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It's All in the Timing: Rethinking Remand of Supplemental Claims to Preserve Court Resources

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IT'S ALL IN THE TIMING: RETHINKING REMAND OF SUPPLEMENTAL CLAIMS TO PRESERVE COURT RESOURCES

The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without Due Process of law include a right to be heard and to offer testimony: "A person's . . . right to his day in court [is] basic in our system of jurisprudence."¹

I. INTRODUCTION

Lance Raygor was denied employment at the local university because of his age, and he wanted to assert an age discrimination claim under both the federal Age Discrimination in Employment Act² ("ADEA") and the state Minnesota Human Rights Act³ ("MHRA").⁴

¹ Rock v. Arkansas, 483 U.S. 44, 51 (1987) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

² 29 U.S.C. § 621 (2000).

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Id.

³ MINN. STAT. ANN. § 363.13 (West 1991).

⁴ This illustration is based on *Raygor v. Regents of University of Minnesota*, 534 U.S. 533 (2002), to demonstrate the procedural injustice of 28 U.S.C. § 1367(c)(3), which provides the judicial discretion to dismiss supplemental claims at any time in a suit. This injustice is illustrated in Part III of this Note, and a revision of 28 U.S.C. § 1367(c)-(d) is proposed in Part IV of this Note.

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After assessing the various jurisdiction alternatives, Raygor's attorneys advised him that he could either: (1) file the claims in federal court; (2) file the claims in state court; or (3) file the ADEA claim in federal court and the MHRA claim in state court.⁵ Raygor chose to file both claims in the federal district court, which had jurisdiction over the MHRA claim under supplemental jurisdiction.⁶

After a substantial amount of pretrial proceedings, the ADEA claim was dismissed.⁷ Since Raygor's anchor claim was dismissed and the federal court did not have original jurisdiction to hear his MHRA claim, the court exercised its discretion under 28 U.S.C. § 1367(c)(3) and dismissed the MHRA claim.⁸ To add insult to Raygor's injury, the state statute of limitations tolling provision in 28 U.S.C. § 1367(d) does not apply to claims asserted against States, and thus, Raygor could not assert his MHRA claim in the state court at this time.⁹ Therefore, Raygor did not have an alternate forum to have his state discrimination claim heard. Raygor fell victim to a jurisdictional technical knock-out ("TKO").

Plaintiffs that have both a federal and state cause of action against a State, and choose to file their claims in federal court, take the substantial risk that a judge will exercise her discretion and leave them without a forum—depriving the plaintiffs of their day in court.¹⁰ This Note will address the discretion that § 1367(c) provides district court judges and how the timing of this inquiry affects the presumption of whether a federal court should maintain supplemental jurisdiction.¹¹

Part II of this Note discusses how the Supreme Court of the United States interpreted its authority to grant jurisdiction prior to the supplemental jurisdiction statute.¹² The reasons that Congress passed the supplemental jurisdiction statute, 28 U.S.C. § 1367, and the current

⁵ See *infra* note 233.

⁶ Raygor, 534 U.S. at 537.

⁷ *Id.* In 1996, Raygor first filed his claims in federal court, but in 1997, Raygor's ADEA claim was stayed pending the Supreme Court's holding in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). *Id.* The Court in *Kimel* held that the "ADEA does not validly abrogate the states' sovereign immunity." 528 U.S. at 92. Raygor's ADEA claim was subsequently dismissed. Raygor, 534 U.S. at 537.

⁸ *Id.* at 545.

⁹ *Id.* at 546.

¹⁰ See, e.g., *id.* at 547; *Costello v. Mass. Rehab. Comm'n*, 982 F. Supp. 61 (D. Mass. 1997) (using § 1367(c)(3) to dismiss supplemental claims after dismissal of federal claims).

¹¹ See *infra* Part III.B-C.

¹² See *infra* Part II.

state of § 1367 law are also discussed.¹³ Part III analyzes how the timing of the discretionary analysis authorized by § 1367(c) affects the presumption of whether a court should maintain supplemental jurisdiction.¹⁴ Part III also discusses the reason that § 1367(d) should be revised so that it provides a tolling of the statute of limitations to all claims granted by § 1367(a).¹⁵ In order to address the shortcomings of § 1367(c)-(d), this Note proposes a revision in Part IV that will take into consideration the timing of the dismissal.¹⁶

II. LEGAL BACKGROUND: SUBJECT MATTER JURISDICTION OF THE FEDERAL COURTS

This Part discusses the two ways that litigants can get into federal court: federal question or diversity.¹⁷ Once a litigant has a valid "anchor" claim in federal court, there are occasions when the district court should allow other claims to be heard along with the anchor claim.¹⁸ Before *Finley v. United States*,¹⁹ these claims were referred to as pendent and ancillary.²⁰ After *Finley*, Congress attempted to codify these principles by authorizing the court to hear these claims under the supplemental jurisdiction statute.²¹

A. Limited Jurisdiction of the Federal Courts

Federal courts are courts of limited jurisdiction and may only exercise subject matter jurisdiction over claims for which both constitutional and congressional authorization exists.²² The

¹³ See *infra* Part II.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part III.

¹⁶ See *infra* Part IV.

¹⁷ See *infra* Part II.A.

¹⁸ See *infra* Part II.B.

¹⁹ 490 U.S. 545 (1989); see *infra* notes 91-99 and accompanying text.

²⁰ See *infra* Part II.B. Pendent and ancillary jurisdiction were doctrines that would allow state-law claims to be joined to the anchor claim when there was a "common nucleus of operative fact," and Congress had not negated the existence of such an exercise of jurisdiction. See *infra* notes 62-67 and accompanying text.

²¹ See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified in scattered sections of 28 U.S.C.); *infra* Part II.C.

²² *Finley*, 490 U.S. at 548.

[A]ll courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. *The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it.* . . . To the extent that such action is not taken, the power lies dormant.

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constitutional authority from which federal judicial power extends is found in Article III, Section 2 of the United States Constitution.²³ Federal question jurisdiction and diversity jurisdiction are the two most common constitutional categories of subject matter jurisdiction.²⁴

Congress granted the federal courts federal question jurisdiction over claims “arising under” the Constitution, federal laws, and treaties by enacting 28 U.S.C. § 1331.²⁵ The question whether a claim arises under federal law must be determined by reference to the “well-pleaded complaint.”²⁶ A defense that raises a federal question is inadequate to confer federal jurisdiction.²⁷ The federal cause of action must appear on the face of the claim.²⁸

Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868) (emphasis added).

²³ U.S. CONST. art. III, § 2, cl. 1. Article III, Section 2, Clause 1 provides that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

²⁴ See *infra* notes 25-28, 33-39 and accompanying text.

²⁵ 28 U.S.C. § 1331 (2000). This path requires the plaintiff to establish a cause of action based in federal law. *Id.*; Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (holding that to invoke federal question jurisdiction, the cause of action must arise under federal law).

²⁶ Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9-10 (1983). “[T]he phrase ‘arising under’ masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.” *Id.* at 8.

²⁷ *Mottley*, 211 U.S. at 152. The *Mottley* rule requires that the eligibility of a case for statutory federal-question jurisdiction—either originally under § 1331 or by removal under § 1441(a)—be determined by reference only to the well-pleaded allegations of the complaint, without consideration of the defendant’s pleadings. *Id.* at 152-54. This control rationale seems to be the only one that the Supreme Court articulated in the early cases from which the modern rule has developed. *Jenkins v. Nat’l Union Fire Ins. Co.*, 650 F. Supp. 609, 613-15 (N.D. Ga. 1986) (discussing turn-of-the-century Supreme Court cases).

²⁸ *Blair v. Source One Mortgage Servs. Corp.*, 925 F. Supp. 617, 620 (D. Minn. 1996) (quoting *M. Nahas & Co. v. First Nat’l Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir. 1991)). “However, there is an exception to the well-pleaded complaint rule: ‘a plaintiff cannot thwart the removal of a case by inadvertently, mistakenly or fraudulently concealing the federal question that would necessarily have appeared if the complaint had been well pleaded.’” *Id.*

But even a federal issue in a well-pleaded complaint may not be enough to allow federal question jurisdiction.²⁹ There are two ways to apply federal question jurisdiction. First, in the vast majority of federal question cases, federal law creates the cause of action.³⁰ Second, federal question jurisdiction may arise in cases where the “relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation.”³¹ However, if a complaint alleges a violation of a federal statute as an element of a state cause of action, and Congress did not create a private cause of action for the federal statute, then the claim does not create a federal question.³²

In addition to federal question jurisdiction, federal courts can hear claims between citizens of different states under diversity jurisdiction.³³ Congress granted the federal courts diversity jurisdiction by enacting 28 U.S.C. § 1332.³⁴ The diversity jurisdiction statute has two elements.³⁵

²⁹ See, e.g., *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986) (holding that since Congress did not intend for a private cause of action, the fact that the interpretation of a federal statute as an element of a state cause of action did not create a claim “arising under the Constitution, laws, or treaties of the United States”).

³⁰ *Franchise Tax Bd.*, 463 U.S. at 8-9. The “vast majority” of cases that come within this grant of jurisdiction are covered by Justice Holmes’ statement that a “suit arises under the law that creates the cause of action.” *Id.* (quoting *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). Although it is not used as such, the Holmes test was meant to be a device for exclusion. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (“It has come to be realized that Mr. Justice Holmes’ formula is more useful for inclusion than for the exclusion for which it was intended.”).

³¹ *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921).

³² *Merrell Dow Pharm.*, 478 U.S. at 817; see also *Moore v. Chesapeake & Ohio R.R. Co.*, 291 U.S. 205, 216-17 (1934) (emphasizing that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action). *But see Smith*, 255 U.S. at 201 (“It is . . . apparent that the controversy concerns the constitutional validity . . . drawn in question. The decision depends upon the determination of this issue.”).

³³ 28 U.S.C. § 1332 (2000); see also *Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) (“It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim.”).

³⁴ 28 U.S.C. § 1332. Congressional authorization for diversity jurisdiction provides that:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;

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First, diversity jurisdiction has been interpreted to require complete diversity.³⁶ Complete diversity requires that plaintiffs be domiciled in different states from all of the defendants.³⁷ Second, jurisdiction based on diversity requires that the plaintiffs meet the statutorily mandated amount in controversy of \$75,000.00.³⁸ Any claim that does not meet either of these requirements must be dismissed.³⁹

Federal courts first received the power to hear claims asserted under diversity jurisdiction from the Judiciary Act of 1789.⁴⁰ In 1809, Chief Justice Marshall of the Supreme Court of the United States explained that diversity jurisdiction was needed for fairness between litigants of different states, and thus, federal diversity jurisdiction has remained firmly rooted in common law for over two-hundred years.⁴¹ Hence,

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

Id.

³⁵ See *supra* notes 22-25 and accompanying text.

³⁶ 28 U.S.C. § 1332(a)(1)-(4). It is important to note that the United States Constitution requires only minimal diversity—where at least one plaintiff has a citizenship status different than at least one defendant. U.S. CONST. art. III, § 2, cl. 1; see also *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967).

³⁷ *Strawbridge v. Curtiss*, 3 U.S. (1 Cranch) 267 (1806) (mem.).

³⁸ Congress limited diversity jurisdiction by increasing the amount-in-controversy requirement to \$75,000 in the 1996 Amendments. Pub. L. No. 104-317, § 205(a)(1) (1996). See *supra* note 34 for the text of § 1332.

³⁹ *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973) (holding that all members of a class must individually meet the statutory amount in controversy requirement of § 1332).

⁴⁰ *Id.* The Judiciary Act of 1789 gave the lower federal courts jurisdiction over “all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.” Act of Sept. 24, 1789, ch. 20, §§ 11, 12, 1 Stat. 73 (1789).

⁴¹ See *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). Chief Justice Marshall explained:

However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decisions of controversies between aliens and a citizen, or between citizens of different states.

Id.

diversity jurisdiction exists to provide access to impartial tribunals for out-of-state residents who fear bias in state courts.⁴² In 1948, Congress passed § 1332 to authorize federal courts to hear suits based on diversity.⁴³ Congress' purpose in passing § 1332 was to limit the diversity caseload of the federal courts.⁴⁴ To effectuate this objective, courts have developed rules governing the complete diversity and the amount-in-controversy requirements, which further limit federal jurisdiction.⁴⁵

These rules have played a major role in shaping the diversity class actions in federal courts.⁴⁶ The complete diversity requirement is relaxed in class actions so that only the named representative of the class needs

⁴² See *supra* note 33.

⁴³ See 28 U.S.C. § 1332 (2000).

⁴⁴ *Snyder v. Harris*, 394 U.S. 332, 339-40 (1969) (stating that the purpose of the diversity jurisdictional amount is to remove from federal courts claims that are insubstantial in character and to avoid encroaching on the jurisdiction of the state courts); see *Lorraine Motors, Inc. v. Aetna Cas. & Sur. Co.*, 166 F. Supp. 319 (E.D.N.Y. 1958) (stating that the purpose of the amount-in-controversy requirement is to prevent the dockets of federal courts from being overcrowded with small cases that should be brought in state courts); see also *Pierson v. Source Perrier, S.A.*, 848 F. Supp. 1186 (E.D. Pa. 1994) (stating that the congressional purpose behind the amount-in-controversy requirement is to keep the caseload of federal courts under some modicum of control); *Brown v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 281 F. Supp. 82 (N.D. Ill. 1968).

