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RISK OF JURY CONFUSION AS THE GROUND FOR DISCRETIONARY DISMISSALS OF SUPPLEMENTAL CLAIMS

JOHN D. EGNAL*

INTRODUCTION

A damages claim based on federal law will often involve facts which give rise to related state law claims. Since the major expansion of the scope of a civil action occasioned by the adoption of the Federal Rules of Civil Procedure in 1938,¹ claimants have joined their related federal and non-federal² claims in a single lawsuit. Often such joinder results in a question of subject matter jurisdiction over the non-federal claims. In 1966, the Warren Court articulated a simple, welcoming approach to such jurisdiction in the landmark case of *United Mine Workers v. Gibbs*.³ In stark contrast, the Burger and Rehnquist Courts exhibited such hostility to these claims that in 1990, Congress settled the basic dispute by codifying the *Gibbs* approach.⁴ In 28 U.S.C. § 1367(a), using the term supplemental jurisdiction, Congress provided for subject matter jurisdiction over all claims that are “part of the same case or controversy.”⁵

Throughout this period from 1966 to 1990, a number of issues roiled in the wake of the *Gibbs* doctrine,⁶ which addressed the sub-

* B.A., Lehigh University; J.D., Temple University; LL.M., Temple University. I would like to thank my colleagues Bruce Miller and Art Wolf for their invaluable assistance.

1. FED. R. CIV. P.; REX R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and its Discontents*, 61 OKLA. L. REV. 275, 283 (2008).

2. Non-federal, as used in this article, refers to a claim which, standing alone, does not satisfy any ground of federal subject matter jurisdiction. Normally, such claims would be based on state law between citizens who are not diverse under 28 U.S.C. § 1332(a), or who are diverse as to claims for less than the jurisdictional amount.

3. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (finding that “state and federal claims must derive from a common nucleus of operative fact”).

4. See 28 U.S.C. § 1367(a) (2006).

5. *Id.*

6. See, e.g., Richard A. Matasar, *Rediscovering “One Constitutional Case”*: *Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL.

ject matter jurisdictional power of the federal trial courts over non-federal, or as they were then known, pendent claims. One such problem was whether the trial judge should entertain the claim—a question of the court’s discretion. Judge-made law addressed this question, identifying various grounds that would justify dismissal (even if the court had the power to entertain the claim).⁷ For example, dismissal of the state law claim was appropriate when the federal claim—the basis for federal jurisdiction—had been dismissed or was simply the tail on a state law dog, or when considerations of comity called for unsettled state law issues to be resolved by the state courts.⁸ The 1990 statute in § 1367(c) expressly codified these three grounds for discretionary dismissal.⁹

One judge-made ground for discretionary dismissal was not expressly codified—dismissal of a state law claim based solely on the ground that trial of both the state and federal claims in one lawsuit might lead to jury confusion.¹⁰ This article will address the unresolved question of the appropriateness of the use of this ground to dismiss a state law claim properly joined to a related federal claim.

I. GROUNDS FOR DISMISSAL OF SUPPLEMENTAL CLAIMS

Since Congress created the lower federal courts in 1789,¹¹ there has been a problem defining the scope of the federal judicial power in lawsuits involving the joinder of both federal and non-federal claims. While it is axiomatic that only Congress can define the scope of that power (within the bounds established by Article III of the Constitution), prior to 1990, Congress had, with few exceptions, left this problem to the federal courts.¹²

L. REV. 1399 (1983); Note, *The Concept of Law-Tied Pendent Jurisdiction*: Gibbs and Aldinger Reconsidered, 87 YALE L. J. 627 (1978); Michael Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968) (all providing varying interpretations of the Gibbs standard).

7. See *Williams v. United States*, 405 F.2d 951, 955 (9th Cir. 1967).

8. See 28 U.S.C.A. § 1367 official commentary at 765-66 (West 2006); Patel v. Penman, 103 F.3d 868, 877 (9th Cir. 1996) (state law claim predominated); Fable v. Braslow, 913 F.Supp. 145, 152 (E.D.N.Y. 1996), *aff’d* 111 F.3d 123 (2d Cir. 1997) (federal claims dismissed); Saturday Evening Post. Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1195 (7th Cir. 1987); Grogg v. General Motors Corp., 444 F.Supp. 1215, 1221 (S.D.N.Y. 1978); see also *infra* note 19.

9. See *infra* note 57 and accompanying text (text of 28 U.S.C. § 1367(c) (2006)).

10. See *id.*

11. Act of Sept. 24, 1789, 1 Stat. 73.

12. The most pertinent to this article is 28 U.S.C. § 1338(b) (2006), which provides for subject matter jurisdiction over “a claim of unfair competition when joined

Using the labels “pendent” and “ancillary,” the federal courts developed two overlapping judge-made doctrines to address the problem. The 1966 Supreme Court decision of *United Mine Workers v. Gibbs* became the leading case.¹³ *Gibbs* reflected a welcoming approach to the problem of jurisdictional power.¹⁴

In *Gibbs*, a federal claim (labor law) was joined with a state law claim (interference with contract).¹⁵ The Court first held that the district court had power (i.e. pendent subject matter jurisdiction) over the state law (non-federal) claim because the two claims,

with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.” The House Report stated:

Subsection (b) is added and is intended to avoid “piecemeal” litigation to enforce common-law and statutory copyright, patent, and trade-mark rights by specifically permitting such enforcement in a single civil action in the district court. While this is the rule under Federal decisions, this section would enact it as statutory authority. The problem is discussed at length in *Hurn v. Oursler* (1933, 53 S. Ct. 586, 289 U.S. 238, 77 L.Ed. 1148) and in *Musher Foundation v. Alba Trading Co.* (C.C.A. 1942, 127 F.2d 9) (majority and dissenting opinions).

Historical and Revision Notes, 28 U.S.C. § 1338 (2006).

In 28 U.S.C. § 1334(b) (2006), Congress provided that:

[N]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [Bankruptcy Code] or arising in or related to cases under title 11.

28 U.S.C. § 1334(b). And in 28 U.S.C. § 1334(c)(1) (2006), Congress provided that federal courts may “abstain[] from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.” Such language has been interpreted to recognize the power of federal courts to hear supplemental claims. See Patrick M. Birney & Michael R. Enright, *May a Bankruptcy Court Exercise Supplemental Jurisdiction Predicated on its Referred “Related To” Jurisdiction?*, 19 NORTON J. BANKR. L. & PRAC. 1, 3 (2010).

In 28 U.S.C. § 1441(c) (2006), Congress authorized the removal of “a separate and independent claim” when joined with a removable federal question claim. In the early days, fewer lawsuits raised the problem; the 1938 Federal Rules and post-WWII federal legislation increased dramatically the lawsuits containing the joinder of federal and non-federal claims.

13. The portion of *Gibbs* relevant to this discussion is Part I. *Gibbs* was written by Justice Brennan, Part I (which addressed the subject matter jurisdiction issue) was joined by all of the Justices who participated; Chief Justice Warren did not participate. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 715 (1966). See D.C. Common Cause v. District of Columbia, 858 F.2d 1, 10 (D.C. Cir. 1987) (noting that *Gibbs* is the leading case); *Hamilton v. Roth*, 624 F.2d 1204, 1211 (3d Cir. 1980) (noting that *Gibbs* is the leading case).

14. *Gibbs*, 383 U.S. at 724-25 (overturning the “unnecessarily grudging” approach of *Hurn v. Oursler*, 289 U.S. 238, 246 (1933)). For a detailed description of the early developments leading up to *Gibbs*, see Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1, 4-8 (1992).

15. *Gibbs*, 383 U.S. at 717-18. Since there was no diversity of citizenship, this was a non-federal claim.

together, “comprise[d] but one constitutional ‘case.’”¹⁶ In later cases, the Supreme Court differentiated between *Gibbs* (involving a pendent claim), and cases where the state law claim was asserted against one not subject to the federal claim (pendent party).¹⁷ The 1990 statute eliminated this distinction, making it clear in the final sentence of § 1367(a) that newly named supplemental jurisdiction was available in such a situation.¹⁸

But another problem remained. The *Gibbs* opinion, in dicta, elaborated on the “consistently . . . recognized” notion that the trial court had the discretion to dismiss the state law, or pendent claims,¹⁹ and held that the trial court had not abused that discretion by retaining jurisdiction after the federal claim had been dismissed on the merits.²⁰ As with its holding regarding jurisdictional power, *Gibbs*’s discussion of discretion reflected a welcoming approach to federal jurisdiction.

Gibbs mentioned grounds that would be appropriate to justify a discretionary dismissal.²¹ One was “the likelihood of jury confusion” if both the federal and state claims were tried to a single jury.²² Other possible grounds that might justify a discretionary dismissal were also mentioned, but Justice Brennan stressed the idea that pendent jurisdiction’s “justification lies in the considerations of judicial economy, convenience and fairness to litigants.”²³ The presence of these factors supported retention of the pendent claim, while their absence should incline a trial judge to dismiss.

16. *Id.* at 725.

17. *Aldinger v. Howard*, 427 U.S. 1, 14-15 (1976).

18. The text of § 1367(a) is:

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.*

28 U.S.C. § 1367 (a) (2006) (emphasis added).

19. *Gibbs*, 383 U.S. at 726. *Gibbs* cited *Mass. Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 501 (1st Cir. 1949) (upholding the dismissal, without prejudice, of a pendent state law claim in the wake of a dismissal, on the merits, of the federal question claim).

20. *Gibbs*, 383 U.S. at 728.

21. *Id.* at 726-27.

22. *Id.* at 727, 723, 725 n.13 (reflecting the welcoming approach to pendent jurisdiction, the Court offered ideas on retaining the entire case, such as the use of a special verdict, and stressed the importance of “try[ing] his . . . whole case at one time”) (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 320 (1927)).

23. *Id.* at 726.

The Court returned to the issue of discretion to dismiss a pendent claim in 1970 in *Rosado v. Wyman*,²⁴ where, like *Gibbs*, it upheld a trial judge's decision to retain jurisdiction over a pendent claim.²⁵ In *Rosado*, where the federal claim became moot, the Court reiterated the theme that retention of pendent claims should be the norm:

We are not willing to defeat the commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.²⁶

Rosado reiterated the broad, welcoming theme of *Gibbs*.²⁷ The next opinion, three years later, reflected the shift brought on by the Burger Court's²⁸ much less welcoming approach to federal plaintiffs in general and to civil rights plaintiffs in particular.²⁹ The case, *Moor v. County of Alameda*,³⁰ involved a pendent party

24. *Rosado v. Wyman*, 397 U.S. 397 (1970).

25. *Id.* at 401.

26. *Id.* at 405.

27. *Id.* at 404-08. *Rosado* was decided during the transition from the Warren Court (which ended in 1969 with the appointment of Chief Justice Burger) to the conservative Burger court, which was completed in 1971 with the appointments of Justices Powell and Rehnquist. JOHN DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 265 (2002) ("The Rehnquist choice, however, has redefined the Supreme Court, making it a politically conservative bastion within our governmental system."). While technically the Burger Court, *Rosado* was a 7-2 decision, written by Justice Harlan. *Rosado*, 397 U.S. at 399. The dissent, written by Justice Black, was joined by Chief Justice Burger. *Id.* at 430-35.

28. See generally DEAN, *supra* note 27 (describing the shift resulting from President Nixon's four appointments between 1969 and 1971).

29. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1962). With the language that follows, the Court redefined the qualified immunity defense to permit civil rights defendants to successfully move for summary judgment:

Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 817-18; see also Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 537 (2003) ("*Legal Services Corporation v. Velazquez* . . . is aberrational because a civil rights plaintiff won, which has rarely happened in recent years in the Rehnquist Court. A year ago, in October Term 2000, the Court ruled against civil rights claims in virtually every case in which they were presented.").

30. *Moor v. Cnty. of Alameda*, 411 U.S. 693, 713-18 (1973).

claim³¹ that was dismissed on two grounds. The trial judge in *Moor* dismissed pendent state law claims against the county, even though the related federal claims against individual defendants (county employees) were still pending.³² The trial judge pointed to: (1) the novel and complex state law issues raised by the pendent claims and (2) likelihood of jury confusion if the state and federal claims were tried to the same jury.³³ Both the Ninth Circuit and the Supreme Court upheld this dismissal.³⁴ Whether *Moor*'s language as to jury confusion was holding or dicta, federal trial judges had little doubt after *Moor* that they could dismiss a pendent state law claim on the ground there was a likelihood of jury confusion.³⁵

Three grounds other than jury confusion were mentioned in *Gibbs* as justification for discretionary dismissal: (1) the non-federal claim raises novel or complex issues of state law;³⁶ (2) the non-federal claim substantially predominates the lawsuit;³⁷ and (3) the federal claim has been dismissed before trial.³⁸ These three grounds for discretionary dismissal were adopted by Congress as § 1367(c)(1), (c)(2) and (c)(3).³⁹ In each of these situations, it is easy to see the justice in sending those claims to the state courts for

31. Unlike *Gibbs*, where the pendent claim was added against the union, a party already subject to federal jurisdiction, the pendent party claim in *Moor* was asserted against the county, which was not subject to federal jurisdiction. Compare *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966), with *Moor*, 411 U.S. at 710-17 (Part II).

