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Learning to Follow Directions: When District Courts Should Decline to Exercise Supplemental Jurisdiction under 28 U.S.C. 1367(c)

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LEARNING TO FOLLOW DIRECTIONS: WHEN DISTRICT COURTS SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION UNDER 28 U.S.C. § 1367(c)

I. INTRODUCTION

Discussing the subject matter jurisdiction of the federal courts, the Fifth Circuit in *Whalen v. Carter*[1] stated that, prior to 1990, "[a] federal district court[] could exercise 'pendent jurisdiction' over state claims arising from the same common nucleus of operative fact[s] as [the] federal claims that confer subject matter jurisdiction."[2] The thrust of the Supreme Court's decision in *United Mine Workers v. Gibbs* was that while such state claims were within the jurisdiction of the district courts, "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right," and that the doctrine is justified by "considerations of judicial economy, convenience and fairness to litigants."[3] The *Whalen* court went on to discuss the 1990 Congressional enactment of a "supplemental jurisdiction" statute[4] and stated that "[i]t is unclear whether [28 U.S.C. § 1367] merely codifie[d] the pendent jurisdiction doctrine or actually change[d] the doctrine in some fashion."[5] This statement by the *Whalen* court presented an issue that has since received divergent treatment among the circuit courts of appeals, resulting in at least two separate interpretations of § 1367.

Shortly after the *Whalen* decision, the Seventh Circuit, in *Brazinski v. Amoco Petroleum Additives Co.*,[6] held that § 1367 merely "intended to codify rather than to alter the judge-made principles of pendent and pendent party jurisdiction."[7] Less than a year following the *Brazinski* decision, the Ninth Circuit handed down its opinion in

1. 954 F.2d 1087 (5th Cir. 1992).
2. *Id.* at 1097 n.10 (citing United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)).
3. *Gibbs*, 383 U.S. at 726.
4. *See* 28 U.S.C. § 1367 (1994).
5. *Whalen*, 954 F.2d at 1097 n.10.
6. 6 F.3d 1176 (7th Cir. 1993).
7. *Id.* at 1182.

Executive Software North America, Inc. v. District Court.[8] The *Executive Software* court held that Congress intended the factors enumerated in § 1367(c) "to provide the exclusive means by which supplemental jurisdiction can be declined by a court."[9] The essence of the Ninth Circuit's *Executive Software* decision was that district courts no longer retained the discretion to decline jurisdiction over state claims, cutting back on the power given to the district courts by *Gibbs*. Rather, the new supplemental jurisdiction statute "created a presumption in favor of jurisdiction."[10]

This Comment discusses the subject matter jurisdiction of the federal courts as it relates to supplemental jurisdiction over related state claims. Part II reviews the common law doctrines of pendent, ancillary and pendent party jurisdiction. Part III discusses the enactment of § 1367 and its provisions. Part IV discusses current preferences in statutory interpretation and the different views among the circuits as to whether the enactment of § 1367 changed the preexisting common law,[11] concluding that the view held by the Seventh Circuit and others comports with the plain meaning of the statute and remains faithful to the legislative history of § 1367. Part V provides a model for applying § 1367(c), focusing on when state claims predominate under § 1367(c)(2) and when "other compelling reasons"[12] warrant declining jurisdiction under § 1367(c)(4). Finally, Part VI concludes that, in the absence of post-enactment guidance from the Supreme Court, lower courts should look to the plain meaning of the statute and to the Supreme Court's *Gibbs* opinion when interpreting § 1367.

II. BACKGROUND

As early as 1824, Chief Justice John Marshall recognized the expansive jurisdiction of the federal judiciary by stating that "when a question to which the judicial power of the Union is extended by the [C]onstitution . . . forms an ingredient of the original cause, it is in the

8. 24 F.3d 1545 (9th Cir. 1994).

9. *Id.* at 1556.

10. *See* Georgene M. Vairo, *Problems in Federal Subject Matter Jurisdiction: Supplemental Jurisdiction; Removal; Preemption, Abstention, and Diversity*, *in* CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS 121, 152 (Sol Schreiber et al. eds., Supp. 1997).

11. Part IV compares the holdings of *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176 (7th Cir. 1993), and *Executive Software North America, Inc. v. District Court*, 24 F.3d 1545 (9th Cir. 1994).

12. 28 U.S.C. § 1367(c)(4).

power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."[13] In Chief Justice Marshall's view, so long as any ingredient of the case or controversy[14] before the court involved a federal element—no matter how tenuous the federal element was to the actual substance of the case—a federal court could hear the claim within the constitutional bounds of the federal judicial power.[15]

Though a federal court may constitutionally hear any claim with a federal "ingredient," the broad grant of federal jurisdiction contained in the Constitution[16] is not self-executing, and "[b]oth the Constitution and an act of Congress must concur in conferring power upon the [federal c]ourts."[17] Congress has never authorized federal jurisdiction to the constitutional limits established by Chief Justice Marshall in *Osborn v. Bank of the United States*.[18]

A. Pendent Jurisdiction

In the very distant past, litigants with causes of action giving rise to both federal and state claims were forced to choose between foregoing the state claims and pursuing only federal claims in federal court, bringing both claims in a state court, or simultaneously litigating in both state and federal courts.[19] In order to avoid duplicative litigation, and in the interests of "expediency and efficiency,"[20] the federal courts developed the doctrines of pendent and ancillary jurisdiction, which were ushered into the modern era with *United Mine*

13. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824).

14. Courts have interpreted the "case or controversy" requirement of Article III, Section 2 as including all claims arising from a single set of facts. *See* Shay S. Scott, Comment, *Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 72 OR. L. REV. 695, 698 (1993). Therefore, under the Constitution and *Osborn*, a federal court may hear an entire matter, even where only part of the matter independently meets the subject matter jurisdiction requirement. *See id.*

15. *See* Jon D. Corey, Comment, *The Discretionary Exercise of Supplemental Jurisdiction Under the Supplemental Jurisdiction Statute*, 1995 B.Y.U. L. REV. 1263, 1265.

16. *See* U.S. CONST. art. III, § 2 (extending the federal judicial power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority").

17. Sheldon v. Sill, 49 U.S. (8 How.) 441, 442 (1850) (holding that "the disposal of the judicial power . . . belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the Federal courts to every subject which the Constitution might warrant").

18. *See* Corey, *supra* note 15, at 1265.

19. *See id.*

20. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 120 (1984).

Workers v. Gibbs.[21] In its opinion in *Gibbs*, the Supreme Court noted the "considerable confusion" among the lower federal courts regarding the power of the federal courts to hear related state claims that did not themselves have an independent basis of federal subject matter jurisdiction.[22]

Gibbs involved a dispute between different labor unions competing to represent a group of miners. After Paul Gibbs, a mining supervisor, lost several hauling contracts and eventually his job, he brought a cause of action against the United Mine Workers of America. Gibbs brought his suit in federal court, alleging a federal claim under the Labor Management Relations Act[23] and state law claims based on conspiracy and tortious interference with a contract. While the Labor Management Relations Act claim clearly presented a federal question, there was no independent basis for federal subject matter jurisdiction over his state law claims.[24]

In affirming the district court's decision to take jurisdiction over the pendent state claim, the Supreme Court articulated a two-prong test for determining when the power of pendent jurisdiction could be exercised over claims made under state law.[25] Justice Brennan, writing for the majority, held that pendent claim jurisdiction existed when there was a *substantial* federal claim over which the court has proper subject matter jurisdiction and when the state and federal claims arise from a "common nucleus of operative fact[s]," such that a plaintiff would "ordinarily be expected to try them all in one judicial proceeding."[26] Pendent jurisdiction, therefore, exists whenever the relationship between the federal and state claims "permits the conclusion that the entire action before the court comprises but one constitutional 'case'" under Article III, Section 2, of the Constitution.[27]

While the Supreme Court held that pendent jurisdiction *existed* over state law claims if this two-prong test was met, the Court emphasized that "pendent jurisdiction is a doctrine of discretion, not of

21. 383 U.S. 715 (1966).
22. *Id.* at 724.
23. 29 U.S.C. §§ 147-197 (1994).
24. *See Gibbs*, 383 U.S. at 720.
25. *See id.* at 725.
26. *Id.*
27. *Id.* While the *Gibbs* decision only discussed pendent jurisdiction in terms of constitutional power, the Court believed that jurisdictional statutes passed by Congress implicitly authorized jurisdiction over related state claims. *See* Scott, *supra* note 14, at 700 n.30.

plaintiff's right," and that the justification of the doctrine "lies in considerations of judicial economy, convenience and fairness to litigants."[28] If these reasons for asserting federal jurisdiction were not present, the *Gibbs* Court directed district courts to "hesitate to exercise jurisdiction over state claims."[29]

The *Gibbs* Court also gave guidance as to when a district court should refuse to hear related state claims, stating that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."[30] The Court further held that jurisdiction should not be exercised over pendent claims if "it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought."[31] In such a case, "the state claims may be dismissed without prejudice and left for resolution to state tribunals."[32] Independent of these "jurisdictional considerations," the *Gibbs* Court stated that other reasons might exist that would counsel against the exercise of pendent jurisdiction and would justify separating state and federal claims for trial, for example, "the likelihood of jury confusion in treating divergent legal theories of relief."[33]

B. Ancillary Jurisdiction

While pendent claim jurisdiction under *Gibbs* is generally limited to supporting a state claim arising from the same facts as the claim arising under federal law,[34] the doctrine of ancillary jurisdiction may be invoked to support jurisdiction over claims brought by parties other than the original plaintiff.[35] The use of ancillary jurisdiction by

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28. *Gibbs*, 383 U.S. at 726.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 726-27.
33. *Id.* at 727.
34. *See* David D. Siegel, Practice Commentary, 28 U.S.C.A. § 1367, at 829 (West Supp. 1993) (describing a federal claim as a "jurisdictional crutch" for the related state claim).
35. *See* Thomas Jamison, Note, *Pendent Party Jurisdiction: Congress Giveth What the Eighth Circuit Taketh Away*, 17 WM. MITCHELL L. REV. 753, 757 n.24 (1991) (describing ancillary jurisdiction as "a mechanism used by defendants and third parties whose interests would be inadequately protected if their claims were disallowed in the ongoing federal case," and recognizing that "[a]ncillary jurisdiction usually arises in complex multiple party litigation involving third-party defendants, compulsory counterclaims, and cross-claims").

plaintiffs was most significantly restricted by the Supreme Court's decision in *Owen Equipment & Erection Co. v. Kroger*,[36] which held that a plaintiff in a diversity suit could not assert a claim against an impleaded third-party defendant where the new claim would destroy the requirement of complete diversity.[37]

This restriction makes sense as a matter of policy; a contrary rule would allow a plaintiff to artfully plead his claim in order to circumvent the statutory requirement[38] of complete diversity by "suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."[39] Such a rule is also not unfair to the plaintiff who could have brought his entire claim in a state court of general jurisdiction but instead chose a federal forum and, therefore, "must thus accept its limitations."[40]

C. *Pendent Party Jurisdiction*

While *Gibbs* provided a framework for federal jurisdiction over separate but related state claims,[41] additional issues arise when different parties are sued on the state claim but not on the federal claim.[42] The Supreme Court first addressed the issue of pendent party jurisdiction in *Aldinger v. Howard*.[43]

The issue arose in *Aldinger* when plaintiff Monica Aldinger was fired from her job with the county treasurer and brought suit under 42 U.S.C. § 1983, claiming that the county and several of its officials had violated her constitutional rights.[44] Aldinger also brought state claims against the County of Alameda.[45] She sought both injunctive

36. 437 U.S. 365 (1978).

