

Making Sense of Nonsense: Reforming Supplemental Jurisdiction

GRAHAM C. LILLY*

I. SUPPLEMENTAL JURISDICTION, THE SUPREME COURT, AND CONGRESS

The principal trouble with supplemental jurisdiction is the “modern” United States Supreme Court. In the last several decades, the Justices have so unsatisfactorily developed supplemental jurisdiction that Congress felt obligated to intervene. First, the Court gave us *Zahn v. International Paper Co.*,¹ holding that when a class action is based on diversity jurisdiction, every member of the plaintiff class—named and unnamed—must meet the amount in controversy minimum of 28 U.S.C. § 1332. This ruling effectively removed from the diversity docket class actions under Rule 23 of the Federal Rules of Civil Procedure. Yet that Rule is indifferent to the basis of federal subject-matter jurisdiction. Second, the Court presented us with *Aldinger v. Howard*,² a case in which the plaintiff’s primary claim (against *D-1*) rested on federal question jurisdiction. In *Aldinger*, the Justices denied supplemental jurisdiction to plaintiff’s related state law claim against *D-2*. It was beside the point, or at least unpersuasive to the Court, that it would be convenient and efficient to try all claims arising from the same transaction in a single judicial proceeding. Third, in *Finley v. United States*,³ the Court extended the *Aldinger* barrier—negating “pendent party” jurisdiction—to a case in which the federal claim against *D-1* was within the *exclusive* subject-matter jurisdiction of the federal district court. The Court held that a state claim against *D-2* arising out of the same events as the federal claim against *D-1* was unsupportable by supplemental jurisdiction. Never mind that the plaintiff would now have to split his case into two parts or simply abandon his related state claim. Judicial economy and fairness to the plaintiff took a back seat to separation of powers concerns. Fourth, in the interim between *Aldinger* and *Finley*, the Court decided *Owen Equipment & Erection Co. v. Kroger*,⁴ in which it held that, in a diversity suit, supplemental jurisdiction did not support the claim of the plaintiff against a (nondiverse) impleaded, third-party defendant. It was of no consequence that Rule 14 of the Federal Rules of Civil Procedure permitted the claim on the apparent ground that since it was part of the same case, judicial efficiency and convenience would be served by resolving it. Finally, the Court recently construed the supplemental-jurisdictional statute—enacted in 1990 because of

* Armistead M. Dobie Professor of Law and Thomas F. Bergin Teaching Professor of Law, University of Virginia School of Law.

1. 414 U.S. 291 (1973).

2. 427 U.S. 1 (1976).

3. 490 U.S. 545 (1989). The *Finley* decision drew a lot of commentary, nearly all of which was critical. See, e.g., Wendy Collins Perdue, *Finley v. United States: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539 (1990).

4. 437 U.S. 365 (1978).

widespread dissatisfaction with the Court's *judicial* development of pendent jurisdiction⁵—to embrace claims that historically have been considered to fall within appellate, as opposed to original, jurisdiction. In *City of Chicago v. International College of Surgeons*,⁶ the Court held that, in a removed “federal question” case, statutory supplemental jurisdiction supported a district court’s on-the-record review of the rulings of a state administrative agency for the purpose of determining whether the agency had complied with *state* law. It was not decisive that this holding would be an invitation to disgruntled administrative litigants to seek cross-system appeals.

Against the background of comparatively recent cases lies a cluster of earlier cases that stress judicial economy, convenience, and fairness to the litigants. In these cases, the Court reached quite sensible results, at least on the criteria that it found controlling. Illustrative of the Court’s more flexible approach to supplemental jurisdiction is a 1921 decision⁷ holding that in class actions based on diversity jurisdiction, only the citizenship of *named* class members need be taken into account for purposes of applying the “complete diversity” rule. Shortly thereafter, in a 1926 decision,⁸ the Court held that, in a case in which the plaintiff relied on federal law, a defendant’s related, state law counterclaim could rest upon supplemental jurisdiction. An essential point was that the defendant’s counterclaim was closely linked to the plaintiff’s claim in the sense that it arose from the same “transaction” or group of interconnected facts.

After the passage of the Federal Rules of Civil Procedure in 1938, lower federal courts, reacting to earlier Supreme Court decisions, routinely invoked supplemental jurisdiction to support cross-claims, third-party (impleader) claims, and claims by or against parties who intervened as a matter of right.⁹ And in the venerable 1966 case of *United Mine Workers v. Gibbs*,¹⁰ the Supreme Court held that when the plaintiff’s action is based on a substantial federal claim, supplemental jurisdiction can support her related state claims against the defendant, provided all claims “derive from a common nucleus of operative fact.”¹¹

It is not easy to reconcile the early line of decisions that expansively interprets supplemental jurisdiction with the recent line of decisions that is restrictive, even

5. See generally John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735 (1991). The statute is found at 28 U.S.C. § 1367 (1994).

6. 118 S. Ct. 523 (1997). The actions of the state administrative agency were also attacked as violating the Federal Constitution which, of course, provided the core federal question jurisdiction to which the on-the-record review was supplemental. See *id.* at 529-31.

7. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

8. See *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926).

9. For an exposition of these and other instances in which supplemental jurisdiction was allowed, see 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3523, at 106-15 (2d ed. 1984). See also 7 *id.* § 1659 (2d ed. 1986).

10. 383 U.S. 715 (1966).

