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NOTES

WEAVING THE CLOTH OF SUPPLEMENTAL JURISDICTION: THE ROLE OF DIALOGUE IN TAILORING JUDICIAL POWER

Shawn Doyle*

INTRODUCTION

"But he doesn’t have anything on," exclaimed the child upon observing the emperor.1 In Hans Christian Andersen’s classic tale, The Emperor’s New Clothes,2 two swindlers came to the court of an emperor and claimed the ability to weave the most exquisite cloth. This cloth had a rather unique property though—it was “invisible to any person who was unfit for his position or inexcusably stupid.”3 The emperor charged the swindlers to fashion new clothes from this cloth for his upcoming procession. Anxious to hear of the tailors’ progress, the emperor sent members of his court to inspect the tailors’ work. Although they could see no cloth, the members of the imperial court nevertheless exclaimed its delicate and charming character, for they feared the emperor would deride them as incompetent if they admitted the truth. On the day of the royal procession, the emperor excitedly awaited his new clothes, but, when they arrived, he too could not see them. Nevertheless, the emperor donned his new clothes because

* Candidate for Juris Doctor, Notre Dame Law School, 2007; B.S. Truman State University, 2004. First and foremost, I would like to thank my family, particularly my parents, Dennis and Patty, and my friends for their enduring love and support. I would like to thank Professor Jay Tidmarsh for his ever-helpful advice and counsel. Katherine D. Spitz, G. David Mathues, and Professor Anthony J. Bellia also provided invaluable assistance on prior drafts of this Note. Finally, I would like to thank those many educators and staff members at Sumner Academy of Arts and Science and Truman State University who truly inspired me to achieve all that I can.

2 Id. at 91–95.
3 Id. at 91.
he feared his court would ridicule him if he admitted he could not see the garments. After the cry of the young child during the procession, the entire crowd echoed, “But he doesn’t have anything on!” The emperor cringed but continued.

Andersen’s tale reminds us to look closely, for there may be a distinction between rhetoric and reality. This admonition can serve legal scholars as well. The answer to a most fundamental question of law—the relative power of the legislative and judicial branches to control the subject-matter jurisdiction of lower federal courts—continues to elude legal scholars. The debates during the Constitutional Convention provide little guidance because “matters other than the national judiciary consumed the bulk of the delegates’ attention.” The compromise reached by the delegates, codified as Article III of the Constitution, furthermore, establishes but a mere framework for the federal judiciary. In search for an answer, then, scholars have turned to the Supreme Court. However, the Court has done little to resolve this debate. Like the tailors in Andersen’s tale, the Supreme Court has presented the sovereign with a beautifully tailored jurisprudence of congressional supremacy that bares little relation to reality.

Professor Barry Friedman developed an analytical framework to see through the Court’s rhetoric and resolve this fundamental question of power. He constructed two models—congressional power and dialogic—to analyze the interactions between Congress and the

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4 Id. at 94–95.
5 Id. at 95.
7 Per the first Section of that Article, the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1. Detailing the jurisdiction of the federal judiciary, the second Section of Article III reads, in pertinent part, “[t]he judicial Power shall extend to all Cases ... arising under this Constitution, the Laws of the United States, and Treaties made ... under their Authority ... to Controversies ... between Citizens of different States.” Id. § 2, cl. 1.
federal judiciary on questions of Article III, generally, and subject-matter jurisdiction of lower federal courts, more particularly. At its most fundamental level, the congressional power model contends that the Constitution grants Congress the ultimate authority to determine the subject-matter jurisdiction of lower federal courts. In contrast, proponents of the dialogic model predict that a discourse between the co-equal judicial and legislative branches determines the actual contours of lower federal court subject-matter jurisdiction. Part I of this Note summarizes Professor Friedman’s analytic framework.

The efficacy of these two models may be tested by examining actual interactions between Congress and the federal judiciary. Supplemental jurisdiction is a particularly fruitful area for investigation. This area of jurisprudence has evolved for over forty years and has been particularly active in recent decades. Part II examines the interactions between the judiciary and Congress regarding the proper scope of supplemental jurisdiction.

After Congress enacted a supplemental jurisdiction statute, 28 U.S.C. § 1367, disputes quickly arose between the circuit courts as to its effect on the scope of supplemental jurisdiction. The Supreme Court sought to resolve this question in Exxon Mobil Corp. v. Allapattah Services, Inc. The Court’s approach to dealing with Congress’s interjection into this area provides a window into the Court’s view of its power to affect subject-matter jurisdiction. Therefore, Part III analyzes the Supreme Court’s reasoning in Allapattah.

The Court’s supplemental jurisdiction jurisprudence provides several examples of a divergence between rhetoric and action. By focusing on the Court’s reasoning as opposed to its rhetoric, evidence for the Court’s true conception of its own power can be found. In the end, the interactions of the Court and Congress provide evidence in support of the dialogic model.

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9 Professor Friedman fails to consider a “judicial power model” in his analysis. Supporters of this model would, presumably, argue that the judiciary has the superior position when determining lower federal court subject-matter jurisdiction.

10 See infra Part I.A.

11 See infra Part I.C.

12 The author of this Note uses the term “supplemental jurisdiction” merely as shorthand for pendent and ancillary jurisdictions. But see Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2621 (2005) (“Nothing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary.”).

13 125 S. Ct. 2611. Because Allapattah is a diversity class action, this Note will not discuss § 1367’s interaction with other forms of jurisdiction, such as federal question jurisdiction.
Part IV, then, summarizes the insights into the Court’s jurisprudence and the dialogic model that the analysis in this Note brings to the fore.

I. THE MODELS OF FEDERAL JURISDICTION

Legal scholars generally accept the premise that Article III grants Congress power over the jurisdiction of lower federal courts. The debate, therefore, focuses on the relative power of Congress and the federal judiciary to determine the final scope of subject-matter jurisdiction. Professor Friedman offers two models to explain the process of determining jurisdiction—congressional power and dialogic. This Part summarizes Professor Friedman’s analytical approach.

A. Congressional Power Model

The congressional power model is an aggregation of several interpretations of Article III. At base, the premise that Congress has the power to set the final scope of federal jurisdiction within constitutional bounds joins these interpretations. In other words, Congress has the power to circumscribe the scope of the judicial power. Accordingly, federal courts may only exercise jurisdiction if there is both a constitutional grant and a congressional authorization. “Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited not

14 See David E. Engdahl, Intrinsic Limits of Congress’ Power Regarding the Judicial Branch, 1999 BYU L. Rev. 75, 76-79 (noting that some scholars “have argued that a ‘plenary’ power in Congress to meddle with the courts is an aspect of constitutional ‘checks and balances,’ and there are some Supreme Court dicta exhibiting what one observer described as ‘an almost unseemly enthusiasm in discussing Congress’ power to lop off diverse heads of . . . [A]rticle III jurisdiction’” (footnotes omitted)). Given that Professor Friedman suggests that both Congress and the federal judiciary create the contours of lower court jurisdiction, the dialogic model would also endorse this statement.

15 As Professor Friedman notes, this discussion joins two different, but related, questions. See Friedman, Different Dialogue, supra note 8, at 5-10. The first question concerns the authority of Congress to allocate jurisdiction to federal courts and the limits on that authority. Id. The second question centers on the permissibility of courts to decline to exercise that jurisdiction authorized by Congress. Id.

16 Proponents of the congressional power model acknowledge that extra-Article III provisions such as the Due Process Clause of the Fifth Amendment also limit Congress’s power. See Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler’s The Federal Courts and the Federal System 335 (5th ed. 2003) [hereinafter Hart & Wechsler]; Friedman, Different Dialogue, supra note 8, at 31.
only by the provisions of Art. III of the Constitution, but also by Acts of Congress."

The limited divergence among the different permutations of the congressional power model centers on the constraints that Article III itself places on the power of Congress to affect the scope of subject-matter jurisdiction. One permutation—the "strong" congressional power model—contends Article III places no constraints on Congress's power. This reading of Article III suggests that the power to create lower federal courts granted to Congress in the Tribunals Clause necessarily grants Congress the plenary power to control inferior courts, including "prescribing and circumscribing subject matter jurisdiction [and] dictating details of procedure, evidence, and remedies." Supporters of this proposition look to the 1850 Supreme Court decision in Sheldon v. Sill. There, the Court stated, "Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."

Another permutation of this model—"mandatory" congressional power—is most closely associated with the arguments proffered by Jus-

18 See Friedman, Different Dialogue, supra note 8, at 31.
19 U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in . . . such inferior Courts as the Congress may from time to time ordain and establish.").

Professor Friedman notes that the strong variant also relies on the Exception Clause of Article III to permit almost unlimited congressional control over the jurisdiction of the Supreme Court. See Friedman, Different Dialogue, supra note 8, at 35-36. However, a discussion of this concept is outside of the scope of this Note.

20 Engdahl, supra note 14, at 105. Proponents of the strong model argue, in part, that the principle of federalism supports this view of the Tribunal Clause. As Professor Friedman argues, "[u]nder the strong congressional control model, a state court is at least as good as, if not better than, a federal court with regard to protecting constitutional rights. According to the strong model proponents, state courts are the 'primary guarantors of constitutional rights.'" Friedman, Different Dialogue, supra note 8, at 37 (quoting Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1401 (1953)). Accordingly, Professor Erwin Chemerinsky proposes that division of jurisdiction between state and federal courts is a policy decision properly considered by Congress. See Erwin Chemerinsky, Ending the Parity Debate, 71 B.U. L. REV. 593, 600-01 (1991). See generally Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. REV. 233, 233-35 (1988) (summarizing the history of the parity debate).

Professor Friedman takes issue with this assertion because of the continuing debate over the parity between federal and state courts. See Friedman, Different Dialogue, supra note 8, at 37 & n.196.

21 49 U.S. (8 How.) 441 (1850).
22 Id. at 449.
tice Joseph Story and Professor Akhil Amar. The Supreme Court, speaking through Justice Story, succinctly summarized this interpretation in *Martin v. Hunter's Lessee*:

[T]here are two classes of cases enumerated in the constitution, between which a distinction seems to be drawn. The first class [enumerated in Article III, Section 2] includes cases arising under the constitution, laws, and treaties of the United States .... In this class the expression is, and that the judicial power shall extend to all cases; but in the subsequent part of the clause which embraces all the other cases of national cognizance, [including diversity jurisdiction,] and forms the second class, the word "all" is dropped seemingly ex industria. Here the judicial authority is to extend to controversies (not to all controversies) ....

According to "mandatory" scholars, therefore, the text of Article III limits the power of Congress to control the subject-matter jurisdiction of lower federal courts in the first class of enumerated cases.

