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Comment on the Supplemental- Jurisdiction Statute: 28 U.S.C. § 1367

ARTHUR D. WOLF*

INTRODUCTION

In its short history, the supplemental-jurisdiction statute of 1990, 28 U.S.C. § 1367, has generated more commentary than perhaps any other jurisdictional section. Together, § 1331, which traces its history to the Judiciary Act of 1875, and § 1332, which dates back to the Judiciary Act of 1789, did not undoubtedly promote more examination in their first eight years of existence. One might speculate why § 1367 has been the focus of so much commentary, largely critical: critical of the speed with which § 1367 was enacted, critical of the narrow range of persons involved in its drafting, critical of its scope, and critical of particular subsections, such as § 1367(b), which limits the use of supplemental jurisdiction in diversity and alienage controversies. While the scholarly literature has served the useful purpose of targeting areas of the statute that may need to be reconsidered, it has, to some degree, obscured the many benefits the statute has wrought. This Comment has three goals: (1) to examine the benefits achieved through the enactment of § 1367, (2) to explore the genuine policy issues that underlie the critical commentary, and (3) to suggest, in general terms, subsections that might benefit from amendment.

I. BENEFITS OF § 1367

Congress enacted the supplemental-jurisdiction statute, it should be recalled, in the wake of *Finley v. United States*¹ and the Report of the Federal Courts Study Committee,² composed of a highly regarded panel of judges, law professors, and practitioners appointed to examine various aspects of the federal judiciary. In the wake of *Finley*, the Committee and others³ were concerned that the Court would soon jettison supplemental jurisdiction altogether because Justice Scalia's

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Professor Wolf expresses his deep appreciation to Professor John Egnal, a friend and fellow traveler to many arcane corners of federal jurisdiction, for his helpful insights and comments on earlier drafts.

1. 490 U.S. 545 (1989).

2. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter STUDY COMMITTEE REPORT].

3. See, e.g., Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247.

majority opinion contained some ominous sounds.⁴ After all, the federal courts had, without guidance or direction from Congress, created supplemental jurisdiction (formerly pendent and ancillary jurisdictions) out of the “case” or “controversy” language of Article III.⁵

Both before and after its landmark decision in *United Mine Workers v. Gibbs*,⁶ the Supreme Court referred to the doctrine as judicially created.⁷ For example, in *Murphy v. John Hofman Co.*,⁸ a pre-*Gibbs* decision involving ancillary jurisdiction, as it was then called, the Court stated: “In the courts of the United States this ancillary jurisdiction may be exercised, *though it is not authorized by any statute.*”⁹ Similarly, in *Pennhurst State School & Hospital v. Halderman*,¹⁰ a post-*Gibbs* decision, the Court noted that “pendent jurisdiction is a judge-made doctrine inferred from the general language of Art. III.”¹¹ Later in the same opinion, Justice Powell observed that “pendent jurisdiction is a judge-made doctrine of expediency and efficiency derived from the general Art. III language conferring power to hear all ‘cases’ arising under federal law or between diverse parties.”¹²

The Supreme Court created supplemental jurisdiction out of the general language of Article III in the face of its holdings, statements, and dicta that Congress decides on the scope of federal court jurisdiction. In judicially creating supplemental jurisdiction prior to the 1990 statute by placing it on Article III grounds, the Court altered the usual jurisdictional analysis it has articulated

4. See *Finley*, 490 U.S. at 549. In *Finley*, the Court sought to reconstruct the judicially created doctrine of supplemental jurisdiction upon a statutory footing. The Court foreshadowed this change of direction in *Aldinger v. Howard*, 427 U.S. 1 (1976), and *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

5. U.S. CONST. art. III, § 2.

6. 383 U.S. 715 (1966).

7. See generally Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986) (exploring the concept of judicially created rules of jurisdiction in a broader context); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (same).

8. 211 U.S. 562 (1909). The Court’s holding in *Murphy* derived from its earlier decision in *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1861).

9. *Murphy*, 211 U.S. at 569 (emphasis added). The newly enacted § 1367 combines “ancillary jurisdiction” with “pendent jurisdiction” to form “supplemental jurisdiction.” 28 U.S.C. § 1367 (1994).

10. 465 U.S. 89 (1984).

11. *Id.* at 117.

12. *Id.* at 120 (citing *Hagens v. Lavine*, 415 U.S. 528, 545 (1974)); see also *Gibbs*, 383 U.S. at 725. In relying on “the general Article III language” as the basis for supplemental jurisdiction, the Court has not drawn any distinction between “cases” and “controversies,” the critical words in Article III. Arguably “cases” could have a narrower meaning than “controversies” since “cases” are tied to federal sources of law, while “controversies” refer to disputes involving designated parties. Thus, an Article III “case” arguably is only as broad as the federal claim or question (including the facts or transaction upon which it is based) that confers the jurisdiction, while an Article III “controversy” could include the whole range of claims and questions that are in dispute between designated parties that determine jurisdiction.

through the years¹³ in two significant respects. First, the Court has insisted that federal courts address non-constitutional state or federal grounds of decision before addressing constitutional questions.¹⁴ In *Burton v. United States*,¹⁵ the Court stated that “[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”¹⁶ If the jurisdictional statute, say, in *Gibbs*¹⁷ (the Taft-Hartley Act) did not authorize supplemental jurisdiction, then the Court should not have addressed the scope of a constitutional “case” in Article III. With the possible exception of *Finley*,¹⁸ the Court has never addressed this statutory question in supplemental-jurisdiction cases.