37. *Id.* at 377.

38. *See* 28 U.S.C. § 1332 (1994). Although § 1332, which governs federal jurisdiction over diversity suits, does not explicitly speak in terms of "complete diversity," the statute has been interpreted as carrying forward the long-standing requirement of complete diversity first articulated by Chief Justice Marshall in his opinion in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

39. *Owen Equip.*, 437 U.S. at 374.

40. *Id.* at 376.

41. *See supra* notes 25-27 and accompanying text.

42. *See* M. Ashley Harder, Comment, *Making a Federal Case Out of It: Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 22 U. BALT. L. REV. 67, 72 (1992).

43. 427 U.S. 1 (1976).

44. *See id.* at 3-4.

45. *See id.* at 4-5. Since, at the time, courts had interpreted § 1983 as not extending to municipal corporations, Aldinger was unable to assert a federal claim against the county. This construction was overruled two years after *Aldinger* in *Monell v. Department of Social Services*, 436 U.S. 658, 683-88 (1978). *See* Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional*

relief and damages.[46] Aldinger claimed federal jurisdiction over the § 1983 claim under 28 U.S.C. § 1343(a)(3)[47] and claimed pendent jurisdiction over the state claims. The Court refused to permit the pendent party jurisdiction sought in *Aldinger*[48] but limited its holding to claims brought under §§ 1983 and 1343(a)(3), stating that "'[o]ther statutory grants and other alignments of parties and claims might call for a different result.'"[49] The *Aldinger* decision led to a split among the courts of appeals on whether or not pendent party jurisdiction existed in cases where federal jurisdiction was predicated on a federal question.[50]

Although the *Aldinger* Court left the door of pendent party jurisdiction slightly open, Justice Scalia slammed it shut in 1989 in *Finley v. United States*[51] and attempted to resolve the split among the circuits. *Finley* involved an airplane crash and a subsequent suit by Barbara Finley, whose husband and children had been killed in the crash. Mrs. Finley brought an action in federal court against the Federal Aviation Administration pursuant to the Federal Tort Claims Act.[52] Title 28 U.S.C. § 1346(b) provides exclusive federal jurisdiction over such a claim.[53] Mrs. Finley also brought a state law negli-

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and Statutory Analysis, 24 ARIZ. ST. L.J. 849, 883 & n.195 (1992). In addition, no diversity jurisdiction existed "because both the plaintiff and the county were citizens of Washington." *Id.* at 883.

46. *See Aldinger*, 427 U.S. at 4.

47. 28 U.S.C. § 1343(a)(3) extends federal jurisdiction to "any civil action authorized by law to be commenced by any person" deprived of a federal constitutional or statutory right, privilege or immunity "under color of any State law." 28 U.S.C. § 1343(a)(3) (1994).

48. The *Aldinger* Court based its holding on the grounds that jurisdiction flowing from Article III must be conferred upon the courts by congressional statute, and because "Congress had excluded counties from liability under § 1983, the 'indirect' exercise of subject matter jurisdiction under the guise of pendent party jurisdiction was impliedly negated." McLaughlin, *supra* note 45, at 884 (citations omitted).

49. *Id.* (quoting *Aldinger*, 427 U.S. at 18).

50. *See* Scott, *supra* note 14, at 706. Some courts rejected pendent party jurisdiction in the wake of *Aldinger*. *See* Ayala v. United States, 550 F.2d 1196, 1200 n.8 (9th Cir. 1977). Other courts recognized such jurisdiction "where the main claim [was] a federal-question rather than diversity claim." Price v. Pierce, 823 F.2d 1114, 1119 (7th Cir. 1987) (citing Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985)).

51. 490 U.S. 545 (1989).

52. *See id.* at 546.

53. *See* 28 U.S.C. § 1346(b) (1994) (providing "exclusive [district court] jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government" if the act or omission occurred under circumstances

gence claim against the San Diego Gas and Electric Company for their alleged failure to adequately maintain the runway lights at the airport, a claim over which there was no independent basis for subject matter jurisdiction.[54] Without the possibility of pendent party jurisdiction, Mrs. Finley would have had no choice but to litigate her cases simultaneously in different fora.[55]

Despite this compelling case for the exercise of pendent party jurisdiction, the Supreme Court found that no federal jurisdiction existed over the negligence claim. In its opinion in *Finley*, the Supreme Court completely eliminated the doctrine of pendent party jurisdiction by holding that federal courts could only hear claims against additional parties where an independent basis for jurisdiction existed for each claim.[56] Although Justice Scalia recognized that such pendent party jurisdiction was within the bounds of the Constitution's extension of the judiciary power, he refused to "assume that the full constitutional power has been congressionally authorized," and stated that the Supreme Court would not read jurisdictional statutes so broadly as to include the pendent party jurisdiction sought.[57] In so holding, however, the Supreme Court invited Congress to overrule the *Finley* decision and to extend the jurisdiction of the federal courts to claims against additional parties.[58]

III. THE ENACTMENT OF 28 U.S.C. § 1367: WHAT DID CONGRESS SAY?

In 1990, at the invitation of the Supreme Court and on the recommendation of the Federal Courts Study Committee,[59] Congress codified the common law doctrines of pendent and ancillary jurisdiction, overruled the Supreme Court's *Finley* decision, and created jurisdiction over both additional claims and parties.[60] Congress also eliminated the distinction between pendent and ancillary claim jurisdiction by bringing both types of jurisdiction under the single heading

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in which the United States would be liable to the plaintiff if the Government were a private person).

54. *See Finley*, 490 U.S. at 546.

55. *See supra* note 19 and accompanying text.

56. *See Finley*, 490 U.S. at 556.

57. *Id.* at 549.

58. *See id.* at 556 (stating that "[w]hatever we say regarding the scope of jurisdiction . . . can of course be changed by Congress").

59. H.R. REP. NO. 101-734, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6860.

60. *See* 28 U.S.C. § 1367 (1994).

of "supplemental jurisdiction."[61]

The new statute provided, with limited exceptions, that 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."[62] The statute also specifically provides for supplemental jurisdiction over "claims that involve the joinder or intervention of *additional* parties."[63] The exception to this broad grant of federal jurisdiction is § 1367(b), which excepts from the supplemental jurisdiction of the federal courts claims made by plaintiffs in diversity actions "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 . . ., or seeking to intervene as plaintiffs under Rule 24," if the joinder of the additional claims "would be inconsistent with the jurisdictional requirements of section 1332."[64] Section 1367(b) is congressional

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61. *See id.*

62. 28 U.S.C. § 1367(a) (emphasis added).

63. *Id.* (emphasis added).

64. 28 U.S.C. § 1367(b). 28 U.S.C. § 1332 requires that multiple plaintiffs asserting federal jurisdiction solely on diversity grounds be completely diverse and have an amount in controversy greater than $75,000. In *Patterson Enterprises v. Bridgestone/Firestone, Inc.*, 812 F. Supp. 1152 (D. Kan. 1993), the court held that *Zahn v. International Paper Co.*, 414 U.S. 291, 294 (1973)—which held that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement"—was overruled by the plain language of § 1367. *See Patterson*, 812 F. Supp. at 1154. The *Patterson* court, however, stated that the legislative history of § 1367 indicates that Congress did not intend to abrogate the requirement of independent satisfaction of the jurisdictional amount requirement in class actions. *See id.* This statement has since been cast into doubt by opinions from the Fifth and Seventh Circuits.

In *Free v. Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995), the Fifth Circuit, in an opinion by Judge Patrick E. Higginbotham, held that "under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement" if the class representatives met the requirement. In *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996), the Seventh Circuit went even further, holding that no plaintiff need individually meet the amount-in-controversy requirement. The *Stromberg* court stated that "[i]f § 1367(a) allows suit by a pendent plaintiff who meets the jurisdictional amount but not the diversity requirement, it also allows suit by a pendent plaintiff who satisfies the diversity requirement but not the jurisdictional amount." *Id.* at 931. *But see* Spellman v. Meridian Bank, 1995 WL 764548, at *7-8 (3d Cir. Dec. 29, 1995) (not reported in F.3d) (stating, in dicta, that a district court will lack jurisdiction if the named plaintiff in a class action fails to meet the amount in controversy requirement) (affirmed en banc on other grounds; sub nom Deffner v. Corestates Bank of Delaware, N.A., 92 F.3d 1170 (3d Cir. 1996) (unpublished table decision)).

recognition and acceptance of the Supreme Court's concerns over the use of ancillary jurisdiction to circumvent the requirement of complete diversity, as expressed by the Court in its opinion in *Owen Equipment & Erection Co. v. Kroger*.[65]

In addition to the limits of subsection (b), a district court "*may* decline to exercise supplemental jurisdiction" if the claim "raises a novel or complex issue of State law" or "substantially predominates over the claim or claims over which the district court has original jurisdiction," or if "the district court has dismissed all claims over which it has original jurisdiction," or if there are otherwise "exceptional circumstances, . . . [due to the existence of] other compelling reasons for declining jurisdiction."[66] This discretionary language appears to codify the *Gibbs* test for those instances when a court should decline pendent jurisdiction.[67]

Section 1367, by its terms, neither allows nor prohibits a district court from remanding federal claims to state court when the court exercises its discretion to decline jurisdiction under § 1367(c). In *In re City of Mobile*,[68] however, the court held that "[s]ection 1367(c) cannot be fairly read as bestowing on district courts the discretion to remand to a state court a case that includes a properly removed federal claim."[69] While the *City of Mobile* court recognized that § 1367(c) gives courts the discretion to refuse to exercise supplemental jurisdiction and acknowledged that "ostensibly compelling reasons" existed in that case for remanding the entire case to state court under § 1367(c)(2) and (4), the court found no support for the district court's decision to remand in the language of 1367(c), "its legislative history, or [the] relevant case law."[70]

Section 1367(d) recognizes that serious statutes of limitation problems may arise for plaintiffs whose state claims have been dismissed by the district court.[71] Section 1367(d) provides that 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

65. *See* H.R. REP. NO. 101-734, at 29 & n.16, *reprinted in* 1990 U.S.C.C.A.N. at 6875.

