a Federal Tort Claims Act (FTCA) suit in federal court against the Federal Aviation Administration. She later sought to amend her complaint to add state tort law claims against the city and the utility company that maintained the lines. Although there was no independent basis for jurisdiction over her state law claims, the district court found it had

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¹ 304 U.S. 64 (1938).

² Roosevelt and Frankfurter: Their Correspondence 1928-1945, 456 (M. Freedman ed. 1967) [hereinafter M. Freedman], quoted in C. Wright, *Federal Courts* 355 n.12 (4th ed. 1983).

³ 109 S. Ct. 2003 (1989).

⁴ In *Finley*, the Court defines pendent-party jurisdiction as “jurisdiction over parties not named in any claim that is independently cognizable by the federal court.” 109 S. Ct. at 2006; see Currie, *Pendent Parties*, 45 U. Chi. L. Rev. 753 (1978); Note, *Unravelling the “Pendent Party” Controversy: A Revisionist Approach to Pendent and Ancillary Jurisdiction*, 64 B.U.L. Rev. 895 (1985).

pendent jurisdiction and then certified the issue of jurisdiction for interlocutory appeal.⁵ The United States Court of Appeals for the Ninth Circuit summarily reversed,⁶ and the Supreme Court in a 5-4 decision affirmed that reversal.

Although the Court might have limited its holding to peculiarities of the FTCA or suits involving the United States,⁷ it instead used broad language that could potentially invalidate all pendent-party jurisdiction absent explicit statutory authority.⁸ Even more surprising than its broad treatment of pendent-party jurisdiction were the Court's comments on pendent-claim jurisdiction. The Court described pendent-claim jurisdiction as inconsistent with what it called the "rudimentary" principle that federal court jurisdiction exists only if it is conferred by Congress.⁹ Despite having declared pendent-claim jurisdiction to be completely lacking a statutory foundation, the Court declined to take the logical next step to limit or impair that doctrine.¹⁰ Thus, in essence what the Court did was to announce that it has been unconstitutionally usurping power for years but that it was not going to do anything about this, at least for now.

⁵ *Finley v. United States*, No. 86-1151 (S.D. Cal. Apr. 13, 1987), in Appendix to Petition for Certiorari at A5-A10, *Finley v. United States*, 109 S. Ct. 2003 (1989) (87-1973).

⁶ *Finley v. City of San Diego & United States*, No. 87-6091 (9th Cir. Mar. 4, 1988), in Appendix to Petition for Certiorari at A1, *Finley v. United States*, 109 S. Ct. 2003 (1989) (87-1973).

⁷ In its brief, the government argued that the FTCA was intended to function like the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1), which does not permit private defendants to be joined with the United States as a party. See Brief for the United States at 22-24, *Finley v. United States*, 109 S. Ct. 2003 (1989) (No. 87-1973); *United States v. Sherwood*, 312 U.S. 584 (1941). Although the Court noted its prior holding in *Sherwood* construing the Tucker Act, 109 S. Ct. at 2008, it didn't discuss whether Congress intended the two acts to operate similarly. The government also argued that because the Federal Tort Claims Act is a waiver of sovereign immunity it should be narrowly construed. Brief for the United States at 20-22, *Finley v. United States*, 109 S. Ct. 2003 (1989) (No. 87-1973). The Court did not address this argument.

⁸ 109 S. Ct. at 2010.

⁹ *Id.* at 2006; see Freer, A Principled Statutory Approach to Supplemental Jurisdiction, 1987 Duke L.J. 34, 37 (noting that the Constitution sets outer boundaries of federal jurisdiction, but with respect to the lower federal courts "[t]his jurisdiction is not self executing; Congress must prescribe it"); Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 25 (1981) (indicating that "[c]ourts and commentators agree that Congress' discretion in granting jurisdiction to the lower federal courts implies that those courts take jurisdiction from Congress and not from Article III").

¹⁰ 109 S. Ct. at 2010.

The approach adopted by the Court calls into question not only pendent-claim jurisdiction but ancillary jurisdiction as well. Particularly vulnerable to attack are those uses of ancillary jurisdiction that involve the addition of new parties such as class action, intervention, and impleader. Furthermore, the opinion may lay a foundation for attacking ancillary-claim jurisdiction involving counterclaims or cross-claims. This commentary will examine *Finley* and the potential impact of the opinion on the various permutations of ancillary and pendent jurisdiction.

I. A BRIEF HISTORY OF ANCILLARY AND PENDENT JURISDICTION

Before examining the Court's rationale in *Finley*, it will be useful to outline some of the history of the development of the doctrines of pendent and ancillary jurisdiction. The federal courts have long recognized that there are occasions when they may hear claims over which there is no independent federal jurisdiction. This situation arises when those claims are joined with other claims that are properly before the court.¹¹ This type of jurisdiction is usually labeled either "ancillary" or "pendent" jurisdiction. Under traditional usage, "pendent" is the label used to describe jurisdiction exercised over nonfederal claims asserted by a plaintiff, while "ancillary" is the label used for jurisdiction over claims or parties joined by someone other than the plaintiff.¹²

This description of the terms' linguistic usage does not explain why there is any practical need to distinguish between situations based on whether a claim is raised by the plaintiff or by someone else. One

¹¹ For a discussion of the historical development of ancillary jurisdiction, see 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3523 (1982); Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 *U.C.D.L. Rev.* 103, 141-45 (1983). For a discussion of the historical development of pendent jurisdiction, see 13 C. Wright, A. Miller & E. Cooper, *supra*, §§ 3567-3567.2; Matasar, *supra*, at 119-24.

¹² See J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 2.14, at 77-78 (1985); G. Shreve & P. Raven-Hansen, *Understanding Civil Procedure* 129 (1989); Matasar, *supra* note 11, at 117-18. This traditional distinction between ancillary and pendent jurisdiction explains the usage of the terms in most but not all situations. It has, for example, been suggested that counterclaims, cross-claims, and third-party claims by a plaintiff should be called "ancillary." J. Cound, J. Friedenthal, A. Miller & J. Sexton, *Civil Procedure, Cases and Materials* 260 (4th ed. 1985); Fraser, *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims*, 76 *F.R.D.* 525, 539 (1977).

explanation is purely historical. As discussed below, there are two distinct lines of cases, each of which has traditionally carried a separate label. Beyond history, the usual explanation for treating claims joined by a plaintiff differently from claims joined by others is that there are more compelling fairness reasons for allowing defendants or others involuntarily brought before the court to raise their nonfederal claims.¹³ As the Supreme Court has observed, "ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."¹⁴ By contrast, efficiency and convenience, rather than fairness are the traditional justifications for allowing a plaintiff to join a pendent state claim to her federal claim.¹⁵ Fairness considerations are less significant with respect to the plaintiff because it is the plaintiff who has chosen the federal forum with its more limited jurisdiction.

This differentiation is not completely satisfactory. As Professor Richard Matasar has observed, "One person's convenience is another person's fairness."¹⁶ For example, the different treatment for purposes of ancillary jurisdiction of compulsory and permissive counterclaims¹⁷ suggests that the "unfairness" rationale is closely tied to efficiency.¹⁸ It is unfair to force a defendant to endure a separate trial for her counterclaim only if that separate trial would entail some inefficiency. Just as the fairness concern in most ancillary jurisdiction cases is closely linked to efficiency, the efficiency argument in pendent jurisdiction is closely linked to fairness. Having granted plaintiffs the option of pursuing a claim in federal court, one can argue that it is unfair to burden the exercise of that option with the burden of having to litigate two related claims in different places.¹⁹ This fairness argn-

¹³ See G. Shreve & P. Raven-Hansen, *supra* note 12, at 120-21; Comment, Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines, 22 UCLA L. Rev. 1263, 1267, 1269 (1975).

¹⁴ *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978).

¹⁵ See G. Shreve & P. Raven-Hansen, *supra* note 12, at 120; Matasar, *supra* note 11, at 152; Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 Nw. U.L. Rev. 245, 278 (1980); Comment, *supra* note 13, at 1269.

¹⁶ Matasar, *supra* note 11, at 153.

¹⁷ See 13 C. Wright, A. Miller & E. Cooper, *supra* note 11, § 3523, at 107-09; Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 Calif. L. Rev. 1399, 1472 (1983).

¹⁸ See Miller, *Ancillary and Pendent Jurisdiction*, 26 S. Tex. L.J. 1, 5 (1985).

¹⁹ See *id.* at 4; Schenkier, *supra* note 15, at 255.

ment is particularly strong where the federal claim concerns a matter over which there is exclusive federal jurisdiction providing the plaintiff no choice of forum. It is increasingly argued that there is no meaningful distinction between pendent and ancillary jurisdiction²⁰ and commentators have urged that the two terms be abandoned in favor of one generic label such as "extended,"²¹ "supplemental,"²² or "incidental"²³ jurisdiction.

A. Ancillary Jurisdiction

The earliest ancillary jurisdiction cases involved claims to property within a federal court's exclusive control. For example, in *Freeman v. Howe*,²⁴ the Supreme Court held that where property had been seized by a federal marshal under a federal writ of attachment, mortgagees could intervene in the federal court action regardless of whether they were diverse from the parties to that action. The Court explained that the claims of the intervenors would be "ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and . . . maintained without reference to the citizenship or residence of the parties."²⁵ In a 1925 case, the Court described the scope of ancillary jurisdiction as follows:

The general rule is that when a federal court has properly acquired jurisdiction over a cause, it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or

²⁰ See Matasar, *supra* note 11, at 150-57; Note, A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction, 95 Harv. L. Rev. 1935, 1937 (1982); Comment, *supra* note 13, at 1271-87. The Supreme Court has declined to state specifically whether pendent and ancillary jurisdiction constitute a single doctrine, see *Aldinger v. Howard*, 427 U.S. 1, 13 (1976) (finding "little profit in attempting to decide . . . whether there are any 'principled' differences" between the two), but it has described them as part of "the same generic problem." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). Lower courts have demonstrated some confusion about proper usage of the two terms. See, e.g., *County of Oakland v. City of Berkeley*, 742 F.2d 289, 296 (6th Cir. 1984) (court expresses doubt whether lower court exercised pendent or ancillary jurisdiction); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 962 (7th Cir. 1982) (discussing extended jurisdiction over defendant's counterclaim as "pendent jurisdiction").

²¹ G. Shreve & P. Raven-Hansen, *supra* note 12, at 119.

²² Freer, *supra* note 9, at 34.

²³ Note, *supra* note 20, at 1935.

²⁴ 65 U.S. (24 How.) 450 (1860).