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23 See Friedman, *Different Dialogue*, supra note 8, at 40–48. While this Note raises two versions of the mandatory argument, there are others that exist. See id. at 39–40; *Hart & Wechsler*, supra note 16, at 342–44; infra note 24.

24 14 U.S. (1 Wheat.) 304 (1816). Justice Story believed that the Constitution may place an even greater burden on Congress. "If, then, it is a duty of congress to vest the judicial power of the United States," according to Justice Story, "it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all." Id. at 330. However, Congress has never vested full, constitutional jurisdiction in federal courts. *Hart & Wechsler*, supra note 16, at 320. Importantly, the Judiciary Act of 1789, ch. 20, 1 Stat. 73, is seen as a window through which modern scholars may view the intention of the founding generation. *Hart & Wechsler*, supra note 16, at 342. The first Congress’s failure to fully vest courts with all Article III jurisdiction, therefore, militates against an interpretation of the Constitution that requires full vesting of permissible jurisdiction in federal courts. Although such criticism applies to the mandatory permutation presented in this Note, Professor Amar has breathed new life into this approach. See id. at 343–44.


However, Article III does not impose such a limitation on Congress's power over the second class of controversies.\textsuperscript{26} Much like the "strong" congressional power model proponents, then, "mandatory" scholars believe Article III grants Congress final authority over the scope of subject-matter jurisdiction for lower federal courts—at least, over the second class of jurisdictional grants.

While "mandatory" and "strong" theorists disagree over Congress's power to authorize certain of the specified cases and controversies, they both acknowledge Congress's wide latitude to control the scope of those subject matters over which it has discretion.

\textbf{B. The Problem of Discretion}

In conjunction with the congressional power model, Professor Friedman considers the obligation of courts to exercise congressionally authorized subject-matter jurisdiction.\textsuperscript{27} Professor Friedman argues that the discretionary school of thought, which is most closely associated with Professor David Shapiro, assumes congressional supremacy over subject-matter jurisdiction.\textsuperscript{28} Hence, he places Professor Shapiro's school within the congressional power model.

According to Professor Shapiro, federal courts exercise discretion when they determine whether or not to hear a case.\textsuperscript{29} A court exercises discretion when it declines to hear a case for which it has jurisdiction, or, more subtly, when it interprets a jurisdictional statute not to authorize judicial power over the subject matter of the case.\textsuperscript{30} Yet, the

\begin{itemize}
  \item \textsuperscript{26} See U.S. CONST. art. III, § 2; HART & WECHSLER, supra note 16, at 343–44; Amar, \textit{Reply to Professor Friedman}, supra note 25, at 446–50.
  \item \textsuperscript{27} See Friedman, \textit{Different Dialogue}, supra note 8, at 8–9.
  \item \textsuperscript{28} See id. Professor Friedman summarizes the various perspectives in this debate as two schools—obligation and discretion. The first school "maintains that federal courts have a 'virtually unflagging obligation' to exercise the jurisdiction granted them by Congress." \textit{Id.} at 8 & n.91. Champions of this school include Chief Justice John Marshall and Professors Martin Redish and Philip Kurland. \textit{Id.} at 8. In fact, Chief Justice Marshall thought it would be treasonous for a court to decline to exercise congressionally authorized subject-matter jurisdiction. See David L. Shapiro, \textit{Jurisdiction and Discretion}, 60 N.Y.U. L. REV. 543, 543 (1985). The second school accords "much greater discretion to the federal courts to decide in which cases jurisdiction will be exercised." Friedman, \textit{Different Dialogue}, supra note 8, at 8.
  \item \textsuperscript{29} See Shapiro, supra note 28, at 543–45. Professor Shapiro notes that there are two forms of discretion—normative and allocative. "Normative discretion is discretion delegated to a rulemaking or adjudicative body by the legislature, while allocative discretion refers to delegation of decision-making authority within a particular hierarchy (here, the judiciary)." \textit{Id.} at 546. Professor Shapiro focuses on normative discretion.
  \item \textsuperscript{30} See \textit{id.} at 561–62. Neither the Constitution nor jurisdictional statutes necessarily provide the authority for the court to exercise this discretion. Instead, "as experi-
federal judiciary does not have unbridled power to exercise this discretion. Initially, "when jurisdiction is conferred . . . there is at least a 'principle of preference' that a court should entertain and resolve on its merits an action within the scope of the jurisdictional grant." When declining to exercise jurisdiction, according to Professor Shapiro, the court should look to countervailing concerns such as federalism, separation of powers, and judicial administration. However, "the language of the [jurisdictional] grant, the historical context in which the grant was made, or the common law tradition behind it" can expand or reduce a court's discretion, even to the point of elimination. Professor Shapiro, therefore, appears to support the legislative supremacy envisioned by the congressional power model.

Professor Friedman too quickly disregards Professor Shapiro's discretionary school as another brick in the edifice of the congressional power model. As shown in Parts III and IV, the line between discretion and dialogue can, at times, be difficult to discern.

C. The Dialogic Model

As an alternative to the congressional power model, Professor Friedman constructed the dialogic model. At its most fundamental level, the dialogic model asserts that "[A]rticle III means what it comes to mean as the Court and Congress interact." Likewise, the

ence and tradition teach, the question whether a court must exercise jurisdiction and resolve a controversy on its merits is difficult, if not impossible, to answer in gross. And the courts are functionally better adapted to engage in the necessary fine tuning than is the legislature." Id. at 574. This argument is similar to the inherent powers argument this Note offers for the dialogic model. See infra note 45.

31 Shapiro, supra note 28, at 575 (footnotes omitted).
32 See id. at 579-88. Some of these factors are strikingly similar to those offered by Professor Friedman. See infra note 47.
33 Shapiro, supra note 28, at 575.
34 See id. at 575-76.
35 Professor Friedman even acknowledges that "this obviously is a tricky question within the context of the congressional control approach." Friedman, Different Dialogue, supra note 8, at 8.
36 Friedman, (Dialogic) Reply, supra note 8, at 478 ("At bottom, what [Professor Friedman] hoped to accomplish was to challenge the nature of the debate that has occurred on this subject [of relative power] virtually since the time of the Constitution's framing. [His] original article grew out of frustration at two levels: first, the positions frequently taken in the debate were observably incorrect, that is, they were not an accurate description of the 'data' bearing on the question; and second, framed as it was, the debate was not going anywhere but to and fro, while interesting questions remained unanswered.").
37 Id. at 489. "The dialogic approach is the most reasonable interpretation of [A]rticle III precisely because it does the best job of harmonizing the text of the
interaction between Congress and the federal judiciary determines the scope of lower federal courts' subject-matter jurisdiction. The Constitution, according to Professor Friedman, leaves unresolved "how far Congress may go in controlling federal jurisdiction and, conversely, to what extent the federal courts may resist such control, or assert themselves in defining the scope of federal jurisdiction." 

As with congressional power, the dialogic model first looks to the text of Article III for guidance. Professor Friedman cites the competing permutations of the congressional power model as evidence that there is no "correct" interpretation of Article III. For example, Congress may assert the strong congressional permutation as justification for exercising greater power over the subject-matter jurisdiction of lower federal courts just as the federal judiciary may look to the mandatory variant for support to limit Congress's authority. The debate between the competing permutations within the congressional power model, moreover, evidences a dialogue within the legal community over the relative powers of Congress and the courts to control subject-matter jurisdiction.

As described by the dialogic model, Congress and the federal judiciary interact via their respective, institutional competencies. Congress, of course, may enact jurisdictional statutes such as §§ 1332 and

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Constitution, the judicial interpretation of that text, and policy arguments concerning which branch should maintain control over federal jurisdiction." Friedman, Different Dialogue, supra note 8, at 29.

38 See Friedman, (Dialogic) Reply, supra note 8, at 478.

39 Friedman, Different Dialogue, supra note 8, at 48. In the context of the executive and legislative powers, the Court has accepted the notion that the boundary is not always clearly defined and is subject to the vagaries of circumstance. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). That the full scope and source of the judiciary's power vis-à-vis Congress may be similarly uncertain should not be entirely surprising. But see Shapiro, supra note 28, at 578-79 ("Of equal importance, it means that these criteria are capable of being articulated and openly applied by the courts, evaluated by critics of the courts' work, and reviewed by the legislative branch. The elemental requirement of candor, which is basic to the proper carrying out of the judicial function, calls for no less.").

40 See Friedman, Different Dialogue, supra note 8, at 50-51. Professor Friedman chastises the proponents of the strong and mandatory congressional power models for their inability to definitively prove their variant superior to the other. See Friedman, (Dialogic) Reply, supra note 8, at 480.

41 See Friedman, Different Dialogue, supra note 8, at 50-51. As previously noted, however, the mandatory permutation would provide a weak justification for limiting congressional power over the second class of cases and controversies identified by Justice Story and Professor Amar, which includes diversity jurisdiction.

42 See id. at 53.
the judiciary asserts itself through the adjudication of cases. Professor Friedman illustrates a possible interaction between the two branches:

[If Congress tries to so curtail the Supreme Court’s jurisdiction, and if the Court acquiesces, then the Court’s jurisdiction is curtailed]—at least (and only) for the time being . . . But, if the Court resists, either by holding the limitation unconstitutional, or (as is more likely) by construing its way around the statute . . . the Court’s jurisdiction would not be curtailed]—at least so long as Congress goes along with the Court’s construction.44

Importantly, the logic underlying Professor Friedman’s model necessitates acceptance of the possibility that the order of this example could be reversed. Per the dialogic model, the federal judiciary has a fount of independent power by which it may act.45 Because the Court

43 The federal judiciary impacts the scope of lower-court, subject-matter jurisdiction with both its procedural and substantive decisions. See Henry J. Friendly, Federal Jurisdiction: A General View 17–22 (1973) (discussing the impact of judicial interpretations of substantive rights on the scope of jurisdiction); Friedman, Different Dialogue, supra note 8, at 52–55 (discussing the courts’ role in defining substantive rights). The “pure ‘judicial power’ consists of applying pre-existing law to the facts in a particular case, then rendering a final, binding judgment.” Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 844 (2001). If the duty of the federal courts, then, is “to decide a properly presented case in accordance with the law,” Shapiro, supra note 28, at 579, they must make a critical determination—whether or not they have jurisdiction to hear the case.

44 Friedman, Different Dialogue, supra note 8, at 48–49. Because this Note focuses on the subject-matter jurisdiction of lower federal courts, this example is simply illustrative of the dialogic process.

Professor Amar criticizes the underlying foundation of the dialogic model when it is applied to the Supreme Court’s jurisdiction. “Friedman’s ‘dialogue’ rests on a reading of the text that requires a Supreme Court with some undiminishable jurisdiction. (Friedman’s ‘flexible’ dialogue thus reads the text [of the Constitution] as ‘fixed’ and ‘immutable,’ at least to this extent.)” Amar, Reply to Professor Friedman, supra note 25, at 446. After all, without such an assumption, “Congress could silence the Court by stripping it of all jurisdiction . . . or better still, by eliminating the Court altogether.” Id. As noted by Professor Friedman, however, such a “dooms-day” scenario has yet to occur in the history of the United States. See infra note 49.

