ABDICATION TO ACADEMIA: THE CASE OF THE SUPPLEMENTAL JURISDICTION STATUTE, 28 U.S.C. § 1367

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I. Introduction

Since the ill-fated decision in *Finley v. United States*,[1] supplemental jurisdiction has provided ample ammunition for academic debate.[2] It is not surprising that Congress' attempt to codify supplemental jurisdiction would prove to be equally fertile ground. Codification of supplemental jurisdiction has some universally recognized benefits. Chief among these is providing federal courts the power to exercise jurisdiction over related claims that form "part of the same case or controversy under Article III of the United States Constitution."[3] By extending supplemental jurisdiction to its constitutional limits, Congress gave the federal courts an important tool to promote judicial efficiency. Likewise, the statute specifically authorizes the use of supplemental jurisdiction to include additional parties. Additionally, the creation of a common concept—supplemental jurisdiction—clarifies the interrelationship between the old concepts of ancillary, pendent, and pendent party jurisdiction. If the statute stopped here, it would undoubtedly have been hailed as a major advance in clarifying jurisdictional issues in the federal courts. The statute, however, went further.

Forged from a general antipathy toward diversity cases, § 1367 went on to restrict the use of supplemental jurisdiction in cases founded solely on diversity of citizenship.[4] These restrictions em-

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1 490 U.S. 545 (1989).

2 *See, e.g.*, Wendy C. Perdue, *Finley v. United States: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539 (1990) (exploring the potential impact of *Finley* on ancillary and pendent jurisdiction); Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247 (1990) (proposing that Congress revitalize supplemental jurisdiction through codification); Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34 (1987) (noting that *Finley* and the subsequent supplemental jurisdiction statute served only to confuse the area of supplemental jurisdiction); Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983) (analyzing supplemental jurisdiction); John H. Garvey, *The Limits of Ancillary Jurisdiction*, 57 TEX. L. REV. 697 (1979) (suggesting that the interpretation of ancillary jurisdiction has been flawed).

3 *See* 28 U.S.C. § 1367(a) (1994).

4 *See* 28 U.S.C. § 1367(b) (1994).

bodied in § 1367(b) have been the main target of blistering criticism from various scholars.[5] These attacks have two common themes. First, the supplemental jurisdiction statute is the product of a triumvirate of meddling academics who sought to impose their own vision of limitations on supplemental jurisdiction. Congress, without concern for either the merits or effects of these restrictions, acquiesced in the limitations. In essence, the language of § 1367(b) is the direct result of congressional abdication to the trio to deal with the problem of supplemental jurisdiction. The second theme is the direct result of this absence of oversight. Not only did Congress ignore the important task of crafting the statute, but the end product is riddled with undesirable effects which could have been avoided with more conscientious drafting.

This article verifies these two general themes. Part II traces the evolution of the restrictions on supplemental jurisdiction in diversity cases. From the initial proposal of a subcommittee of the Federal Courts Study Committee through the actual language adopted in § 1367(b), the unmistakable conclusion is that Congress did indeed abdicate its responsibility for the content of the statute. This delegation might be tolerable if the end result was the adoption of merely noncontroversial legislation. Unfortunately, that is not the case with § 1367(b). Part III examines the alleged deficiencies of § 1367(b). Rather than enter the fray, this section synthesizes the academic criticisms with the drafters' defenses. For each of the major criticisms, examination of the district courts' practical experience under the statute documents the relative merits of this scholarly debate. Having identified deficiencies in the statute, Part IV offers suggestions for reform, allowing Congress the opportunity to absolve its abdication to academia.

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[5] *See infra* Part III A - F. While most of the academic criticism centers around the restrictions on diversity jurisdiction, there is also concern over whether the grant of supplemental jurisdiction in § 1367(a) is discretionary or mandatory. One panel of the Ninth Circuit recently concluded that Congress intended to create a presumption that if power exists under § 1367(a) and is not stripped under (b), supplemental jurisdiction must be granted unless a district court rejects it under one of the enumerated exceptions under § 1367(c). *See* Executive Software North America, Inc. v. United States Dist. Ct., 24 F.3d 1484, 1495 (9th Cir. 1994) (granting mandamus and concluding that supplemental jurisdiction must be asserted unless a § 1367(c) factor is invoked).

II. Evolution of § 1367(b)

The limitations on supplemental jurisdiction embodied in § 1367(b) are the product of several distinct phases of drafting. The concept began with a proposal by a subcommittee of the Federal Courts Study Committee. This proposal was later abandoned by the whole committee in favor of general language endorsing supplemental jurisdiction. The efforts of academics convinced influential congressmen to attempt to codify supplemental jurisdiction. This initial attempt at codification was embodied in H.R. 5381. During the brief congressional hearings on the bill, the subcommittee's diversity limitations were resurrected. Following the cursory congressional hearings, other academics entered the fray to craft additional limitations on supplemental jurisdiction in diversity cases. Having captured the ear of the Chairman of the House Judiciary Subcommittee on Courts, these academics massaged the language of the statute into what became § 1367(b). This so-called noncontroversial recommendation[6] was accepted by Congress without scrutiny as to either the effects or merits of the change. Examination of each of these phases of drafting provides a stellar example of congressional abdication to academia.

A. *Federal Courts Study Committee*

1. Subcommittee on the Role of the Federal Courts

Congress created the Federal Courts Study Committee in 1989 with the express charge to make recommendations to minimize the ever-growing case load of the federal judiciary.[7] To effectively review the many issues before it, this fifteen-member committee divided itself into three subcommittees "described as: (1) role and relationship; (2) workload; and (3) administration, management, and structure."[8] It was the five-member Subcommittee on the Role

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[6] *See* Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 213 n.2 (1991) (describing the intent of Congress to implement the less controversial recommendations of the Federal Courts Study Committee).

[7] Pub. L. No. 100-702, 102 Stat. 4642, 4645 (1988). Specifically, the committee was mandated to examine alternate means of resolving disputes, federal court structure and administration, and classes of disputes undertaken by federal courts. *Id.*

[8] 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS at frontispiece, n.1 (1990) [hereinafter WORKING PAPERS].

of the Federal Courts[9] that first suggested codification of supplemental jurisdiction with limitations for diversity cases.

While embracing the concept of congressional authorization for supplemental jurisdiction,[10] the Subcommittee clearly sought to limit supplemental jurisdiction in diversity cases. This restriction was motivated by the Subcommittees's general hostility for diversity cases,[11] as well as their desire to preserve the complete diversity requirement.[12] The Subcommittee's objective was to suggest to Congress codification of the law as it existed prior to *Finley v. United States.*[13] This proposal would instruct courts not to exercise supplemental jurisdiction in diversity cases "over claims by non-diverse permissive intervenors, or by plaintiffs against non-diverse third-party defendants or defendants joined under Rule 19."[14] The proposal essentially embodies the restrictions enumerated by the court in *Owen Equipment & Erection Company v. Kroger.*[15]

The Subcommittee recognized that their proposal might be both over-inclusive and under-inclusive, but concluded that their solution had "the virtue of simplicity."[16] To deal with the exceptional cases,[17] the Subcommittee suggested an exception to the rule allowing supplemental jurisdiction "if necessary to prevent substantial prejudice to a party or third-party."[18]

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9 The Subcommittee consisted of Judge Richard Posner (Chairman), Congressman Robert Kastenmeier, Keith Callow, Rex Lee, and Larry Kramer (Reporter). *Id.* at frontispiece.

10 *See id.* at 559 ("We recommend that Congress expressly authorize the federal courts to exercise supplemental jurisdiction").

11 *Id.* at 566.

12 *Id.* at 563.

13 490 U.S. at 545.

14 WORKING PAPERS, *supra* note 8, at 567.

15 437 U.S. 365 (1978).

16 WORKING PAPERS, *supra* note 8, at 567.

17 The Subcommittee was concerned about cases where denial of supplemental jurisdiction would be both costly and unfair. *Id.* at 566. They specifically discussed Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Ctr., Inc., 564 F.2d 816 (8th Cir. 1977). Helzberg sued the shopping center in federal court alleging violation of its lease when the shopping center leased space to a competitor, Lord. The Subcommittee speculated that Helzberg might oppose Lord's involvement for settlement reasons. In contrast, both the mall and Lord had strong incentives to participate. The Subcommittee characterized this as a situation where the plaintiff was not trying to avoid complete diversity, and in which the lack of supplemental jurisdiction would be both unfair and inefficient. *See* WORKING PAPERS, *supra* note 8, at 564-66.

18 WORKING PAPERS, *supra* note 8, at 568.

The main focus of the Subcommittee proposal was to restore the law as it existed prior to *Finley*. However, the proposal also intended to make one significant change—to effectively "overrule the Supreme Court's decision in *Zahn v. International Paper Company*,[19] which held that each plaintiff in a diversity class action must meet the amount in controversy requirement."[20] The Subcommittee concluded that "[f]rom a policy standpoint, this decision makes little sense, and we therefore recommend that Congress overrule it."[21]

The Subcommittee's proposal[22] provided the basic framework for restriction of supplemental jurisdiction in diversity cases. There are four important aspects of this initial attempt. First, the draft tries to restrict jurisdiction by reference to plaintiff's claims against persons joined under Rules 14 or 19. This language highlights concern only about plaintiff claims. Likewise, it begins the trend to restrict jurisdiction by reference to specific Federal Rules of Civil Procedure. Second, the proposal also restricts claims by parties who intervene under Rule 24(b). This restriction is significant because it only focuses on permissive intervenors and was designed to codify existing practice. Third, the proposal introduces the use of a general exception clause with the belief that it would handle the exceptional cases arising under the statute. Finally, the proposal inadvertently applies the restrictions to "civil actions under § 1332 of this Title." While the manifest intention was to deal solely with diversity cases, the proposal introduces language which would apply to other cases as well.[23] This first proposal for

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19 414 U.S. 291 (1973).

20 WORKING PAPERS, *supra* note 8, at 561 n.33.

21 *Id.*

22 The Subcommittee's proposal concerning limitations on supplemental jurisdiction as contained in subsection (b) was as follows:

> In civil actions under §1332 of this Title, jurisdiction shall not extend to claims by the plaintiff against parties joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or to claims by parties who intervene under Rule 24(b) of the Federal Rules of Civil Procedure, *provided*, that the court may hear such claims if necessary to prevent substantial prejudice to a party or third-party.

Id. at 567-68 (emphasis in original).

23 It appears from the Report of the Subcommittee that there was never any consideration that the use of "§ 1332" might apply to cases other than diversity ones. The entire discussion on supplemental jurisdiction reflects no consideration of this potential problem area. *See* WORKING PAPERS, *supra* note 8, at 546-68. This inattention to

restriction on supplemental jurisdiction underwent many stages before ultimate codification.