²⁵ *Id.* at 460.

control by the principal suit.²⁶

One year later, in 1926, in the case of *Moore v. New York Cotton Exchange*,²⁷ the Supreme Court expanded this relatively narrow concept of ancillary jurisdiction. In *Moore*, the plaintiff had sought injunctive relief under a federal antitrust claim and the defendant had counterclaimed based upon state law. The Supreme Court held that the federal courts had jurisdiction over the state counterclaim because the connection between the claim and counterclaim was so close "that it only needs the failure of the former to establish a foundation for the latter."²⁸

Following the adoption of the Federal Rules of Civil Procedure, lower courts and commentators have come to assume that there is ancillary jurisdiction coextensive with the Federal Rules of Civil Procedure²⁹ in cases involving Rule 13(a) compulsory counterclaims,³⁰ Rule 13(g) cross-claims,³¹ Rule 14 impleader,³² and Rule 24(a) intervention of right.³³ The Supreme Court has never squarely held that ancillary jurisdiction extends to the full extent of the Federal Rules in these contexts, although it has in dicta suggested that it does.³⁴

²⁶ *Fulton Nat'l Bank v. Hozier*, 267 U.S. 276, 280 (1925).

²⁷ 270 U.S. 593 (1926).

²⁸ *Id.* at 610.

²⁹ See Matasar, *supra* note 11, at 144.

³⁰ See, e.g., *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631 (3d Cir. 1961); 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1414 (1990).

³¹ See, e.g., *LASA Per L'Industria Del Marmo Soc. Per Azioni v. Alexander*, 414 F.2d 143, 146 (6th Cir. 1969); *Scott v. Fancher*, 369 F.2d 842, 844 (5th Cir. 1966); 6 C. Wright, A. Miller & M. Kane, *supra* note 30, at § 1433; Fraser, *supra* note 12, at 526-30.

³² See, e.g., *H.L. Peterson Co. v. Applewhite*, 383 F.2d 430, 433 (5th Cir. 1967); *Dery v. Wyer*, 265 F.2d 804, 807 (2d Cir. 1959); 6 C. Wright, A. Miller & M. Kane, *supra* note 30, § 1444, at 312-19; Fraser, *supra* note 12, at 535.

³³ See, e.g., *Smith Petroleum Serv. v. Monsanto Chem. Co.*, 420 F.2d 1103, 1113-14 (5th Cir. 1970); *Lenz v. Wagner*, 240 F.2d 666, 668-69 (5th Cir. 1957); 7A C. Wright, A. Miller & M. Kane, *supra* note 30, § 1917 (1986).

³⁴ In *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Court refers to "the well-established doctrine of ancillary jurisdiction in the context of compulsory counterclaims under Fed. Rules Civ. Proc. 13(a) and 13(h), and in the context of third-party claims under Fed. Rule Civ. Proc. 14(a)." *Id.* at 714-15 (footnote omitted); see also *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 (1978) (indicating that "the exercise of ancillary jurisdiction over nonfederal claims has often been upheld in situations involving impleader, cross-claims or counterclaims"); *Baker v. Gold Seal Liquors*, 417 U.S. 467, 469 n.1 (1974) (discussing ancillary jurisdiction over compulsory counterclaims under Rule 13(a)).

B. Pendent Jurisdiction

The origins of modern pendent jurisdiction date back to *Siler v. Louisville & Nashville R.R. Co.*,³⁵ and *Hurn v. Oursler*.³⁶ In *Siler*, a state order regulating rates was challenged as a violation of state and federal constitutional law. The Court held that the presence of the federal questions gave the federal courts jurisdiction to decide all the issues raised in the case, including the state law issues.³⁷ The Court further declared that where state issues are combined with federal constitutional issues it is preferable to decide the case on state grounds and avoid unnecessary determinations of federal constitutional questions.³⁸ Although *Siler* established that at least in some circumstances the federal courts have jurisdiction to decide state issues raised by a plaintiff, the Court did not address what type of relationship must exist between the state claim and the jurisdictionally sufficient federal claim, the issue addressed in *Hurn*. In *Hurn*, the plaintiffs sought to enjoin production of defendants' play alleging copyright infringement under federal law and two counts of unfair competition under state law. The district court dismissed the copyright claim on the merits and then dismissed the two state claims for want of jurisdiction.³⁹ The Supreme Court reversed in part, holding that where a state claim and federal claim were "but different grounds asserted in support of the same cause of action,"⁴⁰ the federal court had jurisdiction over both claims. Where, however, the claim constituted "two separate and distinct causes of action," there was jurisdiction only over the federal "cause of action."⁴¹

Applying this test that relied on the concept of "cause of action" proved difficult, and in the 1966 landmark case of *United Mine Workers v. Gibbs*,⁴² the Court offered a broader and more functional approach to pendent jurisdiction. In *Gibbs*, the Court held that a plaintiff with a claim arising under federal law may also join a state claim, even if there is no diversity, provided the two claims "derive

³⁵ 213 U.S. 175 (1909).

³⁶ 289 U.S. 238 (1933).

³⁷ 213 U.S. at 193.

³⁸ *Id.*

³⁹ 289 U.S. at 239-40.

⁴⁰ *Id.* at 247.

⁴¹ *Id.* at 248.

⁴² 383 U.S. 715 (1966).

from a common nucleus of operative fact.”⁴³ This basic test for pendent jurisdiction continues to this day.

C. The Focus on the Sources of the Courts' Authority in More Recent Cases

Until *Gibbs*, none of the cases involving either ancillary or pendent jurisdiction focused on the question of the source of the courts' authority to exercise such jurisdiction. In *Gibbs*, the Court offered a partial explanation. The Court explained that constitutional authority existed to hear such claims because they constituted one “case” within the meaning of Article III.⁴⁴ Notably absent from *Gibbs* was any discussion of statutory authority to hear such claims. This absence has led some to describe supplemental jurisdiction as “judicially created jurisdiction,”⁴⁵ in apparent violation of the long-established principle that jurisdiction in the lower federal courts must be supported by a statutory authorization.⁴⁶ However, as others have pointed out,⁴⁷ rather than assume that the federal courts have been acting for years in blatant violation of this fundamental principle, one could make a strong argument that statutory authority already exists. Just as constitutional authority was found in the word “cases” in Article III, statutory authority could be found in the words “civil actions”⁴⁸ or “case,”⁴⁹ which appear in most of the jurisdictional statutes. Of course, jurisdictional statutes do not have to be interpreted to be coextensive with the Constitution. The language in both the

⁴³ *Id.* at 725.

⁴⁴ *Id.* *Gibbs* established the outer limits of constitutional power but also held that the courts may, as a matter of discretion, decline to exercise that power. See *id.* at 726.

⁴⁵ J. Friedenthal, M. Kane & A. Miller, *supra* note 12, at §§ 2.12-14; see F. James & G. Hazard, *Civil Procedure* § 2.7, at 61-62 (3d ed. 1985) (ancillary and pendent jurisdiction “product[s] of decisional law rather than statute”).

⁴⁶ See, e.g., *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1867); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807).

⁴⁷ See H. Fink & M. Tushnet, *Federal Jurisdiction: Policy and Practice* 433 n.5 (2d ed. 1987); Currie, *supra* note 4, at 754; Freer, *supra* note 9, at 56-58.

⁴⁸ See, e.g., 28 U.S.C. §§ 1331, 1332(a). As part of the 1948 revision of the Judicial Code, the phrase “civil action” was substituted throughout the provisions governing district court jurisdiction. See Pub. L. 773, 62 Stat. 869, 930 (1948). According to the Reviser's Notes, the purpose of this change was to bring the language into conformity with Fed. R. Civ. P. 2. See H.R. Rep. No. 308, 80th Cong., 1st Sess. app. A114-A125 (1947) (reviser's notes). The *Finley* majority concludes that this change was merely stylistic. 109 S. Ct. at 2009; see *id.* at 2018 n.25 (Stevens, J., dissenting).

⁴⁹ See, e.g., 28 U.S.C. §§ 1331(a), 1334(a).

diversity⁵⁰ and federal question⁵¹ jurisdictional statutes has been construed to be less expansive than the nearly identical language in the Constitution. Also, the phrase "civil actions" could be interpreted differently in different jurisdictional statutes. Nonetheless, these words provide an easy and logical statutory basis for supplemental jurisdiction.

Given that the Court in *Gibbs* found that it had jurisdiction over the pendent claims but discussed only constitutional authority, *Gibbs* could be interpreted to have implicitly held that the statutory grant was coextensive with the constitutional grant.⁵² However, several subsequent cases made clear that, in at least some circumstances, this was not the case.

In *Aldinger v. Howard*,⁵³ Ms. Aldinger brought a section 1983 civil rights action against her former boss, the Spokane County Treasurer. She also joined Spokane County as a defendant alleging a purely state-law theory of vicarious liability. She could not sue the county under section 1983 because the part of *Monroe v. Pape*⁵⁴ exempting municipalities from liability had not yet been overruled.⁵⁵ The Court held that it had no jurisdiction over the state-law claim against the county.⁵⁶

In reaching its conclusion, the Court focused for the first time on the need for a statutory basis for pendent jurisdiction, at least when additional parties are involved. It announced the rule that before a federal court may exercise pendent-party jurisdiction, it "must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication

⁵⁰ See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

⁵¹ See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908).

⁵² See H. Fink & M. Tushnet, *supra* note 47, at 433 n.5.

⁵³ 427 U.S. 1 (1976).

⁵⁴ 365 U.S. 167 (1961).

⁵⁵ In *Monroe v. Pape*, the Court reviewed the legislative history of § 1983 and concluded that Congress did not intend the section to apply to suits against municipal corporations. 365 U.S. at 187. In *Aldinger*, the Court relied on *Monroe v. Pape* for its conclusion that Congress did not want counties brought into federal court as pendent parties to a § 1983 action. *Aldinger*, 427 U.S. at 16 n.11. Two years after *Aldinger*, in *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658 (1978), the Court overruled *Monroe v. Pape*, concluding that it had misread the legislative history and that in fact Congress *did* intend counties to be subject to suit under § 1983. *Id.* at 690.

⁵⁶ *Aldinger*, 427 U.S. at 19.

negated its existence.”⁵⁷ The Court also turned its attention to the meaning of “civil action” as that phrase is used in the jurisdictional grant of section 1343(3).⁵⁸ The Court concluded that a broad construction of “civil action” that allowed counties to be sued in federal court as part of a section 1983 action would be inconsistent with the congressional desire to exclude counties from the reach of section 1983.⁵⁹ The Court stressed that it was not laying down “any sweeping pronouncement upon the existence or exercise” of pendent-party jurisdiction,⁶⁰ and noted by way of example that in cases of exclusive federal jurisdiction, pendent-party jurisdiction might be available.⁶¹

In focusing on the need for a statutory foundation for pendent jurisdiction, the Court acknowledged that *Gibbs* and its predecessors had not addressed this issue.⁶² The Court then offered the largely unexplained⁶³ and completely unnecessary suggestion that a statutory foundation was not required for pendent claims. According to the Court, in the area of pendent-claim jurisdiction, “the way was . . . left open for the Court to fashion its own rules under the general language of Art. III.”⁶⁴ Nonetheless, two years later in *Owen Equipment and Erection Co. v. Kroger*,⁶⁵ the Court appeared to move toward a more unified treatment for all types of supplemental jurisdiction. The case involved a wrongful death action brought by Ms. Kroger against the Omaha Public Power District (OPPD) in connection with the death of her husband. The suit was brought in federal court and based on diversity. After OPPD impleaded Owen Equipment, Ms. Kroger amended her complaint to add Owen Equipment as a defendant. Ms. Kroger and Owen Equipment were not diverse, and the Supreme Court held that there was no jurisdiction over that claim.