32. *Moor*, 411 U.S. at 697.

33. *Id.* at 715-16.

34. *Id.* at 697, 717.

35. See Suzanna Sherry, *Logic Without Experience: The Problem of the Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 125-26 (2006) (describing "the virtually unfettered discretion" available to trial judges).

36. *Gibbs*, 383 US at 726 ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.").

37. *Id.* at 726-27 ("Similarly, 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.").

38. *Id.* at 726 ("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.").

39. 28 U.S.C. § 1367(c) (2006) ("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 . . ."). In addition, Congress provided in (c)(4) authority to dismiss a supplemental claim "in exceptional circumstances, [when] there are other compelling reasons for declining jurisdiction." *Id.*

resolution. This is easiest to see for the second and third grounds. In cases involving the third ground, state law claims are the only ones left in the lawsuit; in the case of the second ground, the lawsuit is predominantly based on state law. Thus, for these two grounds, there is no problem of a lawsuit divided between state and federal court. For the first ground (novel or complex state law) a discretionary dismissal of the state law claims does create the burdens of a divided lawsuit, a risk which *Gibbs* suggested should be balanced against the need for the “surer-footed” reading of state law.⁴⁰

Unlike the three grounds discussed in the previous paragraph, risk of jury confusion does not serve any obvious federal or national interest. Yet it can be easily invoked by a judge who wants to disfavor the civil rights plaintiff or favor the defense.⁴¹ Despite the techniques available to minimize the risk of confusion⁴² and the small likelihood that a civil lawsuit will actually be tried,⁴³ there was no doubt that the pre-1990 case law permitted a trial judge to dismiss a pendent claim simply by stating there was a risk of jury confusion if the case were tried to a single jury.⁴⁴ Many judges had made it a

40. An alternative to dismissal of a claim involving unsettled state law is certification of question(s) of law by the federal court to the highest court of the state. See *Arizona v. Official English v. Arizona*, 520 U.S. 43, 75 (1997) (“Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State’s highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.”); 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 4248 (3d ed. 2011); Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1306 (2003). The Wolf-Egnal proposal contained such a provision. Subsection (f) provided “[t]he district court, in determining the nature and scope of any non-federal claim based on state law, shall freely utilize any certification procedures available for the determination of state law.” Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings on H.R. 5381 and H.R. 3898 Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary 31, 101st Cong., 2d Sess. (1990) [hereinafter Hearings]. See *infra* notes 102-109 (discussing the Wolf-Egnal proposal).

41. 28 U.S.C. § 1367(a) (2006).

42. In *Gibbs*, Justice Brennan praised the trial judge for using a special verdict form to aid the jury’s resolution of multiple claims. *Gibbs*, 383 U.S. at 729; see also Matthew A. Reiber, *The Complexity of Complexity: an Empirical Study of Juror Competence in Civil Cases*, 78 U. CIN. L. REV. 929 (2010) (discussing methods for improving the ability of juries to deal with complex cases); Development in the Law, *The Jury’s Capacity to Decide Complex Civil Cases*, 110 HARV. L. REV. 1489 (1997) (same).

43. See *Government Survey Shows 97 Percent Of Civil Cases Settled*, PHOENIX BUSINESS JOURNAL (May 30, 2004), <http://www.bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html>; see also *infra* note 275.

44. See *infra* text accompanying notes 68-74.

routine practice to dismiss such claims⁴⁵ and as long as they stated a reason, they were rarely found to have abused their discretion.⁴⁶

As noted above, the new statute contained, in subsection (c), a provision authorizing the use of discretionary dismissal. If the supplemental claims were dismissed and the federal claims were still pending in federal court, the plaintiff would be faced with four choices—none good: (1) the costly and difficult option of appellate review.⁴⁷ If appellate review failed or was not attempted, the remaining choices are (2) file a state court lawsuit raising the state law claims and pursue lawsuits in both state and federal court,⁴⁸ (3) file a state court lawsuit raising the state law claims and abandon the federal claims,⁴⁹ or (4) stay in federal court and abandon the state law claims.

Such was the law in 1990, when in the wake of confusion sowed in 1989 by the 5-4 decision of *Finley v. United States*,⁵⁰ Congress responded promptly⁵¹ and adopted 28 U.S.C. § 1367, using the term

45. See *infra* notes 68-76.

46. If the trial judge gave risk of jury confusion as the reason, reversal was unlikely; cf. *Miller v. Lovett*, 879 F.2d 1066, 1073 (2d Cir. 1989) (giving no reason for refusing to exercise supplemental jurisdiction is an abuse of discretion).

47. The appeal could fail on the merits (trial judge did not abuse her discretion) or the appeal could be dismissed as not a final order. See David D. Siegel, Practice Commentary, *Operation of "Supplemental" Jurisdiction Under § 1367*, 28 U.S.C.A. § 1367 (West 1993) ("Appealability of Discretionary Dismissal[:] It would have been helpful if Congress had included some instruction about whether a dismissal under § 1367(c) is appealable. Congress having said nothing about it, however, the matter must be left to the usual batch of appellate statutes and rules, notably 28 U.S.C.A. §§ 1291 and 1292 and Rule 54(b) of the Federal Rules of Civil Procedure. Under § 1291, the rule is that the disposition must be 'final' in order to be appealable. If all claims are dismissed, giving rise to a final disposition of the whole case, finality would be satisfied and appeal allowed. When only the dependent claim is dismissed, however, the matter is more complex. Prior cases involving dismissals of claims that depended on pending or ancillary jurisdiction can be consulted.").

48. In addition to the obvious duplication in pretrial proceedings and the greater difficulty in achieving settlement when cases are pending in both state and federal court, preclusion problems are likely to arise as soon as one of the two lawsuits becomes final. See Edward H. Cooper, *An Alternative and Discretionary § 1367*, 74 IND. L.J. 153, 158-59 (1998); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §4412 (2011).

49. If the federal claims are joined in the state court lawsuit, the defendant can remove the entire case to federal court.

50. *Finley v. United States*, 490 U.S. 545 (1989); see also discussion *infra* notes 88-94.

51. Justice Scalia seemed to solicit a Congressional response with the following: 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.

supplemental⁵² to replace both pendent and ancillary. The key provisions of the statute were sections (a), (b) and (c).

Section 1367(a) essentially codified the “power” paragraph of *Gibbs*, using “the same case or controversy under Article III”⁵³ Congress added a sentence at the end of § 1367(a) to make it pellucidly clear that the “one case” test applied both where there was one plaintiff and one defendant, like *Gibbs*, as well as “claims that involve the joinder or intervention of additional parties.”⁵⁴ Section (b) imposed limitations on the use of supplemental jurisdiction in certain cases where there were no federal question claims and federal jurisdiction was available “solely on” the basis of diversity of citizenship.⁵⁵ Subsections (c)(1)-(3) set forth three specific grounds, all based on language from *Gibbs*, on which a trial judge could base

Finley, 490 U.S. at 556.

52. The term “supplemental” seems to have been coined by Professor Richard A. Matasar in *Rediscovering “One Constitutional Case”: Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1402 (1983). In footnote 3, Matasar states that:

[f]or convenience, this Article uses “supplemental jurisdiction” throughout to refer to all exercises of pendent and ancillary jurisdiction. The term is apt, for it suggests an extension of power over claims normally outside federal jurisdiction in order to serve important federal interests that supplement the purposes underlying the decision on the original federal claims. See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (allowing convenient and efficient litigation of an entire legal dispute); *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1861) (ensuring a forum for vindication of claims); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (preserving a federal court’s ability to function effectively).

Id. at 1402 n.3; see also William D. Claster, Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263, 1271-87 (1975); Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 34 (stating that “[s]upplemental jurisdiction” is a generic term encompassing the concepts of ancillary and pendent jurisdiction”).

53. 28 U.S.C. § 1367(a) (2006); see *supra* note 18. With respect to this subsection, both the text and the House Report are consistent.

54. 28 U.S.C. § 1367(a). Thus Congress clearly overturned both *Aldinger* and *Finley*.

55. *Id.* § 1367(b). Subsection (b) contained obvious drafting flaws which led to a serious split in the circuits over its application to class actions and to simple joinder by the plaintiff of another plaintiff who did not meet the amount in controversy requirement or was not diverse from the defendant. In 2005, the Supreme Court, in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005), ended the dispute, holding that § 1367(b) did not preclude supplemental plaintiffs who did not satisfy the amount requirement, but did preclude supplemental plaintiffs who did not satisfy the diversity requirement. For the extensive literature (from 1990 to 2004) on this issue, see Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 EMORY L.J. 55, 57 n.15 (2004) (“I will not even try to list a representative sample [of the law review articles concerning § 1367(b)] except to note a colloquium in the *Emory Law Journal* in 1992, 41 EMORY

a discretionary dismissal, as well as a “catch all” provision in (c)(4).⁵⁶ The full text of § 1367(c) is as follows:

[Authority of Courts to Decline Supplemental Jurisdiction:] 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.⁵⁷

It is clear that the likelihood of jury confusion is not part of § 1367(c)(1)-(3). The topic that this article will address is whether this ground for discretionary dismissal has survived and is part of § 1367(c)(4), or whether it has been eliminated by the 1990 statute.

In Part II of this Article, the pre-1990 history relevant to the topic will be expanded beyond the brief discussion in this introduction. Part III will examine the legislative history of § 1367(c)(4), followed in Part IV by the reaction of the district courts (IV.A), courts of appeal (IV.B), and scholars (IV.C). Part V will reflect the author’s own analysis of the availability of the risk of jury confusion as the basis for a § 1367(c)(4) dismissal.

II. PRE-1990 HISTORY: JURY CONFUSION IS ON THE JUDGE-MADE LIST

As one might expect, the reported decisions after *Gibbs* and before the adoption of § 1367 (1966 to 1990) involving a proposed discretionary dismissal of a pendent⁵⁸ claim based *solely* on the ground of a likelihood of jury confusion reflect a mixed picture—some were dismissed and some were retained.⁵⁹ Judges who retained jurisdiction tended to focus on the reasoning from the 1966 and 1970 decisions of the Supreme Court (*Gibbs* and *Rosado*),

L.J. 1, and a symposium in 1998, published at 74 IND. L.J. 1, which featured four articles and nine responses.”).

56. 28 U.S.C. § 1367(c) (2006).

57. *Id.*

58. In this Part II, the term “pendent” will be used; “supplemental” was not used in this context by the courts until the adoption of § 1367 in 1990.

59. See *Carrol v. General Datacomm Industries, Inc.*, 680 F.Supp. 71, 73 (D.Conn. 1987) (retaining pendent claim); *Esposito v. Buonome*, 647 F.Supp. 580, 581 (D.Conn. 1986) (dismissing pendent claim); *Frye v. Pioneer Logging Machinery, Inc.*, 555 F.Supp. 730 (D.S.C. 1983) (dismissing pendent claim).

which upheld jurisdiction over pendent claims, even after the federal claims had dropped from the cases.⁶⁰ Thus these decisions focused on overall efficiency and fairness to litigants.

For example, in *Miller v. Lovett*,⁶¹ the Second Circuit reversed a pretrial dismissal of a pendent claim. The federal § 1983 claim for excessive force was tried to a jury and resulted in a defendants' verdict.⁶² On appeal, the Second Circuit vacated the verdict on the federal claim due to errors in the instructions and remanded for a new trial. It then addressed the pretrial dismissal of the pendent claim.

Miller asserted a constitutional claim of excessive force and common-law claims for negligence and assault and battery. If these federal and state claims are so tightly interwoven that a decision on the former will collaterally estop litigation of latter, we see no principled reason for refusing to exercise pendent jurisdiction over the entire case, and potential injustice in failing to do so.