2. Report of the Federal Courts Study Committee

Despite the drafting effort of the Subcommittee, the final Report by the Federal Courts Study Committee (FCSC) did not provide a draft for the supplemental jurisdiction statute. Rather, the brief discussion[24] on supplemental jurisdiction concluded with the general recommendation that "Congress expressly authorize the federal courts to hear any claims arising out of the same 'transaction or occurrence,'" including joinder of additional parties.[25] The Report, however, is completely silent regarding limitations on jurisdiction in diversity cases.[26]

This omission provides the first major problem for understanding the intended scope of the supplemental jurisdiction statute. Because the FCSC does not propose a statute, or even mention restrictions in diversity cases, it is unclear if the full committee report constitutes a rejection of such restrictions or merely oversight.[27] This difficulty is compounded by the fact that the FCSC specifically disclaims the Subcommittee reports and working papers.[28] Consequently, the intention of the Subcommittee has been distilled by the FCSC Report into a mere recommendation that Congress authorize supplemental jurisdiction. It is into this void that the academics plunged.[29]

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drafting makes the Subcommittee proposal applicable to alienage cases under § 1332. For discussion of the effect of this omission, see *infra* Part III.F.

24 The discussion was three paragraphs. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990).

25 *Id.*

26 *Id.* at 47-48.

27 Professor Wolf describes the difficulty of "reading the tea leaves" on this issue. Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1, 42-44 (1992) (describing the difficulty of discerning intent).

28 *See* WORKING PAPERS, *supra* note 8, at frontispiece ("In no event should the enclosed materials be construed as having been adopted by the Committee").

29 Professor Freer suggests one explanation for the oversight. Given the other sweeping recommendations raised by the FCSC, including abolition of diversity jurisdiction, little attention was given to the entire issue of supplemental jurisdiction. *See* Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 470 (1991).

B. *Congressional Proposal H.R. 5381*

Following the release of the FCSC Report, the Congressmen who sat on the committee[30] directed their staffs to draft a bill incorporating the noncontroversial recommendations of the FCSC.[31] They defined "noncontroversial" as those recommendations to which none of them objected or which might draw significant opposition.[32] Enter the academics: on their own initiative, Professors Arthur Wolf and John Egnal[33] drafted their own proposal and submitted it to Congressman Kastenmeier.[34] Despite the fact that three members of the FCSC had opposed the recommendation of supplemental jurisdiction because it included pendent party jurisdiction,[35] the Wolf-Egnal letter convinced Kastenmeier to include the proposal in section 120 of House Bill 5381.[36]

This proposal, as expressed in H.R. 5381, differs considerably from the earlier FCSC Subcommittee proposal. First, it limits its restriction to civil actions "founded solely on diversity of citizenship under section 1332."[37] Unlike the Subcommittee proposal, H.R. 5381 limited jurisdiction by allowing the original plaintiff to assert a non-federal claim only against the original defendant or against a party or person who has been brought into the action by a party or person other than the plaintiff.[38] This restriction was intended to maintain the rule of complete diversity. If, however, the original

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30 The four congressmen were: Representatives Robert Kastenmeier and Carlos Moorhead, and Senators Charles Grassley and Howell Heflin.

31 *See* Wolf, *supra* note 27, at 17 & n.91 (describing a conversation with Charles Geyh, former counsel to the House Judiciary Subcommittee on Courts and staff member responsible for H.R. 5381).

32 *Id.* at 17.

33 Both Wolf and Egnal are professors of law at Western New England College of Law.

34 Wolf, *supra* note 27, at 17. A copy of the Wolf-Egnal correspondence is provided in the Hearings on H.R. 5381. *See Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings on H.R. 5381 and 3898 Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong., 2d Sess. 686-700 (1990) [hereinafter *Hearings*].

35 *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 48 (1990) (noting the dissent of Judge Campbell, Mr. Harrell, and Mrs. Motz).

36 Wolf, *supra* note 27, at 18. *Compare* Wolf-Egnal proposal *reprinted in Hearings, supra* note 34, at 687 *with* H.R. 5381, section 120 *reprinted in Hearings, supra* note 34, at 28-29.

37 H.R. 5381, 101st Cong., 2d Sess. (1990) *reprinted in Hearings, supra* note 34, at 28-29.

38 *Id.*

defendant impleads a third-party defendant, then the plaintiff could use supplemental jurisdiction for his claim against the third-party even in the absence of diversity.[39] This is a direct departure from the Subcommittee proposal which specifically prohibited supplemental jurisdiction over plaintiffs' claims against impleaded third-party defendants.

A final difference included in H.R. 5381 is an exception for removal cases. If an action was removed from state court, the original plaintiff could invoke supplemental jurisdiction in all instances, notwithstanding a lack of complete diversity.[40] Wolf and Egnal justify this exception because it avoids penalizing plaintiffs who tried to bring their case in state court in the first place.[41] These differences invited other academics to offer their proposals on supplemental jurisdiction.

C. *Hearings and the Weis Alternative*

The House Subcommittee on Courts, under the leadership of Chairman Kastenmeier, held a half-day hearing[42] on September 6, 1990 to discuss H.R. 5381. The character of this hearing underscores the willingness of the subcommittee to leave the details of supplemental jurisdiction to the interested academics. Only four members of the subcommittee were even present.[43] Only nine witnesses testified at the hearing.[44] Of those testifying, only four made any reference to supplemental jurisdiction. Judge Deanell Tacha of the U.S. Court of Appeals for the Tenth Circuit offered three minor corrections unrelated to the general operation of sup-

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39 *See* Letter of Arthur Wolf to Robert Kastenmeier (June 8, 1990) *reprinted in Hearings, supra* note 34, at 686, 693 (describing the intention to maintain the rule of complete diversity by restricting jurisdiction over an original plaintiff's non-federal claim against a non-diverse person, but allowing jurisdiction if the party was an impleaded third-party defendant).

40 *See* H.R. 5381, *reprinted in Hearings, supra* note 34, at 29. The restriction on jurisdiction was expressly limited in those cases which had not been removed from a state court. *Id.*

41 *See* Letter of Arthur Wolf, *reprinted in Hearings, supra* note 34, at 693 (offering the rationale for the removal exception).

42 The hearing commenced at 10:10 a.m. and concluded less than four hours later at 1:50 p.m. *Hearings, supra* note 34, at 1.

43 The members present were Chairman Robert W. Kastenmeier, John Bryant, Hamilton Fish, Jr., and F. James Sensenbrenner, Jr. *Id.* There are fifteen members on the subcommittee. *Id.* at II.

44 *Id.* at III.

plemental jurisdiction.[45] Assistant Attorney General Stuart Gerson opposed the entire concept of supplemental jurisdiction on the belief that it would increase the burden on the federal courts.[46] Alan B. Morrison, director of the Public Citizen Litigation Group, strongly supported the supplemental jurisdiction provisions. He specifically endorsed the exception for removed cases, as well as the overruling of *Owen*.[47] Morrison's testimony also foreshadowed the academic debate to follow. While not opposing the restriction on supplemental jurisdiction in H.R. 5381, he questioned "the necessity for the rather complex and difficult to craft exception" and urged the committee "to give serious thought to deleting it."[48]

The most direct discussion of the implications of H.R. 5381 came from Judge Joseph Weis. He recognized that H.R. 5381 went beyond the initial FCSC Subcommittee proposal and would overrule *Owen*.[49] While recognizing that the FCSC Report was "not as precise as it might have been," Weis contended that the FCSC did not intend to "encourage additional diversity litigation in that fashion."[50] Influenced by Professors Thomas Rowe and Larry Kramer, FCSC Reporters, Weis submitted an alternative proposal.[51]

The Weis alternative is basically a return to the earlier FCSC Subcommittee proposal.[52] It returns to the language of § 1332 as

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45 *Hearings, supra* note 34, at 147. Specifically, Tacha recommended deletion of: the 90-day time frame for dismissal or remand on non-federal claims; requirement of a separate written statement for reasons of dismissal or remand; and certification to state courts on state law matters. *Id.*

46 *Id.* at 201. In addition, Gerson believed that the expansion of pendent jurisdiction would allow plaintiffs to use "limited jurisdictional grounds" to bring suits in Federal court which should be in state court. *Id.*

47 *Hearings, supra* note 34, at 217. Morrison felt that this bill would not destroy the diversity requirement because it dealt with "same transaction or occurrence situations," which usually involve tort situations when there is no diversity. *Id.* He believed that the issue was to be litigated, therefore, it was not necessary to bring the action in two courts. *Id.*

48 *Id.* The end result, of course, was a statute that included even greater complexity than either the House version or Weis's alternative.

49 *Hearings, supra* note 34, at 94.

50 *Id.* at 93-94. Weis believes that supplemental jurisdiction should only apply to cases involving a federal question. *Id.*

51 *Id.* at 95.

52 The Weis alternative to § 1367(b) is as follows:

> In any civil action of which the district courts have original jurisdiction under section 1332 of this title, the district courts shall not have supplemental jurisdiction over claims by the plaintiff against persons joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or over

opposed to referring to diversity cases.[53] As with the FCSC Subcommittee draft, it restricts supplemental jurisdiction over plaintiffs' claims against persons joined under Rules 14 and 19. Similarly, this alternative restricts jurisdiction over claims by persons seeking to intervene under Rule 24.[54] However, this contrasts with the FCSC Subcommittee proposal which clearly applied to only 24(b) permissive intervenors.[55] Whether by oversight or design,[56] the Weis alternative applies to 24(a) intervenors of right as well. Consistent with the original FCSC Subcommittee proposal, the Weis version provides no exception for removed cases. Finally, the Weis alternative substitutes new language for the FCSC Subcommittee exception for substantial prejudice. This new exception restricts jurisdiction "when exercising supplemental jurisdiction over such claims would be inconsistent with the complete diversity requirement of section 1332."[57] Given the general absence of congressional interest on the issue of supplemental jurisdiction[58] and the prominence of Judge Weis,[59] it is not surprising that his alternative became the new canvas on which others chose to paint.

D. *Rowe, Burbank & Mengler Version*

The influence of Professors Rowe, Burbank, and Mengler[60] be-

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claims by persons seeking to intervene under Rule 24 of the Federal Rules of Civil Procedure, when exercising supplemental jurisdiction over such claims would be inconsistent with the complete diversity requirement of section 1332.

Hearings, supra note 34, at 98.

53 *See id.*

54 *Id.*

55 *See* WORKING PAPERS, *supra* note 8, at 567-68 (indicating FCSC proposal is only applicable to 24(b)).

56 It may well have been an oversight by Judge Weis. However, given the influence of Rowe and Mengler on Judge Weis's alternative, it was clearly by design on their part to correct this perceived anomaly. *See infra* notes 63-67 and accompanying text.

