1992

Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal

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Volume 14
Issue 1
1992

WESTERN NEW ENGLAND LAW REVIEW

CODIFICATION OF SUPPLEMENTAL JURISDICTION: ANATOMY OF A LEGISLATIVE PROPOSAL

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Professor Wolf expresses his deep appreciation to Ms. Panagiota Brotsis who ably served as his research assistant during the preparation of this Article. Her diligence, insights, perseverance, and good humor made the writing infinitely easier.

Professor Wolf also expresses his gratitude to Ms. Michele Felasco, Class of 1991, for her research during the early stages of the development of this Article.

INTRODUCTION

Recent Supreme Court decisions have threatened the vitality of pendent and ancillary jurisdiction, collectively known as supplemental jurisdiction. Under the supplemental jurisdiction doctrine, federal courts had for many years entertained supplemental claims over which they would not otherwise have had jurisdiction. Through judicial law-making, they had fashioned the doctrine by expansively interpreting the word "case" in Article III of the United States Constitution. In 1990, to prevent further erosion of supplemental jurisdiction, Congress enacted legislation that placed the doctrine on a statutory footing.

On December 1, 1990, President Bush approved the Judicial Improvements Act of 1990.[1] Title III of that Act, the "Federal Courts Study Committee Implementation Act of 1990" (hereinafter Implementation Act),[2] enacted a number of recommendations contained in the Report of the Federal Courts Study Committee,[3] released on April 2, 1990. Section 310 of the Implementation Act codified supplemental jurisdiction by creating a new section, section 1367 of title 28.[4] This codification was the first congressional effort to address this subject comprehensively. On prior occasions, Congress has expressly legislated supplemental jurisdiction in limited areas, the most prominent of which are: (1) actions involving copyright, plant variety, trademark, and patent claims;[5] (2) actions removed from state to federal court;[6]

1. Pub. L. No. 101-650, 104 Stat. 5089 (1990) (to be codified as amended in scattered titles of U.S.C.).

2. *Id.* at 5104.

3. FEDERAL STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (April & July 1990) [hereinafter STUDY COMMITTEE REPORT].

4. See Appendix A for statutory text.

5. 28 U.S.C. § 1338(b) (1988) provides: "The district courts shall have original juris-

and (3) bankruptcy cases.[7] In three other areas, the Supreme Court has interpreted the relevant jurisdictional statutes to prohibit the assertion of some supplemental claims.[8]

The historic nature of congressional action in codifying supplemental jurisdiction in section 1367 calls for a close examination of the legislative process and product. Section I of this Article presents a brief survey of the development of supplemental jurisdiction. Section II examines the history of the legislative process that produced section 1367. Section III contains a preliminary review of judicial decisions under the new supplemental jurisdiction statute. The Article concludes with some editorial remarks regarding the statute and the process by which it became public law.

I. THE DOCTRINE OF SUPPLEMENTAL JURISDICTION

Current terminology refers to the doctrines of pendent and ancillary jurisdiction collectively as "incidental" or "supplemental" jurisdiction. The new provision, section 1367, employs the latter phrase, which courts and commentators appeared to favor prior to the enact-

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diction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws." *Id.*

6. 28 U.S.C. § 1441(c) as amended by the Judicial Improvements Act of 1990 provides:

> Whenever a separate and independent claim or cause of action, within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Judicial Improvements Act of 1990, Pub. L. No. 101-650, 1990 U.S.C.C.A.N. (104 Stat.) 5089, 5114.

Section 312 of Title III of the Judicial Improvements Act, the Federal Courts Study Committee Implementation Act of 1990, amended this section to limit its reach to actions based on the general federal question jurisdictional statute, 28 U.S.C. § 1331 (1988). *See* discussion *infra* at Section II.C.4.

7. 28 U.S.C. § 1334(b) (1988) provides in relevant part: "[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [the Bankruptcy Code], or arising in or related to cases under title 11." *Id. See also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

8. Finley v. United States, 490 U.S. 545 (1989) (28 U.S.C. § 1346(b) forbids a plaintiff who asserts a claim under the Federal Tort Claims Act from asserting a supplemental claim against a person who is not already a party to the action); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (28 U.S.C. § 1332 forbids a plaintiff from asserting a supplemental claim against an impleaded defendant who is not diverse from the plaintiff); Aldinger v. Howard, 427 U.S. 1 (1976) (28 U.S.C. § 1343(3) forbids a plaintiff who asserts a claim under 42 U.S.C. § 1983 from asserting a supplemental claim against a municipality that is not already a party to the action).

ment of the new statute.[9] The doctrine of supplemental jurisdiction permits the federal courts to entertain claims over which they would not otherwise have jurisdiction. In other words, the supplemental or non-federal claim does not have an independent basis of jurisdiction. The federal or jurisdiction-conferring claim could be rooted in any one of many federal statutes that give the district courts jurisdiction based on the nature of the claim (for example, federal question cases) or the nature of the party (for example, diversity cases). The non-federal claim that does not have an independent basis of jurisdiction is usually rooted in state law, although many such claims are based on other sources, such as foreign law.

The development of the doctrine of supplemental jurisdiction moved through four stages. The first stage encompassed the period between the decisions of the Supreme Court in *Osborn v. Bank of the United States*[10] in 1824 and *United Mine Workers v. Gibbs*[11] in 1966. The second stage began with *Gibbs*, the landmark case that expanded the scope of supplemental jurisdiction, and continued until *Aldinger v. Howard*[12] in 1976. The third stage commenced with *Aldinger*, when the Court started restricting supplemental jurisdiction, and continued through *Finley v. United States*[13] in 1989 up to the enactment of section 1367 on December 1, 1990. The fourth stage began with the enactment of section 1367, the supplemental jurisdiction statute.[14]

A. *Early Development*

Some commentators[15] trace the roots of supplemental jurisdiction to the 1824 decision of the United States Supreme Court in *Osborn v. Bank of the United States*.[16] Writing for the Court, Chief Justice Mar-

9. Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991) [hereinafter Freer, *Compounding Confusion and Hampering Diversity*]; Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34 [hereinafter Freer, *A Principled Statutory Approach*]; Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983); Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247. One commentator traces the use of the word "supplemental" as a jurisdictional concept to equity practice of antiquity. Susan M. Glenn, Note, *Federal Supplemental Enforcement Jurisdiction*, 42 S.C. L. REV. 469 (1991).

10. 22 U.S. (9 Wheat.) 738 (1824).

11. 383 U.S. 715 (1966).

12. 427 U.S. 1 (1976).

13. 490 U.S. 545 (1989).

14. This fourth stage will be discussed in Section III.

15. *E.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.4.1 (1989); CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 19 (4th ed. 1983).

16. 22 U.S. (9 Wheat.) 738 (1824).

shall observed:

> There is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States. . . . If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, . . . then all the other questions must be decided as incidental to this, which gives that jurisdiction.[17]

The "other questions" to which he referred were matters arising under state law, the decision of which was both necessary and "incidental"[18] to the federal questions. Since nearly every case arising under federal law would raise non-federal questions, as Marshall noted, the federal court must have the authority to resolve all of the issues in the case.[19]

While the federal courts could have limited the *Osborn* language to resolving only state law *questions*, but not separate, state-based *claims*, they did not interpret the words so restrictively. In succeeding years, the Supreme Court and lower federal courts employed the doctrine of supplemental jurisdiction in a wide variety of contexts, permitting the joinder of additional claims and parties even without an independent basis of jurisdiction. Notwithstanding the requirement of complete diversity,[20] for example, the Supreme Court permitted persons to intervene as defendants to protect their property interests even though they were citizens of the same state as the plaintiff.[21] In later years the Court also permitted defendants to assert, against non-diverse plaintiffs, state-based counterclaims arising out of the same

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17. *Id.* at 820, 822. Even Justice Johnson in dissent agreed. "No one can question, that the Court which has jurisdiction of the principal question, must exercise jurisdiction over every question." *Id.* at 884 (Johnson, J., dissenting).

18. *Id.* at 822. Some authors have used the word "incidental" to describe a unified doctrine of pendent and ancillary jurisdiction. *E.g.*, Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction,* 95 HARV. L. REV. 1935 (1982). The more common phrase is "supplemental jurisdiction," which § 1367 employs. *See supra* text accompanying note 9.

19. *Osborn*, 22 U.S. (9 Wheat.) at 822. Of course, the presence of those "other questions" in the case does not deprive Congress of the power to confer jurisdiction on the federal courts over the federal issues.

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

Id. at 823.

20. The requirement of complete diversity, in which each plaintiff must be a citizen of a different state from each defendant, traces its lineage to Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). *See generally* CHEMERINSKY, *supra* note 15, § 5.3.3.

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

transaction or occurrence that gave rise to the plaintiff's federal claim.[22] Indeed the Court, relying on supplemental jurisdiction, even permitted a plaintiff to assert a state law claim against an entity of state government,[23] notwithstanding state sovereign immunity embedded in the Eleventh Amendment to the United States Constitution.[24]

In 1933, the Supreme Court sought to restate the doctrine of supplemental jurisdiction in *Hurn v. Oursler*.[25] For federal court jurisdictional purposes, the Court distinguished cases in which state and federal grounds are asserted in support of a "single cause of action" from suits where the state and federal bases comprise "two separate and distinct causes of action."[26] In tying federal jurisdiction over nonfederal claims to the concept of a "single cause of action," the Court created a rule that was the "source of considerable confusion" in the lower federal courts.[27] Many years later the Court recognized that by the "first third of the 20th century, however, the phrase [cause of action] had become so encrusted with doctrinal complexity that the authors of the Federal Rules of Civil Procedure eschewed it altogether."[28]

B. *The Gibbs Era*

In 1938, five years after *Hurn*, the Supreme Court adopted the Federal Rules of Civil Procedure, which laid the groundwork for a

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

23. Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909). However, the Supreme Court disapproved this use of supplemental jurisdiction in Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), which extended the reach of the Eleventh Amendment to bar federal court jurisdiction over plaintiff's state law claims against a state or its entities and officials.

24. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

25. 289 U.S. 238 (1933).

26. *Id.* at 246. The Court rejected the notion of defining "cause of action" by its factual underpinnings for purposes of supplemental jurisdiction. *Id. See generally* Note, *The Concept of Law-Tied Pendent Jurisdiction:* Gibbs *and* Aldinger *Reconsidered*, 87 YALE L.J. 627 (1978). At other points in the *Hurn* opinion, however, the Court did make reference to the claims as "dependent on the same facts," and as resting "upon identical facts." *Hurn*, 289 U.S. at 244, 246. The attention in *Hurn* to the facts underlying claims might have inspired the Court in *Gibbs* to reformulate supplemental jurisdiction in terms of a "common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

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

28. Davis v. Passman, 442 U.S. 228, 237 (1979). Nonetheless, the Court in *Davis* continued the use of the phrase "cause of action," which created additional confusion among civil procedure mavens. *Id.* at 237, 239 nn.15, 18.

reformulation of the doctrine of supplemental jurisdiction.[29] Among other things, the rules merged law and equity into one civil action,[30] provided for liberal joinder of claims and parties,[31] and effected other reforms aimed at litigating all claims among the disputants in one lawsuit.[32] In 1966, the Supreme Court relied heavily on the modernization of the Federal Rules of Civil Procedure when it reformulated the doctrine of supplemental jurisdiction.

In the leading case of *United Mine Workers v. Gibbs*,[33] the Court noted the difficulties experienced by the lower federal courts in applying the *Hurn* "cause of action" doctrine.[34] Referring to the rules and the tendency of its earlier cases to require a plaintiff to join all related claims in one action, the Court held that jurisdiction, in an Article III sense, exists if the relationship between the federal and state claims "permits the conclusion that the entire action before the court comprises but one constitutional 'case.' "[35] In short, the Court permitted

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29. *See generally* United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

30. FED R. CIV. P. 2. Rule 2 provides: "There shall be one form of action to be known as 'civil action.' " *Id.*

31. *See id.* Rule 18 (joinder of claims and remedies); *id.* Rule 19 (joinder of persons needed for just adjudication); *id.* Rule 20 (permissive joinder of parties); *id.* Rule 21 (misjoinder and nonjoinder of parties).

32. *See id.* Rule 13 (counterclaim and cross-claim); *id.* Rule 14 (third-party practice); *id.* Rule 15 (amended and supplemental pleadings); *id.* Rule 22 (interpleader); *id.* Rule 24 (intervention); *id.* Rule 42 (consolidation).

33. 383 U.S. 715 (1966).

34. *Id.* at 724.

35. *Id.* at 725 (footnote omitted). Although the *Gibbs* opinion is vulnerable on several grounds, perhaps its most obvious flaw is the Court's reversal of the usual analysis that addresses statutory issues before examining constitutional questions. *See generally* Michael Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968). Prior to determining the scope of the word "case" in Article III, the *Gibbs* Court should have studied the jurisdictional statute to determine whether Congress intended to confer pendent jurisdiction, and in what measure. If the statutory grant reached the state claim, only then would it have been necessary to decide whether that grant was within the confines of Article III. *See infra* notes 42-52 and accompanying text.

One commentator suggested that Aldinger v. Howard, 427 U.S. 1 (1976), may have undermined *Gibbs* by requiring that the plaintiff affirmatively show that Congress intended in the jurisdictional statute to permit the assertion of the particular pendent claim in question. Geoffrey P. Miller, Comment, Aldinger v. Howard *and Pendent Jurisdiction*, 77 COLUM. L. REV. 127 (1977). The thrust of *Aldinger*, as later amplified by the Court in Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978), did not go quite that far. Rather *Aldinger* and *Kroger* appeared to create a presumption in favor of pendent jurisdiction that could be rebutted by a showing that Congress intended to exclude a particular pendent claim or party from the scope of federal jurisdiction. *See generally* Ellen S. Mouchawar, Note, *The Congressional Resurrection of Supplemental Jurisdiction in the Post*-Finley *Era*, 42 HASTINGS L.J. 1611, 1624-25 (1991). The Court's subsequent decision in Finley v. United States, 490 U.S. 545 (1989), may indeed have gone that far. See *infra* notes 62-66 and accompanying text for a discussion of the *Finley* case.

the plaintiff to assert both federal and state law claims in one civil action even though the state claim did not have an independent basis of jurisdiction.

After surmounting the constitutional objection to a more expansive view of supplemental jurisdiction, the Court in *Gibbs* articulated the criteria by which to determine, in any given action, whether the federal and state claims do indeed constitute "one constitutional 'case.'" With the vagaries of "cause of action" undoubtedly in mind, the Court adopted a two-pronged test to determine when non-federal claims (those which do not have an independent basis for federal jurisdiction) may properly be asserted in federal court.[36] First, the federal claim that provides the independent basis for jurisdiction must have "substance sufficient to confer subject matter jurisdiction."[37] Second, the federal and non-federal claims must "derive from a common nucleus of operative fact."[38]

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36. *Gibbs*, 383 U.S. at 725. A lively debate has developed over whether the *Gibbs* test is two-pronged or three-pronged. This debate has arisen because Justice Brennan, after noting the "substantiality" and "common nucleus" factors, added: "But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.* Three distinguished commentators, relying on the "ordinarily be expected to try" language, maintain that this element is cumulative to the other two factors, and thus constitutes a third criteria. 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567.1, at 116 (2d ed. 1984); *accord,* Norbert J. Bissonette, Note, *Pendent Party Jurisdiction: The Demise of a Doctrine?*, 27 DRAKE L. REV. 361, 364-65 (1977-78); Mouchawar, *supra* note 35, at 1619-21 (referring to this third factor as the "single trial expectancy" standard).

But other commentators are equally certain that *Gibbs* announced only a two-pronged test, with the above quoted sentence serving as an alternative formulation. *E.g.*, Joan Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 764-65 (1972); *accord*, William D. Claster, Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263, 1272 (1975). Still other scholars view the trial expectation language as "surplusage, used only to give content to the common nucleus test." Matasar, *supra* note 9, at 139; *see also* Mengler, *supra* note 9, at 274.

The Supreme Court itself has not resolved this ambiguity nor has it acknowledged the underlying debate. Its recent descriptions of the *Gibbs* opinion could be read to support any of these interpretations. *See, e.g.*, Finley v. United States, 490 U.S. 545 (1989); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349 (1988). In the legislative history accompanying the Civil Rights Attorney's Fees Awards Act of 1976, Congress adopted a two-pronged test, based on its interpretation of the *Gibbs* case, for the purpose of awarding attorney fees in actions involving supplemental claims. H.R. REP. NO. 1558, 94th Cong., 2d Sess. 4 n.7 (1976). The federal courts have followed this interpretation of *Gibbs* in construing the Civil Rights Attorney's Fees Awards Act. *See generally* MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES ¶ 12.03 (1991).

