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SUPPLEMENTAL SERENDIPITY: CONGRESS’ ACCIDENTAL IMPROVEMENT OF SUPPLEMENTAL JURISDICTION

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I. INTRODUCTION

A. Background

In 1990, largely in response to a dare from the Supreme Court,1 Congress took its first institutional step2 into the murky waters3 of

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1See infra note 83 and accompanying text.

2The doctrine of supplemental jurisdiction—historically referred to under the twin banners of pendent and ancillary jurisdiction—has been almost exclusively the province of the federal caselaw and not legislation. See, e.g., Thomas D. Rowe, Jr., 1367 and All That: Recodifying Federal Supplemental Jurisdiction, 74 Ind. L.J 53, 54 (1998) (“The law governing the federal courts’ supplemental jurisdiction, previously described in its various parts as pendent and ancillary jurisdiction, had long been developed by judicial decision with virtually no direct legislative focus on the subject.”). Professor Rowe noted one limited exception, 28 U.S.C. § 1338(b), which expressly authorized supplemental jurisdiction over claims for unfair competition under state law “when joined with a substantial and related claim” under federal copyright, patent and trademark laws. Id. at 54 n.6. See also James E. Pfander, Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism, 148 U. Pa. L. Rev. 109, 117 (1999) (“The Supreme Court had developed the two doctrines in a series of decisions running well back into the nineteenth century without much in the way of explicit guidance from Congress and without identifying an entirely satisfying conceptual or statutory basis for them.”).

3Rowe, supra note 2, at 55 (“Some Supreme Court decisions were questionable in their reasoning and effects, and the field suffered from lack of clarity in as yet unilluminated corners.”); See, e.g., Finley v. United States, 490 U.S. 545, 556 (1989) (“[O]ur cases do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred.”); Id. at 575 (Stevens, J., dissenting) (“I fear that [the majority’s approach to supplemental jurisdiction] will
supplemental jurisdiction by enacting a statute that provided, generally, for federal court jurisdiction over all related claims that are part of the same case or controversy as claims in the action within the court’s original jurisdiction. 4 This federal supplemental jurisdiction statute, 28 U.S.C. § 1367 (Supplemental Jurisdiction Statute), has been nearly

4. 28 U.S.C. § 1367(a) (2000); Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, Congress Accepts Supreme Court’s Invitation to Codify Supplemental Jurisdiction, 74 JUDICATURE 213, 215 (1991) (“Section 1367(a), for example, generally authorizes the district courts to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim that provides the basis of the district court’s original jurisdiction.”).

Professor Mengler was one of the primary drafters of § 1367. See infra notes 93-96, 110, and accompanying text.

5. 28 U.S.C. § 1367 provides, in relevant part:

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

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

I have not recited the remaining provisions of § 1367 because their inclusion was not necessary to the discussion in this article. However, it is worth noting that subsection (c) permits the courts to exercise their discretion to refuse to exercise supplemental jurisdiction. One interesting, and open, issue under subpart (c) is whether the enumerated factors are different from those recognized by the pre-$§1367$ caselaw. Compare Brazinski v. Amoco Petrol. Additives Co., 6 F.3d 1176, 1181 (7th Cir. 1993) (noting that § 1367(c) codifies Gibbs factors) with Executive Software N. Am., Inc. v. U.S. Dist. Ct., 24 F.3d 1545, 1558 (9th Cir. 1994) (holding, in effect, that subpart (c) provides narrower grounds for discretionary refusal of supplemental jurisdiction than contemplated by Gibbs). See also La Sorella v. Penrose St. Francis Healthcare Sys., 818 F. Supp. 1413, 1415 (D. Colo. 1993) (holding, in effect, that subpart (c) provides narrower grounds for discretionary refusal of supplemental jurisdiction than contemplated by Gibbs). Subpart (d) provides for a tolling of the applicable statute of limitations until 30 days after a claim covered by (a) is dismissed, unless state law provides for a longer tolling period. The Supreme Court held recently that subsection (d) was constitutional under the Necessary and Proper clause of Article I, against challenges that it could not be applied in the face of inconsistent state law on tolling. See Jinks v. Richland County, 538 U.S.
universally derided by legal scholars\textsuperscript{6} and numerous judges\textsuperscript{7} since its enactment thirteen years ago, including by its own scholarly drafters.\textsuperscript{8} As will be discussed in this article, much of the criticism of the statute seems to be borne of the fact that it has effected substantially more than a mere codification of prior case law.\textsuperscript{9} Accordingly, Congress effectively displaced federal judges as the sole craftsmen in shaping the contours of supplemental jurisdiction.\textsuperscript{10}

At the core of the debate about the Supplemental Jurisdiction Statute lies a deep circuit split over whether federal courts should enforce the statute according to its terms or resort to its legislative history to enforce instead what Congress surely must have meant. At stake are not only questions as to the continued viability of such jurisdictional juggernauts as \textit{Zahn v. International Paper}\textsuperscript{11} and \textit{Clark v. Paul Gray, Inc.}\textsuperscript{12} but even the complete diversity rule of \textit{Strawbridge v. Curtiss}.\textsuperscript{13} Further, this debate highlights the tensions between Justice


\textsuperscript{7} See generally infra Section IV.

\textsuperscript{8} See, \textit{e.g.}, Rowe, supra note 2, at 56 (“At least until congress can be persuaded to revisit the statute, any error in drafting is chiseled in stone.”). Professor Rowe was one of the principal drafters of § 1367, and in the foregoing article he proposed revisions to the statute to clear up ambiguities and to change results otherwise dictated by the current language of the statute. \textit{See infra} notes 93-96, 110, and accompanying text.

\textsuperscript{9} See infra Section III.

\textsuperscript{10} One of the statute’s drafters, Professor Rowe, hints at this anti-legislative bias in an article proposing a rewriting of § 1367. \textit{See Rowe, supra note 2, at 56 (“Experience with the codification effort when it took place in 1990 had left me, even before controversy about the statute mounted in the following year, with doubts about whether the area was better treated by legislation or by decisional law.”). \textit{See also Pfander, supra note 2, at 160 (lamenting the fact that “the rigorous textualism of Finley and Abbott Laboratories will ultimately displace the judicial role” in shaping concepts of supplemental jurisdiction.).}

\textsuperscript{11} 414 U.S. 291 (1973).

\textsuperscript{12} 306 U.S. 583 (1939).

\textsuperscript{13} 7 U.S. 267 (1806).
Scalia and the textualist camp, on the one hand, and others advocating for a more prominent use of legislative history in statutory exegesis. Even the United States Supreme Court found itself unable to resolve the debate over the statute’s interpretation after deadlocking four-to-four, with Justice O’Connor recusing. Thus, the conflagration has continued to burn with tempers sometimes boiling over on both sides. The continuing inability of the circuit courts to get on the same interpretational page increases the likelihood of the Supreme Court revisiting this issue again in the near future.14

Regardless of Congress’ possible intentions to the contrary, a “plain reading”15 of the statute dictates several significant, though not necessarily catastrophic, changes to the doctrine of supplemental jurisdiction. Nevertheless, many federal judges appear dismayed to see any perceived legislative undermining of the substantial judge-created limitations on federal court jurisdiction erected over many decades of federal court jurisprudence. Legal scholars also have sung a similar chorus, possibly miffed at the idea that Congress, perhaps by accident, might have achieved some actual advance in the field of federal court jurisprudence. Even the slight majority of federal circuit courts that have committed to enforcing the “plain meaning” of the Supplemental Jurisdiction Statute often do so begrudgingly and more out of a sense of jurisprudential duty than desire.16 In short, if published cases and law review articles are any indication, this statute’s friends and admirers could enjoy a cocktail party on the balcony of a mid-sized Manhattan balcony.17


In a blistering dissent from the Eleventh Circuit’s recent denial of rehearing en banc on the issue of how to interpret § 1367, Judge Tjoflat pleaded with the Supreme Court to resolve the debate of this statute:

Regardless of the underlying merits of the dispute, however, this issue is one where careful judicial consideration should not end with a three-judge panel, or even an en banc sitting of a circuit court of appeals, but with the Supreme Court of the United States. In light of its own criteria for granting certiorari, the Court should issue an authoritative determination as to the proper interpretation of § 1367.


15. See infra notes 246-56 and accompanying text.

16. See, e.g., In re Abbott Labs, 51 F.3d 524, 529 (5th Cir. 1995) (“[T]he wisdom of the statute is not our affair . . . .”). Even some courts that defend the need to apply the statute as written admit that “[w]hether § 1367(b) is a model drafting exercise may be doubted.” Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 932 (7th Cir. 1996).

17. Although I have seen no empirical evidence, as a lawyer in practice I have seen much anecdotal evidence that many practicing trial lawyers appreciate the codification of supplemental
Whatever the motivation, critics of the Supplemental Jurisdiction Statute have called for its legislative demise or overhaul—including one of its original drafters. Short of achieving this goal, courts and scholars have suggested other mechanisms for defeating the statute’s advances in jurisdiction suggested by the statute’s plain language. These devices consist of such things as declaring the statute vague—even in instances when clearly it is not—to justify an interpretation of the statute based upon its murky legislative history rather than its language, or declaring the result of a straightforward application of the statute to lead to absurd results—similarly justifying the trumping of the language with its legislative history. One scholar has even come up with the novel suggestion of suspending the well established and generally applied rules of statutory interpretation and adopting a different set of rules—“sympathetic textualism” to permit a more satisfying interpretation of the much-maligned statute.

These criticisms of the statute, and the various proposals of novel tools for altering the result the statute’s application would otherwise require, are indeed ironic. After all, the impetus for Congress’ first significant foray into consciously legislating in the area of supplemental jurisdiction came at the behest of federal court scholars upset with the Supreme Court’s controversial, jurisdiction-limiting decision in *Finley v. United States*. In that decision, the Supreme Court invited Congress to overrule the Court’s decision through legislation if Congress did not agree with the result. After Congress acceded to this request and passed § 1367, legal scholars and many federal judges became upset at the notion that the statute should be given jurisdiction in § 1367. I have personally utilized § 1367 to help escape more than one forum where neither my client nor I perceived that we had any chance of obtaining a fair hearing on class certification. I share this not only as an admission of possible bias but also to highlight the absence in the published literature of any indication that practitioners are up in arms over § 1367.

18. Two of the primary critics of § 1367 early on called for Congress to “immediately repeal section 1367 or adopt a simple amendment which restores” the prior state of the caselaw. Arthur & Freer, *Burnt Straws*, supra note 6, at 989.
19. See Rowe, supra note 2.
20. See generally infra Section IV.
21. See Pfander, supra note 2.
22. Id. at 160-61 (Admitting that the result-oriented goal of his interpretational approach was to avoid the “unsetting and confusing” decisions required by the textual approach to interpreting the statute).
23. Prior to *Finley*, federal courts had been willing to assume congressional intent to permit supplemental jurisdiction when interpreting various jurisdictional statutes that did not expressly address supplemental jurisdiction. *Id.*
25. *Id.* at 556.
any authoritative reading and, in effect, tie the hands of federal judges’ efforts to further evolve the doctrine of supplemental jurisdiction.

In this article, I contend that the Supplemental Jurisdiction Statute should be given a plain-language interpretation because the reasons underlying the traditional rules of statutory interpretation are sound, this interpretation actually achieves the desirable goal of enhancing the consistency of federal court jurisprudence in this field, and because such a reading can be done without causing institutional harm and disrupting the business of the federal courts. In short, the Supplemental Jurisdiction Statute is neither broke nor in need of major overhaul or abandonment.

B. Adding Context to the Debate

It is appropriate to preface a discussion of the Supplemental Jurisdiction Statute with an example of a litigation context typical of that in which the statute’s interpretation has arisen. Outside litigation counsel for XYZ Corporation receives a late Friday afternoon fax from the client enclosing an original petition filed against XYZ in Brownsville, Texas, state district court. Ostensibly this appears to counsel to be a fairly manageable lawsuit involving a claim that XYZ committed a deceptive trade practice through alleged misleading advertisements of XYZ’s product to consumers. The named plaintiffs ask for their money back from the transactions, punitive damages, and statutory attorney’s fees available under Texas law. One plaintiff seeks damages in the total sum of $100,000 while the other plaintiff’s total damages sought is only $50,000.

What brings counsel to her feet, however, is when she reads that the plaintiffs not only sue in their own behalf but also on behalf of a putative class of similarly situated consumers of XYZ’s product across the nation. Anyone remotely familiar with litigation in this jurisdiction should be aware of the perception among practicing trial lawyers that Brownsville is an unlikely place to avoid class certification—either in the trial court or on appeal to the intermediate court of appeals in Corpus

26. As is discussed infra notes 311-17 and accompanying text, another possible good achieved through honoring Congress’ intent as manifested in its official legislative pronouncements is to expand federal court jurisdiction over a class of cases for which federal courts are, from a policy perspective, more appropriate forums.

27. Indeed, this hypothetical combines the contexts of the first two significant appellate decisions construing the supplemental jurisdiction statute. See, e.g., In re Abbott Labs, 51 F.3d 524 (5th Cir. 1995), aff’d sub. nom. Free v. Abbot Labs, 529 U.S. 333 (2000) (Rule 23 class action); Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928 (7th Cir. 1996) (Rule 20 joinder).
Christi—and also a poor place to have any shot at obtaining summary judgment for a defendant in a class action. Such a perception is not limited to just Brownsville, Texas, either. Indeed, most plaintiff class action attorneys “want to avoid federal court like the plague”28 because “[f]ederal judges are widely viewed as being less lenient toward class actions than their colleagues in the state courts, particularly on the key issue of whether or not to certify a class so the case may proceed.”29 Rightly or wrongly deserved, since the vast majority of civil cases are settled rather than litigated to their final end, perception is as important to counsel and clients as reality. Thus, counsel advises XYZ that its only chance to avoid a significant settlement obligation, perhaps another coupon-type class action settlement where the class receives little and the plaintiff’s counsel receives much,30 is to get the case removed to federal court.

Under settled federal jurisprudence,31 complete diversity exists in this hypothetical case because the named class representatives are citizens of Texas and the defendant is not.32 Since Ben-Hur,33 the citizenship of unnamed class members is irrelevant to determining whether Strawbridge’s34 complete-diversity requirement is satisfied. The only obstacle to removal, therefore, is satisfying the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332, and this obstacle is present in two respects. First, one plaintiff’s claim meets this threshold while the other plaintiff’s claim does not. Since at least 1939, the law


29. Id.

30. This phenomenon is not just assailed by corporate defendants but is widely criticized by consumer rights’ advocates as well, who object to the class members receiving little or no benefit from many if not most class actions. See id. In Neil’s article, she quotes one plaintiff class action attorney as referring to this process as “just another milking of the system by professionals, in this case lawyers.” Id. This phenomenon is more than just academic conjecture or the hyperbolic ranting of reformers. During my career in private practice, I was involved in negotiating these kinds of class action settlements on behalf of clients who felt the squeeze of unfavorable state-court forums.


32. The hypothetical case is as follows:

Plaintiff #1 (Tex.) (≥ $75,000), and
Plaintiff #2 (Tex.) (≤ $75,000), and
Absent Class (50 states) (≤ $75,000)

v.

Defendant (N.Y.)


34. Strawbridge v. Curtiss, 7 U.S. 267 (1806).
has been established that each plaintiff must, independently, meet the amount in controversy requirement of Section 1332. Second, the amount in controversy hurdle is also problematic for the remainder of the absent class members as it appears that most of them would possess claims valued at significantly less than the named plaintiffs. Since 1973, the result would be that the case is nonremovable because original jurisdiction would not lie for the entire case.

However, according to the slim majority of federal circuit courts of appeal to have opined on the subject, Congress’ “codification” of the doctrine of supplemental jurisdiction in 1990 has, to the surprise of the statute’s drafters, apparently changed this result. In essence, these circuits have held that because diversity jurisdiction exists on the “anchor claim”—that is, the claim by at least one of the named class representatives against XYZ Corporation—the statute’s clear and unambiguous language permits the federal court to exercise supplemental jurisdiction over the remaining claims since they clearly form one constitutional case or controversy.

Thus, as long as this case is filed in states such as Texas (Fifth Circuit), Illinois (Seventh Circuit), Virginia (Fourth Circuit), California (Ninth Circuit), or Florida (Eleventh Circuit), counsel for XYZ will be able to successfully remove this hypothetical case to federal court. On the other hand, if this case is filed instead in an unfavorable venue within states such as Colorado (Tenth Circuit), New Jersey (Third Circuit), or Missouri (Eighth Circuit), counsel would be advised to commence settlement negotiations immediately, as any efforts to remove to federal court will be quickly rebuffed. In states such

37. See 28 U.S.C. § 1441(a) (stating that original jurisdiction is required in order to remove a case to a district court of the United States).
38. Rowe et al., supra note 4, at 214.
39. Id. at 216.
40. See infra Section IV.
42. See In re Abbott Labs, 51 F.3d 524 (5th Cir. 1995); 28 USC § 41 (2000) (identifying the geographic boundaries of each circuit).
43. See Stromberg Metal Works v. Press Mech., Inc., 77 F.3d 928 (7th Cir. 1996).
45. See Gibson v. Chrysler Corp., 261 F.3d 927 (9th Cir. 2001).
46. See Allapattah Serv., Inc. v. Exxon Corp., 333 F.3d 1248 (11th Cir. 2003), reh’g en banc denied by 362 F.3d 739 (2004).
47. See Leonhardt v. Western Sugar Co., 160 F.3d 631 (10th Cir. 1998).
as, for example, Maine\textsuperscript{50} and New York\textsuperscript{51} it is entirely unsettled how severe XYZ’s predicament would be, as the circuit courts governing those states, while acknowledging the debate, have yet to commit to how the supplemental jurisdiction statute should be interpreted.

C. Overview

This article will discuss the historical, jurisprudential context of Congress’ enactment of the supplemental jurisdiction statute; provide an overview of the rather emotional reaction to this statute from courts and legal scholars and of the jurisprudential problems with this reaction; and offer a canon for interpretation of the statute that is arguably consistent with well settled models of statutory construction. This proposed interpretation dispels much disharmony previously found in federal courts’ jurisdictional decisions without causing any fatal damage to the business of our federal courts.