⁴⁵ *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 292 (1973). In *Zahn*, the plaintiffs, citizens of Vermont, were owners of Lake Champlain front property that had been damaged by the polluted waters of the lake. *Id.* The landowners sought damages from International Paper Company, a New York corporation, who allegedly permitted discharge from its pulp and paper plant to flow into a creek that shared a stream with Lake Champlain. *Id.* The suit was a class action, governed by Rule 23 of the Federal Rules of Civil Procedure, which states in pertinent part:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) *there are questions of law or fact common to the class*, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a) (emphasis added). The claim of the named plaintiff exceeded the jurisdictional amount in controversy. *Zahn*, 414 U.S. at 292 (stating that in 1973, the statutory amount-in-controversy for diversity jurisdiction was \$10,000). However, not every individual member of the class suffered pollution damages that exceeded the amount in controversy. *Id.*

⁴⁶ See *supra* notes 44-45.

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to be diverse from the defendants.⁴⁷ The Court found the need for this exception to the complete diversity requirement because of the difficulty of obtaining complete diversity in large class actions with plaintiffs from every state.⁴⁸ However, the amount-in-controversy requirement was not relaxed for members of a diversity class action.⁴⁹ In *Zahn v. International Paper Co.*,⁵⁰ the Court held that each member of the class had to individually meet the amount-in-controversy requirement.⁵¹ Failure to do so required dismissal of that member's claim from federal court.⁵² However, in a dissenting opinion, Justices Douglas and Marshall joined Justice Brennan in stating that the claims of all the class members should be allowed in fairness to the litigant and in the interest of judicial economy.⁵³ Thus, federal question and diversity jurisdiction have provided litigants a way to have their claims litigated in federal courts, and the Supreme Court has determined the boundaries of those legislative grants in jurisdiction.⁵⁴

Once an anchor claim is properly in federal court, there are many instances where it is in the interests of the parties and judicial economy if additional claims are heard within the same case.⁵⁵ However, federal courts must have the *power* to hear the additional claims.⁵⁶ Recognizing

⁴⁷ See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921) (holding that only the named representative of the class needs to be diverse from the defendants to get diversity jurisdiction).

⁴⁸ *Id.*

⁴⁹ *Zahn*, 414 U.S. at 294. The Court held that "[w]hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount." *Id.* (quoting *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)).

⁵⁰ 414 U.S. 291.

⁵¹ *Id.*

⁵² *Id.* The *Zahn* rule plainly mandates "that the entire case must be dismissed where none of the plaintiffs claims more than \$10,000 [now \$75,000] but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims." *Id.* at 300. However, dismissal is necessary only if there is no other independent basis for maintaining original jurisdiction. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 381 (1959).

⁵³ *Zahn*, 414 U.S. at 308 ("[D]enial of ancillary jurisdiction will impose a much larger burden on the state and federal judiciary as a whole, and will substantially impair the ability of the prospective class members to assert their claims."). The claims of all of the class members, when the named representative meets the § 1332 requirements, should be allowed to avoid the "redundant litigation of the common issues . . . the cost to the litigants and the drain on the resources of the judiciary." *Id.*

⁵⁴ See *supra* notes 44-45.

⁵⁵ See *infra* Part II.B.

⁵⁶ See *supra* notes 22-25 and accompanying text.

the need to resolve this issue, the Supreme Court developed the doctrines of pendent and ancillary jurisdiction.⁵⁷

B. Pendent and Ancillary Jurisdiction

The origins of pendent and ancillary jurisdiction can be traced back to *Osborn v. Bank of the United States*,⁵⁸ where the Court held that the Constitution authorized the exercise of federal question jurisdiction over non-federal questions of law or fact in a case arising under the laws of the United States.⁵⁹ From the holding in *Osborn*, the Court developed the common law doctrines of pendent and ancillary jurisdiction.⁶⁰ Pendent and ancillary jurisdiction developed in response to a need for judicial economy and efficiency.⁶¹ This goal was best served by allowing the joinder and adjudication of certain claims that relied on a common nucleus of facts, but that would not otherwise have an independent basis for federal subject matter jurisdiction.⁶²

Pendent jurisdiction existed whenever there was a federal question properly before the federal court and the litigants wanted to add a state-

⁵⁷ See generally *Finley v. United States*, 490 U.S. 545 (1989) (narrowing the application of pendent and ancillary jurisdiction); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978) (placing limits on ancillary jurisdiction); *Aldinger v. Howard*, 427 U.S. 1 (1976) (holding that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966) (announcing a three-part test for pendent jurisdiction).

⁵⁸ 22 U.S. (9 Wheat.) 738 (1824) (mem.).

⁵⁹ *Id.* at 823. *Id.* The Supreme Court held that the Constitution authorizes the exercise of federal jurisdiction over a case arising under the laws of the United States even though the case presents other nonfederal questions. *Id.* Chief Justice Marshall declared:

[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of the Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

Id.

⁶⁰ See *Kroger*, 437 U.S. at 370 (noting that pendent and ancillary jurisdiction “are two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?”); *Aldinger*, 427 U.S. at 13 (stating that “there is little profit in attempting to decide, for example, whether there are any ‘principled’ differences between pendent and ancillary jurisdiction”).

⁶¹ *Aldinger*, 427 U.S. at 13.

⁶² *Osborn*, 22 U.S. at 738. Dating back to 1824, the first exercise of pendent jurisdiction is attributed to Chief Justice Marshall in *Osborn*. *Id.* Ancillary jurisdiction is traced at least as far back as *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860).

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law claim to the suit before the commencement of the law suit.⁶³ Ancillary jurisdiction existed whenever there was either a federal question or diversity claim properly before the federal court and the litigants wanted to add a state-law claim after the law suit had begun.⁶⁴ The exercise of pendent and ancillary jurisdiction had to satisfy a two-step test.⁶⁵ First, the federal and nonfederal claims had to arise from a "common nucleus of operative fact."⁶⁶ If the court was satisfied that the claims met this minimum test of relatedness, the court could then exercise jurisdiction over the state-law claim only if it found that "Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."⁶⁷

1. Pendent Jurisdiction

Courts have traditionally divided the doctrine of pendent jurisdiction into two parts: pendent claim jurisdiction and pendent party jurisdiction.⁶⁸ Pendent claim jurisdiction exists whenever there is a

⁶³ See *infra* Part II.B.1.

⁶⁴ See *infra* Part II.B.2.

⁶⁵ *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

⁶⁶ *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (applying test to the exercise of ancillary jurisdiction); *Gibbs*, 383 U.S. at 725 (applying test to pendent jurisdiction).

⁶⁷ *Aldinger v. Howard*, 427 U.S. 1, 18 (1976). *Aldinger* limited this inquiry to the exercise of pendent party jurisdiction. *Id.* However, the Supreme Court eventually applied this test to the exercise of ancillary jurisdiction in *Kroger*:

The *Aldinger* and *Zahn* cases thus make clear that a finding that federal and nonfederal claims arise from a "common nucleus of operative fact," the test of *Gibbs*, does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones. Beyond this constitutional minimum, there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has . . . expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim.

437 U.S. at 373 (quoting *Aldinger*, 427 U.S. at 18) (alteration in original).

⁶⁸ The doctrine of pendent claim jurisdiction has its origin in two cases: *Siler v. Louisville & Nashville Railroad Co.*, 213 U.S. 175 (1909), and *Hurn v. Oursler*, 289 U.S. 238 (1933). In *Siler*, the Court held that whenever federal jurisdiction was based on a "colorable" federal question, the lower court "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." 213 U.S. at 191. In *Hurn*, the Supreme Court answered the question as to what extent did the state law claim need to be related to the federal claim to permit the exercise of pendent claim jurisdiction. 289 U.S. at 246-47. The Court held that a federal court may exercise

federal question and the relationship between that claim and a state-law claim permits the conclusion that the entire action before the court comprises but one constitutional "case."⁶⁹ Pendent party jurisdiction expands the scope of pendent jurisdiction by allowing a plaintiff to add in the original complaint a related state law claim against an additional defendant when the plaintiff's original federal claim is based on a federal question.⁷⁰ In *United Mine Workers v. Gibbs*,⁷¹ the Supreme Court established the inquiry for pendent claim jurisdiction.⁷²

jurisdiction over claims for which no independent basis of jurisdiction exists only if the federal and state-law claims form a single cause of action. *Id.* However, the Federal Rules of Civil Procedure abandoned the "cause of action" terminology in favor of a liberal joinder policy. *Gibbs*, 383 U.S. at 724 (noting the confusion caused by the *Hurn* cause of action test).

⁶⁹ *Id.* at 725.

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

Id. (citations omitted).

⁷⁰ *Aldinger*, 427 U.S. at 1 (restricting the scope of pendent party jurisdiction). The Court in *Aldinger*, emphasized the well-established principle that federal courts are courts of limited jurisdiction and held that before a federal court may exercise pendent party jurisdiction, it must "satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." *Id.* at 18. The Court noted that although the facts in *Aldinger* and the pendent claim in *Gibbs* served the same considerations of judicial economy, there was something significantly different about a pendent party claim:

The situation with respect to the joining of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in *Gibbs* and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and

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In *Gibbs*, the Court held that pendent claim jurisdiction might be exercised whenever the relationship between the federal question and the state-law claim "permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"⁷³ The Court announced a three-part test for pendent claim jurisdiction: (1) the federal claim must have sufficient substance to confer subject matter jurisdiction on the court; (2) the state and federal claims must derive from a common nucleus of operative fact; and (3) the claims must be such that they would ordinarily be brought together in one judicial proceeding.⁷⁴

In dicta, the Court noted that the reasons for allowing pendent jurisdiction were judicial economy, fairness, and convenience to litigants.⁷⁵ In addition, the Court stated that if these factors were absent in a given case, a court had discretion to decline to exercise pendent jurisdiction, and it provided examples of other considerations and situations in which pendent jurisdiction may be allowed.⁷⁶ Even though

his claim against the second defendant "derive from a common nucleus of operative fact."

Id. at 14 (quoting *Gibbs*, 383 U.S. at 725).

⁷¹ 383 U.S. 715.

⁷² *Id.* at 725; see *supra* note 69.

⁷³ *Gibbs*, 383 U.S. at 725. The Court emphasized that under the Federal Rules of Civil Procedure, "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties [and that] joinder of claims, parties and remedies is strongly encouraged." *Id.* at 724.

⁷⁴ *Id.* at 725.

⁷⁵ *Id.* According to Judge Posner in *Sarnoff v. American Home Products Corp.*, "[a] dictum is a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding that, being peripheral, may not have received the full and careful consideration of the court that uttered it." 798 F.2d 1075, 1084 (7th Cir. 1986).

⁷⁶ *Gibbs*, 383 U.S. at 726-27.

[J]ustification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. 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. 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. 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. There may, on the other hand, be

this discretionary analysis was dicta, district courts have used this portion of the *Gibbs* opinion at every stage of litigation to evaluate the exercise of jurisdiction.⁷⁷

The Supreme Court addressed the issue of pendent party jurisdiction in *Aldinger v. Howard*.⁷⁸ In *Aldinger*, the plaintiff claimed federal jurisdiction over a § 1983⁷⁹ claim under 28 U.S.C. § 1343(a)(3)⁸⁰ and claimed pendent jurisdiction over the state claims.⁸¹ The Court refused because it would undermine another federal statute (namely, § 1983 as then interpreted) to permit pendent party jurisdiction, but limited its holding to claims brought under §§ 1983 and 1343(a)(3), stating that other claims might call for a different result.⁸² After *Aldinger*, federal courts have to show not only that Article III of the United States Constitution permitted jurisdiction, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its

situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.

Id. (citations omitted).

⁷⁷ *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988) (affirming the use of the *Gibbs* balancing test at every stage of litigation to evaluate the exercise of jurisdiction). "Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims." *Id.* at 350.

⁷⁸ 427 U.S. 1 (1976).

⁷⁹ 42 U.S.C. § 1983 (2000) (providing a civil action in federal courts for deprivation of rights).

⁸⁰ 28 U.S.C. § 1343(a)(3) (1974).

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Id.

⁸¹ *Aldinger v. Howard*, 427 U.S. 1, 4 (1976). *Aldinger* was unable to assert a federal claim against the county, since, at the time, courts had interpreted § 1983 as not extending to municipal corporations. *Id.* This construction was overruled two years after *Aldinger* in *Monell v. Department of Social Services*, 436 U.S. 658, 683-88 (1978). Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute – A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 883 (1992). In addition, no diversity jurisdiction existed "because both the plaintiff and the county were citizens of Washington." *Id.*

⁸² *Aldinger*, 427 U.S. at 18.

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existence.⁸³ Because of the limitations that *Aldinger* placed on pendent party jurisdiction, litigants turned to ancillary jurisdiction to join additional parties.⁸⁴

2. Ancillary Jurisdiction

Unlike pendent jurisdiction, ancillary jurisdiction authorizes the exercise of jurisdiction over a related state-law claim after the commencement of the lawsuit, even if the anchor claim is based on diversity jurisdiction.⁸⁵ However, this authorization is a narrow one. In *Owen Equipment & Erection Co. v. Kroger*,⁸⁶ the Supreme Court held that when a plaintiff's anchor claim is based on diversity, the plaintiff may not assert additional state-law claims against non-diverse third-party defendants.⁸⁷ Therefore, the Court refused to allow the exercise of ancillary jurisdiction of the plaintiff's claim against a non-diverse third-party defendant, reasoning that the exercise of jurisdiction over such a claim would allow plaintiffs to circumvent the complete diversity requirement of § 1332.⁸⁸

⁸³ *Id.*

⁸⁴ See *infra* Part II.B.2.

⁸⁵ *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978). “[A]ncillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court.” *Id.*

⁸⁶ 437 U.S. 365.

