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# Supplemental Jurisdiction and § 1367: The Good, The Bad, and the Ugly

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# SUPPLEMENTAL JURISDICTION AND § 1367: THE GOOD, THE BAD, AND THE UGLY

Wendy C. Perdue*

Among the outstanding accomplishments of Judge Joseph F. Weis, Jr. was his work chairing the Federal Court Study Committee. Appointed by Chief Justice Rehnquist at the direction of Congress, the committee undertook a fifteen month study of the problems in the federal court system.[1] The final report was issued in 1990 and made a series of recommendations addressing a broad range of topics including tax jurisdiction, narcotics prosecutions, habeas cases, sentencing reform, disability adjudications, and diversity jurisdiction, which the committee recommended eliminating entirely.[2]

With one noteworthy exception, all of the recommendations were intended to reduce the workload of the federal courts.[3] That one exception concerned supplemental jurisdiction. The committee recommended that Congress should statutorily authorize supplemental jurisdiction.[4] This recommendation came in response to the Supreme Court's decision in *Finley v. United States*, which held that pendent party jurisdiction can be exercised only where there is explicit statutory authority to do so.[5]

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* Dean & Professor of Law, University of Richmond School of Law. My thanks to Luke Norris for his helpful suggestions and to the organizers of the University of Pittsburgh conference on The Jurisprudence and Legacy of the Honorable Joseph F. Weis, Jr.

[1] FED. CTS. STUDY COMM., 101ST CONG., REP. OF FED. COURTS STUDY COMM. (Comm. Print 1990), https://www.ojp.gov/pdffiles1/Digitization/124270NCJRS.pdf [hereinafter REPORT].

[2] *Id.*

[3] *Id.* at 3.

[4] *Id.* at 47.

[5] 490 U.S. 545, 556 (1989).

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On its facts, *Finley* provided a compelling case for pendent party jurisdiction. After the plaintiff's husband and two children were killed in an airplane crash, she sued the Federal Aviation Administration in federal court relying on the Federal Tort Claims Act (FTCA) and sought to join an additional party against whom she had a state law claim.[6] Without pendent party jurisdiction, the plaintiff would have had to bring two separate suits because FTCA suits fall within the exclusive jurisdiction of the federal courts.[7] Despite the obvious efficiency and fairness reasons to allow jurisdiction over the additional party, the Court found nothing in the FTCA explicitly authorizing such jurisdiction and therefore dismissed the claim against the additional party.[8]

Concerns about statutory authorization for pendent and ancillary jurisdiction had surfaced some years earlier in *Aldinger v. Howard*[9] and *Owen Equipment & Erection Co. v. Kroger*.[10] Prior to *Finley*, the Court seemed to construe jurisdictional statutes as authorizing supplemental jurisdiction to the full extent allowed by the Constitution, except where the statute conferring jurisdiction has "expressly or by implication *negated* its existence."[11] *Finley* altered the presumption in favor of supplemental jurisdiction and referred instead to "the necessity that jurisdiction be explicitly conferred."[12] And although the holding was limited to pendent party jurisdiction, the Court's analysis called into question previously well-established rules of pendent and ancillary jurisdiction.[13]

The *Finley* Court basically told Congress that if it did not like the decision, it could pass a statute authorizing jurisdiction.[14] That is what the Federal Court Study

[6] *Id.* at 546.

[7] *Id.* at 547.

[8] *Id.* at 555–56.

[9] 427 U.S. 1, 2–3, 18–19 (1976).

[10] 437 U.S. 365, 367, 377 (1978).

[11] *Aldinger*, 427 U.S. at 18 (emphasis added).

[12] *Finley*, 490 U.S. at 556.

[13] Wendy Perdue, Finley v. United States*: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539–41 (1990).

[14] *See Finley*, 490 U.S. at 556 ("Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress.").

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Committee wisely recommended and what Congress did by enacting the supplemental jurisdiction statute, 28 U.S.C. § 1367.[15]

Although the general recommendation was wise and important, the language of the statute that ultimately passed has proved challenging. Notwithstanding five Supreme Court decisions regarding the statute,[16] and a very extensive academic literature,[17] there continues to be litigation and uncertainty about every substantive section of the statute. The purpose of this Essay is to review what is settled about the statute and to highlight what remains unresolved.

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[15] REPORT, *supra* note 1, at 47.

[16] *See* Artis v. District of Columbia, 138 S. Ct. 594, 594 (2018); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005); Jinks v. Richland Cnty., 538 U.S. 456, 458 (2003); Raygor v. Regents of Univ. Minn., 534 U.S. 533, 535–36 (2002); City of Chicago v. Int'l Coll. Surgeons, 522 U.S. 156, 161–62 (1997).

[17] *See, e.g.*, Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963, 963–64 (1991); Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007, 1007 (1991); Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3, 3 (1992); Edward H. Cooper, *An Alternative and Discretionary § 1367*, 74 IND. L.J. 153, 153 (1998); Rochelle Cooper Dreyfuss, *The Debate Over § 367: Defining the Power to Define Federal Judicial Power*, 41 EMORY L.J. 13, 13 (1992); Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 SETON HALL LEGIS. J. 157, 158 (1994); Howard P. Fink, *Supplemental Jurisdiction—Take It to the Limit!*, 74 IND. L.J. 161, 161 (1998); Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 IND. L.J. 5, 5 (1998); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 446 (1991); Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 IND. L.J. 181, 181–82 (1998); John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 IND. L.J. 25, 26 (1998); Wendy Collins Perdue, *The New Supplemental Jurisdiction Statute—Flawed but Fixable*, 41 EMORY L.J. 69, 69–70 (1992); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 109–10 (1999) [hereinafter *Sympathetic Textualism*]; James E. Pfander, *The Simmering Debate Over Supplemental Jurisdiction*, 2002 U. ILL. L. REV. 1209, 1209 (2002) [hereinafter *Simmering Debate*]; Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993, 993–94 (1991); Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 943–44 (1991); Thomas D. Rowe, Jr., *1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 IND. L. REV. 53, 53–54 (1998); David L. Shapiro, *Supplemental Jurisdiction: A Confession, an Avoidance, and a Proposal*, 74 IND. L.J. 211, 212 (1998); Joan Steinman, *Crosscurrents: Supplemental Jurisdiction, Removal, and the ALI Revision Project*, 74 IND. L.J. 75, 76 (1998). *See also* 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3567, at 324–26 (3d ed. 2008) (listing additional academic commentary on § 1367).

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The structure of this Essay follows the structure of the statute. Subsection (a) of the statute provides supplemental jurisdiction to the full extent allowed by Article III of the Constitution. Subsection (b) cuts back in diversity cases on some of that broad grant, although the largely unexplored last clause of that subsection may mean that subsection (b) cuts back on jurisdiction less than is sometimes assumed. Subsection (c) gives the court discretionary power to dismiss some supplemental claims. Finally, subsection (d) provides a tolling position so that claims that are dismissed may be refiled. Where there are continuing debates about meaning, the different views will be described though I do not try to resolve the disagreements—just highlight where they exist.

## I. SUBSECTION (A)

### *A. The Article III Same Case and Controversy Test*

Subsection (a) provides that "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy under Article III of the United States Constitution."[18] There are two noteworthy aspects of this language. First, it appears to solve the *Finley* problem by providing explicit statutory authorization for supplemental jurisdiction.[19] Second, rather than specifying a test for the outer limits of supplemental jurisdiction, it provides that jurisdiction shall extend to the full extent allowed by the Constitution.[20]

The approach adopted by § 1367 has the beneficial effect of assuring that there is no gap between what the statute authorizes and what the Constitution permits. The downside of this approach is that there remains some uncertainty concerning the scope of what the Constitution permits.

The leading case on the constitutional scope of supplemental jurisdiction is *United Mine Workers v. Gibbs*.[21] The case grew out of a labor dispute between rival labor unions.[22] The plaintiff brought suit in federal court alleging that the defendant's

[18] 28 U.S.C. § 1367(a).

[19] I say "appears" because, as discussed *infra*, there is a plausible reading of the second half of subsection (a) that calls into question whether the statute does solve the *Finley* problem. *See infra* notes 63–68, and accompanying text.

[20] See 13D WRIGHT ET AL., *supra* note 17, § 3567.1, at 335.

[21] United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 718 (1966).