11. *Id.* at 725. The Court went on to point out that this supplemental (or “pendent”) jurisdiction did not have to be invoked in every case. District courts had discretion to decline supplemental jurisdiction in certain instances by weighing such factors as “judicial economy, convenience and fairness to litigants.” *Id.* at 726.

stingy. Of course, a partial explanation for the schism lies in the tension between two competing policies of federal court jurisdiction.¹² On the one hand, the Constitution speaks in terms of federal courts having jurisdiction over “cases” and “controversies”¹³ and, taking account of this principle, the Federal Rules of Civil Procedure are designed for the resolution of an entire lawsuit. The Rules are particularly attentive to suits involving multiple claims and multiple parties.¹⁴ On the other hand, federal courts are limited to the subject-matter jurisdiction specified in Article III and, as a general matter, further limited to such portions of (potential) Article III jurisdiction as Congress has statutorily conferred.¹⁵ Thus, the policy of resolving an entire case—a policy rooted in convenience, efficiency, and fairness to the parties—often collides with a policy rooted in federalism concerns: federal courts, unlike their state counterparts, are courts with only limited subject-matter jurisdiction.¹⁶

In the context of these competing concerns, comparatively small factors can tip the scales for or against supplemental jurisdiction. For example, the posture of the litigant invoking derivative jurisdiction may be a decisive factor. The Supreme Court has generally been willing to sustain supplemental jurisdiction when invoked by a defendant or by a plaintiff forced into a defensive posture by, for example, a defendant’s counterclaim.¹⁷ But a plaintiff who has not been placed in a defensive position has been less successful.¹⁸ The plaintiff, after all, chose the federal forum and, the argument goes, should not be permitted easily to escape its jurisdictional limitations by relying on supplemental jurisdiction. As noted, however, should the plaintiff become a functional defendant, then like the original defendant she may generally rely on supplemental jurisdiction to support claims occasioned by her defensive posture. Nonetheless, there is a limit to the weight accorded a litigant’s trial posture. After all, in *Finley v. United States*,¹⁹ the Court denied supplemental jurisdiction to a plaintiff whose choice of forum was limited to a federal district court because of its exclusive subject-matter jurisdiction over her principal claim.

Another factor that influences the scope of supplemental jurisdiction is the Court’s protective attitude regarding the so-called “complete diversity” rule, anchored in Chief Justice Marshall’s famous opinion in *Strawbridge v. Curtiss*.²⁰ There, Marshall construed the diversity (jurisdictional) statute as requiring that

12. See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2, ix-x (1998) [hereinafter T.D. NO. 2]. This work gained final approval at the 1998 annual meeting of the American Law Institute (“ALI”).

13. U.S. CONST. art. III, § 2.

14. See, e.g., FED. R. CIV. P. 13 (counterclaims and cross-claims), 14 (third-party practice), 18 (joinder of claims and remedies), 19 (joinder of persons needed for just adjudication), 20 (permissive joinder of parties), 22 (interpleader), 23 (class actions), and 24 (intervention).

15. See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 27 (5th ed. 1994). The original jurisdiction of the United States Supreme Court is conferred directly by the Constitution and Congress is powerless to enlarge or diminish this jurisdiction. See *id.* at 41.

16. See *id.* at 27.

17. See, e.g., *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926).

18. See, e.g., *Aldinger v. Howard*, 427 U.S. 1 (1976); *supra* text accompanying note 2.

19. 490 U.S. 545 (1989).

20. 7 U.S. (3 Cranch) 267 (1806).

every plaintiff must be diverse in citizenship from every defendant.²¹ If claims between nondiverse parties to a multi-party suit were to be freely supported by supplemental jurisdiction, the *Strawbridge* rule would be threatened. To preserve at least the core of this rule, the Court has been wary of granting supplemental jurisdiction in contexts where it could be manipulated to make inroads into the complete diversity rule. This protectionism underlies the Court's decision in *Owen Equipment & Erection Co. v. Kroger*, a diversity case noted above.²² The Court was apparently apprehensive that if supplemental jurisdiction were granted to the plaintiff against a nondiverse, impleaded defendant, the rule requiring complete diversity would be too easily avoided. The plaintiff, unable to include the impleaded defendant in the original complaint, would simply await the original defendant's invocation of impleader and then file a claim against the newly added third-party defendant. It is noteworthy that Congress found the policy underpinning of *Kroger* persuasive. In 1990, when supplemental jurisdiction was codified, Congress restricted its exercise in diversity cases so as to thwart strategies that would emasculate the complete diversity rule.²³ Indeed the literal text of the present statute, 28 U.S.C. § 1367, is more restrictive than the judicial precedents extant at the time of the statute's enactment.²⁴

The structure of the current statute is both noteworthy and revealing. It opens (subsection (a)) with a broad conferral of supplemental jurisdiction, without regard to the core jurisdictional statute on which the plaintiff grounds her independent or "freestanding" claim.²⁵ It then (subsection (b)) limits the exercise of supplemental jurisdiction in cases where the freestanding claim(s) rests solely on the general diversity statute.²⁶ Finally (subsection (c)), it confers discretion upon district courts to decline the exercise of supplemental jurisdiction by applying the criteria set forth in this last portion of the statute.²⁷

As noted previously, the catalyst for the codification of supplemental jurisdiction was the general dissatisfaction with the Supreme Court's recent decisions, in particular, those which curtailed this jurisdiction in federal question cases. It is unfortunate that the Court's development of supplemental jurisdiction