66. 28 U.S.C. § 1367(c)(1)-(4) (emphasis added).

67. *See supra* notes 30-33 and accompanying text.

68. 75 F.3d 605 (11th Cir. 1996).

69. *Id.* at 607 (citing Borough of West Mifflin v. Lancaster, 45 F.3d 780, 787 (3d Cir. 1995)).

70. *Id.* at 607-08.

71. *See* Siegel, *supra* note 34, at 836.

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."[72]

IV. DISTRICT COURT DISCRETION TO DECLINE JURISDICTION UNDER § 1367(C): WHAT DID CONGRESS MEAN?

A. Interpreting the Language of the Statute: Under What Circumstances May a District Court Decline Jurisdiction?

When the language of a statute "is clear and does not demand an absurd result," current Supreme Court doctrine directs lower courts to look to the language of the statute as "the sole repository of congressional intent."[73] While legislative history is not irrelevant to statutory interpretation, "[t]he best evidence of [legislative intent] is the statutory text adopted by both Houses of Congress and submitted to the President."[74] Clear and unambiguous statutory language may not "be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."[75] Though the mandatory language of § 1367(a)—"district courts shall have jurisdiction"—when read with § 1367(c)'s discretionary language—"district courts may decline to exercise supplemental jurisdiction"—arguably creates ambiguity, thereby allowing deviation from the normal rules of statutory interpretation, § 1367 may be fairly read as consistent among its provisions and may be literally applied without reaching absurd results. This notwithstanding, neither courts nor commentators have agreed on how § 1367 should be interpreted.

Post-enactment case law illustrates the confusion in which the language of § 1367 has left the federal courts. Though § 1367(c) appears to be a codification of *United Mine Workers v. Gibbs*, which gave federal courts discretion to decline jurisdiction over state claims,[76] courts have read the language of § 1367 as being "loaded in favor of

72. 28 U.S.C. § 1367(d).

73. Free v. Abbott Labs., 51 F.3d 524, 529 (5th Cir. 1995) (citing United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 99-100 (1991)).

74. *West Va. Univ. Hosps.*, 499 U.S. at 98.

75. *Id.* at 98-99 (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)).

76. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

retaining jurisdiction."[77] This result is reached by comparing § 1367(a) with § 1367(c)'s discretionary language, which appears to specifically limit the circumstances under which a district court may decline jurisdiction over a state claim.

Assuming that a court interpreting § 1367 *should* consult the statute's legislative history, the fact that very little history preceded the enactment of § 1367 adds to this confusion. To begin with, the Senate Report submitted with the Judicial Improvements Act of 1990,[78] which enacted § 1367, contains no mention of the statute and therefore gives no guidance as to its underlying legislative intent.[79] In addition, the analysis of the bill regarding supplemental jurisdiction contained in the House Report is less than three total pages in length.[80] What little the House Report does provide, however, gives valuable insight into the legislative purposes underlying § 1367.

In describing the purpose and prospective application of the statute, the House Report states that

> [s]ubsection [1367](a) generally *authorizes* the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controvery as the claim or claims that provide the basis of the district court's original jurisdiction .... In doing so, subsection (a) *codifies* the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*.[81]

This passage delivers two important messages to courts seeking to properly interpret the statute: (1) section 1367 *authorizes*—but *does not command*—a court to exercise jurisdiction over supplemental claims; and (2) section 1367 is intended to be a codification of the Supreme Court's analysis in *Gibbs*, which held that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."[82]

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77. *See* Vairo, *supra* note 10, at 151-52.

78. Pub. L. No. 101-650, 104 Stat. 5113 (codified in scattered sections of Title 28 U.S.C.).

79. The House bill was passed in lieu of the Senate bill after its language was amended to contain much of the text of the Senate bill. *See* 1990 U.S.C.C.A.N. 6802. The Senate Report, does not address the topic of supplemental jurisdiction. *See* S. REP. NO. 101-416 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802.

80. *See* H.R. REP. NO. 101-734, at 27, *reprinted in* 1990 U.S.C.C.A.N. at 6873-76.

81. *Id.* at 28-29 & n.15, *reprinted in* 1990 U.S.C.C.A.N. at 6874-75 (emphasis added) (citation omitted).

82. *Gibbs*, 383 U.S. at 726.

Opponents of such a construction of § 1367 focus on the discussion included in Professor David D. Siegel's Practice Commentary following the text of § 1367 in the annotated version of the United States Code.[83] Professor Siegel writes that

> [t]he operative verb is "may," importing its usual broad degree of discretion, so that there may be a temptation to conclude that what Congress has given with one hand—under subdivision (a) the court "shall have" supplemental jurisdiction—it has taken away with the other, or permitted the judges to take away with the "may decline" language of subdivision (c). But the decline must be based on one of the four numbered grounds set forth in subdivision (c).[84]

In his discussion of § 1367(c), Professor Siegel states that subsections (c)(1) and (2) codify "abstention doctrines under which a federal court can stay or dismiss a claim with heavy state law elements."[85] Professor Siegel believes that subdivision (1) codifies the doctrine of *Railroad Commission v. Pullman Co.*,[86] commonly referred to as the "*Pullman* abstention," and that subdivision (2) codifies the common law abstention doctrine created in *Burford v. Sun Oil Co.*,[87] and developed through subsequent case law.[88] Subsection (c)(3) provides a basis for declining supplemental jurisdiction over a state law claim once all federal claims—the jurisdictional "crutches" supporting any state law claim—have been dismissed.[89]

In explaining subdivision (4), Professor Siegel, referring to the House Report, states that

> clause (4) was . . . included just to be sure that the court can decline supplemental jurisdiction in other "exceptional circumstances" that present "compelling reasons." While appearing to constitute a separate category for declining supplemental jurisdiction, distinct from the first three, the language of clause (4) would also appear to indicate that all declinations of supplemental jurisdiction should be reserved

83. *See* Siegel, *supra* note 34.
84. *Id.* at 834.
85. *Id.*
86. 312 U.S. 496 (1941).
87. 319 U.S. 315 (1943).
88. *See* Siegel, *supra* note 34, at 835. *But see infra* notes 202-06 and accompanying text.
89. *See* Siegel, *supra* note 34, at 835. For a more thorough discussion of subsections (c)(1)-(4) and their application, see Part V, *infra*.

for situations in which there are "compelling reasons."[90]

Professor Siegel misstates the legislative history. The House Report reads that subsection (c) "codifies the factors that the Supreme Court has [previously] recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim, even though it is empowered to hear the claim."[91] In addition, "[s]ubsection (c)(4) acknowledges that occasionally there may exist *other* compelling reasons for a district court to decline supplemental jurisdiction, which the subsection does not foreclose a court from considering in exceptional circumstances."[92]

The Practice Commentary is incorrect to the extent that it views subdivision (4) as anything less than a completely separate ground upon which a district court may decline to exercise supplemental jurisdiction, and not merely a qualification as to when the first three grounds may be used. It is true that any declination of jurisdiction "must be based on one of the four numbered grounds set forth in subdivision (c)."[93] It may also be true that "all declinations of supplemental jurisdiction should be reserved for situations in which there are 'compelling reasons.'"[94] If this is the case, however, it is not to say that subdivisions (1)-(3) provide the only instances in which declination is acceptable and that if the court intends to employ one of those grounds to decline jurisdiction, it must be in a case where there are *additional* compelling reasons.[95] Rather, if § 1367 requires all declinations to be based on one of the four numbered grounds set forth in subdivision (c), the better view is that, by enumerating the grounds contained in subdivisions (1)-(3), Congress has merely codified situations in which the Supreme Court had already decided that circumstances are "exceptional" and in which jurisdiction should be declined.[96] In addition, different circumstances may provide other

90. Siegel, *supra* note 34, at 836.
91. H.R. REP. NO. 101-734, at 29, *reprinted in* 1990 U.S.C.C.A.N. at 6875.
92. *Id.* (emphasis added).
93. Siegel, *supra* note 34, at 834.
94. *Id.* at 836.
95. Professor Siegel's view was even rejected by the Ninth Circuit in *Executive Software North America, Inc. v. District Court*, 24 F.3d 1545, 1557 n.9 (9th Cir. 1994) ("We therefore reject the interpretation, suggested by some courts and commentators, that 'compelling' in § 1367(c)(4) should be read *back* into § 1367(c)(1)-(3) in the sense that an exercise of discretion under those categories should be made only in narrower circumstances than permitted under their *Gibbs* counterparts.").
96. These situations are apparently taken directly from the Supreme Court's opinion in *Gibbs*. *See Gibbs*, 383 U.S. at 726.

"compelling reasons for declining jurisdiction."[97]

B. *Reading § 1367 Through the Judicial Gloss: Is § 1367(c) Intended to Codify* Gibbs*'s Grant of Discretion or to Change the Analysis?*

The academic debate rages on over what interpretation of § 1367(c) correctly states when a district court "may decline to exercise supplemental jurisdiction . . . under subsection (a)."[98] In practice, courts have disagreed over whether § 1367 was merely intended to overrule the Supreme Court's decision in *Finley v. United States*[99] and to codify the doctrines of pendent, ancillary and pendent party jurisdiction, while at the same time preserving the discretion to decline jurisdiction that district courts enjoyed under *Gibbs*. The Seventh and Ninth Circuits have perhaps taken the most definitive stands on the issue, with other circuits falling somewhere in between—though generally aligning themselves with the Seventh Circuit's interpretation. Below, the author reviews the decisions of both the Seventh and Ninth Circuits, tracking closely the language used by the courts in an attempt to explain such divergent interpretations of what appears to be relatively clear statutory language.[100]

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97. 28 U.S.C. § 1367(c)(4). Legal scholars have suggested that § 1367(c)(4) is congressional recognition and codification of language taken from the Supreme Court's opinion in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). In his *Colorado River* opinion, Justice Brennan held that "[a]bdication of [a district court's] obligation to decide cases can be justified under [the doctrine of abstention] only in the *exceptional circumstances* where the order to the parties to repair to the State court would clearly serve an important countervailing interest." 424 U.S. at 813 (emphasis added) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)). For a discussion of the abstention doctrines in the context of the supplemental jurisdiction statute and of other circumstances previously recognized as "compelling reasons for declining jurisdiction," see Part V.C., *infra*.