[22] *Id.*

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conduct violated both federal and state law.[23] Although there was no independent basis for federal jurisdiction over the state law claim, the Court upheld jurisdiction explaining:

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [t]he Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ," U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power . . . .[24]

The "common nucleus of operative fact" language was new—similar but not identical to the "same transaction or occurrence" test that appears in the Federal Rules of Civil Procedure.[25] Without a historical antecedent, the courts have struggled to determine "how much relationship is required between the claims for them to satisfy the 'common nucleus' test."[26] As the Third Circuit has observed: "The test for a 'common nucleus of operative facts' is not self-evident. Indeed, '[i]n trying to set out standards for supplemental jurisdiction and to apply them consistently, we observe that, like unhappy families, no two cases of supplemental jurisdiction are exactly alike.'"[27] A number of courts have interpreted the *Gibbs* test to require only "a loose factual connection,"[28] although as Judge Easterbrook has observed: "How loose is that? What does enough commonality really mean? Still, unless there is a

[23] *Id.* at 720.

[24] *Id.* at 725 (emphasis omitted).

[25] *See* FED. R. CIV. P. 13(a)(1), 13(g), 20(a).

[26] Colo. Dep't Pub. Health & Env't, Hazardous Materials & Waste Mgmt. Div. v. United States, No. 17-cv-02223-RM-SKC, 2021 WL 3286589, at *2 (D. Colo. Aug. 2, 2021).

[27] Lyon v. Whisman, 45 F.3d 758, 760 (3d Cir. 1995) (quoting Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96, 105 (3d Cir. 1988)).

[28] *See, e.g.*, Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir. 1995); Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385 (7th Cir. 1996); McCoy v. Iberdrola Renewables, Inc., 760 F.3d 674, 683 (7th Cir. 2014); Douglas v. Lalumiere, No. 2:20-cv-00227-JDL, 2022 WL 17832727, at *1, *3–4 (D. Me. Dec. 21, 2022); 13D WRIGHT ET AL., *supra* note 17, § 3567.1 at 359, 359 n.42. ). *But see* Mason v. Richmond Motor Co., 625 F. Supp. 883, 886–88 (E.D. Va. 1986), *aff'd*, 825 F.2d 407 (4th Cir. 1987).

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phrase better than 'nucleus of operative facts,' there's no point in complaining. No one has come up with a better phrase, despite a lot of trying, so we apply this one as best we can."[29]

Whatever "common nucleus of operative fact" means, there is broad, though not universal, agreement that it is more expansive than "same transaction or occurrence"[30] and this conclusion has generated its own anomaly. Prior to the enactment of § 1367, courts routinely held that there was no supplemental jurisdiction over permissive counterclaims[31] which, by definition, do not arise from the same transaction or occurrence. Subsequent to the enactment of § 1367, a number of courts have upheld supplemental jurisdiction over permissive counterclaims that had some factual connection but did not arise from the same transaction or occurrence.[32] This is despite the fact that the House Report on the statute states that § 1367 was intended to "restore the pre-*Finley* understanding of the authorization for and limits on other forms of supplemental jurisdiction."[33]

There is no question that the drafters were aware of both the *Gibbs* test and the "same transaction or occurrence" language. The original draft of § 1367 proposed by the Working Committee of the Federal Courts Study Committee used the "same transaction or occurrence" language:

> (a) Except as provided in subsections (b) and (c) or in another provision of this Title, in any civil action on a claim for which jurisdiction is provided, the district court shall have jurisdiction over all other claims arising out of the same

[29] Prolite Bldg. Supply v. MW Mfrs., 891 F.3d 256, 258 (7th Cir. 2018).

[30] *See* Glob. NAPS, Inc. v. Verizon New Eng., Inc., 603 F.3d 71, 88 (1st Cir. 2010); 13D WRIGHT ET AL., *supra* note 17, § 3567.1 at 359 ("*Gibbs* is broader than transaction or occurrence, and embraces all claims with a loose factual connection."). *But see* Colborn v. Forest Good Eats, LLC, No. 5:19-CV-431-D, 2020 WL 5629765, at *1, *7 (E.D.N.C. 2020) (cases cited therein).

[31] *See* 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1422, at 202, 202 n.3 (3d ed. 2010).

[32] *See Global NAPs, Inc.*, 603 F.3d at 83; Jones v. Ford Motor Credit Co., 358 F.3d 205, 207, 208–09 (2d Cir. 2004); *Channell*, 89 F.3d at 385; Frisby v. Keith D. Weiner & Assocs. Co., 669 F. Supp. 2d 863, 872 (N.D. Ohio 2009); Michelle S. Simon, *Defining the Limits of Supplemental Jurisdiction Under 28 U.S.C. § 1367: A Hearty Welcome to Permissive Counterclaims*, 9 LEWIS & CLARK L. REV. 295, 295, 304–06 (2005); Graham M. Beck, Comment, *Supplemental Jurisdiction over Permissive Counterclaims in Light of* Exxon v. Allapattah, 41 UNIV. S.F. L. REV. 45, 47 (2006); *id.* at 208, 208 n.7.

[33] H.R. REP. NO. 101-734, at 28 (1990).

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> transaction or occurrence, including claims that require the joinder of additional parties.[34]

But this is not the language that was adopted. Instead, the statute avoids including a specific test and a footnote in the House Report that says: "subsection (a) codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*."[35] It is unclear whether the drafters envisioned that they were adopting a test that was broader than the "same transaction or occurrence" test or whether they believed the tests were fundamentally the same. But whatever the drafters intended, a number of courts have now held that § 1367 does alter prior practice and extends supplemental jurisdiction to at least some permissive counterclaims.[36]

Aside from the question of how best to apply the *Gibbs* test, a further question remains: does the *Gibbs* test delineate the outer limits of constitutional authority? Based on the House Report regarding § 1367, it appears that Congress assumed that to be the case. As noted above, the House Report states that the statute "codifies . . . *United Mine Workers v. Gibbs*."[37] Likewise, a number of cases and commentators state that § 1367 "codified" *Gibbs*.[38] But as the Second Circuit has observed: "Congress's understanding of the extent of Article III is of course not binding as constitutional interpretation, and section 1367's legislative history cannot be read as an independent limit on subsection 1367(a)'s clear extension of jurisdiction to the limits of Article III."[39]

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[34] FED. CTS. STUDY COMM., 1 WORKING PAPERS AND SUBCOMMITTEE REPORTS 567 (1990) [hereinafter WORKING PAPERS].

[35] H.R. REP. NO. 101-734, at 28 n.15 (1990).

[36] *See* Nalan v. Access Fin., Inc., No. 5:20-cv-02785-EJD, 2020 WL 6270945, at *4–5 (N.D. Cal. Oct. 23, 2020); Adams St. Joint Venture v. Harte, 231 F. Supp. 2d 759, 762–64 & n.1 (N.D. Ill. 2002).

[37] H.R. REP. NO. 101-734, at 28 n.15.

[38] *See* 13D WRIGHT ET AL., *supra* note 17, at 337; 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3523, at 172, 172 n.43; Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. STATE L.J. 849, 873–74, 914 (1992).

[39] Jones v. Ford Motor Credit Co., 358 F.3d 205, 213 n.5 (2d Cir. 2004). *See also* Voda v. Cordis Corp., 476 F.3d 887, 894 (Fed. Cir. 2007).

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*Gibbs* itself is pretty Delphic. The opinion does reference Article III, but the analysis is not grounded in any constitutional considerations.[40] Instead, the Court makes much of the fact that the prior and more narrow test that was set out in *Hurn v. Oursler* was decided before the new Federal Rules of Civil Procedure were adopted.[41] And those new rules were built around the impulse "toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[42] That analysis may explain why *Hurn* was too narrow but it does not address whether the common nucleus test delineates the outer limits of what constitutes a single constitutional case.

Subsequent to *Gibbs*, the Court in *Owen Equipment* quoted the key language from *Gibbs* about judicial power and observed that "[i]t is apparent that *Gibbs* delineated the constitutional limits of federal judicial power."[43] However, in a footnote the Court added:

> The Court of Appeals in the present case believed that the "common nucleus of operative fact" test also determines the outer boundaries of constitutionally permissible federal jurisdiction when that jurisdiction is based on diversity of citizenship. We assume without deciding that the Court of Appeals was correct in that regard.[44]

And because the Court went on to find an absence of statutory authority, the scope of Article III was not before the Court in that case.

Like the Supreme Court in *Owen Equipment*, many courts and commentators seem to assume that *Gibbs* describes the outer limits of Article III—but not everyone agrees.[45] Seventy years ago, before *Gibbs* was decided, Professor Thomas Green argued the Constitution permits jurisdiction over all counterclaims, including

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[40] *See In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 510 F. Supp. 2d 299, 322 (S.D.N.Y. 2007).

