courts with the power to subjectively evaluate the content of broadcast programming. This evaluation is necessary to determine if any of the content is "patently offensive," for only then will the time, place and manner elements of "indecent" speech be considered. With the value of speech ultimately resting upon the decision of five members of the Supreme Court, there exists a very real concern that a significant amount of protected speech will not be broadcast for fear of regulatory sanction.[95]

The *Pacifica* decision represents a new direction taken in the field of broadcast regulation. In addition to regulating obscenity, the FCC, with the approval of the Supreme Court, has developed a concern over indecent expression and has authorized the imposition of sanctions for it. Hopefully, the flexibility of the nuisance rationale approach, of channeling rather than prohibiting broadcast content, will prove fair and effective. The rationale, however, suffers because it will have to be applied on a case-by-case basis, and the results may vary significantly. As a consequence, the case-by-case approach will necessitate increased litigation. More importantly, the uncertainty of outcome engendered by this approach threatens the vitality of first amendment rights.

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95. In response to the concern that the *Pacifica* decision will have an inhibiting effect on broadcast program content, the Court emphasized the narrowness of its holding. Justice Stevens stated: "This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that his broadcast would justify a criminal prosecution." 98 S. Ct. at 3041.

CRITIQUE—ANCILLARY AND PENDENT PARTY JURISDICTION IN THE AFTERMATH OF OWEN EQUIPMENT & ERECTION CO. V. KROGER.

In a casenote on *Owen Equipment & Erection Co. v. Kroger*[1] appearing in the November, 1978 issue of the *Harvard Law Review*,[2] it is argued that *Kroger*'s per se denial of federal ancillary or pendent party jurisdiction over a plaintiff's claim against a nondiverse third-party defendant is not only theoretically justified, but also a desirable result.[3] This writer also noted the *Kroger* decision in an earlier issue of the *Drake Law Review*.[4] In that casenote it is argued that the *Kroger* decision is not only undesirable but unnecessary as well.[5] This critique will further explore the implications of *Kroger* and, specifically, will take issue with the premises and conclusions of the *Harvard Law Review* casenote.

In *Owen Equipment & Erection Co. v. Kroger*,[6] Kroger, a citizen of Iowa, brought a diversity action for wrongful death against the Omaha Public Power District (OPPD), a Nebraska Corporation.[7] OPPD in turn impleaded[8] Owen Equipment & Erection Co. (Owen), an Iowa Corporation, and then moved for summary judgment on Kroger's claim against it.[9] During the pendency of this motion, Kroger was granted leave to amend her complaint to state a claim directly against Owen. Thereupon, summary judgment was

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1. 98 S. Ct. 2396 (1978).
2. 92 HARV. L. REV. 241 (1978).
3. *Id.* at 251.
4. 28 DRAKE L. REV. 182 (1979).
5. *See id.* at 187-90.
6. 98 S. Ct. 2396 (1978).
7. *Id.* at 2399.
8. Owne was brought into the suit pursuant to FED. R. CIV. P. 14, which 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 his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13.
9. 98 S. Ct. at 2400. *See generally* FED. R. CIV. P. 54(b), 56.

granted in favor of OPPD,[10] leaving only Kroger's claim against Owen. Owen moved to dismiss for lack of diversity jurisdiction. This motion was denied by the district court[11] and affirmed on appeal to the Eighth Circuit.[12]

The United States Supreme Court *held*, reversed. Federal jurisdiction under 28 U.S.C. 1332[13] does not extend to include a plaintiff's claim against a nondiverse third-party defendant. *Owen Equipment & Erection Co. v. Kroger*, 98 S.Ct. 2396 (1978).[14] In so doing, the Supreme Court disapproved the Eighth Circuit's reliance on *United Mine Workers v. Gibbs*,[15] which set the constitutional limits of the federal courts' power to exercise jurisdiction, in its discretion, over pendent and ancillary claims.[16] Although holding that the exercise of jurisdiction over Kroger's claim against Owen was not a matter for the district court's discretion, but rather a matter of statutory prohibition,[17] the Supreme Court did not expressly limit *Gibbs* as it might apply in other contexts.[18] The *Kroger* Court's handling of *Gibbs* becomes the analytical cornerstone of the position taken in the *Harvard Law Review* casenote:

> The reasoning of the Court in *Kroger* must therefore be viewed in light of the distinguishing factors in *Gibbs*. The crux of the matter would seem to

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10. 98 S. Ct. at 2400. The judgment was subsequently affirmed in Kroger v. Omaha Pub. Power Dist., 523 F.2d 161 (8th Cir. 1975).