II. SUPPLEMENTAL JURISDICTION: THE STATUTE’S BACKGROUND

The Supplemental Jurisdiction Statute was drafted in the glow of over one-hundred-and-sixty years\textsuperscript{52} of Supreme Court decrees concerning the twin doctrines of ancillary and pendent jurisdiction. Beginning with \textit{Osborn v. Bank of the United States},\textsuperscript{53} the Supreme Court recognized that not every issue in a case needed to turn on federal law for there to exist federal court jurisdiction over that case. Rather, federal court jurisdiction might exist over entire causes of action that contained some federal “ingredient.”\textsuperscript{54} Understanding the nuances

\textsuperscript{50} See Spielman v. Genzyme Corp., 251 F.3d 1 (1st Cir. 2001) (acknowledging the issue but refraining from ruling upon it).

\textsuperscript{51} See Mehlenbacher v. Akzo Nobel Salt, Inc., 216 F.3d 291 (2d Cir. 2000) (recognizing the open issue). Similarly, there are no reported decisions from either the Sixth Circuit or D.C. Circuit discussing this issue. \textit{See, e.g.}, Olden v. LaFarge Corp., 203 F.R.D. 254 (E.D. Mich. 2001) (noting the absence of any controlling law on point from the Sixth Circuit).

\textsuperscript{52} See, \textit{e.g.}, Osborn v. Bank of the U.S., 22 U.S. 738 (1824) (observing the federal and state-law components of that breach of contract action); Freeman v. Howe, 65 U.S. 450, 460 (1860) (recognizing jurisdiction over certain claims that were considered “ancillary” to the main action); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 192-93 (1909) (reasoning that a state-law claim which was related to federal due process claim was within the federal court’s jurisdictional power).

\textsuperscript{53} For a good discussion of the evolution of the doctrines of pendent and ancillary jurisdiction, see McLaughlin, \textit{supra} note 6, at 870-72, and \textit{Charles Alan Wright, The Law of Federal Courts} 103-06 (5th ed., West 1994).

\textsuperscript{54} “[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in
between the two doctrines of pendent and ancillary jurisdiction has vexed first-year law students, and many lawyers and judges, since the formation of the doctrines. Pendent jurisdiction has traditionally referred to a plaintiff’s ability to join related claims to its claims over which the federal court already had original jurisdiction.55 Ancillary jurisdiction is a related doctrine permitting certain claims to be added by other litigants, such as defendants and third-party defendants, to a case already pending in federal court.56 Together these doctrines “permit parties in many circumstances to litigate an entire controversy, typically all transactionally-related claims, as long as the district court has a statutory basis for asserting subject-matter jurisdiction over a claim raised in plaintiff’s complaint.”57 The twin doctrines are pragmatic in theory and application:

[T]he rules developed to control the exercise of that jurisdiction cannot be explained by “any single rationalizing principle.” C. Wright, Federal Courts § 9, p 21 (2d Ed. 1970). They are instead accommodations that take into account the impact of the adjudication on parties and third persons, the susceptibility of the dispute or disputes in the case to resolution in a single adjudication, and the structure of the litigation as governed by the Federal Rules of Civil Procedure.58

At least since Congress’ enactment of § 1367 in 1990, these doctrines have come to be referred to under the common standard of “supplemental jurisdiction.”59

Modern concepts of supplemental jurisdiction began with the seminal case of United Mine Workers v. Gibbs in 1966.60 Gibbs represents one of the Supreme Court’s earliest, thoughtful articulations of this jurisdictional concept. Gibbs involved a labor dispute in which it.” Id. at 823.

55. REPORT OF THE SUBCOMM. ON THE FEDERAL COURTS AND THEIR RELATION TO THE STATES, 546 (Mar. 12, 1990), reprinted in 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS [hereinafter SUBCOMM. REPORTS] (July 1, 1990) (“Pendent jurisdiction refers to claims that are joined in the plaintiff’s complaint.”).

56. Id. (“Ancillary jurisdiction refers to additional claims that are joined after the complaint is filed.”)

57. Rowe et al., supra note 4, at 213.


59. As the Federal Courts Study Committee’s Working Papers make clear, this simplification in semantics was one of the purposes behind § 1367. See SUBCOMM. REPORTS, supra note 55.

the plaintiff asserted federal and state-law causes of action. These claims were not required to be brought together in any jurisdictional sense; rather, allowing the claims to be joined served concepts of judicial efficiency and, thus, fairness to the litigants. The Supreme Court held that the federal district court had subject matter jurisdiction over the state law claims that “derive[d] from a common nucleus of operative facts” from the federal cause of action. As such, both claims formed one “constitutional case.” Federal courts thus had the presumptive constitutional power to hear any such “pendent” claim meeting the Gibbs’ transactional test.

The Gibbs test, taken to its extreme, would have seemed to permit extraordinary and seemingly near-limitless exercises of federal jurisdiction over state-law claims. However, the Supreme Court showed that this doctrine had its limits twelve years later in Aldinger v. Howard, when the court distinguished between pendent claim and pendent party jurisdiction. In Aldinger, the plaintiff sought to add to a § 1983 claim against one defendant, a state-law claim against a different defendant arising out of the same incident. The Supreme Court stated that “the addition of a completely new party would run counter to the well established principle that federal courts are courts of limited jurisdiction marked by Congress.” Unlike pendent claim jurisdiction, as in Gibbs, the Court reasoned that pendent party jurisdiction called for “careful attention to the relevant statutory language.” In that case, the Court looked at 28 U.S.C. § 1343, which authorized federal jurisdiction

61. Id. at 720.
62. Id. at 726.
63. Id. at 728.
64. Id.
65. The jurisdictional power was presumed to have been bestowed by Congress because neither the Supreme Court nor the lower courts in subsequent decisions made any general effort to hunt for a manifestation of congressional intent in any jurisdictional statutes in applying the Gibbs standard. See Finley v. United States, 490 U.S. 545, 548 (“Despite this principle [that federal courts can only exercise jurisdiction conferred by Congress, within the limits of the Constitution] in a line of cases by now no less well established we have held, without specific examination of jurisdictional statutes, that federal courts have ‘pendent’ claim jurisdiction—that is, jurisdiction over nonfederal claims between parties litigating other matters before the court—to the full extent permitted by the Constitution.”) (citing United Mine Workers v. Gibbs, 383 U.S. 715 (1966), Hurn v. Oursler, 289 U.S. 238 (1933) and Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909)).
66. See Aldinger v. Howard, 427 U.S. 1, 12 (1976) (“Since it is upon Gibbs’ language that the lower federal courts have relied in extending the kind of pendent-party jurisdiction.”).
68. Id. at 17-18.
69. Id. at 3-4.
70. Id. at 15.
71. Id. at 17.
over certain civil rights actions, and found in its text congressional intent not to permit an exercise of pendent party jurisdiction against an entity (a county government) “excluded from liability under § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3).”

Similarly, in Owen Equipment & Erection Co. v. Kroger, the Court refused to permit a plaintiff to assert state-law claims against a third-party, non-diverse defendant. The Court stated that the defendant’s Rule 14 impleader of the third-party defendant was a proper exercise of ancillary jurisdiction but that permitting the plaintiff to assert its claim against this same party would invite unsavory conduct in derogation of the principles behind the complete diversity requirement. Specifically, the Supreme Court was concerned with possible sharp practices by shrewd plaintiff’s lawyers undermining established jurisdictional boundaries, noting that a plaintiff could otherwise defeat the statutory requirements (i.e., the complete diversity rule) by “the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants.” With regard to congressional intent, the Supreme Court reiterated that for a federal court to exercise supplemental jurisdiction in a given context, the court would first have to find that Congress had not “expressly or by implication negated” its consent for the federal court to hear claims joined with a claim for which the court had original jurisdiction. There, the Court interpreted § 1332 to not permit pendent party jurisdiction over the claims of a plaintiff against a nondiverse

72. Id.
74. Id. at 374.
75. Id. In Strawbridge v. Curtis, 7 U.S. 267 (1806), the Supreme Court purported to interpret the diversity statute, 28 U.S.C. § 1332, to require that all plaintiffs have diverse citizenship from all defendants for a federal court to have jurisdiction under that statute. Id. This holding has since been clarified by the Supreme Court which has made clear that Strawbridge’s complete diversity rule was a statutory and not a constitutional requirement. Thus, in certain contexts courts have held that other jurisdictional statutes did not require complete diversity yet were constitutional. See State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967) (In interpleader action, Supreme Court held that the complete diversity rule was merely an interpretation of 28 U.S.C. § 1332 and not Article III). One recent example of this is 28 U.S.C. § 1369, which went into effect in January 2003 and provides for federal court jurisdiction over certain mass-tort accidents with only minimal diversity of citizenship between plaintiffs and defendants. For each of the last several years, Congress has also been debating passage of a so-called Class Action Fairness Act that would provide for federal court jurisdiction over certain “large” class actions with only minimal diversity of citizenship. As of this writing, different versions of the Class Action Fairness Act of 2003, has been passed by the U.S. Senate and House of Representatives and there is anticipation that the two houses will work out a compromise bill suitable to a majority. See Neil, supra note 28.
77. Id. at 373 (quoting Aldinger v. Howard, 427 U.S. 1, 18 (1976)).
third-party defendant even if it met Gibbs’ transactional test.78

Eleven years later, in Finley v. United States,79 the Court demonstrated that it was not done yet with its attempts to evolve a workable compromise of the competing aims for efficiency and allegiance to prior court-made limitations on federal jurisdiction (e.g., the complete-diversity rule).80 More importantly, the Finley court pushed Congress back to the forefront with its holding that the Court would no longer presume congressional permission for the exercise of supplemental jurisdiction.81 In doing so, the Supreme Court actually struck a near death-blow to pendent party jurisdiction and threatened to topple the pillars underlying all forms of pendent and ancillary jurisdiction. The wrongful-death plaintiff in Finley desired to bring all of her claims arising out of the airplane crash death of her husband in one forum against all potential tortfeasors. Because she asserted a claim under the Federal Tort Claims Act—for which there was only exclusive federal court jurisdiction—against the FAA,82 she had to file her claim in federal court. The issue for the federal district court was whether to permit her to join (i.e., pendent party jurisdiction) with that federal question a state-law claim against a non-diverse defendant (a utility company that was responsible for the power line that the airplane hit during its landing) that clearly arose out of the same common nucleus of operative facts. In an opinion by Justice Scalia, the Court held that pendent party jurisdiction was not present because the Court was duty-bound to only tolerate such jurisdiction when the underlying jurisdictional statutes clearly contemplated such jurisdiction. In other words, the Court was no longer going to continue recognizing extensions of court-created jurisdictional concepts without affirmative Congressional approval. Nevertheless, the Court taunted Congress to pass legislation overruling the court’s decision if Congress were displeased with the restrictive decision in that case:

Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a

78. As discussed infra note 71, Kroger has been interpreted to permit only compulsory counterclaims by a plaintiff against a third-party defendant who has filed a claim over against the plaintiff. On the other hand, courts have distinguished Kroger to permit a plaintiff to implead under Rule 14 a third-party defendant in response to a counterclaim being asserted against the plaintiff. See Guaranteed Sys., Inc. v. Am. Nat’l Can Co., 842 F. Supp. 855, 857 (M.D.N.C. 1994).
80. Id. at 555-56.
81. Id.
82. 28 U.S.C. § 1346(b).
background of clear interpretive rules, so that it may know the effect of the language it adopts.83

There were multiple problems with the Court’s holding and reasoning in Finley, including the following: (i) this plaintiff would be forced to pursue piecemeal litigation through no fault of her own; (ii) much judicial inefficiency would be bound to follow such a restrictive view of pendent party jurisdiction in the federal question context; and (iii) judicial observers were left wondering how many other notions of pendent and ancillary jurisdiction could withstand this type of statutory parsing for congressional approval.84 After all, it was difficult to imagine a more sympathetic situation for extension of doctrines of judicial efficiency and fairness to litigants than that in which the plaintiff in Finley found herself. If the Court were not inclined to tolerate any extension of supplemental jurisdiction to this plaintiff, so the thinking went, what litigant could be assured of having their non-federal claim heard in federal court regardless of the circumstances? Even though the Court in Finley specifically distinguished pendent claim jurisdiction from this requirement of express congressional approval, it seemed to do so only because of precedent and without logical support.85 Further, Justice Scalia’s dogged refusal to consider any possible assumption of extended jurisdiction in the absence of a clear statement from Congress that it intended to permit such state-law claims to be made in a federal forum led to the logical observation that even Gibbs’ pendent-claim jurisdiction would not survive such scrutiny, if it were applied.86 After all, in the Gibbs opinion recognizing pendent claim jurisdiction, the Supreme Court never identified any express congressional approval of the doctrine.87

83. Finley, 490 U.S. at 556.
84. See Pfander, supra note 2, at 120 (noting the common view after Finley that “its emphasis on the absence of a statute appeared to threaten many established forms of supplemental jurisdiction over additional parties [pendent party jurisdiction]”); Thomas M. Mengler, The Demise of Pendent and Ancillary Jurisdiction, 1990 B.Y.U. L. REV. 247, 258 (1990) (expressing concerns that ancillary jurisdiction might be threatened in addition to pendent party jurisdiction). Indeed, some viewed Finley as a threat to the very core holding of Gibbs. McLaughlin, supra note 6, at 887-89.
85. The Court seemed to admit that Gibbs did not square with its holding in Finley: [O]ur cases do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred. The Gibbs line of cases was a departure from prior practice, and a departure that we have no intent to limit or impair. But Aldinger indicated that the Gibbs approach would not be extended to the pendent-party field, and we decide today to retain that line. Finley, 490 U.S. at 556.
86. Mengler, supra note 84, at 258-60.
Such concerns over the sudden, possible demise of important, long-standing jurisdictional law gave rise to the call for legislation overruling the holding in *Finley*. 88 Indeed, some lower federal courts had already begun to apply the holding of *Finley* to deny federal jurisdiction in circumstances where jurisdiction had previously been recognized. 89 On the heels of *Finley*’s attack on these judicially established jurisdictional principles, the Federal Courts Study Committee recommended to Congress that it “should expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base.” 90 This recommendation was premised on the Federal Courts Subcommittee’s fear that *Finley* may have signaled an end to the pragmatic doctrines of pendent and ancillary jurisdiction: “[T]he Court’s rationale [in *Finley*] may prohibit any exercise of pendent party jurisdiction and threatens to eliminate pendent claim and ancillary jurisdiction as well. We recommend that Congress overrule *Finley* by codifying the doctrines of pendent and ancillary jurisdiction.” 91 The Subcommittee made it clear that it viewed *Finley* as a threat to both the pragmatic tools of pendent and ancillary jurisdiction and to litigants’ ability and willingness to bring important cases to federal court:

88. See H.R. REP. NO. 101-734 (1990), reprinted in 1990 U.S.C.C.A.N 6860 [hereinafter HOUSE REPORT]. Virtually every court to opine has agreed that § 1367 was passed in response to the Supreme Court’s decision in *Finley*. See, e.g., Rosner v. Pfizer, Inc., 263 F.3d 110, 113 (4th Cir. 2001). See Rowe et al., supra note 4, at 213 (noting that § 1367 was enacted in response to *Finley* which threatened “to subvert the federal courts’ power to deal with related matters efficiently, in single rather than in multiple litigation”).


90. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (Apr. 2, 1990) [hereinafter STUDY COMM. REPORT]. The Federal Courts Study Committee was formed pursuant to the Judicial Improvements and Access to Justice Act of 1988. Pub. L. No. 100-702, 102 Stat. 4642 (1988). This act required the Chief Justice of the U.S. Supreme Court to appoint a fifteen-member committee to spend fifteen months studying the federal courts in order to: (i) “examine problems and issues facing the courts of the United States”; (ii) “develop a long-range plan for the future of the judiciary”; and (iii) prepare a report on its findings and recommendations to the three branches of the federal government. See Pub. L. No. 100-702, § 102(b), 102 Stat. 4642. The committee’s report was published on April 2, 1990. Professor Rowe, who has received much attention for his role in drafting § 1367, was one of the Reporters for the committee. The committee’s recommendation for a legislative cure for the problems caused, or at least feared, by the Supreme Court’s apparent retrenchment on the pendant and ancillary jurisdiction doctrines was but one of many proposed changes. The committee’s boldest recommendation was for an end to diversity jurisdiction with certain exceptions (e.g., mass tort multi-state litigation). Id. at 14 (“Diversity cases are a large part of the trial load of the district courts, and their elimination would therefore markedly lighten the burden on those courts.”).

91. STUDY COMM. REPORT, supra note 90, at 547.
By undermining these doctrines the Supreme Court has impeded the efficient use of judicial resources and made the federal courts a less attractive forum in which to bring federal claims. . . . [I]n our view abolishing supplemental jurisdiction would not be a sensible means of limiting the federal courts’ work, because the cases eliminated would include many that should be heard by a federal tribunal.92

The House Committee that drafted § 1367 was assisted in its drafting efforts by several legal scholars, including Professors Mengler, Rowe, and Burbank,93 who initially advised that § 1367 was a “codification”94 of the field of supplemental jurisdiction “framed to restore and regularize supplemental jurisdiction”95 and hailed as a “model of successful dialogue between the judicial and legislative branches.”96

The Supplemental Jurisdiction Statute provides for a jurisdictional two-step. Section 1367(a) sets forth a broad, general grant of supplemental jurisdiction up to the limits of the Constitution.97 Subpart (a) states that “in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”98 Further, in case there was any doubt about Congress’ intent to permit even pendent party jurisdiction—as the Finley court invalidated—subpart (a) also adds the following clarification: “Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.”99 With this one simple clarification, Finley’s holding that pendent parties have no place in federal court was...