The Court’s analysis began with the observation that ancillary and pendent jurisdiction are part of “the same generic problem: Under

⁵⁷ *Id.* at 18.

⁵⁸ *Id.* at 17.

⁵⁹ *Id.*

⁶⁰ *Id.* at 18.

⁶¹ *Id.*

⁶² *Id.*

⁶³ In drawing a distinction between pendent claims and pendent parties, the Court offered practical differences between the two, *id.* at 14, but it did not explain why these differences altered the requirement for a statutory foundation.

⁶⁴ *Id.* at 15.

⁶⁵ 437 U.S. 365 (1978).

what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same state?"⁶⁶ The Court then turned to *Gibbs*, commenting that the court of appeals in *Kroger* had "failed to understand the scope of the doctrine of the *Gibbs* case."⁶⁷ In delineating the scope of *Gibbs*, the Court drew no distinction between pendent parties and pendent claims. Instead, the Court stressed that *Gibbs* had simply determined the boundaries of constitutional power. In addition, the Court noted, it was also always necessary to determine whether there was statutory authority for pendent jurisdiction.⁶⁸ The Court then went on to articulate what appeared to be a general statutory test to judge all assertions of pendent or ancillary jurisdiction, noting that,

[T]here must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has . . . expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim.⁶⁹

Applying this test the Court found no jurisdiction. The Court concluded that pendent jurisdiction would be inconsistent with the clearly demonstrated "congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant."⁷⁰ By allowing a plaintiff to use pendent jurisdiction to sue a nondiverse party, pendent jurisdiction could completely eliminate the total diversity rule. As long as there is diversity between one plaintiff and one defendant, all other claims could be considered pendent. Of course, *Kroger* involved a claim by a plaintiff against an impleaded third party, but the Court concluded that this

⁶⁶ Id. at 370.

⁶⁷ Id.

⁶⁸ Id. at 371-72.

⁶⁹ Id. at 373 (quoting *Aldinger*, 427 U.S. at 18).

⁷⁰ Id. at 374. It is worth noting that the "congressional mandate" for the complete diversity rule is not found on the face of § 1332. Rather, the Court found that mandate in the fact that, following *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), Congress repeatedly reenacted the diversity statute without saying that it meant to change the complete diversity rule enunciated in *Strawbridge*. See *Kroger*, 437 U.S. at 373. Thus, in finding no pendent jurisdiction, the Court engages in a kind of stacking of implied congressional mandates. Having found an implied congressional endorsement of the complete diversity rule, the Court then implies from this implied endorsement that Congress also meant to negate pendent jurisdiction.

still provided too easy a circumvention of the complete diversity rule to have been contemplated by Congress.⁷¹ The Court took some pains to suggest in dicta that the diversity statute might authorize jurisdiction over a claim between nondiverse parties in other circumstances. Specifically, the Court appeared to reaffirm in dicta the traditional understanding that there is jurisdiction over a claim between a *defendant* and a nondiverse impleaded third party.⁷²

The result in *Kroger* is consistent with the analysis in another case, *Zahn v. International Paper Co.*,⁷³ where the Court held that, in a diversity class action, the claim of each member of the plaintiff class must independently satisfy the amount in controversy requirement. Although the majority's analysis was not framed in terms of pendent or ancillary jurisdiction,⁷⁴ the approach is strikingly similar to that in *Kroger*. The Court stressed that for more than a century section 1332(a) has been interpreted to require that the separate claim of each plaintiff must meet the amount in controversy requirement.⁷⁵ As in *Kroger*, invoking pendent or ancillary jurisdiction would have been completely contrary to the Court's interpretation of the rest of the jurisdictional grant.

Following *Kroger*, the lower courts began doing two things. First, courts in every circuit⁷⁶ except the Ninth⁷⁷ acknowledged that pendent-party jurisdiction was permissible in at least some cases. Second,

⁷¹ 437 U.S. at 374; see Currie, *supra* note 4, at 765 n.76.

⁷² *Kroger*, 437 U.S. at 376.

⁷³ 414 U.S. 291, 301 (1973).

⁷⁴ Justice Brennan in dissent argued that jurisdiction should be available under a theory of ancillary jurisdiction. *Id.* at 305-08.

⁷⁵ *Id.* at 294-95.

⁷⁶ See, e.g., *Brown v. United States*, 838 F.2d 1157 (11th Cir. 1988); *Price v. Pierce*, 823 F.2d 1114 (7th Cir. 1987), cert. denied, 108 S. Ct. 1222 (1988); *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982), cert. denied, 469 U.S. 1018 (1984); *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); *North Dakota v. Merchants Nat'l Bank & Trust Co.*, 634 F.2d 368 (8th Cir. 1980); *Federal Deposit Ins. Corp. v. Otero*, 598 F.2d 627 (1st Cir. 1979); *Koppers Co. v. Garling & Langlois*, 594 F.2d 1094 (6th Cir. 1979); *Dick Meyers Towing Serv. v. United States*, 577 F.2d 1023 (5th Cir. 1978), cert. denied, 440 U.S. 908 (1979); *Kline v. United States*, 587 F. Supp. 1386 (M.D. Pa. 1984); *Murphy v. United States*, 451 F. Supp. 544 (D.D.C. 1978); *Santoni v. United States*, 450 F. Supp. 608 (D. Md. 1978).

⁷⁷ See, e.g., *Carpenters S. Calif. Admin. Corp. v. D. & L. Camp Constr. Co.*, 738 F.2d 999 (9th Cir. 1984); *Safeco Ins. Co. v. Guyton*, 692 F.2d 551 (9th Cir. 1982); *Munoz v. Small Business Admin.*, 644 F.2d 1361 (9th Cir. 1981); *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), cert. dismissed, 435 U.S. 982 (1978).

the Court's admonition in *Kroger* that one always had to consider whether there was a statutory basis for jurisdiction began to carry over into pendent⁷⁸ and ancillary⁷⁹ claim jurisdiction. These two lines of lower court cases do in fact reflect a relatively coherent way of combining *Gibbs*, *Aldinger*, and *Kroger*. The principle that seemed to emerge was that, in all cases in which a federal court was asked to exercise jurisdiction over a claim for which there was no independent basis for jurisdiction, the court had to consider both whether jurisdiction was constitutional and whether it was statutorily authorized. As to the statutory analysis, in essence, the Court construed the jurisdictional statutes to authorize full constitutional authority with respect to pendent and ancillary jurisdiction except where allowing it seems inconsistent with the particular jurisdictional statute itself or, in the case of suits based on federal questions, where pendent or ancillary jurisdiction would be inconsistent with the goals and purposes of the underlying cause of action.

II. *FINLEY V. UNITED STATES*

In light of all of these precedents, *Finley* seemed to present a strong case for pendent jurisdiction. The original claim was one over which the federal courts had exclusive jurisdiction. Not only had *Aldinger* specifically mentioned exclusive jurisdiction as a category of cases in which pendent-party jurisdiction might be appropriate, but jurisdiction seemed completely consistent with the rationale in *Kroger*. Where there is exclusive federal jurisdiction, the plaintiff does not have the option of litigating the entire case in state court. Moreover, there was no reason to believe that allowing pendent jurisdiction was

⁷⁸ See, e.g., *Jones v. Intermountain Power Project*, 794 F.2d 546, 552 (10th Cir. 1986); *Thompkins v. Stuttgart School Dist. No. 22*, 787 F.2d 439, 441-42 (8th Cir. 1986); *United States ex rel. Hoover v. Franzen*, 669 F.2d 433, 438-41 (7th Cir. 1982); *Ortiz v. United States*, 595 F.2d 65, 71-73 (1st Cir. 1979); *Davis v. Devereux Found.*, 644 F. Supp. 482, 487 (E.D. Pa. 1986); *Lage v. Thomas*, 585 F. Supp. 403, 407 (N.D. Tex. 1984); *James v. KID Broadcasting Corp.*, 559 F. Supp. 1153, 1155-56 (D. Idaho 1983); *Frye v. Pioneer Logging Mach.*, 555 F. Supp. 730, 732-33 (D.S.C. 1983); *Lieb v. Am. Motors Corp.*, 538 F. Supp. 127, 139-40 (S.D.N.Y. 1982); *Bennett v. Southern Marine Management Co.*, 531 F. Supp. 115, 117-18 (M.D. Fla. 1982); *Jong-Yul Lim v. International Inst. of Metro. Detroit*, 510 F. Supp. 722, 724-26 (E.D. Mich. 1981); *Catania, State Employment Discrimination Remedies and Pendent Jurisdiction and Title VII: Access to Federal Courts*, 32 Am. U.L. Rev. 777 (1983).

⁷⁹ See, e.g., *Finkle v. Gulf & W. Mfg. Co.*, 744 F.2d 1015, 1018-19 (3d Cir. 1984); *Ambromovage v. United Mine Workers*, 726 F.2d 972, 989-92 (3d Cir. 1984); *Travelers Ins. Co. v. First Nat'l Bank*, 675 F.2d 633, 638-40 (5th Cir. 1982); *Otero*, 598 F.2d at 630-32.

inconsistent with the goals or policies of the FTCA. In fact, an earlier version of the FTCA gave district courts “exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States,”⁸⁰ but this was changed in 1948 to allow “exclusive jurisdiction of civil actions on claims against the United States.”⁸¹

Writing for the majority, Justice Scalia dismissed these arguments, stressing that no matter how sensible or convenient pendent jurisdiction might be, the FTCA did not explicitly authorize jurisdiction over additional parties. Scalia dismissed the 1948 revision as a “minor rewording” of no significance,⁸² and, adopting a literalist approach to the statutory language, he argued:

The FTCA, § 1346(b), confers jurisdiction over “civil actions on claims against the United States.” It does not say “civil actions on claims that include requested relief against the United States,” nor “civil actions in which there is a claim against the United States”—formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions. Just as the statutory provision “between . . . citizens of different States” has been held to mean citizens of different states and no one else, . . . so also here we conclude that “against the United States” means against the United States and no one else.⁸³

Notwithstanding this discussion of the language of the FTCA, Justice Scalia makes clear that the holding goes far beyond the FTCA. The opinion concludes by “reaffirm[ing]” that “a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.”⁸⁴ The Court’s rationale for this broadly stated holding hinges on its perception that there was an irreconcilable inconsistency between *Gibbs* and the principle that the lower federal courts must have a statutory basis for jurisdiction.⁸⁵ Rather than attempting to reconcile these lines of

⁸⁰ 28 U.S.C. § 931 (1946).

