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SUPPLEMENTAL JURISDICTION: AN ANALYSIS OF ITS EXPANSIONS AND REDUCTIONS

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There is scarcely any case, every part of which depends on the Constitution, laws, or treaties of the United States . . . [T]hen all the other [non-jurisdictional] questions must be decided as incidental to [the claim] which gives [the court] jurisdiction.

– Chief Justice John Marshall, recognizing supplemental jurisdiction (1824)¹

INTRODUCTION

Supplemental jurisdiction enables the federal district courts to hear cases that include non-jurisdictional claims, if they are sufficiently related to jurisdictional claims.² But the contours of the doctrine have been interpreted and reinterpreted so many times that it would be unrecognizable to its creators.³ For example, just before this article was completed, the Supreme Court released its opinion in *Royal Canin U.S.A. v. Wullschleger*, in which the Court significantly reduced the scope of the supplemental jurisdictional statute.⁴ *Royal Canin*, decided in 2025, signaled that the time is right for a review and appraisal of the doctrine. Therefore, this article attempts to analyze the present state of supplemental jurisdiction—or at least seeks to do so as well as possible within the length of a single writing.⁵

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1. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 820 (1824).

2. See *infra* Part II (discussing section 1367, the supplemental jurisdictional statute).

3. See *infra* Part III (describing the history of judicial decisions).

4. 604 U.S. 22 (2025); see *infra* Part III.A (discussing the *Royal Canin* case).

5. There has been some fine scholarship on the general subject of supplemental jurisdiction, but the most relevant articles were written many years ago. See, e.g., *Supplemental Jurisdiction—Amount in Controversy Requirement*, 119 HARV. L. REV. 317 (2005); Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 IND. L.J. 5 (1998); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A*

The history of supplemental jurisdiction is a tale of twists and turns, in which the cases have sometimes produced surprises. The courts frequently expand or diminish the scope of the doctrine. And so, Part I of this article begins the analysis by considering the judicial history of section 1367, commonly known as the supplemental jurisdiction statute, as a guide to understanding its later interpretation.⁶ The courts have tended to rely on pre-statutory opinions in fashioning their decisions under the statute. In fact, this reliance is pervasive. The era of pre-statutory judicial decisions was long and complex, and it is divided here into three time periods.⁷

Part II covers the enactment of the supplemental jurisdiction statute. The legislation begins with three subsections, (a) through (c), which are, at first, a broad grant of jurisdiction, and then, in the latter two subsections, significant reductions of the jurisdiction thus granted.⁸ The statutory structure has guaranteed a large number of jurisdictional puzzles.⁹ Part III of the article, therefore, focuses on the limits of supplemental jurisdiction imposed by interpretation or by statute. This section considers both the *Royal Canin* decision and the restrictions in sections (b) and (c) of the statute.¹⁰

Part IV of the article covers the effects of removal when it is combined with supplemental jurisdiction. Removal frequently complicates actions in unpredictable ways, and it certainly does so with supplemental claims.¹¹ Part V analyzes mistakes that can confer jurisdiction when it was not otherwise possible. Additionally, Part V considers what might be called “jurisdiction by mistake,” where mistakes by the court or by the litigants have created jurisdiction that otherwise would not have existed.¹²

Part VI covers sources of unfairness, contradiction, and confusion that arise under the supplemental jurisdiction statute.¹³ Finally, the author concludes with a novel proposal for encouraging early decisions of supplemental jurisdiction questions.¹⁴ If adopted, this addendum would reduce a major kind of unfairness produced by the statute.¹⁵

Constitutional and Statutory Analysis, 24 ARIZ. ST. L.J. 849 (1992); Edward A. Hartnett, § 1367 *Producamus*, 51 DUKE L.J. 687 (2001).

6. See *infra* Part I (analyzing the judicial history of the statute).

7. See *infra* Part I.

8. See *infra* Part II (covering the statute’s legislative history).

9. See *infra*, e.g., Part III (analyzing issues raised by the statute).

10. See *infra* Part III.C (analyzing puzzles created by subsections (b) and (c) of the statute).

11. See *infra* Part IV (covering effects of removal on supplemental jurisdiction).

12. See *infra* Part V (analyzing mistakes that create jurisdiction).

13. See *infra* Part VI (considering unfairness and other problems).

14. See *infra* Conclusion (communicating the author’s conclusions).

15. See *infra* Conclusion (proposing an addendum to the statute to encourage early decisions about supplemental jurisdiction).

I. JUDICIAL DECISIONS PRECEDING THE SUPPLEMENTAL JURISDICTION STATUTE

Professor Wolf divides the legislative history of supplemental jurisdiction into four different stages.¹⁶ He provides:

The first stage encompassed the period between the decisions of the Supreme Court in *Osborn v. Bank of the United States* in 1824 and *United Mine Workers v. Gibbs* in 1966. The second stage began with *Gibbs*, the landmark case that expanded the scope of supplemental jurisdiction, and continued until *Aldinger v. Howard* in 1976. The third stage commenced with *Aldinger*, when the Court started restricting supplemental jurisdiction, and continued through *Finley v. United States* in 1989 up to the enactment of section 1367 on December 1, 1990. The fourth stage began with the enactment of section 1367, the supplemental jurisdiction statute.¹⁷

Professor Wolf's categorization is useful, and this article will employ it here. These cases are important because cases decided before the statute was adopted have frequently been relied on by the courts ever since.¹⁸

A. The Early Era, From *Osborn* to *Gibbs*

From the early era to the present, the federal courts have exercised two main types of jurisdiction. There was diversity jurisdiction,¹⁹ which existed when all parties on one side of the “v.” had state citizenship that was different from all parties on the other side.²⁰ Additionally, there was federal question jurisdiction, which existed when the claim arose under federal law.²¹ And there were other kinds of jurisdiction, all created by statute.²²

But in their purest statutory forms, these types of jurisdictions would have functioned imperfectly.²³ One of the main reasons was the effect created by joinder of claims, particularly state-law claims, that lacked any basis for

16. Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1 (1992). This is an impressive article, written by a professor who worked on the language of the statute while working inside the Congress.

17. *Id.* at 3.

18. See *infra*, e.g., Part III (describing development of the “*Gibbs* values,” which involve balancing four factors expressed in case law long before passage of the supplemental jurisdiction statute).

19. 28 U.S.C. § 1332.

20. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1807) (requiring complete diversity).

21. 28 U.S.C. § 1331.

22. For example, the jurisdictional statutes included 28 U.S.C. § 1343 (civil rights claims), 28 U.S.C. § 1346(b)(1) (cases in which the United States was a party), and several others.

23. See, e.g., *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966) (illustrating this problem).

jurisdiction in the federal courts. For example, if a plaintiff added a state-law claim to a federal claim to which it was closely related, the desirable result was their adjudication in the same court.²⁴ However, if the two claims were joined in a federal court, there would be no specified jurisdiction over the state-law claim without supplemental jurisdiction.

The joinder of a state claim to a federal claim was only one of several ways for this result to occur.²⁵ Another was the assertion of a non-jurisdictional counterclaim, such as a state-law claim without diversity, in a diversity case.²⁶ Likewise, there might be a counterclaim that demanded damages in an amount less than the jurisdictional amount.²⁷ Alternatively, a claim could be asserted between two defendants for indemnity and contribution under state law.²⁸ And so on.

A lack of jurisdiction over these claims was undesirable for several reasons. First, and most obviously, there was the matter of judicial inefficiency.²⁹ If the federal courts were to dismiss non-jurisdictional claims when they were closely related to the central issues of jurisdictional claims, the wasted court efforts would be enormous. State courts then would have to proceed for a second time through pretrial and possibly trial before adjudicating the claims dismissed by the federal court.

Second, there would be timing problems. A state court ready to hear a claim between defendants for indemnity and contribution could not proceed if the federal courts had jurisdiction over a liability or damage issue but had not yet decided it.³⁰ Third, *res judicata* questions would arise when the holder of the first-filed judgment tried to use it to preclude the remaining claims.³¹

Fourth and finally, one can infer that federal question and diversity jurisdiction would not work properly for the parties. There would be significant unfairness and perverse incentives if supplemental jurisdiction did not exist. A potential plaintiff would be discouraged from using a federal forum for a proper federal or diversity claim because other, non-jurisdictional claims could not be joined with it. A defendant might find that a counterclaim could not be brought except by a separate suit in state court, at additional cost to both plaintiff and defendant. Likewise, there might be no jurisdiction over other kinds of related claims, from indemnity to intervention.

24. *See, e.g., id.* at 715 (state-law claim together with federal question claim); *cf. Booty v. Shoney's, Inc.*, 872 F. Supp. 1524 (E.D. La. 1995) (state-law claim together with diversity claim).

25. *See id.* (illustrating this problem).

26. *Cf. Moore v. N.Y. Cotton Exch.*, 270 U.S. 593 (1926) (illustrating this kind of claim).

27. *Ahle v. Veracity Rsch. Co.*, 641 F. Supp. 2d 857, 862 (D. Minn. 2009).

28. *Underwriters at Lloyd's Subscribing to Cover Note B1526MACAR1800089 v. Abaxis, Inc.*, 491 F. Supp. 3d 506 (N.D. Cal. 2020) (dealing with indemnity and contribution in dispute involving subsection (b) of the statute).

29. Judicial efficiency is an important value in the application of the statute. *See infra* Part III.C.

30. *Moore*, 270 U.S. at 609 (allowing supplemental jurisdiction).

31. Thus, for example, a judgment by a federal court on a federal claim could preclude a closely related state-law claim that was dismissed or remanded to state court.

This state of affairs could have existed in the early years, but it did not, because the courts recognized the need for supplemental jurisdiction even then. Actually, the notion of supplemental jurisdiction goes back centuries. Chief Justice John Marshall was one of the early members of the judiciary to recognize it. In his 1824 landmark opinion in *Osborn v. Bank of the United States*, the Chief Justice wrote that there were almost always “other” claims involved in federal question cases, and those must be addressed too.³² “There is scarcely any case, every part of which depends on the Constitution, laws, or treaties of the United States [T]hen all the other questions must be decided as incidental to [the claim] which gives [the court] jurisdiction.”³³

And so, in this early era, the federal courts permitted various kinds of supplemental jurisdiction. For example, in *Freeman v. Howe*, the Supreme Court allowed intervention in a diversity case by a party that was not diverse from the plaintiff.³⁴ In another diversity case, *Moore v. New York Cotton Exchange*, the court permitted a counterclaim that did not satisfy diversity jurisdiction, but there was no overarching definition of supplemental jurisdiction.³⁵

The Supreme Court finally tried to make supplemental jurisdiction coherent in the case of *Hurn v. Oursler*.³⁶ There, the plaintiff asserted a federal copyright claim along with a state-law claim for unfair competition.³⁷ The unfair competition claim rested on the same acts as the copyright infringement claim.³⁸ The trial court heard and rejected the copyright claim on the merits, and then it dismissed the state-law claim for lack of jurisdiction.³⁹ The Supreme Court affirmed these holdings.⁴⁰ The Court set out a new rule for this situation: “[W]here the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground.”⁴¹

32. 22 U.S. (9 Wheat.) 738, 760 (1824).

33. *Id.* at 820–22; see also Wolf, *supra* note 16 (describing the legislative history of 28 U.S.C. § 1367). The dissenting Justice, Justice Johnson, agreed with this principle, even though he disagreed with the main decision: “No one can question, that the Court which has jurisdiction of the principal question, must exercise jurisdiction over every question.” *Osborn*, 22 U.S. at 884 (Johnson, J., dissenting).

34. 65 U.S. (24 How.) 450, 460 (1860).

35. 270 U.S. 593, 609 (1926).

36. 289 U.S. 238 (1933).

37. *Id.* at 239.

38. *Id.* at 239–40.

39. *Id.*

40. *Id.* at 248 (affirming with modifications not relevant to this analysis).

41. *Id.* at 246.

B. The Gibbs Era: Pendent and Ancillary Jurisdiction

The Supreme Court ultimately addressed the problem by a far reach of necessary interpretation. It recognized two types of court-created jurisdiction called pendent and ancillary jurisdiction.⁴² These two doctrines lurked in the crevices left among the existing jurisdictional statutes.

United Mine Workers v. Gibbs was the origin of what the Supreme Court called pendent jurisdiction.⁴³ If a state-law claim piggybacked upon a federal claim that had a jurisdictional basis in federal court—and if the core aspects of the state-law claim overlapped the federal claim—pendent jurisdiction furnished jurisdiction over the state-law claim.⁴⁴ This idea dealt with most of the problems of lack of jurisdiction in this situation.

The Labor Management Relations Act (LMRA), more commonly known as the Taft-Hartley Act, prohibits the use of a labor strategy called a “secondary boycott.”⁴⁵ This labor law violation, a secondary boycott, occurs when a union’s labor weapons, including picketing, are used against a company that does business with another company with which the union has its primary dispute.⁴⁶ In other words, a secondary boycott means that the union pressures one company, with which it does not have a labor dispute, to induce the pressured company to put pressure on another company, with which the union does have

42. As this section will indicate, pendent jurisdiction applied to a non-jurisdictional claim that was parallel to a jurisdictional, federal claim. Ancillary jurisdiction was applicable to other kinds of claims. This is the author’s preferred characterization of the two types. After *Gibbs*, which referred to pendent jurisdiction, the terms were used interchangeably to some extent.

