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DISPELLING THE MYTHS OF PENDENT AND ANCILLARY JURISDICTION: THE RAMIFICATIONS OF A REVISED HISTORY

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In the last twenty-five years, the doctrines of ancillary and pendent jurisdiction have been the subject of much discussion by scholars[1] and judges.[2] The labels "ancillary" and "pendent" are applied to the juris-

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1. *See, e.g.*, Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759 (1972); Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753 (1978); Dwyer, *Pendent Jurisdiction and the Eleventh Amendment*, 75 CALIF. L. REV. 129 (1987); Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34; Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399 (1983) [hereinafter Matasar, *"One Constitutional Case"*]; Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983) [hereinafter Matasar, *Primer*]; Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1 (1985); Minahan, *Pendent and Ancillary Jurisdiction of United States Federal District Courts*, 10 CREIGHTON L. REV. 279 (1976); Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U.L. REV. 245 (1980); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968); Smith, Pennhurst v. Halderman: *The Eleventh Amendment,* Erie *and Pendent State Law Claims*, 34 BUFFALO L. REV. 227 (1985); Sullivan, *Pendent Jurisdiction: The Impact of* Hagans *and* Moor, 7 IND. L. REV. 925 (1974); Note, *Unravelling the "Pendent Party" Controversy: A Revisionist Approach to Pendent and Ancillary Jurisdiction*, 64 B.U.L. REV. 895 (1985) [hereinafter B.U. Note]; Comment, Aldinger v. Howard *and Pendent Jurisdiction*, 77 COLUM. L. REV. 127 (1977) [hereinafter COLUM. Comment]; Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935 (1982) [hereinafter 1982 HARV. Note]; Note, UMW v. Gibbs *and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968); Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263 (1975) [hereinafter UCLA Comment]; Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971) [hereinafter VA. Note]; Note, *The Concept of Law-tied Pendent Jurisdiction:* Gibbs *and* Aldinger *Reconsidered*, 87 YALE L.J. 627 (1978) [hereinafter YALE Note].

2. *See, e.g.*, Finley v. United States, 109 S. Ct. 2003 (1989); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Aldinger v. Howard, 427 U.S. 1 (1976); United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); Evra Corp. v. Swiss Bank Corp., 673 F.2d 951 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982); Acton Co. of Mass. v. Bachman Foods, Inc., 668 F.2d 76 (1st Cir. 1982); Boudreaux v. Puckett, 611 F.2d 1028 (5th Cir. 1980); Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474 (3d Cir. 1979); Ortiz v. United States, 595 F.2d 65 (1st

diction exercised by a federal court over nonfederal[3] claims that arise in a case properly before it.[4] Twentieth-century lawyers are disturbed by what they view as a "manifest paradox":[5] the tension between the limited nature of federal jurisdiction[6] and its expansion through the use of these doctrines. Seeking a constitutional basis for them, modern lawyers have turned to two nineteenth-century Supreme Court cases[7] for authority. Based on these two cases, an entire history of the doctrines has evolved. The Supreme Court has accepted this history, choosing to base the modern doctrines of ancillary and pendent jurisdiction on their "lineal ancestor[s]."[8]

A close study of the cases cited as the first ones to apply these doctrines, however, is startling. These cases actually belie the accepted history. This fact might not cause undue alarm, except to a historian. Unfortunately, because the ancestry of the doctrines has been misconstrued, the modern rules defining them are unnecessarily complicated. First, early American jurists would have seen no distinction between

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Cir. 1979); Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed*, 435 U.S. 982 (1978); Niebuhr v. State Farm Mut. Auto. Ins. Co., 486 F.2d 618 (10th Cir. 1973); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972); Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971); Revere Copper & Brass, Inc. v. Aetna Casualty & Surety Co., 426 F.2d 709 (5th Cir. 1970); Hatridge v. Aetna Casualty & Surety Co., 415 F.2d 809 (8th Cir. 1969); LASA per L'Industria Del Marmo Societa per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969); Rumbaugh v. Winifrede R.R. Co., 331 F.2d 530 (4th Cir. 1964), *cert. denied*, 379 U.S. 929 (1964); Bolton v. Gramlich, 540 F. Supp. 822 (S.D.N.Y. 1982); Pearce v. United States, 450 F. Supp. 613 (D. Kan. 1978); Maltais v. United States, 439 F. Supp. 540 (N.D.N.Y. 1977); Home Ins. Co. v. Ballenger Corp., 74 F.R.D. 93 (N.D. Ga. 1977).

3. In this article, the term "federal issues" or "federal claims" refers to those issues or claims that are normally within the original jurisdiction of the federal courts, as given to those courts by the Constitution and federal jurisdictional statutes. Thus the term includes not only federal question cases, but also diversity suits. The term "nonfederal" refers to issues and claims that are jurisdictionally insufficient to be heard alone in federal court. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 n.11 (1978).

4. For more specific definitions of ancillary and pendent jurisdiction, see *infra* notes 22-23 and accompanying text.

5. Freer, *supra* note 1, at 55; *accord*, United Mine Workers v. Gibbs, 383 U.S. 715, 721 (1966); Ruiz v. Estelle, 679 F.2d 1115, 1145 nn.41-42, 1146 n.46, 1157 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523, at 95, 117 (2d ed. 1984); Baker, *supra* note 1, at 761; Matasar, *Primer*, *supra* note 1, at 110-11; Schenkier, *supra* note 1, at 245-47; Shakman, *supra* note 1, at 262; B.U. Note, *supra* note 1, at 895-97; 1982 HARV. Note, *supra* note 1, at 1935; VA. Note, *supra* note 1, at 268; YALE Note, *supra* note 1, at 641-48; *see* Matasar, *"One Constitutional Case,"* *supra* note 1, at 1402 n.4.

> 6. It is a principle of first importance that the federal courts are courts of limited jurisdiction. . . . They are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress.

C. WRIGHT, THE LAW OF FEDERAL COURTS § 7, at 22 (4th ed. 1983).

7. Freeman v. Howe, 65 U.S. (24 How.) 450 (1861); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

8. Aldinger v. Howard, 427 U.S. 1, 13 (1976).

"pendent" and "ancillary" jurisdiction as they are defined today. This unnecessary pigeon-holing has led to an almost unintelligible dichotomy in the modern cases.[9] Moreover, the three most recent Supreme Court pronouncements on the doctrines[10] are rigid and unduly limited.[11] These limitations are based, at least in part, on a misunderstanding of the origins of the doctrines. Yet if one sees the doctrines in historical perspective, one recognizes that these restrictions are unnecessary.

It is, therefore, time to set the record straight. This article will first review the conventional history of pendent and ancillary jurisdiction, revealing its flaws.[12] Next, this article will demonstrate that it is an ancient doctrine that the court that first has jurisdiction of a matter may decide every question in the case, even if some questions are normally outside that court's jurisdiction ("the doctrine"[13]). Although the origins of this

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9. The exacerbation of the dichotomy in recent years can be traced to the Supreme Court's opinion in Aldinger v. Howard, 427 U.S. 1 (1976). *See infra* notes 492-503 and accompanying text. All of us who have taught this subject in law school can empathize with Professor Matasar who noted:

> The decisions seem especially enigmatic to students. It never ceases to amaze me that at the end of the semester each year the question I most often hear from my students is: "Say, just what is the difference between pendent and ancillary jurisdiction anyhow?" So much for the clarity of my teaching; or, is it so much for the clarity of the decisions?

Matasar, *Primer*, *supra* note 1, at 105 n.6. This article will argue that it is the decisions that are unclear. For example, in Blake v. Pallan, 554 F.2d 947 (9th Cir. 1977), the Ninth Circuit was not sure whether the nonfederal claim before it involved a pendent party, *see infra* note 22, or an ancillary claim. So the court addressed both situations. *See* 554 F.2d at 957. The reader is left confused.

10. Finley v. United States, 109 S. Ct. 2003 (1989); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Aldinger v. Howard, 427 U.S. 1 (1976).

11. *See* Freer, *supra* note 1, at 74-77.

12. *See infra* notes 19-81 and 338-429 and accompanying text.

13. The doctrine is occasionally referred to as the doctrine of supplemental or incidental jurisdiction. *See, e.g.*, Matasar, *"One Constitutional Case," supra* note 1 ("supplemental jurisdiction"); 1982 HARV. Note, *supra* note 1 ("incidental jurisdiction"). The term "incidental" is derived from early American descriptions of the doctrine. For example, Chief Justice Marshall noted that when a federal court has jurisdiction, "then all the other questions must be decided as *incidental* to this [question], which gives that jurisdiction." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822 (1824) (emphasis added); *see also* McDonough v. Dannery (The Mary Ford), 3 U.S. (3 Dall.) 188, 197 (1796) (argument for defendant in error); Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6, 6 (1794) (argument for appellants). The problem with the word "incidental" is that it carries the connotation of dependence or lesser worth. *See* BLACK'S LAW DICTIONARY 686 (5th ed. 1979). Yet the jurisdiction of a court over these so-called "incidental" questions was every bit as valid as over the principal question. *See infra* notes 313-37 and accompanying text.

The term "supplemental" is also derived from early American cases applying the doctrine. For example, in Freeman v. Howe, 65 U.S. (24 How.) 450, 461 (1860), the Court described the nonfederal bill as "*supplementary* merely to the original suit." (emphasis added). The term "supplemental" is also problematic because it has the connotation of something added, generally at a later time. *See* BLACK'S LAW DICTIONARY, *supra*, at 1290. While it implies that the supplemental item is a natural part of the whole, its traditional

doctrine are unknown, it was well-established in medieval England.[14] The colonists brought the doctrine with them to America.[15] The doctrine was so basic to the notion of a court's power that it survived the American Revolution.[16] The framers of the Constitution and early justices of the Supreme Court recognized and accepted the doctrine without question.[17] They applied it, not surprisingly, to the same types of cases in which it had been used in England. But early American jurists also used the doctrine to solve the new, unique problem of nonfederal claims arising in federal cases. Finally, the article will discuss the importance of the historical doctrine to today's federal courts. It will conclude with a suggestion for the appropriate inquiry to determine whether a modern federal court should exercise jurisdiction over a nonfederal claim in an otherwise federal case.[18]

I. THE CONVENTIONAL WISDOM (AND ITS FLAWS) CONCERNING THE DOCTRINE

A. The Conventional Wisdom

Conventional wisdom holds that the doctrine is distinctly American in character, devised because of the peculiar nature of the American federal system of courts.[19] According to the received wisdom, federal judges developed the doctrine to deal with the intrusion of nonfederal claims in federal cases.[20] This same wisdom splits the doctrine into two branches:

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use in the area of procedure to describe corrective measures makes it somewhat inappropriate.

The author has rejected the use of "catchy" labels to divide and categorize a court's jurisdiction into components. From the early years of the Republic, there was only one basic jurisdictional doctrine: a court with jurisdiction over a case may decide every question in the case. The purpose of this doctrine was to afford the parties complete relief. By using labels and categories, we have lost sight of the forest for the trees.

14. *See infra* notes 83-178 and accompanying text.

15. *See infra* notes 180-90 and accompanying text.

16. *See infra* notes 191-212 and accompanying text.

17. *See infra* notes 213-60 and accompanying text.

18. *See infra* notes 430-516 and accompanying text.

19. "No other English-speaking union . . . ha[d] a scheme of federal courts." F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 4-5 (1928 & photo. reprint 1972) (footnote omitted).

20. *See, e.g.*, Aldinger v. Howard, 427 U.S. 1, 9-10 (1976); Lentino v. Fringe Employment Plans, 611 F.2d 474, 478 (3d Cir. 1979); Almenares v. Wyman, 453 F.2d 1075, 1089 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); Maltais v. United States, 439 F. Supp. 540, 545 (N.D.N.Y. 1977); Home Ins. Co. v. Ballenger, 74 F.R.D. 93, 97 (N.D. Ga. 1977); J. FRIEDENTHAL, M.K. KANE & A. MILLER, CIVIL PROCEDURE § 2.12, at 65-66 (1985); C. WRIGHT, *supra* note 6, § 9, at 28, 30; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3523, at 85, 100, § 3567, at 106, 109; Baker, *supra* note 1, at 762; Freer, *supra* note 1, at 49; Matasar, *"One Constitutional Case," supra* note 1, at 1401 & n.1; Matasar, *Primer*, *supra* note 1, at 104 nn.1, 3; Miller, *supra* note 1, at 1; Schenkier, *supra* note 1, at 245-46; B.U. Note, *supra* note 1, at 898; 1982 HARV. Note, *supra* note 1, at 1935; VA. Note, *supra* note 1, at 267.

pendent and ancillary jurisdiction.[21] The modern term "pendent jurisdiction" describes a federal court's power to hear a plaintiff's nonfederal claim that has been appended to a related federal claim.[22] The term "ancillary jurisdiction," as used today, describes a federal court's power to hear related nonfederal claims raised in any other context than the pendent situation, such as a defendant's counterclaim or cross-claim.[23] The commentators recognize these doctrines as similar, but historically discrete.[24]

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21. A good measure of conventional wisdom is what is currently taught in the law schools. Virtually every casebook that treats the subject of "pendent" and "ancillary" jurisdiction presents the students with the prevailing scholarly view. *See, e.g.*, P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1040-52, 1679-88 (3d ed. 1988) [hereinafter HART & WECHSLER]; R. CASAD, H. FINK & P. SIMON, CIVIL PROCEDURE: CASES AND MATERIALS 270-84 (2d ed. 1989); J. COUND, J. FRIEDENTHAL, A. MILLER & J. SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS 274-96 (5th ed. 1989); D. CRUMP, W. DORSANEO, O. CHASE & R. PERSCHBACHER, CASES AND MATERIALS ON CIVIL PROCEDURE 201-12 (1987); R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 722-39 (5th ed. 1984); H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 429-34, 551-77 (2d ed. 1987); J. LANDERS, J. MARTIN & S. YEAZELL, CIVIL PROCEDURE 210-19 (2d ed. 1988); M. REDISH, FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS 604-44 (2d ed. 1989); M. ROSENBERG, H. SMIT & H. KORN, ELEMENTS OF CIVIL PROCEDURE: CASES AND MATERIALS 235-45 (4th ed. 1985).

The author does not wish to imply that because these casebook authors have divided the material into pendent and ancillary jurisdiction, they have necessarily accepted the "conventional wisdom" without question. Rather, several have wondered (not unlike Professor Matasar's students, *see supra* note 9), "What is, after all, the difference between pendent and ancillary jurisdiction?" R. FIELD, B. KAPLAN & K. CLERMONT, *supra*, at 739.

22. J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.12, at 66; Freer, *supra* note 1, at 34 n.1; Matasar, *"One Constitutional Case," supra* note 1, at 1401 n.1; Matasar, *Primer, supra* note 1, at 104 n.1; Miller, *supra* note 1, at 2; B.U. Note, *supra* note 1, at 898; 1982 HARV. Note, *supra* note 1, at 1936; UCLA Comment, *supra* note 1, at 1263; YALE Note, *supra* note 1, at 627; *see* case cited in *supra* note 21.

This definition also includes the hybrid situation called "pendent party" jurisdiction. A pendent plaintiff is one who appends a nonfederal claim to another plaintiff's federal claim against the same defendant. A pendent defendant is one against whom a plaintiff appends a nonfederal claim to a federal claim against another defendant. *See, e.g.*, 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3523, at 98; Freer, *supra* note 1, at 61; Miller, *supra* note 1, at 11; Minahan, *supra* note 1, at 280, 305; Schenkier, *supra* note 1, at 245 n.4, 275; Sullivan, *supra* note 1, at 927 n.11, 929; B.U. Note, *supra* note 1, at 895; UCLA Comment, *supra* note 1, at 1278; YALE Note, *supra* note 1, at 627-28.

23. J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.12, at 66; Freer, *supra* note 1, at 34 n.1; Matasar, *"One Constitutional Case," supra* note 1, at 1401 n.1; Matasar, *Primer, supra* note 1, at 104 n.1; B.U. Note, *supra* note 1, at 898; 1982 HARV. Note, *supra* note 1, at 1936-37; UCLA Comment, *supra* note 1, at 1263; *see* case cited in *supra* note 21.

24. *See, e.g.*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.13, at 66; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3523, at 96; Freer, *supra* note 1, at 36; Matasar, *Primer, supra* note 1, at 155; Miller, *supra* note 1, at 1; Minahan, *supra* note 1, at 280, 322; 1982 HARV. Note, *supra* note 1, at 1937; UCLA Comment, *supra* note 1, at 1264; VA. Note, *supra* note 1, at 269; YALE Note, *supra* note 1, at 642.

The authority for pendent jurisdiction supposedly originated in 1824, with the venerable case of *Osborn v. Bank of the United States*.[25] In particular, scholars find authority for the doctrine in Chief Justice Marshall's language in *Osborn*:

> that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.[26]

Osborn, however, did not involve a state claim that was pendent to a federal claim. Instead, plaintiff had only one claim, which involved both state and federal questions. The issue in *Osborn* was simply whether a federal court could decide only the federal questions, rather than all the issues, in the case. Because the Constitution gave the federal courts power over "cases" rather than "questions,"[27] the only sensible result was to let the federal court decide the nonfederal issues (such as fact disputes), as well as the federal issues, in a case before it.[28] Thus, many writers consider this result to be mandated by necessity.[29]

Modern jurists believe that in 1909 the Supreme Court, relying on the rule stated in *Osborn*, first exercised pendent jurisdiction. The later case, *Siler v. Louisville & Nashville Railroad*,[30] unlike *Osborn*, did involve a pendent state claim. In the federal claim, plaintiff alleged that a state statute violated the United States Constitution. In the state claim, plaintiff

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25. 22 U.S. (9 Wheat.) 251 (1824); *see, e.g.*, Aldinger v. Howard, 427 U.S. 1, 6-9 (1976); Florida East Coast Ry. v. United States, 519 F.2d 1184, 1193 (5th Cir. 1975); Rumbaugh v. Winifrede R.R., 331 F.2d 530, 541 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964); Maltais v. United States, 439 F. Supp. 540, 545 (N.D.N.Y. 1977); J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.12, at 66; C. WRIGHT, *supra* note 6, § 19, at 103; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3523, at 95, 117, §§ 3562, 3567; Brown, *Beyond* Pennhurst*—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343, 357 (1985); Freer, *supra* note 1, at 49; Matasar, *"One Constitutional Case," supra* note 1, at 1409-11; Matasar, *Primer*, *supra* note 1, at 118; Miller, *supra* note 1, at 1; Schenkier, *supra* note 1, at 246; Sullivan, *supra* note 1, at 925; UCLA Comment, *supra* note 1, at 1267; YALE Note, *supra* note 1, at 629 n.15.

26. Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 251, 257-58 (1824).

27. U.S. CONST. art. III, § 2, cl. 1.

28. *See Osborn*, 22 U.S. (9 Wheat.) at 257 (judicial power extended to whole case as expressed by Constitution).

29. *See, e.g.*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.13, at 68-69; C. WRIGHT, *supra* note 6, at 104; Matasar, *"One Constitutional Case," supra* note 1, at 1409; Matasar, *Primer*, *supra* note 1, at 151, 153; Miller, *supra* note 1, at 1; Minahan, *supra* note 1, at 285, 289; UCLA Comment, *supra* note 1, at 1264-67.

30. 213 U.S. 175 (1909); *see, e.g.*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.13, at 69; C. WRIGHT, *supra* note 6, § 19, at 103-04; Matasar, *"One Constitutional Case," supra* note 1, at 1410; Matasar, *Primer*, *supra* note 1, at 116-17; Schenkier, *supra* note 1, at 246 n.8; Sullivan, *supra* note 1, at 925-26; B.U. Note, *supra* note 1, at 898 n.10; UCLA Comment, *supra* note 1, at 1267 n.25.

alleged that the action taken by a state commission was unauthorized by the state statute.[31] The *Siler* Court held that:

> having properly obtained [jurisdiction], [a federal] court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.[32]

Thus, a federal court may decide a state claim appended to a federal claim. By so holding, the Supreme Court was able to avoid a decision of federal constitutional law. The opinion therefore has been cited as reflecting wise judicial restraint.[33]

In 1933 the Supreme Court applied the *Siler* rule to a nonconstitutional case. In *Hurn v. Oursler*[34] the Court had to decide whether a federal court could exercise jurisdiction over a state claim for unfair competition appended to a federal claim for copyright infringement. The Supreme Court read the rule in *Siler* broadly. A federal court "having acquired jurisdiction by reason of the federal questions involved, 'had the right to decide all the questions in the case . . . .' "[35] There is no limitation as to the subject matter of the federal claim. The state claim simply has to be part of a federal case. A case, the Court said, included "two distinct grounds in support of a single cause of action."[36] Because the state claim in *Hurn* was merely a "different epithet[]"[37] for the federal cause of action,[38] the federal court could hear both claims. Scholars opine that this result is justified only on the basis of "procedural convenience."[39]

Commentators assert that the doctrine of ancillary jurisdiction has a completely different history. This doctrine supposedly stems from the 1861

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31. Siler v. Louisville & Nashville R.R., 213 U.S. 175, 190-91 (1909).

32. *Id.* at 191.

33. *See, e.g.*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.13, at 69; Matasar, *"One Constitutional Case," supra* note 1, at 1427 n.117; Matasar, *Primer, supra* note 1, at 115, 126 n.106, 152; Minahan, *supra* note 1, at 290; Sullivan, *supra* note 1, at 926, 940, 960; YALE Note, *supra* note 1, at 629.

34. 289 U.S. 238 (1933).

35. Hurn v. Oursler, 289 U.S. 238, 243 (quoting *Siler*, 213 U.S. at 191).

36. *Id.* at 246.

37. *Id.*

38. *Id.* Plaintiffs actually had two claims for unfair competition. One was based on a copyrighted version of their play; the other referred to an uncopyrighted version. The Supreme Court held that the latter claim was not part of the same case as the federal copyright claim, and thus a federal court could not hear that claim. *Id.* at 248.

39. C. WRIGHT, *supra* note 6, § 19, at 104; *accord*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.13, at 68; Matasar, *"One Constitutional Case," supra* note 1, at 1405-06 n.5; Miller, *supra* note 1, at 2-3; Schenkier, *supra* note 1, at 249; Shakman, *supra* note 1, at 266; UCLA Comment, *supra* note 1, at 1268; VA. Note, *supra* note 1, at 270.

case of *Freeman v. Howe*.[40] In *Freeman* a New Hampshire citizen commenced a federal diversity action at law against a Massachusetts railroad. "The suit was commenced in the usual way, by process of attachment and summons."[41] Therefore, the federal marshal, Watson Freeman, attached several of the defendant's railroad cars. Several mortgagees of the railroad, who were also from Massachusetts, instituted a replevin action in state court to recover the cars from the marshal.[42]

On appeal, the Supreme Court held that the mortgagees could not get replevin because the state court could not order the property seized from the custody of the federal court.[43] The mortgagees were not remediless, however. They could file a bill on the equity side of the federal court to restrain the suit at law until their claims to the cars were decided. The federal court could hear their bill, even though it had no independent grounds for federal jurisdiction. The Supreme Court noted that:

> The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under *mesne* or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.[44]

Historians of the doctrine of ancillary jurisdiction generally believe that, in its early form, it was principally used, as in *Freeman*, to provide a forum for claimants to property in the custody of a federal court. These scholars say that the jurisdiction was exercised only to "prevent injustice"[45] and, therefore, refer to it as a doctrine of necessity.[46]

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40. 65 U.S. (24 How.) 450 (1861); *see, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375 n.18 (1978); Aldinger v. Howard, 427 U.S. 1, 9-10 (1976); Pearce v. United States, 450 F. Supp. 613, 615 n.4 (D. Kan. 1978); Maltais v. United States, 439 F. Supp. 540, 545 (N.D.N.Y. 1977); J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.14, at 75; C. WRIGHT, *supra* note 6, § 9, at 28-29; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3523, at 87; Freer, *supra* note 1, at 50; Matasar, *"One Constitutional Case," supra* note 1, at 1410; Matasar, *Primer, supra* note 1, at 117; Schenkier, *supra* note 1, at 248 n.29; B.U. Note, *supra* note 1, at 898 n.11; UCLA Comment, *supra* note 1, at 1265-66; VA. Note, *supra* note 1, at 267; YALE Note, *supra* note 1, at 639-40. Some scholars trace the original authority for the *Freeman* decision back to *Osborn*. These scholars, however, maintain that the doctrines of pendent and ancillary jurisdiction developed separately thereafter. *See, e.g.*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.13, at 69; Matasar, *"One Constitutional Case," supra* note 1, at 1401 n.1, 1410; Matasar, *Primer, supra* note 1, at 116-17; Schenkier, *supra* note 1, at 279; UCLA Comment, *supra* note 1, at 1267.

41. Freeman v. Howe, 65 U.S. (24 How.) 450, 453 (1861).

42. *Id.*

43. *Id.* at 461.

44. *Id.* at 460.

45. *Id.*

46. *See, e.g.*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.14, at

The Supreme Court is said to have expanded the doctrine of ancillary jurisdiction in 1926, in the oft-cited case of *Moore v. New York Cotton Exchange*.[47] In *Moore* plaintiff filed a bill on the equity side of the federal court, alleging a violation of the antitrust laws. Defendant responded with a nonfederal counterclaim. The district court dismissed the bill and granted the injunction prayed for in the counterclaim. The circuit court affirmed both orders on appeal.[48]

The Supreme Court had to decide if the counterclaim needed independent jurisdictional grounds. The Court held that it did not. In so doing, the Court implied that any compulsory counterclaim, that is, one "arising out of the transaction which is the subject matter of the suit,"[49] need not have an independent jurisdictional basis.[50] Because the counterclaim arose out of the transaction that was the subject of the bill, the federal court could decide it.

The result in *Moore*, the theory holds, indicated a shift away from the limited application of ancillary jurisdiction only to cases of necessity. After *Moore* ancillary jurisdiction could be used to hear any nonfederal claims that were transactionally related to federal claims. The new doctrine merely serves the convenience of the litigants and does not protect their property rights, or so the commentators say.[51]

The Supreme Court has based the modern doctrines of "pendent" and "ancillary" jurisdiction on this history.[52] Accepting the supposed historical distinction between pendent and ancillary jurisdiction, the Court has questioned "whether there are any 'principled' differences between"[53]

76, 80; C. WRIGHT, *supra* note 6, § 9, at 29; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3523, at 85, 87; Freer, *supra* note 1, at 50; Matasar, *"One Constitutional Case," supra* note 1, at 1411; Matasar, *Primer, supra* note 1, at 153; Minahan, *supra* note 1, at 285, 293; B.U. Note, *supra* note 1, at 925; VA. Note, *supra* note 1, at 267, 268, 270.

47. 270 U.S. 593 (1926); *see, e.g.*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.14, at 76; C. WRIGHT, *supra* note 6, § 9, at 29; Freer, *supra* note 1, at 51; Matasar, *"One Constitutional Case," supra* note 1, at 1411; UCLA Comment, *supra* note 1, at 1266.

48. Moore v. New York Cotton Exchange, 270 U.S. 593, 603 (1926).

49. Fed. R. Equity 30, 226 U.S. 649, 657 (1912).

50. *Moore*, 270 U.S. at 609. The Court's implication appears from the statement that "we need not consider the point that, under the second branch [i.e., permissive counterclaims], federal jurisdiction independent of the original bill must appear . . . ." *Id.*

51. *See, e.g.*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.14, at 76; C. WRIGHT, *supra* note 6, § 9, at 30; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3523, at 95; Freer, *supra* note 1, at 51-52; Matasar, *"One Constitutional Case," supra* note 1, at 1411-12; Matasar, *Primer, supra* note 1, at 142; Miller, *supra* note 1, at 1-2, 5; Minahan, *supra* note 1, at 281 & n.8, 299; Schenkier, *supra* note 1, at 277; Shakman, *supra* note 1, at 279; Sullivan, *supra* note 1, at 949; UCLA Comment, *supra* note 1, at 1266; VA. Note, *supra* note 1, at 268; YALE Note, *supra* note 1, at 643.

