

The Discretionary Exercise of Supplemental Jurisdiction Under the Supplemental Jurisdiction Statute¹

Since the inception of the federal system of government in the United States, federal courts have continuously been required to strike a balance between jurisdictional limitations and the efficient adjudication of related claims. In response to the clamor for efficiency and contrary to the jurisdictional limits set by Congress, the federal judiciary developed the doctrines of pendent and ancillary jurisdiction. These doctrines allow a party with a claim within the federal court's original jurisdiction to have related state-law claims heard with the federal claim so that the entire case can be resolved in one proceeding, even though there is no independent jurisdictional basis for the pendent or ancillary claims.

In the past fifteen years the Supreme Court has gradually eroded the conceptual and constitutional underpinnings of pendent and ancillary practice, which have become a staple in the litigation community. Most recently the Supreme Court, in *Finley v. United States*² refused to allow a court to exercise pendent party jurisdiction because Congress had not specifically allowed the court to exercise such jurisdiction.³ Although the facts of *Finley* dealt exclusively with pendent party jurisdiction, many interpreted the Court's reasoning as threatening the future of these efficiency promoting devices. Congress, recognizing the value of pendent and ancillary jurisdiction, responded by passing the supplemental jurisdiction statute which merged the doctrines of pendent and ancillary jurisdiction and provided a statutory basis for its exercise.⁴

1. The author would like to thank Professor C. Douglas Floyd for his encouragement and feedback while writing this Comment. The views expressed herein, and any errors, however, remain the author's.

2. 490 U.S. 545 (1989).

3. *Id.* at 548.

4. 28 U.S.C. § 1367 (Supp. 1993).

As developed prior to *Finley* and the enactment of the supplemental jurisdiction statute, the decision to exercise pendent and ancillary jurisdiction over non-federal claims was left to the discretion of the court.⁵ In making that decision the court was to consider comity, efficiency, judicial economy, fairness to the litigants, and all aspects of the litigation.⁶

Yet the supplemental jurisdiction statute seems to have changed the common law by constraining the bench's discretion. As enacted, the statute suggests a modicum of discretion is left to the courts with its use of the words "may decline jurisdiction," but that discretion appears to be exercisable only in specifically listed factual circumstances. Additionally, the statute does not specifically incorporate comity, efficiency, judicial economy, and fairness, the factors constituting the core of the common law's discretionary analysis.

This Comment analyzes how the supplemental jurisdiction statute has constrained a court's discretion to hear supplemental claims and explores the distinct approaches to judicial discretion taken by the various courts as they build foundational case law around this relatively new statute. Part I explores the history of modern pendent and ancillary jurisdiction practice, the case law leading up to the codification of supplemental jurisdiction, and the supplemental jurisdiction statute. Part II examines the discretionary portion of the supplemental jurisdiction statute and how it differs from prior common-law practice. Part III looks at each of the statutory bases under which a judge can decline to exercise jurisdiction in more detail, including their origin, how they differ from pre-codification practice, and unique problems that may arise under each of them. Part IV explains and distinguishes the various approaches courts have taken in the discretionary exercise of supplemental jurisdiction after its codification.

I. HISTORY AND DEVELOPMENTS LEADING TO THE ENACTMENT OF THE SUPPLEMENTAL JURISDICTION STATUTE

In the beginning, Justice Marshall provided for expansive jurisdiction of the federal courts. He positioned the Constitution's jurisdictional limits on the federal courts at the

5. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

6. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988).

ends of reason. As long as an original ingredient of the claim involved a federal element, no matter how remote from the actual substance of the claim, a federal court could hear the case.⁷ But the Constitution alone does not set the jurisdictional limits. Those limits are established by the affirmative grants of jurisdiction that Congress allots to the judiciary within the limits of the Constitution.⁸ However, Congress has never granted jurisdiction to the federal judiciary that extended to the constitutional limit as expressed by Justice Marshall in *Osborn*. The resulting gap creates significant problems for litigants.

In the past, when faced with a situation that gave rise to both federal and state claims, a litigant was forced to choose either to forego the state claims and sue in federal court, to bring the federal claims in state court, or to litigate in both forums simultaneously. As none of these options was particularly appealing, the federal courts, in an effort to streamline the judicial process, relied upon the conceptual basis established by *Osborn* to develop the doctrines of pendent and ancillary jurisdiction.

The law of pendent and ancillary jurisdiction entered the modern era with the Supreme Court's decision in *United Mine Workers v. Gibbs*.⁹ The *Gibbs* decision allowed expansive jurisdiction over pendent claims,¹⁰ and was subsequently

7. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824): [W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

8. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 442 (1850): [T]he disposal of the judicial power . . . belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the Federal courts to every subject which the Constitution might warrant. . . . Both the Constitution and an act of Congress must concur in conferring power upon the Circuit Courts.

9. 383 U.S. 715 (1966). For a summary of the evolution of pendent and ancillary jurisdiction prior to *Gibbs*, see 13B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 3567-3567.3 (2d ed. 1984 & Supp. 1995) [hereinafter *WRIGHT & MILLER*] (pendent jurisdiction) and 13 *WRIGHT & MILLER, supra*, § 3523 (ancillary jurisdiction). See also Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983).

10. A federal court exercises pendent claim jurisdiction when there is a proper federal claim before it and the court agrees to hear a related state claim between the same plaintiff and defendant for which there is no original

extended to cases of pendent party¹¹ and ancillary jurisdiction.¹² This Part will examine *Gibbs* and subsequent case law, the need for a statutory basis for supplemental jurisdiction, and the supplemental jurisdiction statute itself.

A. *The Case Law*

1. *United Mine Workers v. Gibbs*

In *United Mine Workers v. Gibbs*,¹³ Gibbs had entered into an employment contract with the Grundy Company in which he was to be a mining supervisor. Before he was able to assume his position, he was fired due to a conflict with United Mine Workers and another union. Subsequently, Gibbs began to lose other hauling contracts and mining leases. Alleging that these losses were a result of concerted union action, he sued United Mine Workers, alleging a violation of the Labor Management Relations Act, a federal claim, and state law claims of conspiracy and interference with an employment contract.¹⁴ The district court dismissed the federal claim after the jury's verdict and retained jurisdiction over the state law claims.

In approving the district court's decision to entertain the pendent state claim, the Supreme Court indicated that the

jurisdiction.

11. Assuming a plaintiff has asserted federal claims against a defendant, pendent party jurisdiction allows the court to exercise jurisdiction over state law claims against a different, non-diverse defendant. *Rodriguez v. PacifiCare, Inc.*, 980 F.2d 1014, 1018 (5th Cir. 1993), *cert. denied*, 113 S. Ct. 2456 (1993); see 13B WRIGHT & MILLER, *supra* note 9, §§ 3567.1-2.

12. Whereas pendent party jurisdiction has focused on claims asserted by the plaintiff, ancillary jurisdiction provides a district court with the jurisdiction to hear claims and add parties by defendants or intervenors. *Matasar*, *supra* note 9, at 104 n.1; see 13 WRIGHT & MILLER, *supra* note 9, § 3523. The crux of ancillary jurisdiction depends upon the control of property or funds to be disposed of by the court, in which case parties may join the controversy to protect an interest in the property.

The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.

Fulton Nat'l Bank v. Hozier, 267 U.S. 276, 280 (1925).

13. 383 U.S. 715 (1966). The Supreme Court's analysis will be treated at length elsewhere. See *infra* part II.A.

14. *Id.* at 717-20.

threshold inquiry was into the relationship of the claims. Before pendent claim jurisdiction was proper, the state and federal claims must constitute "one constitutional 'case'" or, as stated differently, the claims must "derive from a common nucleus of operative fact."¹⁵ Once this determination was made, the court's concern with the constitutional limits of its jurisdiction was allayed, and it had the power to hear the pendent claim. The Court's second inquiry focused on the practical determination of whether the claim should be heard in federal court. It left that decision with the trial courts, admonishing each to consider "judicial economy, convenience, and fairness to litigants."¹⁶ After *Gibbs*, the exercise of pendent claim jurisdiction, pendent party jurisdiction, and ancillary jurisdiction proliferated under the new, less restrictive "common nucleus of operative fact" standard.¹⁷

2. *Aldinger v. Howard*

In *Aldinger v. Howard*,¹⁸ the Court limited pendent party jurisdiction by requiring, for the first time, a statutory basis for its exercise. Monica Aldinger's supervisor, Merton Howard, fired her from her position as a clerk in the county treasurer's office solely because she was living with her boyfriend.¹⁹ She brought a claim against Howard individually, under § 1983,²⁰ and asked the district court to exercise pendent party jurisdiction over her state law claims against the county.²¹ The Su-

15. *Id.* at 725.

16. *Id.* at 726.