The reasons given by the district court for dismissing the state claims are unpersuasive. In its one-page endorsement ruling, the court stated that "courts in this district have repeatedly discouraged pendent claims in section 1983 litigation", and that Miller "d[id] not adequately address the concerns raised in *Esposito v. Buonome*, 647 F.Supp. 580 (D.Conn.1986)." It is obvious, first, that dismissing Miller's pendent claims on the ground that they are "discouraged" in § 1983 cases is tantamount to giving no reason at all for their dismissal. No decision of the Supreme Court or of this circuit implies that pendent jurisdiction is disfavored in civil rights actions; indeed our viewpoint is to the contrary. See *Perez v. Ortiz*, 849 F.2d 793,] 798 [2d Cir. 1988].

Even if it ever had validity, *Esposito*, on which the district court relied, is now outdated. . . . Any remaining danger of jury confusion under the new standard can in most cases readily be met with judicious use of special verdicts and carefully drawn instructions. See *Carroll v. General Datacomm Industries, Inc.*, 680 F.Supp. 71, 73 (D.Conn.1987) (Burns, J.).⁶³

60. See, e.g., *Miller v. Lovett*, 879 F.2d 1066 (2d Cir. 1989).

61. *Id.* at 1073.

62. *Id.* at 1068-69. Apparently, plaintiff chose to abandon the state law claim; no further proceedings are reported. *Id.*

63. *Id.* at 1073. *Miller* specifically explained why *Esposito* was outdated.

[In *Esposito*], common-law tort claims were dropped from a § 1983 action primarily because the common-law standard for liability (reasonableness) conflicted with what was assumed to be the federal standard (the "shock the conscience" test of *Johnson v. Glick*) [sic] and therefore were thought to create a likelihood of jury confusion. 647 F.Supp. at 581. As we discuss more

There are few reported opinions by trial judges denying an unappealable⁶⁴ motion to dismiss a pendent claim. One example is *West Hartford v. Operation Rescue*, where the town sued under alleging causes of action against activists who protested at a women's clinic including: violations of the Racketeer Influenced and Corrupt Organization Act (RICO), violations of Connecticut statutory law, common law nuisance, conspiracy, and negligence.⁶⁵ In granting a preliminary injunction the court held that injunctive relief was not available under civil provisions of RICO, but that for purposes of obtaining a preliminary injunction under state nuisance law, the town established the likelihood of success on the merits.⁶⁶ As to the court's jurisdiction over the pendent state law claims, the court cited *Miller v. Lovett* for the proposition that "a presumption favors exercising [pendent] jurisdiction."⁶⁷

Far more common during this period are reported decisions dismissing pendent claims on the ground of jury confusion. Some, for example the lower court in *Miller v. Lovett*,⁶⁸ explain why there would be a likelihood of jury confusion if the federal and pendent claims were tried together. Many, however, simply invoke a broad (not case specific) presumption *against* the assertion of pendent jurisdiction.⁶⁹

A classic example is *Douglas v. Town of Hartford*,⁷⁰ where a mother and her son filed excessive force § 1983 claims against Hartford and several of its police officers. The son was *in utero* when his mother was assaulted.⁷¹ Chief Judge Clarie refused to dismiss the son's federal claims against the police officers⁷² but did dismiss the

extensively above, however, the "shock the conscience" standard no longer applies to cases such as this, and the proper test is now one of "reasonableness" under the [F]ourth [A]mendment. *Graham*, 109 S. Ct. 1865.

Id.

64. Such decisions are not "final" under 28 U.S.C. § 1291 and thus not appealable. *See supra* note 47.

65. *Town of West Hartford v. Operation Rescue*, 726 F.Supp. 371, 371 (D.Conn. 1989).

66. *Id.* at 378, 381.

67. *Id.* at 376.

68. *Miller*, 879 F.2d at 1073. The lower court opinion is not reported; it is quoted in part by the Second Circuit.

69. *Douglas v. Town of Hartford*, 542 F.Supp. 1267, 1269 (D.Conn. 1982).

70. *Id.* at 1269.

71. *Id.*

72. *Id.* The court did hold that the plaintiff could not sue "John Doe" defendants; rather, plaintiff had to identify and serve each defendant it wanted to sue. *Id.*

Monell (federal) claims against Hartford.⁷³ Judge Clarie then turned to the defendants' motion to dismiss the pendent (state law) claims against both the police officers and the municipality. What follows is his entire discussion of the defendants' motion to dismiss these pendent claims:

In the Third Count of their complaint, the plaintiffs allege a myriad of state law claims sounding in tort, including assault and battery, intentional infliction of emotional distress, negligence and gross negligence. *This Court has regularly stated that it will not exercise pendent jurisdiction over state tort claims in civil rights actions commenced under § 1983, because these federal lawsuits would be unnecessarily complicated and burdened by the introduction of many state law issues into an already complex litigation. See Galbert v. City of Hartford*, Civ. No. H-80-576, Ruling on Defendant's Motion to Dismiss (May 28, 1982); *Saylor v. Town of Hartford*, Civ. No. 8-81-542, Ruling on Defendants' Motion to Dismiss (December 31, 1981). Accordingly, the Court dismisses Count III of the plaintiffs' complaint, which alleges violations of the state tort law.⁷⁴

Writ large, there is no doubt that prior to 1990 the likelihood of jury confusion was a proper ground on which to base the pretrial dismissal of a pendent claim. As we have seen, the lower courts differed as to the need for a case-specific analysis. They also differed as to the slope of the playing field: was it level, or was there a presumption in favor or against the assertion of pendent jurisdiction? While the United States Supreme Court never addressed these questions, it is clear that the favorable view of pendent jurisdiction exhibited by the Warren Court⁷⁵ was replaced with a negative—one might say very “grudging”—view by the Burger and Rehnquist Courts.⁷⁶

Despite the different approaches to discretionary dismissals of pendent claims, from the *Gibbs-Rosado-Miller* approach that fa-

73. *Id.* at 1271. The claims were dismissed based on the soon-to-be-discredited heightened pleading standard; see *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (holding that a court may not require a heightened pleading standard in a § 1983 municipal liability case).

74. *Id.* at 1271 (emphasis added); see also *Esposito v. Buonome*, 647 F.Supp. 580, 580-81 (D.Conn. 1986) (disapproved by the Second Circuit in *Miller v. Lovett*, *supra* notes 62-64); *Gaison v. Scott*, 59 F.R.D. 347, 349 (D. Haw. 1973).

75. The Warren Court presided over the cases from *Gibbs* (1966) to *Rosado* (1970) (see *supra* text accompanying notes 13-28).

76. The Burger and Rehnquist Courts presided over the cases from *Moor* (1973) to *Finley* (1989) (see *supra* text accompanying notes 28-35); for reference to grudging, see *supra* note 14.

vored retention, to the *Moor-Douglas* approach that favored dismissal, the impetus for legislative action had nothing to do with discretionary dismissals. Rather, as mentioned in the Introduction, it was the 1989 5-4 decision of *Finley v. United States*, concerning jurisdiction power, that led directly to the adoption in 1990 of § 1367.⁷⁷

III. THE TEXT AND LEGISLATIVE PATH OF § 1367(C)(4): JURY CONFUSION IS NOT ON THE LIST

This section will focus on the text and legislative path of § 1367(c)(4). The best place to begin the story of the adoption of § 1367 is with one of the vexing questions left open after *Gibbs*: whether its rationale would apply to claims against so-called pendent parties.⁷⁸ Outside the Ninth Circuit,⁷⁹ most courts of appeals resolved that question in the affirmative.⁸⁰ The Supreme Court never fully addressed it. In *Moor v. County of Alameda*,⁸¹ the Court explicitly left the question open, resting its decision on what it viewed as appropriate use below of a discretionary dismissal. In *Aldinger v. Howard*,⁸² the Court again rejected the pendent party claim, but with a more diffused rationale. Then Justice Rehnquist, writing for a six-judge majority, acknowledged that the logic of *Gibbs* was relevant to the question of jurisdictional power, but added an additional test—the so-called congressional negative.⁸³ Relying on the soon to be discredited reasoning from Part III of *Monroe v. Pape*,⁸⁴ *Aldinger* held that jurisdictional power over the

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

78. *See supra* note 31.

79. *See Ayala v. United States*, 550 F.2d 1196 (9th Cir. 1977) (categorically rejecting pendent party jurisdiction).

80. *See Pendent Jurisdiction of Federal Court over State Claim Against Party not Otherwise Subject to Federal Jurisdiction where State Claim is Sought to be Joined with Claim Arising Under Laws, Treaties, or Constitution of United States* ("Pendent Party Jurisdiction"), 72 A.L.R. FED. 191, 220-25 (1985) (listing the First, Second, Third, Fifth, Sixth and Tenth Circuits as permitting pendent party jurisdiction and the Fourth, Seventh, Eighth, and Ninth Circuits as precluding such jurisdiction).

81. *Moor v. County of Alameda*, 411 U.S. 693, 712-15 (1973).

82. *Aldinger v. Howard*, 427 U.S. 1, 18 (1976).

83. *See Kleppe v. Sierra Club*, 427 U.S. 390, 415-19 (1976). The congressional negative was also used to deny jurisdiction in *Owen v. Kroger*, 437 U.S. 365, 374-77 (1978) (no power over claim by plaintiff against non-diverse third-party defendant).

84. *Aldinger*, 427 U.S. at 16-18 (1976). *Monroe v. Pape*, 365 U.S. 167 (1961), which in Parts I and II opened the flood gates for § 1983 litigation against individuals (over the strong dissent of Justice Frankfurter who predicted the flood), holding that the City of Chicago was not a "person" under § 1983 because the Congress of 1871 refused to add an unrelated provision, concerning municipal liability for the acts of

pendent party claim was negated by congressional hostility to claims against municipalities. This point was described as a “legal difference” between *Aldinger* and *Gibbs*.⁸⁵ In addition, the Court added a second point which it called a “factual” difference: “If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim.”⁸⁶

Rather than categorically precluding pendent party claims (which would have followed from the “factual” point) Justice Rehnquist articulated a clear limit to the reach of the Court’s decision:

There are, of course, many variations in the language which Congress has employed to confer jurisdiction upon the federal courts, and we decide here only the issue of so-called “pendent party” jurisdiction with respect to a claim brought under §§ 1343 (3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result. 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.⁸⁷

In 1989, the case Justice Rehnquist anticipated in the paragraph quoted above reached the Court: *Finley v. United States*.⁸⁸ An airplane crash led to a claim against the United States under the Federal Tort Claims Act (FTCA) and state law claims against other defendants. Now the Chief Justices, both Rehnquist and Justice White⁸⁹ must have changed their view since they were two of the four Justices who joined Justice Scalia’s five-judge majority opinion, which threw this dictum from *Aldinger* under the bus.⁹⁰ Like *Ald-*

those they could not control (e.g., KKK), to the Act that included § 1983. The issue was clarified in Part I of *Monell v. Dept. of Social Servs. of the City of New York*, 436 U.S. 658, 664-89 (1978), which held in Part I that municipalities are “persons” under § 1983, but in Part II rejecting respondeat superior liability and imposing a requirement that liability be based upon a “custom” or “policy.”

85. *Aldinger*, 427 U.S. at 15-18.

86. *Id.* at 18.

87. *Id.*

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

89. Along with Rehnquist, White was the only Justice on the *Finley* bench who joined the *Aldinger* majority opinion.

90. The other two who joined the majority were Justices O’Connor and Kennedy (not on the Court in 1976); Justices Brennan, Marshall, and Blackmun dissented in both *Aldinger* and *Finley*; Justice Stevens was in the majority in *Aldinger* but dissented in

inger, *Finley* relied on the same double barrel approach: (1) adding a new party is frowned upon and (2) the FTCA suggested that Congress was hostile to the pendent claim.⁹¹ The pellucid efficiency point from *Aldinger* was thus subordinated to a fanciful notion of Congressional hostility toward combining federal claims against the government and state claims against other defendants in a single civil action, although all claims arose from a single accident.⁹²

More importantly, *Finley* raised serious doubts about the viability of pendent jurisdiction, writ large.⁹³ At the same time, recognizing that he had seriously roiled the waters, Justice Scalia challenged Congress to assert what he viewed as its exclusive role in determining the scope of federal subject matter jurisdiction:

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.⁹⁴

It did not take Congress long to respond. The Federal Court Study Committee (FCSC) had already been established by Congress (November 1988, effective date of January 1, 1989) and given

Finley, relying heavily on the language from *Aldinger* quoted in the text. *Finley*, 490 U.S. at 567-68.

91. *Finley*, 490 U.S. at 544-56.

92. The majority made this point with the following language:

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 forgone in favor of separate actions in state and federal courts. We acknowledged this potential consideration in *Aldinger*, 427 U.S. at 18, but now conclude that the present statute permits no other result.