21. Of course, this is purely a statutory construction, for Article III permits Congress to confer diversity jurisdiction if *any* plaintiff is diverse from *any* defendant. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

22. See *supra* text accompanying note 4.

23. See 28 U.S.C. § 1367(b) (1994).

24. See the discussion of § 1367(b) in T.D. NO. 2, *supra* note 12, at 17-18. The text of the statute operates in some contexts to deny supplemental jurisdiction to plaintiffs who are placed in a defensive posture. See, e.g., *Guaranteed Sys., Inc. v. American Nat'l Can Co.*, 842 F. Supp. 855 (M.D.N.C. 1994) (holding that § 1367 does not allow a plaintiff to implead a nondiverse indemnitor in response to a defendant's counterclaim). But the literal text of the statute also expands supplemental jurisdiction in unanticipated ways. See, e.g., *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) (holding that claims of unnamed class members need not satisfy the amount in controversy requirement of the diversity statute of 28 U.S.C. § 1332).

25. 28 U.S.C. § 1367(a). The term "freestanding claim" is used in the ALI's revision of § 1367 to denote a claim that, without regard to supplemental jurisdiction, falls within the original jurisdiction of a federal district court. See T.D. NO. 2, *supra* note 12, at 1.

26. See 28 U.S.C. § 1332 (1994).

27. See *id.* § 1367(c).

was sufficiently problematic to prompt the passage of a remedial statute. First, the varied contexts in which issues of supplemental jurisdiction arise make it an ideal subject for case-by-case judicial development. It is true, of course, that federal courts are tribunals of limited jurisdiction and draw their power only from congressional statutes passed pursuant to Article III. Yet it is unlikely that separation of powers would suffer a major fracture by the judicial development of supplemental jurisdiction. The Court, after all, is only interpreting a broadly worded statutory grant—illustrated by the current “federal question” statute.²⁸ Statutory grants of original jurisdiction in civil cases typically empower the district courts to entertain designated “civil actions,” “cases,” or “proceedings.”²⁹ In the face of such broad textual grants, judicial control of supplemental jurisdiction appears comfortably situated within the bounds of judicial propriety and self-restraint. When a federal court grants supplemental jurisdiction, the expanded suit falls within the literal language of the applicable jurisdictional statute which refers to a “case” or an “action;” when a federal court denies supplemental jurisdiction, it is curtailing its own power.

The second unfortunate consequence of the congressional capture of supplemental jurisdiction is that the resulting enactment, 28 U.S.C. § 1367, was hurriedly conceived and poorly drafted. It has generated an inordinate number of issues of statutory construction, producing unforeseen, unintended, and often unfortunate results. These difficulties are thoroughly canvassed by the ALI in connection with its recent effort to revise and clarify the current statute.³⁰ It suffices here to note that in its passage of the present statute, Congress inadvertently overruled a long line of cases involving multiple plaintiffs in which the courts had consistently disallowed the use of supplemental jurisdiction to support the claims of those plaintiffs who failed to satisfy the amount in controversy requirement of the diversity statute.³¹ Second, either through oversight or faulty drafting, Congress negated judicially approved supplemental jurisdiction in certain contexts where “diversity plaintiffs” asserted claims only after being placed in a defensive posture.³² Third, Congress did not take account

28. *Id.* § 1331 (1994) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

29. *See, e.g., id.* § 1332 (“civil actions” in diversity cases); *id.* § 1333 (“[a]ny civil cases” within admiralty jurisdiction); *id.* § 1334 (“cases” in bankruptcy); *id.* § 1337 (“any civil action or proceeding arising under any act of Congress regulating commerce”); *id.* § 1339 (“any civil action arising under” postal service statutes).

30. *See* T.D. NO. 2, *supra* note 12, at 16-20, 25-30.

31. *See* *Stromberg Metal Works v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996); *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995). In these cases, the “plain meaning” of the statutory text was held controlling, even though the result was inconsistent with the legislative history of the supplemental-jurisdiction statute.

32. *See* *Guaranteed Sys., Inc. v. American Nat’l Can Co.*, 842 F. Supp. 855 (M.D.N.C. 1994); T.D. NO. 2, *supra* note 12, at 27-29; 6 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1444, at 25 (2d ed. Supp. 1998). An example would be when a defendant counterclaims against a plaintiff and the latter now wishes to implead a nondiverse third-party defendant under Rule 14 of the Federal Rules of Civil Procedure. Similarly, suppose a nondiverse third-party defendant, impleaded by our original defendant, files a claim against the plaintiff and the plaintiff wishes to respond with a compulsory counterclaim.

of how the present statute should be applied to cases removed from the state to the federal court, thus producing uncertainty about the proper application of the statute to a removed case³³ and, indeed, uncertainty about whether the statute applies at all to such a case.³⁴ Finally, Congress's deliberate denial of supplemental jurisdiction to plaintiff-intervenors of right has produced unsatisfactory results and widespread criticism.³⁵ A principal justification for intervention of right is that it affords the intervenor the opportunity to protect his interest from the harm or injury he might suffer from the outcome of the pending litigation.³⁶ This protective procedural device, designed to promote fairness to the "outsider," is eroded by the current statute which denies supplemental jurisdiction to "persons . . . seeking to intervene as plaintiffs under Rule 24."³⁷