98. 28 U.S.C. § 1367(c).

99. *See, e.g.*, *Executive Software*, 24 F.3d at 1563 (vacating remand order of district court that interpreted § 1367 "as merely allowing [the c]ourt, at its discretion, to exercise jurisdiction over supplemental parties, which was previously foreclosed by *Finley v. United States*, 490 U.S. 545 (1989)").

100. While the discussion that follows may seem to contain a good deal of extraneous information regarding the underlying facts and procedural postures of the cases reviewed, it is important to understand the facts and lower court rulings in order to more easily comprehend how the cases arrived at the decision-rendering appellate court.

1. *Brazinski v. Amoco Petroleum Additives Co.* and the Seventh Circuit's "mere codification" approach

In *Brazinski v. Amoco Petroleum Additives Co.*,[101] the Seventh Circuit took a definitive stand on the meaning of § 1367(c), holding that the enactment of § 1367 "carried forward rather than extinguished" the practice of the district courts of exercising discretion to relinquish jurisdiction over pendent claims when appropriate.[102] Judge Richard Posner, writing for a unanimous three-judge panel, further stated that "[t]he legislative history indicates that the new statute is intended to codify rather than to alter the judge-made principles of pendent and pendent party jurisdiction," and that this view of § 1367 "is also the view of the courts and . . . commentators."[103] Describing the judicial practice carried forward through the enactment of § 1367, Judge Posner stated that the system was not an inflexible one, but rather a system vesting discretion in the district courts to remand state claims to the state courts.[104]

The *Brazinski* decision turned on an interpretation of § 1367(c)(3), perhaps the easiest of the § 1367(c) exceptions to apply. Section 1367(c)(3) provides that a district judge "may" relinquish supplemental jurisdiction if the main claim is dismissed, codifying a long-recognized feature of the doctrine of pendent jurisdiction[105]—that a judge can relinquish supplemental jurisdiction once the jurisdictional "crutch" is removed, or alternatively, may retain jurisdiction over what is now a wholly state law matter between nondiverse parties in order "to save the parties the expense of having to try the pendent claim twice."[106]

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101. 6 F.3d 1176 (7th Cir. 1993).
102. *Id.* at 1182.
103. *Id.*
104. *See id.*
105. *See Gibbs*, 383 U.S. at 726. Because "jurisdiction is measured at the time [an] action is filed," federal jurisdiction over a remaining state claim is not constitutionally insufficient. Smith v. Campbell, 450 F.2d 829, 832 (9th Cir. 1971) (citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938)). Nonetheless, this exception has long been recognized by the federal courts. *See, e.g.*, O'Neill v. Maytag, 339 F.2d 764, 766 n.3 (2d Cir. 1964) (stating that "[d]ismissal of [a] pendent state law claim was . . . proper where the federal claim could be dismissed on a preliminary motion"); Ruckle v. Roto Am. Corp., 339 F.2d 24, 27 (2d Cir. 1964) (stating that "pendent jurisdiction over a claim under state law requiring a plenary trial on the merits should not be exerted when the federal claim is dismissed prior to trial").
106. *Brazinski*, 6 F.3d at 1182 (citing Salazar v. City of Chicago, 940 F.2d 233, 243 (7th Cir. 1991); Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 458-59 (7th Cir. 1982)). Judge Posner would likely approve of retaining jurisdiction over a

Brazinski involved an action brought by eight female workers challenging video surveillance in the workplace. The plaintiffs contended that a video camera placed in a women's locker-room violated their tort right of privacy.[107] Defendants removed the case on the grounds that it actually arose under § 301 of the Taft-Hartley Act[108] and not under state tort law.[109] Without explanation, District Judge William L. Beatty remanded the entire case to state court.[110] Amoco then successfully sought mandamus relief from the Seventh Circuit, which ordered Judge Beatty to retain the case.[111] Judge Beatty next granted summary judgment for Amoco on the grounds that the plaintiffs had failed to file a grievance within the thirty days allowed by the collective bargaining agreement, and "having thus failed to exhaust their remedies under the agreement were not entitled to recover anything under it."[112]

The plaintiffs appealed the dismissal, charging that the filing of a grievance would have been futile and, as such, was not required.[113] Amoco responded that in so arguing, the plaintiffs were "attempting to reopen issues settled by [the Seventh Circuit's] previous decision, which established the law of the case."[114] While the Seventh Circuit concluded that Amoco was correct, the instant appeal presented a "curious wrinkle" not present in the first matter.[115] Although in the first action all eight plaintiffs were referred to as employees of Amoco, one of them was actually an employee of a different company who simply performed work at Amoco's facility at the time of the surveillance.[116] Since this plaintiff, Tracy Jones, was not an employee of Amoco, she was also not a party to the collective bargaining agreement, and her suit for the infringement of her right of privacy "could not possibly be construed as a suit 'really' arising under

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dependent state claim after the dismissal of the federal claim if retention met the *Gibbs* values of judicial economy, convenience, and fairness to litigants. *See Gibbs*, 383 U.S. at 726.

107. *See Brazinski*, 6 F.3d at 1178.

108. 29 U.S.C. § 185 (1994).

109. Defendants claimed the suit arose under the Taft-Hartley Act because it required the interpretation of a collective bargaining agreement. *See Brazinski*, 6 F.3d at 1178.

110. *See id.*

111. *See In re* Amoco Petroleum Additives Co., 964 F.2d 706, 713 (7th Cir. 1992).

112. *Brazinski*, 6 F.3d at 1178.

113. *See id.* at 1179.

114. *Id.* (citing Williams v. Commissioner, 1 F.3d 502, 503-04 (7th Cir. 1993)).

115. *Brazinski*, 6 F.3d at 1181.

116. *See id.*

section 301 [of the Taft-Hartley Act]."[117]

Since complete diversity was lacking between the parties to Jones's suit, and because her suit presented no federal question, it was within the subject matter jurisdiction of the federal courts "if at all only by virtue of the concept of 'pendent party' jurisdiction, which several years ago the Supreme Court squashed in [*Finley v. United States*]."[118] Judge Posner noted, however, that Congress had overruled *Finley* through its enactment of § 1367, providing for pendent party jurisdiction as a component of the newly created "supplemental jurisdiction."[119]

While the *Brazinski* court held that a suit like Jones's was within the jurisdiction of the court, they emphasized that prior to the enactment of § 1367, the "rule[s] that if the main claim had not been tried, the pendent claim must be dismissed, and [that if the main claim] had been tried, the pendent claim must be retained . . . were at most presumptions."[120] The analysis for whether a state claim should be retained by the district court depended then and still depends on whether "considerations of judicial economy warranted retention and decision [on the state claims] rather than relinquishment of the case to the state court."[121]

By § 1367(c) standards, *Brazinski* is a simple case. Its bare holding enforces a well-established and sound policy of judicial economy. The case involved two types of plaintiffs—one raising a federal question and the other raising only state law claims. Once a district court dismisses the claim arising under federal law it "may," pursuant to § 1367, decline jurisdiction over the state claim or, if the interests of judicial economy so counsel, render final judgment on the claim. The same logic would apply if the case involved one plaintiff bringing both federal and state claims and having all federal claims dismissed before trial.[122]

The *Brazinski* decision, however, stands for a larger, more important principle than this holding. While properly deciding that the

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117. *Id.*
118. *Id.* (citing Finley v. United States, 490 U.S. 545 (1989)).
119. *See id.*
120. *Id.* at 1182 (citations omitted).
121. *Id.* (citing Newport Ltd. v. Sears, Roebuck & Co., 941 F.2d 302, 308 (5th Cir. 1991); Disher v. Information Resources, Inc., 873 F.2d 136, 140 (7th Cir. 1989); Graf v. Elgin, Joliet & E. Ry., 790 F.2d 1341, 1347-48 (7th Cir. 1986); United States v. Zima, 766 F.2d 1153, 1158-59 (7th Cir. 1985)).
122. *See, e.g.*, Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1191 (2d Cir. 1996).

plaintiff's wholly state law claim was meritless, the *Brazinski* court established that the discretion of the federal courts survived the enactment of § 1367.

2. *Executive Software North America, Inc. v. District Court* and the Ninth Circuit's "presumption of jurisdiction" approach

In its decision in *Executive Software North America, Inc. v. District Court*,[123] the Ninth Circuit Court of Appeals adopted a different interpretation of § 1367 than that adopted by the Seventh Circuit in its *Brazinski* decision less than one year earlier. The *Executive Software* court held that a district court did not have the discretion to decline to exercise supplemental jurisdiction over pendent state claims on the ground that "'retention of the state claims [would] require[] the expenditure of substantial judicial time and effort.'"[124] The *Executive Software* court further held that District Judge Harry L. Hupp had erred in declining to exercise jurisdiction over pendent state claims without providing written reasons which would enable a reviewing court to determine whether he had relied on statutorily permissible factors in declining jurisdiction.[125] Finally, the court concluded that Judge Hupp's incorrect application of the law was "clearly erroneous," and therefore, warranted mandamus relief.[126]

The *Executive Software* decision involved an employment discrimination case brought by Donna Page against her employers, Craig and Sally Jensen (the Jensens), and Executive Software North America, Inc. (Executive Software).[127] Ms. Page, a black female, filed her complaint in state court, claiming to have experienced several acts of discrimination during the period of her employment with Executive Software, including an allegation that the company required all of its employees to study the writings of L. Ron Hubbard and the Church of Scientology.[128] Having refused to comply with such instructions, Page was charged by the Jensens with having made a number of errors in her work and was terminated when she attempted to contest the charges.[129] Page complained that the charges against her and her ultimate termination "were a mere 'subterfuge

123. 24 F.3d 1545 (9th Cir. 1994).
124. *Id.* at 1560 (alterations in original) (citation omitted in original).
125. *See id.* at 1561.
126. *See id.* at 1562.
127. *See id.* at 1548.
128. *See id.*
129. *See id.*

for illegal discrimination against non believers in the Church of Scientology, women and racial minorities.'"[130]

Page asserted a Title VII[131] claim for unlawful employment discrimination and a civil rights claim under 42 U.S.C. § 1983.[132] Page also alleged three state law claims: a claim of unlawful religious and racial discrimination under the California Fair Employment and Housing Act;[133] a claim under the state constitution for wrongful termination;[134] and a common law claim for negligent supervision.[135]