Id. at 555-56.

93. See H.R. Rep., No. 101-734, at 6874 (1990). "Recently, however, in *Finley v. United States*, 109 S. Ct. 2003 (1989), the Supreme Court cast substantial doubt on the authority of the federal courts to hear some claims within supplemental jurisdiction." *Id.*; see also Wolf, *supra* note 14, at 13 ("Indeed, in *Finley*, the Court appeared to cast doubt on the *Gibbs* case itself, suggesting that congressional authorization is necessary, at least where new parties are joined, before the courts may invoke supplemental jurisdiction.").

Clearly Justice Scalia wanted to "impair" *Gibbs*, if not overrule it. But it would appear that he did not have the votes. Thus, when he said "[t]he *Gibbs* line of cases was a departure from prior practice, and a departure that we have no intent to limit or impair" it would seem he was speaking for the majority, not himself. *Finley*, 490 U.S. at 556 (emphasis added).

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

a broad charge.⁹⁵ *Finley* added a measure of urgency to the topic (as it was then known) of pendent and ancillary jurisdiction.⁹⁶ Chaired by Third Circuit Judge Joseph Weis, the FCSC Final Report, dated April 2, 1990, contained, among other recommendations, one that “Congress should expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base.”⁹⁷ This report did not contain a specific proposal, although the non-authoritative working papers did go further.⁹⁸

The primary focus of the FCSC was on jurisdictional power, and was reflected in § 1367(a)⁹⁹ and in § 1367(b) which limited subsection (a) power in certain diversity cases.¹⁰⁰ The FCSC report contained the following brief reference to discretionary dismissals:

In order to minimize friction between state and federal courts, however, Congress should direct federal courts to dismiss state claims if these claims predominate or if they present novel or

95. Pub. L. 100-702, Title I, Nov. 19, 1988, 102 Stat. 4644. Section 102(b) of the Act described the purposes of the FCSC as follows: “The purposes of the Committee are to—(1) examine problems and issues currently facing the courts of the United States; [and] (2) develop a long-range plan for the future of the Federal judiciary” *Id.*

96. *Finley*, 490 U.S. at 545-54.

97. Federal Court Study Committee, Report of The Fed. Courts Study Comm., 47-48 (April 2, 1990) [Hereinafter “FCSC Report”].

98. In the FCSC working papers, dated July 1, 1990, there is a more detailed discussion of supplemental jurisdiction as well as a proposed statute; the working papers were expressly not adopted by the FCSC, and in the introduction to the March 12, 1990 Report of the Sub-committee on the Federal Courts and their Relation to the States, contained in the working papers, the following note appears: “Not every member of the subcommittee has agreed to all of the proposals or analysis contained in this [March 12, 1990] Report, and the absence of dissent should not be understood to signify approval.” Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and their Relation to the States (Mar. 12, 1990). *But see* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 569-70 (2005) (where the Court failed to note this point as it equates conflicting views on § 1367(b) from the House Report and the working papers).

99. The Congressional goal of § 1367(a) was to restore the “power” paragraph from *Gibbs* and apply it to both new claims and new parties; that is, to overturn *Aldinger* and *Finley*. The text of subsection (a) and the House Report discussion of that subsection are consistent, and no court has had any trouble with the provision. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

100. The Congressional goal was to codify *Owen v. Kroger*, 437 U.S. 365 (1978), as homage to the complete diversity requirement of *Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

complex questions of state law, or if dismissal is warranted in the particular case by considerations of fairness or economy.¹⁰¹

The original version of what was to become § 1367 began with a proposal submitted on June 8, 1990 directly to the chair of the House Judiciary Committee¹⁰² by Professors Arthur Wolf and John Egnal.¹⁰³ In this version, subsection (c) restricted discretionary power to dismiss supplemental claims to three situations: (1) the federal claim was dismissed¹⁰⁴ (2) the supplemental claim substantially predominates¹⁰⁵ or (3) the federal and supplemental claims should be tried separately.¹⁰⁶ In addition, this version required federal judges to “file . . . a written statement of reasons for the dismissal”¹⁰⁷ and contained no catch-all provision.

This original version, § 120 of House Bill 5381,¹⁰⁸ was substantially replaced by a version promoted by Judge Weis, which was based on the proposed statute in the FCSC working papers.¹⁰⁹ In the Weis proposal, subsection (c) included the first two grounds for discretionary dismissal from the original with one change—the elimination of the word “substantially” from what was to become § 1367(c)(2).¹¹⁰ In addition, this version added two grounds: “the

101. FCSC Report, *supra* note 97, at 47-48. Note the unusual use of “fairness or economy” as a reason for dismissal. *See infra* notes 111-115 and accompanying text (standing the terms on their heads as a means of *excluding* claims from federal jurisdiction rather than including them).

102. Hearings, *supra* note 40, at 686 (containing letter to the chair of the Committee, Robert W. Kastenmeier).

103. *Id.* at 27-31 (describing the Wolf-Egnal Proposal).

104. Adopted as § 1367(c)(3).

105. Adopted as § 1367(c)(2).

106. Not adopted.

107. Hearings, *supra* note 40 at 30, 688.

108. H.R. 5381, 101st Cong. (1990).

109. Wolf, *supra* note 14, at 16-20 (1992) (providing a detailed description of these events). Actually there were two similar proposals—one from Judge Weis, Hearings, *supra* note 40 at 98, and the other from Professors Rowe, Burbank, and Mengler, Hearings *supra* note 40 at 722. As to subsection (c) they are the same, down to the typo in the first line. This version of § 1367(c) will be referred to as the Weis proposal:

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

Id.

110. Hearings, *supra* note 40 at 30, 98. *Compare* Hearings, *supra* note 40 at 98 (the Weis proposal, which omitted the word “substantially”), *with* 28 U.S.C. § 1367(c)(2) (2006) (retaining the word “substantially”).

[supplemental] claim raise[d] a novel or complex issue of state law”¹¹¹ and a broad catch-all provision with the following, puzzling language: “(4) there are other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants, for declining jurisdiction.”¹¹² The language is puzzling because the reasons set forth in this version of (c)(4) are not reasons to *dismiss*; rather, they are reasons to *retain* a supplemental claim.¹¹³ According to *Gibbs*, the “justification [for pendent jurisdiction] lies in considerations of judicial economy, convenience and fairness to litigants”;¹¹⁴ it was the absence of these reasons that would suggest that discretionary dismissal might be appropriate. It may be that Judge Weis was thinking about economy and convenience for the federal trial judges and not so much about *Gibbs*’s obvious concern with overall judicial economy and “convenience and fairness to *litigants*.”¹¹⁵

The House subcommittee¹¹⁶ made two changes to the Weis version: first, “substantially” was restored to § 1367(c)(2)¹¹⁷ and second, Weis’s (c)(4) catch-all was totally rewritten to read: “(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.”¹¹⁸ No official document explains these changes.¹¹⁹ Clearly, the Congressional drafters wanted to limit, not expand, the use of discretionary dismissals. This was the version

111. Adopted as 28 U.S.C. § 1367(c)(1) (2006).

112. Hearings, *supra* note 40 at 30, 98.

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

114. *Id.*

115. *Id.* (emphasis added); sometimes defendants want a single lawsuit as much as plaintiffs; more often defendants want to frustrate plaintiffs.

116. Drafting was done by Committee staff; no members involved. *See Wolf, supra* note 14, at 17.

117. Although this was a minor change, it was clearly aimed at adding to the constraints on the use of discretionary dismissals. *Supra* note 110.

118. 28 U.S.C. § 1367(c)(4) (2006).

119. For a further discussion of this legislative change, see *Wolf, supra* note 14 at 25. “Although the hearings do not reflect it, other consultants to the subcommittee criticized the Weis substitute after the hearing on September 6th. [n.145: ‘Conversation with Charles G. Geyh.’] They thought the discretion given to judges under the substitute to dismiss the non-federal claims was too broad.” *Wolf, supra* note 14, at 25. That is, the Weis version gave too much discretion to trial judges, which would undermine the basic goal of § 1367(a). Note that the FCSC working papers approach to discretion is at odds with the action taken by the Congressional drafters. Following the recommendation to expressly authorize supplemental jurisdiction, the working papers add: “In addition, we recommend that Congress direct the courts to decline to exercise jurisdiction more often than they do at present.” FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMM. REP. Volume I, 559 (July 1, 1990). Professor Freer’s view of the replacement of Judge Weis’s version of (c)(4) is that “for some reason, it was removed before the final draft was approved.” RICHARD D. FREER, CIVIL PROCEDURE 220 (2d ed. Aspen 2009).

that was adopted by Congress and signed into law by President George H. W. Bush.¹²⁰

(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.¹²¹

The phrase “jury confusion,” which was clearly part of the pre-1990 case law, was never explicitly included in any version of the text.¹²² The Weis catch-all, “there are other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants, for declining jurisdiction” would easily include jury confusion as a permissible ground for dismissal.¹²³ However, the clause which authorized dismissal for any “appropriate reason” was rejected by the drafters and replaced with language that imposed significant textual limitations.¹²⁴

Rather than resolve the status of “jury confusion,” the House Report¹²⁵ ignored the point. Its entire coverage of subsection (c) is the following puzzling paragraph:

Subsection [1367](c) codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim, even though it is empowered to hear the claim. Subsection (c)(1)-(3) codifies the factors recognized as relevant under current law. Subsection (c)(4) acknowledges that occasionally there may exist other compelling reasons for a district court to decline supplemental jurisdiction, which the subsection does not foreclose a court from considering in exceptional circumstances. As under current law, subsection (c) requires the district court, in exercising its discretion, to undertake a case-specific analysis.¹²⁶

120. Wolf, *supra* note 14, at 2.

121. 28 U.S.C. § 1367(c)(1)-(4).

122. *Id.*

123. Wolf, *supra* note 14, at 24-25.

124. *See* 28 U.S.C. § 1367(c)(4).

125. There was no Senate report for this statute.

126. Federal Courts Study Committee Implementation Act of 1990, H.R. REP. NO. 101-734, at 29 (1990).

If one only considered the first sentence and viewed it as authoritative (while ignoring the rest of the paragraph and the text of subsection (c)), there would be no doubt that risk of jury confusion would be an appropriate ground for discretionary dismissal. However, the second sentence of this paragraph undermines such a conclusion. The so-called codification of prior case law is said to be reflected in § 1367(1)-(3).¹²⁷ Clearly, none of these three subsections has anything to do with jury confusion.¹²⁸ As such, if “jury confusion” survived the statute, it could only be in (c)(4). But (c)(4) dismissals are limited to “exceptional circumstances,” and jury confusion could hardly be characterized as “exceptional.”¹²⁹ One way to correct this obvious conflict and bring the text and House Report into alignment would be to read the words “some of” into the first sentence, so the House Report would read, “codifies some of the factors.” Such an interpretation would underscore the omission from the statute of jury confusion as a ground for discretionary dismissal. Or one could ignore the text and the second sentence of the House Report and simply follow pre-1990 case law. As we will see, the federal courts have done both.

IV. JURY CONFUSION UNDER § 1367(c)(4)

Before proceeding to an analysis of the case law under § 1367(c)(4), there are two indisputable points that should be mentioned: first, a discretionary dismissal of a claim within the court’s supplemental jurisdiction under § 1367(a) must be based upon § 1367(c), and second, the risk of jury confusion is not any part of (c)(1), (2) or (3).¹³⁰ Explicit articulation of the need to use § 1367(c) for discretionary dismissals appears in *Executive Software North America, Inc. v. United States District Court*:

[I]t is clear that Congress intended section 1367(c) to provide the exclusive means by which supplemental jurisdiction can be declined by a court. Not only is this conclusion supported by the legislative history . . . , but a contrary reading of the statute would appear to render section 1367(c) superfluous.¹³¹

127. *Id.*

128. The closest is subsection (1), which is about judge (not jury) confusion. 28 U.S.C. § 1367(1).

129. See *infra* notes 238-47 and accompanying text.

130. 28 U.S.C. § 1367(c)(1)-(3) (2006).

131. *Executive Software North America, Inc. v. U.S. Dist. Court for the Cent. Dist. of Calif.*, 24 F.3d 1545, 1556 (9th Cir. 1994) (citation omitted) (reversing the dismissal of a supplemental claim where the trial court gave no reason for the dismissal);

The self-evident fact that jury confusion is not within § 1367(c)(1), (2) or (3) was mentioned *supra*, at the end of Part III. What is less evident, and worth repeating¹³² is the policies shared by the three judge-made grounds Congress did adopt, as distinguished from jury confusion, the ground Congress did not adopt. Any supplemental claim dismissed under (c)(1), (2) or (3) can readily be said to belong in state court.¹³³ The same cannot be said about a claim that might lead to jury confusion if included in a trial with a related federal claim.