57 *See supra* note 52.

58 *See supra* notes 42-48 and accompanying text.

59 Judge Weis was the former chairman of the Federal Courts Study Committee. Undoubtedly, his position was influential in deciding which version expressed the intent of the FCSC despite the absence of a clear expression to restrict supplemental jurisdiction in diversity cases in the FCSC Report itself.

60 Thomas D. Rowe, Jr. is a Professor of Law at Duke University. Stephen B. Burbank is the Robert G. Fuller, Jr. Professor of Law at the University of Pennsylvania. Thomas M. Mengler is a Professor of Law at the University of Illinois. The trio is frequently referred to in this article as "the drafters."

gan in the summer of 1990. In the course of monitoring the progress of H.R. 5381, Burbank and Mengler became concerned that the bill might overrule *Owen*.[61] They found it ironic that Congress might enact legislation that would expand diversity jurisdiction, when the FCSC opted to abolish it altogether.[62] Burbank and Mengler alerted former FCSC Reporters Rowe and Kramer to this problem, hoping they would warn Judge Weis of the deficiency.[63] In response, Kramer wrote to Weis suggesting that the original FCSC Subcommittee proposal was a superior alternative.[64] Specifically, Kramer called attention to the *Owen* problem.[65]

At the same time, Mengler began to rework the FCSC Subcommittee proposal. Deciding to "scrap" H.R. 5381's language entirely, and using the FCSC Subcommittee proposal as a framework, Mengler suggested the deletion of the exception and substitution of new language: "when exercising supplemental jurisdiction over such claims would be inconsistent with the complete diversity requirement of section 1332."[66] Mengler also suggested barring claims by any Rule 24 intervenor, not merely permissive intervenors, on the grounds that it was "more consistent with *Kroger*'s rationale than the current case law on 24(a) intervenors."[67]

Following the September 6, 1990 hearing, the Kastenmeier subcommittee drafted a substitute for section 120 of H.R. 5381. Having the ear of Kastenmeier, this substitute was essentially drafted by Rowe, Mengler, and Burbank.[68] The substitute embodied virtually all of the language contained in the Rowe-Burbank-

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61 *See* Letter of Stephen Burbank to Thomas Mengler (Aug. 14, 1990), *reprinted in Hearings, supra* note 34, at 706-07; Letter of Thomas Mengler to Stephen Burbank (Aug. 24, 1990), *reprinted in Hearings, supra* note 34, at 708-10. Mengler believed that § 1317 would allow all intervenors to intervene without diversity. *Id.*

62 *Id. See also* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE at 38-39 (1990) (suggesting the abolition of diversity jurisdiction with certain narrow exceptions).

63 Letter of Thomas M. Mengler to Arthur Wolf (Aug. 24, 1990), *reprinted in Hearings, supra* note 34, at 711.

64 Letter of Larry Kramer to Joseph Weis (Aug. 21, 1990), *reprinted in Hearings, supra* note 34, at 713-15.

65 *Id.* at 714-15.

66 Letter of Thomas M. Mengler to Thomas Rowe (Aug. 28, 1990), *reprinted in Hearings, supra* note 34, at 716-17.

67 *Id.* at 717.

68 *See* Wolf, *supra* note 27, at 18-19 (describing the influence on Rowe, Burbank, and Mengler on the subcommittee and their substitute proposal). The trio also note their own influence in their writings. *See* Thomas M. Mengler et al., *Recent Federal*

Mengler draft of September 11, 1990 submitted to the subcommittee.[69] This proposal[70] retained some of the language of the FCSC Subcommittee and Weis versions. It applies to civil actions where the district court has original jurisdiction "founded solely on section 1332." While this is similar to the earlier versions, it introduces the word "solely."[71] As with the Weis alternative, the general exception to the restriction of jurisdiction of H.R. 5381 was replaced with new language that it applied when exercising jurisdiction was inconsistent with the requirements of § 1332.

The major change from the Weis alternative was an expansion of the laundry list of situations in which jurisdiction was restricted. The Weis alternative applied only to plaintiff claims against persons joined under Rules 14 or 19.[72] The Rowe-Burbank-Mengler version expanded the restrictions to plaintiff claims against persons made parties under Rules 14, 19, 20, or 24, as well as claims by persons proposed to be joined under Rule 19 or those who intervene under Rule 24.[73] These new additions were the by-product of the internal debates between the three professors.[74]

E. *28 U.S.C. § 1367(b) and the House Report*

1. Enactment of § 1367(b)

Under the influence of the triumvirate, the House Subcommittee on Courts accepted a substitute for H.R. 5381 on September 13, 1990 that was essentially identical to the Rowe-Burbank-Men-

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Court Legislation Made Some Noteworthy Changes, NAT'L L.J., Dec. 31, 1990, Jan. 7, 1991, at 20.

69 *See* Wolf, *supra* note 27, at 18-19.

70 The September 11, 1990 proposal by Rowe, Burbank, and Mengler is as follows:

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

Hearing, *supra* note 34, at 722.

71 The use of the word "solely" has implications for whether this section applies to removed cases. *See infra* Part III.D.

72 *See supra* note 52.

73 *See supra* note 70.

74 *See* Letter of Thomas Mengler, *supra* note 61, at 716-17 (explaining the suggested changes to H.R. 5381).

gler draft. The Subcommittee reported the bill favorably with the substitute amendment.[75] By voice vote, the full Judiciary Committee favorably reported H.R. 5381.[76] The House passed H.R. 5381 on September 27, 1990.[77]

The Senate took up the bill a month later on October 27, 1990. The provisions of H.R. 5381 were subsumed in an omnibus bill, the Judicial Improvement Act of 1990.[78] Merging the provisions of various House and Senate proposals concerning the federal judiciary, the language of H.R. 5381 was passed by the Senate that same day. President George Bush signed the bill on December 1, 1990.[79] The efforts of the academics to restrict supplemental jurisdiction in diversity cases became law—28 U.S.C. § 1367(b).

2. The "Legislative History" of the House Report.

While it is possible to trace the genesis of § 1367(b) from the early recommendations of the FCSC Subcommittee through H.R. 5381, the only real expression of congressional intent comes from the House Report on H.R. 5381.[80] This House Report, as the statute itself, can be attributed to the efforts of Rowe, Burbank, and Mengler.[81] This brief discussion of the diversity restrictions in § 1367 reveals some of the trio's intentions.

Initially, the House Report contends that the section implements the recommendations of the Federal Courts Study Committee.[82] The Report makes clear that the statute is intended to codify

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75 H.R. REP. No. 734, 101st Cong., 2d Sess. 16, *reprinted in Hearings*, *supra* note 34, at 330 [hereinafter REPORT].

76 *Id.*

77 Wolf, *supra* note 27, at 19.

78 *Id.*

79 Judicial Improvements Act of 1990, Pub. L. No. 101-650, 1990 U.S.C.C.A.N. (104 Stat.) 5089, 5137.

80 The Senate created no independent report on the effect of codifying supplemental jurisdiction. The only indication of Senate concern for the issue comes from the incorporation of the House Report into comments made by Senator Grassley. *See* 136 CONG. REC. S17577-17583 (daily ed. Oct. 27, 1990).

81 *See* Wolf, *supra* note 27, at 19 n.110 (describing the three as the principal consultants in the drafting of the House Report according to a conversation with Charles Geyh, counsel for the subcommittee). The House Report itself recognized the efforts of the three in the drafting of the language of the statute. REPORT, *supra* note 75, at 27 n.13.

82 Given the absence of any discussion in the FCSC Report concerning restrictions on supplemental jurisdiction in diversity cases, this author finds that statement unhelpful. *See supra* Part II.A.2.

pre-*Finley* practice and allow supplemental jurisdiction.[83] Likewise, the Report indicates congressional intention to restrict such jurisdiction in cases founded solely on diversity of citizenship under § 1332 and to "implement the principal rationale of *Owen*."[84] According to the Report, this rationale is to prohibit plaintiffs from initially naming defendants whose joinder satisfies diversity requirements and later adding claims not within federal jurisdiction who have intervened or been added on a supplemental basis.[85] This also seems to imply that the use of the language "founded solely on section 1332" really means cases founded solely on the diversity provisions of § 1332.

The Report is also helpful in identifying the affect of § 1367(b) in two specific areas. First, the section is not intended to effect the jurisdictional requirements of diversity class action suits. The Report claims in a footnote that both the requirements of diversity of citizenship (as articulated in *Supreme Tribe of Ben Hur v. Cauble*[86]) and amount in controversy (under *Zahn v. International Paper Company*[87]) remain unchanged.[88] In contrast, the Report makes clear that the section "makes one small change in pre-*Finley* practice."[89] The Report identifies the anomaly that under current law a party could intervene as of right under Rule 24(a)[90] and take advantage of supplemental jurisdiction, whereas no supplemental jurisdiction exists under Rule 19 joinder.[91] The statute corrects this anomaly by excluding supplemental jurisdiction in both cases.[92]

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83 REPORT, *supra* note 75, at 28-29.

84 *Id.* at 29 & n.16.

85 *Id.* at 29.

86 255 U.S. 356 (1921).

87 414 U.S. 291 (1973).

88 REPORT, *supra* note 75, at 29 & n.17. It is immediately apparent that the goal of implementation of the FCSC recommendations may conflict with the retention of *Zahn*. While the full FCSC Report says nothing about *Zahn*, the FCSC Subcommittee recommendations expressly indicated the goal of overruling it. *See supra* notes 22-23 and accompanying text.

89 REPORT, *supra* note 75, at 29.

90 The actual House Report refers twice to Rule 23(a) plaintiff-intervenors. Of course, Rule 23(a) concerns the requirements for class actions, not intervention. *See* FED. R. CIV. P. 23(a) & 24(a). Apparently, those who hastily drafted the House Report did not notice this error. What effect, if any, this error will have on the usefulness of the Report as a legislative history remains to be seen.

91 REPORT, *supra* note 75, at 29.

92 *Id.*

3. When a Legislative History Is Not a "Legislative" History.

One inescapable conclusion of this survey of the development of § 1367(b) is the general absence of congressional concern over the impact and merits of this statute. The language of the actual statute was drafted by academics on their own initiative. The restrictions on jurisdiction in diversity cases exploded from the earliest suggestion of the FCSC Subcommittee to the ultimate laundry list of § 1367(b). The House Subcommittee on Courts provided little oversight. When confronted with criticism at the brief hearing, the Kastenmeier committee abdicated to the academics. The end result underscores the House Subcommittee's willingness to let someone else do the actual crafting of the statute. The willingness to let others write the law is compounded by the absence of congressional analysis on the impact of § 1367(b) following the Subcommittee's adoption of the substitute section. Even the House Report was drafted with the help of the academics. The Senate made no meaningful contribution at all. What remains for practitioners and courts to deal with is a statute and legislative history in which Congress played, at best, a small role. With this background, it is not surprising that § 1367(b) is an easy target for scholarly criticism and judicial uncertainty.

