

1995

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Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. Sec. 1367*, 78 Marq. L. Rev. 973 (1995).

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A FEDERAL PRACTITIONER'S GUIDE TO SUPPLEMENTAL JURISDICTION UNDER 28 U.S.C. § 1367

PATRICK D. MURPHY*

I. INTRODUCTION

On December 1, 1990, then-President George Bush signed into law the Judicial Improvements Act of 1990 ("the Act").¹ The Act was designed in part to implement several of the recommendations of the Federal Courts Study Committee,² which Congress had created a year earlier to develop ways to improve federal court practice.³ This article focuses exclusively on the most significant change to federal court practice in that Act: the supplemental jurisdiction provisions codified at 28 U.S.C. § 1367.

The supplemental jurisdiction statute applies to civil actions commenced on or after December 1, 1990.⁴ Section 1367 merges under the

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† This Article is dedicated to the loving memory of my Dad—Edward J. Murphy (1927-1995), the former John N. Matthews Professor of Law, Notre Dame Law School.

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

2. The Committee recommended that "Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely defendants against whom that plaintiff has a closely related state claim." FEDERAL COURTS STUDY COMMITTEE REPORT 47-48 (April 2, 1990) [hereinafter COMMITTEE REPORT]. Other significant changes to federal court practice recommended by the Committee and enacted by Congress concerned amendments to the venue and removal provisions of Title 28 of the United States Code. The most controversial recommendation of the Committee was to abolish, with few exceptions, diversity of citizenship jurisdiction. *Id.* at 38-45. Congress did not implement that recommendation, however.

3. Title III of the Act is entitled the Federal Courts Study Committee Implementation Act of 1990. Pub. L. No. 101-650, Title III, § 301-25, 104 Stat. 5089, 5104-21. The Committee was formed pursuant to the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 102(2), 102 Stat. 4642, 4644 (1988). Congress directed the Committee to "examine problems and issues" currently facing the federal courts and to develop "a long-range plan for the future of the Federal Judiciary . . ." Pub. L. No. 100-702, § 102(b), 102 Stat. 4642, 4644 (1988).

4. Pub. L. No. 101-650, § 310(c), 104 Stat. 5089, 5114 ("The amendments made by this section shall apply to civil actions commenced on or after the date of the enactment of this Act," which was December 1, 1990.). "A civil action is commenced by filing a complaint with

name of "supplemental jurisdiction" the former case-law doctrines of pendent, ancillary, and pendent-party jurisdiction. In enacting the supplemental jurisdiction statute, Congress sought to codify those former doctrines,⁵ and succeeded in large part in doing so. However, there are significant differences between the supplemental jurisdiction statute and prior case law. Today, approximately five years after § 1367 was enacted, the federal courts are now beginning to analyze the extent to which the supplemental jurisdiction statute changed prior law in this area.

This article has five aims: (1) to compare "supplemental jurisdiction" to the former doctrines of pendent, ancillary, and pendent-party jurisdiction; (2) to analyze the different provisions of the supplemental jurisdiction statute so that the federal practitioner, as well as other members of the bar, can readily determine how each of the provisions operates in the context of a particular federal civil action; (3) to explore the potential scope of supplemental jurisdiction and the limits placed on it by Article III of the Federal Constitution; (4) to highlight the unresolved issues surrounding the use of supplemental jurisdiction; and (5) to survey recent federal decisions to determine how federal courts have used (or declined to use) the supplemental jurisdiction statute during the five years since it became law.

Part II of this article briefly describes the doctrines of pendent, ancillary, and pendent-party jurisdiction as they existed prior to the enactment of § 1367 in 1990. The Supreme Court's 1989 decision in *Finley v. United States*,⁶ which effectively abolished the doctrine of pendent-party jurisdiction and, as a result, served as the impetus for the codification of "supplemental jurisdiction," will be examined in detail. Part III sets forth the complete text of § 1367 and briefly discusses the circumstances under which the statute is applicable. Part IV examines the broad grant of supplemental jurisdiction found in § 1367(a), which is generally applicable in all federal actions. Although the legislative history indicates that Congress enacted this statute to restore "the pre-*Finley* understand-

the court." FED. R. CIV. P. 3. Thus, by its express terms, the supplemental jurisdiction statute applies only to cases in which the complaint was filed on or after December 1, 1990.

5. See *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993) ("The legislative history indicates that the new statute is intended to codify rather than alter the judge-made principles of pendent and pendent-party jurisdiction, and this is also the view of the courts and the commentators."); *Carlucci v. United States*, 793 F. Supp. 482, 484 (S.D.N.Y. 1992) ("This new statute codifies the doctrines of ancillary and pendent jurisdiction, in addition to permitting pendent-party jurisdiction, which had been rejected by the Supreme Court in 1989.").

6. 490 U.S. 545 (1989).

ing" of supplemental jurisdiction,⁷ Part IV demonstrates that Congress actually expanded such jurisdiction, particularly in the former areas of ancillary and pendent-party jurisdiction.

Part V examines subsection (b) of § 1367, which places significant restrictions on a plaintiff's use of supplemental jurisdiction in actions founded "solely" on 28 U.S.C. § 1332.⁸ By doing so, subsection (b) restricts a plaintiff's use of supplemental jurisdiction in diversity and alienage cases to a greater degree than did prior case law. Part VI discusses under what circumstances a federal district court may decline, in its discretion, to exercise its supplemental jurisdiction under § 1367(c). Part VII examines the tolling provisions of subsection (d) and considers a constitutional challenge to those provisions. Throughout the discussions of each of the subsections of § 1367, this article highlights and analyzes unresolved issues regarding the use of supplemental jurisdiction and surveys recent federal decisions to determine how federal courts have wrestled with the supplemental jurisdiction statute since its enactment in 1990.

Finally, Part VIII briefly discusses whether the supplemental jurisdiction statute serves as a model of successful "dialogue" between Congress and the federal courts as to the proper scope of federal jurisdiction.

II. AN OVERVIEW OF THE FORMER DOCTRINES OF PENDENT, ANCILLARY, AND PENDENT-PARTY JURISDICTION

As codified at 28 U.S.C. § 1367, "supplemental jurisdiction" replaces the former case-law doctrines of pendent, ancillary, and pendent-party jurisdiction. Before examining the ways in which supplemental jurisdiction differs from those earlier doctrines, this article will briefly review pendent, ancillary, and pendent-party jurisdiction. Collectively, these three court-created doctrines of jurisdiction were generally used by federal courts, in cases properly within their jurisdiction, to decide state-law claims over which no independent basis for federal jurisdiction existed (such as diversity of citizenship). In this way, federal courts avoided piecemeal litigation by entertaining related federal and state claims that were said to make up but one constitutional "case or controversy" under

7. See H.R. REP. NO. 734, 101st Cong., 2d Sess. 28 (1990), *reprinted* in 1990 U.S.C.C.A.N. 6860, 6874 [hereinafter *House Report*] (Section 1367 was enacted to "authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction.").

8. Section 1332(a)(1) governs diversity of citizenship jurisdiction in actions between "citizens of different States"; section 1332(a)(2)-(4) governs so-called alienage jurisdiction in actions involving foreign states or citizens of foreign states. 28 U.S.C. § 1332(a) (1988).

Article III. Judicial economy and efficiency were thereby served by averting duplicative litigation in federal and state forums. Finally, these doctrines also preserved for litigants the attractiveness of the federal forum by allowing the entire case to be tried in federal court.⁹

A. *Pendent Jurisdiction*

Plaintiffs often invoked pendent jurisdiction in the course of litigating federal claims in federal court against nondiverse defendants and related state-law claims against the same defendants. In such an action, no independent basis for federal jurisdiction, such as diversity of citizenship, would apply to the state claim. Thus, the existence of the federal claim served as a mechanism by which the additional, "pendent" state claim could be brought in federal court. Because of the need for an underlying federal claim to which to append the state claim, plaintiffs most frequently invoked pendent jurisdiction in the context of federal-question cases under 28 U.S.C. § 1331.¹⁰

The seminal case concerning pendent jurisdiction is *United Mine Workers v. Gibbs*.¹¹ In *Gibbs*, the plaintiff brought an action in federal district court, asserting two parallel claims: a federal statutory claim and a state-law claim. Although the federal claim was ultimately dismissed and complete diversity of citizenship was lacking between plaintiff and defendant, the Supreme Court upheld the district court's exercise of "pendent" jurisdiction over the plaintiff's state claim. Justice Brennan, writing for the Court, stated:

Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case."¹²

Thus, for the requisite relationship between the state and federal claims to exist under *Gibbs*, three conditions must be met. First, the federal and state claims must derive from "a common nucleus of opera-

9. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 5.4.1, at 276 (1989).

10. See *Id.* § 5.4.2, at 277-83.

11. 383 U.S. 715 (1966). See also *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348 (1988) ("The modern doctrine of pendent jurisdiction stems from this Court's decision in *Mine Workers v. Gibbs* . . .").

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

tive fact.”¹³ Second, the federal claim must have “substance sufficient” to confer subject-matter jurisdiction on the federal court.¹⁴ Third, the federal and state claims must be such that a plaintiff “would ordinarily be expected to try them all in one judicial proceeding”¹⁵ If these three conditions are satisfied, then the federal court has power to decide the whole constitutional “case.”

Based on *Gibbs*, the Supreme Court had long “held, without specific examination of jurisdictional statutes, that federal courts have ‘pendent’ claim jurisdiction—that is, jurisdiction over nonfederal claims between parties litigating other matters properly before the court—to the full extent permitted by the Constitution.”¹⁶ Thus, if the “common nucleus of operative fact” test of *Gibbs* was met, there was “wide-ranging power in the federal courts to decide state-law claims in cases that also present[ed] federal questions.”¹⁷

“Under the pendent jurisdiction doctrine set forth in *Gibbs*, however, the District Court had to consider throughout the litigation whether to exercise its jurisdiction over the case.”¹⁸ Thus, *Gibbs* drew an important distinction between the power of federal courts to hear state claims that had no independent basis of federal jurisdiction and the federal courts’ discretionary exercise of that power. The decision of whether to exercise pendent jurisdiction was left to the sound discretion of the federal district courts.¹⁹ As the *Gibbs* Court stated:

[P]endent jurisdiction is a doctrine of discretion, not of plaintiff’s right. Its justification lies in considerations of judicial economy, convenience and fairness to the litigants; if these are not present a federal court should hesitate to exercise [pendent] jurisdiction over state claims²⁰

In keeping with the suggestion in *Gibbs*, federal courts generally declined to exercise pendent jurisdiction when the federal claims were dismissed prior to trial or when the state claims involved unresolved and

13. *Id.*

14. *Id.*

15. *Id.*

16. *Finley v. United States*, 490 U.S. 545, 548 (1989).

17. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988).

18. *Id.* at 351.

19. The district court’s discretion to relinquish pendent jurisdiction was so broad as to be “almost unreviewable.” *Graf v. Elgin, Joliet and Eastern Ry. Co.*, 790 F.2d 1341, 1347 (7th Cir. 1986).

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

complex questions of state law.²¹ If the federal court decided to relinquish jurisdiction over the pendent claims, then it would either dismiss those claims without prejudice or remand them back to state court if removal had occurred earlier.²²

B. Ancillary Jurisdiction

In contrast to pendent jurisdiction, which was generally a doctrine used by plaintiffs, ancillary jurisdiction was generally a doctrine used by defendants and third parties.²³ "[A]ncillary jurisdiction typically involve[d] claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."²⁴ In addition, ancillary jurisdiction extended to subsequent suits brought to effectuate a federal court's earlier judgment determining the rights to certain property.²⁵

As with pendent jurisdiction, however, ancillary jurisdiction encompassed only additional claims that were closely related to the original action that conferred federal jurisdiction on the district court.²⁶ The defendant's or third party's claims had to be factually similar to and logi-

21. See, e.g., *Cohill*, 484 U.S. at 350 n.7 (dismissal of federal claims prior to trial); *Moor v. County of Alameda*, 411 U.S. 693, 716-17 (1973) (uncertain and complex state-law issues).

22. *Cohill*, 484 U.S. at 351-52. Remand was generally preferable to dismissal when the statute of limitations on the state claim had expired before the federal court had exercised its discretion to decline pendent jurisdiction. *Id.*

23. *Federman v. Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 810 (2d Cir. 1979). The court stated:

It is the combination of state and federal claims in a complaint that gives rise to the doctrine of pendent jurisdiction. On the other hand, when, subsequent to the filing of the complaint, a party other than the original plaintiff injects state claims into a controversy as counterclaims, cross-claims, or third-party claims, such claims fall within the court's ancillary jurisdiction rather than its pendent jurisdiction.

Id.

24. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978). See also *Aldinger v. Howard*, 427 U.S. 1, 11 (1976) ("The doctrine of ancillary jurisdiction . . . is bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction.").

25. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

26. In this respect, the two doctrines seem to merge. See William D. Clasper, Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263 (1975). The Supreme Court has recognized the entwined nature of the two doctrines by stating that "there is little profit in attempting to decide, for example, whether there are any 'principled' differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences." *Aldinger v. Howard*, 427 U.S. 1, 13 (1976).

cally dependent on the claims raised in plaintiff's complaint.²⁷ Also, as with pendent jurisdiction, ancillary jurisdiction was a doctrine of discretion; federal courts had broad discretion in determining whether to exercise jurisdiction over ancillary claims.²⁸

Ancillary jurisdiction applied to both federal-question and diversity cases. For example, as early as 1926, in *Moore v. New York Cotton Exchange*,²⁹ the Supreme Court sustained a federal district court's jurisdiction over a nondiverse defendant's compulsory counterclaim arising out of the same transaction upon which the plaintiff's federal antitrust claim was grounded, even though the defendant's state-law counterclaim had no independent basis for federal jurisdiction.³⁰ Similarly, in diversity cases, ancillary jurisdiction was used to support a defendant's compulsory counterclaim when the counterclaim was for less than the minimum jurisdictional amount.³¹

Ancillary jurisdiction was generally held to be sufficiently broad to encompass a variety of cases involving multiparty practice, such as impleader, cross-claims, and intervention as of right.³² Thus, for example, a defendant in a diversity case was permitted to implead a nondiverse third-party defendant, even if the defendant/third-party plaintiff's claim was predicated on state law.³³ However, one important limitation existed on the scope of ancillary jurisdiction in the context of impleader: In diversity cases, ancillary jurisdiction did not extend to a plaintiff's state-law claim against a nondiverse third-party defendant.³⁴ To allow a plaintiff to bring a state-law claim directly against a non-diverse, third-party defendant would enable the plaintiff to evade the requirement of

27. See *Kroger*, 437 U.S. at 376.

28. See CHEMERINSKY, *supra* note 9, § 5.4.3, at 283.

29. 270 U.S. 593 (1926).

30. Ancillary jurisdiction, however, did not support *permissive* counterclaims under Federal Rule 13(b) that did not have an independent basis for federal jurisdiction, because permissive counterclaims, by definition, do "not aris[e] out of the transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(b). See, e.g., *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 360 (7th Cir. 1990).

31. See CHEMERINSKY, *supra* note 9, § 5.4.1, at 276.

32. See *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 375-76 (1978). See also CHEMERINSKY, *supra* note 9, § 5.4.3, at 283-84 (1989); 13 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3523, at 106-13 (1984). Ancillary jurisdiction was generally held not sufficiently broad to cover *permissive* intervention under Federal Rule 24(b). *Id.* at 113.

33. *Kroger*, 437 U.S. at 375-76.

34. See *Kroger*, 437 U.S. 365 (1978). A detailed discussion of *Kroger* is presented in Part V.A.1.a of this article.

"complete diversity" of citizenship mandated by the Supreme Court's interpretation of 28 U.S.C. § 1332.³⁵

C. *Pendent-Party Jurisdiction*

Prior to the enactment of "supplemental jurisdiction" under 28 U.S.C. § 1367 in December 1990, the doctrines of pendent and ancillary jurisdiction were, for the most part, well-settled. However, the doctrine of pendent-party jurisdiction was still very controversial.³⁶ Pendent-party jurisdiction referred to the authority of federal courts to hear claims against "parties not named in any claim that is independently cognizable by the federal court."³⁷ Stated differently, pendent-party jurisdiction raised the following question:

whether "pendent" federal jurisdiction encompass[e] not merely the litigation of additional *claims* between parties with respect to whom there is federal jurisdiction, but also the joining of additional *parties* with respect to whom there is no independent basis of federal jurisdiction³⁸

Questions about pendent-party jurisdiction arose generally in three distinct factual settings: (1) when a plaintiff brought a federal-question claim against one defendant and a related state-law claim against a second nondiverse defendant; (2) when a plaintiff brought a diversity claim against one defendant and a related state claim against a second nondiverse defendant³⁹; and (3) when one plaintiff brought a federal claim against a defendant and a second plaintiff brought a related state claim against the same defendant. Thus, one could think of pendent-party jurisdiction as comprising two parts: pendent-defendant and pendent-plaintiff jurisdiction.

The Supreme Court directly examined the doctrine of pendent-party jurisdiction in only two cases: *Aldinger v. Howard*⁴⁰ and *Finley v. United*

35. *Id.* at 373-74.

36. *See, e.g.,* Citizens Marine Nat'l Bank v. United States Dep't of Commerce, 854 F.2d 223, 226 (7th Cir. 1988) (referring to pendent-party jurisdiction as an "embattled" concept).

37. *Finley v. United States*, 490 U.S. 545, 549 (1989).

38. *Aldinger v. Howard*, 427 U.S. 1, 6 (1976).

39. Some courts had held that pendent-party jurisdiction did not exist in diversity cases. *See, e.g.,* Hixon v. Sherwin-Williams Co., 671 F.2d 1005 (7th Cir. 1982).

A similar, but distinct, factual setting occurred in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). In *Kroger*, the plaintiff brought a diversity suit against the defendant and later sought to bring state claims against a nondiverse third-party defendant who had been impleaded by the defendant. *Kroger* is best viewed as involving a federal court's ancillary jurisdiction, not pendent-party jurisdiction. *See generally* CHEMERINSKY, *supra* note 9, § 5.4.3, at 284. *Kroger* is discussed at length in Part V.A.1.a of this article.

40. 427 U.S. 1 (1976).

States.⁴¹ Both cases involved plaintiffs who had brought a federal-question claim against one defendant and a related state-law claim against a second nondiverse defendant (the first factual setting set forth above). Neither case succeeded in settling the heated debate over the proper scope of pendent-party jurisdiction. Because the doctrine of pendent-party jurisdiction as enunciated by the Court in *Aldinger* and *Finley* was greatly expanded by the codification of supplemental jurisdiction under 28 U.S.C. § 1367, a brief discussion of *Aldinger* and *Finley* is necessary to understand the effect § 1367 has had in this area of the law.

1. *Aldinger v. Howard*

The Supreme Court directly addressed the issue of pendent-party jurisdiction for the first time in 1976 in *Aldinger v. Howard*.⁴² *Aldinger* had been hired as a clerical worker by Howard, a county treasurer. Shortly thereafter, Howard fired *Aldinger* because she was allegedly living with her boyfriend. *Aldinger* then filed suit against the county treasurer in federal court, alleging that the discharge infringed her federal constitutional rights in violation of 42 U.S.C. § 1983. In addition, she sought to bring state-law claims directly against the county. (A federal § 1983 claim was at that time unavailable against a county or municipality.⁴³) The federal district court, she argued, had pendent-party jurisdiction over the state claims against the county because they arose from the same set of facts upon which her federal claim against the county officer was based.

The Supreme Court held, six to three, that the federal district court lacked jurisdiction over the state claims against the county, the asserted pendent party. In enacting § 1983 and 28 U.S.C. § 1343 (the jurisdictional statute conferring federal jurisdiction in civil rights cases), Congress had, by implication, declined to extend federal jurisdiction over pendent parties, such as the county.⁴⁴ To permit the exercise of pendent-party jurisdiction in the context of an action under § 1983 would circum-

41. 490 U.S. 545 (1989).

42. 427 U.S. 1 (1976).