⁸⁷ *Id.* at 377. The plaintiff in *Kroger*, a citizen of Iowa, brought a claim based on state law in the federal district court against the Omaha Public Power District (“OPPD”), a Nebraska corporation. *Id.* at 365. OPPD then impleaded Owen Equipment and Erection Corporation, a citizen of both Iowa and Nebraska, pursuant to FRCP 14. *Id.* Rule 14 allows a defendant, as a third-party plaintiff, to assert a claim for indemnity against “a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.” FED. R. CIV. P. 14(a). The plaintiff filed an amended complaint naming Owen as an additional defendant even though there was no independent basis of federal jurisdiction over the plaintiff’s claim because the complete diversity requirement was no longer met. *Kroger*, 437 U.S. at 377. Complete diversity was destroyed because the plaintiff and Owen were citizens of the same state, Iowa. *Id.*

⁸⁸ *Id.* at 374-77. The Court stated that:

[N]either the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff’s cause of action against a citizen of the same State in a diversity case. Congress has established the basic rule that diversity jurisdiction exists under 28 U.S.C. § 1332 only when there is complete diversity of citizenship.

Id. at 377. “Ancillary jurisdiction is not a device for plaintiffs. Rather, it is ‘primarily a tool for defendants, in a court against their will, to facilitate their assertion of claims against

Before 1989, the federal courts assumed that they could exercise jurisdiction over any matter authorized by Article III unless that authority was expressly or implicitly negated by statute.⁸⁹ However, this presumption changed after the Supreme Court in *Finley v. United States*,⁹⁰ held that pendent and ancillary jurisdiction were unconstitutional usurpations of power.⁹¹

3. The Effect of *Finley* on Pendent and Ancillary Jurisdiction

In *Finley*, the plaintiff asserted pendent jurisdiction to amend her federal complaint to include claims against another defendant, who shared state citizenry with the plaintiff, to which no independent basis for federal jurisdiction existed.⁹² However, since the claims asserted against both the defendant of the federal claim and the defendant of the state claim arose "from a common nucleus of operative facts," the district court allowed the amended claim in the interest of "economy and efficiency" favored [by] trying the actions together."⁹³

others.'" Heather McDaniel, *Plugging the Gaping Hole: The Effect of 28 U.S.C. § 1367 on the Complete Diversity Requirement of 28 U.S.C. § 1332*, 49 BAYLOR L. REV. 1069, 1080 (1997) (quoting § 1367 as construed in David D. Siegel, Practice Commentary: The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction, at 830 (West Supp. 1993).

⁸⁹ *Aldinger v. Howard*, 427 U.S. 1, 13 (1976).

Gibbs and its lineal ancestor, *Osborn*, were couched in terms of Article III's grant of judicial power in "Cases . . . arising under this Constitution, the Laws of the United States, and [its] Treaties," since they (and implicitly the cases which linked them) represented inquiries into the scope of Art. III jurisdiction in litigation where the "common nucleus of operative fact" gave rise to non-federal questions or claims between the parties. None of them posed the need for a further inquiry into the underlying statutory grant of federal jurisdiction or a flexible analysis of concepts such as "question," "claim," and "cause of action," because Congress had not addressed itself by statute to this matter.

Id. (alteration in original).

⁹⁰ 490 U.S. 545 (1989).

⁹¹ *Id.* at 556.

⁹² *Id.* at 546-47. Plaintiff's husband and her two children died when an airplane, on which they were passengers, struck electric transmission lines. *Id.* at 546. The plaintiff brought a state-tort action against San Diego Gas and Electric Company. *Id.* The plaintiff later learned that the Federal Aviation Administration ("FAA") was partly responsible for the deaths and she filed an action against this agency in the federal district court. *Id.* She then wanted to combine the suits by amending her federal complaint to include the San Diego Gas and Electric Company as a co-defendant with the FAA. *Id.*

⁹³ *Id.* at 547.

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However, the Court, in an opinion authored by Justice Scalia, announced that pendent party jurisdiction must be authorized by an affirmative congressional grant of jurisdiction.⁹⁴ The Court sent a clear message to Congress that federal courts could no longer obtain jurisdiction unless granted power to do so by the Constitution and authorized to do so by Congress.⁹⁵ Recognizing the need for legislative action, Justice Scalia wrote:

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.⁹⁶

After the *Finley* decision, a plaintiff with an exclusively federal claim and a closely related state claim did not have a forum that could hear the entire case at once.⁹⁷

The Court's announcement extended beyond pendent party jurisdiction and threatened all forms of pendent and ancillary jurisdiction.⁹⁸ The Court turned the supplemental jurisdiction

⁹⁴ *Id.* at 552-56.

⁹⁵ *Id.* at 556; Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247, 270.

[T]o preserve supplemental jurisdiction and thereby to ensure the viability of the federal judiciary as an important player on federal questions, Congress need only codify pendent party jurisdiction. In effect, since the *Finley* Court appears adamant about applying stare decisis to its cases on pendent claim and ancillary jurisdiction, Congress need overrule only *Finley's* express implications.

One can only speculate how the Supreme Court will apply stare decisis in this area in the future. Indeed, as it stands now, Justice Scalia may be able to deliver on his resolve not to "limit or impair" *Gibbs* and the ancillary jurisdiction. In *Finley* four Justices joined his opinion and four other Justices were outraged that the Court had cut back at all on supplemental jurisdiction. No one presently on the Court seems inclined to inflict any more damage.

Mengler, *supra*, at 270.

⁹⁶ *Finley*, 490 U.S. at 556.

⁹⁷ McDaniel, *supra* note 88, at 1082. "The claimant would have two alternatives: (1) split the action and try each claim in a separate court, thereby wasting valuable time and judicial resources; or (2) forsake either the federal or the state claim and sue in one forum." *Id.*

⁹⁸ See McLaughlin, *supra* note 81, at 887-88 (" *Finley* raised substantial concerns about the legitimacy of all existing forms of supplemental jurisdiction because, with one minor

framework on its head by requiring Congress to expressly authorize any form of pendent or ancillary jurisdiction that it wanted the federal courts to possess.⁹⁹ Congress quickly responded with the passage of § 1367.¹⁰⁰

C. Supplemental Jurisdiction: The Attempted Codification of Case Law in 28 U.S.C. § 1367

Approximately six months after *Finley*, Congress created the Federal Courts Study Committee (a group of distinguished judges, lawyers, and scholars). Congress instructed the Committee to analyze the current problems facing the judiciary and to develop long-range strategies to remedy the problems.¹⁰¹ The Committee issued a report that recommended, among other suggestions, that Congress expressly authorize the doctrines of pendent claim, pendent party, and ancillary jurisdiction under the new title of "supplemental jurisdiction."¹⁰² After considering the Committee's recommendations, Congress enacted § 1367 as part of a comprehensive restructuring of the federal court system in Title III of the Judicial Improvements Act of 1990.¹⁰³

exception, no form of supplemental jurisdiction was expressly authorized by Congress."). At the time that *Finley* was decided, the only statute that expressly authorized the exercise of supplemental jurisdiction was 28 U.S.C. § 1338, which allowed the federal courts to exercise jurisdiction over related state unfair competition claims asserted in federal patent, copyright, and trademark cases. 28 U.S.C. § 1338(b) (2000).

⁹⁹ Mengler, *supra* note 95, at 255 ("In *Finley*, the Supreme Court turned this analytic framework on its head and in the process took the breath away from all forms of supplemental jurisdiction.").

¹⁰⁰ JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47-48 (1990) [hereinafter CONFERENCE REPORT]. In 1989, Congress created this committee to "examine problems and issues currently facing the courts of the United States" and to "develop a long-range plan for the future of the Federal Judiciary." *Id.*

¹⁰¹ See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) [hereinafter Improvements Act] (codified in scattered sections of 28 U.S.C.).

¹⁰² H.R. REP. NO. 101-734, at 47 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6873-74. The Committee recommended that "Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely defendants against whom that plaintiff has a closely related state claim." CONFERENCE REPORT, *supra* note 100, at 47.

¹⁰³ 28 U.S.C. § 1367. The Congressional grant of supplemental jurisdiction provides that:

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

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Congress' primary intention in codifying supplemental jurisdiction was to overrule *Finley* and to restore the exercise of pendent and ancillary jurisdiction as they had existed prior to the *Finley* decision.¹⁰⁴ The House Report accompanying the statute notes that § 1367 codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *Gibbs* and implements the principal rationale of *Kroger*.¹⁰⁵ However, legislative history shows that some of the *Gibbs* factors were intentionally excluded during the drafting process.¹⁰⁶ The general

States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

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

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

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

Id. See Improvements Act, *supra* note 101. The passage of this Act began heated debate among scholars regarding whether the statute only created new gaps in the federal courts' jurisdictional authority. Thomas D. Rowe et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993, 993 (1991). Namely, scholars have debated whether the statute succeeded in filling a gap in federal courts' jurisdictional authority created by *Finley* or whether the new statute is an "unmitigated unsalvageable flop" which created new gaps on its own. *Id.*
¹⁰⁴ 136 CONG. REC. S17, 580-81 (daily ed. Oct. 27, 1990). The House Report states that § 1367 "would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction." H.R. REP. NO. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874.

¹⁰⁵ H.R. REP. NO. 101-734 at 29, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 nn.15-16; see *supra* note 88 (quoting the rationale of *Kroger* that ancillary jurisdiction cannot be used to thwart the complete diversity requirement of § 1332).

¹⁰⁶ Improvements Act, *supra* note 101; Jon D. Corey, Comment, *The Discretionary Exercise of Supplemental Jurisdiction Under the Supplemental Jurisdiction Statute*, 1995 BYU L. REV. 1263, 1281-82. The Working Papers of the Federal Courts Study Committee to the penultimate draft of the statute before Congress demonstrate that the *Gibbs* factors were in the text of the proposed statute, but they were withdrawn at the last minute because some

consensus was that the statute restored the federal courts' power to exercise pendent and ancillary jurisdiction as it had existed prior to *Finley*.¹⁰⁷ However, § 1367 did more than just overrule *Finley*; the statute created the presumption that certain state-law claims that could not independently be heard in federal court under the common law *would* be heard in federal court under the statute.¹⁰⁸

1. The General Rule of § 1367(a)

Section 1367(a) codifies the *Gibbs* standard by requiring federal courts to exercise supplemental jurisdiction over all claims "so related" to the anchor claims that they "form part of the same case or controversy under Article III of the United States Constitution."¹⁰⁹ The last sentence in subsection (a) achieves the main purpose of the Committee's recommendation in that it expressly overrules *Finley* by allowing supplemental jurisdiction for parties who are joined or who intervene under the federal rules.¹¹⁰ Thus, § 1367(a) not only authorizes district courts to hear state-law claims that have a common nucleus of operative fact to the anchor claim, but the subsection also requires the district court to hear such claims.¹¹¹

2. The Limitations Imposed by § 1367(b)

The general grant of jurisdictional power contained in subsection (a), which applies equally to cases based on federal question jurisdiction as well as cases based on diversity jurisdiction, is subject to the limitations provided in subsection (b).¹¹² Subsection (b) preserves the *Kroger* rule by

commentators had criticized that language as allowing too much discretion to the district courts. *Id.*

¹⁰⁷ See, e.g., Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3, 3 (1992) ("[T]he new law is very desirable in allowing pendent party jurisdiction and in reversing the Supreme Court's decision in *Finley v. United States*.").

¹⁰⁸ 28 U.S.C. § 1367; see *supra* notes 103-07.

¹⁰⁹ 28 U.S.C. § 1367(a). For a useful discussion of the relationship between the constitutional limits of supplemental jurisdiction and the "common nucleus" test of *Gibbs*, see McLaughlin, *supra* note 81, at 890-95.

¹¹⁰ 28 U.S.C. § 1367(a) (authorizing supplemental jurisdiction over "claims that involve the joinder or intervention of additional parties"). "In providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly filled the statutory gap noted in *Finley v. United States*." H.R. REP. NO. 101-734, at 29, reprinted in 1990 U.S.C.C.A.N. 6860, 6875.

¹¹¹ See *supra* note 110 and accompanying text.

¹¹² 28 U.S.C. § 1367(b). Commentators have exposed several gaps, anomalies, and unanswered questions in § 1367(b). See, e.g., Thomas C. Arthur & Richard D. Freer,

prohibiting the exercise of supplemental jurisdiction when the following three factors are present: (1) the court's original jurisdiction is based on diversity; (2) the plaintiff is the party seeking to assert supplemental jurisdiction; and (3) exercising such jurisdiction would be inconsistent with the requirements of the diversity statute.¹¹³ Therefore, plaintiffs cannot use the supplemental jurisdiction of the federal courts to assert claims in diversity actions "against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19" if the joinder of the additional claims would be inconsistent with the statutory requirements for diversity jurisdiction.¹¹⁴ However, if the anchor claim is based on a federal question, or if the state-law claim is not excluded by § 1367(b), then the district court is required to grant jurisdiction.¹¹⁵

3. The Grant of Discretion in § 1367(c)

Subsections 1367(a)-(b) are mandatory rules of inclusion and exclusion.¹¹⁶ The language in subsection (a) is mandatory—the district courts "shall" have supplemental jurisdiction—and goes further than *Gibbs*, which stated that courts had discretion over whether to exercise

Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute, 40 EMORY L.J. 963, 980 (1991) [hereinafter Arthur & Freer, *Burnt Straws*] ("Underinclusion in section 1367(b) results in an unduly broad grant of jurisdiction. Overinclusion in section 1367(b) results in undue constriction of federal jurisdiction.").

¹¹³ See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374-75 (1978) (holding that a plaintiff cannot use pendent jurisdiction to secure subject matter jurisdiction over a nondiverse third-party defendant in an action based solely on diversity).