⁸¹ *Id.* § 1346(b) (1952); see *Finley v. United States*, 109 S. Ct. 2003, 2009 (1989).

⁸² *Finley*, 109 S. Ct. at 2009. He also argued that at the time of the 1948 revision “the concept of pendent-party jurisdiction was not considered remotely viable.” *Id.* at 2010.

⁸³ *Id.* at 2008 (citation omitted).

⁸⁴ *Id.* at 2010.

⁸⁵ See *id.* at 2006 & n.1.

authority by finding statutory authorization,⁸⁶ the Court described *Gibbs* as “a departure from prior practice” and viewed its task as deciding whether pendent-party jurisdiction should be included in the *Gibbs* aberration.⁸⁷ The Court chose not to put pendent-party jurisdiction with *Gibbs* because, according to the Court, pendent-party jurisdiction is “fundamentally different” than pendent claim jurisdiction.⁸⁸ The Court did not explain how the difference between claims and parties was relevant to the issue of pendent jurisdiction, but relied instead on the raw assertion that *Aldinger* and *Kroger* had already established that the *Gibbs* “exception” did not apply to pendent-party jurisdiction.⁸⁹

The Court’s treatment of *Aldinger* and *Kroger* is at best disingenuous. In *Aldinger*, the Court had concluded its opinion by stressing that it was not striking down all pendent-party jurisdiction. It then announced the rule that “[b]efore it can be concluded that such jurisdiction [over a new party not otherwise subject to 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

⁸⁶ See *supra* text accompanying notes 47-49. At one point in his opinion, Scalia hints that he understands how one might overcome the supposed lack of statutory authority in *Gibbs*. He states that, with respect to added parties, “we will not assume that the full constitutional power has been congressionally authorized.” *Finley*, 109 S. Ct. at 2007. Nonetheless, Scalia asserts that there is a “divergence” between the requirement of statutory authority and *Gibbs*. *Id.* at 2006 n.1. Justice Stevens’ dissent seems to play right into Scalia’s characterization of *Gibbs*. Stevens demonstrates that he too understands that statutory authority may be found in the phrase “civil actions” in jurisdictional statutes, *id.* at 2017, but he never persuasively confronts the majority’s assertion that pendent jurisdiction is inconsistent with the requirement for statutory authorization. Instead, he argues, somewhat unhelpfully, that pendent jurisdiction is not inconsistent with the requirement for statutory authority because “[t]he District Court clearly had jurisdiction over this case and the only question is the scope of its authority to consider specific claims.” *Id.* at 2019 n.26. Moreover, Stevens focuses on how well-established pendent jurisdiction is rather than on disputing Scalia’s premise. See *id.* at 2013-18. As a result, Scalia quotes Stevens as arguing that “[i]f the Court’s demonstration [of lack of statutory authority] ‘were controlling, *Gibbs*, *Hurn* and *Moore*, as well as a good many other cases, were incorrectly decided.’” *Id.* at 2006 n.1. The bracketed material is Scalia’s characterization of Stevens’ argument and may not be accurate, because the paragraph from which Scalia quotes seems to focus more on the lack of an *explicit* statutory authority specifically directed at pendent jurisdiction. See *id.* at 2019. Nonetheless, Stevens does not dispute Scalia’s use of the quotation and the net result is that the dissent seems simply to reinforce Scalia’s assertion that pendent jurisdiction is inconsistent with the requirement of statutory authority.

⁸⁷ *Id.* at 2010.

⁸⁸ *Id.* at 2006.

⁸⁹ *Id.* at 2007.

or by implication negated its existence."⁹⁰ This principle was reiterated in *Kroger*:

Beyond this constitutional minimum, there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has . . . expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim.⁹¹

Based on this language, federal courts in nearly every circuit as well as commentators had understood the relevant statutory test for all pendent jurisdiction to be whether the jurisdictional statute "explicitly or by implication negated" pendent jurisdiction.⁹² Even the government's brief in *Finley* focused on this as the relevant test.⁹³

This test is not without its critics and it is not surprising that Justice Scalia, and maybe some others on the Court as well, would find the "negation" test unsatisfactory. Scalia views the search for legislative intent as highly suspect in general,⁹⁴ and the prospect of searching for evidence that Congress had implicitly negated jurisdiction must have seemed particularly unappealing. *Aldinger* and the Court's subsequent reinterpretation of the legislative history of section 1983 certainly highlight the difficulty of the test.⁹⁵ But if the Court was seeking to avoid unnecessary forays into supposed legislative intent, the easy solution would have been to interpret "civil actions" as used in the jurisdictional statutes as conferring full constitutional author-

⁹⁰ *Aldinger v. Howard*, 427 U.S. 1, 18 (1976).

⁹¹ *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978) (quoting *Aldinger*, 427 U.S. at 18).

⁹² See, e.g., authorities cited supra note 76; Schenkier; supra note 15, at 257.

⁹³ Brief for the United States at 14-15, *Finley v. United States*, 109 S. Ct. 2003 (1989) (No. 87-1973).

⁹⁴ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting) (pointing out that "[d]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task"); *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring) (criticizing as unnecessary the majority's analysis of the Immigration and Naturalization Act's legislative history because the statutory language is clear); *Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (characterizing committee reports as unreliable indicators of legislative intent); D. Farber & P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423, 454-55 (1988) (quoting Justice Scalia's Speech on Use of Legislative History).

⁹⁵ See supra note 55.

ity. This was after all the implicit holding of *Gibbs*, which had found supplemental jurisdiction but discussed only constitutional limits on power.⁹⁶ *Kroger* could be understood as a very limited exception to this general rule. As noted earlier, the diversity statute presents a unique problem because a full exercise of pendent-party jurisdiction would completely eliminate the requirement of total diversity. Thus, to construe the diversity statute to require total diversity and also to grant supplemental jurisdiction to the full extent allowed by the Constitution would create an internal inconsistency in the statute.

Whatever the Court's reasons for disliking the "negation" test,⁹⁷ the Court chose not to dignify the test with so much as a decent burial. Instead, the Court relied on the first half of the sentence in *Kroger* in which the test appears without even quoting the second half, which contains the important qualification of asking whether Congress "expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim."⁹⁸

⁹⁶ See *supra* note 52 and accompanying text.

⁹⁷ The government in its brief suggested that by rejecting pendent-party jurisdiction in this case, the Court could avoid a difficult constitutional question. Brief for the United States at 11-12, *Finley v. United States*, 109 S. Ct. 2003 (1989) (No. 87-1973). Indeed, the Ninth Circuit, in rejecting pendent-party jurisdiction, has stated that the "difficulty with pendent-party jurisdiction is a constitutional one under Article III." *Ayala v. United States*, 550 F.2d 1196, 1200 n.8 (9th Cir. 1977), cert. dismissed, 435 U.S. 982 (1978). Neither the government nor the Ninth Circuit clearly describes exactly what this constitutional problem is. While it may violate the Constitution for a district court to take jurisdiction over a matter as to which it has no statutory authority, that problem disappears if "civil actions" in the jurisdictional statutes is interpreted to encompass these types of supplemental jurisdiction. The only other constitutional question is whether the *Gibbs* interpretation of Article III applies only to the addition of claims and not to the addition of parties. Although the Court has declined to explicitly address this question, see *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 n.8 (1978), there is no obvious reason why one would believe that the Constitution differentiates between added claims and added parties. Moreover, such an interpretation would have significant implications far beyond the facts of this case—it would mean that the jurisdiction that federal courts have exercised for years over ancillary parties is in violation of Article III. See *supra* notes 77-81 and accompanying text. Thus, although the Court has frequently announced the rule that constitutional questions should not needlessly be addressed, see, e.g., *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-75 (1947) (the court should not decide a constitutional question unless necessity compels such consideration); *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (listing the canons of interpretation justifying the Court's refusal to pass on the constitutionality of an act of Congress), this hardly seems an appropriate case in which to invoke that rule, because a narrow decision would do nothing to stop the supposed violation of Article III that is occurring routinely in federal courts around the country.

⁹⁸ See *Kroger*, 437 U.S. at 373 (quoting *Aldinger*, 427 U.S. at 18).

In his final substantive paragraph, Justice Scalia does proffer an explanation of the majority's true concern. That paragraph, which is set off from the rest of the opinion, begins by reemphasizing that "[t]he *Gibbs* line of cases was a departure from prior practice" requiring that jurisdiction be explicitly conferred.⁹⁹ Nonetheless, the Court explains, it has "no intent to limit or impair" *Gibbs*.¹⁰⁰ According to the Court, its real concern "is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."¹⁰¹ Thus, the Court concludes that it must "reaffirm" that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties" because "the opposite would sow confusion."¹⁰² The Court seems in essence to be saying that it has abandoned any goal of rationalizing the law of supplemental jurisdiction and has opted instead to clarify the area using arbitrary distinctions. The theme of clarity in the rules of statutory interpretation is one that appears in other Scalia opinions.¹⁰³ Unfortunately, the opinion in *Finley* creates rather than eliminates confusion. Specifically, the Court's rationale in *Finley* creates a host of practical uncertainties as to when a federal court has jurisdiction over pendent and ancillary parties and claims. In the short time since *Finley* was decided, the lower courts have predictably demonstrated substantial disagreement and confusion about the meaning of *Finley*.

III. THE IMPACT OF *FINLEY*

A. *Does Finley Apply to Both Ancillary and Pendent Jurisdiction?*

At the beginning of his opinion, Justice Scalia describes the issue before the Court as whether the FTCA "permits an assertion of *pendent* jurisdiction over additional parties."¹⁰⁴ Later, Justice Scalia distinguishes other cases on the grounds that they involve "ancillary

⁹⁹ *Finley*, 109 S. Ct. at 2010.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See, e.g., *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring); *Chan v. Korean Air Lines*, 109 S. Ct. 1676, 1683-84 (1989); *United States v. Stuart*, 109 S. Ct. 1183, 1194 (1989) (Scalia, J., concurring).

¹⁰⁴ *Finley*, 109 S. Ct. at 2005 (emphasis added).

jurisdiction.”¹⁰⁵ Nonetheless, the Court’s analysis appears equally applicable to most categories of cases that have been traditionally labeled “ancillary.”