17. The test was more liberal in the sense that *Gibbs* expanded the standard from a "cause of action" standard to a "common nucleus of operative fact." The Court had created the cause of action language in *Hurn v. Oursler*, 289 U.S. 238 (1933), where "cause of action" was interpreted very narrowly. In *Hurn*, the state and federal claims were "little more than the equivalent of different epithets to characterize the same group of circumstances." *Id.* at 246. After the adoption of the Federal Rules of Civil Procedure, with its liberal joinder provisions and permissive pleading requirements, significant confusion arose when the courts tried to apply the cause of action limitation into the new context. See *Aldinger v. Howard*, 427 U.S. 1, 9 (1976); *Gibbs*, 383 U.S. at 722-24; Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1413-14 (1983).

18. 427 U.S. 1 (1976).

19. *Id.* at 3.

20. 42 U.S.C. § 1983 (1988).

21. *Aldinger*, 427 U.S. at 4. The state law claims were "said to rest on state statutes waiving the county's sovereign immunity and providing for vicarious liability arising out of tortious conduct of its officials." *Id.* at 5.

preme Court had previously held that counties were not considered "persons" for the purpose of suit under § 1983 and thus could not be a defendant in a civil rights action in federal court.²² Yet *Aldinger* sought to use pendent party jurisdiction to bring the county into federal court even though the Supreme Court had interpreted § 1983 to exclude counties from this type of liability by denying federal courts the power to exercise jurisdiction over them. Looking for the first time at a jurisdictional statute²³ as a necessary source of law for the exercise of pendent party jurisdiction, the Court resolved that "the reach of a statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal judicial power *has* been extended by Congress."²⁴ Because it had interpreted § 1983 to exclude counties, leaving no basis for original jurisdiction over counties in federal court, the Court was reluctant to find in the jurisdictional statute an alternative basis for entertaining claims against counties in federal court, and did not do so.²⁵ However, the Court did suggest that the exercise of pendent party jurisdiction may be proper to avoid bifurcated proceedings where the federal courts have exclusive jurisdiction over the federal claim.²⁶

3. *Finley v. United States*

Justice Scalia sounded the death knell of pendent party jurisdiction in *Finley v. United States*.²⁷ In *Finley*, plaintiff's family was killed when the airplane in which the family was

22. *Monroe v. Pape*, 365 U.S. 167, 187-91 (1961), *overruled by* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

23. 28 U.S.C. § 1343(3) (1988).

24. *Aldinger*, 427 U.S. at 17.

25. *Id.*

26. *Id.* at 18:

When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States . . . the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together

See Finley v. United States, 490 U.S. 545, 557-58 (1989) (Blackmun, J., dissenting).

Many courts relied on this language in *Aldinger* and allowed the exercise of pendent party jurisdiction in instances where the federal courts have exclusive jurisdiction. *See* Ellen S. Mouchawar, Note, *The Congressional Resurrection of Supplemental Jurisdiction in the Post-Finley Era*, 42 HASTINGS L.J. 1611, 1625 n.90 (1991) (identifying instances and collecting cases in which the federal courts have exclusive jurisdiction).

27. 490 U.S. 545 (1989).

flying struck electric transmission lines prior to landing. The power lines were not illuminated as they should have been, and were thus not visible to the occupants of the plane. Initially the plaintiff brought a negligence claim against the San Diego Gas and Electric Company and the City of San Diego in state court. Later, upon learning that the Federal Aviation Administration (FAA) had the duty to illuminate the power lines, plaintiff filed a complaint in federal court. Subsequently, she sought to add the parties in the state action to the federal case, but as both plaintiff and the state defendants were residents of California, there was no independent basis for jurisdiction.

Jurisdiction in the federal cause of action against the FAA was based upon the Federal Tort Claims Act (FTCA),²⁸ which provides the federal courts with exclusive jurisdiction.²⁹ Instead of preserving common-law pendent party jurisdiction in cases of exclusive jurisdiction as it suggested it would in *Aldinger*, the Court took a more restrictive tack requiring both constitutional power *and* congressional authorization before the federal courts could properly have jurisdiction over pendent parties.³⁰ The FTCA did not provide for jurisdiction over pendent parties, so federal jurisdiction over the state law claims was improper.³¹

Ostensibly, the Court distinguished the facts before it from pendent claim and ancillary jurisdiction cases,³² but by refusing to accept the *Gibbs* analysis in the pendent party context³³ and by requiring statutory authorization prior to exercising pendent party jurisdiction, the Court undermined the entire foundation of what is now known as supplemental jurisdiction.³⁴ However, while Justice Scalia closed a door on previous

28. *Id.* at 546.

29. 28 U.S.C. § 1346(b) (1988) ("The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . .").

30. *Finley*, 490 U.S. at 548 ("[T]wo things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it* To the extent that such action is not taken, the power lies dormant.") (quoting *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868)) (emphasis added).

31. *Id.* at 552-56 (refuting arguments that the FTCA supports exercise of pendent jurisdiction).

32. *Id.* at 549, 551-52.

33. *Id.* at 549-52.

34. The response to the Court's ruling in *Finley* was, if nothing else, entertaining. See *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 361 (7th Cir. 1990) ("We are well aware that [the *Finley*] decision is premised on a hostility to nonstatutory jurisdiction that may eventually sweep into history's dustbin not

practice, he opened a window inviting Congress to step into the pendent jurisdiction arena and provide a statutory basis for the exercise of supplemental jurisdiction.³⁵

B. *The Federal Courts Study Committee*

In 1988 Congress created the Federal Courts Study Committee (Committee)³⁶ with the mandate to "make a complete study of the courts of the United States and of the several States and . . . recommend revisions to be made to laws of the United States as the Committee, on the basis of such study, deems advisable."³⁷ In its report, the Committee recognized the questions *Finley* raised³⁸ and recommended that "Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties."³⁹ The entire recommendation comprised less than

only whatever pendent party jurisdiction survives the holding of *Finley* but also pendent claim jurisdiction and ancillary jurisdiction." "Supplemental jurisdiction," therefore, "is arguably dead and surely expiring." Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247, 248. "In *Finley*, the Supreme Court turned [the *Gibbs-Aldinger-Kroger*] analytical framework on its head and in the process took the breath away from all forms of supplemental jurisdiction." *Id.* at 255. "Similar reasoning [to that of *Finley*] applied to other jurisdictional statutes, would have a devastating effect on the availability of supplemental jurisdiction." Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. REV. 321, 330. "[T]he *Finley* Court declared *Gibbs* brain dead, but refused to discontinue life support. One can only wonder how long this can continue." Wendy C. Perdue, *Finley v. United States: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 568 (1990); see also Mouchawar, *supra* note 26, at 1648.

Lower court reaction to *Finley* and its effect on pendent claim and ancillary jurisdiction was mixed. See Perdue, *supra* note 34, at 888-89 & nn.229-33 (collecting cases).

35. *Finley*, 490 U.S. at 556 ("Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

36. 102 Stat. 4642 (1988).

37. *Id.* § 105.

38. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990) [hereinafter COMMITTEE REPORT] ("Recent decisions of the Supreme Court raise doubts about the scope of pendent party and ancillary jurisdiction under existing federal statutes.").

39. *Id.* Ironically, one of the compelling factors behind the creation of the Federal Courts Study Committee was the need to reduce the federal docket. However, when addressing the uncertainty of pendent and ancillary jurisdiction after

one page of the Committee's report and did not include a proposed statute.

C. *The Statute*

Congress adopted the Committee's recommendations as a portion of the omnibus Judicial Improvements Act of 1990 (JIA).⁴⁰ The supplemental jurisdiction portion of the JIA is codified as 28 U.S.C. § 1367.⁴¹ This Comment is concerned

Finley, concerns for efficiency won out. Even though the Committee realized that this would increase the caseload of the federal courts, it reasoned first that federal issues should be heard in federal court, and second that overly broad discretion on the part of the district court to dismiss pendent and ancillary claims and parties would result in parties litigating their entire "case" in state court. That possibility led the Committee to suggest the expansion of supplemental jurisdiction and the limitation of judicial discretion not to hear supplemental claims. FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 562 (1990) [hereinafter WORKING PAPERS].

40. The Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089. For a participant's treatment of the legislative development of the supplemental jurisdiction statute, see Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1 (1992).

41. The entire statute reads as follows:

Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

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

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dis-

with the discretionary portion of the statute contained in subsection (c):

- (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
- (1) the claim raises a novel or complex issue of State law,
 - (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
 - (3) the district court has dismissed all claims over which it has original jurisdiction, or
 - (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.⁴²

Although this portion of the JIA was one of the most important, there is relatively little legislative history for guidance in its interpretation.⁴³ In its Report, the Committee's direction is sparse as well.⁴⁴

II. DISTINCTIONS BETWEEN THE COMMON LAW AND THE SUPPLEMENTAL JURISDICTION STATUTE

Congress intended the supplemental jurisdiction statute to codify the pre-*Finley* status of pendent and ancillary jurisdiction.⁴⁵ Whether, in fact, that is the actual result of the enactment of § 1367 is a matter of great debate.⁴⁶ This Part

missed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

42. 28 U.S.C. § 1367(c).

43. H.R. REP. NO. 734, 101st Cong., 2nd Sess. 27-30 (1990).

44. COMMITTEE REPORT, *supra* note 38, at 47-48 (1990). The Committee also published a multi-volume set containing findings, but its contents are specifically not adopted by the Committee as a whole. *See id.* at 3.