Second, the Court has long stated that the jurisdiction of the federal courts, including the appellate jurisdiction of the Supreme Court, is governed by statute.¹⁹ In 1799, the Court stated that “the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress . . . [and] congress is not bound . . . to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.”²⁰ Almost fifty years later, the Court iterated that federal courts “must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them.”²¹ In *Gibbs*, the Supreme Court ignored the statutory basis for jurisdiction in the federal courts and moved directly to the scope of an Article III “case.”

Consequently, the enactment of the supplemental-jurisdiction statute in 1990 settled the question whether the courts would continue to define the scope of supplemental jurisdiction or abandon it altogether. By codifying the doctrine in

13. See, e.g., *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). The *Osborn* “two-step” has governed jurisdictional analysis for 175 years. First, the court should determine whether the jurisdictional statute authorizes the federal court to entertain the claim, suit, bill, or civil action in dispute. Second, if so, the court should then determine whether the statute is constitutional.

14. See, e.g., *Hagans v. Lavine*, 415 U.S. 528 (1974) (addressing federal statutory ground); *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909) (discussing state law ground). But see *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (addressing constitutional questions before addressing the statutory issue).

15. 196 U.S. 283 (1905).

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

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

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

19. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (discussing lower federal court jurisdiction); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (addressing the Supreme Court’s appellate jurisdiction). For the view that the Constitution limits the power of Congress to control federal court jurisdiction, see generally Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). For the status of the current debate between these two positions, see generally RICHARD H. FALLON ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 358-87 (4th ed. 1996).

20. *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799) (parenthetical in original).

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

§ 1367, Congress enabled the federal courts to continue entertaining a variety of claims (i.e., claims, counter-claims, cross-claims, and third-party claims) that do not have an independent basis of jurisdiction. While the original proposal sought to cabin that authority short of the constitutional limits of Article III and to define its scope, the final version of the statute left open both the scope and the constitutional limits of supplemental jurisdiction.

Thus, with the enactment of the statute, Congress achieved several important objectives. First, by codifying supplemental jurisdiction, it harmonized the doctrine with all other jurisdictional grants that are in statutory form.²² Second, by defining supplemental jurisdiction in Article III terms, Congress signaled a desire to extend the doctrine as far as the Constitution allows. Third, by giving the courts the power to define further the scope of the jurisdiction, Congress continued the "common law" or more accurately the "judge-made law" tradition of supplemental jurisdiction.²³ Fourth, Congress altered the approach of *Gibbs* that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."²⁴ If a litigant satisfies the criteria for jurisdiction under subsection (a), then the district court "shall have supplemental jurisdiction over all other claims . . ."²⁵ Thus, Congress converted a doctrine of judicial discretion to a claim of right, even though it retained some discretion, in § 1367(c), for the courts to dismiss supplemental claims.

II. POLICY ISSUES

While the statute admirably advances these important objectives, it does raise a variety of policy issues that should be addressed in revisiting the statute. Professor John Oakley's draft of a revised statute for the American Law Institute²⁶ ("ALI") and the articles in this Journal go far in the direction of identifying and proposing solutions to the perceived problems in current law. Although the discussion here may overlap the other contributions to this Symposium, it will also seek to move off in different directions. Four areas of policy need to be addressed as the statute is evaluated for amendment: (1) the scope of discretion § 1367 gives to federal judges, (2) the statutory treatment of diversity cases, (3) the degree to which § 1367 supersedes all other grants of supplemental

22. See 28 U.S.C. §§ 1330-1368 (1994).

23. In this sense, the statute looks like section 301(a) of the Labor Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. § 185(a) (1994), as the Supreme Court read it in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). In that decision, the Court interpreted what appeared to be a jurisdiction-granting section of Taft-Hartley to confer upon the federal courts the authority to develop a federal common law governing collective bargaining agreements. See generally Donald Doernberg, *Juridical Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759; Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263 (1992); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989).

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

25. 28 U.S.C. § 1367(a) (emphasis added).

26. AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, COUNCIL DRAFT NO. 2 (1997) [hereinafter C.D. NO. 2]. The ALI approved this draft in May 1998.

jurisdiction, and (4) the impact of the statute on the *Burford*, *Pullman*, and *Colorado River* abstention doctrines.

A. Judicial Discretion

First, § 1367 gives the federal courts much discretion in the use of supplemental jurisdiction. Such discretion appears in several critical areas of the statute. For example, the fundamental scope of the jurisdiction is within the discretion of the courts. Subsection (a) of the statute assigns to the courts the question whether the supplemental claim is “so related to claims in the [existing] action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”²⁷ The legislative history indicates that these words are designed to codify the ruling in *Gibbs*,²⁸ thus leaving to the courts the power to decide the scope of Article III, and, thus the scope of the statute. The original bill had a more narrow formulation, phrased in terms of the “same transaction or occurrence or series of transactions or occurrences,”²⁹ the traditional and well-worn language of the federal rules.³⁰

Second, the statute gives the federal courts the discretion to dismiss supplemental claims even though they are within the scope of the statute. Subsection (c) identifies four grounds for such discretionary dismissals: (1) when the supplemental claim involves a “novel or complex” question rooted in state law,³¹ (2) when the supplemental claim “substantially predominates” over the jurisdiction-conferring claim,³² (3) when the district court has dismissed the jurisdiction-conferring claim,³³ and (4) in “exceptional circumstances,” when the court finds “other compelling reasons for declining jurisdiction.”³⁴

While *Gibbs* suggests that, if at least some of the above criteria are met, the supplemental claims “should be dismissed”³⁵ or “may fairly be dismissed”³⁶ or “jurisdiction should ordinarily be refused,”³⁷ the statute uses “may” which seems to expand the discretion of the court to retain rather than dismiss the supplemental claim. On the other hand, *Gibbs* could be read as an open-ended invitation for courts to exercise their power to dismiss supplemental claims whenever appropriate so that the statute might be viewed as narrowing such discretion since it allows such exercises in only four limited circumstances. Further, the source for

27. 28 U.S.C. § 1367(a).