45 While not raised by Professor Friedman, courts could reference inherent power. Though the federal courts have never reconciled their claim of inherent power with the Constitution, they have continually asserted power to control their dockets. Pushaw, supra note 43, at 760–61, 783–86 (2001). Judge Friendly urged:

If even [modest reform of diversity jurisdiction] . . . cannot be enacted with more than deliberate speed, I see no reason why busy district courts should not promulgate rules that . . . all other proceedings shall be preferred for trial over actions where federal jurisdiction is invoked solely on the basis that the parties are citizens of different states . . . .
can disregard Congress's will as expressed via the legislative process, the enactment of a statute is but a mere formality; federal courts need not act as servants to the congressional will. Any resulting congressional silence after the Court acts may, therefore, be read as tacit approval, for the time being at least, of the judiciary's conduct.\textsuperscript{46}

Free from the deferential role envisioned by the congressional power model, courts may interject their own substantive policy determinations into debates over the scope of subject-matter jurisdiction. In other words, courts have the power of choice.\textsuperscript{47} They may choose to cooperate with the legislative branch and further that branch's policy goals, or the interaction between the two branches can devolve into "an elaborate game of 'push-shove,' in which the branches resist one another's views of when the exercise of federal jurisdiction is appropriate."\textsuperscript{48}

Because the branches are coequal, no entity exists to arbitrate disputes between the two. The political environment in conjunction with the relative strength of each branch's arguments determines the

\textsuperscript{46} See Friedman, \textit{Different Dialogue, supra note 8}, at 48–49. See \textit{infra} note 71 and accompanying text for another example.

\textsuperscript{47} See Friedman, \textit{Different Dialogue, supra note 8}, at 52–55. In his original work, Professor Friedman identifies several factors courts may examine when determining questions of jurisdiction, including: protection of federal rights and interests, comity and federalism, caseloads and judicial resources, and need for uniformity. \textit{Id.} at 52. In support of this position, Professor Friedman asserts "the Supreme Court ought to—and does—possess at least as much authority and expertise as Congress over [these] factors." \textit{Id.}

According to critics, questions of federalism and the conduct of the federal government should be decided by the citizenry via their elected representatives as opposed to unelected judges. Congressional supremacy protects state governments against "the danger that the federal courts will aggrandize their power at the expense of the states." Michael Wells, \textit{Congress's Paramount Role in Setting the Scope of Federal Jurisdiction}, 85 NW. U. L. Rev. 465, 467 (1991). As discussed below, \textit{infra} Part III.B, many members of the founding generation feared that the federal courts would destroy or, at least, severely undercut the role of state courts. Congressional enactments reflect the will of the citizenry, which should constrain the federal judiciary unless this constraint would violate another provision of the Constitution.

\textsuperscript{48} Friedman, \textit{Different Dialogue, supra note 8}, at 49.
outcome of the dispute.\textsuperscript{49} In the end, Congress and the judiciary will reach an equilibrium point on the particular question at issue.\textsuperscript{50}

To support this predicted interaction, Professor Friedman relies heavily on data describing the actual interaction between the two branches and normative rationales.\textsuperscript{51} Professor Friedman asserts that the dialogic model provides an "accurate description of the ‘data’ bearing on the question" of the relative power of the judiciary and Congress.\textsuperscript{52} While Professor Friedman cites several examples to support his hypothesis,\textsuperscript{53} as will be shown in Parts II and III, the history of supplemental jurisdiction lends strong support to the dialogic model. Professor Friedman additionally argues that the flexibility embedded in the dialogic model promotes respect between the legislative and judicial branches. This freedom of action promotes caution, discourages overreaching, and allows for flexibility as times and circum-

\textsuperscript{49} See id. at 54–55. Professor Friedman notes that "for two hundred years, these ultimate crises have, by and large, been avoided." \textit{Id.} at 55. In the rare instances in which the process has "broken down," such as the Roosevelt Court-packing plan, the failure is often more the result of one branch taking the other branch’s decision as being final. \textit{See id.} Professor Friedman also notes, however, that the flexibility for each branch in this system can often help prevent these "break downs." \textit{See id.} at 57.

\textsuperscript{50} \textit{Id.} at 56 ("The dialogue does not suggest that the process of defining jurisdiction is completely open-ended. . . Congress inevitably will enact a number of jurisdictional statutes, and the Court and federal courts generally will put them into operation. Over time certain patterns emerge, and it becomes somewhat easier to predict what the reaction of either branch will be."). Thus, dialogue typically occurs on the fringes of jurisdiction or when one branch takes uncharacteristically drastic action. \textit{See id.}

"If everything truly is open," critics contend, "we have interpretive nihilism and chaos, not an ‘enduring framework.’" Amar, \textit{Reply to Professor Friedman, supra} note 25, at 443.

\textsuperscript{51} Friedman, \textit{Different Dialogue, supra} note 8, at 29 ("The dialogic approach is the most reasonable interpretation of [A]rticle III precisely because it does the best job of harmonizing the text of the Constitution, the judicial interpretation of that text, and policy arguments concerning which branch should maintain control over federal jurisdiction.").

\textsuperscript{52} Friedman, (Dialogic) \textit{Reply, supra} note 8, at 478; \textit{see also} FRIENDLY, supra note 43, at 22 (noting that individuals increasingly look to federal courts instead of Congress to supply legal reforms).

\textsuperscript{53} For examples cited by Professor Friedman in support of this contention, see Friedman, \textit{Different Dialogue, supra} note 8, at 10–28. As an illustration, Professor Friedman cites the seeming inconsistent treatment of the complete diversity and amount-in-controversy requirements in \textit{Supreme Tribe of Ben-Hur v. Cauble}, 255 U.S. 356 (1921), and \textit{Zahn v. International Paper Co.}, 414 U.S. 291 (1973). Congressional power proponents criticize Professor Friedman’s interpretation of some of the cases used to support his argument. \textit{See} Amar, \textit{Reply to Professor Friedman, supra} note 25, at 448–50; Wells, \textit{supra} note 47, at 468–70.
stances change.\textsuperscript{54} Furthermore, the federal judiciary is "more competent than Congress in refining jurisdictional decisions," according to Professor Friedman.\textsuperscript{55} In practice, Congress simply cannot answer all questions of jurisdiction before or even after they arise.\textsuperscript{56}

Because of the ambiguity of Article III, then, Professor Friedman looks to the actual interactions of Congress and the federal judiciary and normative principles for guidance when interpreting that Article of the Constitution.\textsuperscript{57} Based on these observations and principles, Professor Friedman’s dialogic model predicts that the interactions between Congress and the federal judiciary determine the final scope of lower-court, subject-matter jurisdiction.\textsuperscript{58}

Though the dialogic and congressional power models may be seen as competing with each other, the dialogic model conceptually incorporates the deference to congressional intent envisioned by the congressional power model.\textsuperscript{59} For a court may have freedom to act and, yet, choose not to exercise that freedom. If a court chooses to defer to congressional pronouncements, for instance, its reasoning would likely appear similar to that used by congressional power proponents. Examples of courts going beyond congressional intent, therefore, will be critical in determining the accuracy of the dialogic model.

While no single note will resolve the debate between legal scholars, a detailed examination of the interactions between Congress and the federal judiciary can advance the debate by providing evidence to support one model or the other. The history of supplemental jurisdiction and the Court’s recent assessment of Congress’s supplemental jurisdiction statute in \textit{Allapattah} provide fertile ground for such an examination.

\begin{itemize}
\item \textsuperscript{54} See Friedman, \textit{Different Dialogue, supra} note 8, at 57–58. "The dialogic approach . . . not only has room for such changing norms, but actually facilitates them. The dialogic approach recognizes the Constitution has sufficient play in the joints to keep the federal system operating smoothly." \textit{Id.} at 48.
\item \textsuperscript{55} \textit{Id.} at 60.
\item \textsuperscript{56} See \textit{id.}
\item \textsuperscript{57} See \textit{supra} notes 51–53 and accompanying text.
\item \textsuperscript{58} See \textit{supra} notes 47–50 and accompanying text.
\item \textsuperscript{59} These models remind the author of the comparison between a square and rectangle in geometry. A square is a shape with four sides of equal length and four right angles. A rectangle is a shape with corresponding sides of equal length and four right angles. Thus, a square is always a rectangle, but a rectangle need not be a square.
\end{itemize}
II. SUPPLEMENTAL JURISDICTION: THE PRELUDE TO ALLAPATTAH

The interaction between Congress and the federal judiciary over the scope of the courts’ supplemental jurisdiction provides strong evidence in support of Professor Friedman’s dialogic model. Prior to 1989, supplemental jurisdiction was largely a creature of judicial creation;\textsuperscript{60} Congress remained conspicuously absent from the debate. The Supreme Court questioned this regime in its 1989 decision, \textit{Finley v. United States}.\textsuperscript{61} Subsequently, Congress interjected itself into the area with the Judicial Improvements Act of 1990\textsuperscript{62} codified, in pertinent part, at 28 U.S.C. § 1367. The circuit courts quickly diverged over the impact of § 1367 on the Supreme Court’s earlier jurisprudence.\textsuperscript{63} This Part will briefly recount the history of supplemental jurisdiction and examine the evidence it provides for the dialogic model. The Supreme Court finally resolved the dispute among the circuits in \textit{Allapattah}, which is examined in the subsequent Part of this Note.