[41] 289 U.S. 238 (1933).

[42] United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966).

[43] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 371–72 (1978).

[44] *Id.* at 371 n.10.

[45] *See, e.g.*, LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 126–27 (5th ed. 2013) [hereinafter TEPLY].

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permissive counterclaims.[46] Judge Friendly has offered his agreement with Green's conclusion.[47] Writing subsequent to the passage of § 1367, Professor, now Judge, Fletcher reached a similar conclusion, noting that beginning in the early 1700s, English and American courts entertained unrelated counterclaims for defensive set-off.[48] As to the *Gibbs* test, Judge Fletcher observed:

> [I]f the *Gibbs* test does apply to all types of supplemental jurisdiction, it is almost certainly wrong as a matter of historical constitutional interpretation. The Court's opinion relies on the term "case" in Article III, but it supplies no evidence—and so far as I am aware there is none—that to the framers the terms "case" and "controversy" meant only disputes involving transactionally related claims.[49]

Likewise, Professors Larry Teply and Ralph Whitten have argued that "[b]ecause Congress might have legitimate policy reasons for conferring pendent or ancillary jurisdiction over factually unrelated nonfederal claims, it is unwise to conclude that the scope of Article III 'case or controversy' can never be extended to such claims."[50]

How far might Article III extend? Professor C. Douglas Floyd has argued that the contours of Congress' authority to authorize joinder of claims should be based "not on the nature of the factual or transactional relationship among the claims to be joined, but rather on whether such joinder is necessary and proper to achieve the purposes underlying the enumerated heads of federal jurisdiction set out in Article III."[51] Professor Richard Matasar has offered the broadest test, arguing that Article III allows jurisdiction over all matters authorized by "lawfully adopted procedural rules for joinder of claims and parties."[52]

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[46] Thomas Green, Jr., *Federal Jurisdiction over Counterclaims*, 48 NW. U. L. REV. 271 (1953).

[47] United States v. Heyward-Robinson Co., 430 F.2d 1077, 1088 (2d Cir. 1970) (Friendly, J., concurring).

[48] William A. Fletcher, *"Common Nucleus of Operative Fact" and Defensive Set-Off: Beyond the* Gibbs *Test*, 74 IND. L.J. 171, 177 (1998).

[49] *Id.*

[50] TEPLY, *supra* note 45, at 128.

[51] C. Douglas Floyd, *In Honor of Walter O. Weyrauch: Three Faces of Supplemental Jurisdiction After the Demise of* United Mine Workers v. Gibbs, 60 FLA. L. REV. 277, 283 (2008).

[52] Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1401 (1983).

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It remains to be seen whether the Supreme Court will embrace any of these theories, but in the meantime we do not have a definitive determination of the constitutional outer limits of supplemental jurisdiction. As the Second Circuit has observed, "the correct reading of subsection 1367(a)'s reference to 'the same case or controversy under Article III' remains unsettled."[53]

### *B. Civil Actions, Claims and "Contamination"*

Most of the confusion over subsection (a) is not about the scope of Article III. Instead, the interpretative difficulties have centered around the first half of the first sentence in subsection (a), which provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims."[54] A grammatical oddity of this clause is that it refers to "a civil action . . . [and] all other claims."[55] A civil action is not ordinarily understood to be the same as a claim, so what exactly does this mean?[56]

Some commentators,[57] and a few lower courts,[58] focused on the reference to a "civil action" and "original jurisdiction" and argued that before a court could exercise supplemental jurisdiction over an additional claim or party, the court needed to have jurisdiction over the suit laid out in the plaintiff's well-pleaded complaint.[59] Under this interpretation, if the plaintiff's initial suit is based on diversity and included a nondiverse party or one with an insufficient amount in controversy, there could be no supplemental jurisdiction because there is no original jurisdiction over the plaintiff's suit.[60] On the other hand, if the plaintiff's original suit meets the requirements of § 1332, there could be supplemental jurisdiction over a subsequently added party—such as a Rule 14 party—over whom there is not an independent basis

[53] Jones v. Ford Motor Credit Co., 358 F.3d 205, 213 n.5 (2d Cir. 2004).

[54] 28 U.S.C. § 1367(a).

[55] *Id.*

[56] *See* TEPLY, *supra* note 45, at 133–36.

[57] *See Sympathetic Textualism*, *supra* note 17, at 132–37; *Simmering Debate*, *supra* note 17, at 1214.

[58] *See* Leonhardt v. W. Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998); ZB Holdings, Inc. v. White, 144 F.R.D. 42, 47 (S.D.N.Y. 1992).

[59] 28 U.S.C. § 1367(a); *Sympathetic Textualism*, *supra* note 17, at 133; *Simmering Debate*, *supra* note 17, at 1215; *Leonhardt*, 160 F.3d at 640; *ZB Holdings, Inc.*, 144 F.R.D. at 47.

[60] *See Sympathetic Textualism*, *supra* note 17, at 128.

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of diversity jurisdiction.[61] This interpretation is sometimes referred to as the "action-specific" interpretation.[62]

The problem with this interpretation is that if it were applied to federal question cases, it would leave the *Finley* problem unsolved.[63] In *Finley*, the plaintiff's initial complaint included both a federal claim defendant and a state claim defendant.[64] The holding of *Finley* was that the FTCA did not authorize jurisdiction over the non-federal defendant, which meant there was no original jurisdiction over the plaintiff's complaint.[65] Both the Federal Courts Study Committee Report[66] and the legislative history[67] are clear that the purpose of the statute was to provide a statutory basis for supplemental jurisdiction in federal question cases like *Finley*, so it would be very odd to adopt an interpretation that failed to accomplish this core objective.[68]

An alternative interpretation of subsection (a) is "claim-specific" which focuses on the language referring to "all other claims."[69] Under this approach, instead of looking to see if the federal courts would have original jurisdiction over the plaintiff's original complaint in its entirety, the court would identify what the ALI project calls a "freestanding" claim, that if sued upon alone would be one over which the federal courts would have jurisdiction.[70] This freestanding claim could then serve as the anchor to which other claims or parties could be added and as to which the court could exercise supplemental jurisdiction.[71]

The claim-specific interpretation of subsection (a) solves the *Finley* problem. In *Finley*, the plaintiff had a claim against the Federal Aviation Administration over which the federal courts would have original jurisdiction if that claim had been

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[61] TEPLY, *supra* note 45, at 134; *see id.* at 146. Jurisdiction over the subsequently added party would have traditionally been called ancillary jurisdiction.

[62] *See* TEPLY, *supra* note 45, at 133.

[63] *See id.*

[64] Finley v. United States, 490 U.S. 545–47 (1989).

[65] *Id.* at 553–54.

[66] WORKING PAPERS, *supra* note 34, at 547; REPORT, *supra* note 1, at 47.

[67] H.R. REP. NO. 101-734, at 28 (1990).

[68] *Id.*; *see also* REPORT, *supra* note 1, at 47; WORKING PAPERS, *supra* note 34, at 547.

[69] 28 U.S.C. § 1367(a); *see* TEPLY, *supra* note 45, at 133.

[70] AM. L. INST., FEDERAL JUDICIAL CODE REVISION PROJECT § 1367, at 13 (2004).

[71] *Id.*

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brought alone.[72] That federal claim could serve as the anchor to which the state law claim would then be appended for purposes of supplemental jurisdiction.

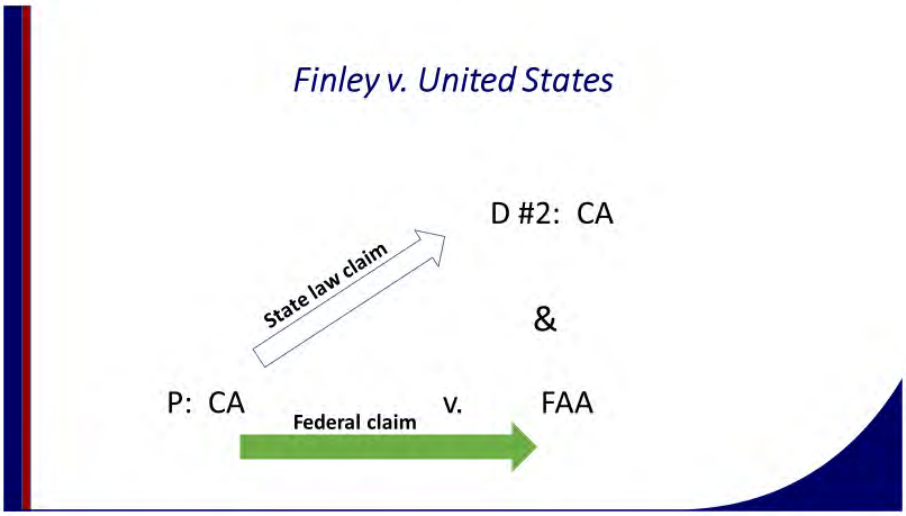


Diagram 1: *Finley v. United States*

After much litigation in the lower courts,[73] in *Exxon Mobil Corp. v. Allapattah*,[74] the Court largely endorsed the claim-specific approach explaining that "once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy."[75] Unfortunately, while the claim-specific approach solves the *Finley* problem, it creates a different problem in cases in which jurisdiction is founded on § 1332. Courts have long held that a suit under § 1332 requires each claimant to independently meet the amount in controversy.[76] Likewise, under the total diversity

[72] Finley v. United States, 490 U.S. 545, 547 (1989).