52. *See* Aldinger v. Howard, 427 U.S. 1, 6-16 (1976); *see also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372-73 (1978) (accepting without question law set out in *Aldinger*).

53. *Aldinger*, 427 U.S. at 13 (1976); *accord, Owen*, 437 U.S. at 370 (doctrines are two species of same generic problem).

the two doctrines. Some commentators have suggested that, therefore, the distinction is no longer relevant.[54] The Supreme Court has, however, staunchly refused to merge the two doctrines.[55]

The Court's most recent test for pendent jurisdiction, found in *United Mine Workers v. Gibbs*,[56] rejected the *Hurn* equation of "case" with "cause of action."[57] The *Gibbs* Court considered the concept "cause of action" to be out of date and problematic.[58] Instead, the Court held that a federal court could hear a pendent nonfederal claim if:

> [t]he state and federal claims . . . derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[59]

In *Owen Equipment & Erection Co. v. Kroger*[60] the Court noted the longstanding division between pendent and ancillary jurisdiction and developed a modern test for the latter. The Court suggested, but did not decide, that the *Gibbs* test applied to ancillary jurisdiction as well.[61] The Court added the following two requirements, however:

> Beyond this constitutional minimum, there must be an examination [1] of the posture in which the nonfederal claim is asserted and [2] 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.[62]

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54. *See, e.g.*, Matasar, *Primer*, *supra* note 1, at 189; Minahan, *supra* note 1, at 322; 1982 HARV. Note, *supra* note 1, at 1947, 1953; UCLA Comment, *supra* note 1, at 1287; VA. Note, *supra* note 1, at 271, 273; YALE Note, *supra* note 1, at 643.

55. *Owen*, 437 U.S. at 370; *Aldinger*, 427 U.S. at 13; *see infra* note 65.

56. 383 U.S. 715 (1966).

57. *See* text accompanying *supra* note 36.

58. United Mine Workers v. Gibbs, 383 U.S. 715, 722-23 (quoting United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1933)) (footnotes omitted).

59. 383 U.S. at 725 (emphasis in original). The exercise of this jurisdiction is discretionary, however. The Supreme Court listed a number of factors for a federal court to consider in its decision whether to exercise jurisdiction over the nonfederal claim. *Id.* at 726-27. For a fuller discussion of *Gibbs*, *see infra* notes 477-91 and accompanying text.

60. 437 U.S. 365 (1978).

61. The Court refused to decide whether the *Gibbs* test applied. The Court felt such decision was unnecessary for the holding in *Owen*. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 371 n.10 (1978).

62. *Id.* at 373 (quoting Aldinger v. Howard, 427 U.S. 1, 18 (1976)). The Supreme Court drew *Owen*'s statutory requirement from an earlier case, Aldinger v. Howard, 427 U.S. 1 (1976). *Aldinger* dealt with the hybrid situation called "pendent party" jurisdiction. *See supra* note 22. For a fuller discussion of *Owen* and *Aldinger*, see *infra* notes 492-511 and accompanying text.

The Court gave no satisfactory explanation for the added requirements for ancillary jurisdiction. The *Owen* Court seemed troubled by the potential expansion of the federal court's limited jurisdiction merely for the convenience of the litigants.[63] In particular, the Court was reluctant to allow a plaintiff, rather than "a defending party haled into court against his will,"[64] to cause that expansion. But that does not explain why these new hurdles do not also apply to pendent jurisdiction,[65] through which a federal court expands its jurisdiction at the request of a plaintiff.[66] This state of affairs, unfortunately, has drawn criticism from scholars[67] and confused the courts.[68]

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63. *Owen*, 437 U.S. at 372.

64. *Id.* at 376.

65. The lower federal courts are not in total agreement on this point. Some courts have suggested that the added requirements of *Aldinger*, *see supra* note 62, and *Owen* apply also to pendent claim jurisdiction. *See, e.g.*, Weinberger v. Kendrick, 698 F.2d 61, 76 (2d Cir. 1982); United States *ex rel.* Hoover v. Franzen, 669 F.2d 433, 438 (7th Cir. 1982); Limerick v. Greenwald, 666 F.2d 733, 736 (1st Cir. 1981); *see also* Sullivan, *supra* note 1, at 954; 1982 HARV. Note, *supra* note 1, at 1943, 1954; VA. Note, *supra* note 1, at 275. Other courts, however, apply the *Gibbs* test to pendent claims, reserving the *Gibbs-cum-Aldinger*-and-*Owen* test to determine pendent party and ancillary jurisdiction. *See, e.g.*, Charles D. Bonanno Linen Service, Inc. v. McCarthy, 708 F.2d 1, 6 (1st Cir. 1983); Williams v. Bennett, 689 F.2d 1370, 1379 (11th Cir. 1982); North Dakota v. Merchants National Bank & Trust Co., Fargo, N.D., 634 F.2d 368, 370-72 (8th Cir. 1980); National Bank & Trust Co. of South Bend v. United States, 589 F.2d 1298, 1305 (7th Cir. 1978); Pitrone v. Mercadante, 572 F.2d 98, 100 (3d Cir. 1978); *see also* Minahan, *supra* note 1, at 312; B.U. Note, *supra* note 1, at 925-26, 929.

The Supreme Court, however, has never used the *Aldinger* and *Owen* limitations in determing pendent claim jurisdiction. In fact, recently the Court implied that the new requirements do not apply to pendent claims. In Carnegie-Mellon University v. Cohill, 108 S. Ct. 614 (1988), the Supreme Court discussed the doctrine of pendent jurisdiction, mentioning only *Gibbs*. The only inquiry was whether the federal and nonfederal claims arose out of a common nucleus of operative fact. There was no inquiry as to whether the jurisdictional statute expressly negated jurisdiction over the nonfederal claim or parties, as required by both *Aldinger* and *Owen*. *See id.* at 618-19. Even the dissent did not disagree with the majority's statement of the test for pendent jurisdiction. *See id.* at 622-26 (White, J., dissenting).

Even more recently, the Supreme Court stated expressly that it meant to "retain that line" between those cases to which *Gibbs* alone applies and those to which the *Aldinger-Owen* limitations apply. Finley v. United States, 109 S. Ct. 2003, 2010 (1989). The Court noted that a *Gibbs*-type case is "fundamentally different" from a pendent party case. *Id.* at 2006. The Court summarized the *Gibbs* test, *id.*, and, quite adamantly, stated that "we have no intent to limit or impair" that test, *id.* at 2010.

66. *See supra* note 22 and accompanying text.

67. *See, e.g.*, Baker, *supra* note 1, at 779; Freer, *supra* note 1, at 36, 67, 69, 74; Matasar, *"One Constitutional Case," supra* note 1, at 1405 & n.5, 1417; Matasar, *Primer*, *supra* note 1, at 169, 175-76, 189; Miller, *supra* note 1, at 10; Minahan, *supra* note 1, at 318, 319, 322; Schenkier, *supra* note 1, at 247, 258, 260, 283, 305; B.U. Note, *supra* note 1, at 925, 930; 1982 HARV. Note, *supra* note 1, at 1935, 1950, 1953; VA. Note, *supra* note 1, at 273; YALE Note, *supra* note 1, at 628, 648.

68. *See, e.g.*, Freer, *supra* note 1, at 34, 69, 74; Matasar, *Primer*, *supra* note 1, at 133, 167, 190; Minahan, *supra* note 1, at 306, 309, 317; Schenkier, *supra* note 1, at 305; B.U. Note, *supra* note 1, at 899, 922; 1982 HARV. Note, *supra* note 1, at 1935, 1953; VA. Note, *supra* note 1, at 265.

B. The Flaws

Seeking a principled approach to the doctrine, one hopes to find a solution beyond the conventional wisdom in the "seminal" cases themselves. Instead of finding a solution, however, one is struck by the many unanswered questions the cases pose. For example, if *Moore* expanded and applied the doctrine of ancillary jurisdiction, why was the term "ancillary" never used in the case? Why did the *Moore* Court not cite *Freeman*? For that matter, why should we consider the jurisdiction applied in *Moore* and *Freeman* to be the same? In *Moore* jurisdiction was extended to a defendant's compulsory counterclaim in the *same* suit[69] as the plaintiff's claim. In *Freeman* jurisdiction was extended to a *separate* bill in equity by strangers to the law suit. Modern scholars have never satisfactorily answered these questions.[70]

Turning to the pendent jurisdiction cases, one finds similar questions. The opinion in *Siler* did not cite *Osborn* or use the term "pendent." Moreover, *Hurn* did not refer to the jurisdiction it applied as "pendent." In fact, no reported federal court opinion used the term "pendent" to describe jurisdiction until 1942.[71] Finally, although modern scholars aver that the doctrines of ancillary and pendent jurisdiction were, in the past, very different,[72] the Supreme Court clearly did not think so. In *Hurn*, uniformly classified as a pendent jurisdiction case,[73] the Court unequivocally stated: "We think the question there [in *Moore*] and the one here, in principle, cannot be distinguished."[74]

The confused reader turns hopefully to the earlier cases, looking for some answers to these questions. Unfortunately, the reader finds only more questions. The text of the "first" cases to adopt the doctrines actually contains evidence that their age is greater than has been reported. For example, Justice Johnson, in his dissent in *Osborn*, expressed surprise that Chief Justice Marshall felt the need to address the doctrine. Johnson

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69. For the purposes of this article, "suit" and "case" will not be used synonymously. The term "suit" will be used to denote a litigative unit, as shaped and limited by the rules of procedure. The term "case" will be used to denote the scope of a controversy to which a court's jurisdiction extends. *See infra* notes 261-312 and accompanying text. A case may include more than one suit. For example, a suit to recover damages and a subsequent suit to enforce the judgment obtained in the first may be considered part of the same *case*, but are nonetheless regarded as separate *suits*.

70. For an answer to these questions, *see infra* notes 338-49 and accompanying text.

71. Judge Learned Hand first used the term "pendent jurisdiction" in Pure Oil Co. v. Puritan Oil Co., 127 F.2d 6, 7 (2d Cir. 1942). This assertion is based on the following LEXIS, Genfed library, Courts file, search: "Date bef (1943) and pendent w/5 (claim or jurisdiction)."

72. *See supra* notes 21-24 and accompanying text.

73. *See, e.g.*, Baker, *supra* note 1, at 762 n.24; Matasar, *Primer*, *supra* note 1, at 119, 152; Miller, *supra* note 1, at 2; Minahan, *supra* note 1, at 292, 302; Schenkier, *supra* note 1, at 246; Shakman, *supra* note 1, at 263, 286; Sullivan, *supra* note 1, at 926; VA. Note, *supra* note 1, at 269.

74. *Hurn*, 289 U.S. at 242.

noted that counsel had certainly not argued the point and then exclaimed: "No one can question, that the court which has juridiction of the principal question, must exercise jurisdiction over every question."[75]

Likewise, in *Freeman* when the Supreme Court discussed the doctrine, it quoted a twelve-year-old case that noted, " 'It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause . . . .' "[76] Moreover, in discussing the supposedly novel procedure to present the nonfederal claim to the federal court, the *Freeman* Court chided that anyone "familiar with the practice of the Federal courts [would] have found no difficulty" in knowing what to do.[77]

What then was the origin of the doctrine? The narrow focus of modern legal historians on the American federal courts[78] has caused them to end their inquiry in 1824, long after the doctrine had evolved. The persistence of this narrow view has led scholars to ignore evidence of the doctrine's age and origin. For example, in 1866 the Supreme Court, in passing, restated the rule that "the court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause . . . ."[79] The Court then remarked that:

> It is scarcely necessary to observe that the rule thus announced is one which has often been held by this and other courts, and which is essential to the correct administration of justice in all countries where there is more than one court having jurisdiction of the same matters.[80]

Thus the problem of dealing with claims brought in one court that are normally outside its jurisdiction is not new. Moreover, the problem is not distinctly federal, nor is it distinctly American. Any court system that distributes its jurisdiction to more than one court must address the problem. The problem created by such a system is actually twofold. First, there is a potential for unseemly conflict between courts over cases that contain elements within the jurisdiction of separate courts. Second, there is a potential for unfairness to litigants if their cases must be split between courts. The American response attempted to lessen both these evils. Despite the newness of the federal dimension of the problems, the early United States jurists did not devise their solution without help. They looked to their Mother Country,[81] which had been dealing with these problems for centuries. We must, therefore, turn to medieval and early modern English

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75. *Osborn*, 22 U.S. (9 Wheat.) at 884 (Johnson, J., dissenting).

76. Freeman v. Howe, 65 U.S. (24 How.) 450, 457 (quoting Peck v. Jenness, 48 U.S. (7 How.) 612, 621 (1849)).

77. *Id.* at 460.

78. *See supra* notes 19-20 and accompanying text.

79. Buck v. Colbath, 70 U.S. (3 Wall.) 334, 344 (1866).

80. *Id.* at 345.

81. *See infra* notes 179-246 and accompanying text.

practice for the origins of the American version of the doctrine.

II. The Origin of the Doctrine—English Antecedents[82]

The English court "system"[83] was much more tangled than the American system ever was. It consisted of, first, many local courts of conflicting jurisdiction, some dating from even before the Norman Conquest.[84] In addition, there were three separate common law courts at Westminster.[85] There were also the equity courts, Chancery[86] and the equity side of the

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82. The purpose of this article is not to recount in detail the history of the English court system. That has already been done thoroughly elsewhere. *See, e.g.*, J.H. Baker, An Introduction to English Legal History 1-192 (2d ed. 1979); 3 W. Blackstone, Commentaries *22-85; 4 *id.* at *258-79; M. Hastings, The Court of Common Pleas in Fifteenth Century England (1947); 1 W. Holdsworth, A History of English Law (A.L. Goodhart, H.G. Hanbury & S.B. Chrimes 7th rev. ed. 1956); S.F.C. Milsom, Historical Foundations of the Common Law 11-96 (2d ed. 1981); 1 F. Pollock & F. Maitland, The History of English Law 527-688 (2d ed. 1968); 2 *id.* at 558-672; G.R.Y. Radcliffe & G. Cross, The English Legal System (G.J. Hand & D.J. Bentley 6th ed. 1977); Chrimes, *Introductory Essay* to 1 W. Holdsworth, *supra*.

83. One historian referred to the seventeenth-century English legal system as a "patchwork quilt," noting that " 'the English are past masters at holding together odd bits and pieces of incompatible systems and at drawing lines that seem quite arbitrary even to sympathetic friends.' " J. Goebel, Antecedents and Beginnings to 1801, at 7 (Oliver Wendell Holmes Devise History of the Supreme Court Vol. 1, 1971) (footnote omitted) (quoting B. Minchin, Outward and Visible 343 (1961)).

84. There were:

> myriad inferior courts that administered local enactments and a variety of usages, some of great antiquity, some reflecting, ofttimes clumsily, central court law. These were the courts frequented by masses of people for reasons of convenience and ecomony or because, as in the case of tenant farmers, they would otherwise have been remediless.

J. Goebel, *supra* note 83, at 5. It is difficult to make any generalizations about the business of these courts. They varied from century to century, as well as borough to borough. They dealt, *inter alia*, with matters of purely local interest, such as certain property disputes, and with petty litigation. For more information about English local courts in the medieval and early modern periods, see J.H. Baker, *supra* note 82, at 4-15, 18-27; 3 W. Blackstone, *supra* note 82, at *32-37; 1 W. Holdsworth, *supra* note 82, at 3-193; S.F.C. Milsom, *supra* note 82, at 11-31, 50-52; 1 F. Pollack & F. Maitland, *supra* note 82, at 527-688; G.R.Y. Radcliffe & G. Cross, *supra* note 82, at 21-24, 35-45, 70-73, 75-79; Beckerman, *The Forty-Shilling Jurisdictional Limit in Medieval English Personal Actions*, in Legal History Studies 1972, at 110 (1975); Chrimes, *supra* note 82, at 1*-29*. *See also* D. Konig, Law and Society in Puritan Massachusetts: Essex County, 1629-1692, at 3-34 (1979).

85. J.H. Baker, *supra* note 82, at 35; 3 W. Blackstone, *supra* note 82, at *38, *41; 1 W. Holdsworth, *supra* note 82, at 196, 233; S.F.C. Milsom, *supra* note 82, at 56 & n.1. The common law courts occasionally sat in other places. 3 W. Blackstone, *supra* note 82, at *41; M. Hastings, *supra* note 82, at 20-22; 1 W. Holdsworth, *supra* note 82, at 196, 233; *see* S.F.C. Milsom, *supra* note 82, at 56 n.1. For a discussion of the jurisdiction of these courts, see *infra* notes 90-132 and accompanying text.

86. For a discussion of the history and development of Chancery, see J.H. Baker, *supra* note 82, at 83-97; 3 W. Blackstone, *supra* note 82, at *46-55; 1 W. Holdsworth, *supra* note 82, at 395-476; S.F.C. Milsom, *supra* note 82, at 82-96; G.R.Y. Radcliffe & G. Cross, *supra* note 82, at 113-54; Chrimes, *supra* note 82, at 53*-57*. For a discussion of Chancery's use of the doctrine, see *infra* notes 135-71 and accompanying text.

Court of Exchequer.[87] Finally, there were several courts with special jurisdiction, such as the Court of Admiralty and the ecclesiastical courts.[88]

Then, as now, cases did not always fit into neat single-issue packages.[89] The English, however, developed jurisdictional rules that lessened the twin evils of a divided court system. Each of the major courts had different procedural constraints. These constraints affected the nature of the jurisdiction exercised by each court over questions normally outside its competence. Each court, however, devised a solution that avoided conflict with the others, while ensuring fairness to the litigants.

A. The Common Law Courts

The three great common law courts of medieval and early modern[90] Britain were the Court of Common Pleas, the King's[91] Bench, and the Court of Exchequer. Their origins are distant and not entirely clear.[92] "By

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87. The Court of Exchequer also had a common law side. *See infra* notes 102-03 and accompanying text. For a discussion of the equity side of the Court of Exchequer, see 3 W. BLACKSTONE, *supra* note 82, at *43-46; 1 W. HOLDSWORTH, *supra* note 82, at 240-42; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 122, 171-72; Bryson, *The Equity Jurisdiction of the Exchequer*, in LEGAL HISTORY STUDIES 1972, at 118 (1975). The jurisdiction of this court, however, " '. . . never rivalled that of the chancery in size or in significance.' " G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 172 (quoting W.H. BRYSON, THE EQUITY SIDE OF THE EXCHEQUER 33 (1975)); *see also* S.F.C. MILSOM, *supra* note 82, at 62 (doings of Court of Exchequer had no particular influence on legal development). The equity side of this court, therefore, will not be discussed further in this article.

88. There were a number of courts with a very specialized jurisdiction. With the exception of Admiralty, *see infra* notes 176-77 and accompanying text, they did not have any real counterparts in the American court system and will therefore not be dealt with in this article. For a discussion of these courts, see J.H. BAKER, *supra* note 82, at 101-14; 3 W. BLACKSTONE, *supra* note 82, at *62-85; 1 W. HOLDSWORTH, *supra* note 82, at 526-632; S.F.C. MILSOM, *supra* note 82, at 23-25; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 229-56; Chrimes, *supra* note 82, at 62*-77*.

89. Due to procedural constraints, the medieval litigant was at more of a disadvantage in this regard than a modern one. Under old common law practice:

> the parties were compelled to frame with great exactness the precise issue which they wished to submit to the adjudication of the court, and all pleadings were bound to end in a single "issue," either of law or of fact, to be decided in the first case by the judgment of the court, and in the second by a verdict of a jury.

G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 178 (footnote omitted).

90. "[I]n 1875, the courts . . . were abolished and their jurisdiction transferred to a single High Court." J.H. BAKER, *supra* note 82, at 47.

91. Between 1400 and 1800, queens ruled, or co-ruled, England for 68 years. Mary I ruled alone from 1553-1554, and with Philip from 1554-1558. Elizabeth I ruled from 1558-1603. The second Mary ruled with William from 1689-1694. Anne ruled from 1702-1714. *Id.* at xxvii-xxviii. The King's Bench, however, was not renamed during any of their reigns. Only under Victoria (1837-1901) was this court quite commonly called the "Queen's Bench," though it was also sometimes called the "King's Bench."

92. For a detailed history of the development of the common law courts, see *id.* at 11-27, 34-48; 3 W. BLACKSTONE, *supra* note 82, at *37-46; 1 W. HOLDSWORTH, *supra* note 82, at 194-264; S.F.C. MILSOM, *supra* note 82, at 31-81; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 52-65, 155-88; Chrimes, *supra* note 82, at 29*-38*.

1400, [however,] . . . the three common law courts are completely separate bodies, each with its own set of records and its own forms of procedure."[93] Because the topic of this article is how separate courts deal with overlapping jurisdiction, the inquiry will begin at that point.

The Court of Common Pleas had exclusive jurisdiction over "common pleas," that is, actions between subject and subject. Thus:

> [t]he court was the only one of the courts of common law in which real actions and the older personal actions of debt detinue, account, and covenant could be begun; and its jurisdiction over them could only be ousted by express words of exclusion in a charter or other instrument granting this jurisdiction to another court.[94]

This exclusive jurisdiction was mandated by a document no less revered than the United States Constitution, to wit, Magna Carta.[95] Clause 17 required that common pleas be heard in one fixed location, rather than in a court that followed the monarch from place to place.[96] Because neither King's Bench nor the Exchequer were by law held in one place, they were forbidden by Magna Carta from hearing common pleas.[97]

The jurisdiction of the King's Bench was much narrower than Common Pleas. King's Bench had jurisdiction over matters in which a personal wrong or force was alleged.[98] It naturally had a criminal jurisdiction.[99] In

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93. G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 64; *accord*, J.H. BAKER, *supra* note 82, at 35, 44; 1 W. HOLDSWORTH, *supra* note 82, at 195-96, 206-07, 232; S.F.C. MILSOM, *supra* note 82, at 32.

94. 1 W. HOLDSWORTH, *supra* note 82, at 198 (footnotes omitted); *accord*, J.H. BAKER, *supra* note 82, at 35; M. HASTINGS, *supra* note 82, at 16; S.F.C. MILSOM, *supra* note 82, at 52; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 56.

95. Magna Carta has been described as "a sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had." 1 F. POLLACK & F. MAITLAND, *supra* note 82, at 173.

96. "Common pleas shall not follow our court, but shall be held in some definite place." Magna Carta 1215, cl. 17, *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 118 (C. Stephenson & F. Marcham ed. & trans. rev. ed. 1972). The quoted language appeared in clause 11 of the Magna Carta of 1225. J.H. BAKER, *supra* note 82, at 17 n.12; S.F.C. MILSOM, *supra* note 82, at 52 n.1. The Magna Carta of 1215 is referred to as the "historian's Magna Carta," while the issue of 1225, in which it took permanent shape, is referred to as the "lawyer's Magna Carta." G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 52 n.1.

97. At the time Magna Carta was first signed, this clause was not meant as a direct attack on the jurisdiction of the King's Bench or Exchequer. Its purpose was to guarantee a stationary forum for individual litigants. Gradually, however, the principle developed that common pleas could not be directed to any court but the Court of Common Pleas. J.H. BAKER, *supra* note 82, at 36, 44; S.F.C. MILSOM, *supra* note 82, at 35, 52; *see* G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 49, 56; Chrimes, *supra* note 82, at 36*; *see also* M. HASTINGS, *supra* note 82, at 22 (literal-minded reverence for Magna Carta in seventeenth century).

98. 1 W. HOLDSWORTH, *supra* note 82, at 219.

99. J.H. BAKER, *supra* note 82, at 35; 4 W. BLACKSTONE, *supra* note 82, at *265-67;

addition, the civil side heard actions of trespass and private criminal actions.[100] Because these civil actions were between subject and subject, the jurisdiction of the King's Bench over them was concurrent with that of Common Pleas.[101]

The jurisdiction of the Court of Exchequer was narrower still. The Exchequer was the royal department of finance. The Court of Exchequer developed to deal with litigation concerning with the collection of the monarch's revenue.[102] The court's jurisdiction was initially "limited almost entirely to the hearing of revenue cases."[103]

Then, as now, however, disputes did not always come in neat, jurisdictional packages. For example, let's say that Tom owes money to Dick, but refuses to pay. When Dick goes to Tom's home to try to collect the money, an altercation ensues, during which Tom injures Dick. Dick brings his trespass action in the King's Bench.[104] Will Dick have to bring his debt action in Common Pleas, thus being forced not only to pay the cost of initiating two law suits, but also to litigate in two courts at once?

For a second example, let's say that Anne owes money to the sovereign. She is accordingly brought before the Court of Exchequer. But she is unable to pay her debt because Mary has not paid the money she owes to Anne.[105] Will Anne have to bring her debt action in Common Pleas, thus being forced to collect the money to pay the sovereign's claim in a separate court?

Because a plaintiff had to go to Chancery to purchase a writ in order to commence any suit in Common Pleas,[106] Dick and Anne would face

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1 W. HOLDSWORTH, *supra* note 82, at 212-18; S.F.C. MILSOM, *supra* note 82, at 53. Although the King's Bench "had unlimited criminal jurisdiction throughout the realm[,] . . . after the fourteenth century it acted as a court of first instance in Middlesex cases only." J.H. BAKER, *supra* note 82, at 35. (Middlesex is county that includes Westminster. *Id.* at 39; S.F.C. MILSOM, *supra* note 82, at 34-35.)

100. J.H. BAKER, *supra* note 82, at 35; 3 W. BLACKSTONE, *supra* note 82, at *42; 1 W. HOLDSWORTH, *supra* note 82, at 212; S.F.C. MILSOM, *supra* note 82, at 53; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 59. The court also entertained suits to correct the errors of other courts.

101. J.H. BAKER, *supra* note 82, at 35; M. HASTINGS, *supra* note 82, at 16; 1 W. HOLDSWORTH, *supra* note 82, at 219; S.F.C. MILSOM, *supra* note 82, at 53-54, 63; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 56-57, 59. In the fourteenth century, King's Bench had unsuccessfully attempted to make its jurisdiction over trespass actions exclusive. M. HASTINGS, *supra* note 82, at 24.

102. J.H. BAKER, *supra* note 82, at 44; 1 W. HOLDSWORTH, *supra* note 82, at 42-44; S.F.C. MILSOM, *supra* note 82, at 32; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 57.

103. 1 W. HOLDSWORTH, *supra* note 82, at 233; *accord*, J.H. BAKER, *supra* note 82, at 45; 3 W. BLACKSTONE, *supra* note 82, at *44-45; Wurzel, *The Origin and Development of Quo Minus*, 49 YALE L.J. 39, 39 (1939).

104. The Court of Common Pleas had concurrent jurisdiction over trespass actions. *See supra* note 101 and accompanying text. Dick, however, might prefer to go to King's Bench because its process was so much less expensive and time-consuming than that of Common Pleas. *See infra* note 124 and accompanying text.

