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Pendent Parties

David P. Currie†

The lower federal courts remain divided over whether pendent jurisdiction in federal question cases extends to nonfederal claims against additional defendants. Although twice recently the Supreme Court has gone to great lengths to avoid the question, an intervening decision on a related issue had effectively resolved the problem. The result indicated by that decision, however, is difficult to reconcile with the Court's long-standing construction of the same statutory language in three other contexts.

I. THE STATUTORY LANGUAGE AND PENDENT PARTIES

The foundation stone of modern pendent jurisdiction doctrine is *United Mine Workers v. Gibbs*.¹ In a case arising under federal law, a federal district court has "power" to entertain a claim between the same parties based on state law, provided that the state and federal claims are closely enough related that, "without regard to their federal or state character," the plaintiff "would ordinarily be expected to try them all in one judicial proceeding" ² The policy underlying *Gibbs* is based on "judicial economy, convenience and fairness to litigants"; specifically, it looks to the undesirability of requiring the plaintiff either to pursue two overlapping lawsuits or to forgo his federal forum.³

† Harry N. Wyatt Professor of Law, University of Chicago.

¹ 383 U.S. 715 (1966).

² *Id.* at 725.

³ *Id.* at 726.

The constitutionality of pendent jurisdiction *Gibbs* explicitly based upon the conclusion that "Cases . . . arising under . . . the Laws of the United States" included state law claims closely enough related to the federal:

Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . .," U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case."⁴

Although *Gibbs* did not similarly elaborate the statutory basis of pendent jurisdiction, the sole conceivable rationale is the same: a "civil action wherein the matter in controversy . . . arises under the . . . laws . . . of the United States,"⁵ over which 28 U.S.C. § 1331 gives jurisdiction,⁶ embraces state law claims sufficiently related to the federal.⁷

Most courts of appeals that have considered the issue have had no difficulty extending *Gibbs* to cases in which an additional party not subject to the federal claim is brought in to answer a state one.⁸ As Judge Friendly has written, "Mr. Justice Brennan's language [in *Gibbs*] and the common sense considerations underlying it seem broad enough to cover that problem also";⁹ when "the same facts are . . . controlling with respect to both the federal and state claims . . . the desirability of having both claims tried in the same forum is self-evident."¹⁰ The Ninth Circuit, however, has consistently disagreed,¹¹ relying without elaboration on its earlier conclusory state-

⁴ *Id.* at 725 (footnote omitted).

⁵ 28 U.S.C. § 1331(a) (1970).

⁶ "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 . . . and arises under the Constitution, laws, or treaties of the United States." *Id.*

⁷ While the Court in *Owen Equip. & Erection Co. v. Kroger*, 98 S. Ct. 2396, 2401 (1978) described *Gibbs* as having "delineated the constitutional limits of federal judicial power" and emphasized the need also to determine whether there were statutory limits on pendent or ancillary jurisdiction, it did not suggest any alternative statutory basis for *Gibbs* itself.

⁸ *See, e.g.*, *Bowers v. Moreno*, 520 F.2d 843, 846-48 (1st Cir. 1975); *Florida E. Coast Ry. v. United States*, 519 F.2d 1184, 1193-96 (5th Cir. 1975); *Curtis v. Everette*, 489 F.2d 516 (3d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Schulman v. Huck Finn, Inc.*, 472 F.2d 864, 866-67 (8th Cir. 1973); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809-11 (2d Cir. 1971).

⁹ *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627, 629 (2d Cir. 1971).

¹⁰ *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 811 (2d Cir. 1971).

¹¹ *E.g.*, *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), *cert. dismissed*, 435 U.S. 982 (1978); *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972), *aff'd in part, rev'd in part, sub nom. Moor v. County of Alameda*, 411 U.S. 693 (1973).

ment, in the context of the jurisdictional amount, that “[j]oinder of claims, not joinder of parties, is the object of the doctrine.”¹²

The Supreme Court, reviewing two of these Ninth Circuit decisions, has managed to leave the question open.¹³ In both cases the plaintiff had joined with his federal claim against a state officer under section 1983¹⁴ a vicarious state law claim against the officer’s local government employer. In the first, the Court found that, regardless of the question of power, the district judge had acted within his discretion in refusing to entertain the state claim because of “the unsettled nature of state law and the likelihood of jury confusion.”¹⁵ In the second, the Court held that Congress’s decision not to provide a remedy against local governments in section 1983 itself¹⁶ implicitly precluded pendent jurisdiction.¹⁷

If this were the whole story, there would be little worth discussing; the policy of judicial economy either does or does not justify construing the statutory “civil action” and the constitutional “Case” to include pendent parties as well as pendent claims.¹⁸ After *Gibbs I* should have thought it did.