A. *Post-1990 Judicial Decisions: the District Courts Divide on Jury Confusion*¹³⁴

Focusing on the outcomes of decided cases, the overall picture of motions to dismiss supplemental claims¹³⁵ based on the likelihood of jury confusion did not change with the adoption of § 1367—some were granted and some were denied. Most, but not all¹³⁶ courts recognized that the statute did change the name from “pendent” to “supplemental.” As far as the impact of the statute, there was a wide divergence.

Prior to 1990, a court faced with such a motion to dismiss a supplemental claim would have to assess the reasons for the likelihood of confusion and the availability of means to reduce or eliminate that confusion, and then place this analysis on the scale of discretion.¹³⁷ Since the adoption of the statute, some, but not all, courts recognize that a new threshold issue has emerged: whether

see also *Feezor v. Tesstab Operations Grp., Inc.*, 524 F.Supp.2d 1222, 1224 (S.D. Cal. 2007) (“Once the court acquires supplemental jurisdiction over state law claims, section 1367(c) provides the only valid basis upon which it may decline to exercise it.”).

132. *See supra* notes 35-46.

133. Because it is the only claim left in the lawsuit, it is the predominant claim, or it is a claim that should be settled by a state, not a federal judge.

134. The discussion starts with district court decisions, since no appellate court has dealt directly with the issue.

135. In this part, the term “supplemental” will be used, even for pre-1990 cases; “supplemental” and “pendent” are synonymous.

136. *See* *Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533 (10th Cir. 1995) (in lawsuit filed in 1993, “pendent” used at least six times and “supplemental” once in reporting the outcome of another post-1990 decided case).

137. This assumes the court took the motion seriously; as we have seen, some courts reflexively dismiss all supplemental claims. *See, e.g.*, *Walker v. City of Detroit*, No. 10-13179, 2010 WL 4259835, at *6 (E.D. Mich. 2010) (exercising the court’s discretion to dismiss the supplemental claims).

jury confusion is an appropriate ground on which to base a discretionary dismissal.¹³⁸

Many opinions have ignored this question, and assumed that the statute made no change in the appropriate grounds.¹³⁹ These opinions mostly result in dismissal of the supplemental claim, while some deny the motion to dismiss, reasoning that the risk of jury confusion is not great or can be ameliorated.¹⁴⁰ Some opinions acknowledge the threshold issue.¹⁴¹ Of that group, a few make an attempt to support the view that jury confusion is an appropriate ground on which to base dismissal,¹⁴² while most opinions that focus on this threshold issue conclude that the risk of jury confusion as an appropriate ground for dismissal has been eliminated by the statute.¹⁴³

1. Risk of Jury Confusion as a Ground for Dismissal

An oft-cited example of a post-1990 decision dismissing (and remanding to state court) supplemental claims solely on the ground of potential jury confusion is *Padilla v. City of Saginaw*.¹⁴⁴ This excessive force civil rights action, asserting both federal and state claims, was filed in state court and properly removed to federal court.¹⁴⁵ Plaintiff then moved to remand the entire case.¹⁴⁶ After rejecting the applicability of 28 U.S.C. § 1441(c), the court, apparently on its own motion,¹⁴⁷ retained jurisdiction over the federal

138. See, e.g., *Padilla v. City of Saginaw*, 867 F.Supp. 1309, 1315 (E.D. Mich. 1994) (“The potential for jury confusion can be a sufficiently compelling reason for declining jurisdiction.”).

139. See, e.g., *Palmer v. Hosp. Auth. of Randolph County*, 22 F.3d 1559, 1562 n.3 (11th Cir. 1994) (“Formerly known as pendent and ancillary jurisdiction, such grounds for the exercise of federal subject matter jurisdiction have now been codified in 28 U.S.C. § 1367.”).

140. See, e.g., *Rosen v. Change*, 758 F.Supp. 799, 803 (D.R.I. 1991) (noting that “concerns [regarding jury confusion] . . . are outweighed by the furtherance of judicial economy in trying these closely related claims together, particularly when clear jury instructions may alleviate any juror confusion”).

141. *Padilla*, 867 F.Supp. at 1315; *LaSorella v. Penrose St. Francis Healthcare Sys.*, 818 F.Supp. 1413, 1414-15 (D. Colo. 1993); 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3567.1 n.46 (3d ed. 2008).

142. See, e.g., *Padilla*, 867 F.Supp. at 1315.

143. *LaSorella*, 818 F.Supp. at 1415.

144. *Padilla*, 867 F.Supp. at 1309.

145. *Id.*

146. *Id.*

147. According to the docket entries, the defendants never moved to dismiss the supplemental claims; rather, the only motion before Judge Cleland was the plaintiff’s motion to remand the entire case to state court. *Id.*

claims while it declined to exercise supplemental jurisdiction over the closely related state law claims, relying on § 1367(c)(4).¹⁴⁸ The opinion contains one paragraph in support the assertion that the risk of jury confusion was an appropriate ground for dismissal.¹⁴⁹ That paragraph includes a reference to the Supreme Court's 1973 decision of *Moor v. Alameda* and a sentence from the Wright, Miller & Cooper treatise,¹⁵⁰ which relied, for its statement, on the 1966 *Gibbs* decision. The opinion then contains four paragraphs supporting the assertion that the risk of jury confusion is great (i.e. compelling) while ignoring the question whether this compelling risk is exceptional.¹⁵¹ Finally, the court notes "that the advantages to be gained by trying these claims together are outweighed by the potential for confusion of the issues by the jury."¹⁵² Thus, remand of all state law claims is appropriate."¹⁵³

Judge Cleland has continued to dismiss supplemental claims on the ground of jury confusion, often *sua sponte*.¹⁵⁴ His more recent opinions include a paragraph, noticeably absent from *Padilla*, addressing the (c)(4) requirement that the situation be exceptional.¹⁵⁵

148. *Id.* at 1314-17.

149. *Id.*

150. *Padilla*, 867 F.Supp. at 1315 (1994).

The potential for jury confusion can be a sufficiently compelling reason for declining jurisdiction. The United States Supreme Court has cited jury confusion in cases brought under 42 U.S.C. § 1983 and state law as a proper reason for a district court to decline to exercise pendent jurisdiction. *Moor v. County of Alameda*, 411 U.S. 693 . . . (1973). Wright, Miller & Cooper identify jury confusion as a sound reason for a district court to remand state law claims over which it has supplemental jurisdiction. "One example of this [exceptional circumstance under 28 U.S.C. § 1367(c)(4)] might be the possibility of jury confusion, which was recognized in *Gibbs* as a reason for declining jurisdiction." Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3567.1, n. 46.

Id.

151. *Padilla*, 867 F.Supp. at 1315-16.

152. *Id.* at 1316-17.

153. *Id.* at 1317. The following sentence preceded the one quoted in the text: "There will be some duplication of effort required by the prosecution and defense of this case in two courts if the plaintiff decides to pursue her federal claims." *Id.* at 1316. "Plaintiff's counsel intimated at oral argument that Plaintiff might prefer to abandon her federal claims rather than pursue them in federal court." *Id.* at n.5.

154. See *Barnes v. Hayse*, No. 10-12501, 2010 WL 3448377 (E.D.Mich. 2010); *King v. City of Detroit*, No. 10-12133, 2010 WL 2813349 (E.D.Mich. 2010); *Orr v. City of Roseville*, No. 10-11389, 2010 WL 2595533 (E.D.Mich. 2010). Other decisions to the same effect include *Riza v. Countrywide Home Loans*, No. 09-12605, 2009 WL 3756685 (E.D.Mich. 2009) (relying on *Padilla*), *Walker v. City of Detroit*, No. 10-13179, 2010 WL 4259835 (E.D.Mich. 2010), and *Young v. Bank of Boston Conn.*, No. 3:93 CV 1642 (AVC), 1996 WL 756504 (D.Conn. 1996).

155. *Walker*, 2010 WL 4259835 at *3.

However, what is said to be exceptional is simply the standard pre-*Gibbs* rationale for dismissal based on the risk of jury confusion:

The court finds that exceptional circumstances are present in this case in weighing the likelihood of jury confusion, judicial inefficiency, substantial inconvenience to the parties, and potential unfairness in outcome which could readily result by attempting to resolve all claims in a single trial.¹⁵⁶

Another rationale that often accompanies the dismissal of supplemental claims comes from the first sentence of the relevant paragraph of the House Report¹⁵⁷—the simplistic idea that § 1367(c) was a codification of *Gibbs* and its progeny. Thus in *German v. Eslinger*,¹⁵⁸ an excessive force civil rights claim, the sua sponte dismissal of the supplemental claims was based on the view that § 1367 was simply a codification of *Gibbs*,¹⁵⁹ supported by cases which relied only on pre-1990 decisions.¹⁶⁰

Some courts, while denying a motion to dismiss a supplemental claim, nevertheless tacitly acknowledge that risk of jury confusion is an appropriate ground on which to base a dismissal.¹⁶¹ Such decisions conclude that in the case at bar, the risk of confusion is not great or that the policies that favor retention of the supplemental claim outweigh the risk of confusion. Thus in *Rosen v. Chang*,¹⁶² a prisoner wrongful death claim, the court held that under federal law the defendants could be held liable in their individual capacities, and that it would exercise supplemental jurisdiction over plaintiff's state law claims, despite the risk of jury confusion. "Such concerns [about jury confusion], however, are outweighed by the furtherance of judicial economy in trying these closely related claims together, particularly when clear jury instructions may alleviate any juror confusion."¹⁶³

156. *Id.* at *6.

157. H.R. Rep. No. 101-734, *supra* note 126, at 29.

158. *German v. Eslinger*, No. 6:08-CV-845-ORL-22GJK, 2008 WL 2915071 (M.D.Fla. 2008).

159. The court did not differentiate between *Gibbs*' relevance to § 1367(a) and § 1367(c). *Id.*

160. See *Palmer v. Hosp. Auth. of Randolph County*, 22 F.3d 1559, 1562 n.3 (11th Cir. 1994); *James v. Sun Glass Hut of Cal., Inc.*, 799 F.Supp. 1083, 1084 (D.Colo. 1992); see also *Zelaya v. J.M. Macias, Inc.*, 999 F.Supp. 778, 783 (E.D.N.C.1998) (FLSA class action; state and federal claims would result in distinct classes; one paragraph to dismiss supplemental claims based on jury confusion; no discussion).

161. *Rosen v. Chang*, 758 F.Supp. 799, 803 (D.R.I. 1991).

162. *Id.*

163. *Id.* at 803; see also *McLaurin v. Prestage Foods, Inc.*, 271 F.R.D. 465 (E.D.N.C. 2010) (certifying class and upholding supplemental jurisdiction over state

2. Risk of Jury Confusion Rejected as a Ground for Dismissal

Some district courts have explicitly rejected the view that under the 1990 statute, the risk of jury confusion is still a proper ground for discretionary dismissal. For example, in *LaSorella v. Penrose St. Francis Healthcare System*, an age discrimination civil rights case, the plaintiff joined both federal and state law claims against the defendant, who promptly moved to dismiss the state law claims under both § 1367(c)(2) and (c)(4).¹⁶⁴ The court quickly rejected the (c)(2) argument that the state law claim predominated and then turned to the contention that if jurisdiction were retained, there would be a risk of jury confusion.¹⁶⁵

LaSorella rejected several opinions which it suggested supported the notion that § 1367(c) was a total codification of *Gibbs* and its progeny.¹⁶⁶

Most [courts] have uncritically suggested that the [Judicial Improvement Act]¹⁶⁷ is merely a codification of the old pendant jurisdiction doctrine, thus allowing them to continue to rely on *Gibbs*. See, e.g., *Walter Fuller Aircraft v. Republic of Philippines*, 965 F.2d 1375, 1389 n. 13 (5th Cir.1992); *Promisel v. First American Artif. Flowers*, 943 F.2d 251, 254 (2d Cir.1991); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir.1991). Some sections of the JIA's legislative history suggest such an interpretation. See H.Rep. No. 101-734, 101st Cong.2d Sess., 27-29, 1990 U.S.C.C.A.N. 6802, 6873-75.¹⁶⁸

claims, subordinating claimed jury confusion to broader efficiency concerns in an FLSA case); *Lucarino v. Con-Dive, LLC*, No. H-09-2548, 2010 WL 2196233 (S.D.Tex. May 27, 2010) (retaining supplemental jurisdiction; upholding prior decision); *Lucarino v. Con-Dive, LLC*, No. H-09-2548, 2010 WL 786546, at *3-4 (S.D.Tex. March 5, 2010) (considering and rejecting jury confusion); *Heinemann v. Howe & Rusling*, 260 F.Supp.2d 592 (W.D.N.Y. 2003) (relying on *Miller v. Lovett*).