The Court describes pendent claim jurisdiction as set forth in *Gibbs* as a “departure”¹⁰⁶ from the requirement of statutory authority for jurisdiction. If the phrase “civil actions” does not include pendent jurisdiction,¹⁰⁷ it is not obvious why it should be understood to include ancillary jurisdiction. Of course, the classic ancillary claim is one raised by the defendant, and there are strong fairness reasons why such claims should be allowed.¹⁰⁸ But an underlying premise of *Finley* itself is that the needs of fairness cannot override the requirements for statutory authorization.¹⁰⁹ Thus, the argument must be not that ancillary jurisdiction exists because it is fair, but that fairness concerns lead us to interpret “civil actions” to include ancillary jurisdiction. The difficulty with this is that it suggests that there is statutory authorization for jurisdiction over claims lacking an independent jurisdictional basis, provided there is a “good enough” reason for jurisdiction. However, if this is true, it is hard to explain how the Court could conclude that there is never statutory authority for pendent claims without making any inquiry into the reasons that might support such jurisdiction.

B. Does *Finley* Apply to All Added Parties?

In addition to differentiating between pendent and ancillary jurisdiction, the Court distinguished between adding claims and adding parties.¹¹⁰ There are two problems that result from this distinction. First, it is not always easy to distinguish between added claims and added parties. Second, as to those situations that clearly involve added parties, the Court’s pronouncements are broadly phrased and appear to eliminate jurisdiction in several significant areas in which the federal courts have traditionally exercised ancillary jurisdiction.

¹⁰⁵ Id. at 2008 n.4.

¹⁰⁶ Id. at 2010.

¹⁰⁷ See supra notes 47-52 and accompanying text for a discussion of this concept.

¹⁰⁸ See supra notes 24-34 and accompanying text.

¹⁰⁹ See *Finley*, 109 S. Ct. at 2008 (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376-77 (1978)).

¹¹⁰ Id. at 2007. The Court stated, “[o]ur cases show, however, that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized.” Id.

The problem of distinguishing between added claims and added parties can be illustrated with a hypothetical case based on *Kroger*. Imagine a slight change of the facts in *Kroger* so that there was diversity between the defendant and the impleaded third-party defendant¹¹¹ but not between the plaintiff and the third-party defendant. Under these circumstances, the plaintiff would not be relying on pendent jurisdiction to bring an entirely new party into the lawsuit, but instead, the third-party defendant would have been brought into the case on the basis of a claim over which there was an independent basis for jurisdiction, namely, diversity. Thus, one could easily characterize this case as involving pendent claim rather than pendent-party jurisdiction. Indeed, the case does not seem to fit the definition of pendent-party jurisdiction offered by the *Finley* Court—that pendent-party jurisdiction is “jurisdiction over parties not named in any claim that is independently cognizable by the federal court.”¹¹² On the other hand, the fortuity of diversity between the defendant and third-party defendant does not alter the concern articulated in *Kroger* that taking jurisdiction would allow plaintiffs to circumvent the total diversity rule.¹¹³ Moreover, at the end of *Finley*, the Court describes *Zahn*, *Aldinger*, and *Kroger* as having held that “a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.”¹¹⁴ This language could be read to suggest that the Court would treat the hypothetical case as a pendent-party case over which there was not jurisdiction, because although there was jurisdiction over the claim between the plaintiff and defendant and the claim between the defendant and the third-party defendant, that would not confer jurisdiction “by” the plaintiff “against” the third-party defendant. The indeterminacy of the posed hypothetical highlights the potential problems that can arise from the *Finley* Court’s failure to articulate a rationale for distinguishing between added claims and added parties.

The second difficulty with the Court’s distinction between added claims and added parties is that the Court appears to be eliminating jurisdiction over *all* claims involving additional parties, including sit-

¹¹¹ In *Kroger*, both the defendant and the impleaded third party were incorporated in Nebraska. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 368 (1978).

¹¹² 109 S. Ct. at 2006 (footnote omitted).

¹¹³ See 437 U.S. at 374-75.

¹¹⁴ 109 S. Ct. at 2010.

uations in which the federal courts have traditionally exercised ancillary jurisdiction, such as impleader,¹¹⁵ intervention of right,¹¹⁶ class actions,¹¹⁷ joinder of additional parties as part of a compulsory counterclaim¹¹⁸ or cross-claim.¹¹⁹ Because in these situations it is usually someone other than the plaintiff who seeks to bring in the additional party, the jurisdiction is generally labeled "ancillary,"¹²⁰ but the Court's definition of pendent jurisdiction¹²¹ and its description of its holding in *Zahn*, *Aldinger*, and *Kroger*,¹²² both quoted above,¹²³ make no distinction based on who seeks to bring in the extra party. The *Finley* Court does at one point hint that ancillary parties might be treated differently from pendent parties.¹²⁴ Yet different treatment for ancillary and pendent parties seems inconsistent with the Court's assertion that adding parties is always different from adding claims. If the explanation for the different treatment of pendent and ancillary jurisdiction is to go beyond mere linguistics, the Court must have concluded that explicit authority is not necessary for at least some situations involving added parties.¹²⁵ But this conclusion would be flatly

¹¹⁵ See 6 C. Wright, A. Miller & M. Kane, *supra* note 30, § 1444. As noted earlier, the *Kroger* Court recognized in dicta that there is jurisdiction over claims between a defendant and an impleaded third party. See 437 U.S. at 375-76.

¹¹⁶ See *Wichita R.R. & Light Co. v. Public Utils. Comm'n*, 260 U.S. 48, 53-54 (1922); *Phelps v. Oaks*, 117 U.S. 236, 240-41 (1886); 7A C. Wright, A. Miller & M. Kane, *supra* note 33, § 1917.

¹¹⁷ Under current doctrine, in a class action only the named class representatives need be diverse from the opposing party. See *Snyder v. Harris*, 394 U.S. 332, 340 (1969). This doctrine has been described as an exercise of "ancillary" jurisdiction, see *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 365-66 (1921), although if the term "ancillary" is used for claims joined by someone other than the plaintiff, it is not clear that this is the proper term, at least in cases of a plaintiff class action.

¹¹⁸ See *Dewey v. West Fairmont Gas Coal Co.*, 123 U.S. 329, 333 (1887); 6 C. Wright, A. Miller & M. Kane, *supra* note 30, § 1436; *Fraser*, *supra* note 12, at 533-34.

¹¹⁹ See 6 C. Wright, A. Miller & M. Kane, *supra* note 30, § 1436; *Fraser*, *supra* note 12, at 534.

¹²⁰ On occasion, a plaintiff might respond to a counterclaim by impleading a third party. Commentators have suggested that this should be considered ancillary jurisdiction. See *supra* note 12.

¹²¹ *Finley*, 109 S. Ct. at 2006.

¹²² *Id.* at 2010.

¹²³ See *supra* text accompanying notes 112 & 114.

¹²⁴ 109 S. Ct. at 2007-08.

¹²⁵ There may, of course, be fairness reasons for being more solicitous toward ancillary parties that a defendant seeks to join because ordinarily the defendant does not choose the federal forum. But such concerns do not give a basis for dispensing with the requirement of statutory authority. As the Court itself noted in *Finley*, "'neither the convenience of the

inconsistent with the Court's position that explicit authorization is necessary before parties can be added.

It is possible that the Court envisioned retaining a very narrow exception for ancillary parties. The Court acknowledged that it has long found jurisdiction over "a narrow class of cases" involving added parties over whom no independent basis of jurisdiction exists where that claim is "'ancillary' to jurisdiction otherwise properly vested—for example, when an additional party has a claim upon contested assets within the court's exclusive control . . . or when necessary to give effect to the court's judgment."¹²⁶ Unfortunately, it is unclear from this statement whether the Court means to treat all assertions of "ancillary party" jurisdiction differently from pendent jurisdiction, or if it is only treating differently those categories of ancillary jurisdiction involving exclusively controlled property or those that are necessary to effectuate the judgment. Treating ancillary parties differently from pendent parties undermines the premise of the Court's argument that additional parties are always treated differently than additional claims.

Whatever arguments the Court might offer for retaining ancillary jurisdiction over additional parties in some contexts,¹²⁷ two traditionally recognized areas of ancillary jurisdiction seem particularly vulnerable to attack using the *Finley* Court's logic—class actions and impleader.¹²⁸

litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction.'” *Id.* at 2008 (quoting *Kroger*, 427 U.S. at 376-77). Moreover, this argument completely undermines the result in *Finley*, because the “fairness” argument in cases of exclusive jurisdiction is quite similar to the argument for ancillary jurisdiction.

¹²⁶ *Id.* at 2008.

¹²⁷ The Court might, for example, continue to allow ancillary jurisdiction over intervention of right under Rule 24(a)(2), which allows intervention “when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest.” Fed. R. Civ. P. 24 (a)(2); see Fraser, *Ancillary Jurisdiction of Federal Courts of Persons Whose Interest May Be Impaired if Not Joined*, 62 F.R.D. 483 (1974). There are particularly strong fairness reasons for allowing intervention in this context. Moreover, there is Supreme Court authority dating back more than 100 years that authorizes ancillary jurisdiction at least where the intervenor claims property within the control of the court. See, e.g., *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860). This line of cases is cited with apparent approval by the Court in *Finley*. See 109 S. Ct. at 2008.

¹²⁸ In his dissent, Justice Stevens hints that the majority opinion might create problems for impleader claims but does not elaborate on the point. 109 S. Ct. at 2020 n.30.

1. *Class Actions*

Even if the Court were to try to retain jurisdiction in some of these situations that have historically been classified under ancillary jurisdiction, the most vulnerable to future attack would seem to be class actions. Prior to *Finley*, the accepted doctrine with respect to class actions was that only the named plaintiffs need be diverse from the defendants and that the federal court could exercise ancillary jurisdiction over the claims of the nondiverse class members.¹²⁹ This rule dates back to the case of *Supreme Tribe of Ben-Hur v. Cauble*.¹³⁰ The Supreme Tribe of Ben-Hur was a fraternal benefit association that had successfully defended a class action brought on behalf of a group of shareholders in federal court. When a disgruntled group of shareholders filed a second suit in state court seeking to relitigate the same issues, the Supreme Tribe filed suit in federal court seeking to enjoin the state court action. In determining whether the injunction should issue, the Supreme Court first had to determine whether the federal court in the original class action had jurisdiction where the plaintiff class included unnamed class members who were not diverse from the defendant. The Court held that there was jurisdiction and that the nondiverse class members were bound by the judgment.¹³¹ The Court quoted extensively from *Stewart v. Dunham*,¹³² which had allowed intervention by a nondiverse party and used the label "ancillary."¹³³ The Court then announced that the principle of *Stewart v. Dunham* "controls this case."¹³⁴ Although *Ben-Hur* could be construed to apply only where the class members are asserting a joint interest,¹³⁵ it has come to be cited for the proposition that there is ancillary juris-

¹²⁹ See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 162 (2d Cir. 1987); J. Friedenthal, M. Kane & A. Miller, *supra* note 12, at 742; C. Wright, *supra* note 2, at 484.