92. Id.
94. See Rowe et al., supra note 4, at 216.
95. Id. at 215.
96. Id. at 213.
98. Id.
legislatively overruled.100

Had Congress intended to permit supplemental jurisdiction, in all classes of cases, up to the full limits of the Constitution, it could have merely stopped with subsection (a). In effect, this is what Congress achieved with § 1367(a) in federal question cases.101 No more do courts have to grapple with the legal fiction of divining congressional intent to allow or withhold supplemental jurisdiction based upon the review of statutes that truly did not even contemplate that the topic. Any time a statute gets the federal courts out of the business of engaging in fictional analysis, that is a jurisprudential improvement.

The statute, however, takes a decidedly different stance with regard to diversity cases. For diversity cases, Congress chose to impose limitations on supplemental jurisdiction—as the federal courts had been doing for years.102 Subpart (b) accomplishes this limitation of the

100. See Rosmer v. Pfizer, Inc., 263 F.3d 110, 114 (4th Cir. 2001)

101. See Rowe et al., supra note 4, at 215 (“In reaching to the limits of Article III, subsection (a) codifies supplemental jurisdiction at the outer constitutional boundary that existed before Finley’s statutory revisionism.”). Of course, the restrictions to this grant of constitutional proportions contained in subpart (b) only apply to diversity cases. Thus, supplemental jurisdiction now exists up to the full limit of the constitution—that is, subject only to the Gibbs’ transaction or occurrence test—in cases where original jurisdiction is premised upon a federal question.

102. It must be remembered that, with respect to the federal district courts, Congress may choose to grant or withhold subject matter jurisdiction with few, if any, limitations:

[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to [the Supreme Court] dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

Cary v. Curtis, 44 U.S. 236, 245 (1845). Although there has been some debate about whether Congress could, from a constitutional perspective, entirely withhold subject matter jurisdiction from the district courts, “[n]early two centuries stand in the way of those who would claim that Congress must vest the entire judicial power.” WRIGHT, supra note 52, § 10 at 47. For a general discussion, see Palmore v. United States, 411 U.S. 389 (1973), where the Court opined on the ability of Congress to limit federal jurisdiction:

[T]he judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which Congress may seem proper for the public good.

Id. at 401 (quoting Cary, 44 U.S. at 245). Thus, there is not much debate that Congress could grant supplemental jurisdiction up to the limits of the Constitution or disallow it altogether. See also, Howard P. Fink, Supplemental Jurisdiction—Take It to the Limit!, 74 IND. L.J. 161, 164 (1998) (“Congress controls federal jurisdiction and can expand it or retract it, within constitutional limits, as it chooses to do so.”).
doctrine in diversity cases, as follows:

[In diversity cases] 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.\(^{103}\)

Thus, for the diversity class of cases filed in or removed\(^ {104}\) to federal district court, in order to analyze supplemental jurisdiction over any claims for which no original jurisdiction exists, one must first apply subpart (a) and then (b). The first inquiry is fairly straightforward—at least with the benefit of nearly 40 years experience applying the Gibbs standard—asking whether the additional claim is so closely related to the anchor claim\(^ {105}\) for which original jurisdiction exists that it forms part of the same constitutional "case or controversy."\(^ {106}\) As the last sentence in subpart (a) makes clear, this analysis applies the same regardless of whether one is talking about claims against additional parties or additional claims against the same party.\(^ {107}\) For federal question cases, this is the end of the supplemental jurisdiction analysis.\(^ {108}\) For diversity cases, one must then seek to apply the limitations provided for in subpart (b). This latter analysis is where most of the controversy—often heated—surrounding § 1367 has arisen.

While much of the hubbub about § 1367 has expressed concern with it opening the floodgates of the federal courts to diversity cases, the truth is that the statute has been more of a mixed bag. As one commentator noted, the statute impacts the caselaw doctrines of pendent and ancillary jurisdiction by “strengthening them in some respects but

\(^{103}\) 28 U.S.C. § 1367(b).

\(^{104}\) The Supreme Court has made it clear that the standards for supplemental jurisdiction set forth in § 1367 apply with equal force with respect to both lawsuits filed originally in federal court and those filed in state court and removed to federal court. See, e.g., City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164 (1997).


\(^{106}\) U.S. CONST. art. III § 2, cl. 1.


\(^{108}\) Of course, the district courts are expressly given discretion under subpart (c) to consider possible dismissal or remand under the appropriate circumstances.
perhaps weakening them in others." In any event, scholars would not continue to assert that § 1367 achieved merely a codification of the prior caselaw. As will be seen below, however, the more significant changes to § 1367 do not spell doom for the federal courts, but actually offer some improvements to the prior caselaw in the area.

III. EARLY REACTION BY COMMENTATORS TO THE STATUTE

With very little fanfare, § 1367 was enacted into law effective, December 1, 1990. Other than legislatively overruling the Supreme Court’s restrictive holding in Finley, the prevailing thought at the time of its enactment seemed to be that it would merely codify and reaffirm existing caselaw from pendent and ancillary jurisdiction under the single umbrella of supplemental jurisdiction. In a sort of “famous last words” article written by three of the primary scholarly drafters of § 1367, the measure was treated as a mere codification of the doctrine as it existed before Finley:

With few exceptions discussed below, section 1367 codifies supplemental jurisdiction as it existed before the Finley decision. In order to repair Finley’s damage in a noncontroversial manner without expanding the scope of diversity jurisdiction, the statutory measure was therefore framed to restore and regularize supplemental jurisdiction, not to revamp it.

The silence surrounding the enactment of the statute was brief as legal scholars began analyzing the statute’s text and seeing results different from the pre-Finley days. Professor Freer led the early

109. SIEGEL, supra note 105.
110. The statute was a part of the Federal Court Study Committee Implementation Act of 1990, 150 Cong. Rec. H13301-07 (daily ed. Oct. 27, 1990), which implemented certain, though not all, recommendations of the Federal Courts Study Committee. The most notable recommendation of the committee, rejected by the new statute, was a call for the demise of all diversity jurisdiction. See STUDY COMM. REPORT, supra note 90, at 176.
111. See generally Rowe et al., supra note 4, at 214-15. See also HOUSE REPORT, supra note 88, § 114 (“This section would authorize jurisdiction in a case like Finley, as well as essentially restore the pre-Finley understandings of the authorization for and limits on other forms of supplemental jurisdiction.”).
112. HOUSE REPORT, supra note 88, at 176.
113. See, e.g., 1 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE, ¶ 0.97[5], at 928 (referring to congressional “sloth in drafting the supplemental jurisdiction statute”); Arthur & Freer, Government Work, supra note 6, at 1007 (noting that the statute was a “nightmare of draftsmanship”); Freer, Compounding, supra note 6, at 471 (opining that Congress passed § 1367 too quickly); Karen N. Moore, Colloquium, Perspectives on Supplemental Jurisdiction: The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction, 41 EMORY L.J. 31, 56-58 (1992) (observing § 1367’s ambiguity and blaming it on its
chorus of attacks on the statute, observing among the many perceived problems with the statute, the following:

In the guise of a non-controversial bill aimed at fixing a problem caused by the Supreme Court and codifying pre-Finley practice, the supplemental jurisdiction statute greatly extends the anti-diversity effect of Kroger, maiming efficient packaging of diversity cases. The statute has several presumably unforeseen consequences as well, such as precluding supplemental jurisdiction in alienage cases and confusing areas that had been relatively clear even in the aftermath of Finley.\(^{114}\)

One of the areas of “unforeseen consequences” detected by Professor Freer was the omission of Rule 23 from § 1367(b)’s enumerated exceptions to supplemental jurisdiction and his observation that this suggested the abolition of preexisting law that served to limit diversity class actions from federal court.\(^{115}\) The academics that helped draft the statute\(^{116}\) admitted that the statute was “not perfect”\(^{117}\) but, in response to the spreading criticism of it, expressed their “hope”\(^ {118}\) that the federal courts could be “trusted to make the best of it.”\(^ {119}\) With regard to the problem spotted by Professor Freer concerning § 1367(b) and class actions, they admitted that “[i]t would have been better had the statute dealt explicitly with this problem, and the legislative history was an attempt to correct the oversight.”\(^ {120}\) In sum, however, the statute’s drafters believed that the legislative history behind the statute would serve to fill in any perceived gaps or errors in the statute’s text.\(^ {121}\) This response did not silence the statute’s critics however.\(^ {122}\) Finally, even the statute’s primary scholarly drafter has now come full circle and has suggested his own recodification of supplemental jurisdiction.\(^ {123}\)

\(^{114}\) Freer, Compounding, supra note 6, at 471. Recounting the background facts in the enactment of § 1367 and observing the relative speed of its passage through Congress, Professor Freer opined that its “haste” in passage may have led to many problems. Id. at 486.

\(^{115}\) Id. at 485-86. Also see the discussion of Zahn v. International Paper Co. in the next section of this article.

\(^{116}\) See supra notes 93-96, 110, and accompanying text.

\(^{117}\) Rowe et al., Reply, supra note 93, at 961.

\(^{118}\) Id.

\(^{119}\) Id. at 961 n.90.

\(^{120}\) Id. at 961 n.90 (discussing problems with Rule 23 and Rule 20 joinder situations).

\(^{121}\) The American Law Institute has generated its own proposed rewriting of § 1367. See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT (Tentative Draft No. 2, 1998).

\(^{122}\) Rowe, supra note 2, at 54 (suggesting a modified version of § 1367 “in light of the
IV. COURTS’ GRAPPLING WITH § 1367

This article does not purport to analyze every interpretational issue arising under § 1367. Instead, the article will focus initially upon two primary battlegrounds in the interpretational struggle: Rule 23 class actions and Rule 20 joinder of plaintiffs. These areas were chosen because the federal circuit court opinions to address whether a textual approach to the interpretation of § 1367 is required have all arisen in one of these two contexts. Further, the cases arising in these two contexts highlight some of the most important, and controversial, legal issues that exist regarding § 1367 and they showcase the battle behind the battle—federal district and intermediate appellate courts’ reluctance to permit Congress to carry out its constitutionally delegated task of defining the parameters of the inferior federal courts’ jurisdictional powers. Following the discussion of these two contexts, this article will examine whether a consistent interpretation of § 1367 can be then applied to a few other hotly debated interpretational issues under the statute without upsetting the business of the federal courts.

A. Rule 23 Class Actions

The one area that has undoubtedly received the most attention124 of the federal district and circuit courts of appeal relates to diversity class actions and to what extent § 1367 alters the traditional § 1332 requirements for federal court jurisdiction. Cases brought pursuant to the federal courts’ diversity power, 28 U.S.C. § 1332, require two elements as the Supreme Court has interpreted that statute: (a) complete diversity of citizenship among the parties;125 and (b) an amount in

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125. Strawbridge v. Curtiss, 7 U.S. 267, 267 (1806). Of course, Strawbridge is subject to criticism because the Court ignored the fact that the statute was worded almost identically to Article III of the Constitution which the Court has acknowledged does not require complete diversity of citizenship. Indeed, if the Constitution mandated the result in Strawbridge, then it would not be possible to have diversity jurisdiction in areas such as statutory interpleader. Further, congressional legislation such as the Multidistrict, Multiparty, Multiform Trial Jurisdiction Act of 2001, Pub. L. No. 107-273, 116 Stat. 1758 (2002), codified at 28 U.S.C. § 1397, or the proposed Class Action Fairness Act of 2003, H.R. Rpt. 108-144 (June 9, 2003)—each of which only requires minimal diversity—would be impermissible.
controversy for each claimants’ claim in excess of $75,000, exclusive of interest and costs. As discussed below, it would be fair to characterize the Supreme Court’s application of these statutory requirements to class actions as schizophrenic.

1. Judicial Origins and Evolution

With regard to the requirement for complete diversity, the Supreme Court has made clear the general rule that each plaintiff must have diverse citizenship from each defendant. The question before the Supreme Court in Supreme Tribe of Ben-Hur v. Cauble was how that rule would apply to a class action where some of the unnamed members of the class were not diverse from the named defendants. In that case, the plaintiffs were citizens of Kentucky and the named defendants were Indiana citizens. However, members of the plaintiff-class included Indiana citizens. Stressing that the named plaintiffs were acting as representatives for the unnamed, Indiana class members, the Court found that the presence in the class of those Indiana citizens did not oust the district court’s jurisdiction over the case: “Diversity of citizenship gave the district court jurisdiction. Indiana citizens were of the class represented; their rights were duly represented by those before the court.”

In reaching this decision, the Court never acknowledged the fact that such an extension of diversity jurisdiction would arguably undermine the complete diversity requirement of Strawbridge and the Court never explicitly urged that its decision rested upon the concept of pendent party or ancillary jurisdiction. Rather, the decision seemed to be premised on the assumption that unnamed members of the class, only being present in the form of the named plaintiff’s representative capacity, were not really parties to the case. Further, the decision seemed to be a very pragmatic one; it is hard to imagine many large, multi-state class actions where every class member would be diverse from the defendant(s). Unless the Court was to decide that it did not want such class actions in federal court, the holding in Ben-Hur would seem to be necessary. In any event, following Ben-Hur, the rule for over 80 years has been to consider only the citizenship of named class representatives and to disregarded the citizenship of all others in the

127. Strawbridge, 7 U.S. at 267.
128. 255 U.S. 356 (1921).
129. Id. at 366.
class.

The Supreme Court took a much different approach with the other diversity requirement—the amount in controversy. For nearly a century, the Supreme Court has required that plaintiffs with separate and distinct claims each satisfy the jurisdictional-amount requirement for suits in federal court. The classic statement of this non-aggregation rule was articulated in 1911 by the Supreme Court, as follows:

> When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.

In *Snyder v. Harris* the Court applied this non-aggregation rule to class actions for the first time. In that case the Court held that the class members could not, in effect, pool their individual claims in order to get over the amount-in-controversy requirement of § 1332. In that case, none of the named plaintiffs alleged a claim that exceeded the requisite statutory amount. The Court’s holding, therefore, did not appear to represent any radical departure from prior principles and was not inconsistent with *Ben Hur*. After all, even *Ben Hur* required named representatives in a class action to have diversity of citizenship from the opposing party. Four years later, however, the Supreme Court was faced with a situation seemingly not unlike that in *Ben-Hur*.

In *Zahn v. International Paper Co.*, the named class representatives filed suit on behalf of over 200 lakefront property owners and lessees against International Paper for permitting harmful discharges of pollution from a local pulp and paper-making plant. Although each named class representative was diverse from International Paper and—individually—owned a claim valued at greater than $10,000, the district court had found that “to a legal certainty” not every individual property

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130. See, e.g., *Stewart v. Dunham*, 115 U.S. 61, 64-65 (1885) (applying the rule to federal appellate jurisdiction which, at the time, required a certain amount-in-controversy); *Walter v. Northeastern R.R.*, 147 U.S. 370, 373 (1893) (applying this non-aggregation rule to the amount-in-controversy requirement for federal district courts then in effect).


133. The Supreme Court reached a logical corollary to this non-aggregation rule—litigants whose claims do not satisfy the statutory minimum must be dismissed even though other claimants assert claims sufficient to invoke the federal court’s jurisdiction. *See* *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939).

owner in the class had suffered pollution damages in excess of $10,000.\textsuperscript{135} Since the absent class members were no more parties in \textit{Zahn} than they were in \textit{Ben-Hur}, one could anticipate the Court holding that subject matter jurisdiction existed for all of the claims in the putative class action. The Court, however, reached a contrary holding. Disingenuously, the Supreme Court said that the holding in \textit{Snyder} dictated this result. In fact, \textit{Snyder} was not on point at all because in that case it was clear that no party plaintiff met the statutory requirements. Perhaps a bit more persuasively, the Court also turned to its holding in \textit{Clark}\textsuperscript{136} that required every party making a claim to individually satisfy the amount-in-controversy requirement.\textsuperscript{137} But \textit{Clark} never addressed the issue of whether an unnamed class member, who was being represented by a party plaintiff who \textit{did} meet both of § 1332’s requirements, and who was not considered a party by the Court in \textit{Ben-Hur} with respect to § 1332’s diversity requirement, would nevertheless be treated as a party and required to individually meet § 1332’s amount-in-controversy hurdle. Rather than address these differences head-on, the Supreme Court was content to suggest that \textit{stare decisis} dictated its holding. Thus, with the misleadingly simple invocation of the lower court’s quote—“one plaintiff may not ride in on another’s coattails”\textsuperscript{138}—the Court held that unnamed class members each had to meet § 1332’s amount-in-controversy requirement.\textsuperscript{139}

There were a number of problems with the majority’s opinion in \textit{Zahn}. First, as mentioned above, there was no controlling precedent that necessitated the Court’s holding. Indeed, the Court was addressing an open question that it had never before confronted. Second, because the Court was merely construing an element of Congress’ statutory-grant of diversity jurisdiction, there was no Constitutional mandate for requiring that each aspect of a class action separately meet § 1332’s twin

\begin{footnotes}
\footnote{135. \textit{Id.} at 292. The minimum amount required by § 1332 at that time was only $10,000. This was later changed to $50,000 and then to the current minimum of $75,000.}
\footnote{138. \textit{Zahn} v. Int’l Paper Co., 469 F.2d 1033, 1035 (2d Cir. 1972).}
\footnote{139. In an ironic twist, the Supreme Court demanded that if Congress ever wanted to change this holding, it had to state such intention clearly in any subsequent legislation: \textit{[H]}ad there been any thought \textit{[by Congress]} of departing from these decisions and, in so doing, of calling into question the accepted approach to cases involving ordinary joinder of plaintiffs with separate and distinct claims, some express statement of that intention would surely have appeared, either in the amendments themselves or in the official commentaries. But we find not a trace to this effect. As the Court thought in \textit{Snyder} v. \textit{Harris}, the matter must rest there, \textit{absent further congressional action}. \textit{Zahn}, 414 U.S. at 302 (emphasis added).}
\end{footnotes}
requirements. Third, the Court never mentioned the concept of pendent or ancillary jurisdiction. Most, if not all, cases meeting Rule 23’s thresholds for maintenance of a class action will necessarily meet Gibbs’ test for relatedness and, therefore, no constitutional hurdles would have precluded the Court from permitting the federal district court to have exercised pendent or ancillary jurisdiction over the smaller claims by some of the unnamed class members. Fourth, and perhaps most disturbing, the Court never even recognized the anomaly it was creating in applying § 1332 to class actions. For purpose of § 1332’s diversity requirement, the Court had held (in Ben-Hur) that absent class members were not really parties and need not demonstrate any diversity of citizenship. On the other hand, with respect to § 1332’s amount-in-controversy requirement, the Court in Zahn held that the absent class members were really parties who each must demonstrate the requisite amount-in-controversy or suffer dismissal. One would think that if the Court was going to take a stricter view of either of § 1332’s dual elements, then it would impose the tougher burden on the diversity requirement than on the amount-in-controversy. After all, only the former has any constitutional mandate while the latter is merely Congress’ administrative screen for keeping some smaller cases out of the federal court system. Instead, the Supreme Court held, in effect, that the diversity requirement—as applied to class actions—was less important than the amount-in-controversy requirement. Justice Brennan’s dissent (joined by Justices Douglas and Marshall) eloquently highlighted this anomaly:

Particularly in view of the constitutional background on which the statutory diversity requirements are written, it is difficult to understand why the practical approach the Court took in Supreme Tribe of Ben-Hur must be abandoned where the purely statutory “matter in controversy” requirement is concerned.