The statutory glitches in the present version of § 1367 should not obscure its beneficial effects, for it operates satisfactorily in some contexts, especially in federal question cases.³⁸ Furthermore, some of the unintended results³⁹ of the statute are salutary. For example, extending supplemental jurisdiction to unnamed class members who fail to meet the amount in controversy requirement of the diversity statute⁴⁰ is a sensible break with Supreme Court precedent.⁴¹ Nonetheless, experience with the present statute confirms both mixed results and

33. Suppose, for example, the plaintiff in a removed "diversity case" seeks to add to her complaint an additional defendant who shares the plaintiff's citizenship. Is it fair to the plaintiff, who is in federal court against her will, to disallow supplemental jurisdiction? After all, were the case still in state court, the additional defendant probably could be routinely added. Yet the language of 28 U.S.C. § 1367 might foreclose supplemental jurisdictional support.

34. The argument is that since the jurisdictional restrictions of present § 1367(b) apply only to cases "founded solely on section 1332," they have no application to a case removed pursuant to 28 U.S.C. § 1441 (1994).

35. The current statute also forecloses the use of supplemental jurisdiction by a nondiverse plaintiff against an intervening defendant, a statutory feature which has also caused difficulty. See 28 U.S.C. § 1367(b) (1994). Suppose, for example, the intervening defendant invokes supplemental jurisdiction in order to claim against the plaintiff. Is the plaintiff's counter-claim supported by supplemental jurisdiction?

36. See, e.g., FED. R. CIV. P. 24(a) (allowing intervention as a matter of right when "the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest").

37. 28 U.S.C. § 1367(b); see also *supra* note 30.

38. In these cases, of course, supplemental jurisdiction is granted for the entire "case," and the special restrictions of § 1367(b), applicable to diversity cases, do not apply.

39. The legislative history of the statute makes it clear that its drafters and supporters intended, generally speaking, to confer supplemental jurisdiction to support claims against pendent parties in federal question cases. In diversity cases, the congressional intention was to leave largely undisturbed the case law that preceded the statutory enactment. See Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991).

40. The jurisdictional threshold is now set at a "sum or value" that "exceeds . . . \$75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a) (1994).

41. This construction of the statute overrules *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), discussed briefly *supra* text accompanying note 1.

the difficulties that are likely to frustrate a comprehensive statutory solution to the frequent and subtle issues that permeate supplemental jurisdiction.

II. THE AMERICAN LAW INSTITUTE AND PROPOSED STATUTORY REFORM

As part of its Federal Judicial Code Revision Project, the ALI is currently drafting a proposed revision of the present supplemental-jurisdiction statute, 28 U.S.C. § 1367. At this writing, the proposed revision, though approved by the ALI, has yet to be considered by Congress. The general thrust of the proposed statute is clear enough. The new provisions would retain many features of the present § 1367,⁴² but would specifically address the ambiguities and omissions in the current statute. The proposed codification would also make significant substantive changes in the availability of supplemental jurisdiction. In some instances—as, for example, in sustaining supplemental jurisdiction for unnamed class members—the proposed statute adopts the position of a recent case that rests on the “plain meaning” of the text of current § 1367.⁴³ (This textual construction is at odds with the intention of those who drafted and enacted the present statute.⁴⁴) In some other instances—as, for example, in granting supplemental jurisdiction to both the plaintiff and the defendant intervenors—the proposed codification reflects a position that is contrary to both the intention and clear language of the present statute.⁴⁵ In still other instances—as, for example, in its detailed resolution of the availability of supplemental jurisdiction in removed cases⁴⁶—the proposed provision addresses problems that were largely neglected in the original version.

The proposed statute is carefully and masterfully crafted. The Reporter and his colleagues⁴⁷ have assayed every problem that has surfaced in the construction of the present § 1367 and anticipated the emergence of others. The resulting numerous and varied issues are resolved within the comprehensive sweep of the proposed revision.⁴⁸ The first key to this statutory provision lies in its “definitions” section⁴⁹ and, in particular, in the definition of the phrase “asserted

42. For example, proposed § 1367 retains the power granted to trial judges under the current statute to decline to exercise supplemental jurisdiction. *Compare* 28 U.S.C. § 1367(c), with proposed § 1367(d), T.D. NO. 2, *supra* note 12, at 2-3. There are, however, some differences in the scope and governing criterion pertaining to the discretionary declination. *See id.* at 84-95.

43. *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995). The proposed statute embraces not only those cases that extend supplemental jurisdiction to unnamed class members, but also those that extend supplemental jurisdiction cases to certain claims of additional plaintiffs in conventional lawsuits. *See* T.D. NO. 2, *supra* note 12, § 1367(c), at 2.

44. The judicial results adopted by the proposed statute conflict with the legislative history of present § 1367. *See* T.D. NO. 2, *supra* note 12, at 25.

45. *Compare* 28 U.S.C. § 1367(b), with T.D. NO. 2, *supra* note 12, § 1367(b)-(c), at 1-2.

46. *See* T.D. NO. 2, *supra* note 12, § 1367(c), at 2.

47. For the names of these individuals, see *id.* at v, vii-viii.

48. *See generally id.* at 11-100.