¹³⁰ 255 U.S. 356 (1921).

¹³¹ *Id.* at 366.

¹³² 115 U.S. 61 (1885), quoted in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 365 (1921).

¹³³ *Id.* at 64.

¹³⁴ *Ben-Hur*, 255 U.S. at 365.

¹³⁵ The complaint in *Ben-Hur* had asserted that the plaintiffs all had "a common but indivisible interest." 255 U.S. at 361. However, the United States Court of Appeals for the Second Circuit has held that class actions proceeding under Fed. R. Civ. P. 23(a)(3) are "separate suits" that require each claimant to meet his or her own jurisdictional requirements. *Steele v. Guaranty Trust Co.*, 164 F.2d 387 (2d Cir.), cert. denied, 333 U.S. 843 (1947).

diction over nondiverse class members in all class actions.¹³⁶ This broad reading of *Ben-Hur* was seriously undermined by *Zahn v. International Paper Co.*¹³⁷ in which the Court held that all class members must satisfy the amount in controversy requirement.¹³⁸ Nonetheless, courts¹³⁹ and commentators¹⁴⁰ have continued to assume that there is ancillary jurisdiction over nondiverse class members.

Even if *Ben-Hur* survived *Zahn*,¹⁴¹ it is hard to see how it can survive *Finley*. In *Finley*, the Court's holding that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties"¹⁴² appears to be squarely applicable to the class-action context. The fact that the class-action situation has traditionally been labeled "ancillary" provides scant protection. The application of that label to the class-action context is not the result of some considered analysis, but simply reflects the fact that *Ben-Hur* and *Stewart* were decided before there was significant development in the concept of pendent jurisdiction. Moreover, the fairness rationale for ancillary jurisdiction, i.e., that ancillary jurisdiction is invoked to protect "a defending party haled into court against his will,"¹⁴³ does not apply to class actions. It is ordinarily not the defendant who seeks to create a class action, but rather the plaintiff. In fact, the defendant frequently objects to the certification of a plaintiff class. Thus, even if one were to accept that the federal courts should exercise ancillary jurisdiction because of compelling concerns about fairness to the defendant, this has no relevance to the analysis of class actions. In sum, it seems likely that

¹³⁶ See *Zahn v. International Paper Co.*, 414 U.S. 291, 309 (1973) (Brennan, J., dissenting); *Snyder v. Harris*, 394 U.S. 332, 340 (1969); J. Friedenthal, M. Kane & A. Miller, *supra* note 12, at 742; C. Wright, *supra* note 2, at 484.

¹³⁷ 414 U.S. 291 (1973).

¹³⁸ *Id.* at 301.

¹³⁹ See, e.g., *Lumbermen's Underwriting Alliance v. Mobile Oil Corp.*, 612 F. Supp. 1166, 1168 n.2 (D.C. Idaho 1985) (asserting that only the citizenship of the class representative is considered for purposes of determining diversity in a class action).

¹⁴⁰ See, e.g., J. Friedenthal, M. Kane & A. Miller, *supra* note 12, at 742 (noting that "it is well settled that only the citizenship of the named representative is considered in determining whether federal diversity jurisdiction may be involved"); C. Wright, *supra* note 2, at 484 ("It has long been the rule that in class actions only the citizenship of the named representatives is to be considered. . . . This continues to be held under the amended rule.").

¹⁴¹ For a discussion of the impact of *Zahn* on the broad reading of *Ben-Hur*, see Currie, *supra* note 4, at 762-64.

¹⁴² 109 S. Ct. at 2010 (emphasis added).

¹⁴³ *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978).

Finley marks the end of ancillary jurisdiction over nondiverse class members.

2. *Impleader*

Rule 14 of the Federal Rules of Civil Procedure allows a defendant to bring into the litigation a third party “who is or may be liable to him for all or part of the plaintiff’s claim against [him].”¹⁴⁴ It is now considered hornbook law that there is ancillary jurisdiction over such claims¹⁴⁵ and the Supreme Court has described this principle as “well-established doctrine.”¹⁴⁶

At first glance, impleader might seem to present a compelling case for ancillary jurisdiction at least where it is the defendant (as opposed to the plaintiff) who impleads the third party. As the Supreme Court explained in *Kroger*, a “third-party complaint depends at least in part upon the resolution of the primary law suit. Its relation to the original complaint is thus not mere factual similarity but logical

¹⁴⁴ Fed. R. Civ. P. 14(a).

¹⁴⁵ See, e.g., J. Friedenthal, M. Kane & A. Miller, *supra* note 12, at 364 (noting that federal courts have gradually extended the concept of ancillary subject-matter jurisdiction to cover most claims under Rule 14); C. Wright, *supra* note 2, at 515 (indicating that as long as there is diversity jurisdiction between the original parties, there need be no independent jurisdiction for the third-party defendant); 6 C. Wright, A. Miller & M. Kane, *supra* note 30, § 1444.

¹⁴⁶ *Moor v. County of Alameda*, 411 U.S. 693, 714 (1973); see *Kroger*, 437 U.S. at 375-76 (acknowledging that lower courts have often found ancillary jurisdiction in cases of impleader and distinguishing claims by a defendant against an impleaded third party from claims by a plaintiff against such a party). However well-established the doctrine is now, the doctrine developed only after the promulgation of the Federal Rules of Civil Procedure. See, e.g., *Galveston, Harrisburg & San Antonio R.R. Co. v. Hall*, 70 F.2d 608, 610 (5th Cir. 1934) (judgment against impleaded party reversed because the impleaded party did not independently satisfy federal jurisdictional requirements); Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 *Stan. L. Rev.* 395, 418-19 (1976) (using the impleading of the third-party defendants to demonstrate how the advent of the federal rules has changed the test for ancillary jurisdiction). Both courts and commentators have observed that as a result of the literal joinder of rules, ancillary jurisdiction has become “much broader and much more elastic than it had previously been understood to be.” *Brandt v. Olson*, 179 F. Supp. 363, 360 (N.D. Iowa 1959); see Goldberg, *supra*, at 416-21; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendment of the Federal Rules of Civil Procedure (I)*, 81 *Harv. L. Rev.* 356, 400 (1969). This expansion has occurred with little recognition of the doctrinal difficulties. The Federal Rules of Civil Procedure do not and cannot create jurisdiction where it does not otherwise exist. See Fed. R. Civ. P. 82. A Supreme Court concerned about the statutory foundation for jurisdiction over added parties might view with some skepticism doctrines that have developed simply to accommodate the liberal joinder provisions of the Federal Rules of Civil Procedure.

dependence."¹⁴⁷

Upon closer inspection, the case for ancillary jurisdiction over impleader claims is not so compelling. The "logical dependence" argument offered in *Kroger* is weak. It is true that the factual prerequisite to recovery under a third-party claim is that the defendant is liable to the plaintiff.¹⁴⁸ This does not explain why the third-party claim should be tried in the same court as the underlying dispute. To the extent the third-party defendant disputes his liability to the defendant, that dispute may focus on issues wholly unrelated to the plaintiff's claims—issues such as whether the defendant paid his insurance premiums or lied on his application for insurance. Thus, there may be no litigation efficiency involved in combining the third-party claim with the main lawsuit. Put differently, this suggests that there may be no inefficiency and, therefore, no unfairness¹⁴⁹ in requiring the defendant to litigate his third-party claim in a separate court.

The defendant might reply that the unfairness results from the fact that he may not be able to commence a separate lawsuit against the third-party defendant until the defendant's liability has been established and the would-be third-party defendant has refused to pay. This may mean that for a significant period of time the defendant is obligated to the plaintiff but has not yet established that the would-be third-party defendant is obligated to reimburse him.¹⁵⁰

There are several responses to this. First, the argument assumes that the suit in state court against the would-be third-party defendant cannot be filed until liability for the underlying claim has been established. However, this assumption may not be accurate in states that allow declaratory judgment actions. Moreover, if a state requires that the underlying liability be fully established before the suit for reimbursement may proceed, any unfairness is a direct result of the state law. There is no reason to alter federal jurisdictional law so as to correct a perceived unfairness in state law. The proper remedy in such a case is to change the state law.

The Court in *Finley* justified its elimination of pendent-party jurisdiction on the grounds that there is "a central distinction . . . between

¹⁴⁷ 437 U.S. at 376.

¹⁴⁸ See Fed. R. Civ. P. 14.

¹⁴⁹ See *supra* notes 16-19 and accompanying text for a discussion equating efficiency and fairness concerns.

¹⁵⁰ See Note, *supra* note 4, at 908.

new parties and parties already before the court”¹⁵¹ and that “the addition of a completely new party . . . would run counter to the well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress.”¹⁵² This concern seems fully applicable when “a completely new party” is brought into the federal court under a third-party complaint as well.

Even assuming one overcomes the statutory obstacle and allows ancillary jurisdiction over at least those impleader claims for which a separate lawsuit would be particularly burdensome, some further issues remain. For example, removal presents a complication because here it is the defendant, and not the plaintiff, who has chosen the federal forum. Whatever fairness arguments can be made to support jurisdiction over impleader claims when the defendant is involuntarily haled into federal court seem far less compelling when the defendant selects the forum. The *Kroger* Court’s observation about the plaintiff in that case seems fully applicable to a removing defendant: “[T]he efficiency plaintiff seeks so avidly is available without question in the state courts.”¹⁵³ One can, of course, argue that unless the court takes ancillary jurisdiction, defendants will be discouraged from exercising their right to remove and that Congress surely did not intend such a result. This argument has force, but it is the same argument that has been offered to justify pendent jurisdiction,¹⁵⁴ which was rejected in *Finley*.¹⁵⁵ There is no reason why the courts should be so much more concerned about protecting the defendant’s right to select a federal forum than protecting the plaintiff’s right to the same.

Removal also complicates the analysis of impleader claims raised by a plaintiff in response to a compulsory counterclaim.¹⁵⁶ In analyzing the plaintiff’s situation, it is not clear whether this should be labeled ancillary or pendent. Although it is the plaintiff who is seeking to join the impleader claim, the plaintiff is acting in her capacity as defendant to the counterclaim. Moreover, the plaintiff did not choose the federal forum. This highlights how fluid and ultimately

¹⁵¹ 109 S. Ct. at 2006 n.2.

¹⁵² *Id.* at 2007 (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976)).

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

¹⁵⁴ See *supra* note 19 and accompanying text.

¹⁵⁵ 109 S. Ct. at 2008 n.5.