105. This plea was very frequently raised. G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 57.

106. J.H. BAKER, *supra* note 82, at 49-50; M. HASTINGS, *supra* note 82, at 16, 19, 158;

increased cost,[107] risk,[108] and delay[109] if forced to bring a second suit in Common Pleas.[110] Moreover, the second suit might cause unseemly conflict

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1 W. HOLDSWORTH, *supra* note 82, at 396; S.F.C. MILSOM, *supra* note 82, at 35, 36, 37; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 55, 79.

107. There was a substantial fee for an original writ from Chancery. M. HASTINGS, *supra* note 82, at 25-26, 161-62; *see* J.H. BAKER, *supra* note 82, at 50; S.F.C. MILSOM, *supra* note 82, at 60, 64; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 78. The fee varied depending on the value of plaintiff's demand. J.H. BAKER, *supra* note 82, at 40; M. HASTINGS, *supra* note 82, at 161.

108. There was a certain risk in the purchase of a writ. There were about 500 types of writs. G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 79. Choosing the wrong one would be fatal to the plaintiff's case. J.H. BAKER, *supra* note 82, at 40 n.12, 52, 59; S.F.C. MILSOM, *supra* note 82, at 35, 64; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 46, 80-81, 156.

109. The original writ did not in itself grant jurisdiction to the Court of Common Pleas. Rather, it ordered the sheriff to commence process against the defendant. The sheriff then endorsed the writ, describing the action he had taken, and returned it to Common Pleas. The court now had jurisdiction over the suit. J.H. BAKER, *supra* note 82, at 50; *see* G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 164.

Unfortunately, the case was probably not yet ready for the pleading stage. The sheriff often was unable to procure the appearance of the defendant on the first writ. There was, therefore, need for various *mesne*, or intermediate, writs. G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 165. There were three main types of *mesne* process: attachment, by which the sheriff got pledges for the appearance of the defendant; *distringas*, by which the sheriff was empowered to seize property of the defendant; and *capias*, by which the sheriff was authorized to seize the person of the defendant. J.H. BAKER, *supra* note 82, at 52; 3 W. BLACKSTONE, *supra* note 82, at *279-84; *see* G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 165-66. The *capias* was the most effective means of service because it physically brought the defendant before the court. *Id.* at 166; *see* M. HASTINGS, *supra* note 82, at 171-12 (*capias* not more efficient, but only way to proceed against party who had nothing that could be distrained). *But see* J.H. BAKER, *supra* note 82, at 52-53 (sheriff, who was liable for any mistakes, often did not attempt to seize defendant); M. HASTINGS, *supra* note 82, at 162-64 (sheriff's office often embezzled writs). Unfortunately, for most actions, the *capias* was not immediately available. J.H. BAKER, *supra* note 82, at 53. For example, in a debt action, the *capias* could only be used after futile attempts to make the defendant appear by using attachment and *distringas*. 3 W. BLACKSTONE, *supra* note 82, app. III, § 2; S.F.C. MILSOM, *supra* note 82, at 64; *see* G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 165-66. For a detailed discussion of the costs of, and the delays caused by, *mesne* process, see M. HASTINGS, *supra* note 82, at 169-83. However, possibly in an effort to make itself more competitive with the other common law courts, *cf. infra* notes 124-25 and accompanying text (easier process of King's Bench and Exchequer), Common Pleas, by the end of the fifteenth century, allowed most actions to be commenced with a *capias*. 3 W. BLACKSTONE, *supra* note 82, at *281-82, *285-86; J. GOEBEL, *supra* note 83, at 512; M. HASTINGS, *supra* note 82, at 163, 169-70, 171 n.10; 1 W. HOLDSWORTH, *supra* note 82, at 222; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 166.

The delay was exacerbated by the limited times for the sheriff's return of a writ. The court sat in fixed terms. In Elizabeth I's reign (1558-1603), the court sat only ninety-nine days of the year. Through later reforms, the court lost about ten more days. If one form of *mesne* process was unsuccessful, the case would be continued to a "return" day in the next term. J.H. BAKER, *supra* note 82, at 53. "It was not uncommon for a year or two to pass before a defendant appeared." *Id.* at 54; *accord*, M. HASTINGS, *supra* note 82, at 23. For a list of return days, see *id.* app. IV.

110. These concerns are not unlike those of the modern federal court litigant who has

between the courts. The process generally used to commence a suit was either the arrest of the defendant (*capias*) or the distraint of his or her property (*distringas*).[111] To allow one court to seize a person or property in the custody of another would be detrimental to the orderly administration of justice. Fortunately for the litigants and the courts, the answer to both hypothetical questions was "no."

The basic rule was as follows: "there is no Court that suffers its process either to be insulted or to be materially interrupted; and whenever this is attempted, it is a contempt . . . ."[112] Thus, "to prevent the inconvenience which would arise if plaintiffs could have [prisoners in the custody of one court] arrested and moved into other courts,"[113] once a defendant was seized by one court, no other court could arrest that defendant.[114]

A person with a claim against the defendant that was outside the jurisdiction of the arresting court was not left remediless, however. Each of the common law courts had a jurisdiction based on privilege which, in the fifteenth century, was already considered ancient, "from time beyond memory."[115] Thus:

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a related state claim. *See, e.g.*, Acton Co. of Massachusetts v. Bachman Foods, Inc., 668 F.2d 76, 79 (1st Cir. 1982); Lentino v. Fringe Employment Plans, 611 F.2d 474, 478, 479 n.16 (3d Cir. 1979); Ayala v. United States, 550 F.2d 1196, 1200 (9th Cir.), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed*, 435 U.S. 982 (1978); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894 (4th Cir. 1972); Bolton v. Gramlich, 540 F. Supp. 822, 846 (S.D.N.Y. 1982); Pearce v. United States, 450 F. Supp. 613, 615, 616 (D. Kan. 1978); Maltais v. United States, 439 F. Supp. 540, 550 (N.D.N.Y. 1977); J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.13, at 68; C. WRIGHT, *supra* note 6, § 9, at 22; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3523, at 83.

111. *See supra* note 109.

112. Cawthorne v. Campbell, 1 Anst. 205, 212, 145 Eng. Rep. 846, 849 (Ex. 1790).

113. J.H. BAKER, *supra* note 82, at 38.

114. M. HASTINGS, *supra* note 82, at 19; 1 W. HOLDSWORTH, *supra* note 82, at 203 & n.10; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 57; *see* Wurzel, *supra* note 103, at 56 n.70.

By the late fifteenth century, most common-law actions were commenced by *capias*. *See supra* note 109 and *infra* notes 124 & 125. It was the use of this form of process, rather than *distringas*, that led to the relevant jurisdictional developments. *See infra* notes 123-32 and accompanying text. *Distringas* will therefore not be discussed further. Suffice it to say that in those cases in which distraint was used, there was also a potential for conflict between courts. What should happen if one court attempted to seize property that was already in the custody of another court? The rule was the same as for *capias*: no court could wrest the control of the property from the court that first seized it. Taylor v. Carryl, 61 U.S. (20 How.) 583, 594-95 (1858); *see* Payne v. Drewe, 4 East 523, 545, 102 Eng. Rep. 931, 939 (K.B. 1804); Cawthorne v. Campbell, 1 Anst. 205, 212, 145 Eng. Rep. 846, 849 (Ex. 1790) (citing Rex v. Oliver, Bunbury 14, 145 Eng. Rep. 578 (Ex. 1717)); *see also* Russell v. East Anglian Ry., 3 Mac. & G. 104, 115, 117, 42 Eng. Rep. 201, 205, 206 (Ch. 1850) (Common Pleas unable to seize property under control of Chancery). Those persons whose property was wrongly seized were not forgotten, however. Remedies were provided for them. J.H. BAKER, *supra* note 82, at 52 (suit could be brought against sheriff for wrongful seizure); M. HASTINGS, *supra* note 82, at 179 & n.44 (statutes provided for persons whose goods were taken erroneously).

115. M. HASTINGS, *supra* note 82, at 17 (quoting typical language from plea rolls of

> [i]f either the plaintiff or defendant had a connection with one of the three common law courts, then any civil proceedings could, and indeed should, be brought by or against him as the case might be in that court by a bill, or as we might say, a statement of claim, presented to the court without the formality of the issue of a writ from the Chancery to set the court in motion.[116]

This connection included being in the custody of the court for another action.[117] Thus, if the process used to command the appearance of the defendant was arrest, the privilege would attach.[118] Hence, all litigation concerning the party could be brought in the court with custody. Because the process used to begin the initial suits in the two hypothetical cases would have been *capias*,[119] Anne and Dick were not forced to divide their litigation between two courts.

This privilege jurisdiction was not limited to the parties to the first action. Unrelated third parties could take advantage of the privilege. Thus, in the first hypothetical, if:

> Tom who owed a debt to Dick, happened to be in the king's bench prison at the suit of Harry, Dick could sue for the debt in the king's bench instead of in the common pleas, could do so without a writ, and could be sure that the case would be heard quickly because Tom was immediately available.[120]

In fact, "[w]ise attorneys kept a careful watch on the marshal's gaol calendar, because they might be able to save their own clients' time and money by taking advantage of process commenced by someone else."[121]

The benefits of the privilege jurisdiction were several. First, it helped prevent conflict among the courts. Second, it assured the protection of the interests of claimants. Third, because the second action needed no

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Court of Common Pleas in fifteenth century); *accord*, *id.* at 19; *see* 3 W. BLACKSTONE, *supra* note 82, at *42 (court "always" had privilege jurisdiction). It is possible that an analogous device was used as early as Edward I's reign (1272-1307) to expand the jurisdiction of another court. 1 W. HOLDSWORTH, *supra* note 82, at 219.

116. G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 164-65.

117. J.H. BAKER, *supra* note 82, at 38; 3 W. BLACKSTONE, *supra* note 82, at *45, *285; 1 W. HOLDSWORTH, *supra* note 82, at 203 & n.10, 212, 239-40; S.F.C. MILSOM, *supra* note 82, at 62; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 57, 165, 167. It is not clear whether the action for debt would be allowed in the Exchequer because of privilege, or because the sovereign had an indirect interest in the suit. J.H. BAKER, *supra* note 82, at 45; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 57-58.

118. The privilege attached even if the defendant were out of the actual custody of the court on bail. J.H. BAKER, *supra* note 82, at 38 n.9, 39 n.10; 3 W. BLACKSTONE, *supra* note 82, at *285-86; 1 W. HOLDSWORTH, *supra* note 82, at 219-20; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 165, 169.

119. *See infra* notes 124 & 125.

120. S.F.C. MILSOM, *supra* note 82, at 62; *see id.* at 63.

121. J.H. BAKER, *supra* note 82, at 38.

original writ, the second process was much cheaper, more expeditious, and safer than if it had been started by writ.[122]

An important characteristic of the jurisdiction by privilege was that once it attached, the court did not lose it. Thus, if the original claim was discontinued, the court did not lose jurisdiction over the second claim, even if it was within the exclusive jurisdiction of another court. This characteristic can be inferred from the various fictions that were developed to increase the jurisdiction of the King's Bench and Exchequer.[123]

Litigation in the King's Bench[124] and Exchequer[125] was much easier and less expensive than in the Court of Common Pleas.[126] Thus, a party with two claims would save even more time and money if the original action could be commenced in the former two courts instead of Common Pleas. In fact, because the process of Common Pleas was so costly, many litigants with a common plea engaged in the following practice: (1) file

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122. *Id.* at 40, 53-54; M. HASTINGS, *supra* note 82, at 18; S.F.C. MILSOM, *supra* note 82, at 64. For a discussion of the problems caused by the original writ, see *supra* notes 107-09 and accompanying text.

Although the recognition of privilege jurisdiction made procedure somewhat more convenient, this is not to say that the parties received the benefits of the modern joinder rules. Due to procedural constraints, the parties were not allowed to litigate two different forms of action in the same proceeding. G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 177.

123. *See infra* notes 124-32 and accompanying text.

124. First, plaintiff did not need a writ from Chancery to begin all actions in King's Bench. If a litigant had an action for trespass that had been committed in the county where the court sat (usually Middlesex), the action could be commenced by filing a bill, or statement of claim, directly with the court. J.H. BAKER, *supra* note 82, at 38; 3 W. BLACKSTONE, *supra* note 82, at *285; 1 W. HOLDSWORTH, *supra* note 82, at 199-200; S.F.C. MILSOM, *supra* note 82, at 34, 54, 63. Thus the risk attached to the writ system was avoided. *See supra* note 108 and accompanying text.

Second, proceedings in the King's Bench were less expensive than in Common Pleas. J.H. BAKER, *supra* note 82, at 40; 1 W. HOLDSWORTH, *supra* note 82, at 199 & n.9, 219; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 171.

Third, in a trespass action, the *capias* was available immediately, without the previous use of other *mesne* writs. 3 W. BLACKSTONE, *supra* note 82, at *280; 1 W. HOLDSWORTH, *supra* note 82, at 200; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 166, 171; *see* J.H. BAKER, *supra* note 82, at 59; *cf. supra* note 109 and accompanying text (delay caused by *mesne* process).

Fourth, time was further saved because return days were not used in the continuation of cases in King's Bench. M. HASTINGS, *supra* note 82, at 23; *see* J.H. BAKER, *supra* note 82, at 54. For the problems caused by the return days in Common Pleas, see *supra* note 109 and accompanying text.

125. First, "[t]he attraction of the court [of Exchequer] to private litigants needs little explanation: the methods used by the King to collect his own revenue must be the best." J.H. BAKER, *supra* note 82, at 44; *accord*, Wurzel, *supra* note 103, at 39, 47-48. Second, there was never a need for a Chancery writ to begin an action in the Exchequer. J.H. BAKER, *supra* note 82, at 44; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 165, 177. Third, the *capias* was immediately issued for the defendant. 3 W. BLACKSTONE, *supra* note 82, at *286; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 166.

126. For a discussion of the costs of Common Pleas process, see *supra* notes 107-09 and accompanying text.

an imaginary claim that was within the jurisdiction of the King's Bench or Exchequer in such court; (2) once the defendant was in the custody of the court, file a bill against him or her for, say, debt; and then (3) discontinue the first suit. This practice was actually less costly than filing the debt action originally in Common Pleas.[127] King's Bench and Exchequer allowed such practice, not questioning the disappearance of the imaginary claim.[128] In fact, various fictions were devised[129] to allow plaintiffs to use the more efficient courts.[130] By the seventeenth century, through the use of these fictions,[131] the King's Bench and Exchequer were routinely hearing

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127. J.H. BAKER, *supra* note 82, at 40; 1 W. HOLDSWORTH, *supra* note 82, at 219.

128. Initially, there was some resistance in King's Bench to the use of fictions. M. HASTINGS, *supra* note 82, at 26. By the fifteenth century, however, that court held that it would not inquire why the defendant was in the custody of the court. J.H. BAKER, *supra* note 82, at 39 & n.9. At first, the Court of Exchequer did allow litigants to challenge the fictitious basis of jurisdiction. By the seventeenth century, however, the court did not allow a defendant to question the fiction. *Id.* at 45-46; Wurzel, *supra* note 103, at 53-61, 64.

129. By the late fifteenth century, litigants had found that they could file a bill in King's Bench for a fictional trespass supposedly committed in the county in which the court sat. Plaintiffs thereby avoided the purchase of an original writ and had the advantage of a *capias* without other *mesne* process. *See supra* note 124. Once the defendant was in the custody of the court, plaintiff would prefer a bill of, say, debt against the prisoner. Before trial, "the action of trespass could be quietly discontinued." J.H. BAKER, *supra* note 82, at 39. For a detailed discussion of this fiction, referred to as the "Bill of Middlesex," see *id.* at 38-40; 3 W. BLACKSTONE, *supra* note 82, at *42-43; M. HASTINGS, *supra* note 82, at 25; 1 W. HOLDSWORTH, *supra* note 82, at 220-22; S.F.C. MILSOM, *supra* note 82, at 62-65; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 166-68.

In the Exchequer, debtors of the King could recover their own debts if they alleged in their bills of complaint the following: "by reason of the debt or damages due [plaintiff] he was 'so much the less able to satisfy the lord king of the debts which he owes at the Exchequer.'" J.H. BAKER, *supra* note 82, at 45; *accord*, 3 W. BLACKSTONE, *supra* note 82, at *45; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 168; Wurzel, *supra* note 103, at 39. By the seventeenth century, the allegation of a debt to the King was commonly fictitious. J.H. BAKER, *supra* note 82, at 45-46; 3 W. BLACKSTONE, *supra* note 82, at *45-46; 1 W. HOLDSWORTH, *supra* note 82, at 240; S.F.C. MILSOM, *supra* note 82, at 62; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 168; Wurzel, *supra* note 103, at 61, 64.

130. Fairness to litigants was at least one motivating factor behind the courts' acceptance of the use of fictions. As Blackstone averred:

> these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful; especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. So true it is, that *in fictione juris semper subsistit aequitas.*

3 W. BLACKSTONE, *supra* note 82, at *43. The judges' motivation was not completely altruistic. A considerable portion of their income came from fees. It was, thus, to their advantage to attract business to their courts. 1 W. HOLDSWORTH, *supra* note 82, at 254.

131. These fictions became less important later with the development of actions on the case. J.H. BAKER, *supra* note 82, at 40-41, 59-60; 1 W. HOLDSWORTH, *supra* note 82, at 199, 219; S.F.C. MILSOM, *supra* note 82, at 61, 67-70; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 80, 89, 155-63.

cases that were within the exclusive jurisdiction of the Common Pleas.[132]

To suggest that the medieval privilege jurisdiction was "ancillary" or "pendent" jurisdiction as we know it today would be hopelessly anachronistic. Certainly, the use of fictions to expand the jurisdiction of the federal courts was rejected very soon after the adoption of the Constitution.[133] The medieval jurisdiction is, however, a direct, albeit distant, ancestor of the modern doctrine. This relationship is better perceived by closely examining a nearer relation, the early American doctrine. The early American courts consciously adopted an approach very similar to the English solution to ordering relations between courts, while protecting claimants from unfairness.[134] Before turning to the American doctrine, however, its closer English relations should be examined.

B. Chancery

The procedure in the common law courts was rigid and often led to unjust results.[135] For example, in 1258 the Provisions of Oxford severely limited the grant of new writs.[136] The types of actions that could be brought from that time were virtually restricted to those that were available in 1258.[137] In addition, joinder of parties was very limited, thus leading to a multiplicity of law suits.[138] Moreover, strict rules of evidence often cut off a party's right to offer proof as to the actual merits of the case.[139]

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132. "[B]y the sixteenth century the plea rolls [of the King's Bench] contain a remarkable proportion of bills complaining of trespasses to land in Westminster or Hendon; the plaintiffs, of course, always return within a term or two to pursue bills of debt." J.H. BAKER, *supra* note 82, at 39; *accord*, M. HASTINGS, *supra* note 82, at 16; 1 W. HOLDSWORTH, *supra* note 82, at 200, 219; S.F.C. MILSOM, *supra* note 82, at 62, 65-67; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 171.

133. *See* Maxfield's Lessee v. Levy, 4 U.S. (4 Dall.) 330, 334 (C.C.D. Pa. 1797) (Iredell, Cir. J.); *see also* J. GOEBEL, *supra* note 83, at 49.

134. *See infra* notes 240-42 and 352-65 and accompanying text.

135. J.H. BAKER, *supra* note 82, at 87; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 116.

136. The Provisions of Oxford provided, *inter alia*, "Concerning the chancellor:— . . . merely by the king's will he shall seal nothing out of course [i.e., nothing but routine documents], but shall do so by [the advice of] the council that surrounds the king." The Provisions of Oxford (1258), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 96, at 144-45 (footnote omitted).

137. J.H. BAKER, *supra* note 82, at 51; S.F.C. MILSOM, *supra* note 82, at 36; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 79-80. There was a little discretion left to the clerks in Chancery for devising new writs, " 'whensoever it shall happen that in one case a writ is found and in like case (in consimili casu) falling under like law and requiring like remedy is found none.' " Statute of Westminster II (1285), *quoted in* G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 80. This power was "little used," however. *Id.*; *accord*, J.H. BAKER, *supra* note 82, at 51 n.8.

138. C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 348-52 (2d ed. 1947). "Joinder as a procedural device to shorten litigation was not contemplated at common law." *Id.* at 352.

139. The stock example was that of the debtor who did not ensure that his sealed

Very gradually, to correct these procedural defects, the Court of Chancery developed.[140] By the late fifteenth century, Chancery had become the fourth central court of England.[141]

This new court added yet another dimension to the problems of divided jurisdiction.[142] What was a litigant who had a case that was part equitable and part legal to do? If the new court's procedure forced a party to litigate in two separate tribunals, it might cause injustice similar to that which Chancery was attempting to lessen. For example, a party who filed a suit in Chancery, only to find that the case, or part of it, had to be heard at law, might then be barred by the statute of limitations.[143] A party with a meritorious claim would, thus, be left remediless because of procedural rules. To prevent such unfairness to the litigants, Chancery applied the following maxim: "when a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue."[144] Following are several examples of the maxim's application.[145]

> bond was cancelled when he paid up. The law regarded the bond as incontrovertible evidence of the debt, and so payment was no defence. Here the debtor suffered the obvious hardship of being driven to pay a second time . . . . It was not that the common law held that a debt was due twice . . . . It was a matter of observing strict rules of evidence, rules which might exclude the merits of the case from consideration but which could not be relaxed without destroying certainty and condoning carelessness.

J.H. BAKER, *supra* note 82, at 87-88; *see also* S.F.C. MILSOM, *supra* note 82, at 86; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 118-19.

140. J.H. BAKER, *supra* note 82, at 87; S.F.C. MILSOM, *supra* note 82, at 82-86; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 64, 96; *see also* 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 192 (S. Symons 5th ed. 1941) (1st ed. 1881). Actually, the rise of Chancery spurred many procedural reforms in the common law courts. J.H. BAKER, *supra* note 82, at 36-37; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 120. Unfortunately, Chancery ultimately developed its own procedural problems. As one historian noted:

> It is the height of irony that the court which originated to provide an escape from the defects of common law procedure should in its later history have developed procedural defects worse by far than those of the law. For two centuries before Dickens wrote *Bleak House*, the word 'Chancery' had been synonymous with expense, delay and despair.

J.H. BAKER, *supra* note 82, at 95.

141. J.H. BAKER, *supra* note 82, at 84, 87; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 117-18. In strict theory, the Chancery did not apply law; it merely ensured that legal rights were exercised in accordance with good conscience and equity. In effect it came to apply a form of law.

142. *See supra* notes 80-89 and accompanying text.

143. Levin, *Equitable Clean-up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320, 320 (1951). Moreover, "to turn first to law might, as a simple matter of res judicata, lose [the plaintiff] the more-desired chancellor's remedy . . . ." *Id.* (footnote omitted).

144. 1 J. POMEROY, *supra* note 140, § 181, at 257; *see also* 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 64 *k*, at 63 (J. Perry 12th ed. 1877 & photo. reprint 1984) (court with jurisdiction for the purpose of discovery will grant complete relief); Levin, *supra* note 143, at 320 (equitable "clean-up" rule allowed award of damages).

145. For more examples of the maxim's application, see 1 J. POMEROY, *supra* note 140, §§ 231-241.

Chancery had jurisdiction to order specific performance in certain contract cases if the damages provided at law were inadequate.[146] In addition, Chancery sometimes "assumed jurisdiction to award damages in lieu of specific performance."[147] The chancellor might decide not to order specific performance because it was impossible or oppressive.[148] Rather than leave the plaintiff to pursue an action at law, however, the chancellor might use the "clean-up" doctrine to award damages. For example, damages might be appropriate if the party's inability to perform the contract had been caused by the party himself or herself.[149] In addition, when a subsequent event made specific performance oppressive, the chancellor might award damages.[150]

The reason cited for the use of clean-up was "to avoid multiplicity of suits."[151] Clean-up was not always allowed when specific performance was denied, however; plaintiffs sometimes were left to their remedy at law.[152] This fact suggests that the convenience of the parties was not the main concern. One scholar has opined that clean-up was available when specific performance was denied to prevent injustice and "the award of damages [would] not perpetrate the very injustice which [the] denial . . . [was] intended to prevent."[153] Thus, notions of fairness supported this extension of Chancery's jurisdiction.

Chancery also had jurisdiction to compel discovery from a party. At common law, no party could be forced to testify.[154] Yet, to establish a claim or defense, one party might need evidence that was within the exclusive knowledge of an opponent. Chancery allowed the party to file a bill of discovery to collect that information.[155] To maintain such a bill,

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146. *Id.* § 221b; 1 J. STORY, *supra* note 144, §§ 716-717. Chancery had initially developed the remedy of specific performance to give effect to agreements that the common law refused to recognize. H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 53, at 125-26 (2d ed. 1948). By the sixteenth century, the common-law courts allowed new causes of action that provided relief in such cases. *See supra* note 131. Chancery, however, continued to award specific performance in appropriate cases. H. MCCLINTOCK, *supra*.

147. Levin, *supra* note 143, at 333 (footnote omitted); *see* 1 J. POMEROY, *supra* note 144, § 237e.

148. H. MCCLINTOCK, *supra* note 146, § 61; 1 J. STORY, *supra* note 144, § 714, at 701-02.

149. Levin, *supra* note 143, at 333, 334-35; *see, e.g.*, Greenaway v. Adams, 12 Ves. Jr. 395, 400-01, 33 Eng. Rep. 149, 152 (Ch. 1806); Denton v. Stewart, 17 Ves. Jr. 276, 280 n.1, 34 Eng. Rep. 107, 108 n.1 (Ch. 1786).

150. Levin, *supra* note 143, at 348-49; *see, e.g.*, City of London v. Nash, 3 Atk. 512, 26 Eng. Rep. 1095 (Ch. 1747).

151. Levin, *supra* note 143, at 325; *see* 1 J. POMEROY, *supra* note 140, § 237e; 2 J. STORY, *supra* note 144, § 797, at 5-6; Levin, *supra* note 143, at 340.

152. *See* 1 J. POMEROY, *supra* note 140, § 237d; Levin, *supra* note 143, at 340-48.

153. Levin, *supra* note 143, at 351; *accord*, 2 J. STORY, *supra* note 144, §§ 798-799.

154. H. MCCLINTOCK, *supra* note 146, § 206, at 547; *see* 3 W. BLACKSTONE, *supra* note 82, at *381-82; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 139.

155. 1 W. HOLDSWORTH, *supra* note 82, at 458; H. MCCLINTOCK, *supra* note 146, § 206, at 547; 1 J. POMEROY, *supra* note 140, § 191; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 139-40.

however, the party had to show not only the need for discovery,[156] but also that the party had a right to the relief claimed in the legal action. Hence, the litigants would be forced to try the same case in two forums—one to collect the evidence, the other to resolve the dispute.[157] To prevent a multiplicity of suits:[158]

> [i]n many cases it has been held, that, where a party has a just title to come into equity for a discovery, and obtains it, the court will go on, and give him the proper relief; and not turn him round to the expenses and inconveniences of a double suit at law.[159]

This jurisdiction was not always exercised, however. On the one hand, complete relief was most often given when the suit was one for an accounting, fraud, or mistake.[160] To leave a party to an action at law in those cases would do more than cause inconvenience. The legal remedy in such cases was incomplete.[161] On the other hand, jurisdiction over the legal questions was not exercised "where the remedy at law is more appropriate than the remedy in equity."[162] Hence, a sense of fairness determined Chancery's application of the doctrine in these cases.

The concerns evident in Chancery's decision to exercise jurisdiction over legal questions in the two foregoing examples are claimants' concerns. The protection of sovereignty, so important to the common law courts,[163] is not apparent. Chancery was protective of its sovereignty, though. In contrast to the usual deference given to the sovereignty of another court, Chancery actually claimed the power to enjoin the law courts from proceeding further on matters related to suits in Chancery.[164]

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156. *See generally* 1 J. STORY, *supra* note 144, §§ 74-74 *e*.