164. *LaSorella v. Penrose St. Francis Healthcare Sys.*, 818 F.Supp. 1413 (D. Colo. 1993).

165. *Id.* at 1414.

166. *Id.* at 1415.

167. The Judicial Improvements Act, Pub. L. No. 101-650, 104 Stat. 5089 (1990), contained eight titles; pertinent to this article is Title III, Implementation of Federal Courts Study Committee Recommendations, also known as the Federal Courts Study Committee Implementation Act of 1990. This Act contained a number of so-called non-controversial matters that had been proposed by the Federal Courts Study Committee, including Supplemental Jurisdiction, which when adopted was codified at 28 U.S.C. § 1367.

168. *LaSorella*, 818 F.Supp. at 1415.

These cases cited by *LaSorella* concerned subsection (a), which can be fairly characterized as a simple codification of the *Gibbs* doctrine.¹⁶⁹ Thus, Judge Kane cited to the wrong cases as standing for the point that as to discretionary dismissals, *Gibbs* was codified.¹⁷⁰ As to the specific statement in the House Report concerning subsection (c) that it “codifies the factors that the Supreme Court has recognized,”¹⁷¹ Judge Kane correctly stated, “[t]his passage is simply wrong and I reject it in favor of the plain meaning and language of [§ 1367(c)].”¹⁷² One additional reference from the Wright, Miller & Cooper treatise is worth noting: “The circumstances in which a court may exercise discretion to refuse to hear a case are quite strictly defined.”¹⁷³

Other district courts have followed the lead of *LaSorella*.¹⁷⁴ For example, in *Gard v. Teletronics Pacing Systems, Inc.*, a civil rights case involving claims of age discrimination and sexual harassment, the court refused to consider the risk of jury confusion in connection with the defendant’s motion to dismiss the supplemental claims.¹⁷⁵

B. *Post-1990 Judicial Decisions: The Appellate Courts Have Not Dealt Directly with the Issue*

The United States Supreme Court has not directly addressed the issue at hand. Of the six cases where the Court mentioned § 1367(c), only one contained any discussion of the operation of that subsection. In *City of Chicago v. International College of Surgeons*,¹⁷⁶ the Court reinstated the trial court’s decision that it had

169. *Id.*

170. Those cases are discussed in the previous paragraphs.

171. H.R. Rep. No. 101-734, *supra* note 126, at 29 (setting forth the language of the House Report).

172. *LaSorella*, 818 F.Supp. at 1416. The opinion continued with the following footnote: “Professor Oakley suggests that the late night legislative action that accompanied the passage of [§ 1367] may be responsible for some of the oddities of the present statute.” *Id.* at 1416 n.1 (citing John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C.DAVIS L.REV. 735, 736 n.2 (1991)). Professor Oakley had more to say on this point, which will be discussed *infra* in Part IV.C (scholarship).

173. 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3567.3 at 39 (2d ed. Supp 1992). Recall, prior footnote 150, that *Padilla* also relied on the Wright, Miller & Cooper treatise, albeit a different section. This discrepancy will be addressed in Part IV.C.

174. See, e.g., *Gard v. Teletronics Pacing Sys., Inc.*, 859 F.Supp. 1349, 1351-52 (D.Colo. 1994).

175. *Id.* at 1349-52.

176. *City of Chicago v. Int’l College of Surgeons*, 522 U.S. 156, 174 (1997).

federal question¹⁷⁷ and supplemental jurisdiction¹⁷⁸ over the plaintiffs' claims, which the Seventh Circuit had reversed. In Part III, the Court made clear that the trial court had not yet ruled on a motion to dismiss the supplemental claims based upon § 1367(c), and that it would not address that issue in the first instance.¹⁷⁹ The Court nevertheless went on to describe in broad terms the notion of discretionary authority to dismiss supplemental claims, quoting from *Gibbs*¹⁸⁰ and another pre-1990 decision, *Carnegie-Mellon Univ. v. Cohill*.¹⁸¹ The Court did not discuss the text, legislative history, or lower court decisions interpreting § 1367(c). But while this short, unsupported discussion¹⁸² is consistent with the view that the statute made no change in prior case law,¹⁸³ it lends no more than superficial support to such a view.

The courts of appeal have had more to say about the operation of § 1367(c), but none has addressed the specific question whether the risk of jury confusion has survived the 1990 codification. Most of these appellate decisions concern the application of subsections (c)(1), (c)(2) and (c)(3), each of which has an antecedent in pre-1990 case law¹⁸⁴ and identifies a specific type of case that would be appropriate for discretionary dismissal. A few courts of appeal have addressed subsection (c)(4).¹⁸⁵ For example, in *Executive Software North America, Inc. v. United States District Court*,¹⁸⁶ the district court remanded the supplemental (state law discrimination) claims while retaining jurisdiction of the properly removed federal

177. 28 U.S.C. § 1331 (2006); 28 U.S.C. § 1441(a) (2006).

178. 28 U.S.C. § 1367(a) (2006).

179. *City of Chicago*, 522 U.S. at 172-74.

180. *Id.* at 172 (“[P]endent jurisdiction ‘is a doctrine of discretion, not of plaintiff’s right’”) (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966)).

181. *Id.* at 172-73 (“[W]e have indicated that ‘district courts [should] deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine.’”) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988)).

182. Part III is four paragraphs long and covers two full pages. *City of Chicago*, 522 U.S. at 172-74.

183. Professor Oakley had this to say about *Carnegie-Mellon*: “Because the case in question was being remanded to the Seventh Circuit, the Court’s framing of the issues left open on remand in terms of the governing law of the relevant circuit does not support the inference that the Supreme Court has sub silentio resolved an unacknowledged circuit split.” John B. Oakley, *Prospectus for the American Law Institute’s Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 943 n.381 (1998).

184. See *supra* notes 36-40 and accompanying text.

185. *Exec. Software N. Am. v. U.S. Dist. Court for the Central Dist. of Cal.*, 24 F.3d 1545, 1557-61 (9th Cir. 1994).

186. *Id.* at 1548.

discrimination claims. The trial judge gave no reason, but did indicate his view that § 1367(c) had simply codified prior case law.¹⁸⁷ Though not reported, the Ninth Circuit quoted from the trial judge's opinion as follows:

Even if [the *Gibbs* test is] met, however, a federal court has discretion to decline jurisdiction over state law claims if, for instance, the state claims substantially predominate, the state claims involve novel or complex issues of state law, trial of the state and federal claims together is likely to result in jury confusion, or retention of the state claims requires the expenditure of substantial additional judicial time and effort. [*Gibbs*, 383 U.S.] at 726-27 . . . ; see also 28 U.S.C. § 1367(c); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 . . . (1988).

The Removing Party(ies) should also be aware that this Court does not interpret the 1990 enactment of Section 1367 as restricting the discretionary factors set forth in *Gibbs*. Rather, this Court interprets Section 1367 as merely allowing this Court, at its discretion, to exercise jurisdiction over supplemental parties, which was previously foreclosed by *Finley v. United States*, 490 U.S. 545 . . . (1989).¹⁸⁸

The Ninth Circuit reversed, holding that failure to give any reason for failing to accept supplemental jurisdiction was an abuse of discretion.¹⁸⁹ After noting that a discretionary dismissal of a supplemental claim could only be accomplished under § 1367(c) and that subsections (c)(1), (c)(2), and (c)(3) did not appear to apply, the court articulated its view that subsection (c)(4) narrowed the scope of a trial court's discretion:

[S]ubsection (c)(4), which also permits a court to decline jurisdiction when, "in exceptional circumstances, there are other compelling reasons," channels the district court's discretion to identify *new grounds* for declining jurisdiction more particularly than did preexisting doctrine. Accordingly, we conclude the district court erred to the extent that it relied on a basis for remanding pendent claims not permitted under section 1367(c). Finally, we conclude that, because the district court failed to articulate

187. *Id.* at 1551.

188. *Id.* at 1548-49.

189. *Id.* at 1562. To the same effect as *Executive Software* is *McLaurin v. Prater*, 30 F.3d 982, 985-86 (8th Cir. 1994) (remanded due to failure to give a reason for dismissing supplemental claim; on the merits court ruled for plaintiff on the § 1983 claim). The same result would have been reached prior to 1990. See, e.g., *Miller v. Lovett*, 879 F.2d 1066, 1072-73 (2d Cir. 1989) (giving no reason for refusing to exercise supplemental jurisdiction is an abuse of discretion).

reasons for its remand of the pendent claims, we cannot determine whether the district court relied on a statutory ground and exercised its discretion in a permissible manner. Consequently, we conclude that the district court clearly erred.¹⁹⁰

But the Ninth Circuit never addressed the question whether the risk of jury confusion could be a “new ground” under (c)(4). In footnote 14, the court cites to two district court decisions and suggests a divide on this question,¹⁹¹ concluding: “[w]e intimate no view on the matter.”¹⁹² Several other courts of appeal have agreed with the Ninth Circuit that the statute has narrowed the scope of the trial judge’s discretion to dismiss supplemental claims, but none have addressed the availability of jury confusion as a permissible ground.¹⁹³

Other courts of appeal have parted company with the Ninth Circuit and reached the same conclusion as the trial judge in *Executive Software*, that § 1367(c) does not “restrict[] the discretionary factors set forth in *Gibbs*.”¹⁹⁴ This language would seem to support the idea that risk of jury confusion is an appropriate ground on which to base a § 1367(c) dismissal. However, none of these appellate decisions involves such a fact pattern. The discussion of discretion has been in the context of § 1367(c)(1), (2), or (3).¹⁹⁵ But while this split of the circuits has been one focus of the § 1367(c) scholarship,¹⁹⁶ we will see in the next part that none of it addresses the status of risk of jury confusion.

190. *Exec. Software*, 24 F.3d at 1551-51 (emphasis added).

191. *LaSorella v. Penrose St. Francis Healthcare Sys.*, 818 F.Supp. 1413, 1415 (D. Colo. 1993) (finding jury confusion is not within the statute); *Picard v. Bay Area Reg'l Transit Dist.*, 823 F.Supp. 1519 (N.D.Cal. 1993) (suggesting that jury confusion is a permissible ground but finding no risk of confusion in this case).

192. *Exec. Software*, 24 F.3d at 1560.

193. See Rachel Ellen Hinkle, *The Revision of 28 U.S.C. § 1367(c) and the Debate Over the District Court's Discretion to Decline Supplemental Jurisdiction*, 69 TENN. L. REV. 111, 120, 130-34 (2001) (listing the Second, Fifth, Eighth and Eleventh Circuits as agreeing with the Ninth Circuit); see also Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 125-27 (2006) (listing the Second, Eighth, Ninth and Eleventh Circuits as reading § 1367(c) as curtailing the *Gibbs* approach to discretion).

194. *Exec. Software*, 24 F.3d at 1548; see Hinkle, *supra* note 193 at 121-30 (listing the First, Third, Sixth, Seventh, Tenth and D.C. Circuits as reading § 1367(c) as preserving the *Gibbs* approach to discretion).

195. *Exec. Software*, 24 F.3d at 1548.

196. See 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3567.3 at 39 (2d ed. Supp 1992).

C. *Post-1990 Scholarship*

A burst of scholarship followed almost immediately upon the passage of § 1367.¹⁹⁷ Its primary focus was the obvious drafting error in § 1367(b), the subsection intended to limit supplemental jurisdiction in certain diversity-only lawsuits.¹⁹⁸ Little attention was paid to § 1367(c), but to the extent it was discussed, the earliest articles tended to support the view that § 1367(c) was simply a codification of *Gibbs*.¹⁹⁹

Thus in 1991, Professors Rowe, Burbank, and Mengler describe subsection (c) as follows: “It codifies those factors that the Supreme Court in *United Mine Workers v. Gibbs* recognized as providing a sound basis for a lower court’s discretionary decision to decline supplemental jurisdiction.”²⁰⁰ Later in 1991, Professor Freer expressed the same view in a short paragraph describing § 1367(c): “Thus, the statute basically codifies the teaching of *Gibbs* regarding the discretionary decline of supplemental jurisdiction.”²⁰¹ In 1992, Professor Steinman was heard from.²⁰² She begins her discussion of § 1367(c)(4) in tune with the (c) codified *Gibbs* view,²⁰³ but does acknowledge that the text might support a restriction in the permissible scope of discretion: “It is not apparent to me that [the risk of jury confusion] would constitute a compelling reason” under § 1367(c)(4).²⁰⁴ Eschewing further analysis of Congressional intent, she adds, “It is a more difficult question whether such a curtailment of the courts’ discretion is or would be a good thing.”²⁰⁵ And there the discussion of (c)(4) ends, “[b]ecause of my desire to discuss other matters and because I think that few judicial decisions

197. See *supra* note 55.

198. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (resolving the drafting problem).

