granted summary judgment for media defendants. Furthermore, in Iowa, the common law of libel in actions against non-media defendants remains untouched by the constitutional considerations of *New York Times v. Sullivan*[113] and its progeny.[114] There are indications, however, that constitutional standards will eventually be applied in libel actions against non-media defendants.[115] If the *Winegard* court would have considered the statements allegedly made by the attorney to be constitutionally protected, the court could have considered plaintiff's libel action frivolous.[116] However, because the Iowa court appears to base its decision on common-law libel grounds, its reluctance to find plaintiff's claim patently frivolous is the logical outcome.

The *Winegard* court's recognition of a newsperson's qualified privilege from compelled disclosure is a positive step towards securing the "preferred position" of first amendment rights. The test employed by the Iowa Supreme Court is in keeping with strong precedent and sound legal reasoning. No doubt newspersons and their potential sources are pleased with this result.

However, the viability of the test set forth in *Winegard* will be determined by its future application. Acceptance of a qualified privilege is not enough to combat the real possibility of a "chilling effect." The Iowa courts must clarify the implications of each element in the test to quell the fears which stem from uncertainty. The Iowa Supreme Court's satisfaction with a litigant's "basic discovery objective" will result in a diluted test; a test which does not accomplish its goal.

James Fallace

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113. 376 U.S. 254 (1964).

114. Note, *Iowa Libel Law and the First Amendment: Defamation Displaced*, 62 Iowa L. Rev. 1067, 1101 (1977).

115. *Id.*

116. It is interesting to note that the Iowa Supreme Court subsequent to the *Winegard* decision held in Winegard v. Larsen, 260 N.W.2d 816 (Iowa 1977) that defendant Schalk was entitled to summary judgment with respect to the invasion of privacy claim by Winegard. In the opinion the court also holds that the statements allegedly made by Schalk were a matter of public record. *Id.* at 821-22. If the *Winegard* court would have made this determination it could have considered Schalk's statements to be privileged. *See* RESTATEMENT (SECOND) OF TORTS § 611, Comment C (1972).

FEDERAL JURISDICTION—WHERE A PLAINTIFF ASSERTS A CLAIM AGAINST A NONDIVERSE THIRD-PARTY DEFENDANT, JURISDICTION DOES NOT ACCRUE UNDER THE 28 U.S.C. § 1332 DIVERSITY STATUTE.—*Owen Equipment & Erection Co. v. Kroger* (U.S. Sup. Ct. 1978).

Kroger, a citizen of Iowa and administratrix of her husband's estate, brought a wrongful death action in the United States District Court for the District of Nebraska as the result of an accident in which her husband was electrocuted. Jurisdiction was based on diversity of citizenship.[1] The complaint alleged that the defendant, Omaha Public Power District (OPPD), was negligent in the construction, maintenance and operation of the power lines which caused Kroger's death.[2] Pursuant to rule 14(a) of the Federal Rules of Civil Procedure, OPPD impleaded Owen Equipment and Erection Company (Owen),[3] alleging that Owen was liable to OPPD for any recovery which Kroger might obtain.[4] OPPD further alleged that Owen owned and operated

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1. Jurisdiction was alleged under 28 U.S.C. § 1332 (1976), which reads in part:
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between
(1) citizens of different States
. . .
(c) For the purposes of this section . . . , a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . .

2. Kroger v. Owen Equipment & Erection Co., 558 F.2d 417 (8th Cir. 1977), *rev'd*, 46 U.S.L.W. 4732 (U.S. June 21, 1978). The district court issued an unreported memorandum opinion.

3. The original complaint in impleader had named Owen Construction Co., Inc. as a third-party defendant. However, upon discovering that the corporate name was in fact Owen Equipment and Erection Company, OPPD moved for dismissal of the third-party complaint and for leave to amend the complaint in order to name Owen Equipment and Erection Company. The district court termed Owen Construction Company, Incorporated as "an Iowa corporation" and Owen Equipment and Erection Company as "a Nebraska corporation." 558 F.2d at 429.