45. H.R. REP. NO. 734, *supra* note 43, at 28 ("This section [1367] would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction."). The fact that Congress adopted the recommendation of the Committee, and the Committee envisioned a liberal supplemental jurisdiction statute (contrary to *Finley*), further supports this assertion. COMMITTEE REPORT, *supra* note 38, at 47 (1990).

46. The debate has been particularly heated in the statute's treatment of joinder of parties under 28 U.S.C. § 1367(b) (1988). *See* Richard D. Freer, *Com-*

will examine a district court's discretion in exercising supplemental jurisdiction both before and after the supplemental jurisdiction statute. In analyzing how the statute may have altered the discretionary analysis, this Comment will focus on the text of the statute, legislative history, and the Committee's recommendations.

A. Pre-1367—The Gibbs Approach

*United Mine Workers v. Gibbs*⁴⁷ was the crystallization of the modern approach to pendent jurisdiction. The Supreme Court, in deciding to assert pendent claim jurisdiction over the claim of interference with an employment contract, created a two-part test, consisting of a power element and a discretionary element. The power element determined whether the district court could constitutionally exercise jurisdiction over the pendent claim. Under this prong, the federal claim had to be substantial.⁴⁸ Additionally, the state and federal claims had to constitute one "constitutional case," which the court appeared

pounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute, 40 EMORY L.J. 445 (1991); Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusions About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991) (Professors Rowe, Burbank, and Mengler are the authors of the supplemental jurisdiction statute); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991); Thomas D. Rowe, Jr. et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991); Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007 (1991); Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 1 (1992); Rochelle C. Dreyfuss, *The Debate over § 1367: Defining the Power to Define Federal Judicial Power*, 41 EMORY L.J. 13 (1992); Karen N. Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31 (1992); Wendy C. Perdue, *The New Supplemental Jurisdiction Statute—Flawed But Fixable*, 41 EMORY L.J. 69 (1992); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85 (1992). See generally Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 1 (1992).

47. 383 U.S. 715 (1966). For the facts of *Gibbs*, see *supra* part I.A.1.

48. *Id.* at 725. The standard for substantiality, however, is very low. In *Hagans v. Lavine*, 415 U.S. 528 (1974), Justice White reviewed cases stating the standards for substantiality of a constitutional claim, including phrases like "so attenuated and unsubstantial as to be absolutely devoid of merit," "wholly insubstantial," "obviously frivolous," "no longer open to discussion," and "essentially fictitious." *Id.* at 536-37. Justice Rehnquist, in his dissenting opinion, stated his interpretation of the majority's standard for substantiality as follows: "Under today's rationale it appears sufficient for jurisdiction that a plaintiff is able to plead his claim with a straight face." *Id.* at 564 (Rehnquist, J., dissenting).

to equate with the requirement that the claims "arise from a common nucleus of operative fact."⁴⁹ The discretionary element reflected the underlying purpose of supplemental jurisdiction: to promote the efficient adjudication of related claims in a single forum.⁵⁰ The *Gibbs* Court stated this purpose in terms of "judicial economy, convenience and fairness to litigants."⁵¹ A court should not assert jurisdiction over the pendent claims unless considerations of economy, convenience, and fairness are best served by its exercise.⁵² The presumption was that pendent jurisdiction not be exercised unless affirmative considerations compel its use.⁵³ Many cases acknowledged categories in which the *Gibbs* discretionary balancing would not favor the exercise of pendent jurisdiction: dismissal of the jurisdiction-conferring claim early in the proceedings,⁵⁴ jury confusion,⁵⁵ the predominance of state law claims predominate,⁵⁶ and the "unsettled nature of state law."⁵⁷

B. Section 1367

Having examined the pre-codification approach to pendent and ancillary jurisdiction, this Comment will now examine supplemental jurisdiction in terms of its statutory language, legislative history, and the recommendations of the Committee in an attempt to discern the similarities and differences, if any,

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

50. *See id.* at 726; *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 789 (3d Cir. 1995) (dicta); *Matasar*, *supra* note 9, at 106, 110-15.

51. *Gibbs*, 383 U.S. at 726. In *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), the Court stated these factors in terms of "economy, convenience, fairness, and comity." *Id.* at 351.

52. *Gibbs*, 383 U.S. at 726; *see Carnegie-Mellon*, 484 U.S. at 350 ("[A] federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case . . .").

53. *Gibbs*, 383 U.S. at 726 ("Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them.") (emphasis added).

54. *See id.*; *Carnegie-Mellon*, 484 U.S. at 350-51 & n.7 (1988); *Rosado v. Wyman*, 397 U.S. 397, 403-04 (1970). Under the *Gibbs* analysis, the federal claim had to be substantial. If the federal claim was dismissed for failure to state a claim, the court was not able to consider pendent claims because there never existed a valid federal question claim to which pendent claims could be appended. *See supra* note 48 (noting the low substantiality threshold).

55. *See, e.g., Moor v. County of Alameda*, 411 U.S. 693, 715 (1973).

56. *See, e.g., Hubbard v. Moore*, 537 F. Supp. 126, 130-31 (W.D. Ark. 1982).

57. *See, e.g., Moore*, 411 U.S. at 716.

between the prior common-law approach to the discretionary portion of the supplemental jurisdiction analysis and the approach taken by the statute.

1. *The statutory language*

The statute seems to have essentially codified the power prong of the *Gibbs* analysis by requiring that the district court have original jurisdiction over some element of the case.⁵⁸ The statute, however, does not adopt the “common nucleus of operative fact” language to define the scope of the jurisdiction. Instead, it makes direct reference to the Constitution’s case or controversy requirement,⁵⁹ which is really not a deviation from *Gibbs*, as the “common nucleus of operative fact” language is the *Gibbs* Court’s restatement of a “constitutional ‘case.’”⁶⁰ All appellate courts that have considered the issue support this proposition; the supplemental jurisdiction statute made no change to the power portion of the *Gibbs* analysis.⁶¹

On its face, however, the supplemental jurisdiction statute seems to change the discretionary prong. Initially, one notes that nowhere in the statute do the terms fairness, economy, comity, or convenience appear. Their absence raises two possibilities. Either the drafters of the statute sought to make a change from previous practice, or they thought that they could codify previous practice by referring to previously recognized factual categories in which pendent claims were traditionally allowed. Both possibilities will be addressed in examination of the legislative history.⁶² Even though absent from the statute, as will be seen below, courts continue to consider the *Gibbs* factors in three of their general approaches.⁶³

Under *Gibbs* the presumption was that pendent jurisdiction would not be appropriate unless the balance of consider-

58. 28 U.S.C. § 1367(a) (stating that “in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction”).

59. See U.S. CONST. art. III, § 2, cl. 2; see also *Gibbs*, 383 U.S. at 725.

60. *Gibbs*, 383 U.S. at 725; see also *Lyon v. Whisman*, 45 F.3d 758, 759-60 (3d Cir. 1995) (requiring both a substantial claim and a two-step constitutional case requirement under § 1367).

61. See, e.g., *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1175 (1st Cir. 1995); *Lyon*, 45 F.3d at 759-60; *Palmer v. Hospital Auth.*, 22 F.3d 1559, 1568 (11th Cir. 1994); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1276 (5th Cir. 1994); 13B WRIGHT & MILLER, *supra* note 9, § 3567.1.

62. See *infra* part IV.B-D.

63. See *infra* part IV.B-D.

ations of economy and fairness weighed in favor of its exercise.⁶⁴ Under the supplemental jurisdiction statute, however, district courts are commanded *not* to exercise discretion to refuse to hear supplemental claims unless any of a number of circumstances are apparent.⁶⁵ Subsection (a) states that "the district courts *shall* have supplemental jurisdiction" unless there are other statutory provisions to the contrary, including subsections (b) or (c).⁶⁶ Therefore, contrary to *Gibbs*, under § 1367(a) the presumption is that the district courts have jurisdiction unless compelled otherwise by statute.⁶⁷

Under *Gibbs*, the court was to consider all aspects of the litigation in order to determine what would be the best for all parties concerned.⁶⁸ The supplemental jurisdiction statute has cabined those instances in which the court can even consider declining to exercise jurisdiction.⁶⁹ Even though subsection (c)(4) provides for dismissal in exceptional circumstances, those circumstances are not, and have not been, considered to be nearly as broad as the considerations under *Gibbs*.⁷⁰

64. *Gibbs*, 383 U.S. at 726; *Carnegie-Mellon*, 484 U.S. at 350.

65. "The statute plainly allows the district court to reject jurisdiction over supplemental claims only in the four instances described therein." *McLaurin v. Prater*, 30 F.3d 982, 985 (8th Cir. 1994). *But see* Jason C.N. Smith, Comment, *Update on Changes in Federal Jurisdiction: Supplemental Jurisdiction, Venue, and Removal*, 23 TEX. TECH L. REV. 571, 579 (1992) (asserting that the statutory list is only a suggestion of when a district court should decline jurisdiction).