II. ZAHN V. INTERNATIONAL PAPER CO.

*Zahn v. International Paper Co.*¹⁹ was a class action brought by four plaintiffs for pollution damage to themselves and to others similarly situated. Federal jurisdiction was based upon diversity of citizenship; each of the named plaintiffs asserted claims individually exceeding the statutory minimum of \$10,000.²⁰ The Supreme

¹² *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969).

¹³ *Aldinger v. Howard*, 427 U.S. 1 (1977), *aff’g* 513 F.2d 1257 (9th Cir. 1975); *Moor v. County of Alameda*, 411 U.S. 693 (1973), *aff’g in part, rev’g in part, Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972).

¹⁴ 42 U.S.C. § 1983 (1970).

¹⁵ *Moor v. County of Alameda*, 411 U.S. 693, 716 (1973).

¹⁶ The overruling of this premise in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), which held a local government body a “person” within section 1983, does not affect the present analysis.

¹⁷ *Aldinger v. Howard*, 427 U.S. 1, 17 (1976). I have criticized this decision in *The Supreme Court and Federal Jurisdiction: 1975 Term*, 1976 Sup. Ct. Rev. 183, 197.

¹⁸ A holding that a “civil action” under § 1331 does not include related claims against additional parties ought to mean that the federally cognizable part of the case is itself a “civil action of which the district courts have original jurisdiction,” 28 U.S.C. § 1441(a) (1970), so as to permit removal of that part alone from a state court without regard to the narrow construction of § 1441(c)’s provision for removal of a “separate and independent claim” in *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 13-14 (1951).

¹⁹ 414 U.S. 291 (1973).

²⁰ “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000 . . . and is between . . . citizens of different States . . .” 28 U.S.C. § 1332(a) (1970).

Court affirmed a refusal to hear any claims of class members that did not independently satisfy the \$10,000 requirement: since the claims were not joint, the Court held precedent "requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims."²¹

The precedent chiefly relied on was *Snyder v. Harris*,²² which had refused to aggregate the amounts claimed by class members lacking joint interests in order to determine whether there was any federal jurisdiction at all. In policy terms, *Snyder* was no precedent whatever, for in *Snyder* no single claim satisfied the amount requirement. It is one thing to hold one cannot independently force a flock of petty controversies upon a federal court by combining them in a single complaint; it is quite another to remit the holders of petty claims to a duplicative state court suit when there is a substantial federal suit pending.

In statutory terms, *Zahn's* reliance upon *Snyder* is more troublesome. *Snyder* held that the claim of each party representing a separate interest is a separate "matter in controversy," which under section 1332 must exceed \$10,000.²³ It might be thought to follow that the "civil action" over which section 1332 gives jurisdiction similarly includes only the claim of the individual plaintiff whose claim exceeds \$10,000.²⁴ But the statutory use of the singular—"the matter in controversy"—seems too weak a reed to preclude the possibility that one "civil action" (or one article III "Case" or "Controversy") may contain more than one "matter in controversy." For example, I would not find the "matter in controversy" in a simple two-party action sufficiently great when related federal and state claims of \$6000 each are joined. Under *Gibbs* there is a single "civil action," but it is the matter arising under federal law that must exceed \$10,000. Similarly, while it was plausible to hold in *Snyder* that the claim of each separate class member constituted a distinct "matter in controversy" in order to avoid unnecessary decision of petty claims, it would have made sense in *Zahn* to hold that these several "matter[s] in controversy" constituted a single "civil action" in order to avoid multiple litigation.²⁵

²¹ 414 U.S. at 300.

²² 394 U.S. 332 (1969).

²³ 28 U.S.C. § 1332 (1970).

²⁴ See note 20 *supra*.

²⁵ *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), the much older precedent truly analogous to *Zahn* that was invoked both in that opinion and in *Snyder*, surely should have been considered fair game for reconsideration in light of the modern philosophy expressed so forcefully in *Gibbs*.