49. *Id.* § 1367(a), at 1.

in the same pleading.”⁵⁰ This language embraces not just the complaint, but other pleadings in which a jurisdictionally sufficient, or freestanding, claim can be joined with a claim that requires (if it is to be sustained) the exercise of supplemental jurisdiction. When this phrase is linked to the section of the statute that restricts supplemental jurisdiction in diversity cases,⁵¹ a surprising variety of issues are statutorily addressed and resolved.

The second key to the proposed statute’s discriminating treatment of supplemental jurisdiction lies in the recognition that even though the various statutes that confer original jurisdiction on federal district courts usually speak in terms of jurisdiction over “civil actions,” or “cases,” the courts have consistently applied these statutes by a jurisdictional analysis of each *claim* within the larger case.⁵² Of course, the result of this claim-by-claim application of the various statutes reveals that some claims are freestanding—as, for example, a claim based on federal law—while others—such as a related claim based on state law—are not, standing alone, jurisdictionally sufficient.⁵³ Thus, the question becomes whether or not the jurisdictionally dependent claim will be sustained by derivative or supplemental jurisdiction. Through the express recognition that all federal subject-matter jurisdiction is actually “claim specific” rather than “action” (or “case”) specific, issues of supplemental jurisdiction are brought into clear relief. Indeed, the famous case of *Strawbridge v. Curtiss*,⁵⁴ requiring complete diversity, may be properly recast as a statutory construction that denies supplemental jurisdiction to the co-plaintiffs who are not diverse from all of the defendants.⁵⁵ Put otherwise, the diverse plaintiffs have freestanding claims, while the nondiverse plaintiffs must depend on a construction of the diversity statute that imparts supplemental jurisdiction. Generally, under *Strawbridge*, supplemental jurisdiction has not been available in this context. The proposed statute, with limited exceptions, continues this tradition.

50. This phrase embraces

relevant claims [that] have been joined either in the pleading as originally filed . . . or by amendment of the pleading, or by the pleader’s assertion of a claim against a third party impleaded in response to the pleading, or by order of the court reformulating the pleading, or by the assertion of the claim or defense of an intervenor who seeks to be treated as if the pleading had joined a claim by or against that intervenor.

Id. § 1367(a)(3), at 1.

51. *See id.* § 1367(c), at 2. In general, the restrictions apply when a supplemental claim is asserted in the same pleading as a freestanding claim, and the latter rests safely on diversity. Certain, specified supplemental claims, such as those in class actions and intervention, escape the restrictions.

52. *See id.* at xvi-xvii, 18-20, 29-30, 101-25.

53. This observation assumes that the state law claim is asserted by a plaintiff who shares the defendant’s citizenship and, therefore, diversity jurisdiction is not available.

54. 7 U.S. (3 Cranch) 267 (1806).

55. *See* T.D. NO. 2, *supra* note 12, at 4-5, 45, 121-25. Under *Strawbridge*, the whole action is tainted by the joinder of nondiverse parties. But the plaintiff can amend his complaint and refile. Furthermore, if no timely jurisdictional objection is raised and the case proceeds, the “jurisdictional spoilers” can be dropped from the case at any time, even after judgment. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830, 833 n.7 (1989). Thus, in reality, *Strawbridge* is consistent with a claim-by-claim approach to federal jurisdiction.

Note again, however, that until 1990 when the present supplemental-jurisdiction statute was passed, decisions about the reach of supplemental jurisdiction were made largely by the courts. But, as remarked earlier, the courts, and in particular the United States Supreme Court, produced such unsettling results that what was for many years a judicial jurisdictional province was seized by Congress. This usurpation would not be an occasion for regret if not for the fact that issues of supplemental jurisdiction arise in such varied contexts that their resolution is ill-suited to statutory treatment. As noted above, the current supplemental-jurisdiction statute fails to take account of many of the jurisdictional questions that have arisen in its brief history. Even those issues that were anticipated by Congress often were not clearly or satisfactorily resolved.⁵⁶ In addition, even in those cases where the application of the statute has fulfilled the design of its sponsors, the results are problematic.⁵⁷

The proposed new statute has its own problems. First, its subtle complexity demands careful study, and its application by federal judges will, to say the least, be challenging. As the Reporter for the ALI project aptly remarked, "the reader of proposed new § 1367(a)(3) (which defines the phrase, "asserted in the same pleading") will feel like the proverbial snake after dining on a pig."⁵⁸ The second difficulty with the proposed statute is its embrace of the rule of complete diversity as that rule has traditionally been applied when a diversity suit is initially filed.⁵⁹ The preservation of that rule complicates the conceptual and practical application of supplemental jurisdiction. It also frustrates the design of the Federal Rules of Civil Procedure which were crafted to achieve the holistic resolution of an entire case. It seems, therefore, that alternative approaches to supplemental jurisdiction should compete for the attention of Congress. Ideally, a scheme of supplemental jurisdiction should implement a clearly defined, meritorious policy, exhibit comparative administrative convenience, promote fairness between the litigants, and avoid dysfunctional results (such as undue court congestion) that would have negative effects on other users of the judicial system.

III. ANOTHER VIEW: SKETCHING AN ALTERNATIVE

Consideration of supplemental jurisdiction invariably leads to an appraisal of diversity jurisdiction, for it is in diversity cases that the federal courts, and more recently Congress, have been consistently wary of allowing ancillary jurisdiction. This resistance probably reflects abiding doubts about the justification for diversity jurisdiction, as well as the apprehension that facilitating its exercise by generous grants of supplemental jurisdiction risks untoward increases in federal

56. The sponsors of current § 1367 expected that supplemental jurisdiction would be extended to plaintiffs who were placed in a defensive posture, but judicial outcomes have been mixed. See T.D. No. 2, *supra* note 12, at 27-28.