11. 98 S. Ct. at 2400.

12. Kroger v. Owen Equipment & Erection Co., 558 F.2d 417, *rev'd*, 98 S. Ct. 2396 (1978).

13. 28 U.S.C. § 1332(a)(1) (1976).

14. The Supreme Court's decision in *Kroger* has also been noted at 64 A.B.A.J. 1585 (1978). The Eighth Circuit's decision has been heavily noted. *See* 11 CREIGHTON L. REV. 631 (1977); 8 CUM. L. REV. 965 (1978); 46 GEO. WASH. L. REV. 416 (1978); 26 KAN. L. REV. 493 (1978); 62 MINN. L. REV. 251 (1978); 43 MO. L. REV. 310 (1978); 54 N. DAK. L. REV. 314 (1977); 38 OHIO ST. L. J. 939 (1977); 9 ST. MARY'S L. J. 599 (1978); 23 S. DAK. L. REV. 499 (1978); 9 TOL. L. REV. 304 (1978).

15. 383 U.S. 715 (1966).

16. *Gibbs* stated the constitutional limits as follows:

> The state and federal claims must 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 the federal courts to hear the whole.

Id. at 725.

The *Gibbs* Court further noted that beyond the constitutional limitations, a federal court, in the exercise of its discretionary jurisdiction over the pendent claim, should give weight to considerations of judicial economy, convenience and fairness to litigants. *Id.* at 726.

17. 98 S. Ct. at 2404-05.

18. In this regard, the Court states:

> It is apparent that *Gibbs* delineated the constitutional limits of federal judicial power. But even if it be assumed that the District Court in the present case had constitutional power to decide the respondent's lawsuit against the petitioner, it does not follow that the decision of the Court of Appeals was correct. Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy.

98 S. Ct. at 2401-02. The implication seems to be that *Gibbs* still represents the constitutional limits of a federal court's power to hear the whole case, including all incidental claims arising therefrom.

> be that *Gibbs* involved federal question jurisdiction, toward which the Court adopted a generous and expansive attitude, to the point of not even discussing the implications of the *statutory* grant for the exercise of incidental jurisdiction. By contrast, the *Kroger* Court noted that "Congress has established the basic rule that diversity jurisdiction exists only where there is complete diversity of citizenship. 'The policy of the statute calls for its strict construction.' "[19]

The *Harvard* casenote sees the Supreme Court broadly construing section 1331 while narrowly construing section 1332. It is suggested that the reason for such a distinction lies in the analytical differences between these two basic types of federal jurisdiction:

> Federal question jurisdiction is defined by reference to the type of legal claim created by a particular factual pattern. Jurisdiction arises by virtue of that factual pattern and so should be limited by factual parameters. Diversity jurisdiction, on the other hand, is predicated upon the identity of the parties and their alignment. This suggests that the restrictive principle in diversity cases should be the identity of the parties, not the factual pattern, and that the courts should hesitate to accomodate those claims or parties which cast doubt upon compliance with the diversity prerequisites.[20]

While the reasoning of the *Harvard* casenote may provide some basis by which to distinguish *Kroger* from *Gibbs,* it must be noted that significant legal reasoning has come between these two decisions. Thus, an analysis of a number of intervening Supreme Court decisions suggests that the *Harvard* reasoning may not adequately explain the Court's action in *Kroger.*

For example, in *Moor v. County of Alameda,*[21] claims were brought against individual defendants under 42 U.S.C. sections 1983 and 1988.[22] Plaintiffs also sought to exercise pendent party jurisdiction over the County in a claim asserted under the California tort claims act.[23] The district court held that the state claim against the County did not fall within its pendent jurisdiction.[24] The district court further noted, as did the Supreme Court in *Kroger,*[25] that "the issue is not one of discretion."[26] On certiorari to the Supreme Court,[27] the action of the district court was affirmed.[28] The Court did not, however, resolve the issue of the per se unavailability of pendent party

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19. 92 HARV. L. REV. at 248.
20. *Id.* at 249.
21. Rundle v. Madigan, 331 F. Supp. 492 (N.D. Cal. 1971), *aff'd sub nom.* 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).
22. 42 U.S.C. §§ 1983, 1988 (1970).
23. *See* CAL. GOV'T CODE § 815.2(a) (West 1963).
24. 331 F. Supp. at 493.
25. *See* 98 S. Ct. at 2404-05.
26. 331 F. Supp. at 493.
27. Moor v. County of Alameda, 411 U.S. 693 (1973).
28. *Id.* at 717-18.