A. The Judicial Foundation of Supplemental Jurisdiction

The modern era\textsuperscript{64} of the Court’s jurisprudence began with \textit{United Mine Workers v. Gibbs}\textsuperscript{65} in 1966. This case raised a fundamental ques-


\textsuperscript{65} 383 U.S. 715 (1966). This seminal case dealt specifically with the scope of pendent-claim jurisdiction. \textit{Id.} at 721. “Pendent [claim] jurisdiction, in the sense of judicial power, exists whenever there is a [federal question] claim . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional ‘case.’” \textit{Id.} at 725. See generally Chemerinsky, \textit{supra} note 25, § 5.4, at 331–32 (summarizing scope of pendent jurisdiction); Fed. Courts Study Comm., \textit{supra} note 61, at 546 (same); Freer, \textit{supra} note 64, at 447–48 (same).
tion of judicial power—may a federal court deliver judgment on a state law claim that arises from the same transaction as the federal claim then being adjudicated? Based on its analysis, the Supreme Court concluded that claims could be resolved more efficiently and with greater convenience to the parties if a federal court adjudicates both the federal and state claims before it.\(^6^6\) If a federal court otherwise has jurisdiction over at least one of the claims raised, it may, as a result of \textit{Gibbs}, exercise supplemental jurisdiction over those claims for which it lacks an independent basis of jurisdiction. The Court limited this authorization to those claims that constitute one constitutional case, which the Court defined as all claims deriving "from a common nucleus of operative fact."\(^6^7\) Moreover, the Court permitted lower federal courts to employ discretion in their exercise of supplemental jurisdiction.\(^6^8\)

For over two decades after \textit{Gibbs}, Congress did not comment on the Court's supplemental jurisdiction jurisprudence, and the Court "never addressed the need for \textit{statutory} authorization of supplemental jurisdiction."

\begin{quote}
"In contrast, ancillary jurisdiction can be understood as [jurisdiction for] claims that are asserted \textit{after the filing of the original complaint} that do not independently meet the requirements for federal court jurisdiction." \textit{Chemerinsky, supra} note 25, \$ 5.4, at 331–32. Ancillary jurisdiction typically involves claims between defendants and third-party defendants or claims by the plaintiff in response to a counterclaim, intervention, or the like. This type of jurisdiction occurs by-and-large in diversity jurisdiction cases. \textit{See generally Fed. Courts Study Comm., supra} note 61, at 546, 550–52 (summarizing the scope of ancillary jurisdiction); Freer, \textit{supra} note 64, at 448–49 (same); James E. Pfander, \textit{Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism}, 148 U. Pa. L. Rev. 109, 134–35 (1999) (same). The Court has not allowed ancillary jurisdiction to expand to such a point as to endanger the complete diversity rule for diversity jurisdiction. \textit{See Owen Equip. & Erection Co. v. Kroger}, 437 U.S. 365, 377 (1978). The \textit{Owen} Court was concerned that plaintiffs would deliberately circumvent the complete diversity rule by intentionally not bringing suit against a non-diverse party with the intention that the defendant would implead the non-diverse party. \textit{Id}. The plaintiff could then assert a claim against the now third-party defendant. \textit{Id}.\(^6^6\)
\end{quote}

\begin{quote}
\textit{Gibbs}, 383 U.S. at 726.
\end{quote}

\begin{quote}
\textit{Id}. at 725.
\end{quote}

In the context of ancillary jurisdiction, federal courts traditionally look for a logical relationship between the claim that has original jurisdiction and the additional claim. \textit{See Owen}, 437 U.S. at 376. However, the Supreme Court has recognized that ancillary and pendent jurisdictions are "two species of the same generic problem." \textit{Id}. at 370. Thus, scholars have interpreted the pendent-claim test—common nucleus of operative facts—to also apply to ancillary jurisdiction. \textit{See Chemerinsky, supra} note 25, \$ 5.4, at 331.

\begin{quote}
Federal courts can consider judicial economy, substantiality of the federal question, and convenience and fairness to litigants to determine if they should hear the additional pendent claim. \textit{Gibbs}, 383 U.S. at 726.
\end{quote}
Thus, many legal scholars concluded that supplemental jurisdiction needed no statutory base but, instead, rested upon some sufficient common law tradition. Gibbs and its progeny represent a repudiation of the congressional power model. Congress cannot occupy the superior position envisioned by the congressional power model if the Supreme Court may embark upon the seemingly common-law analysis it employed in Gibbs. Instead, the Court’s actions lend credence to the dialogic model.

However, the Court struck a blow at the foundation of its prior jurisprudence in Finley v. United States. The Court argued:

It remains rudimentary law that “[a]s regards all courts of the United States inferior to [the Supreme Court], two things are necessary to create jurisdiction . . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it . . . . To the extent that such action is not taken, the power lies dormant.

While explicitly refusing to overturn Gibbs, the Court lambasted its previous jurisprudence for “not mention[ing], let alone com[ing] to grips with, the text of the jurisdictional statutes and the bedrock principle that federal courts have no jurisdiction without statutory authorization.” To reconcile Gibbs with the “rudimentary law” of jurisdiction, the Court read the jurisdictional statutes as broadly authorizing federal courts to dispose of an entire constitutional case at one time. The Finley Court steadfastly refused to extend this reading to other areas not covered by its previous precedents. The Court reminded the legislative branch:

69 Freer, supra note 63, at 453.

70 Id.

71 This is an example of the silence as a form of acceptance discussed in Part I.

72 E.g., Fed. Courts Study Comm., supra note 61, at 552.

73 Finley v. United States, 490 U.S. 545, 547-48 (1989) (first alteration and second omission in original) (quoting The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868)).

74 Id. at 556 (“As we noted at the outset, our cases do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred. The Gibbs line of cases was a departure from prior practice, and a departure that we have no intent to limit or impair.”).

75 Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2617 (2005) (citing Finley, 490 U.S. at 548); see also H.R. Rep. No. 101-734, supra note 60, at 6874 (summarizing Finley’s holding).

76 See Finley, 490 U.S. at 549.

77 Id. Finley specifically dealt with pendent-party jurisdiction. Id. This type of jurisdiction “permits a plaintiff to join to a federal claim a factually related state claim
Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.78

“If Finley is correct,” some scholars argued, “the federal courts are engaging in a systematic, unlawful grabbing of subject-matter jurisdiction that goes to the very heart of our federal structure.”79 These scholars clearly viewed Finley as a repudiation of the logical underpinnings of the Court’s previous jurisprudence and a strong affirmation of the congressional power model. As examined in Part IV, this common reading of Finley is likely incorrect in the light of the Court’s total supplemental jurisdiction jurisprudence.

B. Section 1367 and Its Gaping Holes80

Congress responded to Finley’s invitation by authorizing supplemental jurisdiction through 28 U.S.C. § 1367.81 Though Congress purported to affect little change via its enactment,82 controversy quickly erupted over the precise meaning and effect of the new statute.83 This Note will not enter the decade-long debate over the effects of § 1367 on supplemental jurisdiction. Rather, this history is recounted in order to provide background for the discussion of Allapat-

78 Finley, 490 U.S. at 556. Such a result would undermine the complete diversity rule.
79 Fed. Courts Study Comm., supra note 61, at 556 (emphasis added); see also Pfander, supra note 65, at 156–57 (“With its emphasis on the necessity for written authority, the Finley Court made what some have seen as a decisive break with the past. On this account, Finley brought to a close the free-wheeling jurisdictional days of Gibbs and inaugurated an era of close attention to statutory text.”).
80 See Thomas D. Rowe, Jr. et al., Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer, 40 Emory L.J. 943, 961 n.91 (1991) (“We can only hope that the federal courts will plug that potentially gaping hole in the complete diversity requirement . . . ”).
82 Id.
83 For a review of the debate over § 1367, see Mericcare Inc. v. St. Paul Mercury Insurance Co., 166 F.3d 214, 220 n.5 (3d Cir. 1999). See generally Edward A. Hartnett, Would the Kroger Rule Survive the ALI’s Proposed Revision of § 1367?, 51 Duke L.J. 647 (2001) (outlining the judicial response to Congress’s enactment of § 1367 and the probable effect of the ALI’s proposed revision); Pfander, supra note 65 (proposing a reading of § 1367 that accounts for both legislative history and textual consideration).
to examine the interactions between Congress and the judiciary.

1. Congress Responds to *Finley*

Turning first to the text of § 1367, the statute is composed of three major subsections. Section 1367(a) represents a broad grant of supplemental jurisdiction.\(^8\) Section 1367(b) limits that grant of jurisdiction when the court's original jurisdiction is founded upon the parties' diversity of citizenship. Particularly, supplemental jurisdiction shall not extend

over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure [("Group One"), or over claims by persons proposed to be joined as plaintiffs under Rule 19... or seeking to intervene as plaintiffs under Rule 24 ["Group Two"]... when exercising supplemental jurisdiction would be inconsistent with the jurisdictional requirements of section 1332.\(^8\)

The authors of § 1367 designed subsection (b) to prevent parties from circumventing the requirements of diversity jurisdiction.\(^8\) Section 1367(c) grants courts discretion in their exercise of supplemental jurisdiction. Scholars have generally interpreted this subsection as an authorization for the same broad grant of discretion sanctioned by the Supreme Court in *Gibbs*.\(^8\)

There is little evidence whether or not Congress was consciously acting under the congressional power or dialogic model in either the statute’s text or its legislative history. Assuming, for the sake of argument, that Congress accepted *Finley’s* critique of the Court’s previous reasoning, there is little warrant for pause. As seen in the discussion of the dialogic model, both Congress and the judiciary can assert various justifications for their respective actions. Critically, however, Congress in fact established a dialogue with the Court over the proper scope of supplemental jurisdiction by enacting § 1367. Congress both lent its imprimatur to the previously sanctioned scope of supplemental jurisdiction and encouraged the exercise of even broader jurisdiction than the Court was willing to accept in *Finley*.

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\(^8\) "[T]he district courts shall have supplemental jurisdiction over all claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy..." 28 U.S.C. § 1367(a) (2000).

\(^8\) 28 U.S.C. § 1367(b).


2. Gaping Holes

Nonetheless, omissions in § 1367(b) caused confusion among the circuit courts. One of these apparent oversights was Congress's failure to include Rule 20 in Group One. The authors of the statute acknowledged that, read literally, this failure permits circumvention of the requirements for diversity jurisdiction. To overcome the drafting error, the authors of the statute urged federal courts to "plug that potentially gaping hole in the complete diversity requirement—either by regarding it as an unacceptable circumvention of original diversity 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."  

Another omission, this time from Group Two of § 1367(b), is Rule 23, which governs federal class actions. Prior to § 1367, the Supreme Court held in Zahn v. International Paper Co. that a member of a Rule 23 diversity class action must independently satisfy the amount-in-controversy requirement in order for a federal court to hear that class member's claim. The statute's legislative history indicates that Congress and the statute's authors did not intend to overturn Zahn.

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88 See Rowe et al., supra note 80, at 961 n.91 ("Literally, though, section 1367(b) does not bar an original complete diversity filing and subsequent amendment to add a nondiverse co-plaintiff under Rule 20, taking advantage of supplemental jurisdiction over the claim of the new plaintiff against the existing defendant."). A nondiverse party, for example, could join as a plaintiff after the original cause was filed.
89 Id.; see also H.R. Rep. No. 101-734, supra note 60, at 6874–75 & n.17.

As noted previously, a circuit split developed over the proper interpretation of § 1367. Those circuits that relied on the text of § 1367(b) would likely decline the invitation to read Rule 20 into the statute. See Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1253–54 (11th Cir. 2003), aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611; Rosmer v. Pfizer Inc., 263 F.3d 110, 114–19 (4th Cir. 2001); Gibson v. Chrysler Corp., 261 F.3d 927, 933–40 (9th Cir. 2001); In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997); In re Abbott Labs., 51 F.3d 524, 527–29 (5th Cir. 1995), aff'd by an equally divided Court sub nom. Free v. Abbott Labs., Inc., 529 U.S. 333 (2000).