157. H. MCCLINTOCK, *supra* note 146, § 206, at 548; J. STORY, COMMENTARIES ON EQUITY PLEADINGS § 319 (J. Gould 10th ed. 1892).

158. 1 J. STORY, *supra* note 144, § 64 *k*, at 63.

159. *Id.*; *accord*, 1 J. POMEROY, *supra* note 140, § 234.

160. 1 J. POMEROY, *supra* note 140, § 234, at 420; 1 J. STORY, *supra* note 144, § 64 *k*, at 63.

161. 1 J. STORY, *supra* note 144, §§ 67-68.

162. *Id.* § 73, at 70.

163. *See supra* notes 111-14 and accompanying text.

164. The law courts were not very pleased with Chancery's exercise of this power. This displeasure erupted into the famous dispute between Sir Edward Coke, Chief Justice of the King's Bench, and the Chancellor, Lord Ellesmere, during the reign of James I (1603-1625). By this time, Chancery issued "common injunctions" restraining a defendant from pursuing a remedy at common law. In fact, Ellesmere encouraged suits in Chancery after common law had issued a judgment resolving the dispute. Disobedience of such injunctions was punished by imprisonment. Coke responded by using habeas corpus to release those whom Ellesmere had imprisoned for contempt. The dispute was put to the King in 1616. The resolution devised by the Attorney General, Sir Francis Bacon, allowed Chancery to enjoin suits and judgments at law, when warranted. These injunctions were, however, directed to the parties to the litigation only. In other words, Chancery could not order another court to do or refrain from doing anything. J.H. BAKER, *supra* note 82, at 92-92; 1 W. HOLDSWORTH, *supra* note 82, at 459-65; H. MCCLINTOCK, *supra* note 146, § 4, at 10-11; S.F.C. MILSOM, *supra* note 82, at 92-93; G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 123-25.

Moreover, clashes between the process of Chancery and that of other courts occurred on occasion. For example, if a defendant did not appear in response to a subpoena,[165] the defendant was considered to be in contempt. Chancery could, *inter alia*, order some of the defendant's property sequestered.[166] Once the property was in the custody of Chancery, the familiar rule[167] applied: no other court could seize it.[168] Chancery had a very effective means to enforce that rule; the court could enjoin subsequent proceedings at law concerning the sequestered property.[169] Those persons who had claims to the sequestered property were not left without recourse, however. They could intervene and be heard *pro interesse suo*.[170] Chancery, in deciding the intervenor's interests, would often rule on legal issues.[171] Chancery's solution thus struck the same balance as that of the common law courts: protection of sovereignty without causing unfairness to litigants.

C. *Admiralty*

Although the Court of Admiralty had a substantial jurisdiction over commercial cases in the Tudor era,[172] it was never as strong or important as the four central courts.[173] Moreover, by the seventeenth century, the Court of Admiralty was reduced to hearing cases that, quite literally,

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165. The usual method of process in Chancery was the subpoena, rather than arrest or distraint. J.H. BAKER, *supra* note 82, at 88; 3 W. BLACKSTONE, *supra* note 82, at *442-42; 1 J. STORY, *supra* note 157, § 44.

166. Sequestration was ordered following unsuccessful attempts to have the defendant arrested. J.H. BAKER, *supra* note 82, at 88 n.13; 3 W. BLACKSTONE, *supra* note 82, at *443-45; *see* H. MCCLINTOCK, *supra* note 146, § 39.

167. *See supra* notes 112-14 and accompanying text.

168. Russell v. East Anglian Ry., 3 Mac. & G. 104, 115, 117, 42 Eng. Rep. 201, 205, 206 (Ch. 1850); *accord*, Taylor v. Carryl, 61 U.S. (20 How.) 583, 594-95 (1858); *see* Payne v. Drewe, 4 East 523, 545, 102 Eng. Rep. 931, 939 (K.B. 1804).

169. Evelyn v. Lewis, 3 Hare 472, 475, 67 Eng. Rep. 467, 468 (Ch. 1844); Kaye v. Cunningham, 5 Madd. 406, 56 Eng. Rep. 950 (Ch. 1820); H. MCCLINTOCK, *supra* note 146, § 169; 1 J. POMEROY, *supra* note 140, § 236; *see generally* 1 J. STORY, *supra* note 144, §§ 874-904. For a discussion of the dispute over this power between Coke and Ellesmere, see *supra* note 164.

170. Anonymous, 6 Ves. Jr. 287, 31 Eng. Rep. 1055 (Ch. 1801) (relying on Hamlyn v. Lee, Dick. 94, 21 Eng. Rep. 203 (Ch. 1743)).

> When a person claims to be entitled to an estate, or other property sequestered, . . . or has a title paramount to the sequestration, he should apply to the court to direct an inquiry whether the applicant has any, and what, interest in the property; and this inquiry is called an "examination *pro interesse suo*."

BLACK'S LAW DICTIONARY, *supra* note 13, at 1091.

171. Angel v. Smith, 9 Ves. Jr. 335, 338, 32 Eng. Rep. 632, 633 (Ch. 1804); 1 J. POMEROY, *supra* note 140, § 236.

172. The Tudor Era was 1485-1603.

173. For a history of the jurisdiction of the Court of Admiralty, see 1 W. HOLDSWORTH, *supra* note 82, at 544-73. For a briefer history, see J.H. BAKER, *supra* note 82, at 107-19; G. GILBERT & C. BLACK, THE LAW OF ADMIRALTY § 1-4 (2d ed. 1975); G.R.Y. RADCLIFFE & G. CROSS, *supra* note 82, at 246-56.

involved "a thing done upon the sea."[174] Thus, for example, "contracts having a maritime subject-matter but made on land (as most were) were outside the jurisdiction of the Admiralty."[175]

As limited as it was, this court's jurisdiction would not have been particularly pertinent to the present inquiry. The admiralty jurisdiction in the United States, however, was not so limited. From colonial times, American courts of admiralty had a broad, general maritime jurisdiction.[176] There was a distinct possibility that the admiralty jurisdiction over shipping contracts, for example, might overlap the jurisdiction of the common law. Thus, an admiralty court might be asked to address issues of common law and vice versa. When an American court faced that situation, it looked to English precedent for a solution.[177] Hence, an examination of the doctrine in the Court of Admiralty is necessary.

Admiralty's solution was very similar to that devised by the central courts. In the words of Blackstone:

> Where the admiral's court hath not original jurisdiction of the cause, though there should arise in it a question that is proper for the cognizance of that court, yet that doth not alter nor take away the exclusive jurisdiction of the common law. And so *vice versa*, if it hath jurisdiction of the original, it hath also jurisdiction of all consequential questions, though properly determinable at common law.[178]

Counsel cited these very words to the United States Supreme Court in the first case in which it applied the doctrine.[179] Therefore, it is fitting that we now turn to an examination of the American version of the doctrine.

III. The Americanization of the Doctrine

A. Early American Acceptance of the Doctrine

1. An English Doctrine Is Used To Solve an English Problem

The inquiry into the American version of the doctrine begins in the late seventeenth century, when the colonies experienced an influx of

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174. 13 Rich. 2, ch. 5 (1389), *quoted in* G. Gilbert & C. Black, *supra* note 173, § 1-4, at 9. This statute was interpreted narrowly in the seventeenth century. For a discussion of the Admiralty jurisdiction in the seventeenth century, see Yale, *A View of the Admiral Jurisdiction: Sir Matthew Hale and the Civilians*, in Legal History Studies 1972, at 88 (1975).

175. G. Gilbert & C. Black, *supra* note 173, § 1-4, at 10.

176. When the colonial courts of Vice-Admiralty were established in North America, they were given a broad general maritime jurisdiction. *Id.* Moreover, when the admiralty jurisdiction was established in the federal courts, it was interpreted broadly, rather than following the narrow English jurisdictional rules. *See* De Lovio v. Boit, 7 F. Cas. 418, 442-44 (C.C.D. Mass. 1815) (No. 3776) (Story, Cir. J.).

177. *See infra* notes 191-201 and 209 and accompanying text.

178. 3 W. Blackstone, *supra* note 82, at *108; *accord*, Tremoulin v. Sands, Comb. 462, 90 Eng. Rep. 592 (K.B. 1697); Radley v. Egglesfield, 2 Wms. Saund. 259, 85 Eng. Rep. 1050 (K.B. 1681).

179. McDonough v. Dannery (The Mary Ford), 3 U.S. (3 Dall.) 188, 197 (1796) (argument for defendant in error); *see infra* notes 213-37 and accompanying text.

immigrant lawyers from England.[180] From this time, the rules of pleading and practice in the central courts at Westminster began to appear in the colonies, displacing the rough practices of the original American courts.[181] At the same time, the monarchy began to assert more control over colonial courts.[182] The King controlled the establishment of new colonial courts,[183] and the supreme appellate court for the colonies was the Privy Council.[184]

Although the English judicial system was not transplanted to the colonies, it influenced colonial jurisprudence.[185] Important to the current inquiry, by the eighteenth century, either through choice or imposition by the monarchy, most of the colonies imitated the English practice of dividing judicial business among several courts. They had common law courts,[186] courts of equity,[187] and admiralty courts.[188] Exactly how these courts dealt with cases that would not fit into neat jurisdictional packages is unclear, as almost no decisions were reported.[189] However, one historian has found in the colonial courts of that time a "well-nigh utter dependence upon English case law."[190]

One of the earliest indications of how the American courts resolved the problems caused by separate jurisdictions is found in a 1785 case in

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180. J. GOEBEL, *supra* note 83, at 6. The original colonists had not established a court system in the image of the English system. The ordinary Englishman did not have first-hand experience with the courts at Westminster, but with the inferior local courts. *See supra* note 84. Thus, it was with a "heterogeneous body of local law from the backwaters of the mainstream of the common law that the bulk of the immigrants had had immediate experience." J. GOEBEL, *supra* note 83, at 5. It was from this experience that the early colonists shaped their judicial systems. *Id.*; *see generally* D. KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692 (1979); L. LEWIS, THE CONSTITUTION, JURISDICTION, AND PRACTICE OF THE COURTS OF PENNSYLVANIA IN THE SEVENTEENTH CENTURY (1881); P. REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES (1899).

181. R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 111 (1971); J. GOEBEL, *supra* note 83, at 6-8; L. LEWIS, *supra* note 180, at 50; P. REINSCH, *supra* note 180, at 54, 58.

182. "[A]ctive intervention by the Crown began in the latter years of Charles II's reign [1660-1685] . . . ." J. GOEBEL, *supra* note 83, at 10.

183. *See id.* at 11-15; *see also* Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 922 (1978).

184. J. GOEBEL, *supra* note 83, at 7; *see generally id.* at 35-49.

185. For an extensive discussion of early colonial court systems and their English antecedents, see *id.* at 1-49. *See also* R. ELLIS, *supra* note 181, at 5-7.

186. *See generally* J. GOEBEL, *supra* note 83, at 9-18.

187. R. ELLIS, *supra* note 181, at 5. Maryland, New York, New Jersey, North Carolina, and South Carolina had separate Chancery courts. J. GOEBEL, *supra* note 83, at 8 n.14. Although the New England colonies initially had no equity courts, one was imposed on them when they were reorganized as the Dominion of New England in the late seventeenth century. *Id.* at 13 n.26.

188. De Lovio v. Boit, 7 F. Cas. 418, 442 (C.C.D. Mass. 1815) (No. 3776) (Story, Cir. J.); R. ELLIS, *supra* note 181, at 5; G. GILMORE & C. BLACK, *supra* note 173, § 1-4, at 10-11; *see generally* 1 E. BENEDICT, THE AMERICAN ADMIRALTY §§ 654-665 (G. McCloskey 5th ed. 1925).

189. J. GOEBEL, *supra* note 83, at 6.

190. *Id.*

the Pennsylvania Court of Admiralty.[191] In *Dean v. Angus*[192] the court accepted the doctrine without question. The suit was a libel[193] for indemnity. The obligation for which the libellants sought indemnity arose out of an earlier libel. In the first action, the owners of a ship captured at sea filed suit against the owners of the captor ship, alleging that the capture was wrongful.[194] The libellants in that suit won. The owners of the captor ship then filed the libel in *Dean* against the captain of their ship for indemnity.

The captain challenged the jurisdiction of the court, claiming that his contract with the libellants was made on land. Moreover, the judgment for which the libellants sought indemnity had been issued on land.[195] Therefore, he argued, the matter was within the exclusive jurisdiction of a common law court.[196] The court began its opinion by noting the "acknowledged" principle of law that:

> Where the original cause of action is exclusively of admiralty or exclusively of common law jurisdiction, all incidental matters, and all matters necessarily flowing from, or dependent upon, that first cause of action, shall follow the original jurisdiction, whatever the complexion of those matters, separately considered, may be.[197]

The court went on to hold that the second libel for indemnity was incidental to the original libel. The admiralty court could, therefore, hear the case.[198]

The court's statement of the law was almost identical to Blackstone's formulation of admiralty's power to address questions of common law.[199] This acceptance of Blackstone, or at least of his principles, is interesting because it occurred after the American Revolution when there was a great

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191. Pennsylvania passed an act establishing a court of admiralty on Sept. 9, 1778. 1 E. BENEDICT, *supra* note 188, § 667, at 821. For a discussion of post-revolutionary state admiralty practice, see *id.* §§ 666-672.

192. 7 F. Cas. 294 (Pa. Adm. 1785) (No. 3702).

193. Until 1966, when the Federal Rules of Civil Procedure became applicable to suits in admiralty, FED. R. CIV. P. 1 advisory committee note (1966), a libel was the admiralty equivalent of a complaint. G. GILMORE & C. BLACK, *supra* note 173, § 1-12, at 35; *accord*, BLACK'S LAW DICTIONARY, *supra* note 13, at 824.

194. When a vessel of one nation captures an enemy's vessel, the captor may file a libel for adjudication as prize of war. "The prize proceeding, long in substantial disuse with us, consists in the subjection to condemnation and sale of vessels and cargoes having some 'enemy' taint in wartime." G. GILMORE & C. BLACK, *supra* note 173, § 1-15, at 44; *accord*, BLACK'S LAW DICTIONARY, *supra* note 13, at 1080. Of course, the owners of the captured vessel may contend that the capture was wrongful, and if successful, may obtain damages. *See* Juando v. Taylor, 13 F. Cas. 1179, 1189 (S.D.N.Y. 1818) (No. 7558); 1 E. BENEDICT, *supra* note 188, § 598.

195. 7 F. Cas. at 294.

196. For a discussion of admiralty jurisdiction, see *supra* notes 172-78 and accompanying text.

197. 7 F. Cas. at 294.

198. *Id.* at 296-97.

199. *See supra* note 178 and accompanying text.

deal of opposition to English law. To the newly-independent Americans, "to have been subject in any case to the law of the *enemy*, seemed in some manner like a dereliction of the principle of independence . . . ."[200] Feeling ran so high that Pennsylvania had actually "prohibited by law the citing of British authorities posterior to the revolution."[201]

In 1789, as the first Congress was drafting the blueprint for the federal judicial system, some natural antipathy toward Britain remained.[202] Thus, not surprisingly, the Judiciary Act of 1789[203] drew more from the practices of the States than from those of England. Hence, the Judiciary Act is "rooted in the law and custom of divers American jurisdictions."[204] But the basic model for the American federal courts provided in the Judiciary Act did not reject the English model in one important regard. The federal courts exercised separate jurisdiction over cases at law, in equity, and in admiralty.[205]

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200. P. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 94 (Philadelphia 1824) (emphasis in original); *accord*, G. GILMORE, THE AGES OF AMERICAN LAW 22 (1977).

201. P. DU PONCEAU, *supra* note 200, at xxiii; G. GILMORE, *supra* note 200, at 22-23.

202. The spirit of the Revolution had not been forgotten. Radical Republicans felt that Americans had accepted too much of the English common law tradition. R. ELLIS, *supra* note 181, at 14; J. ZAINALDIN, LAW IN ANTEBELLUM SOCIETY: LEGAL CHANGE AND ECONOMIC EXPANSION 8-11, 53-55 (1983). For a more detailed study of radical Republicanism and its effects on early American jurisprudence, see R. ELLIS, *supra* note 181, at 111-284. An example of this attitude is Judge John Dudley's charge to the jury (circa 1805):

> [T]he lawyers, the rascals!. . . They want to govern us by the common law of England; trust me for it, common sense is a much safer guide for us . . . . It's our business to do justice between the parties; not by any quirks o' the law out of Coke or Blackstone—books that I never read and never will—but by common sense and common honesty between man and man.

40 AM. L. REV. 437 (1906), *reprinted in* J. ZAINALDIN, *supra*, at 83.

203. Ch. 20, 1 Stat. 73.

204. J. GOEBEL, *supra* note 83, at 458; *accord*, R. ELLIS, *supra* note 181, at 112. This is not to say that the Judiciary Act of 1789 was a complete break from English practice. Most American procedure bore more resemblance to English law than to, say, French law. The American practices had been after all derived or adapted from English practices to a large degree. That is what led one scholar to comment that "English law was the only law that post-Revolutionary American lawyers knew anything about." G. GILMORE, *supra* note 200, at 19. For an in-depth discussion of the provisions of the Judiciary Act of 1789 and their sources, see J. GOEBEL, *supra* note 83, at 457-508.

205. The district courts were given exclusive jurisdiction over "all civil causes of admiralty and maritime jurisdiction." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77. "[T]he forms and modes of proceedings in causes . . . of admiralty and maritime jurisdiction, shall be according to the course of civil law." Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94. In 1792, Congress made it clear that these procedures were to be those of courts of admiralty "as contradistinguished from courts of common law." Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276; *see* G. GILMORE & C. BLACK, *supra* note 173, § 1-9, at 19.

The circuit courts had jurisdiction, concurrent with the state courts, over certain suits at common law or in equity. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79. Although § 11 provided for jurisdiction over cases at law and in equity in the same courts, it is clear from other sections of the Judiciary Act, the Process Acts, and early case law that the two

This division led to the same problems encountered in England.[206] Because there was no division of the common law business between separate courts, the Americans avoided one dimension of the English problems. But what should happen to a case that is both equitable and legal in nature? Or a case that has issues of admiralty and law? Despite the initial rejection of English practice,[207] the early federal cases dealing

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systems were not merged, but were to be treated separately, as in England. Suits in equity could only be maintained if there were no adequate remedy at law. *Id.* § 16, 1 Stat. at 82. The rules of decision in trials at common law were to be the laws of the States, *id.* § 34, 1 Stat. at 92, and the process used in such cases was to be the process then in use in the state courts, Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94; Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. The process in suits in equity, however, was according to "the course of the civil law." Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94. As with admiralty, Congress provided in 1792 that this process was that of courts of equity "as contradistinguished from courts of common law." Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. Case law also recognized the distinction between a court of equity and a court of common law. *See, e.g.*, Gordon v. Hobart, 10 F. Cas. 795, 797 (C.C.D. Me. 1836) (No. 5609); Baker v. Biddle, 2 F. Cas. 439, 445 (C.C.E.D. Pa. 1831) (No. 764); *see also* R. HUGHES, JURISDICTION AND PROCEDURE IN UNITED STATES COURTS § 136, at 353 (1904).

206. *See supra* notes 80-89 and accompanying text.

207. *See supra* notes 202-04 and accompanying text. It did not take long, however, for American courts and lawyers to turn to English precedent for guidance. "Blackstone's commentaries were extraordinarily influential . . . in America in the late eighteenth and early nineteenth centuries." J. ZAINALDIN, *supra* note 202, at 7 n.3. As early as August 8, 1792, the Supreme Court ordered that it would consider "the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court . . . ." Sup. Ct. R. 8, 2 U.S. (2 Dall.) 414, *reprinted at* 5 U.S. (1 Cranch) xvii.

Not everyone shared this respect for English customs, however. Significant opposition to the Mother Country remained. But the attitude of those like Judge Dudley, *see supra* note 202, did not insinuate itself into the Supreme Court in its early years. The Court was made up completely of Federalists until 1804, R. ELLIS, *supra* note 181, at 14, and maintained a Federalist majority until 1810, *see* G. GUNTHER, CONSTITUTIONAL LAW app. B at B-1 to B-2 (11th ed. 1985). Moreover, "[n]ot one of the judges that Jefferson appointed to the Supreme Court did anything to weaken the independence or influence of the national judiciary or to espouse a radical brand of Jeffersonianism." R. ELLIS, *supra* note 181, at 241; Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1834*, 49 U. CHI. L. REV. 646, 647 & n.13 (1982).

The doctrine does not seem to have been a matter of dispute between the Republicans and Federalists, however. Among the topics that, "during the last two decades of the eighteenth century provoked some of the most vituperative conflict in American political history," Nelson, *supra* note 183, at 925, was "the distribution of power among various levels of government," *id.* at 924. The Federalists tried to make the federal judiciary stronger, while the Republicans were concerned over increases in federal jurisdiction. *See* R. ELLIS, *supra* note 181, at 14-16. In 1801, "political considerations, coupled with the first change of government under the Constitution, pushed the judiciary issue into the forefront . . . ." *Id.* at 4-5. Perhaps the most obvious example of the clash between the Republicans and the Federalists over federal jurisdiction is the short-lived act of 1801. In that year, the defeated Federalists passed an act that provided, *inter alia*, for general federal question jurisdiction. Act of Feb. 13, 1801, ch. 4, §§ 11-14, 2 Stat. 89. This act was highly controversial, and was repealed by the Republicans only a year later. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132. For an in-depth look at the Judiciary Act of 1801, see Surrency, *The*

with these questions followed the English solution. By 1831 the Supreme Court was able to say, "It is . . . well settled, that if the [equity] jurisdiction attaches, the court will go on to do complete justice, although, in its progress, it may decree on a matter which was cognizable at law."[208] The same rule was followed in admiralty.[209]

2. An English Doctrine Is Used To Solve an *American* Problem

The American federal system added a new dimension to the question of when a court could rule on issues outside its jurisdiction.[210] The tripartite division was not the only limitation on the federal courts. The judicial power of United States courts was also limited by article III of the Constitution[211] and the jurisdictional statutes enacted pursuant to it. What would happen if a nonfederal question arose in a federal case? The United

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Judiciary Act of 1801, 2 AM. J. LEGAL HIST. 53 (1958).

Thus one might expect, when the Federalist influence on the Supreme Court finally began to wane about 1830, Currie, *supra*, at 648, that there would be a change in the attitude toward the doctrine, which seems to expand the jurisdiction of the federal courts. Yet, there was no change in attitude. In fact, Justice Johnson, the first Republican justice, expressed surprise that anyone would question the doctrine. *See infra* notes 239, 419-20 and accompanying text.

208. Cathcart v. Robertson, 30 U.S. (5 Pet.) 264, 278 (1831); *accord*, Russell v. Clarke's Executors, 11 U.S. (7 Cranch) 69, 90 (1812); *see* Hepburn v. Dunlop, 14 U.S. (1 Wheat.) 179, 197 (1816); *see also* Massie v. Watts, 10 U.S. (6 Cranch) 148, 158 (1810); Leland v. The Ship Medora, 15 F. Cas. 298, 305 (C.C.D. Mass. 1846) (No. 8237). In ruling on the contours of the equity jurisdiction of a circuit court, Justice Story stated that this jurisdiction "is the same in its nature and extent, as the equity jurisdiction of England, from which ours is derived, and is governed by the same principles." Gordon v. Hobart, 10 F. Cas. 795, 797 (C.C.D. Me. 1836) (No. 5609) (Story, Cir. J.).

209. Leland v. The Ship Medora, 15 F. Cas. 298, 305 (C.C.D. Mass. 1846) (No. 8237); The Tilton, 23 F. Cas. 1277, 1279 (C.C.D. Mass. 1830) (No. 14,054); Brevoor v. The Fair American, 4 F. Cas. 71, 73 (D. Pa. 1800) (No. 1847); Coulter v. L'Esperanza, 6 F. Cas. 641, 641 (D.S.C. 1799) (No. 3277).

210. *See supra* note 19.

211. Article III provides in pertinent part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, §§ 1-2.

States courts solved this problem early in their history. They simply adapted the old solution to the new problem. "[W]here a court has jurisdiction it has a right to decide every question which occurs in the cause . . . ."[212] While the context in which the doctrine was applied had changed, the basic notion of a court's power had not.

The Supreme Court first approved and exercised this new version of the doctrine in 1796[213] in the case *The Mary Ford*.[214] In that case, the captain and crew of an American ship, the *George*, found the ship *Mary Ford* "utterly deserted" and in "a most perilous state."[215] The Americans took possession of the ship and brought her into the port of Boston. The owner and crew of the *George* then filed a libel for salvage[216] of the *Mary Ford* in the United States District Court for the District of Massachusetts.[217]

The next day, the British consul filed a claim in the district court. He alleged that at the time the Americans took possession of the *Mary Ford*, the ship was owned by subjects of the British Crown. The consul prayed that, after a reasonable salvage was paid to the rescuers, the ship (or the proceeds of its sale) be delivered to him.[218]

A month later, the French consul filed a claim in the district court. He admitted that the *Mary Ford* had been owned originally by subjects of the British King. He asserted, however, that it had been "attacked, subdued and taken"[219] on the high seas by a squadron of ships belonging to the French Republic. The French squadron possessed the *Mary Ford* for twenty-four hours. They abandoned it, however, to prevent a weakening of their force. At the time of the capture, France was at war with Great Britain. Therefore, the consul alleged, under the law of nations, the *Mary Ford* was the property of the French Republic.[220] He prayed that, after a reasonable salvage was paid to the rescuers, the ship (or the proceeds of its sale) be delivered to him.[221]

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212. Freeman v. Howe, 65 U.S. (24 How.) 450, 457 (1861) (quoting Peck v. Jenniss, 48 U.S. (7 How.) 612, 624 (1849) (quoting without citation Elliott v. Peirsol, 26 U.S. (1 Pet.) 328, 340 (1828))).

213. The doctrine was argued in the Supreme Court on at least one prior occasion. Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794) (argument for appellants). The Court, however, decided that there was original jurisdiction over the claim in question. Thus, it was unnecessary to exercise jurisdiction over a claim outside the court's power. *See id.* at 16 (per curiam).

214. McDonough v. Dannery (The Mary Ford), 3 U.S. (3 Dall.) 188 (1796).

215. *Id.* at 188 (statement of case).

216. "A salvage award, or reward, is the compensation allowed to the volunteer whose services on navigable waters have aided distressed property in whole or in part." M. NORRIS, THE LAW OF SALVAGE § 3, at 3 (1958); *accord*, BLACK'S LAW DICTIONARY, *supra* note 13, at 1202.

217. 3 U.S. (3 Dall.) at 188 (statement of case).

218. *Id.* at 188-89 (statement of case).

219. *Id.* at 189 (statement of case).

220. *See supra* note 194.

221. 3 U.S. (3 Dall.) at 189 (statement of case).

The district judge decided first that one-third of the value of the *Mary Ford* should be paid to the owner and crew of the *George* for salvage.[222] The judge then ruled that the remaining two-thirds of the value of the ship should be given to the original British owners.[223] The French consul appealed the decree only as it respected the British owners. The circuit court reversed.[224]

The British consul appealed to the Supreme Court.[225] Here, the parties argued not only the merits of the case, but also the jurisdiction of a United States court to hear the dispute between them. The British consul argued that the district court did not have jurisdiction to hear the dispute between him and the French consul. He cited the rule that a neutral nation cannot determine the validity of a capture between belligerent powers.[226]

The French consul responded that, even if the court did not have jurisdiction over their dispute as an original matter,[227] the doctrine applied, and the court could decide the question. It was undisputed that the federal

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222. *Id.* at 191 (Lowel, J., district court opinion).