¹¹⁴ 28 U.S.C. § 1367(b). The federal rules referenced in subsection (b) include the following:

Rule 14, which provides for third-party suits such that any time after the commencement of the suit, the defendant—or plaintiff acting as a defendant—may become a third-party plaintiff and bring an action against a third party for all or part of the original plaintiff's claim or original defendant's cross-claim. FED. R. CIV. P. 14(a), (b). Rule 19, which provides for compulsory joinder over absent parties if in such absence complete relief cannot be accorded among those who are already parties, and if not joining may impair the ability of those absent parties to protect their interests, or if not joining would place persons already parties to the suit in jeopardy of inconsistent obligations. *Id.* at 19(a). Rule 20, which allows for permissive joinder of additional parties who either assert rights or have rights asserted against them that arise out of the same transaction involving the original parties. *Id.* at 20(a). Rule 24, which provides the right of intervention for anyone who is permitted to intervene under a federal statute or whose rights will be impaired, unless there is an opportunity to protect his or her interests. *Id.* at 24(a), (b). Additionally, subsection (b) allows for permissive intervention when provided by federal statute or when the person's claim or defense has common questions of law or fact. *Id.* at 24(b).

¹¹⁵ See *supra* notes 113-14 and accompanying text.

¹¹⁶ See *supra* Part II.C.1-2.

pendent jurisdiction.¹¹⁷ Thus, district courts *must* grant jurisdiction over state-law claims that are “so related” that they form the same case or controversy as the anchor claim, and *must* dismiss any claims excluded by § 1367(b).¹¹⁸ However, § 1367(c) gives the court *discretion* to decline to exercise supplemental jurisdiction in specific circumstances:

The district courts may decline to exercise supplemental jurisdiction over a claim in 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.¹¹⁹

In *City of Chicago v. International College of Surgeons*,¹²⁰ the Supreme Court interpreted this statutory discretion when it explained that the supplemental jurisdiction statute “codifies those principles” of economy, convenience, fairness, and comity that inform the discretionary regime of *Gibbs*.¹²¹ But since *Gibbs* provided more discretion to district courts than does the text of § 1367(c), the federal courts have differing opinions on the boundaries of this discretion.¹²²

¹¹⁷ 28 U.S.C. § 1367(c). Cf. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

¹¹⁸ See *supra* Part II.C.1.

¹¹⁹ 28 U.S.C. § 1367(c).

¹²⁰ 522 U.S. 156 (1997).

¹²¹ *Id.* at 165. “Section 1367, by its terms, neither allows nor prohibits a district court from remanding federal claims to state court when the court exercises its discretion to decline jurisdiction under § 1367(c).” Joseph N. Akrotirianakis, Comment, *Learning to Follow Directions: When District Courts Should Decline to Exercise Supplemental Jurisdiction Under 28 U.S.C. § 1367(c)*, 31 LOY. L.A. L. REV. 995, 1004 (1998). “This discretionary language appears to codify the *Gibbs* test for those instances when a court should decline pendent jurisdiction.” *Id.*

¹²² See *infra* Part II.C.4.

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4. Two Ways to Interpret § 1367(c)'s Grant of Discretion

The fundamental issue over subsection (c) was whether it was intended to codify prior case law or to modify the analysis of *Gibbs* and its progeny.¹²³ Textually, § 1367 limits the federal courts' discretion by requiring the adjudication of supplemental claims unless one of the four circumstances enumerated in subsection (c) is present.¹²⁴ Subsection (a) states that the court "shall have" supplemental jurisdiction over the related state claims.¹²⁵ When coupled with the language of subsection (c), which states that courts "may" decline jurisdiction in any of the four circumstances, the "shall" of subsection (a) appears to create a presumption to grant jurisdiction except in certain situations.¹²⁶ That presumption contradicts the *Gibbs* model, which allowed the court unfettered discretion in exercising jurisdiction over the state-law claims.¹²⁷ Under the plain meaning of the statute, a district court's decision whether to exercise jurisdiction no longer includes an open-ended mandate to consider issues such as efficiency, federal policy, or jury confusion.¹²⁸ Instead, a court must fit the refusal to hear supplemental claims into one of the four circumstances of § 1367(c).¹²⁹

¹²³ See *supra* notes 120-21 and accompanying text.

¹²⁴ See 28 U.S.C. § 1367(c)(1)-(4). The four discretionary dismissal factors are: (1) novel state issue; (2) supplemental claim predominates over anchor claim; (3) dismissal of all anchor claims; and (4) exceptional circumstances. See *supra* note 103 for full text of the statute.

¹²⁵ 28 U.S.C. § 1367(a).

¹²⁶ See *id.* § 1367(c).

¹²⁷ See 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, 766 (1991) ("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.").

¹²⁸ See SIEGEL, *supra* note 88, at 831 ("The conferral is in mandatory terms—the court 'shall' have the supplemental jurisdiction—but subdivision (c), treated below, gives the court discretion to 'decline to exercise' the supplemental jurisdiction in various circumstances.").

¹²⁹ See Steven H. Steinglass, *Litigating State Employment Discrimination Claims in Federal Courts Under the New Doctrine of Supplemental Jurisdiction*, C780 ALI-ABA 467, 487 (1993).

Congress focused on the comity-related discretionary factors while saying nothing explicit in either the statutory language or the legislative history of 28 U.S.C. § 1367 about efficiency-related factors. *Gibbs* had defined the discretionary leg in terms of "judicial economy, convenience and fairness to litigants" but had identified concerns going to both comity and efficiency. In § 1367(c), however, Congress did not use the *Gibbs* efficiency-related language. Rather, Congress restricted refusals to exercise supplemental jurisdiction to the three enumerated factors and the fourth undefined catchall for "exceptional

Five appellate circuits have taken the position that § 1367(c) narrows judicial discretion to decline supplemental jurisdiction as compared to the level of discretion allowed under *Gibbs*.¹³⁰ Thus, a federal court is limited to the four circumstances listed in § 1367(c) when determining whether it has discretion to dismiss the state-law claim.¹³¹ Such a textual reading of § 1367 would be correct only if the language of the statute was clear and unambiguous.¹³²

Assuming that a court interpreting § 1367 should consult the statute's legislative history, the only insight within the legislative history is in the House Report connected with the supplemental jurisdiction statute.¹³³ Although the House Report is not lengthy, it does provide valuable insight into the legislative purposes underlying § 1367.¹³⁴ The House Report states that the supplemental jurisdiction statute "codifies the scope of supplemental jurisdiction [that was] first articulated by the Supreme Court in *United Mine Workers v. Gibbs*."¹³⁵ Thus, contextualists

circumstances" when there were "other compelling reasons for declining jurisdiction." Consequently, federal district courts deciding whether to exercise supplemental jurisdiction no longer have an open-ended mandate to consider "judicial economy, convenience or fairness to litigants" but must fit the refusal to hear state law claims into one of these four factors of § 1367(c).

Id. (emphasis added).

¹³⁰ See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442 (2d Cir. 1998) (holding that the district court erred in assuming that § 1367 codified *Gibbs* and thus declining supplemental jurisdiction); *McLaurin v. Prater*, 30 F.3d 982, 984-85 (8th Cir. 1994) (stating that a district court is required to exercise supplemental jurisdiction over related state law claims unless one of the statutory exceptions applies); *Executive Software N. Am., Inc. v. United States Dist. Court*, 24 F.3d 1545, 1556 (9th Cir. 1994) (stating that it is clear that Congress intended § 1367(c) to provide the exclusive means by which supplemental jurisdiction can be declined by a court, and a contrary reading of the statute would appear to render section 1367(c) superfluous); *Palmer v. Hosp. Auth.*, 22 F.3d 1559, 1569 (11th Cir. 1994) (stating that the district court should consider the statutory language first, and if one factor under § 1367(c) is present, then the district court may consider the *Gibbs* factors); *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993) (finding a statutory reason to decline supplemental jurisdiction and supplementing its analysis with *Gibbs* factors only after making an independent determination under the supplemental jurisdiction statute).

¹³¹ See *supra* notes 129-30 and accompanying text.

¹³² See *supra* Part III.A. for a discussion of the two ways to interpret § 1367(c)'s grant of discretion: textual or contextual.

¹³³ See H.R. REP. NO. 101-734, at 27, reprinted in 1990 U.S.C.C.A.N. 6860, 6873-76. But see *Corey*, *supra* note 106, at 1294 (arguing that section 1367(c)(4) was not meant to incorporate the non-codified *Gibbs* factors and act as a "catchall").

¹³⁴ *Akrotirianakis*, *supra* note 121, at 1006 ("What little the House Report does provide, however, gives valuable insight into the legislative purposes underlying § 1367.").

¹³⁵ H.R. REP. NO. 101-734, at 29, reprinted in 1990 U.S.C.C.A.N. at 6875 n.15.

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view supplemental jurisdiction as a doctrine of discretion, not of a plaintiff's right.¹³⁶ Six appellate courts have interpreted the supplemental jurisdiction statute as a codification of *Gibbs* and still perform a broad *Gibbs*-style analysis instead of applying the narrower language of the statute.¹³⁷

The Supreme Court had the opportunity to clarify this in *City of Chicago*.¹³⁸ However, it failed to do so, saying, "[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.' The supplemental jurisdiction statute codifies these principles."¹³⁹ This decision had the effect of saying that both sides of the debate are correct.

In sum, the text of § 1367(c) allows federal courts to decline to exercise supplemental jurisdiction when one of the four listed factors are present.¹⁴⁰ However, some courts have interpreted this section to also allow for a broad *Gibbs*-style analysis which includes additional factors

¹³⁶ Cf. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (holding that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right"). Judge Posner stated that "[t]he legislative history indicates that the new statute is intended to codify rather than to alter the judge-made principles of pendent and pendent party jurisdiction." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993).

¹³⁷ See *Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533, 541 (10th Cir. 1995) (adopting the *Thatcher* test, despite the availability of § 1367); *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1175 (1st Cir. 1995) (holding that a district court retains its discretionary authority to "entertain a new, unpleaded (but related) claim"); *Borough of W. Mifflin v. Lancaster*, 45 F.3d 780, 787 (3d Cir. 1995) (informing the district court that the proper analysis is one under a *Gibbs*-based reading of § 1367 that imparts broad discretion to decline supplemental claims to the district court); *Diven v. Amalgamated Transit Union Int'l*, 38 F.3d 598, 602 (D.C. Cir. 1994) (expanding the discretion allowed under § 1367(c) by holding that the test for substantial predominance was "whether the state claims are more complex or require more judicial resources to adjudicate or are more salient in the case as a whole than the federal law claims"); *Brazinski*, 6 F.3d at 1182 (leading the other courts into reading § 1367(c) as a codification of the *Gibbs* factors and not as a change in the scope of a district court's discretion to decline supplemental jurisdiction). The *Thatcher* test states that "discretion should be exercised in those cases in which, given the nature and extent of pretrial proceedings, judicial economy, convenience, and fairness would be served by retaining jurisdiction." *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1254 (6th Cir. 1996) ("A district court has broad discretion in deciding whether to exercise supplemental jurisdiction over state law claims."); *Thatcher Enters. v. Cache County Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990)).

¹³⁸ *City of Chi. v. Int'l Surgeons*, 522 U.S. 156 (1997).

¹³⁹ *Id.* at 172-73 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988)).

¹⁴⁰ See *supra* notes 129-30 and accompanying text.

for dismissal.¹⁴¹ The practical effect of this history is that a presumption clearly exists that district courts should exercise supplemental jurisdiction.¹⁴² However, it is unclear whether the timing of the discretionary analysis alters this presumption or whether the availability of an alternate forum should be a factor when exercising the discretion.¹⁴³

5. The Statute of Limitations Tolling Provision in § 1367(d)

Section 1367(d) recognizes that serious statute of limitations problems may arise for plaintiffs whose state-law claims have been dismissed by the district court—without a tolling provision, plaintiffs could be left without a forum to hear their claims.¹⁴⁴ Subsection (d) provides that all claims asserted under the supplemental jurisdiction statute and later dismissed, plus those that are voluntarily dismissed at the same time, will have the state statute of limitations *tolled* while the claim is pending in federal court.¹⁴⁵ The statute also permits a tolling period in excess of thirty days if applicable state law provides for a longer tolling period.¹⁴⁶ This incorporation of state law is significant because several state tolling statutes provide for tolling periods longer than thirty days.¹⁴⁷

But there are some problems with § 1367(d). First, even in states with tolling provisions, these provisions do not always apply to claims that are voluntarily dismissed or dismissed for reasons other than

¹⁴¹ See *supra* note 138.

¹⁴² See *infra* Part III.B-C.

¹⁴³ See *infra* Part III.A.

¹⁴⁴ See Siegel, *supra* note 88, at 836; *infra* note 164 and accompanying text.

¹⁴⁵ 28 U.S.C. § 1367(d) (2000).

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.

Id.

¹⁴⁶ See, e.g., N.M. STAT. ANN. § 37-1-14 (Michie 1978); N.Y. CIV. PRAC. L. & R. § 205(a) (McKinney 1990); TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a)(2) (Vernon 1986).