jurisdiction in these circumstances, instead noting that "the District Court, in the legitimate exercise of its discretion, properly declined to join the claim against the County in these suits."[29]

That issue was finally resolved in *Aldinger v. Howard.*[30] On facts substantially similar to those in *Moor,* the Supreme Court read section 1983's companion jurisdictional statute, 28 U.S.C. § 1343,[31] to prohibit any assertion of pendent party jurisdiction over the county.[32]

The Court's reasoning in *Aldinger* is strikingly similar to its reasoning in *Kroger,* where it read 28 U.S.C. § 1332[33] to prohibit the plaintiff's assertion of an ancillary claim against a nondiverse third-party defendant. Indeed, *Aldinger* was expressly relied on by the *Kroger* Court.[34] It seems apparent that the Supreme Court in *Aldinger* is reading a statute conferring special federal question jurisdiction[35] as strictly as it read section 1332 in *Kroger.*[36]

While the Court went to pains to state that its holding in *Aldinger* was limited to section 1983 actions brought under 28 U.S.C. § 1343,[37] some commentators have expressed concern that *Aldinger* has broader implications affecting the future availability of pendent party and ancillary jurisdiction in other types of federal question actions.[38] Even if *Aldinger* is taken only at face value and narrowly read, it must be noted that, as section 1983 is one of the most heavily reported sections in the *United States Code Annotated,*[39] its

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29. *Id.* at 715.

30. 427 U.S. 1 (1976).

31. 28 U.S.C. § 1343(3) (1976).

32. Aldinger v. Howard, 427 U.S. 1, 16-19 (1976).

33. 28 U.S.C. § 1332(a)(1) (1976).

34. *See* Owen Equipment & Erection Co. v. Kroger, 98 S. Ct. 2396, 2402 (1978).

35. 28 U.S.C. § 1343(3) (1976).

36. *See also* Ayala v. United States, 550 F.2d 1196 (9th Cir.), *cert. granted,* 98 S. Ct. 50 (1977), *cert. dismissed,* 98 S. Ct. 1635 (1978), in which the Ninth Circuit refused to exercise pendent party jurisdiction over plaintiff's claim against a railroad in an action brought against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 (1970). Jurisdiction was asserted under the Act's companion jurisdictional statute, 28 U.S.C. § 1346. Since section 1346 provides that jurisdiction over claims brought under the Act is exclusive in the federal district courts, the federal court would be the only forum in which all claims could be tried against all parties.

Thus, the context of *Ayala* presents an appealing argument in favor of the exercise of pendent party jurisdiction. Indeed the Supreme Court noted exactly this in Aldinger v. Howard, 427 U.S. 1, 18 (1976). Nevertheless, the Ninth Circuit continued its absolute ban against pendent party jurisdiction in all contexts, which it originated in Hymer v. Chai, 407 F.2d 136, 137 (9th Cir. 1969). Since the issue of the availability of pendent party jurisdiction over the railroad in *Ayala* was settled and dismissed pursuant to Sup. Ct. R. 60, (Ayala v. United States, 98 S. Ct. 1635 (1978)), it is unknown how the Supreme Court would have definitively dealt with pendent party jurisdiction in this context.

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

38. *See* Note, *Pendent Party Jurisdiction: The Demise of a Doctrine?,* 27 DRAKE L. REV. 361, 385-89 (1977-78); *cf.* Note, *The Supreme Court Says No to Pendent Parties—At least This Time,* 38 PITT. L. REV. 395, 412-15 (1977).

39. Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape,* 82 HARV. L.

effect in the general area of federal question jurisdiction will be substantial in any event.[40]

Against the backdrop of *Aldinger,* it is difficult to see how it can be posited that the Supreme Court is taking an expansive view of pendent party jurisdiction when there is federal question rather than diversity of citizenship jurisdiction.[41] While such a result might be indicated if one were merely to distinguish *Kroger* from *Gibbs,*[42] that analysis fails to take account of intervening cases. Clearly, the state tort claim which the plaintiff sought to bring within the court's pendent jurisdiction in *Aldinger* would pass the *Harvard* factual parameter test. Under this test, the presence of a pendent party should not effect the availability of jurisdiction over the pendent claim. Yet, in its denial of pendent party jurisdiction in *Aldinger,* the Court implicitly rejects the reasoning of the *Harvard* casenote, which would base the availability of pendent party and ancillary jurisdiction in a federal question case solely on factual parameters.

