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Serious Mischiefs: Exxon Mobil Corp. v. Allapattah Services, Inc. Supplemental Jurisdiction, and Breaking the Promise of Finley

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NOTES

SERIOUS MISCHIEFS: *EXXON MOBIL CORP. v. ALLAPATTAH SERVICES, INC.*, SUPPLEMENTAL JURISDICTION, AND BREAKING THE PROMISE OF *FINLEY*

*Brian E. Foster**

> The constitution declares, that it is mandatory to the legislature, that the judicial power of the United States shall extend to controversies "between citizens of different states"; and it is somewhat singular, that the jurisdiction actually conferred on the courts of the United States should have stopped so far short of the constitutional extent. That serious mischiefs have already arisen, and must continually arise from the present very limited jurisdiction of these courts, is most manifest to all those, who are conversant with the administration of justice. But we cannot help them.[1]

* Candidate for Juris Doctor, Notre Dame Law School, 2007; B.A., Political Science, Michigan State University, 1995. I would like to acknowledge my debt and gratitude to Professor Amy Coney Barrett for her advice and guidance on this Note and a great many other topics; thanks also to Professor Joseph P. Bauer and to G. David Mathues for extremely helpful comments and suggestions. This Note is dedicated to the three most important women in my life, the reasons for everything I do: my wife, Susan, and my daughters, Faith and Lexi. I'm sorry I missed so many bedtimes, but now I'm coming home to eat cookies and drink milk.

This Note won the 2006 James William Moore Federal Practice Award from LexisNexis for the outstanding student paper on federal civil practice and procedure.

1 White v. Fenner, 29 F. Cas. 1015, 1015–16 (C.C.R.I. 1818) (No. 17,547). While the opinion in this case is unsigned, Justice Joseph Story is considered to be its author. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 334 n.4 (5th ed. 2003); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 135.

INTRODUCTION

In *Finley v. United States*,[2] the Supreme Court brought two divergent and inconsistent lines of cases crashing together. One line traced its ancestry to *Ex parte Bollman*[3] and stood for the proposition that the federal courts are of limited jurisdiction, unable to act unless expressly authorized by an Act of Congress. The other line, descended from *Osborn v. Bank of the United States*,[4] established the principle that once a federal court had jurisdiction over one part of a case, the court would not lose jurisdiction if it heard other claims in the case that could not independently be brought into federal court. For nearly two hundred years, these two lines evolved separately, becoming more and more at odds with one another. The Court read express statutory grants of jurisdiction narrowly, while simultaneously developing common law doctrines to permit federal courts to decide claims that fell outside those narrow confines. *Finley* finally acknowledged the inherent logical contradiction.[5] In curtailing the expansive *Osborn* line, the *Finley* Court committed to using "a background of clear interpretive rules, so that [Congress] may know the effect of the language it adopts."[6]

Faced with the possibility that *Finley*'s ruling might severely hinder the ability of federal courts to resolve cases efficiently, Congress hastily passed a law intended to overturn *Finley* and provide the statutory basis for "supplemental" jurisdiction over nonfederal claims closely related to other claims that can be validly heard in federal court.[7] But this statute raised new questions of its own, which plagued the federal courts of appeals for fifteen years and led to a deep circuit split on the precise meaning and effect of the supplemental jurisdiction statute, 28 U.S.C. § 1367.

When it agreed to consolidate and hear the cases *Exxon Mobil Corp. v. Allapattah Services, Inc.* and *Ortega v. Star-Kist Foods, Inc.*,[8] the Supreme Court had an opportunity to remain true to its promise in *Finley* to apply the "clear interpretive rules" upon which it said Con-

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2 490 U.S. 545 (1989).

3 8 U.S. (4 Cranch) 75 (1807).

4 22 U.S. (9 Wheat.) 738 (1824). The *Finley* Court did not mention *Osborn*, but in an earlier case, the Court acknowledged *Osborn* as the patriarch of this strand. *See* Aldinger v. Howard, 427 U.S. 1, 6–7, 13–16 (1976).

5 *Finley*, 490 U.S. at 556 ("[O]ur cases do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred.").

6 *Id.*

7 *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113–14 (codified at 28 U.S.C. § 1367 (2000)).

8 125 S. Ct. 2611 (2005).

gress could rely when it passed the supplemental jurisdiction statute. In its decision, the Court settled one of the most contentious issues arising from the supplemental jurisdiction statute, but in doing so, it compromised the "clear interpretive rules" it had committed to use. The Court thus broke its *Finley* promise—ironically, while interpreting the very statute that had been passed in *Finley*'s wake.

This Note explores the "serious mischiefs"[9] that evolved out of the divergent line of jurisdictional cases, became codified in § 1367, and were reborn in *Allapattah*. Part I examines the narrow limits the Supreme Court has placed on inferior federal courts through its interpretation of congressional grants of jurisdiction, the much more expansive doctrine it developed to permit courts to hear supplemental claims despite the lack of statutory authorization, and the Court's reasoning in *Finley*, in which the mischiefs were laid bare and the Court called upon Congress to act. Part II recounts the congressional attempt to overturn the result in *Finley* and codify the prior practice, mischiefs and all, and describes the new set of serious mischiefs resulting from the "effect of the language [Congress] adopt[ed]."[10] Part III then thoroughly analyzes the Court's opinion in *Allapattah*, using the Court's treatment of the complete diversity rule to reveal its abandonment not only of the *Finley* promise, but also of the very rationale the Court employed to decide the case. Finally, Part IV examines the feasibility of various possible solutions to the problem of authorizing supplemental jurisdiction while simultaneously limiting the reach of federal judicial power, concluding that regardless of the specific legislative fix, if the Court will not honor its commitment to provide clear interpretive rules for Congress, then Congress should provide clear statutory rules for the Court.

I. SERIOUS MISCHIEFS EVOLVED: ORIGINAL AND SUPPLEMENTAL JURISDICTION PRIOR TO 1990

Article III, Section 2 of the United States Constitution provides nine heads of jurisdiction for the federal courts.[11] The First Congress

9 White v. Fenner, 29 F. Cas. 1015, 1016 (C.C.R.I. 1818) (No. 17,547).

10 *Finley*, 490 U.S. at 556.

11 U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof,

created the inferior courts of the federal judiciary with the passage of the Judiciary Act of 1789, which included specific statutory grants of jurisdiction according to the various heads provided in the Constitution.[12] In early cases interpreting the scope of these grants, the Supreme Court read them very narrowly.[13] The reasoning behind this construction was that Congress, having discretionary power to create the lower federal courts, necessarily also had power to vest those courts with as little or as much jurisdiction as it chose, up to the limit specified in Article III. Thus, any statutory grant of jurisdiction must be presumed to have vested only the specific and narrow jurisdictional power prescribed by its terms; absent a statutory grant, a federal court simply has no power to act because it has not been authorized by Congress to do so. This fundamental principle of construction has guided the Court's interpretation of federal jurisdiction ever since.

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and foreign States, Citizens or Subjects."). This Note is principally concerned with jurisdiction between "citizens of different States." 28 U.S.C. § 1332(a)(1) (2000). While the supplemental jurisdiction statute also has implications for alienage jurisdiction, *see id.* § 1332(a)(2)–(3), they are beyond the scope of this Note.

12 *See* Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–79 (codified as amended in scattered sections of 28 U.S.C.). Notably, the original Judiciary Act did not provide a statutory basis for federal question jurisdiction. It was not until 1875 that Congress authorized judicial action under that jurisdictional head. *See* Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331 (2000)); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 730 (2004). *But see* David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV. 521, 521–22 (1989) (arguing that the original Judiciary Act did provide for federal jurisdiction over all cases arising under federal law).

13 *See, e.g.*, M'Intire v. Wood, 11 U.S. (7 Cranch) 504, 505–06 (1813) (holding that the circuit courts' mandamus power under the Judiciary Act extended only to cases already encompassed by other jurisdictional grants in the Act); United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812) (holding that inferior federal courts had no power to assume jurisdiction beyond the specific limits placed on them by Congress); Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 11 (1799) (establishing the presumption that federal courts must be satisfied that statutory jurisdictional requirements are met rather than assuming jurisdiction is proper); *see also* FALLON ET AL., *supra* note 1, at 319; Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 33–36 (1981) (noting that both Congress and the Supreme Court have understood Congress's discretion to create inferior federal courts to carry with it the discretion to grant only portions of Article III jurisdiction in the inferior courts it creates).

A. *Very Limited Jurisdiction: The Complete Diversity and Amount-in-Controversy Requirements*

1. The Complete Diversity Rule

Whether following this principle, considering the apparent purposes of diversity, or both, the Supreme Court opted for a narrow statutory reading when it formulated the "complete diversity" rule in the landmark case of *Strawbridge v. Curtiss.*[14] In *Strawbridge*, several Massachusetts plaintiffs sued several Massachusetts defendants and one Vermont defendant in Massachusetts federal court.[15] The decision itself is brief and cryptic.[16] It appears the Court approached the case by considering the underlying purpose for including diversity cases among the heads of federal jurisdiction. The conventional view is that diversity jurisdiction aims to provide a neutral forum where out-of-state litigants can be free from local bias toward in-state litigants.[17] Thus, Chief Justice John Marshall's opinion held that each plaintiff must be independently capable of bringing the case in federal court against each defendant;[18] in other words, each plaintiff must be of diverse citizenship from each defendant, such that each and every pairing of plaintiff and defendant would satisfy the statutory requirement that the parties be "citizens of different states."

The precise wording of the statutory grant of diversity jurisdiction has changed over the years, but the core phrase "citizens of different states" has consistently been construed, ever since *Strawbridge*, to demand complete diversity in most cases.[19] There are, however, some exceptions.

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14 7 U.S. (3 Cranch) 267 (1806).

15 *Id.* at 267.

16 *See* Arthur D. Wolf, *Comment on the Supplemental-Jurisdiction Statute: 28 U.S.C. § 1367*, 74 IND. L.J. 223, 232 (1998).

17 The original grant of diversity jurisdiction required that the plaintiff be a citizen of the state where the suit was brought. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (current version at 28 U.S.C. § 1332 (2000)) (granting jurisdiction over suits that exceed "the sum or value of five hundred dollars" and are "between a citizen of the State where the suit is brought, and a citizen of another State"). *But see* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495–97 (1928) (arguing that the true purpose of diversity jurisdiction was to provide out-of-state creditors a more favorable tribunal than the generally pro-debtor state courts); *infra* Part IV.A (examining the effectiveness of diversity jurisdiction in protecting out-of-state litigants).

18 7 U.S. (3 Cranch) at 267–68.

19 *See, e.g.*, Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990); Smith v. Sperling, 354 U.S. 91, 93 (1957); Treinies v. Sunshine Mining Co., 308 U.S. 66, 71 (1939); Camp v. Gress, 250 U.S. 308, 312–13 (1919); Smith v. Lyon, 133 U.S. 315, 318–20 (1890); Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16. How.) 314, 339–42 (1854).

First, the Supreme Court has held, absent any statutory direction, that class actions in federal court need only achieve complete diversity between the named class representatives and the opposing parties.[20] Unnamed class members are not considered in determining whether or not the requisite diversity of citizenship exists. The Court reasoned that only the named representatives are truly part of the Article III case at hand, so only their citizenship, and not that of other class members, should matter for the purpose of establishing jurisdiction.[21]

Second, Congress in 1917 passed legislation permitting interpleader jurisdiction in the federal courts when minimal diversity is present, i.e., when any plaintiff is of diverse citizenship from any defendant.[22] The constitutionality of this legislation turned on whether the complete diversity rule in *Strawbridge* was an interpretation of the diversity jurisdiction grant in Article III of the Constitution, or merely of the statutory language of the original Judiciary Act authorizing such jurisdiction in the federal courts. In 1967, the Supreme Court finally resolved the question by holding that the *Strawbridge* complete diversity rule is an interpretation of statutory language, and not a requirement of the Constitution.[23] Thus, the minimal diversity required by the interpleader statute is sufficient to invoke the diversity jurisdiction provided by the Constitution.

Third, Congress passed the Class Action Fairness Act of 2005 (CAFA),[24] which significantly amends § 1332 to provide a statutory basis for federal jurisdiction over certain class action lawsuits.[25] Generally, class actions can invoke federal jurisdiction under CAFA if they (1) are multistate in scope;[26] (2) present an aggregate[27] amount in

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

21 *Id.* at 367.

22 Federal Interpleader Act, ch. 113, 39 Stat. 929 (1917) (current version at 28 U.S.C. §§ 1335, 1397, 2361 (2000)); *see* RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE 789 (4th ed. 2005).

23 State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967).

24 Pub. L. No. 109-2, 119 Stat. 4. (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–1715).

25 28 U.S.C.A § 1332(d) (West Supp. 2006).