4. FED. R. CIV. P. 14 provides in part:
(a) When Defendant May Bring In Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert

the crane which had contacted the power lines, and that the fatal accident was the proximate result of Owen's negligence.[5]

Prior to the trial, OPPD moved for summary judgment on Kroger's claim against it.[6] During the pendency of this motion, the trial court granted Kroger leave to amend her complaint to state a claim directly against Owen.[7] Thereupon, summary judgment was granted in favor of OPPD[8] and the case went to trail between Kroger and Owen only.

Kroger's amended complaint had alleged Owen to be a "Nebraska corporation with its principal place of business in Nebraska."[9] In its answer, Owen admitted only that it was a "corporation organized and existing under the laws of the state of Nebraska," and denied every other allegation.[10] On the third day of the trial, it was disclosed by a witness for Owen that its principal place of business was Iowa rather than Nebraska.[11] As a result of this disclosure, the trial court was left with opposing parties who were both citizens of Iowa. Owen then moved for a dismissal for lack of diversity jurisdiction.[12]

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his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13.

5. 46 U.S.L.W. at 4732. Although the exact basis of Owen's alleged liability to OPPD was not specified in the third-party complaint, the court assumed that the liability was based on the state common law right of contribution among joint tortfeasors. 46 U.S.L.W. at 4732 n.3 (citing Dairyland Ins. Co. v. Mumert, 212 N.W.2d 436, 438 (Iowa 1973); Best v. Yerkes, 247 Iowa 80, 77 N.W.2d 23 (1956)).

6. *See generally* FED. R. CIV. P. 54(b), 56.

7. 46 U.S.L.W. at 4733. *See generally* FED. R. CIV. P. 15(a), providing for amendments after responsive pleadings have been filed or after 20 days if no responsive pleading is required only by leave of the court, such leave to be "freely given when justice so requires." Other authority for plaintiff's right to amend her complaint may be found in FED. R. CIV. P. 14(a), which provides that the plaintiff may assert claims against the third-party defendant arising out of the transaction or occurrence that is the subject of the plaintiff's claim against the third-party plaintiff. *See* note 4 *supra*. Although rule 14 is silent as to whether an independent basis of jurisdiction is necessary for the assertion of such a claim, FED. R. CIV. P. 82 provides that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ."

8. The judgment was subsequently affirmed in Kroger v. Omaha Pub. Power Dist., 523 F.2d 161 (8th Cir. 1975).

9. 46 U.S.L.W. at 4733.

10. *Id.* The Eighth Circuit noted that this form of answer was violative of FED. R. CIV. P. 8(b), which provides that "[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and deny only the remainder." The court viewed the form of Owen's denial as a "qualified general denial," which was not in conformance with rule 8(b). 558 F.2d at 419 (citing Kirby v. Turner-Day & Woolworth Handle Co., 50 F. Supp. 469, 470 (E.D. Tenn. 1943); 2A MOORE'S FEDERAL PRACTICE ¶ 8.23, at 1828 (2d ed. 1975); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1266, at 284 (1971)).

11. The confusion as to Owen's citizenship arose here as result of the fact that Owen's principal place of business and the site of the accident was Carter Lake, Iowa, a community on the west bank of the Missouri River. Normally the river represents the Iowa-Nebraska border but it had meandered after the border was established so that Carter Lake is now separated from the rest of Iowa.

12. *See generally* 28 U.S.C. § 1332(c), which provides that "[f]or the purposes of [diversity jurisdiction] . . . a corporation shall be deemed a citizen of any state by which it has been incorporated and of the State where it has its principal place of business."