91 Id. at 301. For complete diversity, conversely, a court need only look at the citizenship of the named plaintiffs as opposed to each individual plaintiff. See Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921).
However, scholars and the authors of the statute acknowledged that the text, read literally, abrogates the Court's holding in that case.\(^9\) Whether, in fact, § 1367 overrules \textit{Zahn} has also generated much disagreement among the circuit courts.\(^9\)

3. Dueling Interpretations of § 1367

In the decade following the enactment of § 1367, the circuit courts adopted two methods of interpreting the statute. Some courts relied on the text of the statute, and others relied on its legislative history.

a. The Textualist Approach

Those circuits utilizing textualism relied on the express language of § 1367 to conclude that Congress intended to reject \textit{Zahn}'s interpretation of the amount-in-controversy requirement. The Fifth Circuit adopted this method of analysis in \textit{In re Abbott Laboratories}.\(^9\) There, the court examined the amount-in-controversy requirement in the context of Rule 23 diversity class actions.\(^9\) The Fifth Circuit grudgingly acknowledged that legislative history signaled no intent on the part of Congress to overturn \textit{Zahn}.\(^7\) Nevertheless, the court refused to consider this history because it believed the statute to be unambiguous.\(^8\) The court found, consequently, that the statute overpowers \textit{Zahn}.\(^9\)

The Seventh Circuit extended the logic of \textit{Abbott Laboratories} to Rule 20 joinder in \textit{Stromberg Metal Works, Inc. v. Press Mechanical, Inc.}\(^1\) However, the court went further and acknowledged what the authors of the section feared, that § 1367 "has the potential to move from complete to minimal diversity."\(^1\)

\(^{93}\) \textit{See Abbott Labs.}, 51 F.3d at 527 n.5; Freer, \textit{supra} note 64, at 485; Rowe et al., \textit{supra} note 80, at 961 n.91.

\(^{94}\) \textit{See infra} Part II.B.3.

\(^{95}\) 51 F.3d 524.

\(^{96}\) \textit{Id.} at 526.

\(^{97}\) \textit{Id.} at 528.

\(^{98}\) \textit{Id.} at 528–29 ("[T]he statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result.").

\(^{99}\) \textit{Id.} at 529.

\(^{100}\) 77 F.3d 928, 932 (7th Cir. 1996). Although \textit{Zahn} applied to class actions, the Third and Seventh Circuits have held that \textit{Zahn} applies equally to Rule 20 joinder. Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 218 (3d Cir. 1999) (citing Snyder v. Harris, 394 U.S. 332, 337 (1969)); \textit{Stromberg Metal Works, Inc.}, 77 F.3d at 931.

\(^{101}\) \textit{Stromberg Metal Works, Inc.}, 77 F.3d at 932. If diversity exists between at least one plaintiff and the defendants, non-diverse plaintiffs could then join under Rule 20,
b. The Legislative History Approach

Conversely, a minority of circuit courts chose to examine the statute's legislative history and, subsequently, concluded that § 1367 does not repudiate Zahn's interpretation of the amount-in-controversy requirement. The Third Circuit's decision in *Meritcare Inc. v. St. Paul Mercury Insurance Co.* exemplifies this approach. As with Stromberg, the Third Circuit examined the amount-in-controversy rule in the context of Rule 20 joinder. The *Meritcare* court found, however, "there is sufficient ambiguity in [§ 1367] to make resort to the legislative history appropriate." Based on this history, the court held that Congress did not intend to abrogate Zahn.

The Tenth Circuit in *Leonhardt v. Western Sugar Co.* embarked on a slightly different path—known as "sympathetic textualism"—when it analyzed § 1367, but the statute's legislative history guides this method as well. This approach focuses on the different functions of §§ 1367(a) and (b). The Tenth Circuit read

section 1367(a) as having incorporated the joinder and aggregation rules of complete diversity into its requirements that the district court first obtain "original jurisdiction" of the claims in a civil action. . . . [T]he restrictions in section 1367(b) operate to prevent the erosion of the complete diversity requirement that might other-

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102 See *Meritcare*, 166 F.3d at 222; *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 640–41 (10th Cir. 1998).
103 166 F.3d 214.
104 *Id.* at 216.
105 *Id.* at 222.
106 *Id.* With such reliance on legislative history, *Meritcare* effectively reads Rule 20 into the second grouping of § 1367.
107 160 F.3d 631.
109 See *Leonhardt*, 160 F.3d at 640–41; Pfander, *supra* note 65, at 147–48. Justice Ruth Bader Ginsburg asserts that her interpretation of § 1367, which mirrors sympathetic textualism, "does not rely on the measure's legislative history." *Allapattah*, 125 S. Ct. at 2641 n.14 (Ginsburg, J., dissenting). However, she cites the section's legislative history in her dissenting opinion, *id.* at 2640 n.13, and notes that her interpretation of § 1367 is in accord with the legislative history. *Id.* at 2641 n.14 (citing *id.* at 2628–31 (Stevens, J., dissenting)).
110 See *Leonhardt*, 160 F.3d at 639–40; Pfander, *supra* note 65, at 114.
wise result from an expansive application . . . of ancillary jurisdiction.\textsuperscript{111}

Because each plaintiff must satisfy the amount-in-controversy and complete diversity requirements in order for a court to have original diversity jurisdiction,\textsuperscript{112} the omission of Rules 20 and 23 from § 1367(b) do not work as an abrogation of \textit{Zahn} or the complete diversity requirement.\textsuperscript{113}

Consequently, two different approaches emerged over the proper method to interpret § 1367. One focuses solely on the text of the statute, and the other uses legislative history to inform its opinion. The division among the circuits once again called the Supreme Court into the area of supplemental jurisdiction.\textsuperscript{114}

III. \textbf{Allapattah: Caution, Dialogue At Work}

\textit{Allapattah} officially presents "the question [of] whether a federal court in a diversity action may exercise supplemental jurisdiction over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided" some members of the class do satisfy that requirement.\textsuperscript{115} Like \textit{Stromberg}, the Court does not limit its answer to the amount-in-controversy question presented; it looks more fundamentally at the interaction between § 1367 and § 1332.\textsuperscript{116} The Court's analysis provides a window through which one may view the Court's conception of its own power to determine the scope of subject-matter jurisdiction. The Court first divorces its examination from the statute's legislative history.\textsuperscript{117} Then, in an un-Finley-like analysis, the Court responds, through the guise of statutory interpretation, with its own judgment on the proper scope of supplemental jurisdic-

\textsuperscript{111} Pfander, supra note 65, at 114; see also Leonhardt, 160 F.3d at 639-40 (adopting and explaining the sympathetic textualist interpretation of § 1367).
\textsuperscript{112} See \textit{Zahn v. Int'l Paper Co.}, 414 U.S. 291, 311-12 (1973) (requiring each party to satisfy the amount-in-controversy requirement); \textit{Strawbridge v. Curtiss}, 7 U.S. (3 Cranch) 267 (1806) (requiring complete diversity). There is an exception to the general rule of complete diversity—in class actions, it is only applied against the named plaintiffs. See \textit{Supreme Tribe of Ben Hur v. Cauble}, 255 U.S. 356 (1921).
\textsuperscript{113} See Leonhardt, 160 F.3d at 641; Pfander, supra note 65, at 148-49.
\textsuperscript{114} The Supreme Court previously attempted to resolve the split in \textit{Free v. Abbott Laboratories, Inc.}, 529 U.S. 353 (2000) (per curiam).
\textsuperscript{115} Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2615 (2005). Thus, the key question here is the interaction between supplemental jurisdiction as codified in § 1367 and the requirements for diversity jurisdiction. Also, as discussed in the previous part of this Note, the answer to this question will impact Rule 20 joinder.
\textsuperscript{116} See infra Part III.B.
\textsuperscript{117} See infra Part III.A.
tion and the effect of supplemental jurisdiction on the requirements for diversity jurisdiction.118 As a result, the Court's reasoning in Al-
apattah provides support for Professor Friedman's dialogic model.

A. The Role of Legislative History

A key distinction between the congressional power and dialogic models is the judiciary's deference to congressional intent when confronted with questions of jurisdiction. The congressional power model demands that the Court defer to congressional intent when interpreting § 1367. Conversely, no such deference need be given by the Court under the dialogic model.119 The Allapattah Court's reasoning lacks the deference predicted by the congressional power model.

The Supreme Court's interpretation, much like the textualist interpretation employed by several of the circuit courts, rejects the use of legislative history and, instead, relies solely on the text of the statute to determine Congress's intent.120 According to the Court, legislative history is often ambiguous or inaccurate.121 In Allapattah, for example, the Court argues that the statute's legislative history does not clearly indicate a congressional intent to retain the holding of Zahn.122 To support its argument, the Court looks to the seeming ambiguity in the Report of the Federal Courts Study Committee ("Study Committee"), which demarcated the parameters for what would become § 1367.123 Even though the full committee did not endorse a recommendation by its sub-committee to overturn Zahn, the full committee did not explicitly reject this recommendation either.124 The Court finds itself in a dilemma, unable to reconcile the final Study Committee report with the sub-committee's recommenda-

118 See infra Part IIIB.
119 As indicated in Part I, this does not mean that the Court need totally ignore the congressional enactment in order to be consistent with the dialogic model.
120 The Court notes that it must "examine the statute's text in light of [its] context, structure, and related statutory provisions." Allapattah, 125 S. Ct. at 2620. These sources of insight, however, are unable to fully account for all of the provisions of § 1367 as shall be seen later in this Part.
121 Id. at 2626. The Court explicitly declines to hold that legislative materials are inherently unreliable as a source of congressional intent. Id.
122 Id. at 2626–27.
123 Id. at 2626. The Study Committee was established by Congress "to develop a long-range plan for the future of the Federal Judiciary." Fed. Courts Study Comm., supra note 61, at 1 (quoting Federal Courts Study Act, Pub. L. No. 100-702, 100 Stat. 4644, 4644 (1988)).
124 Allapattah, 125 S. Ct. at 2626–27.
Interestingly, though, the title page of the Study Committee’s Working Papers and Subcommittee Reports has the following disclaimer: “In no event should the enclosed materials be construed as having been adopted by the [full] Committee.”

Additionally, the Court criticizes legislative history for being too malleable. In furtherance of this argument, the Court cites the drafters of § 1367. The authors of the statute freely acknowledged that “the legislative history was an attempt to correct the oversight” in the statute’s text, which appears to signal Congress’s displeasure with Zahn. However, a qualitative difference exists between the authors of a statute clarifying the language of their statute, on the one hand, and lobbyists or rogue members of Congress surreptitiously inserting comments in the legislative history to fundamentally alter its meaning on the other.