26 28 U.S.C.A. § 1332(d)(3)–(5). The intricacies of CAFA, designed to ensure that only truly multistate class actions fall within its province, are largely beyond the scope of this Note. For a preliminary discussion of how CAFA changes the landscape for class action litigation generally, see Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1357–58 (2005); David F. Herr & Michael C. McCarthy, *The Class Action Fairness Act of 2005—Congress Again Wades into Complex Litigation Management Issues*, 228 F.R.D. 673, 676–86 (2005); Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 885–92 (2005); Anthony Rollo & Gabriel A.

controversy of at least $5 million; and (3) are between minimally diverse named parties.[28]

2. The Amount-in-Controversy Requirement

In addition to diversity of citizenship, the statutory grant of diversity jurisdiction has also always required that the matter in controversy exceed a certain dollar amount. Originally $500, this amount has been increased several times, and currently stands at $75,000.[29] The Supreme Court has held, analogous to the *Strawbridge* rule regarding diversity, that each individual plaintiff must independently meet the amount-in-controversy threshold; aggregation of several plaintiffs' claims to reach the threshold is not allowed.[30] Moreover, this rule applied even if one plaintiff could meet the required amount threshold but other plaintiffs could not. In *Clark v. Paul Gray, Inc.*,[31] the Supreme Court refused to allow additional plaintiffs whose claims did not meet the then-required amount of $3000 to join their claims with another plaintiff whose claims were sufficient to invoke federal jurisdiction.[32] Curiously, in 1973 the Court extended this nonaggregation principle to class actions in *Zahn v. International Paper Co.*[33] Although the question was presented to the Court in terms of pendent jurisdic-

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Crowson, *Mapping the New Class Action Frontier—A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 CONSUMER FIN. L.Q. REP. 11, 13–22 (2005).

27 28 U.S.C.A. § 1332(d)(6). By permitting aggregation, CAFA significantly changes the prior doctrine with respect to the amount-in-controversy requirement. *See infra* Part I.A.2.

28 28 U.S.C.A. § 1332(d)(2)(A). Thus, CAFA partially supersedes *Ben-Hur* because it would permit diversity jurisdiction over class actions where any named representative is diverse from any opposing party, whereas *Ben-Hur* required complete diversity among all named parties. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 363–64 (1921).

29 28 U.S.C. § 1332(a) (2000).

30 Snyder v. Harris, 394 U.S. 332, 336 (1969) ("By 1916 this Court was able to say . . . that it was 'settled doctrine' that separate and distinct claims could not be aggregated to meet the required jurisdictional amount." (quoting Pinel v. Pinel, 240 U.S. 594, 596 (1916))); Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40 (1911) ("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 . . . .").

31 306 U.S. 583 (1939).

32 *Id.* at 589.

33 414 U.S. 291, 299–301 (1973).

tion,[34] the majority opinion resolved the case on original jurisdiction terms by invoking the *Clark* rule as controlling precedent.[35]

Not only did this rationale needlessly confuse the distinction between original and pendent jurisdiction, it also created an arbitrary inconsistency in the determination of original jurisdiction for class actions. As noted, in assessing the diversity of parties to a class action, the court considers the citizenship of only the named representatives of the class; in determining the amount in controversy, however, each member of the class must independently satisfy the statutory requirement.[36] This makes it "difficult to bring a class action in federal court," since many class actions arise under state rather than federal law and involve thousands of class members, each of whom has suffered a relatively small amount in damages.[37] The practical effect of *Zahn*, then, was to deny federal diversity jurisdiction to virtually all class actions that did not qualify for federal question jurisdiction, even if the parties satisfied the *Ben-Hur* requirement of complete diversity.

Original jurisdiction in diversity cases is thus determined by both the diversity of the parties to the suit and the amount in controversy of each plaintiff's claim. With respect to diversity of citizenship, each plaintiff must be of diverse citizenship from each defendant, subject to the exceptions for interpleader and class actions. If inclusion or joinder of a particular party would run afoul of the *Strawbridge* rule, then either that party cannot be joined or must be removed from the action, or the entire case must be dismissed for lack of original jurisdiction.[38] With respect to the amount in controversy, each individual plaintiff must allege claims sufficient to satisfy the minimum amount in controversy provided by statute. Again, if a particular party's claims cannot meet the required threshold, the party or the entire case must be dismissed. By dismissing parties or cases that do not meet the established requirements for diversity jurisdiction, federal courts ensure that, pursuant to the narrow interpretation of federal judicial power, they only hear cases over which they are duly authorized to exercise original jurisdiction.

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34 *See id.* at 305 (Brennan, J., dissenting); Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 IND. L.J. 5, 19–20 (1998).

35 *Zahn*, 414 U.S. at 300–01 (majority opinion).

36 *See supra* Part I.A.1.

37 FREER & PERDUE, *supra* note 22, at 839.

38 While dismissal of diversity-destroying parties is almost always a viable option, some courts may dismiss the entire case on the theory that the nondiverse party has "contaminated" the entire action. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2617 (2005); *infra* Part III.A.

B. Trying To Help Them: Supplemental Jurisdiction Doctrine Prior to § 1367

1. Pendent Jurisdiction

In contrast to its very narrow interpretation of judicial power with respect to the original jurisdiction granted by Congress, the Supreme Court employed a very broad understanding of the fundamental constitutional power to decide "Cases [and] Controversies"[39] as a general matter. Even as the Supreme Court was carefully parsing the jurisdiction statutes to deduce such principles as the *Strawbridge* complete diversity rule and the *Clark* nonaggregation rule, it was developing a set of common law rules enabling federal courts to hear claims over which they could not establish original jurisdiction, but that were substantially related to a claim that does fall within the narrow understanding of a statutory grant. The leading case, *United Mine Workers v. Gibbs*,[40] held that when jurisdictionally insufficient claims "derive from a common nucleus of operative fact" with claims that do satisfy jurisdictional requirements, "[supplemental] jurisdiction, in the sense of judicial *power*, exists" to hear all claims that "comprise[ ] but one constitutional 'case.'"[41]

Gibbs established the contours of what was then known as "pendent" or "pendent claim" jurisdiction.[42] The plaintiff invoked federal question jurisdiction[43] to bring suit against the defendant union.[44] Gibbs also asserted a state law claim against the union arising out of the same set of facts.[45] The Court's holding meant that the federal district court could adjudicate both the federal and state claim together in one case, even though the state claim would not have been sufficient to invoke federal jurisdiction on its own.[46]

The *Gibbs* Court further held that, despite the power to hear such pendent claims, the district court had discretion to refuse to hear the

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39 U.S. CONST. art. III, § 2, cl. 1.

40 383 U.S. 715 (1966).

41 *Id.* at 725.

42 *See id.*

43 Interestingly, neither the plaintiff nor the Court invoked the general federal question statute, 28 U.S.C. § 1331 (2000); the majority opinion noted that "jurisdiction was premised on allegations of secondary boycotts under" section 303 of the Labor Management Relations Act. *Gibbs*, 383 U.S. at 720; *see also* Labor Management Relations Act, ch. 120, § 303, 61 Stat. 136, 158–59 (1947) (codified as amended at 29 U.S.C. § 187 (2000)).

44 *Gibbs*, 383 U.S. at 717.

45 *Id.* at 717–18.

46 Gibbs and the union were both citizens of the State of Tennessee; thus, there was no diversity of citizenship. *Id.* at 721.

claims for a variety of reasons.[47] This discretion permitted the district courts wide latitude in evaluating supplemental jurisdiction on a case-by-case basis.[48]

Gibbs was thus a remarkable expansion of federal jurisdiction. The Court assumed the power to resolve nonfederal claims related to a case properly in federal court,[49] despite the absence of an express statutory grant to that effect. Instead, the Court reasoned that Congress intended for federal courts to have such expansive pendent jurisdiction unless there was an express statutory *denial* of that jurisdiction.[50] This idea ran directly counter to the fundamental principle that federal courts were powerless unless Congress bestowed authority on them through a statute. That principle, in turn, was further limited by the Court's narrow interpretation of statutory grants of jurisdiction. The *Gibbs* Court took a very different approach, skirting past the question of whether there was a statutory grant in support of pendent jurisdiction, and instead holding as a matter of Article III judicial power that federal courts could hear and decide nonfederal claims if they are sufficiently related to a federal case or controversy.[51] The only limits on that power, according to *Gibbs*, are the requirement of a relational nexus and the discretion of the district courts.[52] Thus, narrow interpretations of statutory grants of jurisdiction could conceivably be circumvented easily under the doctrine of pendent jurisdiction.

Later cases sought to contain or distinguish *Gibbs*. One way the Court limited *Gibbs* was to narrow the reach of "pendent party" jurisdiction. Pendent party jurisdiction involved the assertion of

47 *Id.* at 726.

48 *Id.* at 726–27 (discussing judicial economy, convenience, fairness to litigants, dismissal of federal claims prior to trial, the substantial predominance of state issues, and the likelihood of jury confusion as reasons for federal courts to decline to exercise pendent jurisdiction).

49 Although the federal claim in *Gibbs* invoked the federal question jurisdiction of § 1331, the language in the decision was sufficiently broad to reach all forms of federal jurisdiction, including diversity of citizenship. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 371 n.10 (1978) (assuming, without deciding, that *Gibbs* extends to diversity cases); *id.* at 379 (White, J., dissenting) ("Although the specific facts of [*Gibbs*] concerned a state claim that was said to be pendent to a federal-question claim, the Court's language and reasoning were broad enough to cover the instant factual situation . . . .").

50 *Gibbs*, 383 U.S. at 722–25; *see* Aldinger v. Howard, 427 U.S. 1, 18 (1976) ("Before it can be concluded that [supplemental] jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence.").

51 *Gibbs*, 383 U.S. at 725.

52 *Id.* at 725–26.

nonfederal claims by the plaintiff, not against the original defendant (over whom federal jurisdiction did exist with respect to the plaintiff's federal claim), but against another defendant, not otherwise party to the suit and against whom no valid federal claim was asserted.[53] Pendent party jurisdiction extended the reach of federal courts beyond not just the *claims* over which they have jurisdiction, but *parties* as well.

In *Aldinger v. Howard*,[54] the Supreme Court denied pendent party jurisdiction against a municipal government when the "host" federal claim arose under the civil rights laws.[55] Because those laws[56] at the time were construed to expressly deny federal jurisdiction over local governments, the Court held that pendent party jurisdiction could not be used to bring a related state law claim against the county; the statutes' limitation of jurisdiction as an original matter also operated to limit pendent jurisdiction.[57] Nevertheless, the Court's analysis in *Aldinger* accepted the general premise of pendent party jurisdiction, at least in those instances where (as noted in *Gibbs*) there was no reason to believe, as there was in *Aldinger*, that Congress had denied the federal courts power to resolve pendent claims and claims over pendent parties.[58]

2. Ancillary Jurisdiction

Ancillary jurisdiction, on the other hand, was another supplemental jurisdiction concept that predated *Gibbs*. If pendent jurisdiction was conventionally understood to describe nonfederal claims asserted by a plaintiff "pendent to" her federal claim, then ancillary jurisdiction described claims asserted by parties other than the original plaintiff "ancillary to" the original plaintiff's federal claims. For example, ancillary jurisdiction was used to extend federal jurisdiction over claims by defendants against impleaded third parties, cross-claims between co-defendants, counterclaims against the original plaintiff, and claims by or against indispensable or intervening parties, when there was no independent basis for federal jurisdiction over such claims.[59] Similar to the pendent jurisdiction concept developed in *Gibbs*, the objective of ancillary jurisdiction was to maximize judicial

53 *See Aldinger*, 427 U.S. at 9–10.

54 427 U.S. 1.

55 *Id.* at 16–19.

56 28 U.S.C. § 1343(a)(3) (2000); 42 U.S.C. § 1983.

57 *See Aldinger*, 427 U.S. at 17.

58 *Id.* at 18.

59 *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375 & n.18 (1978) (citing cases).

economy and provide for the efficient resolution of all related claims in a single action.[60]

In *Owen Equipment & Erection Co. v. Kroger*,[61] the Supreme Court limited the use of ancillary jurisdiction by plaintiffs in actions based on diversity of citizenship.[62] The *Kroger* plaintiff was an Iowa citizen who brought suit in federal court against a Nebraska defendant, which in turn impleaded an Iowa corporation.[63] The plaintiff then amended her complaint to name the Iowa corporation as a co-defendant, and the district court, relying on *Gibbs*, permitted the joinder despite the absence of diversity between the two parties.[64]

The Supreme Court reversed, holding that such a broad application of ancillary jurisdiction could permit a plaintiff to "defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."[65] Despite the Court's belief that "Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit,"[66] it refused to allow ancillary jurisdiction over "a plaintiff's cause of action against a citizen of the same State in a diversity case."[67] To do so "would simply flout the congressional command."[68]

It is worthwhile to note that in both *Aldinger* and *Kroger*, the Court characterized the challenges presented under the pendent and ancillary jurisdiction concepts as "two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?"[69] That is to say, the entire problem of supplemental jurisdiction arises only when there is no independent basis for jurisdiction over the claim. If the claim meets the statutory requirements under § 1331, then it is a federal claim and the doctrine of supplemental jurisdiction need not be consulted. Similarly, if the claim is between citizens of different states and is of the requisite amount in controversy, then the

60 *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378–80 (1994).
61 437 U.S. 365.
62 *Id.* at 377.
63 *Id.* at 367–69.
64 *Id.* at 369.
65 *Id.* at 374.
66 *Id.* at 377.
67 *Id.*
68 *Id.*
69 *Id.* at 370 (citing Aldinger v. Howard, 427 U.S. 1, 13 (1976) ("[T]here is little profit in attempting to decide . . . whether there are any 'principled' differences between pendent and ancillary jurisdiction . . . .")).

federal courts have original jurisdiction under § 1332. It is only when the claim arises between citizens of the same state, *and* does not present a federal question or any other independent basis for federal jurisdiction, that supplemental jurisdiction—whether pendent or ancillary—comes into play.