¹⁵⁶ See Fed. R. Civ. P. 14(b).

useless the labels "pendent" and "ancillary" are. The fairness concerns that would justify ancillary jurisdiction over the defendant's impleader claims in nonremoval cases would seem to justify ancillary jurisdiction over plaintiff's impleader claims in cases that have been removed. These fairness concerns would be even more compelling where the plaintiff's impleader is in response to a compulsory counterclaim involving a claim over which there is exclusive federal jurisdiction. Yet the statutory analysis needed to support jurisdiction in such a case is quite similar to that categorically rejected in *Finley*.¹⁵⁷

As the foregoing discussion demonstrates, there is a strong argument that *Finley* eliminates ancillary jurisdiction over all impleader claims. Further, if ancillary jurisdiction survives for any impleader situation, the courts will face the difficult task of differentiating among impleader cases in a way that is neither arbitrary nor inconsistent with *Finley*.

C. Does *Finley* Affect Pendent and Ancillary Claim Jurisdiction?

In addition to creating confusion concerning supplemental *party* jurisdiction, *Finley* also creates confusion with respect to both pendent and ancillary *claim* jurisdiction. As noted earlier, the statutory test articulated in *Kroger* has been understood to apply in all instances of supplemental jurisdiction, regardless of whether that jurisdiction involved claims or parties and regardless of whether it was "ancillary" or "pendent."¹⁵⁸ Following *Kroger*, numerous lower courts applied its test to traditional pendent claims and on a number of occasions found that Congress had "by implication negated" pendent

¹⁵⁷ In 1988, Congress amended the removal statute to provide:

If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. § 1447(e) (1988). This amendment, might be broadly interpreted to prohibit a plaintiff from joining any additional nondiverse defendants including impleaded third-party defendants, but such an interpretation does not appear warranted. The section is addressed to joinder that would "destroy subject matter jurisdiction." This language appears to be inapplicable where the plaintiff impleads a nondiverse third-party defendant in response to a counterclaim over which there is federal question jurisdiction. See H.R. Rep. No. 889, 100th Cong., 2d Sess. 73, reprinted in 1988 U.S. Code Cong. & Ad. News 5982, 6034 (indicating that the subsection was intended to prevent "a small enlargement of diversity jurisdiction"). Even if the impleader claim is based on state law, the addition of that claim would not seem to *destroy* subject-matter jurisdiction over the original claim or counterclaim.

¹⁵⁸ See *supra* notes 78-79 and accompanying text.

claim jurisdiction.¹⁵⁹ However, the rationale of *Finley* makes it unclear whether any statutory inquiry is appropriate or necessary for traditional pendent-claim jurisdiction. The Court described *Gibbs* as a “departure”¹⁶⁰ from the requirement of statutory authority for jurisdiction, although it also asserted “no intent to limit or impair”¹⁶¹ that departure. The idea that *Finley* may eliminate, with respect to pendent claims, the need to consider anything other than the *Gibbs* constitutional test is reinforced by the Court’s complete disregard of the language in *Kroger* that had previously been thought to state the proper statutory test.¹⁶² Thus, although *Finley* virtually eliminated pendent-party jurisdiction, it may have increased the availability of pendent-claim jurisdiction.¹⁶³

Any reinvigoration of pendent-claim jurisdiction may, however, be short lived. By characterizing *Gibbs* as inconsistent with the requirement of statutory authorization of jurisdiction, the Court has in essence declared pendent-claim jurisdiction to be an unconstitutional

¹⁵⁹ See, e.g., *United States ex. rel. Hoover v. Franzen*, 669 F.2d 433, 444-45 (7th Cir. 1982); *Davis v. Devereux Found.*, 644 F. Supp. 482, 487 (E.D. Pa. 1986); *Lage v. Thomas*, 585 F. Supp. 403, 407 (N.D. Tex. 1984); *James v. KID Broadcasting Corp.*, 559 F. Supp. 1153, 1156-57 (D. Idaho 1983); *Frye v. Pioneer Logging Mach.*, 555 F. Supp. 730, 734 (D.S.C. 1983); *Bennett v. Southern Marine Management Co.*, 531 F. Supp. 115, 117-18 (M.D. Fla. 1982); *Jong-Yul Lim v. International Inst. of Metro. Detroit*, 510 F. Supp. 722, 724-26 (E.D. Mich. 1981).

¹⁶⁰ *Finley*, 109 S. Ct. at 2010.

¹⁶¹ *Id.*

¹⁶² See *supra* notes 90-98 and accompanying text. The Ninth Circuit has in dicta cited *Finley* for the proposition that “[i]n the case of pendent claim jurisdiction, the Supreme Court has extended jurisdiction to the full extent authorized by *Gibbs* without conducting a close examination of the relevant jurisdictional statutes.” *Teledyne Inc. v. Kone Corp.*, 892 F.2d 1404, 1408 (9th Cir. 1989).

¹⁶³ While on the Court of Appeals, Scalia wrote an opinion in a case in which he upheld a district court’s refusal to allow a plaintiff to bring a pendent state claim along with her Title VII claim. *Bouchet v. National Urban League*, 730 F.2d 799 (D.C. Cir. 1984). Scalia cited with approval numerous other cases that had reached a similar result. *Id.* at 805. Although several of these cases had relied on the *Kroger* statutory test to reach this result, Scalia specifically declined to rely on a statutory test. *Id.* at 806 n.2. Instead, he held that because of the differences in the remedies available under state and federal law, it was appropriate to dismiss the state claim as a matter of discretion. *Id.* at 805. Thus, it may be that Scalia envisions that the trend toward more restricted use of pendent-claim jurisdiction will continue, with the courts undertaking the type of statutory analysis described in *Kroger*, but labeling what they do as an exercise of discretion. On the other hand, in another recent opinion written by Justice Scalia, the Court limited the federal courts’ discretion to abstain from hearing a case based on the so-called *Burford* doctrine. *New Orleans Public Serv. v. Council of New Orleans*, 109 S. Ct. 2506, 2508 (1989).

usurpation of power. Although the Court specifically declined in *Finley* to correct this usurpation, the Court may be laying the foundation for eventual elimination of pendent-claim jurisdiction.¹⁶⁴ In effect, the *Finley* Court declared *Gibbs* brain dead, but refused to discontinue life support. One can only wonder how long this can continue.

The potential ramifications do not end with pendent jurisdiction. If pendent-claim jurisdiction lacks any statutory basis, what about traditional ancillary claims such as compulsory counterclaims¹⁶⁵ and cross-claims?¹⁶⁶ Although it has long been held that jurisdiction exists over these claims, that view is subject to the same challenge that can be made against pendent claims. Thus, *Finley* has opened the door for the complete elimination of all supplemental jurisdiction absent explicit congressional authorization.¹⁶⁷

Even if the Court retains ancillary jurisdiction for compulsory counterclaims and cross-claims, it could cut back on the breadth of that doctrine. The courts have come to assume that there is ancillary jurisdiction over compulsory counterclaims and cross-claims whenever the "transaction" test¹⁶⁸ set forth in Rules 13(a) and 13(g) is met.¹⁶⁹ Under this approach, courts focus on the overlap in evidence and the convenience and efficiency of trying the two claims together.¹⁷⁰

¹⁶⁴ Interestingly, shortly after *Finley* was decided, Justice Kennedy cited it for the proposition that it has never been the rule that "federal courts, whose jurisdiction is created and limited by statute, . . . acquire power by adverse possession." *Newman-Green, Inc. v. Alfonso-Larrain*, 109 S. Ct. 2218, 2226 (1989) (Kennedy, J., dissenting).

¹⁶⁵ See *Baker v. Gold Seal Liquors*, 417 U.S. 467, 469 n.1 (1974); 6 C. Wright, A. Miller & M. Kane, *supra* note 30, § 1414; *Fraser*, *supra* note 12, at 526-30.

¹⁶⁶ See 6 C. Wright, A. Miller & M. Kane, *supra* note 30, § 1433; *Fraser*, *supra* note 12, at 530-31.

¹⁶⁷ Justice Stevens' dissent hints at this potential problem. See 109 S. Ct. at 2020 n. 30 (Stevens, J., dissenting).

¹⁶⁸ See Fed. R. Civ. P. 13(a) & (g).

¹⁶⁹ See *Matasar*, *supra* note 11, at 144.

¹⁷⁰ See, e.g., *Sue & Sam Mfg. Co. v. B-L-S Constr. Co.*, 538 F.2d 1048, 1051-53 (4th Cir. 1976) (using a four-part test based on the similarity of issues and evidence, logical relation, and possibility for *res judicata*, to determine whether a counterclaim is permissive or compulsory); *Great Lakes Rubber Co. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961) (a counterclaim is compulsory where it bears a logical relationship and furthers judicial economy); *J. Friedenthal, M. Kane & A. Miller*, *supra* note 12, at 352 (noting that the principal consideration when determining if a counterclaim is compulsory is whether it is efficient and economical to consider it in the same litigation as the main claim).

However, the current broad approach is not mandated by *Moore v. New York Cotton Exchange's* "close connection" between the claim and counterclaim test.¹⁷¹ Although the Court in *Moore* quoted from and appeared to construe broadly Equity Rule 30, which required the defendant to plead any counterclaim "arising out of the transaction which is the subject matter of the suit,"¹⁷² the Court also noted that in the particular case before it, the claim and counterclaim were so closely related "that it only needs the failure of the former to establish a foundation for the latter."¹⁷³ Thus, construing *Moore* narrowly, the Court might allow ancillary jurisdiction over counterclaims or cross-claims only where a decision on the plaintiff's claims is decisive as to the other claims, or where a failure to adjudicate the other claims might result in a hollow judgment for the plaintiff.¹⁷⁴

The foregoing discussion is, of course, simply speculation. The Court in *Finley* says very little about ancillary-claim jurisdiction.¹⁷⁵ However, in distinguishing cases that had upheld ancillary jurisdiction over additional parties, the Court stressed that these cases involved claims to property within the federal court's exclusive control, or situations in which the additional party was "necessary to give effect to the court's judgment."¹⁷⁶ This suggests that the Court was limiting ancillary-party jurisdiction to situations of necessity. A simi-

¹⁷¹ See Matasar, *supra* note 11, at 142 (under the facts of *Moore*, transactional ancillary jurisdiction could have been read narrowly); Matasar, *supra* note 17, at 1412-13 (noting that subsequent courts have gone well beyond the relatively narrow ruling in *Moore*).

¹⁷² *Moore v. New York Cotton Exch.*, 270 U.S. 593, 609 (1926).

¹⁷³ *Id.* at 610.