66. 28 U.S.C. § 1367(a) (emphasis added); *McLaurin*, 30 F.3d at 984-85 (interpreting "shall" as "a mandatory command" and to be interpreted as having the same meaning as the word "shall" in 28 U.S.C. §§ 1331-32 (the federal question and diversity jurisdiction statutes)); *see also* *Executive Software North Am., Inc. v. United States Dist. Court*, 24 F.3d 1545, 1555-56 (9th Cir. 1994).

67. *See* 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, 766 (1991) ("By the juxtaposition of sections 1367(a) and 1367(c) Congress appears to have created a strong presumption in favor of the exercise of supplemental jurisdiction."); *see also* *Cedillo v. Valcar Enter. & Darling Delaware Co.*, 773 F. Supp. 932, 939 (N.D. Tex. 1991).

68. *See, e.g.*, *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988). *But see* *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995) (admonishing a district court to "assess the totality of the attendant circumstances" when making its "discretionary determination on the jurisdictional question" under the supplemental jurisdiction statute).

69. *E.g.*, *Executive Software*, 24 F.3d at 1555-56; *see* *Lyon v. Whisman*, 45 F.3d 758, 762 n.8 (3d Cir. 1995).

70. *See infra* part III.D.

2. *The legislative history*

There is very little legislative history underlying § 1367. In fact, only one three-line paragraph is addressed to subsection (c).⁷¹ Congress recognized that *Finley* threatened the practice of supplemental jurisdiction, and the legislative history indicates that the purpose of the statute is to overrule *Finley* and codify pre-*Finley* practice.⁷²

The House Report is internally inconsistent, however, and raises more questions than it answers. While indicating that the statute's purpose is to codify pre-*Finley* practice, the discretionary portion of the statute does not use the *Gibbs* language,⁷³ but instead "codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction."⁷⁴ This could be read to require that courts not consider any of the *Gibbs* factors, but rather exercise their discretion only when one of the specific instances in subsection (c) arises. The use of the word "bases" indicates that Congress may have been trying to short-cut the supplemental jurisdiction analysis by examining the reasons for which pendent jurisdiction is usually declined, and codifying them. If that is the proper interpretation of the legislative history, then a court's discretion is dramatically curtailed under § 1367; as some considerations are specifically omitted,

71. Subsection [1367(c)] codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which a district court may decline jurisdiction over a supplemental claim, even though it is empowered to hear the claim. Subsection (c)(1)-(3) codifies the factors recognized as relevant under current law. Subsection (c)(4) acknowledges that occasionally there may exist other compelling reasons for a district court to decline supplemental jurisdiction, which the subsection does not foreclose a court from considering in exceptional circumstances. As under current law, subsection (c) requires the district court, in exercising its discretion, to undertake a case specific analysis.

H.R. REP. NO. 734, *supra* note 43, at 29. The above constitutes the entire legislative history relating to subsection (c) from the House, and the Senate legislative history is limited to the above report, which was adopted by the Senate, and one Senator's remarks upon the floor.

72. *Id.* at 28.

73. See *infra* notes 142-44 and accompanying text (noting that the *Gibbs* factors, judicial economy, convenience, and fairness to the litigants were in drafts of the supplemental jurisdiction statute, but were removed in favor of the "exceptional circumstances" language after commentators protested that the above factors would not sufficiently cabin judicial discretion).

74. H.R. REP. NO. 734, *supra* note 43, at 29 (emphasis added).

most notably the possibility of jury confusion as a result of divergent theories of relief with state and federal claims.⁷⁵

However, the above interpretation—that the analysis was fundamentally changed—goes against the feel of the legislative history and the underlying purpose of supplemental jurisdiction—the efficient adjudication of claims.⁷⁶ The House Report praises the liberal use of supplemental jurisdiction,⁷⁷ and then identifies the core problem after *Finley* as being a threat to this efficiency promoting device.⁷⁸ Under this less dramatic interpretation of the legislative history, efficiency should be the court's major consideration when determining whether or not to exercise supplemental jurisdiction. However, a pure efficiency analysis would almost always weigh in favor of exercising jurisdiction and consolidating claims, and is contrary to the teachings of *Gibbs*—which also considered deference to state courts and avoidance of unnecessary decisions of state law.⁷⁹

Whichever interpretation of the official legislative history one takes, only one thing is clear: there is no specific mention of the *Gibbs* factors in the legislative history and there is no

75. Jury confusion was one of the instances suggested by the *Gibbs* Court in which pendent jurisdiction may be improper. *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966).

76. Professor McLaughlin notes:

Because of the practical considerations of judicial efficiency and fairness to the litigant are so clearly established as the bedrock of supplemental jurisdiction, however, it would seem unlikely that a significant limitation in the use of these discretionary factors, contrary to that allowed under the prior case law, would be intended without a word of explanation in the legislative history or in the articles by the professors drafting the statute.

McLaughlin, *supra* note 46, at 976.

77. Supplemental jurisdiction has enabled federal courts and litigants to take advantage of the [liberal] federal procedural rules . . . to deal economically—in single rather than multiple litigation—with related matters Moreover, the district courts' exercise of supplemental jurisdiction, by making federal court a practical arena for the resolution of an entire controversy, has effectuated Congress's intent . . . to provide plaintiffs with a federal forum for litigating claims within original federal jurisdiction.

H.R. REP. NO. 734, *supra* note 43, at 28.

One of the concerns with pendent and supplemental jurisdiction is that without it, when faced with a choice of bifurcated litigation and complete litigation in state court, a plaintiff would use the latter. That choice would lead to the common adjudication of federal issues in state court systems, hardly a policy Congress would wish to promote.

78. *Id.*

79. *Gibbs*, 383 U.S. at 726-27.

corresponding duty, explicit or otherwise, to consider "judicial economy, convenience, fairness, and comity"⁸⁰ to determine if assertion of supplemental jurisdiction would be proper. Nowhere in the legislative history are the *Gibbs* factors mentioned.⁸¹ However, some courts have taken the approach that because the legislative history indicates that the purpose of the supplemental jurisdiction statute was to codify pre-*Finley* practice, the statute does not change the *Gibbs* analysis at all. Thus, the *Gibbs* factors are to be considered and courts are left with discretion unfettered by statutory language.

3. *Recommendations of the Federal Courts Study Committee*

The Federal Courts Study Committee's recommendation to Congress concerning supplemental jurisdiction filled less than two pages of full text. The Committee recommended that the result in *Finley* be overruled and that Congress provide a statutory basis for supplemental jurisdiction.⁸² While the Committee did not draft a proposed statute, their recommendation was couched in terms similar to the text of subsection (c). Instead of allowing discretionary consideration of the instances in subsection (c), the recommendation stated that "Congress should direct federal courts to *dismiss state claims* if these claims predominate or if they present novel or complex questions of state law, or if dismissal is warranted in the particular case by considerations of fairness or economy."⁸³ This last element incorporates some semblance of the *Gibbs* factors, but the other bases—novel or complex state claims or predominant state claims—give the district court no discretion to retain jurisdiction regardless of the efficiency or fairness that the exercise of supplemental jurisdiction may promote.

The Committee's Working Papers, while not adopted by the entire Committee, provide further insight into the reasoning which underlies the Committee's recommendation and include a recommended supplemental jurisdiction statute.⁸⁴ The

80. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

81. They are, however, mentioned in the Committee Report. "Congress should direct federal courts to dismiss state claims . . . if dismissal is warranted in the particular case by considerations of fairness or economy." COMMITTEE REPORT, *supra* note 38, at 48.

82. *Id.* at 47.

83. *Id.* at 48 (emphasis added).

84. WORKING PAPERS, *supra* note 39, at 567-68. The discretionary portion of the recommended statute reads as follows:

Working Papers note that under *Gibbs*, district courts rarely exercised their discretion to decline supplemental claims unless the federal claim had been dismissed before trial—even when state claims predominated or were novel or complex.⁸⁵ It is probable that this recognized weakness in the district courts' application of pendent and ancillary jurisdiction led to novel or complex claim or predominant state claim elements being listed in the current statute. Their inclusion indicates that one of the problems to be corrected by the new statute was federal overreaching into issues more appropriate for state courts. This corrective action suggests that there may be no room for weighing of economy, efficiency and fairness factors when the decision to exercise or decline pendent jurisdiction centers on claims that are arguably novel or complex or on a case in which state law predominates. To the contrary, if those circumstances exist, the judge should not have the discretion to retain jurisdiction.

The Working Papers address the *Gibbs* factors in a footnote, acknowledging that the district court can consider judicial economy, convenience, and fairness to the litigants and that the federal courts have been acting in accordance with *Gibbs* with respect to these factors. The footnote concludes by noting that “[n]othing in our proposal is intended to or should affect this practice.”⁸⁶

The statute set forth in the Working Papers addresses the apparent contradiction between the footnote's statement and the stated purpose of curtailing federal overreaching. It begins by listing the instances in which the federal courts have been derelict—deciding claims that are more appropriately decided in state court. The final catchall category then lists the *Gibbs* factors for consideration.⁸⁷ Listing the *Gibbs* discretionary factors separate from the novel or complex state claims or predominant state claims analysis seems to indicate that the Committee considered an approach distinct from *Gibbs* for the first two

(c) The district court may decline to exercise jurisdiction over a claim under subsection (a) if the claim presents a novel or complex issue of state law, state law issues predominate, or there are other appropriate reasons (including judicial economy, convenience, and fairness to litigants.