[73] *See, e.g.*, Rosmer v. Pfizer Inc., 263 F.3d 110 (4th Cir. 2001); Gibson v. Chrysler Corp., 261 F.3d 927 (9th Cir. 2001); *In re* Abbott Laboratories, 51 F.3d 524, 529 (5th Cir. 1995); Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 930–33 (7th Cir. 1996); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997); Trimble v. ASARCO, Inc., 232 F.3d 946, 962 (8th Cir. 1999); Mericare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999); Leonhardt v. W. Sugar Co., 160 F.3d 631, 640–41 (10th Cir. 1998).

[74] 545 U.S. 546 (2005).

[75] *Id.* at 552.

[76] *See* 14AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3704, at 606 (2011).

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rule, all plaintiffs must be diverse from all defendants. A claim-specific approach would potentially undermine both of these rules.[77]

In *Exxon Mobil*, the Court endorsed the claim-specific approach as to the amount in controversy (though not as to diversity of citizenship), explaining that "[w]hen the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the district court, beyond all question has original jurisdiction over that claim."[78] And once a federal court has original jurisdiction over one claim, that claim can serve as the anchor for additional claims.

Application of this approach is well-illustrated by *Ortega v. Star-Kist Foods, Inc.*, the companion case to *Exxon Mobil* in which all the plaintiffs were diverse from the defendant but only one met the amount in controversy.[79] The Court held that the claim that met the amount in controversy was one over which the district court had original jurisdiction and could therefore serve as the anchor to which the other claim could be appended and over which the court could exercise supplemental jurisdiction.[80]

[77] *See* Strawbridge v. Curtiss, 7 U.S. 267, 267 (1806).

[78] *Exxon Mobil Corp.*, 545 U.S. at 559.

[79] 370 F.3d 124 (1st Cir. 2004), *rev'd*, 545 U.S. 546 (2005).

[80] *Exxon Mobil Corp.*, 545 U.S. at 549.

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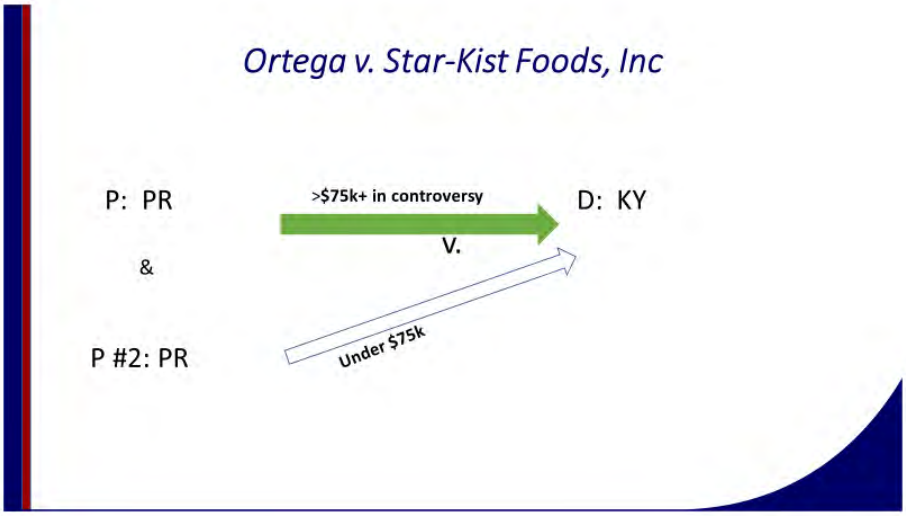


Diagram 2: *Ortega v. Star-Kist Foods, Inc.*

The *Exxon Mobil* Court applied this same rationale to class actions and held that if the claim of the named party meets the amount in controversy, then there is supplemental jurisdiction over the claims of unnamed class members whose individual claims do not meet the amount in controversy.[81] This holding overruled *Zahn v. International Paper Co.*[82] which had held that all class members must meet the amount in controversy and was at odds with the House Report on § 1367 which had explicitly stated that § 1367 was not intended to overrule *Zahn*.[83]

[81] *Id.*

[82] Zahn v. Int'l. Paper Co., 414 U.S. 291, 301 (1973).

[83] The House Report states that § 1367(b) "is not intended to affect the jurisdictional requirements of [§ 1332] in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. REP. NO. 101-734, at 29 (1990).

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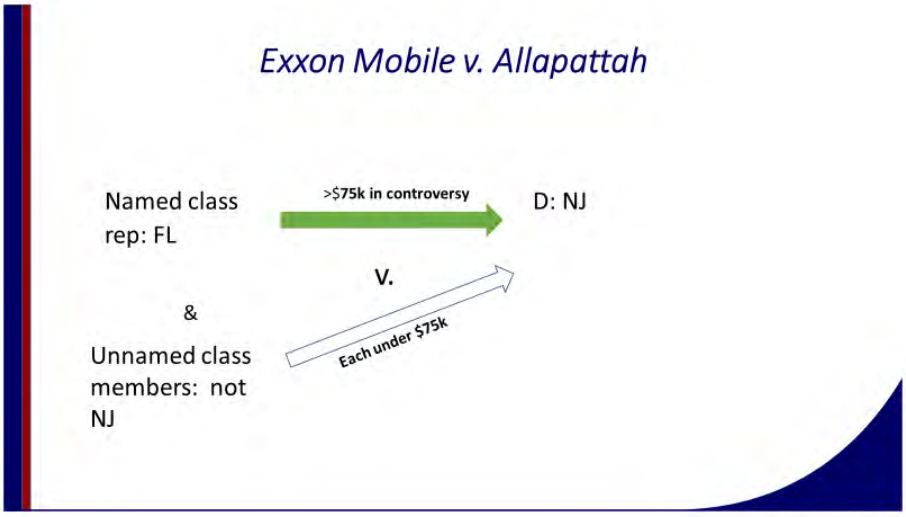


Diagram 3: *Exxon Mobile v. Allapattah*

Both *Ortega* and *Exxon Mobil* involved the amount in controversy, but what if the claim to be appended is one by a nondiverse plaintiff? Suppose, for example, that the second plaintiff in *Ortega* had been a citizen of the same state as the defendant. The claim by the diverse plaintiff is one over which the district court would have had original jurisdiction if sued upon alone—can it serve as the anchor and support supplemental jurisdiction over nondiverse parties? If the Court were to allow supplemental jurisdiction in this case, that would completely undermine the total diversity rule of *Strawbridge*.[84]

[84] Strawbridge v. Curtiss, 7 U.S. 267, 267 (1806).