43. 383 U.S. 715 (1966).

44. *Id.* at 725.

45. Title 29 U.S.C. § 158, refers to the secondary boycott prohibition:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing

46. *Id.*

a labor dispute.⁴⁷ Gibbs claimed that the union had picketed Grundy Company to get that company to get rid of him, Gibbs: a secondary boycott.⁴⁸

The Tennessee common-law claim was simpler to understand. Gibbs asserted a claim for intentional interference with contract.⁴⁹ He alleged that, by the same tactics as its alleged secondary boycott, the union had interfered with his business relationships and his contract of haulage.⁵⁰

The Court began with the jurisdictional issue: that is, whether the federal courts had jurisdiction over the state-law claim for intentional interference with contract.⁵¹ The Court cited *Hurn v. Oursler*,⁵² which was one of the formative cases about pendent jurisdiction.⁵³ It described *Hurn* by saying, “[S]tate law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law.”⁵⁴ The Court then proceeded to provide a description of pendent jurisdiction by saying, “[t]he state and federal claims must derive from a common nucleus of operative fact.”⁵⁵ This language has furnished the standard in many cases, including many decided after the supplemental jurisdiction statute was adopted.⁵⁶

The Court’s conclusion was blunt: Yes, “the state and federal claims arose from the same nucleus of operative fact.”⁵⁷ One can infer the reason: the conduct that allegedly amounted to a secondary boycott against Gibbs was largely the same as the actions that led to the claim for intentional interference with Gibbs’s haulage contract.⁵⁸ The federal courts disposed of the former claim by deciding that there was no secondary boycott.⁵⁹ Could they then proceed to decide the second claim, the state-law claim for interference with contract? Here, the Court also perceived a special reason for jurisdiction over the state-law claim, concluding that it was preempted by the LMRA.⁶⁰ The federal courts, explained the Court, are “particularly appropriate” forums for deciding issues of federal preemption, holding that the state-law claim was preempted.⁶¹

47. *E.g.*, *Secondary boycotts (Section 8(b)(4))*, NAT’L LAB. REL. BD., <https://www.nlr.gov/about-nlr/rb/rights-we-protect/the-law/secondary-boycotts-section-8b4> [https://perma.cc/HF9L-TF42] (last visited September 30, 2025).

48. *Gibbs*, 383 U.S. at 720.

49. *Id.* at 720–21.

50. *Id.* at 720.

51. *Id.* at 721.

52. 289 U.S. 238 (1933).

53. *See supra* Part I.A (discussing early cases, including *Hurn*).

54. *Gibbs*, 383 U.S. at 722.

55. *Id.* at 725.

56. *See infra* Part III.A–C (discussing later cases).

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

58. *Id.* at 720.

59. *Id.* at 728.

60. *Id.* at 729.

61. *See id.* at 737 (adding analysis of an exception from preemption for state-law prevention of violence).

The *Gibbs* decision has been important to the law of supplemental jurisdiction ever since, including after the adoption of the supplemental jurisdiction statute.⁶² The Court also decided in *Gibbs* that a court having supplemental jurisdiction was not bound to exercise it.⁶³ It could dismiss a pendent claim.⁶⁴ “Its justification lies in considerations of judicial economy, convenience and fairness to litigants.”⁶⁵ If these elements are not present, “a federal court should hesitate to exercise jurisdiction over state claims.”⁶⁶ Today, four factors—judicial economy, convenience, fairness and comity—are still important and are known as “the *Gibbs* values.”⁶⁷

Another aspect of the *Gibbs* opinion was a suggestion by the Court that the district courts had discretion to dismiss some kinds of pendent claims.⁶⁸ In particular, the courts should dismiss if the jurisdictional claim itself was dismissed before trial or if the non-jurisdictional claims predominated.⁶⁹ When the time came for Congress to enact a statute, it codified both the *Gibbs* holding and a list of situations, similar to the *Gibbs* list, in which the district courts could decline to exercise jurisdiction.⁷⁰ And the courts since then have looked to *Gibbs* for guidance in their interpretations of this part of the statute. The *Gibbs* opinion, by Justice Brennan, was simply brilliant in recognizing the future.

Thus, pendent jurisdiction allowed the Supreme Court to clarify an important principle about labor laws. Also, *Gibbs* enabled the Court to address some questions about federal preemption. But what did Paul Gibbs, the plaintiff, get? The Justices might as well have said, “Thank you, Gibbs, for furnishing us with the vehicle to resolve some important issues of federal jurisdiction, but we’re sorry; you recover zero.”

Pendent jurisdiction solved a serious problem. A state-law claim could piggyback on a federal claim, so that judicial resources were not wasted, and litigants were not discouraged from choosing a federal forum.⁷¹ But this was a single, narrow problem, and a whole range of other problems remained. What about claims that did not parallel federal claims, or claims by parties other than the plaintiff?

Specifically, what if a defendant, after being sued in a diversity case, filed a state-law counterclaim for less than the required judicial amount?⁷² Or, what if two defendants both filed claims for indemnity and contribution against each other?⁷³ Or, what if non-jurisdictional claims furnished grounds for intervention

62. See, e.g., Part III (citing cases interpreting subsections (b) and (c) of the statute).

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

64. *Id.* at 726–27.

65. *Id.* at 726.

66. *Id.*

67. See *infra* Part III.C (citing cases depending on the *Gibbs* values).

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

69. *Id.*

70. See *infra* Part II (describing the language and adoption of the statute).

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

72. See *infra* Part III.B.2 (this kind of claim was not allowed before the statute).

73. See *infra* Part III.B.2 (analyzing a case about indemnity and contribution).

by a wholly new party?⁷⁴ Pendent jurisdiction of the *Gibbs* variety did not fit any of these situations.⁷⁵ Instead, the answer was another court-created doctrine called “ancillary jurisdiction.”⁷⁶ This invention enabled the federal courts to exercise jurisdiction over some types of these claims if they connected sufficiently with jurisdictional claims that were already in the case.⁷⁷

Actually, pendent and ancillary jurisdiction were separate names for the same device.⁷⁸ They furnished a basis for the addition of non-jurisdictional claims. The Supreme Court later explained the two types:

The terms of [the later-passed supplemental jurisdiction statute] do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction. Though the doctrines of pendent and ancillary jurisdiction developed separately as a historical matter, the Court has recognized that the doctrines are “two species of the same generic problem.”⁷⁹

And the doctrines have remained the same after passage of the supplemental jurisdiction statute. “Nothing in [the statute] indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary.”⁸⁰

For example, in *Baker v. Gold Seal Liquors, Inc.*, the Supreme Court invoked ancillary jurisdiction in a way that showed its identity with pendent jurisdiction.⁸¹ The Court had before it a bankruptcy reorganization case involving Penn-Central Transportation Company that included multiple claims.⁸² Ancillary jurisdiction arises frequently in bankruptcy proceedings because claims involving the bankrupt party can be of varied types, including non-jurisdictional claims.⁸³ In this case, Baker, the bankruptcy trustee, brought a claim against Gold Seal Liquors for freight charges allegedly owed to the

74. See *infra* Part IV (dealing with the *Caterpillar* case, in which an intervention was central to the analysis).

75. These kinds of claims, unlike the supplemental claim in *Gibbs*, would not involve supplemental state-law claims piggybacked on federal claims.

76. See *infra* Part III.C.1 (concerning the *Acri* case, in which ancillary jurisdiction was involved).

77. See, e.g., *infra* Part III.C.1.

78. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005) (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)).

79. *Id.*

80. *Id.*

81. 417 U.S. 467, 470 (1974).

82. *Id.* at 467–68.

83. Garrard Glenn, *Effect of Discharge in Bankruptcy: Ancillary Jurisdiction of Federal Court*, 19 J. NAT’L ASS’N REF. BANKR. 83, 83 (1945) (discussing the particulars of bankruptcy).

bankrupt, Penn Central.⁸⁴ This claim amounted to \$8,256.61.⁸⁵ Gold Seal filed a counterclaim for \$19,319.42 for loss and damage to shipments over the bankrupt's lines.⁸⁶ Both claims were undisputed.⁸⁷ The district court therefore allowed both claims and offset them, awarding the difference to Gold Seal.⁸⁸

The Supreme Court held that ancillary jurisdiction extended to the counterclaim, even though it was non-jurisdictional.⁸⁹ "If a counterclaim is compulsory, the federal court will have ancillary jurisdiction over it even though ordinarily it would be a matter for a state court."⁹⁰ A counterclaim is compulsory if it arises from the same "transaction" as the original claim,⁹¹ and the Court observed that "'transaction' is a word of flexible meaning which may comprehend a series of occurrences if they have logical connection."⁹² Furthermore, the Court suggested that permissive counterclaims would also be within ancillary jurisdiction.⁹³ "Thus the court may dispose of all claims between the parties in one proceeding whether or not they arose in the 'same transaction.'"⁹⁴

The Court proceeded to hold that the counterclaim was within the federal courts' ancillary jurisdiction.⁹⁵ But then, the Court disallowed it on the holding that the trial court's judgment recognizing Gold Seal's claim amounted to an illegal preference.⁹⁶ A preference is the payment of a claim to a lower-ranking unsecured creditor, in this case, Gold Seal, while other claimants, like Trustee Baker, have priority.⁹⁷ The Court explained this concept:

There is a hierarchy of claims, the owner of the equity [i.e., stockholders] coming last. Wages owing workers running the trains have a high current priority. Secured creditors have by law a priority in the hierarchy. Unsecured creditors [such as Gold Seal] usually are pooled together [with lower priority] . . . Allowance of a setoff that reduces all or part of the debtor's claim against them [including Gold Seal, in this case] is a form of [illegal] priority [i.e., a preference].⁹⁸

84. *Baker*, 417 U.S. at 468.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 468–69.

89. *Id.*

90. *Id.* at 469 n.1.

91. FED. R. CIV. P. 13 (defining a compulsory counterclaim).

92. *Baker*, 417 U.S. at 469 n.1 (citing *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926)).

93. *Id.* (quoting the rule for permissive counterclaims).

94. *Id.*

95. *Id.* at 472–73.

96. *Id.* at 473.

97. *Id.*

98. *Id.*

Thus, the setoff by the district court was unlawful, and the Court reversed it.⁹⁹ And so, once again, the Justices might as well have said, “Thank you, Gold Seal Liquors, for helping us clarify an important jurisdictional principle, but we’re sorry; you recover zero.”

Sometimes the result under ancillary jurisdiction seems strange. In *Freeport McMoRan, Inc. v. K N Energy, Inc.*, for example, Freeport, the original plaintiff, assigned its claim to a limited partnership for business reasons unrelated to the dispute.¹⁰⁰ The original claim was based on diversity, but the limited partnership included partners who were of the same citizenship as defendant K N Energy.¹⁰¹ The multiple citizenships of a partnership are the citizenships of all of its partners.¹⁰² Thus, the limited partnership would have destroyed diversity if it had been the original claimant.

But the Court cited the rule that jurisdiction over a diversity case is established when the suit is originally filed.¹⁰³ The original filing was Freeport versus K N Energy, which was a sound diversity case.¹⁰⁴ And so, a diversity suit, followed by substitution of a different plaintiff that destroyed diversity, was (amazingly) within the ancillary jurisdiction of the federal courts.¹⁰⁵

C. The Aldinger and Owen v. Kroger Era: The Jurisdiction Shrinks

Then, in *Aldinger v. Howard*, the Supreme Court began a series of retrenchments from pendent and ancillary jurisdiction.¹⁰⁶ There, the plaintiff filed suit after she claimed she was wrongfully discharged from her job at Spokane County in Washington State.¹⁰⁷ She asserted jurisdiction under 28 U.S.C. § 1343, the civil rights jurisdictional statute.¹⁰⁸ The Court held that Aldinger could not base jurisdiction on § 1343 because a county, like her defendant, was not a “person” under the statute.¹⁰⁹

But Aldinger had also filed state-law claims against additional parties not involved in the § 1343 suit, based on statutory waivers of sovereign immunity.¹¹⁰ Could a federal court have “pendent-party” jurisdiction over those additional parties? The Court said “No.”¹¹¹ The statutes, it pronounced, required “a holding

99. *Id.* at 474.

100. 498 U.S. 426, 427 (1991).

101. *Id.*

102. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196–97 (1990).

103. *Freeport-McMoRan*, 498 U.S. at 428.

104. *Id.* at 427 (“Freeport and McMoRan were Delaware corporations with their principal place of business in Louisiana. K N was and is a Kansas corporation with its principal place of business in Colorado.”).

105. *Id.* at 429.

106. 427 U.S. 1 (1976).

107. *Id.* at 3–4.

108. *Id.*

109. *Id.* at 16.

110. *Id.* at 14–15.

111. *Id.* at 19.

that the joinder of . . . the county here, for purposes of asserting a state-law claim not within federal diversity jurisdiction, is without the statutory jurisdiction of the district court.”¹¹²

Then, in *Owen Equipment & Erection Company v. Kroger*, the Court introduced a larger and more important shrinkage of ancillary jurisdiction.¹¹³ This kind of jurisdiction, the Court held, did not extend to a claim by a plaintiff in a diversity action against a nondiverse third-party defendant impleaded by the original defendant.¹¹⁴ Thus, if *A* sues *B*, and *B* uses ancillary jurisdiction to implead third-party *C*, who is of the same citizenship as *A*, *A* cannot use ancillary jurisdiction to add *C* as a party.