¹⁴⁷ See, e.g., N.M. STAT. ANN. § 37-1-14 (six months); N.Y. CIV. PRAC. L. & R. § 205(a) (six months); TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a)(2) (sixty days).

jurisdictional defects.¹⁴⁸ In addition, the Supreme Court in *Raygor v. Regents of University of Minnesota*,¹⁴⁹ held that the supplemental jurisdiction statute does not toll the statute of limitations for claims against nonconsenting states filed in federal court and subsequently dismissed on Eleventh Amendments grounds.¹⁵⁰ The combination of the lack of the tolling provision in certain situations and unclear boundaries for discretionary dismissal in § 1367(c) creates an incredulous hardship for plaintiffs like Raygor, as was shown in the Introduction.¹⁵¹

III. LEGAL ANALYSIS: TIMING IS EVERYTHING

This Part discusses the statutory interpretation of § 1367(c) and shows how the timing of the discretionary dismissal inquiry can affect the presumption of whether to maintain jurisdiction.¹⁵² Timing is only a factor when the dismissal of the anchor claim triggers the discretionary dismissal inquiry.¹⁵³ Therefore, when a federal court is using § 1367(c)(3), the presumption of whether to maintain jurisdiction switches after substantial pretrial proceedings have occurred.¹⁵⁴ Failure to take this factor into consideration can create hardship for plaintiffs like Raygor if § 1367(d) does not toll the state statute of limitations.¹⁵⁵ This Part discusses reasons for revising § 1367(d) so that the state statute of limitations is tolled for all claims brought under the supplemental jurisdiction statute.¹⁵⁶

¹⁴⁸ See, e.g., N.Y. CIV. PRAC. L. & R. § 205(a) (stating that New York's tolling provisions do not apply if the prior action was voluntarily terminated); TEX. CIV. PRAC. & REM. CODE ANN. § 16.064 (providing for tolling if the first action is dismissed for lack of jurisdiction).

¹⁴⁹ 534 U.S. 533 (2002).

¹⁵⁰ *Id.* at 548. Raygor held that respondent never consented to suit in federal court on petitioners' state law claims and that § 1367(d) does not toll the period of limitations for state law claims asserted against nonconsenting state defendants that are dismissed on Eleventh Amendment grounds. Therefore, § 1367(d) did not operate to toll the period of limitations for petitioners' claims.

Id.

¹⁵¹ See *supra* Part I. Raygor did not have an alternate forum to have his claim of discrimination heard because of the jurisdictional hole that the Court exposed in *Raygor*. 534 U.S. at 546.

¹⁵² See *infra* Part III.A.

¹⁵³ See *infra* Part III.B.

¹⁵⁴ See *infra* Part III.B.1-2.

¹⁵⁵ See *supra* Part I. Raygor was deprived of any forum to hear his discrimination claim.

¹⁵⁶ See *infra* Part III.D.

The timing of the discretionary analysis becomes an issue in the third dismissal factor, subsection (c)(3), which involves the use of the federal courts to litigate state-law claims when the anchor claim has been dismissed on a nonjurisdictional basis.¹⁵⁷ In this situation only the state-law claims are left to be resolved.¹⁵⁸ By not imposing time limitations on a discretionary dismissal, the statute continues the rule established in *Gibbs* that the propriety of supplemental jurisdiction “remains open throughout the litigation.”¹⁵⁹ This timing issue is not raised by subsections (c)(1)-(2) and (4), which naturally become an issue only at the initial stages of the suit and can be determined from the pleadings.¹⁶⁰ Thus, the same discretionary inquiry is not appropriate for subsection (c)(3).¹⁶¹ To provide fairness to litigants, the debate on the appropriate level of dismissal discretion must be resolved.¹⁶²

A. Interpretive Disagreements Over the Supplemental Jurisdiction Statute

Almost immediately following its passage, § 1367 provoked debate in the legal and academic communities.¹⁶³ Critics challenged the formulation of the statute, highlighting the issues left unsettled or confused by codification.¹⁶⁴ Criticisms included the failure to address whether the statute applied to removal cases and whether individual claims that did not meet the amount-in-controversy requirement, such as

¹⁵⁷ See *infra* Part III.C.

¹⁵⁸ 28 U.S.C. § 1367(c)(3) (2000) (becoming a dismissal factor only after all anchor claims have been dismissed).

¹⁵⁹ *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966). As explained by the Court in *Carnegie-Mellon*, “[u]nder *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

¹⁶⁰ See *infra* text accompanying notes 180-85.

¹⁶¹ See *infra* text accompanying notes 201-05.

¹⁶² See *infra* Part III.B-C.

¹⁶³ *McDaniel*, *supra* note 88, at 1089 (addressing the debate on the proper statutory interpretation of § 1367); see *Arthur & Freer, Burnt Straws*, *supra* note 112, at 964 (summarizing the negative reactions to § 1367 among “[d]istinguished commentators”).

¹⁶⁴ See generally *Arthur & Freer, Burnt Straws*, *supra* note 112, at 963 (attacking the statute on the basis that it includes unintended ambiguities); *Chemerinsky*, *supra* note 107, at 3 (pointing to ambiguities in historical treatment of jurisdiction that creates ambiguities in statute); *Rowe*, *supra* note 103, at 943 (attacking the fact that § 1367 reflects a bias toward diversity jurisdiction).

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class action suits, could be heard under § 1367.¹⁶⁵ More generally, some commentators suggested that the statute was “poorly drafted” and passed without proper “public ventilation and congressional scrutiny.”¹⁶⁶ The result, they argued, was “[the] most wasteful type of litigation—fights over jurisdiction.”¹⁶⁷

These fights over jurisdiction arise from different statutory interpretations of § 1367.¹⁶⁸ The disagreement as to the correct interpretation of § 1367 can be illustrated by two approaches to statutory interpretation: the “textualist” approach and the “contextualist” approach.¹⁶⁹ One form of textualism is referred to as “four corners,” meaning that a court should only look within the four corners of the statutory text to determine the statute’s meaning.¹⁷⁰ But other textualists prefer a broader approach to interpretation wherein the meaning of a statute should be gleaned from the statutory text, “without unnecessary recourse to the legislative history or other materials.”¹⁷¹ Textualists are

¹⁶⁵ See *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928 (7th Cir. 1996); *Shanaghan v. Cahill*, 58 F.3d 106 (4th Cir. 1995); *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995).

¹⁶⁶ Arthur & Freer, *Burnt Straws*, *supra* note 112, at 964; Thomas C. Arthur & Richard Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007 (1991) [hereinafter Arthur & Freer, *Close Enough*].

¹⁶⁷ Arthur & Freer, *Burnt Straws*, *supra* note 112, at 964; Arthur & Freer, *Close Enough*, *supra* note 166, at 1007.

¹⁶⁸ See *supra* notes 164-67 and accompanying text.

¹⁶⁹ Laura L. Hirschfeld, *The \$50,000 Question: Does Supplemental Jurisdiction Extend to Claims Between Diverse Parties Which Do Not Meet 1332's Amount-in-Controversy Requirement?*, 68 TEMP. L. REV. 107, 118 (1995). The textualist approach “favor[s] interpreting statutes using nothing but the literal language of the statute itself.” *Id.* The contextualist approach “believe[s] that a statute often cannot be clearly interpreted and applied without a thorough review of its legislative history.” *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

“Plain meaning” advocates argue that the meaning of a statute should be gleaned from the text of the statute itself, without unnecessary recourse to the legislative history or other materials. “Textualists” fear that use of legislative materials such as committee hearing notes, floor debates, and earlier bill drafts—materials which are often drafted by persons other than legislators, frequently go unread and do not make it into the final text—compromises the integrity of the legislative process. To incorporate these sources, the textualist theory goes, is the worst sort of judicial activism—impermissible judicial legislation. Further, the ability to meddle with the meaning of statutory text opens a Pandora’s box of temptations, not the least of which is the temptation to substitute case-by-case, result-oriented jurisprudence for the rule of law.

concerned that legislative materials are often drafted by persons other than legislators and frequently go unread by the voting Congress.¹⁷² According to a textualist, the ideas from many committee hearing notes, floor debates, and earlier drafted bills do not make it into the final draft, and the use of such materials to gain legislative intent compromises the integrity of the legislative process.¹⁷³

On the other hand, contextualists condemn excessively conservative statutory interpretation because it ignores the social and historical context necessary to ascertain the true intent of the legislators who drafted the unclear statute.¹⁷⁴ Therefore, the initial inquiry is whether the words of the statute are clear and unambiguous.¹⁷⁵

The dividing line between judicial interpretation and judicial legislation becomes particularly gray when the argument is not over what a statute says, but rather what it does not say.¹⁷⁶ Section 1367(a) clearly creates a presumption for district courts to have jurisdiction over all state-law claims that are so related to the anchor claims that they form

Id.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 119. "'Contextualists' or 'intentionalists' argue that a statute's language (and thus its application) is often unclear, and therefore, to perform the proper judicial function of interpretation, one must study the legislative history to ascertain the legislature's intent in enacting the statute." *Id.*; see also Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 301 (1990). Justice Benjamin Cardozo has been characterized as a moderate contextualist because of his view about judicial interpretation. Wald, *supra* at 301. In the words of Cardozo:

There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* § 102, at 14 (1921).

¹⁷⁵ *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). "Where [the statutory text] contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id.*

¹⁷⁶ CARDOZO, *supra* note 174, at 14-15. "Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning . . . [t]he ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute." *Id.*

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part of the same case or controversy.¹⁷⁷ Therefore, the presumption for § 1367(c) is that courts should maintain jurisdiction unless doing so would be adverse to the principles of economy, convenience, fairness, and comity, and the authorization for dismissal is among the four circumstances listed in § 1367(c).¹⁷⁸

B. *Proper Statutory Interpretation of § 1367(c)(1)-(2) and (4)*

Section 1367(a) states that a federal court *shall* hear claims that are so related that they form the same case or controversy as the anchor claim.¹⁷⁹ When the district courts inquire into whether they should dismiss a claim based on § 1367(c)(1)-(2) and (4), the inquiry only takes place at the beginning of the suit. At this time, any dismissal will not necessarily be adverse to the principles of economy, convenience, fairness, or comity, because the parties have not yet invested large amounts of time and resources into the suit at the federal forum.¹⁸⁰ In exercising their discretion under § 1367(c), courts should be mindful that although the statute is intended to preserve and codify the court's traditional right to decline supplemental jurisdiction in an appropriate case, this right is to be exercised only when legitimate and compelling considerations of federalism and fairness outweigh the valid goals of supplemental jurisdiction.¹⁸¹

Section 1367(a) creates a presumption that the district court shall grant jurisdiction, and § 1367(c) should be read to create a presumption to maintain jurisdiction except for exceptional circumstances where maintaining jurisdiction will be adverse to the principles of economy, convenience, fairness, or comity. For example, the statute's use of "other compelling reasons" as the residual standard in § 1367(c)(4) demonstrates the congressional understanding that discretionary dismissal under any provision of § 1367(c) should be reserved for compelling circumstances.¹⁸² Therefore, the text of § 1367(c)(1)-(2) and

¹⁷⁷ See *supra* Part II.C.1.

¹⁷⁸ See *supra* text accompanying notes 121-23.

¹⁷⁹ 28 U.S.C. § 1367(a) (2000).

¹⁸⁰ See *supra* text accompanying notes 121-23.

¹⁸¹ See *supra* notes 104-06 and accompanying text.

¹⁸² Akrotirianakis, *supra* note 121, at 1026-27. Professor Georgene Vairo and other legal scholars have suggested that § 1367(c)(4)'s "exceptional circumstances" language is taken from the Supreme Court's opinion in *Colorado River Water Conservation District v. United States*. *Id.* Discussing the doctrine of abstention in the majority's opinion in *Colorado River*, Justice Brennan held that the "[a]bduction of [a district court's] obligation to decide cases can be justified under this [abstention] doctrine only in the exceptional circumstances

(4) clearly establishes a presumption to exercise supplemental jurisdiction.¹⁸³ It also clearly reserves the district court's discretion to dismiss or remove any claims under § 1367(c)(1)-(2) and (4) in exceptional circumstances.¹⁸⁴

However, the fourth factor, § 1367(c)(4), has been interpreted to read the prior common law back into the statute.¹⁸⁵ For example, the Supreme Court recognized jury confusion as a factor that could be included in the "exceptional circumstances" language of (c)(4).¹⁸⁶ *Gibbs* specifically suggests jury confusion as an instance that would make the exercise of pendent claims improper.¹⁸⁷ Thus, some courts interpret (c)(4) as a "catchall section" since there is no guidance on what those exceptional circumstances are or when they are properly deemed to be compelling.¹⁸⁸ Since § 1367(c)(4) is not textually clear as to what exceptional circumstances are, it is proper to look to the legislative history for this

where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colo. R. Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 180-89 (1959)).

Justice Brennan further stated that prior decisions of the Supreme Court had "confined [these exceptional] circumstances appropriate for abstention to three general categories:" (1) "'cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law;'" . . . (2) "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;" . . . and (3) where there are certain ongoing state proceedings.

Akrotirianakis, *supra* note 121, at 1027 (alteration in original). Situations such as these—which warrant abstention in order to serve "an important countervailing interest" would undoubtedly qualify as "exceptional circumstances" in which there are "compelling reasons for declining jurisdiction" under § 1367(c)(4). *Id.* "In determining whether 'exceptional circumstances' and 'compelling reasons' exist for declining jurisdiction under § 1367(c)(4), a court should look to the guidance of the Supreme Court, handed down through its opinion in *United Mine Workers v. Gibbs*." *Id.* at 1031.

¹⁸³ See *supra* text accompanying notes 180-82.

¹⁸⁴ See *supra* note 182 and accompanying text.

¹⁸⁵ *Corey*, *supra* note 106, at 1287 ("Some courts have . . . used [§ 1367(c)](4) to read prior practice back into the [supplemental jurisdiction] statute.").

¹⁸⁶ *Moor v. Alameda County*, 411 U.S. 693, 716 (1973) (stating that the supplemental jurisdiction statute would include jury confusion as an "exceptional circumstance" where the court could decline jurisdiction); see also *Vera-Lozano v. Int'l Broad.*, 50 F.3d 67 (1st Cir. 1995) (holding that the district court abused its discretion by failing to consider the possibility of jury confusion when considering whether to allow supplemental claims).