43. See *Monroe v. Pape*, 365 U.S. 167 (1961). The Court held in *Monroe* that local governmental units, such as counties and municipalities, were immune from liability under the Civil Rights Act of 1871. In 1978, the Supreme Court overruled *Monroe* and held that counties and municipalities could be sued in federal court under 42 U.S.C. § 1983. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978).

44. *Aldinger*, 427 U.S. at 18.

vent the congressional bar to such suits against local governmental units.⁴⁵

Aldinger established the mode of analysis to be used by federal courts in determining whether pendent-party jurisdiction existed in a particular case. Significantly, the majority declined to apply the *Gibbs* test ("common nucleus of operative fact") to claims involving pendent parties. Writing for the majority, then-Justice Rehnquist found *Gibbs* factually and legally distinguishable:

The situation with respect to the joining of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in *Gibbs* and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact." . . . [T]he addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress . . .

There is also a significant legal difference. In . . . *Gibbs*, Congress was silent on the extent to which the defendant, already properly in federal court under a statute, might be called upon to answer nonfederal questions or claims; the way was thus left open for the Court to fashion its own rules under the general language of Art. III. But the extension of *Gibbs* to this kind of "pendent party" jurisdiction—bringing in an additional defendant at the behest of the plaintiff—presents rather different statutory jurisdictional considerations.⁴⁶

The Court reasoned that, before it could be concluded that pendent party jurisdiction existed, "a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."⁴⁷ Thus,

45. See *supra* note 43 and accompanying text.

46. *Aldinger*, 427 U.S. at 14-15.

47. *Id.* at 18.

under the majority's approach, a federal court had jurisdiction over a related state claim against a pendent party—*unless* Congress had expressly or impliedly negated the existence of such jurisdiction in the statutes conferring jurisdiction over the federal claim.

In a sharp dissent, Justice Brennan, joined by Justices Marshall and Blackmun, criticized the majority's refusal to employ the mode of analysis set forth in *Gibbs*, stating "*Gibbs* concerned a state-law claim jurisdictionally pendent to one of federal law, but no reason appears why the identical principles should not equally apply to pendent state-law claims involving the joinder of additional parties."⁴⁸ According to the dissent, the result reached by the majority led to needless and expensive duplicative litigation and frustrated a federal litigant's right to have his federal claim heard in federal court. As Justice Brennan stated:

Regardless of the balance of the discretionary factors enunciated in *Gibbs*; regardless of the clarity of state law respecting the pendent claim against the local government unit; regardless of the absolute identity of factual issues between the two claims; regardless of the monetary expense and other disadvantages of duplicative litigation; regardless of the waste of judicial time and the "travesty on sound judicial administration", the Court by its *per se* rule forces upon a litigant the indefensible choice of either suffering the costs of duplicative litigation or forgoing his right, a right emphatically emphasized in the congressional policy, to a federal forum in which to be heard on his federal claim.⁴⁹

Despite the red flags raised in the dissenting opinion, *Aldinger* in no way signaled the demise of pendent-party jurisdiction. The Court's majority was careful to emphasize the narrow scope of its ruling—pendent-party jurisdiction was foreclosed only with respect to claims brought under 42 U.S.C. § 1983.⁵⁰ The Court refused "to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction."⁵¹ Instead, the Court specifically noted: "Other statutory grants [of federal jurisdiction] and other alignments of parties and claims might call for a different result."⁵²

48. *Id.* at 20 (Brennan, J., dissenting).

49. *Id.* at 35-36 (Brennan, J., dissenting) (citations omitted).

50. *Id.* at 18.

51. *Id.*

52. *Id.*

2. *Finley v. United States*

Thirteen years after its decision in *Aldinger*, the Supreme Court again directly addressed the issue of pendent-party jurisdiction in *Finley v. United States*.⁵³ *Finley's* husband and two of her children were killed in a plane crash after the plane in which they were flying struck electric transmission lines during its approach to a San Diego airfield. *Finley* brought a state-law tort action in state court against the electric company and the city of San Diego for their alleged negligence in causing the plane crash. When she later learned that the Federal Aviation Administration (FAA) might have been responsible, *Finley* filed suit in federal district court against the FAA under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). A year later, *Finley* moved to amend her federal complaint to add claims against the original state-court defendants. No independent basis for federal jurisdiction (such as diversity of citizenship) existed over these added state-law claims.

The district court granted *Finley's* motion, asserting "pendent" jurisdiction over the added state-law claims against the nondiverse defendants because the federal and state claims arose from "a common nucleus of operative fact"—the test enunciated earlier by the Supreme Court in *Gibbs* in the context of pendent-claim jurisdiction. The Ninth Circuit reversed. The Supreme Court then granted certiorari "to resolve a split among the Circuits on whether the FTCA permits an assertion of pendent jurisdiction over additional parties."⁵⁴

Finley presented the Supreme Court with a very strong case for recognizing pendent-party jurisdiction (at least in the narrow context of cases brought under the FTCA). First, plaintiff *Finley's* federal claim against the FAA could not be brought in state court because the federal district court had *exclusive* jurisdiction over the FTCA claim.⁵⁵ To deny

53. 490 U.S. 545 (1989).

54. *Finley*, 490 U.S. at 547. Compare, e.g., *Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977), cert. dismissed, 435 U.S. 982 (1978) (no pendent-party jurisdiction under FTCA), with *Lykins v. Pointer, Inc.*, 725 F.2d 645 (11th Cir. 1984) (pendent-party jurisdiction under FTCA).

55. The FTCA permits the federal government to be sued only in federal court. See 28 U.S.C. § 1346(b) (stating that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States" for certain torts committed by federal employees within the scope of their employment). Thus, the federal district court was the *only* forum in which the entire constitutional "case" could be tried. Earlier, in *Aldinger*, the Supreme Court indicated that this was a strong argument for recognizing pendent-party jurisdiction. See *Aldinger*, 427 U.S. at 18 ("When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together.").

pendent-party jurisdiction, therefore, would present Finley with a difficult choice: either abandon the FTCA claim or pursue simultaneous litigation in federal and state forums. Second, the federal and state claims were closely related and arose from a "common nucleus of operative fact" under the *Gibbs* test. Third, judicial economy and efficiency would be squandered by forcing the plaintiff to pursue related claims in separate forums.

Despite these arguments, the Supreme Court held, five to four, that, in a FTCA suit against the United States, a federal district court was without *statutory* authority to exercise jurisdiction over related state-law claims by the plaintiff against additional, nondiverse defendants.⁵⁶ Writing for the majority, Justice Scalia first distinguished an earlier Supreme Court case, *Moore v. New York Cotton Exchange*,⁵⁷ which had sustained a district court's ancillary jurisdiction over a nondiverse defendant's compulsory counterclaim arising out of the same transaction upon which the plaintiff's federal claim was grounded, even though no independent basis for federal jurisdiction existed for the defendant's state-law counterclaim.

Moore, Justice Scalia wrote, "involved jurisdiction over a counterclaim brought by and against parties who were already properly before the court on other, federal-question grounds."⁵⁸ According to the majority, the distinction "between new parties and parties already before the court" was "a central distinction" not grasped by the dissenters.⁵⁹ Next, Justice Scalia rejected the notion, implied in Justice Stevens's dissent,⁶⁰ that the liberal joinder rules of Federal Rules 14 and 20 (which permit impleader and joinder of parties, respectively) authorized the district court to exercise pendent-party jurisdiction. The federal rules of civil procedure, he explained, do not and cannot extend the district court's subject-matter jurisdiction.⁶¹

56. The *Finley* Court declined to address whether a federal district court's exercise of pendent-party jurisdiction was permissible under Article III. The Court stated: "We may assume, *without deciding*, that the constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction, and that petitioner's state-law claims pass that test." *Finley*, 490 U.S. at 549 (emphasis added). It is unclear how or why the Court was able to "assume" that the constitutional criterion for pendent-party and pendent-claim jurisdiction were analogous "without deciding" the constitutional basis for pendent-party jurisdiction.

57. 270 U.S. 593 (1926).

58. *Finley*, 490 U.S. at 549 n.2.

59. *Id.*

60. *See id.* at 560-61 (Stevens, J., dissenting).

61. *Id.* at 553 n.6. *See* FED. R. CIV. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.").

The *Finley* Court, as it had done previously in *Aldinger*, again rejected the use of the *Gibbs* mode of analysis in the context of pendent-party claims:

Analytically, petitioner's case is fundamentally different from *Gibbs* in that it brings into question what has become known as pendent-party jurisdiction, that is, jurisdiction over parties not named in any claim that is independently cognizable by the federal court. . . . Our cases show . . . that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.⁶²

The Court indicated that pendent-party jurisdiction would not be found to exist unless Congress had made an "affirmative grant of pendent-party jurisdiction" in the federal statute that provides the jurisdictional basis of the main claim.⁶³ After examining the "posture" in which the state claim had been asserted against the nondiverse defendants and the language of the FTCA jurisdictional statute,⁶⁴ the majority concluded that Congress had made no such affirmative grant of pendent-party jurisdiction in enacting the FTCA and that the statute "defines jurisdiction in a manner that does not reach defendants other than the United States."⁶⁵

By requiring affirmative evidence of Congress's intent to confer pendent-party jurisdiction, *Finley* marked a subtle, but significant, change in the standard used previously by the Court in *Aldinger*. Previously, in *Aldinger*, the Court held that federal courts had jurisdiction over pendent parties *unless* Congress in the statutes conferring jurisdiction had expressly or by implication negated its existence.⁶⁶ *Aldinger* presumed

62. *Id.* at 549.

63. *Id.* at 553.

64. The FTCA, at 28 U.S.C. § 1346(b), confers exclusive jurisdiction on the federal courts over "civil actions on claims against the United States." The *Finley* Court concluded that the words "against the United States" as used in § 1346(b) meant "against the United States and no one else." *Finley*, 490 U.S. at 552.

65. *Id.* at 553.

66. See *id.* at 556 (Blackmun, J., dissenting) ("If *Aldinger v. Howard* required us to ask whether the Federal Tort Claims Act embraced 'an affirmative grant of pendent-party jurisdiction,' I would agree with the majority that no such specific grant of jurisdiction is present. But, in my view, that is not the appropriate question under *Aldinger*." (citations omitted); *Lewis v. Windsor Door Co.*, 926 F.2d 729, 731 (8th Cir. 1991) ("The Court [in *Finley*] adopted a new and more narrow interpretive rule for pendent party jurisdiction, finding it exists only when Congress has affirmatively granted such jurisdiction."); *Commonwealth Edison Co. v. Westinghouse Electric Co.*, 759 F. Supp. 449, 453 (N.D. Ill. 1991) ("*Finley* now requires an affirmative statutory grant of jurisdiction in order to validate pendent-party claims."); see also

that pendent-party jurisdiction existed; *Finley* presumed that it did not. As a result, *Finley* effectively abolished pendent-party jurisdiction because few, if any, federal statutes contained "affirmative evidence" of Congress's intent to confer pendent-party jurisdiction.⁶⁷

The *Finley* Court realized that, because of its decision, "the efficiency and convenience of a consolidated action w[ould] sometimes have to be foregone in favor of separate actions in state and federal courts," but stated that the FTCA permitted "no other result."⁶⁸ Any change in the scope of pendent-party jurisdiction in FTCA actions (or other federal actions) would have to be made by Congress. The Court then concluded:

Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts. All our cases . . . have held that *a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties*. Our decision today reaffirms that interpretive rule; the opposite would sow confusion.⁶⁹

D. Post-Finley Confusion and Hostility Toward Court-Created Doctrines of Federal Jurisdiction

Despite its attempt to announce a clear interpretive rule regarding the scope of pendent-party jurisdiction, the *Finley* decision in practice sowed only confusion. Some lower federal courts confined *Finley* to FTCA cases and upheld the use of pendent-party jurisdiction in the context of cases brought under other federal statutes.⁷⁰ In contrast, most other federal courts interpreted *Finley* broadly as sounding the death-

John R. Maley, 1990 *Federal Practice and Procedure Update for the Seventh-Circuit Practitioner*, 24 IND. L. REV. 631, 643 (1991) (In *Finley*, "the Supreme Court effectively abolished pendent-party jurisdiction, not by saying, 'This concept is dead,' but by subtly altering the standards for invoking the doctrine.").

67. See *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548, 551 (5th Cir. 1990); *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 n.5 (2d Cir. 1989) (after *Finley*, "pendent-party jurisdiction is no longer a viable concept"); *Birkinshaw v. Armstrong World Indus., Inc.*, 715 F. Supp. 126, 127 (E.D. Pa. 1989) (stating that "the Supreme Court [in *Finley*] held that the federal courts were not authorized to exercise pendent party jurisdiction").

68. *Finley*, 490 U.S. at 555-56.

69. *Id.* at 556 (emphasis added).

70. See, e.g., *Rodriguez v. Comas*, 888 F.2d 899, 906 (1st Cir. 1989) (pendent-party still available in civil rights actions under 42 U.S.C. § 1983).

knell for pendent-party jurisdiction under then-existing jurisdictional statutes.⁷¹

Even more foreboding, some federal courts read sweeping language in *Finley* as undermining previously accepted and customary forms of ancillary jurisdiction, particularly as used in third-party actions.⁷² For example, prior to *Finley*, ancillary jurisdiction was routinely held to be sufficiently broad to encompass impleader of a nondiverse third-party defendant under Federal Rule 14(a), even if the claim against the third-party defendant claim was predicated only on state law.⁷³ However, in *Aetna Casualty & Sur. Co. v. Spatan Mechanical Corp.*,⁷⁴ the United States District Court for the Eastern District of New York rejected this exercise of ancillary jurisdiction. The district court in *Aetna* held that "[o]n the basis of *Finley v. United States*, this Court does not have subject matter jurisdiction over the third-party claims for contribution or indemnification as they lack an independent jurisdictional basis and are not within ancillary jurisdiction."⁷⁵

71. See, e.g., *Iron Workers Mid-South Pension Fund*, 891 F.2d at 551 (rejecting pendent-party jurisdiction under ERISA and stating that "[t]he Supreme Court held in *Finley* that while pendent-party jurisdiction may pass constitutional muster, it has not been congressionally authorized"); *Alumax Mill Prod. v. Congress Fin. Corp.*, 912 F.2d 996, 1007 (8th Cir. 1990) (no pendent-party jurisdiction under civil RICO); *Lockard v. Missouri Pacific Railroad Co.*, 894 F.2d 299 (8th Cir. 1980), *cert. denied*, 111 S.Ct. 134 (1990) (no pendent-party jurisdiction under FELA); *Stallworth v. City of Cleveland*, 893 F.2d 830 (6th Cir. 1990) (no pendent-party jurisdiction under 42 U.S.C. § 1983); see also 13B WRIGHT & MILLER, *supra* note 32, § 3567.2 (Supp. 1994) ("There may be statutes that affirmatively grant pendent-party jurisdiction, but they surely must be exceptional. It is not surprising that some lower courts were reading *Finley* as putting an end to that jurisdiction."); see also Maley, *supra* note 66, at 644 ("[A]fter *Finley*, the notion of implying pendent-party jurisdiction is not a viable concept. The *Finley* search for affirmative evidence should always be fruitless, for no such jurisdiction would need to be implied if the statutory basis of federal jurisdiction contained an affirmative grant of jurisdiction over related state law claims involving third parties.").

72. See, e.g., *Lewis v. Windsor Door Co.*, 926 F.2d 729, 731 (8th Cir. 1991) ("Although *Finley* concerned pendent-party jurisdiction, its language and references apply as well to ancillary jurisdiction."). But see 13B WRIGHT & MILLER, *supra* note 32, § 3567.2 (Supp. 1994) ("The Supreme Court's language in *Finley* about having allowed 'ancillary jurisdiction' only in a 'narrow class of cases' cast doubt on that line of authority as well. Most lower courts, however, adhered to what had been, prior to *Finley* the accepted rules about ancillary jurisdiction.").

73. See *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 375-76 (1978).

74. 738 F. Supp. 664 (E.D.N.Y. 1990).

75. *Id.* at 679 (citation omitted). See also *Community Coffee Co. v. M/S Kriti Amethyst*, 715 F. Supp. 772, 774 (E.D. La. 1989) (concluding that *Finley* prohibits ancillary jurisdiction over third-party actions lacking an independent basis for federal jurisdiction). But see *King Fisher Marine Serv., Inc. v. 21st Phoenix Corp.*, 893 F.2d 1155 (10th Cir. 1990) (concluding that *Finley* left ancillary jurisdiction over third-party claims unchanged).

Three statements in *Finley*, if read broadly, could be construed as supporting the district court's decision in *Aetna*. The *Finley* Court had stated (1) that "a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties,"⁷⁶ (2) that ancillary jurisdiction had been restricted in prior Supreme Court decisions to "a narrow class of cases,"⁷⁷ and (3) that "with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly."⁷⁸ These statements in *Finley*, among others, threatened to prevent federal courts from exercising ancillary jurisdiction in a variety of third-party actions.

Finally, *Finley* signaled a general hostility toward all court-created doctrines of federal jurisdiction. As the Seventh Circuit noted:

Finley . . . is premised on a hostility to nonstatutory jurisdiction that may eventually sweep into history's dustbin not only whatever pendent party jurisdiction survives the holding of *Finley* but also pendent claim jurisdiction and ancillary jurisdiction. And we share the concern that underlies *Finley* with judges creating their own jurisdiction.⁷⁹

III. 28 U.S.C. § 1367

In response to the Supreme Court's narrow invitation to expressly confer pendent-party jurisdiction and the broad confusion created by the *Finley* decision, Congress seized the opportunity to codify the case-law doctrines of pendent, ancillary, and pendent-party jurisdiction.⁸⁰ The re-

76. *Finley*, 490 U.S. at 556.

77. *Id.* at 551.

78. *Id.* at 549.

79. *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 361 (7th Cir. 1990). *See also* *Community Coffee Co. v. M/S Kriti Amethyst*, 715 F. Supp. 772, 774 (E.D. La. 1989) ("[T]he ancillary jurisdictional basis for the third party claims . . . may have been caught in the wide swath *Finley* cut into the supplemental jurisdiction. While the *Finley* majority may well have intended to address specifically the pendent party jurisdiction problem, the opinion's sweeping language is undeniable. Thus, its effect on supplemental jurisdiction in general is potentially far-reaching."); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 446 (1991) ("Although required only to address pendent parties jurisdiction (one of those few remaining areas of uncertainty), the Supreme Court's broad language [in *Finley*] cast doubt on other long-settled and, frankly, more important areas of supplemental jurisdiction.").

80. *See House Report, supra* note 7, at 6874 (stating that "the Supreme Court has virtually invited Congress to codify supplemental jurisdiction by commenting in *Finley*, 'Whatever we say regarding the scope of jurisdiction . . . can of course be changed by Congress'"); *see also* Thomas M. Mengler, et. al., *Congress Accepts Supreme Court's Invitation to Codify Supple-*

sult was Congress's enactment of laws conferring "supplemental jurisdiction" on federal trial courts under 28 U.S.C. § 1367. Section 1367 states in full:

§ 1367. Supplemental Jurisdiction

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

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

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

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

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

mental Jurisdiction, 74 JUDICATURE 213, 214 (1991) ("A fair reading of *Finley* suggests that the majority was not oblivious to the possible need for a legislative response. Indeed, Justice Scalia's opinion for the Court virtually invited Congress to fill the jurisdictional gaps its decision had created. . . . Congress through 28 U.S.C. § 1367 has accepted the Court's invitation.").

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.⁸¹

This statute applies "to civil actions commenced on or after the date of the enactment of this Act."⁸² Section § 1367 was enacted on December 1, 1990.⁸³ Thus, the concept of "supplemental jurisdiction" applies to all civil actions commenced on or after December 1, 1990.⁸⁴

IV. THE SCOPE OF SUPPLEMENTAL JURISDICTION

The legislative history reveals that Congress's purpose in enacting § 1367 was to "authorize jurisdiction in a case like *Finley*, as well as essentially [to] restore the pre-*Finley* understanding of the authorization for and limits on other forms of supplemental jurisdiction."⁸⁵ The supplemental jurisdiction statute did succeed in restoring pendent-party jurisdiction, which *Finley* had effectively abolished.⁸⁶

81. 28 U.S.C. § 1367 (Supp. V 1995).