The Court’s reasoning in *Owen v. Kroger* was based on the diversity statute itself, 28 U.S.C. § 1332(a).¹¹⁵ The Court said:

This statute and its predecessors have consistently been held to require complete diversity of citizenship Over the years Congress has repeatedly re-enacted or amended the statute conferring diversity jurisdiction, leaving intact this rule of complete diversity [T]his subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant.¹¹⁶

But this explanation proves too much. The holding, if applied consistently, would prohibit every exercise of ancillary jurisdiction over a non-diverse state-law claim. Every such exercise of ancillary jurisdiction, then, would be illegal under section 1332,¹¹⁷ including the third-party action in *Kroger*, which was a claim supported by ancillary jurisdiction.¹¹⁸ Therefore, *Owen v. Kroger* would have destroyed ancillary jurisdiction over the third-party claim too if its reasoning had been consistently extended. Unfortunately, ancillary jurisdiction operates in a strange universe.

Finally, in *Finley v. United States*, the Court held that a plaintiff who brought a Federal Torts Claim Act (FTCA) suit could not also assert a state-law claim against other, non-diverse parties.¹¹⁹ The lower courts took the hint and began denying various exercises of supplemental jurisdiction.¹²⁰ In reality, the Supreme Court’s reasoning in *Owen v. Kroger* would have destroyed ancillary jurisdiction completely. With that, one commentator declared, “[s]upplemental

112. *Id.* at 17.

113. 437 U.S. 365 (1978).

114. *Id.* at 377.

115. *Id.* at 373–74.

116. *Id.*

117. 28 U.S.C. § 1332.

118. *Owen*, 437 U.S. at 367–69.

119. 490 U.S. 545, 555–56 (1989).

120. Wolf, *supra* note 16, at 13–14.

jurisdiction, therefore, is arguably dead and surely expiring.”¹²¹ *Finley*, one might presume, led to Congress’s passage of a supplemental jurisdiction statute the very next year.

II. THE ENACTMENT OF THE SUPPLEMENTAL JURISDICTION STATUTE

After *Finley*, Congress became aware of the need for a comprehensive statute authorizing supplemental jurisdiction. Professor Wolf, who was involved in the proceedings, says there were several goals:

These goals were: to define supplemental jurisdiction as precisely as possible; to authorize such jurisdiction broadly, but stop short of the full reach of Article III judicial power; to permit the invocation of supplemental jurisdiction uniformly . . . with one narrow exception in diversity cases; to circumscribe the discretion of federal judges to entertain or dismiss supplemental claims; and to reassert the power of Congress as the principal actor in defining . . . federal court jurisdiction, including supplemental jurisdiction.¹²²

But the actual statute that survived the process contained three variations from these goals. First, it broadened supplemental jurisdiction to reach the full power authorized by Article III by extending it to all “cases and controversies” under the Article.¹²³ Second, it limited the availability of supplemental jurisdiction in diversity cases by codifying *Owen v. Kroger*.¹²⁴ Third, it ratified and extended the discretionary power of the district courts to dismiss supplemental claims, which had been recognized in *Gibbs*.¹²⁵

There were many changes during the legislative process. But the statute that emerged included in subsection (a) the following grant of jurisdiction, which encompassed all of the jurisdiction allowable under Article III:

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

121. Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247, 248 (1990).

122. Wolf, *supra* note 16, at 20.

123. *Id.*

124. *Id.*

125. *Id.*

Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.¹²⁶

But in subsection (b), the statute prohibited supplemental jurisdiction if a plaintiff, in a diversity case, added a state-law claim against a non-diverse defendant brought into the case by another party:

(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 1332.¹²⁷

And in subsection (c), the statute allowed discretion in the district courts to dismiss supplemental claims in certain situations:

(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 . . .¹²⁸

The supplemental jurisdiction statute has been amended several times. Today, it says the following as its grant of jurisdiction in subsection (a):

[I]n 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 with such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.¹²⁹

126. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113 (codified as amended at 28 U.S.C. § 1367).

127. *Id.*

128. *Id.*

129. 28 U.S.C. § 1367(a).

And the statute goes on to say, “Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.”¹³⁰

Several aspects of the statutory language are notable. First, the statute replaces the doctrines of pendent and ancillary jurisdiction. Supplemental jurisdiction now includes both court-created jurisdiction types.¹³¹ Hence, a state-law claim that piggybacks on a federal claim, formerly given life by pendent jurisdiction, is now a creature of supplemental jurisdiction. Likewise, a non-jurisdictional counterclaim, third-party claim, cross-claim, or other claim, formerly covered by ancillary jurisdiction, may be supported by supplemental jurisdiction today.

Second, the statute provides that the measure of supplemental jurisdiction is claims that “form part of the same case or controversy under Article III of the United States Constitution.”¹³² Article III allows federal jurisdiction to extend to all “cases and controversies.”¹³³ Congress, in the supplemental jurisdiction statute, has adopted the Constitution as the standard for the breadth of supplemental jurisdiction. Thus, the Congressional intent appears to have been to extend supplemental jurisdiction in subsection (a) as far as constitutionally possible.

Third, the statute recognizes that some supplemental claims might require the addition of parties not yet joined in the suit.¹³⁴ If there is a counterclaim, this additional extension of the statute is not necessary because the plaintiff, who becomes the counterclaim defendant, is already present in the lawsuit. But the addition of a third-party claim by the defendant usually requires joinder of an additional party: the third-party defendant.¹³⁵ This sentence in the statute, allowing joinder of additional parties, creates the jurisdictional basis in this situation.

But fourth and finally, the statute contains two big subtractions. It disallows plaintiffs’ supplemental claims against new parties brought into their cases.¹³⁶ It also provides the district courts with discretion to dismiss supplemental claims in several common situations.¹³⁷ The next sections of this article will consider these provisions and certain interpretations that narrow the application of the statute.

130. *Id.*

131. *Cf. Thyssenkrupp Mexinox S.A. de C.V. v. United States*, 33 C.I.T. 1757 (2009) (referring to supplemental jurisdiction statute in terms of pendent and ancillary jurisdiction in the analysis of a claim that really was a supplemental claim).

132. 28 U.S.C. § 1367(a).

133. U.S. CONST. art. III, § 2, cl. 1 (creating the judicial power and extending it to “cases and controversies”).

134. 28 U.S.C. § 1367(b).

135. FED. R. CIV. P. 14 (authorizing third-party practice).

136. This is the effect of subsection (b) of the statute. *See infra* Part III.B (discussing 28 U.S.C. § 1367(b)).

137. This is the effect of subsection (c) of the statute. *See infra* Part III.B (discussing 28 U.S.C. § 1367 (c)).

III. LIMITS ON SUPPLEMENTAL JURISDICTION BY INTERPRETATION OR BY STATUTE

A. The Most Recent Retrenchment: The Royal Canin Decision

Most recently, in 2025, the Supreme Court has limited the supposedly broad jurisdiction created by section 1367. In *Royal Canin U.S.A. v. Wullschleger*, Plaintiff Wullschleger sued Royal Canin for allegedly deceptive marketing practices, asserting both federal and state-law claims.¹³⁸ Royal Canin removed the case to federal court.¹³⁹ Then, Wullschleger dismissed all of her federal claims, because she, like many plaintiffs, preferred to be in state court.¹⁴⁰ The district court extended supplemental jurisdiction to her state-law claims and refused to remand them.¹⁴¹ The Eighth Circuit reversed, holding that supplemental jurisdiction could not exist when all federal claims had been dismissed.¹⁴² Because of a circuit split, the Supreme Court granted certiorari and affirmed the lower court's holding that a federal court has no supplemental jurisdiction once all claims allowing federal-question jurisdiction have been dismissed.¹⁴³

The Court reasoned that the text of section 1367 required this result because its subsection (a) extended jurisdiction only to claims sufficiently related to jurisdictional claims.¹⁴⁴ Citing *Gibbs*, the Court added that the relationship must be "one of fact."¹⁴⁵ And the jurisdictional question, it said, followed the amended claim.¹⁴⁶ Therefore, if a plaintiff withdraws her jurisdictional claims, leaving only state-law claims, she deprives the federal courts of supplemental jurisdiction.¹⁴⁷ Furthermore, this result must be the same in a removed case, because the statute does not distinguish between removed and original claims.¹⁴⁸ The Court also cited subsection (c), which allows discretionary dismissal,¹⁴⁹ but the decision depended on subsection (a) and did not treat dismissal as

138. 604 U.S. 22, 28 (2025).

139. *Id.*

140. *Id.* at 29; see also Part IV (discussing the *Caterpillar* case, in which the plaintiff explained his preference for state court).

141. *Royal Canin*, 604 U.S. at 29.

142. *Id.* (citing *Wullschleger v. Royal Canin U.S.A., Inc.*, 75 F.4th 918, 924 (8th Cir. 2023)).

143. *Id.* at 29–30.

144. *Id.* at 30–31.

145. *Id.* at 31.

146. *Id.* at 32 (quoting *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007)).

147. *Id.*

148. *Id.* at 33.

149. *Id.* at 31–33.

discretionary in this situation.¹⁵⁰ In accordance with the statute, the trial court should then “kick the case to state court.”¹⁵¹

Still, the Court expressed approval of supplemental jurisdiction over a federal-and-state-law claim combination when the claims are factually intertwined.¹⁵² “Under [the supplemental jurisdiction] statute, as under *Gibbs*, jurisdiction over a federal-law claim brings with it supplemental jurisdiction over a state-law claim arising from the same facts.”¹⁵³ But the Court’s extension in *Royal Canin* of supplemental jurisdiction over a state-law claim intertwined with a federal claim may be illusory, because the plaintiff always has the ability to dismiss all federal claims.

The *Royal Canin* holding is unfortunate in denying supplemental jurisdiction and returning the case to state jurisdiction in this situation.¹⁵⁴ Imagine that a plaintiff files a claim under the Federal Employers’ Liability Act (FELA), which creates favorable conditions for railroad workers’ suits against railroad companies.¹⁵⁵ The plaintiff may also file a state-law claim for negligence based on the same facts. The point of the state-law claim in this situation must be to provide a backup route to recovery in case the federal claim fails for some reason.

But imagine that the federal claim does fail. Perhaps, for example, the district court decides that the defendant is not a railroad (this has occurred in some cases).¹⁵⁶ Suddenly, there is no basis for federal jurisdiction. As the Supreme Court said in *Royal Canin*, “deletion of all federal claims deprived the District Court of federal-question jurisdiction. And once that was gone, the court’s supplemental jurisdiction over the state claims dissolved too.”¹⁵⁷ The Court also sent the same message in different words: “Once the plaintiff has ditched all claims involving federal questions, the leftover state claims are supplemental to nothing—and § 1367(a) does not authorize a federal court to resolve them.”¹⁵⁸ Thus, given the reasoning and holding in *Royal Canin*, the trial court now has to “kick the case to state court,”¹⁵⁹ and thereby must destroy the

150. *Id.* at 33–34.

151. *Id.* at 32. One might regard this phrase either as a refreshing turn toward informal directness or an inappropriate lapse from dignity, or perhaps both. One really should look at an opinion, at least in part, for its effect on the losing party, who is already disappointed and deserves a message that is not delivered in callous terms.

152. *Id.* at 27.

153. *Id.*

154. *Id.* at 43–44.

155. 45 U.S.C. § 51 *et seq.* For example, FELA compensation is usually many times greater than worker’s compensation provided to non-railroad employees. *See, e.g.,* Jerry J. Phillips, *An Evaluation of the Federal Employers’ Liability Act*, 25 SAN DIEGO L. REV. 49, 50, 54 (1988).

156. *E.g.,* *Brooks v. Sw. Transp. Co.*, 494 F.2d 1271, 1272 (6th Cir. 1974) (defendant was not a railroad although a railroad company owned all of its stock); *cf. Montgomery v. NLR Co.*, No. 2:05–CV–251, 2008 WL 299555, at *1 (D. Vt. Jan. 31, 2008) (jury found that plaintiff was not employee, as required by FELA).

157. *Royal Canin*, 604 U.S. at 44.

158. *Id.* at 34.

159. *Id.* at 32.

usefulness of supplemental jurisdiction over any state-law claim asserted as a backup. Supplemental jurisdiction, then, is indeed illusory.

The Court in *Royal Canin* was so determined to rein in state-law claims that it overruled two statements in its cases saying the opposite from its holding¹⁶⁰—first, in *Carnegie-Mellon University v. Cohill*,¹⁶¹ and later in *Rockwell International Corp. v. United States*¹⁶² in a footnote. In both cases, said the Court, the remarks were dictum, and they could not “bear the weight” of the defendant’s argument based on them.¹⁶³ The Court even characterized the two references as “drive-by” statements.¹⁶⁴

The Court’s own holding, however, should bear these epithets. The decision in *Royal Canin* is as potentially disastrous as metal in a microwave. If every disappearance of federal claims requires the dismissal of supplemental parallel claims, then there is no point in adding state-law claims, rendering supplemental jurisdiction meaningless. Perhaps there is a way for the courts to avoid this disruptive interpretation of *Royal Canin*. But if so, it will conflict with the logic of *Royal Canin* and may require a significant cleanup of the decision. Additionally, the *Royal Canin* holding arguably conflicts with the statutory extension of supplemental jurisdiction to all cases and controversies within the ambit of Article III.