Id. at 568.

85. *Id.* at 561-62.

86. *Id.* at 562 n.35.

87. *Id.* at 568. For the text of the discretionary portion of the statute, see *supra* note 84.

factual scenarios. The Working Paper's approach appears to be the most rational, and the draft statute is most in line with the drafters' goal—to encourage federal courts to refrain from deciding as many state claims and to leave the *Gibbs* discretionary analysis unchanged.

Two points are worth making here. The language of this particular statute cast the consideration of state claim complexity or predominance as a different consideration than the economy, efficiency and fairness analysis. Second, the supplemental jurisdiction statute as enacted differs from this draft,⁸⁸ and the omission of the *Gibbs* factors in the supplemental jurisdiction statute severely weakens the argument that the common-law analysis remained untouched.

4. Clarifying subsection (c)(4)

Subsection (c)(4) incorporates a strict, vague, catchall provision. "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . in exceptional circumstances, there are other compelling reasons for declining jurisdiction."⁸⁹ A fundamental question is whether those exceptional circumstances and other compelling reasons incorporate the considerations of "judicial economy, convenience and fairness to the litigants."⁹⁰ Although some argue that the *Gibbs* factors are incorporated in the statute⁹¹ or even that the statute did not change prior practice.⁹² The fact of the matter is that from the Working Papers of the Federal Courts Study Committee⁹³ to the penultimate draft of the statute before Congress,⁹⁴ the *Gibbs* factors were in the text of the proposed statute,⁹⁵ but they were withdrawn at the last minute

88. Compare *supra* note 84 with 28 U.S.C. § 1367(c).

89. 28 U.S.C. § 1367(c)(4).

90. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); see *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1980).

91. See *infra* part IV.C.

92. *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993); *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1284 (3d Cir. 1993); see *infra* part IV.B.

93. WORKING PAPERS, *supra* note 39.

94. Wolf, *supra* note 40, at 58 app. E.

95. In the statute proposed in the Working Papers, the corresponding section of the proposal included the following sentence: "The district court may decline to exercise jurisdiction over a claim . . . if . . . there are other appropriate reasons (including judicial economy, convenience, and fairness to litigants) to refuse jurisdiction." WORKING PAPERS, *supra* note 39, at 568. Congress relied heavily on the

because some commentators had criticized that language as allowing *too much discretion* to the district courts.⁹⁶

III. SECTION-BY-SECTION ANALYSIS

This Part will examine the individual subsections of § 1367(c) in terms of their common-law origin, legislative history, and particular issues that arise with respect to each.

A. *Subsection 1367(c)(1): Novel or Complex Issues of State Law*⁹⁷

Subsection (c)(1) allows the district court to decline to exercise supplemental jurisdiction if "the claim raises a novel or complex issue of state law."⁹⁸ The novel or complex issue element of subsection (c) may have found its genesis in *Gibbs*, but it was not clearly articulated in the same terms.⁹⁹ It is more likely that this particular consideration arose from jurisprudence which permits a district court to decline to exercise jurisdiction when comity would be best served by allowing states to

Rowe-Burbank-Mengler proposal. Their proposal also incorporated the *Gibbs* factors and mimicked the language from the statute in the Working Papers. "The districts [sic] courts may decline to exercise jurisdiction over a claim . . . if . . . there are other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants, for declining jurisdiction." Wolf, *supra* note 40, at 58 app. E.

In fairness, all of the proposed statutes did not contain the *Gibbs* factors, see *id.* at 53 app. B (the Wolf-Egnal Proposal) and *id.* 55 app. C (H.R. 5381 § 120 (the initial draft before Congress)), and the Working Papers were not adopted by the Federal Courts Study Committee as a whole, but are merely the subcommittee reports. In their report, the Federal Courts Study Committee did not draft a statute nor did they recommend one. See COMMITTEE REPORT, *supra* note 38, at 47-48.

96. Wolf, *supra* note 40, at 25. In making this assertion, Professor Wolf, who was involved in the legislative process, relies upon a conversation with Charles G. Geyh, because the reasons for the changes from the *Gibbs* language to the more stringent "exceptional circumstances" and "compelling reasons" language are not apparent from the hearings. *Id.* at 25 & n.145. Mr. Geyh was counsel to the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice and was assigned to this particular bill. *Id.* at 17 n.91.

97. It should be noted that some commentators have traced the lineage of subsection (c)(1) to abstention jurisprudence. Granted some of the verbiage of the two analyses is similar. However, the contention is flawed. There is a fundamental difference between abstention, in which a court considers refraining from hearing claims properly within its *original jurisdiction*, and the supplemental jurisdiction analysis in which a court affirmatively decides whether to hear a claim specifically outside its original jurisdiction.

98. 28 U.S.C. § 1367(c)(1).

99. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (suggesting that a court decline jurisdiction if "state issues substantially predominate . . . in terms . . . of the scope of the issues raised").

decide cases of first impression or upon tenuous footing in state law.¹⁰⁰ The Supreme Court specifically recognized the novel-and-complex-state-claim standard in *Moor v. County of Alameda*¹⁰¹ when it declined to exercise jurisdiction over “difficult or unsettled issues of state law.”¹⁰² The policy underlying the encouragement of federal courts to decline to hear novel, complex, or state issues of first impression is comity; state law should be developed by the state courts, not by federal courts guessing, no matter how educated the guess, what state supreme courts would decide.¹⁰³

B. Subsection 1367(c)(2): State Law Claim Predominates

The district court may decline to exercise supplemental jurisdiction if “the claim substantially predominates over the claim or claims over which the district court has original jurisdiction.”¹⁰⁴ This factor addresses the concern of the inappropriate encroachment of federal courts into cases of state import and the unscrupulous use of federal claims and federal courts to litigate primarily state issues.

The *Gibbs* Court thought that if state claims predominate, the considerations of economy, convenience, and fairness would weigh in favor of dismissing the state claims.¹⁰⁵ In contrast, post-codification courts considering whether state claims predominate consider primarily the relative weight and number of

100. See *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 449-50 (9th Cir. 1994) (refusal to hear state constitutional establishment claims because they created issues of first impression was not an abuse of discretion); *Medrano v. City of Los Angeles*, 973 F.2d 1499, 1506 (9th Cir. 1992); *Winn v. North Am. Philips Corp.*, 826 F. Supp. 1424, 1426 (S.D. Fla. 1993) (dismissing under subsection (c)(1) a state law claim for tortious sexual harassment as a previously unrecognized claim and negligent hiring, negligent supervision, negligent training and their relation to workers' compensation as implicating undeveloped state law issues).

101. 411 U.S. 693 (1973).

102. *Id.* at 715-16.

103. “Another factor to be weighed is the clarity of the law that governs a pending claim, for the federal court may be wise to forego the exercise of supplemental jurisdiction when the state law that undergirds the nonfederal claim is of dubious scope and application.” *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995).

104. 28 U.S.C. § 1367(c)(2).

105. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966) (“[I]f it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.”). The primary motivation for declining jurisdiction in this instance was to provide the litigants a “surer-footed reading” of state law. *Id.* at 726.

the claims,¹⁰⁶ not whether the *Gibbs* factors weigh in favor of exercising jurisdiction once the state claims are determined to predominate.

C. *Subsection 1367(c)(3): Dismissal of Jurisdiction Conferring Claim*

Of all the circumstances listed in subsection (c), dismissal of the jurisdiction-conferring claim is the one that most frequently confronts district courts. If the "district court has dismissed all of the claims over which it has original jurisdiction"¹⁰⁷ then the court has discretion not to exercise jurisdiction over the supplemental claim.

The doctrinal background of the dismissal factor involves the problematic use of the federal courts to litigate state claims. This differs from the problem of an insubstantial federal claim which, once dismissed, destroys the basis for the exercise of supplemental jurisdiction.¹⁰⁸ Instead, the dismissal factor becomes relevant after the federal claim has been dismissed on a nonjurisdictional basis, leaving the state claims remaining to be resolved.

Prior to the supplemental jurisdiction statute, the practice was to determine at what point in the proceeding the federal claim was dismissed, and make the determination of whether or not to exercise supplemental jurisdiction based upon a simple efficiency analysis—efficiency in this context usually means how much effort has been put into the entire case.¹⁰⁹ The

106. See *Anspec Co. v. Johnson Controls, Inc.*, 788 F. Supp. 951, 959-60 (E.D. Mich. 1992) (declining to exercise jurisdiction over three state law claims because they predominated over the single federal claim in number and weight); *Council of Unit Owners of the Wisp Condominium, Inc. v. Recreational Indus., Inc.*, 793 F. Supp. 120, 123 (D. Md. 1992) (declining to exercise jurisdiction over 12 state claims with only one federal antitrust claim when the state claims were all inconsistent with the federal claim); *James v. Sun Glass Hut*, 799 F. Supp. 1083 (D. Colo. 1992) (suggesting that when the only federal claim is an age discrimination claim, the balance would favor not exercising jurisdiction over supplemental state claims). *But see Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 789-90 (3d Cir. 1995) (dicta) (rejecting the pure numerosity approach and analyzing the claims in terms of comprehensiveness of remedy, terms of proof, and scope of issues).