82. Pub. L. No. 101-650, § 310(c), 104 Stat. 5089, 5114. "A civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3.

83. Pub. L. No. 101-650, 104 Stat. 5089.

84. *But see* 13B WRIGHT & MILLER, *supra* note 32, § 3567.2 (1991 Supp.) ("The specific holding of *Finley* must surely be applied in cases that were already pending prior to December 1, 1990, but it would make no sense to give an expansive reading to *Finley* to reach a result that Congress has deliberately repudiated for future cases.").

Whether the supplemental jurisdiction statute applies to civil actions commenced in state court prior to December 1, 1990, but removed to federal court on or after that date is unclear. A precise reading of the Act would dictate that the supplemental jurisdiction statute is inapplicable in such cases. However, at least one court has held that the supplemental jurisdiction statute is applicable in such cases, reasoning that "the pertinent time for determining federal jurisdiction is the date on which such jurisdiction is invoked." *Cedillo v. Valcar Enter. & Darling Del. Co.*, 773 F. Supp. 932, 939 (N.D. Tex. 1991).

Similarly, it is unclear whether the supplemental jurisdiction statute applies to third-party claims under Federal Rule 14(a), where such claims are asserted after December 1, 1990, but in civil cases commenced prior to that date. Again, a precise reading of the Act would dictate that the supplemental jurisdiction statute is inapplicable in such cases. However, at least two courts have held that the supplemental jurisdiction statute is applicable in such cases, reasoning that such third-party claims are independent actions for purposes of triggering the effective date of the Act. *See Estate of Bruce v. Middletown*, 781 F. Supp. 1013, 1016 (S.D.N.Y. 1992); *In re Joint E. & S. Dists. Asbestos Litig.*, 769 F. Supp. 85, 87 (E.D.N.Y. 1991) ("The third-party complaints that brought these defendants into the litigation were filed in March of 1991. Such third-party claims should be treated as 'actions' filed after the operative date of the statute to avoid unnecessary hardship to defendants.").

85. *House Report*, *supra* note 7, at 28. *See also Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993) ("The legislative history indicates that the new statute is intended to codify rather than alter the judge-made principles of pendent and pendent party jurisdiction . . .").

86. *See supra* part II.C.2.

Section 1367 also successfully codified "the pre-*Finley* understanding" of supplemental jurisdiction in many important respects. Consistent with prior case law, § 1367(a) encompasses within the scope of supplemental jurisdiction the following:⁸⁷ compulsory counterclaims under Federal Rule 13(a);⁸⁸ cross-claims under Federal Rule 13(g);⁸⁹ claims against persons added as parties by defendants under Federal Rule 13(h);⁹⁰ claims against persons added as parties by defendants under Federal Rule 14(a);⁹¹ and claims by third-party defendants under Rule 14(a)⁹²—assuming such claims satisfy Article III's "case" requirement of relatedness. Section 1367(a) is also consistent with prior case law in *excluding* permissive counterclaims under Federal Rule 13(b) from the scope of supplemental jurisdiction.⁹³

87. See Freer, *supra* note 79, at 448; Denis E. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 927 (1992).

88. FED. R. CIV. P. 13(a) provides that, with a few exceptions, a responsive pleading "shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

89. FED. R. CIV. P. 13(g) provides:

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

90. Federal Rule 13(h) provides: "Persons other than those made parties to the original action may be made parties to a counter-claim or cross-claim in accordance with the provisions of Rules 19 and 20." FED. R. CIV. P. 13(h). Prior to the enactment of § 1367, most federal courts permitted the exercise of ancillary jurisdiction over claims against parties joined to a compulsory counterclaim or cross-claim under Federal Rule 13(h). See, e.g., *Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1125 (2nd Cir. 1990). However, a minority of federal courts, particularly the Ninth Circuit, did not. See, e.g., *Danner v. Himmel-farb*, 858 F.2d 515, 522 (9th Cir. 1988) (requiring "an independent jurisdictional basis" for the joinder of additional parties under Rule 13(h)). Section 1367 rejects the Ninth Circuit's approach and permits supplemental jurisdiction in this context.

91. FED. R. CIV. P. 14(a) provides in part that "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."

92. FED. R. CIV. P. 14(a) provides in part that persons added as parties under Rule 14(a) shall assert "any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13" and "may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

93. See McLaughlin, *supra* note 87, at 920. By definition, permissive counterclaims do not arise out of the same transaction or occurrence as the opposing party's claim. See FED. R.

However, § 1367 has also both expanded and restricted the “pre-*Finley* understanding” of supplemental jurisdiction. In the former areas of ancillary and pendent-party jurisdiction, § 1367(a) expands pre-*Finley* case law.⁹⁴ In contrast, § 1367(b) significantly restricts a plaintiff’s use of supplemental jurisdiction in the context of diversity actions.⁹⁵

A. Subsection (a)’s Broad Grant of Supplemental Jurisdiction

The general grant of supplemental jurisdiction is found in § 1367(a), which is quite broad in scope. Subsection (a) provides:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.⁹⁶

Thus, subsection (a) is a broad grant of federal judicial power over claims supplemental to any civil action within the original jurisdiction of the district courts. These supplemental claims “may be separate claims, or they may merely be different ‘counts’ or ‘grounds’ or ‘theories’ in support of what is essentially a single claim.”⁹⁷

In addition to the limitations placed by the introductory phrase to subsection (a),⁹⁸ two important requirements must be met before a fed-

Civ. P. 13(b). Thus, they do not satisfy the constitutional “case” requirement of Article III, as incorporated in § 1367(a). See *infra* part IV.B.

94. See *infra* part IV.C-D.

95. See *infra* part V.A.

96. 28 U.S.C. § 1367(a) (Supp. 1993).

97. DAVID D. SEIGEL, PRACTICE COMMENTARY, THE 1990 ADOPTION OF § 1367, CODIFYING “SUPPLEMENTAL” JURISDICTION, following 28 U.S.C.A. § 1367 (West 1993), at 829. See also *White v. County of Newberry, S.C.*, 985 F.2d 168, 172 (4th Cir. 1993) (“supplemental jurisdiction is not limited to restatements of the same basic ground for recovery”).

98. Limitations placed by subsection (b), which apply in actions founded “solely” on 28 U.S.C. § 1332 (diversity of citizenship jurisdiction and alienage jurisdiction), are addressed in Part V of this Article. Limitations placed by subsection (c), which concerns under what circumstances a district court may decline to exercise supplemental jurisdiction, are addressed in Part IV. An example of the “or as expressly provided otherwise by Federal statute” limitation to subsection (a) can be found in *Walter Fuller Aircraft Sales v. Rep. of Philippines*, 965 F.2d 1375, 1389 n.13 (5th Cir. 1992) (Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1330, 1602-1611, provides sole means of acquiring jurisdiction over foreign sovereign; therefore, § 1367(a) is inapplicable).

eral district court⁹⁹ may exercise supplemental jurisdiction over a state-law claim under § 1367(a).

First, the supplemental claim must be asserted in the context of a "civil action of which the district courts have original jurisdiction"¹⁰⁰—such as federal question jurisdiction under § 1331, diversity or alienage jurisdiction under § 1332, or admiralty jurisdiction under § 1333. As the name implies, "supplemental" jurisdiction can only be exercised when the federal district court already has original subject-matter jurisdiction over an action.¹⁰¹ As one federal district court recently explained: "[I]f no jurisdictional predicate exists for such a claim, then by definition there is no 'supplemental jurisdiction' under Section 1367's recent replacement of the pendent jurisdiction concept (for by definition there must be an original-jurisdiction anchor to which the supplemental jurisdiction can attach)."¹⁰²

Second, the supplemental claims must be "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."¹⁰³ This requirement is discussed in detail in the next subsection of this Article.

B. To the Boundaries of Article III

The general grant of supplemental jurisdiction contained in subsection (a) of § 1367 provides for "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

99. Although subsection (a) states that "the district courts shall have supplemental jurisdiction," at least one bankruptcy court has exercised supplemental jurisdiction. See *In re W.J. Servs., Inc.*, 139 B.R. 824, 826 (Bankr. S.D. Tex. 1992).

100. 28 U.S.C. § 1367(a) (Supp. 1993). Thus, the supplemental "claim" must sufficiently relate to the original federal "action."

101. See *LaSalle Nat'l Bank v. Wilkinson Mfg. Co.*, 1992 WL 80053, *1 (N.D. Ill. 1992) ("In this case, plaintiff asserted supplemental claims, abuse of process and interference with contractual relations, but no claims in which the court has original jurisdiction. The court cannot have jurisdiction over supplemental claims alone.").

102. *Georgia Carpet Sales, Inc. v. SLS Corp.*, 789 F.Supp. 244, 246 (N.D. Ill. 1992). See also *Winstead v. J.C. Penney Co., Inc.*, 933 F.2d 576, 580 (7th Cir. 1991) ("For there is no such thing as a claim that lies *only* within federal ancillary jurisdiction. Such jurisdiction is a device for bringing into federal court claims that, but for the considerations of economy of litigation that power the device, would have to be litigated elsewhere. It is not a device for *creating* actionable claims. The new statute codifying under the name of supplemental jurisdiction the doctrine of ancillary (including pendent) jurisdiction helps make this transparent by stating that 'the district courts shall have supplemental jurisdiction over all other *claims* that are so related to claims in the [original] action,' etc.") (citations omitted).

103. 28 U.S.C. § 1367(a) (Supp. 1993).

Article III of the United States Constitution.”¹⁰⁴ Thus, under the express terms of subsection (a), the standard for supplemental-jurisdiction analysis is the same as the constitutional “case” standard used in Article III analysis.¹⁰⁵ Congress’s extension of supplemental jurisdiction to the full limits of Article III is one of the most significant features of § 1367.¹⁰⁶

The legislative history of § 1367 reveals that “subsection (a) codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*.”¹⁰⁷ In *Gibbs*, the Supreme Court discussed the outer boundaries of an Article III “case” as follows:

Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim “arising under [the] Constitution, the Laws

104. Article III, Section 2, of the Federal Constitution provides:

The judicial Power shall extend 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;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States,—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Eleventh Amendment later modified Article III, Section 2, by withdrawing federal jurisdiction over suits “against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

105. McLaughlin, *supra* note 87, at 891 (“The statute’s utilization of Article III as both the constitutional and statutory limit of supplemental jurisdiction will most likely force a closer analysis of the constitutional limit as the outer boundaries of Article III are tested.”). “The supplemental jurisdiction statute does *not* require that all claims asserted in a federal action meet the constitutional ‘case’ requirement of Article III”; rather, “[o]nly those claims for which supplemental jurisdiction is sought must meet this requirement.” *Id.* at 893 (emphasis added).

106. See *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181-82 (7th Cir. 1993) (“The statute extends the jurisdiction of the federal district courts to all claims sufficiently related to the claim on which its original jurisdiction is based to be part of the same case or controversy within the meaning of Article III of the Constitution. If a claim is close enough to the federal (or other) claim that confers federal jurisdiction to be part of the same case, there is no constitutional bar to the assumption of federal jurisdiction over the claim, because Article III confers federal jurisdiction over cases or controversies rather than over claims; and the new statute goes to the constitutional limit.”); McLaughlin, *supra* note 87, at 856-57 (§ 1367(a) “authorizes supplemental jurisdiction to the full constitutional ‘case’ limit of Article III, unless the exercise of supplemental jurisdiction is otherwise statutorily prohibited or restricted. This is a significant provision . . .”).

107. *House Report*, *supra* note 7, at 6875 n.15 (citations omitted). See also 13B WRIGHT & MILLER, *supra* note 32, § 3567.3, at 35-36 (Supp. 1991) (28 U.S.C. § 1367(a) effectively “gives federal courts supplemental jurisdiction to the limits Article III of the Constitution permits” and “ratifies and incorporates the constitutional analysis the Supreme Court made in the *Gibbs* case”).

of the United States, and Treaties made, or which shall be made, under their Authority . . ." U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.¹⁰⁸

The *Gibbs* formulation of an Article III "case" has three distinct facets. First, the federal and state claims must derive from "a common nucleus of operative fact."¹⁰⁹ Second, the federal claim must have "substance sufficient" to confer subject-matter jurisdiction on the federal court.¹¹⁰ Third, the federal and state claims must be such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."¹¹¹ If these three conditions are satisfied, then, under *Gibbs*, the federal court has power to decide the whole, constitutional "case."

As noted earlier, the Eleventh Amendment limited Article III's original grant of federal subject-matter jurisdiction by withdrawing federal jurisdiction over suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."¹¹² In *Pennhurst State School & Hospital v. Halderman*,¹¹³ the Supreme Court

108. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966) (citations omitted). See also *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 371 (1978) ("It is apparent that *Gibbs* delineated the constitutional limits of federal judicial power.").

109. *Gibbs*, 383 U.S. at 725. In practice, the "common nucleus of operative fact" test seems to be the only test actually applied by the courts in determining whether the federal claims and supplemental state claims form part of the same constitutional "case" under Article III. See, e.g., *White v. County of Newberry, S.C.*, 985 F.2d 168, 172 (4th Cir. 1993) ("The claims need only revolve around a central fact pattern.").

110. *Gibbs*, 383 U.S. at 725. One commentator has argued that the substantiality requirement of *Gibbs* should be discarded as part of the constitutional "case" standard for supplemental jurisdiction under § 1367 and Article III. See McLaughlin, *supra* note 87, at 913-14.

111. *Gibbs*, 383 U.S. at 725. One commentator has argued that this reasonable expectations requirement of *Gibbs* should be discarded as part of the constitutional "case" standard for supplemental jurisdiction under § 1367 and Article III. See McLaughlin, *supra* note 87, at 917-18.

112. The Supreme Court has made clear, however, that a state may consent to be sued in federal court, notwithstanding the Eleventh Amendment's limitation on the federal courts' exercise of jurisdiction over actions brought against a state. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

113. 465 U.S. 89 (1984).

concluded that the Eleventh Amendment's limitation on federal subject-matter jurisdiction applied with equal force to the exercise of pendent-claim jurisdiction. In *Pennhurst*, the Court held that a federal court's exercise of jurisdiction over the plaintiffs' pendent state-law claim against state officials was barred by the Eleventh Amendment.¹¹⁴

The supplemental jurisdiction statute has not affected the *Pennhurst* decision or the Eleventh Amendment's limitation on Article III.¹¹⁵ Nor could it for one simple reason: "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution."¹¹⁶ The Supreme Court, not Congress, defines the constitutional scope of the federal courts' jurisdiction.¹¹⁷

C. *How Subsection (a) Has Expanded the Prior Case-Law Doctrine of Ancillary Jurisdiction*

As noted, the legislative history to § 1367 indicates that the supplemental jurisdiction statute was designed to restore the "pre-*Finley* understanding" of the doctrines of pendent, ancillary, and pendent-party jurisdiction.¹¹⁸ However, § 1367 actually clarifies and expands the prior doctrine of ancillary jurisdiction in several important respects.

1. Permissive Intervention

In the context of claims by intervenors under Federal Rule 24, the prior case-law doctrine of ancillary jurisdiction generally extended only to claims by intervenors as of right, not to claims by permissive intervenors.¹¹⁹ Section 1367(a) discards this distinction. Thus, under subsection

114. *Id.* at 123. The *Pennhurst* decision has been criticized for a variety of reasons. For a thorough discussion of *Pennhurst*, see Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643 (1985).

115. See *Texas Hosp. Assoc. v. National Heritage Ins. Co.*, 802 F. Supp. 1507, 1511 (W.D. Tex. 1992) (§ 1367 does not "override Eleventh Amendment immunity"); McLaughlin, *supra* note 87, at 893-94.

116. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983).

117. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

118. See *supra* note 84 and accompanying text.

119. See CHEMERINSKY, *supra* note 9, § 5.4.3, at 284 ("Ancillary jurisdiction exists when there is intervention as of right, but not for permissive intervention.").

FED. R. CIV. P. 24(a) governs intervention as of right and generally provides that a person "shall" be permitted to intervene in an action "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

(a), supplemental jurisdiction now encompasses the claims of permissive intervenors as well as intervenors as of right—subject, of course, to subsection (b)'s limitations on a plaintiff's use of supplemental jurisdiction in diversity and alienage cases.

Subsection (a)'s requirement that supplemental claims be sufficiently related to the original action so as to be part of the same constitutional "case" under Article III may impose a barrier to a permissive intervenor's use of § 1367 under certain circumstances. Federal Rule 24(b) allows for permissive intervention when the intervenor's "claim or defense and the main action have a question of law or fact in common."¹²⁰ A permissive intervenor's claim based on a common question of *fact* would fall within Article III's scope because the supplemental claim and original federal action would arise from a "common nucleus of operative fact" under the *Gibbs* analysis.¹²¹

However, a problem arises when a permissive intervenor's claim is based on a common question of *law*, as opposed to fact. In such cases, the permissive intervenor's claim would not satisfy the "common nucleus of operative fact" test of *Gibbs* and would, therefore, not form part of the same constitutional "case" under Article III. Accordingly, the district court would be prohibited under § 1367(b) from exercising supplemental jurisdiction over such a claim.¹²²

2. Joinder of Necessary or Indispensable Party Under Rule 19

Under prior case law an anomaly existed in the use of ancillary jurisdiction in the context of claims involving the addition of parties pursuant to Federal Rules 19 and 24. Generally, federal courts held that a person could not join an action as a necessary or indispensable party under Federal Rule 19 on the basis of ancillary jurisdiction; however, that same person could intervene as of right under Federal Rule 24(a).¹²³ This practice resulted in an anomaly: ancillary jurisdiction could be used to support an absentee party's intervention as of right but not to support

FED. R. CIV. P. 24(b) governs permissive intervention and generally provides that a person "may" be permitted to intervene in an action "when an applicant's claim or defense and the main action have a question of law or fact in common."

120. FED. R. CIV. P. 24(b).

121. See *supra* part IV.B.

122. See McLaughlin, *supra* note 87, at 919 ("If *Gibbs* is read as limiting constitutional power to only those supplemental claims that arise from a 'common nucleus of operative fact' as the original jurisdiction claim, however, supplemental claims asserted by permissive intervenors based solely on a common question of law would be constitutionally prohibited under Article III.")

123. See 7 & 7C WRIGHT & MILLER, *supra* note 32, §§ 1610 & 1917 (1986).

the joinder of that same absentee party as a necessary or indispensable party.

Section 1367(a) resolves the anomaly by extending supplemental jurisdiction to all "claims that involve the joinder or intervention of additional parties."¹²⁴ Thus, in all actions not founded solely on § 1332,¹²⁵ supplemental jurisdiction now extends regardless of whether the absentee party would qualify as a necessary or indispensable party under Federal Rule 19 or would seek to intervene (either permissively or as of right) under Federal Rule 24.¹²⁶ Nor is supplemental jurisdiction affected by whether the absentee party is aligned as a plaintiff or defendant.¹²⁷ One commentator has correctly noted that, in addition to the overruling of *Finley*, "this change in the prior practice concerning Rule 19 parties and Rule 24 intervenors constitutes the most significant modification and expansion of the prior case law."¹²⁸

3. Defendants' Claims Against Third-Party Defendants

Federal Rule 14(a) provides that "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."¹²⁹ Thus, defendants may assert under Federal Rule 14(a) only those claims that rest on a theory that the third-party defendant is derivatively liable on plaintiff's claim.¹³⁰

Federal Rule 14(a) does not, standing alone, permit a defendant to assert other types of non-derivative claims against a third-party defendant, even if those claims are sufficiently related to the original action.¹³¹

124. 28 U.S.C. § 1367(a) (1993).

125. For discussion of how subsection (b) of the supplemental jurisdiction statute resolves this anomaly in the context of actions founded "solely" on § 1332 where the absent party seeks to align itself as a plaintiff, see *infra* part V.A.1.c.