B. Subsection (b) of the Statute: The Codification of Owen v. Kroger

1. *The Legislative Adoption of Subsection (b).*—*Owen Equipment & Erection Co. v. Kroger* was decided before the enactment of the supplemental jurisdiction statute.¹⁶⁵ This decision held that a plaintiff could not assert an ancillary-jurisdiction claim against a non-diverse party brought into the case by the defendant.¹⁶⁶ As explained above, if *A* sues *B*, and *B* impleads third-party *C*, *A* cannot add *C* as a defendant if *C* is non-diverse from *A*.

There was no particular policy reason for the statute to include this subtraction from supplemental jurisdiction.¹⁶⁷ The holding in *Owen v. Kroger*, of course, contradicted the goal of the final statute drafters to reach to the limit of the Article III authorization of jurisdiction.¹⁶⁸ Furthermore, its practical effects were inefficient and unfortunate because it meant that a party already in the federal case could not be sued there and would need to be sued separately in

160. *Id.* at 39–40.

161. 484 U.S. 343, 357 (1988).

162. 549 U.S. 457, 474 n.6 (2007).

163. *Royal Canin*, 604 U.S. at 39.

164. *Id.* at 42.

165. 437 U.S. 365 (1978).

166. *Id.* at 374.

167. The decision was based upon statutory interpretation. The Court applied the diversity statute and decided that it denied jurisdiction here.

168. *See supra* Part II (analyzing the adoption of the statute)

state court with duplication of all proceedings.¹⁶⁹ But the drafters included subsection (b) in the statute, and thus they codified the holding in *Owen v. Kroger*.

Subsection (b) of the statute provides that:

[if] the district courts have original jurisdiction founded solely on 1332 of this title, the district courts shall not have supplemental jurisdiction . . . over claims by plaintiffs against persons made parties under [third-party practice, required joinder, permissive joinder, or intervention] . . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.¹⁷⁰

Thus, although subsection (b) does not use the exact words of *Owen*, its effect closely mimics the holding of that case.

A slew of unfortunate results follows this language. Subsection (b) is inefficient in disallowing state-law claims intertwined with federal claims and requiring duplicate proceedings in state court.¹⁷¹ It also means that if the plaintiff's federal claim requires an indispensable non-diverse party, the federal claim will need to be dismissed, and the case will have to be litigated in state court, where the indispensable party can be joined.¹⁷² And if a new, non-diverse party intervenes with a frequent kind of claim, such as that of a non-diverse insurer seeking subrogation, the plaintiff cannot sue the insurer to protect its interests in the plaintiff's primary claim against an at-fault defendant.¹⁷³ Additionally, of course, subsection (b) disallows plaintiffs from suing non-diverse third-party defendants impleaded by defendants,¹⁷⁴ no matter how closely related the impleader is to the plaintiff's original federal claim.

These results not only frustrate the drafters' intent to reach all possible jurisdiction under Article III, but they are also unfair to plaintiffs who want federal forums to decide their federal claims. Why would Congress have adopted this unfortunate provision?

The answer is that Congress preferred to retain the diversity jurisdiction of section 1332 intact. Specifically, Congress intended, in early drafting, to avoid creating any jurisdiction that was "inconsistent with the jurisdictional

169. The result of the lack of jurisdiction would mean that state courts were the only possible forums.

170. 28 U.S.C. § 1367(b) (denying jurisdiction in this situation).

171. *E.g.*, *Reyes v. City of New York*, 141 F.4th 55, 65 (2d Cir. 2025).

172. FED. R. CIV. P. 19 (dealing with "required parties" who should be joined "if feasible," including indispensable parties, who must be joined).

173. *See infra* Part IV (discussing the *Caterpillar* case, in which such an intervention occurred).

174. *See supra* Part I.C (discussing the *Kroger* case); Part II (discussing adoption of statute).

requirements of section 1332.”¹⁷⁵ And the intention was to retain the essence of the complete diversity requirement that derives from *Strawbridge v. Curtiss*.¹⁷⁶

But as the statute twisted toward enactment, it changed. First, in spite of the early attempt to follow the complete diversity requirement of *Strawbridge v. Curtiss*, a plaintiff could now sue a non-diverse party on a state-law claim in the original complaint, creating the scenario that *Strawbridge* seemed to prohibit.¹⁷⁷ Second, the treatment of the complete diversity requirement was inconsistent. Although plaintiff’s claims against non-diverse defendants were prohibited, defendants could sue non-diverse plaintiffs with state-law claims—an approach that was “inconsistent with the jurisdictional requirements of section 1332,” to quote the statute.¹⁷⁸

Third, although the original retrenchment of jurisdiction covered cases based on “diversity” under section 1332,¹⁷⁹ the final enactment covered cases globally under “section 1332.”¹⁸⁰ The problem is, section 1332 covers more than diversity; subsection 1332(a)(4) also creates jurisdiction over plaintiffs’ claims by foreign states.¹⁸¹ Therefore, section 1367(b) would appear to abolish federal jurisdiction over foreign-state claims.¹⁸² But this result was probably inadvertent, and the federal courts have continued to recognize this foreign-state jurisdictional provision in spite of it.¹⁸³

One theoretical factor in favor of section 1367(b) might be that it prevents a plaintiff from colluding with a defendant to add a third party for the purpose of suing that party with a state-law claim in which the plaintiff lacks complete diversity. The defendant in an extreme case might even be a sham party against whom the plaintiff has an agreement not to pursue liability. But in such a case, the better remedy would be for the court to utilize section 1359 to recognize and dismiss claims against parties “collusively made or joined to invoke []

175. 28 U.S.C. § 1367(b); See, e.g., *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings on H.R. 5381 and H.R. 3898 Before the S. Comm. on Cts., Intell. Prop., & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong., 15 (1990) [hereinafter *Hearings on H.R. 5381 and H.R. 3898*] (statement of Stuart Gerson, Assistant Att’y Gen. of the U.S., Civil Division).

176. *Federal Courts Study Committee Implementation Act: Hearing on H.R. 5381 Before the S. Comm. on Cts., Intell. Prop., & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong., 7 (1990) [hereinafter *Hearing on H.R. 5381*] (statement of Judge Joseph F. Weis, Jr., 3d Cir.) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)).

177. *Strawbridge*, 7 U.S. (3 Cranch) at 267; 28 U.S.C. § 1367(b), which excluded jurisdiction, was triggered by the addition of parties through various Federal Rules of Civil Procedure that were not mentioned in subsection (a), which granted supplemental jurisdiction to district courts; hence an original claim in the suit was not affected by the exclusion.

178. Subsection (b) affected only claims by “plaintiffs” and contains this requirement for its operation.

179. *Hearing on H.R. 5381*, *supra* note 176, at 8.

180. 28 U.S.C. § 1367(b).

181. 28 U.S.C. § 1332(a)(4).

182. 28 U.S.C. § 1367(b).

183. E.g., *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 83–84 (2d Cir. 1997).

jurisdiction . . .”¹⁸⁴ The alternative remedy of subsection (b), which closes the possibility of any claims against such a party, is overkill, like shooting a termite with a howitzer.

To sum these oddities up, subsection (b) of the supplemental jurisdiction statute is an unfortunate piece of legislation. Although it is true that non-diversity state-law claims would have been inconsistent with traditional requirements of complete diversity, so were various other claims that were allowed by section 1367.¹⁸⁵ The whole thrust of the statute was to create judicial efficiency by allowing non-jurisdictional claims to be litigated together with related jurisdictional claims, and this objective produced many supplemental claims inconsistent with the complete diversity requirement.¹⁸⁶ Indeed, subsection (b) seems to express a kind of hostility to diversity jurisdiction. This subtraction from supplemental jurisdiction was a preference for theoretical purity, in deference to a distant precedent, instead of sound policy, and it was unwarranted.

2. *Confusion, Costs, and Delays in Interpretations of Subsection (b).*—At first, subsection (b) even created confusion about whether, in a diversity case, there could be supplemental jurisdiction over related claims that did not meet the amount-in-controversy requirement. One might think that this would be an easy call in favor of supplemental jurisdiction. But no. In *Rosario Ortega v. Star-Kist Foods, Inc.*, the court reported a circuit split involving a number of courts.¹⁸⁷ The *Rosario Ortega* court itself decided, after an extensive analysis, that although Rosario Ortega herself had asserted a valid diversity claim, the tag-along claims of her family members did not qualify for supplemental jurisdiction.¹⁸⁸ Those claims sought less than the required jurisdictional amount and were excluded, said the court, by subsection (b).¹⁸⁹ The decision was understandable. Subsection (b) prohibited non-jurisdictional claims by plaintiffs against newly added defendants who were joined as defendants under F.R.C.P. 20, and this case seemed to fit the exclusion literally.¹⁹⁰ The First Circuit modified the judgment and affirmed.¹⁹¹

But the Supreme Court granted certiorari and reversed.¹⁹² The Court held that “§ 1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for

184. 28 U.S.C. § 1359.

185. Claims such as counterclaims, cross-claims, third-party claims, and interventions and even original plaintiffs’ claims all fall within section (a) and are not automatically excluded by section (b).

186. See *infra* Part III.B.2 (analyzing the *Rosario Ortega* case, which permits non-jurisdictional state-law claims by plaintiffs parallel to plaintiff’s jurisdictional claims but charged in plaintiff’s original complaint).

187. 370 F.3d 124, 127 (1st Cir. 2004).

188. *Id.* at 137.

189. *Id.* at 137–38.

190. 28 U.S.C. § 1367(b); FED. R. CIV. P. 20.

191. *Rosario Ortega*, 370 F.3d at 144.

192. *Sub nom.* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549–50 (2005).

less than the jurisdictional amount”¹⁹³ The Court began its reasoning by considering the legislative history. *Gibbs*, *Howard*, and *Finley* had left the pre-statutory meaning of pendent jurisdiction as disallowing supplemental claims by the plaintiff if they did not meet the jurisdictional statutes.¹⁹⁴

But the supplemental jurisdiction statute was intended to change these results.¹⁹⁵ Specifically, subsection (a) of the statute was a broad grant of jurisdiction, intended to enable the courts to address entire Article III cases and controversies.¹⁹⁶ And it expressly allowed the addition of new parties to supplemental claims.¹⁹⁷ And then, “Nothing in the text of 1367(b), however, withholds supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 The natural, indeed the necessary, inference is that § 1367 confers supplemental jurisdiction over claims by Rule 20 . . . plaintiffs.”¹⁹⁸

This decision solved one narrow question. But there have been many more cases in which subsection (b) has caused confusion, costs, and delays. In *Underwriters at Lloyd’s v. Abaxis, Inc.*, for example, the original plaintiffs filed contract and tort claims, after which the defendants filed cross-claims that included tort and indemnification claims.¹⁹⁹ The Underwriters, the original plaintiff, dismissed their claims against two defendants, TCSL and CHR.²⁰⁰ After the court denied the remaining defendants’ (Abaxis and Zoetis) motion to dismiss, they filed cross-claims against TCSL and CHR.²⁰¹ Among other tort claims, Abaxis and Zoetis sought to find TCSL and CHR jointly liable for the Underwriters’ breach of contract claim asserted solely against Abaxis and Zoetis.²⁰² Plaintiffs in the Underwriters’ position, one might speculate, dislike cross-claims because they cause confusion and delay that detracts from the court’s attention to resolving the plaintiffs’ claims, while ballooning the time that all lawyers must spend on the cross-claims.

CHR, seeking to dismiss the defendants’ cross-claims, first argued that there was no jurisdiction under subsection (a), the statutory grant of jurisdiction, because the plaintiff’s claim sounded in contract and the cross-claims did not; therefore, the supplemental claims were not sufficiently related to the original suit.²⁰³ But all of the claims were about the same loss to the same property, and

193. *Id.* at 549.

194. *Id.* at 556.

195. *Id.* at 558.

196. *Id.* (citing 28 U.S.C. § 1367(a)).

197. *Id.* at 560.

198. *Id.*

199. *Underwriters at Lloyd’s Subscribing to Cover Note B1526MACAR1800089 v. Abaxis, Inc.*, 491 F. Supp. 3d 506, 510 (N.D. Cal. 2020) (dealing with indemnity and contribution in dispute involving subsection (b) of the statute).

200. *Id.* at 509.

201. *Id.* at 509–10.

202. *Id.* at 512.

203. *Id.* at 513.

the court easily found the required “common nucleus of operative fact.”²⁰⁴ Supplemental jurisdiction, the court held, extended to the cross-claims.²⁰⁵

Subsection (b), however, created the more complex and novel arguments in the *Underwriters* case. This subsection, of course, excluded some kinds of claims by “plaintiffs.”²⁰⁶ The *Underwriters* and CHR argued that the cross-claimants were effectively “plaintiffs” because they were asserting claims—making them, in substance, cross-claim plaintiffs.²⁰⁷ This line of reasoning would have meant that the cross-claims were prohibited by subsection (b). The court noted that “several courts of appeal have held that section 1367(b)’s use of the term ‘claims by plaintiffs’ only refers to the original plaintiffs and not defendants who then assert a crossclaim or third-party claim.”²⁰⁸ Furthermore, subsection (b) “states congressional intent to prevent original plaintiffs—but not defendants or third parties—from circumventing the requirements of diversity.”²⁰⁹

The court could have added, but perhaps did not need to add, that subsection (b) codified *Owen v. Kroger*, in which the Supreme Court excluded only the original plaintiff’s claims.²¹⁰ Along the way, the *Underwriters* court also had to analyze issues under F.R.C.P. 13, concerning cross-claims, and F.R.C.P. 14, third-party claims.²¹¹ Subsection (b) indeed produces difficult questions, even though the court decided this case sensibly.