For at least some of these reasons, Zahn has been the frequent subject of criticism from legal scholars, including those who helped to

140. For cases originally filed in federal court, the result in this instance would be the dismissal of any claims not meeting § 1332’s requirements or the refusal by the district court to certify all such holders of small claims as members of a class. On the other hand, for cases removed from state to federal court, the result of unnamed class members failing to meet § 1332’s amount-in-controversy requirement would be a remand of the entire action to state court. This is true because the removal statute, 28 U.S.C. § 1441, requires that the entire case be within the court’s original jurisdiction in order to remove the case.
141. Zahn, 414 U.S. at 309 (Brennan, J., dissenting) (citation omitted).
142. Moore’s Federal Practice, supra note 113, at 928; Arthur & Freer, Government Work,
draft the Supplemental Jurisdiction Statute, one of whom has stated that
Zahn “has few defenders.”

2. Impact of § 1367

The specific issue faced first by the Fifth Circuit in 1995 was whether Congress’ enactment of § 1367 legislatively overruled the Supreme Court’s holding in Zahn. In re Abbott Laboratories was a state-law antitrust class action filed in Louisiana state court against manufacturers of infant formula, alleging price-fixing. The defendants removed the case, citing diversity of citizenship, and the district court granted the plaintiffs’ motion to remand on abstention grounds. The named plaintiffs were completely diverse from the defendants and, according to the district court, also met §1332’s amount-in-controversy requirement. Thus, had the case not been a class action it is clear that subject matter jurisdiction would not have been an issue on appeal. However, the plaintiffs sought the certification of a plaintiff class of consumers, perhaps none of whom would have had a claim sufficient to meet the amount-in-controversy requirement of §1332. (Per the Supreme Court’s holding in Ben-Hur the absent class members’ citizenship was of no import in determining whether § 1332’s complete-

supra note 6, at 1008 n.6 (“Abrogating Zahn would hardly be absurd.”); HOWARD P. FINK, LINDA S. MULLENIX, THIMAS D. ROWE, JR. & MARK V. TUSHNET, FEDERAL COURTS IN THE 21ST CENTURY 404 (2d ed. LexisNexis 2002) (“Those requirements schizophrenically look to the citizenship of only the named class representatives for purposes of determining diversity of citizenship . . . but require that each class member with a legally separate claim independently satisfy the amount-in-controversy requirement.”).

143. Rowe, supra note 2, at 63.


145. Because the remand was premised on discretionary grounds, rather than lack of subject matter jurisdiction, the Fifth Circuit held that it had jurisdiction to hear an appeal from the remand order. Id. at 525-26.

146. The district court found that the named plaintiffs’ claims were large enough because, under Louisiana law, all of the class’s attorney’s fees could be attributed to the named plaintiffs. Id. at 526. The named plaintiffs’ own damages were only $20,000 without including the attorney’s fees. Prior to Abbott Labs, only one circuit had faced the issue of whether to aggregate the class’s attorney’s fees to the name representatives or to distribute them across the entire class pro rata. See Goldberg v. CPC Int’l, Inc., 678 F.2d 1365, 1367 (9th Cir. 1982) (holding that attributing the class’ attorney’s fees to the named plaintiffs rather than pro rata to the entire class would “conflict” with Zahn.). Despite the fact that many district courts had since followed the Ninth Circuit, the Fifth Circuit held that that, upon examination of the particular Louisiana attorney’s fee statute at issue in that case, the named representatives would, if victorious, be entitled to recover all of the attorney’s fees incurred in prosecuting the class action. Just because this meant that the named plaintiffs had claims in excess of § 1332’s requirement did nothing to frustrate Zahn’s requirement that, generally, the rule against aggregation applied to class actions. Abbott Labs, 51 F.3d at 527.
diversity hurdle had been cleared. Therefore, the case presented no diversity issues for jurisdictional purposes.) In other words, this case was—from a jurisdictional perspective—exactly the same as presented by Zahn twenty-two years earlier. The only possible difference was the 1990 enactment of the Supplemental Jurisdiction Statute. The Fifth Circuit had to address the issue, therefore, of whether this statute changed the holding in Zahn.

In Abbott Labs, the Fifth Circuit succinctly framed the issue as follows:

Defendants argue that Congress changed the jurisdictional landscape in 1990 by enacting § 1367. Section 1367(a) grants district courts supplemental jurisdiction over related claims generally, and § 1367(b) carves exceptions. Significantly, class actions are not among the exceptions.147

... Some commentators have interpreted this silence to mean that Congress overruled Zahn and granted supplemental jurisdiction over the claims of class members who individually do not demand the necessary amount in controversy. Some of § 1367’s drafters disagree. No appellate court has ruled on the question yet. The district courts are split even within this circuit, although the majority appear to hold that Zahn survives the enactment of § 1367.148

For the Fifth Circuit, the application of the language of § 1367 made the result exceedingly clear—because the class members’ claims were part of the same constitutional case as the named plaintiffs’ claims and were, therefore, within § 1367(a)’s broad grant, the only way the district court could have lacked jurisdiction would be if the case fell within one of subpart (b)’s enumerated exceptions. It was not, as § 1367(b) nowhere mentions Rule 23 joinder in its exclusive list of exceptions to subpart (a)’s grant. Accordingly, the Fifth Circuit asserted that the only way to reach a different result would be if it were free to search the legislative history to trump the language of the statute.

The court held that it could resort to the legislative history in a search for a possible contrary intent in two limited circumstances: (i) if it found the statute “unclear or ambiguous”149 or if applying the “plain language” of the statute would result in a “positively absurd result.”150

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147. Id. at 527.
148. Id. at 527-28.
149. Id. at 528.
150. Id. at 529 (citing West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 99-100
According to the Fifth Circuit, there was nothing ambiguous about the statute as applied to the facts in that case. Further, while the court did not necessarily endorse the wisdom behind the statute, it held that it was not “absurd” for the statute to overrule *Zahn*. The court’s conclusion on this point was bolstered by the dissenting opinion of Justice Brennan in *Zahn*. Indeed, in light of the problems with *Zahn* enumerated above, there is a much more persuasive argument that § 1367’s overruling of *Zahn* was sensible.

The holding in *Abbott Labs* was not unforeseen in light of the scholarly opinions issued in the wake of § 1367’s enactment that *Zahn* was dead. The most remarkable thing about the Fifth Circuit’s treatment of the issue was the self-discipline the court displayed in analyzing the statute. The court commented upon the legislative history which suggested that Congress never intended to modify *Zahn*, stating that “[p]erhaps by some measure of transcending its language, Congress did not intend the Judicial Improvements Act to overrule *Zahn*.” In fact, the court noted that “[o]mitting the class action from the exception [in subpart (b)] may have been a clerical error.” Nevertheless, the court felt obligated to give the statute the effect that its straightforward language required.

Before discussing the other circuits’ reactions to *Abbott Labs*, the subsequent history of that decision is noteworthy. In *Abbott Labs*, the U.S. Supreme Court granted a writ of certiorari to decide whether § 1367 should be given a literal reading or whether its legislative history should trump its language. However, with Justice O’Connor recusing herself, the Court divided four-to-four on the issue and affirmed without opinion

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151. *Abbott Labs*, 51 F.3d at 528.
152. Id. at 529.
153. See supra notes 169-43 and accompanying text.
154. See supra note 84.
155. *Abbott Labs*, 51 F.3d at 528.
156. Id. The court also noted that the scholar-drafters of the Supplemental Jurisdiction Statute had fallen on their swords, conceding shortly after its passage that the statute was “not a perfect effort” at draftsmanship. *Id.* 528 n.9 (citing Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 1991 (1991)).
157. Id at 528-529. Despite the House Committee on the Judiciary’s characterization of the bill as a “noncontroversial” collection of “relatively modest proposals,” the court reasoned that the “statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result.” *Id.*
158. Id.
or any other guidance.\textsuperscript{159} Having initiated this whole affair with its congressional dare in \textit{Finley}, the Court was not able to resolve the present controversy over the ensuing litigation.

The Tenth Circuit was the first to reach a contrary conclusion regarding how § 1367 should be interpreted in the class action context.\textsuperscript{160} In 1998, \textit{Leonhardt v. Western Sugar Co.}\textsuperscript{161} became the banner carrier for those courts unwilling to follow § 1367’s language. \textit{Leonhardt} was a class action brought by sugar beet farmers against a sugar company asserting claims under the federal Agricultural Fair Practices Act (AFPA) and state law causes of action (breach of contract, breach of fiduciary duty, etc.).\textsuperscript{162} The district court had granted a Rule 12(b)(6) dismissal of the federal cause of action for failure to state a claim and then refused to exercise jurisdiction over the remaining state law claims because not all unnamed members of the class had claims in excess of § 1332’s $75,000 amount-in-controversy requirement.\textsuperscript{163} The Tenth Circuit first upheld the lower court’s ruling dismissing the AFPA claims for failure to state a claim upon which relief could be granted.

With respect to the issue of whether supplemental jurisdiction existed over the remaining state law claims, the Tenth Circuit stated that the test for whether it should look solely to the statute’s language was “whether Congress has spoken ‘in reasonably plain terms.’”\textsuperscript{164} According to that court, if there were a “split in the circuits” on the meaning of a statutory phrase, this permits some presumption of textual ambiguity.\textsuperscript{165} The court began its analysis, thusly, not by looking to the text of the statute but by canvassing the opinions of other courts and scholars, observing that the “majority of district courts addressing the

\begin{itemize}
\item \textsuperscript{159} Free v. Abbott Labs, 529 U.S. 333 (2000) (per curium).
\item \textsuperscript{160} As will be discussed in the next section, the Seventh Circuit was the next circuit to address the issue of whether the legislative history or the statute’s language should control, but that case arose in the context of Rule 20 joinder and not Rule 23. See Stromberg Metal Works, Inc. \textit{v. Press Mech., Inc.}, 77 F.3d 928 (7th Cir. 1996). Nevertheless, it certainly established the direction the Seventh Circuit would take on whether § 1367 must be interpreted according to its express terms. \textit{See infra} Section IV.B.
\item \textsuperscript{161} 160 F.3d 631 (10th Cir. 1998).
\item \textsuperscript{162} \textit{Id.} at 632-33.
\item \textsuperscript{163} \textit{Id.} Prior to the district court’s order of dismissal, the plaintiff had voluntarily withdrawn an additional count under the Sherman Act. Actually, no named plaintiff alleged damages in excess of $75,000 at the time of the district court’s ruling. However, one named plaintiff had requested leave to amend its complaint to add a punitive damage claim. This claim would have elevated that plaintiff’s claim to an amount greater than $75,000. The court did not grant leave because it held that it would be futile because the court would be unable to exercise supplemental jurisdiction over the remaining claims in the suit under § 1367. \textit{Id.} at 633.
\item \textsuperscript{164} \textit{Id.} at 638.
\item \textsuperscript{165} \textit{Leonhardt}, 160 F.3d at 638.
\end{itemize}
issue” disagreed with the Fifth Circuit’s decision in *Abbott Labs*\(^\text{166}\) and that “commentators and treatises [were] divided” on the issue.\(^\text{167}\) The implicit message in this survey was that the statute is likely ambiguous since there was no clear consensus of judicial and scholarly opinion regarding what the language meant.\(^\text{168}\)

Turning its attention to the statute’s language it concluded that “§ 1367(a) and (b) can be read literally, and unambiguously, to require each plaintiff in a class action diversity case to satisfy the *Zahn* definition of ‘matter in controversy’ and to individually meet the $75,000 requirement.”\(^\text{169}\) To reach this conclusion, the Court assumed that subsection (b) only came into play when a party sought to *add* additional claims or parties to an existing lawsuit. Relying upon the phrase “original jurisdiction” in subsection (a), the Tenth Circuit argued that district courts were required to have original jurisdiction over every claim involving every party in the original complaint in order to hear the matter. In other words, the only place for the exercise of supplemental jurisdiction would be subsequent to the original case filing.\(^\text{170}\) As will be discussed below, the implications of this logic are far more unsettling than was the Supreme Court’s decision in *Finley*.\(^\text{171}\)

Rightly or wrongly, having justified in its own mind the propriety

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167. *Leonhardt*, 160 F.3d at 639 n.6 (citing multiple scholars for comparison). Compare 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 23.07[3][c], at 23-47 (3d ed. 1998) (“The conclusion that *Zahn* remains good law is ultimately unconvincing . . . .”) and HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS vol. 2 § 6.11 at 598 (4th ed., West 2002) (“The Act’s probable overruling of *Zahn* is fully consistent with the reasoning of the Federal Courts Study Committee on whose recommendation the Act was adopted.”), with WRIGHT ET AL., supra note 3, § 3523.1 at 112 (“Perhaps the most compelling evidence from the legislative history that Section 1367 was not intended to overrule *Zahn* is not so much what is said in the history itself, but rather what is omitted.”).

168. Had the court carefully reviewed these authorities, however, it would have discovered that the courts and scholars opining that § 1367 did not overrule *Zahn*, did so not based upon the language in the statute but upon the legislative history. Thus, just because these authorities reached the opinion that *Zahn* remained viable does not mean that the language of the statute is ambiguous.


170. Id. at 639.

171. See infra notes 262-76 and accompanying text.
of resort to legislative history, the Tenth Circuit quickly concluded that Congress never intended to broaden supplemental jurisdiction by overruling *Zahn*. 172 In looking at the legislative history, the Tenth Circuit relied almost exclusively upon the House Report accompanying the Judicial Improvements Act, which stated that § 1367 “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].” 173 The court then pointed out, in a footnote, that the House Report expressly cites *Zahn* as an example of that case law which was not intended to be disturbed by § 1367. 174 Apparently anticipating possible criticism as a result of trumping the language of § 1367 through reliance on one footnote in a committee report, the Tenth Circuit defended its analysis by stating that this was an “unusual situation” because “the legislative history so clearly refutes the textualist analysis of [Abbott Labs].” 175 In other words, while a statute’s language is normally supposed to guide its interpretation, when a court feels the legislative history strongly suggests a contrary result, the court should be free to judicially rewrite the statute.

Similar to *Leonhardt*, the Eighth Circuit also reached the conclusion that *Zahn* survived the enactment of § 1367. In *Trimble v. Asarco, Inc.* 176 that court considered the effect of § 1367(b)’s omission of Rule 23 from its enumerated exceptions. The court fairly quickly reached the conclusion that § 1367 was unambiguous, finding the rationale in *Leonhardt* persuasive. Further, the Eighth Circuit thought the last clause of § 1367(b) was important. This last section provides that, with respect to the enumerated exceptions set forth in subpart (b), that district courts do not have supplemental jurisdiction when the presence of those additional claims would “be inconsistent with the jurisdictional requirements of section 1332.” 177 The Eighth Circuit believed this evidenced “a concern for preserving the historical and well-established rules of diversity.” 178 Because there existed at least an

173. HOUSE REPORT, supra note 88, at 29.
174. *Leonhardt*, 160 F.3d at 640 n.9. Of course, as discussed below, that footnote first cites *Ben-Hur* as an example of the good case law that was intended to remain intact. Ironically, *Ben-Hur* establishes that unnamed class members are not parties under § 1332’s diversity analysis and is logically inconsistent with *Zahn*. See supra notes 134-39 and accompanying text.
175. *Leonhardt*, 160 F.3d at 640 n.9.
176. 232 F.3d 946 (8th Cir. 2000).
177. 28 U.S.C. § 1367(b).
“arguable ambiguity,” the Eighth Circuit mentioned that it also agreed with Leonhardt’s review of legislative history to provide further support for its conclusion.

After the decisions from the Tenth and Eighth Circuits, it was beginning to look as if the trend might favor Zahn’s continued viability. This apparent momentum changed dramatically when, within the course of a mere three days in the late summer of 2001, two other circuit courts embraced textualism, agreeing with the Fifth Circuit that § 1367 overruled Zahn.

The first shoe dropped on August 20, 2001, in the Ninth Circuit’s decision in Gibson v. Chrysler Corp. That case represented a rare instance when the appeal of a district court’s order remanding the case to state court was proper. In Gibson the appeal was proper because the defendant was appealing from the district court’s order awarding sanctions against defendant for the “clearly frivolous” arguments for removal in what constituted its second attempt to remove the case from California state court. The Ninth Circuit found that it could review the order of sanctions even though it necessarily required the court to “address the merits” of the order of remand. The Ninth Circuit noted

179. Id.

180. One exception to this trend was the Seventh Circuit’s decision to extend its own plain meaning interpretation of § 1367 in the Rule 20 context to Rule 23 cases. See infra notes 209-27 and accompanying text. See also In re Brand Name Prescr. Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997).

181. Textualism is a term applied to the belief that strict adherence solely to the text of a statute should be maintained when analyzing the statute for its “plain meaning.” Justice Scalia is perhaps the most renowned advocate of this approach to statutory construction. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 29-37 (Amy Gutmann ed., 1997); William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621 (1990) (discussing the prominence of Justice Scalia in this debate).

182. 261 F.3d 927 (9th Cir. 2001).