126. McLaughlin, *supra* note 87, at 930.

127. *Id.*

128. *Id.*

129. FED. R. CIV. P. 14(a).

130. 3 JAMES W. MOORE ET. AL., MOORE'S FEDERAL PRACTICE ¶ 14.07[1], at 14-48 (2d ed. 1985) ("Given the emphasis on the liberal reading of 'claim,' it is easy to lose track of a major limitation on the availability of impleader: it must be an assertion of the third-party defendant's derivative liability to the third-party plaintiff. Thus, an impleader claim cannot assert any and all rights to recovery arising from the same transaction or occurrence as the underlying action. It must involve an assertion of indemnity, contribution, subrogation or some other form of vicarious liability.").

131. However, once a proper impleader claim is asserted, Federal Rule 18(a) would allow a defendant/third-party plaintiff who desires to assert such related, but non-derivative, claims

Under the broad provision of § 1367(a), however, supplemental jurisdiction would encompass any type of claim by a defendant against a third-party defendant, as long as the claim is sufficiently related to the main action to form part of a constitutional "case" under Article III.

D. The Re-emergence of Pendent-Party Jurisdiction Under a New Name

As discussed at length in Part II(C)(2) of this article, the Supreme Court in *Finley v. United States*¹³² effectively abolished the court-created doctrine of pendent-party jurisdiction.¹³³ It did so by requiring an "affirmative grant" of pendent-party jurisdiction by Congress. In its report to Congress, the Federal Courts Study Committee recommended: "Congress should expressly authorize federal courts to exercise pendent jurisdiction over parties without an independent federal jurisdictional basis."¹³⁴

By authorizing "supplemental jurisdiction" under 28 U.S.C. § 1367, Congress adopted the Federal Courts Study Committee's recommendation and filled the statutory gap noted in *Finley* by supplying an affirmative grant of what was formerly known as pendent-party jurisdiction.¹³⁵ The second sentence of subsection (a) of § 1367 states that "supplemental jurisdiction shall include claims that involve the joinder or interven-

against a third-party defendant. See *id.* ("Once an impleader has been asserted, Rule 18 permits the party asserting it to join any other claims—regardless of whether transactionally related—against the third-party defendant. But this is possible only after a proper impleader claim has been brought against the third-party defendant."). Federal Rule 18(a) provides: "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternative claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party." FED. R. CIV. P. 18(a).

132. 490 U.S. 545 (1989).

133. See *supra* notes 55-67 and accompanying text.

134. COMMITTEE REPORT, *supra* note 2, at 47.

135. See *House Report*, *supra* note 7, at 6875 (stating that "[i]n providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley v. United States*"); see also 136 CONG. REC. S17580 (daily ed. Oct. 27, 1990) ("Section [1367] implements a recommendation of the Federal Courts Study Committee by authorizing federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base."); 13B WRIGHT & MILLER, *supra* note 32, § 3567.2 (Supp. 1991) ("The principal purpose of the statute is to make it clear that in federal-question cases pendent-party jurisdiction is permissible.") and § 3523 (Supp. 1994) ("In the Judicial Improvements Act of 1990, Congress explicitly granted pendent party jurisdiction to the district courts.").

tion of additional parties." With this sentence, Congress overruled *Finley*¹³⁶ and "definitively resuscitated pendent party jurisdiction."¹³⁷

Although the drafters of § 1367 indicate that it was designed to reinstate the pre-*Finley* understanding of pendent-party jurisdiction,¹³⁸ the actual wording of the statute goes much further. The pre-*Finley* understanding of pendent-party jurisdiction was set forth by the Supreme Court in *Aldinger v. Howard*.¹³⁹ In that case, the Supreme Court stated that federal courts had jurisdiction over a related state claim brought against pendent parties—*unless* Congress had "expressly or by implication negated its existence" in the statutes conferring jurisdiction over the federal claims.¹⁴⁰ Thus, as in *Aldinger* itself, Congress could "by implication" deprive federal courts from exercising pendent-party jurisdiction.¹⁴¹

Under § 1367(a), however, such implied negations of jurisdiction over pendent parties are no longer sufficient to prevent federal courts from deciding claims against such parties. Limited only by the exceptions in subsections (b)¹⁴² and (c),¹⁴³ subsection (a) states that the district

136. See *Manela v. Gottlieb*, 784 F. Supp. 84, 88 n.6 (S.D.N.Y. 1992) ("Congress specifically rejected the holding in *Finley* by enacting the Judicial Improvements Act of 1990 . . . which codified the concepts of ancillary and pendent jurisdiction, renaming them 'supplemental jurisdiction.'"); C.D.S. *Diversified v. Franchise Fin. Corp.*, 757 F. Supp. 202, 205 (E.D.N.Y. 1991) (§ 1367 "effectively overrules *Finley*"); see also *Mengler et. al.*, *supra* note 80, at 215 ("The second sentence . . . modifies current law by overruling *Finley*. Congress thus has resolved the controversy over pendent party jurisdiction by providing the explicit statutory authorization found lacking and regarded as necessary by the *Finley* majority.").

137. *McCray v. Holt*, 777 F. Supp. 945, 948 (S.D. Fla. 1991).

138. See *Mengler et. al.*, *supra* note 80, at 214-16 ("With a few exceptions . . . section 1367 codifies supplemental jurisdiction as it existed before the *Finley* decision. . . . In order to repair *Finley's* damage in a noncontroversial manner without expanding the scope of diversity jurisdiction, the statutory measure was therefore framed to restore and regularize supplemental jurisdiction, not to revamp it. . . . The second sentence of subsection (a), making explicit the federal courts' authority to hear supplemental claims 'that involve the joinder or intervention of additional parties,' in part reinstates prior settled law. . . . Congress responded [to *Finley*] by codifying supplemental jurisdiction largely as it had evolved through judicial decisionmaking."); see also COMMITTEE REPORT, *supra* note 2, at 47-48 (recommending that Congress codify pendent and ancillary jurisdiction); cf. *House Report*, *supra* note 7, at 28 ("This section [§ 1367] would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understanding of the authorization for and limits on other forms of supplemental jurisdiction."); 136 CONG. REC. S17581 (daily ed. Oct. 27, 1990) (same).

139. 427 U.S. 1 (1976). A detailed discussion of *Aldinger* is presented in Part II.C.1. of this Article.

140. *Aldinger*, 427 U.S. at 18.

141. *Id.* at 19 ("We conclude that in this case Congress has by implication declined to extend federal jurisdiction over a party such as Spokane County.").

142. Subsection (b) restricts plaintiffs' use of supplemental jurisdiction in diversity actions and alienage actions. This subsection is discussed at length in Part V of this article.

courts "shall" have supplemental jurisdiction over "claims that involve the joinder or intervention of additional parties"—unless Congress has "expressly provided otherwise by Federal statute."¹⁴⁴ Thus, under subsection (a), Congress has effectively overruled *Aldinger* as well as *Finley*.¹⁴⁵

Section 1367(a) also expands the "pre-*Finley* understanding" of pendent-party jurisdiction by encompassing within its broad wording the concept of pendent-*plaintiff* jurisdiction. Prior to the Supreme Court's decision in *Finley*, the existence of pendent-plaintiff jurisdiction was less than certain. However, the reference in the second sentence of § 1367(a) to "claims that involve the joinder or intervention of additional parties" is certainly broad enough to include the former case-law doctrine of pendent-plaintiff jurisdiction.¹⁴⁶

At least one federal court has held that § 1367(a) encompasses the former doctrine of pendent-plaintiff jurisdiction. In *Arnold v. Kimberly Quality Care Nursing Service*,¹⁴⁷ the plaintiff's husband sought to bring a state-law claim for loss of consortium in the context of plaintiff's Title VII action against her former employer and supervisor.¹⁴⁸ The defendants moved to dismiss the husband's state-law claim, arguing that § 1367(a) did not, "and was not intended to, recognize pendent plaintiff jurisdiction."¹⁴⁹ However, based on the second sentence of § 1367(a) and its legislative history, the Court concluded that it had supplemental jurisdiction over the state-law claim brought by the husband (a pendent party plaintiff).¹⁵⁰ The *Arnold* court concluded that there was "no reason to distinguish between pendent party plaintiffs and pendent party defendants in this regard."¹⁵¹

143. Subsection (c) permits federal courts to decline to exercise supplemental jurisdiction in limited circumstances. This subsection is discussed at length in Part VI of this article.

144. 28 U.S.C. § 1367(a) (1993) (emphasis added).

145. See SIEGEL, *supra* note 97, at 832 ("With that last sentence [in subsection (a)], *Finley* and *Aldinger* are overruled and pendent party jurisdiction is allowed . . .").

146. See McLaughlin, *supra* note 87, at 926 ("In all cases not founded solely on § 1332, the statute now authorizes full supplemental jurisdiction for all claims involving additional parties, without restriction as to whether the additional party is joined as a 'pendent party plaintiff' or 'pendent party defendant.'").

147. 762 F. Supp. 1182 (M.D. Pa. 1991).

148. *Id.* at 1183.

149. *Id.* at 1185.

150. *Id.* See also 136 CONG. REC. S17580 (daily ed. Oct. 27, 1990) (Section 1367 "implements a recommendation of the Federal Courts Study Committee by authorizing federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base.").

151. *Arnold*, 762 F. Supp. at 1185.

*E. Unresolved Issues Regarding § 1367(a)***1. Does § 1367(a) Apply Where the “Pendent Party” Is Made Part of the Original Complaint?**

As previously discussed, Congress’s enactment of § 1367 effectively overruled the Supreme Court’s decision in *Finley* and resuscitated the doctrine of pendent-party jurisdiction. The second sentence of § 1367(a) specifically states: “Such supplemental jurisdiction shall include claims that involve the joinder or intervention of *additional parties*.”¹⁵² Arguably, the reference to the joinder or intervention of “additional parties” in the supplemental jurisdiction statute authorizes the former doctrine of pendent-party jurisdiction only when the pendent party joins or intervenes in the federal action after the original complaint is filed.

At least one district court, however, has rejected such a limitation on the use of supplemental jurisdiction in the context of pendent parties. In *Arnold v. Kimberly Quality Care Nursing Service*,¹⁵³ the United States District Court for the Middle District of Pennsylvania held that the second sentence of § 1367(a) “is broad enough to include a pendent plaintiff who is named in the original complaint, not just one . . . who may subsequently be joined, or seek to join, or who intervenes.”¹⁵⁴ Legal commentators agree with this reasoning.¹⁵⁵

2. Do Counterclaims Under Federal Rule 13(e) Fall Within the Scope of Supplemental Jurisdiction Under § 1367(a)?

As noted earlier, § 1367(a) is consistent with prior case law in including compulsory counterclaims under Federal Rule 13(a), but excluding permissive counterclaims under Federal Rule 13(b), from the scope of supplemental jurisdiction.¹⁵⁶ Whether the supplemental jurisdiction statute encompasses counterclaims under Federal Rule 13(e) is still an open question.

Federal Rule 13(e) provides that “[a] claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental

152. 28 U.S.C. § 1367(a) (Supp. 1993) (emphasis added).

153. 762 F. Supp. 1182 (M.D. Pa. 1991).

154. *Id.* at 1185.

155. See, e.g., McLaughlin, *supra* note 87, at 927 (stating that “supplemental jurisdiction applies irrespective of whether the additional party is joined on the original complaint or added thereafter”).

156. See *supra* notes 86, 87 & 93 and accompanying text.

pleading."¹⁵⁷ Thus, counterclaims under Federal Rule 13(e) are permissive in nature.

Prior to the enactment of § 1367, some federal courts held that ancillary jurisdiction did not extend to Rule 13(e) counter-claims because such jurisdiction did not extend to permissive counterclaims under Rule 13(b).¹⁵⁸ However, these decisions rested on a faulty premise—namely, that the reason permissive counterclaims under Rule 13(b) did not fall within the court's ancillary jurisdiction was because they were permissive in nature. In fact, the reason permissive counterclaims under Rule 13(b) fell outside the federal courts' ancillary jurisdiction was because they do not, by definition, arise out of the same transaction or occurrence as the opposing party's claim—not because they are permissive in nature. There is no sound reason to exclude Rule 13(e) counterclaims from the federal courts' supplemental jurisdiction under § 1367(a) if those claims are sufficiently related to the original action to form part of the same constitutional "case" under Article III.¹⁵⁹

3. Do Set-Off Claims Fall Within the Scope of Supplemental Jurisdiction Under § 1367(a)?

As noted earlier, prior case law generally excluded permissive counterclaims from the scope of supplemental jurisdiction.¹⁶⁰ However, a few lower federal courts had created a limited exception for set-off claims that were asserted as a means of diminishing a plaintiff's recovery.¹⁶¹ Under these cases, no independent basis for subject-matter jurisdiction was required for set-off claims. After the enactment of § 1367, "[i]t is an open question as to how the courts will treat the issue of set-off claims under the supplemental jurisdiction statute."¹⁶²

Set-off claims are probably not covered by § 1367. The supplemental jurisdiction statute does not encompass supplemental claims that do not satisfy the constitutional "case" requirement of Article III.¹⁶³ Set-off claims generally do not arise out of the same "common nucleus of opera-

157. FED. R. CIV. P. 13(e).

158. See, e.g., *Young v. City of New Orleans*, 751 F.2d 794, 801 (5th Cir. 1985).

159. Cross-claims under Rule 13(g) and impleader claims under Rule 14(a) are also permissive in nature, and there is little, if any, question that these claims fall within the scope of supplemental jurisdiction under § 1367(a). See *supra* notes 87, 89, 91 & 92 and accompanying text.

160. See *supra* note 93 and accompanying text.

161. See, e.g., *Curtis v. J.E. Caldwell & Co.*, 86 F.R.D. 454, 457 (E.D. Pa. 1980); *Am-broviage v. United Mine Workers*, 726 F.2d 972, 988 (3d Cir. 1984).

162. *McLaughlin*, *supra* note 87, at 925.

163. See 28 U.S.C. § 1367(a) (1993).

tive fact" as the original federal action¹⁶⁴ and would, therefore, not satisfy the *Gibbs* test defining the outer boundaries of Article III.

It may be possible for the federal courts to avoid the question as to whether set-off claims fall within the scope of § 1367. Federal Rule 8(c) includes among a specific listing of affirmative defenses a broad catch-all phrase—namely, "any other matter constituting an avoidance or affirmative defense."¹⁶⁵ If a set-off claim is viewed by the courts as essentially an affirmative defense, then a party could assert such a defense without establishing a subject-matter jurisdictional basis for it.¹⁶⁶

V. LIMITATIONS ON THE USE OF SUPPLEMENTAL JURISDICTION IN ACTIONS FOUNDED "SOLELY" ON § 1332

As stated previously, subsection (a) of § 1367 establishes clearly that "supplemental jurisdiction" is applicable in diversity cases in general.¹⁶⁷ However, subsection (b) makes an important exception to the broad grant of supplemental jurisdiction found in subsection (a). Subsection (b) of § 1367 states in full:

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by *plaintiffs* against persons made parties under Rule 14 [impleader], 19 [compulsory joinder], 20 [permissive joinder], or 24 [intervention] of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as *plaintiffs* under Rule 19 of such rules, or seeking to intervene as *plaintiffs* under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.¹⁶⁸

Subsection (b) has been the subject of most of the scholarly criticism surrounding the enactment of the supplemental jurisdiction statute.¹⁶⁹

164. 2A MOORE ET. AL., *supra* note 130, ¶ 8.27[3], at 8-177 ("At common law, matter in recoupment or set-off could be used defensively, but not for the purpose of obtaining an affirmative recovery. Recoupment arose from the same transaction as the plaintiff's claim. Set off, on the other hand, arose out of a transaction different from that sued on.").

165. FED. R. CIV. P. 8(c).

166. 2A MOORE ET. AL., *supra* note 130, ¶ 8.27[3], at 8-177 ("Rule 8(c) does not specifically list them [i.e., recoupment and set-off] as affirmative defenses. At times, however, a defendant may desire to use recoupment or set-off defensively, rather than as the basis of a counterclaim seeking affirmative relief, and it may properly do so.").

167. See *supra* note 100 and accompanying text.

168. 28 U.S.C. § 1367(b) (1990) (emphasis added).

169. See Freer, *supra* note 79, at 474-84; Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31, 33 (1992).

A. *The Limited Scope of Subsection (b)*

A federal district court's exercise of supplemental jurisdiction is restricted significantly when the court's original jurisdiction is based "solely" on 28 U.S.C. § 1332. If an independent and alternative basis for original jurisdiction exists other than § 1332—for example, federal question jurisdiction under 28 U.S.C. § 1331—then § 1367(b)'s restrictions on a plaintiff's use of supplemental jurisdiction do not apply.

Section 1332 essentially authorizes federal district courts to exercise diversity jurisdiction¹⁷⁰ and so-called "alienage jurisdiction."¹⁷¹ Under § 1367(b), "plaintiffs"¹⁷² are barred from using supplemental jurisdiction to undermine the jurisdictional requirements of 28 U.S.C. § 1332 (the diversity or alienage statute).

1. Diversity Cases

The diversity statute, 28 U.S.C. § 1332(a)(1), states in pertinent part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between . . . citizens of different States" As interpreted by the Supreme Court, § 1332 requires "complete diversity" of citizenship.¹⁷³ "That is, diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff."¹⁷⁴ Moreover, the Supreme Court has made clear that each plaintiff must independently satisfy the jurisdictional amount requirement; "one plaintiff may not ride in on another's coattails."¹⁷⁵

Under § 1367(b), supplemental jurisdiction may not be used by plaintiffs in diversity cases to circumvent the complete-diversity and jurisdictional-amount requirements of section 1332. In essence, § 1367(b) implements the underlying rationale of two earlier Supreme Court deci-

170. 28 U.S.C. § 1332(a)(1) (1990).

171. 28 U.S.C. § 1332(a)(2) (1990).

172. As used in § 1367(b), the term "plaintiff" includes a party originally bringing an action, a party proposed to be joined as a plaintiff under Rule 19, or a party seeking to intervene as a plaintiff under Rule 24. What effect, if any, § 1367(b)'s restrictions have on the claims of Rule 20 plaintiffs is discussed in part V.C.5. of this Article.

173. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372-73 (1978) (citing *Strawbridge v. Curtiss*, 7 U.S. 267 (1806)). Complete diversity is not a constitutional requirement. *Kroger*, 437 U.S. at 373 n.13. Thus, Congress could amend the diversity statute to require only "minimal" diversity (*i.e.*, diversity between any one plaintiff and any one defendant) as is currently required under the Federal Interpleader Statute, 28 U.S.C. § 1335.

174. *Kroger*, 437 U.S. at 373.

175. *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) (quoting *Zahn v. International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)).

sions: *Owen Equipment & Erection Co. v. Kroger*¹⁷⁶ and *Zahn v. International Paper Co.*¹⁷⁷

a. *Codification of the Underlying Rationale of Kroger*

In *Owen Equipment & Erection Co. v. Kroger*,¹⁷⁸ a citizen of Iowa was electrocuted when a crane near where he was working touched an electric power line. His estate brought a wrongful-death suit in federal district court against the Omaha Public Power District, a Nebraska corporation with its principal place of business in Nebraska.¹⁷⁹ Federal jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332. The Power District then impleaded the deceased's employer, the Owen Equipment & Erection Company, pursuant to Rule 14(a) of the Federal Rules of Civil Procedure.¹⁸⁰ In its third-party complaint, the Power District alleged that the employer's negligence had been the proximate cause of the deceased's electrocution. Owen Equipment's alleged liability to the Power District, the third-party plaintiff, was based on the state common-law right of contribution among joint tortfeasors.¹⁸¹

The plaintiff subsequently filed an amended complaint, naming Owen Equipment as an additional defendant. The amended complaint was also based on diversity of citizenship jurisdiction, alleging that Owen Equipment was a Nebraska corporation with its principal place of business in Nebraska. In its answer, defendant Owen Equipment admitted the jurisdictional allegations contained in the amended complaint.