Judgment on the motion was reserved until after trial, which resulted in a verdict for Kroger.[13] Owen's motion was then denied.[14]

On appeal to the Eighth Circuit, the judgment was affirmed.[15] Relying heavily on *United Mine Workers v. Gibbs,*[16] the court held that Kroger's claim against Owen, although unsupported by an independent base of jurisdiction, was nevertheless cognizable in the federal court system because the district court had judicial power over the case initially[17] and had not abused its discretion by the continued exercise of that power.[18] The court further held that Owen's conduct in failing to forthrightly deny that its principal place of business was in Iowa estopped it from asserting abuse of discretion.[19]

After granting certiorari,[20] the United States Supreme Court *held,* reversed. Federal jurisdiction under 28 U.S.C. § 1332 does not accrue to plaintiff's amended claim against a nondiverse third-party defendant. *Owen Equipment & Erection Co. v. Kroger,* 46 U.S.L.W. 4732 (U.S. June 21, 1978).

In rendering its decision, the Supreme Court disapproved the Eight Circuit's reliance on *Gibbs,* holding that while that case correctly delineated the constitutional limitations of federal judicial power, "[c]onstitutional power is merely the first hurdle . . . , [f]or the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but by Acts of Congress."[21] Since plaintiff and defendant Owen were both citizens of Iowa and section 1332 is construed to require complete diversity of all

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13. 46 U.S.L.W. at 4733.

14. *Id.*

15. Kroger v. Owen Equipment & Erection Co., 558 F.2d 417 (8th Cir. 1977), *rev'd,* 46 U.S.L.W. 4732 (U.S. June 21, 1978).

16. 383 U.S. 715 (1966).

17. Since Kroger and OPPD were residents of Iowa and Nebraska respectively, the requirements of 28 U.S.C. § 1332(a)(1) were met at the outset of the case.

18. Kroger v. Owen Equipment & Erection Co., 558 F.2d at 427. It has been suggested that when the main claim, upon which jurisdiction rests, is dismissed before trial, the court should dismiss the ancillary claim as well. *See, e.g.,* Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843, 846 (3d Cir. 1962). However, it is also stated that when the main claim is dismissed for substantive rather than jurisdictional reasons, a court may exercise its discretion in determining whether to dismiss or proceed with the ancillary claim. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Dery v. Wyer, 265 F.2d 804, 808-09 (2d Cir. 1959).

19. 558 F.2d at 427. Here the court relied on Murphy v. Kodz, 351 F.2d 163 (9th Cir. 1965), in which an action was filed against several defendants in state court, one of whom was able to invoke the federal district court's removal jurisdiction. Judgment in the original trial was for the defendant who had removed the case, but no verdict was reached as to the other defendants. Following a new trial in which the verdict was adverse to the remaining defendants, those defendants moved to remand, asserting that the court had lost jurisdiction upon entry of judgment for the defendant who had removed and who had been the only party able to invoke the court's jurisdiction. The motions were denied and the Ninth Circuit affirmed, holding that defendants, by failing to contest jurisdiction before a decision on the merits, were estopped from asserting abuse of discretion. 351 F.2d at 168. *See also* Di Frischia v. New York Cent. R.R., 279 F.2d 141 (3d Cir. 1960); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1386, at 64-66, 370-74 (1969).

20. Owen Equipment & Erection Co. v. Kroger, 98 S. Ct. 715 (1978).

21. Owen Equipment & Erection Co. v. Kroger, 46 U.S.L.W. 4732, 4733 (U.S. June 21, 1978).

defendants from all plaintiffs,[22] the statute prohibited jurisdiction. In support of this holding, the Court relied on two of its recent decisions, *Aldinger v. Howard*,[23] and *Zahn v. International Paper Co.*,[24] both of which limited the jurisdiction of the district courts based on readings of federal jurisdictional statutes.[25]