Justice John Paul Stevens also makes a potent rejoinder to the Court’s second attack on the use of legislative history. The Court is more constrained, according to Justice Stevens, when it restricts itself to “all reliable evidence of legislative intent.” Justice Stevens plays on the ubiquitous, friend-in-the-room analogy to exemplify his point. One may focus on select-segments of a statute’s legislative history to support his or her preferred interpretation of the statute just as one may pick a select group of friends in a crowded room. In the end, however, one is confined to that room. If the Court liberates itself from reliable legislative history, it may ground its interpretation on any external source it chooses, including its own policy preferences.

Finally, the Court argues, “[e]xtrinsic 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.” The Court holds that “§ 1367 is not ambiguous.”

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125 Id. at 2626-27. The Court has previously recognized that silence can be tantamount to approval in certain situations. See id. at 2619 (citing Aldinger v. Howard, 427 U.S. 1, 18 (1976)). The impasse in which the Court finds itself in *Allapattah* appears to be more man-made than genuine. Circuit courts adopting both the textualist and deferential approaches have acknowledged that the legislative history indicates Congress’s desire to retain Zahn. See supra Parts II.B.3.a-b. But see Freer, supra note 63, at 72-79. The legislative history clearly indicates that § 1367 “is not intended to affect the jurisdictional requirements of [§ 1332 diversity jurisdiction] in diversity-only class actions, as those requirements were interpreted prior to Finley.” H.R. Rep. No. 101-734, supra note 60, at 6875.


127 *Allapattah*, 125 S. Ct. at 2627 (quoting Rowe et. al., supra note 80, at 960 n.90).

128 Id. at 2628 (Stevens, J., dissenting).

129 Id. at 2626 (majority opinion).
fore, even if congressional intent could be clarified by the statute's history, its language would control.

In freeing itself from the section's legislative history, the Court claims to restrict its search for congressional intent to the text of the statute.131 "As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."132 However, the Court's interpretation of § 1367 produces its own quandary. It acknowledges that "the omission of Rule 20 plaintiffs from § 1367(b) presents something of a puzzle on [its] view of the statute."133

As an anticipatory response to criticism of its opinion on this point, the Court asserts that other interpretations of § 1367 have similar difficulties.134 Notably, such a statement is in tension with the Court's earlier pronouncement that § 1367 is not ambiguous. The dialogic model foresees a court's claim that it is merely interpreting a vague statute when, in fact, the court is crafting its own judgment on the proper scope of jurisdiction.

If language is as malleable as many scholars today take pleasure in demonstrating . . . we then have a model of congressional primacy, but by the same token, Congress seems to have all the authority of the Crown of Great Britain. Under this interpretation Congress gets the "last" word, but this is (of course) subject to the vagaries of judicial interpretation of congressional will.135

By limiting itself solely to a vague text, therefore, the Court frees itself to approach this jurisdictional question, not as a willing implementer, but as a partner with Congress. The Court, thereby, takes a first, important step toward the dialogic method of analysis—it
implicitly rejects the fundamental premise of congressional superior-
ity that underlies the congressional power model.

B. Driving a Wedge in Diversity Jurisdiction

Released from the confines of congressional intent as expressed in legislative history, the *Allapattah* Court is free to look at Congress's contribution with the independence predicted by the dialogic model. Unlike the Court's previous cases, *Allapattah* must be decided against the backdrop of § 1367. As noted in Part II.B, this statute both endorses much of the Court's earlier jurisprudence and authorizes an expansion of supplemental jurisdiction. The circuit courts recognized that such an expansion could undermine the limiting functions of the dual requirements for diversity jurisdiction. Though it professes otherwise, the Supreme Court's holding cannot be completely justified by either the historical underpinnings of the amount-in-controversy and complete diversity requirements or the texts of § 1367 or § 1332.

1. Historical Justifications for Amount-in-Controversy and Complete Diversity

Jurists and legal scholars cite the fear of bias by a state against the citizens of another state as the chief, historical justification for diversity jurisdiction. Chief Justice John Marshall noted “that the constitution itself either entertains the apprehensions [of bias] . . . or views with such indulgence the possible fears and apprehensions of suitors” that it authorizes diversity jurisdiction. Judge Henry Friendly provided numerous examples in his well-known history of diversity jurisdiction to support such fears of bias. “[A] careful read-

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137 See Hart & Wechsler, *supra* note 16, at 1454–56; Borchers, *supra* note 6, at 79; Friendly, *supra* note 6, at 492. For additional justifications for diversity jurisdiction, see Fed. Courts Study Comm., *supra* note 61, at 118 (summarizing Judge Richard Posner's externality justification); id. at 419 (arguing that diversity jurisdiction also serves to promote the visibility of the national government). To this day, scholars debate the need for diversity jurisdiction.


139 The selection of state judges in that era raised questions of judicial independence and reliability. "The method of appointment and the tenure of the [state] judges were not of the sort to invite confidence. . . . Nor were the practical workings of the system better than one might expect." Friendly, *supra* note 6, at 497. For example, the judges of the Connecticut Supreme Court of Errors "[s]ometimes . . . forsook the bench and themselves pleaded before their fellow assistants. On other occasions they appointed themselves judges of the lower courts and then reviewed their own decisions." *Id.* at 497–98.
ing of the arguments of the time,” according to Judge Friendly, “shows that the real fear was not of the state courts so much as of the state legislatures.”140 In response to political pressure, for instance, many states enacted debtor relief laws,141 which subjected interstate lenders in one state to the political whims of another.142

After ratification of the Constitution, an “initial matter of business [by Congress] was to put the federal judiciary in order.”143 Spurred by fears of bias, Congress authorized diversity jurisdiction and created the still extant amount-in-controversy requirement in its first Judiciary Act.144 Some scholars view the amount-in-controversy requirement merely as a method of artificial docket control.145 The Supreme Court has also held this view and, as such, developed non-

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The practices employed by the state judiciaries at that time could easily lead to manipulation of trial procedures to benefit the state’s resident. See Borchers, supra note 6, at 86. “One recurring complaint about state courts was the delay that defendants (often debtors) could engineer to frustrate plaintiffs (often creditors). Federalists complained about delays of twenty to thirty years in prosecuting actions in the state courts, a staggering time period even by modern standards.” Id. at 95 (footnote omitted).

140 Friendly, supra note 6, at 495. Some state legislatures became de facto courts of last resorts and could, therefore, alter the holdings of lower courts based on popular will. For example, the legislature of New Hampshire “vacated judgments and annulled deeds alleged to have been obtained by fraud, and reversed convictions.” Id. at 498 (footnotes omitted).

141 See id. at 495. After the Revolutionary War, the nation experienced severe economic difficulties. See Borchers, supra note 6, at 87–88.

142 See Hart & Wechsler, supra note 16, at 1454–56; Borchers, supra note 6, at 87–90. This justification has lost much of its weight in modern times due to the Erie doctrine.

143 Borchers, supra note 6, at 98.

144 Even early drafts of the Act contained such amount thresholds. See Borchers, supra note 6, at 99–102.

The required amount in controversy has been increased several times over the years and currently stands at $7,500. 28 U.S.C. § 1332 (2000). The initial Act contained a $500 amount-in-controversy requirement. See Borchers, supra note 6, at 99–100. In 1887–88, Congress increased it to $2000. Since that time, Congress increased the requirement to $3,000 in 1911, to $10,000 in 1958, and to $50,000 in 1988. See William A. Braverman, Note, Janus was not a God of Justice: Realignment of Parties in Diversity Jurisdiction, 68 N.Y.U. L. Rev. 1072, 1091 (1993).

aggregation rules to limit the situations in which the amount-in-controversy requirement could be satisfied.\footnote{146}{See Anderson, supra note 145, at 331. Under this rule, "'claims of several plaintiffs, if they are separate and distinct, cannot be aggregated for purposes of determining the amount in controversy.'" Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 218 (3d Cir. 1999) (quoting 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3704, at 134 (1994)); see also Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2636 (2005) (Ginsburg, J., dissenting) ("[I]n multiparty cases, including class actions, we have unyieldingly adhered to the nonaggregation rule stated in Troy Bank [v. G.A. Whitehead & Co., 222 U.S. 39 (1911)].")} The amount-in-controversy requirement is more than mere docket control however. Judge Friendly's history indicated that the requirement was of great import to the founding generation, particularly proponents of states' rights.\footnote{147}{Id. at 489 (quoting 2 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 397 (Jonathan Elliot ed., Washington 1828)).} A number of Founders feared the effect of diversity jurisdiction on state courts. Patrick Henry, for example, believed that diversity jurisdiction would ultimately lead to the "'destruction of the state judiciaries.'"\footnote{148}{Id. at 499. Massachusetts, for example, proposed a constitutional amount-in-controversy requirement of $1,500. Id. Other states proposed substantive limits on the ability to grant diversity jurisdiction or proposed the elimination of diversity jurisdiction altogether. Id.} To limit the reach of diversity jurisdiction, several states, including Federalist states, proposed constitutional amendments to add an amount-in-controversy requirement for diversity jurisdiction.\footnote{149}{See id. at 499. Massachusetts, for example, proposed a constitutional amount-in-controversy requirement of $1,500. Id. Other states proposed substantive limits on the ability to grant diversity jurisdiction or proposed the elimination of diversity jurisdiction altogether. Id.}

Nevertheless, the Supreme Court reasserts in \textit{Allapattah} the traditional belief that the amount-in-controversy requirement is nothing more than a form of docket control.\footnote{150}{At the outset of its opinion, the Court states the amount-in-controversy requirement "'ensure[s] that diversity jurisdiction does not flood the federal courts with minor disputes.'" \textit{Allapattah}, 125 S. Ct. at 2617.} The Court, agreeing with the textualist interpretation, holds that the statute overturns \textit{Zahn}, which required members of a diversity class action to independently satisfy the amount-in-controversy requirement.\footnote{151}{Id. at 2622.} While "flood control" is a permissible interpretation of the mechanics by which the amount-in-controversy requirement operates, so simple a description does not reflect the import of this requirement—to prevent federal encroachment on the traditional domain of state judiciaries.