The *Aldinger* Court was not concerned about whether the pendent claim fell within the limiting factual pattern of the primary claim on which jurisdiction was based. Rather, its concern was that the *party* which the plaintiff sought to make answerable to the pendent claim was not within the contemplation of section 1343.[43] In *Kroger,* as well, the Court's emphasis was not so much on the ancillary claim itself, as on the party against which the claim was asserted and whether that party fell within the contemplation of section 1332.[44] Thus, it appears that *Aldinger* and *Kroger* are cases from the same

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REV. 1486, 1487 n.12 (1969), wherein it is stated that "the only statute sections with more pages of reported cases listed in the February, 1969, supplement to the *United States Code Annotated* are 28 U.S.C.A. § 2243 (Supp. Feb. 1969) and 29 U.S.C.A. §§ 158, 160 (Supp. Feb. 1969)." A recheck of these figures reveals that as of the 1978 cumulative annual pocket part to the *United States Code Annotated,* this statement is still correct.

40. The impact may arguably be lessened by the Supreme Court's recent decision in Monell v. Dept. of Social Services, 98 S. Ct. 2018 (1978), which held that a municipality may be held liable under section 1983 if, under color of state law, it causes an employee to violate another's constitutional rights. *Id.* at 2035-36. However, the Court further held that there is no liability under section 1983 where the plaintiff states only a respondeat superior theory against the municipality. *Id.* at 2036. In that case, a plaintiff's only remedy against a local governing body would remain under the state tort claims act. *See also* Cale v. City of Covington, 586 F.2d 311 (4th Cir. 1978), in which the Fourth Circuit vacated and remanded in light of *Monell,* a district court's grant of summary judgment in favor of the City on the ground that a municipality was not a "person" within the meaning of section 1983.

41. *Accord,* Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977). Indeed, in this regard, the Ninth Circuit has suggested that diversity of citizenship jurisdiction is probably a *more* appropriate base for pendent party jurisdiction than is federal question jurisdiction. *Id.* at 1200-01 n.8. *Contra,* Fawvor v. Texaco, Inc., 546 F.2d 636, 640-41 (5th Cir. 1977).

42. While the distinction may be of minimal significance, it should be noted that jurisdiction in *Gibbs* was founded on section 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187 (1970), not 28 U.S.C. § 1331 (1970). *See* United Mine Workers v. Gibbs, 383 U.S. 715, 720 (1966).

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

44. Owen Equipment & Erection Co. v. Kroger, 98 S. Ct. 2396, 2402-04 (1978).

mold, and that the Supreme Court is not now taking an expansive view of pendent party or ancillary jurisdiction in *any* context, whether the statute conferring jurisdiction is section 1332 or section 1343.

Although the Supreme Court has not yet dealt with pendent party jurisdiction in the context of section 1331, the analysis by which the Court limited this doctrine in the contexts of sections 1332 and 1343 seems clearly relevant. Noting, however, that section 1331 merely defines a type of claim over which the federal courts may exercise jurisdiction and that section 1331 contains no language which *expressly* limits the parties over which that jurisdiction extends, the *Harvard* casenote suggests that *Aldinger* and *Kroger* need not be read as a threat to pendent party jurisdiction in the context of section 1331. Again, the clear implications of *Aldinger* are ignored. What is important to note is that section 1343(3) also limits jurisdiction based on the type of claim asserted and does not, in terms, limit parties. Thus, in these two essential respects, section 1343(3) and section 1331 are analytically identical. In *Aldinger*, the Court reasoned that since the county was not a party against which a federal claim cognizable under section 1343(3) could be asserted, it was not a party within the contemplation of that jurisdictional statute. The application of this reasoning in the context of section 1331 gives the same result: since the pendent party is not a party against which a federal claim cognizable under section 1331 could be asserted, it will not be held a party within the contemplation of section 1331.

While the *Harvard* casenote concedes that its suggested explanation may not supply the justification for the Supreme Court's decision in *Kroger*, it is nevertheless asserted that the reasoning behind such an explanation leads to a desirable result.[45] That result would be to make the availability of pendent party and ancillary jurisdiction in a case where the primary claim is based on diversity of citizenship jurisdiction dependent solely on whether the parties to such claims could always maintain a diverse alignment from one another.[46] Thus, the federal court's pendent party and ancillary jurisdiction in a diversity case would extend only to encompass claims between diverse parties where those claims fell below the amount in controversy requirement.[47]

The assertion of the desirability of such a result ignores the underlying purpose of pendent party and ancillary jurisdiction, which is to facilitate the

45. 92 HARV. L. REV. at 251.