When summary judgment was granted in favor of the Power District, the sole claim remaining was the estate's claim against the employer, Owen Equipment. After trial began on this claim, the trial court learned

176. 437 U.S. 365 (1978).

177. 414 U.S. 291 (1973). See *C.D.S. Diversified v. Franchise Fin. Corp.*, 757 F. Supp. 202, 205 (E.D.N.Y. 1991) (discussing *Kroger* and *Zahn* and stating that "in diversity actions as opposed to 'federal question' cases, the legislature simply codified and made clear, existing case law" when it passed § 1367).

178. 437 U.S. 365 (1978).

179. 28 U.S.C. § 1332(c) (1990) provides that for purposes of diversity jurisdiction, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

180. Federal Rule 14(a) provides in pertinent part:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

FED. R. CIV. P. 14(a).

181. *Kroger*, 437 U.S. at 368 n.3. "Under Rule 14(a), a third-party defendant may not be impleaded merely because he may be liable to the plaintiff." *Id.*

that Owen Equipment's principal place of business was actually in Iowa, not Nebraska. Thus, both the plaintiff estate and the defendant employer were citizens of the same state: Iowa. Owen Equipment then moved to dismiss the amended complaint for lack of subject-matter jurisdiction because of the absence of complete diversity. The district court denied the motion to dismiss and entered judgment for the plaintiff. The court of appeals affirmed, holding that the plaintiff's claim against the third-party defendant was within the district court's ancillary jurisdiction.¹⁸²

The Supreme Court reversed. Writing for the majority, Justice Stewart framed the issue as follows: "In an action in which federal jurisdiction is based on diversity of citizenship, may the plaintiff assert a claim against a third-party defendant when there is no independent basis for federal jurisdiction over that claim?"¹⁸³

The *Kroger* Court held that, in diversity cases, ancillary jurisdiction did not support a plaintiff's state-law claim against a nondiverse third-party defendant.¹⁸⁴ To allow a plaintiff to bring a state-law claim directly against a nondiverse third-party defendant would enable the plaintiff to evade the requirement of complete diversity. The Court reasoned that, under the analysis adopted by the court of appeals, "a plaintiff could defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."¹⁸⁵ Such a hypothesis is not unlikely, "since a defendant in a tort suit such as this one would surely try to limit his liability by impleading any joint tortfeasors for indemnity or contribution."¹⁸⁶

The *Kroger* Court concluded by stating that:

[i]n generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction. But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction

182. *Kroger v. Omaha Pub. Power Dist.*, 523 F.2d 161 (8th Cir. 1975), *reh'g en banc denied*, 558 F.2d 417 (1977).

183. *Kroger*, 437 U.S. at 367.

184. The Court did *not* hold that the district court abused its discretion in deciding to exercise ancillary jurisdiction over the estate's state-law claim against Owen Equipment; rather, it held that the district court lacked *power* to entertain such a claim. *Id.* at 377 n.21.

185. *Id.* at 374.

186. *Id.* at 374 n.17.

to a plaintiff's cause of action against a citizen of the same State in a diversity case. Congress has established the basic rule that diversity jurisdiction exists under 28 U.S.C. § 1332 only when there is complete diversity of citizenship To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command.¹⁸⁷

By enacting § 1367(b), Congress codified the underlying rationale of *Kroger*: A plaintiff may not use supplemental jurisdiction to evade the complete-diversity requirement.¹⁸⁸ Thus, under subsection (b), a district court in diversity actions shall not exercise supplemental jurisdiction over a plaintiff's claim against persons made parties by impleader (Rule 14), compulsory joinder (Rule 19), permissive joinder (Rule 20), or intervention (Rule 24), when doing so would be inconsistent with the complete-diversity requirement of 28 U.S.C. § 1332.¹⁸⁹

By enacting the underlying rationale of *Kroger*, Congress actually restricted the use of supplemental jurisdiction to a greater extent than did the *Kroger* Court. After *Kroger* (but before § 1367), the complete-diversity requirement generally applied only to a plaintiff's original claims and a plaintiff's claims against a nondiverse third-party defendant.¹⁹⁰ The *Kroger* decision itself recognized (and tacitly approved) the lower federal courts' practice of extending ancillary jurisdiction to claims involving intervenors as of right under Federal Rule 24(a).¹⁹¹ However, under the supplemental jurisdiction statute, the complete-diversity requirement "also applies to the plaintiff's claims against necessary parties and intervenors and even to claims by plaintiff intervenors of right."¹⁹²

As noted earlier, the complete-diversity requirement is not constitutionally mandated.¹⁹³ Thus, Congress could amend the diversity statute to require only "minimal" diversity (*i.e.*, diversity between any one plaintiff and any one defendant) as is currently required under the Federal Interpleader Statute, 28 U.S.C. § 1335. However, the legislative history of § 1367(b) reveals that Congress specifically retained the complete-diversity requirement extended in *Kroger* to prevent plaintiffs from evading "the jurisdictional requirement of 28 U.S.C. § 1332 by the

187. *Id.* at 377.

188. See *House Report*, *supra* note 7, at 6875 n.16 (stating that "the net effect of subsection (b) is to implement the principal rationale of *Owen Equip. & Erection Co. v. Kroger*").

189. *Id.* at 6875.

190. Freer, *supra* note 79, at 480.

191. *Kroger*, 437 U.S. 375 n.18.

192. Freer, *supra* note 79, at 480.

193. See *Kroger*, 437 U.S. at 373 n.13 ("It is settled that complete diversity is not a constitutional requirement.").

simple expedient of naming initially only those defendants whose joinder satisfies section 1332's requirements and later adding claims not within original federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis."¹⁹⁴

b. Codification of the Underlying Rationale of Zahn

In *Zahn v. International Paper Co.*,¹⁹⁵ four named plaintiffs brought a class action on behalf of themselves and 200 other lake-front property owners. The suit was brought as a diversity action and sought damages from defendant International Paper Company for its alleged discharge of pollutants into a lake, thereby causing harm to plaintiffs' surrounding properties. The claim of each of the four named plaintiffs satisfied the jurisdictional-amount requirement (then \$10,000, now \$50,000); however, several unnamed class members had not suffered damages in excess of this amount. The district court refused to permit the suit to proceed as a class action because not all class plaintiffs could meet the jurisdictional-amount requirement of 28 U.S.C. § 1332, and the Second Circuit affirmed.¹⁹⁶

The Supreme Court, in an opinion written by Justice White, affirmed, invoking:

the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional-amount requirement if his claim is to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than \$10,000 [now \$50,000] but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.¹⁹⁷

194. *House Report*, *supra* note 7, at 6875.

195. 414 U.S. 291 (1973).

196. *Id.* at 292.

197. *Id.* at 300. Earlier in its opinion, the *Zahn* Court elaborated on this "rule" as follows: When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. This distinction and rule that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in the federal courts were firmly rooted in prior cases dating from 1832 The rule has been applied to forbid aggregation of claims where none of the claimants satisfies the jurisdictional amount It also requires dismissal

Earlier cases, the Supreme Court noted, had applied this rule not only to the ordinary joinder of plaintiffs but also to class actions contemplated by Federal Rule 23.¹⁹⁸ Therefore, the Supreme Court concluded: "Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—one plaintiff may not ride in on another's coattails."¹⁹⁹

The underlying rationale of *Zahn* has application outside of the context of class actions. *Zahn* "definitively establishes that the claims of different plaintiffs asserting their individualized claims cannot be aggregated to satisfy the jurisdictional amount—each plaintiff's claim must be considered on its own as though it were a separate lawsuit."²⁰⁰

By enacting § 1367(b), Congress codified the underlying rationale of *Zahn*: A plaintiff may not use supplemental jurisdiction to evade the jurisdictional-amount requirement of the diversity statute.²⁰¹ Thus, under subsection (b), a district court in diversity actions shall not exercise supplemental jurisdiction over claims brought by persons proposed to be joined as plaintiffs by compulsory joinder (Rule 19), or seeking to intervene as plaintiffs by intervention (Rule 24), when doing so would be inconsistent with the jurisdictional-amount requirement of 28 U.S.C. § 1332.

In addition, although subsection (b) refers only to "claims by plaintiffs against persons made parties" by impleader, compulsory or permis-

of those litigants whose claims do not satisfy the jurisdictional amount, even though other litigants assert claims sufficient to invoke the jurisdiction of the federal court.

Id. at 294-95 (quoting *Troy Bank of Troy, Indiana v. G. A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)).

198. *Id.* at 296.

199. *Id.* at 301 (quoting *Zahn v. International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)). The Court also stated that any other approach would call "into question the accepted approach to cases involving ordinary joinder of plaintiffs with separate and distinct claims" *Id.* at 302. The Court did state, however, that the amounts of class members may be aggregated to achieve the jurisdictional amount when class members "unite to enforce a single title or right in which they have a common and undivided interest." *Id.* at 293-94.

200. *Griffin v. Dana Point Condominium Ass'n*, 768 F. Supp. 1299, 1301 (N.D. Ill. 1991). See also *Griffith v. Sealite Corp.*, 903 F.2d 495, 498 (7th Cir. 1990) ("Multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount . . .").

201. See *Griffin*, 768 F. Supp. at 1301 (discussing *Zahn* and stating that § 1367 "and its legislative history teaches that the new provision does not change the old law in this area at all"); *Averdick v. Republic Fin. Services, Inc.*, 803 F. Supp. 37, 45 (E.D. Ky. 1992) (legislative history of § 1367(b) demonstrates that it was not intended to overrule *Zahn*). But see *Garza v. National American Ins. Co.*, 807 F. Supp. 1256, 1258 n.6 (M.D. La. 1992) (concluding that the "literal language of § 1367" has the effect of overruling *Zahn*). See also SIEGEL, *supra* note 97, at 834 ("There is a dispute about whether *Zahn* is overruled by § 1367."). For a discussion of whether the omission of Rule 23 from the list in § 1367(b) has the effect of overruling *Zahn*, see *infra* part V.B.2.

sive joinder, or intervention and "claims by persons proposed to be joined as plaintiffs under Rule 19 . . . or seeking to intervene as plaintiffs under Rule 24,"²⁰² it does not alter the fundamental proposition articulated by the Supreme Court in *Zahn*; rather, subsection (b) most certainly applies to claims against original defendants made by all persons named as plaintiffs in an original complaint who do not meet the requirements of the diversity statute. Simply put, a plaintiff may not use supplemental jurisdiction to ride into federal court on another plaintiff's coattails.

c. Correcting the Anomaly Existing in Prior Case Law Between Rule 19 and Rule 24

Section 1367(b) corrects an anomaly that existed under prior law, but in a way consistent with the underlying rationale of *Kroger* and *Zahn*. Prior to the enactment of § 1367 in 1990, federal courts generally held that a person could intervene as of right as a plaintiff under Federal Rule 24(a) on the basis of ancillary jurisdiction; however, that same person could not be joined as a plaintiff under Federal Rule 19 on the basis of ancillary jurisdiction.²⁰³ Thus, an anomaly existed under prior case law: ancillary jurisdiction could be used to support an absentee plaintiff's intervention as of right but not to support the joinder of that same absentee plaintiff by the defendant (or court).

"This disparity, which may have had the effect of encouraging certain nondiverse plaintiffs to evade the diversity requirements by intervening in an action shortly after it was filed by diverse plaintiffs, has been abolished in subsection (b)."²⁰⁴ Congress essentially resolved the anomaly by prohibiting supplemental jurisdiction over the absentee plaintiff who intervened as of right. Thus, under § 1367(b), a person can neither intervene as of right as a plaintiff under Federal Rule 24(a) nor be joined as a plaintiff under Federal Rule 19 when doing so would be "inconsistent" with the requirements of 28 U.S.C. § 1332. "In these circumstances, courts should not only deny intervention or joinder, but also consider dismissing the entire action pursuant to Rule 19 when significant interests would be prejudiced by the absentee's exclusion from the action."²⁰⁵

Professor Richard D. Freer has argued that Congress resolved the anomaly that previously existed between Federal Rules 19 and 24—but

202. 28 U.S.C. § 1367(b) (1988).

203. See 7C WRIGHT & MILLER *supra* note 32, §§ 1610 & 1917 (1986).

204. Mengler et. al., *supra* note 80, at 215.

205. *Id.*

did so in "the wrong way."²⁰⁶ In his opinion, Congress should have resolved the anomaly by allowing supplemental jurisdiction over *both* a party plaintiff who is joined under Federal Rule 19 *and* a party plaintiff who intervenes as of right under Federal Rule 24.²⁰⁷ According to Professor Freer, § 1367(b) "strips the plaintiff intervenor of right of the ability to protect herself in the pending federal action."²⁰⁸ Moreover, in his view, the supplemental jurisdiction statute is inconsistent in that it continues to permit supplemental jurisdiction over *defendant* intervenors of right, but not nondiverse *plaintiff* intervenors of right.²⁰⁹

2. Alienage Cases

The broad language of § 1367(b) also encompasses actions based solely on "alienage jurisdiction" under 28 U.S.C. § 1332(a)(2). Alienage jurisdiction involves an action between a citizen of a state and a citizen of a foreign country. As in diversity of citizenship cases, federal courts have traditionally required "complete diversity" in alienage cases—that is, a federal court is prohibited from exercising alienage jurisdiction if aliens are on both sides of the litigation.²¹⁰

Under the express provisions of § 1367(b), when an action is based "solely" on alienage jurisdiction, a federal district court is prohibited from exercising supplemental jurisdiction when to do so would be inconsistent with the complete-diversity rule applicable in alienage cases. This may have been an unintended consequence of the broad wording used in the supplemental jurisdiction statute; nothing in the legislative history of the statute or in subsequent articles by three of its authors suggests that supplemental jurisdiction was to be prohibited in alienage cases.²¹¹

B. *Matters Outside the Scope of Subsection (b)*

The limited application of § 1367(b) cannot be emphasized enough. This subsection affects only *plaintiffs'* claims in actions founded *solely* on 28 U.S.C. § 1332 and only "when exercising supplemental jurisdiction

206. Freer, *supra* note 79, at 476.

207. *Id.* at 477.

208. *Id.* at 478.

209. *Id.* at 477-78.

210. See, e.g., *Eze v. Yellow Cab Co. of Alexandria, Va., Inc.*, 782 F.2d 1064 (D.C. Cir. 1986) (no alienage jurisdiction where citizens of Nigeria sued, *inter alios*, a citizen of Ghana). The complete diversity requirement in the context of alienage cases is not mandated by the Federal Constitution; rather, it is a creature of the federal judiciary; see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 n.18 (1983).

211. Freer, *supra* note 79, at 474-75 (noting the void in the legislative history and criticizing § 1367(b) for "the evisceration of pendent parties jurisdiction in alienage cases").

over such claims would be inconsistent with the jurisdictional requirements of section 1332."²¹² Subsection (b) of § 1367 has no affect on (1) actions founded on grants of original federal jurisdiction other than diversity of citizenship, (2) diversity class actions, (3) claims by defendants or persons joined as defendants, or (4) compulsory counterclaims by plaintiffs in response to a Rule 14(a) claim by a third-party defendant.

1. Nondiversity Actions

Subsection (b) expressly states that it is applicable only in cases founded "solely" on the diversity statute, 28 U.S.C. § 1332.²¹³ Cases based on other grants of original federal jurisdiction, such as federal-question and admiralty cases, remain unaffected by the restriction on supplemental jurisdiction found in subsection (b) of § 1367. Thus, "if a plaintiff asserts two related original jurisdiction claims, based respectively on federal question and diversity of citizenship, full supplemental jurisdiction should apply to all other *related* claims by the plaintiff without reference to the restrictions of § 1367(b),"²¹⁴ but only if the proposed supplemental claims are sufficiently related to the federal-question claim. However, "proposed supplemental claims that relate only to the original jurisdiction diversity claim should be subject to the restrictions of § 1367(b) and should not be exempted simply because an unrelated original jurisdiction federal question claim has also been joined to the action."²¹⁵

2. Diversity Class Actions

"Class actions under Federal Rule of Civil Procedure 23 are not included in the diversity cases to which the restrictions in subsection (b) apply, and the legislative history makes clear that section 1367 is not intended to affect their jurisdictional requirements as previously determined."²¹⁶ As earlier mentioned, in *Zahn v. International Paper Co.*,²¹⁷ the Supreme Court determined that, in diversity class actions under Federal Rule 23(b)(3), the claim of *each* member of the plaintiff class must

212. 28 U.S.C. § 1367(b) (1990).

213. Section 1332 encompasses alienage jurisdiction as well. See 28 U.S.C. § 1332(a)(2)-(4) (1990).

214. McLaughlin, *supra* note 87, at 942 (emphasis added).

215. *Id.*

216. Mengler et. al., *supra* note 80, at 215. See also *House Report*, *supra* note 7, at 6875 ("The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*.").

217. 414 U.S. 291 (1973).

satisfy independently the jurisdictional-amount requirement of the diversity statute.²¹⁸ Even though all of the claims made by the class arose from a “common nucleus of operative fact” under the *Gibbs* test, the *Zahn* Court rejected the argument that ancillary jurisdiction existed over those claims that involved less than the statutory minimum as long as at least one claim in the plaintiff class met the jurisdictional amount requirement. In contrast, in *Supreme Tribe of Ben-Hur v. Cauble*,²¹⁹ the Supreme Court held that the citizenship of a plaintiff class for diversity purposes is determined based solely on the citizenship of the named class representatives, not every member of the class. The legislative history makes clear that *Zahn* and *Supreme Tribe* remain good law after the codification of “supplemental jurisdiction” under section 1367.²²⁰

However, an argument can be made that supplemental jurisdiction applies to all related claims made by plaintiffs joined as members of a diversity-only class action, regardless of the individual amount-in-controversy limitation announced in *Zahn*. This argument rests on a plain reading of § 1367. Subsection (a) extends supplemental jurisdiction to the full limits of Article III (*i.e.*, the constitutional “case” limitation), and subsection (b) in no way limits that broad grant of supplemental jurisdiction. In fact, subsection (b) fails to mention any limitations on claims brought by parties joined as plaintiffs to a diversity class action under Federal Rule 23. Thus, this argument goes, legislative history should not be used to override the plain words of § 1367. Several courts, however, have rejected this argument and have relied on the clear legislative history to conclude that § 1367(b) did not overrule *Zahn*.²²¹

218. Presently, the amount-in-controversy requirement is \$50,000, exclusive of interest and costs. 28 U.S.C. § 1332(a) (1990).

219. 255 U.S. 356 (1921).

220. See *House Report*, *supra* note 7, at 4875 n.17 (citing *Zahn* and *Supreme Tribe* as two cases not affected by the adoption of subsection (b)); see also *McLaughlin*, *supra* note 87, at 973-74 (“In view of Congress’s expressed intent to preserve existing case law, however, § 1367 should be interpreted as effecting no change in the prior practice and continuing undisturbed the rule of *Zahn*. Unfortunately, this interpretation perpetuates the anomaly of allowing supplemental jurisdiction for claims by class members that violate the complete diversity requirement, while prohibiting supplemental jurisdiction for claims that violate the amount in controversy requirement.”).