28. *Gibbs*, 383 U.S. at 715.

29. Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1, 55 (1992) (the proposed § 1367(a)(1)(B)).

30. See, e.g., FED. R. CIV. P. 10(b), 13(a), 13(b), 13(g), 14(a), 14(c), 20(a); see also 28 U.S.C. §§ 1330(c), 1607(b), 2415(f), 3012 (1994) (statutory use of the phrase “transaction or occurrence”).

31. 28 U.S.C. § 1367(c)(1). This provision could be read to impact the application of the *Burford*, *Pullman*, and *Colorado River* abstention doctrines. See *infra* pp. 236-37.

32. 28 U.S.C. § 1367(c)(2).

33. See *id.* § 1367(c)(3).

34. *Id.* § 1367(c)(4).

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

36. *Id.* at 727.

37. *Id.*

the exercise of discretion based on a “novel or complex” issue of state law is not clear from the legislative history. *Gibbs*, which the statute principally codifies, did not address this limitation on the exercise of supplemental jurisdiction.

Third, the restriction on a supplemental claim that “substantially predominates” derives directly from *Gibbs*. But that limit was shaky from the start. Why should it matter whether the supplemental claim substantially predominates over the jurisdiction-conferring claim? If it is properly in federal court, then the plaintiff should be entitled to litigate it there together with the jurisdiction-conferring claim. For example, in *Merrell Dow Pharmaceuticals Inc. v. Thompson*,³⁸ the plaintiffs alleged six claims, only one of which could have conferred jurisdiction on the federal court on removal.³⁹ Had the Supreme Court accepted the lower court’s reading of *Smith v. Kansas City Title & Trust Co.*,⁴⁰ the federal district court would have had “arising under” jurisdiction over one of the plaintiffs’ six claims. Despite the important federal question that one jurisdiction-conferring claim raised, the federal court would have dismissed the other five claims because they “substantially predominate[d]” over the jurisdiction-conferring claim under *Gibbs* or under subsection (c)(2) of the statute.

Yet the potential federal questions in *Merrell Dow* were quite important: whether the Federal Food, Drug, and Cosmetics Act and its implementing regulations provided implied rights of action for injured parties, and whether a state claim that incorporates an essential federal element “arises under” federal law. Had the plaintiffs in *Merrell Dow* prevailed on either of these questions (only the second was contested), the district court would have dismissed the remaining five counts, compelling the plaintiffs to dismiss the federal claim and refile in state court (or litigate the federal claim in state court on remand).

In addition, diversity cases present particularly difficult circumstances for the exercise of subsection (c)(2) discretion since all the claims in the “controversy” will be state-based. Thus, the reasoning based on federalism that guided the *Gibbs* court in formulating this limitation (as well as the other restrictions) for federal question cases has no place in the analysis of civil actions based on diversity because the jurisdictional grant assumes the litigation of state claims in federal court. On the other hand, if the basis for diversity jurisdiction is the apprehended discrimination against non-residents, then supplemental claims between citizens of the forum state would appropriately be subject to subsection (c)(2) dismissal. But the statute leaves the drawing of these lines to the discretion of the courts, unguided by the statute or its legislative history.

The subsection (c)(2) limitation seems, in effect, to readopt the approach to federal court jurisdiction taken in the Judiciary Act of 1875,⁴¹ when Congress first permanently provided for general federal-question jurisdiction. That statute authorized the federal trial courts to dismiss an original suit or remand a removed

38. 478 U.S. 804 (1986).

39. As a citizen of Ohio, the forum state, Merrell Dow could not remove the action because of the “in-state resident” provision in 28 U.S.C. § 1441(b) (1994), although the “alien” plaintiffs could have commenced the civil action in the district court under 28 U.S.C. § 1332(a)(2) (1994).

40. 255 U.S. 180 (1921).

41. Ch. 137, 18 Stat. 470 (1875).

suit to state court if “it shall appear to the satisfaction of said [federal] court, at any time after such suit has been brought or removed thereto, that such suit does not *really and substantially* involve a dispute or controversy properly within the jurisdiction of said [federal] court.”⁴² The *Gibbs* discretionary approach, partly codified in § 1367(c), in essence reinstates the approach of the 1875 statute by giving the federal courts the discretion to dismiss the supplemental claims if they substantially predominate, which is another way of saying that the civil action “does not really and substantially involve a dispute or controversy properly” within the court’s jurisdiction.