184. Gibson, 261 F.3d at 932. The proceedings of the case at the state court level are illustrative of the manipulation of the jurisdictional statutes by plaintiffs’ class counsel in many consumer class actions in order to stay under the federal court radar. In that case, after realizing the defendant’s intent to attempt removal, the plaintiffs filed an amended state court complaint alleging that no plaintiff was seeking damages of $75,000. Plaintiffs’ counsel would not enter into a binding stipulation to that effect. Id. at 931. To do so, of course, would deprive the plaintiffs of the ability to amend the complaint to increase the amount in controversy to a real figure once the one-year deadline on removing a diversity case had expired. See 28 U.S.C. §1446(b). Thus, on the eve of the one-year deadline to attempt removal and with plaintiffs’ counsel equivocating on the actual damages that might be sought, defendant’s counsel faced the choice of either waiving the client’s possible removal rights or responding to a motion for sanctions.

185. Gibson, 261 F.3d at 933.
an unusual dichotomy—the Fifth Circuit believed § 1367 had a plain meaning that resulted in overruling Zahn while the Eighth and Tenth Circuits also believed it had a plain meaning but that Zahn survived the statute.\textsuperscript{186} The court addressed, and rejected, the two textual arguments originally espoused by the Tenth Circuit in Leonhardt.\textsuperscript{187} First, the court disagreed that the term “original jurisdiction” in § 1367(a) meant one thing in federal question cases and another in diversity cases. The court reasoned that there was nothing in the statutory text to support this distinction and that, if this were accurate, it would render § 1367(b) mostly superfluous.\textsuperscript{188}

The second textual argument rejected by the Ninth Circuit relates to the last phrase of § 1367(b) concerning the need to limit its exceptions to instances where “exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of § 1332.”\textsuperscript{189} As mentioned earlier, Leonhardt used this phrase to make the general observation that Congress was concerned about not extending supplemental jurisdiction too far in diversity cases. From this observation, the Tenth Circuit had implicitly concluded that the omission of Rule 23 from any mention in § 1367(b) must have been an unintentional error, thereby justifying the court writing that exclusion into the statute.\textsuperscript{190} The Ninth Circuit opined, however, that this last

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\item \textsuperscript{186} Id. at 934.
\item \textsuperscript{187} Id. at 937-38.
\item \textsuperscript{188} Id. The court noted that, for example, with respect to Rule 20 joinder of defendants that most defendants are joined in the original complaint. The court reasoned, therefore, that:
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\item The exclusion of joined claims against non-diverse defendants from the supplemental jurisdiction granted by subsection (a) indicates that such claims are covered by supplemental jurisdiction, for there would otherwise be no reason for subsection (b) to except them from supplemental jurisdiction.
\item In order for such claims to have been covered by supplemental jurisdiction, “original jurisdiction” under subsection (a) must be determined by looking to see if there was subject matter jurisdiction over any one claim in the complaint, rather than over all of the claims in the complaint.
\end{itemize}
\item \textsuperscript{189} 28 U.S.C. § 1367(b).
\item \textsuperscript{190} See Leonhardt v. Western Sugar Co., 60 F.3d 631, 640 (10th Cir. 1998). The Third Circuit made this finding explicitly. Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 221 n.6 (3d Cir. 1999) (“The omission of Rule 20 at that point is an unintentional drafting gap . . . .”).
\end{itemize}
provision operates to limit the reach of the exceptions to supplemental jurisdiction set forth in § 1367(b). As such, it cannot enlarge the exceptions but only narrow them:

We believe that the last phrase of subsection (b) means that there is supplemental jurisdiction over a claim otherwise excepted from supplemental jurisdiction by subsection (b) if § 1332, as understood before the passage of § 1367, would have authorized jurisdiction over that claim.191

Rejecting each of the Tenth Circuit’s textual arguments, the Ninth Circuit concluded that “the text of § 1367 is clear, and that it confers supplemental jurisdiction over the claims of class members in a diversity class action when named plaintiffs have claims with an amount in controversy in excess of $75,000.”192 Because the text of the statute was clear and the result not “absurd,” the court did not believe it was necessary or appropriate to rely upon possibly conflicting statements from the statute’s legislative history to reach a different result.193

Three days later, the Fourth Circuit reached the identical conclusion in Rosmer v. Pfizer Inc.194 Rosmer was a state-law class action brought by a plaintiff who was diverse in citizenship from the named defendant and who owned a claim in excess of § 1332’s $75,000 jurisdictional minimum.195 In an attempt to avoid removal and federal court scrutiny over the putative class action, the plaintiff’s complaint specifically alleged that some class members had suffered damages less than $75,000 in actual and punitive damages.196 After the district court denied plaintiff’s motion to remand the removed action to state court, an interlocutory appeal was granted so the Fourth Circuit could decide whether § 1367 overruled Zahn.197 For the same reasons as the Ninth Circuit, the Fourth Circuit rejected the Tenth Circuit’s textual arguments: “[W]e refuse to squint at § 1367(a) so hard that we lose sight of the statute’s plain meaning.”198 Not only did the Fourth Circuit believe that resort to the statute’s legislative history was not appropriate, it found the legislative history to be a mixed bag not clearly inconsistent

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191. Gibson, 261 F.3d at 938.
192. Id. at 939.
193. Id. at 940.
194. 263 F.3d 110 (4th Cir. 2001).
195. Id. at 112.
196. Id.
197. Id. See 28 U.S.C. § 1292(b) (permitting district courts to certify such an order for interlocutory review).
198. Rosmer, 263 F.3d at 117.
with the text of the statute. 199

During the writing of this article, the Eleventh Circuit finally 200 addressed the issue of Zahn's viability. In Allapattah Services, Inc. v. Exxon Corp., 201 that court heard an interlocutory appeal following the entry of a judgment of liability from a jury trial of a class action against Exxon by its dealers. After noting the split among the circuits, the Eleventh Circuit proceeded to explain its obligation to adhere to the “plain meaning” of the statute where its text dictated a clear and unambiguous result. 202 Once its commitment to that rule of statutory interpretation was established, the Eleventh Circuit refused to accept the defendant’s invitation for the court to walk through the statute’s legislative history: “[W]e consistently have reiterated that the text of a statute controls and that we may not ‘consider legislative history when the statutory language is unambiguous.’” 203 Resorting to several well accepted canons of statutory interpretation, the court in short order rejected the defendant’s Leonhardt-inspired textual interpretation 204 and held that: “Because we do not believe that the text of the statute expresses any legislative intent to prevent district courts from exercising supplemental jurisdiction in diversity class actions, we decline to ‘rewrite the statute to insert Rule 23 into § 1367(b)’s list of exceptions.” 205

B. Rule 20 Joinder

At the same time that the district and circuit courts have attempted to understand the significance behind § 1367(b)’s omission of Rule 23 from its list of exceptions to the statute’s broad grant of jurisdiction, a smaller but still significant number of courts have also faced the issue in the Rule 20 context. Similar tensions and themes from the Rule 23 cases are also found in the circumstance of attempts to join the claims of jurisdictionally small plaintiff's claims under Rule 20.

199. Id.
200. The Eleventh Circuit had previously noted the issue on two separate occasions but had not been forced to resolve it. Morrison v. Allstate Indem. Co., 228 F.3d, 1255, 1273-74 (11th Cir. 2000); Cohen v. Office Depot, Inc., 204 F.3d 1069, 1080 n.12 (11th Cir. 2000).
201. 333 F.3d 1248 (11th Cir. 2003).
202. Id. at 1258-64.
203. Id. at 1255 (quoting Valdivieso v. Atlas Air, Inc., 305 F.3d 1283, 1287 (11th Cir. 2002) (per curiam), cert. denied, 123 S. Ct. 2213 (2002)).
204. Id. at 1262.
205. Id. at 1256 (quoting Rosner, 263 F.3d at 115).
1. Clark Rule

Somewhat similar to the holding in Zahn was the Supreme Court’s holding in Clark v. Paul Gray, Inc.206 In that case, one of the named plaintiffs did not meet § 1332’s amount-in-controversy requirement while the other plaintiff’s claim was sufficient. The Supreme Court held that there was no pendent party jurisdiction recognized in such a diversity case because each party plaintiff was required to independently meet § 1332’s requirements.207 Prior to the enactment of § 1367, Clark had been accepted as settled law and was not seriously questioned by any courts or commentators.208

2. Impact of § 1367 on Clark

The first circuit court to consider whether § 1367 deserved a plain language interpretation outside the class action context was the Seventh Circuit in the case of Stromberg Metal Works, Inc. v. Press Mechanical, Inc.209 Stromberg involved a Rule 20 joinder issue rather than Rule 23. Stromberg was a diversity case filed by two plaintiffs in federal district court for breach of contract and fraud. While both plaintiffs had diverse citizenships from the defendants, only one of the two named plaintiffs had a claim that met §1332’s amount in controversy requirement.210 Historically, such a situation would not permit the federal court to entertain the jurisdictionally small claim. Just as the defendants had done in Abbott Labs,211 however, the plaintiff in Stromberg argued that § 1367 had changed prior caselaw because subpart (b)’s exceptions did not refer to persons proposed to be joined under Rule 20.212

The Seventh Circuit easily recognized the parallels between the Rule 20 context and the Rule 23 situation addressed by the Fifth Circuit in Abbott Labs.213 Because § 1367(b) neither excepts from subpart (a)’s

207. Id.
209. 77 F.3d 928.
210. Id. at 930.
211. See supra notes 144-59 and accompanying text.
213. Id. One district court observed that the decisions of the various district courts to consider § 1367’s impact on Clark fell into line with how their respective circuits ruled on the issue of whether § 1367 overruled Zahn:

Though only two appellate courts have addressed § 1367’s effect on the jurisdictional-amount issue outside the context of class actions, many district courts have. Generally, these decisions fall along the lines of Zahn. If controlling circuit law is that Zahn was abrogated, district courts within that circuit have found that Clark was abrogated
broad jurisdictional grant claims joined under Rule 23 nor Rule 20, one would ordinarily expect similar results in the two situations. In fact, the Seventh Circuit even characterized Abbott Labs as holding that § 1367 overruled not just Zahn but Clark as well.214 Beginning its analysis with a careful reading of the text of the statute, the Seventh Circuit believed the last sentence of § 1367(a) was significant.215 The last sentence, of course, reaffirms Congress’ commitment for supplemental jurisdiction to include pendent party jurisdiction,216 as follows: “Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.”217 The court believed that, even if the principle purpose behind this language was to reverse the Supreme Court’s unsavory holding in Finley, there was nothing in the text of the statute to limit pendent party jurisdiction to federal question cases.218 According to the Seventh Circuit, even if there existed legislative history suggesting that Congress never intended to overrule Zahn or Clark, “the text is not limited in this way. When text and legislative history disagree, the text controls.”219

The Seventh Circuit seemed to be compelled strongly to reach the same interpretation as the Fifth Circuit had in Abbott Labs.220 The court

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214. Stromberg, 77 F.3d at 930

One court of appeals has held that § 1367 supersedes Clark and allows pendent-party jurisdiction when the additional parties have claims worth less than $50,000 [citing Abbott Labs]. . . . (Actually, the fifth circuit held that § 1367 alters the result of Zahn, 414 U.S. 291; we discuss below whether there is a material difference between Clark and Zahn.) No other court of appeals has addressed this question; we recently remarked on its unsettled nature. Anthony v. Security Pacific Financial Services, Inc., 75 F.3d 311, 315-16 & n.2 (7th Cir. 1996). Most district judges, within and without this circuit, have held that the old rule retains vitality.

Id.

215. Id. at 931.

216. Most courts and commentators have noted that this last sentence was designed specifically to overrule the Supreme Court’s holding in Finley. Id.


218. Stromberg, 77 F.3d at 930 (“Although the final sentence of § 1367(a) might have been designed to do nothing more than reverse the outcome of Finley, 490 U.S. 545, which held that pendent-party jurisdiction is unavailable when the principal claim arises under federal law, the text [of § 1367] is not limited to federal-question cases, and § 1367(b) shows that the statute governs diversity litigation as well.”).

219. Id. (citing In re Sinclair, 870 F.2d 1340 (7th Cir. 1989)).

220. The Seventh Circuit noted at the inception of its analysis that it was “reluctant to create a
concluded that “Section 1367(a) has changed the basic rule by authorizing pendent party jurisdiction, and that change affects Clark and Zahn equally.”²²¹ Indeed, the Seventh Circuit believed that applying this plain-reading of § 1367 to Rule 20 cases was less burdensome on the federal courts than the Fifth Circuit’s holding in class actions. The Seventh Circuit explained the practical appeal of its extension of Abbott Labs’ holding:

To the extent that practical considerations enter in, it is hard to avoid remarking that allowing thousands of small claims into federal court via the class device is a substantially greater expansion of jurisdiction than is allowing a single pendent party. It is therefore easy to imagine wanting to overturn Clark but not Zahn; it is much harder to imagine wanting to overturn Zahn but not Clark, and we have no reason to believe that Congress harbored such a secret desire.²²²

The Seventh Circuit was so committed to a strictly textual reading of § 1367 that it was willing to apply the statutory language even in the face of two strong counterarguments: (1) the threat the court perceived that its holding could logically undermine the Strawbridge complete diversity rule; and (2) the apparent anomaly it believed was present in the exceptions enumerated in § 1367(b).

With regard to the former, the Seventh Circuit observed that “supplemental jurisdiction has the potential to move from complete to minimal diversity.”²²³ The apparent suggestion from the court was that if a claim for less than the jurisdictional minimum could be added under Rule 20 to a diversity claim for which original jurisdiction existed, there was nothing in the language of § 1367 to preclude the joinder under Rule 20 of an additional plaintiff who was not diverse from the existing defendant. The court also observed the “apparent incongruity” of § 1367(b) permitting supplemental jurisdiction for claims by plaintiffs joined under Rule 20 but withholding supplemental jurisdiction for claims against parties joined as defendants under Rule 20.²²⁴ In conflict among the circuits on a jurisdictional issue. We follow Abbot Laboratories, which has strong support from the statutory text.” Id. at 930.

221. Id. at 931.

222. Id.,

223. Id at 932.

224. In other words, the court believed the text of § 1367(b) compelled the following incongruity:

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<th>Jurisdiction Prohibited</th>
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<tr>
<td>Plaintiff #1 (Kan.) and Plaintiff #2 (Calif.)</td>
<td>v.</td>
<td>Defendant (Calif.)</td>
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remarkable candor, the Seventh Circuit even admitted that “[w]hether § 1367(b) is a model drafting exercise may be doubted.”225

Nevertheless, the Seventh Circuit declined the defendants’ invitation to be guided by anything other than the text of the statute. Rather than focus on problems created in future cases by its holding, the Court opined that the present application of the statute to the case before it in a way that permitted supplemental jurisdiction over the smaller claims of the second plaintiff was appropriate. The court noted that the claims were closely related, having arisen out of the same construction project,226 and concluded that the application of § 1367 made sense in that case:

This strikes us as exactly the sort of case in which pendent-party jurisdiction is appropriate. It is two for the price of one: to decide either plaintiff’s claim is to decide both, and neither private interests nor judicial economy would be promoted by resolving Stromberg’s claim in federal court while trundling Comfort Control off to state court to get a second opinion.227

In stark contrast with the Seventh Circuit’s commitment to textualism even in the face of possible drastic consequences, the Third Circuit showed minimal regard for honoring the text of § 1367 in the same Rule 20 context. In *Meritcare Inc. v. St. Paul Mercury Insurance Co.*,228 the Third Circuit followed Leonhardt’s damn-the-language approach in the Rule 20 joinder context. One plaintiff corporation in the diversity case had a claim in excess of §1332’s then-in-effect $50,000 amount in controversy requirement, but the second plaintiff (a subsidiary of the other plaintiff) did not and there was no exception to the rule against aggregation of damages that was applicable.229 Both claims arose out of the same incident (the collapse of a roof and a common insurance coverage issue),230 and the Gibbs’ test under § 1367(a) was seemingly satisfied. Just as with the issue in the class action context, the court grappled with the fact that subpart (b) did not mention plaintiffs joined under Rule 20 as an exception to subpart (a)’s broad grant of supplemental jurisdiction.

Prior to engaging in a predicate discussion of whether it was appropriate to rely upon legislative history, and without attempting any

225. *Stromberg*, 77 F.3d at 932.
226. *Id.*
227. *Id.*
228. 166 F.3d 214 (3d Cir. 1999).
229. *Id.* at 218.
230. *Id.*
literal application of the statute’s language, the Third Circuit launched
into a detailed discussion of § 1367’s legislative history.\footnote{Id. at 221, 219-20.} Similar to
the Tenth and Eighth Circuits, the Third Circuit found persuasive the
House Committee’s Report which, in a footnote, stated that the
committee intended for the statute to permit the holdings in both Zahn
and Ben-Hur to remain viable.\footnote{Id. at 220.} Of course, the House Committee
Report never mentioned the continued viability of the Supreme Court’s
holding in Clark\footnote{H.R. RPT. 101-734, 2d Sess. (1990).} that prohibited the joinder of a claim too small under
§ 1332 with one that met the amount in controversy standard. Implicit in
the Third Circuit’s opinion was that the analyses for Rule 20 and Rule
23 joinder under § 1367 should be treated the same.

The Third Circuit was particularly impressed with the fact that the
statute contemplated a broad grant of supplemental jurisdiction for
federal question cases (through subpart (a)) with a more limited grant
being available in diversity cases (through subpart (b)). This suggested
to the Third Circuit: “Section 1367 was not intended to substantially
expand diversity jurisdiction. Setting aside the holding in Zahn and
Clark would have such an effect.”\footnote{Meritcare, 166 F.3d at 221.} This conclusion, bolstered by the
legislative history in the House Committee Report,\footnote{The Third Circuit felt that the legislative history provided “more than adequate evidence
that Congress did not intend to allow such an obvious evasion of the diversity statute.” Id. at 221 n.6. The court also cited the conclusions of Professor Rowe that the legislative history was
sufficient to fill the presumed ambiguity in the face of § 1367(b). See Rowe, Reply, supra note 93, at 960 n.90.} led the Third
Circuit to the conclusion that the “omission of Rule 20 [in § 1367(b)’s
exceptions] is an unintentional drafting gap.”\footnote{Meritcare, 166 F.3d at n.6.}

Of the three minority circuits to reject the textualist approach to
interpreting § 1367, the Third Circuit showed the least regard for the text
of § 1367. The Third Circuit effectively treated subpart (b)’s exceptions
as mere examples of Congress’ desire not to permit too broad an
exercise of supplemental jurisdiction in diversity cases and supported
this conclusion with its review of the statute’s legislative history. That
court never once attempted to parse the language of the statute to
determine what result its plain-language application would have
achieved.