¹⁸⁷ *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966).

¹⁸⁸ *Akrotirianakis*, *supra* note 121, at 1008; see also *Vera-Lozano*, 50 F.3d at 69; *Moor*, 411 U.S. at 716.

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determination.¹⁸⁹ Therefore, as § 1367 was intended to codify *Gibbs*, courts should use § 1367(c)(4) to dismiss claims that are adverse to the principles of economy, convenience, fairness, or comity. However, § 1367(c)(4), like § 1367(c)(1)-(2), should only be used at the beginning of the suit before the parties have invested large amounts of time and resources into the suit in the federal forum.¹⁹⁰

C. *The Appropriate Presumption for § 1367(c)(3)*

Whether a district court abuses its discretion in declining to exercise supplemental jurisdiction owing to the dismissal of the anchor claims will likely depend on the stage in the litigation when the dismissal takes place.¹⁹¹ If these main claims are dismissed *before* substantial pretrial proceedings have occurred, then the district court's decision to decline supplemental jurisdiction will likely be "almost unreviewable."¹⁹² However, if the main claims are dismissed *after* substantial pretrial proceedings have occurred, an appellate court may scrutinize a district court's decision to decline to exercise supplemental jurisdiction.¹⁹³

¹⁸⁹ See *supra* notes 169-76 and accompanying text.

¹⁹⁰ See *supra* text accompanying notes 180-83.

¹⁹¹ See Siegel, *supra* note 88, at 835.

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

Id.

¹⁹² *Huffman v. Hains*, 865 F.2d 920, 923 (7th Cir. 1989).

[W]e have described the district court's discretion to *relinquish* pendent jurisdiction as "almost unreviewable." . . . This is especially so when all federal claims have dropped from the case before trial, leaving only state-law claims to decide. At that point, respect for the state's interest in applying its own law, along with the state court's greater expertise in applying state law, become paramount concerns.

Id.

¹⁹³ See, e.g., *Growth Horizons, Inc. v. Delaware County, Pennsylvania*, 983 F.2d 1277, 1285 (3d Cir. 1993) (remanding subsection (c) issue and strongly hinting that district court should exercise supplemental jurisdiction where that court "has already held a trial on the

Before the supplemental jurisdiction statute, the practice was to determine at what point in the proceeding the federal claim was dismissed and to make the determination of whether or not to exercise supplemental jurisdiction based upon a simple efficiency analysis at that point.¹⁹⁴ Under this common law approach, the courts asked whether declining to exercise jurisdiction over the pendent and ancillary claims would result in duplicative litigation in state court.¹⁹⁵ This standard was mentioned in *Gibbs*' dictum to illustrate that the exercise of pendent jurisdiction would not be proper when the federal claim was dismissed at the outset.¹⁹⁶

Although the *Gibbs* discretionary factors are not mentioned in the statute or the legislative history, when faced with supplemental claims after dismissal of a federal claim, most courts that have considered this issue have held that dismissal of the federal claim does not mandate dismissal or remand of the supplemental claims.¹⁹⁷ Instead, the courts consider the goal of efficient adjudication of claims to determine whether

merits and has already heard all the evidence necessary to reach a decision on the plaintiff's contract claim").

¹⁹⁴ *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). In *Gibbs*, dismissal of a federal claim before trial was listed as an instance in which efficiency, fairness, and economy would weigh in favor of dismissal of the pendent state claims as well. *Id.* In *Carnegie-Mellon* the Court noted that the assertion in *Gibbs* that the pendent claims should be dismissed once the jurisdiction-granting claim was dismissed did "not establish a mandatory rule to be applied inflexibly in all cases." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988).

¹⁹⁵ See *supra* note 194.

¹⁹⁶ *Gibbs*, 383 U.S. 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.").

¹⁹⁷ *Carnegie-Mellon*, 484 U.S. at 350 (interpreting the effect § 1367(c) had on the *Gibbs* analysis of pendent and ancillary jurisdiction).

Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice. As articulated by *Gibbs*, the doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values.

Id.

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to dismiss or remand the state claims.¹⁹⁸ Thus, any presumption of whether to dismiss a claim based on § 1367(c)(3) must be consistent with this goal.¹⁹⁹

If the anchor claim is dismissed for lack of subject matter jurisdiction, the court is divested of all power to adjudicate any supplemental claim appended to it, and all supplemental claims must be dismissed.²⁰⁰ Dismissal under this rule is mandated irrespective of the amount of judicial time and energy that may have been expended on the case because the court lacked constitutional authority to hear the case in the first place.²⁰¹ The statute clearly effects no change in this view as § 1367(a)'s general grant of supplemental jurisdiction authority is explicitly premised on the existence of a valid anchor claim within the original jurisdiction of the federal courts.²⁰² Therefore, § 1367(c)(3)'s dismissal analysis is only relevant if the anchor claim is dismissed for non-jurisdictional reasons.²⁰³ If dismissal of the anchor claim is for non-

¹⁹⁸ See *Timm v. Mead Corp.*, 32 F.3d 273, 277 (7th Cir. 1994); see also *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 450 (9th Cir. 1994); *Eubanks v. Gerwen*, 40 F.3d 1157, 1161-62 (11th Cir. 1994); *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994) (upholding the district court's weighing of economy, convenience, and fairness with respect to supplemental claims after dismissal of federal claim); *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1287-89 (6th Cir. 1992) (considering judicial economy and fairness); *ITT Commercial Fin. Corp. v. Unlimited Automotive, Inc.*, 814 F. Supp. 664, 669 (N.D. Ill. 1992) (relying on judicial economy and efficiency). But see *Wentzka v. Gellman*, 991 F.2d 423, 425 (7th Cir. 1993) (holding that exercise of pendent jurisdiction is an abuse of discretion unless there is an alternate basis of jurisdiction for the claim or the statute of limitations has run on the claim); *Castellano v. Bd. of Trs. of Police*, 937 F.2d 752, 758 (2d Cir. 1991) ("In deciding whether to exercise discretion under Section 1367(c)(3), the Court should weigh and consider several factors, including judicial economy, convenience, and fairness to litigants.").

¹⁹⁹ See *supra* note 198. Presumption for the § 1367(c)(3) discretionary dismissal must be consistent with the goal of efficient adjudication of claims.

²⁰⁰ *Molett v. Penrod Drilling Co.*, 919 F.2d 1000, 1004 (5th Cir. 1990).

²⁰¹ See, e.g., *Crane Co. v. Am. Standard, Inc.*, 603 F.2d 244, 254 (2d Cir. 1979) ("Even where substantial time and resources have been expended in the trial of an action in federal court, pendent state claims must be dismissed if it later is determined that there never existed a federal claim sufficient to invoke the jurisdiction of the federal court.").

²⁰² See, e.g., *Ga. Carpet Sales, Inc. v. SLS Corp.*, 789 F. Supp. 244, 246 (N.D. Ill. 1992) ("[I]f no jurisdictional predicate exists for [the original grant of jurisdiction] claim, then by definition there is no 'supplemental jurisdiction' under Section 1367's recent replacement of the pendent jurisdiction concept (for by definition there must be an original-jurisdiction anchor to which the supplemental jurisdiction can attach).").

²⁰³ See *supra* notes 200-02 and accompanying text.

subject matter jurisdictional grounds, then the timing of the dismissal becomes an important factor.²⁰⁴

1. Dismissal of Anchor Claim Before Substantial Pretrial Proceedings

After the anchor claim is dismissed for non-jurisdictional reasons, courts must next consider prior case law to determine the presumption that is appropriate for § 1367(c)(3).²⁰⁵ In *Gibbs*, the Supreme Court stated: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."²⁰⁶ The Supreme Court refined this statement in *Carnegie-Mellon University v. Cohill*,²⁰⁷ and "made clear that this statement does not establish a mandatory rule to be applied inflexibly in all cases."²⁰⁸ Rather, "[t]he statement simply recognizes that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims."²⁰⁹ Similarly, under § 1367(c)(3), the balance of these factors also should point toward declining supplemental jurisdiction when the claims conferring original jurisdiction are dismissed early in the litigation.²¹⁰

2. Dismissal of Anchor Claim After Substantial Pretrial Proceedings

After substantial pretrial proceedings have occurred, federal courts may continue to exercise pendent jurisdiction after the dismissal of claims over which they had independent jurisdiction.²¹¹ Section

²⁰⁴ See *infra* Part III.C.1-2.

²⁰⁵ See *supra* notes 194-200 and accompanying text.

²⁰⁶ *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("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 [the] applicable law.").

²⁰⁷ *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988).

²⁰⁸ *Id.* at 350 n.7.

²⁰⁹ *Id.* at 350.

²¹⁰ See *supra* notes 194-98, 206-09.

²¹¹ See *Carnegie-Mellon*, 484 U.S. at 350; see also *Rauci v. Town of Rotterdam*, 902 F.2d 1050 (2d Cir. 1990) (permitting the continued exercise of pendent jurisdiction over state-law claims after the dismissal of joined § 1983 claims); *Ridenour v. Andrews Fed. Credit Union*, 897 F.2d 715 (4th Cir. 1990) (noting that it is now recognized that there are exceptions to the usual rule requiring dismissal of pendent claims after dismissal of federal claims). Cf. *Jenkins v. Weatherholtz*, 909 F.2d 105 (4th Cir. 1990) (requiring district courts to make a

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1367(c)(3) codifies the federal courts' power to continue to hear state-law claims after the dismissal of federal-law claims.²¹² This codified accommodation of pendent claims requires a change in the approach of district courts which currently justify the dismissal of state-law claims after substantial pretrial proceedings simply by pointing to the section as a reason to dismiss state-law claims.²¹³ Likewise, appellate courts that customarily approve such refusals to exercise supplemental jurisdiction should now be required to either remand for a proper exercise of discretion or to engage in such a discretionary review themselves.²¹⁴ Therefore, the presumption is to keep subsection (a)'s general grant and only dismiss if dismissal is in the interests of judicial economy, fairness, convenience to the litigants, and comity.²¹⁵ After substantial pretrial proceedings have occurred, it will neither be in the interests of judicial economy, fairness, convenience to the litigants, nor comity to dismiss the suit and force the plaintiffs to begin again in an alternate forum. Furthermore, some plaintiffs, like Raygor, will not have an alternate forum to begin again. Therefore, after substantial pretrial proceedings have occurred, there should be a *strong* presumption for federal courts to maintain jurisdiction and not use § 1367(c)(3) to dismiss the state-law claims after the anchor claim has been dismissed.

discretionary decision about whether it will exercise pendent jurisdiction over a state-law claim after the dismissal of a federal claim).

²¹² See, e.g., *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (recognizing that pendent claims are normally dismissed without prejudice after dismissal of federal claim before trial); see also *Evans v. City of Marlin, Texas*, 986 F.2d 104, 109 n.10 (5th Cir. 1993) (recognizing that § 1367 makes clear that district courts have discretion to exercise supplemental jurisdiction after the dismissal of all federal claims).

²¹³ See *supra* notes 117-23 and accompanying text.

²¹⁴ See *supra* notes 200-13 and accompanying text.

²¹⁵ See *Sudarsky v. City of New York*, 779 F. Supp. 287, 303 (S.D.N.Y. 1991). "In light of the dismissal of plaintiff's federal claims, dismissal of the pendent claims is appropriate as well. 'It is well settled that if the federal claims are dismissed before trial even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.'" *Id.* (quoting *W. Hartford v. Operation Rescue*, 915 F.2d 92, 104 (2d Cir. 1990)); see also *Pomeroy v. Schlegel Corp.*, 780 F. Supp. 980, 984 (W.D.N.Y. 1990) ("This court has dismissed all of the claims over which it has original jurisdiction and, in accordance with 28 U.S.C. § 1367(c)(3), declines to exercise its supplemental jurisdiction over plaintiff's remaining claims."). But see *Plotkin v. Bearings Ltd.*, 777 F. Supp. 1105, 1108 (E.D.N.Y. 1991).

[C]lause (3) of subdivision (c) allows the court to decline supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction." . . . Under the circumstances of the case this Court determines that considerations of judicial economy, comity, and fairness to the parties warrants the dismissal of the state claims and counterclaims.

Id.; see *supra* text accompanying notes 178-79.

3. Specific Judicial Findings Should Be Required for Dismissal

The American Legal Institute ("ALI") has undertaken a project to propose a revision of many of the rules of federal judicial procedure currently codified in § 1367.²¹⁶ The ALI decided not to include a provision in the proposed statute that would mandate that district judges explicitly state their reasons under § 1367(c) for declining supplemental jurisdiction.²¹⁷ However, doing so would create a record that would more easily be reviewable by the courts of appeals, should a party appeal on the grounds of judicial abuse of discretion. The ALI's concern was that judges would not support its revision of the supplemental jurisdiction statute if such a provision was present.

However, since the judges must go through the discretionary analysis already, there are no reasons of statutory simplicity or judicial policy to avoid making specific findings.²¹⁸ When litigants have participated in substantial pretrial procedures, a dismissal can be an abuse of discretion granted by § 1367(c)(3) because such dismissal would be against the interests of judicial economy, fairness, convenience to the litigants, and comity.²¹⁹ Thus, to safeguard against abuse of discretion, district court judges should be required to make specific findings if they exercise their § 1367(c)(3) discretion to dismiss the state-law claims when

²¹⁶ To learn more about the American Legal Institute, visit their website at <http://www.ali.org/ali/thisali.htm> (last visited Apr. 26, 2004).