223. The district judge ruled in favor of the British owners because he had some doubt as to whether the French had firm enough possession of the ship to have captured her. *Id.* at 193 (Lowel, J., district court opinion).

224. The circuit court held that the French squadron had captured the ship. The French Republic therefore had the right to the two-thirds residue. *Id.* at 194 (Cushing, J., circuit court decree).

225. The appeal was actually disallowed. The case got into the Supreme Court by a writ of error. *Id.* (statement of case); *see* Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84-85.

226. 3 U.S. (3 Dall.) at 195 (argument for plaintiff in error) (citing R. LEE, A TREATISE OF CAPTURES IN WAR 77 (London 1759)).

227. This argument was actually the French consul's second argument. He argued first that the district court did have jurisdiction to hear the dispute between the French and British consuls. He recognized the general principle that "the court of the captor [i.e., the French] is the proper court to decide the question of prize, or no prize . . . ." 3 U.S. (3 Dall.) at 196 (argument for defendant in error) (citing 1 MAGENS 487, 490, 496, 505). But he noted that there are several exceptions to that rule. A United States court does have jurisdiction to decide the question "where neutral property of another nation, or of [American] citizens, has been captured at sea, and is brought within [United States] ports." *Id.* (argument for defendant in error) (citing Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794)). The consul reasoned that the converse must also be true. "[I]f the sovereign will protect his citizen from injury, he must also compel him to do justice." *Id.* (argument for defendant in error). In other words, the consul characterized the dispute as one between the French Republic and the Americans, over which the court should have jurisdiction.

There is a subtle irony in the French consul's citation to *The Betsey*. In that case, a French privateer captured *The Betsey*, which was owned by Swedes and Americans. The owners filed a libel for restitution in a U.S. district court. They alleged the capture was wrongful, since neither Sweden nor the United States was at war with France. The French consul responded by claiming the district court lacked jurisdiction over the case. Rather, he urged, his own prize court was the proper forum. The Supreme Court decreed, first, that the district court could determine whether the French consul had to make restitution. Second, the Court decreed that the French consuls could no longer operate their prize courts within the United States. For an interesting discussion of the case, see J. GOEBEL, *supra* note 83, at 760-65.

court had jurisdiction over the original libel for salvage.[228] "Then, wherever a court takes cognisance of any original matter, it naturally draws to its jurisdiction, every incidental or necessary, question."[229]

The Supreme Court agreed with the French consul's argument. A United States court would not have jurisdiction over the dispute between the English and French consuls as an original matter.[230] The Court held, however, that "the district court had jurisdiction upon the subject of salvage; and that, consequently, they must have a power of determining, to whom the residue of the property ought to be delivered."[231] The Court went on to rule on the merits of the claim between the English and French consuls. The Court held that the French Republic had the right to receive the residue of the property.[232]

This case was different from the cases that held that an admiralty court could decide questions of common law that arose in an admiralty case. The disputed question in *The Mary Ford*, one of prize, was clearly within the admiralty jurisdiction.[233] Nevertheless, the federal admiralty jurisdiction provided in article III of the United States Constitution[234] is defined by the law of nations.[235] Thus, the district courts do not have

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228. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77; M. NORRIS, *supra* note 216, § 14, at 18; *see also* Mason v. The Ship Blaireau, 6 U.S. (2 Cranch) 240, 264 (1804).

229. 3 U.S. (3 Dall.) at 197 (argument for defendant in error) (citing 3 W. BLACKSTONE, COMMENTARIES *106-08).

230. The Court did not state this rule explicitly in its opinion. The Court had, however, accepted the proposition in an earlier case. *See* United States v. Peters, 3 U.S. (3 Dall.) 121, 129-30 (1795); *see also* The Brig Alerta v. Moran, 13 U.S. (9 Cranch) 359, 364 (1815); Hopner v. Appleby, 12 F. Cas. 522, 523 (C.C.D.R.I. 1828) (No. 6699); Juando v. Taylor, 13 F. Cas. 1179, 1184 (S.D.N.Y. 1818) (No. 7558).

231. 3 U.S. (3 Dall.) at 198 (per curiam). In L'Invincible, 14 U.S. (1 Wheat.) 238 (1816), the Supreme Court opined that the Court in *The Mary Ford* had not really decided the question of prize, but merely the question of possession. *Id.* at 258-59.

In the later case, American captors filed a libel in a U.S. district court to condemn their prize, the French ship *L'Invincible*. The owners of an American ship, the *Mount Hope*, interposed a claim asking the district court to decide the question whether the capture of their ship was wrongful. They alleged that this claim was incidental to the condemnation of *L'Invincible*. The two claims were somewhat related because the *Mount Hope* had been allegedly captured by *L'Invincible* before her own capture. *Id.* at 238-39 (statement of case).

Normally, the proper court to decide the question of the capture of the *Mount Hope* was in France. *See supra* notes 226-27 & 230 and accompanying text. However, her owners cited *The Mary Ford* for the proposition that the American court with jurisdiction over the condemnation of *L'Invincible* could decide the validity of the French capture incidentally. Instead of finding that the *Mount Hope* proceeding was not part of the case concerning *L'Invincible*, the Court chose to limit *The Mary Ford*. 14 U.S. (1 Wheat.) at 258-59.

232. 3 U.S. (3 Dall.) at 198 (per curiam).

233. Taylor v. Carryl, 61 U.S. (20 How.) 583, 598 (1858) (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 865 (1st ed. 1833 & photo. reprint 1987) [quotation is actually from a later, unidentified edition of COMMENTARIES]) (admiralty has exclusive jurisdiction of prize cases); De Lovio v. Boit, 7 F. Cas. 418, 419 (C.C.D. Mass. 1815) (No. 3776) (Story, Cir. J.) (admiralty had cognizance of all questions of prize).

234. Section 2, cl. 3. The text of this clause is reprinted at *supra* note 211.

235. By granting the admiralty jurisdiction to the federal courts, "our intercourse with

jurisdiction over cases that would not have been allowed to them by the traditional admiralty law.[236] Therefore, since the prize in dispute in *The Mary Ford* was not within the jurisdiction of a United States court under the law of nations,[237] the United States district courts could not hear it under article III. Hence, for the first time, the Supreme Court allowed a federal court to decide a nonfederal claim that arose in an otherwise federal case.

In the quarter century following the Court's somewhat cryptic opinion in *The Mary Ford*, a few opinions applying the doctrine in the new federal context were reported.[238] Unfortunately for modern scholars, these opinions were terse. There was virtually no discussion of the authority or rationale for the doctrine. We can infer, however, that the power to address nonfederal issues in a federal case was well-accepted from Justice Johnson's comment about this power in 1824. He remarked that "[n]o one can question" this power.[239]

In the second quarter of the nineteenth century, the Supreme Court was asked to use the doctrine to address nonfederal questions several more times. By this time, the Court's opinions contained a fuller explanation of its reasoning. In these cases, the Court generally relied on English precedent. The English courts had solved their jurisdictional woes in a very sensible way.[240] The Supreme Court reviewed the English solution and found that "[t]his rule is the fruit of experience and wisdom, and regulates the relations and maintains harmony among the various superior courts of law and of chancery in Great Britain."[241] Moreover, the Court found that the doctrine "has recommended itself to the courts as just and

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other nations was to be so regulated as to make us one of the family of nations, acknowledging the laws and respecting and adopting the usages which constitute the rule of international intercourse . . . ." 1 E. BENEDICT, *supra* note 188, § 9, at 10; *see also id.* §§ 5, 8, 10; Beeks & Moss, *The Exclusive Admiralty Jurisdiction*, 27 WASH. L. REV. 176, 176-77 (1952).

236. This statement is somewhat simplistic. The courts were not completely bound by international admiralty law. Beeks & Moss, *supra* note 235, at 177. The federal courts, however, chose to be governed by the law of nations as to their jurisdiction over prize cases. *See supra* notes 230 & 233 and accompanying text; *cf. supra* notes 226-27 and accompanying text (law of nations re prize jurisdiction).

237. *See supra* notes 226-27 & 230 and accompanying text.

238. *See, e.g.*, Renner & Bussard v. Marshal, 14 U.S. (1 Wheat.) 215 (1816); Logan v. Patrick, 9 U.S. (5 Cranch) 288 (1809); Penn v. Klyne, 19 F. Cas. 166 (C.C.D. Pa. 1817) (No. 10,936). More federal opinions discussing the doctrine in these early decades applied it to legal issues in equitable or admiralty cases. *See, e.g.*, Russell v. Clarke's Executors, 11 U.S. (7 Cranch) 69, 90 (1812); Massie v. Watts, 10 U.S. (6 Cranch) 148, 158 (1810); Brevoor v. The Fair American, 4 F. Cas. 71, 73 (D. Pa. 1800) (No. 1847); Coulter v. L'Esperanza, 6 F. Cas. 641, 641 (D.S.C. 1799) (No. 3277).

239. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 251, 293 (1824) (Johnson, J., dissenting).

240. *See supra* notes 112-32, 144-71 & 178 and accompanying text.

241. Taylor v. Carryl, 61 U.S. (20 How.) 583, 595 (1858).

equal, and as opposing no hindrance to an efficient administration of the judicial power."[242] The Court, therefore, adopted it.[243]

The reaction of twentieth-century jurists to the early American reliance on English precedent is one of wonderment. The context was completely different, modern lawyers say. In England, it was just a matter of several courts set up by one sovereign (the King). Whether one court or another heard and decided a particular issue was no affront to the sovereign.[244] In America, however, a federal court hearing nonfederal issues would be taking issues from the courts of another sovereign, the State. How could the federal courts adapt the English practice while exhibiting the delicacy required in this new context?

The answer to this query may be troubling to modern lawyers. In the early years of the Republic, however, the Supreme Court's opinions did not evidence any real sensitivity to the change in context. Early federal courts accepted the doctrine without questioning the authority for it.[245] If they looked for anything at all to help them shape the doctrine, they looked to English practice.[246]

By the mid-nineteenth century, however, the Supreme Court's opinions began to change. They now expressed a realization that the doctrine was altered by the change in context. There was a difference, the Court recognized, between a federal equity court's application of the doctrine to legal questions and its application of the doctrine to nonfederal questions. One of the earliest hints of this awareness is seen in a dissent by Chief Justice Taney in 1858.[247] In that opinion, Taney maintained that the majority had come to the wrong result because they treated the question for decision as "a conflict between the jurisdiction and rights of a state court, and the jurisdiction and rights of a court of the United States, as a conflict between sovereignties, both acting by their officers within the spheres of their acknowledged powers."[248] Instead, Taney asserted, the question concerned the proper role of a common law court when faced with an admiralty question. Thus, he implied, the rule could change with a change in context.[249]

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242. *Id.*

243. *Id.*; *accord*, Buck v. Colbath, 70 U.S. (3 Wall.) 334, 345 (1866); Peck v. Jenness, 48 U.S. (7 How.) 612, 625 (1848); Wallace v. McConnell, 38 U.S. (13 Pet.) 136, 151 (1839); *see also* McDonough v. Dannery (The Mary Ford), 3 U.S. (3 Dall.) 188, 197-198 (1796) (winning counsel cited Blackstone); United States v. Myers, 27 F. Cas. 38, 40 (C.C.D. Va. 1836) (Daniel, Dist. J.) (doctrine "sanctioned by the inveterate practice of courts of equity").

244. This belief ignores the very real interest the English courts had in protecting their own sovereignty. Perhaps the best-known example of this concern is the dispute between Sir Edward Coke and Lord Ellesmere. *See supra* note 164.

245. The one anomolous exception to this statement was the Supreme Court's opinion in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). *See infra* notes 368-429 and accompanying text.

246. *See* cases cited in *supra* notes 241 & 243.

247. Taylor v. Carryl, 61 U.S. (20 How.) 583 (1858).

248. *Id.* at 601 (Taney, C.J., dissenting).

249. *Id.*

Just a few years later, in 1865, the Supreme Court expressly recognized that the context in which a court applied the doctrine could change the rules of the doctrine. In *Minnesota Co. v. St. Paul Co.*,[250] the Court noted that the question was not:

> whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal Courts from that of the state courts.[251]

The Court may simply have been expressing what it had known all along. Or maybe the Court was just beginning, as it saw more cases in which the doctrine was applied, to realize the differences between the old English problems and the new American ones. Whatever the case, counsel in the *Minnesota Co.* case were caught off guard, not knowing how to argue for (and against) application of the doctrine in the "new" context. The Court chastised them as follows: "We think that all the exhaustive research brought to bear on this technical question of equity pleading, while creditable to the counsel on both sides, is useless in the present case."[252]

This recognition that the rules of the doctrine could change depending on the context did not indicate a growing sensitivity to the federalism concerns of the modern lawyer. Rather, while the Court noted that the form of the doctrine could change, it maintained that the underlying theory remained the same. As the Court stated in 1858: "the question has come before this and other courts in other forms and has received its solution by the application of a comprehensive principle . . . ."[253]

In fact, use of the doctrine in the new federal-nonfederal context was actually broader than traditional applications. Each bill in equity began a new suit. Under certain circumstances, however, two bills in equity might be seen as part of the same case.[254] For example, a cross-bill by a defendant was often treated as part of the same case as an original bill.[255] Because the court could answer all the questions in a case, the plaintiff on the second bill did not have to plead independent grounds of equity jurisdiction.[256] Since the federal courts of equity and law were separate and

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250. 69 U.S. (2 Wall.) 609 (1865).

251. *Id.* at 633.

252. Milwaukee & Minn. R.R. v. Soutter, 17 L. Ed. 886, 895 (1865). The quoted language is deleted from the official report of the case. *Cf.* Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609, 633 (1865) (official report of quoted case).

253. Taylor v. Carryl, 61 U.S. (20 How.) 583, 594 (1858).

254. For a definition of the terms "suit" and "case" as used in this article, see *supra* note 69.

255. J. STORY, *supra* note 157, § 399.

256. *Id.* "A defendant who is brought into a court of equity may, by a cross-bill,

distinct courts, however, the issues in a law suit were not seen as part of the same case as the issues in a related equity suit.[257] Thus the equity plaintiff had to satisfy the court it had equity jurisdiction.[258]

In the new American context of the doctrine, however, the notion of the equitable and legal courts as two different courts faded. Rather, they were seen as one federal court. As the Supreme Court remarked "with reference to the line which divides the jurisdiction of the Federal Courts from that of the state courts":[259]

> No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law, is an original bill in the chancery sense of the word. Yet this court has decided many times, that when a bill is filed in the [Federal] Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law . . . .[260]

In other words, an equitable bill could be part of the same federal case as a law suit. Because the federal court could decide all questions in a case properly before it, the plaintiff in the related bill did not have to establish independent grounds of federal jurisdiction. Thus, the notion of "case" in the new context was broader than the traditional notions.

B. The Scope of the American Doctrine: What is a "Case"?

1. In General

The statement of the doctrine is simple: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause . . . ."[261] If one matter were properly before a court, that court

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obtain a money recovery on a purely legal demand if it is germane to the cause of suit alleged in the bill." H. McCLINTOCK, *supra* note 146, at 122 (footnote omitted). *But see* J. STORY, *supra* note 157, § 358 (relief prayed by cross-bill should be equitable relief).

257. There were a few exceptions to this rule. For example, a bill for discovery in aid of an action at law was considered ancillary to the law suit. H. McCLINTOCK, *supra* note 146, § 206. The plaintiff to such bill still had to establish that the court of equity had jurisdiction over the bill. *See supra* notes 156-57 and accompanying text.

258. Of course, "[w]hen equity jurisdiction *has once attached* to a suit, the court may retain jurisdiction to give complete relief . . . even though such . . . relief could be obtained at law." H. McCLINTOCK, *supra* note 146, at 121 (emphasis added); *see supra* notes 144-71 & 208 and accompanying text.

259. Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609, 633 (1865).

260. *Id.*

261. Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 599-600 (1840) (Baldwin, J., concurring) (quotation marks and citations omitted). This is the basic principle that underlies all cases in which the doctrine is applied, whether they be denominated "ancillary" or "pendent" jurisdiction cases by modern scholars. *See, e.g.*, Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909) ("Federal questions . . . gave the Circuit Court jurisdiction, and,

could rule on any other matter in the "cause" or "case."[262] That simple statement of the doctrine, however, does not help the twentieth-century lawyer understand the scope of the American version of the doctrine. What was a "case" so that we may understand what questions would be considered to have "occurred in the case"?

The language in the early opinions indicates that the concept "case" is very broad. A case includes the plaintiff's claims as well as the defendant's defenses and claims.[263] It includes all stages necessary to adjudicate the dispute between the parties, even subsequent suits to enforce or enjoin the judgment in the first suit.[264] One scholar opined, based on this broad view, that a case is anything the procedural rules say it is.[265]

This theory, however, confuses the notion of a "case," to which a court's jurisdiction extends, with the litigative unit as defined by the procedural rules, referred to in this article as a "suit."[266] While the size of the permissible litigative unit influenced the definition of a "case,"[267]

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having properly obtained it, that court had the right to decide all the questions in the case . . . .") ("pendent" jurisdiction); Freeman v. Howe, 65 U.S. (24 How.) 450, 457 (1861) (" '. . . where a court has jurisdiction it has a right to decide every question which occurs in the cause . . . .' ") ("ancillary" jurisdiction); Omaha Horse Ry. v. Cable Tram-Way Co. of Omaha, 32 F. 727, 729 (C.C.D. Neb. 1887) ("when a case is presented involving a federal question, the jurisdiction of the court attaches to the whole case, and is not limited to the mere decision of that single federal question.") ("pendent" jurisdiction); Miller v. Rogers, 29 F. 401, 402 (C.C.W.D. Pa. 1886) ("where the court has once acquired jurisdiction of the cause, a supplementary proceeding may be maintained without regard to the citizenship of the parties.") ("ancillary" jurisdiction).

262. "Cause imports a judicial proceeding entire, and is nearly synonymous with *lis* in Latin, or suit in English. 'Case' not infrequently has a more limited signification, importing a collection of facts, with the conclusion of law thereon. But 'cause' and 'case' are often synonymous." BLACK'S LAW DICTIONARY 279 (rev. 4th ed. 1968) (citations omitted).

The term "case" will be used in this article instead of "cause" for two reasons. First, the twentieth-century reader is more apt to be familiar with it. Second, "case" avoids the confusion engendered by the term "cause of action," which might arise if the term "cause" were used. *See supra* note 58 and *infra* notes 477-85 and accompanying text.

In this article, the term "suit" is not used synonymously with "case." *See supra* note 69.

263. Cohens v. Va., 19 (6 Wheat.) 264, 379 (1821); *see also* Railroad Co. v. Miss., 102 U.S. (12 Otto) 135, 141 (1880); Tenn. v. Davis, 100 U.S. (10 Otto) 257, 264 (1880).

264. Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

265. Matasar, *"One Constitutional Case," supra* note 1, at 1479; *see also* Freer, *supra* note 1, at 56-58.

266. *See supra* note 69.

267. The philosophy of equity, to do complete justice, which led to a much broader permissible litigative unit than law, was very influential in the development of the American notion of a "case." *See infra* notes 274-75 and accompanying text. Moreover, when the size of the litigative unit was expanded to include certain claims by defendants, the courts recognized those claims for the first time as part of the original case. *See infra* notes 470-76 and accompanying text. The influence of procedure on jurisdiction is still apparent today. For example, in *Gibbs* the Supreme Court held that two claims are part of the same case "if . . . a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." 383 U.S. at 725.

the two concepts are separate. In the eighteenth and nineteenth centuries, the procedural rules allowing joinder of parties and claims in one suit were very narrow.[268] In addition, the bifurcated system of law and equity often caused parties to divide their cases into two or more suits.[269] As noted above,[270] however, federal jurisdiction was not limited by the definition of a suit. Frequently, two or more suits would be viewed as part of the same case.[271] As long as a federal court had jurisdiction over the first suit, a federal court could address the claims in the other suits, even without independent federal jurisdiction.

By the same token, twentieth-century procedural reforms have allowed the joinder in one suit of completely unrelated claims.[272] While these claims have been allowed as part of the same suit, they have never been considered part of the same case for jurisdictional purposes.[273] Thus, we are back to the initial question: what is a "case"? We must examine the early opinions to determine the answer to that question.

In defining the concept "case," the early federal courts turned to the ancient principle of equity[274] that a court "should do complete justice as between all parties before it, giving to each party the redress which *ex equo et bono* belongs to him, rather than compelling him to go out into another forum for their establishment."[275] Thus, a defendant was allowed to file a cross-bill, even without independent federal jurisdiction, if it would allow the court to make "a complete determination of the matters already in litigation."[276] For example, in *Schenck v. Peay*,[277] Schenck, an

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268. *See generally* C. CLARK, *supra* note 138, §§ 56-77; Matasar, *"One Constitutional Case," supra* note 1, at 1484 n.387.

269. For example, a party might wish to pursue both an action at law for breach of contract and an equitable suit for reformation of the contract. *See, e.g.*, Rosenbaum v. Council Bluffs Ins. Co., 37 F. 724 (C.C.N.D. Iowa 1889); *see also* Lumley v. Wabash Ry., 76 F. 66 (6th Cir. 1896) (action at law for personal injuries; equitable suit to cancel release).

270. *See supra* notes 254-60 and accompanying text.

271. For a complete discussion of when two suits were deemed part of the same case, see *infra* notes 276-312 and accompanying text.

272. *See, e.g.*, FED. R. CIV. P. 13 (b), 18; Fed. R. Equity 26, 30, 226 U.S. 649, 655, 657 (1912).

273. *See, e.g.*, Gallardo v. Santini Fertilizer Co., 11 F.2d 587, 589 (1st Cir. 1926) (each of plaintiff's unrelated claims requires independent federal jurisdiction); Cleveland Eng'g Co. v. Galion Dynamic Motor Truck Co., 243 F. 405, 407 (N.D. Ohio 1917) (permissive counterclaim requires independent federal jurisdiction); *see also infra* notes 451-56 and accompanying text. Even the scholar who proposed that a "case" was the same as a "suit" was troubled by his proposition. He suggested that the tenth amendment, for example, imposed additional limitations on a federal court's jurisdiction. *See* Matasar, *"One Constitutional Case," supra* note 1, at 1487-89.

274. *See supra* note 144 and accompanying text.

275. Howards v. Selden, 5 F. 465, 474 (C.C.E.D. Va. 1880) (citing *inter alia* J. STORY, EQUITY PLEADINGS).

276. Morgan's La. & Tex. R.R. & S.S. Co. v. Tex. Central Ry., 137 U.S. 171, 201 (1890); *accord*, Ames Realty Co. v. Big Indian Mining Co., 146 F. 166, 181 (C.C.D. Mont. 1906); Howards v. Selden, 5 F. 465, 474 (C.C.E.D. Va. 1880); Schenck v. Peay, 21 F. Cas. 667, 669 (C.C.E.D. Ark. 1868) (No. 12,450).

277. 21 F. Cas. 667 (C.C.E.D. Ark. 1868) (No. 12,450).

Ohio citizen, filed a bill in federal court against Peay and Bliss, both citizens of Arkansas. Schenck sought to quiet title to certain real estate as against Peay and a partition of it as against Bliss. Peay maintained that the titles of Schenck and Bliss were void, and filed a cross-bill against them to quiet title. Because Peay and Bliss were from the same State, complete diversity was lacking on the cross-bill. The federal court looked to the "essence of the matter,"[278] and found that the cross-bill enabled Peay to defend himself fully against the original bill.[279] It was "necessary to a complete determination of the controversy brought before the court by the original bill"[280] for the court to hear the nonfederal claim. The defendant's claim therefore was considered to be part of the same case as plaintiff's claim.[281] No independent jurisdiction over the cross-bill was required.

If, however, a "cross-bill ha[d] no relation to the subject matter of [plaintiff's] suit, nor [was the] cross-bill in any sense a reply to allegations of the original bill,"[282] the federal court was much more likely to require independent federal jurisdiction before it would allow the suit. If the cross-bill were filed solely against co-defendants and did not affect the relief requested by plaintiff,[283] a federal court might not deem it to be part of the same case as the original suit. For example, in *Putnam v. New Albany*,[284] plaintiffs filed a diversity action against a railroad and the subscribers to its stock. Plaintiffs had recovered a judgment against the railroad in a previous suit and were attempting to collect it. One of the defendants filed a cross-bill against the other defendants, seeking an accounting among the subscribers to ascertain how much each one owed the railroad. Because all the defendants were citizens of Indiana, there was no independent federal jurisdiction over the cross-bill. The court

278. *Id.* at 669.

279. *Id.* Providing a party with the opportunity to defend himself or herself is often cited as the reason that that party's nonfederal claim is part of a federal case. *See, e.g.*, Johnson v. Christian, 125 U.S. 642, 645 (1888); First Nat'l Bank of Salem v. Salem Capital Flour-Mills Co., 31 F. 580, 584 (C.C.D. Ore. 1887); Stone v. Bishop, 23 F. Cas. 154, 155 (C.C.D. Mass. 1878). The court in *Schenck* also suggested that it was important that there be no new parties to the nonfederal bill. 21 F. Cas. at 669. This requirement had been suggested earlier in a Supreme Court opinion, Dunn v. Clarke, 33 U.S. (8 Pet.) 1, 3 (1834). However, as the Supreme Court later remarked, "This [requirement] was probably not intended, as any party may file the bill whose interests are affected by the suit at law." Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861).

280. 21 F. Cas. at 669.

281. "[T]he cross-bill and the original bill are but one cause, and jurisdiction of the latter includes the former." First Nat'l Bank of Salem v. Salem Capital Flour-Mills Co., 31 F. 580, 584 (C.C.D. Ore. 1887).

282. Vannerson v. Leverett, 31 F. 376, 377 (C.C.S.D. Ga. 1887); *accord*, Putnam v. City of New Albany, 20 F. Cas. 79 (C.C.D. Ind. 1869) (No. 11,481); *see* Ames Realty Co. v. Big Indian Mining Co., 146 F. 166, 180 (C.C.D. Mont. 1906); *see also* Ayres v. Carver, 58 U.S. (17 How.) 591, 594-95 (1854).

283. In other words, if it were like the modern cross-claim. *See* FED. R. CIV. P. 13(g).

284. 20 F. Cas. 79 (C.C.D. Ind. 1869) (No. 11,481).

refused to consider the cross-bill part of the same case as the original suit because plaintiffs were not interested in the results of that accounting and because postponing final hearing on the plaintiffs' bill until the cross-bill was decided would be unjust.[285] While it was not unheard of for a federal court to deem a cross-bill between defendants part of plaintiff's case,[286] plaintiff's interest in the results of the cross-bill was a factor in that decision.[287]

As complete relief was the goal of the federal court, it should not be surprising that the scope of a case could include a plaintiff's nonfederal claim, too. For example, in *Rosenbaum v. Council Bluffs Insurance Co.*,[288] plaintiffs filed an action at law in state court to recover on an insurance policy. Although plaintiffs were citizens of Illinois and defendant was a citizen of Iowa, diversity jurisdiction did not exist over their claim. Plaintiffs were assignees of the policy, and the assignor was a citizen of Iowa. Under the then-current jurisdictional statutes, the citizenship of the assignor was the relevant one when determining if diversity existed.[289] Nevertheless, another provision of the jurisdictional statutes provided that even in those circumstances, if defendant alleged local prejudice, the suit could be removed to federal court.[290] That was done in this instance. Plaintiffs then sought to file a bill in federal court seeking a reformation of the policy. Just as with the original suit, there was no original federal jurisdiction over this bill. The court, however, allowed the bill, finding that it was "necessary to the full and final hearing and disposition of [the federal suit]."[291]

The court relied on *Krippendorf v. Hyde*,[292] deemed by modern scholars as a leading case on "ancillary" jurisdiction.[293] Yet, the court in

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285. Putnam v. New Albany, 20 F. Cas. 79, 83 (C.C.D. Ind. 1869) (No. 11,481); *see also* Vannerson v. Leverett, 31 F. 376, 377 (C.C.S.D. Ga. 1887).