III. Point, Counterpoint, and the Real World

Undoubtedly, the circumstances under which § 1367(b) was drafted have contributed to the ensuing scholarly debate on the effects and merits of the statute. Rather than enter this fray,[93] this section synthesizes the academic criticisms of the statute with the drafters' defenses. For each of the six major criticisms, an examination of the most recent case law documents the relative merits of the scholarly arguments.

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93 Professor Wright has characterized this dialogue between the drafters and critics as "an extraordinary series of spirited, and often ad hominem, exchanges." CHARLES T. MCCORMICK ET AL., CASES AND MATERIALS ON FEDERAL COURTS 138 (9th ed. 1992). Professor Chemerinsky calls it a "heated exchange." Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3, 3 (1992). Even the participants recognize the intensity of the discourse. *See* Letter of Richard Freer to Charles Alan Wright (Dec. 16, 1993) (noting the vitriol in the exchange) (on file with the *Seton Hall Legislative Journal*).

A. *The Gaping Hole*

Ironically, the drafters[94] themselves were first to point out the most glaring deficiency in their drafting.[95] This self-proclaimed "gaping hole" stems from the language of the statute. Section 1367(b) specifically bars supplemental jurisdiction only for claims by plaintiffs *against* persons made parties under Rule 20.[96] Under the language of the section, a plaintiff could file a diversity suit and later join a non-diverse *plaintiff* under Rule 20 without running afoul of the language of the statute. The result would circumvent the requirement of complete diversity under *Strawbridge*.[97] Along with the "gaping hole," additional companion deficiencies are present. For example, the statute fails to mention claims against persons made parties under Rule 13(h).[98] Rule 13(h) permits joinder of parties to a counterclaim or cross-claim.[99] Likewise, the statute is silent concerning non-diverse plaintiffs who are joined under Rule 20 as part of the original complaint.[100]

Having been the first to raise the issue, the drafters are obviously aware of this potential problem area. With this recognition, they turn to the courts to rectify the problem. They "hope that the federal courts will plug that potentially gaping hole in the complete diversity requirement—either by regarding it as an unaccept-

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94 "Drafters" refers to Rowe, Burbank, and Mengler who collectively drafted the language of § 1367(b).

95 *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) (describing the gaping hole).

96 28 U.S.C. § 1367(b).

97 Following the self-admission of this drafting problem, several other commentators have identified this as a significant drawback to the statute. *See* Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963, 982 (1991) (arguing the drafting error eviscerates the complete diversity rule); Karen N. Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31, 48-49 (1992) (identifying the problem and calling for a technical correction); Wolf, *supra* note 27, at 40-41 (describing how § 1367(b) does not restrict supplemental jurisdiction of plaintiffs initially or later joined under Rule 20(a)); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 940-41 (1992) (identifying the problem of Rule 20 plaintiffs and calling for congressional amendment); Cami R. Baker, Note, *The Codification of Pendent and Ancillary Jurisdiction: Supplemental Jurisdiction*, 27 TULSA L.J. 247, 254-55 (1991).

98 *See* McLaughlin, *supra* note 97, at 940 (noting the statutory omission and calling on courts to interpret § 1367(b) to prohibit such claims).

99 FED. R. CIV. P. 13(h).

100 McLaughlin, *supra* note 97, at 941 n.476.

able circumvention of original diversity jurisdiction requirements, or by reference to the intent not to abandon the complete diversity rule that is clearly expressed in the legislative history of section 1367."[101] If the courts fail to plug the hole, then the drafters call for a "modest amendment."[102]

In practice, the fear that plaintiffs will file a diversity suit and later try to join non-diverse plaintiffs to circumvent complete diversity has failed to materialize. There are no cases under § 1367(b) where such a brazen attempt to avoid *Strawbridge* is evident. When considering the related omissions, the federal district courts, true to the drafters' hope, have taken the initiative to close the gaps. If the original complaint has non-diverse parties, district courts reject supplemental jurisdiction either on the grounds of an absence of "original jurisdiction"[103] or as being inconsistent with § 1332.[104]

At least one district court has directly addressed the problem of Rule 13(h) parties. In *Mayatextil, S.A. v. Liztex U.S.A., Inc.*,[105] the original plaintiff, Mayatextil, filed a diversity action against Liztex U.S.A for various fraud and contract interference claims. Liztex U.S.A. counterclaimed against Mayatextil and several additional parties under Rule 13(h). These additional parties were not diverse, but Liztex argued for supplemental jurisdiction under § 1367.[106] After noting the omission of Rule 13(h) parties from the laundry list of jurisdiction limitations, the court held that Congress intended § 1367(b) to include Rule 13(h).[107] As a result, this court followed the route the drafters suggested and closed the hole.

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101 Rowe et al., *supra* note 95, at 961 n.91.

102 Thomas D. Rowe, Jr. et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993, 996 n.20 (1991).

103 *See* Miller Parts Co. v. Joe Self Chevrolet, Inc., No. 93-1035-PFK, 1993 WL 246071, at *3 (D. Kan. June 14, 1993) (rejecting supplemental jurisdiction over an original complaint against a non-diverse defendant due to lack of original jurisdiction).

104 *See* Blum v. Toyota Motor Sales, U.S.A., No 90-2428-R, 1991 WL 50259, at *3 (D. Kan. Mar. 5, 1991) (describing a "textbook example of a situation where complete diversity is lacking" and rejecting supplemental jurisdiction over an original claim between a Kansas citizen and the Kansas State Department of Transportation).

105 No. 92 Civ. 4528, 1993 WL 180371 (S.D.N.Y. May 19, 1993).

106 *Id.*

107 *Id.* at *3. The court even noted that Professor McLaughlin had raised this issue in his article and followed his analysis that granting such jurisdiction would be inconsistent with the intent of § 1367(b). *Id.*

Further support for the proposition that district courts will unilaterally close these gaps comes from a flurry of cases where plaintiffs tried to use supplemental jurisdiction to avoid the amount in controversy requirements of § 1332. In some cases, multiple plaintiffs filed claims against defendants where only one of their claims met the $50,000 amount in controversy requirement. In this situation, the courts held that while the statute did not mention original plaintiffs whose claims failed to meet the jurisdictional requirements, the implication of the statute was to prevent "piggybacking" of this sort.[108] Similarly, if a single plaintiff has claims against multiple defendants and one claim fails to meet the amount in controversy requirement, district courts reject the inadequate claims.[109] Given this propensity, it appears that the drafters have correctly predicted that this potential "gaping hole" has not materialized.

B. *Defensive Claims by Plaintiffs and "Law School Exam" Questions*

Another unanswered question concerning the operation of § 1367(b) is whether it restricts supplemental jurisdiction over a claim made by a plaintiff in a defensive posture. For example, if a

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[108] *See* Leung v. Checker Motors Corp., No. 93-C-2704, 1993 WL 515470, at * 2 (N.D. Ill. Dec. 7, 1993) (arguing that the language and legislative history preclude supplemental jurisdiction); Fink v. Heath, No. 91-C-2982, 1991 WL 222178, at *3 (N.D. Ill. October 21, 1991) (contending that when a plaintiff does not have an independent ticket to the federal court, he cannot piggyback on another plaintiff's presence); Griffin v. Data Point Condominium Ass'n, 768 F. Supp. 1299, 1301-02 (N.D. Ill. 1991) (holding that *Zahn* prohibits supplemental jurisdiction in this situation). There is one possible limitation to the weight of this authority. All three cases come from the same federal division—the Eastern Division of the Northern District of Illinois. Two of the cases, *Fink* and *Griffin,* come from the same judge, Milton I. Shadur. *But see* Lindsay v. Kvortek, No. 93-2076, 1994 WL 578535, at *11-12 (W.D. Pa. Sept. 12, 1994) (describing the area of law as "far from clear" and exercising supplemental jurisdiction).

[109] *See* Pellegrino v. Pesch, No. 91-C-4967, 1992 WL 159169, at *6 (N.D. Ill. June 29, 1992) (holding that Congress did not intend to extend supplemental jurisdiction where it was inconsistent with § 1332 and dismissing the inadequate claim); Varga v. Grossfeld, No. 90-C-6652, 1991 WL 93270, at *1 (N.D. Ill. May 23, 1991) (citing § 1367(b) as support for denying supplemental jurisdiction). *But see* Corporate Resources, Inc. v. Southeast Suburban Ambulatory Surgical Ctr., Inc., 774 F. Supp. 503, 505-06 (N.D. Ill. 1991) (holding that § 1367 does grant supplemental jurisdiction over a plaintiff's claims against defendant doctors which did not meet the $50,000 jurisdictional amount). As with the multiple plaintiff issue, this entire body of authority is centered in the Eastern Division of the Northern District of Illinois.

third-party defendant asserts a claim against the original plaintiff, is the original plaintiff's compulsory counterclaim proscribed by the statute? Technically, it would be a claim by a plaintiff against a person made a party under Rule 14 and therefore prohibited. If this is the case, it is arguable that the result is inconsistent with the rationale of *Owen*.[110] Unfortunately, the legislative history of the § 1367(b) does not contemplate this type of scenario.

Despite the number of scholars who have raised the specter of this problem,[111] the drafters summarily dismiss these claims. Describing the situation of plaintiff defensive claims as having "come up far more on law school exams than in reported decisions," the drafters contend that "responsible courts should have little if any difficulty" reading the statute to avoid absurd results.[112]

They suggest that the courts use the language of the final clause of § 1367(b), which restricts supplemental jurisdiction only when it is inconsistent with the jurisdictional requirements of § 1332, as the tool for granting jurisdiction in these cases.[113] Additionally, the drafters turn toward the "expressed congressional intent 'to implement the principal rationale of *Kroger*'" as a way to avoid the "preposterous and ridiculous" results of their scholarly opponents.[114]

Unlike the "gaping hole," the drafters' prediction that the courts would prevent this problem from occurring is wrong. District courts do feel constrained by the language of § 1367(b) and

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110 *See* McLaughlin, *supra* note 97, at 945 (arguing that such a restriction violates the "context and posture" rationale of *Owen*).