²¹⁷ 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, 141-42 (2001).

The ALI decided not to include a provision in the proposed statute that would mandate that district judges explicitly state their reasons under § 1367(c) for declining supplemental jurisdiction that was a mistake. If district court judges are going through the analysis under § 1367(c), what would be the harm in requiring those judges to put their reasons on paper? This would create a record more easily reviewable by the courts of appeals should a party appeal on the grounds of judicial abuse of discretion. The ALI discussed and quickly rejected the idea of including such a provision in the proposal, but not for reasons of statutory simplicity or judicial policy. Rather, there was concern that judges, who not only largely compose the ALI but are also the primary audience for the proposed revision, would not support such a provision.

Id.

²¹⁸ *Id.*

²¹⁹ See *supra* note 215.

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the anchor claims are removed from the suit after substantial pretrial proceedings have occurred.²²⁰

D. The Deficiency of §1367(d)'s Tolling of the State Statute of Limitations Provision

Many courts prior to § 1367 held that it was an abuse of discretion to dismiss a supplemental claim without first considering if the supplemental claim would be time-barred in state court.²²¹ This consideration is analogous to the common law *forum non conveniens* dismissal. A *forum non conveniens* dismissal permits a federal court to refuse to proceed with a case before it and to dismiss so that an alternate foreign or state jurisdiction can be sought.²²² At the outset of any *forum non conveniens* inquiry, the court must determine whether an alternate forum exists, and if no other forum does exist, "dismissal would not be in the interests of justice."²²³ On the other hand, some federal courts upheld a district court's discretionary dismissal of supplemental claims even though the claims may have been time-barred in state court.²²⁴

Section 1367(d) provides for a tolling of the statute of limitations for claims that are "asserted under subsection (a), and . . . voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a)."²²⁵ However, the Supreme Court exposed a large hole in subsection (d) in *Raygor v. Regents of University of Minnesota*.²²⁶ In *Raygor*, the petitioners filed a federal cause of action and a state-law cause of action based upon a common nucleus of operative facts in federal court against the state of Minnesota.²²⁷ The State had given its consent to be

²²⁰ See *supra* notes 217-19 and accompanying text.

²²¹ See, e.g., *Giardiello v. Balboa Ins. Co.*, 837 F.2d 1566, 1571 (11th Cir. 1988); *Cooley v. Pa. Hous. Fin. Agency*, 830 F.2d 469, 476 (3d Cir. 1987); *Henson v. Columbus Bank & Trust Co.*, 651 F.2d 320, 325 (5th Cir. 1981).

²²² *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The *forum non conveniens* dismissal also allows a court to exercise its discretion to avoid the oppression or vexation that might result from automatically honoring plaintiff's forum choice. *Id.*

²²³ *Id.* at 254.

²²⁴ See, e.g., *Notrica v. Bd. of Supervisors*, 925 F.2d 1211, 1215 (9th Cir. 1991) (distinguishing cases in other circuits and holding that "it [was] not an abuse of discretion for the federal court to decline to consider state court time-bar" when plaintiff had initially filed suits in the state and federal courts).

²²⁵ 28 U.S.C. § 1367(d) (2000).

²²⁶ 534 U.S. 533 (2002).

²²⁷ *Id.* at 535-36, 545. "It is unclear if the tolling provision was meant to apply to dismissals for reasons unmentioned by the statute, such as dismissals on Eleventh Amendment grounds." *Id.* at 545; see *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809

sued in its own courts for such violations, but had not given consent to be sued in federal court.²²⁸ The federal cause of action was dismissed on non-jurisdictional grounds, and the district court used § 1367(c)(3) to dismiss the petitioner's state-law claim.²²⁹ The Court stated that the text of subsection (d) that purports to apply to dismissals of "any claim asserted under subsection (a)" does not abrogate the state's Eleventh Amendment immunity.²³⁰ The court said, "When Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"²³¹ Therefore, the Court held that "§ 1367(d) does not toll the [statute] of limitations for ... claims ... against nonconsenting State[s]" filed in federal court but subsequently dismissed on Eleventh Amendment grounds.²³²

This result goes against the goal of efficiency in supplemental jurisdiction by forcing petitioners such as *Raygor* to either: (1) file the claims in federal court; (2) file claims in state court; or (3) file two suits—one in federal court and one in state court.²³³ Congress should revise § 1367(c) so that the existence of an alternate forum is a statutory factor for dismissal, or in the alternative, create a rule that will abrogate the state's Eleventh Amendment immunity and apply § 1367(d) to situations such as *Raygor's*.²³⁴

(1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

²²⁸ *Raygor*, 534 U.S. at 553 (Stevens, J., dissenting).

²²⁹ *Id.* at 537-38.

²³⁰ *Id.* at 542 (quoting 28 U.S.C. § 1367(d) (emphasis added by Court)).

²³¹ *Id.* at 543 (quoting *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989)).

²³² *Id.* at 548.

²³³ See Janet L. Holt, *Supreme Court Further Expands State Sovereignty*, 38 ASS'N OF TRIAL LAWYERS OF AM. 15 (May 2002). Erwin Chemerinsky, a law professor at the University of Southern California, called *Raygor* "a trap for the unwary. It's a very technical decision, and it will be easy for it to fall below the radar of many plaintiff attorneys." *Id.* It creates difficult choices even for informed lawyers: "You can bring all your client's claims in federal court, giving up the state forum; file in the state and give up the federal forum; or file state and federal claims in federal court, and then, if the state statute of limitations is about to expire, file in state court." *Id.* While the third choice might seem to be a good option, "the risk is that whichever court decides first will preclude the other court from deciding anything because of *res judicata*." *Id.* There is no good option for the plaintiff in *Raygor*. See also *supra* notes 1-10 and accompanying text.

²³⁴ See *supra* text accompanying notes 138-43. See also *supra* Part I for details concerning *Raygor's* situation.

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Congress could include in § 1367(c)'s dismissal analysis the statutory factor that an alternate forum must exist before a court can use its discretion to not exercise supplemental jurisdiction over the state-law claims.²³⁵ Since the existence of an alternate forum can be an issue at any stage of the law suit, a federal court should consider this factor whenever it is inquiring into whether to exercise its § 1367(c)(3) discretionary dismissal power. Congress should also revise § 1367(d) so that it clearly abrogates the state's immunity.

To abrogate a state's sovereign immunity, the Court must first ask whether Congress has unequivocally expressed its intent to abrogate.²³⁶ Only then will it address whether Congress acted pursuant to a valid exercise of power.²³⁷ In *Raygor*, Justice O'Connor wrote for the majority that a clear statement of congressional intent was required.²³⁸ In *Raygor*, § 1367(d) "fail[ed] this test," because it "reflect[ed] no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States."²³⁹ Hence, Congress should revise § 1367(d) so that its original intention—to overrule *Finley* and codify *Gibbs'* principles of economy, convenience, fairness, and comity in *all* cases—is clearly and unequivocally stated.²⁴⁰ This revision will enable the Supreme Court to take the next step in its Eleventh Amendment inquiry and determine whether Congress has the power to abrogate the state's immunity in this specific procedural matter.

Because of the ambiguity in § 1367(c)(3), a change also needs to be made to more clearly state that the presumption shifts according to the timing of the dismissal of the anchor claim.²⁴¹ To safeguard against misuse of dismissal discretion, after substantial pretrial proceedings have occurred, district judges should be required to record their reasons

²³⁵ See *infra* note 281 (inserting the phrase in the proposed revision of § 1367(c)(3)).

²³⁶ Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (expressing the need for Congress to clearly show its intent to abrogate).

²³⁷ Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996). To determine whether a statute validly abrogates the state's sovereign immunity, the Court must ask: "first, whether Congress has unequivocally expresse[d] its intent to abrogate, . . . and second, whether Congress has acted pursuant to a valid exercise of power." *Id.*

²³⁸ Raygor v. Regents of Univ. of Minn., 534 U.S. 533, 544 (2002). The reason for the clear statement is that by "allowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States." *Id.*

²³⁹ *Id.* at 534.

²⁴⁰ See *infra* Part IV.C.

²⁴¹ See *supra* Part III.C.1-2.

for the exercise of such discretion.²⁴² Finally, the situation of a plaintiff having no forum to assert its claim after the discretionary dismissal of the federal courts should be rectified.²⁴³ Since the judiciary has not used its opportunities to make these changes and has only furthered the debates in these jurisdictional issues, Congress should take the initiative to make the needed changes.²⁴⁴ Congress should redraft § 1367(c)-(d).

IV. CONTRIBUTION — A PROPOSED REVISION OF § 1367(c)-(d)

This Part proposes a revision of § 1367(c)-(d), clarifying the presumption that a federal court should have when using a discretionary dismissal factor from § 1367(c), and addresses the hole that *Raygor* exposed in § 1367(d).²⁴⁵ The timing of the dismissal inquiry uniquely affects § 1367(c)(3) since the dismissal of the anchor claim can happen at any stage in the suit.²⁴⁶ Therefore, this Part proposes a revision of § 1367(c) that separates the current § 1367(c)(3)—which allows for dismissal of a supplemental claim after all of the anchor claims have been dismissed—from the other three dismissal circumstances.²⁴⁷ Furthermore, this Part proposes a revision of the current § 1367(c)(3) that takes into consideration the timing of the dismissal of the anchor claim.²⁴⁸

Section 1367(a) creates a presumption that a federal court shall exercise supplemental jurisdiction over all claims so related to the anchor claim that they form part of the same case or controversy.²⁴⁹ The presumption of whether federal courts should maintain jurisdiction is not as clear since this presumption depends upon the timing of the dismissal inquiry.²⁵⁰ Currently, § 1367(c)(3) is grouped with the other dismissal factors.²⁵¹ However, § 1367(c)(1)-(2) and (4) are always

²⁴² See *supra* Part III.C.3

²⁴³ See *supra* Part III.D.

²⁴⁴ See *infra* Part IV for a proposed revision of § 1367(c)-(d).

²⁴⁵ See *infra* text accompanying notes 258, 279-80 for a proposed revision of the current § 1367(c)(1)-(2), (4), § 1367(c)(3), and § 1367(d) respectively.

²⁴⁶ See *supra* Part III.C.1-2.

²⁴⁷ See *infra* text accompanying note 278.

²⁴⁸ See *infra* text accompanying note 278.

²⁴⁹ See *supra* text accompanying notes 177-79.

²⁵⁰ See *supra* notes 198-202 and accompanying text.

²⁵¹ See 28 U.S.C. § 1367(c) (2000). The four discretionary dismissal factors are: (1) novel state issue; (2) supplemental claim predominates over anchor claim; (3) dismissal of all anchor claims; and (4) exceptional circumstances. See *supra* note 103 for full text of the statute.

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determined at the beginning of the suit.²⁵² Thus, any dismissal based on these factors occurs before the parties engage in substantial pretrial expenses. In contrast, the courts can dismiss the state-law claim at any time in the suit if the anchor claim is dismissed.²⁵³ Therefore, the presumption of whether a federal court should maintain jurisdiction is different for § 1367(c)(1)-(2) and (4) than for § 1367(c)(3).²⁵⁴

A. *Revision of § 1367(c)(1)-(2) and (4)*

At the beginning of a suit, the discretionary dismissal of certain claims will not thwart the purpose of the supplemental jurisdiction statute because the litigants have not yet invested a large amount of time and resources bringing their suit in the federal forum.²⁵⁵ Therefore, federal courts should maintain discretion to decline to exercise supplemental jurisdiction over a claim that: (1) raises a novel or complex issue of state law; (2) substantially predominates over the claim or claims over which the district court has original jurisdiction; or (3) in exceptional circumstances where there are other compelling reasons for declining jurisdiction.²⁵⁶ The third situation, which allows for discretion to dismiss supplemental claims in exceptional circumstances, should only be used when dismissal is at the beginning of the suit and dismissal is in the interests of economy, convenience, fairness, and comity.²⁵⁷ Therefore, § 1367(c) should be revised to read as follows:

- (c) The district courts may *initially* 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, or

²⁵² See *supra* Part III.B.

²⁵³ See *supra* Part III.C.

²⁵⁴ See *supra* Part III.B-C.

²⁵⁵ See *supra* Part III.B.

²⁵⁶ See *supra* note 103 for the current text of § 1367(c)(1)-(2), (4).

²⁵⁷ See *supra* notes 186-91 and accompanying text.

- (3) in exceptional circumstances where there are other compelling reasons for declining jurisdiction. [formerly § 1367(c)(4)].²⁵⁸

This revision will maintain the current status of § 1367(c)(1)-(2) and (4).²⁵⁹ The word “initially” should be added in the description so it is textually clear that these discretionary dismissal factors will only be used at the beginning of the suit.²⁶⁰ This addition will insure that the dismissal factors, especially the “exceptional circumstances” factor, will not be used after substantial pretrial proceedings have occurred, and thus will promote efficiency and fairness of trials.²⁶¹

B. Revision of § 1367(c)(3)

The anchor claim can be dismissed at any time in the suit.²⁶² Thus, the dismissal of the supplemental claims can also happen at any time in the suit.²⁶³ However, if these claims are dismissed after substantial pretrial proceedings have occurred for non-jurisdictional purposes, any dismissal will thwart the purposes of the supplemental jurisdiction statute: to promote efficiency and fairness of trials.²⁶⁴ Therefore, Congress has two options: (1) take all discretion away from courts after the suit begins; or (2) add a timing element to the revised statute.²⁶⁵ Taking away all discretion from federal courts after the suit begins would make this dismissal factor equivalent to the other three dismissal factors because the district court could only use the factor to dismiss

²⁵⁸ The Note's contribution is in italicized text. The text in regular font is taken from the existing 28 U.S.C. § 1367(c)(1)-(2) and (4).