While taking a rigid stand in support of the complete diversity requirement,[26] the Court in *Kroger* noted that the concept of ancillary jurisdiction works to relax this requirement and has frequently been used in complex litigation situations such as impleader, cross-claims, counterclaims or intervention as of right.[27] But, the Court continued, "in determining whether jurisdiction over an [ancillary] claim exists, the context in which [that] claim is asserted is crucial."[28] The Court then distinguished, on the basis of two principles, the setting of the present case from those traditionally thought to fall within the court's ancillary jurisdiction. First, Kroger's amended claim against Owen is entirely separate from her original claim against OPPD since Owen's liability is not now at all dependent on whether OPPD is found liable. Thus, because rule 14 only permits impleader when it appears that the third party defendant is or may be liable to the original defendant for all or part of the plaintiff's claim against him, the claim against Owen is not ancillary in the sense that impleader by the defendant of a third-party defendant always is. Second, the claim in question is asserted by the plaintiff, rather than by the defendant or another party not voluntarily before the court as in the typical application of ancillary jurisdiction. Thus, since the plaintiff has chosen the forum, she should not now be heard to complain over its limitations.[29] Concluding that the district court lacked the statutory power to entertain jurisdiction,[30] the Supreme Court stated, "the asserted inequity in the respondent's alleged concealment of its citizenship is irrelevant."[31]

Although the Supreme Court suggested that the distinctions between ancillary and pendent jurisdiction were also not relevant to its decision,[32] a

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22. For examples of previous decisions which required complete diversity, see American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941); Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1870); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). *But cf.* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967) (complete diversity not constitutionally required).

23. 427 U.S. 1 (1976).

24. 414 U.S. 291 (1973).

25. The statute involved in *Aldinger* was 42 U.S.C. § 1983 (1970), and its companion jurisdictional statute 28 U.S.C. § 1343(3) (1976); in *Zahn*, the statute was 28 U.S.C. § 1332(a) (1976).

26. *See* note 22 *supra*.

27. 46 U.S.L.W. at 4734, 4734 n.18.

28. *Id.* at 4734.

29. *Id.* at 4734-35.

30. *Id.* at 4735.

31. *Id.* at n.21. Iowa has a savings clause. Thus the claim, although time barred at this point, could likely be reasserted in the Iowa courts. *See* IOWA CODE § 614.10 (1977).

32. 46 U.S.L.W. at 4733 n.8. *See also* Aldinger v. Howard, 427 U.S. 1, 13 (1976), in which the Court states "there is little profit in attempting to decide, for example, whether there are

brief overview of the area would be helpful. The federal courts are forums of limited subject matter jurisdiction.[33] There are constitutional limits,[34] which mark the broadest outlines of federal judicial power, as well as statutory limits, which set the currently excercisable jurisdiction. Two statutes account for jurisdictional authorization in a majority of cases heard before the federal courts. The first provides jurisdiction over cases arising under federal law or presenting federal questions.[35] The second, with which *Kroger* is concerned, authorizes jurisdiction when a case arises between adverse parties of different states.[36] The general diversity statute has been interpreted to require complete diversity between all plaintiffs and all defendants,[37] although this condition is held not to be constitutionally required.[38]

The effect of the concepts of ancillary and pendent jurisdiction has been to widen the base of federal jurisdiction in complex litigation.[39] The distinctions between the two have chiefly to do with the manner in which the court's jurisdiction is originally invoked and whether new parties are brought in to answer the new claims. Pendent jurisdiction empowers a federal court whose jurisdiction is originally invoked by a federal claim to hear a state-law claim which derives from "a common nucleus of operative fact, . . . such that the [plaintiff] would ordinarily be expected to try them all in one proceeding. . . ."[40] Pendent jurisdiction usually does not extend to include the addition of parties, although many courts are now finding no bar to joinder of nondiverse "pendent parties" in order to consider the pendented state-law claim.[41] Ancillary jurisdiction empowers a federal court, whose jurisdiction has been properly invoked, to hear other matters raised by the case without the need of an independent jurisdictional base.[42] These matters have typically included counterclaims, cross-claims, actions in impleader, intervention as of right[43] and even claims of a third-party defendant against the plaintiff.[44]

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any 'principled' differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences." Some commentators are in agreement with this position, noting a blurring of the two concepts in recent years. *See, e.g.*, Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A. L. Rev. 1263, 1264-65 (1975).