221. See, e.g., *Riverside Transport, Inc. v. Bellsouth Telecommunications, Inc.*, 847 F. Supp. 453, 455 (M.D. La. 1994) (“At least two federal district courts . . . have held, in non-class action suits, that § 1367 effectively overruled *Zahn*. However, the vast majority of cases interpreting § 1367 have reached a contrary result.”); *Averdick v. Republic Fin. Servs., Inc.*, 803 F. Supp. 37, 45 (E.D. Ky. 1992) (“To this court, subsection (b) forbids use of the concept of supplemental jurisdiction created by subsection (a) to expand jurisdiction in diversity cases. . . . The purpose of subsection (b) is to prevent plaintiffs from using the concept of supplemental jurisdiction to evade the complete diversity requirement and other limitations

3. Claims by Defendants

Subsection (b) does not affect claims by defendants or persons who are joined as defendants or who intervene as defendants. Rather, that subsection "is concerned only with efforts of a plaintiff to smuggle in claims that the plaintiff would not otherwise be able to interpose against certain parties in certain specific contexts for want of subject matter jurisdiction."²²² This is made clear by Congress's repetition of the word "plaintiffs" in subsection (b).²²³ Only "claims by plaintiffs" and "claims by persons proposed to be joined as plaintiffs" are affected by subsection (b)'s restriction on the use of supplemental jurisdiction.²²⁴

Thus, § 1367 authorizes supplemental jurisdiction for all claims by a *defendant* that form part of the same constitutional "case" as the original jurisdiction claim, regardless of whether the original jurisdiction claim is based on a federal question, diversity of citizenship, or other original jurisdictional basis. This includes claims asserted by *third-party defendants* pursuant to Federal Rule 14(a).²²⁵

To avoid application of subsection (b), a party may choose to attempt to intervene as a defendant rather than a plaintiff. The district court would then be required to address first whether the party should be characterized as a "plaintiff" for purposes of the proposed intervention. In *City of Indianapolis v. Chase Nat'l Bank*,²²⁶ the Supreme Court held that a district court must determine the relationship of the parties from their relative positions vis-a-vis the primary claim in the litigation.²²⁷ If a party successfully intervenes as a defendant, then supplemental jurisdic-

on diversity jurisdiction. . . . This purpose is inconsistent with an implied repeal of *Zahn*."); *Griffin v. Dana Point Condominium Ass'n*, 768 F. Supp. 1299, 1301 (N.D. Ill. 1991); *Bradbury v. Robertson-Ceco Corp.*, 1992 WL 178648, *2 (N.D. Ill. 1992) (stating that "section 1367 did not alter the requirements of *Zahn*"); *Pellegrino v. Pesch*, 1992 WL 159169, *6 (N.D. Ill. 1992) ("Congress did not intend § 1367(a) to disturb this settled law in diversity cases."). *But see* *Garza v. National Am. Ins. Co.*, 807 F. Supp. 1256, 1258 n.6 (M.D. La. 1992) (concluding that the "literal language of § 1367" has the effect of overruling *Zahn*). *See also* Siegel, *supra* note 97, at 834 ("There is a dispute about whether *Zahn* is overruled by § 1367.").

222. SIEGEL, *supra* note 97, at 832.

223. *Id.*

224. *See* McLaughlin, *supra* note 87, at 857 ("[T]he statute exempts defendants from the restrictions of § 1367(b) and thus fully preserves supplemental jurisdiction for claims asserted by defendants in all actions, whether founded on federal question, diversity of citizenship, or any other jurisdictional basis.").

225. *Id.* at 929.

226. 314 U.S. 63 (1941).

227. In *City of Indianapolis*, the Court made clear that federal courts were obligated to scrupulously examine assertions of federal jurisdiction so as to confine their jurisdiction to the precise limits defined by statute, in due regard for the rightful independence of state governments. *Id.* at 77. Federal courts should likewise scrupulously examine assertions of supple-

tion would extend—pursuant to § 1367(a)—to all claims brought by the intervenor-defendant that are sufficiently related to the primary claim conferring original federal jurisdiction so as to make but one “case or controversy” under Article III.²²⁸

4. Compulsory Counterclaims by Plaintiffs

Finally, a compulsory counterclaim by a plaintiff in response to a Rule 14(a) claim by a third-party defendant is probably not affected by subsection (b).²²⁹ As the authors of the statute have noted: “Subsection (b), in prohibiting certain *claims* by a plaintiff, is silent regarding *counter-claims* by the plaintiff in reaction to the claims of joined parties against the plaintiff. Such counterclaims, at least if compulsory, are therefore within supplemental jurisdiction.”²³⁰ This is so because exercising supplemental jurisdiction over a plaintiff’s compulsory counterclaim would not circumvent the complete-diversity requirement and, therefore, would not be “inconsistent with the jurisdictional requirements of section 1332,” under subsection § 1367(b).

A slight modification of the facts in *Kroger*²³¹ provides a good example. Assume P (a citizen of Iowa) brings a diversity suit against D (a citizen of Nebraska), who then impleads corporation T (a citizen of both Iowa and Nebraska) for indemnity or contribution. The third-party defendant, T, then brings a related claim against P under Federal Rule 14(a).²³² The district court would have supplemental jurisdiction over T’s claim against P under subsection (a) of § 1367.²³³ If P now brings a compulsory counterclaim in response to T’s Federal Rule 14(a) claim, then supplemental jurisdiction should cover this claim, too. Because T

mental jurisdiction under § 1367 so as to prevent parties from circumventing statutory limitations placed on the courts’ jurisdiction by Congress.

228. See *Atherton v. Casey*, 1992 WL 235894 (E.D. La. 1992) (trial court denied party’s request to intervene as plaintiff because to do so would destroy diversity jurisdiction and implicate § 1367(b); however, party was permitted to intervene as defendant and assert claim for declaratory relief under 28 U.S.C. § 2201(a)).

229. For a contrary view, see *Freer*, *supra* note 79, at 481 (express terms of § 1367(b) regrettably prohibit supplemental jurisdiction in such cases).

230. *Mengler et. al.*, *supra* note 80, at 215 n.17.

231. See *supra* part V.A.1.

232. Federal Rule 14(a) provides in part: “The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff [*i.e.*, the original defendant].” FED. R. CRV. P. 14(a).

233. Cf., e.g., *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982) (ancillary jurisdiction upheld over third-party defendant’s claim against non-diverse plaintiff because no risk of circumventing complete-diversity requirement).

initiated the claim to which P is responding in bringing a compulsory counterclaim, the risk of P using supplemental jurisdiction to circumvent the complete-diversity requirement is not present (or is at least dramatically reduced), as it was in *Kroger*.

Permitting supplemental jurisdiction over a plaintiff's *compulsory* counterclaim in response to a third-party defendant's Rule 14(a) claim would be consistent with case law as it developed after the *Kroger* decision in 1978 but prior to the enactment of the supplemental jurisdiction statute in 1990. During those years, federal courts routinely exercised ancillary jurisdiction over such claims.²³⁴

C. *Unresolved Issues Regarding § 1367(b)*

1. Does § 1367(b) Apply in Cases Removed from State Court under 28 U.S.C. § 1441?

Section 1367(b) significantly restricts plaintiffs' use of supplemental jurisdiction in actions where "original jurisdiction" is founded "solely" on 28 U.S.C. § 1332. When a case is removed from state court to federal court under 28 U.S.C. § 1441, the question arises: Do the restrictions of § 1367(b) on a plaintiff's use of supplemental jurisdiction still apply when the plaintiff did not choose the federal forum?

If the answer is yes, then the plaintiff would be severely penalized under circumstances where the threat of the plaintiff subverting the complete-diversity requirement or the amount-in-controversy requirement is absent.

If the answer is no, then the district court would be allowed to exercise supplemental jurisdiction to the full extent permitted by Article III. In such a case, the plaintiff would be allowed to assert, for example, a Rule 14(a) claim against a nondiverse third-party defendant—which is exactly what was prohibited in *Kroger*.

A strong argument can be made that § 1367(b)'s restrictions on a plaintiff's use of supplemental jurisdiction do *not* apply in cases removed from state court. Section 1367(b) applies only where the district court's "original jurisdiction" is founded "solely" on 28 U.S.C. § 1332. "In a

234. See, e.g., *Finkle v. Gulf & Western Mfg. Co.*, 744 F.2d 1015, 1018-19 (3d Cir. 1984) (pre-section 1367 case holding that federal court had ancillary jurisdiction over plaintiff's compulsory counterclaim brought in response to third-party defendant's Federal Rule 14(a) claim against plaintiff); *Hyman-Michaels Co. v. Swiss Bank Corp.*, 496 F. Supp. 663, 666 (N.D. Ill. 1980) (same).

removed case, the 'original' jurisdiction would seem to be granted, even in a diversity case, by section 1441," not by section 1332.²³⁵

2. Does § 1367(b) Apply in Cases Where a Party Seeks to Intervene as a Defendant But the Court Realigns that Party as a Plaintiff?

Section 1367(b) restricts supplemental jurisdiction over claims brought by, *inter alios*, those parties "seeking to intervene as plaintiffs under Rule 24."²³⁶ Can a party avoid application of § 1367(b) by seeking to intervene as a *defendant*, even though his or her interests are more closely aligned with those of the plaintiff? If so, that party could intervene as a defendant and then assert cross-claims against the defendants who have interests adverse to the intervening "defendant."

A federal district court is, of course, free to realign the parties to an action in light of their true interests.²³⁷ It is not bound by the label a party wishes to assign itself or another party.²³⁸ To prevent misuse of the supplemental jurisdiction statute, federal courts should interpret § 1367(b) as limiting supplemental jurisdiction over claims brought by, *inter alios*, those parties who seek to intervene as defendants but who are realigned by the court as plaintiffs.

3. Does § 1367(b) Apply in Cases Where a Plaintiff Impleads a Nondiverse Third Party in Response to a Defendant's Counterclaim or a Third-Party Defendant's Rule 14(a) Claim?

Suppose P files an action against D based solely on diversity of citizenship jurisdiction under 28 U.S.C. § 1332. D then files a counterclaim against P. In reaction to this counterclaim, P wants to assert a claim for indemnity against X (a nondiverse party) for sums that P may be liable to pay on the counterclaim. If P impleads X under Federal Rule 14(b), will the district court have supplemental jurisdiction over P's indemnity claim?

P's indemnity claim would fall within § 1367(b)'s express limitation on "claims by plaintiffs against persons made parties under Rule 14" and would, therefore, prohibit a district court from exercising supplemental jurisdiction if to do so "would be inconsistent with the jurisdictional re-

235. Freer, *supra* note 79, at 485.

236. 28 U.S.C. § 1367(b)(1990).

237. See CHEMERINSKY, *supra* note 9, § 5.3, at 253; *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, (1941).

238. See CHEMERINSKY, *supra* note 9, § 5.3, at 253.

quirements of section 1332.²³⁹ P's indemnity claim against a nondiverse party would appear at first blush to run afoul of the complete-diversity requirement of § 1332. However, the Supreme Court's decision in *Kroger*, which was codified in § 1367(b),²⁴⁰ seems to be aimed at eliminating the devious use of supplemental jurisdiction to circumvent the complete-diversity requirement. The risk of P purposefully using supplemental jurisdiction to circumvent the complete-diversity requirement does not seem to be present (or is at least dramatically reduced) when P is simply reacting to a claim brought by D.

4. Does § 1367(b) Apply to Claims Against Persons Made Parties Under Federal Rule 13(h)?

Section 1367(b) explicitly prohibits a plaintiff from using supplemental jurisdiction to add claims "against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure."²⁴¹ It does not mention claims against persons made parties under Rule 13(h), which permits the joinder of additional parties to a "counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20."²⁴² Thus, a literal reading of the statute would exclude a plaintiffs' claims against Rule 13(h) parties from the restrictions in § 1367(b).

To allow supplemental jurisdiction in a diversity case over a plaintiff's claims against persons joined under Rule 13(h)—but not against persons added under Rules 14, 19, 20, and 24—is inconsistent with Congress's apparent intent in enacting subsection (b). In actions founded solely on § 1332, Congress evidently intended to limit supplemental claims by plaintiffs against parties later added to the main action—regardless of how those additional parties were joined.

5. Does § 1367(b) Apply to Claims Brought by Rule 20 Plaintiffs?

The restrictions found in § 1367(b) expressly apply to (1) original plaintiffs, (2) persons "proposed to be joined as plaintiffs under Rule 19," and (3) persons "seeking to intervene as plaintiffs under Rule 24."²⁴³ However, § 1367(b) fails to mention persons joined as plaintiffs under Federal Rule 20 and whether its restrictions apply to such plain-

239. 28 U.S.C. § 1367(b) (1990).

240. See *supra* notes 178-94 and accompanying text.

241. 28 U.S.C. § 1367(b) (1990).

242. FED. R. CIV. P. 13(h).

243. 28 U.S.C. § 1367(b) (1990).

tiffs. Thus, a literal reading of the statute would exclude Rule 20 plaintiffs from the restrictions in § 1367(b).

The authors of the supplemental jurisdiction statute have acknowledged that this "potentially gaping hole" was simply an oversight.²⁴⁴ At least one federal court has already plugged this gaping hole in § 1367(b) by applying its restrictions to plaintiffs joined under Rule 20.²⁴⁵ Any other interpretation would be inconsistent with the underlying rationale of the *Kroger* and *Zahn* decisions, which § 1367(b) embodies, and would permit Rule 20 plaintiffs to circumvent the jurisdictional requirements of § 1332.

VI. DISCRETIONARY EXERCISE OF SUPPLEMENTAL JURISDICTION

In *United Mine Workers of America v. Gibbs*, the Supreme Court drew an important and sharp distinction between (1) the power of federal courts to hear state claims that had no independent basis of federal jurisdiction, and (2) the federal courts' discretionary exercise of that power.²⁴⁶ Just because a federal court *could* exercise pendent jurisdiction did not mean that the court *should* do so. "The *Gibbs* Court recognized that a federal court's determination of state-law claims could conflict with the principle of comity to the States and with the promotion of justice between the litigating parties."²⁴⁷ Thus, under the analysis set forth in *Gibbs*, a federal district court was required to:

consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, . . . the federal court should decline the exercise of jurisdiction . . .²⁴⁸

244. See Thomas D. Rowe, Jr. et. al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L. J. 943, 961 n.91 (1991).

245. See *Griffin v. Dana Point Condominium Ass'n*, 768 F. Supp. 1299, 1301 (N.D. Ill. 1991).

246. 383 U.S. 715, 726 (1966) (stating that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right"). See also *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 627 (1974) (pendent jurisdiction is doctrine of discretion).

The issue of the district court's power to hear a pendent claim was usually resolved on the pleadings, but the issue of the district court's discretionary exercise of that power remained open throughout the litigation. See *Gibbs*, 383 U.S. at 727; 13B WRIGHT & MILLER, *supra* note 32, § 3567.1. This distinction will certainly continue with the adoption of supplemental jurisdiction under 28 U.S.C. § 1367.

247. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-50 (1988).

248. *Id.* at 350.

The values of judicial economy, convenience, fairness, and comity mentioned in *Gibbs* also underscore Congress's enactment of subsection (c) of § 1367. Under that subsection, "district courts *may* decline to exercise supplemental jurisdiction over a claim under subsection (a),"²⁴⁹ but only in limited circumstances. Thus, like the previous case law doctrines of pendent and ancillary jurisdiction, supplemental jurisdiction is a doctrine of discretion, not of right.

The four exclusive grounds upon which federal district courts may decline to exercise supplemental jurisdiction are:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.²⁵⁰

The first three of these grounds mirror those that the Supreme Court in *Gibbs* identified as proper justifications for a district court's refusal to exercise pendent jurisdiction.²⁵¹ All three appear to be premised on a belief that state courts are more competent in interpreting state law than are federal courts.²⁵² Subsections (c)(1)-(3) also reflect the Federal Courts Study Committee's perception that federal courts should expend more of their resources resolving federal-law disputes rather than those involving state law.²⁵³

The fourth ground ("exceptional circumstances") is a catch-all category that may provide district courts with greater latitude in declining

249. 28 U.S.C. § 1367(c) (1990) (emphasis added). The operative verb "may" indicates that the district courts still possess the broad discretion to decline supplemental jurisdiction that they had under the former doctrines of pendent, ancillary, and pendent-party jurisdiction. This has led one commentator to state 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)." SIEGEL, *supra* note 97, at 834.

250. 28 U.S.C. § 1367(c) (1990). A district court may, *sua sponte*, raise the issue as to whether it should exercise supplemental jurisdiction. See *Anspec Co. v. Johnson Controls, Inc.*, 788 F. Supp. 951, 959 (E.D. Mich. 1992).

251. See *House Report*, *supra* note 7, at 6875 ("Subsection (c) (1)-(3) codifies the factors recognized as relevant under current law.").

252. The premise that state courts are more competent in interpreting state law is debatable in light of the fact that federal courts, under *Erie*, routinely apply state law in diversity cases. See CHEMERINSKY, *supra* note 9, § 12.2.1, at 597.

253. See *Mengler et. al.*, *supra* note 80, at 214; COMMITTEE REPORT, *supra* note 2, at 14-15 (recommending that diversity jurisdiction be abolished so federal courts can expend their resources resolving federal-law disputes).

supplemental jurisdiction than they possessed previously with regard to pendent and ancillary jurisdiction. It is also important because it indicates—with its reference to “other compelling reasons”—that *all* declinations of supplemental jurisdiction must be based on a compelling reason. In analyzing whether such compelling reasons exist, district courts, before exercising their discretion, must “undertake a case-specific analysis.”²⁵⁴

If none of the four grounds set forth in § 1367(c) are present, then the district court must exercise supplemental jurisdiction.²⁵⁵ Subsection (a) is clear: federal district courts “shall” have supplemental jurisdiction over claims which are part of the same case or controversy as an action over which the court exercises original jurisdiction. Only if one of the four grounds enumerated in subsection (c) is present “may” the district court decline to exercise supplemental jurisdiction.²⁵⁶

A. *Novel or Complex Issues of State Law*

Under subsection (c)(1) of § 1367, the first ground upon which a district court may decline to exercise supplemental jurisdiction is that the claim over which no independent basis of federal jurisdiction exists raises a “novel or complex” issue of state law.²⁵⁷ This statutory basis for declining supplemental jurisdiction has its roots in *Gibbs* and is designed to promote the values of comity between federal and state courts and fairness to litigants. As the *Gibbs* Court stated: “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

254. *House Report*, *supra* note 7, at 6875.

255. Moreover, the retention of supplemental jurisdiction is particularly appropriate when the claim conferring original subject-matter jurisdiction in federal court falls within that court’s *exclusive* jurisdiction. See *United States v. Tazzioli Constr. Co.*, 796 F. Supp. 1130, 1132 (N.D. Ill. 1992) (“Supplemental jurisdiction is especially appropriate here. Because the Miller Act claim falls exclusively within the federal courts’ jurisdiction . . . , hearing both claims together serves judicial economy by preventing duplicative litigation.”).

256. See *Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277, 1284 (3rd Cir. 1993); *Cedillo v. Valcar Enter.*, 773 F. Supp. 932, 940 (N.D. Tex. 1991) (stating that § 1367 limits the district court’s discretion “by mandating that supplemental jurisdiction be exercised unless one of the categories in § 1367(c) is met”). A district court may decide to dismiss or remand certain supplemental claims and retain others. See *Johnson v. Coughlin*, 1992 WL 6227, *10 (S.D.N.Y. 1992).

257. For an application of a district court’s use of subsection (c)(1) to decline supplemental jurisdiction, see *Support Ministries for Persons with Aids, Inc. v. Village of Waterford, New York*, 799 F. Supp. 272, 280 (N.D.N.Y. 1992) (stating that “there is no reason for this court to embroil itself in a dispute between the State and a local government and to make this novel and potentially extremely significant interpretation of state law”).

of applicable law."²⁵⁸ Under the former doctrines of pendent and ancillary jurisdiction, federal courts commonly used the presence of novel or complex state-law issues as a basis for declining such jurisdiction.²⁵⁹

This basis for declining supplemental jurisdiction is analogous to the *Pullman* abstention doctrine.²⁶⁰ In *Railroad Commission of Texas v. Pullman Co.*,²⁶¹ the Supreme Court held that, when presented with a federal constitutional challenge to an unclear state statute, a district court should exercise its discretion to stay the action pending an authoritative interpretation of the challenged statute by the state courts, thereby possibly avoiding unnecessary constitutional adjudication following a clarification of state law by the state courts.²⁶² Both subsection (c)(1) and *Pullman* abstention are designed to promote comity and are premised on the belief that state courts are more competent than federal courts in interpreting state law.