Zahn itself, however, decided before the Supreme Court last went through such contortions to avoid the pendent party issue, implicitly resolves it. The Court in *Zahn* did not consciously give a narrow construction to the term "civil action"; it thought it was dealing with a "construction of the 'matter in controversy' requirement of § 1332."²⁶ But it did not hold (and could not very well have held) that the matter in controversy was less than \$10,000, for it acknowledged there was jurisdiction over the claims of the named plaintiffs.²⁷ Jurisdiction, once established as it was in *Zahn*, extends under *Gibbs* to the entire "civil action"; in holding there was no power to entertain the claims of absent class members, the Court must have held they were not part of the same "civil action." It follows that a nonfederal claim against an additional defendant is not a part of the "civil action" over which a federal claim gives jurisdiction unless the defendants share (in *Snyder's* words) a "common and undivided interest."²⁸

The factual differences between *Zahn* and the hypothesized case are not significant. *Snyder*, on which *Zahn* was based, emphatically rejected any distinction between class actions and voluntary joinder of parties under rule 20 of the Federal Rules of Civil Procedure: "[I]t was in joinder cases . . . that the doctrine that distinct claims could not be aggregated was originally enunciated."²⁹ I also see no reason to doubt *Zahn* would apply to multiple defendants as well as to multiple plaintiffs,³⁰ or to cases in which the original claim is based on a federal question rather than diversity, for in such cases the statutory language is identical.³¹ That the jurisdictional defect for the pendent party in the latter case is lack of a federal question rather than insufficient amount should not matter: if claims respecting nonjoint parties are not part of the "civil action," they may not be entertained unless they independently satisfy *all* jurisdictional requirements. Moreover, in policy terms the cases cannot

²⁶ 414 U.S. at 301.

²⁷ *Id.* at 292.

²⁸ *Snyder v. Harris*, 394 U.S. 332, 335 (1969).

²⁹ *Id.* at 337.

³⁰ Cited as an example of the "unbroken line" of precedents in *Zahn*, 414 U.S. at 294 n.3, was *Walter v. Northeastern R.R.*, 147 U.S. 370 (1893), stating the rule limiting aggregation by plaintiffs and adding "when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff." *Id.* at 373.

³¹ See notes 6 & 18 *supra*; *Zahn*, 414 U.S. at 302 n.11 (dictum) ("Because a class action invoking general federal-question jurisdiction under 28 U.S.C. § 1331 would be subject to the same jurisdictional-amount rules with respect to plaintiffs having separate and distinct claims, the result here would be the same even if a cause of action under federal law could be stated").

be distinguished: the desirability of avoiding multiple proceedings is unaffected by the nature of the jurisdictional defect.³²

III. COMPLETE DIVERSITY

A. The Matter in Controversy

"[D]iversity jurisdiction," the Court said only last term, "does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff."³³ Derived from the early and conclusory opinion in *Strawbridge v. Curtiss*,³⁴ this rule today is based upon construction of section 1332's requirement that "the matter in controversy" be "between citizens of different States." The definition of the same term "matter in controversy" was in issue in *Snyder* and also, according to the Court, in *Zahn*.³⁵

Snyder holds that the claims of multiple parties without joint interests do not constitute a single "matter in controversy." *Strawbridge* itself was consistent with this interpretation, for it applied the complete diversity rule only to a case in which there were joint interests. Indeed, in the early case of *Cameron v. M' Roberts*,³⁶ the Supreme Court applied *Strawbridge* in a manner wholly parallel to the interpretation of "matter in controversy" in *Snyder*: "If a distinct interest vested in [the diverse defendant] . . . so that substantial justice . . . could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone."³⁷ Both before and after that decision, however, the Court viewed the *Strawbridge* principle in an entirely different light. In *Corporation of New Orleans v. Winter*,³⁸ where the plain-

³² If there were a distinction it would cut the other way: the amount requirement is merely statutory, the absence of a federal question or diversity is of constitutional significance. Thus the policy of judicial economy would be a more compelling argument for extending jurisdiction in *Zahn* than in the unresolved pendent party case.