286. *See, e.g.*, Ames Realty Co. v. Big Indian Mining Co., 146 F. 166 (C.C.D. Mont. 1906); United States v. Myers, 27 F. Cas. 38 (C.C.D. Va. 1836) (No. 15,844).

287. Republic Nat'l Bank v. Mass. Bonding Co., 68 F.2d 445, 447-48 (5th Cir. 1934); *Ames Realty Co.*, 146 F. at 177. This result may have been an instance of procedure influencing the scope of jurisdiction. A proper cross-bill "touch[ed] the matters in question in the original bill." J. STORY, *supra* note 157, § 389. The Supreme Court therefore ruled that a 'cross-bill' in which plaintiff on the original bill was not interested was not a proper cross-bill. Ayres v. Carver, 54 U.S. (17 How.) 591, 594-95 (1854). Thus, a suit that was not ancillary to a proper suit under the rules of equity *pleading* was not part of the same "case" as the original suit, either. This view changed as the rules of procedure changed. *See infra* notes 470-76 and accompanying text.

288. 37 F. 724 (C.C.N.D. Iowa 1889).

289. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

290. *Id.* § 2; *see* Claflin v. Commonwealth Ins. Co., 110 U.S. 81 (1884); Bushnell v. Kennedy, 76 U.S. (9 Wall.) 387 (1869); Green v. Custard, 64 U.S. (23 How.) 484 (1859).

291. Rosenbaum v. Council Bluffs Ins. Co., 37 F. 724, 725 (C.C.N.D. Iowa 1889).

292. 110 U.S. 276 (1884).

293. *See, e.g.*, C. WRIGHT, *supra* note 6, at 28 n.2. Of course, strictly speaking, *Rosenbaum* was a case involving ancillary jurisdiction; Plaintiff's bill was ancillary to the lawsuit. But modern commentators do not recognize that "ancillary" jurisdiction applies to

Rosenbaum found absolutely no difference between *Krippendorf* and the case before it.[294] Once the jurisdiction of the federal court attached, the court would go on to grant complete relief, no matter what the posture of the parties.[295]

The same result occurred if plaintiff's federal and nonfederal claims were joined in the same suit. In *Ober v. Gallagher*,[296] Fleming, a citizen of Tennessee, had assigned a series of notes to Gallagher, a citizen of Louisiana. When the debtor, Thompson, a citizen of Tennessee, defaulted on one of the notes, Gallagher sued him in state court. Gallagher obtained a judgment in that suit, but was unable to collect. He therefore filed a diversity action in federal court to collect on the judgment. This action was properly before the federal court.[297] Gallagher amended his bill, however, to include claims on other notes on which Thompson had subsequently defaulted, but which were not merged in the state court judgment. The federal court had no independent jurisdiction over these claims because both the assignor and defendant were from the same State.[298] Nonetheless, the Supreme Court, relying on the same principles of equity, held that the federal court could hear and determine the nonfederal claim in order to "make its jurisdiction effectual for complete relief."[299]

The notion that a federal court would give a plaintiff complete relief extended even if a nondiverse party was substituted for the original plaintiff. For example, in *Miller v. Rogers*[300] plaintiffs filed a diversity action against Mary Ann Rogers, a citizen of Pennsylvania. Plaintiffs sought to set aside a deed of conveyance of real estate to her. While the suit was pending, plaintiffs sold the real estate to a Pennsylvania bank and conveyed their title to the bank. The bank then filed a bill against Rogers, seeking the same relief as the original plaintiffs. The court held that independent federal jurisdiction over the second bill was not needed;

Plaintiff's claims against the original Defendant. Moreover, the rule was the same even when Plaintiff's claim against Defendant was in the same suit as the first. *See infra* notes 296-99 and accompanying text.

294. 37 F. at 725.

295. *See also* Lumley v. Wabash R.R., 76 F. 66 (6th Cir. 1896) (action at law for personal injuries and bill to cancel release part of same case, relying on "ancillary jurisdiction" opinion). The fact that Defendant sought the federal jurisdiction initially through removal was irrelevant. The same rule applies if Plaintiff came to federal court first. *See infra* notes 296-99 and accompanying text.

296. 93 U.S. 199 (1876).

297. The suit was based on the judgment, not on the assigned notes. The assignment clause therefore did not apply. Oher v. Gallagher, 93 U.S. 199, 206 (1876).

298. *See supra* note 289 and accompanying text.

299. 93 U.S. at 206; *see also* Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909); Omaha Horse Ry. v. Cable Tram-Way Co. of Omaha, 32 F. 727, 729 (C.C.D. Neb. 1887).

300. 29 F. 401 (C.C.W.D. Pa. 1886).

it was part of the same case as the original bill, even though the new party destroyed diversity.[301]

The doctrine that a court would grant complete relief included the converse statement of the rule: a party could get no more relief than he or she was entitled to. The federal courts, therefore, often allowed strangers to the litigation to interject themselves into it if their rights might be prejudiced by the court's action. Thus, in the well-known case of *Freeman v. Howe*,[302] strangers to the litigation alleged that if plaintiffs received the relief they sought, the strangers' rights would be prejudiced. The Supreme Court held that the strangers could file a bill in federal court to enjoin the litigation and have their claims resolved. That the court had no independent federal jurisdiction over the bill was immaterial. The court had to hear the bill to prevent plaintiff from receiving an inequitable advantage.[303]

When strangers to the litigation interjected their claims into it, the posture of the parties asserting the nonfederal claims was irrelevant. The interjection was allowed even if the stranger joined the suit as a co-plaintiff.[304] Moreover, the plaintiff who had initially sought the federal court's aid was still entitled to complete relief. Therefore, if plaintiff, in order to get the relief to which he or she was entitled, had to file a claim against the new, nondiverse party, that claim was allowed.[305]

There was one exception to an interested stranger's ability to thrust himself or herself into a federal litigation. The federal court would not act if it could not grant complete relief to the parties:

> a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights.[306]

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301. Miller v. Rogers, 29 F. 401, 402 (C.C.W.D. Pa. 1886). The court relied on *Clarke v. Mathewson*, 37 U.S. (12 Pet.) 164 (1838). For a discussion of *Clarke*, see *infra* notes 320-23.

302. 65 U.S. (24 How.) 450 (1861).

303. Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861); *see, e.g.*, Park v. New York, Lake Erie & Western R.R., 70 F. 641 (C.C.S.D.N.Y. 1895); McBee v. Marietta & North Ga. Ry., 48 F. 243 (C.C.E.D. Tenn. 1891); Central Trust Co. of New York v. Wabash, St. Louis & Pacific Ry., 46 F. 156 (C.C.E.D. Mo. 1891); St. Luke's Hosp. v. Barclay, 21 F. Cas. 212 (C.C.S.D.N.Y. 1855) (No. 12,241); *see also* Campbell v. Emerson, 4 F. Cas. 1162 (C.C.D. Mi. 1839) (No. 2357). The interested strangers could interject themselves even after the federal litigation had ended, seeking relief from the effects of an unfair judgment. *See, e.g.*, Pacific R.R. of Mo. v. Missouri Pacific Ry., 110 U.S. 505 (1884); Krippendorf v. Hyde, 110 U.S. 276 (1884); Dunn v. Clarke, 33 U.S. (8 Pet.) 1 (1834); Logan v. Patrick, 9 U.S. (5 Cranch) 288 (1809); Central Trust Co. of New York v. Bridges, 57 F. 753 (6th Cir. 1893); Thompson v. McReynolds, 29 F. 657 (W.D. Ark. 1887).

304. Stewart v. Dunham, 115 U.S. 61 (1885).

305. Reilly v. Golding, 77 U.S. (10 Wall.) 56 (1870).

306. Shields v. Barrow, 58 U.S. (17 How.) 130, 141-42 (1854).

Thus, for example, if plaintiff sought the rescission of a contract, but sued less than all of the contractors, the court was faced with a dilemma. The court simply could not rescind the contract as to a few of the parties. Moreover, the court would not decide the rights of the absent parties, because it could not bind them.[307] Plaintiff, therefore, could not get the relief sought, and the court would not act.[308] The absent parties were free to appear voluntarily,[309] but the federal court could not act if those parties destroyed the subject matter jurisdiction of the court.[310]

This problem did not exist in actions at common law, however, because:

> at common law, the plaintiff, by his judgment against one of his joint debtors, gets the relief he is entitled to, and no injustice is done to the debtor, because he is only made to perform an obligation which he was legally bound to perform before.[311]

Moreover, those not made parties to the suit were not prejudiced because they were not bound by any decree the court might make. Therefore, the court was capable of granting the relief asked for in the suit as fashioned and would proceed without the outsiders. If the outsiders' rights would be prejudiced by the proceeding, they could intervene or file a bill to enjoin the action, even if they destroyed diversity.[312]

2. The Disappearing Federal Question

In determining the nature of a federal court's power to decide a nonfederal claim, the Supreme Court had to address another question. What would happen to the nonfederal claim if the federal claim disappeared, through, e.g., settlement or dismissal? The English courts often exercized jurisdiction even after the claims within their jurisdiction had disappeared.[313] The American courts followed the same practice. Perhaps the best-known confirmation of this power is found in *Siler v. Louisville & Nashville Railroad*.[314] There, the Supreme Court averred that:

> having properly obtained [jurisdiction], [a federal] court had the right to decide all the questions in the case, *even though it decided the Federal questions adversely to the party raising them, or even*

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307. Hagan v. Walker, 55 U.S. (14 How.) 29, 36 (1852).

308. *Shields*, 58 U.S. (17 How.) at 142; *see also* Barney v. Baltimore City, 73 U.S. (6 Wall.) 280 (1868) (court would not act in suit for partition without all owners before court).

309. Jones v. Andrews, 77 U.S. (10 Wall.) 327, 332 (1870).

310. Barney v. Baltimore City, 73 U.S. (6 Wall.) 280, 288 (1868); Commercial & R.R. Bank of Vicksburg v. Slocomb, Richards & Co., 39 U.S. (14 Pet.) 60, 65 (1840).

311. Barney v. Baltimore City, 73 U.S. (6 Wall.) 280, 288 (1868); *see also* Inbusch v. Farwell, 66 U.S. (1 Black) 566, 571-73 (1862); Clearwater v. Meredith, 62 U.S. (21 How.) 489, 493 (1859); Hagan v. Walker, 55 U.S. (14 How.) 29, 36 (1852).

312. *See supra* notes 302-05 and accompanying text.

313. *See supra* notes 123-32 & 147-62 and accompanying text.

314. 213 U.S. 175 (1909).

> *if it omitted to decide them at all, but decided the case on local or state questions only.*[315]

Thus, once the jurisdiction of a federal court attaches to a case, including the nonfederal claims, it is not lost even if the federal claims later disappear from the case.

This power was actually a simple extension of the basic doctrine, a corollary to it. In 1824 Chief Justice Marshall confidently proclaimed: "It is quite clear, that the jurisdiction of the [federal] court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."[316] On the one hand, this statement was merely a reformulation of the basic doctrine.[317] "Subsequent events" included the filing of a nonfederal claim. Thus, for example, suppose a suit at law is properly pending in the federal court. Then an outsider files a bill in equity to enjoin the action at law, asking the federal court to decide his or her related claims. There is no independent federal jurisdiction over this bill, however. As we have seen,[318] this "subsequent event" would not oust the federal court's jurisdiction; the court could decide the whole case.[319]

On the other hand, Marshall's statement led to the formulation of the corollary. Thus, "subsequent events" included not only the filing of a nonfederal claim, but also the disappearance of the federal claim. In *Clarke v. Mathewson*,[320] for example, plaintiff, a Connecticut citizen, filed a diversity action against defendant, a Rhode Island citizen. While suit was pending, plaintiff died. Under the rules of pleading, this claim became abated,[321] or "disappeared." To continue the action, plaintiff's administrator, a Rhode Island citizen, had to file a bill of revivor.[322] There was no independent federal jurisdiction over this bill. Nevertheless, the Supreme Court held:

> The parties to the original bill were citizens of different states; and the jurisdiction of the court completely attached to the controversy. Having so attached, it could not be divested by any subsequent events; and the court had a rightful authority to proceed to a final determination of it.[323]

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315. Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909) (emphasis added).

316. Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824).

317. *See supra* notes 261-62 and accompanying text.

318. *See supra* notes 302-05 and accompanying text.

319. *See* Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861) (citing Clarke v. Mathewson, 37 U.S. (12 Pet.) 164 (1838); Dunn v. Clarke, 33 U.S. (8 Pet.) 1 (1834)).

320. 37 U.S. (12 Pet.) 164 (1838).

321. *See* J. STORY, *supra* note 157, §§ 329, 354.

322. *See id.* § 354.

323. Clarke v. Mathewson, 37 U.S. (12 Pet.) 164, 170 (1839) (citing Dunn v. Clarke, 33 U.S. (8 Pet.) 1 (1834); Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824); Morgan's Heirs v. Morgan, 15 U.S. (2 Wheat.) 290 (1817)).

Likewise, in *United States v. Myers*,[324] the court found that the disappearance of a federal claim did not divest a federal court of jurisdiction over the nonfederal claim. In that case, the United States brought suit to recover a debt for duty bonds. The federal court had jurisdiction of the matter because the suit was brought by the United States.[325] The defendants included the surety on the bonds and an agent of the orginal debtors. The surety and the agent each claimed the right to collect debts due to the debtors. These parties, however, were both Virginia citizens. Thus, the federal court did not have independent jurisdiction over their claims against each other. Some of the defendants objected to the jurisdiction of the court, asserting, *inter alia*, that if the United States received satisfaction of its claim, the court would then lose jurisdiction of the claim between the co-defendants. The court retained jurisdiction of the matter, however, opining that "a decree between co-defendants, though both citizens of Virginia, may be made in this court."[326] The court reasoned that once the jurisdiction of the court attached, subsequent events could not deprive it of that jurisdiction.[327]

In *Omaha Horse Railway v. Cable Tram-Way Co. of Omaha*,[328] plaintiff asserted two claims for relief. First, plaintiff averred that the contract awarded to defendant by the State of Nebraska impaired the obligation of its contract with plaintiff, in violation of the United States Constitution.[329] This federal claim was enough to confer federal question jurisdiction on the circuit court. Plaintiff also alleged that the contract with defendant violated plaintiff's rights under the Nebraska Constitution.

The federal court found that the federal constitution was not violated. It then went on to hold, in the face of a jurisdictional challenge by defendant, that the state constitution had been violated. In so ruling, the court noted that "[i]t is the settled law of the supreme court that, when a case is presented involving a federal question, the jurisdiction of the court attaches to the whole case, and is not limited to the mere decision of that single federal question."[330]

Some federal courts refused to accept the corollary.[331] The Supreme Court expressly adopted it, however, in two cases. First, in *Moore v. New*

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324. 27 F. Cas. 38 (C.C.D. Va. 1836) (No. 15,844).

325. *See* U.S. CONST. art. III, § 2, cl. 4. The text of this clause is reprinted at *supra* note 211.

326. United States v. Myers, 27 F. Cas. 38, 43 (C.C.D. Va. 1838) (No. 15,844) (Barbour, Cir. J.) (citing Dunn v. Clarke, 33 U.S. (8 Pet.) 1 (1834)).

327. *Id.* at 40 (Daniel, Dist. J.) (citing Dunn v. Clarke, 33 U.S. (8 Pet.) 1 (1834)); *accord*, *id.* at 43 (Barbour, Cir. J.) (citing Dunn v. Clarke, 33 U.S. (8 Pet.) 1 (1834)).

328. 32 F. 727 (C.C.D. Neb. 1887).

329. Art. I, § 10.

330. 32 F. at 729 (citing Railroad Co. v. Mississippi, 102 U.S. (12 Otto) 135 (1880); Tennessee v. Davis, 100 U.S. (10 Otto) 257 (1880)).

331. *See, e.g.*, A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 201 U.S. 166 (1906); Elgin Nat'l Watch Co. v. Illinois Watch-Case Co., 179 U.S. 665 (1901)); Cabaniss v. Reco Mining Co., 116 F. 318, 323 (5th Cir. 1902); Kromer v. Everett Imp. Co., 110 F. 22, 25 (C.C.D. Wash. 1901).

York Cotton Exchange,[332] the Court held that a federal court maintained jurisdiction over a nonfederal counterclaim even after dismissing the plaintiff's federal claim.[333] Second, in *Hurn v. Oursler*,[334] the Supreme Court held that a federal court could maintain jurisdiction over a plaintiff's nonfederal claim after disposing of the federal claim adversely to plaintiff.[335] In a third case, *United Mine Workers v. Gibbs*,[336] the Supreme Court held that whether a federal court applied the corollary was within the discretion of the trial court.[337]

IV. THE MYTHS OF "PENDENT" AND "ANCILLARY" JURISDICTION EXPLAINED

A. The Myths of "Ancillary" Jurisdiction

1. The Terminology

The use of the term "ancillary jurisdiction" to apply to, for example, a defendant's counterclaim or an intervenor's claim is somewhat anachronistic. The term was derived from equity pleading.[338] A bill that was considered dependent on an original bill was called an "auxiliary" or "ancillary" bill. Such bills, while separate from the original *suit*, were so closely related to it that they were nevertheless considered part of the same *case* as the original bill.[339] As the doctrine was adapted to the needs of the federal court system,[340] the terminology was borrowed. Thus, a separate nonfederal bill, such as a cross-bill or a bill to enjoin an action at law, that was considered part of the federal case was referred to as an ancillary bill.[341]

It is not remarkable, therefore, that the oft-cited case of *Freeman v. Howe*[342] is referred to as a case of "ancillary jurisdiction." The strangers to the original litigation who claimed an interest in the property seized by the federal court were unable procedurally to intervene in the law suit. But the settled practice of the federal courts allowed them to file a bill in

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332. 270 U.S. 593 (1926).

333. *See* Moore v. New York Cotton Exch., 270 U.S. 593, 608-09 (1926). The dismissal of the federal claim was on the merits. Had it been on the basis of lack of jurisdiction, the federal court's jurisdiction would never have attached to it, let alone the nonfederal counterclaim. If that had been the case, the nonfederal counterclaim would have been dismissed with the federal claim. *Id.*

334. 289 U.S. 238 (1933).

335. Hurn v. Oursler, 298 U.S. 238, 245 (1933).

336. 383 U.S. 715 (1966).

337. United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966); *see supra* note 59.

338. *See generally* H. MCCLINTOCK, *supra* note 146, §§ 206-212.

339. *See supra* notes 254-56 and accompanying text.

340. *See supra* notes 259-60 and accompanying text.

341. An ancillary suit "grows immediately out of and is a necessity which arises from the [original] suit . . . . The [ancillary] suit is really a continuation of that one." Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609, 632 (1865).

342. 65 U.S. (24 How.) 450 (1861).

equity to enjoin the law suit. This bill was ancillary to the law suit and thus part of the same case. The federal court, therefore, could determine their rights, despite the lack of diversity, in the ancillary proceeding.[343]

By the time *Moore v. New York Cotton Exchange*[344] was decided, the Federal Rules of Equity had been promulgated.[345] One innovation in the rules was to permit a defendant with a claim against the plaintiff to file a counterclaim in the same suit, rather than being forced to file a separate cross-bill.[346] Thus, the federal court did not have to exercise jurisdiction over a separate, ancillary proceeding. The counterclaim was part of the same suit as plaintiff's claim. The justification for the result in *Moore* may "be found in the adumbrations of ancillary or auxiliary jurisdiction,"[347] but the jurisdiction exercised was not ancillary jurisdiction in the traditional sense. Thus, it should not be surprising that the *Moore* Court did not refer to the jurisdiction it exercised as "ancillary jurisdiction" or cite *Freeman*.[348]

Today, under the Federal Rules of Civil Procedure, most claims that were traditionally filed as ancillary bills are part of the same suit as the plaintiff's original federal claim.[349] There is thus no need for the court to exercise jurisdiction over an ancillary proceeding. To use the adjective "ancillary" to describe these claims today holds on to a procedure that has long since disappeared.

2. The Basis for the Doctrine

As we have seen,[350] federal courts exercised jurisdiction over nonfederal claims in order to provide complete relief among the parties. This practice was derived from Chancery practice and ensured fairness to the litigants. Yet many scholars and courts have opined that federal courts exercised "ancillary jurisdiction" initially only when the federal court had possession of the property of third parties. These jurists aver that the doctrine was originally a doctrine of necessity.[351]

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343. Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861).

344. 270 U.S. 593 (1926).

345. The Federal Rules of Equity are reprinted at 226 U.S. 649 (1912).

346. *See* Fed. R. Equity 30, 226 U.S. at 657.

347. Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 413 (1936).

348. *See supra* notes 69-70 and accompanying text.

349. *See* FED. R. CIV. P. 13 (a), (b), (g), 18, 20, 24. There are a few exceptions. For example, a suit brought to enforce a judgment would still be considered "ancillary" to the original suit.

350. *See supra* notes 274-75 and accompanying text.

351. *See, e.g.*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.14, at 76, 80; C. WRIGHT, *supra* note 6, § 9, at 29; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3523, at 85, 87; Freer, *supra* note 1, at 50; Matasar, *"One Constitutional Case," supra* note 1, at 1411; Matasar, *Primer*, *supra* note 1, at 153; Minahan, *supra* note 1, at 285, 293; B.U. Note, *supra* note 1, at 925; VA. Note, *supra* note 1, at 267, 268, 270; YALE Note, *supra* note 1, at 79; *see also supra* notes 45-46 and accompanying text.

Some historical evidence could lead these theorists to this conclusion. A desire to reduce the second evil of a divided court system—conflict between the courts—also played a role in the development of the American doctrine. In the early Republic, most state courts, and therefore the federal courts sitting in them,[352] followed the then-current English practice:[353] in common law actions, defendants were arrested to command their appearance.[354] A problem arose, as it had in England, when an officer of one court attempted to arrest a defendant who was already in the custody of another court. The federal courts resolved the problem very much like the English common law courts had.[355] In America, "[w]here persons or property are liable to seizure or arrest by the process of both [state and federal courts], that which first attached should have the preference."[356]

That question also was addressed in cases involving the seizure of property, rather than the arrest of a defendant. The New England States still used the older English methods of process,[357] requiring the attachment of defendant's property before arrest was permitted.[358] Problems occurred

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352. The original Process Acts provided that, in a common law action, a federal court must follow the process of the State in which it sat. Act of Aug. 1, 1842, ch. 109, 5 Stat. 499; Act of May 19, 1828, ch. 68, 4 Stat. 278; Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276; Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93. Because the state process that was followed was that current when the State was admitted to the Union, not the practice current at the time of suit, the federal courts often applied an out-of-date rule. To correct this confusing situation, Congress passed the Conformity Act in 1872. Act of June 1, 1872, ch. 255, 17 Stat. 197. From that time until the promulgation of the Federal Rules of Civil Procedure, in 1938, the federal courts followed the current procedure of the State in which they sat in common law actions.

353. *See supra* notes 109, 124 & 125.

354. W. COX, COMMON LAW PRACTICE IN CIVIL ACTIONS 82-83 (1877).

355. *See supra* note 114 and accompanying text.

356. *Ex parte* Jenkins, 13 F. Cas. 445, 446 (C.C.E.D. Pa. 1853) (No. 7259) (Grier, Cir. J.); *accord*, Duncan v. Darst, 42 U.S. (1 How.) 301 (1843); *see* Freeman v. Howe, 65 U.S. (24 How.) 450, 459 (1861) (rule applies also to "arrests upon mesne, and imprisonment upon final process of person").

357. For a brief discussion of the various forms of *mesne* process formerly used in England, see *supra* note 109 and accompanying text.

358. J. GOEBEL, *supra* note 83, at 511-12, 517-18; *accord*, Freeman v. Howe, 65 U.S. (24 How.) 450, 453 (1861) (suit commenced "in the usual way" in Massachusetts, by process of attachment); Peck v. Jenness, 48 U.S. (7 How.) 612, 618 (1849) (suit commenced according to practice of New Hampshire, by attachment). Attachment remained the usual procedure to commence suit in New England until well into the twentieth century. C. CLARK, *supra* note 138, at 75 n.6.

Today, suit is commenced in most of the New England States by service of a summons and complaint. *See* ME. REV. STAT. ANN. tit. 14, § 553 (1980); MASS. R. CIV. P. 3, 4; R.I. SUPER. CT. R. Civ. P. 3, 4; R.I. DIST. CT. CIV. R. 3, 4; VT. R. CIV. P. 3, 4; *see also* CONN. GEN. STAT. ANN. § 52-45a (West Supp. 1988) (suit may be commenced by writ of summons). Attachment, however, remains an option for plaintiff in all the New England States. *See id.*; ME. R. CIV. P. 4A; MASS. R. CIV. P. 4.1; N.H. REV. STAT. ANN. § 509:4 (1983); R.I. GEN. LAWS § 9-5-14 (1985); VT. R. CIV. P. 4.1.

Process by arrest of the defendant is still available in Maine and Rhode Island. *See* ME. R. CIV. P. 4C; R.I. GEN. LAWS § 9-5-14 (1985).

when one court attached the property of the defendant, and another court attempted to seize the same property from the first court.[359] The rule was the same. "Neither can one [court] take property from the custody of the other by replevin or any other process . . . ."[360]

The reasoning of the American courts was the same as the reasoning behind the English notion of jurisdiction:[361] any other rule "would produce a conflict extremely embarrassing to the administration of justice"[362] and "lead to most deplorable consequences."[363] In fact, the Supreme Court consciously looked to English practice. The Court noted: "This rule is the fruit of experience and wisdom, and regulates the relations and maintains harmony among the various superior courts of law and of chancery in Great Britain."[364]

That a state court could not attach the property in the custody of the federal court posed no problem for the state court claimants. The federal courts recognized that the rule protecting their sovereignty might lead to unfairness for the claimants. The doctrine, however, mitigated this unfairness. Someone with a claim to property in the custody of a federal court could file a bill to enjoin the proceeding until his or her claim was adjudicated. Because this party's claim in essence alleged that the federal plaintiff might receive more relief than he or she was entitled to, this claim was considered part of the federal case. Independent federal jurisdiction over the bill was unnecessary.[365]

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359. The problem arose in other situations as well. For example, officers of different courts might attempt to seize the same property to execute on different judgments. *See, e.g.*, Pulliam v. Osborne, 58 U.S. (17 How.) 471 (1854); Hagan v. Lucas, 35 U.S. (10 Pet.) 400 (1836). In addition, an officer of one court might attempt to seize the assets of a trust or estate that was in the custody or control of another court. *See, e.g.*, Peale v. Phipps, 55 U.S. (14 How.) 368 (1852); Wiswall v. Sampson, 55 U.S. (14 How.) 52 (1852); Williams v. Benedict, 49 U.S. (8 How.) 107 (1850).