But if there is to be this kind of confusion, let it be about something other than jurisdiction. Litigants ought to have a known battlefield so that their disputes can be definitively settled.

And there are more difficulties. Class actions, with their already inherent complexity, also create conundrums under subsection (b). For example, does supplemental jurisdiction create jurisdiction over a diversity class action in which some claims seek damages that are below the required jurisdictional amount? The Supreme Court once held that all the claims have to be within the courts’ jurisdiction.²¹² But that was before the supplemental jurisdiction statute. Did the supplemental jurisdictional statute change this result?

After the statute passed, in *Rosmer v. Pfizer Inc.*, the Court of Appeals held that the answer was yes.²¹³ Rosmer filed a class action in state court on state-law claims, and Pfizer removed the case on diversity grounds.²¹⁴ Rosmer filed a

204. *Id.* at 515.

205. *Id.* at 515–16.

206. *Id.* at 516 (discussing how other circuits have addressed “claims by plaintiffs”).

207. *Id.*

208. *Id.*

209. *Id.*

210. See *supra* Part I.C (analyzing cases that shrank supplemental jurisdiction, including *Owen v. Kroger*).

211. *Underwriters at Lloyd’s*, 491 F. Supp. 3d at 515–16.

212. *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 300–01 (1973).

213. 263 F.3d 110, 122 (4th Cir. 2001).

214. *Id.* at 112.

motion to remand, but the district court refused.²¹⁵ The Fourth Circuit held that subsection (a) of the supplemental jurisdiction statute was a broad grant of authority, and it was not limited by theories that did not fit the plain language of the statute.²¹⁶ However, subsection (b) applied to parties added after the commencement of the suit, not those already in the suit from its beginning.²¹⁷ Other circuits had split over this issue.²¹⁸ The Supreme Court had divided 4-4 on the same issue.²¹⁹ “Our view, respectfully,” the Fourth Circuit concluded, “is that § 1367 confers supplemental jurisdiction in diversity class actions, so long as one named plaintiff has a claim giving a federal court original jurisdiction.”²²⁰ Another court described this awkward decisional law as follows:

The question of supplemental jurisdiction in diversity-based class actions has mired not only the circuit courts of appeals in confusion and disarray, but district courts and legal commentators, as well. The dissension among circuits has played out across district court opinions, learned treatises, law review articles, and even bar review books.²²¹

Again, jurisdiction ought to be clear to the parties, just as the rules of the road ought to be clear to drivers.

Finally, the Supreme Court resolved the question.²²² Yes, the supplemental jurisdiction statute does allow class actions that include members with claims below the jurisdictional amount, provided at least one named class member’s claim meets the minimum.²²³ The same rule applied in smaller cases that were not class actions, such as in Rosario Ortega’s case.²²⁴ In the meantime, however, no one can know how many cases before *Exxon Mobil* were affected adversely to the prevailing party or how many were settled based on confusion.

215. *Id.* at 113.

216. *Id.* at 114.

217. *Id.* at 115.

218. *Compare* Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 930–31 (7th Cir. 1996) (stating that supplemental jurisdiction applies to class actions and allows class members with claims below jurisdictional amount), and *In re Abbott Labs.*, 51 F.3d 524, 528–29 (5th Cir. 1995), *aff’d by an equally divided court sub nom.* Free v. Abbott Labs., Inc., 529 U.S. 333 (2000) (per curiam) (same), with *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000) (holding that each member of a class who does not meet the jurisdictional amount must be dismissed from the case), *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 218 (3d Cir. 1999) (same), and *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998) (same).

219. *Abbott*, 529 U.S. at 333.

220. *Rosmer*, 263 F.3d at 114.

221. *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 747 (11th Cir. 2004) (Tjoflat, J., dissenting) (rejecting the majority’s interpretation of 28 U.S.C. § 1367).

222. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005).

223. *Id.*

224. *Id.* at 551, 559. The Supreme Court decision did not include Rosario Ortega’s name in the caption, but her family’s claim against Star-Kist was decided *sub nom. Id.*

C. Discretionary Dismissal Under Subsection (c)

Subsection (c) of the supplemental jurisdiction statute allows the district courts to “decline to exercise supplemental jurisdiction over a claim” 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 ²²⁵

By way of example, imagine that a state has just passed a major antitrust statute. Subsection (c)(1) allows the federal courts to defer to state courts, enabling them to undertake the first effort to interpret this “novel or complex issue of State law.”²²⁶ Subsection (c)(2) allows the federal courts, for example, to send a state-law product liability case to state court, although it is joined with a long-shot federal claim under a related federal statute.²²⁷ The product claim will “predominate.” Or if, as in *Royal Canin*, the federal claim disappears from the case, the federal court can also dismiss a related state-law claim.²²⁸ The court no longer has a federal claim as an anchor, “over which it has original jurisdiction.”²²⁹

1. Deciding Whether Supplemental Jurisdiction Really Exists.—This provision raises a broad range of jurisdictional puzzles. For example, if neither litigant raises the issue, must the district court initiate attention to the question of declining jurisdiction on its own and decide whether to remand or dismiss a supplemental claim? The possibility is real; both parties may see that there is jurisdiction over the claim, and then neither may be attentive to the possibility that jurisdiction might be declined. Or they may simply neglect the issue. Does supplemental jurisdiction exist, then? In *Acri v. Varian Associates, Inc.*, the court held that the answer was yes—supplemental jurisdiction survives and the case continues.²³⁰ “We hold that when there is power to hear the case under § 1367(a),” said the court, “the district court may exercise supplemental jurisdiction over state law claims without *sua sponte* addressing whether it should be declined under § 1367(c).”²³¹

The *Acri* case is significant for another reason. The court granted summary judgment against *Acri*’s jurisdictional claim, which alleged violations of the federal Age Discrimination in Employment Act, and also against his

225. 28 U.S.C. § 1367(c).

226. 28 U.S.C. § 1367(c)(1).

227. 28 U.S.C. § 1367(c)(2).

228. *Royal Canin U.S.A. v. Wullschleger*, 604 U.S. 22, 33–34 (2025).

229. 28 U.S.C. § 1367(c)(3).

230. 114 F.3d 999, 1000 (9th Cir. 1997) (en banc) (citation omitted).

231. *Id.*

supplemental jurisdiction claims under parallel state laws.²³² In such a situation, the Supreme Court had held in *Gibbs* that if the jurisdictional federal claim disappeared, the supplemental claims should be dismissed or remanded.²³³ But the *Acri* court decided that this language did not mean what it appeared to mean. “That state law claims ‘*should*’ be dismissed if federal claims are dismissed before trial, as *Gibbs* instructs, has never meant that they *must* be dismissed.”²³⁴ A dissenting judge charged that the majority had “essentially ignore[d] what the Supreme Court ha[d] long required of federal courts exercising supplemental jurisdiction.”²³⁵

The *Acri* case might be characterized as one in which supplemental jurisdiction was created by neglect, or even one in which jurisdiction was conferred by mistake.²³⁶ Likewise, subsection (c) has provided many cases in which the courts have muddled through jurisdictional puzzles in ways that seem less than satisfying.

For example, in *City of Chicago v. International College of Surgeons*, the Supreme Court upheld an extensive application of supplemental jurisdiction.²³⁷ The Chicago Landmarks Commission designated certain properties owned by the College of Surgeons as historic landmarks.²³⁸ An owner might initially view this recognition as an honor, only to later discover that the label significantly restricts their ability to use their property as they wish. In this case, the Commission refused efforts by the College of Surgeons to demolish all but the historic facades of two structures so that a high-rise building could be constructed.²³⁹ The College of Surgeons sued the City in state court, seeking relief under the Illinois Constitution and administrative review of the Commission’s decisions denying the permits.²⁴⁰ It also asserted federal claims under the Due Process Clause, Equal Protection Clause, and Takings Clause.²⁴¹

The City removed the action to federal district court, which ultimately granted summary judgment in favor of the City.²⁴² The Court of Appeals reversed and remanded, holding that the court had no jurisdiction.²⁴³ The Seventh Circuit reasoned that a proceeding to review state administrative action under a deferential standard was not a “civil action” within a district court’s “original jurisdiction” under the removal statute, and therefore it could not be removed.²⁴⁴

232. *Id.* at 999.

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

234. *Acri*, 114 F.3d at 1000.

235. *Id.* at 1002 (O’Scannlain, J., dissenting).

236. *Cf. infra* Part V (discussing jurisdiction created by mistake).

237. 522 U.S. 156, 172–73 (1997).

238. *Id.* at 159–60.

239. *Id.* at 160.

240. *Id.*

241. *Id.*

242. *Id.* at 161.

243. *Id.* (citing *Int’l Coll. of Surgeons v. City of Chicago*, 91 F.3d 981, 990 (7th Cir. 1996)).

244. *Int’l Coll. of Surgeons*, 522 U.S. at 162.

But then, the Supreme Court reversed the Court of Appeals' reversal.²⁴⁵ There was nothing magical about review of a state administrative action, and it could be removed in the normal manner.²⁴⁶ Therefore, the federal claims in this case could be removed, and the district court had jurisdiction over them.²⁴⁷ But what about the supplemental claims for review of the administrative agency action? Could the district court exercise supplemental jurisdiction over them? If so, did it have the discretionary power to dismiss them?

The Court explained that, "this Court has long adhered to principles . . . by which the federal courts' original jurisdiction . . . carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact.'"²⁴⁸ This was the formula that the *Gibbs* case created to judge pendent claims.²⁴⁹ And the state-law claims in this case did, indeed, share a common nucleus of operative fact with the federal claims.²⁵⁰ All of them were about the denial of the demolition permits sought by the College of Surgeons.²⁵¹ Supplemental jurisdiction therefore existed.²⁵²

The question of discretionary dismissal remained. The Court cited *Gibbs* in recognizing this power in the federal district courts.²⁵³ "Our decisions have established that pendent jurisdiction 'is a doctrine of discretion, not of plaintiff's right,' and that district courts can decline to exercise jurisdiction over pendent claims for a number of valid reasons."²⁵⁴ Quoting subsection (c) of the statute, including its four categories of discretion to decline jurisdiction, the Court noted that the supplemental statute "codifies" *Gibbs*.²⁵⁵

2. *The Decision to Decline Jurisdiction: The "Gibbs Values" of Judicial Economy, Convenience, Fairness, and Comity.*—How should a district court go about deciding whether to invoke the power to dismiss? The *College of Surgeons* court answered in generalities:

Depending on a host of factors, then—including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims—district courts may decline to exercise jurisdiction over supplemental state law claims.²⁵⁶

245. *Id.* at 163.

246. *Id.* at 163–64.

247. *Id.* at 166.

248. *Id.* at 164–65.

249. *Id.* at 165 (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)).

250. *Id.*

251. *Id.*

252. *Id.* at 166–67.

253. *Id.* at 172 (quoting *Gibbs*, 383 U.S. at 726).

254. *Id.*

255. *Id.* at 173.

256. *Id.*

But the test that has since been emphasized came down to four words. When deciding whether to decline supplemental jurisdiction, “a federal court should consider and weigh . . . the values of judicial economy, convenience, fairness, and comity.”²⁵⁷ The courts that have used them have called these four factors “the *Gibbs* values.”²⁵⁸

The Court explained that, here, “the District Court decided that those interests [i.e., the *Gibbs* values] would be best served by exercising jurisdiction over ICS’ state law claims.”²⁵⁹ The Court considered and reserved another important but unrelated question for the Court of Appeals to address: whether the abstention doctrines applied to this case.²⁶⁰

Justice Ginsburg, joined by Justice Stevens, dissented. The review that state law provided was “on the agency’s record, not *de novo*.”²⁶¹ How could a federal district court mimic the kind of deferential review that a state court would provide?²⁶² But “the Court decides today that this standard brand of appellate review can be shifted from the appropriate state tribunal to a federal court of first instance at the option of either party—plaintiff originally or defendant by removal.”²⁶³

The lower federal courts have implemented the *Gibbs* values. Thus, recently, in *Arroyo v. Rosas*, the plaintiff filed federal claims under the Americans with Disabilities Act and parallel claims under California’s Unruh Act, which provides broad protections from discrimination.²⁶⁴ The district court dismissed the supplemental state-law claims, which provided certain procedural advantages, and granted judgment on the federal claims.²⁶⁵ Arroyo appealed the dismissal, which the court had issued under subsection 1367(c)(4), on the ground that “extraordinary circumstances” created “compelling reasons” for a discretionary decision to decline jurisdiction.²⁶⁶ The district court explained that retaining jurisdiction would allow the plaintiff to circumvent California’s procedural requirements and further contribute to the rapid influx of such cases in the federal courts.²⁶⁷

The Ninth Circuit followed a two-step process for determining whether declining jurisdiction was an abuse of discretion.²⁶⁸ First, did the district court adequately explain why the case was exceptional?²⁶⁹ And second, did the

257. *Id.* (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)).

258. *See, e.g., id.*; *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (referring to these considerations as the “*Gibbs* values”).