3. *Finley v. United States* Threatens To Eviscerate Supplemental Jurisdiction

In 1989, the Supreme Court was faced with a question expressly left open by the Court in *Aldinger*[70]: whether, in an action against one defendant over which federal courts have *exclusive* jurisdiction, the plaintiff could use pendent party jurisdiction to assert a state law claim against a nondiverse defendant.[71] Petitioner Barbara Finley sued the United States on a claim over which the federal district court had exclusive jurisdiction under the Federal Tort Claims Act (FTCA).[72] She amended her complaint to assert state law claims against a city government and local public utility, both of which were deemed citizens of the same state (California) as Finley.[73] The district court permitted the joinder of these claims and parties, relying on *Gibbs* for justification.[74]

The Supreme Court reversed, finding that nothing in the FTCA, nor in any other jurisdictional statute, gave federal courts the authority to exercise jurisdiction over nonfederal claims by plaintiffs that introduce new parties to the suit.[75] "[W]ith respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly."[76] The *Finley* majority read *Aldinger* to support its contention that pendent party jurisdiction does not automatically follow from *Gibbs*, but rather must also rely on "'careful attention to the relevant statutory language.'"[77] Finding sig-

70 427 U.S. at 18 ("Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together.").

71 *See* Finley v. United States, 490 U.S. 545, 547 (1989).

72 28 U.S.C. § 1346(b) (2000).

73 *Finley*, 490 U.S. at 546.

74 *Id.* at 546–47.

75 *Id.* at 549–51.

76 *Id.* at 549.

77 *Id.* at 550 (quoting Aldinger v. Howard, 427 U.S. 1, 17 (1976)).

nificance in the fact that *Zahn*, *Aldinger*, and *Kroger* all involved "claims [against] added parties over whom no independent basis of jurisdiction exists,"[78] the Court read the FTCA narrowly: "Just as the statutory provision 'between . . . citizens of different States' has been held to mean citizens of different States and no one else, so also here we conclude that 'against the United States' means against the United States and no one else."[79] Thus, the *Finley* Court read the relevant jurisdictional statute as expressly denying jurisdiction over other parties—just as *Kroger* held with regard to diversity of citizenship and § 1332,[80] *Aldinger* held with regard to local governments and the civil rights laws,[81] and *Zahn* held with regard to amount in controversy and § 1332.[82]

The *Finley* majority bookended its analysis with an acknowledgement of the tension between the Court's narrow and limited approach to its interpretation of original jurisdiction on the one hand, and the broad and expansive approach it has taken to supplemental jurisdiction doctrines on the other. Early in its opinion, the Court acknowledged the fundamental principle: "'[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.'"[83] More specifically, "'The Constitution must have given to the [inferior federal] court[s] the capacity to take [jurisdiction], *and an act of Congress must have supplied it.* . . . To the extent that such action is not taken, the power lies dormant.'"[84] In concluding its opinion, the *Finley* majority described the "*Gibbs* line of cases [as] a departure from prior practice," but declined to overturn them.[85] Instead, the Court adhered to the *Aldinger* line limiting the use of the *Gibbs* departure in pendent party cases.[86] The Court refused to recognize pendent party jurisdiction in the absence of a specific statutory grant authorizing such jurisdiction, but invited Congress to correct the Court's interpretation of the jurisdictional statutes if it wished.[87]

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78 *Id.* at 551.

79 *Id.* at 552 (citation omitted).

80 *See supra* text accompanying notes 61–68.

81 *See supra* text accompanying notes 54–58.

82 *See supra* Part I.A.2.

83 *Finley*, 490 U.S. at 547 (quoting *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807)).

84 *Id.* at 548 (quoting Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868)).

85 *Id.* at 556.

86 *Id.*

87 *Id.* ("Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress.").

II. SERIOUS MISCHIEFS CODIFIED: CONGRESS ACCEPTS THE INVITATION AND ENACTS § 1367

The reaction to *Finley* was swift.[88] A Federal Courts Study Committee, already in existence pursuant to earlier judicial legislation,[89] included in its final report to Congress a recommendation for dealing with the *Finley* problem.[90] It noted the potential problems with the reach of *Finley*'s holding[91] and suggested that "Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, *within federal question jurisdiction*, that require the joinder of additional parties, *namely*, defendants against whom that plaintiff has a closely related state claim."[92]

A statutory provision that tracked this recommendation by specifying that pendent party jurisdiction extended only to state law claims closely related to claims presenting a true federal question would have avoided uncertainty and controversy.[93] Unfortunately, the final version of the statute as passed was much less limited. Indeed, § 1367(a) by its terms has been understood to codify fully the *Gibbs* holding that

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88 *See, e.g.*, Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 469–71 (1991); Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation To Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 213 (1991); Heather McDaniel, Note, *Plugging the "Gaping Hole": The Effect of 28 U.S.C. § 1367 on the Complete Diversity Requirement of 28 U.S.C. § 1332*, 49 BAYLOR L. REV. 1069, 1083 (1997).

89 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 101–109, 102 Stat. 4642, 4644–45 (1988).

90 *See* FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, at 47–48 (1990) [hereinafter FCSC REPORT].

91 *See id.* at 47 ("[A] litigant with related claims against two different parties—one within and one outside original federal jurisdiction—may have to choose between (1) splitting the claims and bringing duplicative actions in state and federal courts; (2) abandoning one of the claims altogether; or (3) filing the entire case in state court, thus delegating the determination of federal issues to the state courts. The first alternative wastes judicial resources. The second is unfair to the claimant. The third forces litigants to bring a wide variety of federal claims into the state courts and in some cases is unavailable because federal jurisdiction over the federal aspect is exclusive.").

92 *Id.* (emphasis added).

93 *See* Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 91–92 (1992). *But see* Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and Their Relation to the States, *in* 1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 567–68 (1990) (proposing draft statutory language that does not make these distinctions).

supplemental jurisdiction extends to the limit of the Constitution.[94] Moreover, the statute makes no distinction between pendent and ancillary jurisdiction, instead acknowledging the reality that they are "two species of the same generic problem"[95] and codifying both doctrines under the new term "supplemental jurisdiction."[96] The last sentence of § 1367(a) expressly overrules *Finley* by providing for the joinder or intervention of additional parties, and nothing at all in § 1367(a) itself limits the breadth of the statute. Thus, § 1367(a) standing alone appears to authorize supplemental jurisdiction for any claim at all that is "so related to claims in the action within . . . original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."[97]

Even *Gibbs*, of course, was not so unbridled an expansion of the power of the federal courts.[98] Section 1367(c) of the supplemental jurisdiction statute purports to codify the limitations in *Gibbs*,[99] just as § 1367(a) codifies the reach of *Gibbs*. While the language in

94 *See, e.g.*, Gold v. Local 7 United Food & Commercial Workers Union, 159 F.3d 1307, 1309–10 (10th Cir. 1998); Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1175–76 (1st Cir. 1995); Shanaghan v. Cahill, 58 F.3d 106, 109 (4th Cir. 1995); Promisel v. First Am. Artificial Flowers, Inc., 943 F.2d 251, 254 (2d Cir. 1991); Sinclair v. Soniform, Inc., 935 F.2d 599, 603 (3d Cir. 1991); Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 EMORY L.J. 55, 67, 81–82 (2004); 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, 763–65 (1991); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 142 & n.127 (1999). The text of § 1367(a) provides:

> 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.

28 U.S.C. § 1367(a) (2000).

95 Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978).

96 28 U.S.C. § 1367(a).

97 *Id.*

98 *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726–27 (1966).

99 28 U.S.C. § 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.").

§ 1367(a) and (c) does not exactly track the language from *Gibbs*, the general consensus is that these two provisions together operate to overturn *Finley* and restore *Gibbs* as the controlling doctrine for the discretionary exercise of supplemental jurisdiction by the federal courts.[100]

That leaves the *Kroger* problem: how to codify supplemental jurisdiction in such a way as to prevent plaintiffs from using it to circumvent the limits placed by Congress and the courts on diversity of citizenship jurisdiction. Congress's answer to this dilemma is contained in § 1367(b), which provides:

> 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.[101]

Section 1367(b) thus applies to limit supplemental jurisdiction only (1) when the original action arises under the diversity head of jurisdiction; *and* (2) when the additional claims are made either by plaintiffs against certain specified parties, or by persons who would be joined as plaintiffs under Rules 19 or 24 of the Federal Rules of Civil Procedure.[102] The final fragment of § 1367(b) further indicates that supplemental jurisdiction is to be withheld from such claims only when hearing them "would be inconsistent with the jurisdictional requirements of section 1332."[103]

The meaning, effects, and implications of § 1367 have been hotly debated from almost the moment it became law.[104] Because the Su-

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100 *See, e.g.*, Musson Theatrical, Inc. v. Fed. Express Corp., 89 F.3d 1244, 1254 (6th Cir. 1996); Freer, *supra* note 94, at 81; Pfander, *supra* note 94, at 121–22; McDaniel, *supra* note 88, at 1083–84.

101 28 U.S.C. § 1367(b).

102 *See* McDaniel, *supra* note 88, at 1085–86.

103 28 U.S.C. § 1367(b).

104 *See, e.g.*, Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007 (1991); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991); Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3 (1992); Rochelle Cooper Dreyfuss, *The Debate Over § 1367: Defining the Power To Define Federal Judicial Power*, 41 EMORY L.J. 13 (1992); Freer, *supra* note 88; Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An*

preme Court has at least nominally resolved the most fundamental questions in the debate with its decision in *Allapattah*, there is little need to rehash the arguments here.[105] It will, however, be helpful to review the major contentions in order to better understand the significance of the Court's decision.

Professor Freer's initial article criticizing § 1367 identified ten potential problems with the statute.[106] The last of his enumerated problems involved the question ultimately resolved by the Court in *Allapattah*: whether or not § 1367 overruled the *Clark* and *Zahn* rules prohibiting jurisdiction over supplemental claims that do not meet the amount-in-controversy requirement.[107] As Professor Freer noted, the plain language of the statute would permit supplemental jurisdiction over such claims,[108] but "[b]uried in the legislative history . . . is a disclaimer regarding class actions" which indicates that "the drafters did not intend to affect the present jurisdictional standards for class actions."[109]

In response, three principal drafters of the statute acknowledged the *Zahn* problem with § 1367 and wrote 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."[110] Thus, from the outset the question that eventually reached the Court in *Allapattah*

Important but Controversial Supplement to Federal Jurisdiction, 41 EMORY L.J. 31 (1992); Wendy Collins Perdue, *The New Supplemental Jurisdiction Statute—Flawed But Fixable*, 41 EMORY L.J. 69 (1992); Thomas D. Rowe, Jr. et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991); Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991) [hereinafter Rowe et al., *Reply*]; Steinman, *supra* note 93.

105 Indeed, one writer observed several years ago that the raging debate had "destroyed most of a mid-sized forest," leaving "nothing new for anyone to say about supplemental jurisdiction." Peter Raven-Hansen, *The Forgotten Proviso of § 1367(b) (And Why We Forgot)*, 74 IND. L.J. 197, 197 (1998).

106 Freer, *supra* note 88, at 474–86.

107 *See id.* at 485–86.

108 *Id.* at 485. Professor Freer's article discussed only the class action context. *See id.* at 485–86.

109 *Id.* at 486. The legislative history for § 1367 states: "The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to Finley." H.R. REP. No. 101-734, at 29 & n.17 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6875 (naming *Ben-Hur* and *Zahn* as the requirements in question).

110 Rowe et al., *Reply*, *supra* note 104, at 960 n.90. The authors went on to note that the conflict between the text and history "creates the delicious possibility that despite Justice Scalia's opposition to the use of legislative history, he will have to look to the history or conclude that section 1367 has wiped *Zahn* off the books." *Id.* That § 1367 "has wiped *Zahn* off the books" is, of course, precisely what the Court concluded in *Allapattah*, and Justice Scalia was part of the majority in that decision.

pitted a textualist approach to § 1367 against one that prioritized the legislative history.