360. Peck v. Jenniss, 48 U.S. (7 How.) 612, 624 (1849); *cf. supra* note 114 and accompanying text (English common law rule re conflicting attempts to seize property); *supra* note 168 and accompanying text (Chancery rule re attempt to seize property from its custody).

361. *See supra* notes 111-14 and accompanying text.

362. Peck v. Jenniss, 48 U.S. (7 How.) 612, 624 (1849); *accord*, Freeman v. Howe, 65 U.S. (24 How.) 450, 455 (1861) (rule to avoid "unseemly collision between" courts).

363. *Ex parte* Jenkins, 13 F. Cas. 445, 446 (C.C.E.D. Pa. 1853) (No. 7259) (Grier, Cir. J.).

364. Taylor v. Carryl, 61 U.S. (20 How.) 583, 594 (1858); *see also* Buck v. Colbath, 70 U.S. (3 Wall.) 334, 344-45 (1866); *see supra* notes 240-46 and accompanying text.

365. Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861). Whether nonfederal claimants could proceed in federal court against a party in the custody of that court was not addressed. In Wallace v. McConnell, 38 U.S. (13 Pet.) 136 (1839), the Supreme Court held that the court in which action was commenced first retained jurisdiction over the whole case. The first court, the federal court, had commenced suit through *capias*, while the second court, a state court, had attached defendant's property. The first court retained the case, suggesting that nonfederal claimants could proceed in federal court against the "seized" party. But in Duncan v. Darst, 42 U.S. (1 How.) 301 (1843), the Supreme Court, in dicta, suggested that they could not. *Id.* at 307. However, the Court may have been referring to

Thus, federal courts did exercise jurisdiction over nonfederal claims to property in their possession. That is not to say, however, that the federal courts could hear a nonfederal ancillary bill *only* when they had property in their possession. In numerous instances federal courts applied the doctrine even though they did not have control of certain property.[366] Just as in Chancery,[367] the federal courts endeavored to reduce the burdens on litigants caused by the divided court system, even when sovereignty concerns were not involved. It is therefore more accurate to describe the doctrine as one of fairness, not necessity.

B. The Puzzle of Osborn

Despite the evidence of the doctrine's age, why do modern scholars believe that *Osborn v. Bank of United States*[368] was the first case to approve the doctrine?[369] The answer is simple: because Chief Justice Marshall discussed it at length in that case as if it were a question of first impression.[370] Marshall, however, often treated settled questions as if they had not been decided before.[371] One cannot help asking why he did it in this case. His motives are unclear. They may be explained by the historical context of the case, however.[372]

After heated debate, the second Bank of the United States was incorporated in 1816.[373] The creation of a national bank had been one of the early issues that divided Federalists and Republicans.[374] Those who favored

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in personam jurisdiction problems. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79. No definitive answer has been found.

366. *See, e.g.*, Wallace v. McConnell, 38 U.S. (13 Pet.) 136 (1839); Renner & Bussard v. Marshal, 14 U.S. (1 Wheat.) 215 (1816); St. Luke's Hosp. v. Barclay, 21 F. Cas. 212 (C.C.S.D.N.Y. 1855) (No. 12,241).

367. *See supra* notes 144-63 and accompanying text.

368. 22 U.S. (9 Wheat.) 738 (1824).

369. *See supra* notes 25-29 and accompanying text.

370. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 819-23 (1824).

371. As one student of Marshall's opinions has found, their common traits include:

> great rhetorical power, invocation of the constitutional text less as the basis of decision than as a peg on which to hang a result evidently reached on other grounds, a marked disdain for reliance on precedent, extensive borrowing of the ideas of others without attribution, an inclination to reach out for constitutional issues that did not have to be decided, a tendency to resolve difficult questions by aggressive assertion of one side of the case, and an absolute certainty in the correctness of his conclusions.

Currie, *supra* note 207, at 661.

372. As one scholar has noted, "The political struggle between Federalists and Republicans is centrally important to understanding John Marshall's constitutional jurisprudence." Nelson, *supra* note 183, at 932.

373. Bank of the United States Act, ch. 44, 3 Stat. 266 (1816) (expired 1836).

374. Nelson, *supra* note 183, at 929; *see generally* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 499-503 (rev. ed. 1926). Much of the resistance to a second Bank was due to the general dislike of the first Bank of the United States. That dislike was caused, in part, by the makeup of the first Bank. "[I]t was under almost complete control of the Federalists (who, it was believed, used it as a political machine), . . . its stock was largely held by British and other foreigners . . . ." 1 C. WARREN, *supra*, at 504; *accord, id.* at 504 n.2 (quoting Letter from Timothy Pickering to Judge Richard Peters (Jan. 30, 1811)).

a strong federal government hailed the Bank as a "necessary and proper"[375] institution, that is, one "conducive to the exercise of a power granted by the constitution."[376] They reasoned that "[t]he collection and administration of the public revenue is, of all others, the most important branch of the public service. . . . The bank is, in effect, an instrument of the government . . . . It is as much a servant of the government as the treasury department."[377]

Those who favored states' rights viewed the Bank differently. As one Virginia Congressman said, "I fear [the Bank] may ultimately turn out to be a dangerous, a very dangerous political machine to this country . . . ."[378] He feared that such a broad interpretation of the "necessary and proper" clause "might sweep away . . . every vestige of authority reserved to the States."[379]

Within two years, opposition to the Bank had spread from the purely intellectual realm to become an issue in everyday life. The Bank's policies had helped to ruin many state banks.[380] In addition, due to mismanagement, speculation, and fraud, the Bank was on "the verge of insolvency."[381] In reaction to this state of affairs, a number of States enacted legislation to prevent the Bank from doing business within their borders.[382] One of those States, Ohio, imposed a tax of $50,000 on each branch of the Bank.[383]

The month following the passage of the Ohio tax, the Supreme Court announced its decision in *McCulloch v. Maryland*,[384] holding that a state tax on the Bank was unconstitutional. This opinion "was greeted with an outburst of indignation and even of actual defiance."[385] Opposition to the decision in *McCulloch* was strongest in Ohio.[386] The state legislature

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375. U.S. CONST. art. I, § 8, cl. 18.

376. United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805) (defining "necessary and proper").

377. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 810 (argument for jurisdiction).

378. 28 ANNALS OF CONG. 978 (1814) (statement of Rep. Clopton).

379. *Id.* at 980.

380. 1 C. WARREN, *supra* note 374, at 505.

381. *Id.* at 506.

382. These States included Georgia, Illinois, Indiana, Kentucky, Maryland, North Carolina, Ohio, and Tennessee. *Id.* at 505-06.

383. Law of Feb. 8, 1819, ch. 83, § 1, 17 Ohio Laws 190, 191. To put the amount of the Ohio tax in perspective, it should be noted that the capital of the Cincinnati branch of the Bank was only $1,500,000, and that of the Chillicothe branch, $500,000. The tax was greater than the Bank's entire dividends. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 795 (1824) (argument for respondents).

384. 17 U.S. (4 Wheat.) 316 (1819). This decision was announced on March 7, 1819. *Id.* at 400. The Ohio tax was passed February 8, 1819. *Osborn*, 22 U.S. (9 Wheat.) at 740 (statement of the case); *see* Law of Feb. 8, 1819, ch. 83, § 1, 17 Ohio Laws 190, 191.

385. 1 C. WARREN, *supra* note 374, at 504 (footnote omitted).

386. *Id.* at 526. A number of newspaper editorials denounced the decision on political and legal grounds. *Id.* at 526-27. "Opposition to the Court's decision in Ohio, however,

decided to disregard the case, claiming that it was a collusive one.[387]

Because Ohio clearly planned to collect its tax, the Bank filed a bill in the United States Circuit Court for the District of Ohio on September 11, 1819, praying for an injunction to restrain the auditor of the State of Ohio from collecting the tax.[388] On September 14, the court awarded the injunction.[389] The auditor, however, considered the service of the injunction to be defective, so he ignored it.[390] Instead, on September 17, he sent someone to the Bank's Chillicothe branch who collected the tax.[391] The Bank's lawyers "quickly completed service of the injunction" on September 18.[392] The State did not, however, return the money.

A year later, the Bank filed an amended bill praying for, *inter alia*, a decree to restore the money.[393] The court awarded the requested relief in September 1821. When the state treasurer refused to comply with the decree, he was imprisoned and the key to the state treasury was forcibly taken from him.[394] Amidst great public debate,[395] the Ohio officials appealed to the Supreme Court.[396]

In oral argument, the parties addressed a number of issues, such as the power of a court of equity to enjoin a trespass, the effect of the eleventh amendment on suits against state officials, and the power of a State to tax the Bank.[397] After these arguments, however, the Court asked for a reargument of the case and a companion case, *Bank of the United States v. Planters' Bank of Georgia*.[398] The issue the Court wanted addressed was "the constitutionality and effect of the provision in the charter of the bank, which authorizes it to sue in the circuit courts of the Union."[399]

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was based not so much on political or legal grounds as on the financial and economic conditions then existing. No State had suffered more in 1818 from wild inflation and commercial failures than had Ohio . . . ." *Id.* at 528 (footnote omitted).

387. *Id.* at 528-29; *see id.* at 529 n.1 (quoting Report of Committee of Ohio Legislature, Dec. 12, 1820). The attorney general of Maryland and United States officials had agreed to the facts and cooperated to make *McCulloch* a test case. 1 C. WARREN, *supra* note 374, at 506.

388. *Id.* at 529.

389. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 740-41 (1824) (statement of case).

390. 1 C. WARREN, *supra* note 374, at 529.

391. *Id.*; *accord*, *Osborn*, 22 U.S. (9 Wheat.) at 741 (statement of case).

392. 1 C. WARREN, *supra* note 374, at 530.

393. *Osborn*, 22 U.S. (9 Wheat.) at 741 (statement of case). The Bank also filed an action at law for trespass. 1 C. WARREN, *supra* note 374, at 533 & n.2.

394. 1 C. WARREN, *supra* note 374, at 533-34.

395. *Id.* at 534-35.

396. *Osborn*, 22 U.S. (9 Wheat.) at 744 (statement of case).

397. *Id.* at 744-804 (arguments for appellants and respondents).

398. 22 U.S. (9 Wheat.) 904 (1824). In *Planters' Bank*, the right of the Bank of the United States to sue on a promissory note was at issue. *Id.*

399. *Osborn*, 22 U.S. (9 Wheat.) at 804 (statement of case). The Bank's charter gave it the power "to sue and be sued . . . in any circuit court of the United States." Bank of United States Act, ch. 44, § 7, 3 Stat. 266, 269 (1816) (expired 1836).

The reargument was not heard until March 11, 1824. At that time, counsel arguing against jurisdiction[400] asserted that if the charter provision granted federal jurisdiction in every case in which the Bank was a party,[401] it would be unconstitutional. The only arguably applicable clause of article III was that permitting jurisdiction over "all Cases . . . arising under this Constitution, [and] the Laws of the United States."[402] Yet, the suits in *Osborn* and *Planters' Bank* did not arise under a law of the United States; they arose under the local laws of trespass and contract. Moreover, in *Planters' Bank* "*no* question can arise, except under the law of contract . . . . *No* law of congress is drawn into question, and its correct decision cannot possibly depend upon the construction of such law."[403] No federal court could have jurisdiction over such a case.

In *Osborn* a question would arise under the Constitution, but only in reply to a justification by the defendants.[404] Under those circumstances, a federal court *could* take cognizance of the case.[405] At that time, however, the only provision giving such jurisdiction was section 25 of the Judiciary Act of 1789,[406] which provided for appeal to the Supreme Court from a

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400. The argument for jurisdiction is not particularly relevant to the present discussion. For a summary of the argument, see *Osborn*, 22 U.S. (9 Wheat.) at 805-11 (argument for jurisdiction).

401. Counsel had argued first that the charter provision in question only empowered the Bank to bring suit in a federal circuit court in those cases over which the circuit courts already had jurisdiction. *Id.* at 811-14 (argument against jurisdiction) (relying on Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809)). This power to sue would have been extremely limited. The circuit courts only had original jurisdiction over diversity cases and suits between citizens of the same State suing under land grants from different States. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77. At that time, a corporation was considered to be a citizen of every State of which its members were citizens. *Deveaux*, 9 U.S. (5 Cranch) at 91. Hence, in a suit by the Bank, complete diversity, as required by Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), would be rare.

402. U.S. CONST. art. III, § 2, para. 1, cl. 1. Clauses three (admiralty jurisdiction) and eight (suits disputing land grants) were clearly inapplicable. *See id.* cls. 3, 8. The judicial power of the United States extends not only to certain cases depending on the nature of the suit, however. It also extends to certain cases depending on the character of the party. But counsel also reasoned that that type of jurisdiction was inapplicable. If jurisdiction over a suit by the Bank is based on the character of the party, i.e., the Bank, counsel argued, it extends beyond the scope of the Constitution. Jurisdiction based on the character of the party is limited to those categories listed in article III (e.g., diverse citizens and ambassadors). *See id.* cls. 2, 4, 5, 6, 7, 9. Since the Bank is not included in those categories, there can be no jurisdiction over a suit simply because it is a party. *Osborn*, 22 U.S. (9 Wheat.) at 813-14 (argument against jurisdiction). For the text of U.S. CONST. art. III, § 2, para. 1, see *supra* note 211.

403. *Osborn*, 22 U.S. (9 Wheat.) at 815 (argument against jurisdiction) (emphasis added); *see supra* note 398.

404. The bill sought to enjoin a trespass by state officials. The defendants' justification would be the state statute. In reply to that justification, the Bank would cite McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), to argue that the statute was unconstitutional. *See* Currie, *supra* note 207, at 695 n.303.

405. *Osborn*, 22 U.S. (9 Wheat.) at 814 (argument against jurisdiction).

406. Ch. 20, § 25, 1 Stat. 73, 85-87.

final judgment of the highest court of the State. If Congress wished to extend this jurisdiction to the lower federal courts, counsel urged, it must have done so unequivocally. It did not.[407]

Chief Justice Marshall began the discussion of the charter provision's constitutionality[408] by averring that "[t]he appellants contend, that [the case] does not [arise under a law of the United States], because several questions may arise in it, which depend on the general principles of the law, not on any act of congress."[409] Counsel had not contended any such thing.[410] Yet with this misstatement of counsel's argument, the Chief Justice posed the question implicitly answered in *The Mary Ford*: could a federal court decide nonfederal questions that arose in a federal case? His answer was the same as the earlier court's. If a federal court has jurisdiction, "then all the other questions must be decided as incidental to this, which gives that jurisdiction."[411]

That Marshall discussed the doctrine without citation of precedent was nothing new. He was known for his general practice of not citing any authority.[412] He also, on at least one prior occasion, addressed at length an argument foreclosed by an earlier opinion. He actually retraced the reasoning in the earlier opinion without much reference to it.[413]

In *Osborn*, however, Marshall went beyond rediscussing an already-decided issue. He actually made up an argument so he could address the doctrine. This fabrication is especially puzzling because the question as it arose in *Osborn* was not at all controversial. Counsel had not missed an important step in their argument. No one would have suggested that a federal court had to choose between answering only the federal questions

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407. *Osborn*, 22 U.S. (9 Wheat.) at 814-16 (argument against jurisdiction).

408. Marshall first decided that the Bank's charter authorized it to sue in federal court. *Id.* at 817-18.

409. *Id.* at 819.

410. *Id.* at 884 (Johnson, J., dissenting); *see id.* at 811-16 (argument against jurisdiction); *supra* notes 401-03 and accompanying text.

411. *Osborn*, 22 U.S. (9 Wheat.) at 822. Marshall then discussed the limits of the "arising under" jurisdiction. *Id.* at 823-28. Whether a case "arises under" a federal law is a complex question in itself, and will not be dealt with in this Article. For a discussion of federal question jurisdiction, see HART & WECHSLER, *supra* note 21, at 983-88; M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 53-77 (1980); C. WRIGHT, *supra* note 6, §§ 17-18, 20.

412. P. DUPONCEAU, *supra* note 200, at xxiv; Currie, *supra* note 207, at 656, 661, 689-90, 699. Marshall was not alone in this practice. At that time, Lord Mansfield was influential on American jurisprudence. "[H]is lighthearted disregard for precedent, his joyous acceptance of the idea that judges are supposed to make the law—the more law the better—became a notable feature of our early jurisprudence." G. GILMORE, *supra* note 200, at 24.

413. *Compare* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 323-52 (1816), *with* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 413-23 (1821). In *Cohens*, Marshall "wrote ten pages retracing *Martin*'s reasoning, without attribution or noticeable improvement." Currie, *supra* note 207, at 689. Another example of such unnecessary discussion of an already-decided issue is Marshall's discussion of the merits in *Osborn*. "[T]ypically, he felt it necessary to retrace much of [*McCulloch*'s] reasoning . . . ." *Id.* at 695 n.301.

in a case and giving up jurisdiction entirely. One must ask, why, then, did he go to the trouble in *Osborn* to discuss the doctrine? The answer reveals whether the opinion changes the ancient notion of the power of a court to answer questions outside its jurisdiction.

It was important to Marshall that there be federal jurisdiction in this case. Without federal jurisdiction, the Bank might not have been able to survive.[414] To recognize jurisdiction in this case, however, required diplomacy. First, a federalist-controlled Congress only once had given general federal question jurisdiction to the lower federal courts, and the Republicans had revoked it almost immediately.[415] The proper scope of federal jurisdiction was still a point of disagreement between the parties.[416] Second, Marshall had read narrowly an earlier provision granting the Bank the right to sue in any competent court.[417] Last, the facts in this case gave it much sensitivity.[418] The eyes of the Nation were on Marshall.

The discussion of the doctrine thus may have been a rhetorical tactic to make the rest of his opinion more palatable. The misstatement of the argument cast counsel against the jurisdiction in the position of arguing a ridiculous point. No one could agree with their supposed argument. Even Justice Johnson, "the first dissenter,"[419] accepted this position.[420] By starting in a position of strength, Marshall could proceed to other, weaker arguments without as much resistance on the part of the reader.[421]

If the discussion of the doctrine were merely a rhetorical device, and the sole reason for it were to assure the Bank's survival, the discussion would not be particularly relevant to the development of the doctrine. There may have been, however, another motive behind Marshall's decision

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414. As the dissent noted, "a state of things has now grown up, in some of the states, which renders all the protection necessary, that the general government can give to this bank. The policy of the decision is obvious, that is, if the bank is to be sustained . . . ." *Osborn*, 22 U.S. (9 Wheat.) at 871-72 (Johnson, J., dissenting). At least one historian would minimize this fear, however. According to Charles Warren, "[w]hen, after many delays attendant upon its argument in the Court, the case was finally decided in 1824, it had become almost wholly a dead issue." 1 C. WARREN, *supra* note 374, at 538 (footnote omitted).

415. Act of Feb. 13, 1801, ch. 4, §§ 11-14, 2 Stat. 89, *repealed by* Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

416. *See supra* note 207.

417. *See supra* note 401.

418. *See supra* notes 373-96 and accompanying text.

419. This epithet was inspired by the book, D. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER (1954).

420. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 884 (Johnson, J., dissenting). Johnson's unquestioning acceptance of the doctrine is important because "[i]t was Johnson's leading rule to construe strictly grants of jurisdiction, whether constitutional or statutory." D. MORGAN, *supra* note 419, at 86.

421. Marshall had used this technique in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). R. MCCLOSKEY, THE AMERICAN SUPREME COURT 42-44 (1960); Currie, *supra* note 207, at 657, 660. He also used it in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). Currie, *supra* note 207, at 688.

to discuss it. He "typical[ly] . . . disdained reliance on British precedents."[422] He believed that:

> the court will not review [English] decisions, because it is thought, a question growing out of the constitution of the United States, requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the courts of any other country.[423]

Although the authority for the holding in *The Mary Ford* was unstated, the winning side had cited Blackstone.[424] Instead of referring to Blackstone or any other English authority, in *Osborn* Marshall turned to article III and found that its language adopted the doctrine. The drafters' use of the word "Cases" indicated an implicit acceptance of the notion that cases do not always come in neat jurisdictional packages. "On the opposite construction, [Marshall noted,] the [federal] judicial power never can be extended to a whole case, as expressed by the constitution . . . ."[425] Therefore, Congress may give the federal courts jurisdiction over entire cases, not just federal questions.[426]

The doctrine was not changed by the discussion in *Osborn*. The real importance of the case is that it clearly states that the doctrine was given an *imprimatur* by the Constitution. In that sense *Osborn* was unique. The other cases that applied the doctrine in the eighteenth and nineteenth centuries did not self-consciously question their authority.[427] Instead, the cases simply accepted the doctrine as a part of normal "courtly" powers. Moreover, despite the importance modern scholars place on *Osborn* as authority for the doctrine, it was evidently not so considered by contemporaries. The case was not cited to support the doctrine until almost a half century later,[428] despite numerous decisions applying the doctrine in the intervening forty-three years.[429]

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422. Currie, *supra* note 207, at 699 (footnote omitted); *see* G. HASKINS & H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-15, at 442 (Oliver Wendell Holmes, Devise History of the Supreme Court Vol. 2, 1981) (personal prediliction formed resistance to English law).

423. *Osborn*, 22 U.S. (9 Wheat.) at 851 (discussing doctrine of sovereign immunity).

424. *See supra* note 229 and accompanying text; *cf.* text accompanying *supra* note 178 (cited words of Blackstone).

425. *See supra* note 229 and accompanying text; *cf.* U.S. CONST. art. III, § 2, para. 1 (judicial power of United States extended to "Cases").

426. *Osborn*, 22 U.S. (9 Wheat.) at 823. One could argue that Congress *must* give the federal courts jurisdiction over entire cases, since "[t]he courts of the United States do not sit to decide questions of law presented in a vacuum, but only such questions as arise in a 'case or controversy.' " C. WRIGHT, *supra* note 6, at 53.

427. *See supra* notes 238-46 and accompanying text.

428. *See* Mayor of Nashville v. Cooper, 73 U.S. (6 Wall.) 253 (1867) (approving removal jurisdiction although federal question only arises in defendant's answer).

429. *See, e.g.*, Freeman v. Howe, 65 U.S. (24 How.) 450, 457 (1861); Taylor v. Carryl, 61 U.S. (20 How.) 583, 596-97 (1858); Peck v. Jenness, 48 U.S. (7 How.) 612, 621 (1849);

V. The Doctrine in the Twentieth Century

A. *From the Rules of Equity to* Gibbs

The Federal Rules of Equity, which became effective in 1913,[430] contained a number of innovative changes in equity pleading and practice. Important to this inquiry were several changes regarding the joinder of claims in one suit.[431] Rule 26 expressly allowed the plaintiff to join in one suit any claims he or she had against the defendant.[432] In addition, rule 30 allowed the defendant to join any counterclaims against the plaintiff in the same suit.[433] This change in procedure did not materially affect the basic jurisdictional doctrine, however. If a separate nonfederal proceeding could be heard in federal court, *a fortiori*, a federal court could hear the same nonfederal claim when actually filed in the original federal proceeding.

A defendant always had been allowed to file a cross-bill against the plaintiff so that the court could award complete relief between the parties.[434] Before the rules went into effect, a proper cross-bill "touch[ed] the matters in question in the original bill."[435] This relatively vague description was translated in rule 30 as the compulsory counterclaim, which was one "arising out of the transaction which is the subject matter of the suit."[436] The federal courts took the procedural change in stride, equating such a counterclaim with the old cross-bill.[437] They, therefore, applied the same jurisdictional rules to the new context. Just as with the cross-bill,[438] a counterclaim against the plaintiff that arose out of the same transaction as plaintiff's claim was considered part of the same case as the original claim. The counterclaim therefore needed no independent basis for jurisdiction.[439]

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see also Williamson v. Berry, 49 U.S. (8 How.) 495, 541 (1850); Hickey's Lessee v. Stewart, 44 U.S. (3 How.) 750, 762 (1845); Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 599-600 (1840) (Baldwin, J., concurring); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 511 (1839); Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 478 (1836); Thompson v. Tolmie, 27 U.S. (2 Pet.) 157, 169 (1829); Elliott v. Piersol's Lessee, 26 U.S. (1 Pet.) 328 (1828).

430. Fed. R. Equity 81, 226 U.S. 673 (1912).

431. *See supra* notes 345-48 and accompanying text.

432. 226 U.S. at 655.

433. *Id.* at 657. In addition, rule 37 provided: "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention . . . ." *Id.* at 659.

434. *See supra* notes 276-81 and accompanying text.

435. J. Story, *supra* note 157, § 389.

436. 226 U.S. at 657.

437. "The counterclaim constituted what was formerly known, in the equity practice, as a cross-bill." Mathis v. Ligon, 39 F.2d 455, 457 (10th Cir. 1930); *accord*, Kaumagraph Co. v. General Trade Mark Corp., 12 F. Supp. 230, 231 (S.D.N.Y. 1935); Electric Boat Co. v. Lake Torpedo Boat Co., 215 F. 377, 380 (D.N.J. 1914).

438. *See supra* notes 276-81 and accompanying text.

439. *See, e.g.*, Mathis v. Ligon, 39 F.2d 455, 457 (10th Cir. 1930); Kaumagraph Co. v. General Trade Mark Corp., 12 F. Supp. 230, 231 (S.D.N.Y. 1935); Badger v. E.B. Badger & Sons Co., 288 F. 419 (D. Mass. 1923); Electric Boat Co. v. Lake Torpedo Boat Co., 215 F. 377, 383 (D.N.J. 1914).

When the Supreme Court decided *Moore v. New York Cotton Exchange*,[440] it did not even address, let alone question, this conclusion. In that case, the Court was faced with a federal claim and a nonfederal counterclaim. It dismissed the claim and decided the counterclaim in defendant's favor.[441] Plaintiff argued that the claim had been dismissed for lack of jurisdiction, and therefore the court could not decide the counterclaim.[442] In other words, plaintiff argued, no federal case was before the court, so it could decide none of the issues presented to it. The Supreme Court rejected that argument, finding that the claim had been dismissed on the merits.[443] A federal case was before the trial court, and, therefore, the court could dispose of the other issues in the case, including the nonfederal counterclaim.

The plaintiff next argued that, even if there were a federal case, the nonfederal counterclaim did not arise out of the same transaction as the plaintiff's claim.[444] The counterclaim was thus not part of the federal case. The Court ruled that " '[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."[445] The two claims in the present case had a logical relationship. They were, therefore, part of the same case, and the federal court could decide them both.[446]

Modern scholars view this opinion as an important change in the exercise of federal jurisdiction over nonfederal claims. They suggest that "ancillary jurisdiction" was now no longer a doctrine of necessity,[447] but one of convenience.[448] A careful reading of the *Moore* Court's language shows that this theory is inaccurate. The Court's rationale for finding the two claims to be part of the same case was that "the *relief* afforded by the dismissal of the bill is not *complete* without"[449] granting the relief asked for in the counterclaim. Since a federal court had jurisdiction to

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440. 270 U.S. 593 (1926).

441. Moore v. New York Cotton Exch., 270 U.S. 593, 603 (1926).

442. *Id.* at 607-08.

443. *Id.* at 609. The dismissal on the merits did not oust the court of jurisdiction over the counterclaim. *See supra* notes 313-35 and accompanying text.

444. 270 U.S. at 608.

445. *Id.* at 610.

446. *Id.*

447. For a discussion of the basis for the doctrine, rejecting this theory, see *supra* notes 366-67 and accompanying text.