259. *Int’l Coll. of Surgeons*, 522 U.S. at 173.

260. *Id.* at 174.

261. *Id.* at 175 (Ginsburg, J., dissenting).

262. *Id.* at 177, 185 (Ginsburg, J., dissenting).

263. *Id.* at 175 (Ginsburg, J., dissenting).

264. 19 F.4th 1202, 1204 (9th Cir. 2021).

265. *Id.* at 1204–05.

266. *Id.*

267. *Id.* at 1205.

268. *Id.* at 1210–11.

269. *Id.* at 1210.

“balance of the *Gibbs* values” show compelling reasons for declining jurisdiction?²⁷⁰ The court had “little difficulty” in deciding that the district court had not abused its discretion, finding that these circumstances were exceptional.²⁷¹ Furthermore, retaining jurisdiction over the supplemental claims would have a “substantial adverse impact on the core *Gibbs* values of ‘economy, convenience, fairness, and comity.’”²⁷² In particular, federal jurisdiction would pose a “very substantial threat to federal-state comity that this overall situation presents.”²⁷³

But that factor—comity—was not determinative by itself. The whole sum of the *Gibbs* factors tugged in the opposite direction, and the court seems to have been determined to weigh all of the *Gibbs* values. “Given the very late stage at which the district court declined supplemental jurisdiction in this case, these values overwhelmingly favored *retaining* jurisdiction over Arroyo’s Unruh Act claim, and the district court therefore abused its discretion in dismissing that claim.”²⁷⁴

The court in *Shanaghan v. Cahill* identified several grounds that were not obvious for deciding about declining supplemental jurisdiction.²⁷⁵ These issues seem to fit under the *Gibbs* factor of fairness: fairness, that is, to the plaintiff, who might have a diminished or increased ability to present the claim if it is dismissed:

[I]t is important to consider whether the amount claimed in the complaint was made in good faith, or whether plaintiff was consciously relying on flimsy grounds to get into federal court. Another critical equitable factor is the existence of any state limitations bars to refile in state court. Another critical equitable factor is the existence of any state limitations bars to refile in state court. Where, as here, a plaintiff might suffer serious prejudice from the dismissal of her action, courts should be more willing to retain the case despite the smaller amount in controversy. Next, courts should account for the amount of time and energy that has already been expended, and decide whether it might be more efficient to simply retain jurisdiction.²⁷⁶

The possible considerations are open-ended and subject to close distinctions.

Some courts have found particularly strong grounds for retention of supplemental claims. For example, in *Executive Software North America, Inc. v. U.S. District Court for the Central District of California*, after consulting “the text, structure, legislative history, and apparent purpose of section 1367,” the

270. *Id.*

271. *Id.* at 1214.

272. *Id.* at 1211.

273. *Id.* at 1213.

274. *Id.* at 1216.

275. 58 F.3d 106, 110 (4th Cir 1995).

276. *Id.* at 112 (internal citations omitted).

Ninth Circuit concluded that the statute “create[s] a presumption that supplemental jurisdiction should be asserted unless one of the categories specifically enumerated in subsection 1367(c) applies.”²⁷⁷

But declining supplemental jurisdiction cannot be based on just any factor. In a later iteration of *Executive Software*, the Court of Appeals found that a statement by the district court had “implied[d] that it might have remanded the state law claims solely to ease docket congestion.”²⁷⁸ The appellate court responded: “This clearly is impermissible.”²⁷⁹ So, there are limits.

D. The Tolling of Limitations Under Subsection (d)

The supplemental jurisdiction statute has in subsection (d) a provision for tolling of the state statute of limitations when a state-law claim is dismissed. This provision is important because decisions about the exercise of supplemental jurisdiction sometimes last for long periods, and they may occur after a state statute of limitations has run. Subsection (d) provides as follows:

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.²⁸⁰

Strangely, some cases under section (d) have raised the question whether this provision is constitutional.

Specifically, in *Artis v. District of Columbia*, the defendant attacked the statute on the ground that its connection to Congress’ enumerated powers was too attenuated and because it was too great an incursion on the States’ domain.²⁸¹ The Supreme Court held that the statute “is necessary and proper for carrying into execution Congress’s power ‘[t]o constitute Tribunals inferior to the supreme Court,’ . . . and to assure that those tribunals may fairly and efficiently exercise ‘[t]he judicial Power of the United States.’”²⁸²

277. 15 F.3d 1484, 1489 (9th Cir. 1994).

278. *Exec. Software N. Am., Inc. v. Dist. Ct. for C.D. Cal.*, 24 F.3d 1545, 1560 n.15 (9th Cir. 1994), *superseding*, 15 F.3d 1484 (9th Cir. 1994), *overruled by*, *Cal. Dep’t of Water Res. v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008).

279. *Id.*; *see also* *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976), *abrogated by*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

280. 28 U.S.C. § 1367(d).

281. 583 U.S. 71, 89 (2018); *see also* *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 460 (2003) (arguing that 28 U.S.C. § 1367(d) interfered with a State’s sovereign authority).

282. *Artis*, 583 U.S. at 89–90 (quoting *Jinks*, 538 U.S. at 460).

The normal application of subsection (d) is exemplified by cases like *Baylon v. Wells Fargo Bank, N.A.*²⁸³ There, in a federal district court, the plaintiff alleged violations of the Federal Debt Collection Act and New Mexico debt collection laws.²⁸⁴ The court dismissed the federal claim with prejudice and dismissed the state-law claims without prejudice.²⁸⁵ The plaintiff refiled the state-law claims in state court.²⁸⁶

The defendants removed the case on diversity grounds, then moved to dismiss on the ground that the plaintiff's state-law claims were barred by limitations.²⁸⁷ They relied on state statutes and case law in making this defense. In particular, they relied on a New Mexico Supreme Court case which held that "a dismissal without prejudice operates to leave the parties as if no action had been brought at all."²⁸⁸ As a result, the court explained, "following such dismissal the statute of limitations is deemed not to have been suspended during the period in which the suit was pending."²⁸⁹

But here, the federal statute controlled. The federal court quoted subsection (d) of the supplemental jurisdiction statute and cited *Artis v. District of Columbia*, to the effect that "the state limitations period is suspended during the pendency of a federal suit."²⁹⁰ Plaintiff's second round of state-law, state-court claims had been filed within 30 days of the dismissal of the federal case.²⁹¹ The court held that because of § 1367(d), the plaintiff's claims had been timely filed, and it overruled the motion to dismiss.²⁹²

On the other hand, several other cases have held that subsection (d) did not save the claims at issue. For example, in *Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Financial Corp.*, the court held that § 1367(d) will not toll supplemental state claims while the plaintiff's federal claims are being resolved if those supplemental claims had already been dismissed.²⁹³ In *Malone v. Bayerische Hypo-Und Vereins Bank*, the court held that the tolling provision only applies when the supplemental claim is refiled in *state* court, not when it is dismissed in federal court and refiled in another federal court.²⁹⁴

Another case in which the court refused to allow tolling presented a strange question. In *Parrish v. HBO & Co.*, the plaintiff voluntarily dismissed his entire case, including both federal and state claims.²⁹⁵ Did § 1367(d) apply to his later-

283. 303 F. Supp. 3d 1160 (D.N.M. 2018).

284. *Id.* at 1161–62.

285. *Id.* at 1162.

286. *Id.*

287. *Id.* at 1162–63.

288. *King v. Lujan*, 646 P.2d 1243, 1245 (N.M. 1982).

289. *Id.*

290. *Wells Fargo*, 303 F. Supp. 3d at 1164 (citing *Artis v. District of Columbia*, 583 U.S. 71, 75 (2018)).

291. *Id.* at 1162, 1164.

292. *Id.* at 1165.

293. 878 F. Supp. 2d 1009, 1019 (C.D. Cal. 2011).

294. Nos. 08 Civ. 7277, 09 Civ. 3676, 2010 WL 391826 at *7–8 (S.D.N.Y. Feb. 4, 2010).

295. 85 F. Supp. 2d 792, 793 (S.D. Ohio 1999).

filed suit in federal court, which included the same types of claims? The plaintiff in this case originally filed three claims in federal court: a federal claim under the Age Discrimination in Employment Act (ADEA) and two state-law claims for age discrimination and for breach of his commission agreement.²⁹⁶ The plaintiff voluntarily dismissed these claims.²⁹⁷ He then refiled his claims in federal court, and this time he added a fourth claim for violation of his employment agreement.²⁹⁸ The court held that all of the claims, federal and state, were barred by limitations statutes unless a tolling statute applied.²⁹⁹

The plaintiff argued that subsection (d) tolled limitations.³⁰⁰ The earlier state and federal age discrimination claims, he maintained, had been dismissed—voluntarily, yes, but dismissed, so that his situation fit the statute literally and exactly.³⁰¹ The plaintiff was then in the position of arguing that subsection (d) applied “when the supplemental claim is refiled in federal court, as opposed to state court, and when it is voluntarily dismissed, . . . as opposed to having been dismissed by the court.”³⁰² The court disagreed.³⁰³ Instead of using the plaintiff’s textual analysis, the court considered the legislative history of the tolling provision, explaining:

Numerous authorities have recognized that the purpose of § 1367(d) was to ensure that plaintiffs did not lose their right to pursue their state law claims in *state court* in the event that the federal court failed to exercise supplemental jurisdiction over those claims.³⁰⁴

Thus, the legislative purpose did not apply to the plaintiff’s voluntary dismissals. The court therefore granted the defendant’s motion to dismiss the age discrimination claims, with prejudice, on limitations grounds.³⁰⁵ The court dismissed the plaintiff’s state-law claims without prejudice.³⁰⁶

IV. REMOVAL AND SUPPLEMENTAL JURISDICTION

Removal creates frequent problems, and it especially creates problems when it is combined with issues raised by supplemental jurisdiction. Some parties have even attempted to base removal on supplemental claims. For example, in *Ahearn v. Charter Township of Bloomfield*, a taxpayer sued the township in state

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 794–95.

300. *Id.*

301. *Id.* at 795.

302. *Id.*

303. *Id.*

304. *Id.* at 795–96 (emphasis in original).

305. *Id.* at 799.

306. *Id.*

court with state-law claims to avoid a special assessment related to a construction project.³⁰⁷ The city removed the action on the ground that the federal court was the “best” forum to hear it.³⁰⁸ The city further justified its removal by explaining that “construction grants and loans had to comply with federal laws and regulations, and the township was ‘particularly concerned’ that any delay in the state court might prevent it from getting grants and loans from higher levels of [the federal] government.”³⁰⁹

The court held that the supplemental jurisdiction statute is not a source of original subject matter jurisdiction.³¹⁰ A removal petition, said the court, may not therefore base its subject matter jurisdiction on the supplemental jurisdiction statute, even if removal would be efficient.³¹¹ The district court had erred when it denied the plaintiff’s motion to remand.³¹²

This issue may seem strange; the supplemental statute does not enable jurisdiction to exist because the defendant favors a federal forum or thinks it is “best.” But then again, a West headnote attached before *Ahearn*, covering the principle that removals cannot be based on supplemental jurisdiction, indicates that over 200 cases have cited that same idea.³¹³ Thus, the defendant’s removal in *Ahearn* must have reflected a wider belief in the defendant’s arguments than might at first be supposed, and perhaps the headnote shows that the issue might not be as surprising as it appears at first glance. Many other litigants must have made similar arguments.

Likewise, removal raised jurisdictional issues in *Reneau v. Oakwood Mobile Homes*.³¹⁴ After discovering defects with their manufactured home, the plaintiffs alleged breach of implied warranty of merchantability under Alabama law and a violation of the federal Magnuson-Moss Warranty Act in state court.³¹⁵ The defendants removed the case under §§ 1331 and 1441.³¹⁶ The court concluded that it would have jurisdiction over the supplemental claim if it had been filed originally in federal court.³¹⁷ However, the court declined to exercise jurisdiction here because the plaintiffs could not demonstrate that the state-law claim is “‘separate and independent’ from the federal claim.”³¹⁸ One can infer that the district court had uncertainty about this conclusion.

Of course, plaintiffs who file in state court and rely on federal as well as state-law claims often change their minds when defendants remove their cases.

307. 100 F.3d 451, 455 (6th Cir. 1996).

308. *Id.*

309. *Id.*

310. *Id.* at 456.

311. *Id.*

312. *Id.*

313. *Id.* at 451 (West headnote 334k11).

314. 952 F. Supp. 724 (N.D. Ala. 1997).

315. *Id.* at 725.

316. *Id.*

317. *Id.* at 728.