37. *Gibbs*, 383 U.S. at 725.

38. *Id.*

In 1974, eight years after *Gibbs*, the Court clarified the first prong of the test by explaining more precisely what it meant by a claim of "sufficient substance." In *Hagans v. Lavine*,[39] the Court held that this standard required only that the federal claim be one that is not "obviously frivolous," or "absolutely devoid of merit," or "wholly insubstantial."[40] The relatively low quantum of "federalness" needed to satisfy this minimal requirement led Justice Rehnquist, dissenting in *Hagans*, to characterize the standard as permitting jurisdiction whenever the "plaintiff is able to plead his claim with a straight face."[41]

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39. 415 U.S. 528 (1974).

40. *Id.* at 536-37 (citations omitted). When the defendant moves to dismiss the complaint because the federal question is "insubstantial" or "frivolous," the court, in ruling on that motion, looks only to the plaintiff's allegations. *See* Rosado v. Wyman, 397 U.S. 397 (1970). Thus, the plaintiff need not demonstrate jurisdiction "over the primary claim at all stages as a prerequisite to resolution of the pendent claim." *Id.* at 405. This approach is little more than an application of the "well-pleaded complaint" rule, which the Court has applied to resolve subject matter jurisdiction questions. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938) (jurisdictional amount); Metcalf v. Watertown, 128 U.S. 586 (1888) ("arising under" questions); Mollan v. Torrance, 22 U.S. (9 Wheat.) 537 (1824) (diversity of citizenship). In each of these cases, the Court relied on Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), in holding that jurisdiction depends "on the state of things when the action is brought." *Id.* at 824. That "after vesting, it cannot be ousted by subsequent events." *Mollan*, 22 U.S. (9 Wheat.) at 539; *cf.* Mosher v. City of Phoenix, 287 U.S. 29, 30 (1932) ("Jurisdiction is thus determined by the allegations of the [complaint] and not by the way the facts turn out or by a decision of the merits."). The Court recently reaffirmed this settled rule in Freeport-McMoRan, Inc. v. K N Energy, Inc., 111 S. Ct. 858, 860 (1991) (per curiam) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events.").

In view of a provision in the Judiciary Act of 1875, ch. 137, 18 Stat. 470, the rule might have been the other way, that is, that federal court jurisdiction could be "ousted by subsequent events." Section 5 of the 1875 Act required dismissal of a suit commenced in or removed to federal court "*at any time after* such suit has been brought [if the suit] does not really and substantially involve a dispute or controversy properly within the jurisdiction" of the court. Judiciary Act of 1875, ch. 137, § 5, 18 Stat. 470, 472 (emphasis added); *see generally* Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877) (federal court suit may be dismissed if it later appears that disposition of the case does not depend upon the construction of federal law or the Constitution). Even though that language remained in the United States Code until 1948, when it was removed "as unnecessary," the Supreme Court nonetheless adhered to the "well-pleaded complaint" rule through those years. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1705 (3d ed. 1988). The Supreme Court has also held, however, that other jurisdictional attacks, such as the absence of a justiciable controversy (e.g., standing to sue or mootness), remain open throughout the litigation and are subject to later developments. *E.g.*, County of Los Angeles v. Davis, 440 U.S. 625 (1979) (mootness).

41. *Hagans*, 415 U.S. at 564 (Rehnquist, J., dissenting). Because Justice Rehnquist thought the jurisdiction-conferring constitutional claim was so weak and insubstantial, he quipped that "this seems to be a classic case of the statutory tail wagging the constitutional dog." *Id.* Indeed some of the earlier precedents required that the federal question be "real and substantial," which seemed to impose something more than the minimal test of *Hagans*. McCain v. Des Moines, 174 U.S. 168, 181 (1899). The formulation in *McCain* de-

One of the puzzling points in *Gibbs* was its placing the doctrine of supplemental jurisdiction on Article III grounds, without regard to any jurisdictional statute. Both before and after *Gibbs*, the Supreme Court referred to the doctrine as judicially created.[42] In *Murphy v. John Hofman Co.*,[43] a pre-*Gibbs* decision, the Court held:

> Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, *though it is not authorized by any statute*.[44]

In *Pennhurst State School & Hospital v. Halderman*,[45] a post-*Gibbs* decision, the Court noted that "pendent jurisdiction is a judge-made doctrine inferred from the general language of Article III."[46] Later in the same opinion, Justice Powell observed that "pendent jurisdiction is a judge-made doctrine of expediency and efficiency derived from the general Article III language conferring power to hear all 'cases' arising under federal law or between diverse parties."[47]

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rived from the general federal question jurisdictional statute, enacted in 1875, which authorized the federal trial courts to dismiss an original suit or remand a removed suit to the state court if "it shall appear to the satisfaction of said [federal] court, at any time after such suit has been brought or removed thereto, that such suit does not *really and substantially* involve a dispute or controversy properly within the jurisdiction of said [federal] court." Judiciary Act of 1875, ch. 137, § 5, 18 Stat. 470, 472 (emphasis added). Although this provision was omitted from the 1948 recodification of the Judicial Code "as unnecessary," the federal courts continued to apply the substantiality test after 1948. HART & WECHSLER, *supra* note 40, at 1705 (quoting from the legislative history of the recodification). Perhaps that omission underlays Justice Harlan's observation that the standard is "a maxim more ancient than analytically sound." Rosado v. Wyman, 397 U.S. 397, 404 (1970).

42. *See generally* Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986) (exploring the concept of judicially created rules of jurisdiction in a broader context).

43. 211 U.S. 562 (1909). The Court's holding in *Murphy* derived from its earlier decision in Freeman v. Howe, 65 U.S. (24 How.) 450 (1861).

44. *Murphy*, 211 U.S. at 569 (emphasis added). The newly enacted § 1367 combines "ancillary jurisdiction" with "pendent jurisdiction" to form "supplemental jurisdiction." 28 U.S.C.A. § 1367 (West Supp. 1991). See Appendix A.

45. 465 U.S. 89 (1984).

46. *Id.* at 117.

47. *Id.* at 120. In relying on "the general Article III language" as the basis for supplemental jurisdiction, the Court has not drawn any distinction between "cases" and "controversies," the critical words in Article III. Arguably "cases" could have a narrower meaning than "controversies" since "cases" are tied to federal sources of law, while "controversies" refer to disputes involving designated parties. Thus, an Article III "case" ar-

In judicially creating supplemental jurisdiction and placing it on Article III grounds, the Supreme Court altered the usual jurisdictional analysis it has articulated through the years in two significant respects. First, the Court has insisted that lower federal courts address non-constitutional state or federal grounds of decision before addressing constitutional questions.[48] In *Burton v. United States*,[49] the Court stated that "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."[50] If the jurisdictional statute in *Gibbs* (the Taft-Hartley Act) did not authorize supplemental jurisdiction, then the Court did not have to address the scope of a "constitutional case" in Article III.[51] The Court never addressed this statutory question.

Second, the Court has long stated that the jurisdiction of the federal courts, including the appellate jurisdiction of the Supreme Court,[52] is governed by statute. In 1799, the Court stated that "[t]he political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress, . . . [and] congress is not bound . . . to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant."[53] Almost 150 years ago, the Court held that federal courts "must look to the statute as the warrant for their authority; certainly they cannot go

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guably is only as broad as the federal claim or question (including the facts or transaction upon which it is based) that confers the jurisdiction, while an Article III "controversy" could include the whole range of claims and questions that are in dispute between designated parties that determine jurisdiction.

Recently, in Finley v. United States, 490 U.S. 545 (1989), the Court sought to reconstruct the judicially created doctrine of supplemental jurisdiction upon a statutory footing. See *infra* notes 62-66 and accompanying text for a discussion of the *Finley* case.

48. *See, e.g.*, Hagans v. Lavine, 415 U.S. 528 (1974) (federal statutory ground); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909) (state law ground).

49. 196 U.S. 283 (1905).

50. *Id.* at 295; *accord* Township of Hillsborough v. Cromwell, 326 U.S. 620, 629 (1946); Cincinnati v. Vester, 281 U.S. 439, 448-49 (1930).

51. *See generally* Shakman, *supra* note 35.

52. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). The Court stated:

> The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

Id. at 513.

For the view that the Constitution limits the power of Congress to control the exercise of Supreme Court appellate jurisdiction, see generally Lawrence G. Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). For the status of the current debate between these two positions, see generally HART & WECHSLER, *supra* note 40, at 379-87.

53. Turner v. Bank of North Am., 4 U.S. (4 Dall.) 8, 10 n.1 (1799).

beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them."[54] In *Gibbs*, the Supreme Court ignored the statutory basis for jurisdiction in the federal courts and moved directly to the scope of an Article III "case."

In any event, for ten years after the 1966 ruling in *Gibbs*, the lower federal courts liberally followed its teachings. In a wide variety of cases, the district judges permitted litigants to join separate claims in one lawsuit if they met the *Gibbs* criteria.[55] Some courts applied the generous *Gibbs* test to cases in which new parties were brought into the litigation. For example, in *Revere Copper & Brass Inc. v. Aetna Casualty & Sur. Co.*,[56] the Fifth Circuit Court of Appeals held that a third party defendant in a diversity suit could assert a claim against a non-diverse plaintiff.[57]

C. *Erosion of the Doctrine*

In a series of decisions beginning in 1976, however, the Supreme Court started restricting supplemental jurisdiction. While adhering to the general contours of *Gibbs*, the Court held that the broad reach of *Gibbs* would be limited where Congress, by statute, has so indicated. For example, in *Aldinger v. Howard*,[58] the Court held that a plaintiff may not invoke supplemental jurisdiction to assert a state law claim against a county government that is not already a party to a lawsuit based on 42 U.S.C. § 1983.[59] Similarly, in *Owen Equipment & Erection Co. v. Kroger*,[60] the Court held that the plaintiff in a diversity suit may not invoke supplemental jurisdiction to assert a state law claim against an impleaded third party defendant if diversity of citizenship does not exist between them under 28 U.S.C. § 1332.[61]

The erosion of supplemental jurisdiction continued in *Finley v. United States*.[62] In *Finley*, the Court refused to permit the plaintiff, suing the United States under the Federal Tort Claims Act (FTCA),

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54. Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845).

55. *See generally* WRIGHT, *supra* note 36, § 3567.2; CHEMERINSKY, *supra* note 15, § 5.4.

56. 426 F.2d 709 (5th Cir. 1970).

57. *Id.* at 715-16. Eight years later, the Supreme Court held that the plaintiff in a diversity suit could not assert a claim against a non-diverse third party defendant, even though that defendant could assert a claim against the plaintiff. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978).

58. 427 U.S. 1 (1976).

59. *Id.* at 16-19.

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

61. *Id.* at 373-77.

62. 490 U.S. 545 (1989).

to join a non-diverse entity as a defendant and assert a state law claim against it.[63] The Court reached this result even though federal jurisdiction is exclusive in FTCA cases,[64] and even though the federal courts largely apply state law in such suits.[65] Indeed, in *Finley,* the Court appeared to cast doubt on the *Gibbs* case itself, suggesting that congressional authorization is necessary, at least where new parties are joined, before the courts may invoke supplemental jurisdiction. The Court stated that where existing parties seek to bring new persons into the lawsuit, it would not presume that supplemental jurisdiction would extend to the limits of Article III.[66]

Following the lead of the Supreme Court in *Finley*, some lower federal courts restricted the reach of supplemental jurisdiction. In *Lockard v. Missouri Pacific Railway Co.*,[67] for example, the Eighth Circuit Court of Appeals ruled that a plaintiff may not assert a state law claim for negligence against a person not already a party to a law suit arising under the Federal Employers' Liability Act.[68] Similarly, in *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*,[69] the Court of Appeals held that the plaintiff could not, in the absence of diversity, assert a claim against a third person, not already in the lawsuit, to enforce a state based property lien in an action arising under the Employee Retirement Income Security Act of 1974.[70]

In contrast, other federal courts were more generous in reading the *Finley* opinion. The Court of Appeals for the Ninth Circuit permitted pendent party claims based on state law in suits grounded in the Foreign Sovereign Immunities Act.[71] Furthermore, in some cases,

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63. *Id.* at 554-56.

64. 28 U.S.C. § 1346(b) (1988) provides that, in FTCA cases, "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States." *Id.*

65. Section 1346(b) further provides that the district courts, in FTCA cases, shall apply "the law of the place where the act or omission [giving rise to governmental liability] occurred." *Id.* With some exceptions, this means that state law ordinarily applies in FTCA cases. *See* Dalehite v. United States, 346 U.S. 15 (1953); *cf.* Berkovitz v. United States, 486 U.S. 531 (1988).

66. *Finley*, 490 U.S. at 549. One could argue that Congress implicitly adopted the broad *Gibbs* approach to supplemental jurisdiction in every jurisdictional statute enacted or amended since the *Gibbs* decision in 1966. Herman & MacLean v. Huddleston, 459 U.S. 375, 384-86 (1983), seems to support that theory. In *Herman & MacLean*, the Court stated that congressional reenactment of a statutory scheme, in the face of numerous judicial precedents, could be seen as a ratification of "well established judicial interpretation." *Id.* at 385-86. See Mengler, *supra* note 9, at 260-67, for an exploration and rejection of this adoption or ratification theory.

67. 894 F.2d 299 (8th Cir.), *cert. denied*, 111 S. Ct. 134 (1990).

68. *Id.* at 301-03.

69. 891 F.2d 548 (5th Cir.), *cert. denied*, 110 S. Ct. 3272 (1990).

70. *Id.* at 550-52.

71. Teledyne, Inc. v. Kone Corp., 892 F.2d 1404 (9th Cir. 1989). The new statute,

the courts simply disagreed on the point whether a particular statute authorized supplemental jurisdiction. Interpreting the same statutory language in the same context, federal courts came to different conclusions on the scope of such jurisdiction.[72] The most favorable reading of these cases was that the courts will address the question of supplemental jurisdiction on a statute-by-statute basis, a time-consuming and expensive process with uneven results.

The one point upon which courts and commentators agreed, however, was that the decision in *Finley* was a genuine and substantial threat to the doctrine of supplemental jurisdiction. For example, the Second Circuit Court of Appeals stated that after *Finley* "the continued viability of the doctrine of pendent party jurisdiction in any context is seriously in question."[73] A district court in Louisiana noted that the impact of *Finley* "on supplemental jurisdiction in general is potentially far-reaching."[74] Legal scholars also expressed alarm at the thrust of the *Finley* decision. President Lee, a member of the Federal Courts Study Committee, and Professor Wilkens wrote: "Similar reasoning, applied to other jurisdictional statutes, would have a devastating effect on the availability of supplemental jurisdiction."[75] In his frank and perceptive assessment of the law after *Finley*, Professor Mengler observed: "Supplemental jurisdiction, therefore, is arguably dead and surely expiring."[76]

To prevent further erosion of supplemental jurisdiction, congressional action was necessary. In light of the Supreme Court's recent curtailing of such jurisdiction and the lower federal courts' confusion about the reach of the *Finley* case, Congress sought to remove the

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28 U.S.C. § 1367(b), may overrule this holding to the extent it is a suit involving a foreign sovereign based solely on 28 U.S.C. § 1332. *See* 28 U.S.C.A. § 1367(b) (West Supp. 1991); 28 U.S.C. § 1332(a)(4) (1988).

72. *Compare* Stallworth v. City of Cleveland, 893 F.2d 830 (6th Cir. 1990) (disallowing pendent party claim for loss of consortium under 42 U.S.C. § 1983) *with* Rodriguez v. Comas, 888 F.2d 899 (1st Cir. 1989) (allowing pendent party claim for loss of consortium under 42 U.S.C. § 1983).

73. Roco Carriers, Ltd. v. M/V Nurnberg Express, 899 F.2d 1292, 1295 (2d Cir. 1990).

74. Community Coffee Co. v. M/S Kriti Amethyst, 715 F. Supp. 772, 774 (E.D. La. 1989).

75. Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. REV. 321, 330. *See generally Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) [hereinafter *Hearings*].