B. State-Law Claims Substantially Predominate

The second ground for declining supplemental jurisdiction, found in subsection (c)(2), is that the state claim "substantially predominates over the claim or claims over which the district court has original jurisdiction."²⁶³ In other words, a state dog cannot wag a federal tail and expect to remain in federal court. This basis for refusing supplemental jurisdiction also has its roots in *Gibbs*, which stated that "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, the state claims may be dismissed without prejudice and left for resolution to state tribunals."²⁶⁴ The *Gibbs* Court further elaborated:

[R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body

258. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966).

259. See, e.g., *Moor v. County of Alameda*, 411 U.S. 693, 716-17 *reh'g denied*, 412 U.S. 963 (1973); *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768 (D.C. Cir. 1982).

260. See SIEGEL, *supra* note 97, at 834-35. Of course, under abstention doctrines, the case generally is dismissed in its entirety. In contrast, under § 1367(c), only the state-law claims are dismissed.

261. 312 U.S. 496 (1941).

262. See CHEMERINSKY, *supra* note 9, § 12.2.1, at 595-600 (discussion of *Pullman* abstention).

263. 28 U.S.C. § 1367(c)(2) (1990).

264. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-27 (1966).

of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.²⁶⁵

Reported cases in which a district court has declined supplemental jurisdiction on the basis of subsection (c)(2) are rare. However, a few such cases do exist. For example, in *James v. Sun Glass Hut of California, Inc.*,²⁶⁶ the plaintiff brought a single federal claim under the Age Discrimination in Employment Act²⁶⁷ and state-law claims for breach of contract, promissory estoppel, fraud, negligent misrepresentation, bad faith, and outrageous conduct. The United States District Court for the District of Colorado declined to exercise supplemental jurisdiction based on subsection (c)(2). After finding that several of the plaintiff's state-law claims required "elements of proof that are distinct and foreign to her ADEA claim" and that all of the state-law claims sought "damages not available under the ADEA,"²⁶⁸ the court concluded that "the state law claims substantially predominate over the federal claim."²⁶⁹

Declining supplemental jurisdiction because state law issues "predominate" is loosely analogous to invoking the *Burford* abstention doctrine.²⁷⁰ In *Burford v. Sun Oil Co.*,²⁷¹ the Supreme Court approved of the use of abstention as a means of dismissing an action in federal court in deference to an overriding state interest in the matters at issue and to the superior competence of state courts to adjudicate such matters.²⁷² Thus, both subsection (c)(2) and the *Burford* abstention doctrine promote, in a general way, the values of comity and federalism.

C. Dismissal of Claims Conferring Original Jurisdiction in Federal Court

Under subsection (c)(3), the third ground upon which a district court may decline to exercise supplemental jurisdiction is that "the district

265. *Id.* at 727.

266. 799 F. Supp. 1083 (D. Colo. 1992).

267. 29 U.S.C. § 621 (1990) *et seq.*

268. *James*, 799 F. Supp. at 1085.

269. *Id.*

270. See SIEGEL, *supra* note 97, at 835. At least one court has explicitly recognized this analogy to the *Burford* abstention doctrine. See *White v. County of Newberry*, S.C., 985 F.2d 168, 172 (4th Cir. 1993) (citing *Burford* and stating that "the district court, when exercising its discretion [under § 1367(c)(2)], is invoking the abstention doctrine and must address federalism concerns about avoiding federal overreaching into highly specialized state enforcement or remedial schemes").

271. 319 U.S. 315, *reh'g denied*, 320 U.S. 214 (1943).

272. See CHERMERINSKY, *supra* note 9, § 12.2.3, at 608-611 (1989) (discussing the *Burford* abstention doctrine).

court has dismissed all claims over which it has original jurisdiction.²⁷³ Simply put, without the crutch of the claim conferring original federal jurisdiction, the state-law claim should fall.²⁷⁴ As the name implies, supplemental jurisdiction is not an independent basis for federal subject-matter jurisdiction;²⁷⁵ rather, it is "supplemental" to the district courts' original jurisdiction.

In *Gibbs*, the Supreme Court stated: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."²⁷⁶ The Supreme Court later refined this statement and "made clear that this statement does not establish a mandatory rule to be applied inflexibly in all cases."²⁷⁷ Rather, "[t]he statement simply recognizes that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state law claims."²⁷⁸ Similarly, under 28 U.S.C. § 1367(c)(3), the balance of these factors also will usually point toward declining supplemental jurisdiction when the claims conferring original federal jurisdiction are dismissed early in the litigation.

Whether a district court abuses its discretion in declining to exercise supplemental jurisdiction due to the dismissal of the claims conferring original federal jurisdiction will likely depend, as it did under prior law, on the stage in the litigation when the dismissal takes place.²⁷⁹ If these

273. 28 U.S.C. § 1367(c)(3) (1990).

274. See SIEGEL, *supra* note 97, at 835 ("The idea here is that once the crutch is removed—the claim that supports the supplemental jurisdiction of the other claim or claims—the other should not remain for adjudication. . . . [J]udicial discretion here is a particularly important element. Here the 'may' in 'may decline' has a major role to play.").

275. Because supplemental jurisdiction is not an independent basis for federal subject-matter jurisdiction, it cannot serve as the basis for removal under 28 U.S.C. § 1441(a). See *Holt v. Lockheed Support Systems, Inc.*, 835 F. Supp. 325, 329 (W.D. La. 1993). Section 1441(a) states that "any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a) (1990) (emphasis added).

276. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (stating also 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 the applicable law").

277. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988).

278. *Id.*

279. See SIEGEL, *supra* note 97, at 835 ("Whether a dismissal of the touchstone claim should bring about a dismissal (or remand, in a removal situation) of the dependent claim for

main claims are dismissed prior to trial or before a substantial amount of discovery and pretrial jockeying has occurred, then the district court's decision to decline supplemental jurisdiction will likely be "almost unreviewable."²⁸⁰ However, if the main claims are dismissed during or after trial, an appellate court may scrutinize a district court's decision to decline to exercise supplemental jurisdiction.²⁸¹

Should the district court decide to decline supplemental jurisdiction in the context of a case previously removed from state court, it should remand (rather than dismiss without prejudice) the supplemental state claims, particularly if the state statute of limitations has expired²⁸² or a similar hardship to the plaintiff would result.²⁸³ "The discretion to remand enables district courts to deal with cases involving [supplemental] claims in the manner that best serves the principles of economy, convenience, fairness, and comity,"²⁸⁴ which underlie 28 U.S.C. § 1367(c).

"District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims

want of supplemental jurisdiction should hinge on the moment within the litigation when the dismissal of the touchstone claim takes place, and on the other surrounding circumstances. If, for example, the main claim is dismissed early in the action, before any substantial preparation has gone into the dependent claims, dismissing or remanding the latter upon declining supplemental jurisdiction seems fair enough. But if the dismissal of the main claim occurs late in the action, after there has indeed been substantial expenditure in time, effort, and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair.").

280. *Huffman v. Hains*, 865 F.2d 920, 923 (7th Cir. 1989). "We have described the district court's discretion to *relinquish* pendent jurisdiction as 'almost unreviewable.' . . . This is especially so when all federal claims have dropped from the case before trial, leaving only state-law claims to decide. At that point respect for the state's interest in applying its own law, along with the state court's greater expertise in applying state law, become paramount concerns." *Id.*

281. *See, e.g., Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277, 1285 (3d Cir. 1993) (remanding subsection (c) issue and strongly hinting that district court should exercise supplemental jurisdiction where that court "has already held a trial on the merits and has already heard all the evidence necessary to reach a decision on the plaintiff's contract claim").

282. The drafters of the supplemental jurisdiction statute recognized this potential hardship to plaintiffs and correctly included a provision to toll the statute of limitations for supplemental claims dismissed by federal courts. That tolling provision is found in § 1367(d), which is discussed, *infra*, in part VII.

283. *Cf. Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988) ("We conclude that a district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate."); *Brewer v. City of El Cerrito*, 666 F. Supp. 1346, 1351 (N.D. Cal. 1987) (pendent claims dismissed on condition that defendants submit to jurisdiction of state court and waive state statute of limitations).

284. *Cohill*, 484 U.S. at 357.

are dismissed.”²⁸⁵ For this reason, courts of appeal will “not lightly disturb a district court’s § 1367(c)(3) determination to remand state law claims.”²⁸⁶ In fact, courts of appeal often affirm the lower courts’ decisions to dismiss state law claims pursuant to 28 U.S.C. § 1367(c)(3) without analyzing the issue in any depth.²⁸⁷

D. *Exceptional Circumstances that Present Compelling Reasons*

The fourth and final basis for declining to exercise supplemental jurisdiction is codified in subsection (c)(4). This catch-all provision allows district courts to decline the exercise of supplemental jurisdiction in “exceptional circumstances” that present “other compelling reasons.”²⁸⁸ Whether this provision will change federal court practice to a substantial degree remains to be seen.²⁸⁹ The legislative history, however, indicates that this subsection is quite narrow and is to be used infrequently.²⁹⁰ Certainly, Congress did not intend for subsection (c)(4) to be used as a “docket clearing” device by the district courts.²⁹¹

285. *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993).

286. *Id.*

287. *See, e.g., Rhyne v. Henderson County*, 973 F.2d 386, 395 (5th Cir. 1992) (“The district court has properly dismissed all of the federal questions that gave it original jurisdiction in this case. Therefore, we find that the district court’s dismissal of the state-law claims was proper under 28 U.S.C. § 1367(c)(3).”); *Packett v. Stenberg*, 969 F.2d 721, 726-27 (8th Cir.), *reh’g en banc denied*, 1992 U.S. App. LEXIS 19376 (Aug. 20, 1992) (appellate court would “presume that the district court properly declined to exercise supplemental jurisdiction” where action “clearly fit within subsection (c)(3)”).

288. 28 U.S.C. § 1367(c)(4) (1990). An imperfect analogy can be made between Subsection (c)(4) and federal abstention under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 *reh’g denied*, 426 U.S. 912 (1976). In *Colorado River*, the Court stated that, although a federal court has a virtually unflagging obligation to exercise the jurisdiction given it by Congress, it may abstain out of deference to parallel litigation in state court for reasons of “wise judicial administration.” *Id.* at 818; *see also* CHEMERINSKY, *supra* note 9, § 14.2, at 663 (discussing *Colorado River* abstention). Both subsection (c)(4) and *Colorado River* abstention give federal district courts leeway, in exceptional circumstances, to decline to exercise federal jurisdiction granted to it by Congress.

289. *See Rosen v. Chang*, 758 F. Supp. 799, 803 n.6 (D.R.I. 1991) (“On its face, 28 U.S.C. § 1367(c) seems to indicate that a court should decline jurisdiction over a related state claim only in unusual circumstances. In the present case, however, I need not determine to what extent the statute may curtail the discretion afforded the courts under *Gibbs*.”). Likewise, the extent to which subsection (c)(4) may *expand* the district courts’ discretion remains to be seen.

290. *See House Report, supra* note 7, at 6875 (“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.”) (emphasis added).

291. *See Mengler et. al., supra* note 80, at 216; *see also* *Executive Software North America, Inc. v. U.S. District Court for the Central District of California*, 63 Fair Empl. Prac. Cas. (BNA) 1143 (9th Cir. 1994) (reversing district court’s decision to decline supplemental

Although the “exceptional circumstances” justifying the declination of supplemental jurisdiction are left undefined in subsection (c)(4), earlier cases involving pendent and ancillary jurisdiction may shed some light on the meaning of this subsection. In *Gibbs*, for example, the Supreme Court stated:

there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed.Rule Civ.Proc. 42(b). If so, [pendent] jurisdiction should ordinarily be refused.²⁹²

Jury confusion caused by the addition of state claims was explicitly upheld by the Supreme Court in subsequent cases as a proper basis for declining to exercise pendent jurisdiction over such claims.²⁹³ Similarly, the potential for jury confusion has recently been used by one district court to justify a decision to decline to exercise supplemental jurisdiction.²⁹⁴

District courts may also be justified in declining supplemental jurisdiction under subsection (c)(4) when an array of special rules governing procedure, defenses, and damages are applicable to the main claims but not the supplemental claims. Claims brought under the Federal Torts Claims Act (FTCA) provide a good example. In his dissent in *Finley*, Justice Stevens recognized:

that an FTCA claim against the Government must be tried without a jury whereas pendent state-law claims would generally be subject to trial by jury under the Seventh Amendment; that the Government cannot be held liable for punitive damages or on a strict liability theory whereas both may be available against a private party; that the Government has numerous defenses and immunities not available to a private party; and that a claimant

jurisdiction over state-law claims based, in part, on the belief that those claims would require the expenditure of substantial judicial time and effort); *Brown v. Bronx Cross County Medical Group*, 834 F. Supp. 105, 111 (S.D.N.Y. 1993) (requiring additional proof for state claims insufficient).

292. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727 (1966).

293. See, e.g., *Moor v. County of Alameda*, 411 U.S. 693, 716-17 (1973) (jury confusion likely due to special defenses available on state claim); *Marchwinski v. Oliver Tyrone Corp.*, 461 F. Supp. 160, 173 (W.D. Pa. 1978) (“This is not the type of case wherein the state claims so predominate over federal claims that were we to accept jurisdiction, we would allow ‘the tail to wag the dog’; on the contrary, the federal claims promise to be so large and complicated that we feel the creature would be more manageable without its tail.”).

294. See, e.g., *Mid-Atlantic Exporters, Ltd. v. Krick*, 1992 WL 195418, *7 (E.D. Pa. 1992) (“The court finds that the presence of several state-based counts would place a significant burden on the jury’s ability to resolve this already complex RICO suit. Accordingly, the court declines to exercise supplemental jurisdiction over the state law counts.”).

against the Government under the FTCA must comply with the Act's administrative claim procedures.²⁹⁵

Justice Stevens stated that "the presence of any of these factors in a particular case may weigh against the exercise of pendent jurisdiction" ²⁹⁶ Similarly, these factors may constitute "other compelling reasons" for a district court's refusal to exercise supplemental jurisdiction under subsection (c)(4).²⁹⁷

If the supplemental claim interferes with the prosecution of the primary claim, then a district court may be justified in declining to exercise supplemental jurisdiction. For example, in *Carlucci v. United States*,²⁹⁸ the United States District Court for the Southern District of New York relied on subsection (c)(4) to justify a taxpayer's supplemental claim for contribution against third parties because that claim would "simply prolong and complicate" the underlying tax collection proceeding.

Under the previous case-law doctrines of pendent and ancillary jurisdiction, district courts generally *retained* such jurisdiction if the added state claim was (1) closely tied to an important question of federal policy, (2) limited by any of the federal preemption doctrines, or (3) barred by the state statute of limitations.²⁹⁹ In making its "case-specific analysis," federal district courts should also consider these factors before declining supplemental jurisdiction. Worth repeating is that subsection (c) of § 1367 is intended to promote the values of judicial economy, convenience, fairness, and comity thought important by the Supreme Court in *Gibbs*.³⁰⁰ If those values would not be served by declining supplemental jurisdiction, federal district courts should exercise the supplemental jurisdiction conferred on them by subsection (a).

295. *Finley v. United States*, 490 U.S. 545, 570 n.24 (1989) (Stevens, J., dissenting).

296. *Id.*

297. *See, e.g., Lewis v. United States*, 816 F. Supp. 1097, 1098 (E.D. Va. 1993) (declining supplemental jurisdiction under subsection (c)(4) where "substantial risk of confusion and prejudice" could result because case required trial by jury for supplemental claims and bench trial for main claim); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir.), *reh'g en banc denied*, 974 F.2d 169 (1992), *cert. denied*, 113 S.Ct. 1067 (1993) (affirming district court's decision to decline under subsection (c)(4) supplemental jurisdiction over state claims where identical state claims were pending in state court).

298. 793 F. Supp. 482 (S.D.N.Y. 1992).

299. *See* 13B WRIGHT & MILLER, *supra* note 32, § 3567.1 (1984).

300. Freer, *supra* note 79, at 472 ("Thus, the statute basically codifies the teaching of *Gibbs* regarding the discretionary decline of supplemental jurisdiction.").

E. Reviewability of Remand Orders Based on 28 U.S.C. § 1367(c)

When a case has been removed from state court to federal court, 28 U.S.C. § 1447(c) authorizes remand where there is (1) a lack of federal subject-matter jurisdiction or (2) a defect in the removal procedure.³⁰¹ Generally, under 28 U.S.C. § 1447(d), an order remanding a case to state court is not reviewable by appeal or otherwise. However, in *Thermtron Products, Inc. v. Hermansdorfer*,³⁰² the Supreme Court recognized a limited exception to this rule in cases where a remand order is based on reasons not authorized under 28 U.S.C. § 1447(c). Accordingly, "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." ³⁰³

A remand order pursuant to § 1367(c) falls within the *Thermtron* exception to § 1447(d); therefore, it is reviewable by a court of appeals.³⁰⁴

A remand order pursuant to 28 U.S.C. § 1367(c) is not premised on § 1447(c) because it is a discretionary decision declining the exercise of *expressly acknowledged jurisdiction*. It is not a remand premised on either a defect in removal procedure or a lack of jurisdiction. As a result, an order expressly remanding pursuant to § 1367(c) is reviewable.³⁰⁵

VII. TOLLING OF LIMITATIONS PERIOD FOR CLAIMS ASSERTED UNDER § 1367(A) AND LATER DISMISSED

Subsection (d) of the supplemental jurisdiction statute provides in full:

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides a longer tolling period.³⁰⁶

301. 28 U.S.C. § 1447(c) (1990).

302. 423 U.S. 336 (1976).

303. *Id.* at 346.

304. See *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1257 (11th Cir. 1992); *PAS v. Travelers Ins. Co.*, 7 F.3d 349, 352 (3d Cir. 1993).

305. *Surinam Airways*, 974 F.2d at 1257.

306. 28 U.S.C. § 1367(d) (1990). This one-sentence provision appears to have been the original idea of the drafters of the supplemental jurisdiction statute. The Federal Courts Study Committee did not recommend, or apparently even consider, such a tolling provision. See *Committee Report*, *supra* note 2, at 47-48 (setting forth the Committee's recommendations). Section 1367(d) appears to be modeled in part on a 1969 proposal of the American Law Institute, which advocated a 30-day tolling period for all actions timely filed in federal

Although the idea of such a tolling provision is well-intentioned and useful in theory,³⁰⁷ § 1367(d) is fraught with unanswered questions and may prove difficult to apply in practice.

A. *The Scope of § 1367(d)'s Tolling Provisions*

At the outset, it is important to understand that § 1367(d) is a *tolling* provision only. It applies only to dismissed claims that were earlier commenced in a timely fashion under the applicable limitations period. If the limitation period expires before the claim is asserted, then the tolling provisions of § 1367(d) do not apply. "Any other interpretation would create the anomalous situation of permitting time-barred supplemental claims to be asserted in federal court and then resurrected under the provisions of § 1367(d) upon dismissal."³⁰⁸

Nevertheless, federal litigants would still have available to them doctrines that ameliorate harsh applications of the statute of limitations. For example, a party's amended claim may be timely commenced because it "relates back" to the commencement of the original claim under Federal Rule 15(c). However, if no such doctrine is available and the claim is untimely under the applicable limitations period, then a federal litigant cannot use § 1367(d) to resurrect expired state claims.

The tolling provisions of § 1367(d) are *not* limited to those supplemental claims that a district court dismisses under the discretionary provisions of § 1367(c). Rather, the tolling provisions apply to "any claim asserted under subsection (a)" and later dismissed.³⁰⁹ Thus, § 1367(d) applies to supplemental claims that are dismissed because they are not sufficiently related to satisfy the constitutional "case" requirement of Article III, as commanded by § 1367(a). Section 1367(d) also applies to supplemental claims that are dismissed under one of the exclusion provisions of subsection (a) or (b).³¹⁰

court and later dismissed for lack of subject-matter jurisdiction. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1386 (1969).

307. Absent subsection (d), parties asserting supplemental claims in federal court "would be left to the vagaries of state tolling laws." McLaughlin, *supra* note 87, at 982. State tolling laws vary dramatically. *Id.* at 982-83. Some are statutory, and others are based on the court-created doctrine of equitable tolling. *Id.* Thus, § 1367(d) is a bold attempt to simplify statute-of-limitations problems faced by federal litigants who have their supplemental claims dismissed.