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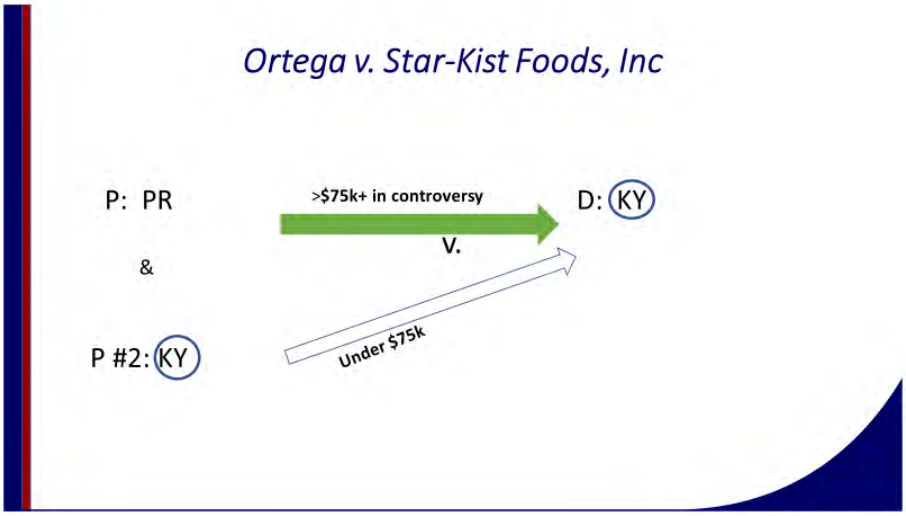


Diagram 4: *Ortega v. Star-Kist Foods, Inc.*

In *Exxon Mobil*, the Court solved this issue by explaining that "a single nondiverse party can contaminate every other claim in the lawsuit,"[85] and that "[i]ncomplete diversity destroys original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere."[86] As Professors Teply and Whitten have observed, the Court in essence reads § 1367(a) as "'claim-specific' with regard to jurisdictional amount problems and as 'action-specific' with regard to incomplete diversity problems."[87] The Court never attempts to ground this interpretation in the language of the statute. Presumably, the explanation for applying the "contamination" theory to diversity and not to either the amount in controversy or federal question cases lies in the Court's presumption concerning legislative intent. It is certainly a fair inference that this statute was not intended to eliminate the total diversity rule and thereby dramatically expand diversity jurisdiction. Certainly, that was not the intent of the Federal Courts Study Committee which had recommended dramatically curtailing diversity jurisdiction.[88] But nowhere in the legislative history is there any statement about preserving the total diversity rule. There is some irony in the Court's giving credence to unstated legislative intent about

[85] *Exxon Mobil Corp.*, 545 U.S. at 566.

[86] *Id.* at 554.

[87] TEPLY, *supra* note 45, at 140–41.

[88] REPORT *supra* note 1, at 38.

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the total diversity rule while completely ignoring an explicit statement regarding class actions.

Whether warranted by the explicit statutory language, the contamination theory does preserve the total diversity rule, but how far does it go? Specifically, does it apply to class actions in which some of the unnamed class members are not diverse? If so, it would call into question the holding in *Ben Hur*.[89] The Court could have distinguished class actions on the grounds that only the claims of the named parties matter and that the citizenship or amount in controversy of unnamed class members are irrelevant. This was the approach that the Court took in *Ben Hur* but then inexplicably rejected in *Zahn v. International Paper Co.*[90] However, in *Exxon Mobil*, the Court treats unnamed class members exactly as it would additional named parties.[91] If we do the same with respect to the citizenship of nondiverse class members, their presence would implicate the Court's "contamination" rationale and destroy diversity jurisdiction.[92]

The contamination rationale raises other questions as well. Suppose the extra party was a nondiverse Rule 19 party. The contamination theory suggests this case would not get past subsection (a). The oddity of this is that subsection (b)—which only applies to claims that survive subsection (a)—specifically excludes Rule 19 claims.[93] This exclusion would be unnecessary if Rule 19 parties never survive subsection (a).[94] Maybe Congress just wanted to make "double sure"[95] that Rule 19 parties would be excluded. Perhaps, but several of the law professors who were involved in the drafting of § 1367 seem to have thought otherwise, since they have argued that Rule 19 parties can survive subsection (b) so long as they are joined but

[89] Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921).

[90] Zahn v. Intl. Paper Co., 414 U.S. 291 (1973).

[91] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 579 (2005).

[92] *See* TEPLY, *supra* note 45, at 143.

[93] *Id.*; 28 U.S.C. § 1367(b).

[94] Of course, Rule 19 parties with less than $75,000 in controversy would, presumably, survive subsection (a), only to then be excluded by subsection (b). Subsection (b) would exclude these small added claims. But this result is even odder. Bear in mind that if a Rule 19 party can't be joined, there is at least the potential that the whole claim will be dismissed. *See* FED. R. CIV. P. 19(b). This seems particularly problematic when the claim of the Rule 19 party is small. Thus, having excluded nondiverse Rule 19 parties under subsection (a), it would have seemed more sensible to then allow jurisdiction over Rule 19 parties with a small amount in controversy.

[95] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 565 (2005).

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they do not claim nor are they claimed against.[96] In other words, they assumed that Rule 19 parties would survive a challenge under subsection (a).

Although Justice Kennedy's opinion in *Exxon Mobil* has been harshly criticized,[97] the statute as drafted presented a hopeless dilemma. A complete embrace of the action-specific interpretation would leave *Finley* intact which the drafters of § 1367 clearly meant to address, but a complete embrace of the claim-specific approach would undermine the total diversity rule which likewise was certainly not intended. A possible way out of the dilemma would be to do claim-specific for federal question cases and action-specific for diversity cases.[98] This would better capture the likely intent of the statute but there is nothing in the actual text that supports this differential approach. Alas, as we will see, subsection (a) is not the only part of the statute that suffers from problematic drafting.

## II. SUBSECTION (B)

Subsection (a) is not the end of the jurisdictional inquiry. The structure of the statute is that subsection (a) confers broad supplemental jurisdiction, but where the basis for federal jurisdiction derives from § 1332, subsection (b) cuts in back on jurisdiction over some claims. Specifically, the statute provides that in cases founded on § 1332, the district court will not have supplemental jurisdiction "over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 . . . ."[99]

The classic case in which this language would apply is *Owen Equipment & Erection Co. v. Kroger*.[100] Pursuant to Rule 14, the defendant impleaded a nondiverse

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[96] *See* Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 955–59 (1991). *But see* Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963, 970–71 (1991); TEPLY, *supra* note 45, at 764–65.

[97] *See* TEPLY, *supra* note 45, at 141 ("the distinction drawn by Justice Kennedy is simply incoherent as textual exegesis. In addition, the majority opinion was disingenuous in the way in which it dealt with the impact of § 1367(a) on the *Finley* decision.").

[98] *See Sympathetic Textualism*, *supra* note 17, at 138.

[99] 28 U.S.C. § 1367(b).

[100] 437 U.S. 365 (1978).

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third-party defendant and the plaintiff sought to bring a claim against that party.[101] Nothing in subsection (b) takes away jurisdiction over the third-party claim of the defendant—Claim A in the diagram below. It is a claim against a "person made party under Rule 14," but it is not a "claim by a **plaintiff**."[102] On the other hand, the plaintiff's claim against the third-party defendant—Claim B in the diagram below—is excluded because it is a "claim[] by plaintiff[] against person[] made part[y] under Rule 14."[103]

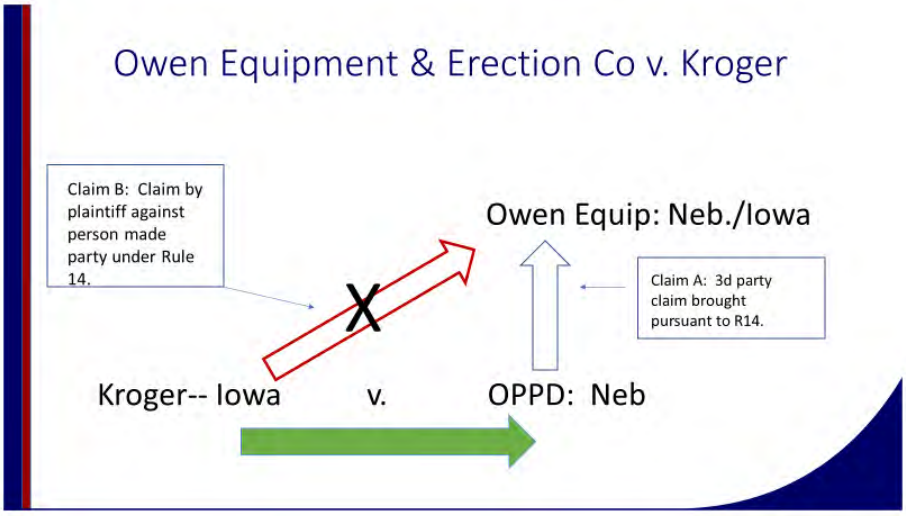


Diagram 5: *Owen Equipment & Erection Co. v. Kroger*

Where else might subsection (b) take away jurisdiction? Consider the situation in which a plaintiff sues two diverse defendants with only one of the claims meeting the amount in controversy. Since it is Rule 20 that allows the plaintiff to join multiple defendants, the plaintiff's secondary claim[104] would be excluded by subsection (b)

[101] *Id.* at 367–68.

[102] 28 U.S.C. § 1367(b) (emphasis added).