199. See *supra* notes 53-57, 125-29, and 158-69 and accompanying text.

200. Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Congress Accepts Supreme Court’s Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 216 (1991) (citing only to *Gibbs*).

201. Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 472 (1991) (citing only to § 1367(c) and to *Gibbs*).

202. Joan Steinman, *Section 1367-Another Party Heard From*, 41 EMORY L.J. 85 (1992).

203. *Id.* at 85-96 (relying primarily on the FCSC report and the first sentence of the relevant paragraph from the House Report).

204. *Id.* at 94.

205. *Id.*

are likely to be altered by § 1367(c)(4)'s language, I will not delve any further into this matter here."²⁰⁶

Some of the scholarship lends some support to the view that § 1367(c) does narrow the scope of discretion.²⁰⁷ Professor Oakley's 1991 discussion of § 1367(c) starts with the following support for the narrow view:

By the juxtaposition of sections 1367(a) and 1367(c) Congress appears to have created a strong presumption in favor of the exercise of supplemental jurisdiction. Section 1367(a) grants the jurisdiction in mandatory terms ("shall have supplemental jurisdiction") subject to section 1367(c)'s rather strict standards for when the district courts may decline to exercise supplemental jurisdiction.²⁰⁸

But in the next sentence, he suggests an important role for *Gibbs*: "These standards combine the language of discretion found in *Gibbs* with the language of abstention."²⁰⁹ Seven years later, Professor Oakley was no closer to a resolution of this issue: "There are manifest discrepancies between *Gibbs*' standards and the text of subsection 1367(c); the circuits are split as to whether these discrepancies should be overlooked."²¹⁰ Clearer support for the view that the pre-1990 discretion was narrowed by the statute comes from Professor Wolf:

Congress altered the approach of *Gibbs* that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." If a litigant satisfies the criteria for jurisdiction under subsection (a), then the district court "*shall* have supplemental jurisdiction over all other claims" 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.²¹¹

As to the scope of that discretion, Professor Wolf suggested that compared to *Gibbs*, "the statute might be viewed as narrowing such discretion since it allows such exercises in only four limited circum-

206. *Id.*

207. John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Act of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735 (1991).

208. *Id.* at 766.

209. *Id.*

210. Oakley, *supra* note 183, at 943.

211. Arthur D. Wolf, *Comment on the Supplemental Jurisdiction Statute: 28 U.S.C. § 1367*, 74 IND. L.J. 223, 226 (1998) (emphasis added).

stances.”²¹² In an earlier article, Professor Wolf pointed out how the changes made in the text of § 1367(c)(4) left no doubt that Congress intended to narrow the scope of judicial discretion.²¹³

The two major procedure treatises have reported the divisions in the interpretation of § 1367(c)(4).²¹⁴ As noted in Part IV.A,²¹⁵ two of the early district court opinions, one going each way, each relied upon the Wright, Miller and Cooper Treatise. In *Padilla v. City of Saginaw*,²¹⁶ a 1994 wrongful death civil rights case where the removed federal claims were retained but the supplemental state court claims were remanded to state court, the opinion included the following quote from the Treatise:

Wright, Miller & Cooper identify jury confusion as a sound reason for a district court to remand state law claims over which it has supplemental jurisdiction. “One example of this [exceptional circumstance under 28 U.S.C. § 1367(c)(4)] might be the possibility of jury confusion, which was recognized in *Gibbs* as a reason for declining jurisdiction.” Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3567.1, n. 46.²¹⁷

A year earlier in an employment discrimination case, *LaSorella v. Penrose St. Francis Healthcare System*,²¹⁸ the court held that the risk of jury confusion was not an appropriate ground under § 1367(c), and also relied on the same treatise: “As Wright and Miller put it, ‘The circumstances in which a court may exercise discretion to refuse to hear a case are quite strictly defined.’ 13B C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 3567.3 at 39 (2d ed. Supp.1992).”²¹⁹

Nearly twenty years later, neither of the above references has survived intact. The current version of the treatise has this to say about jury confusion: “Perhaps [§ 1367(c)(4)’s] concern with ‘exceptional circumstances’ includes the *Gibbs* concern with things such as the likelihood of jury confusion, but the statute does not say

212. *Id.* at 227.

213. Wolf, *supra* note 14, at 24-25; *see supra* notes 78-126 (providing the details of the drafting of § 1367).

214. *See* 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE—CIVIL § 106.60[1] (2012).

215. *See supra* note 144 and Part IV.A.

216. *Padilla v. City of Saginaw*, 867 F.Supp. 1309 (E.D.Mich. 1994).

217. *Id.* at 1315 (brackets by the court; the treatise relies on *Gibbs*).

218. *LaSorella v. Penrose St. Francis Healthcare Sys.*, 818 F.Supp. 1413 (D. Colo. 1993).

219. *Id.* at 1416.

so.”²²⁰ This quote is followed by reports of cases going both ways.²²¹

As to the status of jury confusion as a ground for discretionary dismissal, Moore’s treatise on Federal Practice is less precise, but equally equivocal.²²² Moore first cites circuits expressing the “View That [the] Statute Codifies [the] *Gibbs* Factors,”²²³ and in the next section cites circuits with the “View That [the] Statute Alters Common Law Analysis”²²⁴—circuits rejecting the simplistic “nothing was changed by the statute” approach.²²⁵ This latter section nowhere mentions jury confusion, and as noted earlier, neither do any of the circuit cases in this group.²²⁶ The treatise makes no effort to analyze or reconcile these seemingly conflicting lines of cases.²²⁷

V. ANALYSIS: JURY CONFUSION IS NOT WITHIN § 1367(C)(4)

Part II of this Article makes it clear that for the nearly twenty five years between *Gibbs* and the adoption of § 1367, there was no controversy concerning the discretionary power of federal trial judges to dismiss what are now called supplemental claims, or the grounds on which the judge could base such a decision.²²⁸ The likelihood of jury confusion if the supplemental and federal claims were tried together was “on the list” of appropriate grounds. Most decisions, whether to retain or dismiss, were upheld when challenged on appeal.²²⁹

220. 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567.3, 400 (2010).

221. *Id.* at 402, n. 33.

222. See generally 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE—CIVIL § 106.60[2] (2012).

223. *Id.* In addition to case citations, the only other source in this section is the House Report. *Id.*

224. *Id.* § 106.60[3].

225. *Id.*

226. *Id.*

227. *Id.* § 106.60.

228. See discussion *supra* Part II.

229. See *supra* notes 46-49 and accompanying text (discussing problems with appeal). In the rare cases where a dismissal was reversed, it was on the ground that the trial judge had abused her discretion, usually failing to give any reason for the dismissal; see, e.g., *Miller v. Lovett*, 879 F.2d 1066, 1073 (2d Cir. 1989) (giving no reason for refusing to exercise supplemental jurisdiction is an abuse of discretion). Until 2009, remand to state court of supplemental claims that were part of a properly removed case, as opposed to dismissal, was thought to be not appealable by reason of 28 U.S.C. § 1447(d); however, in *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009), the Court unanimously held that such remand orders are not based upon lack of subject matter jurisdiction and thus may be reviewed by direct appeal.

Part III of this Article makes it clear that when Congress codified the grounds for discretionary dismissal of supplemental claims, the likelihood of jury confusion was not expressly included.²³⁰ Also clear from the history of the legislation was the final change in the language of the catch-all provision²³¹ from language that would easily provide a source for “jury confusion” to language that is inhospitable to such a ground.

Part IV of this Article makes it equally clear that since the adoption of § 1367, both courts and scholars have divided on the scope of § 1367(c)(4): some viewing the statute as having codified the pre-1990 case law and others viewing the statute as having significantly limited the scope of discretion under prior case law.²³² Some district courts have focused specifically on the availability of the risk of jury confusion as an appropriate ground for pretrial dismissal, and have divided.²³³ This specific issue has not yet been addressed by the appellate courts or the scholars.²³⁴

As noted earlier, § 1367(c) provides the exclusive basis for the discretionary dismissal of a supplemental claim, and there is no room in subsections (c)(1), (c)(2), or (c)(3) for jury confusion.²³⁵ As such, if jury confusion remains “on the list,” it must be under (c)(4).

A. *Textual Analysis*

The interpretation of § 1376(c)(4) as it applies to supplemental claims that pose a potential for jury confusion “is simple and straightforward.”²³⁶ It proceeds on the assumption that clear, unambiguous text must be applied, especially when that text is consistent not only with other relevant parts of the text of the statute but also the broad, unambiguous policies of the statute.²³⁷

Section 1367(c)(4) limits discretionary dismissal to supplemental claims that present both (i) circumstances and (ii) compelling

230. See discussion *supra* Part III.

231. 28 U.S.C. § 1367(c)(4).

232. See discussion *supra* Part IV.A.

233. See discussion *supra* Part IV.A.1-2.

234. In *Executive Software v. U.S. Dist. Court for the Central Dist. of Cal.*, 24 F.3d 1545 (9th Cir. 1994), the Ninth Circuit identified the issue and explicitly left it unresolved. See *supra* text at note 192.

235. The closest the statute comes is § 1367(c)(1), which concerns judge confusion, not jury confusion.

236. See *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977).

237. *Tuscaloosa Cnty. Comm'n v. Deputy Sheriffs Ass'n*, 589 So.2d 687, 689 (Ala. 1991).

reasons for declining jurisdiction.²³⁸ It may be that a persuasive argument could be made in a particular case that the risk of jury confusion presents a “compelling reason for declining jurisdiction.”²³⁹ The same cannot be said for the independent requirement that the circumstance be “exceptional.”

As far back as 1976, then Justice Rehnquist undermined the argument that the likelihood of jury confusion could ever be exceptional. In *Aldinger v. Howard*,²⁴⁰ he was reiterating the point made by the Ninth Circuit—and flatly rejected by Congress in 1990 when it adopted § 1367(a)²⁴¹—that adding a pendent party was a bad idea. Among the reasons he gave in support was the following, drawn from the Ninth Circuit’s opinion: “[P]endent state-law claims arising in a civil rights context will ‘almost inevitably’ involve the federal court in difficult and unsettled questions of state law, with the accompanying potential for jury confusion. 513 F.2d at 1261-1262.”²⁴²

The continued frequency with which the lower federal courts continue to rely on jury confusion suggests that not much has changed in the thirty-five years since *Aldinger*. The potential for jury confusion is not exceptional. Yet for the past twenty years, despite the adoption of § 1367, some federal trial judges continue to rely on the risk of jury confusion as a ground to dismiss supplemental claims.

Most cases that have used (c)(4) to dismiss supplemental claims solely on the ground that there is a risk of jury confusion have ignored the “exceptional circumstances” requirement.²⁴³ A few courts have attempted to address the point, but with hollow reasoning.²⁴⁴ Thus, in *Walker v. City of Detroit*,²⁴⁵ a false arrest, false imprisonment civil rights claim, the trial court dismissed the supplemental state law claims under (c)(4) sua sponte due to the

238. 28 U.S.C. § 1367(c)(4).

239. *Id.* Many cases develop this point. See, e.g., *Padilla v. City of Saginaw*, 867 F.Supp. 1309, 1315-16 (E.D. Mich. 1994).

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

241. Specifically, the last sentence of § 1367(a).

242. *Aldinger*, 427 U.S. at 6. Of course, Justice Rehnquist cited no authority for the fairly remarkable assertion that state law will continue to pose “difficult and unsettled questions” for federal courts. *Id.*

243. 28 U.S.C. § 1367(c)(4).

244. *Walker v. City of Detroit*, No. 10-13179, 2010 WL 4259835, at *6 (E.D.Mich.2010) (Cleland, J.).