More alarming to the three drafters, and squarely the focus of this Note, is "section 1367(b)'s silence about supplemental jurisdiction over nondiverse parties proposed to be added after initial filing as plaintiffs under Rule 20 (permissive joinder of parties)."[111] The drafters suggested that "[o]riginal filing of a diversity complaint by two plaintiffs, one of them not of diverse citizenship from a defendant, remains barred by the complete diversity" rule,[112] but that § 1367(b) read literally would not prevent jurisdiction over such an action.[113] The drafters could "only hope that the federal courts [would] plug that potentially gaping hole in the complete diversity requirement."[114]

The hole would work like this: if a single plaintiff brings an action against a diverse defendant that meets the amount-in-controversy requirement, then there is original jurisdiction over that action sufficient to satisfy the requirements of § 1332, and therefore of § 1367(a) as well. That same section then authorizes supplemental jurisdiction over other closely related claims, including claims that involve joinder of additional parties. Thus, according to the terms of § 1367(a) alone, federal courts would have supplemental jurisdiction over the related claim of a co-plaintiff, even if that plaintiff is not diverse from the original defendant.[115] But § 1367(a) is limited by § 1367(b), which withholds supplemental jurisdiction in certain circumstances when original jurisdiction is founded on diversity and the exercise of supplemental jurisdiction would be "inconsistent with the jurisdictional requirements of section 1332."[116] Yet none of the specific cir-

111 *Id.* at 961 n.91.

112 *Id.* This Note argues that according to *Allapattah*'s rationale, it is no longer so clear that this is the case. *See infra* Part III.C. While there may be some fine distinctions between an original action including a nondiverse plaintiff and an original action that is completely diverse but is later amended to add a nondiverse plaintiff, this Note considers these actions in tandem.

113 *See* Rowe et al., *Reply*, *supra* note 104, at 961 n.91. They suggested that federal courts could plug the hole "either by regarding it as an unacceptable circumvention of original diversity jurisdiction requirements, or by reference to the intent not to abandon the complete diversity rule that is clearly expressed in the legislative history of section 1367." *Id.*

114 *Id.*

115 Indeed, the co-plaintiff would have to be nondiverse for § 1367(a) to apply. If the co-plaintiff was diverse, then there would be original jurisdiction over the claim (assuming the requisite amount in controversy), and there would be no need to resort to supplemental jurisdiction.

116 28 U.S.C. § 1367(b) (2000).

cumstances described in § 1367(b) cover the assertion of claims by a plaintiff joined under Rule 20 against a single defendant.[117] Thus, § 1367(a) grants supplemental jurisdiction, and nothing in § 1367(b) takes it away, so the exercise of supplemental jurisdiction is proper, even though the action as a whole is plainly incompatible with the complete diversity rule.

In this way, plaintiffs can easily circumvent the complete diversity requirement of *Strawbridge*, at least in cases where there is only a single defendant, simply by structuring the litigation in a way that meets the complete diversity requirement initially, and then joining nondiverse plaintiffs under Rule 20.[118] This would seem to be much more of a "simple expedient" than what the Court feared in *Kroger*,[119] and yet it emanates from the literal application of a statutory provision purported to codify *Kroger*'s diversity-based limits on supplemental jurisdiction.

Again, the legislative history suggests an intent inconsistent with the language of the statute:

> In diversity-only actions the district courts may not hear plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdictional requirement of 28 U.S.C. § 1332 by the simple expedient of naming initially only those defendants whose joinder satisfies section 1332's requirements and later adding claims not within original federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis. In accord with case law, the subsection also prohibits the joinder or intervention of persons a [sic] plaintiffs if adding them is inconsistent with section 1332's requirements.[120]

This language clearly indicates that there was no intent to permit multiple plaintiffs to circumvent the complete diversity rule; combined with the legislative history regarding diversity-only class ac-

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117 Section 1367(b) does prohibit supplemental jurisdiction over claims "by plaintiffs against persons made parties under . . . Rule 20," *id.*, which would seem to apply to cases in which there are multiple defendants. But in cases with only a single defendant, Rule 20 is not implicated.

118 Alternatively, the plaintiffs could simply file the entire action and assert that the diverse claim establishes original jurisdiction under § 1367(a), thus providing a host claim to which supplemental jurisdiction over the nondiverse claim can attach. Section 1367(a) would not require plaintiffs to take the interim steps of filing and amending under this analysis. *See supra* notes 111–14 and accompanying text.

119 *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978); *supra* notes 61–68 and accompanying text.

120 H.R. REP. No. 101-734, at 29 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6875.

tions,[121] it would also seem that there was no intent to change the rules regarding aggregation or joinder of claims that do not independently satisfy the amount in controversy. The clash between the text of the statute and the statement of intent in the legislative history could not be plainer.

Not surprisingly, the federal circuit courts of appeals have arrived at multiple conclusions to the question of whether § 1367 overruled *Zahn* and *Clark*. A majority of the circuits ruling on the issue applied the plain meaning of the statute to determine that it did indeed overrule *Zahn* and *Clark*.[122] Beginning in 1998, however, three circuits held that *Zahn* and *Clark* survived § 1367, purporting to reach this result by a purely textual interpretation.[123] These courts interpreted the phrase "any civil action of which the district courts have original jurisdiction" in § 1367(a) to incorporate by reference the various nuances of original, pendent, and ancillary jurisdiction that existed prior to *Finley*.[124] According to this reading, an action consisting of multiple claims by plaintiffs, some of which did not meet the amount-in-controversy requirement, would not be a "civil action of which the district courts have original jurisdiction," because the *Zahn* and *Clark* rules requiring each plaintiff to meet the amount-in-controversy requirement would prohibit original jurisdiction over the entire case. As a result, there would be no original jurisdiction to which supplemental jurisdiction could attach.[125] In addition, the Third Circuit held in favor of keeping *Zahn* and *Clark* by going to the legislative history despite acknowledging that "there is much to be said for [the] view that the text [of § 1367] does not displace *Zahn's* ruling," because "this is one of those 'rare cases [in which] the literal application

121 *See supra* note 109 and accompanying text.

122 *See* Olden v. LaFarge Corp., 383 F.3d 495, 502 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005); Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1256 (11th Cir. 2003), *aff'd sub nom.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611 (2005); Rosmer v. Pfizer, Inc., 263 F.3d 110, 114 (4th Cir. 2001); Gibson v. Chrysler Corp., 261 F.3d 927, 934 (9th Cir. 2001); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997); Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 932 (7th Cir. 1996); *In re* Abbott Labs., 51 F.3d 524, 528–29 (5th Cir. 1995).

123 *See* Rosario Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 132–33 (1st Cir. 2004), *rev'd sub nom.* Exxon Mobil Corp. v. Allapattah Servs. Inc., 125 S. Ct. 2611; Trimble v. Asarco, Inc., 232 F.3d 946, 961 (8th Cir. 2000); Leonhardt v. W. Sugar Co., 160 F.3d 631, 640 (10th Cir. 1998).

124 *See Rosario Ortega*, 370 F.3d at 135; *Trimble*, 232 F.3d at 961–62; *Leonhardt*, 160 F.3d at 640.

125 *See* Pfander, *supra* note 94, at 127–28 (describing the "sympathetic" reading of the statute in detail).

of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"[126]

In its 1999 Term, the Supreme Court granted certiorari to resolve the deepening split among the circuits on this question.[127] But because Justice O'Connor recused herself from the case,[128] the Court could not form a majority and affirmed the circuit's result by an equally divided Court.[129] Thus, "[c]ourts, litigants, and scholars would have to wait another five years for the Supreme Court to provide guidance."[130]

III. SERIOUS MISCHIEFS REBORN: THE SUPREME COURT'S DECISION AND RATIONALE IN *EXXON MOBIL CORP. V. ALLAPATTAH SERVICES, INC.*

For its 2004 Term, the Supreme Court granted certiorari in two of the latest cases to address the § 1367 problem in the *Zahn/Clark* context.[131] The first case involved class action litigation arising under state law against Exxon Mobil by more than 10,000 independent Exxon dealers in the State of Florida.[132] The district court had determined that § 1367 overruled *Zahn*, and therefore certified the class despite the fact that several of the dealers could not show claims meeting the $75,000 minimum.[133] The Eleventh Circuit Court of Appeals affirmed, adopting the reasoning of the five other circuits that had

126 Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999) (third alteration in original) (quoting United States v. Sherman, 150 F.3d 306, 313 (3d Cir. 1998)).

127 Free v. Abbott Labs., Inc., 176 F.3d 298 (5th Cir. 1999), *aff'd per curiam by an equally divided Court*, 529 U.S. 333 (2000).

128 No official reason was given, but it appears that Justice O'Connor owned stock in one of the parties to the case. *See* Thomas E. Baker, *Why We Call the Supreme Court "Supreme": A Case Study on the Importance of Settling the National Law*, 4 GREEN BAG 2d 129, 136 & n.34 (2001).

129 *Free*, 529 U.S. at 333.

130 Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction:* Exxon Mobil v. Allapattah *and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 308 (2006).

131 Del Rosario Ortega v. Star Kist Foods, Inc., 370 F.3d 124 (1st Cir. 2004), *rev'd sub nom.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611; Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248 (11th Cir. 2003), *aff'd sub nom.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611.

132 *Allapattah*, 125 S. Ct. at 2615.

133 *See* Allapattah Servs., Inc. v. Exxon Corp., 157 F. Supp. 2d 1291, 1327 (S.D. Fla. 2001), *aff'd*, 333 F.3d 1248 (11th Cir.), *aff'd sub nom.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611.

held the plain language of § 1367 abrogates the *Zahn* rule against aggregation of claims in class actions.[134]

In the second case, a nine-year-old girl severely cut her hand while opening a can of Star-Kist tuna.[135] She filed suit against the company, and several of her family members joined related claims.[136] The district court ruled that none of the plaintiffs satisfied the amount-in-controversy requirement and dismissed the case.[137] The First Circuit partially overruled, finding that the girl herself had stated a claim that met the $75,000 threshold, but the other plaintiffs had not.[138] The First Circuit then considered whether § 1367 permitted the other family members to obtain supplemental jurisdiction over their claims, and held that it did not, following the logic of the circuits that considered such jurisdictionally deficient claims to destroy original jurisdiction over the action.[139] Thus, the First Circuit concluded that the injured girl's claim against Star-Kist could proceed, but joinder of the other family members' claims would destroy original jurisdiction entirely, so they could not be joined to the case.[140]

A. The Jurisdiction Actually Conferred: Analyzing the Statute

Justice Kennedy's majority opinion first reviewed the history of supplemental jurisdiction and § 1367.[141] Then, turning to analysis, the majority employed a methodology and structure that closely resembled § 1367 itself: the Court first established in extremely broad terms an expansive principle of supplemental jurisdiction, but then undercut that principle in an attempt to prevent it from obliterating the complete diversity rule.[142]

The majority began by emphasizing that jurisdictional statutes were to receive no special treatment when being interpreted: "Ordinary principles of statutory construction apply."[143] With that in mind,

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134 *Allapattah*, 333 F.3d at 1253–54.

135 *Allapattah*, 125 S. Ct. at 2616.

136 *Id.*

137 Del Rosario Ortega v. Star Kist Foods, Inc., 213 F. Supp. 2d 84, 92–95 (D.P.R. 2002), *aff'd in part, vacated in part*, 370 F.3d 124 (1st Cir. 2004), *rev'd sub nom.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611.

138 *Rosario Ortega*, 370 F.3d at 128–29.

139 *Id.* at 137–39.

140 *See id.* at 144.

141 *Allapattah*, 125 S. Ct. at 2616–20.

142 *See* Steinman, *supra* note 130, at 313–14.

143 *Allapattah*, 125 S. Ct. at 2620; *see also id.* ("We must not give jurisdictional statutes a more expansive interpretation than their text warrants, but it is just as important not to adopt an artificial construction that is narrower than what the text provides." (citation omitted) (citing Finley v. United States, 490 U.S. 545, 549, 556

the Court described § 1367(a) as "a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction,"[144] and then framed the question before the Court as "whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other plaintiffs do not, presents a 'civil action of which the district courts have original jurisdiction.'"[145] If it does, then so long as the *Gibbs* test would treat all the claims as part of the same case or controversy under Article III, § 1367 permits supplemental jurisdiction over the otherwise jurisdictionally insufficient claims.[146] If, on the other hand, the case is not one of which district courts would have original jurisdiction, then § 1367 cannot operate because there is no original civil action to which supplemental jurisdiction can attach.[147]

In other words, the essential holding of the case—the answer to the question before the Court—turns on the interpretation of the phrase "civil action of which the district courts have original jurisdiction" in § 1367(a). The Court

> conclude[d] the answer must be yes. When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, *and there are no other relevant jurisdictional defects*, the district court, beyond all question, has original jurisdiction over that claim. *The presence of other claims in the complaint, over which the district court may lack original jurisdiction, is of no moment.* If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of § 1367(a), *even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint.*[148]

Here the Supreme Court holds that if a single claim between one plaintiff and one defendant in a complaint is jurisdictionally sufficient in all respects (i.e., in the diversity context, there is complete diversity between the parties to the claim, and the amount-in-controversy requirement is met), then the district court "beyond all question" has original jurisdiction over that claim, *regardless* of "the presence of

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(1989))). In some sense this can be considered a shift from the traditional practice of construing statutory grants of jurisdiction narrowly. *See supra* note 13 and accompanying text.

144 *Allapattah*, 125 S. Ct. at 2620.