57. The best example is the denial of supplemental jurisdiction to nondiverse intervenors of right. See 28 U.S.C. § 1367(b) (1994); T.D. No. 2, *supra* note 12, at 70-74.

58. T.D. No. 2, *supra* note 12, at xvii (remarks of Professor John B. Oakley).

59. Subsequent claims such as compulsory counterclaims, cross-claims, and third-party claims have prompted a softening of the harsh requirement of complete diversity. Generally, these claims have been allowed to rest on supplemental jurisdiction.

court caseloads. Recent statistics indicate that almost one-third of the civil suits filed in federal court rest on the diverse citizenship of the parties.⁶⁰ Arrayed against this considerable caseload, which can be documented, are arguments resting mainly upon anecdotal support that favor diversity jurisdiction. The arguments for and against diversity jurisdiction have been repeated ad nauseam,⁶¹ and, no doubt, most readers are familiar with these. For present purposes it suffices to say that the principal argument for diversity jurisdiction is the protection of out-of-state litigants from local prejudice. The principal argument against such jurisdiction is its substantial claim on federal resources, and especially on federal judges, who are distracted from their core mission of applying federal law. Instead, the judges often become embroiled in cases turning on comparatively unfamiliar state law. In the understanding and application of state law, federal judges, as compared to their state court counterparts, are probably disadvantaged. And, of course, state courts alone have the authoritative voice on the content and construction of state law.⁶² Federal judges are relegated to the awkward task of trying to ascertain how a state's highest court would resolve the state law issue pending in federal court.⁶³

Although there is some evidence suggesting that local bias against nonresidents may affect judicial outcomes,⁶⁴ the sketchy nature of that evidence appears insufficient to support the related conclusions that underpin diversity jurisdiction. These are, first, that local prejudice against out-of-state litigants is a significant problem in state courts, and, second, that the risk of such bias is substantially diminished if state law cases involving non-residents are heard in federal courts. Neither of these considerations is obvious, nor is either convincingly documented. It is frequently noted that many state judges are elected (and thus, presumably, subject to local political pressure) while federal judges enjoy tenure during good behavior.⁶⁵ However, the effect of this difference remains speculative. It is sometimes argued that federal court juries are less likely to be biased than are state court juries.⁶⁶ This contention, too, is unsupported by firm evidence. It is

60. The exact figure is 30.2% of civil cases (excluding prisoner petitions) commenced in 1996. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 135 (1996).

61. For a concise exposition of the arguments for and against diversity, with citations to leading articles, see GEOFFREY C. HAZARD, JR. ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL 414-18 (7th ed. 1994). See generally WRIGHT, *supra* note 15, § 23, at 141-53.

62. See *DeWeerth v. Baldinger*, 804 F. Supp. 539 (S.D.N.Y. 1992); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

63. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

64. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 409-10 (1992), cited along with some anecdotal evidence of bias in HAZARD ET AL., *supra* note 61, at 416-17, and indicating that 56.3% of surveyed lawyers stated that bias against out-of-state citizens was an "important" consideration in the decision to seek removal. See also WRIGHT, *supra* note 15, § 23, at 142.

65. Compare, e.g., U.S. CONST. art. III, § 1 (tenure for federal judge), with W. VA. CODE § 3-1-17 (1994) (election of state circuit judges).

66. See, e.g., WRIGHT, *supra* note 15, § 23, at 148.

noteworthy that a state law case filed in (or removed to) a federal court is still heard within essentially the same general geographic and political boundaries as it would be if the adjudication took place in a state court. True, federal courts are generally located in urban areas (as are *most* state courts), while some state courts are situated in small towns. Precise geographic location may affect the collective experience and outlook of the jury. But there is of yet no evidence that a "rural" jury, as opposed to an "urban" one, is a threat to fair and impartial adjudication.

Perhaps the most telling evidence that the fear of local prejudice is not a paramount concern in maintaining diversity jurisdiction is the federal removal statute.⁶⁷ Subsection (b) of this statute forecloses removal of a diversity case from a state to a federal court if *any* defendant is a citizen of the state in which the state court action is filed. Thus, even if a dozen plaintiffs were citizens of state *X* and twenty-four of twenty-five defendants were not citizens of state *X*, the presence of one state *X* defendant would defeat removal to a federal court. If bias against non-residents were a serious concern, it is difficult to believe that the presence of a single defendant (whose defenses may not be identical with those of his co-defendants) would suffice to ameliorate the prejudice.

Of course, the most plausible explanation for the unbroken presence⁶⁸ of diversity jurisdiction is that the bar, and particularly the trial bar, has put its considerable weight behind it.⁶⁹ Whatever may be said of the role of diversity jurisdiction in neutralizing prejudice, it clearly plays a role in the tactics of litigating by opening the possibility of an additional choice of forum. A federal court may be favored because of its procedures, its judges, its juries, its discovery rules, the state of its case backlog, the opportunity it affords for transfer to another federal court, the belief that a federal judge will take a more favorable view of state law than would a state judge, or for countless other tactical reasons. It thus appears that in the context of today's transient society, the most convincing rationale for the presence of diversity jurisdiction is the political influence of those whose interests it serves.