[103] *Id.*

[104] Professor Pfander has argued that subsection (b) should be understood to come into play only for claims that are added after the original complaint is filed, but this interpretation assumes that, contrary to what the Court later held in *Exxon Mobile*, the reference in subsection (a) to "original jurisdiction" incorporates all the constraints of the total diversity rule and the amount in controversy requirements. *See Sympathetic Textualism*, *supra* note 17, at 146.

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because it constitutes a "claim[] by plaintiff[] against person[] made part[y] under Rule 20 . . . ."[105]

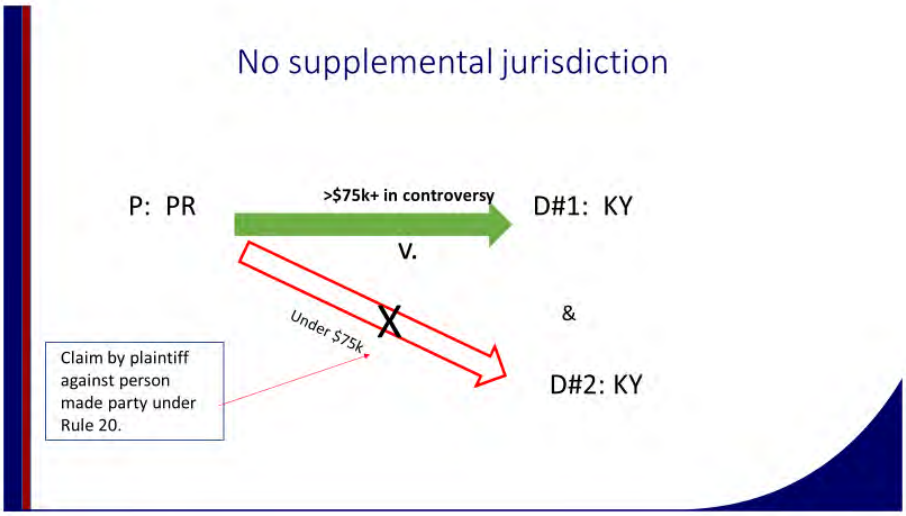


Diagram 6: No Supplemental Jurisdiction

Interestingly, although § 1367(b) would exclude a claim where there is one plaintiff and two defendants, it would not exclude the converse with two plaintiffs and one defendant as was the case in *Ortega*. The reason is that while it is Rule 20 that allows the multiple plaintiffs to join together and the additional claim is a claim by a plaintiff, the claim of the added plaintiff is not "against" a person made party under Rule 14, 19, 20 or 24.

[105] 28 U.S.C. § 1367(b).

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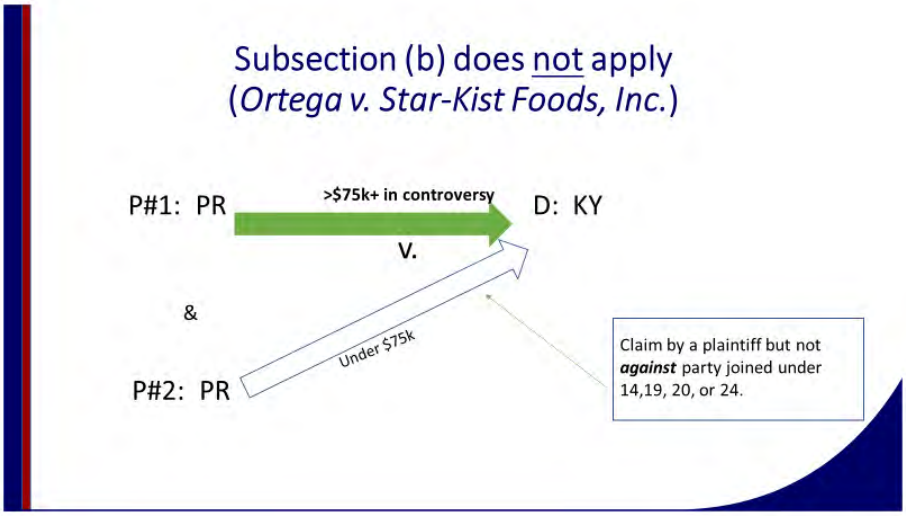


Diagram 7: Subsection (b) does not in *Ortega v. Star-Kist Foods, Inc.*

So, with two plaintiffs and one defendant, supplemental jurisdiction is possible, but with one plaintiff and two defendants it is not. But suppose these situations are combined. In other words, suppose that in *Ortega*, the two plaintiffs had sued two defendants instead of one. In such a case, subsection (b) would exclude the second plaintiff's claim. It is Rule 20 that allows the two defendants to be joined in one suit, so the claim of Plaintiff #2 is a claim by a plaintiff against a person made party under Rule 20.

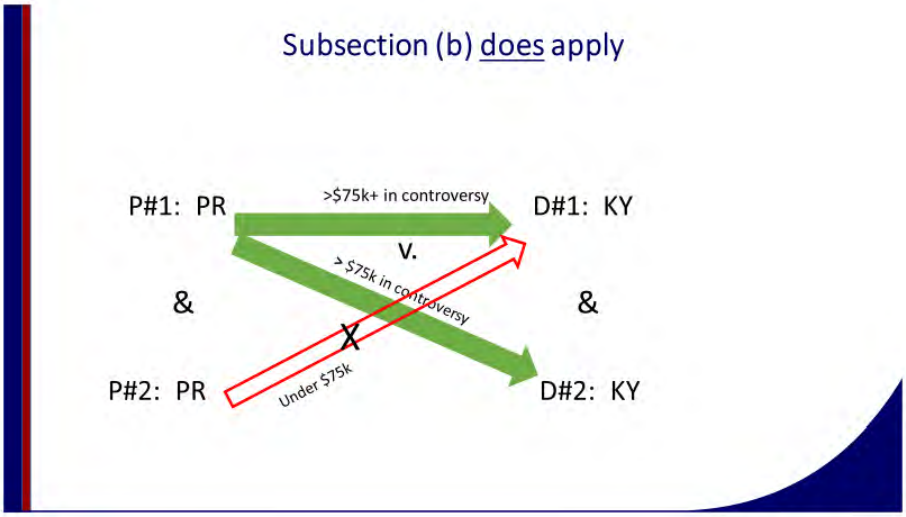


Diagram 8: Subsection (b) does apply.

Presumably, the result is the same irrespective of whether Plaintiff #2 sues Defendant #1 or #2 (or both), at least if both defendants were joined at the same time.

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It is Rule 20 that allowed both of those defendants to be joined so irrespective of which defendant Plaintiff #2 sues, it would still be a claim by a plaintiff against a person made a party under Rule 20. Interestingly, *Ortega* began with multiple defendants.[106] The district court dismissed one of those defendants, Star-Kist Caribe, after it concluded that Star-Kist had its principal place of business in Puerto Rico and was therefore nondiverse from the plaintiffs.[107] The plaintiffs had also joined "XYZ Insurance Companies," which was the fictious name of the insurance companies that insured the defendants.[108] As the complaint explained: "Once the identities of said insurance companies are known, the plaintiffs will request leave to amend the complaint to incorporate their correct names."[109] There is no evidence in the record that the complaint was ever amended to delete the insurance companies, though in the court of appeals the case was captioned with multiple appellants (Rosario Ortega and other family members) but only one appellee—Star-Kist Foods, Inc.[110] Based on the complaint, the Court probably should have treated the case as one involving multiple defendants, with the result being that, irrespective of whether there was supplemental jurisdiction under subsection (a), subsection (b) would have come into play and eliminated jurisdiction.

For future cases, there may be a timing solution that would partially address the situation of multiple defendants. Suppose that the case begins with two plaintiffs and only one defendant. As we saw earlier, there would be supplemental jurisdiction over Plaintiff #2's claim against the one defendant. Now suppose Plaintiff #1 amends the complaint to add a second defendant with a sufficient jurisdictional amount. This defendant would have been joined pursuant to Rule 20 and if Plaintiff #2 brings a claim that lacks the amount in controversy, there would not be supplemental jurisdiction; it would be a claim by a plaintiff against a person made party under Rule 20. But what happens to Plaintiff #2's claim against Defendant #1? Is only Defendant #2 a person made party under Rule 20, or are both defendants persons made parties under Rule 20? If it is the latter, then a claim over which there was supplemental jurisdiction would suddenly be excluded. If it is the former, then that means that plaintiffs simply have to be attentive to the timing of when they bring in additional defendants.

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[106] Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 127 (1st Cir. 2004), *rev'd*, 545 U.S. 546 (2005).

[107] *Id.*

[108] Complaint & Demand for Jury Trial, Ortega v. Star-Kist Foods, Inc., 2004 WL 3168775, at *10.