318. *Id.*

Finney v. Board of Commissioners of the Port of New Orleans is an example.³¹⁹ Plaintiff Finney, a crane operator, filed his suit in state court, including both state-law claims and federal in rem admiralty claims against the ship that had collided with his crane and injured him.³²⁰ The defendant Commissioners removed the case, relying on original federal jurisdiction over the admiralty claim and supplemental jurisdiction over the state-law claims.³²¹ But the light promptly dawned on Finney. He dismissed his federal admiralty claims and moved to remand.³²²

The court then decided that it did not have jurisdiction over the supplemental claims because it lacked original federal jurisdiction after the dismissal of the federal admiralty claim.³²³ In effect, the dismissal of the federal claim left the state claims with nothing to supplement. In addition, the district judge gave a second basis for a holding of no jurisdiction by declining under subsection (c) of § 1367 to exercise supplemental jurisdiction over Finney's state-law claims.³²⁴ The court remanded those claims, and they could now be brought, again, in state court.³²⁵

The *Finney* court's remand analysis prompts the question of whether courts really still analyze the *Gibbs* values when exercising their discretion to exercise supplemental jurisdiction. In *Taylor v. Peak Behavioral Health, Services LLC*, the court indeed considered each of the four *Gibbs* values before deciding to grant a remand order.³²⁶ It first addressed the value of judicial economy, stating:

Applying the *Gibbs* factors, in terms of judicial economy, this Court has not invested a "significant amount of judicial resources" and the case is very much in its early life cycle Thus, "judicial economy" favors remand.³²⁷

The court explained that "[t]he fairness factor," on the other hand, "[was] the Defendant's strongest argument because it believes that Plaintiff is engaging in forum manipulation to stay out of federal court."³²⁸ The court added that "[i]n *Cohill*, the Supreme Court has warned district courts to guard against forum manipulation when deciding whether to remand pendent state-law claims"³²⁹

319. 575 F. Supp. 3d 649 (E.D. La. 2021).

320. *Id.* at 653.

321. *Id.* at 653–54.

322. *Id.* at 654.

323. *Id.* at 667 ("[A]dmiralty claims do not 'aris[e] under the Constitution, laws, or treaties of the United States' for the purposes of § 1333 [U]nder Fifth Circuit precedent, in rem admiralty claims are not federal questions under § 1331.").

324. *Id.* at 668.

325. *Id.* at 669.

326. 735 F. Supp. 3d 784, 790–92 (W.D. Tex. 2024).

327. *Id.* at 790–91.

328. *Id.* at 791.

329. *Id.* (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988)).

“Lastly,” said the court, “‘convenience’ and ‘comity’ weigh towards remand.”³³⁰ Federal courts “are courts of limited jurisdiction and not as well equipped for determinations of state law as are state courts.”³³¹

Having weighed all the factors, the court concluded that “the scales tip in favor of remand.”³³² Thus, while disliking the plaintiff’s “manipulation,” the court decided that the law required the remand order that the plaintiff wanted.³³³

Even relatively simple cases become more complex with removal. In *Booty v. Shoney’s, Inc.*, Plaintiff Mary Booty claimed injuries caused by a slip and fall in the defendant’s restaurant.³³⁴ Her husband, Wilty Booty, claimed damages for loss of consortium.³³⁵ Mary was diverse from Shoney’s and claimed more than the minimum jurisdictional amount.³³⁶ Defendant Shoney’s timely removed the case on the basis of diversity jurisdiction.³³⁷ Wilty was also diverse, but because he claimed less than the required jurisdictional amount, he therefore moved to remand his claim to state court.³³⁸

The consortium suit by Wilty appeared to be a textbook supplemental jurisdiction claim. But Wilty’s lawyers went to the law library, probably wore out some no. 2 pencils, and found an argument to the contrary.³³⁹ The legislative history to § 1367 stated that “[t]he section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*.”³⁴⁰ Thus, they argued, there was no supplemental jurisdiction over Wilty’s claim.³⁴¹ But there was trouble in the implications of this argument. It would have required a finding that § 1367 *did not* legislatively overrule *Zahn v. International Paper Co.*—the pre-statute case that barred ancillary jurisdiction over diversity class actions with claims below the jurisdictional amount—although the Supreme Court had already held that § 1367 *did* overrule *Zahn*.³⁴² And so, after all this complexity, the court held:

[T]hat in a non-class action context, if the requirements of § 1367(a) are met and the exceptions found in § 1367(b) do not apply, then the district

330. *Id.* at 792.

331. *Id.* (quoting *Enochs v. Lampasas Cnty.*, 641 F.3d 155, 160 (5th Cir. 2011)).

332. *Id.*

333. *Id.* at 791–92.

334. 872 F. Supp. 1524, 1526 (E.D. La. 1995).

335. *Id.*

336. *Id.*

337. *Id.* at 1527–28.

338. *Id.*

339. They couldn’t use Westlaw because the Internet wasn’t well developed then. So, on to the library.

340. *Id.* at 1527 (quoting H.R. REP. NO. 101-734, at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875).

341. *Id.* at 1526.

342. *Id.* at 1527 (citing *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 301 (1973)).

court does have jurisdiction over the supplemental claim even though the jurisdictional amount is not met.³⁴³

Thus, in this simple passage, all the complexity of *Booty* disappeared, along with the fruits of the prodigious labor done by the plaintiffs' lawyers, proving once again that removal complicates issues of supplemental jurisdiction.

V. MISTAKES CAN ALSO CREATE SUPPLEMENTAL JURISDICTION

In *Caterpillar Inc. v. Lewis*, the Supreme Court approved what might be called "jurisdiction by mistake."³⁴⁴ There, Lewis sued Caterpillar, and a local dealer, Wayne Supply Company, in state court for personal injuries sustained while operating a bulldozer.³⁴⁵ Caterpillar was diverse from the plaintiff because it was a Delaware corporation with its principal place of business in Illinois, but Plaintiff Lewis and Defendant Wayne Supply were both citizens of Kentucky.³⁴⁶ At this point, there was no diversity jurisdiction. Liberty Mutual Insurance Group, a Massachusetts corporation, intervened and asserted supplemental subrogation claims against both Lewis and Wayne Supply for workers' compensation insurance benefits that it had paid to Lewis for the accident.³⁴⁷ Then, Lewis settled with Wayne Supply, arguably resolving the diversity issue and making the case removable—or at least so Caterpillar thought.³⁴⁸

With the claims in this position and the removal deadline nearing, Caterpillar removed the case with one day to spare.³⁴⁹ Lewis filed a timely motion to remand, arguing that Liberty Mutual's remaining supplemental claim against Wayne Supply destroyed complete diversity.³⁵⁰ The district court proceeded with the case anyway, even though the Supreme Court later assumed that the removal had been improper.³⁵¹ Finally, Liberty Mutual settled with

343. *Id.* at 1572.

344. 519 U.S. 61, 64 (1996).

345. *Id.* at 64–65.

346. *Id.*

347. *Id.* at 65.

348. *Id.* at 65–66.

349. *Id.* at 65; see 28 U.S.C. § 1446(b).

350. *Caterpillar*, 519 U.S. at 65–66.

351. *Id.* at 70 (treating this conclusion as a "given"). The author has always believed that this conclusion was wrong. Liberty Mutual indeed had subrogation claims against Wayne and against Lewis, but those claims were not in favor of Lewis. Rather, Liberty Mutual intervened recovery from Lewis' settlement and from Wayne Supply directly. The subrogation claim against Wayne Supply was not adverse to Lewis, who had already settled with Wayne Supply, making that claim completely irrelevant to Lewis. Liberty Mutual's subrogation claim against Lewis was indeed adverse to him, but complete diversity already existed between the two. Simply put, Liberty Mutual's claim against Wayne Supply did not destroy diversity because it did not make Wayne Supply adverse to Lewis, and Liberty Mutual's claim against Lewis, although adverse, supported diversity jurisdiction. Perhaps this is why the Supreme Court did not analyze this diversity issue but simply assumed that there was no diversity and took this conclusion as a "given."

Whayne Supply, eliminating the last impediment to diversity jurisdiction and placing the case squarely within the federal court's jurisdiction.³⁵² The parties tried the case to a jury.³⁵³ Lewis lost the verdict and appealed to the Sixth Circuit.³⁵⁴

The Supreme Court accepted two findings of the lower courts as "givens."³⁵⁵ First, that the district court's refusal to remand with Whayne still in the case was improper.³⁵⁶ Second, that diversity was not present at the time of removal, but "[b]eyond question, . . . there was in this case complete diversity, and therefore federal subject-matter jurisdiction, at the time of trial and judgment."³⁵⁷ Caterpillar argued that because jurisdiction was present at the end, the Court should affirm the district court's judgment.³⁵⁸ But Lewis vigorously disagreed.³⁵⁹ He argued that:

[Caterpillar's preferred outcome] would disfavor diligent plaintiffs who timely, but unsuccessfully, move to check improper removals in district court. Further, that course would allow improperly removing defendants to profit from their disregard of Congress' instructions, and their ability to lead district judges into error.³⁶⁰

Lewis explained that he "preferred state court to federal court based on differences he perceived in, *inter alia*, the state and federal jury systems and rules of evidence."³⁶¹ He could also have mentioned greater judicial control of proceedings in federal court, and he could have indicated the court's two law clerks, who were recent graduates, were perhaps taught to project alternative outcomes, thereby producing delays and costs. Nevertheless, the Supreme Court decided in favor of Caterpillar on grounds of judicial efficiency, explaining that "[t]o wipe out the adjudication post-judgment . . . would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice."³⁶²

The Court's ultimate response to Lewis' argument was to conjecture that litigants would not wrongfully remove because the district judge would promptly remand—and would fear removing because the judge might get angry(?!). The Court said:

352. *Id.* at 66–67.

353. *Id.*

354. *Id.*

355. *Id.* at 70.

356. *Id.*

357. *Id.* at 70, 73.

358. *Id.* at 70.

359. *Id.* at 73.

360. *Id.* at 74–75.

361. *Id.* at 75 n.14.

362. *Id.* at 77.

The well-advised defendant, we are satisfied, will foresee the likely outcome of an unwarranted removal—a swift and nonreviewable remand order, . . . attended by the displeasure of a district court whose authority has been improperly invoked.”³⁶³

This last remark by the Court is nothing short of silly. Litigators self-select for toughness, and they are perfectly willing to ignore judicial “displeasure” whenever it is strategic to do so.³⁶⁴

The author has personally represented plaintiffs in two cases involving unmeritorious removals: one in which the defendant removed on the ground that the plaintiff’s state-law, plain vanilla contract claims allegedly became “federal” because the parties were contractors of NASA and therefore the case involved an allegedly strong federal interest in space exploration,³⁶⁵ and another in which similarly unvarnished state-law claims allegedly became “federal” because of a general federal interest in airlines and aviation.³⁶⁶ With these kinds of arguments, almost any state-law claim becomes federal because one can conjure up a federal interest in some general aspect of any case. Both cases were remanded, but only after enormous expenses for the plaintiffs and long delays. There was no judicial expression of displeasure in either case.

Reconsideration of jurisdiction in *Caterpillar* exemplifies the metaphysical confusion inherent in supplemental jurisdiction. One can ask, then, whether proper federal jurisdiction actually extended to the entire case at the time of removal? The Supreme Court sidestepped this issue by assuming, as a “given,” that the removal was wrongful.³⁶⁷ But the Supreme Court’s assumption of wrongful removal was perhaps itself wrong. After Lewis settled with Whayne Supply, original federal jurisdiction existed in the plaintiff’s claim because the plaintiff, Lewis, was suing only one defendant, Caterpillar, which was diverse from the plaintiff.³⁶⁸ Subsection (b) did not apply and did not oust supplemental jurisdiction because the plaintiff had not added any new party to its claims; its suit against Caterpillar had existed from the start. And finally, the claim in intervention asserted by Liberty Mutual was a sound supplemental claim. This

363. *Id.* at 77–78.

364. *Cf. In re Kramer*, 282 F.3d 721, 726 n.2 (6th Cir. 2002) (lawyer attempted to defend himself against sanctions by explaining that his conduct was simply “part of being a tough litigator”); *Aerochem Int’l, Inc. v. Buirkle*, 767 F. Supp. 1243, 1245 (S.D.N.Y. 1991) (during settlement conference, lawyer referred to himself as a “tough East Coast litigator”).

365. The issue produced no opinion and was settled too far in the past for the author to be able to locate any citation. The case is memorialized, however, in an excerpt on another subject in an online supplement to the author’s civil procedure casebook. *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE: 2020 SUPPLEMENT, Item 7.1 (7th ed. Carolina Academic Press 2020), <https://caplaw.com/sites/cp7> [<https://perma.cc/X57Y-P7UK>] (discussing this case and showing discovery in the case).

366. Similarly, this issue produced no opinion and was settled too far in the past for the author to be able to locate any citation.

367. *Caterpillar*, 519 U.S. at 70.

368. *Id.* at 65.

reasoning, if credited, indicates that the removal was proper, contrary to the Supreme Court's assumption. The case was simultaneously removable and nonremovable.

But in any event, *Caterpillar* supports the rule that judicial mistakes can create federal jurisdiction, particularly if judicial efficiency is involved. And so, could a mistake about supplemental jurisdiction create federal jurisdiction? Perhaps, if a district court has overlooked the need to dismiss a supplemental claim? Perhaps, if the judge has missed a federal claim over which there is no jurisdiction?

