Congress accepts Supreme Court’s invitation to codify supplemental jurisdiction

Congress’s codification of supplemental jurisdiction in response to the Supreme Court’s decision in Finley serves as a model of successful dialogue between the judicial and legislative branches.

by Thomas M. Mengler, Stephen B. Burbank and Thomas D. Rowe, Jr.

Just before it recessed last October, Congress filled a widening chasm in the jurisdictional authority of the federal courts. That gap, opened by the Supreme Court a little over a year earlier in Finley v. United States,1 was threatening to subvert the federal courts’ power to deal with related matters efficiently, in single rather than in multiple litigation. At risk were the doctrines of pendent and ancillary jurisdiction, which permit parties in many circumstances to litigate an entire controversy, typically all transactionally-related claims, as long as the district court has a statutory basis for asserting subject-matter jurisdiction over a claim raised in plaintiff’s complaint. In legislation that will appear at 28 U.S.C. §1367 (see page 214), Congress has reaffirmed the long-accepted authority of federal courts to hear pendent and ancillary claims, one of a number of recommendations of the Federal Courts Study Committee that were enacted with admirable dispatch.2

Until Finley, the doctrines of pendent and ancillary jurisdiction, jointly labeled supplemental jurisdiction in section 1367, seemed both relatively settled and safe from attack. The contours of pendent claim jurisdiction, allowing a plaintiff in the absence of complete diversity to join to a federal question claim a related state claim, had been sensibly shaped by the Court in United Mine Workers v. Gibbs.3 The federal courts also had largely resolved the details of ancillary jurisdiction, which in many circumstances permits the joinder of otherwise jurisdictionally insufficient claims, including claims by or against additional parties, after the filing of plaintiff’s complaint. Only the existence of pendent party jurisdiction—whether, for instance, jurisdiction over a claim raised in plaintiff’s complaint entails the power to hear a related state claim brought by the same plaintiff against an...

2. The provision is part of the Federal Courts Study Committee Implementation Act of 1990. It is reprinted at 150 Cong. Rec. H13901-07 (daily ed. Oct. 27, 1990). The Act implements several of the less controversial recommendations of the Federal Courts Study Committee, established by Congress to study and report on possible ways to improve the federal court system. Among the Committee’s recommendations that Congress has enacted are modifications of the removal and venue provisions and a 4 year statute of limitations applicable to federal legislation, enacted after the effective date of the Act, creating a right of action but silent as to the applicable limitations period. Moreover, the Committee specifically recommended that Congress codify pendent and ancillary jurisdiction. Federal Courts Study Committee Report 47-48 (April 2, 1990).
additional, nondiverse defendant—had provoked substantial disagreement among the lower courts. Before Finley, the Supreme Court had dealt with pendant party jurisdiction only in limited contexts, and its decisions could be read to suggest that the power was there unless Congress had acted to deny it.4

The Finley case

The 5–4 decision in Finley resolved the uncertainty over pendant party jurisdiction, by rejecting Barbara Finley’s invocation of pendant party jurisdiction in the context of a Federal Tort Claims Act (FTCA) suit. Finley’s husband and children were killed when a plane in which they were flying struck electric transmission wires during its approach to a San Diego airfield. Finley sued the utility company in state court, but when she learned that the Federal Aviation Administration might have been responsible, she brought an action under the FTCA in federal district court, which has exclusive jurisdiction over FTCA suits. Later, Finley tried to append a state law tort claim against a nondiverse defendant, the utility company.3

Finley thus presented the Court with a compelling case for recognizing pendant party jurisdiction: the plaintiff’s federal claim could not be heard in state court; the federal and state law claims were closely linked, and requiring Finley to pursue her claims in two different forums would be sheer waste of judicial resources (or would force her to abandon one if she chose to bring only a single action).

