PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 34 | Issue 3 Article 5

4-20-2007

Exxon Mobil Corp. v. Allapattah Services, Inc.: The Wrath of Zahn. The Supreme Court's Requiem for "Sympathetic Textualism"

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Exxon Mobil Corp. v. Allapattah Services, Inc.: The Wrath of *Zahn*.[1] The Supreme Court's Requiem for "Sympathetic Textualism"

1. Article title based upon the movie STAR TREK: THE WRATH OF KAHN (Paramount Pictures 1982).

I. INTRODUCTION

Imagine a family of eight riding along on the freeway in a van. Out of nowhere, a drunk driver crashes into the van causing injury to all the family members. Upon determining that the federal court is the fairest forum, the family decides to bring suit in federal court. Each claim of each family member is joined in one action under Rule 20 of the Federal Rules of Civil Procedure.[2] The family claims that the federal court has diversity subject matter jurisdiction over the claims of the family members.

A federal court has jurisdiction over a case based on diversity jurisdiction when the diversity of citizenship and amount-in-controversy requirements have been met.[3] Diversity of citizenship is not a problem because the drunk driver is a citizen of a different state than that of all the family members in the van.[4] The current amount-in-controversy requirement is that the "matter in controversy [must] exceed[] the sum or value of $75,000."[5] One family member, a young girl left comatose by the accident, has damages totaling $2,000,000. The other seven members have damages equaling $60,000 each. The family members figure that they must have met the amount-in-controversy requirement because, among the eight of them, they have a $2,420,000 claim, well above the $75,000 mark.

To the surprise of the family, the lone defendant files a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[6] In his motion, the defendant cites *Zahn v. International Paper Co.*[7] and *Clark v. Paul Gray, Inc.*,[8] Supreme Court cases which state that each and every claim must meet

2. FED. R. CIV. P. 20(a).

3. *See* 28 U.S.C. § 1332(a) (2000); *see also* Edward F. Sherman, *Complex Litigation: Plagued By Concerns Over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 595 n.25 (2004). The diversity requirement has long been understood to require "complete diversity," meaning that "no defendant can be a citizen of the same state as any plaintiff." *Id.*

4. *See, e.g.*, Strawbridge v. Curtiss, 7 U.S. 267 (1806).

5. 28 U.S.C. § 1332(a).

6. FED. R. CIV. P. 12(b)(1).

7. 414 U.S. 291 (1973).

8. 306 U.S. 583 (1939).

the amount-in-controversy requirement independently and, therefore, all but the girl's claim must be dismissed from federal court.

The family is distraught. They want the girl to have the fairest trial she can get, which is in federal court. However, due to her vulnerable and minor status the comatose girl is not in a condition to pursue her claim on her own. Therefore, unless the family decides to voluntarily dismiss the girl's claim, and include her claim with the rest of the family in state court, they will be faced with the complex and expensive consequence of pursuing two separate cases in two different judicial systems. Looking for a way out, the family argues that the supplemental jurisdiction statute, which allows jurisdictionally insufficient claims to attach to the jurisdiction of independently sufficient claims, allows the federal court to exercise jurisdiction over the $60,000 claims because the girl's claim meets the amount-in-controversy requirement.[9]

How will the district court rule? Will it rule in favor of the defendant or for the plaintiffs?

Prior to *Exxon Mobil Corp. v. Allapattah Services, Inc.*,[10] the answer would have depended on which federal circuit the district court found itself in. About half of the circuit courts held that the supplemental jurisdiction statute, 28 U.S.C. § 1367, overruled *Zahn* and *Clark*, thereby allowing all of the family claims to be brought in district court.[11] The other half held that § 1367 left the holdings of *Zahn* and *Clark* as good law, requiring the dismissal of the family members' claims, other than that of the girl.[12]

The majority in *Exxon Mobil* found the statute to be unambiguous and determined that § 1367, in effect, overruled *Zahn* and *Clark* and held that when one claim meets both requirements of diversity jurisdiction a federal court could have supplemental jurisdiction over plaintiffs joined under Rule 20 or 23 who did not meet the amount-in-controversy requirement.[13] In their dissents, both Justice Stevens and Justice Ginsburg agreed with the

9. Loosely based on the facts in *Ortega v. Star Kist Foods, Inc.*, 213 F. Supp. 2d 84, 85-87 (D.P.R. 2002).

10. 545 U.S. 546 (2005).

11. *See In re* Abbott Labs., 51 F.3d 524 (5th Cir. 1995); Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928 (7th Cir. 1996); Gibson v. Chrysler Corp., 261 F.3d 927 (9th Cir. 2001). Although in this hypothetical the plaintiffs are joined under Rule 20, *Zahn* and *Clark* also prevents district courts from exercising jurisdiction over class action plaintiffs under Rule 23(b)(3) of the Federal Rules of Civil Procedure who do not individually meet the amount-in-controversy requirement. *See Zahn*, 414 U.S. at 301.