The defendants promptly removed the action to federal court based on the two federal claims, after which the district court sua sponte issued an order to show cause why the state law claims should not be remanded to state court.[136] In issuing this order, the district court held that "'jurisdiction over the state claims depends upon [the court's] discretion to retain [them].'"[137] The court counseled the parties that "'the parameters of a federal court's supplemental jurisdiction [were defined by the Supreme Court's opinion] in *United Mine Workers v. Gibbs*,'" and that the court did "'not interpret the . . . enactment of [s]ection 1367 as restricting the discretionary factors set forth in *Gibbs*.'"[138] Rather, the court interpreted § 1367 "as merely allowing [the c]ourt, at its discretion, to exercise jurisdiction over supplemental parties, which was previously foreclosed by *Finley v. United States*."[139] The district court concluded that even if the *Gibbs* test were met,

> a federal court [retained] discretion to decline jurisdiction over state law claims if, for instance, the state claims substantially predominate, the state claims involve novel or complex issues of state law, trial of the state and federal claims together is likely to result in jury confusion, or retention of the state claims requires the expenditure of substantial additional judicial time and effort.[140]

The district court ultimately remanded the state law claims without

130. *Id.* (citation omitted in original).
131. 42 U.S.C. §§ 2000e-2000e-17 (1994).
132. *See Executive Software*, 24 F.3d at 1548.
133. CAL. GOV'T CODE § 12940 (West 1992 & Supp. 1998).
134. *See* CAL. CONST. art. I, § 7(a).
135. *See Executive Software*, 24 F.3d at 1548.
136. *See id.*
137. *Id.* (citation omitted in original).
138. *Id.* (citation omitted).
139. *Id.* at 1548-49.
140. *Id.* at 1548 (citing *Gibbs*, 383 U.S. at 726-27).

providing any justification for the remand.[141]

Unable to appeal the district court's decision to remand the state law claims,[142] the Jensens and Executive Software petitioned the Ninth Circuit for a writ of mandamus to compel the district court to retain jurisdiction over the state law claims, contending that the district court had "misapprehended the scope of the supplemental jurisdiction statute . . . and failed to undertake the case-specific analysis required by that statute."[143] The petitioners argued "that mandamus [was the] only means of remedying this asserted error" that could not be justified "on a proper application of section 1367."[144]

The Ninth Circuit held that mandamus relief for the Jensens was appropriate, finding that the district court had not only abused its discretion in remanding the plaintiff's state law claims, but also that it had "clearly erred" in its interpretation of § 1367.[145] Discussing the propriety of a mandamus remedy for the Jensens, the Ninth Circuit held that such an extraordinary remedy may only be obtained "'to compel [an inferior court] to exercise its authority *when it is its duty to do so*,'"[146] indicating that a district court judge has a *duty to exercise jurisdiction* over state claims when such claims are properly within the court's jurisdiction.

The Ninth Circuit could have dispelled any concern over whether judges were properly declining jurisdiction over state claims under § 1367(c)(4) by simply requiring a district court, as it did, to "articulate why the circumstances of the case are exceptional in addition to inquiring whether the balance of the *Gibbs* values provide compelling reasons for declining jurisdiction in such circumstances."[147] The *Executive Software* court, however, went much further. The court held that by using mandatory language in § 1367(a),[148]

141. *See id.* at 1549.

142. The Jensens were unable to immediately appeal the decision of the district court because such orders are not considered a "final decision" for purposes of 28 U.S.C. § 1291, and are not appealable under 28 U.S.C. § 1292 absent the district judge's certification of the appeal.

143. *See Executive Software*, 24 F.3d at 1548.

144. *Id.*

145. *Id.* at 1552.

146. *Id.* at 1550 (quoting Will v. United States, 389 U.S. 90, 95 (1967) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943))) (emphasis added).

147. *Id.* at 1558.

148. Subsection 1367(a) states that 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." 28 U.S.C. § 1367(a) (emphasis added).

limited only by § 1367(b),[149] Congress "intended section 1367(c) to provide the *exclusive* means by which supplemental jurisdiction can be declined by a court."[150] The court stated that a contrary intepretation "would appear to render section 1367(c) superfluous."[151] "Accordingly, unless a court properly invokes a section 1367(c) category in exercising its discretion to decline to entertain pendent claims, supplemental jurisdiction *must* be asserted."[152]

The *Executive Software* court went on to state that the enactment of § 1367(c) in fact "change[d] the nature of the *Gibbs* discretionary inquiry;"[153] that the *Gibbs*-era inquiry of whether the assertion of pendent jurisdiction "'best accomodate[d] the values of economy[,] convenience, fairness and comity,'"[154] was changed; and that the new statute "channels the application of the underlying values to a greater degree than the *Gibbs* regime"[155]—meaning that Congress had already performed the value-weighing inquiry previously left to the courts.

The *Executive Software* court held that Congress, in enacting subsections (c)(1)-(3), had "codif[ied] concrete applications of the underlying *Gibbs* values recognized in preexisting case law,"[156] and provided that "the 'catchall' provided by subsection (c)(4) should be interpreted in a similar manner."[157] The court reasoned that by pro-

149. Subsection 1367(b) excepts from the jurisdiction of the federal courts claims made by plaintiffs in diversity actions "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 . . ., or seeking to intervene as plaintiffs under Rule 24" if the joinder of the additional claims "would be inconsistent with the jurisdictional requirements of section 1332." 28 U.S.C. § 1367(b).

150. *See Executive Software*, 24 F.3d at 1556 (emphasis added).

151. *Id.*

152. *Id.* (emphasis added). For this proposition, the *Executive Software* court cited to the Third Circuit case of *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1285 n.14 (3d Cir. 1993). In his dissent in *Executive Software*, Judge Leavy questioned the majority's reliance on the *Growth Horizons* opinion and cited the same case for an opposite conclusion. *See infra* notes 166-69 and accompanying text.

153. *Executive Software*, 24 F.3d at 1556.

154. *Id.* at 1556 (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351 (1988)).

155. *Id.*

156. *Id.*

157. *Id.* at 1557 (citations omitted). The court previously stated that, while subsections (c)(1)-(3) appear to have codified most of the concrete applications of the *Gibbs* values so far recognized by the courts, subsection (c)(4) carries forward the possibility of their extension. *See id.* at 1551-52.

viding that declination of jurisdiction under subsection (c)(4) be made "only in 'exceptional circumstances[,]' Congress has sounded a note of caution that the bases for declining jurisdiction should be extended beyond . . . [those] identified in subsections (c)(1)-(3) only if the circumstances are quite unusual."[158] Based on this interpretation of § 1367(c)(4), the *Executive Software* court would require a district court seeking to decline jurisdiction over a state claim under subsection (c)(4) to not only "balance the underlying [*Gibbs*] values," as required by the *Gibbs* Court, but also to undertake the additional task of "demonstrat[ing] how the circumstances confronted are 'exceptional.'"[159]

The *Executive Software* court stated that this additional inquiry was "not particularly burdensome."[160] Yet, when read together with the court's implication that district courts have a *duty* to exercise jurisdiction over state claims whenever they have the power to exercise such jurisdiction,[161] the Ninth Circuit has altered a district court's analysis of when declinations of jurisdiction are appropriate. As a result, the Ninth Circuit has significantly raised the bar which a party seeking the dismissal of state claims must clear. If the *Executive Software* court's holding did not, by implication, sufficiently distance itself from the Seventh Circuit's interpretation of § 1367, then the court expressly stated that it "reject[ed] the Seventh Circuit's broad dicta that 'the new statute is intended to codify rather than to alter the judge-made principles of pendent . . . jurisdiction.'"[162]

C. *And the Winner Is . . .: Illustrating the Correctness of the Seventh Circuit Approach*

The opinion of the *Brazinski* court and Judge Leavy's dissent in *Executive Software* find support in the legislative history and the plain language of § 1367. Writing against the background of *Brazinski*—and citing frequently to the Supreme Court's opinion in *Gibbs*—Judge Leavy exposed the weaknesses in the majority's interpretation of § 1367. He emphasized that the doctrine of pendent jurisdiction was, and always had been, a "'doctrine of discretion, not of plaintiff's

158. *Id.* at 1558.
159. *Id.*
160. *Id.*
161. *See supra* note 146 and accompanying text.
162. *Executive Software*, 24 F.3d at 1559 n.12 (quoting Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993)).

right.'"[163] In so writing, Judge Leavy remained faithful to a Ninth Circuit opinion[164] he had authored just two years earlier, in which he emphasized the discretion of the distict courts to hear state claims over which there existed no independent basis for federal jurisdiction.[165]

In a "plain meaning" attack on the *Executive Software* majority's conclusion that § 1367 commanded district courts to exercise jurisdiction over any nonexceptional case properly within the court's jurisdiction, Judge Leavy cited the Third Circuit's opinion in *Growth Horizons, Inc. v. Delaware County*[166]—also cited by the majority for a contrary and, according to Judge Leavy, "puzzling" purpose.[167] The *Growth Horizons* court, in an opinion by Judge Walter K. Stapleton, held that "'[t]he language in § 1367 expressly . . . states that federal courts *shall* exercise supplemental jurisdiction over pendent claims arising out of the same case or controversy and *may* decline to exercise jurisdiction [as provided by § 1367(c)].'"[168] Judge Leavy argued that he was unable to "find the words 'shall *exercise* jurisdiction' in the statute," which reads "shall *have* supplemental jurisdiction,"—a phrase which "is further clarified by the exceptions in subsection (c)."[169]

Judge Leavy's argument is simple and rational. It comports with the plain meaning of the statutory language and is likely in accord with congressional intent. Section 1367 allows a district court to exercise jurisdiction over state claims arising from the same nucleus of operative facts as the federal claims over which the court has original jurisdiction. The statute further allows a district court to use its discretion to decline jurisdiction over state claims if the *Gibbs* values of judicial economy, convenience, fairness, and comity[170] are not served by the exercise of federal jurisdiction. Neither the statute nor what exists of its legislative history command district courts to *exercise* the jurisdiction which Congress has *authorized*, and courts should not create such a requirement on their own.

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163. *Id.* at 1563 (Leavy, J., dissenting) (quoting *Gibbs*, 383 U.S. at 726).
164. *See* Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303 (9th Cir. 1992).
165. *See id.* at 1309 (stating that "[t]he exercise of pendent jurisdiction to hear state claims is within the discretion of the federal district court").
166. 983 F.2d 1277 (3d Cir. 1993).
167. *Executive Software*, 24 F.3d at 1564 (Leavy, J., dissenting).
168. *Id.* (citing *Growth Horizons*, 983 F.2d at 1285 n.14) (alteration in original).
169. *Id.* (emphasis added).
170. *See Gibbs*, 383 U.S. at 726.