The majority in Finley was aware of the efficiencies.6 It nonetheless felt compelled to order dismissal of the claim against the pendant party because Congress had not affirmatively provided for subject-matter jurisdiction over Finley’s related state claim against the utility company. Although formally limited to FTCA suits, Finley has been interpreted to disapprove of pendant party jurisdiction generally under existing jurisdictional statutes.8 Even more ominously, the Court’s rationale that “with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly,”8 cut a wider swath. Some lower courts already have understood the Court’s language to undermine previously accepted and important forms of supplemental jurisdiction, such as impleader of a non-diverse third-party defendant.10

A fair reading of Finley suggests that the majority was not oblivious to the possible need for a legislative response. Indeed, Justice Scalia’s opinion for the Court virtually invited Congress to fill the jurisdictional gaps its decision had created. “Whatever we say regarding the scope of jurisdiction,” the Court explained, “can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”11 Congress through 28 U.S.C. §1367 has accepted the Court’s invitation.

Section 1367

With a few exceptions discussed below, section 1367 codifies supplemental jurisdiction as it existed before the Finley decision. Theoretical arguments can be made for broadening supplemental jurisdiction even as it existed prior to Finley. But expanding supplemental jurisdiction would require relaxing the requirements for diversity jurisdiction and would cut against the dominant perception, shared by the Federal Courts Study Committee, that federal courts should focus more of their resources on federal question cases and fewer (or none at all) on diversity cases.12 In order to repair Finley’s damage in a noncontroversial manner without expanding the scope of supplemental jurisdiction.

4. See Aldinger v. Howard, 427 U.S. 1, 18 (1976) (federal courts have jurisdiction over pendant parties as long as “Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence”) (Rehnquist, J.). The Supreme Court’s message was far from clear. Compare, e.g., Feigen v. Tolan, Inc., 826 F.2d 1459, 1457-59 (5th Cir. 1987) (approving pendant party jurisdiction in an admiralty case), with Safeco Ins. Co. v. Gayton, 692 F.2d 551, 555 (9th Cir. 1982) (“This circuit historically has been hostile to the concept of pendant party jurisdiction.”).
5. 109 S. Ct. at 205.
6. See id. at 2010 (Finley holding “means that the efficiency and convenience of a consolidated action will sometimes have to be forgone in favor of separate actions in state and federal courts”).
7. Id. at 2007-09.
8. See, e.g., Iron Workers Mid-South Pension Fund v. Tecestorchnology Corp., 891 F.2d 548, 551 (5th Cir. 1990).
12. See Report of the Federal Courts Study Committee, supra n. 2, at 14-15 (justifying recommendation to abolish diversity jurisdiction on grounds that the federal courts should primarily resolve disputes over federal law).
diversity jurisdiction, the statutory measure was therefore framed to restore and regularize supplemental jurisdiction, not to revamp it. Section 1367(a), for example, generally authorizes the district courts to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim that provides the basis of the district court's original jurisdiction. In reaching to the limits of Article III, subsection (a) codifies supplemental jurisdiction at the outer constitutional boundary that existed before Finley's statutory revisionism. Typically, courts have understood the same constitutional case or controversy to include all claims arising out of a single transaction or occurrence or related series of transactions or occurrences.

The second sentence of subsection (a) states, making explicit the federal courts' authority to hear supplemental claims "that involve the joinder or intervention of additional parties," in part simply reinstates the prior settled law. Thus, for example, as under pre-Finley practice, impleader claims against nondiverse third-party defendants are authorized, as are compulsory counterclaims and cross-claims involving additional parties. The second sentence, however, modifies current law by overruling Finley. Congress thus has resolved the controversy over pendent party jurisdiction by providing the explicit statutory authorization found lacking and regarded as necessary by the Finley majority.