111 *See* Freer, *supra* note 29, at 481-82 (pointing out the silence of the statute concerning these defensive plaintiff counterclaims); Arthur & Freer, *supra* note 97, at 983-84 (restating the problem area first identified by Freer); Moore, *supra* note 97, at 54-56 (describing the disparate treatment of plaintiff's defensive claims); Wolf, *supra* note 27, at 40 (describing how a third-party defendant could assert a claim against a plaintiff, but the plaintiff could not counterclaim); McLaughlin, *supra* note 97, at 942-949 (describing the omission and calling for the courts to use the final clause to avoid inequitable results).

112 Rowe et al., *supra* note 95, at 961 n.91.

113 *Id.*

114 *Id.* at 959-60. Others also argue that both the final clause and the House Report may provide evidence to resolve this situation. *See* McLaughlin, *supra* note 97, at 947-48 (agreeing with the drafters that a court could legitimately use this language to grant supplemental jurisdiction, but noting such a conclusion is not compelled by the statute); David D. Siegel, Practice Commentary, 28 U.S.C.A. § 1367, at 833-34 (West 1993) (noting that the last clause could provide courts some leeway in avoiding overly rigid construction).

can reach the strange results the critics hypothesized. The best example is *Guaranteed Systems, Inc. v. American National Can Company.*[115] The original plaintiff, Guaranteed Systems, filed a state court action against National Can for failure to pay for construction work. National Can removed the case to federal court because of diversity of citizenship. National Can then filed a counterclaim against Guaranteed Systems alleging negligence in the construction work. Defending against this counterclaim, Guaranteed Systems answered and filed a third-party action against a subcontractor for indemnity and contribution.[116] The court framed the issue as whether it had supplemental jurisdiction over the state law claim between the plaintiff and third-party defendant, whom the plaintiff impleaded in defense of a counterclaim, when the parties are non-diverse.[117] The court held that the express terms of § 1367(b) precluded jurisdiction since "Guaranteed Systems is clearly a plaintiff in a diversity suit asserting a claim against a non-diverse [sic] third-party defendant made a party under Rule 14."[118]

Underscoring the depth of the court's dilemma is the discussion of how it reached this decision. The court clearly expressed that had it not been for the statute, it would have extended supplemental jurisdiction under these circumstances. Noting that the principal rationale of both *Owen* and § 1367(b) is to prevent a plaintiff from avoiding the diversity requirements by initially naming only diverse plaintiffs and later adding claims against other defendants who have intervened or have been joined on a supplemental basis, the court declared that the rationale was "inapplicable to the third-party action in this case."[119] Not only was Guaranteed Systems haled into the federal forum on removal, but the plaintiff was acting as defendant to National Can's claim when it impleaded the third party. Guaranteed Systems was "simply and sensibly" trying to avoid piecemeal litigation.[120] It is clear from *Guaranteed Systems* that reliance on either the final clause of

115 842 F. Supp. 855 (M.D. N.C. 1994).

116 *Guaranteed Systems*, 842 F. Supp. at 856.

117 *Id.* at 857.

118 *Id.*

119 *Id.*

120 *Id.*

§ 1367(b) or the House Report[121] will not prevent these "law school exam" cases from materializing.[122]

C. *Is Zahn Gone?*

The applicability of § 1367(b) to diversity class action lawsuits is another trouble spot for the statute.[123] The section does not mention Rule 23 class actions in the laundry list of restrictions to supplemental jurisdiction. Since the statute fails to apply limitations on diversity class actions, the general rule of supplemental jurisdiction under § 1367(a) could apply. This would allow plaintiffs to be members of a class despite failure to individually meet the amount in controversy requirement. If this is a correct reading of the statute, the holding in *Zahn v. International Paper Company*,[124] which requires each class member to satisfy the controversy requirement, would be altered by the statute.[125]

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121 The opinion in *Guaranteed Systems* even cited the House Report for the intent behind both *Owen* and § 1367(b), yet rejected it as authority for granting supplemental jurisdiction.

122 *Guaranteed Systems* is not the only case that illustrates this problem. Miyano Mach. USA, Inc. v. Zonar, No. 92-C-2385, 1993 WL 147346 (N.D. Ill. May 3, 1993), also shows how the plain language of the statute can affect supplemental jurisdiction. In *Miyano*, the original plaintiff brought both federal and state law claims against several defendants. Miyano's entire complaint was dismissed, but the defendant Zonar's counterclaim remained, having independent diversity jurisdiction. Since Zonar persisted in continuing with his claims, Miyano sought to reinstate his state law claims under supplemental jurisdiction. Using a literal reading of the statute, the court found that Miyano was still the plaintiff and his claims were precluded by § 1367(b) despite the fact that Miyano was functionally the defendant in the lawsuit.

123 Professor Freer was the first to point out this omission. *See* Freer, *supra* note 29, at 485 (describing the omission of Rule 23 and characterizing the result as overruling *Zahn*).

124 414 U.S. 291 (1973).

125 There is no shortage of commentators who have taken this view. *See* Freer, *supra* note 29, at 485 (stating that § 1367(a) grants jurisdiction to the constitutional limit but excludes § 1332 claims joined by a plaintiff under various rules, excluding class actions, Rule 23); Arthur & Freer, *supra* note 97, at 981 (repeating Freer's earlier argument); Moore, *supra* note 97, at 56-57 (noting that courts and litigants are left with the confusion of whether *Zahn* applies or not); McLaughlin, *supra* note 97, at 973 (pointing out that a court unaware of the legislative history could easily hold that *Zahn* was overruled); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the "Martian Chronicles,"* 78 VA. L. REV. 1769, 1817 (1992) (describing as "unfortunate" the statute's failure to deal expressly with class actions); *But see* HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 6.11, at 6-48 to 6-49 (3d ed. 1992) (describing the probable overruling of *Zahn* as consistent with the reasoning of the Federal Courts Study Committee, on whose recommendation the Act was adopted). Professor Wright also identifies

The uncertainty about the operation of § 1367(b) and class actions is compounded by contradictory statements contained in the legislative history of the statute. The earliest mention of diversity class action lawsuits and supplemental jurisdiction came from the FCSC Subcommittee. The Subcommittee report specifically noted that their intent was to overrule *Zahn*.[126] Since the final version of § 1367 was based on the Subcommittee recommendation and § 1367(b) fails to mention Rule 23, a strong argument can be made that *Zahn* is overruled.[127]

While recognizing the omission,[128] the drafters deny that such a result is mandated by the statute. Instead, they lodge two arguments. First, § 1367(b) is intentionally silent concerning class actions because the restrictions were not intended to apply. Since they were intentionally omitted from the statute, *Zahn* continues to control.[129] Second, they point to the House Report as evidence of the intent to preserve the rule of *Zahn*.[130] Jokingly, they note the "delicious possibility" that Justice Scalia would be forced to use this legislative history or "wipe[ ] *Zahn* off the books."[131] The critics have not been amused.[132]

Undoubtedly, the courts that have been forced into this "delicious possibility" are equally unamused. The conflict between the

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this problem area. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 9, at 39 (5th ed. 1994). Even the Practice Commentary that accompanies the statute in the Annotated Code recognizes this uncertainty. Siegel, *supra* note 114, at 834. In a parallel problem area, Professor Wolf argues that *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), is also overruled by operation of the statute. Wolf believes that since the statute requires compliance with all of the jurisdictional requirements of § 1332, the holding of *Ben Hur*, requiring that only named plaintiffs in a diversity class action must satisfy the complete diversity requirement, is abrogated. *See* Wolf, *supra* note 27, at 41.

126 *See supra* notes 19-20 and accompanying text.

127 *See* NEWBERG, *supra* note 125, at 6-48 to 6-49 (noting the legislative history, but claiming that courts must enforce the ambiguous statute on its terms); Moore, *supra* note 97, at 57 (noting that the Subcommittee Working Papers indicate their intention to overrule *Zahn*); McLaughlin, *supra* note 97, at 973 (describing the possibility of a court overruling *Zahn* based on a reading of the statute).

128 Rowe et al., *supra* note 95, at 960 n.90 ("It would have been better had the statute dealt explicitly with this problem . . . .")

129 Mengler et al., *supra* note 6, at 215.

130 *Id.*; Rowe et al., *supra* note 95, at 960 n.90.

131 Rowe et al., *supra* note 95, at 960 n.90.

132 *See* Arthur & Freer, *supra* note 97, at 981 ("Is it really so amusing that the statute's text and history so contradict each other that it will take a Supreme Court decision to resolve this mess?")

wording of the statute and the legislative history has led to a distinct split in authority from the district courts forced to grapple with the problem. To date, none of the courts of appeals have directly confronted the conflict.[133] The dissension that remains mirrors the academic debate.

On the one hand, there are those courts which appear to have sided with the critics and conclude that *Zahn* is overruled. This approach is illustrated by *Patterson Enterprises, Inc. v. Bridgestone/Firestone, Inc.*[134] and *Garza v. National American Insurance Company.*[135] While neither case deals specifically with a diversity class action, their analysis applies in that context. In *Patterson*, the district court used a mechanical application of § 1367 to grant supplemental jurisdiction to claims filed in the original complaint that did not meet the amount in controversy requirement.[136] The court proclaimed: "If the Congress had intended to exclude situations such as this one from the scope of supplemental jurisdiction, it could have done so just as easily as it excluded ones arising under Rules 14, 19, and 24."[137] The court continued to describe the basic disagreement as to whether *Zahn* is overruled, yet concluded that "the plain meaning of the language of the statute has the effect of overruling *Zahn* in situations such as the one present here."[138] It would appear that this analysis could overrule *Zahn* in class actions.[139]

Using a similar analysis, the court in *Garza* concluded that *Zahn* is overruled. As with *Patterson*, one of the *Garza* plaintiffs had a claim that met the amount in controversy requirement, while others did not.[140] Since these additional plaintiffs' claims were not

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133 The Third Circuit recently took the time to chronicle the academic and judicial debate in a lengthy footnote, but eschewed resolution because none of the plaintiffs in the pending action satisfied the amount in controversy requirement. *See* Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045-46 n.9 (3d Cir. 1993) ("Because no plaintiff alleges more than $50,000 . . . we need not and do not resolve the issue").

134 812 F. Supp. 1152, 1154 (D. Kan. 1993).

135 807 F. Supp. 1256, 1258 n.6 (M.D. La. 1992).

136 *Patterson*, 812 F. Supp. at 1153-54.

137 *Id.* at 1154.

138 *Id.*

139 Surprisingly, the court did leave open the possibility that *Zahn* may still apply in class actions. *Id.* Noting that the legislative history demonstrated that it was not the intention of the drafters to overrule *Zahn* in class actions, it concluded that the merits of the argument had no force because this was not a class action. *Id.* at 1155. Presumably, if the court were confronted with a class action lawsuit, it would be forced to address the vitality of the legislative history.