Fourth, the statute gives the judges discretion to dismiss supplemental claims when the court has dismissed the jurisdiction-conferring claim.⁴³ Unfortunately neither the statute nor the legislative history provides any guidelines on the exercise of this discretion. Of course, the decisional law has developed some standards to determine the appropriate occasions for exercising this discretion, which the statute or legislative history might well have adopted (or could in the future codify). For example, some courts will assess the stage at which the jurisdiction-conferring claim is dismissed,⁴⁴ including if discovery has occurred, motions for summary judgment denied, pre-trial conferences had, and other matters relating to the point in the proceedings at which the court dismissed the jurisdiction-conferring claims. This approach is consistent with the *Gibbs* admonition that supplemental jurisdiction is designed to advance “considerations of judicial economy, convenience and fairness to litigants.”⁴⁵ But the statute continues to permit the judges to decide the occasions for the exercise of their discretion without much legislative guidance.

Fifth, the last category for discretionary dismissal of supplemental claims is a catch-all that gives the courts unguided discretion to dismiss supplemental claims in “extraordinary circumstances” when the court finds “other compelling reasons for declining jurisdiction.”⁴⁶ As introduced, H.R. 5381 did not have a catch-all provision.⁴⁷ The substitute that Judge Weis offered at the hearing on the bill contained a more generous catch-all which authorized dismissal of any supplemental claim when “there are other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants, for declining jurisdiction.”⁴⁸ When Alan Morrison of the Nader Organization, Public Citizens, Inc., objected to the breadth of the Weis catch-all, the subcommittee developed the narrower formulation of current law.⁴⁹

42. *Id.* at 472 (emphasis added). In 1948 Congress removed this language from the statute “as unnecessary” when it revised and recodified title 28 (the Judicial Code). PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 837 (2d ed. 1973) (quoting from the legislative history of the 1948 recodification of Title 28).

43. See 28 U.S.C. § 1367(c)(3) (1994).

44. See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966).

45. *Id.* at 726.

46. 28 U.S.C. § 1367(c)(4).

47. See Wolf, *supra* note 29, at 55-56.

48. *Id.* at 57; see also *id.* at 58 (Rowe-Burbank-Mengler Proposal).

49. Conversation with Charles Geyh, Counsel for the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice (Nov. 1990).

Finally, stepping back to evaluate the judicial discretion given in subsection (c), what emerges is an extensive power to dismiss supplemental claims that clearly are within subsection (a). When coupled with the broad authority conferred upon the courts under subsection (a) to define the reach of Article III, the statute is really an expansive delegation of congressional power to determine the scope of the supplemental jurisdiction of the federal courts. Dissenting in *Cannon v. University of Chicago*,⁵⁰ Justice Powell observed: "Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts."⁵¹ If so, the delegation in § 1367 may well be unconstitutional. On the other hand, if § 1367 is viewed as a congressional definition of jurisdiction, with the courts simply performing their ordinary interpretive function, the statute is perfectly permissible. Alternatively, assuming Congress may delegate to the judiciary its legislative power to determine the jurisdiction of the federal courts, the question arises whether Congress has properly done so.⁵²

B. Diversity Issue

The current statute treats supplemental claims in diversity controversies differently than it treats supplemental claims in all other civil actions. More precisely, if a civil action is based "solely" on § 1332, subsection (b) of § 1367 restricts the plaintiff's opportunity to assert supplemental claims.⁵³ Congress could have legislated otherwise since it is not a matter of constitutional compulsion. For example, it could have given "diversity" plaintiffs the same opportunities to assert supplemental claims as it gave "federal question" plaintiffs. Congress chose to impose the restrictions because it wanted to codify the pre-*Finley* case law. It purported to "implement the principal rationale of *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978)"⁵⁴ in adopting subsection (b), which imposed limits on the diversity plaintiff's use of supplemental jurisdiction. Since the 1990 supplemental-jurisdiction bill advanced only because it met the House Judiciary Committee's test of "non-controversial,"⁵⁵ the drafters of the bill sought to reflect, as they viewed it, the current state of the law in 1990. Because of these limitations on the legislative process, the drafters' necessarily took a somewhat conservative approach, seeking simply to reflect the decisional law.

Despite the drafters' understandable caution in formulating § 1367(b), the critics of the supplemental-jurisdictional statute have focused much of their

50. 441 U.S. 677, 730-731 (1979).

51. *Id.* at 730 (Powell, J., dissenting).

52. *See* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (Congress may assign Article III "judicial power" to a non-Article III tribunal.). *See generally* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Congress may not excessively delegate its "legislative power" to the executive branch.).

53. 28 U.S.C. § 1367(b) (1994).

54. H.R. REP. NO. 101-734, at 29 n.16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875.

55. *See* *Wolf*, *supra* note 29, at 17.

attacks on it.⁵⁶ The criticism has become something of a cottage industry. It has ranged from attacks upon the good faith of the drafters to bad policy choices through misreading of precedents and sloppy drafting. Considering the circumstances under which the supplemental-jurisdiction section of the 1990 bill advanced and the press of time in which that occurred, it is remarkable that subsection (b), on the whole, does embrace “the principal rationale” of *Kroger*, at least one could reasonably so assert.⁵⁷

To be sure, the courts have struggled with aspects of subsection (b), especially when its terms conflict with its legislative history. For example, in *In re Abbott Laboratories*,⁵⁸ the Fifth Circuit Court of Appeals held that the statute overrules the holding in *Zahn v. International Paper Co.*⁵⁹ that each member of a class must satisfy the amount-in-controversy requirement, even though the legislative history states that *Zahn* is preserved.⁶⁰ Both the Fifth Circuit and the Seventh Circuit have interpreted § 1367(b) to allow a co-plaintiff to assert a claim less than \$75,000 against a diverse defendant even though *Zahn* prohibited such claims. But an apparent conflict between the language of a statute and the intent of the drafters as otherwise revealed is not new. For example, the Supreme Court addressed that issue many years ago in *Church of the Holy Trinity v. United States*⁶¹ and more recently in *Houston v. Lack*⁶² and *United Steelworkers v. Weber*.⁶³ In some cases, the courts have decided on the basis of the “plain meaning” of the statute, while in others they have decided on the basis of the otherwise discovered intent of the drafters. Although the legislature should avoid such apparent or real conflict, the conflict should be seen as an occasional by-product of the legislative process. After all, courts sometimes write decisions that have conflicting and inconsistent language.