448. *See, e.g.*, J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 2.14, at 76; C. WRIGHT, *supra* note 6, § 9, at 29; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 5, § 3523, at 93; Freer, *supra* note 1, at 51; Matasar, *"One Constitutional Case," supra* note 1, at 1411-12; Matasar, *Primer, supra* note 1, at 142; Miller, *supra* note 1, at 1-2, 5; Minahan, *supra* note 1, at 281 & n.8, 299; Schenkier, *supra* note 1, at 277; Shakman, *supra* note 1, at 279; Sullivan, *supra* note 1, at 947, 949; UCLA Comment, *supra* note 1, at 1266; VA. Note, *supra* note 1, at 268, 273; YALE Note, *supra* note 1, at 643; *see supra* note 51 and accompanying text.

449. 270 U.S. at 610 (emphasis added).

afford complete relief,[450] the federal court was correct in ruling on the counterclaim.

Moore's importance was not in establishing a new jurisdictional rule. The plaintiff did not argue that even if the counterclaim arose out of the same transaction as the claim, there would be no federal jurisdiction. That conclusion was beyond question. *Moore's* importance was the clarification of the dividing line between compulsory counterclaims and permissive ones. The permissive counterclaim, which had no relation to the original bill,[451] was a new procedural device. Not all the federal courts took this procedural change in stride. Some courts actually would not permit such a claim, even if there would have been jurisdiction over it.[452] This reluctance was soon overcome, however, and unrelated counterclaims were allowed in the same suit as plaintiff's original claim. But the federal courts never considered this new counterclaim to be part of the same "case" as the federal claim. Therefore, independent jurisdiction was required.[453]

Rule 26 of the Federal Rules of Equity provided that a plaintiff "may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant."[454] The federal courts followed the same principles governing complete relief that had been developed earlier.[455] If plaintiff joined a nonfederal claim with a federal one, the court inquired whether the two claims were part of the same case. If so, the federal court could hear the nonfederal claim.[456]

Application of the doctrine under the new procedure gave the federal courts trouble in one substantive area. Often, a plaintiff would file a claim alleging trademark or patent infringement, coupled with a nonfederal claim seeking relief for unfair competition.[457] The federal courts were split

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450. *See supra* notes 276-81 and accompanying text.

451. Fed. R. Equity 30, 226 U.S. 631, 657 (1912).

452. *See, e.g.*, Klauder-Weldon Dyeing Machine Co. v. Giles, 212 F. 452 (D. Mass. 1914); Adamson v. Shaler, 208 F. 566 (E.D. Wis. 1913); Williams Patent Crusher & Pulverizer Co. v. Kinsey Mfg. Co., 205 F. 375 (W.D.N.Y. 1913); Terry Steam Turbine Co. v. B.F. Sturtevant Co., 204 F. 103 (D. Mass. 1913).

453. *See, e.g.*, Kaumagraph Co. v. General Trade Mark Corp., 12 F. Supp. 230, 231 (S.D.N.Y. 1935); Universal Radiator Products Co. v. Craftsman Radiator Enclosure Co., 2 F. Supp. 205, 208 (E.D.N.Y. 1933); Badger v. E.B. Badger & Sons Co., 288 F. 419, 420 (D. Mass. 1923); *see also* Moore v. N.Y. Cotton Exch., 270 U.S. 593, 609 (1926) (declining to decide question).

454. 226 U.S. at 655.

455. *See supra* notes 288-301 and accompanying text.

456. *See* Geneva Furniture Mfg. Co. v. S. Karpen & Bros., 238 U.S. 254, 259 (1915); Gallardo v. Santini Fertilizer Co., 11 F.2d 587, 589 (1st Cir. 1926); Tullar & Tullar v. Illinois Central R.R., 213 F. 280, 283 (N.D. Iowa 1914).

457. In addition, a defendant might file a nonfederal counterclaim alleging unfair trade practices to plaintiff's claim for infringement. The federal courts viewed this procedural posture in the same way as the joinder of the claims by plaintiff. *See, e.g.*, Kaumagraph Co. v. General Trade Mark Corp., 12 F. Supp. 230, 230-31 (S.D.N.Y. 1935); Marconi Wireless Telegraph Co. of America v. National Electric Signaling Co., 206 F. 295, 300-01 (E.D.N.Y. 1913).

on two questions. First, could the court exercise jurisdiction over the nonfederal claim at all?[458] Second, those courts that held jurisdiction was appropriate were split over whether the court could retain that jurisdiction after the federal claim was decided adversely to the plaintiff.[459] The Supreme Court answered both those questions in the affirmative in *Hurn v. Oursler*.[460]

The *Hurn* Court noted that the issue before it was the same as the issue in *Moore*.[461] Under rule 30, the question faced by a federal court was whether the counterclaim was "a part of the case sought to be stated in the bill."[462] The same question faced the court if plaintiff was the party who joined the two claims together. Rule 30, however, divided claims into those that were part of the same "case" and those that were not.[463] Rule 26 did not make any such distinction. Therefore, the *Hurn* Court described the dividing line for the lower federal courts:

> where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, . . . the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground* . . . .[464]

Contemporaries did not see these opinions as stating the rules for two separate doctrines. Federal courts applying the doctrine cited rule 26 and rule 30 cases interchangeably.[465] As Charles Clark commented about the application of the doctrine, the federal courts "usually use that word 'same transaction,' [when testing a counterclaim] and if [joinder of the nonfederal claim] is by parties who are all on the same side of the case, they [the courts] use the phrase 'same cause of action.' "[466] Use of different

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458. *See, e.g.*, Payton v. Ideal Jewelry Mfg. Co., 7 F.2d 113 (1st Cir. 1925); W.F. Burns Co. v. Automatic Recording Safe Co., 241 F. 472, 486 (7th Cir. 1916); United States Expansion Bolt Co. v. H.G. Kroncke Hardware Co., 234 F. 868, 872-75 (7th Cir. 1916); Planten v. Gednay, 224 F. 382, 386 (2d Cir. 1915); Ludwigs v. Payson Mfg. Co., 206 F. 60, 65 (7th Cir. 1913); Recamier Mfg. Co. v. Harriet Hubbard Ayer, Inc., 59 F.2d 802, 806 (S.D.N.Y. 1932).

459. *See, e.g.*, Vogue Co. v. Vogue Hat Co., 12 F.2d 991, 992-95 (6th Cir. 1926); Taylor v. Bostick, 299 F. 232 (3d Cir. 1924); Detroit Showcase Co. v. Kawneer Mfg. Co., 250 F. 234, 240 (6th Cir. 1918); Mallinson v. Ryan, 242 F. 951, 953 (S.D.N.Y. 1917); Sprigg v. Fisher, 222 F. 964 (D. Md. 1915).

460. 289 U.S. 238 (1933).

461. Hurn v. Oursler, 289 U.S. 238, 242 (1933).

462. *Id.*

463. *See supra* notes 434-39 & 451-53 and accompanying text.

464. 289 U.S. at 246 (emphasis in original).

465. *See, e.g.*, United States Expansion Bolt Co. v. H.G. Kroncke Hardware Co., 234 F. 868, 872-75 (7th Cir. 1916); Kaumagraph Co. v. General Trade Mark Corp., 12 F. Supp. 230, 231 (S.D.N.Y. 1935); Frankart, Inc. v. Metal Lamp Corp., 32 F.2d 920, 922 (E.D.N.Y. 1929); Badger v. E.B. Badger & Sons Co., 288 F. 419, 420 (D. Mass. 1923).

466. PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION INSTITUTE ON FEDERAL RULES AT WASHINGTON, D.C. 60 (E. Hammond ed. 1938) [hereinafter WASHINGTON PROCEEDINGS].

terminology did not indicate a different principle; it simply would make no sense to suggest that a defendant's counterclaim was part of the same cause of action as a plaintiff's claim.

In 1938, with the promulgation of the Federal Rules of Civil Procedure, the procedural innovations of the Rules of Equity were extended to actions at law.[467] The Advisory Committee expected the new rules to dovetail with the doctrine, just as the Rules of Equity had.[468] Indeed, the federal courts applied the same jurisdictional rules to analogous claims brought under the new rules.[469]

The new Federal Rules added two procedures, however, that enlarged the size of a suit. First, a defendant could now file a claim solely against another defendant without resorting to a separate cross-bill.[470] Second, a defendant could implead a nonparty, seeking indemnity or contribution.[471] The federal courts had seen such claims before. Defendants in equity had long been able to file claims against co-defendants through a cross-bill.[472] Impleader was allowed in a few States, such as New York,[473] and therefore could be used in actions at law in the federal courts in those States.[474] The federal courts had not considered either of these claims to be part of the original case, however, unless plaintiff was interested in the relief sought by defendants.[475] Once the procedures were expressly allowed by the Federal Rules, though, the federal courts had no trouble finding that the newly-allowed claims were part of the case presented to them for

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467. *See* FED. R. CIV. P. 13(a), (b), 18, 24.

468. The Advisory Committee was very aware that the federal courts are courts of limited jurisdiction. FED. R. CIV. P. 82 specifically provides that the Federal Rules cannot enlarge the jurisdiction of the federal courts. The rules regarding joinder of parties and claims were drafted with this limitation in mind. Dean Charles E. Clark, Reporter to the Advisory Committee, summarized the doctrine in 1938 as follows: "no new jurisdiction is required in matters which *arise out of* the matter in suit by the plaintiff." WASHINGTON PROCEEDINGS, *supra* note 466, at 60 (emphasis added). That same phrase, "arise out of," was used to limit the scope of most of the new Federal Rules dealing with joinder of parties and claims. *See* FED. R. CIV. P. 13(a), (g), 14(a), 20; *cf. id.* 19, 23, 24. Moreover, the *Moore* Court used the term "occurrence" to describe "transaction." *See supra* note 445 and accompanying text. The advisory committee thus used both of the approved terms. *See* FED. R. CIV. P. 13(a), (g), 14(a), 20.

469. *See, e.g.*, Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631 (3d Cir. 1961); Schram v. Lucking, 31 F. Supp. 749 (D. Mich. 1940); Dewey & Almy Chem. Co. v. Johnson, Drake & Piper, Inc., 25 F. Supp. 1021 (E.D.N.Y. 1939).

470. FED. R. CIV. P. 13(g).

471. *Id.* 14.

472. *See supra* notes 276-87 and accompanying text.

473. N.Y. CIV. PROC. L. & R. § 193, subd. 2.

474. *See supra* note 352.

475. *See, e.g.*, Republic Nat'l Bank v. Massachusetts Bonding Co., 68 F.2d 445, 447-48 (5th Cir. 1934); Magnolia Petroleum Co. v. Suits, 40 F.2d 161, 163 (10th Cir. 1930); Sperry v. Keeler Transportation Line, Inc., 28 F.2d 897, 897 (S.D.N.Y. 1928); Wilson v. United American Lines, 21 F.2d 872, 873 (S.D.N.Y. 1927); Ames Realty Co. v. Big Indian Mining Co., 146 F. 166, 177 (C.C.D. Mont. 1906); *see also supra* notes 282-87 and accompanying text.

determination. They reasoned that to hear these claims would, contrary to prior belief, enable them to "do complete justice" and "dispose of the entire controversy."[476]

In one area, an archaic procedural concept hampered the use of the doctrine. "[T]he meaning of 'cause of action' was a subject of serious dispute; the phrase might 'mean one thing for one purpose and something different for another.' "[477] Partially due to this confusion,[478] the Federal Rules of Civil Procedure were adopted. The Rules rejected the rigid "cause of action" concept,[479] and adopted a very flexible approach to the structure of a suit.[480] Unfortunately, the test for the exercise of jurisdiction over a plaintiff's nonfederal claim remained wedded to the old notion of "cause of action."[481] From the time *Hurn* was decided until *Gibbs*, "there ha[d] been some tendency to limit [the] application [of the doctrine to plaintiff's nonfederal claim] to cases in which the state and federal claims [were], as

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476. Arizona Lead Mines, Inc. v. Sullivan Mining Co., 3 F.R.D. 135, 139 (D. Idaho 1943); *accord*, USF&G Co. v. Janich, 3 F.R.D. 16, 19 (S.D. Cal. 1943); Carter Oil Co. v. Wood, 30 F. Supp. 875, 876 (E.D. Ill. 1940); Lewis v. United Air Lines Transport Corp., 29 F. Supp. 757 (D. Conn. 1939); Satink v. Twp. of Holland, 28 F. Supp. 67 (D.N.J. 1939); Tullgren v. Jasper, 27 F. Supp. 413 (D. Md. 1939).

477. *Gibbs*, 383 U.S. at 722-23 (quoting United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1933))(footnotes omitted). For a discussion of the various meanings given to the term, "cause of action," see C. CLARK, *supra* note 138, § 19; J. FRIEDENTHAL, M.K. KANE & A. MILLER, *supra* note 20, § 5.4.

478. "[T]he [Advisory C]ommittee was committed to promoting a simple system of allegation and defense." C. CLARK, *supra* note 138, at 147.

479. 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 2.06c (2d ed. 1987); Blume, *The Scope of a Civil Action*, 42 MICH. L. REV. 257, 261 (1943).

480. "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *Gibbs*, 383 U.S. at 724 (footnote omitted); *accord*, PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION INSTITUTE ON FEDERAL RULES AT CLEVELAND, OHIO 247-48 (W. Dawson ed. 1938); *see, e.g.*, FED. R. CIV. P. 13-14, 17-25.

481. *See supra* notes 36 & 464 and accompanying text. Pendent jurisdiction is not the only area in which the Supreme Court seemed to cling to the old concept of "cause of action." *Compare* American Fire & Casualty v. Finn, 341 U.S. 6 (1951), decided 13 years after the Federal Rules of Civil Procedure were adopted. In that case, "the Court was forced to plunge into the murky waters of what is a cause of action." C. WRIGHT, *supra* note 6, § 39, at 221. At issue in *Finn* was the meaning of the newly-amended 28 U.S.C. § 1441(c) (1948). Section 1441(c) provides:

> Whenever a separate and independent *claim or cause of action*, which would be removable if sued upon alone, is joined with one or more otherwise non-removable *claims or causes of action*, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(emphasis added). The Court deliberately rejected the modern term, "claim," and chose to focus on the more difficult term, "cause of action," saying that it had to determine "the meaning ascribed to 'separate and independent . . . cause of action.' " 341 U.S. at 12 (deletion in original). To this day, removal under § 1441(c) is tied to the old notion, "cause of action." As one scholar noted, "the statute's utility is greatly outweighed by the confusion it has engendered." C. WRIGHT, *supra* note 6, § 39, at 225.

in *Hurn*, 'little more than the equivalent of different epithets to characterize the same group of circumstances.' "[482]

The Supreme Court set this state of affairs to rights in 1966 in *United Mine Workers v. Gibbs*.[483] The plaintiff's nonfederal claim in *Gibbs* might have passed the "cause of action" test.[484] The Supreme Court, however, found "[t]his limited approach . . . unnecessarily grudging."[485] The Court noted that the inquiry is not whether the two claims before a federal court fit into a now-archaic procedural concept. Instead, the inquiry is whether "the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' "[486]

To define the concept "case," the Court looked beyond the confusing term "cause of action" to the policies underlying the doctrine. The *Gibbs* Court found that "[t]he Court in *Hurn* identified what it meant by the term by citation of *Baltimore S.S. Co. v. Phillips*,[487] . . . a case in which 'cause of action' had been used to identify the operative scope of the doctrine of *res judicata*."[488] Thus:

> the citation of *Baltimore S.S. Co.* shows that the Court found that the weighty policies of judicial economy and fairness to parties reflected in *res judicata* doctrine were in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as the federal claims.[489]

The very same policies are reflected in the Rules.[490] Hence, to adopt an approach to the doctrine that was more in line with the modern procedure set out in the Rules would not do violence to the *Hurn* rationale. With these policies in mind, the Court developed the now-famous *Gibbs* "common nucleus of operative fact test."[491]

B. Aldinger *and* Owen

Just ten scant years after the Supreme Court decided *Gibbs*, it released the first of two opinions[492] that unduly narrowed the scope of the doctrine.

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482. *Gibbs*, 383 U.S. at 724.

483. 383 U.S. 715 (1966).

484. *See* United Mine Workers v. Meadow Creek Coal Co., 263 F.2d 52, 59-60 (6th Cir. 1959) (claims for secondary boycott and unlawful conspiracy to injure business are different grounds to support single cause of action). The Supreme Court in *Gibbs* posed the question whether the state claim could be heard by a federal court under the *Hurn* test. The Court never answered the question, however. 383 U.S. at 722.

485. *Id.* at 725.

486. *Id.*

487. 274 U.S. 316 (1927).

488. *Gibbs*, 383 U.S. at 723 (footnote added).

489. *Id.* at 724.

490. *See* FED. R. CIV. P. 1.

491. For a statement of the test, see *supra* note 59 and accompanying text.

492. A third case, Finley v. United States, 109 S. Ct. 2003 (1989), was just decided

In that decade, the lower federal courts were split on two possible applications of the doctrine. One was whether it covered the new hybrid situation called "pendent parties,"[493] and the other was whether a plaintiff could file a nonfederal claim against a third-party defendant.[494] The Supreme Court addressed those questions in two cases, *Aldinger v. Howard*[495] and *Owen Equipment & Erection Co. v. Kroger.*[496]

In *Aldinger* the Court was faced with a pendent defendant. Plaintiff attempted to join a nonfederal claim against one defendant with a federal claim against another defendant. In deciding whether to exercise jurisdiction over the nonfederal claim, the Court purported to rely on the history of the doctrine.[497] The Court made two crucial mistakes, however. First, it accepted the notion that pendent and ancillary jurisdiction were historically discrete doctrines. Second, its reasoning did not reflect the historical basis for the doctrine at all.

The Court did not even address the traditional notion that a federal court will award complete relief to a party who seeks its aid. Instead, the Court noted that " '. . . the efficiency plaintiff seeks so avidly is available without question in the state courts.' "[498] With this mischaracterization of the doctrine's basis, it is no wonder the Court was antipathetic to the doctrine. Rejecting a party's pleas is much easier when the basis for the

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last term. That opinion, however, does not materially change the doctrine as set out in *Aldinger* and *Owen*. It cautions that pendent party jurisdiction will only be exercised if it is clear that Congress intended it to be.

493. For a definition of "pendent parties," see *supra* note 22. Pendent party jurisdiction was accepted by the following circuit courts of appeals: First, Bowers v. Moreno, 520 F.2d 843, 846-48 (1st Cir. 1975); Second, Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971); Third, Jacobson v. Atlantic City Hosp., 392 F.2d 149, 153-55 (3d Cir. 1968); Fourth, Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Fifth, Conn. Gen. Life Ins. Co. v. Craton, 405 F.2d 41, 48 (5th Cir. 1968); Sixth, Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 917, 919-20 (6th Cir. 1970); Eighth, Hatridge v. Aetna Casualty & Sur. Co., 415 F.2d 809, 816-17 (8th Cir. 1969); and Tenth, Niebuhr v. State Farm Mut. Auto. Ins. Co., 486 F.2d 618, 621 (10th Cir. 1973). Pendent party jurisdiction was rejected by the Seventh Circuit, Hampton v. City of Chicago, 484 F.2d 602, 611 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974), and the Ninth Circuit, Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969).

494. *See, e.g.*, Reiser v. District of Columbia, 580 F.2d 647 (D.C. Cir. 1978); Kroger v. Owen Equip. & Erection Co., 558 F.2d 417 (8th Cir. 1977), *rev'd*, 437 U.S. 417 (1978); Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972); Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D. Kan. 1975); Schwab v. Erie Lackawanna R.R., 303 F. Supp. 1398 (W.D. Pa. 1969); Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968); Palumbo v. Western Md. Ry., 271 F. Supp. 361 (D. Md. 1967); *see also* Note, *Rule 14(a) and Ancillary Jurisdiction: Plaintiff's Claim Against Non-Diverse Third-Party Defendant*, 33 WASH. & LEE L. REV. 796 (1976).

495. 427 U.S. 1 (1976).

496. 437 U.S. 365 (1978).

497. *See* 427 U.S. at 6-13.

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

jurisdiction invoked is deemed to be solely for the party's "efficiency." It is a different matter when the rationale is fairness to the parties, minimizing problems for litigants caused by a dual court system.

Having misconstrued the basis for the doctrine, the Court set up a test for pendent party jurisdiction, which limited the relief plaintiff could receive. First, the Court suggested that the *Gibbs* "common nucleus of operative fact" test applied to pendent parties' claims as well.[499] That test was only the first hurdle, however. Second, the Court mistakenly sought a specific statutory basis for the exercise of pendent party jurisdiction. The inquiry was as follows: "whether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner's principal claim against the [federal defendant] rests, Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought."[500] As Professors Richard Matasar and Richard Freer have clearly demonstrated, this requirement is unnecessary.[501] It is true that the lower federal courts cannot act without a statutory grant of jurisdiction.[502] Once that grant is made for a certain class of cases, however, all the questions in such a case are included in the court's jurisdiction.[503] If Congress gives the federal courts jurisdiction over a "case,"[504] the courts may award complete relief between the parties.

The Supreme Court's new-found antipathy to plaintiffs led it to restrict the application of the doctrine further in *Owen Equipment & Erection Co. v. Kroger*.[505] In that case, the Court refused to exercise "ancillary jurisdiction" over a plaintiff's nonfederal claim against a third-party defendant. The Court opined that:

> the nonfederal claim here was asserted by the plaintiff, who voluntarily chose to bring suit upon a state-law claim in a federal court. . . . A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations.[506]

Instead, the Court found that "claims by a defending party haled into court against his will"[507] were favored. The Court, therefore, held that,

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499. *See id.* at 9, 13, 14-16; *see also* Finley v. United States, 109 S. Ct. 2003, 2006-07 (1989).

500. 427 U.S. at 16 (emphasis in original). The Court requires that Congress be clear in addressing itself to a pendent party. *See Finley*, 109 S. Ct. 2003 (1989).

501. *See* Freer, *supra* note 1; Matasar, *"One Constitutional Case," supra* note 1. Professors Freer and Matasar have thoroughly analyzed this fallacy in the *Aldinger-Owen* requirements. Their arguments will not be restated here.

502. C. WRIGHT, *supra* note 6, at 22.

503. *See supra* notes 261-62 and accompanying text.

504. One might even argue that Congress cannot give the federal courts jurisdiction over less than the entire case. *See supra* note 426.

505. 437 U.S. 365 (1978).

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

507. *Id.*

in addition to the statutory analysis required by *Aldinger*, a federal court faced with a nonfederal, nonpendent claim had to examine the posture of the parties to the claim.[508]

With this restriction, the Court turned the traditional notion of jurisdiction on its head. The posture of the parties to the nonfederal claim had not mattered.[509] Before *Owen*, plaintiffs who properly sought the court's aid had received complete relief from the federal courts.[510] If there had been any limitation on the posture of the parties, it was to limit the rights of defending parties. While defendants were able to assert their claims against the plaintiff, the defendants had initially been limited in seeking relief against co-defendants and third parties.[511] Thus, the party who had originally been, at least arguably, disfavored has become the favored party. At the same time, the injured party[512] seeking the court's aid is now denied complete relief.

C. A Suggested Analysis

First, we must recognize the basic jurisdictional doctrine of complete relief. We must reject as inaccurate and confusing the notion that the doctrine is divided into separate categories. All nonfederal claims asserted in federal cases should be subject to a uniform inquiry: does the nonfederal claim allow the federal court to award complete relief?

Second, we should recognize that the Federal Rules of Civil Procedure were drafted with this jurisdictional doctrine in mind. All claims that arise out of the transaction or occurrence of a plaintiff's federal claim would have traditionally been considered part of the same case. They should be deemed so today. Thus, for example, a compulsory counterclaim or intervention as of right are part of the initial federal case, and no independent basis for jurisdiction is necessary.

Third, the use of the synonymous "common nucleus of operative fact" language only confuses matters. First, it reinforces the mistaken notion that plaintiffs' nonfederal claims are different from other nonfederal claims. Second, use of the *Gibbs* language ignores the careful drafting of the Rules to reflect the doctrine of complete relief. Because plaintiffs' claims were treated no differently than other claims, we should simply adopt the same dividing line: plaintiffs' nonfederal claims that arise out of the same transaction or occurrence as their federal claims are part of the same federal case and can be heard in federal court.

The *Owen* Court feared that if that were the rule, a crafty plaintiff could manipulate a federal court's jurisdiction "by the simple expedient

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508. *Id.* at 373. For the exact statement of the test for "ancillary jurisdiction," see *supra* note 62 and accompanying text.

509. *See supra* notes 295, 300-01 & 304-05 and accompanying text.

510. *See supra* notes 288-301 & 304-05 and accompanying text.

511. *See supra* notes 282-87 and accompanying text.

512. Plaintiff's allegations are deemed to be true at this stage of the proceedings.

of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."[513] Yet the federal courts have always had the inherent power to protect their jurisdiction from such manipulation.[514] If the court fears plaintiff is acting in such a way, it need not hear the nonfederal claim. But this fear should not cause us to disfavor the time-honored rule that a plaintiff may choose his or her defendant. If plaintiff's claim against the chosen defendant is cognizable in federal court, the court should endeavor to give that plaintiff complete relief. If others are subsequently made parties to the suit, absent manipulation or collusion by plaintiff, the court should entertain plaintiff's nonfederal claims against them, if necessary to award complete relief.

Under this traditional doctrine, pendent plaintiffs would not be allowed. Most often, whether one plaintiff gets relief does not make the relief given to another plaintiff any more complete. Thus, while the federal claimant could sue in federal court, the nonfederal plaintiff could not. If the court could not grant relief to either the federal or nonfederal plaintiff unless they joined together, the federal court would not hear either claimant.[515] Thus, in neither situation could the nonfederal plaintiff sue in federal court.

The same result would be true of pendent defendants, with at least one exception. When plaintiff's claim against the federal defendant can only be heard in federal court, Congress has exacerbated the problems of a dual court system. Plaintiff with two claims arising out of the same transaction or occurrence must split them between two different courts unless the federal court will hear the claim against the nonfederal defendant. The federal courts should remember that the basic policy behind the doctrine of complete relief is fairness to claimants who are potentially harmed by our dual court system. Therefore, in deserving circumstances, the federal courts should allow jurisdiction over claims against pendent defendants.

VI. CONCLUSION

The lessons of history are startling. First, there is no historical distinction between "pendent" and "ancillary" jurisdiction. There is but one jurisdictional doctrine: a court with jurisdiction over a case may answer every question in that case, including nonfederal claims. This doctrine was devised to reduce the problems of a system with dual jurisdiction. Conflicts between courts were reduced. More important, the rule was fair to litigants, who after all are the reason the courts exist.

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513. 437 U.S. at 374.

514. *See id.* at 383 (White, J., dissenting); Barney v. Baltimore City, 73 U.S. (6 Wall.) 280 (1868); Maxfield's Lessee v. Levy, 4 U.S. (4 Dall.) 330, 334 (C.C.D. Pa. 1797) (Iredell, Cir. J.); 28 U.S.C. § 1359 (1982).

515. *See supra* notes 306-10 and accompanying text.

The rules set out in the Supreme Court's most recent opinions ignore this history. Rather than granting parties complete relief, they require the federal courts to shut the door on parties, usually plaintiffs, granting them only partial relief. True, the federal courts are courts of limited jurisdiction. But the inquiry should not be the posture of the parties or the implications of the statutory grant of jurisdiction. Rather the court should ask whether the nonfederal claim will enable it to give complete relief to the parties properly before the court on a federal claim. To follow the Court's recent departure from this principle "undercuts the very purposes for which courts were created—that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties."[516]

516. Link v. Wabash R.R., 370 U.S. 626, 648 (1962) (Black, J., dissenting).

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