245. *Id.* at *2-4.

risk of jury confusion. After explaining in some detail²⁴⁶ why the risk of confusion was a compelling reason to dismiss, the opinion deals with the “exceptional circumstances” requirement in a single paragraph:

The court finds that exceptional circumstances are present in this case in weighing the likelihood of jury confusion, judicial inefficiency, substantial inconvenience to the parties, and potential unfairness in outcome which could readily result by attempting to resolve all claims in a single trial. Though there would be some duplication of effort required by Plaintiff and the defense in this case if Plaintiff decides to pursue all of the claims, the court finds that any advantages to be gained by trying all claims together are outweighed by the potential for confusion of the issues, legal theories, and defenses. Thus, the court will not exercise supplemental jurisdiction and will dismiss without prejudice all state law claims.²⁴⁷

Clearly, there is nothing in this paragraph that in any way could be viewed as describing any exceptional circumstance. Rather, it reiterates the basic reasons for dismissal on this ground that have been in use since *Gibbs*.

A conclusion that the risk of jury confusion is not a permissible basis for a (c)(4) dismissal does not render (c)(4) superfluous. There have been, and will continue to be, cases that are properly subject to (c)(4) dismissal. For example, in *Voda v. Cortis Corp.*,²⁴⁸ a patent infringement action included supplemental claims based on foreign patent law. The Federal Circuit held that “a district court’s exercise of supplemental jurisdiction could undermine the obligations of the United States under [international patent] treaties, which therefore constitute an exceptional circumstance to decline jurisdiction under § 1367(c)(4).”²⁴⁹ And in *Sparrow v. Mazda American Credit*,²⁵⁰ a claim that a debt collector engaged in abusive practices in violation of the Fair Debt Collection Practices Act (FDCPA), the court used § 1367(c)(4) to dismiss the supplemental counterclaims, which sought to recover the underlying debt. Exceptional circumstances were based on protecting the policy of the FDCPA:

246. The opinion provided such explanation in eleven paragraphs. See *id.* at *3-7.

247. *Walker*, 2010 WL 4259835 at *6.

248. *Voda v. Cortis Corp.*, 476 F.3d 887, 894 (Fed.Cir. 2007).

249. *Id.* at 900.

250. *Sparrow v. Mazda Am. Credit*, 385 F.Supp.2d 1063, 1069-71 (E.D. Cal. 2005).

[A]llowing a debt collector to bring an action for the underlying debt in a case brought under the FDCPA may deter litigants from pursuing their rights under that statute This policy satisfies the exceptional circumstances requirement to support an order declining to exercise supplemental jurisdiction over Defendant's state law claims to enforce the debt.²⁵¹

And in *Hays County Guardian v. Supple*, the district court remanded, on Eleventh Amendment grounds, the plaintiff's claims against state officials in their official capacities.²⁵² With those claims remanded, the district court decided not to exercise supplemental jurisdiction over the claims against the defendants in their individual capacities, for which there was no Eleventh Amendment bar.²⁵³ The Fifth Circuit affirmed, finding "exceptional circumstances" and "compelling reasons for declining jurisdiction" over state-law claims while identical claims, differing only in the capacity in which the defendants were sued, were proceeding in state court.²⁵⁴ Such duplicative litigation "would be a pointless waste of judicial resources."²⁵⁵

B. *Congressional Intent*

While the clarity of the textual argument might support the view that there is no need to go any further, the seemingly ambiguous phrases of (c)(4) suggest that an analysis of congressional intent is appropriate. The source for the argument that congressional intent supports the inclusion of jury confusion on "the list" is the first sentence from the one relevant paragraph in the House Report.²⁵⁶ "Subsection [1367](c) codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim, even though it is empowered to hear the claim."²⁵⁷

Before examining this sentence (and the rest of the House Report), it will be useful to recall the process that led to the adopted

251. *Id.* at 1071.

252. *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 124 (5th Cir. 1992).

253. *Id.* at 125.

254. *Id.*

255. *Id.*

256. Federal Courts Study Committee Implementation Act of 1990, H.R. REP. NO. 101-734 (to accompany H.R. 5381), 6875 (1990); *see also supra* note 126 and accompanying text (containing the entire paragraph from the House Report).

257. Federal Courts Study Committee Implementation Act of 1990, H.R. REP. NO. 101-734 (to accompany H.R. 5381), 6875 (1990).

text.²⁵⁸ In the case of (c)(4), the catch-all provision, we have an informative trail to follow, starting with the text. The first version of subsection (c) had no catch-all provision.²⁵⁹ The next, the Weis-FCSC version, had a catch-all with the broadest possible reach, permitting discretionary dismissal for any “other appropriate reason[] . . . for declining jurisdiction.”²⁶⁰ The final adopted language eliminates the broad language and replaces it with two high hurdles: the reason for dismissal must be both “exceptional” and “compelling.”²⁶¹

The next place to look for Congressional intent, after the text in question, would be the other parts of the same statute—i.e. the rest of § 1367. Again, the useful information points in the same direction. In § 1367(a), Congress significantly expanded the scope of jurisdictional power over supplemental claims. Both the text of (a) and the relevant portions of the House Report make this point.²⁶² It would be unusual if Congress intended that the § 1367(a) welcome sign could be undermined by the simple expedient of a judge, acting pursuant to essentially unreviewable discretion, stating there would be a risk of jury confusion if the supplemental claim were not dismissed. The final revision of the text of (c)(4) is strong evidence that Congress intended to protect subsection (a) by significantly narrowing the scope of the (c)(4) catch-all.

No post-1990 opinion that supports a (c)(4) dismissal based on jury confusion has much to say about the text or congressional intent. Rather, as noted above, some rely on a sentence from the one relevant paragraph of the House Report. The serious flaw in this paragraph was discussed earlier.²⁶³

Why did the House Report contain such an error? One possible explanation suggests itself upon a careful examination of the legislative path of (c)(4). While the House itself has been criticized for rushing the passage of this statute,²⁶⁴ the same cannot be said

258. See *supra* notes 94-121 and accompanying text.

259. Hearings, *supra* note 40, at 28-32 (describing the Wolf-Egnal Proposal).

260. *Id.* at 98; see also *id.* at 89-98 (the full proposal submitted by Judge Weis).

261. 28 U.S.C. § 1367(c)(4) (2006).

262. See, e.g., Federal Courts Study Committee Implementation Act of 1990, H.R. REP. NO. 101-743 (to accompany H.R. 5381) (1990). “In federal question cases, [the statute] broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims, including claims involving the joinder of additional parties.” *Id.* at 6874.

263. See *supra* notes 124-128 and accompanying text.

264. See *supra* note 172.

for the drafting process. The bill, which became § 1367, was first introduced in Congress on July 26, 1990.²⁶⁵ Hearings were held on September 6, 1990.²⁶⁶ Prior to the Hearings, major changes were made from the original draft at the suggestion of Judge Weis and others.²⁶⁷ The Weis draft included as (c)(4) a broadly worded catch-all provision, which authorized discretionary dismissal for “other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants”²⁶⁸ Clearly, such language could be fairly said to support the view that prior case law was to be codified. However, after the Hearing, (c)(4) was substantially rewritten. Instead of an unlimited list of reasons that only had to satisfy the test of being “appropriate,” (c)(4) now requires that the reason for dismissal be both “exceptional” and “compelling.”²⁶⁹ The House Report was filed on September 18, 1990, and clearly reflects the adopted version of (c)(4).²⁷⁰

The first sentence of the paragraph would have made sense if it had been drafted with the Weis version of (c) in mind. But in light of the final version of (c)(4), which was clearly in mind when the second and third sentences of the paragraph were drafted, it is hard to understand how the first sentence was drafted at the same time. It could well be that the second and third sentences were inserted without realizing how they clashed with the first sentence.²⁷¹

In any event, the text of (c)(4) and the broad policies reflected by § 1367(a) leave no doubt that the text means what it says and that jury confusion is not “on the list.” So how is it that so many judges got it wrong? Not surprisingly, many judges would like to maximize the scope of their discretionary power. Moreover, if a judge wants to dismiss a supplemental claim, supporting the assertion that there is a risk of jury confusion will be fairly simple.

265. See generally Federal Courts Study Committee Implementation Act of 1990, H.R. REP. NO. 101-743 (to accompany H.R. 5381) (1990).

266. *Id.*

267. See Wolf, *supra* note 14, at 15-20.

268. Hearings, *supra* note 40, and accompanying text (describing the full proposal submitted by Judge Weis, Hearings, *supra* note 40, at 98, following his prepared statement to the committee).

269. 28 U.S.C. § 1367(c)(4) (2006).

270. See Federal Courts Study Committee Implementation Act of 1990, H.R. REP. NO. 101-734 (to accompany H.R. 5381) (1990).

271. The simple fix is to read the word “some” into the first sentence, so it would accurately reflect that Congress codified some, but not all, prior case law.

CONCLUSION

There can be little doubt that the elimination of the risk of jury confusion as a ground for dismissal of supplemental claims is supported by the text, the broad policies of the supplemental jurisdiction statute, and the very specific path that led to the text of § 1367(c). Moreover, this conclusion finds further support in the broad procedural policies.

If we focus on the impact of discretionary dismissals of supplemental claims, the most important point is the ground for the dismissal. If it occurred following a dismissal (on the merits) of the federal claims or due to the substantial predominance of the pendent claim, it could be fairly said that the lawsuit belonged in state court.²⁷² Following dismissal of these cases, any further litigation would be in state court and there would be no harm to any significant interest. If the ground for dismissal was the novelty or complexity of the state law issue, there would be significant competing interests.²⁷³ It would be difficult to defend either outcome categorically.²⁷⁴ In situations where the sole ground for the dismissal of the supplemental claim was the risk or likelihood of jury confusion, there would be a clear frustration both of the plaintiffs' interests in obtaining full vindication of their rights in a single proceeding as well as the broad procedural interest in overall efficiency. The supposed upside of such a dismissal is to avoid a hypothetical federal institutional interest in avoiding a confused jury (if the case is ever tried).²⁷⁵

The institutional interests that were served or disserved by such a dismissal depended on the choice made by the plaintiff. If the plaintiff separately pursued both the state and federal claims, overall institutional interests in efficiency were disserved, even if the federal trial jury heard a simpler case.²⁷⁶ And if the dismissal

272. These two grounds are codified as § 1367(c)(2) and (c)(3).

273. Codified as § 1367(c)(1); see *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (holding that overall efficiency would be served by retention of the claim, while dismissal would lead to "a surer-footed reading of applicable [state] law").

274. But I'll try; a better result is to keep lawsuit together and use certification to the highest state court to resolve the state law issue. The Wolf-Egnal proposal contained such a provision. See subsection (f), Hearings, *supra* note 40, at 31; see also Wolf, *supra* note 14, at 30-31.

275. See *supra* notes 47-49 and accompanying text (discussing difficult choices facing a plaintiff). On the likelihood of trial, a 2004 federal study found that 97 percent of civil cases are settled or dismissed without a trial. *Supra* note 43.

276. See *supra* note 275 (discussing how rarely civil lawsuits are actually tried); see also *supra* note 48.

led to the plaintiffs' abandoning the state claims (and litigating only in federal court) or abandoning the federal claims (and litigating only in state court), the federal institutional advantage of avoiding a complicated jury trial (if the case was actually tried) could hardly overcome this loss to the plaintiff. Certainly, such a result was contrary to the spirit of § 1367, of *Gibbs*, and of modern procedure generally.²⁷⁷

A final reason for concluding that the likelihood of jury confusion should be categorically eliminated as a ground for discretionary dismissal is the ease with which a trial judge can invoke it to justify dismissal, whether or not that is the true reason, as well as the difficulty of appellate supervision of such dismissals. Moreover, there are well known techniques for reducing or eliminating jury confusion (if the claims are tried together).²⁷⁸ And there is always the possibility of separate federal trials. In its discussion of the risk of jury confusion as a possible ground for discretionary dismissal, the *Gibbs* Court noted that this factor was "independent of jurisdictional considerations" and that in such a situation, "jurisdiction should *ordinarily* be refused."²⁷⁹

277. Recall that *Gibbs* upheld a trial judge's holding that retained, rather than dismissed, a pendent claim, and commended the judge for "employing a special verdict form" so that "the possibility of confusion could be lessened." *Gibbs*, 383 U.S. at 729. And recall that at the start of *Gibbs*' discussion of discretion is the point that pendent jurisdiction is justified by "considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726. The court further discussed that dismissal would be appropriate where these factors were not present. *Id.* There is no suggestion in *Gibbs* that pendent claims should be dismissed because the trial judge has to work a little harder to make the case less confusing for the jury. *See generally id.*

278. *Id.* at 726-27.

279. *Id.* at 727 (emphasis added).