\footnote{Id. at 221, 219-20.}
\footnote{Id. at 220.}
\footnote{H.R. RPT. 101-734, 2d Sess. (1990).}
\footnote{Meritcare, 166 F.3d at 221.}
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sufficient to fill the presumed ambiguity in the face of § 1367(b). See Rowe, Reply, supra note 93, at 960 n.90.}
\footnote{Meritcare, 166 F.3d at n.6.}
C. *The Advantages of the Textual Interpretation of § 1367*

Taking into account both the Rule 23 and Rule 20 contexts, the circuits are currently split five to three on whether the “plain language” of § 1367 should be enforced or whether its legislative history should trump it to reach a result more consistent with preexisting case law. The Fifth, Seventh, Ninth, Fourth, and Eleventh Circuits have found the statute’s text to be authoritative and have, therefore, enforced it according to its clear terms even when that compelled a holding at odds with prior caselaw and even, perhaps, against the personal preferences of the judges on those panels. By contrast, the Tenth and Eighth Circuits used contrived and allegedly “unambiguous” readings of § 1367 to reach a result consistent with prior caselaw. Those courts were so concerned about the fallacy of their interpretation of the text, however, that they were quick to fall back on the statute’s legislative history—namely, the House Committee Report—to justify the jurisdiction-restrictive result they reached. The Third Circuit ignored the text of the statute and used its legislative history to find ambiguity in its meaning and to reach the same result as the Tenth and Eighth Circuits. The First and Second Circuits have each acknowledged the issue but have not yet ruled upon it. The Supreme Court, as indicated earlier, has failed in its one attempt to resolve this basic interpretational issue.

Given the divergence of approaches to the Supplemental Jurisdiction Statute, what lesson can be learned about how future courts should interpret it?

The nearly universally acknowledged canon for statutory

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237. *In re Abbott Labs*, 51 F.3d 524 (5th Cir. 1995).
238. *Stromberg Metal Works v. Press Mech., Inc.*, 77 F.3d 928 (7th Cir. 1996); *In re Brand Name Prescr. Drug Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997).
239. *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001).
242. See, e.g., *Stromberg*, 77 F.3d at 932. Noting certain incongruities in the application of § 1367(b), the court asked “What sense can this make?” Id. Later the court expressed its doubts that the statute was “a model drafting exercise.” Id.
243. See supra notes 136-48 and accompanying text.
244. See supra notes 187-93 and accompanying text. (observing that the issue was complex but that it was not necessary to decide it to resolve the appeal in that case).
interpretation in the United States is the so-called “plain meaning rule” which generally means that a court is to “follow the plain meaning of the statutory text, except when the text suggests an absurd result or a scrivener’s error.”

Professor Singer’s textbook on the subject of statutory interpretation provides a concise statement of the rule, as follows:

A basic insight about the process of communication was given classic expression by the Supreme Court of the United States when it declared that “the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.”

This generally means when the language of the statute is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning.

Indeed, even with their different results, each of the eight circuits to take a stand on how § 1367 should be interpreted has at least agreed that the plain meaning rule is supposed to govern their interpretation of the statute. While there are certainly competing schools of thought among academics about whether the plain meaning rule ought to be

247. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKLEY, AND ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 375 (Foundation Press 2000).
248. SINGER, supra note 246, at 113-18 (citing, among other sources, Caminetti v. United States, 242 U.S. 470 (1917)).
249. Id.
250. See Abbott Labs, 51 F.3d at 529 (“But the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result.”); Stromberg, 77 F.3d at 931 (“When text and legislative history disagree, the text controls.”); Gibson, 261 F.3d at 938 (“Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then . . . judicial inquiry is complete.”); Rosner, 263 F.3d at 117 (“The Supreme Court, however, has consistently stated that when a statute is plain on its face, a court’s inquiry is at an end. ‘The legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers directly at odds with clear statutory language.’”) (quoting United States v. Lanier, 520 U.S. 259, 268 n.6 (1997)); Leonhardt, 160 F.3d at 638 (“We first examine the statutory language and decide whether Congress has spoken ‘in reasonably plain terms.’”); S. Ute Indian Tribe v. Amoco Prod. Co., 151 F.3d 1251, 1257 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982)) (“Where the will of Congress has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.” (internal quotations omitted)); Trimble, 232 F.3d at 961 (“If the statutory language is clear and unambiguous, we normally find that language conclusive . . . If the language is ambiguous, however, we may ‘resort to legislative history as an aid to interpretation.’”); Id. at 962 (“Thus, in our view § 1367(a) and (b) can be read literally, and unambiguously, to require each plaintiff in a class action diversity case to satisfy the Zahn definition of ‘matter in controversy’ and to individually meet the $75,000 requirement.”); Meritcare, 166 F.3d at 222 (“[W]e conclude that there is sufficient ambiguity in the statute to make resort to the legislative history appropriate.”); Allapattah, 333 F.3d at 1254 (“In construing a statute we must begin, and often should end as well, with the language of the statute itself.”).
followed, it is clear that the federal courts, led by the U.S. Supreme Court, pledge allegiance to this rule, even when departing from it in practice. Further, one can hardly begin to imagine the Pandora’s Box that might unfold if courts were to begin essentially adopting different rules of statutory construction for each statute, taking a peek into the purposes behind each statute before looking to its text, as has been suggested by Professor Pfander. Indeed, such an approach would not really amount to a canon of construction so much as an ex post facto rationalization of the result a particular court chose to uphold—hardly the sort of practice destined to promote predictability and to give deference to the legislators who voted in favor of the statutory text. Professors Arthur and Freer, while not numbered among the few fans of § 1367, are rational enough to understand why courts cannot ignore its plain mandates:

First, basic principles of statutory construction militate against the drafters’ hopes. It is not so easy for judges to ignore the specific commands of a statute in favor of “basic guidance” arguably gleaned from the vague statements found in legislative history. Justice Scalia is leading a campaign to restore the primacy of statutory language, which, as he points out, is all that Congress actually adopts. This campaign is a reaction against the perceived abuse of legislative history to construe statutes contrary to their enacted language. In such cases, Scalia and others argue that it is by no means certain that Congress really “intended” the result. In any event, Article I makes no provision for the enactment of legislative intent—other than the constitutional process of putting it into statutory language.

Assuming that federal courts will not suddenly abandon the plain

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251. See generally supra notes 246-47.
252. See SINGER, supra note 246.
253. Pfander, supra note 2.
254. While there has been much scholarly criticism of not only the plain meaning canon but of other subservient canons, the courts do not seem to be particularly concerned. See Richard A. Posner, Statutory Interpretation—In the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 805 (1983) (“To exaggerate slightly, it has been many years since any legal scholar had a good word to say about any but one or two of the canons, but scholarly opinion . . . has had little impact on the writing of judicial opinions, where the canons seem to be flourishing as vigorously as ever.”).
255. One justification for the plain meaning rule, particularly as applied by textualists, is that legislators who vote for a bill, and the chief executive who signs the bill into law, are not voting on legislative history or other personal observations of the drafters or other supporters of the legislation. Therefore, to impose some alternative meaning on the statute at odds with the plain meaning of its text is undemocratic and, perhaps, implicates fundamental separation of powers concerns. See SINGER, supra note 246; ESKRIDGE ET AL., supra note 247.
256. Arthur & Freer, Burnt Straws, supra note 6, at 985-86.
meaning rule, as a realist must, one must then ask how should that rule apply to § 1367. The emerging majority approach is certainly straightforward. If the claim in question is part of the same constitutional case, subpart (a) provides for supplemental jurisdiction even when the claim involves the joinder of new parties (i.e., pendent party jurisdiction). If original jurisdiction is founded on diversity, one simply asks if the new claim arises in the context of one of the two groups of prohibited situations expressly proscribed by subpart (b). If the claim does not fall into those express categories, the majority approach holds that there is supplemental jurisdiction over that new claim. It’s just that simple. To the majority of circuits, it does not matter if this exercise of supplemental jurisdiction offends traditional notions of pendent or ancillary jurisdiction because, after all, Congress is free to expand supplemental jurisdiction to the limits of the Constitution.

But while clearly the majority’s interpretation is reasonable, before one can hold that the statute is unambiguous, consideration must first be given to alternative suggested interpretations of that language.
Among the three minority circuits that have held that § 1367’s text was impotent against the jurisdiction-restricting holdings of Zahn or Clark, two portions of § 1367’s text are used to support their result. The first textual counter-argument focuses upon the phrase “original jurisdiction” in subpart (a). According to the Tenth Circuit, if original jurisdiction is founded upon diversity jurisdiction, each and every claim stated in the lawsuit must meet § 1332’s amount-in-controversy requirement. If all of the claims against all parties meet this standard, then subpart (a)’s “original jurisdiction” attaches. Otherwise, there is no “original jurisdiction” and the case must be dismissed or, in a removed case, remanded to state court. Of course, in this instance there could be no potential exercise of supplemental jurisdiction at the outset of a diversity case for there would be no federal lawsuit pending.

This “original jurisdiction” textual argument cannot possibly represent the “plain meaning” of the statute for several reasons. First, this argument would implicitly require that that phrase mean one thing in a federal question case and another in a diversity case, which distinction finds no support in the statutory text. No court has suggested that § 1367 overrules Gibbs—the very paradigm of supplemental jurisdiction. Yet if the Tenth Circuit’s interpretation of “original jurisdiction” were applied equally to federal question and diversity cases, Gibbs would be overruled. The Ninth Circuit illustrates this point:

If a non-diverse plaintiff files a complaint with two transactionally related claims against a single defendant, one based on federal law and one based on state law, there is “original jurisdiction” under subsection (a) because there is subject matter jurisdiction over the federal-law they expressed, even if the expression differs from the parties’ [actual] intentions at the time they created the contract.” Id. at 151 (quoting Nicholson Air Services v. Allegany County, 706 A.2d 124 (Md. 1998). Given the rough similarity of the plain meaning rule of statutory and contract interpretation, it is not surprising that so many academics and courts also bristle against application of the rule in contract disputes. Id. In fact, one could fairly easily marshal arguments that the plain meaning rule should apply with even greater force to statutes than contracts. For example, statutes are enacted by larger numbers of individuals, legislative history does not include the views of all of those legislators, statutes have much broader impact, and the public has greater need to predict a statute’s impact.

263. See supra notes 158-81 and accompanying text (discussing Leonhardt and Trimble); supra notes 228-36 and accompanying text (discussing Meritcare).
264. Leonhardt, 160 F.3d at 927.
265. How the complete diversity requirement is to be applied is a different matter, discussed infra at Section V.1.
266. Fed. R. Civ. P. 12(b)(6), 12(c); 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”).
267. See SUBCOMM. REPORTS, supra note 55, at 548-49.
claim. Because there is original jurisdiction, there is supplemental jurisdiction over the state-law claim. The example just described is, of course, United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966), the paradigm case of pendent (now supplemental) jurisdiction. If Leonhardt’s definition of “original jurisdiction” were applied to federal question cases, § 1367 would overrule Gibbs. Since no one, including the Leonhardt panel, argues that § 1367 has that consequence, the question is whether “original jurisdiction” in subsection (a) has a different meaning in diversity cases from its unquestioned meaning in federal question cases.268

Not only would the Tenth Circuit’s interpretation of “original jurisdiction” overrule Gibbs, as the Ninth Circuit demonstrates, the same logic would necessarily reinstate Finley. The only meaningful difference between the procedural posture of Finley and Gibbs was that the former involved the addition of a state-law claim against a new party (i.e., pendent party jurisdiction) whereas the latter only involved the addition of a state-law claim against a defendant already in the case (i.e., pendent claim jurisdiction). One of the clear changes wrought by § 1367, however, was an end to the distinction between pendent party and pendent claim analysis in the federal question context.269 Thus, if the same interpretation of “original jurisdiction” the Tenth Circuit advocates for diversity cases is applied in the federal question context, § 1367(a) would not tolerate the exercise of supplemental jurisdiction in the Finley context, a very ironic result.270

A shrewd reader might respond, however, that this author’s resort

268. Gibson, 261 F.3d at 935-36.
269. Section 1367(a) makes this clear with its last sentence: “Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.”
270. As the Fourth Circuit has observed, this unintended consequence of the Tenth Circuit’s “original jurisdiction” analysis is perhaps its undoing:

More damaging to the Leonhardt court is the fact that under its analysis, § 1367 would not apply to cases such as Finley, the very case that prompted the enactment of the statute in the first instance. If Leonhardt were correct, there would have been no original jurisdiction in Finley because the plaintiff did not have an independent jurisdictional basis for suing the non-diverse party in federal court.

Rosmer, 263 F.3d at 116-17. Another related argument implicit in the Tenth Circuit’s rationale is that, perhaps, “original jurisdiction” in § 1367(a) means original jurisdiction “over the whole action at the initiation of a complaint.” Id. at 115. However, this would preclude supplemental jurisdiction in the Gibbs’ scenario where a state claim is included in an original complaint with a related federal claim. Further, there is nothing in § 1367 to indicate that supplemental jurisdiction is intended to apply only to the addition of claims subsequent to the filing of the original complaint.

Id. at 116-17 (“[Plaintiff] urges us to read distinction after distinction into the term ‘original jurisdiction.’ But we refuse to squint too hard at § 1367(a) so hard that we lose sight of the statute’s plain meaning.”).
to reliance on the legislative purpose behind enacting § 1367 to defeat the minority view is no more analytically true to the textualist’s “plain meaning” rule than was the Tenth Circuit’s analysis. Or put another way, if one is going to look at the legislative history behind § 1367, it is difficult to conclude that Congress intended to overrule Zahn and Clark. However, one hardly needs to depart from the text of § 1367 to reject the Tenth Circuit’s analysis. As stated above, there is no basis in the text of § 1367(a) to distinguish between federal question and diversity cases in giving meaning to the phrase “original jurisdiction.” Further, subpart (b) also refers to “original jurisdiction” in a sense that necessarily contemplates its application to cases where only some of the claims stated meet the requirements of § 1332, or else it would be entirely superfluous and would never have any application.271 Finally, there is simply no getting around the fact that the Tenth Circuit’s reasoning would have the effect of judicially rewriting § 1367(b) to include references to Rules 20 and 23 within its exceptions.272 Thus, Leonhardt’s strained textual distinction would unavoidably violate at least three accepted canons of statutory construction: (i) “[I]dentical terms within an Act bear the same meaning”;273 (ii) “Avoid interpreting a provision in a way that would render other provisions of the Act superfluous or unnecessary”;274 and (iii) “Do not create exceptions in addition to those specified by Congress.”275 Regardless of one’s fondness for the old days of Zahn and Clark, it is hard to condone such a strained interpretation of § 1367 to revive those holdings, particularly when—as noted above—it would effectively destroy Gibbs and resuscitate Finley in the process. From a jurisprudential perspective, one would rather advocate ignoring the statutory text in favor of its legislative history than to distort statutory interpretation in a way that leads to a holding that undermines the central purposes of the statute. That is exactly what Leonhardt’s misguided textual analysis would do.276

271. Section 1367(b) only applies to diversity cases.
272. The Fourth Circuit made the same observation: “In effect, [the plaintiff] would have us rewrite the statute to insert Rule 23 into § 1367(b) list of exceptions. This we cannot do.” Rosmer, 263 F.3d at 115.
273. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992); ESKRIDGE ET AL., supra note 247, at 376 (listing as one textual canon of statutory construction: “Interpret the same or similar terms in a statute the same way.”).
274. ESKRIDGE ET AL., supra note 247, at 376.
275. Id.
276. In a recent essay, Professor Pfander takes issue with the decisions of the Fourth and Ninth Circuits, rejecting Leonhardt’s “original jurisdiction” analysis. See Pfander, supra note 14, at 1209. Professor Pfander demonstrates tremendous creativity in his effort to demonstrate the plausibility of
The only other textual argument advanced by the minority latches on to the last proviso in subpart (b)—“. . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332”—and transmogrifies it by effectively inserting it into the text of subpart (a) instead. In this regard, the Tenth Circuit’s entire second textual argument consisted of the following:

That very language evidences a concern for preserving the historical and well-established rules of diversity. The fact that section § 1367(b) prohibits the addition of claims and parties which would destroy diversity supports our interpretation of § 1367(a) as also fully respecting the rules of diversity in cases invoking the original jurisdiction of the federal courts.

The problem with the foregoing analysis should be fairly obvious. It violates the following well accepted canons of statutory interpretations:

(i) “Provisos and statutory exceptions should be read narrowly”;
(ii) “Avoid interpreting a provision in a way that is inconsistent with the structure of the statute.”

The minority distorts the “plain meaning” of

Leonhardt’s exegesis of that phrase. Essentially, he borrows the broad definition of “original jurisdiction” from the removal statutes to contend, just for federal question cases, that § 1367(a)’s “original jurisdiction” refers to not only a federal anchor claim but to all pendant claims that would have been permitted under pre-§1367 caselaw. The problem with this proposed solution, however, is that it renders the Supplemental Jurisdiction Statute “superfluous” in the Gibbs context and would, in effect, reinstate the spurned Finley holding that everyone concedes the statute sought to change. Professor Pfander admits as much. Id. at 1222. Thus, rejecting the Fourth and Ninth Circuits’ interpretation of “original jurisdiction,” which Professor Pfander concedes is “crisp and logically consistent,” one would be left with an alternative definition that Professor Pfander calls “messy and somewhat inconsistent.” Id. at 1220-23. This tends to be the way analyses go that are result-oriented instead of faithful to a statute’s text. In this case, the alternative interpretation of “original jurisdiction” that has its goal the maintenance of pre-§1367 caselaw necessarily carried Finley’s baggage with it.