145 *Id.*

146 *Id.*

147 *See id.*

148 *Id.* at 2620–21 (emphases added).

other claims in the complaint."[149] The remarkable reach of this statement will be seen below.[150]

Having stated its view that a single jurisdictionally sufficient claim in a complaint is enough to satisfy the "original jurisdiction" requirement of § 1367(a), the Court then made the same observation about § 1367(b) that commentators had made soon after the statute was passed: none of the specific circumstances described in § 1367(b) operates to withhold supplemental jurisdiction over claims by additional plaintiffs added under Rules 20 or 23.[151] "The natural, indeed the *necessary*, inference is that § 1367 confers supplemental jurisdiction over claims by Rule 20 and Rule 23 plaintiffs."[152]

The majority recognized, but rejected, the alternative view of § 1367 "that a district court lacks original jurisdiction over a civil action unless the court has original jurisdiction over every claim in the complaint."[153] The Court criticized this view because it requires one or the other of two assumptions which it found equally untenable. Either "all claims in the complaint must stand or fall as a single, indivisible 'civil action' as a matter of definitional necessity,"[154] or "the inclusion of a claim or party falling outside the district court's original jurisdiction somehow contaminates every other claim in the complaint, depriving the court of original jurisdiction over any of these claims."[155]

The Court rejected the "indivisibility" theory, noting that it is contradicted by the practice of dismissing individual claims or parties in order to cure jurisdictional defects, rather than dismissing the entire case.[156] The indivisibility theory would require a federal court to examine the entire complaint as a single unit, deeming it jurisdictionally sufficient only if every claim meets the requirements; if even one

149 *Id.*; *cf.* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) ("[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 of law may be involved in it.").

150 *See infra* Part III.C.

151 *Allapattah*, 125 S. Ct. at 2621.

152 *Id.* (emphasis added).

153 *Id.*; *see* Pfander, *supra* note 94, at 127–28.

154 *Allapattah*, 125 S. Ct. at 2621.

155 *Id.*

156 *Id.* at 2622 (citing Clark v. Paul Gray, Inc., 306 U.S. 583, 590 (1939), for the proposition that "claims that are jurisdictionally defective as to amount in controversy do not destroy original jurisdiction over other claims").

claim fails, then the indivisibility theory would mandate dismissal of the entire case.[157]

Significantly, the Court also rejected the reasoning of the Tenth Circuit Court of Appeals that the language in § 1367(a) operates differently in federal question cases than it does in diversity cases.[158] The Court considered it

> implausible . . . to say that the identical phrase means one thing (original jurisdiction in all actions where at least one claim in the complaint meets the following requirements) in § 1331 and something else (original jurisdiction in all actions where every claim in the complaint meets the following requirements) in § 1332.[159]

Thus, up to this point in its analysis, the Court has endorsed a very broad and expansive reading of § 1367 that, indeed, codifies *Gibbs* to the extent its language contemplated: Given the presence of a federal claim, federal courts have power to hear all other related claims so long as they are part of the same Article III case or controversy. Subject to the specific list of exceptions in § 1367(b), federal courts are able to hear virtually any claim that shares a "common nucleus of operative fact"[160] with a valid federal claim.

The Court then attempted to cut back on the breadth of this interpretation in its discussion of the "contamination" theory—the idea that the presence of a jurisdictionally insufficient claim contaminates every other claim in the action, destroying the original jurisdiction that might otherwise have been invoked.[161] Specifically, the Court accepted the contamination theory as applied to the diversity of citizenship requirement, while rejecting it as applied to the amount-in-controversy requirement.[162] "The contamination theory . . . can make some sense in the special context of the complete diversity requirement . . . . The theory, however, makes little sense with respect to the amount-in-controversy requirement . . . ."[163] Thus, the Court rejected the contamination theory in all respects *except* for the purpose of requiring complete diversity among all parties, lest "[i]ncomplete diversity destroy[ ] original jurisdiction with respect to all claims."[164] Stating that "[t]here is no inherent logical connection between the amount-in-controversy requirement and § 1332 diversity jurisdiction,"

157 *Id.*
158 *Id.*; *see* Leonhardt v. W. Sugar Co., 160 F.3d 631, 640–41 (10th Cir. 1998).
159 *Allapattah*, 125 S. Ct. at 2622.
160 United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).
161 *Allapattah*, 125 S. Ct. at 2622.
162 *Id.*
163 *Id.*
164 *Id.* at 2618.

the Court asserted that it is "fallacious to suppose, simply from the proposition that § 1332 imposes both the diversity requirement and the amount-in-controversy requirement, that the contamination theory germane to the former is also relevant to the latter."[165] With this distinction, the Court went on to hold expressly that § 1367(a) overruled *Clark*, and by implication, *Zahn* as well.[166]

Following the consideration of some other arguments not directly relevant to the scope of this Note,[167] the Court "circle[d] back to the original question."[168] On one hand, the Court proclaimed that "[u]nder § 1367, the court has original jurisdiction over the civil action comprising the claims for which there is no jurisdictional defect,"[169] thus providing something to which supplemental jurisdiction can attach. On the other hand, "the special nature and purpose of the diversity requirement mean that a single nondiverse party can contaminate every other claim in the lawsuit,"[170] thus depriving otherwise valid claims of original jurisdiction; but contamination "does not occur with respect to jurisdictional defects that go only to the substantive importance of individual claims."[171] As a result, the Court concluded that § 1367 overruled *Zahn* and *Clark*, but seemed never to consider seriously the possibility that § 1367 also overruled *Strawbridge*.[172]

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165 *Id.* at 2622.

166 *Id.* ("[Section] 1367(a) unambiguously overrules the holding and result in *Clark*. If that is so, however, it would be quite extraordinary to say that § 1367 did not also overrule *Zahn*, a case that was premised in substantial part on the holding in *Clark*."); *see also id.* at 2625 ("We hold that § 1367 by its plain text overruled *Zahn* and *Clark* and authorized supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or controversy . . . .").

167 *See id.* at 2622–23 (comparing the present question to the "closely analogous context of removal jurisdiction"); *id.* at 2623–24 (rejecting the argument that "while the presence of additional claims over which the district lacks jurisdiction" is within the reach of § 1367(a), "the presence of additional parties" is not); *id.* at 2624 (acknowledging that the Court's holding "creates an anomaly" by permitting permissive plaintiffs under Rule 20 to acquire supplemental jurisdiction, while prohibiting its use by indispensable plaintiffs under Rule 19 or plaintiff intervenors under Rule 24, but dismissing it as "no more anomalous than . . . if the alternative view of § 1367(a) were to prevail").

168 *Id.* at 2624.

169 *Id.* at 2625.

170 *Id.*

171 *Id.*

172 *See infra* Part III.C.

B. The Administration of Justice(?): Legislative History and Congressional Intent

The *Allapattah* Court found the legislative history rationale[173] unpersuasive, rejecting arguments that rely on the legislative history "at the very outset simply because § 1367 is not ambiguous."[174] While most commentators concede that a literal reading of the statute would indeed overrule *Zahn* and *Clark*,[175] the "uncommonly clear legislative history"[176] of § 1367 strongly suggests that the plain text should yield to the statement of congressional intent. But, as the *Allapattah* Court claims to "have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."[177] Thus, under the majority's view there is no ambiguity and hence no occasion to refer to the legislative history.[178]

The majority could have stopped there, but decided to go on and declare that "[e]ven if . . . the reading these proponents urge upon us is textually plausible, the legislative history cited to support it would not alter our view as to the best interpretation of § 1367."[179] The Court found the particular legislative history relevant to this case wanting for two reasons. First, it was "far murkier than selective quotation from the House Report would suggest,"[180] and therefore was inconclu-

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173 *See supra* notes 106–21 and accompanying text.

174 *Allapattah*, 125 S. Ct. at 2625. *But see The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 169, 325 (2005) (arguing that the majority's determination of unambiguity "conflicts with the common understanding of 'ambiguous'" and was influenced by "skepticism of § 1367's legislative history," thereby "turn[ing] the prevailing framework for the use of legislative history on its head").

175 *See, e.g.*, Rowe et al., *Reply*, *supra* note 104, at 960 n.90; *see also* Freer, *supra* note 34, at 18 ("All observers agree that the supplemental-jurisdiction statute, on its face, overrules *Zahn*.").

176 *Allapattah*, 125 S. Ct. at 2631 (Stevens, J., dissenting).

177 *Id.* at 2626 (majority opinion).

178 *But see id.* at 2628 (Stevens, J., dissenting) ("[T]he Court has made the remarkable declaration that its reading of the statute is so obviously correct—and Justice GINSBURG's so obviously wrong—that the text does not even qualify as 'ambiguous.' . . . I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted."); *The Supreme Court, 2004 Term—Leading Cases*, *supra* note 174, at 323 & n.45.

179 *Allapattah*, 125 S. Ct. at 2625 (majority opinion).

180 *Id.* at 2626.

sive when taken as a whole.[181] Second, "the worst fears of critics who argue legislative history will be used to circumvent the Article I process were realized in this case."[182] The majority found it exceedingly persuasive that "parties who have detailed, specific knowledge of the statute and the drafting process [acknowledged] both that the plain text of § 1367 overruled *Zahn* and that language to the contrary in the House Report was a *post hoc* attempt to alter that result."[183]

Finally, in a short postscript, the majority briefly considered the Class Action Fairness Act of 2005,[184] only to conclude that it "has no bearing on our analysis of these cases. . . . It abrogates the rule against aggregating claims . . . . [but] is not retroactive, and the views of the 2005 Congress are not relevant to our interpretation of a text enacted by Congress in 1990."[185] The Court also pointed out that the issues raised by these cases would continue to arise in cases outside CAFA's purview,[186] so a decision on the question was still necessary.[187]

According to the Supreme Court majority in *Allapattah*, then, here is how matters stand: First, the plain text of § 1367 is clear and unambiguous, overrules the holdings of *Zahn* and *Clark*, and thus permits supplemental jurisdiction over claims that do not meet the amount-in-controversy requirement as long as at least one claim is jurisdictionally sufficient. Second, despite some indication in the legislative history that this was not an intended result, the plain text of the statute controls. But, third, when it comes to the *Strawbridge* rule of complete diversity, none of the foregoing applies. The plain text of § 1367 does *not* clearly and unambiguously overrule *Strawbridge*, and

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181 *But see id.* at 2630 (Stevens, J., dissenting) ("That a subcommittee of the Federal Courts Study Committee believed that an earlier, substantially similar version of the statute overruled *Zahn* only highlights the fact that the statute is ambiguous." (citation omitted)); Steinman, *supra* note 130, at 316 ("Justice Kennedy relied on a non-congressional subcommittee report that the House Judiciary Committee never mentioned and whose recommendations were directly contrary to the goals expressed in the House report.").

182 *Allapattah*, 125 S. Ct. at 2627 (majority opinion). The Court was referring to the statement by Professors Rowe, Burbank, and Mengler that the legislative history regarding *Zahn* "was an attempt to correct the oversight" in the actual language of the statute. *See id.* (quoting Rowe et al., *Reply*, *supra* note 104, at 960 n.90); *cf.* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) (arguing against legislative history because of its potential for bypassing the Article I requirements of bicameralism and presentment).

183 *Allapattah*, 125 S. Ct. at 2627.

184 Pub. L. No. 109-2, § 4(a), 119 Stat. 4, 9–12 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–1715); *see supra* notes 24–28 and accompanying text.

185 *Allapattah*, 125 S. Ct. at 2627–28.

186 *Id.* at 2628.

187 *See id.*

for complete diversity, the intent of Congress is taken into account—even though, according to the majority's analysis in the *Zahn/Clark* context, "the authoritative statement is the statutory text, not the legislative history *or any other extrinsic material.*"[188]

C. *Stopping So Far Short: How the Supreme Court Attempts To Shield* Strawbridge *from* Allapattah *'s Reach (But Fails)*

As discussed, the *Allapattah* Court made extremely broad statements about the meaning and reach of § 1367 in its holding, but tried diligently to cut back on the impact of those statements in the context of the requirement of diversity of citizenship.[189] The Court held that a "civil action of which the district courts have original jurisdiction" can consist of a single claim in a complaint, regardless of the jurisdictional sufficiency of other claims in the complaint,[190] but claimed in dicta that the "special nature and purpose" of the complete diversity requirement nevertheless permits claims by nondiverse parties to destroy original jurisdiction, even when there is a claim in the action that would invoke original jurisdiction on its own.[191]

To justify this disparate treatment, Justice Kennedy's majority opinion invoked the purported purposes of the two requirements of diversity jurisdiction.[192] The majority wrote that the presence of a nondiverse party does indeed contaminate the entire action because "the presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum," whereas the addition of a claim of insufficient amount to a claim of sufficient amount "does nothing to reduce the importance of the claims that do meet

188 *Id.* at 2626 (emphasis added). Presumably the declaration that "[i]n diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute," H.R. REP. NO. 101-734, at 28 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6874, is nonauthoritative "other extrinsic material" to the same extent that "[t]he section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to Finley" is. *Id., as reprinted in* 1990 U.S.C.C.A.N. 6860, 6875; *see infra* notes 207–212 and accompanying text.