¹⁷⁴ See Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 *Stan. L. Rev.* 262, 273-75 (1968). This narrower approach to ancillary jurisdiction would be consistent with § 22(2)(b) of the Restatement (Second) of Judgments. That section provides that a defendant is precluded from bringing a claim against a plaintiff in a subsequent action if "[t]he relationship between the [defendant's] counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action." Restatement (Second) of Judgments § 22(2)(b) (1982). Preclusion is necessary in this situation in order to preserve the integrity of the judgment. Ancillary jurisdiction would also seem to be necessary because defendants in such cases will either lose their counterclaims with no opportunity to pursue them, or the preclusion rule must be abandoned with a resulting threat to the integrity of the judgment. *Id.*

¹⁷⁵ The only reference that seems to address ancillary claim jurisdiction is a footnote in which the Court states that *Moore* is inapplicable because it involved an added claim, not an added party. 109 S. Ct. at 2006 n.2.

¹⁷⁶ *Id.* at 2008.

lar limitation could be applied with respect to ancillary-claim jurisdiction.

D. *Disarray in the Lower Courts*

Whatever the ambiguities of *Finley* concerning ancillary- and pendent-claim jurisdiction, one might have hoped it at least would have clarified the treatment of classic pendent-party cases. Yet even in these cases the opinion is unclear and has already produced an extraordinary range of lower court opinions. Some courts have continued to analyze pendent-party jurisdiction as if *Finley* changed nothing.¹⁷⁷ Two cases have even cited *Finley* for the proposition that the proper statutory inquiry is whether the statute expressly or impliedly negates jurisdiction.¹⁷⁸ The Ninth Circuit has recently upheld pendent-party jurisdiction in a case removed under the Foreign Sovereign Immunities Act,¹⁷⁹ which is somewhat surprising

¹⁷⁷ See, e.g., *Rodriguez v. Comas*, 888 F.2d 899 (1st Cir. 1989), amending 875 F.2d 979 (1st Cir. 1989); *Armstrong v. Edelson*, 718 F. Supp. 1372, 1376 (N.D. Ill. 1989); *640 Broadway Renaissance Co. v. Cuomo*, 714 F. Supp. 686, 690 (S.D.N.Y. 1989). *Rodriguez* allowed the joinder of a pendent-party plaintiff in a § 1983 action. Mr. Rodriguez sued a municipality under § 1983 seeking damages for a wrongful arrest. Mrs. Rodriguez joined in the suit alleging that she suffered emotional distress as a result of her husband's arrest, and she sought damages under both § 1983 and state law. The district court dismissed her federal claim but retained her as a pendent-party plaintiff based on the state claim. Following judgments for both Mr. and Mrs. Rodriguez, the United States Court of Appeals for the First Circuit affirmed. The court's initial opinion was released a few days after *Finley* without citation to that case. Several months later the court amended its opinion to include discussion of *Finley*, but reaffirmed its conclusion that there was pendent-party jurisdiction. The court reasoned that unlike the FTCA, the jurisdictional grant under § 1343(a) is "open-ended—applying to any person and over any civil action." *Rodriguez*, 888 F.2d at 906. But the language of § 1343(a) is not as broad as the court suggests. Section 1343(a)(3) allows any civil action by any person "[t]o redress the deprivation . . . of any right, privilege or immunity secured by the Constitution . . . or by any Act of Congress providing for equal rights." 28 U.S.C. § 1343(a)(3) (1982). Thus, in keeping with Scalia's style of argument, one could say that the statute allows suits by people who seek to redress a federal right and no one else. See *Finley*, 109 S. Ct. at 2010.

Interestingly, the court in *Rodriguez* assumed, without analysis, that the case should be treated as a pendent-party case. See 888 F.2d at 900. The court could, however, have avoided *Finley* and still upheld jurisdiction by treating this as a pendent-claim case. Mrs. Rodriguez did have a federal claim, and, although that claim was dismissed, it may have been sufficiently nonfrivolous to support a pendent claim. See *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (noting that only when a claim is "wholly insubstantial" or "obviously frivolous" will the federal courts be without the power to entertain the claim).

¹⁷⁸ *Armstrong*, 718 F. Supp. at 1376; *Cuomo*, 714 F. Supp. at 690.

¹⁷⁹ *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1408-09 (9th Cir. 1989). In *Teledyne*, a Canadian corporation brought suit in California state court against a private Finnish

because prior to *Finley*, the Ninth Circuit was the only court to reject categorically pendent-party jurisdiction.¹⁸⁰ Other courts have acknowledged that *Finley* cuts back on pendent-party jurisdiction, but seem to find it hard to believe that the Court really meant to eliminate completely this useful doctrine and hence have struggled to distinguish the facts of *Finley*.¹⁸¹ Still other courts have simply assumed that *Finley* eliminated pendent-party jurisdiction altogether.¹⁸² At least one district court has acknowledged that the language and rationale of *Finley* threatened ancillary jurisdiction over impleader claims.¹⁸³ Interestingly, the court seemed reluctant to reach this conclusion in light of what it described "compelling policy considerations" in support of ancillary jurisdiction.¹⁸⁴ However, after analyzing *Finley*, the court concluded that:

For these reasons, the ancillary jurisdictional basis for the third party claims . . . may have been caught in the wide swath *Finley* cut into supplemental jurisdiction. While the *Finley* majority may well

corporation and two state-owned Finnish corporations. The entire case was removed under § 1441(d), which provides that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state." 28 U.S.C. §§ 1441(d). The court held that this language was unlike the relevant statutory language at issue in *Finley* and did authorize pendent-party jurisdiction. The court reasoned that a broad reading of the statute was appropriate in light of the legislative history and the fact that at the time the statute was drafted "pendent party jurisdiction was considered a good deal more than a 'remote' possibility." *Teledyne*, 892 F.2d at 1409. (There is some irony in this latter argument, given that less than a year after the Foreign Sovereign Immunities Act was passed, the Ninth Circuit held that pendent jurisdiction was unconstitutional. See *Ayala v. United States*, 550 F.2d 1196, 1197 (9th Cir. 1977), cert. dismissed, 435 U.S. 982 (1978)). The Court concluded that in granting jurisdiction over "any civil action . . . against a foreign state," 28 U.S.C. § 1441(d), "Congress meant precisely what it said" and hence extended jurisdiction over additional parties. *Teledyne*, 892 F.2d at 1410. Of course, if this language means what it says, it seems equally plausible to assert that § 1331, which extends jurisdiction over all civil actions arising under federal law, likewise includes additional parties. 28 U.S.C. § 1331.

¹⁸⁰ See *Carpenters S. Calif. Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999, 1000 (9th Cir. 1984); *Ayala*, 550 F.2d at 1197.

¹⁸¹ See *Bruce v. Martin*, 724 F. Supp. 124, 130 (S.D.N.Y. 1989).

¹⁸² See, e.g., *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 n.5 (2d Cir. 1989); *North Star Contracting Corp. v. Long Island R.R. Co.*, 723 F. Supp. 902, 912 (E.D.N.Y. 1989); *Microcomputer Workshops Corp. v. Mindscape, Inc.*, No. 89 C 2188, at 6 (N.D. Ill. Sept. 14, 1989) (Lexis, Genfed library, Dist. file); *Brown v. American Arbitration Ass'n*, 717 F. Supp. 195, 198 (S.D.N.Y. 1989); *Birkinshaw v. Armstrong World Indus.*, 715 F. Supp. 126, 127 (E.D. Pa. 1989).

¹⁸³ *Community Coffee Co. v. M/S Kriti Amethyst*, 715 F. Supp. 772, 773-74 (E.D. La. 1989).

¹⁸⁴ *Id.* at 773.

have intended to address specifically the pendent party jurisdiction problem, the opinion's sweeping language is undeniable. Thus, its effect on supplemental jurisdiction in general is potentially far-reaching.¹⁸⁵

In light of the disarray in the lower courts, it seems likely that over the next few years the Supreme Court will be dogged with questions of pendent and ancillary jurisdiction and that there will be ample opportunity for the Court to elaborate on *Finley*, should it so choose.

IV. CONCLUSION

The *Finley* opinion has the potential to unsettle important areas of federal jurisdiction long regarded as well-established. Of course, whatever mischief this creates can be corrected by Congress, although Congress may have its hands full for a while dealing with the other statutory interpretation from this term.¹⁸⁶

Even beyond the opinion's effect, its style of argument is troubling. The Court demonstrates no apparent discomfort with its conclusion that, in exercising pendent-claim jurisdiction, the federal courts have acted without any statutory foundation. This broad condemnation of all pendent jurisdiction may suggest that this Court is disinclined to rationalize the doctrines of its predecessors and instead comes easily to the conclusion such doctrines are ill-conceived. Indeed, in the last decade, the Court has explicitly and implicitly overruled a number of cases¹⁸⁷ and even more often disavowed significant reasoning from other cases.¹⁸⁸ The overruling or disregard of precedent is not, of course, a new phenomena. However, it is relatively unusual for the Court to announce that the federal courts have been unconstitution-

¹⁸⁵ *Id.* at 774 (footnote omitted).

¹⁸⁶ See, e.g., *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2372 (1989) (holding that racial harassment in course of private employment is not actionable under § 1981); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2121 (1989) (statistical evidence in racial makeup of work force did not establish prima facie case of disparate impact in violation of Title VII).

¹⁸⁷ See, e.g., *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 476-78 (1987); *United States v. Lane*, 474 U.S. 438, 444-46 (1986), and other cases in *Eskridge, Overruling Statutory Precedents*, 76 *Geo. L.J.* 1361, 1427, 1430-31 (1988).

¹⁸⁸ See, e.g., *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442-44 (1987); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231-34 (1987) and other cases in *Eskridge*, *supra* note 187, at 1435-37.

ally usurping power for years.¹⁸⁹ Some may applaud the Court's honesty, but others, myself included, share the sentiment of then-Professor Frankfurter who in reacting to a similar pronouncement in *Erie* exclaimed, "How fluid it all makes the Constitution!"¹⁹⁰

¹⁸⁹ Interestingly, although the Court indirectly acknowledges that pendent jurisdiction dates back to at least 1909, see *Finley v. United States*, 109 S. Ct. 2003 (1989), in discrediting that doctrine, the Court labels it as "[t]he *Gibbs* line of cases," *id.* at 2010, thereby linking the doctrine to the 1966 decision. Likewise, the Court does not acknowledge that since *Gibbs* the validity of pendent-claim jurisdiction has been repeatedly reaffirmed without anyone on the Court questioning it. See *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 817 n.15 (1986); *id.* at 823 n.2 (Brennan, J., dissenting); *Rosado v. Wyman*, 397 U.S. 397 (1970). The most recent such occasion occurred only last term. See *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348-50 (1988). One can only wonder whether this Court found it easier to discredit a doctrine by portraying it not only as an historical aberration, but one promulgated by the Warren Court.

¹⁹⁰ M. Freedman, *supra* note 2, at 456, quoted in C. Wright, *supra* note 2, at 355 n.12.