The legislative history of § 1367 also supports the argument that district courts "should consider and weigh [the *Gibbs* values] in each case, and at every stage of the litigation,"[171] and that they should retain discretion to exercise jurisdiction over a case involving state-law claims. Though Congress did not directly address the discretion of the district courts in § 1367, the Federal Courts Study Committee, appointed by the Chief Justice and at the direction of Congress, stated that "[t]hese supplemental forms of jurisdiction . . . may be exercised in the discretion of the federal courts, enabl[ing] them to take full advantage of the rules on claim and party joinder to deal economically . . . with matters arising from the same transaction or occurrence."[172]

Furthermore, the House Report accompanying the final version of § 1367 states that

> [the statute] codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim, even though it is empowered to hear the claim. Subsection (c)(1)-(3) codifies the factors recognized as relevant under current law. Subsection (c)(4) acknowledges that occasionally there may exist other compelling reasons for a district court to decline supplemental jurisdiction, which the subsection does not foreclose a court from considering in exceptional circumstances.[173]

Finally, the position taken by the Ninth Circuit in *Executive Software* puts it in conflict with other circuits.[174] In his dissent, Judge Leavy pointed out that the Third,[175] Fifth,[176] and Seventh[177] Circuits all

171. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988).
172. REPORT OF THE FEDERAL COURTS STUDY COMM. 47 (April 2, 1990).
173. H.R. REP. NO. 101-734, at 29, *reprinted in* 1990 U.S.C.C.A.N. 6875.
174. *See Executive Software*, 24 F.3d at 1564 (Leavy, J., dissenting).
175. *See Growth Horizons*, 983 F.2d at 1284 (finding that a district court should consider the "generally accepted principles of 'judicial economy, convenience, and fairness to the litigants'" in determining whether to remand state claims pursuant to section 1367(c)).
176. *See* Hays County Guardian v. Supple, 969 F.2d 111, 125 (5th Cir. 1992) (holding that "exceptional circumstances" and "compelling reasons" existed to remand state claims (1) when identical claims were pending in a state court and (2) when decisions of state law by a federal court "would be a pointless waste of judicial resources").
177. *See* Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993) (holding that § 1367 was "intended to codify rather than to alter the judge-made principles of pendent and pendent party jurisdiction").

favor an interpretation of § 1367 that allows a district court to maintain the discretion it enjoyed under *Gibbs*. This choice comports with the plain meaning of the statute and is sound policy as a matter of judicial economy, convenience, and fairness to litigants.

V. EXERCISING A COURT'S DISCRETION TO DECLINE JURISDICTION OVER STATE CLAIMS UNDER § 1367(C)—A MODEL FOR APPLICATION

Congress has authorized supplemental jurisdiction over "all . . . claims that are so related to claims . . . within [the] . . . original jurisdiction [of the district court] that they form part of the same case or controversy under Article III of the United States Constitution."[178] In creating such jurisdiction, Congress has also preserved the discretion of the district courts to "decline to exercise supplemental jurisdiction" over a state claim if the claim "raises a novel or complex issue of State law;"[179] if the state claim "substantially predominates over the claim or claims over which the district court has original jurisdiction;"[180] if "the district court has dismissed all claims over which it has original jurisdiction;"[181] or "in exceptional circumstances, . . . [due to the existence of] other compelling reasons for declining jurisdiction."[182] Though these four categories provide the exclusive means by which a district court may decline to exercise supplemental jurisdiction over related state claims, application of the § 1367(c) categories has been less than uniform, at times creating unsound results. At best, this lack of uniformity leaves litigators unable to predict when a federal court will decline to exercise jurisdiction over state claims. The following sections of this Comment review the application of the § 1367(c) categories. Subpart A discusses the relatively straightforward application of §§ 1367(c)(1) and (3). Subpart B discusses when state claims "substantially predominate" over a claim within the district court's original jurisdiction for purposes of § 1367(c)(2). Finally, Subpart C discusses when "exceptional circumstances" and "compelling reasons" exist for declining jurisdiction under § 1367(c)(4).

A. Keeping It Simple: Applying §§ 1367(c)(1) and (3)

Section 1367(c)(1), permitting a court to relinquish jurisdiction

178. 28 U.S.C. § 1367(a) (1994).
179. *Id.* § 1367(c)(1).
180. *Id.* § 1367(c)(2).
181. *Id.* § 1367(c)(3).
182. *Id.* § 1367(c)(4).

when a state claim "raises a novel or complex issue of State law," was recognized by the *Gibbs* Court as a valid reason for declining to exercise pendent jurisdiction, and appears to be merely a codification of that case.[183] Though Professor Siegel believes that § 1367(c)(1) is a codification of the doctrine of *Railroad Commission of Texas v. Pullman Co.*,[184]—commonly referred to as the "*Pullman* abstention"—this theory is without basis or logic. The *Pullman* abstention does require a district court to abstain from making decisions of state law when the state issue is novel or unclear.[185] The *Pullman* abstention's goal, however, is to allow a state court to interpret its own law, in the hope that this interpretation will avoid the constitutional issue entirely.[186] Section 1367(c)(1), on the other hand, is intended to avoid "[n]eedless decisions of state law . . . as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."[187] Section 1367(c)(1) is grounded on principles of federalism rather than avoidance of constitutional federal questions. Apart from problems that predictably arise from the use of terms such as "novel" and "complex," subsection (c)(1) has been applied with little difficulty.

Section 1367(c)(3) is perhaps the easiest of the § 1367(c) exceptions to apply. Providing that a district judge "may" relinquish supplemental jurisdiction if the main claim is dismissed, subsection 1367(c)(3) codifies a long-recognized exception to the doctrine of pendent jurisdiction,[188] permitting a court to, at its discretion, relinquish supplemental jurisdiction over related state claims once the jurisdictional "crutch"—the claim that supports the supplemental jurisdiction of the other claim or claims—is removed. There is no longer any reason for a federal court to hear such state claims.[189] Alternatively, the court may retain jurisdiction over what is now a wholly state law matter between nondiverse parties "in order to save the parties the expense of having to try the pendent claim twice."[190]

Section 1367(c)(3) is merely a codification of the well-

183. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).
184. 312 U.S. 496 (1941).
185. *See id.* at 499-500.
186. *See id.*
187. *Gibbs*, 383 U.S. at 726.
188. *See id.*
189. *See* Siegel, *supra* note 34, at 835.
190. *See Brazinski*, 6 F.3d at 1182 (citing Salazar v. City of Chicago, 940 F.2d 233, 243 (7th Cir. 1991); Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 458-59 (7th Cir. 1982)).

established and sound policy of judicial economy expressed in *United Mine Workers v. Gibbs*.[191] It is straightforward and should be applied in an identical manner whether the case involves two plaintiffs, one raising a federal question and the other raising only state law claims, or one plaintiff bringing both federal and state claims and having all federal claims dismissed before trial.[192]

B. A Rose by Any Other Name . . .: Discretion to Decline Jurisdiction When State Issues Predominate

Subsection (c)(2) allows a district court to decline the exercise of supplemental jurisdiction over a claim if "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction."[193] Whether state law issues subtantially predominate over federal issues "is a 'value judgment' for the court."[194] "The question comes down to whether the state law claims . . . require more judicial resources to adjudicate or are more salient in the case as a whole than the federal law claims."[195] "This is a *qualitative* rather than *quantitative* inquiry."[196]

Clark v. Milam involved a civil action brought pursuant to the Racketeer Influenced and Corrupt Organization (RICO) statute.[197] The plaintiff alleged two RICO claims and five claims arising under state law.[198] In holding that the state claims did not predominate over the RICO claims, the *Clark* court found that the two RICO counts were both at the heart of the complaint and were the most complex.[199] Moreover, while not all defendants were named in the two RICO counts and while the RICO counts were only two of the seven in the complaint, these quantitative considerations were not dispositive in

191. *See* 383 U.S. at 726.

192. *See, e.g.*, Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1191-92 (2d Cir. 1996).

193. 28 U.S.C. § 1367(c)(2) (1994).

194. Clark v. Milam, 813 F. Supp. 431, 435 (S.D. W. Va. 1993) (citing Moore v. DeBiase, 766 F. Supp. 1311, 1319 (D.N.J. 1991); Martin v. Drummond Coal Co., Inc., 756 F. Supp. 524, 527 (N.D. Ala. 1991)).

195. *Id.* (citing *Moore*, 766 F. Supp. at 1319).

196. *Id.* (citing *Moore*, 766 F. Supp. at 1319 n.15).

197. 18 U.S.C. § 1964 (1994). Federal courts have concurrent jurisdiction over civil RICO actions. *See* Tafflin v. Levitt, 493 U.S. 455, 467 (1990). The *Clark* court's analysis, therefore, would presumably apply in any action involving a federal question over which there is concurrent jurisdiction.

198. *See Clark*, 813 F. Supp. at 435.

199. *See id.* at 434-35.

the court's analysis.[200] Ultimately, neither consideration changed the court's conclusion that remand under § 1367(c)(2) was inappropriate.[201]

Though some courts and commentators have suggested that courts should interpret and apply § 1367(c)(2) co-extensively with the *Burford* abstention doctrine,[202] this approach unduly restricts Congress's intent in enacting § 1367. On its face, § 1367(c)(2) appears to codify *United Mine Workers v. Gibbs*, which held that federal jurisdiction should not be exercised over pendent claims "if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought."[203] The factors cited by the *Gibbs* court for when state issues might substantially predominate so as to warrant declining jurisdiction under what is now codified as § 1367(c)(2), are not particularly relevant to a *Burford* abstention analysis.[204] Rather, the intent of Congress in enacting § 1367(c)(2) was to prevent plaintiffs from joining a tenuous federal claim to what is essentially a matter of state law in order to gain entrance into a federal forum,[205]

200. *See id.* at 435.

201. *See id.*

202. *See, e.g.*, White v. County of Newberry, 985 F.2d 168, 172 (4th Cir. 1993) (stating that a "district court, when exercising its discretion [in declining to exercise supplemental jurisdiction over a claim in which state law predominates] is invoking the [*Burford*] abstention doctrine"); *see also* Siegel, *supra* note 34, at 835.

203. *Gibbs*, 383 U.S. at 726; *see* Borough of West Mifflin v. Lancaster, 45 F.3d 780, 789-90 (3d Cir. 1995).