76. Mengler, *supra* note 9, at 248. *See generally* WRIGHT, *supra* note 36, § 3567.2, at 27-28 (Supp. 1991).

uncertainty by codifying the law as it existed before the recent curtailment. Indeed, Justice Scalia's opinion for the Court in *Finley* essentially invited congressional action.[77]

Furthermore, supplemental jurisdiction is a by-product of an important goal of modern civil procedure to join in a single civil action as many claims and parties as feasible in the interest of "judicial economy, convenience and fairness to litigants."[78] Without congressional action, the courts would have continued eviscerating supplemental jurisdiction and thus undermined this important goal. An emasculated doctrine would have resulted in duplicative or overlapping litigation in state and federal courts. If parties cannot litigate all of their claims in the federal forum, they will confront the hard choice of whether to split their claims between state and federal courts, or take the entire dispute to a state court. If federal jurisdiction on the federal claim is exclusive, then splitting the claims will be the only avenue for relief as in the *Finley* case. In addition, the *Finley* case had resulted, and would have continued to result, in extended litigation over the question whether particular statutes do or do not authorize supplemental jurisdiction. At a time of docket congestion in all courts, litigants could not afford these additional expenditures of time, money, and other resources.

II. THE LEGISLATIVE PROCESS

To appreciate the evolution of the proposal to codify supplemental jurisdiction as it moved through Congress, two broad inquiries need to be made. First, Section II of this Article will examine the history of section 120 of House Bill 5381,[79] the bill that eventually became the "Federal Courts Study Committee Implementation Act of 1990."[80] Second, this Section will explore three areas of the legislative development where the proposed provision for supplemental jurisdiction in House Bill 5381 differed significantly from the final product embodied in section 1367 as enacted. The first area to be discussed is the section 1367 provision defining the general scope of supplemental

77. Finley v. United States, 490 U.S. 545, 556 (1989).

78. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). In Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988), the Court added "comity" to "judicial economy, convenience, and fairness" as values that inform the scope and exercise of supplemental jurisdiction, although the *Gibbs* decision did make reference to the impact of the doctrine on federalism. *Id.* at 350.

79. H.R. REP. NO. 734, 101st Cong., 2d Sess. 15, *reprinted in* 1990 U.S.C.C.A.N. 6860 and *in Hearings*, *supra* note 75, at 315.

80. Title III of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5104 (1990) (to be codified as amended in scattered titles of U.S.C.).

jurisdiction. The next area to be discussed is the assignment of discretion to the judges in determining the scope and exercise of the authority conferred by section 1367. Finally, Section II will examine the broad exception for diversity cases.

A. *History of Section 120 of House Bill 5381*

The impetus for section 1367, the supplemental jurisdiction provision, came from recent Supreme Court decisions restricting supplemental jurisdiction[81] and from the Report of the Federal Courts Study Committee.[82] The Report recommended "that Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely, defendants against whom that plaintiff has a closely related state claim."[83] In their letter to Representative Kastenmeier, the authors of the original proposal stated: "Recent decisions of the Supreme Court, eroding the doctrine of supplemental jurisdiction, have generated strong support for codification . . . . If we are to arrest that [erosion] and breathe new life into the doctrine, urgent action by Congress is needed."[84]

Section 1367 progressed through four stages of development before enactment: first, the original proposal submitted to Representative Kastenmeier on June 8, 1990;[85] second, the text of the proposed section 1367 contained in section 120 of House Bill 5381,[86] the bill Representative Kastenmeier introduced on July 26, 1990; third, the amendments to the bill recommended by the witnesses at the congressional hearing on September 6, 1990,[87] and by Professors Rowe, Burbank, and Mengler on September 11, 1990 (hereinafter Rowe-

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81. *Hearings*, *supra* note 75, at 686-91 (Wolf-Egnal proposal). *See generally* STUDY COMMITTEE REPORT, *supra* note 3, pt. III, vol. II, *Working Papers and Subcommittee Reports* 546-68 (1990) (section on pendent and ancillary jurisdiction in the *Report of the Subcommittee on the Role of the Federal Courts and their Relation to the States*, for which Professor Larry Kramer served as the reporter).

82. STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 47-48.

83. *Id.* at 47.

84. *Hearings*, *supra* note 75, at 686 (letter of June 8, 1990, to Representative Kastenmeier from Professor Wolf).

85. *Id.* See Appendix B for text of the Wolf-Egnal proposal.

86. *Hearings*, *supra* note 75, at 2, 28-33. See Appendix C for text of H.R. 5381, section 120.

87. *Hearings*, *supra* note 75, at 98, 155-56, 224-26, 735. See Appendix D for text of the Weis proposal.

Burbank-Mengler proposal);[88] and fourth, the final version of section 1367 that became public law. The principal comparison should be made between House Bill 5381 as introduced in Congress and as it emerged from the subcommittee on September 13th, which became section 1367 as enacted.

After the release on April 2, 1990, of the Report of the Federal Courts Study Committee, the four members of Congress[89] who had served on the Federal Courts Study Committee directed their staffs to prepare a bill that would include the "noncontroversial"[90] recommendations of the Study Committee.[91] They defined "noncontroversial" to include those Study Committee recommendations to which none of them had objected, and which they anticipated would not draw significant opposition.[92] Simultaneously with the work of the subcommittee staff, Professors Wolf and Egnal[93] prepared a draft supplemental jurisdiction statute based on the prior case law and the Report of the Study Committee. By letter dated June 8, 1990,[94] they sent their proposal to Representative Kastenmeier,[95] a member of the Study Committee and chair of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice.[96] Three members[97] of

88. *Hearings*, *supra* note 75, at 722. See Appendix E for text of the Rowe-Burbank-Mengler proposal.

89. The four members were Representatives Robert W. Kastenmeier and Carlos J. Moorhead, and Senators Charles E. Grassley and Howell Heflin.

90. *Hearings*, *supra* note 75, at 103.

91. Conversation with Charles G. Geyh. Mr. Geyh served as counsel to the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice during this period and was assigned to this bill. Mr. Geyh is currently a Professor of Law at Widener University, Harrisburg, Pa.

92. Conversation with Charles G. Geyh. For example, based on this definition, the recommendation to repeal the general diversity jurisdictional statute did not qualify as "noncontroversial" because Senator Grassley disagreed with that proposal, and because it had generated significant opposition in the past. STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 42. Furthermore, Senator Grassley described the contents of the bill in a different way, including "only those consensus items that enjoyed unanimous support among study committee members." 136 CONG. REC. S17578 (daily ed. Oct. 27, 1990).

93. Professor of Law, Western New England College School of Law.

94. *Hearings*, *supra* note 75, at 686.

95. For many years, Representative Kastenmeier served as the chair of the House Judiciary Subcommittee for Courts, Intellectual Property, and the Administration of Justice. His interest in and devotion to matters affecting the federal courts are well known and greatly admired by aficionados of the federal judicial system. *See, e.g.*, Thomas D. Rowe, Jr., *Jurisdictional and Transfer Proposals for Complex Litigation*, 10 REV. LITIG. 325 (1991); Charles G. Geyh, *Complex Litigation Reform and the Legislative Process*, 10 REV. LITIG. 401 (1991). In November, 1990, Representative Kastenmeier suffered an unexpected defeat in the congressional elections of that year. Representative William J. Hughes now serves as chair of that subcommittee.

96. Professors Wolf and Egnal also sent the proposal to Senator Joseph Biden, chair

the Study Committee opposed the recommendation to codify supplemental jurisdiction to the extent it embraced "pendent party jurisdiction,"[98] which furnished cause for concern that the proposal might attract opposition.[99] However, the Wolf-Egnal letter prompted Representative Kastenmeier to revisit the issue and to include the Wolf-Egnal proposal, as modified, in the draft bill, House Bill 5381.[100] On July 26, 1990, Representative Kastenmeier and Representative Moorhead, the other member of the House who served on the Federal Courts Study Committee, introduced House Bill 5381, which contained the supplemental jurisdiction proposal in section 120 of the bill.

On September 6, 1990, the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice held a one day hearing on House Bill 5381 and related bills. Some of the witnesses addressed the supplemental jurisdiction provision. Assistant Attorney General Stuart Gerson, representing the United States Department of Justice, opposed the entire section of House Bill 5381 that would codify supplemental jurisdiction.[101] Judge Deanell Tachs, chair of the Judicial Conference Committee on the Judicial Branch, testified in favor of the supplemental jurisdiction provision recommending "three minor changes."[102] Judge Joseph Weis, Jr., testified as the former chair of the Federal Courts Study Committee.[103] He too supported the supplemental jurisdiction provision, but recommended the adoption of the three changes offered by the Judicial Conference and amendments relating to diversity cases.[104] Alan Morrison, representing Public Citizen Litigation Group (the Ralph Nader litigators), "strongly support[ed] the supplemental jurisdictional provisions"[105] of House Bill 5381 with some suggestions for amendment.[106]

After the hearing on September 6, 1990, the subcommittee pre-

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of the Senate Judiciary Committee, and Senator Howell Heflin, chair of the relevant Senate Judiciary Subcommittee.

97. Judge Levin H. Campbell, Morris Harrell, Esq., and Diana Gribbon Motz, Esq.

98. STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 48.

99. Conversation with Charles G. Geyh.

100. *Id.*

101. *Hearings*, *supra* note 75, at 201.

102. *Hearings*, *supra* note 75, at 155. The three changes were to delete the requirements in the bill that would: (1) impose a ninety-day limit on deciding whether the supplemental claims should remain in the case; (2) require the district judge to give the reasons for dismissing any supplemental claim; and (3) direct the judges to certify state law questions to state courts in certain circumstances. *Id.* at 155-56, 735.

103. *Hearings*, *supra* note 75, at 86.

104. *Id.* at 95, 96, 98.

105. *Id.* at 224.

106. *Id.* at 216-17, 225-28.

pared a substitute for section 120 of House Bill 5381 based on the hearings and subsequent discussions with its consultants, primarily Professors Rowe, Burbank, Mengler, and Kramer.[107] On September 13th, the subcommittee met and favorably reported House Bill 5381 with an amendment in the nature of a substitute.[108] The substitute tracked largely the Rowe-Burbank-Mengler proposal of September 11th. On September 18, 1990, the Judiciary Committee by voice vote reported House Bill 5381 favorably with an amendment in the nature of a substitute.[109] On the same day, Representative Jack Brooks, chair of the House Judiciary Committee, filed the Committee Report.[110] House Bill 5381 passed the House on September 27, 1990.

The Senate did not take up the matter until October 27, 1990. While considering Senate Bill 2648 (the "Judicial Improvements Act of 1990"), Senator Biden, the chair of the Senate Judiciary Committee, and Senator Thurmond, the ranking minority member, offered an amendment in the nature of a substitute that converted Senate Bill 2648 from a two title bill to an eight title bill.[111] The text of House Bill 5381 became Title III of the omnibus bill, the Judicial Improvements Act of 1990.[112] Title III of the Biden-Thurmond substitute retained the short title in the House bill, "Federal Courts Study Committee Implementation Act of 1990."[113] Before the Senate voted on Senate Bill 2648, Senator Biden offered its text as a substitute for the text of House Bill 5316, the House bill creating additional judgeships that became the vehicle for the omnibus bill.[114] The Senate passed House Bill 5316 on October 27, 1990, and the House passed it

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107. Conversation with Charles G. Geyh. *See* H.R. REP. NO. 734, *supra* note 79, at 27 n.13, *reprinted in* 1990 U.S.C.C.A.N. at 6873.

108. H.R. REP. NO. 734, *supra* note 79, at 16, *reprinted in* 1990 U.S.C.C.A.N. at 6861. The legislative history in the Senate of the supplemental jurisdiction proposal is limited to Senator Grassley's statement on the floor of the Senate, which essentially tracks parts of the House Report. 136 CONG. REC. S17577-17583 (daily ed. Oct. 27, 1990).

109. H.R. REP. NO. 734, *supra* note 79, at 15-16, *reprinted in* 1990 U.S.C.C.A.N. at 6860-61.

110. The date of "September 10, 1990," which is on the official print of the House Report, *supra* note 79, is a typographical error. It should read "September 18, 1990." Professors Rowe, Burbank, and Mengler acted as the principal consultants in the drafting of the House Report. Conversation with Charles G. Geyh. *See also* H.R. REP. NO. 734, *supra* note 79, at 27 n.13, *reprinted in* U.S.C.C.A.N. at 6873.

111. 136 CONG. REC. S17570, S17574 (daily ed. Oct. 27, 1990). For the text of the Biden-Thurmond amendment, No. 3204, see 136 CONG. REC. S17904-18 (daily ed. Oct. 27, 1990).

112. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

113. 136 CONG. REC. S17908 (daily ed. Oct. 27, 1990).

114. *Id.* at S17583-84.

later the same day.[115] The President approved the bill on December 1, 1990.[116]

Section 120 of House Bill 5381 had several goals. These goals were: to define supplemental jurisdiction as precisely as possible; to authorize such jurisdiction broadly, but stop short of the full reach of Article III judicial power; to permit the invocation of supplemental jurisdiction uniformly by all persons and parties to federal lawsuits, with one narrow exception in diversity cases; to circumscribe the discretion of federal judges to entertain or dismiss supplemental claims; and to reassert the power of Congress as the principal actor in defining the nature and scope of federal court jurisdiction, including supplemental jurisdiction. As enacted, the supplemental jurisdiction provision of section 1367 altered these goals (and House Bill 5381) in three significant ways. First, it broadened the scope of supplemental jurisdiction generally. Second, it maximized judicial discretion in exercising supplemental jurisdiction and minimized statutory safeguards. Third, it severely limited the use of supplemental jurisdiction in diversity cases. The following materials trace the proposal through the legislative process, focusing on these three areas.

B. *General Scope of Supplemental Jurisdiction*

As introduced by Representative Kastenmeier, House Bill 5381 defined the general scope of supplemental jurisdiction by requiring the person or party asserting the supplemental claim to meet a two-pronged test. In determining whether the district court has the power to entertain the supplemental claim, the plaintiff must meet two criteria: that the jurisdiction-conferring claim not be insubstantial and that the jurisdiction-conferring and supplemental claims arise out of the same transaction or occurrence. Both prongs derive from the *Gibbs* case. Some commentators believe *Gibbs* established a three prong test: the two noted above plus a showing that the jurisdiction-conferring and supplemental claims would ordinarily be tried in one lawsuit.[117] Under House Bill 5381, as introduced, this third prong would not have been a factor in determining initially whether the district court had the *power* to entertain the supplemental claim. Rather, this third prong would provide a basis for the district judge, in the exercise of discretion, to dismiss the supplemental claim after the court deter-

115. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 1990 U.S.C.C.A.N. (104 Stat.) 5089, 5137.

116. *Id.*

117. *See supra* notes 36-41 and accompanying text.

mined that it "should be tried separately."[118]

With regard to the first prong, the jurisdiction-conferring claim (the "federal" or "anchor" claim, as it is sometimes called) must not be "insubstantial."[119] The second prong required that the "federal"[120] and "non-federal"[121] claims "arise out of the same transaction or occurrence or series of transactions or occurrences."[122] In adopting the phrases "federal" and "non-federal" claims, House Bill 5381 utilized the terminology the Supreme Court employed in the *Kroger* case.[123] The "common transaction" formulation of House Bill 5381 differed from *Gibbs* which used the phrase "common nucleus of operative fact" to describe the relationship between the federal and non-federal claims.[124] The "same transaction or occurrence" language came from the recommendation of the Federal Courts Study Committee[125] and the Federal Rules of Civil Procedure.[126] It was not intended to "reach

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118. Subsection (c)(3) of § 1367 contained in § 120 of H.R. 5381 as introduced on July 26, 1990. *Hearings*, *supra* note 75, at 30.

119. Subsection (a)(1)(A) of § 1367 in § 120 of H.R. 5381. *Hearings*, *supra* note 75, at 29. In the *Gibbs* case, the Court simply required that the "federal claim have substance sufficient to confer subject matter jurisdiction on the court." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). It did not define the concept of "substantiality" any further. Eight years later, the Court held that the jurisdiction-conferring ("federal") claim need only be a claim that is not "obviously frivolous," "absolutely devoid of merit," or "wholly insubstantial." Hagans v. Lavine, 415 U.S. 528, 536-37 (1974) (citations omitted). *See also* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974). The low quantum of "federalness" the Court allowed to confer jurisdiction led Justice Rehnquist in dissent to observe that, under this standard, the plaintiff need only "plead his claim with a straight face." *Hagans*, 415 U.S. at 564 (Rehnquist, J., dissenting).