Subsection (b) restricts the federal courts' exercise of supplemental jurisdiction in diversity cases by, in effect, codifying the principal rationale of Owen Equipment & Erection Co. v. Kroger. In Kroger, the Court held that when jurisdiction rests solely on the general diversity statute, 28 U.S.C. § 1332, no supplemental jurisdiction exists for a plaintiff's claim against a nondiverse third-party defendant. To allow supplemental jurisdiction in this circumstance, the Court explained, would encourage plaintiffs to evade the complete diversity requirement of 28 U.S.C. § 1332 by naming initially only defendants of diverse citizenship and waiting for them to implead nondiverse defendants. Subsection (b) fully implements the Kroger rationale by prohibiting the district courts, in actions founded solely on the diversity statute, from exercising supplemental jurisdiction over claims by plaintiffs against persons made parties through any of several of the joinder devices of the Federal Rules of Civil Procedure—impleader under Rule 14, compulsory joinder under Rule 19, permissive joinder under Rule 20, or intervention under Rule 24—when doing so would be inconsistent with the jurisdictional requirements of section 1332.

In the same vein, the subsection also prohibits the exercise of supplemental jurisdiction in connection with the joinder or intervention of persons as plaintiffs when it would be inconsistent with section 1332. Class actions under Federal Rule of Civil Procedure 23 are not included in the diversity cases to which the restrictions in subsection (b) apply, and the legislative history makes clear that section 1367 is not intended to affect their jurisdictional requirements as previously determined. Thus, the Supreme Court's holdings that only the named class representatives must satisfy the citizenship requirement of section 1332 but that all class members must satisfy the amount in controversy requirement, remain good decisional law.

Subsection (b) alters prior law in one modest but significant way, we think in a manner consistent with the spirit of Kroger. Anomalously, cases predating section 1367 held that a person might intervene as of right under Federal Rule of Civil Procedure 2(a) on a supplemental basis, but the same person would not come within supplemental jurisdiction if the person was sought to be joined under Federal Rule 19. This disparity, which may have had the effect of encouraging certain nondiverse plaintiffs to evade the diversity requirements by intervening in an action shortly after it was filed by diverse plaintiffs, has been abolished in subsection (b). Now, that person can neither intervene as a plaintiff under Rule 2(a) nor be joined as a plaintiff under Rule 19 if intervention or joinder would be inconsistent with the diversity requirements. In these circumstances, courts should not only deny intervention or joinder, but also consider dismissing the entire action pursuant to Rule 19 when significant interests would be prejudiced by the absentee's exclusion from the action.

Subsection (c) provides federal courts with discretion in some circumstances to decline to exercise supplemental juris-
diction. It codifies those factors that the Supreme Court in United Mine Workers v. Gibbs recognized as providing a sound basis for a lower court’s discretionary decision to decline supplemental juris-
diction.24 Under subsection (c), a district court may dismiss a supplemental claim if it raises a novel or complex issue of state law, substantially predominates over the claim or claims over which the district court has original jurisdiction, or if the district court has dismissed all claims over which it has original juris-
diction and judicial efficiency does not clearly favor adjudicating the supple-
mental claim.25 Additionally, the subsection accommodates exceptional circum-
stances, not defined, in which grounds for dismissal of the supplemental claim may be compelling. In each of these circum-
cstances, the House Report cautions, the district court in exercising its discre-
tion must undertake a case-specific analysis.26 Illustrative is Perez v. Ortiz.27 In Perez, the Second Circuit reversed the district court for failing to articulate any reasons for dismissing pendant state claims brought by five plaintiffs in a federal civil rights suit under 42 U.S.C. §1983; the district court may simply have had a docket-clearing practice of dis-
missing pendant claims.

Dismissing claims
The possibility that a district court may dismiss supplemental claims brought by one or more parties raises a variety of concerns. Section 1367(d) addresses one of these issues, and the House Report discusses a few others. One concern is that a party, in refiling a claim in state court after the federal court has dis-
missed it, may face a limitations prob-
lem. Congress has explicitly addressed this problem in subsection (d) by providing a period of tolling of statutes of lim-
itations for any supplemental claim that is dismissed and for any other claims voluntarily dismissed at the same time or thereafter. These claims are tolled for 90 days after they are dismissed, unless state law provides a longer period. As the House Report notes, the purpose of sub-
section (d) is to prevent the loss of claims to statutes of limitations where state law fails to toll the running of its limitations period while a supplemental claim is pending in federal court.28 Moreover, subsection (d) eliminates any disincen-
tive to parties who wish to litigate their entire action in state court after their supplemental claims have been dis-
missed, by providing a tolling period of at least 90 days (more if state law allows) for the nonsupplemental claims voluntarily dismissed in federal court and refilled in state court.29