189 *See supra* Part III.A.

190 *See Allapattah*, 125 S. Ct. at 2620–21.

191 *See id.* at 2625.

192 *See id.* at 2618 ("[T]he purpose of the diversity requirement . . . is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants."); *id.* at 2622 ("[T]he amount-in-controversy requirement . . . is meant to ensure that a dispute is sufficiently important to warrant federal-court attention."); *infra* Part IV.A.

[the] requirement."[193] In other words, once there is a single claim that satisfies the minimum amount in controversy, nothing about the addition of subsequent claims for lesser amounts diminishes the total magnitude of the controversy as a whole. But, according to the Court, the presence of nondiverse parties on both sides of the case does fundamentally negate the purpose for which diversity jurisdiction exists; thus, it is appropriate to maintain a "contamination theory" approach to diversity of citizenship.

The problem with this distinction is that it is utterly irreconcilable with the holding and rationale of *Allapattah*.[194] There are four reasons why the majority's attempt to shield *Strawbridge* from its own analysis fails.

First, the Court's analysis of the text of § 1367 admits of no opportunity to shelter *Strawbridge* from the statute's reach. The majority held that a single valid federal claim is sufficient to confer original jurisdiction, that § 1367(a) then acts by its plain terms to permit supplemental jurisdiction over all related claims, subject to specific exceptions in § 1367(b), and that nothing in § 1367(b) exempts Rule 20 coplaintiffs.[195] This is precisely the rationale used by the Court to determine that § 1367 overruled *Zahn* and *Clark*. The Court noted that "[s]ection 1367(b) . . . applies only to diversity cases [and] withholds supplemental jurisdiction" over particular plaintiffs, but not over plaintiffs "permissively joined under Rule 20 . . . or certified as class-action members pursuant to Rule 23."[196] Crucially, the Court's analysis of the effect and meaning of § 1367(a) and (b) never mentions, much less depends on, the citizenship of the parties. The majority's consideration of "the special nature and purpose" of complete diversity comes later in the opinion, as an attempt to contain the scope of the statutory analysis.[197] Purely in terms of the statute's text, however, there is no support for a limitation on, or an exception to, the supplemental jurisdiction granted by § 1367(a) in the diversity (i.e., § 1332) context, other than the specific instances described in § 1367(b). Nor

193 *Allapattah*, 125 S. Ct. at 2622.

194 *Cf. id.* at 2635 n.5 (Ginsburg, J., dissenting) ("Endeavoring to preserve the 'complete diversity rule' . . . , the Court's opinion drives a wedge between the two components of 28 U.S.C. § 1332, treating the diversity-of-citizenship requirement as essential, the amount-in-controversy requirement as more readily disposable. . . . [T]he Court asserts that amount in controversy can be analyzed claim-by-claim, but the diversity requirement cannot. It is not altogether clear why that should be so." (citations omitted)).

195 *See id.* at 2619–21 (majority opinion).

196 *Id.* at 2621.

197 *Id.* at 2625.

is there any basis in the language of § 1367(b) to support a refusal to grant supplemental jurisdiction over claims by nondiverse Rule 20 and Rule 23 plaintiffs. Thus, if § 1367 permits supplemental jurisdiction for claims by Rule 20 and Rule 23 plaintiffs that do not meet the amount in controversy, as the *Allapattah* Court held, then it must also permit supplemental jurisdiction for claims by Rule 20 and Rule 23 plaintiffs that do not satisfy complete diversity.[198]

Second, the Court dismissed claims that the "identical phrase means one thing . . . in § 1331 and something else . . . in § 1332,"[199] but in order to preserve *Strawbridge*, the Court essentially stated that the identical phrase means one thing in § 1332 and something else in the very same § 1332. The Court rejected the "indivisibility theory" supporting the "sympathetic textualist" reading of § 1367 because it would require courts to treat federal question cases differently from diversity cases.[200] For federal question cases, the sympathetic textualist view permits courts to look at each claim individually to determine whether § 1331 jurisdiction is proper, and then use § 1367 to hear any related but jurisdictionally insufficient claims. But for diversity cases, the sympathetic textualist view requires courts to consider the entire civil action as a whole, and to determine that original jurisdiction is lacking if any one claim in the complaint fails to satisfy the complete diversity or minimum amount requirements. The Court found this theory at odds both with the actual practice of curing jurisdictional defects by dismissing insufficient claims or parties, and with the very notion of supplemental jurisdiction as extending to claims that by definition do not meet the requirements for original jurisdiction.[201]

Similarly, in its discussion of the "contamination" theory, the Court rejected the notion that a single claim below the requisite amount in controversy defeats jurisdiction over the entire action, instead maintaining that each claim could and should be evaluated on its own.[202] Yet the Court endorsed the idea of considering the civil

198 *Cf.* Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 931 (7th Cir. 1996) ("If § 1367(a) allows suit by a pendent plaintiff who meets the jurisdictional amount but not the diversity requirement, it also allows suit by a pendent plaintiff who satisfies the diversity requirement but not the jurisdictional amount." (citing Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176 (7th Cir. 1993))).

199 *Allapattah*, 125 S. Ct. at 2622; *cf.* Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 829–30 (2002) (determining that the meaning of "arising under" is the same in both 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a), thus requiring application of the same doctrinal tests to both provisions).

200 *See supra* notes 153–59 and accompanying text.

201 *See Allapattah*, 125 S. Ct. at 2621–22.

202 *See id.* at 2622; *see also supra* note 194.

action *as a whole* for the purpose of determining complete diversity.[203] In other words, the very same flaw that invalidated the indivisibility theory—its disparate treatment of complaints—was endorsed by the Court as a proper application of the contamination theory. The Court rejected the indivisibility theory because it would require the same phrase in two different statutes to mean two different things, but incredibly, the *Allapattah* majority's position on the contamination theory would require the same phrase *in the very same statute* to mean two different things.[204] The Court treated the two requirements of diversity jurisdiction as fundamentally distinct and subject to completely different rules.[205] But if "original jurisdiction of all civil actions" means the same thing in § 1331 and § 1332,[206] then surely the meaning of that phrase cannot change *within* § 1332, depending on whether the diversity of citizenship requirement or the amount-in-controversy requirement is being considered.

Third, the Court held that the text of § 1367 is unambiguous, and there is thus no need to consult any extrinsic material to inform the statute's meaning;[207] but the unambiguous text of the statute operates to overturn *Strawbridge* as surely as it does *Zahn* and *Clark*. If the majority meant what it said,[208] and if indeed it found § 1367 to be unambiguous,[209] then the only thing that matters is the text of the statute. And the text of the statute concededly permits nondiverse plaintiffs to

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203 *See Allapattah*, 125 S. Ct. at 2622.

204 *See* Steinman, *supra* note 130, at 314 ("Justice Kennedy, despite his avowed fidelity to the text, ... defined [the] same phrase to mean different things in the *same* statute: the presence of a non-diverse plaintiff defeats original jurisdiction for all plaintiffs, but the presence of a plaintiff without the requisite amount in controversy does not.").

205 The Court explained that "[t]here is no inherent logical connection between the amount-in-controversy requirement and § 1332 diversity jurisdiction" and that there is no reason to suppose that "the contamination theory germane to the [diversity requirement] is also relevant to [amount in controversy]." *Allapattah*, 125 S. Ct. at 2622. The Court failed to consider that there is also no reason to suppose that the contamination theory continues to be germane to the diversity requirement after the passage of § 1367. *See* Freer, *supra* note 34, at 18 (noting that a literal reading of § 1367 would overrule the complete diversity requirement); Rowe et al., *Reply*, *supra* note 104, at 960 n.90 (acknowledging same).

206 *See Allapattah*, 125 S. Ct. at 2622.

207 *Id.* at 2625–26.

208 *Id.* at 2626 ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."); *see supra* Part III.B.

209 *Allapattah*, 125 S. Ct. at 2625 ("[Section] 1367 is not ambiguous.").

assert claims related to the claims of a diverse plaintiff.[210] Nothing in the unambiguous text of § 1367 provides a confirmation of the "special nature and purpose" of the complete diversity rule. Even the text of § 1367(b), which applies only in diversity cases and withdraws supplemental jurisdiction "when exercising [it] would be inconsistent with the jurisdictional requirements of section 1332,"[211] operates only in certain specified instances, none of which would cover the joinder of a permissive Rule 20 co-plaintiff. The only other way to read the complete diversity rule into the text of § 1367 is to adopt the sympathetic textualist view, bringing it in through the "civil action of which the district courts have original jurisdiction" language of § 1367(a). But the Court rejected this view of § 1367(a), holding instead that a single claim is sufficient to establish original jurisdiction.[212] Thus, there is no way to incorporate the complete diversity rule into the text of § 1367; and because that text is clear and unambiguous, there is no need, and indeed, no justification, to look beyond the text itself. Therefore, § 1367 must override *Strawbridge* just as it overrides *Zahn* and *Clark*.

Finally, the Court refused to yield to legislative history in holding that § 1367 overruled *Zahn*, but acquiesced to congressional intent by treating *Strawbridge* differently.[213] The Court underscored the claim from *Finley* that "'[w]hatever we [the Court] say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress,'"[214] and emphasized that there is "no warrant . . . for assuming that § 1367 did no more than to overrule *Finley*."[215] Given the interpretation the Court then gave to § 1367, there is also no warrant for assuming that § 1367 went beyond overruling *Finley*, but did not go so far as to overrule *Strawbridge*. The Court "treat[ed] statutory interpretation as a pedantic exercise, divorced from any serious attempt at ascertaining congressional intent,"[216] because it found the text clear and unambiguous. The Court was thus unmoved by the "virtual billboard of congressional intent"[217] found in the legislative history, where the intent was claimed to be the reversal

210 *See supra* notes 195–98 and accompanying text.

211 28 U.S.C. § 1367(b) (2000).

212 *Allapattah*, 125 S. Ct. at 2620–21.

213 *Id.* at 2617–18 (discussing the Court's "adhere[nce] to the complete diversity rule in light of the purpose of the diversity requirement").

214 *Id.* at 2619 (quoting Finley v. United States, 490 U.S. 545, 556 (1989)) (first alteration in original).

215 *Id.* at 2620.

216 *Id.* at 2629 (Stevens, J., dissenting).

217 *Id.* at 2630.

of *Finley* and very little more.[218] Indeed, the Court held that the unambiguous text of § 1367 overruled the *Zahn* rule for class actions,[219] despite the express statement to the contrary in the legislative history.[220]

But if the unambiguity of the statutory text is so strong that it compels an interpretation contrary to the stated intent of Congress with respect to the rule in *Zahn*, then that same unambiguous text must be strong enough to compel the same interpretation with respect to the analogous rule in *Strawbridge*. Any declaration, implication or hint in the legislative history of § 1367 purporting to evince a congressional intent to preserve the complete diversity rule[221] is no more relevant or controlling than is the unmistakable statement of intent to preserve *Zahn*. The Court ignored the billboard and found that § 1367 overturned *Zahn*; logically, the *Strawbridge* parallel cannot be distinguished.[222]

Section 1367 thus undermines both rules with the same text, and the interpretive rules employed by the Court leave no room to consider congressional intent for *any* purpose—even *Strawbridge*. The "internal inconsistencies [and] contradictory messages"[223] stemming from *Allapattah*'s refusal to apply its own rules have left the supplemental jurisdiction situation in as much confusion as it was ever in, and have also obscured the "background of clear interpretive rules" against which Congress is expected to legislate on jurisdictional issues.[224] Whereas the *Finley* Court committed to Congress that it would be transparent and consistent in its interpretation of statutory grants of judicial power,[225] the *Allapattah* Court retreated from that promise, saying instead that only"[o]rdinary principles of statutory construction apply."[226]

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218 *See supra* notes 109–21 and accompanying text.

219 *Allapattah*, 125 S. Ct. at 2625.

220 H.R. REP. No. 101-734, at 29 & n.17 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6875.

221 *See id.* at 28–29, *as reprinted in* 1990 U.S.C.C.A.N. at 6874–75; *supra* text accompanying note 120.

222 To be clear, this Note does *not* take the position that *Strawbridge ought* to be overturned, but rather that the rationale used by the Court in *Allapattah* to overturn *Zahn* and *Clark* applies with equal force to *Strawbridge*.

223 Steinman, *supra* note 130, at 335.

224 *See* Finley v. United States, 490 U.S. 545, 556 (1989); *infra* Part IV.C.

225 *See Finley*, 490 U.S. at 556.

226 Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2620 (2005).