When federal jurisdiction of the federal claim is exclusive, as under 28 U.S.C. §§ 1338 (patents and copyrights) and 1346(b) (tort claims against United States) (1970), "the additional argument that *only* in a federal court may all of the claims be tried together", *Aldinger v. Howard*, 427 U.S. 1, 18 (1976) (dictum) (footnote omitted), might support a broader construction of the same term "civil action." The Ninth Circuit, however, has given the narrow construction I attribute to *Zahn* to the constitutional term "Case" and refused pendent-party jurisdiction even in a § 1346 case. *Ayala v. United States*, 550 F.2d 1196, 1199-1200 (9th Cir. 1977), *cert. dismissed*, 98 S. Ct. 1635 (1978).

³³ *Owen Equip. & Erection Co. v. Kroger*, 98 S. Ct. 2396, 2403 (1978).

³⁴ 7 U.S. (3 Cranch) 267 (1806).

³⁵ *Zahn v. International Paper Co.*, 414 U.S. 291, 292-93 (1973); *Snyder v. Harris*, 394 U.S. 332, 336 (1969).

³⁶ 16 U.S. (3 Wheat.) 591 (1818).

³⁷ *Id.* at 593-94.

³⁸ 14 U.S. (1 Wheat.) 91 (1816).

tiffs were heirs seeking to recover a parcel of land, the Court thought it unnecessary to decide whether their interests were joint or several: “[H]aving elected to sue jointly, the court is incapable of distinguishing their case . . . from one in which they were compelled to unite.”³⁹ In *Peninsular Iron Co. v. Stone*⁴⁰ the Court expressly extended *Strawbridge* to a case in which the interests were admittedly not joint:

In the present case the rights of each and all of the parties depend on the alleged contract with Stone, and although, as between themselves, they have separate and distinct interests, [t]here is but a single cause of action, and while all the complainants need not have joined in enforcing it, they have done so, and this, under the rule in *New Orleans v. Winter*, controls the jurisdiction.⁴¹

For present purposes, the significance of the decisions extending *Strawbridge* to cases of nonjoint interests lies not in the fact that the Court refused to entertain the nondiverse claims. To dismiss those and to hear the claims between the diverse parties, as suggested in *Cameron*, would have paved the way for *Snyder's* holding that each of the nonjoint claims represents a separate “matter in controversy.” The significant fact is that in both *Winter* and *Peninsular Iron* the Court ordered or approved dismissal of the diverse claims as well.⁴² The presence of a nondiverse party destroyed jurisdiction over the entire “suit”; it was not a suit “between citizens of different States.” To follow these decisions today, as the Supreme Court quotation beginning this section suggests we should, would be, contrary to *Snyder*, to view the claims of multiple, non-joint parties as a single “matter in controversy.”⁴³ For if, as *Snyder* held, such a case contains two “matter[s] in controversy,” the Court should not dismiss them both; it should retain jurisdiction over the diverse one.⁴⁴

³⁹ *Id.* at 95.

⁴⁰ 121 U.S. 631 (1887).

⁴¹ *Id.* at 633; *accord*, *Hooe v. Jamieson*, 166 U.S. 395, 397-98 (1897).

⁴² *Peninsular Iron Co. v. Stone*, 121 U.S. 631, 633 (1887); *Corporation of New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91, 94-95 (1816).

⁴³ A statement in a later case suggests the matter remained in doubt. In *Florida Cent. & Peninsular R.R. v. Bell*, 176 U.S. 321 (1900), an action by eight plaintiffs, five of whom had not alleged diversity of citizenship, “the jurisdiction of the Circuit Court would have failed, at least as to five of the plaintiffs, if that jurisdiction depended solely on the citizenship of the parties.” *Id.* at 325 (emphasis added).

⁴⁴ An example may help. If a Pennsylvania plaintiff sues Pennsylvania and Delaware defendants for \$6000 each, it is inconsistent to hold that the “matter in controversy” is only

A number of lower court decisions have indeed reached the latter result by allowing the nondiverse party to be dismissed.⁴⁵ But it is not the result on which my argument depends; it is the theory. Some of the decisions allowing dismissal of the nondiverse party alone explicitly embrace the theory that there is no jurisdiction over any part of the case until dismissal of the improper party: “[I]f jurisdiction based on diversity of citizenship is defeated by the existence of parties who are not indispensable in an action, jurisdiction, *although not existing at the time of filing*, can be acquired by dismissing the action as to such parties”⁴⁶ This is not the sole approach.⁴⁷ It is, however, the approach most consistent with Supreme Court precedents, and it is therefore correct until the Court changes its position.