In effect, section 1367(d) contemplates, without specifically addressing the procedural means for doing so, that some parties will desire to take their entire action to state court if they are prohibited from raising some or all of their supplemental claims in federal court. Those procedures, the House Report notes, already exist in Federal Rule of Civil Procedure 41(a). The standards generally governing voluntary dismissal under Rule 41(a) should control here as well.30 Not all parties, of course, will choose or be able to refile their entire action in state court after their supplemental claims are dismissed.31 Some will con-
tinue to litigate what is left of their federal action in federal court, while choosing to refile their supplemental claims in state court. When the district court has exercised its discretion to dismiss a supplemental claim pursuant to subsection (c), a party is forced by court order to split a single “constitutional case” between the federal and state court systems, if that party wishes both to retain its right to a federal forum and to pursue the supplemental claim in a forum that will adjudicate it. To ensure that a party is not discouraged from litigating in fed-
eral district court the claims that are within its original jurisdiction, the House Report advises the district court, “in deciding that party’s claims over which the court has retained jurisdic-
tion, [to] accord no claim preclusive effect to a state court judgment on the supplemental claim.”32 Thus, if the supple-
mental claim reaches final judgment in the state court before the federal dis-
A text appears here.

Conclusion
Congress’s codification of supplemental jurisdiction in response to the Supreme Court’s decision in Finley serves as a model of successful dialogue between the judicial and legislative branches, dialogue that was facilitated by the work of the Federal Courts Study Committee. In May 1989, the Court in Finley rejected the exercise of pendant party jurisdi-
cation without explicit statutory authori-
tization, raised doubts concerning the statutory basis for other forms of supple-
mental jurisdiction, and, in the opinion itself, suggested that Congress could provide a statutory grounding. Just 17 months later, Congress responded by codifying supplemental jurisdiction largely as it had evolved through judi-

cial decisionmaking. In so doing, Con-
gress preserved the federal courts as hos-
pitable forums for the resolution of entire cases or controversies within original federal jurisdiction.

25. See Carnegie-Mellon University v. Cohill, 484 U.S. 343, 359 n.7 (1988) (Gibbs’ statement that supplemental claims should be dismissed after the claims within the court’s original jurisdiction have been dismissed is not an inflexible mandate but a guideline for the exercise of judicial efficiency).
27. 819 F.2d 795, 799 (2d Cir. 1987).
28. House Report, supra n. 19, at 30. This provi-


dío implement in specific context a general recommenda-
tion of the American Law Institute in its 1960 Study of the Division of Jurisdiction Between State and Federal Courts, §1386(b), at 65. In section 1386(b), the ALI recommended that Congress enact legislation providing that if an action timely filed in federal court is dismissed for lack of subject-matter jurisdiction, a litigant should have 90 days to refile the action in state court. The ALI considered and rejected the contention that such a provision was unconstitutional as being an “invaded exercise of federal power to direct a state court to entertain such a cause if it would be barred under the state’s own law.” Id. at 453 (supporting memorandum commenting on the ALI’s analysis of the constitutional issue).
30. Id.
31. Indeed, when the nonsupplemental claims are within the exclusive jurisdiction of the federal courts, a party must spin its action in order to litigate both the exclusive federal claims and the supplemental claims that have been dismissed—
which could be a reason for the federal court to exercise its discretion to retain the supplemental claims.

THOMAS MENGLER is an associate profes-
sor at University of Illinois College of Law, visiting this year at SMU School of Law. STEPHEN BURBANK is a professor at Uni-
versity of Pennsylvania Law School. THOMAS ROWE is a professor at Duke Uni-
viersity School of Law.

The authors participated in the drafting of the legislation codifying supplemental juris-