IV. SERIOUS MISCHIEFS RESOLVED? CLOSING THE "GAPING HOLE"[227] IN *ALLAPATTAH*

What ought to be the fate of *Strawbridge* in light of the Supreme Court's ruling in *Allapattah*? If, as a majority of the Court clearly believes, a statute's text controls whenever it is plain and unambiguous, regardless of any precedent or legislative history to the contrary,[228] then *Strawbridge* is no more sacred than *Zahn*, and it must fall. But the Court already indicated, in *Allapattah* itself, that it is unwilling to endorse this inevitable conclusion of its interpretation of § 1367.[229] Thus, it is very possible that lower courts may be even more confused as a result of this ruling. While there is now a clear answer on the question of whether § 1367 overrules *Zahn* and *Clark*, new questions regarding the extent to which courts should literally apply the statute have arisen in its place.[230] In its effort to preserve the complete diversity rule, the Court has compromised the "background of clear interpretive rules" against which Congress is expected to legislate on jurisdictional issues, reopening the earlier debate over whether and how far federal courts are authorized to act.[231] This Part considers the *Strawbridge* rule in the context of diversity jurisdiction's history and utility, offers several possible reconciliations of the current jurisdictional contradiction represented by *Allapattah*, and concludes that whatever reconciliation is chosen, the onus is on Congress to provide a "background of clear statutory rules" for the Court to interpret.

A. *Somewhat Singular: The (In)effectiveness of the Complete Diversity Rule*

Why was the Supreme Court so much more concerned about preserving *Strawbridge* than it was about preserving *Zahn* and *Clark*? One obvious possible answer is the relative age of the rules. Complete diversity had its origin in the Marshall Court, whereas *Clark* was an early

227 Rowe et al., *Reply*, *supra* note 104, at 961 n.91.

228 *Allapattah*, 125 S. Ct. at 2625–27.

229 *Id.* at 2625 ("Though the special nature and purpose of the diversity requirement mean that a single nondiverse party can contaminate every other claim in the lawsuit, the contamination does not occur with respect to jurisdictional defects that go only to the substantive importance of individual claims.").

230 *See* Steinman, *supra* note 130, at 335 ("*Allapattah* fails to provide coherent guidance for interpreting . . . troublesome jurisdictional statutes. Because of its internal inconsistencies, *Allapattah* sends contradictory messages to federal courts."). *But see infra* note 253 (summarizing post-*Allapattah* decisions and finding little confusion so far, particularly on *Allapattah*'s lesson for statutory interpretation).

231 *See* Finley v. United States, 490 U.S. 545, 556 (1989); *supra* text accompanying notes 223–26.

twentieth-century holding and *Zahn* dated from the mid-1970s. But the *Allapattah* majority never expressly invoked the age of the complete diversity rule; it said simply that "we have consistently interpreted § 1332 as requiring complete diversity."[232]

Instead, the Court repeatedly emphasized the "special nature and purpose" of the complete diversity rule: "[T]o provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for" diversity jurisdiction.[233] But as Professor Redish explains, it is not at all clear that the complete diversity rule successfully eliminates the problem of state court bias against out-of-state litigants.[234] Suppose several plaintiffs from Massachusetts sue several defendants from Massachusetts and one defendant from Vermont.[235] According to the traditional understanding of the complete diversity rule, this case would lack original jurisdiction because there are Massachusetts parties on both sides of the case; thus, the state court would not favor one side or the other, and there is no reason to worry about bias against the out-of-state parties. If the plaintiffs brought the case in federal court, it would be dismissed; if the plaintiffs brought the case in state court, the defendants could not remove it to federal court.

Suppose, then, that the Massachusetts plaintiffs bring the case in Massachusetts state court. The complete diversity rule would assume that there is no bias problem because there are Massachusetts parties on both sides. But, if the state court is intent on favoring the home parties, it could very easily favor all Massachusetts parties at the expense of the Vermont party. On the other hand, if the case were brought in Vermont, the state could very easily favor the Vermont defendant over the other defendants from Massachusetts. Thus, the lack of complete diversity is not a guaranteed solution to the problem of

232 *Allapattah*, 125 S. Ct. at 2617 (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978)).

233 *Id.* at 2618. *But see* Friendly, *supra* note 17, at 495–97 (discounting the home-state bias explanation for diversity jurisdiction and arguing that the true reason for its existence was to encourage expansion of commercial interests by providing a forum more friendly to creditors than state courts, which were perceived as generally pro-debtor).

234 *See* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1805 (1992) (describing a hypothetical to demonstrate the possibility of bias in an incomplete diversity case).

235 This is the posture of *Strawbridge*, 7 U.S. (3 Cranch) 267.

state court bias; the "special nature and purpose" of the rule is perhaps not so special after all.[236]

B. The Constitutional Extent: Fine Tuning the Scope of Diversity Jurisdiction

Regardless of what one thinks of the effectiveness of the complete diversity rule, there can be little doubt that the very existence of diversity jurisdiction has always been controversial.[237] In the debates over ratification of the Constitution,[238] and again in the debate over the judiciary in the First Congress,[239] Antifederalists opposed the grant of diversity jurisdiction (and often the creation of inferior federal courts themselves) out of fear that it would "swallow up" state jurisdiction and essentially drive state courts to extinction. In the early twentieth century, such leading figures as Roscoe Pound, Felix Frankfurter, and Henry Friendly argued that diversity jurisdiction should be eliminated

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236 *See* FALLON ET AL., *supra* note 1, at 141 (Supp. 2005) ("[W]ill the presence of citizens of the same state—even the forum state—on both sides of a case guarantee that a party from another state will not be disfavored in the consideration of questions of liability and/or the measure of relief? Wouldn't it often be possible to prefer a forum-state defendant at the expense of an out-of-state defendant?").

237 *See, e.g.*, HENRY J. FRIENDLY, FEDERAL JURISDICTION 149–50 (1973); Frank M. Coffin, *Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction*, BROOKINGS REV., Winter 1992, at 34, 34–39; Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 121–23; Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 964 (1979).

238 *See, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526 (Jonathan Elliot ed. 1836) (statement of George Mason), *available at* http://rs6.loc.gov/ll/led/003/0500/05380526.tif. ("Their *jurisdiction* further extends to controversies between citizens of different states. Can we not trust our state courts with the decision of these? If I have a controversy with a man in Maryland, . . . are not the state courts competent to try it? Is it suspected that they would enforce the payment if unjust, or refuse to enforce it if just? The very idea is ridiculous. What! carry me a thousand miles from home—from my family and business—to where, perhaps, it will be impossible for me to prove that I paid it? Perhaps I have a respectable witness who saw me pay the money; but I must carry him one thousand miles to prove it, or be compelled to pay it again. Is there any necessity for this power? It ought to have no unnecessary or dangerous power. Why should the federal courts have this cognizance? Is it because one lives on one side of the Potomac, and the other on the other?").

239 1 ANNALS OF CONG. 813 (Joseph Gales ed., 1834) (recording a proposal in the First Congress to eliminate all inferior court jurisdiction except in admiralty cases, and a speech by Representative Livermore expressing fear that the judiciary bill would establish "an entire new system of jurisprudence, and fill every State in the Union with two kinds of courts for the trial of many causes. . . . [I]t will be establishing a Government within a Government, and one must prevail upon the ruin of the other.").

or seriously curtailed, as a waste of judicial resources.[240] Members of Congress introduced legislation to abolish or restrict diversity jurisdiction,[241] but the only congressional restriction on diversity jurisdiction has been to increase the minimum amount in controversy.[242] Notably, the Federal Courts Study Committee, whose supplemental jurisdiction recommendation became § 1367, also recommended in its April 1990 report that Congress consider abolishing almost all diversity jurisdiction.[243]

Nevertheless, diversity jurisdiction has survived. With it, the complete diversity rule thrived for more than 160 years with only one significant exception[244] until the Supreme Court's decision in *State Farm Fire & Casualty Co. v. Tashire*,[245] upholding federal interpleader jurisdiction based on minimal diversity and declaring the complete diversity rule to be one of statutory interpretation rather than constitutional mandate.[246] Once it became clear that Congress could indeed modify or limit the *Strawbridge* rule, it did so on at least two more occasions. Congress passed the Multiparty, Multiforum Trial Jurisdiction Act of 2002[247] to provide for federal jurisdiction over cases involving multiple claims arising from the same transaction, conduct, or accident, provided minimal diversity exists and certain requirements are met. Similarly, the Class Action Fairness Act of 2005[248] also predicates federal jurisdiction on minimal diversity for class actions

240 *See* Friendly, *supra* note 17, at 510 (calling for a critical reexamination of the bases of diversity jurisdiction); Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 756 n.26 (citing Robert K. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301 (1979)) (naming Roscoe Pound, Felix Frankfurter, and Robert Bork as critics of diversity jurisdiction).

241 *See, e.g.*, Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179 (1929) (discussing a bill in the 70th Congress to abolish diversity jurisdiction); *see also* Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935, 1943 n.52 (1982) (describing other legislative attempts to abolish diversity jurisdiction).

242 *See supra* note 29 and accompanying text.

243 FCSC REPORT, *supra* note 90, at 38–42.

244 Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366–67 (1921) (permitting nondiverse members of a class action so long as complete diversity exists between the named class representatives and the opposing parties).

245 386 U.S. 523 (1967).

246 *Id.* at 530–31; *see supra* notes 22–23 and accompanying text.

247 Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826 (codified at 28 U.S.C.A. § 1369 (West Supp. 2006)); *see also* C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 613 (2004).

248 Pub. L. No. 109-2, § 4(a), 119 Stat. 4, 9–12 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–1715); *see supra* notes 24–28 and accompanying text.

that meet certain requirements designed to ensure they are truly of a national or multistate nature.[249]

Notably, the 1917 Federal Interpleader Act and the 2002 Multiparty, Multiforum Trial Jurisdiction Act, along with currently existing alienage jurisdiction, correspond to the three areas in which the 1990 Federal Courts Study Committee recommended that diversity jurisdiction be retained.[250] CAFA goes a step further than the Committee had recommended, but the rationale for hearing multistate class actions in federal court aligns with the rationale for retaining jurisdiction over complex multistate litigation. Thus, Congress has already specifically provided statutory frameworks for the areas of diversity jurisdiction recommended for retention by the Federal Courts Study Committee; for interpleader cases, multistate class actions, and complex multistate litigation, minimal diversity rather than complete diversity is the rule.[251] Against this background, it is even less certain whether Congress continues to intend that § 1367 should be so limited in the diversity context.[252]

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249 *But see* Steinman, *supra* note 130, at 319–27 (arguing that strict adherence to the explicit *Allapattah* rationale would also compel an extremely broad interpretation of CAFA that would permit virtually any class action to be removed to federal court, even if it is local in character).

250 FCSC REPORT, *supra* note 90, at 38.

251 One might interpret these statutes, particularly the two more recent ones, as evidence of a growing congressional warmth or acceptance of diversity jurisdiction. In both instances, the legislation arose in order to expand diversity jurisdiction into areas previously thought to be inaccessible under the diversity doctrines discussed above. *See supra* Part I.A. True, the fact that Congress believed such legislation was necessary suggests that it did not believe § 1367 standing alone provided the requisite statutory grant of jurisdiction. But under the Supreme Court's *Allapattah* rationale—if not artificially limited, as the Court attempted—it does not matter what Congress thought, in 1990 or 2002 or 2005, so long as the text of the statute is clear and unambiguous, as the Court held § 1367 to be. In any event, the passage of both CAFA and the Multiforum, Multiparty Trial Jurisdiction Act support the inference that modern Congresses are less hostile to diversity jurisdiction than earlier Congresses may have been.

252 While the Court correctly noted that "the views of the 2005 Congress are not relevant to our interpretation of a text enacted by Congress in 1990," Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2628 (2005), the dynamic theory of statutory interpretation would urge the Court to "reference signals being sent by the current Congress as well as the broader social and legal context when addressing questions of statutory construction," Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1390 (2005); *see also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 390 (1991) ("Where they diverge from the Courts' preferences, the expectations of the current Congress and the President are more important to the Court than are the expectations of the enacting Congress.").

C. *Mandatory to the Legislature: Congress Must Provide a Background of Clear Statutory Rules for the Courts To Interpret*

If the current state of things remains unchanged, lower courts would seem to have two alternatives. They can follow the illogical and self-contradictory reasoning of *Allapattah* and apply a plain text reading of § 1367 except when doing so threatens the complete diversity rule. Or they can follow only the explicit holding of *Allapattah* with respect to the amount-in-controversy requirement, and then determine on their own how to apply *Allapattah* in the diversity of citizenship context.[253] The dicta in *Allapattah* seems clear enough with respect to the Supreme Court's view of the complete diversity rule. Thus, most inferior courts are likely to follow it, and/or their previous sympathetic readings of § 1367, to hold that *Strawbridge* is not affected, despite the inconsistency between that position and the holding that § 1367 overrules *Zahn* and *Clark*. But it is not impossible to suppose that a circuit court of appeals might strictly apply the logic of *Allapattah*'s holding to the conclusion that § 1367 overrules *Strawbridge*.[254] While the existence of a maverick circuit would not rise to the level of the unstable circuit split over the *Zahn* and *Clark* question, it would nevertheless point out the inconsistency in *Allapattah* that undermines the clarity promised in *Finley*. To rectify this problem, the Court would either have to extend *Allapattah* to permit nondiverse joinder, thereby admitting its error in reasoning, or else it would have to en-

253 According to the "Citing References" listed on Westlaw, *Allapattah* had been cited by 162 decisions between June 23, 2005, when it was announced, and August 1, 2006. A review of these cases reveals that *Allapattah* has been cited roughly forty-nine times for its principal holding permitting supplemental jurisdiction over diversity claims of insufficient amount in controversy. *See, e.g.*, Deajess Med. Imaging, P.C. v. Allstate Ins. Co., 381 F. Supp. 2d 307, 312 (S.D.N.Y. 2005). In ten unreported decisions, district courts have cited *Allapattah* as a straightforward reaffirmation of the complete diversity rule. *See, e.g.*, Brown v. Kerkhoff, No. 4:05 CV 00274 JEG, 2005 WL 2671529, at *5 (S.D. Iowa Oct. 19, 2005). More recently, the Ninth Circuit has done so as well. *See* Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 679 (9th Cir. 2006). Interestingly, *Allapattah*'s true impact may be felt more broadly than simply in jurisdictional cases: it has been cited approximately forty-eight times for its insistence that legislative history cannot be consulted if the text of a statute is unambiguous. *See, e.g.*, Murray v. Household Bank (SB), N.A., 386 F. Supp. 2d 993, 998–99 (N.D. Ill. 2005).