120. Subsection (g)(1) of § 1367 in § 120 of H.R. 5381 defined "Federal claim" as "any claim that has an independent, statutory basis for original jurisdiction in the district courts." *Hearings*, *supra* note 75, at 31. This section was later omitted after the September 6, 1990, hearing.

121. Subsection (g)(2) of § 1367 in § 120 of H.R. 5381 defined "non-Federal" as "any claim that does not have an independent, statutory basis for original jurisdiction in the district courts." *Hearings*, *supra* note 75, at 31. This subsection was omitted after the September 6, 1990, hearing.

122. Subsection (a)(1)(B) of § 1367 in § 120 of H.R. 5381. *Hearings*, *supra* note 75, at 29.

123. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 n.11 (1978).

124. Whatever differences there may be in the meaning of these two phrases, the "common transaction" language has a more ancient and familiar pedigree than "common nucleus." *See* Moore v. New York Cotton Exch., 270 U.S. 593, 609-10 (1926); RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, Rule 30, 226 U.S. 627, 657 (1912).

125. In proposing that Congress expressly authorize supplemental jurisdiction, the Federal Courts Study Committee recommended the use of the phrase "same transaction or occurrence." STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 47. *See generally Hearings*, *supra* note 75, at 692.

126. The Federal Rules of Civil Procedure employ that expression in Rules 10(b),

as far as Article III allows."[127]

At the hearing on September 6, no witness objected to the general definition of supplemental jurisdiction contained in subsection (a)(1) that set forth the two-pronged test. Although Judge Weis offered an amendment in the nature of a substitute for the supplemental jurisdiction provision in House Bill 5381, his substitute for the general ("power") provision tracked closely the language of House Bill 5381. His proposal authorized supplemental jurisdiction "over all other claims arising out of the same transaction or occurrence or series of transactions or occurrences."[128]

In a proposal submitted to the subcommittee on September 11, 1990, Professors Rowe, Burbank, and Mengler[129] suggested that the provision be broadened to permit supplemental jurisdiction to the full reach of Article III of the United States Constitution. Their proposal extended the jurisdiction to "all other claims that are so related to claims within original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."[130] Interestingly, in the original proposal to Representative Kastenmeier on June 8, 1990, Professors Wolf and Egnal recommended, in the alternative, that the supplemental jurisdiction provision in House Bill 5381 be as broad as the Constitution allows.[131] House Bill 5381, as introduced, included the narrower provision (the "same transaction or occurrence" formulation), which mirrored the recommendation of the Federal Courts Study Committee.[132]

At its September 13, 1990, markup, the subcommittee opted for the broader provision contained in the Rowe-Burbank-Mengler proposal of September 11, 1990. At this point, the supplemental jurisdiction

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13(a), 13(b), 13(g), 14(a), 14(c), 15(c), 15(d), and 20(a). *See generally Hearings*, *supra* note 75, at 692.

127. *Hearings*, *supra* note 75, at 692.

128. *Id.* at 98.

129. Professor Rowe had served as a reporter to the Federal Courts Study Committee. STUDY COMMITTEE REPORT, *supra* note 3, at Preface. Judge Weis also consulted with Professors Rowe, Burbank, and Mengler, together with Professor Larry Kramer (who had also served as a reporter to the Study Committee), as he prepared his testimony for the September 6, 1990, hearing. Conversation with Charles G. Geyh. *See also Hearings*, *supra* note 75, at 95.

130. *Hearings*, *supra* note 75, at 722.

131. *Id.* at 687, 692. Both the Rowe-Burbank-Mengler and the Wolf-Egnal proposals trace their ancestry to the *Gibbs* decision, which required, as the basis generally for exercising supplemental jurisdiction, that "the relationship between [the federal] claim and the [non-federal] claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

132. STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 47.

provision took final shape. The Committee Report states that the general provision "codifies the scope of supplemental jurisdiction first articulated by the Supreme Court"[133] in the *Gibbs* case. Together with the language of the statute, this reference presumably states congressional intent to authorize the courts to exercise supplemental jurisdiction as far as Article III allows. Thus, the statute eliminates any gap that may exist between "the same transaction or occurrence" formulation and the constitutional limits of Article III. Neither the final version of subsection (a) of section 1367 (the "power" section) nor its legislative history addresses the point of whether the courts are to apply a two-pronged or a three-pronged test in determining the power question. House Bill 5381, as introduced, sought to clarify that point by expressly codifying a two-pronged test, while the final version of section 1367 obscured it.

C. *Judicial Discretion*

In addition to expanding the reach of supplemental jurisdiction, section 1367, as enacted, also gave judges considerably more discretion than under House Bill 5381, as introduced. The original version of House Bill 5381 had several provisions that sought to circumscribe the discretion of the courts in entertaining supplemental claims. Four areas merit attention: the "power" provision authorizing supplemental jurisdiction; discretionary authority to dismiss supplemental claims; certification of state law questions to state courts; and supersession of federal "common law" development of jurisdiction.

1. Power Provision

Subsection (a) of section 1367 delegates to the judiciary the authority to define the scope of supplemental jurisdiction. As noted above, House Bill 5381 would have restricted supplemental jurisdiction to the "same transaction" formula, with all its attendant history and precedents from the decisions under the Federal Rules of Civil Procedure and ancillary jurisdiction. If Congress had enacted section 1367 as contained in section 120 of House Bill 5381, as introduced, the discretion left to the judiciary would have been considerably less than under the Act as passed. Under the new section 1367, the courts will define the scope of supplemental jurisdiction in each case. Since the test of the reach of subsection (a) will be the scope of Article III, the judges will need to address the constitutional question in each in-

133. H.R. REP. NO. 734, *supra* note 79, at 29 n.15, *reprinted in* 1990 U.S.C.C.A.N. at 6875.

stance. Historically, Congress has defined the scope of federal court jurisdiction.[134] However, this provision would reverse that role by delegating to the courts the power to determine their jurisdiction in cases involving supplemental claims. Congress should be loathe to assign such broad law-creating or interpretative authority to judges.[135]

2. Discretionary Dismissal

In the *Gibbs* decision, the Supreme Court, after defining the scope of pendent jurisdiction under Article III of the Constitution, held that the "power need not be exercised in every case in which it is found to exist."[136] In short, the Court stated that district courts have *discretion* to dismiss supplemental claims even though they have the *power* to entertain them. House Bill 5381, as introduced, sought to control the exercise of such discretion by defining clearly the criteria for discretionary dismissals, by requiring the district judge to provide written reasons for such dismissals, and by imposing a limit on the time period for exercising that discretion.

a. Criteria for Dismissal

In *Gibbs*, the Court identified three instances when the district court should exercise its discretionary power to dismiss the supplemental claim: (1) if the federal claim (the jurisdiction-conferring claim) is "dismissed before trial";[137] (2) if the non-federal questions (usually, but not always, state law issues) "substantially predominate";[138] and (3) if circumstances exist that would "justify separating state and federal claims for trial"[139] under Rule 42(b) of the Federal Rules of Civil Procedure. Subsection (c) of the proposed section 1367 in section 120 of House Bill 5381, as introduced, codified these three exceptions to the exercise of supplemental jurisdiction, seeking to confine the power of discretionary dismissal, identified in *Gibbs*, to these three instances.

The substitute offered by Judge Weis at the September 6, 1990,

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134. *See supra* notes 52-54.

135. In Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the Supreme Court interpreted § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (1988), as authorizing the federal courts to create a federal common law of contracts in the enforcement of collective bargaining agreements in industries affecting commerce. *Id.* at 449-50. *See generally* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986).

136. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

137. *Id.*

138. *Id.*

139. *Id.* at 727.

hearing contained four grounds for discretionary dismissal: when the supplemental claim "raises a novel or complex issue of State law";[140] when the non-federal claim "predominates" over the federal claim;[141] when the judge has dismissed the federal claim;[142] and when "there are other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants, for declining jurisdiction,"[143] a catch-all basis for dismissal. The Rowe-Burbank-Mengler proposal of September 11th also contained these four bases for dismissal.[144] Although the hearings do not reflect it, other consultants to the subcommittee criticized the Weis substitute after the hearing on September 6th.[145] They thought the discretion given to judges under the substitute to dismiss the non-federal claims was too broad. Consequently, the subcommittee made two changes. They reinserted "substantially" back into the phrase "substantially predominates,"[146] and narrowed considerably the catch-all exception by restricting it to "exceptional circumstances [when] there are other compelling reasons for declining jurisdiction."[147]

But these two changes did not address the more fundamental question of whether the district judge should dismiss a supplemental claim simply because it "raises a novel or complex issue of State

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140. *Hearings*, *supra* note 75, at 98. In his testimony, Judge Weis did not explain the basis for this ground of dismissal. It apparently came from a position paper prepared for the Federal Courts Study Committee. STUDY COMMITTEE REPORT, *supra* note 3, pt. III, vol. II, at 561-63, 568. As introduced, subsection (f) of the proposed § 1367 in H.R. 5381 addressed this issue by requiring the district court to certify such questions to the state courts, retaining jurisdiction of the entire case. *Hearings*, *supra* note 75, at 31, 696. *See also* Bellotti v. Baird, 428 U.S. 132 (1976); Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960); Railroad Comm'n. v. Pullman Co., 312 U.S. 496 (1941). Most states with certification procedures will accept certified questions from federal district courts. HART & WECHSLER, *supra* note 40, at 1381. *See also* CHEMERINSKY, *supra* note 15, § 12.2.

141. *Hearings*, *supra* note 75, at 98. The Weis proposal deviated from the *Gibbs* formulation in permitting a dismissal of the non-federal claim if it merely "predominated" over the federal claim; *Gibbs* required that it "substantially" predominate. *Gibbs*, 383 U.S. at 726.

142. *Hearings*, *supra* note 75, at 98.

143. *Id.* at 98. Judge Weis did not identify the source of this basis, but it appears to be a memorandum prepared for the Federal Courts Study Committee. STUDY COMMITTEE REPORT, *supra* note 3, pt. III, vol. I, at 561-63, 568. The memo in turn relies upon that part of the *Gibbs* opinion where Justice Brennan sought to support the discretionary power to dismiss non-federal claims: "Its justification lies in considerations of judicial economy, convenience and fairness to litigants." *Gibbs*, 383 U.S. at 726.

144. *Hearings*, *supra* note 75, at 722.

145. Conversation with Charles G. Geyh.

146. H.R. REP. NO. 734, *supra* note 79, at 11. Thus, the subcommittee restored to the bill the formulation in § 120 of H.R. 5381, as introduced. *See Hearings*, *supra* note 75, at 30.

147. H.R. REP. NO. 734, *supra* note 79, at 11.

law."[148] To be sure, some courts[149] have authorized such dismissals in the wake of the *Gibbs* decision.[150] These dismissals, however, may be inconsistent with some of the Supreme Court's decisions on abstention. For example, the Court has required the federal courts to abstain from deciding "a novel or complex" state law issue when conjoined with a federal constitutional claim. In *Railroad Commission v. Pullman Co.*,[151] where the state law question was novel or unclear, the Court ordered a postponement of jurisdiction until the parties could obtain a ruling from the state court on the state law questions.[152] After securing a ruling from the state court, the parties could return to the federal court to litigate the case to completion.[153] In contrast, where the state law question was "complex" and integral to a state regulatory scheme, as in *Burford v. Sun Oil Co.*,[154] the Court ordered an outright dismissal of the action, requiring the plaintiff to litigate its state and federal claims in the state court.

The legislative history of subsection (c)(1) of section 1367 is silent on the impact of that subsection on *Pullman* and *Burford* abstention. By permitting the district court to dismiss outright supplemental claims raising "a novel or complex issue of State law," the subsection appears to overrule *Pullman* and its progeny, and codify a very expansive view of *Burford*. The overruling of *Pullman* and the codification of *Burford* will come as an unpleasant surprise to federal court litigators, especially of section 1983 claims,[155] who frequently include novel or complex state-law based claims in their federal complaints, and expect to litigate them in one federal proceeding.

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148. 28 U.S.C.A. § 1367(c)(1) (West Supp. 1991).

149. *E.g.*, Pride v. Community School Bd., 482 F.2d 257, 272 (2d Cir. 1973).

150. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

151. 312 U.S. 496 (1941). The Pullman Company sued the Texas Railroad Commission to enjoin an order imposing racial segregation in passenger cars. The company based its claims on state law and the Federal Constitution. *Id.* at 498.

152. *See* discussion *infra* Section II.C.3. *See also* CHEMERINSKY, *supra* note 15, § 12.3.

153. CHEMERINSKY, *supra* note 15, § 12.3.

154. 319 U.S. 315 (1943). Sun Oil sued to enjoin an order of the Texas Railroad Commission relating to oil leases that adversely affected the plaintiff's interests. *Id.* at 316. Although the decision is not clear, it appears that Sun Oil asserted claims, as did the Pullman Company, based on both federal and state law. *Id.* at 317. Professor Chemerinsky argues that *Burford* requires the state law issue to be unclear as well as complex before the court will abstain (dismiss), while Professor Field contends that complexity alone is enough. CHEMERINSKY, *supra* note 15, § 12.2.3 n.77.

155. 42 U.S.C. § 1983 (1988). This statute is widely used to challenge the legality of governmental action taken under color of state law.

b. *Reasons for Dismissal*

To control further the exercise of judicial discretion, House Bill 5381, as introduced, contained another device. To ensure that the judges cabined their discretionary dismissals to the grounds set out in the draft section 1367, subsection (c) required the district judge to "file with the order [of dismissal or remand] a written statement of the reasons for the dismissal or remand."[156] The authors of the initial proposal stated: "The district court must not dismiss a non-federal claim for any reason other than those identified in the statute."[157]

At the September 6 hearing, Judges Weis and Tacha objected to subsection (c).[158] Judge Weis did not offer any reason for his view, but simply adopted by reference the Judicial Conference recommendation to delete subsection (c).[159] Judge Tacha, speaking for the Judicial Conference, objected to Congress requiring district judges to file "a separate written statement"[160] of their reasons for dismissing the supplemental claims. Judge Tacha did not object to compelling the district courts to state the grounds for dismissal, since "the circuit [court of appeals] will require reasons anyway."[161] The basis for Judge Tacha's objection to a "separate" written statement is not clear. Subsection (c) simply required the court to file a written statement in some form to ensure that the reasons be included in a document. Further, since Judge Tacha did not object conceptually to requiring the judges to state the grounds for dismissal, he should have suggested that subsection (c) be amended to require merely that the district courts give the reasons for dismissal in whatever form deemed appropriate. Striking the entire subsection seems a bit drastic.

c. *Time for Dismissal*

In connection with the discretionary dismissal power, subsection (c) also required the district courts to decide whether to retain jurisdiction over the supplemental claim within ninety days of its assertion.[162] This provision was based on "the need for the court and the parties to know early in the litigation whether the non-federal claim

156. *Hearings*, *supra* note 75, at 30, 694.

157. *Id.* at 695. Perez v. Ortiz, 849 F.2d 793 (2d Cir. 1988), seems to require district judges to state their reasons for dismissing supplemental claims. *Id.* at 798.

158. *Hearings*, *supra* note 75, at 96, 147, 155-56, 735.

159. *Id.* at 96.

160. *Id.* at 147, 735.

161. *Id.* at 147.

162. *Id.* at 30.

will remain in the law suit."[163] As with the written statement requirement of subsection (c), Judges Weis and Tacha objected to this provision, Judge Weis again incorporating by reference the Judicial Conference position.[164] Judge Tacha objected because the provision imposed "an unrealistic time frame"[165] on the litigation process. The Weis substitute thus omitted any reference to the ninety-day requirement.[166] The Rowe-Burbank-Mengler proposal tracked the Weis substitute in this regard.[167] The final committee version (which became section 1367 as enacted) thus omitted any reference to a time period in which to determine whether the supplemental claim(s) should remain in the civil action.[168]

The omission of the ninety-day provision from House Bill 5381, as introduced, is very unfortunate. First, its deletion further expands the discretion of the district court to dismiss supplemental claims by removing any time limits for deciding whether such claims should be dismissed. Under section 1367, as enacted, the federal judges may now dismiss supplemental claims at any time during the litigation process, even after trial or on appeal. Under the original proposal, the judges would have been restricted to the ninety-day period. Indeed in *Gibbs*, the district court dismissed the last federal claim (jurisdiction-conferring) after trial, but retained jurisdiction over and entered final judgment upon the supplemental claims.[169] The Supreme Court agreed that the district court's dismissal of the jurisdiction-conferring claims did not deprive the court of jurisdiction over the supplemental claims, and agreed that judgment could be entered upon those remaining claims.[170] Under section 1367, the district courts or the appellate courts could now dismiss the supplemental claims at any time.