308. McLaughlin, *supra* note 87, at 984.

309. 28 U.S.C. § 1367(d) (1990).

310. When supplemental claims are dismissed by the federal court and refiled (or remanded) in state court, the state court should give no preclusive effect, under the doctrines of

The tolling provisions of § 1367(d) also apply to “any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a).”³¹¹ This language gives federal litigants needed flexibility. If a supplemental claim is dismissed, a party may then choose to voluntarily dismiss all of his or her claims and pursue all of the claims in a single state court action.

B. Unresolved Issues Regarding § 1367(d)

1. Does § 1367(d) apply to supplemental claims that are dismissed without prejudice for reasons other than those set forth in § 1367(a)-(c)?

Whether supplemental claims that are dismissed without prejudice for reasons other than those set forth in § 1367(a)-(c) also gain the benefit of § 1367(d)'s tolling provisions is unclear. The legislative history states that § 1367(d) is intended to apply to “any supplemental claim that is dismissed *under this section*,”³¹² implying that supplemental claims that are dismissed without prejudice for other reasons, such as insufficiency of service of process or lack of personal jurisdiction, do not fall within § 1367(d)'s tolling provisions.

However, the limitation on the type of dismissals found in the legislative history (*i.e.*, dismissal “under this section”) did not find its way into the statute. A literal reading of § 1367(d)—“any claim asserted under subsection (a) . . . shall be tolled”—would certainly permit application of the tolling provisions to supplemental claims later dismissed without prejudice for reasons other than those found in § 1367(a)-(c).

2. Can Congress, consistent with the Federal Constitution, enact a statute that tolls a state statute of limitations?

Whether the enactment of § 1367(d) is a constitutional exercise of Congress's power has been the subject of a great deal of academic discussion.³¹³ For reasons discussed below, the answer is yes.

The tolling provisions of § 1367(d) apply to “any claim asserted under subsection (a)” and later dismissed.³¹⁴ These supplemental claims

res judicata or collateral estoppel, to the federal court's dismissal. Under Federal Rule 41(b), a dismissal for lack of jurisdiction does not operate “as an adjudication upon the merits.” FED. R. CIV. P. 41(b).

311. 28 U.S.C. § 1367(d) (1990).

312. *House Report*, *supra* note 7, at 6876 (emphasis added).

313. For an excellent analysis of this issue, see McLaughlin, *supra* note 87, at 985-88.

314. 28 U.S.C. § 1367(d) (1990).

are, of course, state-law claims. Under the *Erie* doctrine,³¹⁵ federal courts must apply state substantive law when deciding state-law claims. Thus, "a simple principle emerges after *Erie*: federal courts are to apply state substantive law and federal procedural law" when deciding state-law claims.³¹⁶

In *Guaranty Trust Co. of New York v. York*,³¹⁷ the Supreme Court held that state statutes of limitations are substantive for *Erie* purposes.³¹⁸ Similarly, in *Ragan v. Merchants Transfer & Warehouse Co., Inc.*,³¹⁹ the Court extended its reasoning in *York* to hold that federal courts should apply a state law that used the time of service as the commencement of an action for purposes of applying the statute of limitations, rather than the federal rule that an action commences with the filing of a complaint. *York* and *Ragan* would, therefore, seem to indicate that Congress is without constitutional power to enact a statute that tolls (or otherwise interferes with) a state statute of limitations.

In 1980, in *Walker v. Armco Steel Corp.*,³²⁰ the Supreme Court reaffirmed its holding in *Ragan*. However, it did so because it concluded that Federal Rule 3, which states that an action commences upon the filing of a complaint, was not intended "to displace state tolling rules for purpose of state statutes of limitations."³²¹

In contrast to the *Walker* Court's interpretation of Federal Rule 3, however, there is no doubt that § 1367(d) was intended "to displace state tolling rules for purpose of state statutes of limitations." Section 1367(d) expressly displaces state tolling rules. Thus, the rationale of the *Walker* decision is absent in the context of the tolling provisions of the supplemental jurisdiction statute.

A strong argument can be made that § 1367(d) passes constitutional scrutiny. The argument is based on the Supreme Court's holding in *Hanna v. Plumber*³²² and its progeny. In *Hanna*, the Court held that, if a Federal Rule of Civil Procedure controlled an issue and was a valid exercise of authority under the Rules Enabling Act, then the Federal Rule must be followed by federal courts in diversity cases.³²³ The applicable

315. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). For a discussion of *Erie* and its progeny, see CHEMERINSKY, *supra* note 9, § 5.3.5, at 260-275.

316. CHEMERINSKY, *supra* note 9, § 5.3.5, at 266.

317. 326 U.S. 99, *reh'g denied*, 326 U.S. 806 (1945).

318. *Id.* at 108-09.

319. 337 U.S. 530, *reh'g denied*, 338 U.S. 806 (1949).

320. 446 U.S. 740 (1980).

321. *Id.* at 750-51.

322. 380 U.S. 460 (1965).

323. *Id.* at 473-74.

Federal Rule preempts inconsistent state law.³²⁴ In 1988, the Supreme Court extended its reasoning in *Hanna* in the case of *Stewart Organization, Inc. v. Ricoh Corp.*³²⁵ by holding that an applicable federal procedural statute also preempts inconsistent state law if the federal statute “represents a valid exercise of Congress’ constitutional powers.”³²⁶

This returns us to the initial question: Is the enactment of § 1367(d) a valid exercise of Congress’s constitutional power? An important passage in the *Hanna* opinion lends considerable support to the position that § 1367(d) was a constitutional exercise of Congressional power. In *Hanna*, the Supreme Court stated:

For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.³²⁷

Section § 1367(d) consists of “rules governing the practice and pleading” in federal courts³²⁸ and regulates matters that, at a minimum, fall “within the uncertain area between substance and procedure” and “are rationally capable of classification as either.” Thus, under *Hanna*, Congress possessed the constitutional power to enact § 1367(d) and conflicting state tolling laws are preempted.

3. What preclusive effect, if any, should federal courts give to supplemental claims dismissed under § 1367 and later adjudicated in state court?

Suppose that a federal court retains jurisdiction over a plaintiff’s federal claim and dismisses the plaintiff’s supplemental state-law claim; that the plaintiff then refiles the dismissed claim in state court; and that the state court renders a judgment on that claim prior to the resolution of the federal action. What preclusive effect, if any, should the federal court give the state-court judgment?

The legislative history of § 1367 states that “the federal district court, in deciding the party’s claims over which the court has retained jurisdic-

324. *Id.* at 470-72.

325. 487 U.S. 22 (1988).

326. *Id.* at 27.

327. *Hannah*, 380 U.S. at 472.

328. One could argue, of course, that § 1367(d) does not govern the practice of federal courts, but of state courts.

tion, should accord no *claim preclusive effect* to a state court judgment on the supplemental claim" that was refiled in state court.³²⁹ However, § 1367 itself is silent on this issue.

Under 28 U.S.C. § 1738, federal courts must give "the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." Stated differently, federal courts are required to give full faith and credit to state court judgments. Thus, despite the legislative history of § 1367, it appears that federal courts must give preclusive effect to supplemental claims dismissed under § 1367 and later adjudicated to final judgment in state court prior to resolution of the parallel federal action.³³⁰

VIII. IS THE SUPPLEMENTAL JURISDICTION STATUTE A MODEL OF SUCCESSFUL DIALOGUE BETWEEN CONGRESS AND THE FEDERAL COURTS?

The primary drafters of 28 U.S.C. § 1367 have argued that "Congress's codification of supplemental jurisdiction in response to the Supreme Court's decision in *Finley* serves as a model of successful dialogue between the judicial and legislative branches, dialogue that was facilitated by the work of the Federal Courts Study Committee."³³¹ They claim that the *Finley* Court "virtually invited Congress to fill the jurisdictional gaps its decision had created" and that "Congress through 28 U.S.C. § 1367 has accepted the Court's invitation."³³² The legislative history to § 1367 also indicates that those in Congress believed that the Supreme Court in *Finley* "virtually invited Congress to codify supplemental jurisdiction."³³³

A careful review of the *Finley* decision, however, indicates that the Court's "invitation" was much more narrow. *Finley* involved the interpretation of the Federal Tort Claims Act,³³⁴ and the Court invited Con-

329. *House Report*, *supra* note 7, at 6875-76 (emphasis added). The legislative history does not mention whether a federal court should give collateral estoppel effect (*i.e.*, issue preclusive effect) on common issues litigated in both the state and federal proceedings.

330. For a contrary position, see McLaughlin, *supra* note 87, at 990-91.

331. Mengler et. al., *supra* note 80, at 216.

332. *Id.* at 214.

333. See 136 CONG. REC. S17580 (daily ed. October 27, 1990) ("Legislation, therefore, is needed to provide the federal courts with statutory authority to hear supplemental claims. Indeed, the Supreme Court has virtually invited Congress to codify supplemental jurisdiction by commenting in *Finley*, 'Whatever we say regarding the scope of jurisdiction . . . can of course be changed by Congress.'").

334. *Finley v. United States*, 490 U.S. 545, 547 (1989) ("We granted certiorari . . . to resolve a split among the Circuits on whether the FTCA permits an assertion of pendent juris-

gress to amend *that statute* so that it explicitly conferred pendent-party jurisdiction. The Court stated: We “now conclude that the present statute permits no other result. . . . Whatever we say regarding the scope of jurisdiction *conferred by a particular statute* can of course be changed by Congress.”³³⁵ The Court in *Finley* did not explicitly invite Congress to codify the case-law doctrines of pendent claim, pendent-party, and ancillary jurisdiction.

Nevertheless, *Finley* did provide the impetus for Congress to codify supplemental jurisdiction by (1) acknowledging that the Court’s earlier cases did “not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred,”³³⁶ (2) virtually abolishing pendent-party jurisdiction by requiring an “affirmative grant” of such jurisdiction in the federal statute that provides the jurisdictional basis of the main claim³³⁷; and (3) reaffirming that federal courts are courts of limited jurisdiction and that Congress can, consistent with the Constitution, “change” the scope of the federal courts’ jurisdiction.³³⁸ In the wake of *Finley*, it is not surprising that Congress took the opportunity to codify (and thereby “explicitly confer”) supplemental jurisdiction.³³⁹ By enacting § 1367, however, Congress did much more than respond to the narrow “invitation” in *Finley*.

The interaction between the Court and Congress as to the proper scope of supplemental jurisdiction eventually produced a statute that, for

diction over additional parties.”). See also *id.* at 555-56 (“Because the FTCA permits the Government to be sued only in federal court, our holding that parties to related claims cannot necessarily be sued there means that the efficiency and convenience of a consolidated action will sometimes have to be foregone in favor of separate actions in state and federal courts. We acknowledged this potential consideration in *Aldinger* . . . but now conclude that *the present statute* permits no other result.”) (emphasis added).

335. *Finley*, 490 U.S. at 556 (emphasis added). When quoting this portion of *Finley*, the drafters omit the words “conferred by a particular statute.” See Mengler et. al., *supra* note 80, at 214 (“A fair reading of *Finley* suggests that the majority was not oblivious to the possible need for a legislative response. Indeed, Justice Scalia’s opinion for the Court virtually invited Congress to fill the jurisdictional gaps its decision had created. ‘Whatever we say regarding the scope of jurisdiction,’ the Court explained, ‘can of course be changed by Congress. . . .’ Congress through 28 U.S.C. § 1367 has accepted the Court’s invitation.”). Similarly, these words are also omitted from the legislative history. See 136 CONG. REC. S17580 (daily ed. October 27, 1990) (“Indeed, the Supreme Court has virtually invited Congress to codify supplemental jurisdiction by commenting in *Finley*, ‘Whatever we say regarding the scope of jurisdiction . . . can of course be changed by Congress.’”).

336. *Finley*, 490 U.S. at 556.

337. *Id.* at 553.

338. *Id.* at 556.

339. Although the *Finley* Court stated that it had “no intent to limit or impair” the “*Gibbs* line of cases,” *id.* at 556, its decision created confusion about and hostility toward court-created doctrines of federal jurisdiction. See *supra* part II.D.

the most part, codified and clarified then-existing case law. The *Finley* Court sought to announce "clear interpretive rules" so that Congress could "legislate against [such] a background" and "know the effect of the language it adopts."³⁴⁰ Congress then reacted to those "interpretive rules" by enacting legislation that contained precise language which expressly conferred supplemental jurisdiction to federal courts.³⁴¹ This "dialogue" between the Court and Congress was successful as a whole and may be used as a model for future discussions about the proper scope of the federal courts' jurisdiction.

IX. CONCLUSION

The federal "supplemental jurisdiction" statute found at 28 U.S.C. § 1367 is an ambitious attempt by Congress to codify the former judicial doctrines of pendent, ancillary, and pendent-party jurisdiction. The drafters of § 1367 did an admirable job of creating, in a lucid fashion, an organized and useful codification of those former doctrines. The federal practitioner who wishes to assert supplemental state-law claims in federal litigation must become familiar with the interrelationship among the different subsections of § 1367 and must know how this statute has expanded and contracted this important area of federal jurisdiction.

The Supreme Court's 1989 decision in *Finley v. United States* had effectively abolished the doctrine of pendent-party jurisdiction and, ominously, threatened the vitality of other court-created doctrines of federal jurisdiction. In response to the broad confusion created by *Finley* and the Supreme Court's narrow invitation in that case to expressly confer pendent-party jurisdiction, Congress seized the opportunity to codify the case-law doctrines of pendent, ancillary, and pendent-party jurisdiction. The enactment of § 1367 in December 1990 was a welcome step by Congress to clarify the confusion sowed among the federal circuits by *Finley*.

Although the legislative history reveals that Congress's purpose in enacting § 1367 was to restore "the pre-*Finley* understanding" of supplemental jurisdiction, the federal "supplemental jurisdiction" statute goes much further. To be sure, in many respects, § 1367 succeeds in codifying the former doctrines of pendent, ancillary, and pendent-party jurisdiction in a manner consistent with "pre-*Finley*" case law. For example, consistent with prior case law, the broad grant of "supplemental jurisdic-

340. *Finley*, 490 U.S. at 556.

341. It is worth noting that the supplemental jurisdiction statute became law 19 months after *Finley* was decided. The drafters of § 1367 are correct in stating that it was enacted "with admirable dispatch." Mengler et. al., *supra* note 80, at 213.

tion" found in subsection (a) encompasses within its scope compulsory counterclaims under Federal Rule 13(a); cross-claims under Federal Rule 13(g); claims against persons added as parties by defendants under Federal Rules 13(h); claims against persons added as parties by defendants under Federal Rule 14(a); and claims by third-party defendants under Rule 14(a)—assuming such claims satisfy Article III's "case" requirement of relatedness. Section 1367(a) is also consistent with prior case law in *excluding* permissive counter-claims under Federal Rule 13(b) from the scope of supplemental jurisdiction.

Subsection (a) also clarifies prior case law in certain important respects and resolves "anomalies" that existed under the former doctrine of ancillary jurisdiction. Subsection (a) encompasses within the broad scope of supplemental jurisdiction all "claims that involve the joinder or intervention of additional parties"—regardless of whether the absentee party would qualify as a necessary or indispensable party under Federal Rule 19 or would seek to intervene (either permissively or as of right) under Federal Rule 24. In addition, notwithstanding Federal Rule 14(a), subsection (a) encompasses any type of claim by a defendant against a third-party defendant, as long as the claim is sufficiently related to the main action to form part of a constitutional "case" under Article III.

Despite the numerous ways in which it codifies and clarifies prior case law, § 1367 also both expands and restricts the "pre-*Finley* understanding" of supplemental jurisdiction. Although subsection (a) does restore pendent-party jurisdiction, which *Finley* had effectively abolished, it does so in a way that expands prior case law. Prior to *Finley*, the Supreme Court in *Aldinger v. Howard* held that "implied" negations of jurisdiction over pendent parties were sufficient to prevent federal courts from deciding claims against such parties. Under § 1367(a), however, a negation of supplemental jurisdiction (including pendent-party jurisdiction) must be "expressly provided" by federal statute. Moreover, the broad wording of subsection (a) also encompasses the concept of pendent-*plaintiff* jurisdiction, which was the subject of much debate in the federal circuits prior to *Finley*.

Subsection (a) is also significant in that it extends the scope of supplemental jurisdiction to the limits of Article III of the Federal Constitution. Thus, as long as the supplemental state-law claim is sufficiently related to the original federal action so as to be part of the same constitutional "case" under Article III, then the federal district court will have the power to exercise jurisdiction over that supplemental claim. Importantly, in enacting § 1367, Congress did not attempt to define the boundaries of Article III, but, instead, left that task to the federal judiciary.

The Supreme Court's analysis in *Gibbs* of the nexus required to satisfy Article III will, therefore, be of considerable importance to the federal practitioner who wishes to assert supplemental state-law claims.

Subsection (b) of § 1367 lies in sharp contrast to subsection (a) and its expansion and clarification of prior case law. Subsection (b) significantly contracts a plaintiff's use of supplemental jurisdiction in the context actions based "solely" on 28 U.S.C. § 1332 (*i.e.*, diversity and alienage actions). Under § 1367(b), "plaintiffs" are barred from using supplemental jurisdiction to undermine the complete-diversity and jurisdictional-amount requirements of 28 U.S.C. § 1332. In essence, § 1367(b) implements the underlying rationale of the Supreme Court's earlier decisions in *Kroger* and *Zahn*: One plaintiff may not ride into federal court on another's coattails.

It is important to note, however, the restrictions on the use of supplemental jurisdiction found in subsection (b) are limited in scope. That subsection affects only *plaintiffs'* claims in actions founded *solely* on 28 U.S.C. § 1332 and only "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." Subsection (b) of § 1367 has no affect on (1) actions founded on grants of original federal jurisdiction other than diversity of citizenship, (2) diversity class actions, (3) claims by defendants or persons joined as defendants, or (4) compulsory counterclaims by plaintiffs in response to a Rule 14(a) claim by a third-party defendant.

In subsection (c) of § 1367, Congress codified an important and sharp distinction drawn by the Supreme Court in *Gibbs* between (1) the power of federal courts to hear state claims that had no independent basis of federal jurisdiction and (2) the federal courts' discretionary exercise of that power. Just because a federal court *could* exercise pendent jurisdiction did not mean that the court *should* do so. The values of judicial economy, convenience, fairness, and comity analyzed in *Gibbs* also underscore Congress's enactment of subsection (c) of § 1367.

Under subsection (c), federal district court "may" decline to exercise jurisdiction over a supplemental state-law claim—but only in limited circumstances, namely when (1) the claim raises a novel or complex issue of State law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. Thus, like the previous case-law doctrines of pendent and ancillary jurisdiction, supplemental jurisdiction is a doctrine of discretion, not of right.

No statute as ambitious as the federal "supplemental jurisdiction" statute can resolve every unanswered question or provide for every possible contingency. Not surprisingly, five years after § 1367 was enacted in December 1990, several unresolved issues related to the use of supplemental jurisdiction still remain. For example, do counterclaims under Federal Rule 13(e) and set-off claims fall within the broad grant of supplemental jurisdiction found in subsection (a)? Do subsection (b)'s limitations on the use of supplemental jurisdiction in actions founded "solely" on 28 U.S.C. § 1332 apply in cases removed from state court under 28 U.S.C. § 1441? Does subsection (b) apply to claims against persons made parties under Federal Rule 13(h) or to claims brought by Rule 20 plaintiffs? Is subsection (d)'s tolling provision constitutional?

Federal courts have just begun to address some of these unresolved issues and will be forced to wrestle with them during the coming years. Hopefully, this article will serve as a useful guide for the federal practitioner who is faced with one of the many unanswered questions left after the enactment of § 1367 or who simply wishes to know how the federal "supplemental jurisdiction" statute has expanded and contracted this important area of federal jurisdiction.