12. *See* Leonhardt v. W. Sugar Co., 160 F.3d 631 (10th Cir. 1998); Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999); Trimble v. Asarco, Inc., 232 F.3d 946 (8th Cir. 2000).

13. *Exxon Mobil*, 545 U.S. at 566.

circuit courts that found the language ambiguous and that § 1367 preserved the holdings in *Zahn* and *Clark*.[14] In the end, however, the majority's textualist approach prevailed.[15]

Is Congress, the body that passed § 1367, made up of civil procedure radicals? Some legal scholars and Justice Ginsburg's dissent in *Exxon Mobil Corp. v. Allapattah Services, Inc.* would lead one to believe that the majority's decision makes such an assertion.[16]

This note will analyze the various opinions in *Exxon Mobil Corp. v. Allapattah Services, Inc.*[17] Part II will be a brief history of diversity jurisdiction and amount-in-controversy jurisprudence, including amount-in-controversy jurisprudence that developed in general federal-question jurisdiction cases. Part III will explore the development of ancillary and pendent jurisdiction. Part IV will discuss the creation of 28 U.S.C. § 1367, the reaction to the legislation by legal scholars and interpretations by the courts. Part V will analyze the Court's decision in *Exxon Mobil Corp.* v. *Allapattah Services, Inc.* Part VI will discuss the ramifications and the effect of the Court's holding.

II. HISTORY OF DIVERSITY JURISDICTION & THE AMOUNT-IN-CONTROVERSY REQUIREMENT

Diversity jurisdiction is authorized by the United States Constitution and was first implemented by Congress through the 1789 Judiciary Act.[18] The

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14. *Id.* at 575-76 (Stevens, J., dissenting) (implying that the assertion that Congress would "attempt to overrule (without discussion) two longstanding features of this Court's diversity jurisprudence" was unrealistic); *id.* at 583-84 (Ginsburg, J., dissenting) (pointing to the fact that the House Committee on the Judiciary Report listed the proposed change as "modest" and "noncontroversial" as evidence that the Court's interpretation of § 1367 should be "one less disruptive of our jurisprudence regarding supplemental jurisdiction").

15. *Id.* at 572.

16. James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109 (1999). The author makes a case for so-called sympathetic textualism. The author places great emphasis on the legislative history that calls the legislation implementing 28 U.S.C. § 1367 "noncontroversial." *See also* House Report No. 101-734, *as reprinted in* 1990 U.S.C.C.A.N. 6802, 6862; Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 960-61 n.90 (1991) (rebutting Professor Freer's assertion that 28 U.S.C. § 1367 would lead to "ridiculous" results such as overturning *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) by pointing to the legislative history and looking forward to the fact that in a future Supreme Court case Justice Scalia, an avowed textualist, will have to use the legislative history or come to the impliedly controversial conclusion "that section 1367 . . . wipe[s] *Zahn* off the books"); *Exxon Mobil*, 545 U.S. at 579 (Ginsberg, J., dissenting) (implying that the majority's interpretation is more "disruptive of [Supreme Court] jurisprudence).

17. 545 U.S. 546 (2005).

18. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 39 (1990) [hereinafter FCSC Report]; *see also* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1800 (1992) (discussing the Supreme Court's analysis of the Constitutional requirements for diversity

constitutional requirement for a federal court to have diversity jurisdiction has been determined by the Supreme Court to be what is called "minimal diversity."[19] However, very early in the Court's history it was determined that the "complete diversity" requirement applied whenever Congress implemented diversity jurisdiction through language similar to that used in the 1789 Judiciary Act.[20] The first Congress also attempted "[t]o limit federal court intrusion into everyday lawsuits [by] establish[ing] a jurisdictional minimum of $500."[21] Currently, the amount-in-controversy requirement for federal diversity jurisdiction under 28 U.S.C. § 1332(a) is "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs . . . ."[22]

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jurisdiction under Article III). Although there is little written history on the matter, the majority of legal scholars agree that diversity jurisdiction was created by the Framers of the Constitution and enacted by Congress "based on a fear that State courts would be biased or prejudiced against those from out of State." STEPHEN C. YEAZELL, CIVIL PROCEDURE 192 (6th ed. 2004) (quoting ABOLITION OF DIVERSITY OF CITIZENSHIP JURISDICTION, H.R. REP. NO. 893 (1978)).

19. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530 (1967). The Court in *State Farm* upheld Congress' grant of jurisdiction in interpleader causes of action under 28 U.S.C. § 1335 (2000). The Court determined that all that was required under the Constitution for a federal court to have diversity jurisdiction was "minimal diversity." *State Farm*, 386 U.S. at 530. The Court defined "minimal diversity" as a cause of action in which there is "diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be cocitizens." *Id.* (footnote omitted).

20. *Id.* at 530-31 (explaining that *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) established that "complete diversity" was required under federal diversity jurisdiction statute, which means that "where co-citizens appear[] on both sides of a dispute jurisdiction [is] lost"). Additionally, the Court strengthened its argument that the Constitution did not require "complete diversity" even though the words of the 1789 Judiciary Act and Article III of the Constitution regarding diversity jurisdiction are very similar, because Chief Justice Marshall did not say that he was interpreting the constitutional requirement but "purported to construe only 'The words of the act of Congress' . . . ." *Id.* at 531 (quoting *Strawbridge*, 7 U.S. (3Cranch) at 267). Compare the words of Article III section 2, "[t]he judicial Power shall extend to all Cases . . . between Citizens of different States," with the language construed by Chief Justice Marshall in *Strawbridge*, ". . . the suit is between a citizen of a state where the suit is brought, and a citizen of another state." U.S. CONST., art. III, § 2, cl. 1; *Strawbridge*, 7 U.S. (3 Cranch) at 267. Because of the almost complete lack of analysis in the opinion by Chief Justice Marshall, *Strawbridge* and the "complete diversity" requirement has come under fire over the years but manages to maintain influence and importance mostly due to its historical pedigree. *See* Redish, *supra* note 18, at 1803-05 (referring to Chief Justice John Marshall's opinion as "cryptic" and highlighting the lack of analysis in the opinion); *see also State Farm*, 386 U.S. at 531 n.6 (discussing how "[s]ubsequent decisions of this Court indicate that *Strawbridge* is not to be given an expansive reading").

21. FCSC Report, *supra* note 18. Limiting the jurisdiction of the federal courts in a diversity of citizenship cause of action by the amount in controversy is known as the "amount-in-controversy" requirement and a claim must meet both the diversity of citizenship and the amount-in-controversy requirement for there to be diversity jurisdiction. *See* 28 U.S.C. § 1332 (2000); *see also* RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 197-218 (3d ed. 2001) (discussing the requirements of federal diversity jurisdiction).

22. 28 U.S.C. § 1332(a) (2000); *see* ALI-ABA Course of Study Materials, 1 Federal Judicial

Over the past century the Supreme Court has applied the requirements of diversity jurisdiction to a variety of different situations and causes of action. Some believe this jurisprudence has led to incongruent results.[23] The following cases focus, for the most part, on the amount-in-controversy requirement when deciding whether a federal court has original jurisdiction over the action.[24]

Troy Bank v. G.A. Whitehead & Co., [25] an early twentieth century case, determined whether two plaintiffs could aggregate their claims to meet the amount-in-controversy requirement of diversity jurisdiction.[26] In this case, a seller of land in Kentucky obtained a "vendor's lien for the unpaid portion of the purchase price."[27] For his lien he received two promissory notes; he then assigned one to each of the plaintiffs who brought suit.[28] Separately, each promissory note did not meet the amount-in-controversy requirement; however, the plaintiffs could meet the requirement if they were allowed to aggregate the value of each of their claims.[29] The Court decided to allow

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Code Revisions 2 (1999) (explaining how Congress raised the amount-in-controversy requirement to anything over $50,000 in 1988 by enacting the Judicial Improvements and Access to Justice Act and then raised it again to the current in excess of $75,000 by enacting the Federal Courts Improvements Act of 1996). The most recent increase in the amount-in-controversy requirement occurred in a relatively short amount of time when compared to the fact that the last time the amount-in-controversy requirement was changed prior to 1988 was in 1959 from "one in excess of $3,000 to one in excess of $10,000." FREER & PERDUE, *supra* note 21, at 217-18. The ever increasing amount-in-controversy requirement is seen as evidence that Congress is attempting to restrict access to federal courts for claims based on diversity jurisdiction and, for some, an indication that as a policy matter Congress does not consider the role of federal courts in diversity matters to be as important as they once were. *See* Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 102 (discussing Congress' "modest limitations" but nevertheless noting an overall "trend to limit diversity . . .").

23. *See* Zahn v. Int'l Paper Co., 414 U.S. 291, 309 (1973) (Brennan, J., dissenting) (noting that "it is difficult to understand why the practical approach the Court took in *Supreme Tribe of Ben-Hur* must be abandoned" when attempting to square the ruling in *Zahn* that all plaintiffs, even unnamed ones, had to individually meet the amount-in-controversy requirement, but that unnamed plaintiffs after *Supreme Tribe of Ben-Hur* did not need to meet the geographical diversity requirement).