Section 1367(b) reads, in full, as follows:

(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.

277. Section 1367(b) reads, in full, as follows:

(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.

278. Leonhardt, 160 F.3d at 640. See also Trimble, 232 F.3d at 962 (quoting Leonhardt favorably).

279. ESKRIDGE ET AL., supra note 247, at 376.

280. Id.
§ 1367(b) by ignoring the fact that the cherry-picked language acts as a limitation on the exception to supplemental jurisdiction in subpart (b) and not as a limitation on the broad grant of supplemental jurisdiction offered in subpart (a). In other words, “the last phrase of subsection (b) means that there is supplemental jurisdiction over a claim otherwise excepted from supplemental jurisdiction by subsection (b) if § 1332, as understood before the passage of § 1367, would have authorized jurisdiction over that claim.”

For example, if caselaw interpreting § 1332 recognized supplemental jurisdiction in some context not recognized by the express exceptions in subpart (b), this proviso would mercifully limit the application to subpart (a)’s grant and allow a federal court to continue to exercise supplemental jurisdiction. This reading not only recognizes the obvious structure of § 1367, it also “preserves a small slice of supplemental jurisdiction that would have otherwise have been lost” by the enactment of the Supplemental Jurisdiction Statute.

In sum, the “plain meaning” result achieved by the ever-widening majority of circuit courts to address § 1367 faithfully honors the text of the statute in a manner consistent with well accepted canons of statutory construction. If the decisions of the Tenth, Eight and Third Circuits were to prevail, it would effectively read Rules 20 and 23 into subpart (b) where they do not currently join the list of other exceptions. This would make the list of exceptions in subpart (b) meaningless. In essence, it would be irrelevant to one’s analysis whether or not a scenario was listed in subpart (b) because a litigant would always have to resort to pre-§1367 caselaw in order to determine if a federal court could exercise supplemental jurisdiction over any proposed claim in a diversity lawsuit. While some critics of § 1367 clearly would prefer to treat the statute as a mere guiding light for courts to use as a reference in the continuing judicial evolution of the doctrine of supplemental jurisdiction, this view of the statute is not consistent with the

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281. Gibson, 261 F.3d at 938.
282. An example of this would be in situations where a plaintiff asserts a defensive claim in response to a claim raised against it by a third-party defendant. See infra Section V.2.
283. Gibson, 261 F.3d at 938.
284. Of course, as noted previously, any interpretation that would render other provisions of a statute superfluous or unnecessary should be avoided. See supra note 274 and accompanying text.
285. See, e.g., Arthur & Freer, Burnt Straws, supra note 6, at 986 (“[E]ven if section 1367 had delegated the task to the judges as the drafters belatedly wish it had . . . .”); Rowe, supra note 2, at 56 (“Experience with the codification effort when it took place in 1990 had left me, even before the controversy about the statute mounted in the following year, with doubts about whether the area was better treated by legislation or by decisional law.”); Pfander, supra note 2, at 115 (advocating a form of interpretation that considers the legislative purposes and history and admitting that such a canon would “restore the courts’ role in the further elaboration of supplemental jurisdictional law”).
Constitution’s delicate balancing of power. Further, the majority’s straightforward interpretation avoids the problem inherent in the opposition’s analysis of overruling Gibbs and reviving Finley in the name of preserving Zahn—an ugly duckling precedent without historical support. Another advantage of interpreting § 1367 according to its plain meaning is that this approach necessarily provides a “background of clear interpretive rules” against which Congress may freely make alterations with subsequent revisions to the rules, confident of the expected results any such revision.

If fidelity to the text of § 1367 requires that Zahn and Clark be overruled, two questions logically remain. First, is such a result “absurd”? If so, courts are well within their recognized duty to go beyond the statute’s text to avoid such an outcome. Second, what are the implications for such a plain meaning of § 1367 in other disputed contexts?

The Fifth, Seventh, Ninth, Fourth and Eleventh Circuits have held, collectively, that a plain reading of § 1367, which overrules Zahn and Clark, is not absurd. However, none of those cases go into much detail about what the “absurd” standard actually entails and there is a dearth of authoritative discussion of the issue. Other phrases courts have used for this standard include: “gross absurdity”; “absurd, and perhaps unconstitutional”; “clearly . . . inconsistent with the purposes and policies of the act in question”; and precluding “rational application.” While these varying articulations of a standard suggest an imprecise benchmark, they all suggest that an absurd result is not

286. Arthur & Freer, Burnt Straws, supra note 6, at 989 (“[D]efining their own jurisdiction by ignoring contrary statutory provisions in the guide of interpretation is an inappropriate role for the federal courts. Even at Congress’ behest, it is inappropriate. For under article III that job belongs to Congress.”).

287. See supra notes 139-40 and accompanying text.

288. See Finley, 490 U.S. at 556. Whether or not one agrees with the result achieved by Justice Scalia’s rigid textualist approach in Finley, there is certainly nothing wrong with striving toward a clear interpretation of a statute to assist Congress in understanding the impact of its legislative actions.


290. See, e.g., Abbott Labs, 51 F.3d at 529; Stromberg, 77 F.3d at 931-32; Rosmer, 263 F.3d at 118-19; Gibson, 261 F.3d at 940.

291. Ink v. Commr., 912 F.2d 325 (9th Cir. 1990).


merely one with which a particular court might personally disagree. As
one scholar has reminded: “[T]he absurd results doctrine should be used
sparingly because it entails the risk that the judiciary will displace
legislative policy on the basis of speculation that the legislature could
not have meant what it unmistakably said.”295 At least with regard to
Zahn it is pretty tough, even for that decision’s most ardent
supporters,296 to argue with much conviction that its demise is absurd,
and no court has so held.

For the Fifth Circuit, the literal interpretation of § 1367 was not
absurd because certain justices on the Supreme Court were not
supportive of Zahn anyway,297 certain “respected commentators”
favored the demise of Zahn,298 and because overruling Zahn would help
to “harmonize case law and ‘enable federal courts to resolve complex
interstate disputes in mass tort situations.’”299 Indeed, one might argue
with greater conviction that what was absurd was the lack of rationality
that had been tolerated in the caselaw prior to the enactment of §
1367.300 The court reminded though that “the wisdom of the statute is
not [its] affair beyond determining that overturning Zahn is not
absurd.”301

But what of the legislative history, which the courts in Leonhardt,
Mercury and Trimble thought was so convincingly in favor of
maintaining Zahn and Clark? One district judge believed that honoring
the text of the statute rather than its arguably contrary legislative history
amounted to gamesmanship: “We know what you meant to say, but you
didn’t quite say it. So the message from us in the judicial branch to you
in the legislative branch is: ‘Gotcha! And better luck next time.’”302
With all due deference to that colorful court, the legislative history of §
1367 is not all that its admirers make it out to be. In all of the pages of
hearings, committee reports and even the Report of the Federal Rules
Study Committee, there is actually very little mention of Zahn or Clark.
The linchpin upon which the holdings of Leonhardt, Mercury and
Trimble are bound is a fairly obscure reference in the footnote of the
House Committee Report. That Report states that § 1367 “is not

295. SINGER, supra note 246, at 90-91.
296. See, e.g., Pfander, supra note 14, at 1209.
297. The court noted that Justices Brennan, Douglas and Marshall had dissented in Zahn.
Abbott Labs, 51 F.3d at 529.
298. Id.
299. Id. (quoting Arthur & Freer, Burnt Straws, supra note 6, at 1008).
300. See supra Section IV.A.1 (discussing Ben-Hur and Zahn).
301. Abbott Labs, 51 F.3d at 529.
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. The Report then drops a footnote citing to both Ben-Hur
and Finley. One major problem with reliance on this footnote in the
report is that there is no plausible reading of the actual text of § 1367
that would permit the vitality of both of those inconsistent decisions.

Further, to suggest that the legislative history is consistent would be
an overstatement. The Working Papers of a subcommittee of the Federal
Courts Study Committee, which generally advocated codification of the
supplemental jurisdiction caselaw as it existed prior to Finley, specifically noted that its proposed legislation would overrule Zahn:

The exception is that our proposal would overrule the Supreme Court’s
decision in Zahn v. International Paper Co., 414 U.S. 291 (1973),
which held that each plaintiff in a diversity action must meet the
amount in controversy requirement. Although Zahn did not discuss
pendent jurisdiction, the lower courts have correctly understood it to
preclude the joinder of claims for less than the requisite amount in
controversy to a claim that satisfies the requirement. From a policy
standpoint, this decision makes little sense, and we therefore
recommend that Congress overrule it.

Perhaps it is just these types of inconsistencies among the many
footnotes comprising the legislative history of a major piece of
legislation that argues against being too quick to abandon statutory
text. In any event, after reviewing all of this inconsistent legislative
history, the Ninth Circuit thoughtfully concluded that it did not rise to a
level sufficient to permit the court to ignore the plain text of the statute:

We do not believe that this is enough to overcome the plain meaning of

303. HOUSE REPORT, supra note 88, at 29.
304. Id. at 29 n.17.
305. “Adding Rule 23 [through creative interpretation] to § 1367(b)’s exceptions would have
the effect of reversing the result in Ben-Hur even as it sustains the result in Zahn. Indeed, the House
Report’s admonition that both Zahn and Ben-Hur survive the enactment of § 1367 is simply
impossible to square with the plain text of the statute.” Rosner, 263 F.3d at 117 n.4; See 16 JAMES
WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 106.44, at 106-63 (Daniel Coquillette et al.
eds., 3d ed., Matthew Bender 2003) (“[A]ssuming that Congress did in fact intend to codify both
Ben-Hur and Zahn, there exists no rational construction of the text of the statute that could dictate
that result.”).
306. SUBCOMM. REPORTS, supra note 55, at 561 n.33 (emphasis added; internal citations
omitted).
307. See generally ESKRIDGE ET AL., supra note 247, chs. 6, 8 (discussing in some detail the
debate about whether, and to what extent legislative history should be used to help decipher
legislative intent). “Perhaps the relevance of the legislative history is not best tied to specific
legislative intent, but instead to general intent or purpose.” Id. at 300-01.
the text. Legislative history can justify a judicial departure from a clear text if Congress makes an obvious clerical error, particularly if the error results in an absurd or difficult-to-justify result. But that is not the case here. Even courts that have read § 1367 to preserve Zahn agree that the result of such a reading would not be absurd. See, e.g., Russ v. State Farm Mut. Auto. Ins. Co., 961 F. Supp. 808, 819 (E.D. Pa. 1997) (“Overruling Zahn would not be absurd; arguably, it would be sensible.”). Moreover, as shown in our discussion of the Working Paper[s] of the Federal Courts Study Committee, some of those involved in drafting § 1367 both knew that the language chosen for § 1367 would over-rule Zahn and approved of that result on policy grounds.

The legislative history therefore does not persuade us that we should refuse to follow what we believe is the clear meaning of the text of § 1367. . . . If courts could ignore the plain meaning of statutory texts because their legislative histories showed that some (or even many) of those who drafted and voted for the texts did not understand what they were doing, the plain meaning of many statutes, not only § 1367, would be in jeopardy.308

Perhaps if the central purpose of § 1367 had been to preserve Zahn, one might be able to argue in favor of a departure from its text. Indeed, if Leonhardt’s tortured statutory analysis were to prevail, one would have a strong case for resorting to legislative history to overcome a holding that Finley survives. However, it is beyond doubt that neither Zahn nor its cousin Clark were at the forefront of many congressional minds when § 1367 was enacted.310

From the perspective of public policy, it is even more difficult to argue with the overruling of Zahn and Clark. Congress has shown increasing willingness to soften the diversity requirements in order to enable complex, multi-party cases to have easier access to a federal forum.312 An example of this is the January 2003 enactment of the

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308. Gibson, 261 F.3d at 940-41.
309. See supra notes 262-66 and accompanying text.
310. Indeed, it would be fair to say that the scholarly drafters forgot about Zahn and Clark in the midst of their efforts to, for the most part, codify the prior caselaw.
311. Professor Rowe agrees that the impact of overruling Zahn and Clark is mostly incremental: “Avoiding truck-sized holes in the complete diversity requirement by maintaining the Kroger principle is one thing; excluding below-limit claims related to those already before a federal court in a diversity case—which the law at least before 1367 generally had done—is another.” Rowe, supra note 2, at 62.
312. One author noted that these types of policy considerations underlying § 1367 that support even a non-textual based rationale for the decisions of the Fifth and Seventh Circuits, overruling Zahn and Clark. See Mark C. Cawley, Note, The Right Result for the Wrong Reasons: Permitting
Multiparty, Multiform Jurisdiction statute. This statute generally provides for minimal diversity federal jurisdiction in cases of mass-disasters where at least seventy-five persons are killed (e.g., airplane crashes). Further, as of the time of this writing Congress appears close to enacting the Class Action Fairness Act of 2003, which, among other things, would permit federal diversity jurisdiction for interstate class actions meeting a certain aggregate level amount in controversy with only minimal diversity among the named parties. This latter statute, if finally enacted, would essentially destroy the Supreme Court’s holding in Snyder v. Harris (precluding the aggregation of damages in class action to meet the amount in controversy) for at least a large portion of class actions. Thus, the momentum of Congress is, increasingly, in favor of allowing more multi-party and class actions into federal court up to the limits of the Court’s Article III diversity jurisdiction.

Professor Fink summed up some of the possible public policy arguments in favor of the elimination of Zahn and Clark as follows:

Questions of interpretive approach (whether the legislative history can cure the gap in the statutory text) aside, the Zahn requirement can have the unfortunate effects of either making a federal class action impossible despite the presence of an adequate and diverse representative with a claim that comes within federal jurisdiction, or splitting a class action between federal and state courts depending on which plaintiffs have claims that do and do not exceed $75,000. If the courts do not end up interpreting § 1367 as overruling Zahn, should Congress amend the statute to get rid of the Zahn rule, as a way of making the federal forum more available for aggregative litigation with a mixture of larger and smaller claims? And while Congress is at it, would there be any good reason not to eliminate the restrictive aggregation rule for non-class multi-plaintiff cases (which the Supreme

Aggregation of Claims Under 28 U.S.C. § 1367 in Multi-Party Diversity Litigation, 73 NOTRE DAME L. REV. 1045, 1075-76 (1998) (“[Congressional] intent to further judicial economy is simply inconsistent with the Judiciary Committee’s purported desire to preserve Zahn.”). In light of the House Committee’s report, however, it is a stretch to argue anything beyond the fact that a review of the legislative history does not lead to entirely clear conclusions.

316. Further, as the Seventh Circuit rationalized in Stromberg:

[It] is hard to avoid remarking that allowing thousands of small claims into federal court via the class device is a substantially greater expansion of jurisdiction than is allowing a single pendent party. It is therefore easy to imagine wanting to overturn Clark but not Zahn; it is much harder to imagine wanting to overturn Zahn but not Clark, and we have no reason to believe that Congress harbored such a secret desire.

Stromberg, 77 F.3d at 931.
Court viewed as supporting its holding in Zahn) . . . by authorizing supplemental jurisdiction over below-limit claims? 317

As the Fifth Circuit recognized, however, so long as the statute’s effects do not lead to “absurd” results, the statute’s resolutions of issues of public policy are for the legislature and not the courts. 318 There is certainly no public policy concern raised by the statute’s effects on Zahn and Clark 319 sufficient to warrant departure from application of the statute’s plain meaning.

V. RAMIFICATIONS OF A PLAIN-MEANING INTERPRETATION OF § 1367

As we have seen, the literal interpretation of § 1367 necessarily causes the overruling of Zahn and Clark, which hardly ushers in the demise of the federal court system. Despite the decisions reaching this result in the Fifth, Seventh, Ninth, Fourth, and Eleventh Circuits, there have been no reports of mass filings in the districts encompassed by those courts of appeal nor has “the Republic . . . tottered.” 320 Indeed, it has been thirteen years since the enactment of § 1367 and the federal courts have not yet been forced to close their doors. In fact, one of Professor Rowe’s key proposed revisions to § 1367 is to amend its text to provide expressly for the same results reached by those courts—a result already dictated by the text of the current statute. But what are the ramifications of the textual-oriented decisions of the courts in Abbott Labs, Stromberg, Gibson, Rosmer and Allapattah for other issues surrounding the interpretation and analysis of the interplay between § 1367(a)-(b)? In this last section, I will briefly discuss two other important issues that have arisen concerning the reach of these two provisions and how the plain-meaning analysis, to the extent the current majority rule ultimately prevails, may impact their resolution.

A. The End of Strawbridge v. Curtis’ Complete Diversity?

A profound fear arising after the enactment of § 1367 was that its literal interpretation would lead to the undoing of Strawbridge v. Curtis’ complete diversity requirement—the most treasured of the judicial tools used to limit the federal courts’ resolution of purely state

317. FINK ET AL., supra note 142, at 444.
318. Abbott Labs, 51 F.3d at 524.
319. The Rule 20 incongruity, while perplexing, does not render the effects of § 1367 on Clark “absurd.”
320. Rowe, supra note 2, at 64. Professor Rowe advocates that § 1367 be revised to make it even more explicit that Zahn and Clark are overruled. Id. at 62-64.
law disputes. Even in the midst of utilizing its plain meaning analysis of § 1367 in the Rule 20 context, the Seventh Circuit fretted over the implications of its literal analysis:

The complete-diversity rule of Strawbridge v. Curtiss excludes from federal court [diversity] cases in which citizens of the same state are on each side. Supplemental jurisdiction has the potential to move from complete to minimal diversity.