Both the critics and defenders of subsection (b), however, need to move beyond the debate over origin and text to focus on the central policy issue: whether plaintiffs in civil actions based “solely” on § 1332 should be treated differently from other plaintiffs, even when they are in a defensive posture (such as responding to counterclaims or third-party claims). Surely if the plaintiff commences the civil action in state court and the defendant removes the action

56. See, e.g., Thomas C. Arthur & Richard D. Freer, *Grasping At Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991).

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

58. 51 F.3d 524 (5th Cir. 1995) (class action); accord *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996) (nonclass action).

59. 414 U.S. 291 (1973).

60. H.R. REP. NO. 101-734, at 29 & n.17 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6875.

61. 143 U.S. 457 (1892).

62. 487 U.S. 266, 272-73 (1988).

63. 443 U.S. 193, 200-08 (1979).

into federal court, the plaintiff should not be penalized by the removal.⁶⁴ Although the 1990 amendment to § 1441(c) purports to address part of this issue, it apparently has not succeeded in resolving the removal problems.⁶⁵

In the past, bills that would have abolished diversity jurisdiction have not become public law. Some have even passed the House of Representatives after full debate only to fail in the Senate after full consideration. One could read this legislative history as an expression of congressional intent not to treat diversity plaintiffs differently. Thus to restrict diversity jurisdiction indirectly through the supplemental-jurisdiction statute may simply reflect the necessary haste in which Congress enacted § 1367. As noted earlier, that Congress should take this restrictive approach in the truncated and abbreviated consideration of the supplemental-jurisdiction provision in the 1990 bill is understandable. Congress now needs, however, to reconsider this aspect of the statute in light of its past indisposition not to restrict severely the exercise of diversity jurisdiction.

Some commentators have noted one area of "obvious" need for change: where the original plaintiff is in a "defensive" posture in responding to a defendant's counterclaim or a third-party defendant's claim. Making that change, however, does not address the more fundamental point that diversity plaintiffs should have equal access to supplemental jurisdiction so long as Congress retains § 1332. While it achieves some fairness in the application of supplemental jurisdiction in § 1332 controversies, such reform falls far short of the need to address the asserted distortion § 1367(b) effects with regard to § 1332.

Revisiting § 1367(b) should also lead Congress to reexamine the complete diversity rule of *Strawbridge v. Curtiss*,⁶⁶ an exploration it has infrequently undertaken. *Strawbridge* has had its detractors. Chief Justice Marshall, who authored the cryptic opinion, "repeatedly expressed regret"⁶⁷ over the decision. In 1844, the Supreme Court thought Congress had enacted a statute in 1839 "exclusively with an intent to rid the courts of the decision."⁶⁸ Despite the protests, *Strawbridge* has persisted through the years, perhaps because it has

64. Professor Steinman, in this Symposium and elsewhere, has addressed the application of § 1367 to removed cases. See, e.g., Joan Steinman, *Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress' Handiwork*, 35 ARIZ. L. REV. 305 (1993). In addition, the original supplemental-jurisdiction bill expressly covered removed cases. See Wolf, *supra* note 29, at 55.

65. See Wolf, *supra* note 29, at 35-38.

66. 7 U.S. (3 Cranch) 267 (1806).

67. *Louisville, Cincinnati, and Charleston R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844).

68. *Id.* at 556. Professor Hartnett has taken a more narrow view of the Court's statements in *Letson* regarding *Strawbridge*, asserting that neither Chief Justice Marshall's suggestions nor the 1839 statute was directed at the complete diversity rule. See Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1111 n.60 (1995). Dicta in cases decided after *Letson* seem to support Professor Hartnett's observations. See *Clearwater v. Meredith*, 62 U.S. (21 How.) 489, 493 (1859); *Northern Ind. R.R. v. Michigan Cent. R.R.*, 56 U.S. (15 How.) 233, 244 (1854).

become a part of the diversity statute.⁶⁹ Since the *Strawbridge* decision in 1806, Congress has codified and recodified the diversity statute on three occasions, and has amended it many other times. In other contexts, the Supreme Court has held that Congress is presumed to adopt the then current judicial interpretation of a statute when Congress reenacts or codifies it.⁷⁰ An in-depth, free-wheeling, and robust debate over the continuing vitality of *Strawbridge* is long overdue.

Although the legislative history of § 1367 makes no reference to *Strawbridge*,⁷¹ the expressed intent to codify the “principal rationale” of *Kroger*, presumably the rule of complete diversity, would seem implicitly to accept it.⁷² Nonetheless, the text of § 1367 could be read to overrule *Strawbridge*, as courts have read it to overrule *Zahn*. Thus, assuming that two plaintiffs commence a civil action against a defendant, who is diverse only from one of the plaintiffs, the nondiverse plaintiff could, by invoking § 1367(a), assert a supplemental claim against the nondiverse defendant. Subsection (b) would be inapplicable on its face because the nondiverse co-plaintiff is not asserting a claim “against persons made parties”⁷³ under a variety of the Federal Rules of Civil Procedure.