254 While no federal district or circuit court has yet read § 1367 after *Allapattah* to permit supplemental jurisdiction over nondiverse co-plaintiffs, one federal magistrate judge has done so. *See* Best Dev. & Constr. Corp. v. AmSouth Bank, No. 3:05 CV 251, 2005 WL 2249868, at *4 (E.D. Tenn. Sept. 15, 2005) ("Because the Bests have been permissively joined in this action, the Court may properly exercise supplemental jurisdiction over their claims pursuant to § 1367, without destroying the diversity that existed at the time of the removal of this action."), *dismissed on other grounds*, 2005 WL 3216264 (E.D. Tenn. Nov. 29, 2005).

dorse unequivocally the complete diversity rule, thereby reopening the divergence in jurisdiction jurisprudence that *Finley* attempted to close when it invited Congress to provide a statutory basis for supplemental jurisdiction.

Alternatively, Congress can—and should—solve the problem by amending or replacing § 1367 and other statutes to make them more workable, less enigmatic,[255] and more directly representative of the actual intent of Congress. A number of legislative corrections exist, from the very minor to the fundamentally sweeping, any one of which would be an improvement over the current post-*Allapattah* inconsistency.

If Congress chooses to limit the reach of *Allapattah,* the simplest fix to § 1367 would be to amend subsection (b) so that supplemental jurisdiction does not extend to the claims of plaintiffs "proposed to be joined . . . or seeking to intervene as plaintiffs" under Rule 20.[256] In addition to being simple, this solution would leave the class action holding of *Allapattah* intact by overruling *Zahn,* while prohibiting the use of Rule 20 to join either nondiverse plaintiffs or plaintiffs whose claims are of insufficient amount. By making this amendment, Congress's intent would be clear and the plain text would match that intent: § 1367 cannot be used to circumvent the complete diversity rule.

Alternatively, Congress could amend § 1367(a) to provide that "supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties" only in the context of federal question jurisdiction under § 1331. This change would essentially codify the distinction between pendent and ancillary jurisdiction as it existed prior to *Finley.*[257] It would also accord with the recommendation of the Federal Courts Study Committee to limit the joinder of additional parties to the federal question context.[258] The net result of this change would be to bring § 1367 more in line with the scope it

255 *See Allapattah,* 125 S. Ct. at 2640 (Ginsburg, J., dissenting) ("[Section] 1367's text defies flawless interpretation . . . .").

256 28 U.S.C. § 1367(b) (2000); *see, e.g.,* Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis,* 24 ARIZ. ST. L.J. 849, 940–42 (1992). Congress could certainly add Rule 23 to the list as well; however, given the great weight of scholarly consensus that *Zahn* was an aberration due to its logical inconsistency with *Ben-Hur, see* Freer, *supra* note 94, at 60–61, the most sensible course would be for Congress to preserve *Strawbridge* in the nonclass action context by adding Rule 20 to § 1367(b) while leaving out Rule 23.

257 *See supra* Part I.B.1.

258 *See* FCSC REPORT, *supra* note 90, at 47–48.

was originally claimed to have: overruling the result in *Finley* and making very few other changes.[259]

More drastically (but less likely, given the historical opposition to such a move)[260] Congress could choose affirmatively to embrace the more expansive view of diversity jurisdiction exemplified in its more recent jurisdictional legislation.[261] It could decide that *Strawbridge* is a relic, ineffective, or otherwise no longer reflective of its preferences for the reach of diversity jurisdiction under its statutory grants of judicial power pursuant to Article III. Accordingly, Congress could specifically amend the jurisdictional statutes[262] to provide for minimal diversity as the basis of jurisdiction.[263] As noted, this change would satisfy the minimum requirements of the Constitution, and would have the additional benefit of enabling federal courts to hear cases where there is a danger of bias against an out-of-state party even though complete diversity is not present.[264] Congress could structure a new "minimal diversity" requirement in one of two ways. Either Congress could grant original jurisdiction over all claims transactionally related to a single claim between diverse parties; or, Congress could make clear that incomplete diversity is *not* a bar to the exercise of supplemental jurisdiction under § 1367(a).[265] Regardless, a congressional endorsement of minimal diversity as the only citizenship requirement would cure the *Allapattah* dichotomy by expressly jettisoning the two-hundred-year *Strawbridge* tradition that the Court was reluctant to overrule on its own.[266]

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259 *See* H.R. REP. No. 101-734, at 28 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6875.

260 *See supra* notes 237–43 and accompanying text.

261 *See supra* notes 244–52 and accompanying text.

262 As it has already done in the class action context. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a), 119 Stat. 4, 9–12 (codified at 28 U.S.C.A. § 1332(d) (West Supp. 2006)).

263 *See* Howard P. Fink, *Supplemental Jurisdiction—Take It to the Limit!*, 74 IND. L.J. 161 (1998).

264 *See supra* Part IV.A.

265 This would be approximately the same result as, and is probably best effected by, repealing § 1367(b) entirely. *See* Fink, *supra* note 263, at 161.

266 Indeed, underlying the Court's reticence to carry its statutory interpretation rationale to its logical conclusion is, undoubtedly, an inherent institutional aversion to interpreting broadly the scope of its own power. *See supra* notes 11–14 and accompanying text. In some sense, it seems incongruous that the Court would interpret other sections of the Constitution applying to other branches so broadly, while maintaining a very narrow view of judicial power under Article III. *Compare* Gonzales v. Raich, 125 S. Ct. 2195, 2209 (2005) (reaffirming that the power "'[t]o regulate Commerce . . . among the several States,'" justifies a law's reach to "purely intrastate" and noncommercial activity (quoting U.S. CONST. art. I, § 8, cl. 3)), *and* Dames & Moore

Finally, and most fundamentally, Congress could abolish general diversity jurisdiction in its entirety by repealing § 1332(a)(1), which provides jurisdiction over run-of-the-mill cases between diverse parties.[267] This solution clearly heads in the opposite direction of the previous possibilities, by essentially scrapping an entire constitutional head of jurisdiction, rather than greatly expanding it[268] or merely tinkering with the reach of the supplemental jurisdiction statute.[269] But the abolition of diversity jurisdiction does solve the *Allapattah* problem and a whole host of other potential pitfalls in § 1367.[270] Moreover, the presence of the statutes providing for diversity-based jurisdiction in specified circumstances would, as noted, preserve federal jurisdiction over those specific categories of cases recommended for retention by the Federal Courts Study Committee in its report that otherwise recommended that diversity jurisdiction be abolished.[271] In this sense, Congress has already laid the groundwork to ensure that those cases truly situated to benefit from a federal forum will continue to have access to that forum; the elimination of § 1332(a)(1) jurisdiction would thus affect only those cases that could just as easily be brought in state court.[272] Whether one accepts the conventional justification for diversity jurisdiction or the narrower view offered by Judge Friendly,[273] it may well be that diversity jurisdiction for relatively sim-

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v. Regan, 453 U.S. 654, 675–79 (1981) (broadly construing the President's authority to act in the area of international affairs absent explicit authorization from Congress), *with* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." (citations omitted)), *and* Finley v. United States, 490 U.S. 545, 548 (1989) (noting that federal courts are generally powerless to exercise their Article III power absent a statutory grant of jurisdiction).

267 28 U.S.C. § 1332(a)(1) (2000).

268 *See supra* notes 260–66 and accompanying text.

269 *See supra* notes 256–59 and accompanying text.

270 *See* Moore, *supra* note 104, at 66–67 ("Congress could make the ultimate decision to abolish general diversity jurisdiction, making this and all other versions of § 1367(b) moot."); *see also* Freer, *supra* note 88, at 474–86 (identifying several problems with the statute). Even the abolition of diversity jurisdiction is not enough to cure all the potential defects in § 1367; some problems remain with respect to alienage and removal, which are beyond the scope of this Note. *See Freer, supra* note 88, at 474–75, 485.

271 *See supra* notes 250–52 and accompanying text.

272 *See* FCSC REPORT, *supra* note 90, at 39. *But see* Redish, *supra* note 234, at 1785–87 (arguing that docket control is not a sufficient reason for restricting jurisdiction because the federal courts exist for more substantive purposes than merely "clearing their dockets").

273 *See supra* note 233 and accompanying text.

ple state law cases that happen to involve parties of diverse citizenship is no longer necessary, and the time has come to withdraw federal jurisdiction over such cases.

Any of the foregoing solutions would resolve the tension in *Allapattah*. Any one of them would provide a clearer statement of the intent of Congress regarding federal jurisdiction. And any one of them would simplify the jurisdictional rules from the perspective of the practitioner, who would need to consult neither legislative history nor the fidelity of the Supreme Court to a particular precedent before confidently asserting federal jurisdiction over her case. There are undoubtedly other solutions that would work as well.[274] Regardless of the specific choice Congress makes, it would seem after *Allapattah* that Congress cannot rely upon the Court's promise in *Finley* to adhere to a "background of clear interpretive rules"[275] when considering jurisdictional statutes.

Accordingly, if and when Congress chooses to act, it must be painstakingly clear in its intent, ensuring that the language operates as intended, and that there can be no mistaking whether and which jurisdictional precedents are preserved or abrogated. In short, Congress should turn *Finley* back on the Court, by enacting a "background of clear statutory rules" for the Court to adjudicate against.[276] Justice Kennedy claimed in *Allapattah* that "[n]o sound canon of interpretation requires Congress to speak with extraordinary clarity in order to modify the rules of federal jurisdiction,"[277] but given the serious mischiefs wrought by the courts' interpretations of § 1367, it would behoove us all—including the Supreme Court—if Congress would return to the arena and be extraordinarily clear this time.

CONCLUSION

Justice Story's belief that Congress was required to authorize federal courts to hear cases to the full extent of the Constitution's limit[278]

274 For example, the American Law Institute has long had a proposed replacement version of § 1367. *See* AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT 13–16 (2004); John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 894–95 (1998).

275 Finley v. United States, 490 U.S. 545, 556 (1989).

276 *See* FALLON ET AL., *supra* note 1, at 930 (noting that AM. LAW INST., *supra* note 274, has taken the view that "the need for clear jurisdictional rules call[s] for detailed statutory specification").

277 Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2620 (2005).

278 *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328–30 (1816); White v. Fenner, 29 F. Cas. 1015, 1015–16 (C.C.R.I. 1818) (No. 17,547); *supra* note 1 and accompanying text.

has long since been discarded as incorrect. He would surely have been pleased, then, with the breadth of the holding in *Gibbs* authorizing supplemental jurisdiction over any claim arising from a common nucleus of operative fact with a valid federal claim.[279] But the contrary view of limited court power had become too firmly established for *Gibbs* to stand unrestrained. The result of this tension in federal jurisdiction has been a series of serious mischiefs nearly forty years in the making. The Supreme Court's most recent contribution to this comedy of errors in *Allapattah* has laid bare the continuing inability of the courts to bring the language of § 1367 and the principles of limited jurisdiction exemplified by the complete diversity rule into peaceful coexistence. The profound difficulties experienced by Congress and the courts in trying to reconcile the two concepts since *Finley* seem to suggest that "neither can live while the other survives."[280] Aside from the possibility of some minor amendatory tinkerings that would eliminate the anomaly at the price of coherence,[281] the options for meaningful resolution would lead to another major shift in the jurisdictional statutes. Moreover, it is plain that the proverbial ball is back in Congress's court, just as it was after *Finley*, albeit for different reasons. Then, it was because the Supreme Court challenged Congress to provide the missing statutory basis for supplemental jurisdiction. Today, it is because after fifteen years of conflict, disagreement, and rhetoric about what Congress did or did not intend with the passage of § 1367, the Supreme Court has finally told us that what Congress intended does not matter—except when it does.

Surely, Congress has something to say about that.

279 United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); *see supra* notes 39–52 and accompanying text.

280 J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 841 (2003); *see also* AM. LAW INST., *supra* note 274, at 6 ("The reconceptualization of the operation of the rule of complete diversity cannot be avoided if a general grant of supplemental jurisdiction is to be melded satisfactorily with retention of the complete-diversity rule.").

281 *See supra* notes 256–59 and accompanying text.