33. C. Wright, Law of Federal Courts § 7, at 17 (3d ed. 1976).

34. U.S. Const. art III, § 2.

35. 28 U.S.C. § 1331 (1976).

36. 28 U.S.C. § 1332 (1976). *See* note 1 *supra*.

37. *See* note 22 *supra*.

38. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967).

39. *See generally* Wright, *supra* note 33, at § 9; Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. Pitt. L. Rev. 759, 760 (1972). *See* note 32 *supra*.

40. United Mine Workers v. Gibbs, 383 U.S. at 725. *See generally* Wright, *supra* note 33, at § 19.

41. *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, 1194-95 (5th Cir. 1975); Alemenares v. Wyman, 453 F.2d 1075, 1083-85 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972).

42. Wright, *supra* note 33, § 9, at 21.

43. *See, e.g.*, note 27 *supra* and accompanying text.

44. *See, e.g.*, Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709 (5th Cir. 1970).

However, in the converse situation, where the plaintiff asserts a claim against a third-party defendant, a majority of the circuits, prior to the Supreme Court's ruling in *Kroger*, required such claim be accompanied by an independent base of jurisdiction.[45] Since the circuits were in disagreement,[46] and because *Kroger* presented this exact question for adjudication, the Supreme Court granted certiorari.

In effect, *Kroger* does not represent a departure from past law. The vast majority of cases which have dealt with this situation have arrived at the same conclusion.[47] But while *Kroger* incorporates the reasoning and rationale of those cases supporting the majority viewpoint, the Court goes a step further by anchoring its holding on statutory power. Until now, even some of the cases espousing the majority viewpoint had not supposed that jurisdiction was prohibited by a narrow reading of 28 U.S.C. § 1332.[48] Instead, these cases developed a number of rationalizations as to why the court, in the exercise

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45. *See, e.g.*, Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977); Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976); Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890 (4th Cir. 1972); McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960); United States v. Lushbough, 200 F.2d 717 (8th Cir. 1952)(dicta); Patton v. Baltimore & O. R. Co., 197 F.2d 732 (3d Cir. 1952); Gladden v. Stockard Steamship Co., 184 F.2d 507 (3d Cir. 1950); Pearce v. Pennsylvania R. Co., 162 F.2d 524 (3d Cir. 1947); Friend v. Middle Atlantic Transp. Co., 153 F.2d 778 (2d Cir.), *cert. denied*, 328 U.S. 865 (1946).

For a discussion of the rationale which has been asserted for refusing to entertain such claims without an independent jurisdictional base, see the text accompanying notes 49-55 *infra*.

46. For the minority view, allowing a plaintiff's claim against a third-party defendant to come within the court's ancillary jurisdiction, see, *e.g.*, Morgan v. Serro Travel Trailer Co., 69 F.R.D. 697 (D. Kan. 1975); Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968); Olson v. United States, 38 F.R.D. 489 (D. Neb. 1965).

47. *See* note 46 *supra*.

48. In Saalfrank v. O'Daniel, 533 F.2d 325, 330 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976), the court specifically declined to read section 1332 as an absolute bar to jurisdiction. Instead, the court held that the district court had abused its discretion by the exercise of ancillary jurisdiction in the case at bar.

Two other cases held, without reference to section 1332, that the concepts of ancillary and pendent jurisdiction were inapplicable to a plaintiff's claim against a third-party defendant. Friend v. Middle Atlantic Transp. Co., 153 F.2d 778, 779 (2d Cir.), *cert. denied*, 328 U.S. 865 (1946) (ancillary jurisdiction not available); Ayoub v. Helms Express, Inc., 300 F. Supp. 473, 474 (W.D. Pa. 1969) (pendent jurisdiction not available).

In Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 894-95 (4th Cir. 1972), the court set a flat prohibition on the exercise of such jurisdiction. In so doing, the court engaged in a lengthy factual analysis, buttressed by the established rationale of the cases representing the majority viewpoint, to distinguish the case at bar from the converse situation where the third-party defendant asserts a claim against the plaintiff. Although reliance on section 1332 is alluded to by reference to the complete diversity requirement of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), it is far from clear whether it forms the basis of the prohibition. In Parker v. W.W. Moore & Sons, Inc., 528 F.2d 764, 766 (4th Cir. 1975), the court adhered to the "absolute rule" of *Kenrose* without reference to the source of that rule.

However, most of the cases comprising the majority viewpoint have clearly based their holdings on section 1332. *See, e.g.*, Fawvor v. Texaco, Inc., 546 F.2d 636, 638, 643 (5th Cir. 1977); McPherson v. Hoffman, 275 F.2d 466, 470 (6th Cir. 1960); United States v. Lushbough, 200 F.2d 717, 721-22 (8th Cir. 1952) (dicta); Gladden v. Stockard S.S. Co., 184 F.2d 510, 512 (3d Cir. 1950); Pearce v. Pennsylvannia R. Co., 162 F.2d 524, 528 (3d Cir. 1947).

of its discretion, should decline to take jurisdiction of a plaintiff's claim against a third-party defendant absent an independent base.

For example, in *Fawvor v. Texaco, Inc.*,[49] while adhering to a section 1332 based requirement of an independent base of jurisdiction,[50] the court buttressed its holding by reasoning that to allow the plaintiff to sue the third-party defendant without such a jurisdictional requirement would be to invite collusion between the plaintiff and a friendly defendant who would then implead the desired nondiverse third-party defendant.[51] This argument, acknowledged in *Kroger*,[52] lacks force for two reasons. First, rule 14 of the Federal Rules of Civil Procedure requires that the defendant himself be able to state a claim against the third-party defendant.[53] It is not enough that the plaintiff might have a claim against the third-party defendant. Indeed, it is not even a consideration discussed by rule 14.[54] Second, in the event of collusion between the plaintiff and defendant, the court has the power to dismiss the case under a statute specifically addressed to collusive suits.[55] Thus reliance on 28 U.S.C. § 1332 to prevent collusion is both misplaced and unnecessary.

The Supreme Court in *Kroger* met these counter-arguments by noting that there was nothing necessarily collusive about a plaintiff selectively suing only diverse parties, or about the defendant thereupon impleading nondiverse parties.[56] Since the situation may not be collusive, it is difficult to understand why the Supreme Court seeks to prevent it.

Another rationalization often posed in support of a denial of jurisdiction over the plaintiff's claim against the third-party defendant is that if the procedure were allowed, plaintiff could thereby sue indirectly a party which he could not sue directly.[57] But as was noted in *Morgan v. Serro Travel Trailer Co.*,[58] unless collusion between the plaintiff and defendant is present, in which case the anti-collusion statute would preclude jurisdiction, the plaintiff does not control who is impleaded.[59] Thus, this procedure is not consciously being invoked to do what the Supreme Court in *Kroger* so adamantly seeks to prevent. As such, it seems the Court may be taking swings at ghosts.

Finally, a number of courts have offered the rationalization that by allowing this procedure, the already overcrowded federal dockets would be

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49. 546 F.2d 636 (5th Cir. 1977).
50. *Id.* at 639.
51. *Id.* at 641.
52. 46 U.S.L.W. at 4734.
53. *See* note 4 *supra*.
54. *Id.*
55. *See* 28 U.S.C. § 1359 (1976), which provides that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusivley made or joined to invoke the jurisdiction of such court." *See also* WRIGHT & MILLER, *supra* note 10, § 1444, at 231-32; 3 MOORE, *supra* note 10, ¶ 14.27(1), at 14-571.
56. 46 U.S.L.W. at 4734 n.17.
57. *See, e.g.*, Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 893 (4th Cir. 1972).
58. 69 F.R.D. 697 (D. Kan. 1975).
59. *Id.* at 702.