Second, giving the district court greater discretion adds additional uncertainty to the litigation process in cases involving supplemental claims. If the district court is permitted to dismiss such claims at any time in the process, including after trial, the parties to the civil action cannot calculate accurately nor predict with any certainty the time and cost of litigating in the federal court. The ultimate nightmare, of course, is a case such as *Mansfield, Coldwater & Lake*

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163. *Id.* at 695.

164. *Id.* at 96.

165. *Id.* at 147. *See also id.* at 735 (stating that the ninety-day provision is "an unrealistic requirement and burden on the court's control of its docket.").

166. *Id.* at 98.

167. *Id.* at 722.

168. H.R. REP. NO. 734, *supra* note 79, at 11-12.

169. United Mine Workers v. Gibbs, 383 U.S. 715, 720 (1966).

170. *Id.* at 728.

Michigan Railway v. Swan.[171] There, after ten years of litigating, first in the state courts and then on removal in the federal courts, the Supreme Court decided that the federal trial court did not have jurisdiction. In reversing a judgment for the plaintiff, the Court ordered that the federal judge remand the case back to the state court where the parties would begin the litigation process again.

Third, the settled rule is that jurisdiction depends "on the state of things when the action is brought."[172] In *Mosher v. City of Phoenix*,[173] the Supreme Court held that "[j]urisdiction is thus determined by the allegations of the [complaint] and not by the way the facts turn out or by a decision of the merits."[174] There is no reason to postpone the decision to hear the supplemental claims, at least to determine if the court has the power to do so, beyond the initial stages of the litigation process. To permit discretionary dismissals at any time tends to undermine the fundamental point that jurisdiction should be determined "when the action is brought," not "by the way the facts turn out," especially after the parties have expended time and money. Perhaps the ninety-day period in House Bill 5381 was too short; perhaps it should have been 180 days or some other period of time. If so, the provision should have been amended, not omitted.

The important point is the scope of judicial discretion to dismiss supplemental claims. Permitting that discretion to persist through the entire litigation is counterproductive. If discovery is needed to determine whether the supplemental claims are within the scope of the statute, then the judge can order limited discovery for that purpose. In addition, if the parties are mistaken as to the facts underlying the supplemental claims, Rule 12(h)(3) is available for a jurisdictional dismissal.[175] In the *Kroger* case, for example, the parties thought they were of diverse citizenship only to find out later that they were citizens of the same state. Since their initial view of diverseness proved incorrect, the Court retained the power to dismiss the case when the true facts became known.

The Supreme Court in the *Gibbs* case stated that the discretionary authority to dismiss supplemental claims "remains open throughout the litigation."[176] But that statement was made twenty-six years ago

171. 111 U.S. 379 (1884).

172. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 824 (1824). *See also supra* note 40.

173. 287 U.S. 29 (1932).

174. *Id.* at 30.

175. *See generally* FED. R. CIV. P. 12(h)(3).

176. United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966).

when federal and state court dockets were not at the current levels. If parties litigate a case vigorously through to the trial stage, the judge should not retain the discretion to dismiss the supplemental claims, absent discovery of facts to invoke Rule 12(h)(3) of the Federal Rules of Civil Procedure. Unfortunately, under section 1367, the federal judges may dismiss supplemental claims at any time, even after trial and on appeal.

3. Certification

Notions of federalism play a role in determining the scope and exercise of supplemental jurisdiction. Since most supplemental claims are rooted in state law,[177] the federal courts are concerned that they not make unnecessary rulings on state law questions. "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties . . . ."[178] By litigating supplemental claims in state court, the parties will secure "a surer-footed reading of applicable law."[179] Subsection (f) of House Bill 5381 called upon the district judges to certify certain questions of state law to the state courts for resolution: "The district court, in determining the nature and scope of any non-Federal claim based on State law, shall use any certification procedures available for the determination of State law."[180] This provision was based on the *Pullman* abstention doctrine.[181]

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177. Supplemental claims may also be rooted in the law of foreign states or arise out of federal law, where Congress has excluded those claims from the federal courts. *See, e.g.*, 28 U.S.C. § 1337(a) (1988) (claims under § 11707 of title 49 must exceed $10,000 to invoke federal court jurisdiction); 15 U.S.C. § 2072(a) (1988) (damage claims under the Consumer Product Safety Act must exceed $10,000 to invoke federal court jurisdiction). *See also* Hagans v. Lavine, 415 U.S. 528 (1974). Although these claims are arguably within the reach of supplemental jurisdiction under § 1367, subsection (a) of § 1367 might exclude them because of the qualifying language: "Except . . . as expressly provided otherwise by Federal statute . . . ." 28 U.S.C.A. § 1367(a) (West Supp. 1991).

178. *Gibbs*, 383 U.S. at 726. *See also* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988).

179. *Gibbs*, 383 U.S. at 726. Some commentators have suggested that state courts may be the better forum for the entire litigation, including both federal and state claims. *See* Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 382 (1984) ("State courts have emerged in recent years as the forum choice for an increasing number of plaintiffs suing state and local officials under 42 U.S.C. § 1983.") (footnotes omitted).

180. *Hearings*, *supra* note 75, at 31. Although subsection (f) employed the words "shall use," the original Wolf-Egnal proposal employed the phrase "shall freely utilize" any available certification procedures. *Id.* at 688. The idea was to require the judges to employ certification where compelled by existing law, but to give them some discretion not to certify when the applicable precedents did not demand it. *Id.* at 696.

181. The doctrine is based on the decision of the Supreme Court in Railroad

In *Railroad Commission v. Pullman Co.*,[182] the plaintiff challenged a rule of the Texas Railroad Commission requiring racial segregation on trains. The plaintiff based its claims on state law and federal constitutional law. The Supreme Court held that, if the state law questions are unclear or uncertain, the federal court should abstain from deciding them. The idea is to avoid unnecessary decisions on federal constitutional issues if the case can be decided on state law grounds. To respect the authority of the states, the Court ordered the district court to send the parties to state court for a decision on the state law questions, retaining jurisdiction over the case unless the parties, in repairing to the state courts, chose to litigate the dispute on the merits, in whole or in part, in the state court. In the wake of the *Pullman* decision, many states adopted certification procedures to facilitate the resolution of state law questions coming to them through the abstention doctrine.[183]

At the September 6, 1990, hearing, Judges Weis and Tacha objected to subsection (f).[184] Judge Weis did not offer any reason for his view, but simply adopted by reference the Judicial Conference recommendation to delete that subsection.[185] Judge Tacha, speaking for the Judicial Conference, objected to the certification procedure because it would delay the processing of the case.[186] This objection to the certification procedure may be inconsistent with the provision in Judge Weis' substitute (and the final version of the bill) authorizing discretionary dismissals when the supplemental claim "raises a novel or complex issue of State law."[187]

The inconsistency is this: Judges Weis and Tacha testified in favor of a provision authorizing dismissal at any time in the litigation process of supplemental claims raising "novel or complex issues" so that state courts could address them. In contrast, they opposed a certification procedure to accomplish the same goal without dismissal of the supplemental claims. An outright dismissal of the supplemental claims, especially after trial or on appeal, does not promote "the values of judicial economy, convenience, fairness, and comity"[188] any bet-

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Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See generally* CHEMERINSKY, *supra* note 15, § 12.

182. 312 U.S. 496 (1941).

183. CHEMERINSKY, *supra* note 15, § 12.3.

184. *Hearings*, *supra* note 75, at 96, 147, 156, 735.

185. *Id.* at 96.

186. *Id.* at 147, 156, 735.

187. *Id.* at 98. *See also* H.R. REP. NO. 734, *supra* note 79, at 11.

188. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988).

ter than a certification procedure. Nonetheless the Subcommittee deleted subsection (f) from the final version of the House Bill 5381.

4. Supersession and Removal

House Bill 5381, as introduced, contained a provision that would have prohibited the federal courts from developing "common law" rules of supplemental jurisdiction.[189] On several occasions, the Supreme Court has acknowledged that the doctrines of pendent and ancillary jurisdiction rest on judicial lawmaking. "[P]endent jurisdiction is a judge-made doctrine of expediency and efficiency derived from the general Article III language conferring power to hear all 'cases' arising under federal law or between diverse parties."[190] Similarly, the Court has noted: "In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute."[191] Commentators have noted the inconsistency between this judicially-created law of supplemental jurisdiction and the traditional view that Congress authorizes and controls the jurisdiction of the lower federal courts.[192]

Subsection (h) of the proposed section 1367 of House Bill 5381 sought to preclude the courts from exercising supplemental jurisdiction unless Congress expressly authorized it.[193] Subsection (h) read: "[Section 1367] supersedes any other provision of law except to the extent that a Federal statute expressly provides otherwise."[194] When coupled with the suggested repeal of sections 1338(b)[195] and 1441(c)[196] of title 28,[197] the new section 1367 would have provided the exclusive authority upon which to exercise supplemental jurisdiction. Judge Weis' substitute, offered to the subcommittee at the September 6 hear-

189. *See generally* Matasar & Bruch, *supra* note 42.

190. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 120 (1984). In another part of the majority opinion, Justice Powell made the point that "pendent jurisdiction is a judge-made doctrine inferred from the general language of Article III." *Id.* at 117.

191. Murphy v. John Hofman Co., 211 U.S. 562, 569 (1909).

192. *See supra* note 15.

193. The definitions of "Federal claim" and "non-Federal claim" in subsection (g) of the proposed section 1367 in H.R. 5381 reinforced the point that jurisdiction in the federal courts must have a "statutory basis." *Hearings*, *supra* note 75, at 31.

194. *Hearings*, *supra* note 75, at 31.

195. See *supra* note 5 for text.

196. See *supra* note 6 for text.

197. The original Wolf-Egnal proposal recommended the repeal of these sections. *Hearings*, *supra* note 75, at 700. The Federal Courts Study Committee recommended the repeal of § 1441(c) if Congress retained the general diversity jurisdictional statute, but was silent on the question of repealing § 1338(b). STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 94-95.

ing, retained subsection (h) as subsection (f).[198] Neither Judge Weis nor Judge Tacha said anything about subsection (h) at the hearing. However, the Rowe-Burbank-Mengler draft of September 11, 1990, omitted subsection (h) of the original bill (subsection (f) of the Weis substitute) for reasons that are not in the public record.[199] The final subcommittee version similarly omitted subsection (h), making no other reference to the concept of supersession.[200]

Section 1367(a) begins with the words: "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute . . . ."[201] In correspondence between Professor Rowe and Judge Weis,[202] Professor Rowe suggested omitting subsection (h) and replacing it with the qualifying language quoted in the previous sentence that now appears at the beginning of subsection (a). For supersession purposes, however, there is a significant difference between the two formulations. Under subsection (h) in the proposed section 1367 contained in House Bill 5381, as introduced, the courts would be foreclosed from developing any common law rules of supplemental jurisdiction outside of section 1367.

In contrast, under subsection (a) of section 1367, as enacted, the federal courts retain that common law authority.[203] The predicate clause in subsection (a) simply recognizes the power of Congress expressly to *limit* the exercise by the courts of supplemental jurisdiction. Although subsection (a) extends the reach of this jurisdiction to the limits of Article III, the dependent clause that introduces the subsec-

198. *Hearings*, *supra* note 75, at 98.

199. *Id.* at 722. See also Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991).

200. H.R. REP. NO. 734, *supra* note 79, at 11-12. In amending the Rules Enabling Act in 1988, Pub. L. 100-702, §§ 401(a), 407, 102 Stat. 4648, 4652 (1988), the House and the Senate also confronted the issue of supersession in a related context: whether rules of practice and procedure promulgated by the Supreme Court should supersede acts of Congress. Although Representative Kastenmeier led the fight to remove the supersession clause from existing law, *see* David D. Siegel, *Commentary on 1988 Revision*, 28 U.S.C.A. § 2072 (West Supp. 1991), Congress retained the clause in the statute, 28 U.S.C. § 2072(b) (1988), which reads in part: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *Id.* In contrast, § 17 of the Judiciary Act of 1789 had a contrary provision: "[T]he said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States." 1 Stat. 73, 83 (1789). *See also* 28 U.S.C. § 2071(a) (1988). *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035-39 (1982).

201. 28 U.S.C.A. § 1367(a) (West Supp. 1991).

202. Letter from Thomas D. Rowe, Professor, Duke University School of Law, to Judge Weis, Chairman, Federal Courts Study Committee, (Aug. 31, 1990) (on file with the author).

203. See Appendix A for text of § 1367.

tion refers to subsections (b) and (c) which are limitations on the general authority. This emphasizes the focus of the predicate clause as the power of Congress to negate the exercise of supplemental jurisdiction. In sharp contrast, under subsection (h) of the original version of House Bill 5381, the federal courts could not extend supplemental jurisdiction beyond the statute without affirmative action by Congress.

The difference between the two approaches is critical. It goes to the heart of competing jurisprudential theories of the relationship between Congress and the federal courts. It may be illustrated by reference to the case law of supplemental jurisdiction that emerged in the *Aldinger-Kroger-Finley* period. After *Aldinger* and *Kroger*, the courts assumed they could exercise supplemental jurisdiction to the limits of Article III, as *Gibbs* had held, unless a congressional statute negated such exercise. That is, they could presume the existence of a broad scope of supplemental jurisdiction unless Congress otherwise expressly restricted it. After *Finley*, at least some courts took the opposite view: a presumption against supplemental jurisdiction (at least in pendent party cases) unless Congress expressly authorized it. Subsection (h) would have adopted the *Finley* approach, building on the traditional theory that Congress, not the judges, decides the scope of federal court jurisdiction. In contrast, section 1367(a), as enacted, adopted the *Aldinger-Kroger* approach: the courts may exercise supplemental jurisdiction to the limits of Article III except "as expressly provided otherwise by Federal statute."[204]

In light of the deleted subsection (h), together with the deletion of subsection (g),[205] the federal courts may continue to develop a federal common law of supplemental jurisdiction in areas where section 1367 is either silent or ambiguous.[206] For example, section 1367 does not by its terms apply to cases removed from the state courts into the federal courts pursuant to Chapter 89 of the Judicial Code.[207] Many such removal cases involve issues of supplemental jurisdiction because of

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204. 28 U.S.C.A. § 1367(a) (West Supp. 1991). *See generally* Mouchawar, *supra* note 35, at 1657-58.

205. *Hearings*, *supra* note 75, at 31 (text of subsections (h) and (g) in House Bill 5381); H.R. REP. NO. 734, *supra* note 79, at 11-12 (text of final version of the bill).

206. To the extent Congress has delegated authority to the federal courts under subsection (a) of § 1367 to determine the scope of an Article III "case," one might more accurately refer to that development as "constitutional common law." *See generally* Henry P. Monaghan, *Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); *but see* Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (criticizing and critiquing Monaghan's approach). *See generally* Matasar & Bruch, *supra* note 42. Whatever label one attaches, the idea is that Congress retains the power to change judicially developed doctrine under § 1367(a).

207. 28 U.S.C. §§ 1441-1452 (1988).

the multi-claim or multi-party (or both) nature of the original suit filed in the state court. In some respects the issues are compounded because the plaintiff may have chosen the state court, recognizing the subject-matter jurisdictional difficulties that arise in federal court. The removal provisions, in giving the defendant the choice of forum, create additional problems of supplemental jurisdiction.

The supplemental jurisdictional provisions in House Bill 5381, as introduced, clearly applied to cases removed from the state courts to the federal courts, as well as to actions commenced originally in the district courts.[208] The Weis substitute and the Rowe-Burbank-Mengler proposal omitted all references to removal cases in their revisions of the supplemental jurisdiction proposal. The public record does not disclose the reasons for this omission. This gap is compounded by the amendments to section 1441(c), which limit the reach of that subsection to civil actions arising under section 1331, the general federal question jurisdictional statute.[209] A few years ago, the Supreme Court applied *Gibbs*-type standards to supplemental claims in a case removed from state to federal court.[210] The legislative history of section 1367 is enigmatic as to the standards the courts should apply in removal cases. If the analysis above is correct, under the new section 1367, the federal courts retain a "common law" jurisdiction to fill gaps. Presumably the courts will fill this particular lacuna by judicially-created common law of supplemental jurisdiction for removed cases, analogizing to the principles and rules in section 1367.