The next issue would be whether the predicate language of subsection (a) would bar the claim because of the operation of § 1332. In other words, would or should a court read the “[e]xcept . . . as expressly provided otherwise by Federal statute”⁷⁴ to bar the claim? Since subsection (b) expressly covers actions based on § 1332, the nondiverse co-plaintiff would argue that, if its claim is not barred by the specific text of subsection (b), which is designed for § 1332 actions, then it should not be barred by the general language of exclusion in subsection (a).

C. Supersession

The third policy question that the current statute raises is whether it should state the rules for supplemental jurisdiction to the exclusion of all other statutory provisions. The original bill contained language designed to make § 1367 the exclusive source of supplemental jurisdiction, except when a federal statute “expressly provides otherwise.”⁷⁵ To effectuate the goal of exclusivity, however, Congress would have to amend or repeal all sections of the United States Code, such as 28 U.S.C. §§ 1334(b), 1338(b), and 1441(c) that authorize supplemental jurisdiction. It would not necessarily have to repeal all provisions that expressly limit it, such as 42 U.S.C. § 13981(e)(4), although concentrating all supplemental-jurisdiction provisions in § 1367 is a good idea. If all power to add

69. *But see* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In overruling the 96 year-old precedent of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), the *Erie* Court reinterpreted the Rules of Decision Act (RDA), although Congress had also codified and reenacted the RDA at least twice after the decision in *Swift*.

70. *See* *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983). *But see* *Erie*, 304 U.S. at 79-80; *Mengler*, *supra* note 3, at 260-67 (rejecting this ratification or adoption theory).

71. *See, e.g.*, H.R. REP. NO. 101-734 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860.

72. *See id.* at 29 n.16, *reprinted in* 1990 U.S.C.C.A.N. at 6875.

73. 28 U.S.C. § 1367(b) (1994).

74. 28 U.S.C. § 1367(a).

75. *Wolf*, *supra* note 29, at 56 (proposed § 1367(h)).

supplemental claims were concentrated in one section of Title 28, the life of federal court judges and litigators would be eased considerably.

As discussed earlier, the current statute permits the continued use of judge-made law to define the parameters of supplemental jurisdiction. The statute does not eliminate the need for "federal common law."⁷⁶ The absence of clarity of the relationship between § 1367 and, say, § 1338(b) means that parties and courts will need to spend additional time resolving these ambiguities. Section 1338(b) authorizes plaintiffs asserting claims under the federal copyright, trademark, plant variety protection, or patent acts to assert supplemental claims based on "unfair competition."⁷⁷

Assume, for example, that a plaintiff, in a trademark action arising under the Lanham Trade-Mark Act,⁷⁸ wishes to assert a supplemental claim based on a state anti-dilution statute. Arguably that claim is not within § 1338(b) because it applies only to unfair competition claims. The anti-dilution claim might also not be within § 1367(a) because it excludes supplemental claims when "expressly provided otherwise by Federal statute,"⁷⁹ here § 1338(b). Of course, the "expressly provided otherwise" language could be read to require that the federal statute, claimed to limit the reach of § 1367(a), must specifically disclaim § 1367(a) as a basis for supplemental claims. For example, the Civil Rights Remedies for Gender-Motivated Violence Act expressly excludes supplemental jurisdiction "over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."⁸⁰ On the other hand, the "expressly provided otherwise" language of § 1367(a) could be read to mean that the other federal statute simply authorizes supplemental claims. If so, then the plaintiff's anti-dilution claim could fall into the lacuna between § 1338(b) and § 1367(a). To avoid problems such as these, § 1367 should be made the exclusive source in the United States Code for supplemental claims.

Although the Federal Courts Study Committee recommended the repeal of § 1441(c) of Title 28,⁸¹ the 1990 act only amended the subsection to restrict its application to supplemental claims when joined with "a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 . . ."⁸² It is thus unavailable to a defendant wishing to remove a diversity case. In such cases, § 1441(a) would govern the scope of removal, which implicates § 1367(a) because removal is tied to original jurisdiction of the district courts. The problem, of course, is that § 1367(b), which limits the scope of supplemental jurisdiction

76. See ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* ch. 6 (2d ed. 1994); CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 60 (5th ed. 1994). See generally commentators listed *supra* note 23.

77. 28 U.S.C. § 1338(b) (1994).

78. 15 U.S.C. §§ 1051-1127 (1994).

79. 28 U.S.C. § 1367(a).

80. 42 U.S.C. § 13981(e)(4) (1994).

81. STUDY COMMITTEE REPORT, *supra* note 2, pt. II, at 94-95. The Committee recommended the repeal of § 1441(c) so long as Congress retained the general diversity jurisdictional statute, 28 U.S.C. § 1332 (1994).

82. 28 U.S.C. § 1441(c) (1994).

in diversity cases, is tied to cases based “solely” on § 1332. A removed diversity action is not based solely on § 1332 since § 1441 authorizes the removal from state to federal court. Although the Supreme Court and lower federal courts have applied § 1367 to removed actions generally, perhaps they should not apply subsection (b), which is designed to inhibit diversity plaintiffs who choose the federal court, not those who are forced there by removal.