This pragmatic explanation of the durability of diversity jurisdiction leads naturally to a related observation: since Congress and the Supreme Court are doubtful about the policy justifying diversity jurisdiction, but quite sensitive to its costs and distractions, they are inclined to chip away at it. This they have done by such devices as curtailing supplemental jurisdiction or by specifying a minimum jurisdictional amount in controversy. Unfortunately, however, most inroads into diversity jurisdiction are at the margins. Frontal attacks, aimed at the elimination or drastic curtailment of diversity jurisdiction, have not prevailed.⁷⁰

67. See 28 U.S.C. § 1441 (1994).

68. Diversity jurisdiction was enacted as part of the First Judiciary Act, passed in 1789, and has existed continuously ever since. See WRIGHT, *supra* note 15, § 23, at 141-42. The principal statute currently vesting the federal district courts with diversity jurisdiction is 28 U.S.C. § 1332 (1994).

69. See, e.g., William L. Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A. J. 379 (1960); George B. McGuin, *Let's Keep Diversity Jurisdiction*, 55 DEF. COUNS. J. 363 (1988); John J. Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A. J. 433 (1932).

70. See WRIGHT, *supra* note 15, § 23, at 142-52.

Nonetheless, Congress has been able to incrementally raise the amount in controversy requirement to its present level of more than \$75,000, thus curtailing somewhat the flow of diversity litigation.⁷¹ Further, during the years when supplemental jurisdiction was the province of judge-made law, the United States Supreme Court took a skeptical, guarded view of supplemental jurisdiction in diversity cases.⁷² The apparent rationale for their restrictive rulings was the necessity of preserving the complete diversity holding of *Strawbridge v. Curtiss*.⁷³ To bestow supplemental jurisdiction too generously and, in particular, to allow plaintiffs to invoke it, would erode the *Strawbridge* principle and entice more plaintiffs to file their diversity cases in a federal court. As noted above, when the supplemental-jurisdiction statute was passed in 1990, Congress endeavored to adopt—and even broaden—the judicial rules limiting supplemental jurisdiction in diversity cases.⁷⁴ And despite some quite sensible modifications of these restrictions, the ALI has adhered to the general view that the *Strawbridge* principle must not be seriously compromised.⁷⁵

The endorsement of the *Strawbridge* principle, however, carries a steep price. For the litigants, it means that the full advantages of the Federal Rules of Civil Procedure often will not be realized. Some claims, freely allowed by the Rules, will not be entertained because they are between co-citizens and thus will fall outside the convenient support of supplemental jurisdiction. For those who study, use, or administer the federal courts, it means mastery of a complicated statute, made so by a heroic effort to preserve the rule of complete diversity while simultaneously trying to accommodate that rule to the realities of modern, complex, multi-party litigation.

If the *Strawbridge* rule in its moderu application serves primarily as a docket control device, the question becomes whether there is a less awkward and costly way of *stabilizing* the flow of diversity cases into the federal system. As put, the question concedes a political reality in which the sharp curtailment of diversity jurisdiction is unlikely. A promising device for controlling the diversity docket is simply to reexamine and raise the required amount in controversy. The difficulty is that, as the requirement is now administered, it is an awkward and imprecise means of regulating case flow. The problem lies with the long-standing rule that essentially defers to a plaintiff's monetary claim that "is apparently made in good faith."⁷⁶ Indeed, the Supreme Court has said that "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to

71. The current amount in controversy is prescribed in 28 U.S.C. § 1332(a). The initial sum, contained in the First Judiciary Act of 1789, was \$500. Congress has increased the sum on five occasions, the last of which was 1996 when the amount was fixed at more than \$75,000. See WRIGHT, *supra* note 15, § 32, at 190; The Federal Courts Improvements Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850.

72. See Zahn v. International Paper Co., 414 U.S. 291 (1973); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978). These cases are discussed briefly *supra* text accompanying notes 1 and 4.

73. 7 U.S. (3 Cranch) 267 (1806).

74. See Mengler et al., *supra* note 39, at 213.

75. See T.D. NO. 2, *supra* note 12, at 45-46.

76. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

justify dismissal.⁷⁷ Thus, in a case in which unliquidated damages are sought, the plaintiff can usually make plausible arguments that it is not a legal certainty that her recovery will fall below the minimum sum. There is, of course, a quite sensible reason supporting the rule that the plaintiff's claim usually governs: the understandable reluctance to take extensive evidence early in the trial proceedings, much of which would be repeated at the actual trial. For obvious reasons, a rule making jurisdiction turn on the amount actually recovered would be even more unsatisfactory.

But if the amount in controversy requirement is to be an effective instrument of docket control, a more demanding jurisdictional hearing seems essential. This hearing, coupled with periodic adjustments—presumably in an upward direction—of the threshold jurisdictional figure, would be a much simpler way of restraining the diversity caseload. Furthermore, this scheme would permit a much simpler supplemental-jurisdiction statute. The heart of the provision could be modeled after subsection (b) of the proposed ALI statute, and would treat federal question cases and diversity cases on an equal footing. After a broad grant of “original jurisdiction of all supplemental claims,”⁷⁸ subsection (b) would then refer to proposed subsection (d), which permits the discretionary decline of supplemental jurisdiction. A third subsection would provide for a tolling of the statute of limitations period for dismissed claims—essentially a modified and much simpler version of proposed subsection (f).