The uncertainty surrounding the exercise of supplemental jurisdiction in removal cases is compounded further because the Federal Courts Study Committee Implementation Act of 1990 also amended

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208. *Hearings*, *supra* note 75, at 28-32 (subsection (a)(1), the general provision, included "an action removed from a State court"; subsection (a)(2) restricted supplemental jurisdiction in certain diversity cases "unless the action was removed from a State court"; and subsection (c) referred to "dismissal or remand").

209. H.R. REP. NO. 734, *supra* note 79, at 5, 22-23. The host of uncertainties engendered by the failure to conform amended § 1441 to the new § 1367 includes the provision authorizing remand only where "State law predominates." 28 U.S.C.A. § 1441(c) (West Supp. 1991). In his letter to Judge Weis of August 21, 1990, Professor Kramer noted that this limitation created an unexplained gap with the proposed § 1367(c), which identified the grounds for discretionary dismissal of supplemental claims in civil actions filed originally in the district courts. *Hearings*, *supra* note 75, at 713. Judge Weis made no reference to Professor Kramer's point in his testimony on September 6, 1990. Furthermore, both the Wolf-Egnal proposal, *Hearings*, *supra* note 75, at 700, and the Federal Courts Study Committee, STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 94-95, recommended outright repeal of § 1441(c). The Study Committee recommended repeal "only if Congress retains the general diversity jurisdiction." *Id.* at 95. Congress did retain diversity jurisdiction, although it imposed limitations regarding supplemental claims.

210. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988).

section 1441(c).[211] Under former section 1441(c), the district court on removal had jurisdiction over "the entire case,"[212] including "separate and independent . . . otherwise non-removable claims."[213] Under the 1990 amendments,[214] removal of "separate and independent" claims that would otherwise be "non-removable" is restricted to actions arising under section 1331 of title 28,[215] the general federal question jurisdictional statute. Although the Federal Courts Study Committee recommended that section 1441(c) be repealed outright,[216] the 1990 Act simply restricted its applicability to actions arising under section 1331.

The legislative history is silent on the relationship between the amended section 1441(c) (and removal in general) and section 1367. The House Report, however, addresses the matter indirectly:

> In many cases the federal and state claims will be related in such a way as to establish pendant [sic] jurisdiction over the state claim. Removal of such cases is possible under section 1441(a). The amended provision would establish a basis for removal that would avoid the need to decide whether there is pendant [sic] jurisdiction.[217]

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211. After the recent amendments, 28 U.S.C. § 1441(c) reads: "Whenever a separate and independent claim or cause of action, [within the jurisdiction conferred by section 1331 of this title,] is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters [in which state law predominates]." 28 U.S.C.A. § 1441(c) (West Supp. 1991). Section 312 of the Federal Courts Study Implementation Act of 1990 amended this section to limit its reach to cases within the jurisdiction of the general federal jurisdictional statute, 28 U.S.C.A. § 1331 (West Supp. 1991). *See* 104 Stat. 5089, 5114 (1990). Prior to the recent amendments, § 1441(c) read: "Whenever a separate and independent claim or cause of action, [which would be removable if sued upon alone,] is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters [not otherwise within its original jurisdiction]." 28 U.S.C. § 1441(c) (1988). The 1990 statute added the bracketed material to the amended § 1441(c) and omitted the bracketed materials from the former section. Prior to the recent amendments to § 1441(c), the Supreme Court had interpreted that subsection not to apply to supplemental claims in cases removed from state courts to federal courts. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988).

212. 28 U.S.C. § 1441(c) (1988).

213. *Id.*

214. Section 312 of the Federal Courts Study Committee Implementation Act of 1990, Title III of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5114 (1990).

215. *Id.*

216. STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 94-95. The original Wolf-Egnal proposal to Representative Kastenmeier also recommended the repeal of § 1441(c) as well as § 1338(b) of title 28. *Hearings*, *supra* note 75, at 700.

217. H.R. REP. NO. 734, *supra* note 79, at 23. The use of the phrase "pendant [sic]

This legislative history suggests that the old law of pendent jurisdiction (and inferentially the new law of supplemental jurisdiction) is "possibly" incorporated into subsection (a) of section 1441 presumably by reason of prior case law.[218]

But the legislative history also states that prior law is not needed because the amended section 1441(c) will take care of all such questions. If pendent (and thus supplemental) claims are not "separate and independent," however, as *Cohill*[219] held, then the amended section 1441(c) cannot be a substitute for supplemental jurisdiction unless the courts, in light of this legislative history, reinterpret the phrase "separate and independent" to include all supplemental claims.[220]

The amended section 1441(c) also raises the question whether, in light of prior interpretation of "separate and independent," it has any utility regarding supplemental claims. At least one commentator has declared the amended section effectively useless.[221] The argument is that, since subsection (a) of section 1367 reaches to the limits of Article III, section 1441(c), if it seeks to reach further, "would pose a constitutional issue."[222] This may be true if one accepts the definition of "one constitutional 'case' " as *Gibbs* defined it (whether one adopts a two-pronged or three-pronged test). If, however, Congress has the power to define "one constitutional 'case or controversy' " differently (and more broadly) from *Gibbs*, then section 1441(c) might very well be constitutional.

The argument is that a "case" or "controversy" could include, for example, all claims a plaintiff has against a defendant even if they arise

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jurisdiction" is odd since the same act establishes supplemental jurisdiction in new section 1367, and thus abolishes the older terminology of "pendent" and "ancillary" jurisdiction.

218. *See* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988).

219. *Id.*

220. Logically, this interpretation would be a very sensible one were it not for the prior decisions of the Supreme Court. *See* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988); American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951). In these cases, the Court held that, if the plaintiff's claims are a result of "a single wrong," they are not "separate and independent" even if the claims are rooted separately in state and federal law. *Cohill*, 484 U.S. at 350-51; *Finn*, 341 U.S. at 14. The reader should contrast this interpretation with the Court's very different approach in applying the "independent and adequate" state grounds doctrine to preclude Supreme Court review of state court judgments. In such instances, the Court essentially considers state and federal grounds for decision as "separate and independent" for purposes of precluding review, even though these grounds are rooted in a single wrong. *See generally* CHEMERINSKY, *supra* note 15, § 10.5. Perhaps Congress has the power to force a judicial reinterpretation of statutory language even though the same words remain in the statute.

221. David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 78-79 (1991) (section 1441(c) "may have to grope for some gainful employment").

222. *Id.* at 79.

out of totally separate transactions or occurrences, or do not have a common nucleus of operative fact. The legislative history supports this interpretation: "The joinder rules of many states permit a plaintiff to join completely unrelated claims in a single action. The plaintiff could easily bring a single action on a federal claim and a completely unrelated state claim."[223] In short, a Rule 18(a)-type joinder is constitutionally permissible if Congress authorizes it, even if each claim does not have an independent basis of jurisdiction. One might ask why Congress would have a broader rule of supplemental jurisdiction on removal than in original actions filed in the district court. The answer may be to prevent plaintiffs from adding unrelated, non-removable claims to their state court suits to deprive the defendant of his or her right to litigate the federal questions in a federal forum.[224]

D. *Diversity Exception*

Subsection (b) of section 1367 carves out an exception for certain supplemental claims asserted in civil actions brought solely under section 1332 of title 28. The thrust of subsection (b) is to preclude voluntary or involuntary plaintiffs or persons seeking to become plaintiffs (for example, intervenors) from asserting any supplemental claim that would be "inconsistent with the jurisdictional requirements of section 1332."[225] This potentially sweeping limitation to the exercise of supplemental jurisdiction has already generated controversy. Professor Freer has written that the new statute "embodies a disquieting bias against diversity of citizenship jurisdiction that maims packaging [of jurisdiction-conferring and supplemental claims] in diversity cases."[226]

Section 1367(b), as enacted, differs significantly from the comparable provisions in House Bill 5381, as introduced. First, under the

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223. H.R. REP. NO. 734, *supra* note 79, at 23.

224. *See supra* note 220.

225. 28 U.S.C.A. § 1367(b) (West Supp. 1991).

226. Freer, *Compounding Confusion and Hampering Diversity*, *supra* note 9, at 446. For a spirited defense of the statute, see Thomas D. Rowe et al., *Compounding or Creating Confusion about Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991). For an equally vigorous response to this response, see Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991) [hereinafter Arthur & Freer, *Grasping at Burnt Straws*]. Not to be outdone, Professors Rowe, Burbank, and Mengler further rejoined in Thomas D. Rowe et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991). Professors Arthur and Freer offered the "final" non-final words in Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007 (1991). Although supportive of the new statute, one commentator argues that subsection (b) is susceptible of three distinct and varying interpretations. Mouchawar, *supra* note 35, at 1659-62.

earlier version of House Bill 5381, the restriction applied only to actions based "solely on diversity of citizenship under section 1332."[227] According to the terms of section 1367(a), the restrictions on the assertion of supplemental claims apply to all actions "founded solely on section 1332,"[228] including alienage and foreign state as plaintiff cases. Although the legislative history discloses an intent to limit the assertion of supplemental claims only in diversity cases,[229] the subsection applies, even if "through inadvertence,"[230] to all actions brought pursuant to section 1332, not just diversity cases.[231]

Second, the intent of the earlier provision was "to retain the essence of the complete diversity requirement that derives from *Strawbridge v. Curtiss*."[232] Thus, the earlier version would have prohibited the original plaintiff or plaintiffs from joining non-diverse defendants in the original action filed in the federal court.[233] However, if an original defendant impleaded a non-diverse defendant, then the original plaintiff or plaintiffs could have asserted a supplemental claim against the impleaded (non-diverse) defendant. This approach would also have prevailed regarding other joined parties or intervenors. In short, as introduced, the provision would have overruled the holding, but not the result, in *Owen Equipment & Erection Co. v. Kroger*.[234]

Section 1367(b) implements the complete diversity requirement in a much wider variety of circumstances than House Bill 5381, as introduced. Indeed, section 1367 imposes greater restrictions than are justified by "pre-*Finley* practice."[235] The legislative history refers to this expansion as "one small change."[236] It codifies the ruling in *Kroger* by

227. *Hearings*, *supra* note 75, at 29.

228. 28 U.S.C.A. § 1367(b) (West Supp. 1991).

229. H.R. REP. NO. 734, *supra* note 79, at 29.

230. Freer, *Compounding Confusion and Hampering Diversity*, *supra* note 9, at 475.

231. *See generally id.* at 474-75.

232. *Hearings*, *supra* note 75, at 692.

233. The restrictions in draft § 1367(a)(2) contained in § 120 of H.R. 5381, as introduced, applied only to "the original plaintiff," a phrase which the Supreme Court later employed to describe the limits of ancillary jurisdiction in a diversity action. Freeport-McMoRan, Inc. v. K N Energy, Inc., 111 S. Ct. 858, 860 (1991) (per curiam).

234. 437 U.S. 365 (1978). Under the proposed § 1367 in H.R. 5381, the district court would have retained the discretionary power to dismiss the supplemental claim if it "substantially predominates" over the jurisdiction-conferring claim. *Hearings*, *supra* note 75, at 30. In *Kroger*, the supplemental claim was the only claim remaining in the case after the judge, at the outset of the litigation, dismissed the jurisdiction-conferring claim against the original diverse defendant. Thus, under the proposed statute, the judge would have dismissed the supplemental claim as well.

235. H.R. REP. NO. 734, *supra* note 79, at 29. *See generally* Freer, *Compounding Confusion and Hampering Diversity*, *supra* note 9; Arthur & Freer, *Grasping at Burnt Straws*, *supra* note 226.

236. H.R. REP. NO. 734, *supra* note 79, at 29. Professor Freer disagrees as to the size

prohibiting plaintiffs from asserting a supplemental claim against impleaded, non-diverse defendants. In addition, the original plaintiff or person(s) later joined or joining as plaintiffs are forbidden to assert supplemental claims (probably including counterclaims) against any non-diverse party. But the complete diversity requirement is abandoned in other instances. For example, as under prior practice, the restrictions in subsection (b) by their terms do not apply to supplemental claims asserted by defendants against non-diverse parties, plaintiff or defendant. Thus, an impleaded third party defendant may assert a supplemental claim against the plaintiff, but the plaintiff cannot assert a supplemental claim against that defendant.[237]

Perhaps also "through inadvertence," section 1367(b), as enacted, appears to permit two plaintiffs in a diversity action to sue a defendant who is not diverse from one of the plaintiffs so long as the other plaintiff is diverse from the defendant.[238] In addition a non-diverse plaintiff who is later joined may also assert such a claim. Three of the consultants to the House Subcommittee on the new statute agree that the statute has these loopholes.[239] The gaps exist because section 1367(b) restricts the use of supplemental jurisdiction in diversity cases only "over claims by plaintiffs *against persons* made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24."[240] The restriction does not on its face reach the plaintiff initially or later joined under Rule 20(a) of the Federal Rules of Civil Procedure.

Thus, the statute could be interpreted to overturn the complete diversity rule of *Strawbridge* in the simplest of cases to which it has always applied. Professors Rowe, Burbank, and Mengler offer an interpretation that would close this "potentially gaping hole in the complete diversity requirement—either by regarding it as an unacceptable circumvention of original diversity jurisdiction requirements, or by reference to the intent not to abandon the complete diversity rule that is clearly expressed in the legislative history of section 1367."[241] This approach raises again the jurisprudential points noted earlier: whether

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of the change effected by subsection (b). Freer, *Compounding Confusion and Hampering Diversity, supra* note 9, at 475-86. *See also* Arthur & Freer, *Grasping at Burnt Straws, supra* note 226.

237. *See generally* Freer, *Compounding Confusion and Hampering Diversity, supra* note 9, at 478-82.

238. *See generally* Arthur & Freer, *Grasping at Burnt Straws, supra* note 226.

239. Rowe et al., *supra* note 226, at 961 n.91.

240. 28 U.S.C.A. § 1367(b) (West Supp. 1991) (emphasis added).

241. Rowe et al., *supra* note 226, at 961 n.91.

the courts may prefer the "spirit" of a statute over its express language, and whether the courts will continue to develop a common law of supplemental jurisdiction. Jurisprudence aside, at least some judges appear to have adopted the Rowe-Burbank-Mengler interpretive approach.[242]

Finally, since the new statute requires compliance with all of "the jurisdictional requirements of section 1332,"[243] the plaintiffs must also satisfy the amount in controversy restriction in section 1332.[244] This limitation arguably overrules *Supreme Tribe of Ben Hur v. Cauble*,[245] which required only the named plaintiffs in a class action suit to satisfy the complete diversity requirement. The legislative history, however, states: "The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to Finley."[246] This conflict between the words of the statute and the legislative history raises the jurisprudential point as to which should prevail. On occasion, the Supreme Court has given primacy to the purpose of a statute or the intention of the legislature over its express language. In *Church of the Holy Trinity v. United States*,[247] for example, the Court noted the "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[248]

Third, the original provision in House Bill 5381 would have applied the complete diversity restriction on supplemental claims in diversity cases only if the plaintiff originally filed the action in the federal district court. If the defendant removed the case from the state court, then the restriction would not apply and the normal rule of supplemental jurisdiction, as set out in subsection (a), would apply.[249] Neither the enacted section 1367 nor the legislative history makes ref-

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242. *See* Fink v. Heath, No. 91-C2982, 1991 U.S. Dist. LEXIS 9182 (N.D. Ill. July 2, 1991); *cf.* Cheramie v. Texaco, Inc., No. 91-3114, 1991 U.S. Dist. LEXIS 15616 (E.D. La. Oct. 30, 1991).

243. 28 U.S.C.A. § 1367(b) (West Supp. 1991).

244. This amount is now $50,000.

245. 255 U.S. 356 (1921).

246. H.R. REP. NO. 734, *supra* note 79, at 29 (footnote omitted). In the omitted footnote, the Report expressly refers to the *Cauble* case as well as Zahn v. International Paper Co., 414 U.S. 291 (1973), which required each member of the plaintiff class to satisfy the amount in controversy requirement.

247. 143 U.S. 457 (1892).

248. *Id.* at 459. *See also* Houston v. Lack, 487 U.S. 266 (1988); United Steelworkers of America v. Weber, 443 U.S. 193, 201-02 (1979).