²⁵⁹ See *supra* note 103 for the current text of § 1367(c)(1)-(2) and (4).

²⁶⁰ See *supra* Part III.B.

²⁶¹ See *supra* Part III.B. Section 1367(a) states that a federal court *shall* hear all claims that are so related to the anchor claim that the supplemental claims form part of the same case or controversy. This mandate of jurisdiction creates a strong presumption that district courts should maintain supplemental jurisdiction. If the dismissal inquiry is performed after the suit has begun, then the timing of the inquiry becomes a significant factor. The use of any of the discretionary dismissal factors discussed in this Section *after* a suit has begun will be adverse to the principles of economy, convenience, fairness, and comity. Therefore, when district courts use the discretionary dismissal factors in this Section, the inquiry can only take place at the beginning of the suit. The word “initially” was added into the proposed revision of § 1367(c)(1)-(2) and (4) to make this principle textually clear.

²⁶² See *supra* note 192 and accompanying text.

²⁶³ See *supra* note 192 and accompanying text.

²⁶⁴ See *supra* Part III.C.2.

²⁶⁵ See *supra* Part III.C (discussing the need for a timing element for § 1367(c)(3)).

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claims at the beginning of the suit.²⁶⁶ As a result, a timing element would not be necessary for § 1367(c)(3), but such a rule could lead to abuse. Plaintiffs' attorneys would be given a powerful tool to have their state-law claims heard in federal court when the anchor claim is not dismissed at the beginning of the suit, but shortly afterwards.

Therefore, Congress should add a timing element to the revised statute.²⁶⁷ The dividing line should be whether the anchor claim is dismissed before or after substantial pretrial proceedings have occurred.²⁶⁸ If the dismissal of the anchor claim is before such event, then the presumption to maintain jurisdiction from § 1367(a) should be reversed.²⁶⁹ Thus, the court must decline to exercise supplemental jurisdiction when the parties have not invested in substantial pretrial proceedings and there is an alternate forum where the plaintiff can assert its supplemental claims.²⁷⁰

There are two ways that Congress can address the problem of a plaintiff not having an alternate forum upon dismissal. First, Congress can use the lack of an alternate forum as a factor that would create a presumption to maintain jurisdiction.²⁷¹ However, such a factor will likely be viewed by the Court as too broad to clearly abrogate the state's

²⁶⁶ See *supra* Part IV.A.

²⁶⁷ See *supra* Part III.C.1-2.

²⁶⁸ When a federal court determines whether "substantial pretrial proceedings" have taken place the court should rely upon Rule 1 of the Federal Rules of Civil Procedure and cases interpreting this rule. See FED. R. CIV. P. 1.

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. *They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.*

Id. (emphasis added); see *Kenney v. Cal. Tanker Co.*, 381 F.2d 775 (3d Cir. 1967) (holding that the district courts have the responsibility to secure the just and speedy and inexpensive determination of every action); see also *Bell v. Swift & Co.*, 283 F.2d 407 (5th Cir. 1960) (noting that Rule 1 is in the interest of the administration of justice and transcends in importance of mere inconvenience to a party litigant); *Canister Co. v. Leahy*, 182 F.2d 510 (3d Cir. 1950) (noting that Rule 1 must be adhered to); *United States v. U.S. Gypsum Co.*, 67 F. Supp. 397 (D.C. 1946) (holding that a court should dispose of the case at first opportunity which is appropriate under these rules and in accord with rights of the parties).

²⁶⁹ See *supra* Part III.C.1.

²⁷⁰ See *supra* notes 209-11 and accompanying text.

²⁷¹ See *supra* Part III.C.2, D.

Eleventh Amendment immunity.²⁷² The second way that Congress can address this problem is to revise § 1367(d) so that it will apply to *all* claims, namely, § 1367(d) will apply to states that have consented to being sued in their state courts.²⁷³

If dismissal of the anchor claim happens after substantial pretrial proceedings have occurred, then the federal court should have discretion about whether to dismiss the remaining state-law claims that do not have an independent basis for federal jurisdiction.²⁷⁴ However, this discretion should not be unfettered.²⁷⁵ Section 1367(a) creates a strong presumption for federal courts to maintain jurisdiction of certain claims.²⁷⁶ In addition, when substantial pretrial proceedings have occurred, dismissal can be an inefficient use of judicial resources and create unfairness to the parties.²⁷⁷ Therefore, the district courts should only exercise their discretion to dismiss the claims if: (1) an alternate forum for the plaintiff to have its supplemental claims heard exists; (2) the dismissal will not substantially interfere with the judicial economy, convenience, fairness, and comity of the parties; and (3) specific findings regarding the reason(s) for dismissal or remand are made.²⁷⁸ Section 1367(c)(3)—now proposed as a separate subsection: § 1367(d)—should be revised to read:

(d) If the district court has dismissed all claims over which it has original jurisdiction—

(1) *before substantial pretrial proceedings have occurred, then the district court must decline to maintain*

²⁷² See *supra* notes 230-31 and accompanying text. The Court in *Raygor* stated that a clear statement of congressional intent to abrogate the state's Eleventh Amendment immunity was needed. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2002); see also *supra* note 239 and accompanying text. Therefore, an alternate forum's availability may not be sufficient to clearly show Congress' intention to abrogate a state's immunity. However, this factor will provide the federal courts with a textual factor that they should consider before dismissing claims.

²⁷³ See *supra* Part III.D.

²⁷⁴ See *supra* Part III.C.2.

²⁷⁵ See *supra* text accompanying note 140.

²⁷⁶ See *supra* text accompanying note 178.

²⁷⁷ See *supra* Part III.C.2.

²⁷⁸ See *supra* Part III.C.1-3. Specific findings regarding the reason(s) for dismissal will create a record that will be more easily reviewable by the appellate courts should a party appeal on the grounds of judicial abuse of discretion. See *supra* notes 219-21 and accompanying text.

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*supplemental jurisdiction, if an adequate alternate forum exists.*²⁷⁹

(2) *after substantial pretrial proceedings have occurred, then the district court may decline to maintain supplemental jurisdiction only if—*

(i) *an adequate alternate forum exists,*

(ii) *the dismissal will not substantially interfere with the judicial economy, convenience, fairness, or comity of the parties, and*

(iii) *specific findings regarding the reason(s) for dismissal or remand are made.*²⁸⁰

By making the timing of the inquiry a factor, Congress will be able to specifically state its intention to switch the presumption of whether supplemental jurisdiction should be maintained in the text of the statute.²⁸¹ Therefore, federal courts will have clear boundaries of when they should use their discretion to dismiss the supplemental claims.²⁸² Furthermore, this revision clearly states what factors the federal courts should consider when conducting this inquiry.²⁸³

The revision of the current version of § 1367(c)(3) will ensure that plaintiffs like Raygor will have an opportunity to have their claims heard.²⁸⁴ First, the discretion to dismiss is tightened by clearly stating

²⁷⁹ See *supra* text accompanying note 273. This factor for dismissal may not fill the jurisdictional gap that the Court exposed in *Raygor*. Therefore, Congress should revise § 1367(d). See *supra* Part III.D.

²⁸⁰ The Note's contribution is in italicized text. The text in regular font is taken from the existing 28 U.S.C. § 1367(c)(3).

²⁸¹ See *supra* Part III.C.

²⁸² See *supra* Part III.C.1-2.

²⁸³ See *supra* text accompanying note 281.

²⁸⁴ See *supra* Part I. With the proposed statute, a federal court should not dismiss Raygor's supplemental claim unless he was allowed to use the state courts of Minnesota to assert his MHRA claim. If an adequate alternate forum did exist, then the federal court may exercise its discretion to dismiss or remand the supplemental claims. If the federal court chooses to dismiss or remand Raygor's supplemental claim, then the court would be required to state the reasons why the dismissal or remand would be in the interest of judicial economy, convenience, fairness, or comity of the parties. The specific findings regarding the reasons for dismissal or remand would create a record that will more easily be reviewable by the appellate courts.

the appropriate presumption.²⁸⁵ Second, requesting specific findings will not further burden the federal judges because they must already go through the discretionary analysis.²⁸⁶ Further, if specific findings are made, then the appellate courts will have a record for easier review.²⁸⁷ Thus, appellate courts would be able to determine whether an abuse of discretion existed in Raygor's situation. Third, the requirement of the existence of an alternate forum will provide plaintiffs like Raygor an argument that dismissing their claim would create a great injustice.²⁸⁸ This injustice would be analogous to dismissing a claim on *forum non conveniens* grounds when an adequate alternate forum does not exist.²⁸⁹

C. Revision of § 1367(d)

The current version of § 1367(d) is sufficient for most purposes.²⁹⁰ However, the Court has recently taken an active role to protect state's sovereign immunity and has stated that the current language of § 1367(d) does not, in fact, apply to all claims.²⁹¹ Specifically, the statute does not toll the state statute of limitations for claims filed in federal court where the state has consented to being sued in their courts.²⁹² Since this limitation has created unfairness to litigants and an inefficient use of judicial resources, Congress should amend the current version of § 1367(d) so that the tolling provision clearly and unambiguously applies to every claim, even claims against states filed in federal court, where the state has consented to being sued in its courts.²⁹³ Section 1367(d)—now proposed as § 1367(e)—should be revised to read:

- (e) The period of limitations 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 for any—

²⁸⁵ See *supra* Part III.C.1-2. Before substantial pretrial proceedings have occurred, the presumption should be that the federal court declines to maintain supplemental jurisdiction. After substantial pretrial proceedings have occurred, the presumption shifts. The presumption at this time in the suit is that a court should maintain supplemental jurisdiction unless the listed factors are met.

²⁸⁶ See *supra* text accompanying notes 219-21.

²⁸⁷ See *supra* text accompanying notes 219-21.

²⁸⁸ See *supra* text accompanying note 271.

²⁸⁹ See *supra* notes 222-24 and accompanying text.

²⁹⁰ See *supra* notes 226-31 and accompanying text.

²⁹¹ See *supra* notes 224-31 and accompanying text.

²⁹² See *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542 (2002).

²⁹³ See *supra* Part III.D.

- (1) *claim asserted under subsection (a),*
- (2) *claim against States filed in federal court where the State has consented to being sued in its courts,*²⁹⁴ *and*
- (3) *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).*²⁹⁵

This revision will clearly and unambiguously abrogate the state's Eleventh Amendment immunity when a claim is properly brought under the supplemental jurisdiction statute and the state has consented to being sued in its courts.²⁹⁶ This revision in the statute will serve two purposes. First, this revision will allow plaintiffs like Raygor an alternate forum where they can have their discrimination claim heard after it is dismissed from federal court.²⁹⁷ Second, by clearly abrogating the state's immunity, this revision will provide the Supreme Court the opportunity to determine whether Congress has the power to abrogate the state's immunity in this specific procedural circumstance or if there will always be a hole in the supplemental jurisdiction statute which will create injustice to plaintiffs such as Raygor.²⁹⁸

V. CONCLUSION

In *Finley*, the Supreme Court sent a message to Congress that the federal courts needed congressional authorization to assert jurisdiction over pendent and ancillary claims. Congress responded to the injustice

²⁹⁴ This clear and unambiguous statement will clearly provide congressional intent to abrogate the state's Eleventh Amendment immunity in this specific procedural issue. Therefore, Raygor's problem will be solved because the statute of limitations in Minnesota state forum will be tolled while he is pursuing his ADEA and supplemental MHRA claim in the federal forum.

²⁹⁵ The Note's contribution is in italicized text. The text in regular font is taken from the existing 28 U.S.C. § 1367(d).

²⁹⁶ See *supra* note 295 and accompanying text.

²⁹⁷ See *supra* text accompanying notes 273, 295.

²⁹⁸ See *supra* notes 237-40 and accompanying text. When a federal court is determining whether a statute abrogates a state's sovereign immunity, the court will first determine whether Congress has clearly and unambiguously stated its intent to abrogate. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996). This proposed revision of the statute will satisfy *Seminole Tribe's* first requirement. Only after Congress unequivocally expresses its intent to abrogate will the federal courts determine whether Congress had the power to do so. Therefore, this proposed revision will allow the federal courts to make this determination.

in *Finley* with the supplemental jurisdiction statute. Since the passage of this statute, courts have inconsistently used their discretion to dismiss claims asserted under § 1367(c), especially § 1367(c)(3). The discretion given by § 1367(c)(3) presently hinges on the timing of the dismissal of the anchor claim. Since Congress did not define this timing line, courts have been inconsistent in its application. Recently, the Court sent a message to Congress that the tolling provision in § 1367(d) will not be sufficient for claims against states filed in federal court where the state has consented to being sued in their courts unless Congress clearly and unambiguously states its intention to do so.

The proposed revision of § 1367(c)-(d) tightens the discretion in § 1367(c) by specifically stating the appropriate presumption of whether federal courts should use their discretion to dismiss a supplemental claim. Since federal courts can use § 1367(c)(3) at any time in the suit, the proposed revision ties the presumption of when a federal court can dismiss the remaining supplemental claims to a timing factor of whether the anchor claim was dismissed before or after substantial pretrial proceeding have occurred. Finally, this proposed revision offers two ways that Congress can address the hole that *Raygor* exposed in § 1367(d). With the proposed revision, plaintiffs such as *Raygor* will have a forum in which they can have their claims heard. Federal courts will know the appropriate presumption for whether to maintain jurisdiction over all supplemental claims. Furthermore, upon dismissal of a supplemental claim after the anchor claim was dismissed, appellate courts will have a record upon which they can assess whether the district court abused its discretion when dismissing the supplemental claims.

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