The answer is yes, it can happen. In *Lapides v. Board of Regents*, the plaintiff was a university professor who sued the state over a personnel decision against him.³⁶⁹ The state attorney general removed the case.³⁷⁰ The removal waived the state's immunity from federal jurisdiction under the Eleventh Amendment, which the attorney general lacked authority to waive.³⁷¹ The Court had earlier held that a state wrongfully sued in federal court, in violation of the Eleventh Amendment, did not subject itself to federal jurisdiction.³⁷² But in contrast, the attorney general's positive act of removal here was a voluntary waiver of the immunity, and it created federal jurisdiction, even if by mistake.³⁷³ Therefore, federal power remained in the court because of the mistake unless the judge exercised the discretion to remand.³⁷⁴

Furthermore, in *Executive Software*, the Ninth Circuit struggled with the question of whether it should issue a writ of mandamus to correct the district court's remand of the plaintiffs' state-law claims.³⁷⁵ The district court had made it clear that it was exercising its discretion to remand, but it provided no explanation of its reasoning about which or the four factors in subsection (c) it was using.³⁷⁶ The Court of Appeals held that the district courts could decline supplemental jurisdiction only "under one of the four criteria specifically enumerated in § 1367(c)."³⁷⁷

If there was any determinable valid reason to remand, "the fact that the district court applied the wrong legal standard would not require us necessarily to vacate the remand order."³⁷⁸ Thus, a mistake about which reason caused the remand could still leave the district court with jurisdiction. Here, however, this principle was inapplicable because the district court had "failed to provide

369. 535 U.S. 613, 616 (2002).

370. *Id.*

371. *Id.* at 617–18.

372. *Id.* at 618 (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)).

373. *Id.* at 622.

374. *Id.*

375. *Exec. Software N. Am., Inc. v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 24 F.3d 1545, 1548–49 (9th Cir. 1994).

376. *Id.* at 1551–52.

377. *Id.* at 1555–56.

378. *Exec. Software N. Am., Inc. v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 15 F.3d at 1496 (9th Cir. 1994), *withdrawn and superseded by*, 24 F.3d 1545 (9th Cir. 1994).

reasons” for its remand.³⁷⁹ Judicial efficiency concerns were important because splitting the claims between state and federal courts “would impose a significant burden on both parties.”³⁸⁰ Thus, a writ of mandamus was appropriate to re-create federal jurisdiction and to require the district court to reconsider discretionary remand.³⁸¹

VI. UNFAIRNESS AND OTHER PROBLEMS

There are many contradictions, problems, and instances of unfairness in the supplemental jurisdiction process.

First, there is the problem of time delays. Sometimes the occasion for remand or dismissal of state-law claims occurs at a late stage in the litigation process, perhaps years after the case was filed.³⁸² The delay may mean that witnesses become unavailable or forgetful, documents are missing, and real evidence becomes tainted. The author has personally been involved in cases in which the local police property room, after long delays, simply lost important articles that should have been used as evidence at trial.

Second, delay means mistakes. Discovery and preparation of a case for trial, when the kind of court that will try the case is uncertain, requires decisions today that may be wrong when the case goes to a jury.³⁸³ Federal courts and state courts are very different in the trial of cases.³⁸⁴ Plaintiffs, especially personal injury plaintiffs, tend to prefer state court.³⁸⁵ Federal judges have more power to influence juries. They can and do even comment on the evidence, whereas state judges typically are required more to remain neutral.³⁸⁶ One message from an employment law defense periodical suggested a “mantra” for defendants: “federal court good; state court bad.”³⁸⁷ Uncertainty about how to prepare for trial, whether in state court or federal, is difficult for lawyers on both sides.

379. *Exec. Software*, 24 F.3d at 1562.

380. *Exec. Software*, 15 F.3d at 1496.

381. *Exec. Software*, 24 F.3d at 1562. The court decided that the order was reviewable by mandamus in spite of § 1447(d) of the removal statute, which prohibits review “by appeal or otherwise.” See also *Exec. Software*, 15 F.3d at 1487–88.

382. See, e.g., *supra* Part V (analyzing the *Executive Software* case, which found that remand “would impose a significant burden on both parties”).

383. See *supra* Part V. In that case, the question whether state or federal courts would handle the trial remained unclear long after the case had been removed.

384. See, e.g., *supra* Part IV (analyzing the *Caterpillar* case and showing reasons why the plaintiff wanted state court jurisdiction because of differences in trial processes between state and federal courts).

385. See *supra* Part IV (explaining this preference).

386. See *United States v. Aboshady*, 951 F.3d 1, 11 (1st Cir. 2020) (explaining federal judge’s power to comment on the evidence); cf. *Riley v. State*, 875 So. 2d 352, 358 (Ala. Crim. App. 2003) (state judge may not comment on the evidence); *State v. Dykstra*, 110 P.3d 758, 761 (Wash. Ct. App. 2005) (same).

387. *Wage and Hour: Fort Worth Federal Court Sends Federal Wage Claim to, Gasp, State Court*, 9 No. 6 TEX. EMP. L. LETTER (June 1998).

Third, beside those issues, one cannot know that a verdict won or lost, whether in state court or federal, will stand up on appeal. The *Caterpillar* holding appears to say that the courts will honor judgments ultimately reached, if possible, but it applies in only a narrow situation: when federal jurisdiction is present at the end of a case even though not present earlier.³⁸⁸ What of a result short of trial: a holding that a federal removal of supplemental claims was wrong? Or what of the opposite situation: when a state-court holding is based on a remand, which is ultimately recognized as wrongful in a state-court or federal appeal? Uncertainty follows supplemental jurisdiction like the uncertainty that follows whether a spacecraft will fly.

Fourth, though it seems a nice way to handle a policy decision, reliance on the balance of the *Gibbs* values creates even more uncertainty for the litigants, the parties to the dispute.³⁸⁹ How will a court come down on a decision that requires balancing “judicial economy, convenience, fairness, and comity?”³⁹⁰ One court may emphasize judicial economy while another prefers fairness, whatever that means in this context, or comity toward state policy? This policy, calling for a vague outcome when jurisdictional guidelines ought to be clear, is ultimately unfair to one litigant or the other, even if fairness is one of the objectives.

In these situations, it may be either plaintiff or defendant who is disadvantaged. And there should be better solutions.

CONCLUSION

A. Subsection (a) of the Supplemental Jurisdiction Statute

Subsection (a) of the supplemental jurisdiction statute is the basic rule that federal jurisdiction includes a claim that is part of the same case or controversy as the original claim.³⁹¹ If it is within the constitutional power to include it, it is included.³⁹² This part of the statute has worked well and has little reason to be amended. The next parts of the statute, however, do not share in this accolade.

388. See, e.g., *supra* Part V (discussing the *Caterpillar* case, in which this phenomenon occurred).

389. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966); see also *supra* Part II.C.2 (discussing the *Gibbs* values).

390. See *supra* Part II.C.2.

391. See *supra* Part II.A (discussing subsection (a)).

392. See *supra* Part II.A (discussing breadth of the statute, extending to whatever the Constitution permits).

B. Subsection (b) of the Supplemental Jurisdiction Statute

Subsection (b) of the supplemental jurisdiction statute, the codification of *Owen v. Kroger*, is a bad piece of legislation.³⁹³ It says that a plaintiff may not join a claim against another party that is present in the case but is non-diverse.³⁹⁴ As illustrated above, if *A* sues *B* and *B* impleads *C*, *A* cannot join a claim against *C* unless the claim is either a federal question claim or a diversity claim.

The *Gibbs* values, if applied to this subsection, would all be negatively affected, except perhaps comity toward the states.³⁹⁵ Judicial economy is not enhanced by this subsection, which splits a claim between two courts; convenience is not served by sending parts of the same case into two different judicial systems; fairness is not increased because both parties' efforts in resolving the case are unnecessarily duplicated; and comity toward the states is a mixed question because, although the federal courts theoretically are deferring to the state courts with part of the claim, the reality is that they are transferring an ungainly piece of a case to the state courts.

The basis of this subsection is said to be that Congress wanted to follow the courts in honoring the diversity statute.³⁹⁶ It is true the *Aldinger* and *Owen v. Kroger* cases were based on this concept.³⁹⁷ Since *Strawbridge v. Curtiss*,³⁹⁸ the rule has been that diversity must be complete, and, of course, the kind of supplemental claim disallowed in subsection (b) would not fit that requirement. But every exercise of supplemental jurisdiction is just like the claims prohibited by subsection (b).³⁹⁹ Supplemental claims have no basis in federal jurisdiction, and they lack complete diversity. By definition, every supplemental claim is one over which the federal courts would not otherwise have jurisdiction absent supplemental jurisdiction.⁴⁰⁰ The rationale of keeping the diversity statute intact does not make sense because it would disallow every supplemental claim if consistently applied.⁴⁰¹

Above all, subsection (b) is wasteful of both judicial and private resources. A claim that could have been decided with other claims to which it is closely related cannot be decided together with them. It will have to be asserted, if at all, separately, in a state court. The state court will have to duplicate the federal court's understanding of the background to the dispute. And the parties will need

393. See *supra* Part III.B (discussing subsection (b)).

394. See *supra* Part III.B (explaining how the statute operates).

395. See *supra* Part III.C.2 (explaining the *Gibbs* values).

396. *Hearings on H.R. 5381 and H.R. 3898*, *supra* note 175.

397. See *supra* Part I.C.3 (discussing these cases).

398. 7 U.S. 267, 267 (1806).

399. See *supra* Part II (discussing the basis of supplemental jurisdiction in subsection (a)).

400. 28 U.S.C. § 1367.

401. See *supra* Part II (discussing the enactment of the statute); see also *supra* Part III.B.2 (discussing limits on the statute).

to duplicate their efforts and expenses either to settle or try it. The parties will have to extend resources disputing this claim.⁴⁰²

It would be a positive development if Congress were to amend the statute and abolish subsection (b). But surely the ship has sailed on this issue, and it sailed long ago. The prospect of this improvement is nil.

C. Subsection (c) of the Supplemental Jurisdiction Statute

Subsection (c) of the supplemental jurisdiction statute contains four reasons for the federal district courts to decline to exercise supplemental jurisdiction. The first three reasons, subsections (c)(1) through (3), allow remand or dismissal because of novel or complex state law, supplemental claims that will predominate, or the disappearance of the jurisdictional claims.⁴⁰³ These provisions are reasonably specific given their purpose, although the district courts will still have a somewhat mushy decision to make under any of them. Subsection (c)(4), which invokes “exceptional circumstances,” is a catchall that will require more ambiguous weighing of factors.

In this regard, the clash of issues involved in the *Gibbs* values—judicial economy, convenience, fairness and comity—is particularly productive of uncertainty.⁴⁰⁴ With these four vague factors or “values,” which are to be melded together and “balanced” in no particular way, who can predict the outcome? One district court may emphasize judicial economy, while another, in an identical case, emphasizes fairness, whatever that means (fairness to which party?), and yet another district court emphasizes comity toward the laws of the states.⁴⁰⁵

Both subsection (b) and subsection (c) can produce lengthy time periods of judicial indecision, or non-decision. These delays by district courts can be particularly unfair if they result in decisions about remand or dismissal late in cases that surprise one party or the other. Therefore, it would be useful if Congress amended the supplemental jurisdiction statute to encourage early decision.

But this kind of amendment would raise pragmatic questions. District courts are very, very busy. Judges must—absolutely must—adopt priorities about which issues to decide now and which to leave for later because sometimes issues left for later disappear in light of what happens between now and then. A rule that forces early decisions may mean prioritizing less important issues.⁴⁰⁶ And yet, some rules can successfully impose deadlines, such as limits on

402. See *supra* Part III.B.2 (discussing the negative effects of subsection (b)).

403. See *supra* Part III.C (discussing subsection (c)).

404. See *supra* Part III.C.2 (discussing the *Gibbs* values).

405. See *supra* Part III.C.2 (discussing these problems).

406. This is because courts may decide issues early if encouraged to do so, and these decisions may be less important than others facing the judge at the same time.

deciding time for post-judgment motions or appellate steps.⁴⁰⁷ Rules that encourage early decision of issues about dismissal or remand would be analogous.

This kind of change in the statute, however, does not really force decisions so much as it describes the consequences of the absence of a decision.⁴⁰⁸ Perhaps this kind of rule could work well in the context of subsection (c) of the supplemental jurisdiction statute.

Therefore, Congress might do well to adopt an amendment to subsection (c) of the supplemental jurisdiction statute like the following:

If the district court decides to exercise discretion to decline jurisdiction over a supplemental claim, it shall do so within ninety (90) days⁴⁰⁹ of the assertion or removal of the claim. If the district court does not enter an order declining jurisdiction during this ninety (90) day period, the court will be deemed to have decided not to decline jurisdiction and cannot decline jurisdiction thereafter except for good cause shown.⁴¹⁰

The court shall have power, within its discretion, to extend this time period for up to 120 days by an order issued within the ninety-day time period. If the court has not acted, then, within this 120-day period to dismiss or remand the supplemental claims, the court will be deemed to have decided not to decline jurisdiction. The court may not, after such 90-day or 120-day time, decline jurisdiction, except for good cause shown.

The drafting of such a provision will be complicated. But there will be rewards. This kind of provision will not cure all problems in the supplemental jurisdiction jurisprudence, but it will remove a significant source of unfairness.

407. *See, e.g.*, FED. R. APP. P. 4(a)(4)–(5) (limiting time for judge to allow later filing of notice of appeal).

408. *See id.* (meaning that no decision by the judge means no later filing of notice of appeal is allowed).

409. The 90-day time limit is a guesstimate by the author, subject to revision in light of input during the legislative process.

410. Good cause is a relatively high standard. *Cf.* FED. R. CIV. P. 4(m) (restricting judge's allowance of late service of complaint by good cause requirement); *see also* Gelin v. Shuman, 35 F.4th 212, 218 (4th Cir. 2022) (holding that open records request and search of telephone records to find defendants in wrongful death case were not sufficient diligence by plaintiffs to show good cause).