249. See Appendix A for text of § 1367.

erence to removed cases. As noted earlier,[250] the amendments to section 1441(c) of title 28 are enigmatic at best on the question of the relationship between the standards for the exercise of supplemental jurisdiction in removal cases and the standards in cases filed originally in the district court to which section 1367 applies.

Fourth, in comparing House Bill 5381 as introduced and section 1367(b) as enacted, the question arises as to which, if either, more faithfully adheres to the recommendations of the Federal Courts Study Committee. The House Report refers to the Study Committee recommendation to codify supplemental jurisdiction. Apart from an ambiguous reference to "federal question jurisdiction,"[251] the Study Committee report is silent on the question whether diversity cases should be treated differently from federal question cases. In his prepared congressional statement, Judge Weis, the chair of the Study Committee stated: "I must confess that the Study Committee Report on [supplemental] jurisdiction is not as precise as it might have been, but I do recall discussion during one of our meetings that supplemental jurisdiction should be limited to federal question cases."[252]

Similarly, the *Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and their Relation to the States* also recommended that supplemental jurisdiction in diversity cases be limited.[253] This report appears in Part III of the Study Committee Report.[254] The Study Committee made it clear, however, that the materials in Part III of its report were not considered authoritative. The introduction to Part III states: "In no event should the enclosed materials be construed as having been adopted by the Committee."[255] In addition, the report of the subcommittee offers this disclaimer: "Not every member of the subcommittee has agreed to all of the proposals or analysis contained in this Report, and the absence of dissent should not be understood to signify approval."[256] Furthermore, reliance on Judge Weis' recollection of subcommittee or committee discussions would also be inappropriate if they did not find

250. *See supra* notes 207-18 and accompanying text.

251. STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 47. In Judge Weis' prepared statement to the subcommittee, he inexplicably omits the reference to "federal question jurisdiction" in quoting from the Report of the Federal Courts Study Committee. *Hearings*, *supra* note 75, at 92-93.

252. *Hearings*, *supra* note 75, at 93.

253. STUDY COMMITTEE REPORT, *supra* note 3, pt. III, vol. II, at 563-68.

254. *Id.*

255. *Id.* pt. III, vol. I, at first page (unnumbered).

256. *Id.* at first page (unnumbered) of subcommittee report.

expression in the text or recommendations of the Study Committee Report.

Perhaps one could justify the limitations on supplemental jurisdiction in certain diversity cases by reference to prior case law[257] or to the recommendation of the Study Committee to abolish diversity jurisdiction generally with three limited exceptions.[258] These approaches have several problems. First, the Study Committee recommendation to Congress to authorize supplemental jurisdiction is at best ambiguous both regarding prior case law and the restrictions in diversity cases.

Second, the Study Committee, as an alternative proposal, recommended restricting diversity jurisdiction if Congress opted not to abolish it altogether. This "backup proposal" contained four distinct elements which collectively would have further restricted the exercise of diversity jurisdiction without abolishing it.[259] None of these elements included any reference to supplemental jurisdiction. If the Study Committee intended to restrict the use of supplemental jurisdiction in diversity cases, one would have expected to find that recommendation either in this back-up proposal, or in the recommendation on supplemental jurisdiction itself.

Third, reliance on the Study Committee recommendation to abolish diversity as the source for restricting the exercise of supplemental jurisdiction in diversity cases confronts another difficulty. As noted earlier,[260] the four members of Congress[261] who served on the Study Committee directed their staffs, in the spring of 1990, to draft a bill that included only the "noncontroversial"[262] recommendations of the Study Committee. They defined "noncontroversial" to include those recommendations to which none of the four members of Congress had objected and which would not generate significant opposition.[263] While these four members agreed with the recommendation to authorize supplemental jurisdiction expressly by statute,[264] only three of

257. *See, e.g., id.* at 563-67.

258. *Id.* pt. II, at 38-43.

259. *Id.* pt. II, at 42.

260. *See supra* notes 79-82 and accompanying text.

261. The four members were Representatives Robert Kastenmeier and Carlos Moorhead, and Senators Howell Heflin and Charles Grassley.

262. Conversation with Charles G. Geyh. *See also Hearings, supra* note 75, at 103.

263. Conversation with Charles G. Geyh. On the floor of the Senate, Senator Grassley described his understanding of "noncontroversial" in a slightly different way. He stated that the proposals in the pending legislation embodied "only those consensus items that enjoyed *unanimous* support among study committee members." 136 CONG. REC. S17578 (daily ed. Oct. 27, 1990) (emphasis added).

264. *See* STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 47-48.

them agreed to abolish diversity jurisdiction.[265] Senator Grassley opposed "the complete abolition of diversity of citizenship jurisdiction."[266]

In addition, the House of Representatives had on recent occasions sought to abolish diversity jurisdiction completely. In both instances, the bill passed the House only to flounder in the Senate. Opposition from the trial lawyers and other segments of the bar caused the defeat of the bill.[267] Although the American Bar Association originally supported the move to abolish diversity, it later changed its mind under pressure from the bar.[268] A provision to restrict severely the utilization of supplemental jurisdiction in diversity actions would have aroused opposition had the matter been widely known. On the other hand, a bill that treated diversity and federal question actions equally with regard to supplemental claims might have provoked vigorous opposition from the federal bench.

Of course, one could read the recommendations of the Study Committee as favoring supplemental jurisdiction equally in federal question and diversity cases. If so, then the original proposal in House Bill 5381, which contained a modest restriction on supplemental jurisdiction in diversity cases, would also be inconsistent with the Study Committee Report. Thus, we may be left with an equally authoritative or nonauthoritative reading of the tea leaves left behind by the Study Committee. In this context, then, Judge Weis' recollection of discussions, even if they never found their way into the Study Committee Report, helps to clarify to some degree the intent of at least some members of the Study Committee on the critical question of the availability of supplemental jurisdiction in diversity cases.

III. POST-STATUTE DECISIONAL LAW

Although section 1367 is barely one year old, it has provided the basis for supplemental jurisdiction in numerous cases. Its regular use demonstrates the need for the statute and the widespread invocation of

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265. The three were Representatives Kastenmeier and Moorhead, and Senator Heflin.

266. STUDY COMMITTEE REPORT, *supra* note 3, pt. II, at 42. When the bill containing § 1367 came to the floor of the Senate, Senator Grassley supported it and included in the Congressional Record a section-by-section analysis of the supplemental jurisdiction proposal, which tracked nearly verbatim the House Judiciary Committee Report. 136 CONG. REC. S17580-81 (daily ed. Oct. 27, 1990).

267. Letter from Arthur D. Wolf, Professor, Western New England College School of Law, to Thomas M. Mengler, Professor, University of Illinois College of Law (Aug. 31, 1990). *Hearings*, *supra* note 75, at 719.

268. *Id.*

supplemental jurisdiction in the federal courts. Most of the decisions are still unreported, although they may be found in electronic databases. Based on this limited sample, one can draw few conclusions about the success or failure of the statute to perform its stated goals. However, a preliminary survey of the decided cases discloses some predictable problems and results, and a few surprises.

First, although section 1367 became effective on December 1, 1990, courts have disagreed as to whether this section is relevant to actions commenced prior to its effective date.[269] Section 310(c) of this Act made section 1367 applicable only "to civil actions commenced on or after the date of enactment of this Act."[270] Consequently, a number of cases have rejected the application of section 1367 because the action was commenced before December 1, 1990.[271] However, some of these courts have nonetheless utilized the statute to confirm (and perhaps to influence) their reading of the law prior to the enactment of the statute.[272] For example, Judge Posner, a member of the Federal Courts Study Committee, appeared to take this approach in a recent court of appeals decision.[273] In addition, at least one court seems to have utilized section 1367 to determine, rather than confirm, the pre-statute practice or rule of supplemental jurisdiction.[274]

Furthermore, other issues have arisen regarding the effective date of the statute. At least one court has held that the relevant date is not the commencement of the original action, but rather the date the party asserting the supplemental claim filed the relevant pleading.[275] Similarly in removal cases, the relevant date appears to be the date of re-

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269. President Bush approved the Judicial Improvements Act of 1990 on December 1, 1990.

270. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310(c), 104 Stat. 5089, 5114 (1990).

271. *E.g.*, Samaad v. City of Dallas, 940 F.2d 925 (5th Cir. 1991); Salazar v. City of Chicago, 940 F.2d 233 (7th Cir. 1991); Scott v. Long Island Sav. Bank, FSB, 937 F.2d 738 (2d Cir. 1991); Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357 (7th Cir. 1990).

272. *E.g.*, Promisel v. First Am. Artificial Flowers, Inc., 943 F.2d 251 (2d Cir. 1991), *cert. denied*, No. 91-864, 1992 U.S. LEXIS 539 (Jan. 21, 1992); Castellano v. Board of Trustees, 937 F.2d 752 (2d Cir.), *cert. denied*, 112 S. Ct. 378 (1991); Scott v. Long Island Sav. Bank, FSB, 937 F.2d 738 (2d Cir. 1991); Chesley v. Union Carbide Corp., 927 F.2d 60 (2d Cir. 1991); Webb v. Just In Time, Inc., 769 F. Supp. 993 (E.D. Mich. 1991); Perkins v. City of Philadelphia, 766 F. Supp. 313 (E.D. Pa. 1991); Flores v. Puerto Rico Tel. Co., 776 F. Supp. 61 (D.P.R. 1991).

273. Winstead v. J.C. Penney Co., Inc., 933 F.2d 576 (7th Cir. 1991).

274. Sinclair v. Soniform, Inc., 935 F.2d 599, 603 (3d Cir. 1991).

275. *In re* Joint E. & S. Dist. Asbestos Litig., 769 F. Supp. 85 (E.D.N.Y. & S.D.N.Y. 1991). The plaintiffs commenced the original action before December 1, 1990, while a defendant filed the third party complaint that asserted the supplemental claim after that date.

moval rather than the date the case began in the state court.[276]

Second, the district judges have typically relied on section 1367, with little or no analysis, to determine whether they have the power to entertain the particular supplemental claims asserted in the action before them.[277] In pre-statute days, the courts would apply the two-prong or three-prong test of *Gibbs* to make that determination.[278] The post-statute decisions tend to refer simply to section 1367 without more. Thus, the decisions do not seem to struggle at all with the question whether the claims "form part of the same case or controversy under Article III of the United States Constitution."[279]

In contrast, some of the recent cases have discussed, however briefly, the statutory prerequisites for exercising supplemental jurisdiction. The decisions vary as they did prior to the statute. Some courts apply a three-factor *Gibbs* test ("substantiality," "common nucleus," and "expected to try") to determine whether they have the power under section 1367(a) to entertain supplemental claims.[280] Other judges apply a two-factor test ("common nucleus" and "expected to try").[281] In one case, the court referred to these two *Gibbs* factors in interpreting section 1367, but applied only the common nucleus test to determine whether supplemental jurisdiction in fact existed.[282] Finally, in another case, the court made reference only to the "common nucleus" factor to determine whether it had the power to entertain the supplemental claims.[283]

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276. Ryan v. Cosentino, 776 F. Supp. 386 (N.D. Ill. 1991); Cedillo v. Valcar Enter. & Darling Del. Co., 773 F. Supp. 932 (N.D. Tex. 1991); *cf.* Doe v. Alpha Therapeutic Corp., 763 F. Supp. 1039 (E.D. Mo. 1991).

277. *E.g.*, Salyard v. Trustees of Bryn Mawr College, No. 91-1812, 1991 U.S. Dist. LEXIS 15900 (E.D. Pa. Oct. 30, 1991); Marco v. Accent Publishing Co., Inc., No. 91-2057, 1991 U.S. Dist. LEXIS 14718 (E.D. Pa. Oct. 15, 1991); Richardson v. Kraft-Holleb Food Serv., Inc., 774 F. Supp. 1108 (N.D. Ill. 1991); Merchant & Evans, Inc. v. Roosevelt Bldg. Prods. Co., 774 F. Supp. 1467 (E.D. Pa. 1991); Travis v. Mattern, No. 90-7929, 1991 U.S. Dist. LEXIS 11489 (E.D. Pa. Aug. 16, 1991); American Millworks v. Mellon Bank Corp., No. 88-6153, 1991 U.S. Dist. LEXIS 8393 (E.D. La. June 13, 1991); Martinez v. Shinn, No. C89-813-JBH, 1991 U.S. Dist. LEXIS 6985 (E.D. Wash. May 20, 1991).

278. *See supra* notes 25-51 and accompanying text.

279. 28 U.S.C.A. § 1367(a) (West Supp. 1991).

280. *E.g.*, Arnold v. Kimberly Quality Care Nursing Serv., 762 F. Supp. 1182 (M.D. Pa. 1991). *See supra* note 36.

281. Pamfiloff v. Giant Records, Inc., No. C91-1708 RFP (ENE), 1991 U.S. Dist. LEXIS 15887 (N.D. Cal. Oct. 28, 1991); Corporate Resources, Inc. v. Southeast Suburban Ambulatory Surgical Ctr., Inc., 774 F. Supp. 503 (N.D. Ill. 1991); Cedillo v. Valcar Enter. & Darling Del. Co., 773 F. Supp. 932 (N.D. Tex. 1991); Di Loreto v. Di Loreto, No. 90-8126, 1991 U.S. Dist. LEXIS 10075 (E.D. Pa. July 19, 1991).

282. *See* Sinclair v. Soniform, Inc., 935 F.2d 599, 603 (3d Cir. 1991).

283. Rosen v. Chang, 758 F. Supp. 799, 803 (D.R.I. 1991); *accord* Ryan v. Cosentino, 776 F. Supp. 386 (N.D. Ill. 1991).

Third, some cases have found it unnecessary to invoke section 1367 because existing law already authorizes supplemental jurisdiction. In *Friedman v. Stacey Data Processing Services, Inc.*,[284] for example, the complaint asserted a copyright claim together with a state law claim of unfair competition. Relying on section 1338(b),[285] one of the few provisions in the United States Code that expressly authorized supplemental jurisdiction prior to section 1367, the court held that it did not have to analyze the new statute because the supplemental claim fit within section 1338(b).[286] Similarly, in a civil action based on the Foreign Sovereign Immunities Act,[287] the court also found that statute sufficiently broad to cover the supplemental claims, although it also relied alternatively on section 1367.[288]

Fourth, in the few removal cases that have raised supplemental jurisdiction issues since the enactment of section 1367, the courts have apparently followed the principles of section 1367,[289] although the statute and legislative history are unclear as to their applicability.[290] In discussing the use of supplemental jurisdiction in removal cases, this Article earlier noted difficulties with the new statute: the problematic reliance upon section 1441(c), as amended, as the source of authority for supplemental jurisdiction; and the silence of the statute and legislative history as to the standards to apply in removal cases. *Doe v. Alpha Therapeutic Corp.*[291] underscores these difficulties.

In *Doe*, the district court rejected the application of section 1441(c) to supplemental claims asserted in removal cases, even though the legislative history stated that it would apply.[292] It did, however,

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284. No. 89-C4444, 1991 U.S. Dist. LEXIS 9243 (N.D. Ill. July 9, 1991).

285. 28 U.S.C. § 1338(b) (1988).

286. In another copyright case, the court relied on § 1367 to reach supplemental claims based on state contract law. Pamfiloff v. Giant Records, Inc., No. C91-1708 RFP (ENE), 1991 U.S. Dist. LEXIS 15887 (N.D. Cal. Oct. 28, 1991). The judge did not address the question whether § 1338(b) should be interpreted to bar all supplemental claims not within that subsection.

287. 28 U.S.C. §§ 1602-1611 (1988).

288. Colgan v. Port Auth., No. 91-CV1136, 1991 U.S. Dist. LEXIS 12610 (E.D.N.Y. Aug. 14, 1991). In suits involving foreign sovereigns as plaintiffs, reliance on § 1367 could be dangerous since subsection (b) might be read to restrict supplemental jurisdiction in cases resting solely on § 1332 (a)(4).

289. *E.g.*, Imperiale v. Hahnemann Univ., 776 F. Supp. 186 (E.D. Pa. 1991); Alexander v. Goldome Credit Corp., 772 F. Supp. 1217 (M.D. Ala. 1991).

290. *See supra* notes 189-220 and accompanying text.

291. 763 F. Supp. 1039 (E.D. Mo. 1991).

292. *Id.* at 1042-43; *accord* Di Loreto v. Di Loreto, No. 90-8126, 1991 U.S. Dist. LEXIS 10075 (E.D. Pa. July 19, 1991).

