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Introduction (A Reappraisal of the Supplemental-Jurisdiction Statute: Title 28 U.S.C sec. 1387, Symposium)

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Introduction

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A federal court has long been able to adjudicate a claim for which jurisdiction did not exist by statute, so long as the claim had the right relation to *another* claim in the case that *was* authorized by statute. Until 1990, this important category of law (termed “extended” or “supplemental” jurisdiction) was governed by a group of federal court doctrines (“ancillary,” “pendent,” or “pendent party” jurisdiction). Then, Congress codified the area through enactment of the federal supplemental-jurisdiction statute, 28 U.S.C. § 1367.

With that event, perhaps all federal trial jurisdiction in civil cases became statutory. Yet § 1367 is indefinite in a way unlike other jurisdictional statutes (e.g., federal question claims under § 1331, diversity claims under § 1332). This is because prior doctrinal law, that Congress sought in large part to replicate, was itself indefinite.

Experiences to date invite a number of questions about the meaning and relative desirability of § 1367. Questions about meaning include these: How much of the law settled prior to § 1367 did the statute preserve through codification? How much did the statute change? Insofar as important issues concerning federal supplemental jurisdiction were unsettled prior to enactment of § 1367, did the statute resolve them? Or does the statute provide means for resolving them yet unrealized?

Questions about desirability include these: Was complete codification of federal supplemental jurisdiction necessary or wise? Even if it was not, is it possible today to return the subject to a state of nonstatutory, doctrinal law? If codification is now the only practical possibility, is § 1367 the best Congress can do? If not, how should the statute be revised or replaced?

In our Symposium, many of the country’s leading civil procedure scholars bring their energies to bear on these and other questions.

In the first Symposium article, Professor Richard D. Freer examines the operation of § 1367 and criticizes the manner in which it restricts plaintiffs acting in a defensive capacity and restricts claims by or against intervenors of right.¹ In the next article, Professor John B. Oakley provides an inside look at the American Law Institute’s current initiative to rewrite the statute and offers some of his own views on supplemental jurisdiction.² Then, Professor Thomas D. Rowe, Jr. writes on the practical necessity of codification for supplemental jurisdiction and offers a draft revision of § 1367.³ In our final article, Professor Joan Steinman carefully

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1. Richard D. Freer, *Toward a Principled Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 IND. L.J. 5 (1998).

2. John B. Oakley, *Integrating Supplemental Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 IND. L.J. 25 (1998).

3. Thomas D. Rowe, Jr., *1367 and All That: Recodifying Supplemental Jurisdiction*, 74 IND. L.J. 53 (1998).

studies a number of questions that arise from the interplay of § 1367 with federal removal statutes.⁴

In the first of a series of comments that follow, Professor Robert G. Bone reflects on the political pragmatism of legislative reform proposals for supplemental jurisdiction and finds a useful distinction between “optional” and “nonoptional” jurisdiction.⁵ Next, Professor Edward H. Cooper warns against attempts to reform supplemental jurisdiction through detailed codification; he offers a legislative proposal that would reintroduce significant judicial lawmaking.⁶ Professor Howard P. Fink views possibilities for improving supplemental jurisdiction through congressional abrogation of the complete-diversity requirement in *Strawbridge v. Curtiss*.⁷

Then, Professor William A. Fletcher considers how a historical examination of multicclaim litigation at the time the Constitution was adopted might inform a better understanding of the role the Constitution could now play in allowing supplemental jurisdiction.⁸ Next, Professor Graham C. Lilly reflects upon the causes of the unfortunate “capture” of the subject of supplemental jurisdiction by Congress and describes how a new statute might restore the balance in lawmaking between Congress and the courts.⁹ Professor Peter Raven-Hansen then identifies and examines the important proviso concluding subsection (b) of § 1367, that particular situations identified in the paragraph will be ineligible for supplemental jurisdiction “when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.”¹⁰

In the comment that follows, Professor David L. Shapiro offers an inside view of Supreme Court argument in the pivotal case, *Finley v. United States*.¹¹ Professor Shapiro contrasts his perspective when arguing the case for the United States with his scholarly look at the Court’s opinion in *Finley* and at the future of supplemental jurisdiction.¹² Then, Professor Arthur D. Wolf presents an overview of the doctrinal and statutory periods making up federal supplemental jurisdiction and discusses the particular effects of § 1367 in federal court abstentions.¹³ Finally, Professor Stephen C. Yeazell combines a historical analysis of

4. Joan Steinman, *Crosscurrents: Supplemental Jurisdiction, Removal, and the ALI Revision Project*, 74 IND. L.J. 75 (1998).

5. Robert G. Bone, *Revisiting the Policy Case for Supplemental Jurisdiction*, 74 IND. L.J. 139 (1998).

6. Edward H. Cooper, *An Alternative and Discretionary § 1367*, 74 IND. L.J. 153 (1998).

7. Howard P. Fink, *Supplemental Jurisdiction—Take It to the Limit!*, 74 IND. L.J. 161 (1998); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1803).

8. William A. Fletcher, “*Common Nucleus of Operative Fact*” and *Defensive Set-Off: Beyond the Gibbs Test*, 74 IND. L.J. 171 (1998).

9. Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 IND. L.J. 181 (1998).

10. Peter Raven-Hansen, *The Forgotten Proviso of § 1367(b) (And Why We Forgot)*, 74 IND. L.J. 197 (1998) (quoting 28 U.S.C. § 1367(b) (1994)).

11. 490 U.S. 545 (1989).

12. David L. Shapiro, *Supplemental Jurisdiction: A Confession, an Avoidance, and a Proposal*, 74 IND. L.J. 211 (1998).

13. Arthur D. Wolf, *Comment on the Supplemental-Jurisdiction Statute: 28 U.S.C. § 1367*, 74 IND. L.J. 223 (1998).

supplemental jurisdiction with thoughts on the planning and pedagogy of the subject in a civil procedure course.¹⁴

This is the richest and most important collection of writings ever assembled on supplemental jurisdiction. I am enormously grateful to our scholars for their contributions and to the editors of the *Indiana Law Journal* for their tireless efforts to bring this issue together. I hope that readers find in this Symposium both enlightenment and a sense of direction for the future.

14. Stephen C. Yeazell, *Teaching Supplemental Jurisdiction*, 74 IND. L.J. 241 (1998).