204. The *Burford* abstention generally arises in non-federal question cases. *See* Vairo, *supra* note 10, at 159. In a typical *Burford* case, the plaintiff alleges state law claims implicating important state regulatory issues and, in particular, where state courts are part of the regulatory process. *See id.* If these factors are present, the federal court will abstain "out of considerations of comity and respect for the paramount state interest." *Id.* A court determining whether to abstain under *Burford* will not be concerned with the terms of proof, the scope of the issues raised, or the comprehensiveness of the remedy sought except as these factors apply to the state regulatory process of which the state courts are an integral component. *See id.*

205. This reasoning has found support among federal appellate panels, creating a split of authority as to the interpretation of subsection (c)(2). An analysis of this split, however, is beyond the scope of this Comment. For purposes of this Comment, citation to the Third Circuit's decision in *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, is sufficient. The *Lancaster* court held that a district court should decline to exercise supplemental jurisdiction under § 1367(c)(2) when "a state claim constitutes the real body of a case, to which the federal claim is only an appendage," and that district courts should examine whether the state claims substantially predominate in terms of proof, comprehensiveness of the remedy sought, and the scope of the issues raised. *Id.* at 789 (quoting *Gibbs*, 383 U.S. at

and to prevent courts from making "[n]eedless decisions of state law."[205] While § 1367(c)(1) generally addresses concerns over federal courts needlessly deciding issues of state law, such concerns have implications here as well. *Palivos v. City of Chicago*[207] presents a good example of how these concerns may be relevant under § 1367(c)(2).

Palivos involved a three-count complaint brought against the City of Chicago, Mayor Richard Daley, and Alderman Joseph Moore.[208] Plaintiff Peter Palivos alleged that the defendants arbitrarily refused to issue him a building permit even though he had complied with all the applicable building code requirements and had already received approval from the city's building department.[209] Palivos sought a writ of mandamus directing the issuance of the building permit and a declaratory judgment stating that he was entitled to renovate his property.[210] He also brought a § 1983 claim against Joseph Moore, apparently alleging the deprivation of a property interest without due process.[211]

Palivos brought his suit in state court, and the defendants promptly removed it to federal court under 28 U.S.C. § 1441(b).[212] Palivos then sought to remand the entire case to state court, relying

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727). The Third Circuit's analysis has been adopted by district courts outside that circuit as well. *See, e.g.*, Neal v. Flav-O-Rich, Inc., 71 Fair Empl. Prac. Cas. (BNA) 1816, 1819 (M.D.N.C. 1996) (following the Third Circuit's *Lancaster* opinion and holding that district courts should look to *Gibbs* when determining whether state issues "substantially predominate"). If it is apparent to the district court that a plaintiff has added tenuous federal claims simply to get into federal court, such circumstances might also present "other compelling reasons" for declining jurisdiction under § 1367(c)(4). *See infra* note 253 and accompanying text.

206. *Gibbs*, 383 U.S. at 726. The *Gibbs* Court counseled that needless decisions of state law should be avoided "both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id.*

207. 901 F. Supp. 271 (N.D. Ill. 1995).

208. *See id.* at 272.

209. *See id.*

210. *See id.*

211. *See id.* at 272-73.

212. *See id.* at 272. 28 U.S.C. § 1441(b) provides that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b) (1994). The *Palivos* defendants also asserted that they also could have removed the case under 28 U.S.C. § 1441(a). *See Palivos*, 901 F. Supp. at 272 n.1 (holding that § 1441(a) removal would not have affected the outcome of Palivos's motion to remand). This subsection provides for the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a).

on 28 U.S.C. § 1441(c).[213] In granting the plaintiff's motion to remand the state claims, the court held that the focus of the complaint was the refusal of the city to issue a building permit, which the plaintiff claimed the city lacked discretion to withhold.[214] Whether the city had any such discretion was purely a matter of local law and, therefore, "more properly entrusted to state courts."[215] The court further held that resolution of the state issues would have a significant impact on Palivos's § 1983 suit, most importantly because state law determined whether the plaintiff possessed a property right at all.[216] Even though the court could not remand the plaintiff's entire case, it avoided making a needless decision of state law by remanding the state claims and abstaining from deciding a federal issue over which state law predominated.[217]

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213. *See Palivos*, 901 F. Supp. at 272. Section 1441(c) provides that "[w]henever 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. § 1441(c) (emphasis added). Though a federal court is empowered to adjudicate the joined state claims, a plaintiff may always seek the remand of *state* claims which a defendant has removed under § 1441 as part of an action partially comprised of a federal claim or claims. *See id.* Though the remand of properly removed *federal* claims is generally not possible, even the federal components of an action comprised of state and federal claims and removed under § 1441(c) may, "in [the court's] discretion," be remanded if state law predominates over them. *Id.* Palivos's § 1983 suit for the deprivation of a property right, where state law determined whether a property right even existed, presents a good example of when state law predominates over a federal issue. Showing the predominance of the state claims, however, "is only half the battle" for a plaintiff like Palivos who, in seeking remand of an entire cause of action under § 1441(c) "must also demonstrate the existence of a 'separate and independent claim.'" *Palivos*, 901 F. Supp. at 272-73 (citing American Fire & Cas. Co. v. Finn, 341 U.S. 6, 14 (1951)). Because Palivos failed to meet this stringent standard, the court refused to remand the entire case under § 1441(c). *See id.* at 273.

If a plaintiff's various claims are not "separate and independent" and are removed under 28 U.S.C. § 1441(a) or (b), a defendant may only seek to remand the plaintiff's state law claims, and not the entire case. This is so because §§ 1441(a) and (b), unlike § 1441(c), do not themselves contain remand clauses. Therefore, a plaintiff's only option is to invoke § 1367(c), which permits district courts to decline to exercise jurisdiction over, and thereby effect the remand of, state claims only, and not properly removed federal claims. *See supra* notes 68-70 and accompanying text.

214. *See Palivos*, 901 F. Supp. at 273.

215. *Id.* (citing Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941)).

216. *See id.*

217. The *Pullman* abstention was appropriate in *Palivos* because decision on the issue of state law had the potential to resolve or moot the federal constitu-

Whenever the scope of the issues raised and the terms of proof involved with state law claims so effect the viability of federal claims, a district court should refuse to hear the state claims and instead remand them for state adjudication. If plaintiffs like Palivos prevail on their state law claims and still desire to pursue a civil rights claim or other federal remedy, they can return to the federal courts, which can then benefit from the guidance of the state courts' interpretation of state law. A separate but related reason to decline jurisdiction under § 1367(c)(2) may be that the state and federal claims have *identical* dispositive issues, with the federal claim having a lower standard of proof.[218]

C. *Giving Meaning to the Catch-All: When "Other Compelling Reasons" to Decline Jurisdiction Exist*

Under § 1367(c)(4), a district court may decline to exercise supplemental jurisdiction over a claim if, "in exceptional circumstances, there are . . . compelling reasons for declining jurisdiction."[219] Other than requiring a district court "to undertake a case-specific analysis" when deciding to decline jurisdiction under § 1367(c)(4), the House Report gives little guidance as to how this category should be applied.[220] Not suprisingly, federal courts have not treated this subsection uniformly.[221] This Subpart discusses scholarly commentary on the meaning of § 1367(c)(4), reviews recent cases decided on § 1367(c)(4) grounds, and proposes other reasons that future courts may find to be "compelling."

Professor Georgene Vairo[222] and other legal scholars[223] have sug-

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tional claim. Even absent the constitutional avoidance issue, a similar result may be attained in many states by remanding the state claims and certifying the federal issue—over which state law predominates—to the state courts for determination.

218. This situation may also comprise "other compelling reasons for declining jurisdiction" under § 1367(c)(4). *See infra* note 261 and accompanying text.

219. 28 U.S.C. § 1367(c)(4) (1994).

220. H.R. REP. NO. 101-734, at 29, *reprinted in* 1990 U.S.C.C.A.N. at 6875.

221. *Compare* Carlucci v. United States, 793 F. Supp. 482, 485-86 (S.D.N.Y. 1992) (holding that "'exceptional circumstances [and] compelling reasons for declining jurisdiction'" existed because "permitting these various third party actions to continue during the pendency of the Government's ... proceedings" would be inefficient and "would simply prolong and complicate the proceedings") *with* Executive Software North America, Inc. v. District Court, 24 F.3d 1545, 1560-61 (9th Cir. 1994) (expressly disapproving of remand under § 1367(c)(4) when adjudication would require the substantial expenditure of time and effort by the federal court).

222. *See* Vairo, *supra* note 10, at 153.

223. *See, e.g.*, Patrick D. Murphy, *A Federal Practitioner's Guide to Supple-*

gested that § 1367(c)(4)'s "exceptional circumstances" language is taken from the Supreme Court's opinion in *Colorado River Water Conservation District v. United States*.[224] Discussing the doctrine of abstention in the majority's opinion in *Colorado River*, Justice Brennan held that the "'[a]bdication of [a district court's] obligation to decide cases can be justified under this [abstention] doctrine only in the *exceptional circumstances* where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'"[225] Justice Brennan further stated that prior decisions of the Supreme Court had "confined [these exceptional] circumstances appropriate for abstention to three general categories:"[226] (1) "'cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law;'" that is, the *Pullman* abstention;[227] (2) cases "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;" that is, the *Burford* abstention;[228] and (3) cases where there are certain ongoing state proceedings; that is, the *Younger* abstention.[229] Situations such as these—which warrant abstention in order to serve "'an important countervailing interest'"[230]—would undoubtedly qualify as "exceptional circumstances" in which there are "compelling reasons for declining jurisdiction" under § 1367(c)(4).

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mental Jurisdiction Under 28 U.S.C. § 1367, 78 MARQ. L. REV. 973, 1028 n.288 (1995) (drawing an "imperfect analogy" between § 1367(c)(4) and the *Colorado River* abstention).

224. 424 U.S. 800 (1976).

225. *Id.* at 813 (emphasis added) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)).

226. *Colorado River*, 424 U.S. at 814.

227. *Id.* (quoting *County of Allegheny*, 360 U.S. at 189 and citing Pullman, 312 U.S. 496). For a discussion of the *Pullman* abstention, see *supra* notes 184-86 and accompanying text.

228. *Colorado River*, 424 U.S. at 814 (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943)). For a discussion of the *Burford* abstention, see *supra* note 204 and accompanying text.

229. *See Colorado River*, 424 U.S. at 816 (citing *Younger v. Harris*, 401 U.S. 37 (1971)). Though the *Younger* decision was formerly limited to abstention where, "absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state *criminal* proceedings," *id.* (emphasis added), the *Younger* doctrine has been modified by subsequent case law to include civil proceedings in state courts. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (holding that the *Younger* abstention applies in both civil and criminal proceedings).