Separately analyzed, *Strawbridge* and *Snyder* can both be made to appear reasonably persuasive in terms of policy. The argument that the presence of adverse cocitizens may obviate the fear of prejudice, while of very questionable force when interests are not joint,⁴⁸ suggests a broad construction of “matter in controversy” in *Strawbridge*; the policy of avoiding collections of petty controversies suggests a narrow construction in *Snyder*. But we are not construing the same words in two separate statutes. Section 1332 uses the term once, modified by two separate clauses: there is jurisdiction “where the matter in controversy exceeds . . . \$10,000, . . . and is between . . . citizens of different States.”

History may help. The 1789 statute did not utilize the same term to define both amount and diversity. There was jurisdiction “where the matter in dispute” exceeded \$500 and “the suit” was diverse.⁴⁹ I know of no reason to think the revisers in streamlining

\$6000 (*Snyder*) and is incompletely diverse (*Strawbridge*). If there is one nondiverse “matter,” as *Strawbridge* tells us, its amount is \$12,000; if there are two “matters,” as held in *Snyder*, one of them is diverse.

⁴⁵ See, e.g., *Ray v. Bird & Son & Asset Realization Co.*, 519 F.2d 1081 (5th Cir. 1975) (per curiam); *Kerr v. Compagnie de Ultramar*, 250 F.2d 860 (2d Cir. 1958); *Haase v. Mallenrodt, Inc.*, 415 F. Supp. 889, 890 n.1 (S.D.N.Y. 1976). But cf. *Universal Underwriters Ins. Co. v. Wagner*, 367 F.2d 866, 870 n.5 (8th Cir. 1966) (refusing on appeal to preserve jurisdiction by allowing dismissal of parties who were not indispensable).

⁴⁶ *Reed v. Robilio*, 376 F.2d 392, 394 (6th Cir. 1967) (emphasis added) (quoting *Grant County Deposit Bank v. McCampbell*, 194 F.2d 469, 472 (6th Cir. 1952)). See also C. WRIGHT, HANDBOOK OF THE LAW OF THE FEDERAL COURTS § 69, at 328 (3d ed. 1976): “If the defect is curable, as where diversity is destroyed by the presence of a party who is not indispensable, it is possible to cure the defect by dropping the nondiverse party.”

⁴⁷ See, e.g., *Anderson v. Moorser*, 372 F.2d 747, 750 (5th Cir. 1967), which speaks as though there is jurisdiction from the outset over the diverse claim.

⁴⁸ See *Currie, The Federal Courts and the American Law Institute* (pt. I), 36 U. CHI. L. REV. 1, 18-19 (1968).

⁴⁹ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73.

the language meant to make any change in established doctrine. Perhaps history and statutory purpose together are sufficient to overcome the insistent conclusion from the statute itself that the "matter" that must exceed \$10,000 and the "matter" that must be diverse are one and the same.

B. Civil Action

The rule of complete diversity and the doctrine limiting aggregation of multiparty claims are both of such long standing that news of their possible statutory incompatibility is certain to fall on deaf ears. In such circumstances *stare decisis* is at its most persuasive. I mention the ramifications of *Strawbridge* only because they are relevant to the professedly still unresolved question of pendent party jurisdiction.

I have argued that *Zahn*, by implicitly holding a "civil action" does not include pendent parties, effectively resolves that question. The extended *Strawbridge* rule, however, implicitly resolves it the other way. The complete diversity rule, as I have suggested, presupposes that the "matter in controversy" in a "civil action" embraces claims involving multiple parties with nonjoint interests; if the "matter in controversy" is that broad, so is the "civil action" that contains it.⁵⁰ History cannot bail us out of this one. The inconsistency is even more obvious under the 1789 statute, which used the same word to express both ideas: there was jurisdiction over the "suit" when the "suit" was diverse.⁵¹ The clear implication of the complete diversity rule is that a single "civil action" includes claims involving multiple, nonjoint parties.⁵² Thus, not only does *Zahn* fail to follow from *Snyder* as a matter of either statutory language or policy—*Zahn* is inconsistent with *Strawbridge*.