140 *Garza*, 807 F. Supp. at 1257 (M.D. La. 1992).

specifically prohibited by § 1367(b), the court applied § 1367(a) and granted supplemental jurisdiction.[141] The court was aware of the judicial and academic debate on the vitality of *Zahn* in a class action context, yet maintained that "Congress said what it meant and that the Congress meant what it said—the language of § 1367 unavoidably overrules these pre-§ 1367 cases [like *Zahn*] in those instances where the requirements of § 1367(a) are fulfilled and the exceptions of § 1367(b) are inapplicable."[142] It seems clear from this language that this district court would not uphold *Zahn* in a class action context.

The *Patterson-Garza* analysis, however, has been rejected by the majority of district courts that have addressed *Zahn* in the class action context. Agreeing with the drafters, these courts have found that the legislative history expressed in the House Report preserves the rule of *Zahn* in diversity class actions.[143] Some even directly address the academic critics' argument and reject it outright.[144]

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141 *Id.* at 1257. The court stated that the claims asserted by family members did not constitute claims excluded under subsection (b) of § 1367 to grant supplemental jurisdiction. *Id.*

142 *Id.* at 1258.

143 *See* Riverside Transport, Inc. v. Bell South Telecommunications, Inc., 847 F.Supp. 453, 456 (M.D. La. 1994)(rejecting *Patterson-Garza* and holding no supplemental jurisdiction over diversity class action because each claim did not exceed $50,000); Benfield v. Mocatta Metals Corp., 26 F.3d 19 (S.D.N.Y. 1993)(holding that in the absence of some showing that Congress intended to abrogate *Zahn* it would decline supplemental jurisdiction over class members' claims less than $50,000); Mayo v. Key Fin. Serv. Inc., 812 F. Supp. 277, 278 (D. Mass. 1993) ("The legislative history of 28 U.S.C. § 1367 clearly indicates, however, that the statute was not intended to affect jurisdictional requirements for diversity class actions set forth in *Zahn*"); Averdick v. Republic Fin. Serv., Inc., 803 F. Supp. 37, 45 (E.D. Ky. 1992) (holding that the legislative history indicates no intention to overrule *Zahn* in class actions); Bradbury v. Robertson-Ceco Corp., No. 92-C-3408, 1992 WL 178648, at *2 (N.D. Ill. July 22, 1992) (upholding the rule of *Zahn* in diversity class actions).

144 *See Benfield*, 1993 WL 148978, at *4 (rejecting *Newberg*); *Averdick*, 803 F. Supp. at 45 (rejecting *Newberg*); *Bradbury*, 1992 WL 178648, at * 2 (rejecting "a treatise on federal practice"). *Bradbury* does not make clear what treatise was relied upon. Presumably it was the 1992 version of Moore's Federal Practice. Apparently, the 1992 version of Moore's took the position that *Zahn* was no longer good law. *See* Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 n.9 (3d Cir. 1993) (describing two commentators supporting the view that *Zahn* was gone—Newberg and the 1992 edition of Moore's Federal Practice), *cert. denied*, 114 S. Ct. 440 (1993). The current edition of Moore's takes the contrary position. *See* 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.67, at 700.202 (1993) ("Evidently, the 1990 supplemental jurisdiction statute will not affect these rules. Although the literal terms of the statute would permit class membership in violation of *Zahn*, and the statute mentions no exception for class actions, the legislative history refers to the desire to leave the class actions rules

While this position appears to dominate,[145] the shadow of *Patterson-Garza* still casts itself upon *Zahn*. Given this situation, the critics' prediction that a higher judicial authority will have to resolve the conflict is likely to come true.

D. *Removal Cases*

Another area of deficiency identified by the commentators concerns the applicability of § 1367(b) to cases removed from state court. In essence, it is unclear from the statute if the restrictions apply to removed cases. The language of the statute applies its restrictions to situations where original jurisdiction is founded *solely* on § 1332. When a diversity case is removed from state court, the jurisdiction arguably is based upon both § 1332 and § 1441, the removal statute.[146] If this reading of the statute rings true, the limitations of § 1367(b) do not apply and district courts can exercise supplemental jurisdiction to the full extent allowed under § 1367(a).[147] This creates the anomaly that Mrs. Kroger's case could not proceed if filed in federal district court, but could be maintained if she filed in state court and Owen Equipment had removed the case under § 1441.

As with the class action problem, the legislative history sends conflicting signals. The initial provisions of H.R. 5381 explicitly ex-

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unchanged."); *Id.* ¶ 0.97[5], at 927 ("Apparently, the 1990 supplemental jurisdiction statute does not overrule *Zahn* and will not affect class actions"). Given the disposable nature of Moore's loose-leaf treatise, it is impossible to corroborate the content of the 1992 version. This is certainly one way for commentators to cope with the uncertainties surrounding § 1367.

145 In addition to those cases directly addressing *Zahn* in the context of class actions, the majority of courts examining *Zahn* in general have upheld its requirements. *See supra* note 108 and accompanying text.

146 *See* Freer, *supra* note 29, at 485 (noting the "solely" language in the statute and speculating about the applicability to cases removed under § 1441); *see also* Moore, *supra* note 97, at 58 (explaining that jurisdiction in a removed diversity case is based on both § 1332 and § 1441). Professor Karen Moore, however, also offers a counter interpretation: "[A]rguably removal is simply the technique for moving a case from state to federal court and is not a source of original jurisdiction. Under this approach, the restrictions of § 1367(b) are relevant to removed cases . . . ." It is this approach that Moore believes the courts will follow. *Id.*

147 *Id.*; Joan Steinman, *Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress' Handiwork*, 35 ARIZ. L. REV. 305, 328 (1993) (describing the consequence of holding § 1367(b) inapplicable in removed cases is extending supplemental jurisdiction to the full constitutional limit); Moore, *supra* note 97, at 58 (positing one interpretation allowing unrestricted supplemental jurisdiction in removed cases).

empted removed cases from the restrictions placed on supplemental jurisdiction.[148] This exemption was deleted from the Rowe-Burbank-Mengler version without discussion as to whether this alteration was intended to place removed cases under § 1367(b).[149] The additional inclusion of the word "solely" also feeds speculation that the drafters did not intend to apply the section to removed cases.

The drafters themselves seem somewhat uncertain about the effect of § 1367(b) on removed cases. Initially, they responded to the ambiguity by claiming that they "do not see the problem because section 1441(a) removal depends on the existence of original district court jurisdiction created elsewhere in federal law."[150] Their further comments, however, illustrate the problem. Without explaining whether or not § 1367(b) applies, the drafters believe that the final clause of § 1367(b) extends district courts' flexibility.[151] They conclude that the requirements of § 1367(b) "might not prohibit supplemental jurisdiction over the claim of a plaintiff who did not choose the federal forum against a non-diverse third-party defendant, even though the concern for evasion of diversity requirements persists (albeit in attenuated form)."[152] This response is consistent with the drafters' belief that the final clause provides a loophole for dealing with unusual circumstances.[153]

In practice, the district courts have not responded to the alleged flexibility in application of § 1367(b) to removed cases. There is little thoughtful judicial discussion of whether the statute applies to cases removed from state court or not. Instead, the district courts appear to assume that it applies without analysis. *Lederman v. Marriott Corporation*[154] is a typical example. The New York plaintiff filed suit in state court against a hotel for damages arising

148 *See supra* notes 41-42 and accompanying text. *See also* Steinman, *supra* note 147, at 329.

149 *See supra* note 70 and accompanying text.

150 Rowe et al., *supra* note 95, at 960 n.90.

151 The drafters are not alone in their belief that flexibility is needed here. Professor McLaughlin appears sympathetic to the drafters' position, yet concludes that ". . . this interpretation is not compelled by the statute and requires courts to read the statute creatively." McLaughlin, *supra* note 97, at 951.

152 Rowe et al., *supra* note 95, at 960 n.90; *See also* McLaughlin, *supra* note 97, at 951 (noting that the professors who drafted the statute believe the last clause offers courts the freedom to interpret the statute).

153 *See supra* notes 65, 114 and accompanying text.

154 834 F. Supp. 112 (S.D.N.Y. 1993).

from a robbery and rape in the hotel parking lot.[155] Marriott, a Delaware corporation with its principal place of business in Maryland, removed the action to the Southern District of New York based on diversity of citizenship.[156] After removal, the plaintiff sought to add additional non-diverse defendants.[157] The district court refused on the grounds that § 1367(b) controlled.[158] The court explained that "in cases where jurisdiction is premised on diversity of citizenship under 28 U.S.C. § 1332, supplemental jurisdiction is inapplicable to claims by plaintiffs against persons made parties under [Rule] 19."[159] Interestingly, the court appears to have read out of the statute the word "solely" in determining the applicability of § 1367(b).[160]

Contrary to the drafters' prediction, the final clause does not appear to offer district courts flexibility. *Guaranteed Systems*[161] again illustrates this point.[162] In that removal case, the district court discussed at length how the plaintiff had not voluntarily chosen the federal forum.[163] Rather, the plaintiff was haled into federal court in contravention of his original forum choice.[164] Recognizing no attempt to evade the requirements of the diversity statute or the rationale of *Owen*, the court nonetheless felt bound by the plain language of the statute to apply the § 1367(b) restrictions.[165]

In sum, neither the critics nor the drafters have accurately pre-

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155 *Id.* at 112.

156 *Id.* at 113.

157 *Id.*

158 *Id.*

159 *Id.* at 114.

160 *Lederman* is not an isolated example of the assumption that § 1367 applies to removed cases. *See Also* Mayo v. Key Fin. Serv. Inc., 812 F. Supp. 277, 277-78 (D. Mass. 1993) (applying § 1367 to a removed diversity class action); Cheramie v. Texaco, No. 91-3114, 1991 U.S. Dist. LEXIS 15616, at *5-6 (E.D. La. Oct. 30, 1991) (applying § 1367(b) in a removal case to deny supplemental jurisdiction over a pendent party claim beneath the amount in controversy requirement).

161 842 F.Supp. 855 (M.D.N.C. 1994).

162 For additional discussion of *Guaranteed Systems*, see *supra* notes 115-22 and accompanying text.

163 *Id.* at 857.

164 *Id.* The court stated that this plaintiff did not willingly choose to bring a state-law claim in federal court, which is unlike the plaintiff in *Owen*, who voluntarily chose federal court. *Id.*

165 *Id.* at 857-58. The court noted that, if it were not constrained by the plain language of supplemental jurisdiction statute, it may be influenced by arguments related to judicial economy and fairness and construe plaintiff's claim as one by a defendant rather than a plaintiff and allow it to go forward. *Id.* at 857.

dicted the statute's operation in the context of removed cases. The critics' fear that § 1367(b) would not apply, thereby granting broad supplemental jurisdiction in removed cases, has not materialized. Likewise, the drafters' belief that the operation of § 1367(b) would be tempered with flexibility to avoid inequitable results is equally misplaced. The district courts seem to apply the section to removed cases in the same mechanical fashion as they use with diversity cases initiated in federal court.