46. *Id.* at 250.

47. *But see* Zahn v. International Paper Co., 414 U.S. 291 (1973), in which the Court held that all class members of a class action brought pursuant to FED. R. CIV. P. 23(b)(3) must satisfy the amount in controversy requirement, thus, by implication, negating the availability of ancillary jurisdiction in this circumstance. *See also* Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753 (1978). Critical of the *Zahn* decision, the author contends that the Supreme Court did *not* in fact construe the "matter in controversy" requirement of 28 U.S.C. § 1332, but rather the term "civil action." *Id.* at 757. Arising from this distinction is the implication that *Zahn* may have a far greater impact on the availability of pendent party jurisdiction than its specific holding might indicate.

adjudication of complex litigation in a single forum. Without the doctrines of pendent party and ancillary jurisdiction, a would-be diversity plaintiff could be severely cricumscribed, if not prohibited, from entering a federal forum by the fact that claims incidental to the claim conferring jurisdiction will not be cognizable.[48] Such a result might be of little significance if diver-

48. The *Kroger* decision could pose grave problems for a hypothetical diversity plaintiff who finds himself subject to a counterclaim asserted by an impleaded third-party defendant. While the third-party defendant's counterclaim would likely come under the court's ancillary jurisdiction, *see* Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 715-17 (5th Cir. 1970), the plaintiff's assertion of a compulsory counterclaim to the third-party defendant's counterclaim would present an interesting question.

Kroger made much of the facts that the claim held not to fall within the Court's ancillary jurisdiction was brought by the plaintiff, rather than the defendant, and the fact that the claim was not logically dependent on the jurisdiction-invoking claim. These factors would *not* favor the inclusion of the hypothetical plaintiff's compulsory counterclaim within the court's ancillary jurisdiction, since, as in *Kroger*, it is the plaintiff who is asserting the claim. Further, while the plaintiff's compulsory counterclaim would be logically dependent on the third-party defendant's counterclaim, it would not necessarily be logically dependent, as well, on the jurisdiction-invoking claim.

However, the context in which the hypothetical plaintiff's compulsory counterclaim arises may be analytically distinguishable from that in which the plaintiff's claim arose in *Kroger*. First, the hypothetical plaintiff resembles a defendant once the third-party defendant asserts his counterclaim, since he becomes, thereby, committed to defend on a claim which he may not wish to litigate at this time or in this forum. Second, FED. R. CIV. P. 13(a) requires the assertion of any compulsory counterclaim he may have, with the failure to do so resulting in the preclusion of that claim in any subsequent action. C. WRIGHT, LAW OF FEDERAL COURTS § 79 at 390 (3rd ed. 1976).

But while it is not entirely clear whether the absolute rule of *Kroger* would also bar the plaintiff's assertion of a compulsory counterclaim in the hypothetical case, it is clear that if it did, the hypothetical plaintiff's position could quickly prove untenable. It must be remembered that it is the *defendant*, not the *plaintiff*, who impleads a third party. Thus, at the outset of the suit, the plaintiff may not even be able to anticipate the third party's potential presence, let alone anticipate his assertion of a counterclaim to which the plaintiff must assert, in reply, a compulsory counterclaim.

By the time the problem arises, the hypothetical plaintiff could be well into the suit. If *Kroger* is then read to bar his assertion of the compulsory counterclaim, his only options at that point would be to waive the counterclaim, or to voluntarily dismiss the entire action pursuant to FED. R. CIV. P. 41(a), and recommence it in state court. Another possibility, which may be available to the court, is suggested by Heintz & Co. v. Provident Tradesmens Bank & Trust Co., 30 F.R.D. 171 (E.D. Pa. 1962), in which the court states:

> The only distinction between a counterclaim under Rule 13(a) and the sort of claim we have before us under Rule 14 is that defendant "must" plead his counterclaim under Rule 13(a) if it grows out of the same transaction or occurrence, whereas under Rule 14, the third party "may" plead his claim for relief.

Id. at 174. The implication is that a third-party defendant's counterclaim against the plaintiff, asserted under FED. R. CIV. P. 14, will never be "compulsory" in the same sense as a counterclaim asserted under FED. R. CIV. P. 13(a), even where it arises out of the same transaction or occurrence which is the subject of the plaintiff's claim. Thus, a court, in its discretion, could decline to exercise jurisdiction over a third-party defendant's counterclaim where doing so would require the plaintiff to assert a compulsory counterclaim over which the court has no jurisdiction.