The matter devolves into the question of the role § 1441(c) plays for supplemental claims in removed cases. Because the Supreme Court has interpreted the “separate and independent” phrase to exclude state and federal claims based on “a single wrong,”⁸³ § 1441(c) has little practical utility in the world of supplemental claims. It could, however, be the Rule 18(a)⁸⁴ equivalent in removed cases when the jurisdiction-conferring claim is rooted in § 1331. That is, since plaintiffs, under Rule 18(a), can join in one action any claims they have against the defendant (even if unrelated, assuming proper subject matter jurisdiction), defendants could remove any case where the plaintiff has joined such unrelated claims in state court since such unrelated claims would qualify as “separate and independent” under § 1441(c). If *Gibbs* and now § 1367(a) describe the outer limits of a constitutional “case,” then § 1441(c) is unconstitutional because the unrelated claims would, by definition, not arise out of “a common nucleus of operative fact,”⁸⁵ the presumed constitutional *sine qua non*.

On the other hand, if the “ordinarily be expected to try”⁸⁶ language of *Gibbs* is an alternative formulation of the limits for a constitutional “case,” then § 1441(c), when interpreted to allow the removal of unrelated claims, would be constitutional so long as the plaintiff would be expected to try the claims in one lawsuit. It may be too that *Gibbs* does not define the outer limits of Article III, even when analyzed as proposing two alternative formulations for a constitutional “case.” If the *Gibbs* definitions fall short of the constitutional limits, then Congress has some latitude to allow unrelated, supplemental claims to be asserted in federal court either in an original action or on removal under § 1441 (a) and (c). Furthermore, *Gibbs* purported only to define a “case” under Article III; it said nothing about a “controversy,” although judges and scholars have generally assumed they mean the same thing.⁸⁷

The natural meaning of “controversy” is broader than “case,” just as “case” is broader than “suit”⁸⁸ (or even “civil action”). A “controversy” between two parties connotes a dispute having one or more facets to it, not one necessarily growing out of one incident. On the other hand, a “case” arising under federal law must have at least some of its roots in a federal source, and seems tied to a common event. If “controversy” is broader than “case,” then the 1990 amendment to § 1441(c) should have limited its reach to § 1332, not § 1331, civil actions.

83. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951).

84. FED. R. CIV. P. 18(a).

85. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

86. *Id.*

87. *But see supra* note 12; Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

88. *See Railroad Co. v. Mississippi*, 102 U.S. 135, 143 (1880) (Miller, J., dissenting).

D. Abstention

Section 1367 may have inadvertently affected the *Burford*,⁸⁹ *Pullman*,⁹⁰ and *Colorado River*⁹¹ abstention doctrines. The statute does not seem to affect *Younger*⁹² abstention. The legislative history of the statute does not make any reference to its possible impact on abstention. First, *Burford* abstention requires the federal court to dismiss federal and state claims that grow out of and are connected to a complex state regulatory scheme "of substantial public import."⁹³ Section 1367 appears to affect *Burford* abstention in two ways: subsection (c)(1) would give the court discretion to dismiss a "complex" state claim while *Burford* requires it; and § 1367 would appear to require the federal court to exercise jurisdiction over the jurisdiction-conferring federal claim unless the plaintiff takes a voluntary dismissal under subsection (d),⁹⁴ while *Burford* requires dismissal of the federal claim as well as the state claim.

Second, *Pullman* abstention authorizes a federal court to postpone decision on a "novel" question of state law, when joined with a federal constitutional claim. In such instances, the federal court directs the parties to secure an interpretation of state law from a state court; state certification procedures are frequently employed to obtain that interpretation.⁹⁵ Section 1367 seems to alter *Pullman* abstention in a fundamental way. Subsection (c)(1) authorizes the federal court to dismiss, not simply postpone entering judgment on, the "novel" state claim. Thus, under § 1367(c)(1), the federal court, in a *Pullman* abstention case, would never have the opportunity to enter judgment on the novel state claim when the court dismisses it prior to final judgment. This approach also infringes the Supreme Court's regular admonition that federal courts should not reach federal constitutional questions unless no other ground is available for decision.⁹⁶

Third, although *Colorado River* insists that abstention is the exception to the general rule that federal courts must exercise the jurisdiction Congress confers upon them, it nonetheless approved dismissal of a civil action the United States commenced in its own courts based on federal and state law. Under § 1367, the state law aspect of the Government's claims in a case like *Colorado River* could be dismissed either because it is "novel or complex"⁹⁷ or because it "substantially predominates"⁹⁸ over the federal aspects. In addition, courts could use the open-

89. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

90. *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

91. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

92. *Younger v. Harris*, 401 U.S. 37 (1971).

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

94. 28 U.S.C. § 1367 (1994).

95. See, e.g., S.J.C. RULE 1:03 Mass. (1998) (Uniform Certification of Questions of Law). See generally Beth A. Hardy, *Certification Before Facial Invalidation: A Return to Federalism*, 12 W. NEW ENG. L. REV. 217 (1990).

96. See, e.g., *Burton v. United States*, 196 U.S. 283, 295 (1904); *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 410 (1886).

97. 28 U.S.C. § 1367(c)(1).

98. *Id.* § 1367(c)(2).

ended authorization of dismissal of the supplemental claim in subsection (c)(4)⁹⁹ to reach the same result as in *Colorado River* in a much wider array of cases or controversies.

Furthermore, if one or more subparagraphs of subsection (c) are viewed as adopting or incorporating then current (1990) judicial interpretations of the abstention doctrine, then *Colorado River* dismissal could become the rule, not the exception as Justice Brennan contemplated.¹⁰⁰ Even though subsection (c) is designed for dismissal only of the supplemental claim, such dismissal will often lead to a voluntary dismissal of the federal claim under subsection (d) to permit litigation of all claims in one forum.