While the Judiciary Act introduced the amount-in-controversy requirement in 1789, the Court did not recognize the complete diversity
requirement until 1806. Chief Justice Marshall first articulated the complete diversity rule in *Strawbridge v. Curtiss.*\(^{152}\) Although the Supreme Court initially rationalized *Strawbridge* as an interpretation of § 1332, *Allapattah* acknowledges the rule "is not mandated by the Constitution, . . . or by the plain text of § 1332(a)."\(^{153}\) Instead, *Allapattah* asserts its adherence "to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants."\(^{154}\) If citizens from the same state are on opposing sides of a dispute, the threat of bias, according to the Court, is dispelled, and, thus, the warrant for diversity jurisdiction is substantially diminished.\(^{155}\)

The Court's justification is not completely satisfying. The constitutional grant of diversity jurisdiction is founded on actual or potential bias in state courts and/or legislatures.\(^{156}\) Yet, the Constitution only requires minimal diversity for federal jurisdiction. While complete diversity may be based on the justification for diversity jurisdiction, it does not occupy the whole field. In other words, the actual or potential bias feared by the Founders may still occur, albeit with less frequency, in minimal diversity cases. Much like amount-in-controversy, furthermore, complete diversity has an undeniable affect on a court's docket. Complete diversity excludes those cases that, in the Court's opinion, are less likely to raise fears of bias. In the end, then, complete diversity works in the same manner as amount-in-controversy—"limiting the scope of diversity jurisdiction."\(^{157}\)

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152 7 U.S. (3 Cranch) 267 (1806). Unlike the amount-in-controversy requirement, then, this requirement for diversity jurisdiction does not appear until seventeen years after the Judiciary Act.

153 *Allapattah*, 125 S. Ct. at 2617 (emphasis added) (citation omitted).

154 *Id.* at 2617–18. The Court has previously protected the complete-diversity requirement. As *Allapattah* notes,

[t]he specific purpose of the complete diversity rule explains both why we have not adopted Gibbs' expansive interpretive approach to this aspect of the jurisdictional statute and why Gibbs does not undermine the complete diversity rule. . . . Before the enactment of §1367, the Court declined in contexts other than the pendent-claim instance to follow Gibbs' expansive approach to interpretation of the jurisdictional statutes.

*Id.* at 2618 (emphasis added). *But see supra* note 91 (discussing the relaxation of the complete diversity requirement for diversity class actions).

155 *See Allapattah*, 125 S. Ct. at 2618.

156 *See supra* notes 137–42 and accompanying text.

157 *See Fed. Courts Study Comm., supra note 61, at 566; see also* Howard P. Fink, *Supplemental Jurisdiction—Take It to the Limit!,* 74 Ind. L.J. 161, 163 (1998) (acknowledging that removing the complete diversity rule would result in an inundation of cases unless other measures were taken to reduce this influx); Rowe et al., *supra* note
could have, therefore, focused on the mechanics of the complete diversity rule and interpreted the rule simply as a form of docket control. Unlike its holding for the amount-in-controversy requirement, however, the Supreme Court directed the federal judiciary to apply the complete diversity rule to the entire case because “[i]ncomplete diversity destroys original jurisdiction with respect to all claims.”

In grappling with the effect that § 1367 should have on the scope of supplemental jurisdiction, Allapattah demonstrates the independent analysis predicted by the dialogic model. As Justice Ruth Bader Ginsburg asserts in her Allapattah dissent,

[e]ndeavoring 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. . . . It is not altogether clear why that should be so.

From a prima facie perspective, the Court, as Justice Ginsburg notes, places much more importance on the complete diversity rule than the statutorily-mandated, amount-in-controversy requirement. Of course, neither § 1332 nor § 1367 contain such a hierarchy of importance, and the justifications for both requirements do not appear to warrant such disparate treatment. Alternatively, if the Court interpreted § 1367 in light of its traditional view of the two requirements for diversity jurisdiction, proponents of the congressional power model would have difficulty reconciling the Court’s statements with the reasoning it employs. Congress may alter either the amount-

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80, at 952–53 (“At an extreme, one could abandon [the complete diversity rule] entirely, which effects a potentially enormous expansion in federal diversity jurisdiction, threatening to swamp the federal courts . . . .”). While the Study Committee recommended eliminating diversity jurisdiction, it favored retaining the complete diversity rule because of its limiting function if Congress chose to retain diversity jurisdiction. See Fed. Courts Study Comm., supra note 61, at 566.

158 Allapattah, 125 S. Ct. at 2618. Under the Court’s interpretation, a district court should first look to see if there is complete diversity. If there is, it should then look to see if there is at least one claim that satisfies the amount-in-controversy requirement. If this second requirement is also satisfied, the court has original jurisdiction for those claims and supplemental jurisdiction under § 1367 for all additional claims that do not satisfy the amount-in-controversy requirement.

159 Id. at 2635 n.5 (Ginsburg, J., dissenting).

160 See id. (“Section 1332 itself, however, does not rank order the two requirements.”). Of course, the statute cannot contain such a hierarchy because it fails to mention the complete diversity rule. Given the great insistence by many of the Founding generation for an amount-in-controversy requirement, as previously discussed, one could even argue, though this Note does not, that the amount-in-controversy requirement should be of greater import than the complete diversity rule.
in-controversy or complete diversity requirements by statute because both are based on § 1332. According to the Allapattah Court, statutes enacting such alterations need not speak with "extraordinary clarity in order to modify the rules of federal jurisdiction." However, § 1367 makes no explicit reference to either amount-in-controversy or complete diversity; instead, the statute refers jointly to "jurisdictional requirements of Section 1332." Recall that Stromberg, which similarly adopted the textualist approach, accepted the argument that § 1367 treats both requirements of diversity jurisdiction the same.

In treating the two elements of diversity jurisdiction so differently, the Court signals a partial disagreement with Congress over the scope of supplemental jurisdiction. While the Court willingly accepts the statute's text on the question of amount-in-controversy, it declines the text's invitation to expand supplemental jurisdiction to the point of endangering complete diversity. Despite the Court's espoused deference to congressional will, then, it introduces its own view of the proper scope of supplemental jurisdiction.

Why would the Court so willingly act to diminish one requirement but not the other? A possible explanation is the efficiency justification that lies at the foundation of supplemental jurisdiction.

2. Efficiency Interests Intersect Diversity Jurisdiction

Proponents of the dialogic model argue that the federal judiciary has a "shared responsibility for evaluating the factors influencing the use of federal courts." As Allapattah notes, "Congress had established the Federal Courts Study Committee to take up issues relating to 'the federal courts' congestion, delay, expense, and expansion.'

Just as Congress may consider judicial administration, the federal judiciary may also look to this factor when deciding questions of lower court jurisdiction. The Allapattah Court implicitly considers the efficient administration of federal courts in its analysis. In addressing potential opposition to its holding, the Court argues that "the presence of a claim that falls short of the minimum amount in controversy does nothing to reduce the importance of the claims that do meet this require-

161 Allapattah, 125 S. Ct. at 2620.
162 Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 932 (7th Cir. 1996); see supra text accompanying note 91.
163 Friedman, Different Dialogue, supra note 8, at 52. Judge Posner opines that "judicial economy is an accepted factor in judicial decision-making" when considering questions of jurisdiction. Posner, supra note 145, at 315.
164 Allapattah, 125 S. Ct. at 2634 (Ginsburg, J., dissenting) (quoting Fed. Courts Study Comm., supra note 61, at 3).
This statement may be viewed as a reference to the efficiency justification used in *Gibbs*. If the court considers an underlying claim sufficiently important because it satisfies the amount-in-controversy requirement, the addition of a claim not satisfying that requirement does nothing to reduce the original claim's significance. Thus, it would be more efficient, according to the Court, to authorize supplemental jurisdiction over those individual claims that do not satisfy the amount-in-controversy requirement and allow the entire case to proceed at one time.

However, a similar holding in the context of the complete diversity requirement would have an impact on the overall workload of the federal courts. As previously noted, *Allapattah* directs courts to look at the entire case when they evaluate the complete diversity requirement. As such, federal courts will not be allowed to exercise supplemental jurisdiction over individual, non-diverse plaintiffs. The Court's rejection of a de facto minimum diversity standard prevents "a potentially enormous expansion in federal diversity jurisdiction." Scholars have opined on the detrimental effect such an expansion could have on the federal judiciary. Judge Richard Posner, for example, argued that the size of the courts' diversity docket actually under-represents its workload because diversity cases are generally considered "above-average" in difficulty. By moving away from a complete diversity standard, then, cases that might not otherwise qualify for federal jurisdiction could be heard in federal court.

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165 Id. at 2622.
167 *See supra* note 158 and accompanying text.
168 Rowe et al., *supra* note 80, at 953. Based on 1996 data, "[d]iversity jurisdiction . . . is invoked in slightly less than one-third of the civil cases filed in federal court." Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 122 (2003). Richard Posner has developed a comprehensive summary of the caseloads of the federal district and appellate courts from 1992–95. Posner, *supra* note 145, at 60–61 tbl. 3.2. Based on his data, diversity cases represented approximately 17.5% of the district courts' and 8.6% of the appellate courts' caseloads. However, he notes that these figures may undercount the actual caseload figures. *Id.* at 58 n.6.

Beside decisions affecting federal jurisdiction, other factors can impact the number of cases based on diversity jurisdiction. *See id.* at 95–98, 108.

170 *Id.* at 210; *see also* FED. COURTS STUDY COMM., *supra* note 61, at 429 ("[D]iversity jurisdiction imposes a significant burden on federal courts to decide issues on which they have no special expertise . . . ").

171 Professor Fink argues that there will be efficiency gains from allowing joinder of more parties to a case because there will be fewer overall cases. Fink, *supra* note 157, at 163. While this may be true on some level, at some point the courts would
Consequently, the Court may have used the statute’s ambiguity to promote what it perceived to be the efficient operation of the federal courts while also preserving the integrity of the judicial system.

Accordingly, the Allapattah Court excludes all resources from its analysis of the statute other than the plain text of § 1367 and its long-held perceptions of the two diversity jurisdiction requirements. In doing so, the Court implicitly acknowledges that its own interpretation does not account for all of the statute’s provision. The Court uses the freedom gained by this exercise to examine § 1367 in light of its own considered opinion on the importance of the two diversity jurisdiction requirements and the relative impact of each requirement on judicial administration. As such, the Court, in the guise of statutory interpretation, engages in a dialogue with Congress over the proper scope of supplemental jurisdiction.

C. A Discretionary Counterargument

However, congressional power model proponents could mount a counterargument to this view of the Court’s reasoning. That counterargument would likely be based on Professor Shapiro’s discretionary school. Part I of this Note discussed the difficulty of placing Professor Shapiro’s work within either the dialogic or congressional power models; those concerns will be briefly set aside.

Professor Shapiro argued that “[d]iscretionary decisions that go beyond questions of timing, appropriate forum, and the appropriate form of relief, and that leave an injured person effectively without redress, can seldom if ever be consistent with the fulfillment of [the judiciary’s] duty.”172 However, “Congress has undoubted authority to expand or narrow the range of permissible discretion, and the challenge of responsible statutory construction is to determine the extent to which it has done so.”173 Section 1367(c) explicitly grants courts discretion in their exercise of supplemental jurisdiction.174 Thus, congressional power proponents could argue that § 1367 abrogated both the amount-in-controversy and complete diversity requirements. In order to preserve the efficient administration of justice, however, the Court could simply decline to exercise jurisdiction over cases that failed to satisfy the complete diversity requirement.