230. *Colorado River*, 424 U.S. at 813 (quoting *County of Allegheny*, 360 U.S. at 189).

The *Colorado River* case itself involved "the effect of the McCarran Amendment[231] upon the jurisdiction of the federal district courts under 28 U.S.C. § 1345[232] over suits for determination of water rights brought by the United States as trustee for certain Indian tribes and as owner of various non-Indian Government claims."[233] The United States brought a suit in federal court on its own behalf and on behalf of two Indian tribes, seeking a declaration of water rights.[234] Shortly after the Government's suit had commenced, a defendant to that suit sought to join the United States as a defendant to an ongoing state proceeding "for the purpose of adjudicating all of the Government's claims, both state and federal."[235] Several defendants and intervenors in the federal action then filed a motion to dismiss the Government's case "on the ground[s] that under the [McCarran] Amendment, the [district] court was without jurisdiction to determine federal water rights."[236] Without deciding the jurisdictional issue, the district court dismissed the case, stating that "the doctrine of abstention required deference to the [state] proceedings."[237] On appeal, the Tenth Circuit reversed the district court and held that abstention was inappropriate.[238]

Though the case fell within none of the traditional abstention categories, the Supreme Court recognized the existence of "principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts."[239] In addition to the three situations which traditionally warrant abstention by the federal courts, the *Colorado River* Court stated that even more narrow

231. 43 U.S.C. § 666 (1994). In substance, the McCarran Amendment, also known as the McCarran Water Rights Suit Act, amounts to congressional consent to the joinder of the United States as a defendant in certain suits for the adjudication or administration of rights to use the water of a river system or other source, as well as the abrogation of a state's right to claim sovereign immunity from such suits.

232. Section 1345 provides for original district court jurisdiction over "all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." 28 U.S.C. § 1345 (1994).

233. *Colorado River*, 424 U.S. at 803.

234. *See id.* at 805.

235. *Id.* at 806.

236. *Id.*

237. *Id.*

238. *See* United States v. Akin, 504 F.2d 115 (10th Cir. 1974).

239. *Colorado River*, 424 U.S. at 817.

"exceptional circumstances" might warrant the *dismissal* of a federal action "for reasons of wise judicial administration," *in the absence* of "weightier considerations of constitutional adjudication and state-federal relations."[240] While "as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction,'" the *Colorado River* Court cited a "general principle . . . to avoid duplicative litigation" in reversing the Tenth Circuit and in affirming the district court's dismissal of the complaint.[241] If the three traditional abstention doctrines present "exceptional circumstances" where "other compelling reasons for declining jurisdiction" exist under § 1367(c)(4), certainly so do the even narrower circumstances where a dismissal is warranted "for reasons of wise judicial administration."[242]

The idea that procedural scenarios appropriate for dismissal under *Colorado River* also fit within § 1367(c)(4) found support from the Fifth Circuit in its opinion in *Hays County Guardian v. Supple.*[243] In an opinion by Judge Patrick E. Higginbotham, the Fifth Circuit found "exceptional circumstances" and "compelling reasons" to decline jurisdiction over a plaintiff's state law claims when adjudicating those claims in federal court "while identical claims are pending in state court would be a pointless waste of judicial resources."[244]

Lower courts have also found "exceptional circumstances" to exist due to the possibility of jury confusion, which the *Gibbs* Court recognized as a justification for declining jurisdiction.[245] In *Padilla v. City of Saginaw*,[246] the court weighed the likelihood of jury confusion against the economy which might result from the resolution of all

240. *Id.* at 818.
241. *Id.* at 817.
242. *Id.* at 818. When "assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction," the *Colorado River* Court stated that a district court should consider: (1) which court had first obtained jurisdiction over a particular res; (2) "the inconvenience of the federal forum;" (3) "the desirability of avoiding piecemeal litigation;" and (4) "the order in which jurisdiction was obtained by the concurrent forums." *Id.* One counter argument to a stay or dismissal under *Colorado River* is that abstention is unnecessary because the *Colorado River* abstention, unlike other traditional abstention doctrines, is grounded in "reasons of wise judicial administration" and not based on principles of federalism, which at least find support in the Constitution.
243. 969 F.2d 111 (5th Cir. 1992).
244. *Id.* at 125.
245. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966).
246. 867 F. Supp. 1309 (E.D. Mich. 1994).

counts in a single court as required by *Moor v. County of Alameda.*[247] The *Padilla* court found that the potential for jury confusion in the case was "great" because "[t]he state claims and [the] federal claims [had] different legal standards, rules of vicarious liability and immunity, and recoverable damages," all of which "would be very difficult for a jury to keep . . . straight."[248]

In *Council of Unit Owners of the Wisp Condominium, Inc. v. Recreational Industries, Inc.*,[249] the district court also found that "exceptional circumstances" and "other compelling reasons for declining jurisdiction" existed under § 1367(c)(4). In dicta, the *Wisp Condominium* court stated that the plaintiff's federal claims were "rather tenuous and were asserted primarily to open up a federal forum."[250] The *Wisp Condominium* court cited *United Mine Workers v. Gibbs*, stating that "a federal district court need not tolerate attempts by a litigant to litigate an essentially state law case in the federal forum."[251] While the *Wisp Condominium* court disposed of the plaintiff's state claims on the ground that they did not arise from the same nucleus of operative facts as did the plaintiff's federal claims,[252] the court stated that, assuming that they had arisen from the same facts, the addition of tenuous federal claims for the purpose of forum shopping also "represent[ed] an exceptional circumstance where

247. 411 U.S. 693, 716 (1973).
248. *Padilla*, 867 F. Supp at 1315-16.
249. 793 F. Supp. 120 (D. Md. 1992).
250. *Id.* at 123.
251. *Id.* (citing *Gibbs*, 383 U.S. at 727).
252. *See id.* at 122. This is, of course, another argument available to a defendant's attorney seeking the dismissal of state claims. In declining jurisdiction over plaintiff's claims for preliminary and permanent injunction barring Recreational Industries from competing with the plaintiff, the *Wisp Condominium* court stated that "[n]ot every dispute that arises between parties litigating a federal claim constitutes a part of the same Article III case, and the present dispute exemplifies those that do not." *Id.* The plaintiff in *Wisp Condominium* alleged that defendant had violated federal antitrust law. *See id.* The court held that "[a]lthough part of an ongoing, bitter dispute between [the] plaintiff and defendant regarding the operation of the Wisp Resort Hotel," the state claim did not "arise from the same 'operative facts' as the antitrust case, nor would it ordinarily be tried together with the plaintiff's antitrust claims." *Id.*

In dicta, the *Wisp Condominium* court stated that, even assuming satisfaction of the *Gibbs* "common nucleus" test, the court would decline to exercise its jurisdiction over the state claims because they predominated over the federal antitrust claims upon which the court's jurisdiction would hypothetically rest. *See id.* at 123. The court reiterated the emphasis of the *Gibbs* court that the federal courts had discretionary power to hear pendent state law claims and stated that this discretion had been preserved in § 1367(c)(2). *See id.*

sound and compelling reasons exist[ed] under 28 U.S.C. § 1367(c)(4) to decline [supplemental] jurisdiction over the plaintiff's . . . claim."[253]

In addition to the reasons cited above, courts will doubtlessly find other "compelling reasons" for declining jurisdiction under § 1367(c)(4). In determining whether "exceptional circumstances" and "compelling reasons" exist for declining jurisdiction under § 1367(c)(4), a court should look to the guidance of the Supreme Court, handed down through its opinion in *United Mine Workers v. Gibbs*.[254] This analysis is likely also in accord with Congress's intent in enacting subsection (c), which appears to be more or less a codification of the *Gibbs* factors for when a district court should use its discretion to decline jurisdiction. Though the only "jurisdictional consideration"—other than those codified in subsections (c)(1)-(3)—cited by the *Gibbs* Court for declining jurisdiction was "the likelihood of jury confusion in treating divergent legal theories of relief,"[255] the Court used this reason by way of example only and left open the door for other possible "compelling reasons."[256]

In determining when reasons argued are compelling, a district court should look to considerations of "judicial economy, convenience and fairness to litigants"[257]—those same values that the *Gibbs* Court determined should be looked to when considering whether pendent jurisdiction should be exercised. If these values were not met, the *Gibbs* Court counseled that a district court should refrain from exercising the jurisdiction that existed when federal and state claims arose from a "common nucleus of operative fact[s]."[258] Finally, a district court should inquire whether federal or state treatment of the claims is more "expedien[t] and efficien[t]"[259]—the interests initially sought to be vindicated by the creation of the doctrine of pendent jurisdiction and the avoidance of claim splitting.[260] For example, if a state court system provides for a "fast track" or similar vehicle for bringing a case to trial more expediently, these interests would be served by sending the litigants to state court, particularly if other reasons for declining jurisdiction also exist; for example, the state and federal claims have identical dispositive issues, or the only remaining federal issues are

253. *Id.* at 123.
254. 383 U.S. 715 (1966).
255. *Id.* at 727.
256. *See id.*
257. *Id.* at 726.
258. *Id.* at 725.
259. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 120 (1984).
260. *See supra* notes 19-20 and accompanying text.

legal issues that may be disposed of through summary judgment or another post-state trial hearing in the federal court.[261]

VI. CONCLUSION

Although Congress has codified the doctrines of pendent and ancillary jurisdiction in § 1367 and, in so doing, has created jurisdiction over pendent parties, the language of § 1367 has left many questions unanswered. Exacerbating the problem, no post-enactment Supreme Court decision has attempted to interpret § 1367's provisions. Until guidance in answering these questions is provided, the lower federal courts should focus on and follow the plain language of the statute. The provisions of § 1367 are reconcilable, and the literal application of § 1367 does not lead to absurd results. Rather, it leads to the most logical conclusion—in enacting § 1367, Congress intended to preserve the discretion which *Gibbs* vested in the district courts.

When faced with one or more of the many questions § 1367 has left unanswered, lower courts should look to that Supreme Court authority which we do have—*United Mine Workers v. Gibbs*.[262] Though the *Gibbs* decision antedates the enactment of § 1367, it discussed the policies underlying the doctrine of pendent jurisdiction, and its language later provided the very foundation on which Congress built our supplemental jurisdiction statute.

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261. This argument is further bolstered if the federal issues have a lower standard of proof than the state issues. In addition, if the parties have a right to a jury trial on the state but not the federal issues, it would serve these interests to hold a state jury trial, and then a less time-consuming court trial—or, if only legal issues remain, summary judgment hearing—in the federal court.

262. 383 U.S. 715 (1966).

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