Stare decisis, no doubt, will nevertheless preserve both doctrines; and if this were the whole picture, one could safely argue that the pendent party case in which the jurisdictional defect is lack of a federal question is more closely analogous, in significant

⁵⁰ Section 1331 makes this clear by referring to "civil actions *wherein* the matter in controversy exceeds . . . \$10,000 . . ." 28 U.S.C. § 1331 (1970) (emphasis added). The substitution of "where" for "wherein" in § 1332 can scarcely be more than an accident. See notes 6 & 20 *supra*.

⁵¹ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73.

⁵² This implication, moreover, is made explicit by § 1332(a)(3), which gives jurisdiction over "civil actions where the matter in controversy . . . is between . . . citizens of different states and in which citizens or subjects of a foreign state are additional parties . . ." Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 3, 90 Stat. 2891 (1976) (to be codified in 28 U.S.C. § 1332(a)(3)).

respects, to *Zahn* than to *Strawbridge*. But I have not yet mentioned the wonderful case of *Supreme Tribe of Ben-Hur v. Cauble*.⁵³

IV. BEN-HUR

In a class action, the Court held in *Ben-Hur*, diversity will be determined by reference to the citizenship of the original named parties alone; that other members of the plaintiff class may be cocitizens of a defendant is immaterial.⁵⁴ To begin with, it is not easy to reconcile this decision with *Strawbridge* unless one concludes that absent members, like trust beneficiaries,⁵⁵ are not to be considered parties. Since they are invisible, the existence of absent members will not influence a biased state tribunal one way or the other, even though they will be affected by the outcome.⁵⁶ This theory, however, appears to be inconsistent with the treatment of absent class members in *Zahn* and in *Snyder*; if the named plaintiffs in those cases were effectively trustees for absent class members they should have been allowed, as individual plaintiffs traditionally have been, to aggregate or to append their several claims.⁵⁷

Indeed, the *Ben-Hur* opinion appears to rely not on the trustee analogy but on the doctrine that the court had jurisdiction, "ancillary" to that over the diverse named plaintiffs, to determine the rights of nondiverse class members. Quoting extensively from *Stewart v. Dunham*,⁵⁸ which had allowed "ancillary" intervention by a nondiverse party, the Court said the principle of *Stewart* "controls this case."⁵⁹ "The intervention of the Indiana citizens in this suit would not have defeated the jurisdiction already acquired," and therefore, without having intervened, they were bound by the

⁵³ 255 U.S. 356 (1921).

⁵⁴ *Id.* at 366.

⁵⁵ *Bonafee v. Williams*, 44 U.S. (3 How.) 574, 577 (1845) ("A person having the legal right may sue . . . in the federal courts without reference to the citizenship of those who may have the equitable interest.").

⁵⁶ See C. WRIGHT, *supra* note 46, § 31. at 117 n.38 (explaining *Ben-Hur* on this basis); Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U. CHI. L. REV. 384, 406, 409 (1978).

⁵⁷ See *Snyder*, 394 U.S. at 335 ("Aggregation has been permitted . . . in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant."). Indeed it may not be necessary in such a case even to speak of aggregation; a trustee has but one claim though he may have to distribute the proceeds among several beneficiaries. Cf. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 346 (1977) (refusing to discuss aggregation: "Obviously, if the Commission has standing to litigate the claims of its constituents, it may also rely on them to meet the requisite amount in controversy.").

⁵⁸ 115 U.S. 61 (1885).

⁵⁹ 255 U.S. at 365.

decree.⁶⁰ “If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.”⁶¹

If ancillary jurisdiction explains *Ben-Hur*, that case remains difficult to square with *Strawbridge*, but only on the question (not relevant to the scope of a “suit” or “civil action”) whether “between citizens of different States” requires complete rather than minimal diversity.⁶² With respect to the breadth of a “civil action” *Strawbridge* and *Ben-Hur* seem to agree: the “action” includes claims of multiple parties. For this reason it was unfortunate for the Court in *Zahn*, in the face of a dissent invoking *Ben-Hur*, not to address the significance of that decision.