172 Shapiro, supra note 28, at 586–87.
173 Id. at 583.
174 See supra note 87 and accompanying text.
However, this counterargument still fails to take account of the Court’s independent analysis of the question presented in Allapattah. First, § 1367 authorizes supplemental jurisdiction beyond that previously sanctioned by the Court.\(^{175}\) If the counterargument is correct, the statute would not prevent the Court from declining to exercise most, if not all, of the additional supplemental jurisdiction authorized by Congress depending on, for example, the vagaries of the judicial workload. A rejection of the statute’s expansive view of supplemental jurisdiction runs contrary to the congressional power model’s foundation of judicial deference.

Second, the Court’s analysis is distinguishable from that used in the counterargument. In Allapattah, the Court fails to hold that § 1367 abrogated both diversity requirements, and it failed to invoke the provisions of subsection (c). Instead, the Court holds that the statute makes a distinction between amount-in-controversy and complete diversity. This distinction, as previously discussed, does not appear on the face of the statute. It is difficult for a congressional power proponent to reconcile the competing propositions that Congress occupies the superior position on questions of subject-matter jurisdiction and that the Supreme Court can so blatantly mischaracterize congressional intent.

Consequently, the counterargument fails to alter this Note’s conclusion that the Court’s analysis in Allapattah is best predicted and explained by the dialogic model.

IV. INSIGHTS INTO THE DIALOGIC MODEL AND SUPPLEMENTAL JURISDICTION

Professor Friedman developed the dialogic model to explain the actual interaction between the federal judiciary and Congress on questions of jurisdiction.\(^{176}\) The Court’s reasoning in Allapattah and its prior jurisprudence support Professor Friedman’s model. The effectiveness of the dialogic model to explain both pre- and post-Finley holdings encourages a re-examination of Finley. The Court’s supple-

\(^{175}\) Per the legislative history of the section, Congress intended § 1367 to preserve pre-Finley holdings while at the same time overturning Finley. See H.R. Rep. No. 101-734, supra note 60, at 6874. Thus, the section permits pendent-party jurisdiction, which the Court refused to sanction in Finley. See Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2621 (2005).

\(^{176}\) See supra Part I.C. Professor Friedman also developed the dialogic model, in part, to move questions to the forefront which, he believed, had been lost in the continual back-and-forth in the strong and mandatory congressional power debate. See Friedman, (Dialogic) Reply, supra note 8, at 492. However, this is beyond the scope of this Note.
mental jurisdiction jurisprudence also helps to clarify the similarities and distinctions, noted in Part I, between Professor Friedman’s dialogic model and Professor Shapiro’s discretionary school.

A. Finley in the Light of Allapattah

As indicated in Part II, the Court laid the modern foundation of supplemental jurisdiction in United Mine Workers v. Gibbs. Without reference to jurisdictional statutes, the Court justified and defined the scope of supplemental jurisdiction and permitted lower federal courts to employ discretion when exercising this type of jurisdiction. Prior to Finley, therefore, the Court’s myriad opinions provided evidence for the dialogic model. However, the Court’s opinion in Finley called into question this longstanding jurisprudence and seemingly signaled the Court’s support for the congressional power model.

Allapattah undermines this interpretation of Finley. Because the Court’s pre- and post-Finley jurisprudence are better explained by the dialogic model, Finley can be recast in light of that model as well. Despite its reiteration of congressional power, the Court’s refusal to overturn Gibbs speaks volumes. The Court could, after all, have overturned its previous precedents and merely waited for Congress to authorize supplemental jurisdiction.

More narrowly, the question presented in Finley concerned the scope of supplemental jurisdiction. In effect, the Finley Court refused to permit the exercise of supplemental jurisdiction over those individuals seeking to join a suit even though they did not have an original basis for jurisdiction. However, the Finley Court explicitly noted that Congress could abrogate the Court’s holding if it chose to do so. Finley can be viewed, therefore, as an invitation for Congress to enter a discussion on the proper scope of supplemental jurisdiction.

177 See supra note 65 and accompanying text.
178 See supra notes 65–69 and accompanying text.
179 See supra note 68 and accompanying text.
180 See supra notes 73–75 and accompanying text.
182 See id. at 556.
183 See id. Again, it should be noted that the dialogic model does not presume conflict among the branches.
B. The Problem of Discretion Revisited

Additionally, the Supreme Court's supplemental jurisdiction jurisprudence clarifies the similarities and differences between Professor Friedman's model and Professor Shapiro's school of thought. As noted in Part I, Professor Shapiro's discretionary approach is in tension with the bimodal construct developed by Professor Friedman. This tension can be seen both in the timing of the branches' interaction and the scope of the judiciary's discretion. A reexamination of Professor Shapiro's work in light of the analysis presented in this Note brings greater clarity to the dialogic model and its interaction with the discretionary school of thought.

The numerous examples cited by Professor Shapiro in his foundational article, *Jurisdiction and Discretion*, are really indicative of two types of discretion. The first type occurs when the judiciary exercises its discretion in a manner consistent with the purpose of the congressional act. Because jurisdictional grants tend to be over-inclusive, a court may "fine tune" the congressional act in order to give effect to the "central purpose of the jurisdictional grant." Alternatively, Professor Shapiro cites examples in which the judiciary gives little credence to congressional intent; instead, it uses discretion to give effect to its own perspective on the matter in question. The former type of discretion is most closely associated with Professor Shapiro's school of thought; the latter type of discretion is synonymous with the dialogic model proffered by Professor Friedman. At its base, consequently, Professor Shapiro's discretionary theory identifies an inherent power vested in the federal judiciary. Professor Friedman grounds his model in this same inherent power. In fact, Professor Shapiro asserts that "[a]ll of [his] examples illustrate the productive dialogue that can occur between the courts and the legislature when

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184 Shapiro, supra note 28, at 587.

185 For example, Professor Shapiro notes that the Supreme Court has imposed limitations on the exercise of federal question jurisdiction despite evidence "that Congress intended the grant to be as broad as the Constitution allowed." Id. at 568. Moreover, courts have exercised discretion in such a way as to make statutory restrictions on jurisdiction meaningless. "The broader language of the Anti-Injunction Act, which dates back to 1793, evidences the same concern, although the Court has rather bluntly construed the Act almost out of existence." Id. at 576 (emphasis added).

186 See, e.g., id. at 576 (discussing the Court's treatment of the Anti-Injunction Act).

187 See id. at 586–87. Returning once again to the square-rectangle analogy, see supra note 59, Professor Shapiro's analysis identifies additional examples of the court acting outside of the square, or the congressional power model. As such, his analysis lends support to the dialogic model.
each recognizes the shared responsibility for defining the contours of the judicial authority. Principles of separation and allocation of powers seldom involve rigid boundaries.”

An important distinction, though, between Professors Friedman and Shapiro appears to be one of timing. Professor Shapiro’s analysis implies that Congress acts first through the adoption of a jurisdictional statute. The courts, then, have an opportunity to “fine tune” the grant through their interpretation and implementation of the statute. If Congress does not support the judiciary’s interpretation, it has the authority to override the decision. In this way, Professor Shapiro’s analysis appears more consistent with the congressional power model. If a court can potentially disregard Congress’s intent when interpreting a jurisdictional statute, however, the enactment of a statute seems of little import. The Court’s jurisprudence, as it evolved after Gibbs and prior to the enactment of § 1367, demonstrates the judiciary’s power to shape jurisdiction pre-statutory enactment.

Was the Court’s pre-Finly jurisprudence a mere aberration that Congress corrected through the enactment of § 1367? Based on the Court’s analysis in Allapattah, the move from the common law-like, pre-§ 1367 analysis to statutory interpretation has had little effect on the Court’s jurisprudence; it still approaches the question from its own, unique perspective. To say, therefore, that § 1367 moved the Court’s jurisprudence from an unconstitutional usurpation of power to a constitutionally permissible implementation of a jurisdictional statute exalts form over reality.

**CONCLUSION**

Returning to the question presented at the beginning of this Note, what is the relative power of the federal judiciary and Congress to control lower federal court subject-matter jurisdiction? Much like Hans Christian Andersen’s tale, Professor Barry Friedman cautions, “what the Court states rhetorically and what the vast body of Supreme Court decisions indicated, are two completely different matters.” Unsatisfied with the Court’s beautifully crafted jurisprudence, Friedman, unlike the fearful courtiers, questioned the Court’s rhetoric. He developed an analytical framework—composed of two models—to re-

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188 Shapiro, supra note 28, at 577 (emphasis added). For example, a court could exercise discretion and refuse to hear a certain class of cases. Under the legislative supremacy principle, Congress could enact another statute to limit the court’s discretion and, in effect, order it to hear such cases.

189 See supra text accompanying note 79.

190 Friedman, Different Dialogue, supra note 8, at 9.
solve this fundamental question. The congressional power model
most broadly contends that Article III grants Congress the ultimate
authority to determine the subject-matter jurisdiction of lower federal
courts. Dialogic model proponents, conversely, argue that a discourse
between the coequal branches actually determines the contours of
lower federal court subject-matter jurisdiction.

The development of supplemental jurisdiction demonstrates the
flexibility and collaboration articulated by the dialogic model. The
Court's early jurisprudence authorized federal courts to exercise sup-
plemental jurisdiction and defined the contours of that jurisdiction.
Later, *Finley v. United States* urged Congress to enter into a dialogue
with the Court over the proper scope of supplemental jurisdiction.
Congress accepted this invitation and *in fact* entered into such a dia-
logue with the Supreme Court when it adopted § 1367. The Supreme
Court in *Allapattah* again exhibits the independence of thought pre-
dicted by the dialogic model. The Court divorced itself from congres-
sional intent as indicated in the statute’s legislative history and used its
own evaluation of the relative import of the dual diversity jurisdiction
requirements to shape its interpretation of § 1367. This history sup-
ports Professor Friedman’s argument that the judiciary, like Congress,
has an independent basis of power through which it can influence the
scope of jurisdiction. In the end, it is this give-and-take between these
independent, coequal branches that determines the proper scope of
lower federal court subject-matter jurisdiction.

While this Note cannot resolve the long-running debate on the
relative power of the judiciary and Congress to shape lower federal
court subject-matter jurisdiction, it does demonstrate that the evolu-
tion of supplemental jurisdiction provides additional support for Pro-
fessor Barry Friedman’s dialogic explanation of this fundamental,
constitutional question.