[109] *Id.* at *10–17 (under 28 U.S.C. § 1332(c)(1)(A), the insurance companies would be deemed to have the same citizenship as the insured).

[110] *Ortega*, 370 F.3d at 124.

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There is a final set of variations involving subsection (b) that raise another interpretative problem. Consider a variation on *Owen Equipment*. Assume that the original defendant, Omaha Public Power District (OPPD), brings a third-party claim against Owen Equipment and Owen Equipment then brings a claim against Kroger. Kroger might wish to implead its insurance company or some other party that it believes may be liable to it for what it owes Owen Equipment. Would there be supplemental jurisdiction over this third-party claim by Kroger (Claim B in the diagram below)? Similarly, if Owen Equipment brings a claim against Kroger and Kroger has what would be considered a compulsory counterclaim against Owen Equipment, would there be supplemental jurisdiction over that claim (Claim C in the diagram below)?

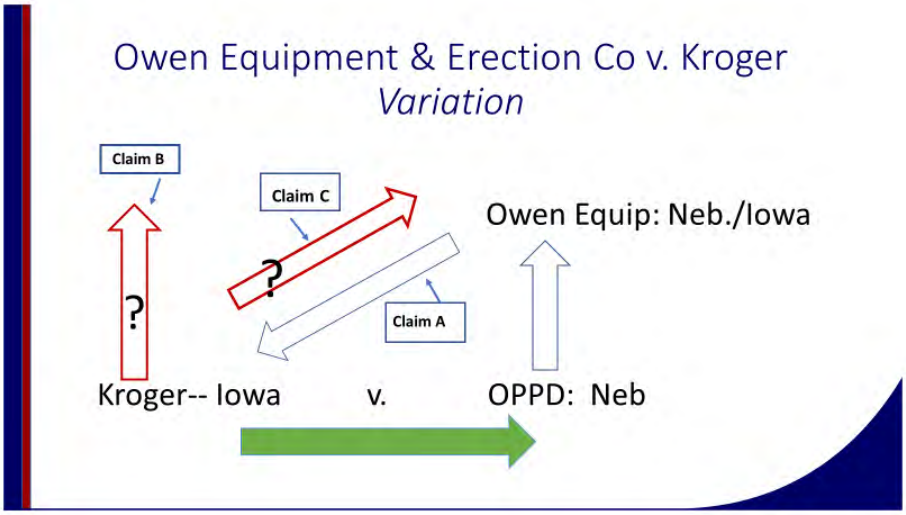


Diagram 9: *Owen Equipment & Erection Co. v. Kroger Variation*

Prior to the enactment of § 1367, there were analogous cases that found jurisdiction.[111] Some did so even after *Owen Equipment* was decided.[112] The Court in *Owen Equipment* was concerned that if jurisdiction were allowed over the claim of the plaintiff against the nondiverse third party, this would encourage circumvention of the total diversity rule.[113] A sneaky plaintiff might sue a diverse party, fully expecting that the defendant would implead a nondiverse third party whom the plaintiff really wanted to claim against. If supplemental jurisdiction were

[111] *See* Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 714–15 (5th Cir. 1970).

[112] *See* Finkle v. Gulf & W. Mfg. Co., 744 F.2d 1015, 1018 (3d Cir. 1984); Berel Co. v. Sencit F/G McKinley Assocs., 125 F.R.D. 100, 102 (D.N.J. 1989).

[113] *Owen Equip. & Erection Co.*, 437 U.S. at 377.

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allowed, this would allow the plaintiff to sue the nondiverse party and thereby circumvent the total diversity rule.

Applying this rationale to Claims B and C above, it imagines that the plaintiff really wanted to sue Owen Equipment in federal court and cleverly plotted to achieve this by suing OPPD, assuming that OPPD would implead Owen Equipment. Whatever the plausibility of this scenario, it is quite far-fetched to assume that Kroger structured the case in the hopes that it would **be sued** by Owen Equipment so that it could then counterclaim, and even more far-fetched to assume this was all a plot to enable Kroger to implead its insurance company.[114]

Section 1367(b) appears to change the analysis. Claims B and C in the diagram above are both "claims by plaintiffs against persons made parties under Rule 14" and therefore appear to be claims that are excluded. The courts that have analyzed claims such as B and C under § 1367(b) have concluded that there is no supplemental jurisdiction.[115] But I would suggest that the courts that have found no supplemental jurisdiction have done so without reading all of subsection (b).

The first part of subsection (b) excludes supplemental jurisdiction over specified claims, but the last clause provides "exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."[116] Courts seem to either ignore the last clause entirely or interpret it to mean that in diversity cases there is no supplemental jurisdiction over claims that do not independently satisfy § 1332.[117] This is the reading that the Supreme Court appears to give in *Raygor v. Regents of University of Minnesota*, when the Court observes: "§ 1367(b) entails that certain claims will be subject to dismissal if exercising jurisdiction over them would be 'inconsistent' with 28 U.S.C. § 1332."[118] But notice that this reading of the clause makes it completely meaningless, since the only time supplemental jurisdiction is necessary is when there is not an independent basis of jurisdiction. In other words, under this reading, § 1367(b) says that there is no supplemental jurisdiction if this is a case that requires supplemental jurisdiction.

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[114] *See* 6 WRIGHT ET AL., *supra* note 17, § 1444.1.

[115] *See* Guaranteed Sys., Inc. v. Am. Nat'l Can Co., 842 F. Supp. 855, 857–58 (M.D.N.C. 1994); Chase Manhattan Bank, N.A. v. Aldridge, 906 F. Supp. 866, 868–69 (S.D.N.Y. 1995); Carolina Asphalt Paving, Inc. v. Balfour Beatty Constr., Inc., 225 F.R.D. 522, 525–26 (D.S.C. 2004).

[116] *Id.*

[117] *See Carolina Asphalt Paving, Inc.*, 225 F.R.D. at 525–26.

[118] 534 U.S. 533, 545 (2002).

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There is an alternative reading of § 1367(b)—one which gives that final clause a meaning beyond mere surplus. It is a reading suggested by the Ninth Circuit in *Gibson v. Chrysler Corp.*[119] In that case, Judge Fletcher explained:

> The text of § 1367 has the following analytic structure: first, subsection (a) broadly confers supplemental jurisdiction, subject to certain exceptions; second, the first part of subsection (b) sets out exceptions to subsection (a); and third, the last phrase of subsection (b) limits the reach of those exceptions. We believe that the last phrase of subsection (b) means that there is supplemental jurisdiction over a claim otherwise excepted from supplemental jurisdiction by subsection (b) if § 1332, as understood before the passage of § 1367, would have authorized jurisdiction over that claim.[120]

Interestingly, the analytic structure described above is the same structure proposed by Federal Courts Working Group. The proposed subsection (b) read:

> In civil actions under § 1332 of this Title, jurisdiction shall not extend to claims by the plaintiff against parties joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or to claims by parties who intervene under Rule 24(b) of the Federal Rules of Civil Procedure, provided, that the court may hear such claims if necessary to prevent substantial prejudice to a party or third-party.[121]

That is not the language that was adopted, but I think it is reasonable to read the language that was adopted as setting forth an alternative version of the "provided that" clause. If the last clause of subsection (b) is understood as a "provided that" clause, that would mean there is supplemental jurisdiction over some of the claims that are otherwise excluded by the first part of (b). Assuming the last clause is read as a proviso that limits the scope of subsection (b), I think the best reading of the proviso is a reference to the rationale of *Owen Equipment*. The Court in *Owen Equipment* was concerned that if it allowed jurisdiction over the claim of the plaintiff against the nondiverse third party, it would encourage circumvention of the total

[119] 261 F.3d 927, 937–38 (9th Cir. 2001).

[120] *Id.* at 938.

[121] WORKING PAPERS, *supra* note 34, at 567–68.

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diversity rule. Sneaky plaintiffs might sue a diverse party with the hope that the defendant would bring the nondiverse third party into the suit.[122]

As discussed above, the sneaky plaintiff problem seems quite improbable in the situation of Claims B or C discussed above. Therefore, even though these are "claims by plaintiffs against persons made party under Rule 14," the last clause of (b) can be read to allow supplemental jurisdiction.[123] If we understand the last clause of (b) as preventing sneaky plaintiffs from circumventing the total diversity rule, we might even get a different result in *Owen Equipment* if it had been a removed case. Suppose a plaintiff sues a diverse defendant in state court. The defendant removes and impleads a third party who is not diverse from the plaintiff. Now the plaintiff brings a claim against that nondiverse third party. In *Owen Equipment*, the Court observed that a "plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations."[124] But in the removal situation, the plaintiff did file in state court. Since only defendants can remove cases, it is hard to see how allowing the plaintiff to bring a claim against a nondiverse third-party defendant would encourage plaintiffs to circumvent the total diversity rule.