One fact I have omitted to state could serve to reconcile *Ben-Hur* with *Zahn*. The complaint in *Ben-Hur*, which the Supreme Court did not disparage, had asserted that the plaintiffs all had “a common but indivisible interest” in the trust funds at issue.⁶³ *Zahn* therefore could be taken to limit the ancillary jurisdiction asserted under *Ben-Hur* to members whose interests are joint.⁶⁴

On the other hand, nothing in the reasoning of *Ben-Hur* seems to limit that decision to joint interests. Moreover, the suggested distinction makes no sense in terms of the policy evidently underlying *Strawbridge*. It is when interests are several that an out-of-state party is most likely to need the jurisdiction provided by *Ben-Hur* to protect him from bias in the local court; when interests are joint, a biased tribunal may be unable to injure the outsider without harming a local coparty as well. It is therefore entirely possible the Court would apply *Ben-Hur* to nonjoint class actions notwithstanding *Zahn*. Such an application would cast further doubt on the outcome of my unresolved pendent party case, for, as so applied, *Ben-Hur*, like *Strawbridge*, appears to run counter to the narrow reading of “civil action” that emerges from *Zahn*. Indeed, since *Ben-Hur* appears to involve pendent parties, it represents an even stronger challenge than does *Strawbridge* to *Zahn*’s implied disposition of the pendent party issue. In one respect *Ben-Hur* is even closer than *Zahn* to the unresolved pendent party case, for *Ben-Hur* shares with the unresolved case the principal factor arguably distinguishing that case from *Zahn*: the jurisdictional defect was not insufficient amount, but lack of either a federal question or diversity.

⁶⁰ *Id.* at 366.

⁶¹ *Id.* at 367.

⁶² *Id.* at 361.

⁶³ *Id.*

⁶⁴ As it has been held to mean in the interpleader statute, 28 U.S.C. § 1335 (1970). See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

I would expect the Court, if confronted in a pendent party case with the competing analogies of *Zahn* and *Ben-Hur*, to choose the more recent *Zahn* as the more compelling. Even if *Ben-Hur* is not distinguished on the ground that it involved joint interests, its upholding of ancillary jurisdiction was clearly limited,⁶⁵ as *Zahn*'s was not,⁶⁶ to class actions: in other cases, diversity must be complete. Nevertheless, the Court's preoccupation with the "matter in controversy" language in *Zahn* makes prediction uncertain.

V. LATER PARTIES

Another line of decisions is relevant to our problem. In avoiding the broad pendent party issue in *Moor v. County of Alameda*,⁶⁷ the Supreme Court referred to the "substantial analogues in the joinder of new parties under the well-established doctrine of ancillary jurisdiction in the context of compulsory counterclaims under Fed. Rules Civ. Proc. 13(a) and 13(h), and in the context of third-party claims under Fed. Rule Civ. Proc. 14(a)."⁶⁸

The source of ancillary jurisdiction over later parties is *Freeman v. Howe*,⁶⁹ which declared that a federal court in which property had been attached could entertain other claims to the same property without an independent jurisdictional basis. Since federal control of the property was exclusive, the claimants would otherwise have been without remedy.⁷⁰ Later decisions extended the principle to allow intervention as of right by nondiverse parties who were not indispensable, although the only apparent consequence was to avoid multiple litigation.⁷¹ Lower courts, as *Moor* indicates, have utilized the same reasoning in sustaining jurisdiction over claims brought under rules 13 and 14 that were not independently cognizable.⁷²

The statutory basis of all these decisions can only be a broad construction of the term "civil action." This construction, moreover, derives support from the Supreme Court's holding, in *Shamrock Oil & Gas Corp. v. Sheets*,⁷³ that a state-court plaintiff

⁶⁵ 255 U.S. at 366-67.

⁶⁶ 414 U.S. at 299-301.

⁶⁷ 411 U.S. 693 (1973).

⁶⁸ *Id.* at 714-15 (footnotes omitted).

⁶⁹ 65 U.S. (24 How.) 450 (1860).

⁷⁰ *Id.* at 460.

⁷¹ *E.g.*, *Wichita R.R. & Light Co. v. Public Utils. Comm'n*, 260 U.S. 48 (1922); *Stewart v. Dunham*, 115 U.S. 61 (1885).

⁷² *E.g.*, *Huggins v. Graves*, 337 F.2d 486 (6th Cir. 1964).

⁷³ 313 U.S. 100 (1941).

against whom a counterclaim is filed cannot remove to federal court because he is not, as the statute requires, a "defendant";⁷⁴ the necessary implication is that the counterclaim is not a separate "civil action" within the meaning of section 1441, which refers back to the same term in sections 1331 and 1332.