107. 28 U.S.C. § 1367(c)(3).

108. See *supra* note 48 and accompanying text.

109. In *Gibbs*, dismissal of a federal claim before trial was listed as an instance in which efficiency, fairness and economy would weigh in favor of dismissal of the pendent state claims as well. *Gibbs*, 383 U.S. at 726. In *Carnegie-Mellon* the Court noted that the assertion in *Gibbs* that the pendent claims should be dismissed once the jurisdiction-granting claim was dismissed did "not establish a

courts asked whether declining to exercise jurisdiction over the pendent and ancillary claims would result in duplicative litigation in state court. This standard was mentioned in *Gibbs* to illustrate that the exercise of pendent jurisdiction would not be proper when the federal claim was dismissed at the outset.¹¹⁰

As mentioned above, although the *Gibbs* factors are not mentioned in the statute or the legislative history, when faced with supplemental claims after dismissal of a federal claim, most courts have followed the direction of *Carnegie-Mellon* and held that dismissal of the federal claim does not mandate dismissal or remand of the supplemental claims.¹¹¹ Instead, the courts consider the goal of efficient adjudication of claims to determine whether to dismiss or remand the state claims.¹¹²

It is apparent that under subsection (c)(3) the courts are not readily willing to interpret the statute as changing prior practice. This reaction may be attributable to the fact that the majority of the litigation over appropriateness of pendent and ancillary jurisdiction, both before and after the supplemental jurisdiction statute, has involved dismissal of the jurisdiction-granting claim.

D. Subsection 1367(c)(4): Exceptional Circumstances

Subsection (c)(4) is the most interesting statutory basis under which the court may decline to exercise jurisdiction. It provides that "the district courts may decline to exercise supplemental jurisdiction . . . if . . . in exceptional circumstances, there are other compelling reasons for declining jurisdic-

mandatory rule to be applied inflexibly in all cases." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988).

110. *Gibbs*, 383 U.S. at 726 ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.")

111. *Carnegie-Mellon*, 484 U.S. at 350 n.7.

112. See *Timm v. Mead Corp.*, 32 F.3d 273, 277 (7th Cir. 1994) (citing *Carnegie-Mellon*); *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994) (upholding the district court's weighing of economy, convenience and fairness with respect to supplemental claims after dismissal of federal claim); *Eubanks v. Gerwen*, 40 F.3d 1157, 1161-62 (11th Cir. 1994) (citing *Carnegie-Mellon*); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 450 (9th Cir. 1994); *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1287-89 (6th Cir. 1992) (considering judicial economy and fairness); *ITT Commercial Fin. Corp. v. Unlimited Automotive, Inc.*, 814 F. Supp. 664, 669 (N.D. Ill. 1992) (relying on judicial economy and efficiency). But see *Wentzka v. Gellman*, 991 F.2d 423, 425 (7th Cir. 1993) (holding that exercise of pendent jurisdiction is an abuse of discretion unless there is an alternate basis of jurisdiction for the claim or the statute of limitations has run on the claim).

tion."¹¹³ Congress has created a catchall section here, acknowledging that "occasionally there may exist other compelling reasons for a district court to decline supplemental jurisdiction, which the subsection does not foreclose a court from considering in exceptional circumstances."¹¹⁴ There is no guidance, however, on what those exceptional circumstances are, or on when they are properly deemed to be compelling.

The courts, for the most part, have interpreted subsection (c)(4) in accord with its legislative history, by not reading it as incorporating the *Gibbs* factors or using it to exercise their discretion in a manner not contemplated by Congress.¹¹⁵ The effect of the exceptional circumstances language has been to cabin the courts discretion as intended. Examples of instances in which courts have declined to exercise supplemental jurisdiction in the face of exceptional circumstances include a mandamus claim against a state agency,¹¹⁶ a petition to combine certifiable federal class-action claims with a noncertifiable state claim,¹¹⁷ a federal claim fundamentally inconsistent with state claims,¹¹⁸ claims identical to the supplemental claim pending in state court,¹¹⁹ and state claims currently being litigated sought to be removed with a federal third-party officer immunity claim.¹²⁰

113. 28 U.S.C. § 1367(c)(4).

114. H.R. REP. NO. 734, *supra* note 43, at 29.

115. *See supra* part II.B.4.

116. *Clemes v. Del Norte County Unified Sch. Dist.*, 843 F. Supp. 583, 596 (N.D. Cal. 1994). Note, however, that the issue of mandamus against the state agency was "uniquely in the interest and domain of the state courts." *Id.* As such, the court could have appropriately resolved the claim under § 1367(c)(1) without resorting to (c)(4) as well.

117. *In Re Synergen, Inc. Sec. Litig.*, 154 F.R.D. 265, 269 (D. Colo. 1994).

118. *Council of Unit Owners, Inc. v. Recreational Indus., Inc.*, 793 F. Supp. 120, 122-23 (D. Md. 1992) (declining to exercise jurisdiction because the federal claim, while tenuous, was an antitrust claim alleging that the defendant was engaging in non-competitive practices while the pendent state law claims were all contract claims alleging a violation of a non-competition clause).

119. *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992) (upholding the district court's decision not to exercise jurisdiction over state law claims against officials in their individual capacity after the same claims against officials in their official capacity had been found to violate the 11th Amendment and had been remanded to state court); *Loral Fairchild Corp. v. Matsushita Elect. Indus. Co.*, 840 F. Supp. 211, 216-18 (E.D.N.Y. 1994) (declining to allow addition of a patent ownership claim to a patent infringement claim when the patent ownership claim was being litigated in state court).

120. The district court declined to exercise supplemental jurisdiction over state law claims removed with a federal third-party claim under the federal officer removal statute because a) the state claims were asbestos claims and if brought into

Some courts have, however, used subsection (c)(4) to read prior practice back into the statute. This is most common when the court is asked to exercise supplemental jurisdiction over state claims that if included at trial would confuse the jury.¹²¹ *Gibbs* specifically suggests jury confusion as an instance that would make the exercise of pendent claims improper.¹²²

The supplemental jurisdiction statute has codified many of the *Gibbs* suggestions of when jurisdiction would be improper, but did not include jury confusion as a circumstance when discretion may be exercised. Given the "exceptional circumstance" language of (c)(4), the fact that the legislative history suggested that it be used only occasionally,¹²³ and the Supreme Court's recognition of jury confusion as a factor to be considered in *Moor v. County of Alameda*,¹²⁴ it seems that the statute would exclude jury confusion as an "exceptional circumstance" where the court could decline jurisdiction. Indeed, the First Circuit, in *Vera-Lozano v. International Broadcasting*¹²⁵ refused to hold that a district court abused its discretion by failing to consider the possibility of jury confusion in deciding to entertain supplemental claims,¹²⁶ contending that the only relevant factors were the predominance and complexity of the state claims.¹²⁷

federal court would have to be transferred to another federal court handling the pre-trial portion of all related asbestos claims, b) state asbestos claims had been pending in state court for three years, and c) the state claims were not directly concerned with the issues in the federal third-party claim. *Crocker v. Borden, Inc.*, 852 F. Supp. 1322, 1329-31 (E.D. La. 1994).

121. See *Padilla v. City of Saginaw*, 867 F. Supp. 1309, 1315 (E.D. Mich. 1994) (citing jury confusion as a sufficiently compelling reason to decline jurisdiction over supplemental claims); *Roy v. Russel County Ambulance Serv.*, 809 F. Supp. 517, 523 (W.D. Ky. 1992); 13B WRIGHT & MILLER, *supra* note 9, § 3567.1 n.46 (suggesting jury confusion as a possible exceptional circumstance).

122. *United Mine Workers v. Gibbs*, 343 U.S. 715, 727 (1966).

123. H.R. REP. NO. 734, *supra* note 43, at 29.

124. 411 U.S. 693, 716 (1973).

125. 50 F.3d 67 (1st Cir. 1995).

126. *Id.* at 70.

127. *Id.*

IBC's only argument is that the district court abused its discretion in exercising jurisdiction over the state claims because the state statutes have different standards of proof and may therefore confuse the jury. . . . Here there is clearly no such abuse [of discretion]: the state claims do not predominate; Vera points to no novel issue of state law; and joint adjudication serves the interest of judicial economy and fairness.

Id.