In *Doe*, the court did not address the point that Congress could command the courts to reinterpret the "separate and independent" language of section 1441(c) to cover supplemental claims. In Alexander v. Goldome Credit Corp., 772 F. Supp. 1217 (M.D. Ala.

rely on prior precedents and section 1367 as the sources of law for asserting supplemental claims in removal cases.[293] Although amended section 1441(c) appears to authorize a remand only of "all matters in which state law predominates,"[294] one court has interpreted the subsection to permit remand of the entire case, including the federal questions,[295] and another to permit remand if the federal claim is dismissed.[296]

Fifth, one surprising impact has been the application of section 1367 to suits against states that assert Eleventh Amendment immunity.[297] Under *Pennhurst State School & Hospital v. Halderman*,[298] federal court plaintiffs may not, because of the Eleventh Amendment, assert supplemental claims based on state law against a state defendant or its agencies or officials. The original Wolf-Egnal proposal,[299] submitted to Representative Kastenmeier, contained a provision that would have overruled *Halderman*.[300] Because some of the consultants to Representative Kastenmeier's subcommittee raised constitutional objections to that proposal, he did not include the provision in House Bill 5381. The issue has arisen in a few cases under the new statute.

One court has exercised supplemental jurisdiction against a state defendant because it read section 1367 as removing prior disabilities under *Aldinger v. Howard*.[301] In *Rosen v. Chang*,[302] the court held that the plaintiff could assert a state claim against the State so long as it has waived its sovereign immunity. Prior case law permitted suits against state entities in federal trial courts, notwithstanding the Eleventh Amendment, if the State consents to suit in the federal court or if Congress abrogates state sovereign immunity. If neither of these conditions obtains, however, section 1367 does not authorize supplemen-

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1991), the court held that, although § 1441(c) is useless as a basis for supplemental jurisdiction, it did find a use for it in that case.

For a discussion of § 1441(c), as amended in 1990, see *supra* notes 209-20 and accompanying text.

293. *Doe*, 763 F. Supp. at 1041; *accord* Di Loreto v. Di Loreto, No. 90-8126, 1991 U.S. Dist. LEXIS 10075 (E.D. Pa. July 19, 1991); Perkins v. City of Philadelphia, 766 F. Supp. 313 (E.D. Pa. 1991).

294. 28 U.S.C.A. § 1441(c) (West Supp. 1991).

295. Alexander v. Goldome Credit Corp., 772 F. Supp. 1217 (M.D. Ala. 1991).

296. Imperiale v. Hahnemann Univ., 776 F. Supp. 189 (E.D. Pa. 1991).

297. *See generally* CHEMERINSKY, *supra* note 15, ch. 7 (excellent discussion of the Eleventh Amendment).

298. 465 U.S. 89 (1984).

299. *Hearings*, *supra* note 75, at 686.

300. *Id.* at 687 (draft § 1367(b)(iv)).

301. 427 U.S. 1 (1976). *See* discussion *supra* note 59 and accompanying text.

302. 758 F. Supp. 799 (D.R.I. 1991).

tal claims against a state entity or official.[303]

Sixth, a smattering of recent cases addresses a series of other questions under section 1367. This Article earlier raised the question whether the judges will state their reasons for dismissing supplemental claims under section 1367(c). Generally, the courts have stated the grounds, however briefly, upon which they have dismissed such claims.[304] On occasion, however, a court has simply dismissed the supplemental claim under section 1367(c) without reference to any particular subparagraph.[305] Another issue raised earlier is the relationship between section 1367 and other provisions of federal law authorizing supplemental jurisdiction.[306] In two recent cases, this question arose under the Copyright Act[307] and under the Foreign Sovereign Immunities Act.[308] In both instances, the courts held that these statutes authorized the exercise of supplemental jurisdiction.[309] In one case,[310] the judge declined to address the application of section 1367, finding the other jurisdictional statute sufficient,[311] while in the other case,[312] the court relied alternatively on section 1367.[313]

CONCLUSION

The codification of supplemental jurisdiction was a necessary congressional act in view of recent Supreme Court decisions that seriously diminished and threatened to undermine completely the doctrines of pendent and ancillary jurisdiction. "Section 1367 not only

303. Ryan v. Cosentino, 776 F. Supp. 386 (N.D. Ill. 1991); *cf.* Blum v. Toyota Motor Sales, U.S.A., Inc., No. 90-2428-R, 1991 U.S. Dist. LEXIS 4612 (D. Kan. March 5, 1991) (diversity jurisdiction action).

304. *E.g.*, Imperiale v. Hahnemann Univ., 776 F. Supp. 189 (E.D. Pa. 1991); Leyh v. Property Clerk, 774 F. Supp. 742 (E.D.N.Y. 1991); Mueller v. Cowen, No. 91-C1173, 1991 U.S. Dist. LEXIS 13153 (N.D. Ill. Sept. 19, 1991); Nieves v. Santa Clara Land Title Co., No. C91-20286, 1991 U.S. Dist. LEXIS 12550 (N.D. Cal. Aug. 14, 1991).

305. *E.g.*, Greene County Racing Comm'n v. City of Birmingham, 772 F. Supp. 1207 (N.D. Ala. 1991); Doe v. Douglas County School Dist., 770 F. Supp. 591, 594 (D. Colo. 1991).

306. *See supra* notes 210-23.

307. 17 U.S.C. §§ 101-119 (1988).

308. 28 U.S.C. §§ 1602-1611 (1988).

309. Friedman v. Stacey Data Processing Serv., Inc., No. 89-C4444, 1991 U.S. Dist. LEXIS 9243 (N.D. Ill. July 9, 1991) (copyright case); Colgan v. Port Auth., No. 91-CV1136, 1991 U.S. Dist. LEXIS 12610 (E.D.N.Y. Aug. 14, 1991) (foreign sovereign immunities case).

310. Friedman v. Stacey Data Processing Serv., Inc., No. 89-C4444, 1991 U.S. Dist. LEXIS 9243 (N.D. Ill. July 9, 1991) (copyright case).

311. *Id.* at *12.

312. Colgan v. Port Auth., No. 91-CV1136, 1991 U.S. Dist. LEXIS 12610 (E.D. N.Y. Aug. 14, 1991) (foreign sovereign immunities case).

313. *Id.* at *6-9.

resurrects pendent and ancillary jurisdiction, it also makes great strides in resolving much of the confusion surrounding the doctrines."[314] The enactment provided the statutory basis for the assertion in federal court of claims that do not have an independent ground of jurisdiction. If Congress had not acted, the absence of a statutory basis for supplemental jurisdiction would have provided continued justification for further judicial erosion of the prior doctrines.

But the good work accomplished by the act of Congress codifying supplemental jurisdiction may have been tainted by two key features of section 1367: the broad power delegated to federal judges to entertain and dismiss supplemental claims, and the major exception provided in the statute for civil actions brought pursuant to section 1332 (largely diversity and alienage cases). The expansion of this exception during the legislative process may have converted a "noncontroversial" measure into a controversial one.

For example, Professor Freer has sharply criticized the Congress for enacting the supplemental jurisdiction provision without adequate consideration, and without giving all concerned parties the opportunity to participate in its drafting and enactment.[315] In addition, Congress has in recent years refused to abolish diversity jurisdiction altogether. The exception for diversity cases in the new section 1367 could be viewed as an end run around past congressional refusal to take the bigger step of repealing diversity jurisdiction.

The statute might very well be praised as "a model of successful dialogue between the judicial and legislative branches."[316] With the exception of a few provisions here and there around the United States Code, supplemental jurisdiction has largely been a product of judicial creativity and ingenuity. The time had arrived when Congress had to address the matter and place the doctrine on a firmer footing. If congressional authorization of federal court jurisdiction is accepted as the controlling principle, then legislative action was absolutely required. Needless to say, Congress rarely "gets it right" the first time it ventures forth into a relatively new field of legislation. Thus, section 1367 might need some fine-tuning as the courts, through interpretation and application, define its scope and impact. As Congress takes up the

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314. Mouchawar, *supra* note 35, at 1613.

315. Freer, *Compounding Confusion and Hampering Diversity, supra* note 9; Arthur & Freer, *Grasping at Burnt Straws, supra* note 226. *See also* John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 757-69 (1991).

316. Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 216 (1991).

more controversial recommendations in the report of the Federal Courts Study Committee,[317] it might wish to reevaluate aspects of section 1367.

317. *See supra* note 3.

APPENDIX A: 28 U.S.C. § 1367

§ 1367. Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

APPENDIX B: WOLF-EGNAL PROPOSAL

§ 1367. Supplemental Jurisdiction

*[(a) In any civil action of which the district courts have original jurisdiction, including an action removed from a State court, any party may assert a non-federal claim against any person or other party if: (i) the federal claim in the original complaint is not insubstantial; and (ii) the original federal claim and the non-federal claim arise out of the same transaction or occurrence or series of transactions or occurrences. If the original federal claim is founded solely on diversity of citizenship, the original plaintiff may assert a non-federal claim only against a party or person whom that plaintiff has not brought into the civil action, unless the action was removed from a State court.]

*[(a) In any civil action of which the district courts have original jurisdiction, including an action removed from a State court, any party may assert a non-federal claim against any person or other party if: (i) the federal claim in the original complaint is not insubstantial; and (ii) the original federal claim and the non-federal claim are so related that they constitute one case or controversy within the meaning of Article III. If the original federal claim is founded solely on diversity of citizenship, the original plaintiff may assert a non-federal claim only against a party or person whom that plaintiff has not brought into the civil action, unless the action was removed from a State court.]

(b) The district court may exercise supplemental jurisdiction under subsection (a) even if: (i) the non-federal claim is asserted against a person who is not already a party to the civil action; (ii) the non-federal claim is the only claim asserted against a party or a person to be brought into the civil action; (iii) the party or person asserting the non-federal claim is an intervenor or an applicant for intervention; or (iv) the party or person against whom the non-federal claim is asserted is a State, an agency of a State, or State officials.

(c) The district court shall, within 90 days of the commencement of the action or assertion of the non-federal claim (whichever is later), determine whether the non-federal claim should be dismissed. The court shall dismiss or remand the non-federal claim if it is outside the scope of subsection (a). The court may dismiss or remand the non-federal claim if: (i) the federal claim is dismissed; or (ii) the non-federal claim substantially predominates over the federal claim; or (iii) the non-federal claim should be tried separately. Upon entry of an

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* Alternative formulations for subsection (a).

order dismissing the non-federal claim, the district court shall file with the order a written statement of reasons for the dismissal.

(d) The period of limitations for any non-federal claim shall be tolled while the claim is pending in the district court and for a period of 30 days after it is dismissed under subsection (c) unless state law provides for a longer tolling period.

(e) The district court may enter final judgment on the merits of the non-federal claim if it is not dismissed under subsection (c), even if, at the time of judgment, the federal claim has been dismissed.

(f) The district court, in determining the nature and scope of any non-federal claim based on state law, shall freely utilize any certification procedures available for the determination of state law.

(g) As used in this section:

(i) "federal claim" means any claim that has an independent, statutory basis for original jurisdiction in the district courts;

(ii) "non-federal claim" means any claim that does not have an independent, statutory basis for original jurisdiction in the district court;

(iii) "State" includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico;

(iv) "case" or "controversy" includes all claims, whatever their legal sources, that: (A) arise out of the same transaction or occurrence or series of transactions or occurrences; or (B) would ordinarily be tried together in one judicial proceeding.

(h) This section supersedes any other provision of law unless Congress otherwise expressly provides by statute.

APPENDIX C: H.R. 5381 SECTION 120

SEC. 120. SUPPLEMENTAL JURISDICTION.

(a) GRANT OF JURISDICTION.-Chapter 85 of title 28, United States Code, is amended by adding at the end the following:

§ 1367. Supplemental jurisdiction

(a) IN GENERAL.-(1) In any civil action of which the district courts have original jurisdiction, including an action removed from a State court, any party or person may assert a non-Federal claim against any person or other party if-

(A) the Federal claim in the original complaint is not insubstantial; and

(B) the original Federal claim and the non-Federal claim arise out of the same transaction or occurrence or series of transactions or occurrences.

(2) If the original Federal claim in a civil action is founded solely on diversity of citizenship under section 1332, the original plaintiff may assert a non-Federal claim under paragraph (1) only against the original defendant or against a party or person who has been brought into the action by a party or person other than the plaintiff, unless the action was removed from a State court.

(b) SITUATIONS WHERE JURISDICTION MAY BE EXERCISED.-Except as provided in subsection (a)(2), the district court may exercise supplemental jurisdiction under subsection (a) even if-

(1) the non-Federal claim is asserted against a person who is not already a party to the civil action;

(2) the non-Federal claim is the only claim asserted against a party or a person to be brought into the civil action; or

(3) the party or person asserting the non-Federal claim is an intervenor or an applicant for intervention.

(c) DISMISSAL OR REMAND.-If a non-Federal claim in an action is asserted under subsection (a), the district court shall, within 90 days after the commencement of the action or, if later, within 90 days after the assertion of the non-Federal claim, determine whether the non-Federal claim should be dismissed or remanded. The court shall dismiss or remand the non-Federal claim if it is not a permissible claim under subsection (a). The court may dismiss or remand the non-Federal claim if-

(1) the Federal claim is dismissed;

(2) the non-Federal claim substantially predominates over the Federal claim; or

(3) the non-Federal claim should be tried separately.

Upon entry of an order dismissing or remanding the non-Federal claim, the district court shall file with the order a written statement of the reasons for the dismissal or remand.

(d) TOLLING OF TIME LIMITATIONS.-The period of limitations for any non-Federal claim asserted under subsection (a) shall be tolled while the claim is pending in Federal court and for a period of 30 days after it is dismissed under subsection (c) unless State law provides for a longer tolling period.

(e) JUDGMENT ON NON-FEDERAL CLAIM EVEN IF FEDERAL CLAIM DISMISSED.-The district court may enter final judgment on the merits of the non-Federal claim if it is not dismissed or remanded under subsection (c) even if, at the time of judgment, the Federal claim has been dismissed.

(f) USE OF CERTIFICATION PROCEDURES TO DETERMINE STATE LAW.-The district court, in determining the nature and scope of any non-Federal claim based on State law, shall use any certification procedures available for the determination of State law.

(g) DEFINITIONS.-As used in this section-

(1) the term "Federal claim" means any claim that has an independent, statutory basis for original jurisdiction in the district courts;

(2) the term "non-Federal claim" means any claim that does not have an independent, statutory basis for original jurisdiction in the district courts; and

(3) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(h) RELATIONSHIP TO OTHER LAW.-This section supersedes any other provision of law except to the extent that a Federal statute expressly provides otherwise.

(b) CONFORMING AMENDMENT.-The table of sections at the beginning of chapter 85 of title 28, United States Code, is amended by adding at the end the following new item:

1367. Supplemental jurisdiction.

(c) EFFECTIVE DATE.-The amendments made by this section shall apply to civil actions commenced on or after the date of the enactment of this Act.

APPENDIX D: WEIS PROPOSAL

Addendum: *Section 1367 Supplemental Jurisdiction*

(a) Except as provided in subsection (b) and (c) or in another section of this title, in any civil action on a claim for which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims arising out of the same transaction or occurrence or series of transactions or occurrences, including claims that require the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction under section 1332 of this title, the district courts shall not have supplemental jurisdiction over claims by the plaintiff against persons joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or over claims by persons seeking to intervene under Rule 24 of the Federal Rules of Civil Procedure, when exercising supplemental jurisdiction over such claims would be inconsistent with the complete diversity requirement of section 1332.

(c) The districts [sic] courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of State law, (2) the claim under subsection (a) predominates over the claim or claims for which the district court has original jurisdiction, (3) the district court has dismissed all claims for which it has original jurisdiction, or (4) there are other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants, for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a) shall be tolled while the claim is pending in the district court and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period.

(e) The word "States," as used in this section includes The Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(f) This section supersedes any other provision of law except to the extent that a federal statute expressly provides otherwise.

APPENDIX E: ROWE-BURBANK-MENGLER PROPOSAL

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims within original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction over claims by plaintiffs against persons made parties under Rules 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19, or seeking to intervene as plaintiffs under Rule 24, of the Federal Rules of Civil Procedure, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The districts [sic] courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of State law, (2) the claim under subsection (a) predominates over the claim or claims for which the district court has original jurisdiction, (3) the district court has dismissed all claims for which it has original jurisdiction, or (4) there are other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants, for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a) shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) The word "State," as used in this section includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.