increased.[60] To the extent this argument is valid, it must be noted that the Eighth Circuit was well aware of it, and all the other arguments as well, when it stated, "the traditional reasons given for supporting a rule of flat prohibition do not necessarily disappear. Instead they become factors for the trial court to consider in exercising its discretion."[61] Indeed, in *Gibbs*, the prescribed considerations for the exercise of discretionary ancillary or pendent jurisdiction, namely those of economy, convenience and justice,[62] would clearly give these arguments their proper weight.

Nevertheless, the Supreme Court held in *Kroger* that a court's exercise of jurisdiction over a plaintiff's claim against a third-party defendant is no longer a matter of discretion, but rather one of statutory prohibition. In so doing, the Court rested its holding on two prior decisions which limited the exercise of pendent and ancillary jurisdiction on the basis of the Court's reading of jurisdictional statutes.[63]

In *Aldinger v. Howard*,[64] an action was brought under 42 U.S.C. § 1983 against county officials. In addition to the federal claim, the plaintiffs attempted to assert a state-law claim against the county. The Supreme Court held that the companion jurisdictional statute to section 1983, 28 U.S.C. § 1343(3) does not permit the exercise of pendent jurisdiction over a state-law claim against a county.[65] Although the Court in *Aldinger* appeared to limit its holding to actions brought under section 1983, [66] some commentators have worried over the possible limiting effect the decision might have generally in the area of pendent party jurisdiction.[67] Indeed, it appears that *Aldinger* was relied on to some extent in *Fawvor* for the proposition that when new parties are brought into an action to answer pendent or ancillary claims, a bar to the exercise of such jurisdiction may be found in various jurisdiction statutes.[68]

In addition to the *Aldinger* decision, the Supreme Court in *Kroger* relied upon *Zahn v. International Paper Co.*[69] In *Zahn*, the Court held each member plaintiff in a class action brought pursuant to rule 23(b)(3) of the Federal Rules of Civil Procedure must satisfy the $10,000 amount in controversy requirement of 28 U.S.C. § 1332(a).[70] In *Kroger*, the Supreme Court read *Zahn* as rejecting the proposition "that jurisdiction existed over those claims

60. Fawvor v. Texaco, Inc., 546 F.2d at 641; Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d at 894.

61. 558 F.2d at 423.

62. 383 U.S. at 726.

63. 46 U.S.L.W. at 4734.

64. 427 U.S. 1 (1976).

65. *Id.* at 16-19. The claim against the county did not fall within the ambit of section 1983 because a county has been deemed to not be a person within the meaning of that statute. *Id.* at 5.

66. *See id.* at 13.

67. Note, *Pendent Party Jurisdiction: The Demise of a Doctrine?*, 27 DRAKE L. REV. 361, 385 (1977).

68. Fawvor v. Texaco, Inc., 546 F.2d at 641.

69. 414 U.S. 291 (1973).

70. *Id.* at 301-02.

that involved less than $10,000 as ancillary to those that involved more."[71] However, it should be noted that the concept of ancillary jurisdiction is neither mentioned nor discussed by the majority in *Zahn,* but is only referred to in the dissent.[72]

Thus, it seems that the fears of some commentators have come true: the Supreme Court in *Kroger* has extended *Aldinger* and clearly found a statutory bar in 28 U.S.C. § 1332(a) to the kind of jurisdiction exercised here by the district court and approved by the Eighth Circuit.[73] No longer may *Gibbs* be read so as to grant federal courts the discretion to hear a plaintiff's claim against a third-party defendant without an independent basis of jurisdiction. The question is not one of discretion, but of statutory power.

Brent Rosenberg

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71. 46 U.S.L.W. at 4734.
72. *See* 414 U.S. at 305 (Brennan, J., dissenting).
73. *See* 46 U.S.L.W. at 4734-35.