Regardless of which option is pursued by the plaintiff or the court, the result would not be

sity jurisdiction was obsolete or merely supplemental to judicial remedies available to litigants in state court proceedings. However, even commentators generally finding diversity jurisdiction to be burdensome are careful to point out that it has not outlived its usefulness in all contexts.[49] It is noted, for example, that diversity jurisdiction continues to play a role in minimizing local prejudice, or, at least, an outsider's fear of such prejudice.[50]

But quite apart from the question of the desirability of diversity jurisdiction is the question of whether pendent party and ancillary jurisdiction in such cases should be limited as the *Harvard* casenote proposes. Although not expressly mandated in the Constitution,[51] the doctrines of pendent party and ancillary jurisdiction are necessary tools of the federal courts for use in the exercise of their jurisdiction over the whole constitutional case.[52] Further, there is no reason to assume that cases brought under section 1332 will be any less complex or likely to generate incidental claims than cases brought under section 1331 or any special federal question jurisdiction statute. Accordingly, there is no rational reason to limit the availability of these doctrines in one circumstance and not in the other.

Kroger might wishfully be distinguished into a manageable niche of federal jurisdiction. Its specific holding, after all, restated nothing more than the opinion held by a majority of the circuits regarding the unavailability of ancillary jurisdiction over a plaintiff's claim against a third-party defendant.[53] A holding so limited would not be an unreasonable one. It is true, as

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conducive to judicial economy in either the federal or state forums, could lead to substantial injustice and is fairly illustrative of the potential problems to be encountered in complex litigation in the aftermath of the abrogation of court's discretion in these matters by the absolute rules of *Aldinger* and *Kroger*.

49. *See* Shapiro, *Federal Diversity Jurisdiction: A Survey and A Proposal*, 91 HARV. L. REV. 317, 327-32 (1977). *See also* Burdick, *Diversity Jurisdiction Under the American Law Institutes Proposals: Its Purpose and Its Effect on State and Federal Courts*, 48 N.D. L. REV. 1 (1971); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968); Field, *Federal Diversity Jurisdiction—A Rebuttal*, 17 S.C. L. REV. 685 (1965); Field, *Proposals on Federal Diversity Jurisdiction*, 17 S.C. L. REV. 669 (1965); Frank, *Federal Diversity Jurisdiction—An Opposing View*, 17 S.C. L. REV. 677 (1965); Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963); Marden, *Reshaping Diversity Jurisdiction: A Plea for Study by the Bar*, 54 A.B.A.J. 453 (1968); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964).

50. Shapiro, *Federal Diversity Jurisdiction: A Survey and A Proposal*, 91 HARV. L. REV. 317, 329-32 (1977).

51. *See generally* United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 238 (1933); Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738 (1824).

52. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); Hurn v. Oursler, 289 U.S. 238, 243 (1938).

53. *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

the *Kroger* Court notes, that the claim was asserted by the plaintiff, who chose the forum and should not now be heard to complain over its limitations.[54] It may also be true that the Court correctly viewed the whole of the action as one essentially against joint tortfeasors,[55] and thus merely held that the plaintiff should not be allowed to evade the complete diversity requirement as the result of a foreseeable impleader. What is disturbing, though, is that rather than approaching the matter on a case-by-case basis as suggested by *Gibbs*, the *Kroger* Court based its holding on a strict reading of section 1332. The problem with such reasoning is that the availability of pendent party and ancillary jurisdiction in other, more appealing contexts will arguably be subject to a similar proscription. Thus, the implication to be drawn from *Kroger* is that the doctrine of pendent party jurisdiction[56] is well on its way to demise.

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F.2d 778 (2d Cir.), *cert. denied*, 328 U.S. 865 (1946). For the minority view, allowing a plaintiff's claim against a third-party defendant to fall 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).

54. Owen Equipment & Erection Co. v. Kroger, 98 S. Ct. 2396, 2404 (1978).

55. *Id.* at 2400 n.3.

56. The *Kroger* Court noted that the distinctions between pendent party and ancillary jurisdiction were not relevant to its decision. *Id.* at 2401 n.8. Although the third-party defendant in *Kroger* would more correctly be termed an ancillary party, the aplication of the generic term, pendent party, is appropriate. *See also* Aldinger v. Howard, 427 U.S. 1, 13 (1976).