The thinking has been that, if the literal application of § 1367(a)-(b) means that a plaintiff with a claim for less than $75,000 can join her claim to another plaintiff’s claim that satisfies § 1332’s amount-in-controversy requirement—as was the holding of the Seventh Circuit in Stromberg—then what is there in the text of § 1367 to preclude a plaintiff with the same state citizenship as a defendant from joining her claim with the related claim of a diverse plaintiff? Or stated another way, since the complete diversity requirement shares its origins in § 1332 with the amount-in-controversy requirement, doesn’t the abolition of Clark signal the abolition of Strawbridge as well? Other notable scholars have echoed concern over this possible plain meaning interpretation. In Professor Fink’s casebook on federal courts, he observes:

Read literally, § 1367’s broad authorization of supplemental jurisdiction, coupled with the failure of § 1367(b) to exclude claims by parties joined under Rule 20 (as opposed to plaintiffs’ claims against parties joined under Rule 20, which are excluded), would confer supplemental jurisdiction over the state law claim of a California co-plaintiff in an Arizona plaintiff’s diversity suit against a California defendant. That would create a gaping hole in the Strawbridge complete diversity rule, contrary to Congress’s intent not to authorize supplemental jurisdiction “when doing so would be inconsistent with the jurisdictional requirements of the diversity statute”. At this writing no reported decision has interpreted § 1367 to have this effect of partially overruling Strawbridge. But cf. Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 932 (7th Cir. 1996). . . ."323

Among the federal district courts, these precise fears of § 1367 overruling Strawbridge have not yet been realized, at least in the context of claims joined in an original complaint. A plain meaning

322. Stromberg, 77 F.3d at 932 (internal citations omitted).
323. FINK ET AL., supra note 142, at 442 (quoting the HOUSE COMM. REPORT).
324. See infra note 327 and accompanying text.
application of § 1367 does not necessarily do away with the complete diversity requirement of § 1332. For supplemental jurisdiction to apply, § 1367(a) requires there to be a claim over which the federal court has "original jurisdiction." The complete diversity rule, by its very definition, does not tolerate a blinders-on analysis of only one plaintiff’s citizenship in isolation from that of the remaining co-plaintiffs. Unlike § 1332’s amount-in-controversy requirement, which courts have historically understood to require satisfaction by each claimant independent of other claimants in the action, complete diversity requires a court to compare the citizenships of all plaintiffs from that of all defendants in the action. This difference has nothing to do with the doctrine of supplemental jurisdiction or the text of § 1367(b) but, rather, is simply the way § 1332 has been interpreted since Strawbridge. Thus, because no plaintiff can be considered completely diverse unless all plaintiffs share that diversity, this component of § 1332’s requirements has been and should continue to be treated different from the amount-in-controversy requirement. As a result, Strawbridge is absolutely distinguishable from Clark and is not overruled by the plain meaning of § 1367. The few reported federal district court cases to hear this issue concur.

However, the thornier issue is whether this analysis is altered in any meaningful way by the timing of the Rule 20 joinder. In other words, may a non-diverse co-plaintiff join a lawsuit after the filing of an original complaint by a diverse plaintiff—and the attachment of “original jurisdiction”—under § 1367(a)? The scholarly drafters of § 1367 recognized this potential problem in the early days of the statute’s life:

325. See, e.g., Snyder, 394 U.S. at 332; Clark, 306 U.S. at 583.
326. See, e.g., Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990) (all plaintiffs must be diverse from all defendants in order to satisfy diversity under § 1332(a)); Kroger, 437 U.S. at 365 (same).
327. See, e.g., Growth Fund v. Morgan Stanley & Co., 1998 WL 375201 (S.D.N.Y. 1998) (refusing to find supplemental jurisdiction in case with aliens as plaintiffs and defendants even though plaintiffs also included citizens of the U.S.); In re Gas Water Heater Prod. Liab. Litig., 1996 WL 732525, at *5 (E.D. La. 1996) ("Abbott did not change the law with respect to diversity of citizenship.... Without first acquiring original jurisdiction over the named plaintiffs, the court cannot consider its supplemental jurisdiction.").
328. See, e.g., Growth Fund, 1998 WL 375201 at *3 ("[I]t is thus a stretch to apply these holdings [Stromberg and Abbott Labs] to this case, where the complete diversity requirement, rather than the amount in controversy, is the central issue.").
Literally, though, section 1367(b) does not bar an original complete diversity filing and subsequent amendment to add a nondiverse co-plaintiff under Rule 20, taking advantage of supplemental jurisdiction over the claim of the new plaintiff against the existing defendant. We can only hope that the federal courts will plug that potentially gaping hole in the complete diversity requirement . . . .\footnote{329}

Unfortunately for these drafters of § 1367, the only two published decisions on this precise issue have failed to “plug that potentially gaping hole” and have held instead that supplemental jurisdiction was properly exercised over the subsequently joined claims of nondiverse plaintiffs.\footnote{330} Those two decisions offer very little analysis other than the fact that § 1367(b) does not list the joinder of claims by plaintiffs under Rule 20 among its exceptions.\footnote{331} In one of the decisions the court at least addressed the argument that amount-in-controversy and complete diversity were distinguishable, but the court found that argument unpersuasive:

Admittedly, both of these cases [Stromberg and Abbott Labs] dealt with the joinder of plaintiffs who by themselves did not meet the amount-in-controversy requirement of § 1332, whereas here the additional Plaintiffs do not satisfy the requirement of complete diversity. However, the language of § 1367 does not distinguish between these two requirements, and the courts drew no such distinction.\footnote{332}

Accordingly, it is conceivable to conclude just from the holdings of the foregoing district courts that whether or not Strawbridge still requires each plaintiff to be diverse from the defendants depends upon whether the non-diverse plaintiff is included in the original complaint or added by subsequent amendment. In the former situation there is never any original jurisdiction under § 1367(a), while in the latter situation there was clearly original jurisdiction when the lawsuit was first filed. If one were to conclude that such a timing-based reading of § 1367(a) were required by its plain language, this would effectively overrule Strawbridge’s complete diversity requirement. Nevertheless, this limited, theoretical overruling of Strawbridge is not the catastrophe that it might appear to be at first blush.

\footnote{329. Rowe, Reply, supra note 93, at 961 n.91.}
\footnote{331. Sunpoint, 192 F.R.D. at 719; El Chico, 980 F. Supp. at 1484.}
\footnote{332. El Chico, 980 F. Supp. at 1484 n.9 (emphasis added).}
A possible answer to this “gaping hole” riddle lies in the unique nature of the complete diversity requirement. As already mentioned, § 1332’s complete diversity requirement is exceptional in that it does not permit the piecemeal consideration of one claimant’s citizenship to the exclusion of the others.333 In cases “arising under” federal law, by contrast, the Supreme Court has understood that not every aspect of the case must involve that federal question for § 1331 to be satisfied.334 Similarly, with regard to § 1332’s amount-in-controversy requirement, the Supreme Court has held that a piecemeal analysis of each claimant’s damages was essential.335 Section 1367(a)’s structure seems to contemplate such piecemeal analysis and this poses no enormous difficulty in either of those two scenarios. The real difficulty lies at the intersection of § 1367 and § 1332’s complete diversity requirement, for the former generally requires the court to engage in the piecemeal search for a federal anchor claim while the latter compels a unified analysis of the entire case. Because § 1367(a) does not alter the requirements for original jurisdiction, and because the complete diversity requirement of § 1332 mandates the inclusion in the equation of all plaintiffs’ citizenships, the subsequent joinder of a nondiverse plaintiff to a diversity lawsuit means that the federal “anchor” is lost at precisely the same metaphysical moment that supplemental jurisdiction would attach.

This situation of adding a non-diverse plaintiff parallels cases involving a federal question claim coupled with a state-law claim where the federal claim goes away prior to trial. In fact, the most analogous circumstance would be where the plaintiff chooses to amend her complaint prior to trial to delete the only federal cause of action in favor of the substitution of a state-law claim. In that instance, the well recognized rule has been that federal courts must exercise their discretion to dismiss the state-law claim, at least when the federal claim disappears well before trial, because the federal component that originally gave rise to the court’s jurisdiction has become extinguished.336 This is equivalent because it involves a situation where the federal court has original jurisdiction over the case at the outset but subsequent events remove the component that justified federal jurisdiction. In such instances, § 1367(c) preserves Gibbs’ requirement.

336. See, e.g., Parker & Parsley Co. v. Dresser Indus., 972 F.2d 580 (5th Cir. 1992) (reversing district court’s entry of near $200 million judgment following a trial on state-law claims when federal RICO cause of action was dismissed a few months before trial).
that courts utilize their discretion to refuse to exercise supplemental jurisdiction. As a practical matter, therefore, if a plaintiff adds a nondiverse plaintiff to a diversity lawsuit early in the litigation, the federal district court would essentially be required to dismiss the case under § 1367(c). On the other hand, if the case is far enough along that a trial court would traditionally have been permitted to go forward with a trial even after the federal anchor has been lost, case law under Rule 15(a) would generally not permit the joinder as untimely.

Of course, it would be plausible for a court to conclude that a true ambiguity is found at the complete diversity intersection of §§ 1332 and 1367(a). If such a conclusion were to be reached, of course, the legislative history would make it abundantly clear that Congress never intended to dispense with the Strawbridge rule for plaintiffs joined under Rule 20. After all, there is no indication in § 1367’s legislative history that its drafters, or anyone in Congress, ever contemplated the legislative overruling of Strawbridge. Thus, this legislative history would lead courts to hold that a nondiverse plaintiff cannot be joined to a preexisting federal diversity lawsuit.

Whether one concludes that the joinder of nondiverse plaintiffs can be permitted subject to the near-required dismissal under § 1367(c), or that § 1367(a) is ambiguous in this context, there is no reason why § 1367’s practical effect will be to open the floodgates to minimally diverse state-law lawsuits. One thing is certain—in the thirteen years since § 1367’s enactment, the worst-case scenarios posed by the statute’s critics have yet to be realized.

2. Claims by Plaintiffs in Defensive Posture

Another interesting area of debate, but which has received much less attention than those issues discussed above, concerns a diversity
plaintiff’s assertion of claims in a defensive posture. This arises in at least two relevant contexts: (i) a plaintiff’s compulsory counterclaim against a third-party defendant’s assertion of a cause of action against the plaintiff; and (ii) a plaintiff’s Rule 14 impleader of a third-party (e.g., for contribution and indemnity) in response to a defendant’s counterclaim. The exercise of supplemental jurisdiction in both of these situations would, at first blush, appear to be prohibited—in the absence of an independent jurisdictional basis—by the express terms of § 1367(b). Among the other claims for which supplemental jurisdiction is not permitted, subsection (b) carves out “claims by plaintiffs against persons made parties under Rule 14.” Indeed, two different district courts have held that the plain meaning of § 1367(b) precludes the exercise of supplemental jurisdiction over these types of claims.

What is unique about this interpretation is the fact that it changes the result from pre-§1367 caselaw in a jurisdiction-limiting fashion despite the fact that no courts or commentators had been advocating against that caselaw. Although Kroger precluded a plaintiff’s offensive assertion of a claim against a third-party defendant joined by a defendant, the lower federal courts had come to recognize an exception to Kroger where the plaintiff’s claim against a third-party defendant was defensive in nature. The courts recognized supplemental jurisdiction in these instances because it promoted efficiency and fairness and because Kroger’s concern with gamesmanship by plaintiffs refraining from joining non-diverse targets in their original complaint was not implicated in these defensive situations. Because of this prior caselaw, one district court commented that, were it not for the court’s allegiance to the plain


343. See supra notes 73-78 and accompanying text.

344. See, e.g., Finkle v. Gulf & W. Mfg. Co., 744 F.2d 1015, 1019 (3d Cir. 1984); Berel Co. v. Sencit F/G McKinley Assoc., 125 F.R.D. 100 (D.N.J. 1989); Hyman-Michaels Co. v. Swiss Bank Corp., 496 F. Supp. 663, 666 (N.D. Ill. 1980). Indeed, the Supreme Court in Kroger specifically noted the distinction between an offensive and defensive claim against parties impleaded under Rule 14. Kroger, 437 U.S. at 376 (the Court stating that the plaintiff’s offensive claim against the third-party defendant in that case was “simply not ancillary to the federal one in the same sense that, for example, the impleader by a defendant of a third-party defendant always is”).
interpretation of the statute, it would have permitted such a defensive assertion of a claim against a Rule 14 party under the statute.\textsuperscript{346}

Commentators have used this apparent overruling of prior caselaw as another negative aspect of § 1367 to justify a call for its revision or repeal. The statute’s drafter, Professor Rowe, stated regarding this issue:

Limited case law under § 1367, however, has read the terms of the statute as banning such claims by plaintiffs even though the claims are brought defensively. Whatever the interpretive pros and cons of these decisions, the results seem unfortunate and worth overruling in a revised 1367. One way or another . . . supplemental jurisdiction should be defined to include claims asserted by plaintiffs in a defensive posture in response to claims against them.\textsuperscript{347}

This outcry against § 1367(b)’s application to such defensive claims against Rule 14 parties is unnecessary, however, because the plain meaning of subsection (b) does not preclude the exercise of supplemental jurisdiction over these claims. The interpretation of a statute’s text should, obviously, include consideration of each of its terms. In this instance, the lower courts have misunderstood or overlooked completely the last proviso of § 1367(b)—“when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.” The way § 1367 is structured, this proviso acts only to limit the reach of § 1367(b)’s exception to § 1367(a)’s broad grant of supplemental jurisdiction.\textsuperscript{348} As the Ninth Circuit put it:

The text of § 1367 has the following analytical structure: first, subsection (a) broadly confers supplemental jurisdiction, subject to certain exceptions; second, the first part of subsection (b) sets out

\textsuperscript{346} Guaranteed Sys., 842 F. Supp. at 857.

If it were not bound by the plain terms of the statute, the court would be swayed by the interests of justice and efficiency to construe Plaintiff’s claim as a claim by a defendant against a person made party under Rule 14 rather than a claim by a plaintiff, and thus to allow it to proceed under 28 U.S.C. § 1367(b). The court believes, however, that such a construction would reach beyond the limits of Section 1367(b).

\textsuperscript{347} Rowe, supra note 2, at 67. See also Arthur & Freer, Burnt Straws, supra note 6, at 983-85 (commenting on this unforeseen consequence of § 1367’s enactment, and calling on “Congress to clean up the section 1367 mess by replacing it with a properly thought-out supplemental jurisdiction statute on which all interested parties are afforded a fair opportunity to comment”).

\textsuperscript{348} See Pfander, supra note 14, at 1226. “The Gibson court observes, quite correctly in my judgment, that the exception for circumstances that do not threaten the complete diversity requirement has the effect of bringing nonthreatening claims by the plaintiff back within the scope of supplemental jurisdiction that § 1367(b) might otherwise place beyond federal diversity jurisdiction.” Id.
exceptions to subsection (a); and third, the last phrase of subsection (b) limits the reach of those exceptions. We believe that the last phrase of subsection (b) means that there is supplemental jurisdiction over a claim otherwise excepted from supplemental jurisdiction by subsection (b) if § 1332, as understood before the passage of § 1367, would have authorized jurisdiction over that claim.349

Because this last proviso instructs courts, before dismissing a claim under one of § 1367(b)’s exceptions, to consider the pre-§1367 caselaw, the untoward apparent result decried by courts and commentators in this context is avoided. Because Kroger was not interpreted to preclude a plaintiff’s defensive assertion of claims against a Rule 14 third-party defendant prior to § 1367,350 the statute does not compel a different result. This analysis does not depart from the text of the statute. To the contrary, it “gives specific meaning to the last phrase of § 1367(b), for it preserves a small slice of supplemental jurisdiction that would otherwise have been lost.”351 Of course, if one chooses to distort this last proviso into a limitation on subpart (a)’s jurisdictional grant—as Leonhardt and Professor Rowe have argued—this escape-valve interpretation would be unavailing.352

VI. CONCLUSION

The Supplemental Jurisdiction Statute is the unwanted orphan of Title 28—perhaps even more disliked than the diversity statute. The irony is that the academic community that clamored for its creation is now upset that it has usurped the role of the judiciary in evolving the doctrine of supplemental jurisdiction. While some would advocate for a

349. Gibson, 261 F.3d at 938.
350. See supra note 344.
351. Gibson, 261 F.3d at 938. The Ninth Circuit, in Gibson, applied this analysis, in dicta, to the same circumstance:

But without its last phrase, subsection (b) would also except from supplemental jurisdiction a claim asserted by the plaintiff against the third-party defendant when that claim is a compulsory counterclaim to a claim by the third-party defendant against the plaintiff. The claim by the third-party defendant against the plaintiff is clearly within the supplemental jurisdiction conferred by subsection (a), and it would be both unfair and inefficient to forbid the plaintiff’s compulsory counterclaim to that claim.

Id. The Practice Commentary to § 1367 suggests an even broader loophole created by this last provision of subpart (b); that this language asks the courts to balance the traditional requirements of § 1332 with practical considerations such as the extent to which the exercise of supplemental jurisdiction would “expedite the disposition of the case while the rejection of supplemental jurisdiction would not spare the federal court all that much.” DAVID D. SIEGEL, PRACTICE COMMENTARY, 28 U.S.C. § 1367, at 834 (West 1993).
352. See supra notes 273-76 and accompanying text.
canon of interpretation for this particular piece of legislation that would emasculate its authoritative dictates in favor of permitting courts to define jurisdiction as they see fit, this approach is both improper and unnecessary. The statute is not necessarily perfect; yet it should not be forgotten that the courts had been unable to come up with a consistently coherent doctrine when left to their own devices for many decades. Because the pre-§ 1367 doctrines of pendent and ancillary jurisdiction were more the result of pragmatic balancing of competing desires than of premeditated logic, it was inevitable than any attempt at codification would be the catalyst for criticism. Such has been the life of this statute. At least at the circuit court level, however, the majority of the courts are starting to show enough self-restraint to honor Congress’ constitutional right to define the jurisdiction of the inferior courts. The good news is that deferring to the text of the statute, as presently written, does not undermine the business of the federal judiciary.353 In fact, at the end of the statutory rainbow lie a few significant, though unintended, advancements in the field.

353. See Lloyd C. Anderson, The American Law Institute Proposal to Bring Small-Claim State-Law Class Actions Within Federal Jurisdiction: An Affront to Federalism That Should Be Rejected, 35 CREIGHTON L. REV. 325, 342 (2002) (“In the years since § 1367 was enacted, it has, for the most part, worked well.”).