IV. APPROACHES TAKEN BY THE COURTS

The distinctions between the *Gibbs* analysis and the supplemental jurisdiction statute analysis are apparent, and future clarification from either Congress or the Supreme Court is uncertain. Faced with these ambiguities, the courts have taken four distinct approaches in interpreting what the supplemental jurisdiction statute requires: the plain meaning approach, the *Gibbs* approach, the *Executive Software* approach, and the (c)(4) approach. The plain meaning and the *Gibbs* approach are at the poles of discretion, while the *Executive Software* approach occupies the middle ground.¹²⁸

A. *The Plain Meaning Approach*

The plain meaning approach is best articulated in *LaSorella v. Penrose St. Francis Health Care System*.¹²⁹ The plaintiff was an employee of a company that merged to form the defendant company. He was fired from the pre-merger company, and when he was not rehired, he brought a federal age discrimination claim and state estoppel claims against the defendant. In deciding to exercise supplemental jurisdiction over the state law claims, the court recognized that while the legislative history of the supplemental jurisdiction statute states that it codifies the *Gibbs* analysis, the statute on its face does not.¹³⁰ The court decided to ignore the legislative history and instead applied the plain, unambiguous meaning of the statute.¹³¹ Under this approach, the question was whether the state law claims predominated, *not* whether considerations of fairness, judicial economy, and comity would best be served by the exercise of supplemental jurisdiction over the state law claim.¹³² Because the state law claims did not predominate, there were no novel or complex issues of state law, the federal

128. There is some complexity in distinguishing the cases as all the jurisdictional analysis occurs under § 1367 rubric. See Thomas Jamison, Note, *Pendent Party Jurisdiction: Congress Giveth What the Eighth Circuit Taketh Away*, 17 WM. MITCHELL L. REV. 753, 783 (1991) (noting that because the standard of review is abuse of discretion the district court can do what it pleases without real limitations by merely mentioning the factors listed in § 1367(c)).

129. 818 F. Supp. 1413 (D. Colo. 1993); see *Grove Holding Corp. v. First Wis. Nat'l Bank*, 803 F. Supp. 1486 (E.D. Wis. 1992); see also *Lyon v. Whisman*, 45 F.3d 758, 760 (3d Cir. 1995).

130. *LaSorella*, 818 F. Supp. at 1415.

131. *Id.* at 1416.

132. *Id.* at 1415-17.

claim was not dismissed, and there were no extraordinary circumstances, the court had jurisdiction over the state law claim.

There is support in the legislative history for this approach in the House Report, which reads that the legislature is “codifying the legitimate *bases* that the Supreme Court has recognized upon which a district court can decline jurisdiction.”¹³³ This implies that the intent of Congress was to constrain, if not remove, the discretion of the district court.

The core of the plain meaning approach is this: once the court finds a circumstance listed in § 1367(c), the inquiry ends and the exercise of supplemental jurisdiction is improper. This plain meaning interpretation of the statute works very well when the district court determines that supplemental claims raise novel or complex issues of state law or that the state law claim predominates. In those cases, a court can unequivocally decide not to exercise jurisdiction. The only consideration is comity: whether or not the issues before the federal court would be more appropriately before a state court. No possible considerations of fairness, convenience, or judicial economy can overcome the comity consideration.

When considering the additional circumstances allowing judicial discretion, however, this approach breaks down. The ability to unequivocally decide whether or not to exercise jurisdiction is made more difficult considering that the fundamental premise of supplemental jurisdiction is to provide for efficient resolution of related claims in one forum. If a court tries to apply a plain meaning interpretation when a federal claim is dismissed, the result forces the litigants to reassert their claims in state court regardless of which stage of the proceedings the claim is dismissed. This result, if taken to its logical extreme, could theoretically abrogate the court’s ability to rule on supplemental claims at the end of a trial if the court’s initial decision was to dismiss the federal claim. This outcome parallels the result of the insubstantial federal claim, and a sufficient number of courts and commentators have distinguished

133. H.R. REP. NO. 734, *supra*, note 43, at 29; *see also* Thomas M. Mengler et al., *Congress Accepts Supreme Court’s Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 216 (1991) (“[Section 1367] 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 jurisdiction.”). The authors of this article, Professors Mengler, Burbank, and Rowe, were involved in drafting the supplemental jurisdiction statute. *Id.*

between the dismissal of the federal claim and the insubstantiality of the federal claim to conclude that such abrogation cannot have been intended by Congress.

Under *Gibbs*, courts were required to weigh economy, fairness, and convenience to determine whether they could exercise jurisdiction over the supplemental claims after the federal claim had been dismissed, regardless of how substantial the claim might have been. It is difficult to argue that the supplemental jurisdiction statute changes this analysis. The legislative history makes the exercise of discretion a "case-specific analysis" and there is no federalism consideration outweighing the efficiency considerations that support the decision to exercise supplemental jurisdiction.

The plain meaning approach suffers a more fundamental flaw when applied in the context of the exceptional circumstances prong. Plain meaning statutory interpretation presumes that the statute is clear on its face. Neither exceptional circumstances nor compelling reasons are defined in the statute or the legislative history. Application of this portion of subsection (c) necessarily involves judicial definition beyond the mere announcement that the exceptional circumstance exists and that the exercise of jurisdiction is thus improper.

B. *The Gibbs Approach*

In *Divens v. Amalgamated Transit Union International*,¹³⁴ members of a local union sued the local and international union on the basis that their freedom of speech was violated when they were fined under local union bylaws for "speaking in a manner deemed 'disruptive'" in union meetings.¹³⁵ The union members' federal claim alleged a violation of the Labor Management Reporting and Disclosure Act. The court, after dismissing the federal claim, declined to exercise supplemental jurisdiction over state law breach of contract claims. While acknowledging that the supplemental jurisdiction statute speaks in mandatory terms,¹³⁶ the court went on to characterize the mandatory language as a "threshold" to be crossed. "The statute fairly exudes deference to judicial discre-

134. 38 F.3d 598 (D.C. Cir. 1994).

135. *Id.* at 599.

136. *Id.* at 600 ("The statute seemingly speaks in directory language: jurisdiction 'shall' be extended to the state claim"); see *Roy v. Russel County Ambulance Serv.*, 809 F. Supp. 517, 523 (W.D. Ky. 1992).

tion—at least once the threshold determinations have been met and the court moves on to consider the exceptions.¹³⁷ Under *Gibbs*, the determination that a court has the power to assert supplemental jurisdiction is also a threshold to be crossed before considering whether or not comity, justice, and fairness would support its exercise.¹³⁸ Thus the approach adopted by the *Divens* court was essentially the pre-codification *Gibbs* approach.

The basis most frequently cited for the proposition that the statute did not change the common-law analysis comes from the legislative history. “This section [1367] would . . . essentially restore the pre-*Finley* understandings of the authorization for and limits on . . . supplemental jurisdiction.”¹³⁹ This interpretation allows a court to rely upon the pre-codification *Gibbs* analysis and thus incorporate without alteration the *Gibbs* discretionary prong. A second technique used to pull the *Gibbs* factors back into the analysis involves the broad interpretation of the word “may” in subsection (c). “The court *may* decline to exercise supplemental jurisdiction”¹⁴⁰ The courts interpret “may” as implying discretion, and discretion prior to the supplemental jurisdiction statute meant considering the *Gibbs* factors.¹⁴¹

One possible weakness in the above technique arises from the Working Papers. The Working Papers draft statute, like

137. *Divens*, 38 F.3d at 601.

138. See *supra* part II.A; *Rodriguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995) (“To be sure, the exercise of supplemental jurisdiction in such circumstances is wholly discretionary. And moreover, the district court, in reaching its discretionary determination on the jurisdictional question, will have to assess the totality of the attendant circumstances.”); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 787-88 (3d Cir. 1995).

139. H.R. REP. NO. 734, at 28; see *Borough of West Mifflin*, 45 F.3d at 787-88; *Purgess v. Sharrock*, 33 F.3d 134, 138 (2d Cir. 1994) (“The statutory concept of supplemental jurisdiction codified and expanded somewhat the earlier judge-made doctrines of pendent and ancillary jurisdiction.”); *Timm v. Mead Corp.*, 32 F.3d 273, 276-77 (7th Cir. 1994) (citing *Brazinski* and specifically calling for a “discretionary approach in which considerations of judicial economy, convenience, fairness, and comity are weighed”); *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993) (“The legislative history indicates that the new statute is intended to codify rather than to alter the judge-made principles of pendent and pendent party jurisdiction”).

140. 28 U.S.C. § 1367(c) (emphasis added).

141. The primary source for this interpretation comes from Professor Siegel in his comments in the U.S.C.A. concerning § 1367 practice. David D. Siegel, *Practice Commentary*, 28 U.S.C.A. § 1367 (1995); see *Purgess*, 33 F.3d at 138; *McCullough v. Branch Banking & Trust Co.* 844 F. Supp. 258, 260 (E.D.N.C. 1993).

the current subsection (c) included the "may decline" language. However, unlike the enacted statute's subsection (c), the draft statute specifically included the *Gibbs* factors.¹⁴² If the drafters had considered the "may" language to include the *Gibbs* considerations, their subsequent inclusion creates a statutory redundancy.

The practical effect of the *Gibbs* approach is that the discretion of the court is not narrowed as was intended by the Committee,¹⁴³ or by those reviewing and drafting the statute.¹⁴⁴ The only real change is that *Finley* was overruled.