E. *19/24 Anomaly*

Ironically, one of the lightning rods of the academic debate on § 1367(b) is an area where both the critics and drafters agree on the operation of the statute. Prior to the adoption of the statute, supplemental jurisdiction did not exist for joinder of parties under Rule 19 or permissive intervenors under Rule 24(b). However, supplemental jurisdiction did apply to claims of an intervenor of right under Rule 24(a), if the intervenor was not characterized as an indispensable party under Rule 19(b).[166] This rare factual situation[167] was nonetheless corrected by § 1367(b). Rather than restrict supplemental jurisdiction in only Rule 24(b) situations, the statute extends the limitation to all claims by those seeking to intervene as plaintiffs under Rule 24. In addition, the statute applies this limitation only for plaintiff intervenors; it is silent concerning defendant intervention.[168]

In this instance, both the statute and the House Report illustrate the drafters' ability to speak with clarity. There is no ambigu-

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166 *See* McLaughlin, *supra* note 97, at 952-53 (describing the pre-statute operation of supplemental jurisdiction in Rule 19 and 24 situations).

167 John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 765-66 n.114 (1991). Professor Oakley underscores just how rare this situation is. Apparently, there is only one reported case where this situation exists. *Id. Drumwright v. Texas Sugarland Co.*, 16 F.2d 657 (5th Cir.), *cert. denied*, 274 U.S. 749 (1927), is labeled as a case "in which a non-diverse necessary party was allowed, possibly erroneously, to intervene as of right by invoking ancillary jurisdiction." *Id.* at 766 n.114. In fact, "[s]o far as any commentator has been able to find, this is the only reported case in which this sequence of events has occurred." *Id.* (quoting 7C CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1917 at 481 (2d ed. 1986)). Not surprisingly, Oakley colorfully describes § 1367(b) as a "sledgehammer" directed at the "head of a single gnat." *Id.*

168 28 U.S.C. § 1367(b).

ity about this "small change in pre-*Finley* practice."[169] The statute prohibits supplemental jurisdiction over all Rule 24 plaintiff intervenors.[170] The House Report clearly expresses this intent.[171] The drafters defend this change as essential to maintain the principal rationale of *Owen*.[172] Arguing for consistency, they proclaim that Congress sensibly chose not to retain this "blemish."[173] Consequently, the academic debate centers on the merits of making this change.[174]

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169 REPORT, *supra* note 75, at 29.

170 *See* 28 U.S.C. § 1367(b), *supra*, note 3. Professor Oakley seems to indicate that this reading is not mandated by the statute. He states that "[t]he vague phrasing of section 1367(b) could also, *but need not*, be construed to go beyond pre-existing law in limiting the availability of ancillary jurisdiction over non-diverse parties seeking to intervene as of right as plaintiffs to protect their interests in litigation brought by others." Oakley, *supra* note 167, at 765 (emphasis added). However, given the plain language of the statute and the House Report, it is unclear how one could avoid the application of § 1367(b) to Rule 24(a) intervenors.

171 REPORT, *supra* note 75, at 29.

> Subsection (b) makes one small change in pre-*Finley* practice. Anomalously, under current practice, the same party might intervene as of right under Federal Rule of Civil Procedure 23(a) [sic] and take advantage of supplemental jurisdiction, but not come within supplemental jurisdiction if parties already in the action sought to effect the joinder under Rule 19. Subsection (b) would eliminate this anomaly, excluding Rule 23(a) [sic] plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19.

Id. (footnote omitted).

172 *See* Mengler et al., *supra* note 6, at 215 (arguing that the modest, but significant change was necessary to be consistent with the spirit of *Kroger*); *see also* Rowe et al., *supra* note 95, at 956.

173 Rowe et al., *supra* note 95, at 956. Given the discussion concerning congressional abdication to the drafters to generate the language and content of the statute, this author is unconvinced that *Congress* made a choice one way or the other. However, the *drafters* definitely made one. Since the earliest proposal from the FCSC Subcommittee specifically applied only to Rule 24(b) intervenors, the expansion is completely at the hands of the drafters. *Compare supra* note 23 and accompanying text (describing the FCSC Subcommittee proposal) *with supra* notes 68-71 (explaining the drafters' intent to broaden the scope).

174 Aside from the drafters themselves, criticism of the merit of this change is universal. *See also* 7C CHARLES ALAN WRIGHT & KENNETH A. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 1917 (Supp. 1993) (stating "This change can be criticized as contrary to the objectives of encouraging efficient joinder and some commentators have noted that it goes beyond the 'modest but significant' alterations stated by the drafters"); Freer, *supra* note 29, at 476-78 (arguing the statute corrects the anomaly the wrong way); Arthur & Freer, *supra* note 97, at 973-74 (reiterating that the statute fixed the anomaly the wrong way); Oakley, *supra* note 167, at 765-66 (describing the reform as "ill-conceived" and "unfortunate"); McLaughlin, *supra* note 97, at 960-61 (describing the change as "unnecessarily restrictive" and "problematic"); 1 JAMES W.

Given the uncharacteristic clarity of both the statute and the legislative history, the courts have no difficulty in applying § 1367(b) to Rule 24 plaintiff intervenors. *Krueger v. Cartwright*[175] shows the application.[176] An injured Michigan driver filed this diversity action against an Indiana driver for damages resulting from a car accident.[177] On its own initiative, defendant's insurance company, also an Indiana resident, sought to be joined as a Rule 19(a) plaintiff; the district court granted the motion.[178] The Seventh Circuit vacated the district court order on the grounds that § 1367(b) specifically prohibits this joinder.[179] In a footnote, the panel explained that the outcome would have been the same if the insurance company had taken "the more conventional route" of intervening as a third-party plaintiff under Rule 24.[180]

While the courts have no difficulty applying the statute to plaintiff-intervenors, the language of the statute creates a secondary problem for the district court. Since the restrictions apply only to plaintiffs, the court must struggle with classification of intervenors as either "plaintiff" or "defendant."[181] This forces the district court to make strange gyrations concerning intervenor alignment, knowing the decision impacts the very basis of jurisdiction. Consider the case of *Colonial Penn Insurance Company v. American Centennial Insurance Company*.[182] Colonial Penn sought a declaratory judgment to determine the rights and obligations of several insurance companies under certain reinsurance agreements.[183] The court's jurisdiction was based on diversity of citizen-

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MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.67, at 700.201 (1993) (describing as "unfortunate" the removal of supplemental jurisdiction over claims by plaintiff intervenors of right).

175 996 F.2d 928 (7th Cir. 1993).

176 Other cases also show the application. *See, e.g.*, Deere & Co. v. Diamond Wood Farms, Inc., 152 F.R.D. 158, 159-60 (E.D. Ark. 1993) (denying supplemental jurisdiction over a Rule 24 intervenor).

177 *Krueger*, 996 F.2d at 929-30.

178 *Id.* at 930.

179 *Id.* at 933.

180 *Id.* at 930 n.6.

181 This problem is not limited to intervenor classification. *See* Avon Insurance, PLC. v. Lubinski, No. C-92-1474-DLJ, 1993 WL 300557, at *3 (N.D. Cal. July 22, 1993) (describing how the original plaintiff tried to characterize the defendant as the "true plaintiff" to defeat supplemental jurisdiction over counterclaims).

182 No. 92 Civ. 3791, 1992 WL 350838 (S.D.N.Y. Nov. 17, 1992).

183 *Colonial Penn*, 1992 WL 350838, at *1.

ship.[184] The rehabilitator of one insurance company, Mutual Fire, sought to intervene as a plaintiff.[185] After noting that § 1367(b) would deny supplemental jurisdiction over the rehabilitator's claim if she intervened as a plaintiff, the court, on its own initiative, decided to classify the rehabilitator as a defendant and allow intervention.[186]

Another example of the difficulty of intervenor alignment is *Atherton v. Casey*.[187] The plaintiff, Atherton, brought a diversity suit for wrongful death against the defendants and their insurance company to recover for the death of Atherton's alleged wife, Ann.[188] Ann's mother[189] tried to intervene under Rule 24(a) asserting wrongful death claims against the insurer and denying that Atherton was Ann's husband.[190] In deciding the intervention issue, the district court essentially split the baby. Concluding that the mother's wrongful death claim classified her as a plaintiff, the court rejected supplemental jurisdiction under § 1367(b).[191] However, noting that the mother's interests were adverse to Atherton on the issue of capacity to sue (i.e. whether Atherton was Ann's husband), the court concluded it would have jurisdiction over this claim because the mother would not be intervening as a plaintiff.[192] The inefficiency of this result, mandated by the language of the statute, is obvious. Two suits with essentially the same parties concerning the wrongful death of Ann will continue.

F. *Alienage Oversight*

The final major criticism lodged against § 1367(b) concerns the scope of its application. Professor Freer was the first to posit that the language of § 1367(b) engulfs alienage cases as well as diversity cases.[193] Despite the fact that there has been little objection

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184 *Id.* at *3.

185 *Id.*

186 *Id.* at *3-4.

187 No. CIV.A.92-1283, 1992 WL 235894 (E.D. La. Sept. 4, 1992).

188 *Atherton*, 1992 WL 235894, at *1.

189 Oddly, Mary Ellen Beattie is both Ann's grandmother and her legal mother by adoption. *Id.* at *1.

190 *Id.*

191 *Id.* at *2.

192 *Id.* Specifically, the court ordered that the mother could re-argue her motion to intervene before the Magistrate Judge provided that it dealt solely with intervention on the capacity issue. *Id.*

193 *See* Freer, *supra* note 29, at 474-75 (describing the "evisceration" of pendent ju-

to supplemental jurisdiction in alienage cases,[194] the statute applies its restrictive limitations to them. Through the use of the phrase "founded solely on section 1332," the statute prohibits supplemental jurisdiction in alienage cases.[195] This inadvertent application has no foundation in any of the history of § 1367(b); nothing in the legislative history gave any hint of this expanded limitation.[196] The imprecise use of § 1332, instead of "§ 1332(a)(1)" or "diversity of citizenship," creates a new limitation on supplemental jurisdiction.

The drafters, however, deny that the statute has this effect. Again they turn to the saving language of the final phrase—"when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."[197] They conclude that the courts are free to reinterpret § 1332's jurisdictional requirements to apply in alienage cases in any way they want.[198] "Section 1367 is neutral on the subject . . . ."[199]

While the academics have batted this issue back and forth, the courts have not had their say. There are no reported cases involving the new statute and its impact on alienage cases. Whether the critics or the drafters have predicted accurately remains to be seen.