III. SUGGESTED REVISIONS FOR § 1367

The commentators in this Symposium and Professor Oakley's work for the American Law Institute ("ALI")¹⁰¹ have suggested a series of amendments for a revised supplemental-jurisdiction statute. One of Professor Oakley's innovations would be to define the jurisdiction in terms of a "claim" rather than a "civil action," a reform long overdue for all federal jurisdictional statutes. Without tracking what he and others have proposed here and elsewhere, this Comment offers a few suggestions for possible revision of § 1367.

First, the scope of supplemental jurisdiction, as defined in § 1367(a), needs to be clarified and made more specific. The Federal Courts Study Committee suggested that its scope be framed in the familiar words of the civil rules: the same transaction or occurrence. The original bill tracked this proposal very closely, and could be the basis for a revised statute. While this definition would fall short of the full reach of Article III, it would make clear that supplemental claims must be closely related to the jurisdiction-conferring claim in all cases or controversies. It surely should not be as broad as, say, Rule 18.

Second, judicial discretion under § 1367(c) to dismiss supplemental claims at any time should be eliminated altogether or severely restricted by a time bar. Dismissal of supplemental claims directly affects the invocation of original jurisdiction since a plaintiff whose supplemental claims are dismissed is under pressure to refile the entire action in state court, thus foregoing the right to litigate the jurisdiction-conferring claim in federal court. Needless to say, if the plaintiff is compelled to bring the jurisdiction-conferring claim in the federal court because of exclusive jurisdiction, then the dismissal of the supplemental claim requires litigation in two forums. Further, if a supplemental claim is "novel," the district court should use the well-worn mechanism of certifying the state law question to the highest state court for resolution, allowing the parties, if they choose, to return to federal court, as in *Pullman* abstention. Alternatively, subsection (c) dismissals should be subject to a time limitation, say, ninety days after the pleading asserting the supplemental claim is filed. The courts could dismiss supplemental claims within that time frame for the reasons set out in §

99. *Id.* § 1367(c)(4).

100. *But see In re Abbott Lab.*, 51 F.3d 524, 529 (5th Cir. 1995).

101. *See* C.D. NO. 2, *supra* note 26.

1367(c), but not thereafter. Such a time limitation on discretionary dismissals would reflect decisional law, such as *Gibbs*,¹⁰² where the Court allowed the entry of judgment solely on the state law claims after all the federal claims had been dismissed.

Third, diversity plaintiffs should be treated the same as other plaintiffs. If Congress wishes to restrict their access to the federal courts, it should not do so through the artificial device of limiting supplemental claims. While this author supports abolition of diversity jurisdiction altogether, with the possible exception of interpleader and mass tort litigation, diversity plaintiffs should not be disadvantaged unless Congress chooses to do so directly. In addition, alienage controversies should not automatically be lumped together with civil actions between citizens of different states.¹⁰³ The drafters of the Judiciary Act of 1789 may have viewed federal court jurisdiction over alienage disputes as "the single most important grant of national court jurisdiction"¹⁰⁴ authorized in the statute.

Fourth, with regard to supersession, Congress should clearly make § 1367 the exclusive authority for supplemental claims, whatever their source and however they entered the federal court. The scope of supplemental jurisdiction should not vary simply because a claim is rooted in a particular statute. To effectuate this proposal, Congress would need to repeal all other provisions in the United States Code which authorize supplemental jurisdiction, such as 28 U.S.C. §§ 1334(b), 1338(b), and 1441(c).

Fifth, Congress needs to study the impact of § 1367 on the *Burford*, *Pullman*, and *Colorado River* abstention doctrines, which it may have inadvertently affected in 1990. It should take account of that impact and determine whether the abstention doctrines should be affected by the supplemental-jurisdiction statute. Since these abstention doctrines are judicially created, like supplemental jurisdiction before the enactment of the 1990 statute, a congressional study of them would dovetail with a reexamination of § 1367.

IV. CONCLUSION

While the enactment of § 1367 has had many salutary effects and should be applauded, the passage of over eight years since its adoption may be an appropriate interval to reevaluate its scope and content. Although the legislative process in 1990 was necessarily truncated, it should not be so on this occasion. To be sure, the current statute has much to commend it; there is now time to make it better. The ALI should target early 1999 for submitting its proposal to Congress for revising § 1367. Any further adjustments the ALI may wish to make

102. *United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966).

103. See Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 4 (1996) (stating that historical evidence discloses that "alienage jurisdiction differs in salient respects from ordinary diversity jurisdiction").

104. Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 548 (1989); see also Wythe Holt, "To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

in its proposal can be undertaken during the give and take of the legislative process. After all, this time around the Judiciary Committees will undoubtedly hold as many hearings as are necessary to explore all the issues thoroughly. Too much delay beyond early 1999 may result in lost momentum for legislative change. To restate an old adage: the perfect should not be the enemy of the good.

Finally, the ALI and others should not prejudge the congressional outcome. Speaking from personal experience, it is always difficult to predict what proposal will or will not receive a warm welcome in the legislature. As scholars, teachers, and practitioners, we should offer the Congress our very best judgments on the scope and content of a supplemental-jurisdiction statute. Nothing less is expected. The members of Congress are perfectly capable of making any appropriate political judgment; that is their role, not ours.