C. *The Executive Software Approach*

In *Executive Software North America, Inc. v. United States District Court*,¹⁴⁵ the Ninth Circuit sought to establish the middle ground. Donna Page, a former employee of Executive Software brought state and federal claims against Executive Software for alleged racial and religious discrimination. Judge Nelson interpreted the discretionary portion of § 1367 to require a two-step analysis. She stated that by listing the four circumstances in subsection (c), Congress had intended to cabin the previous common-law analysis.¹⁴⁶ Due to that limitation, a court no longer had discretion to decline the exercise of supplemental jurisdiction unless one of the specific "factual predicates" of subsection (c) was apparent;¹⁴⁷ otherwise a court must exercise jurisdiction over the supplemental claims. Once a court finds a "factual predicate," however, "the exercise of dis-

142. See *supra* part III.B.2.

143. WORKING PAPERS, *supra* note 39, at 561-62.

Except when the federal claim is dismissed before trial, this advice [that courts not exercise jurisdiction over pendent claims] has basically been ignored. If that [pendent] claim withstands pretrial challenge, most courts retain jurisdiction over state claims regardless of their complexity, novelty, or predominance in the litigation.

The danger that supplemental jurisdiction will strain state-federal relations [due to federal courts' commandeering of claims more appropriately in state court] can be minimized by directing federal courts to relinquish pendent state claims when these claims predominate or when they present novel, complex questions of state law.

Id.

144. See *supra* note 133.

145. 24 F.3d 1545 (9th Cir. 1994).

146. *Id.* at 1556-57; see *Palmer v. Hospital Auth.*, 22 F.3d 1559, 1569 n.11 (11th Cir. 1994).

147. *Executive Software*, 24 F.3d at 1556 (quoting *Imagineering, Inc., v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992).

cretion . . . is informed by whether remanding pendent state claims comports with the underlying objective of 'most sensibly accomodat[ing] the values of economy, convenience, fairness, and comity."¹⁴⁸ The court supports its use of the discretionary prong of the *Gibbs* analysis as the "case-specific analysis"¹⁴⁹ required by the legislative history.¹⁵⁰ A number of courts have used a similar analysis under § 1367, noting that the *Gibbs* factors are part of the analysis, *but only in the context of the specific circumstances listed in subsection (c)*.¹⁵¹

The exceptional circumstances and compelling reasons portion of subsection (c) presents a problem under the *Executive Software* approach. After *Executive Software*, a district court must identify the factual predicate before proceeding to weigh the *Gibbs* factors. The challenge lies in identifying exceptional circumstances that would require moving on to the next step. Judge Nelson's guidance is minimal. "Without any indication from Congress . . . we think that [Congress] meant to conote that § 1367(c)(4) should apply only in factual circumstances that are truly unusual."¹⁵²

148. *Id.* at 1557; see *Palmer*, 22 F.3d at 1569 (citations and footnotes omitted):

The breadth of discretion afforded federal courts in these cases has been codified by section 1367(c). Specifically, it provides for four occasions when a federal court may decline to exercise supplemental jurisdiction otherwise within its power. The remaining considerations articulated in *Gibbs*, however, have not become useless to federal courts in exercising this discretion. Rather, while supplemental jurisdiction *must* be exercised in the absence of any of the four factors of section 1367(c), when one or more of these factors is present, the additional *Gibbs* considerations may, by their presence or absence, influence the court in its decision concerning the exercise of such discretion. Such factors include judicial economy, convenience, fairness to the parties, and whether all the claims would be expected to be tried together.

149. *Executive Software*, 24 F.3d at 1558.

150. H.R. REP. NO. 734, *supra* note 43, at 29 ("[S]ubsection (c) requires the district court, in exercising its discretion, to undertake a case-specific analysis.").

151. See *McLaurin v. Prater*, 30 F.3d 982, 985 (8th Cir. 1994); *O'Connor v. State of Nevada*, 27 F.3d 357, 362-63 (9th Cir. 1994); *Palmer*, 22 F.3d at 1569; *Streck v. Peters*, 855 F. Supp. 1156, 1166 (D. Haw. 1994) (*dicta*); see also *McLaughlin*, *supra* note 46, at 976 (The *Gibbs* factors are relevant "only in the more limited sense of how they affect the three enumerated factors and one catch-all factor of 1367(c).").

152. *Executive Software*, 24 F.3d at 1558 (reviewing other circuits' treatment of "exceptional circumstances" language in other contexts). One commentator interpreted the *Executive Software* test in a (c)(4) context as follows: "[T]he burden is on the court choosing not to exercise pendent party jurisdiction to explain its decision and to identify the complex or novel state issues which it seeks to avoid." *Jamison*, *supra* note 128, at 782.

The *Executive Software* approach is particularly suited for cases in which the federal claim has been dismissed. Once the claim is dismissed, the court must necessarily weigh convenience and economy to decide if the supplemental claims should be retained and decided, or dismissed or remanded. As mentioned above, the courts have not been willing to change the prior practice of considering efficient resolution of all claims in light of the supplementary jurisdiction statute.¹⁵³

D. The (c)(4) Approach

There is a fourth approach suggested by some commentators¹⁵⁴ and in at least one case,¹⁵⁵ but to date the approach has not been adopted by any court. This Comment will refer to it as the (c)(4) approach. Under this approach, the court would apply the provisions of (c)(1) through (c)(3) under a plain meaning approach—a strictly textualist approach with no discretion to retain jurisdiction over supplemental claims if one of the instances in subsections (c)(1) through (c)(3) is present. However, situations outside the scope of (c)(1) through (c)(3) would be handled under (c)(4), which this approach's proponents believe has subsumed the discretionary portion of the *Gibbs* analysis as stated in *Carnegie-Mellon*. However, the legislative history of the section effectively refutes this interpretation. In two drafts of the statute circulating through Congress prior to its passage the subsection that eventually became (c)(4) specifically contained the *Gibbs* factors,¹⁵⁶ but in the final version the *Gibbs* language was taken out for arguably stronger language.¹⁵⁷ The fact that the specific *Gibbs* factors were includ-

153. See *supra* part III.C.

154. See, e.g., Timothy E. Congrove, Comment, *A Look at Supplemental Jurisdiction Following Its Codification*, 40 KAN. L. REV. 499, 520 (1992) (questioning the parallel between the *Gibbs* discretionary analysis and the § 1367(c) approach and resolving the issue providing that § 1367(c)(4) "compelling reasons" subsume the remainder of the *Gibbs* considerations; relying on the statement from the legislative history that the statute was meant to codify pre-existing case law); see also McLaughlin, *supra* note 46, at 977 n.618 ("The courts could interpret § 1367(c)(4)'s undefined catchall of 'other compelling reasons' as embodying these [*Gibbs*] factors.").

155. *First Interregional Equity Corp. v. Haughton*, 805 F. Supp. 196, 200 (S.D.N.Y. 1992).

156. See *supra* notes 93-96 and accompanying text.

157. One can see the difference between language that reads, "The districts [sic] courts may decline to exercise supplemental jurisdiction . . . if . . . there are other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants," Wolf, *supra* note 40, at 57 app. D (the Weis Proposal), and "The

ed in initial drafts, then subsequently rejected, seriously undermines the veracity of this approach and it has received little acceptance by the district or appellate courts.

V. CONCLUSION

Congress has attempted to reestablish supplemental jurisdiction as it existed prior to the Supreme Court's decision in *Finley*. However, in the legislative process the focus of the text of the statute shifted from providing a statutory basis for pendent and ancillary jurisdiction, as established by *Gibbs*, to providing a broader grant of power to the federal judiciary by mandating that district courts accept supplemental claims with limited exceptions. The clear departure of the statute from the well-established verbiage of the common-law pendent jurisdiction analysis and the ambiguity and seeming contradictions in the legislative history left the discretionary portion of the supplemental jurisdiction statute open to varying interpretations. Courts have adopted four distinct approaches to the discretionary analysis under the supplemental jurisdiction statute. Of these, the approach adopted by the greatest number of the federal appellate courts is the *Executive Software* approach. Only in the limited circumstances listed in the subsection (c) of the supplemental jurisdiction statute do the trial courts have any discretion to decline to entertain the supplemental claims.

Of all the approaches, the *Executive Software* approach is the most consistent with the purposes of the Federal Courts Study Committee—to discourage federal overreaching into areas of law more appropriately reserved for state courts, the legislative history, and the plain meaning of the statute—providing discretion to decline jurisdiction only in specific circumstances.

The *Executive Software* approach will become the prevalent approach in the majority of circuits within the years to come. The practical effect of the pervasive adoption of *Executive Software* will result in increased scope of federal jurisdiction and a

district courts may decline to exercise supplemental jurisdiction . . . if . . . in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)(4). Incidentally, the language in the Weis Proposal was identical to the language in the Rowe-Burbank-Mengler proposal. See Wolf, *supra* note 40, at 58 app. E.

corresponding decrease in the discretion of federal courts to determine which supplemental claims it will hear.

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