The bottom line is that subsection (b), like subsection (a), has some ambiguities and unexplored nooks and crannies that we can expect will continue to generate litigation.

## III. SUBSECTION (C): DISCRETION

In *Gibbs*, the Court announced that supplemental jurisdiction "is a doctrine of discretion, not of plaintiff's right."[125] According to the Court, supplemental jurisdiction is rooted in "considerations of judicial economy, convenience, and fairness to litigants."[126] The Court gave three examples of situations that might warrant dismissal:

> [1] 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.

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[122] *See* Guaranteed Sys., Inc. v. Am. Nat'l Can Co., 842 F. Supp. 855, 857 (M.D.N.C. 1994).

[123] 28 U.S.C. § 1367(b).

[124] *Owen Equip. & Erection Co.*, 437 U.S. at 376.

[125] United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

[126] *Id.*

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> [2] 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. . . . [3] Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed. Rule Civ. Proc. 42(b). If so, jurisdiction should ordinarily be refused.[127]

Courts understood *Gibbs* as providing what one scholar characterized as "virtually unfettered discretion."[128]

Subsection (c) addresses the issue of discretion with language that is similar, but not identical to *Gibbs*. The subsection provides:

> 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.[129]

Once again, the House Report suggests that the drafters thought the statute codified the language of *Gibbs*,[130] but the language does not quite track with that aspiration. Specifically, the statute does not refer to "reasons independent of jurisdictional

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[127] *Id.* at 726–27.

[128] Suzanna Sherry, *Federal Courts, Practice & Procedure: Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 126 (2006). One interesting issue that neither *Gibbs* nor the statute resolves is whether objections to the court's failure to dismiss under § 1367(c) are waivable. In *Rubinstein v. Yehuda*, 38 F.4th 982, 992 (11th Cir. 2022), the court held that § 1367(a) implicates Article III's case or controversy requirement and therefore is not waivable but § 1367(c) involves judicial discretion and therefore is waivable.

[129] 28 U.S.C. § 1367(c).

[130] *See* H.R. REP. NO. 101-734, at 29 (1990) ("Subsection 114(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.").

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considerations, such as the likelihood of jury confusion," nor is there any reference to the overarching *Gibbs* rationale of "considerations of judicial economy, convenience, and fairness to the litigants."[131] Instead, the statute adds as an additional basis for dismissal "exceptional circumstances" where there are "compelling reasons."[132]

The language of "exceptional circumstances" and "compelling reasons" can reasonably be read to require a higher showing than *Gibbs*. Interestingly, the Working Group had proposed a broader catch-all provision that would allow dismissal if "there are other appropriate reasons (including judicial economy, convenience, and fairness to litigants) to refuse jurisdiction."[133] But this was not the language that was adopted and so, once again, we have an interpretative question: "Does § 1367(c) narrow *Gibbs* and its 'animating values' or does it codify *Gibbs*?"[134]

The courts of appeals have split on how to interpret subsection (c). While the Seventh and D.C. Circuits have read (c) quite broadly to largely codify the *Gibbs* approach to discretion, at least five circuits have read § 1367(c) as providing relatively constrained authority to decline supplemental jurisdiction.[135] The courts that have taken the latter approach have focused on the fact that subsection (a) says that the district courts "shall" have supplemental jurisdiction. As the Ninth Circuit has explained: "By use of the word 'shall,' the statute makes clear that if power is conferred under section 1367(a), and its exercise is not prohibited by section 1367(b), a court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories specifically enumerated in section 1367(c) applies."[136] This interpretation treats supplemental jurisdiction less as a matter of discretion and more as a fixed right that can be restricted only in relatively narrow circumstances.

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[131] United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

[132] 28 U.S.C. § 1367(c)(4).

[133] WORKING PAPERS, *supra* note 34, at 568 (subsection (c) of the Working Group draft provided: "(c) The district court may decline to exercise jurisdiction over a claim under subsection (a) if the claim presents a novel or complex issue of state law, state law issues predominate, or there are other appropriate reasons (including judicial economy, convenience, and fairness to litigants) to refuse jurisdiction.").

[134] 13D WRIGHT ET AL., *supra* note 17, § 3567.3.

[135] *See id.* (and cases cited therein).

[136] Exec. Software N. Am., Inc. v. United States Dist. Ct., 24 F.3d 1545, 1555–56 (9th Cir. 1994) (emphasis omitted).

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For courts that have taken this approach, even the "catchall" provision of (c)(4) does not provide much additional discretion. As the Ninth Circuit explained: "By providing that an exercise of discretion under subsection 1367(c)(4) ought to be made only in 'exceptional circumstance' Congress has sounded a note of caution that the bases for declining jurisdiction should be extended beyond the circumstances identified in subsections (c)(1)–(3) only if the circumstances are quite unusual."[137]

In sum, subsection (c), like other subsections of § 1367, was probably intended to track *Gibbs* but was not carefully drafted to accomplish that purpose.

## IV. SUBSECTION (D): TOLLING

Finally, we come to the tolling provision:

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.[138]

The purpose of this section is, as Wright & Miller observe, "clear and salutary"—it protects parties who chose to use supplemental jurisdiction but whose claims are dismissed.[139] It tolls the statute of limitations during the pendency of the federal action plus thirty days beyond dismissal. Not only does the tolling provision protect the party whose claim is dismissed, it assures that courts can exercise their discretion under (c) without worrying about leaving the party frozen out of an effort to refile in state court. Unfortunately, even here we have some lack of clarity.[140]

Does (d) apply only to claims over which the court in fact had supplemental jurisdiction and then dismissed under (c)? At least one court has so interpreted this subsection.[141] After reviewing the legislative history, Professor John Oakley has

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[137] *Exec. Software N. Am., Inc.*, 24 F.3d at 1558.

[138] 28 U.S.C. § 1367(d).

[139] 13D WRIGHT ET AL., *supra* note 17, § 3567.4.

[140] *See* Artis v. District of Columbia, 583 U.S. 71, 91–92 (2018) (resolving that this provision is a true "stop-the-clock" provision and not merely a thirty-day grace period).

[141] *See* Parrish v. HBO & Co., 85 F. Supp. 2d 792, 797 (S.D. Ohio 1999).

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reached a similar conclusion,[142] as does one of the leading treatises.[143] Other courts disagree.[144]

Notice that the language in (d) refers to "a claim asserted under" § 1367(a). Suppose it is asserted under (a)—say, a permissive counterclaim—but the court decides it is outside of the Article III test. Would tolling apply? What if the claim is asserted under (a) but gets kicked out under (b)—maybe a situation in which the plaintiff tries to invoke the last phrase in (b), but the court rejects the plaintiff's interpretation. Does tolling apply? There isn't a clear answer.

For something as important as tolling, it is certainly unfortunate not to have clarity. If *Ortega* had been decided differently and the claims of the additional plaintiffs had been dismissed for lack of jurisdiction, it is not clear that those plaintiffs would have been able to refile in state court. It is a reminder that tolling has significant real-world consequences for litigants.

* * * *

Supplemental jurisdiction is a valuable tool for assuring "judicial economy, convenience, and fairness to the litigants."[145] With expansive supplemental jurisdiction, plaintiffs with federal claims do not have to sacrifice efficiency and convenience in order to exercise their right to a federal forum. It is a tribute to Judge Weis's wise leadership that the Federal Courts Study Committee, whose primary task was to propose ways to reduce the caseload of the federal courts, recommended the supplemental jurisdiction statute. The committee's recommendation acknowledged that "curtailing pendent and ancillary jurisdiction would eliminate some cases and claims from federal courts" but concluded that "this is a situation in which it is unwise to do so."[146] It is a sad irony that one of the lasting legacies of the Study Committee is a statute that continues to generate litigation concerning its scope and meaning.

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[142] *See* John B. Oakley, *Prospectuses: Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 945 (1998).

[143] *See* 13D WRIGHT ET AL., *supra* note 17, § 3567.4.

[144] *See* Abear v. Teveliet, No. C06-5220 FDB, 2006 WL 2473481, at *11 (W.D. Wash. Aug. 28, 2006); Naragon v. Dayton Power & Light Co., 934 F. Supp. 899, 902 (S.D. Ohio 1996).

[145] United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

[146] REPORT, *supra* note 1, at 47 (1990).

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