One possible means of reconciling these cases with *Zahn* would be to hold that a "civil action" includes additional parties only if they are added after the original complaint. This interpretation is supported by the Court's reliance in an intervention case on the maxim that jurisdiction once acquired is not defeated by later events.⁷⁵ Although the maxim applies only when—as in the addition of a nondiverse party to a diversity case⁷⁶—the new claim jeopardizes jurisdiction over the original action, the broad construction of "civil action" necessary to take care of the redetermination problem would extend as well to post-complaint ancillary claims with federal question and amount defects, without requiring a broad interpretation with respect to the original complaint. Redetermination, however, can be avoided simply by refusing ancillary jurisdiction of the new claim; the decision to accept it seems to reflect the judgment that judicial efficiency requires construing "civil action" broadly enough to allow claims respecting additional parties to be tried along with a claim properly in federal court. Thus the dictum in *Moor* apparently endorsing decisions allowing ancillary jurisdiction over parties added after the complaint is filed is arguably inconsistent with *Zahn* and suggests that jurisdiction may yet be upheld in the case of the original pendent party where the jurisdictional defect is not the amount in controversy. If *Zahn* is perceived as having given a narrow construction to "civil action," it, rather than the *Moor* dictum, must control. But the probability that it will is substantially reduced by the fact that the Court in *Zahn* did not perceive that that was what it was doing.

Most recently, in *Owen Equipment & Erection Co. v. Kroger*,⁷⁷ the Court has confirmed the view of most of the lower courts⁷⁸ that ancillary jurisdiction does not permit a plaintiff to assert a claim

⁷⁴ [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (1970).

⁷⁵ *Stewart v. Dunham*, 115 U.S. 61, 64 (1885).

⁷⁶ It is also in this situation, however, that the danger of using third-party practice to undermine jurisdictional limitations (*Strawbridge*) is most evident.

⁷⁷ 98 S. Ct. 2396 (1978).

⁷⁸ *E.g.*, *Kenrose Mfg. Co. v. Whitaker Co.*, 512 F.2d 890 (4th Cir. 1972).

over a cocitizen impleaded under rule 14 by a defendant in a diversity case. In so holding, the Court relied heavily on the argument that a contrary decision would have undermined the complete diversity requirement of *Strawbridge v. Curtiss*; it did not attempt to cast doubt upon the traditional exercise of ancillary jurisdiction over claims of defendants or intervenors. One of the Court's bases for distinguishing those cases, however, suggests that it will be less hospitable toward attempts by plaintiffs than by defendants or intervenors to bring in additional parties:

[T]he nonfederal claim here was asserted by the plaintiff, who voluntarily chose to bring suit upon a state-law claim in a federal court. By contrast, ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court. . . . "[T]he efficiency plaintiff seeks so avidly is available without question in the state courts."⁷⁹

Given the Court's emphasis on *Strawbridge*, it is not clear whether the Court would have drawn the same distinction if the sole defect of the plaintiff's claim had been the jurisdictional amount. The Court did not say whether it was construing "matter in controversy" or "civil action." Nevertheless, the quoted passage suggests that the Court would not find the ancillary jurisdiction cases sufficient to outweigh *Zahn* in passing on pendent parties in the initial complaint.

CONCLUSION

The Supreme Court has approached the problems of pendent nonfederal parties, incomplete diversity, and the amount in controversy as though they were essentially unrelated. It has not paid much attention to the interpretation of the statutory language, which should be determinative. If it had, I think it would have discovered that the issues are closely interdependent, as all are affected by the breadth of the term "civil action."

Zahn is the bad apple. *Gibbs* and its policy of efficiency demanded pendent jurisdiction in *Zahn*, as many lower courts have understood in cases involving additional parties in both the original complaint and subsequent pleadings. The cases on complete diversity similarly support a broad reading of "civil action." That the

⁷⁹ 98 S. Ct. at 2404 (1978) (footnote omitted).

Court in *Zahn* seems to have thought it was dealing with the separate problem of determining the amount of the "matter in controversy" may nevertheless serve to limit what would normally be the effect of the decision; the Court may yet uphold jurisdiction over pendent parties in other contexts at the cost of consistency both in the interpretation of statutory language and in relevant policy.