Of course, this approach, too, has disadvantages and practical obstacles. As noted above, if some minimal specified sum is to control the access of diversity cases, there should be some assurance, at least a “reasonable possibility,” that the plaintiff could ultimately satisfy it. A threshold question is whether the hearing judge or magistrate should take into account the probability that the defendant will prevail, eliminating any recovery. Although this inquiry is normatively desirable, its routine pursuit would not only complicate the hearing, but also would embroil the hearing officer in an assessment of the merits—a matter more efficiently addressed in summary judgment proceedings or at trial. Thus, with the focus on the plaintiff's evidence, the form of that evidence should be determined by either a national or local rule, or more likely by both. Here, long experience with summary judgment suggests affidavits and other written matters would constitute the evidentiary record.⁷⁹ Tradition dictates that the defendant should be afforded some opportunity to defeat the plaintiff's jurisdictional claim, but this opportunity should be carefully structured, limited in scope, and generally confined to written materials. Discovery should be minimal and require leave of court. It is important that evidence actually produced at a “jurisdictional hearing”

77. *Id.* at 289.

78. T.D. NO. 2, *supra* note 12, § 1367(b), at 1-2.

79. See FED. R. CIV. P. 56(e); WRIGHT, *supra* note 15, § 99, at 709-10. Under the scheme proposed in the text, the party wishing to invoke federal jurisdiction would be obligated to present materials that demonstrate a reasonable possibility that his recovery would exceed the jurisdictional amount.

be shielded from trial use by the adversary.⁸⁰ This hearing should not be a forum for developing party admissions, impeachment materials, or evidence on the merits. The requirement that these hearings be subject to a protective evidentiary rule is made manifest in the removal context. Here, the defendant seeking to invoke federal jurisdiction would be in the awkward posture of convincing the court that there was a reasonable possibility that his liability would exceed the minimal jurisdictional amount.

Should the plaintiff's demand for punitive damages be taken into account in assessing the value of his claim? The traditional practice of considering punitive claims should be abandoned. First, the presence of a punitive claim often frustrates even a rough approximation of the amount in controversy. Second, the policies behind punitive damages available under state law are particularly within the ambit of state, as opposed to federal, concerns. When state law punitive damages are awarded and enforced, the public policy of the state is being implemented. Note, further, that the influence of a state's interest is not confined simply to whether such damages are permissible, but permeates the larger litigation context to include the amount of the award. Questions of the propriety and amount of punitive damages arise in connection with instructions, new trial motions, and appellate review. At all of these litigation junctures, state interests are not only dominant, but are usually exclusive. Thus, at least on the issue of federal jurisdiction, the potential for a punitive damage award should be excluded from consideration, thus increasing the likelihood of a state court resolution of a punitive-damages case between diverse litigants.

CONCLUSION

Before embarking upon yet another era enforcing the rule of *Strawbridge v. Curtiss*, we should consider other alternatives. The model sketched here would require only a substantial core (or "freestanding") diversity claim. Once jurisdiction is attached to this claim, the Federal Rules of Civil Procedure would operate routinely, just as they do in federal question cases. Supplemental jurisdiction would support all claims, regardless of the party making or responding to them, so long as these supplemental claims were part of the same case or controversy as the freestanding claim. Federal district judges would have discretion, within the bounds of statutory criteria, to decline to exercise this auxiliary jurisdiction. These judges would also have the familiar authority, secured by Rule 42(b) of the Federal Rules to order separate trials of any claims or issues.⁸¹

80. But the shield should only prevent an opponent from using the actual presentation of his adversary as evidence at trial. Materials used as evidence in the amount in controversy hearing would be subject to the ordinary evidentiary rules. *Cf.* FED. R. EVID. 408 (evidence used in compromise negotiations not immune from discovery or use at trial). And, of course, prosecutions for perjury and Rule 11 proceedings could be based on statements offered in evidence at the jurisdictional hearing. *See* FED. R. CIV. P. 11 (requiring that papers filed with the court be based on good faith and reasonable inquiry).

81. *See* FED. R. CIV. P. 42(b). This Rule authorizes separate trials to avoid prejudice or to serve convenience, economy, or expedition. *Id.*

Rather than endorsing a distorted cluster of complex supplemental-jurisdictional rules designed to thwart a plaintiff's stratagem to evade the complete diversity rule, Congress should abandon that rule as a means of docket control. How ironic it is that *Owen Equipment & Erection Co. v. Kroger*,⁸² disallowing supplemental jurisdiction for a plaintiff's claim against a nondiverse, impleaded defendant, is not a case in which the plaintiff lay in wait for the anticipated joinder of a nondiverse adversary. When the plaintiff filed suit, he and all other parties thought that the subsequently impleaded corporation was diverse from the plaintiff. Only later was it discovered that the corporation's principal place of business was the state of the plaintiff's citizenship,⁸³ thus making the plaintiff and the third-party defendant co-citizens. And how curious it seems that after almost two centuries of vigorous and costly enforcement of the rule in *Strawbridge*, we are about to give it new life through a detailed recodification of the supplemental-jurisdiction statute. Should we not remind ourselves that Justice Marshall, the author of *Strawbridge*, is reliably reported to have "repeatedly" regretted its holding.⁸⁴

82. 437 U.S. 365 (1978).

83. *See id.* at 369.

84. *Louisville, Cincinnati, & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844).