IV. Where Do We Go From Here?

While the full panoply of problems suggested by the critics of § 1367(b) has not materialized, the current experience under the statute warrants reform. The question is, what direction should it

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risdiction in alienage cases as the first thing wrong with the statute). While Freer was first, others have followed. *See* Arthur & Freer, *supra* note 97, at 978-79 (describing the alienage oversight and arguing that courts could not seriously ignore the statute's application); Moore, *supra* note 97, at 60-61 (calling for congressional action to correct this deficiency).

194 Freer, *supra* note 29, at 475.

195 *See* Freer, *supra* note 29, at 475. Freer explains that the overbroad reference section 1367(b)'s exception clause prohibits pendent jurisdiction in alienage cases. *Id.*; *see also* Arthur & Freer, *supra* note 97, at 978-79; Moore, *supra* note 97, at 60-61.

196 *See supra* Part II. (describing the evolution of the limitations in § 1367(b)); *see also* Freer, *supra* note 29, at 475 ("Nothing in the legislative history or in a subsequent article by three of the drafters of the statutes suggests that they intended to prohibit pendent parties jurisdiction in alienage cases."); Moore, *supra* note 97, at 61 ("Neither the statute nor the House Report specifically addresses alienage jurisdiction . . . .").

197 Rowe et al., *supra* note 95, at 954.

198 *Id.*

199 *Id.*

take? Taking the most pessimistic view, some critics have called for immediate repeal of the statute.[200] While this "back to the drawing board" approach has some appeal given the scope of criticism lodged at the statute, an alternative solution is desirable. Congress should amend the statute in three distinct ways: immediate minor revisions, major deliberative actions, and a revised disclaimer.

A. *Minor Statutory Revisions*

Two minor, noncontroversial revisions should be immediately adopted by Congress to resolve two of the glaring problems of the statute. First, Congress should plug the "gaping hole" and make clear that § 1367 does not allow supplemental jurisdiction over claims by non-diverse Rule 20 plaintiffs, either when filed with the initial complaint or with subsequent joinder.[201] This will maintain the rule of complete diversity entrenched since *Strawbridge*. This change is consistent with the intent of both Congress and the drafters to maintain, rather than dilute, the complete diversity rule. While the district courts have not had difficulty dealing with this problem,[202] the minor revision enhances the statute's clarity.

Another minor change is to amend the first sentence of § 1367(b) to make clear that that section only applies to cases involving diversity of citizenship. This can be easily achieved by changing the phrase "founded solely on section 1332" to either "founded solely on diversity of citizenship under section 1332"[203] or "founded solely on section 1332(a)(1)."[204] Again, this change is consistent with the intent of both Congress and the drafters. At no point in the legislative process was there any deliberate attempt to apply the statute to alienage cases under § 1332. Despite the fact

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200 *See* Arthur & Freer, *supra* note 97, at 989-90 (arguing for repeal). Another sweeping alternative proposed by some is simply to abolish diversity jurisdiction altogether. This would make all the complaints concerning § 1367(b) moot. *See* Moore, *supra* note 97, at 66-67 (recommending abolition of diversity jurisdiction).

201 For a complete discussion of the "gaping hole" problem, see *supra* Part III.A.

202 As discussed completely in Part III.A., there are no cases where plaintiffs tried to subvert *Strawbridge* with subsequent joinder of non-diverse plaintiffs. In cases where the original complaint included non-diverse plaintiffs, the district courts uniformly reject supplemental jurisdiction. The cases involving amount in controversy deficiencies are in accord.

203 This was the language contained in the original House bill, H.R. 5381. *See supra* note 37 and accompanying text.

204 Professor Karen Moore suggests this simple alternative. *See* Moore, *supra* note 97, at 66.

that the district courts have not yet been troubled by this language,[205] Congress should not be dissuaded from stopping this potential problem before it happens.

B. *Major Deliberative Changes*

1. The Anomaly

There are three other areas where congressional action is needed, but their decision should be the result of a thoughtful and deliberate examination.[206] The first area concerns the resolution of the Rule 19/24 anomaly. Section 1367(b) currently prohibits supplemental jurisdiction over Rule 24(a) plaintiff intervenors of right.[207] While this was a conscious decision on the part of the drafters,[208] it is doubtful Congress considered the implications of this change at all. Since this change in pre-existing law has been roundly criticized, Congress should amend the statute to limit the restriction to Rule 24(b) permissive intervenors. This conforms with both pre-*Finley* law and with the earliest proposal for supplemental jurisdiction, the FCSC Subcommittee proposal.[209] Having returned the law to its pre-existing state, then Congress can thoughtfully decide if they wish to directly address this "gnat" of a problem.[210]

2. Applicability to Removal Cases

While altering its position on Rule 24(a) intervenors requires Congress to rethink an earlier decision, clarification of § 1367(b)'s

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205 *See supra* Part III.F.

206 These suggestions are, of course, premised on the belief that the initial adoption of § 1367(b) was not the result of a careful deliberative process on the part of Congress. This belief is confirmed from the legislative history of the section described in detail, *supra,* Part II.

207 *See* 28 U.S.C. § 1367(b) (restricting supplemental jurisdiction on claims brought by those seeking to intervene as plaintiffs under Rule 24).

208 *See supra* notes 173-74 and accompanying text.

209 *See supra* note 22 and accompanying text.

210 One cannot help but marvel at the amount of ink spilled on this issue given its rarity. This author is sympathetic to Professor Oakley's position. Congressional action on this issue is tantamount to taking a sledgehammer to the head of a single gnat. *See* Oakley, *supra* note 167, at 765-66 n.114. One commentator has suggested statutory reform specifically authorizing jurisdiction over Rule 24(a) plaintiff intervenors, provided they do not meet the criteria for Rule 19(b) parties. *See* Wendy C. Perdue, *The New Supplemental Jurisdiction Statute—Flawed But Fixable,* 41 EMORY L.J. 69, 82 (1992) (suggesting a proposed draft for § 1367(b) revisions).

operation in removal and diversity class action cases does not. In these two areas, the statute is not operating as the drafters intended. Consequently, Congress must step in and resolve both the academic and judicial debate. The application of § 1367(b) to removal cases should be directly addressed. The legislative history illustrates a flip-flop on the topic. H.R. 5381 specifically exempted the restrictions for cases removed from state court.[211] This exemption disappeared in the later versions crafted by Rowe, Burbank, and Mengler. While the drafters maintain that the final clause of the section offers judicial flexibility in application to removed cases, the district courts rigidly apply the section despite the clause.[212] Congress should act thoughtfully. The best approach would be to specifically state that § 1367(b) applies to cases "founded solely on diversity of citizenship under section 1332 or section 1441."[213] The restrictions would apply regardless of whether the lawsuit originated in state or federal court. While the interests of context and posture may not be identical in a case initiated in federal court compared to one removed there by the defendant, consistent treatment seems the superior route.

3. The Vitality of *Zahn*

Similarly, Congress should thoughtfully address the vitality of *Zahn* in class action diversity cases. Despite the footnote in the House Report proclaiming *Zahn* unchanged,[214] the district courts are in discord.[215] Since the legislative history is insufficient to clearly state congressional intent, the district courts should address the issue head-on. The best approach is to reaffirm the Supreme Court's position in *Zahn* and *Ben Hur.* An additional clause should be added to § 1367(b) clearly stating that in diversity class action lawsuits, supplemental jurisdiction may be used to join non-diverse, unnamed class members, provided they satisfy the amount in controversy requirement.[216] This clear expression should resolve any

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211 *See* H.R. 5381, *supra* note 37, at 29.

212 *See supra* Part III.D.

213 A similar suggestion is posited by Professor Perdue. *See* Perdue, *supra* note 210, at 81.

214 REPORT, *supra* note 75, at 29, n.17.

215 *See supra* notes 131-42 and accompanying text.

216 Professor Perdue suggests similar language. *See* Perdue, *supra* note 210, at 82 ("In class action suits, supplemental jurisdiction may be used to join non-diverse [sic] unnamed class members whose claims meet the amount in controversy").

doubts as to supplemental jurisdiction in the class action context.

C. *Revised Disclaimer*

The most difficult problem to resolve is the "law school exam" situation of defensive claims by plaintiffs.[217] While not the routine application of supplemental jurisdiction, Congress should directly address this problem area. The drafters' hope that the final clause would resolve these tough cases is incorrect. The ambiguous wording of the final clause has reduced the phrase to statutory surplusage.[218] The solution is to make clear that the district court can use discretion to avoid bizarre or inequitable results. A model for a revised disclaimer was suggested by the FCSC Subcommittee in their initial proposal. This disclaimer provided that a court could hear claims "if necessary to prevent substantial prejudice to a party or third party."[219]

The challenge for Congress in crafting a new disclaimer is to ensure that it does not swallow the worthwhile restrictions of § 1367(b). Hopefully, the language "substantial prejudice" is strong enough to narrow the exception. In addition, the legislative history accompanying the revised disclaimer should explicitly make clear the restrictiveness of the exception. However, as the experience under the current version of § 1367(b) demonstrates, Congress cannot rely on the legislative history to fill in statutory gaps. Consequently, Congress must specifically provide for the resolution of these situations in the text of the statute.

V. Conclusion

Concern for the operation of § 1367(b) should not overshadow the general benefits of codifying supplemental jurisdiction. Nonetheless, once Congress accepts the task of providing a statutory basis for supplemental jurisdiction, it must carefully draft the language and thoughtfully consider the implications.[220] This was

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217 *See supra* Part III.B (describing defensive claims by plaintiffs).

218 This is not a surprising result since the drafters themselves recognized the final clause was "possibly ambiguous," yet concluded the ambiguity was not harmful. *See* Letter of Thomas Mengler to Thomas Rowe, *supra* note 66, at 717.

219 WORKING PAPERS, *supra* note 8, at 568.

220 This author is reminded of his father's oft-repeated comment that "any job worth doing is worth doing well." Others have been reminded of similar colloquialisms. *See* Thomas C. Arthur & Richard D. Freer, *Close Enough For Government Work:*

not done in 1990. The academic debate, fueled by Congress's inattention, will likely lead to repeated cries for revision. While not of the same magnitude as health care reform or economic revitalization, even supplemental jurisdiction merits careful attention. This does not mean that Congress should draft the statute without guidance. "Guidance," however, does not include allowing a triumvirate of academics to write the statute and include their own restrictions on jurisdiction uncontemplated by Congress. This author joins the ever-growing fold calling on Congress to end its abdication to academia on supplemental jurisdiction.

What Happens When Congress Doesn't Do Its Job, 40 EMORY L.J. 1007, 1007 (1991) (titling their reply piece appropriately).