24. Although this section is primarily dedicated to explaining and discussing diversity jurisdiction and the development of its judicially interpreted requirements, some cases that have played a role in the development of "amount-in-controversy" jurisprudence are federal-question cases. The reason for this is that general federal-question jurisdiction, which can now be found at 28 U.S.C. § 1331 (2000), used to have an "amount-in-controversy" requirement. *Compare* 28 U.S.C. § 1331 (2000), *with Zahn*, 414 U.S. at 293 & n.2 (stating that "[t]he same jurisdictional-amount requirement has applied when the general federal-question jurisdiction of the district courts, 28 U.S.C. § 1331(a), is sought to be invoked"). *See also* FREER & PERDUE, *supra* note 21, at 222 (noting that federal-question jurisdiction "carr[ied] the [same amount-in-controversy] requirement as that imposed by diversity of citizenship cases from 1875 until 1980, when Congress abolished it").

25. 222 U.S. 39 (1911).

26. *Id.* at 40; *see also* Snyder v. Harris, 394 U.S. 332, 337 (1969) (describing the plaintiffs in *Troy Bank* as a "joinder case" much like Rule 20 now provides for in the Federal Rules of Civil Procedure).

27. *Troy Bank*, 222 U.S. at 40.

28. *Id.*

29. *Id.* at 39-40 (stating that each promissory note was worth $1,200 each and that proper diversity jurisdiction requires that "the sum or value of the matter in dispute exceed[] two thousand

aggregation of the two promissory note claims to meet the jurisdictional amount because the enforcement sought by both plaintiffs was for a "common and undivided interest."[30] The case, however, is better known for the following quote rather than the actual result: "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount."[31] Notice that this language is used in several other cases regarding claim aggregation, including *Exxon Mobil*.[32]

Ten years after *Troy Bank*, the Court took a more expansive approach to jurisdiction requirements in *Supreme Tribe of Ben-Hur v. Cauble*.[33] The appellant, the Supreme Tribe of Ben-Hur, was challenging the dismissal of a bill it filed in the District Court of Indiana against appellees to enjoin them from prosecuting an action in the state courts of Indiana.[34] Appellees were members of the tribe and were challenging a reorganization of the entity.[35] Both the appellant and the appellees were citizens of Indiana.[36] Due to the lack of diversity of citizenship the district court dismissed the bill for lack of jurisdiction.[37] The Supreme Tribe of Ben-Hur argued that the appellees were already bound by a judgment entered in a class action suit brought by members of the organization in federal district court.[38] The named plaintiffs in the federal class action were not citizens of Indiana, but the unnamed plaintiffs were citizens of Indiana.[39] The main question before the Court was whether a district court could exercise jurisdiction over the class action

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dollars . . .").

30. *Id.* at 41 (stating that the enforcement of both promissory notes was really the enforcement of the vendor's lien as a whole and that "it is enough if [the plaintiffs'] interests collectively equal the jurisdictional amount") (citations omitted).

31. *Id.* at 40-41.

32. Exxon Mobil Corp. v. Allapattah Servs. Inc., 545 U.S. 546, 585 (2005).

33. 255 U.S. 356 (1921).

34. *Id.* at 357.

35. *Id.* at 357-58. The dispute centered on Supreme Tribe of Ben-Hur phasing out its existing class of benefit certificates, Class A and creating a new class, Class B. *Id.* at 358-59. The Class A members of the organization felt that the reorganization was just an excuse to get more money from them and reduce their benefits. *Id.*

36. *Id.* at 357.

37. *Id.* at 360.

38. *Id.* (summarizing Supreme Tribe of Ben-Hur's argument that the "prosecution of the suits in the state courts of Indiana will have the effect to relitigate questions conclusively adjudicated against the defendants as members of Class A in the action in the United States District Court"). The suit was a class action based on diversity jurisdiction. *Id.* at 366. The defendant in the case, "the Supreme Tribe of Ben-Hur, a fraternal beneficiary society," was a citizen of Indiana. *Id.* at 360. The plaintiffs in the class action were Class A members of the society. *Id.* at 361.

39. *Id.* at 360-61.

and whether a holding would be binding upon the unnamed, nondiverse plaintiffs.[40]

The Court held that a federal court can properly exercise diversity jurisdiction over a class action when the named parties in a class action meet the "complete diversity" requirement even though the unnamed plaintiffs have the same citizenship as the defendant(s).[41] The Court also held that because the federal court had subject matter jurisdiction over the class action that a holding would have the same binding effect on the unnamed and named plaintiffs.[42] The Court explained that the citizenship of the unnamed plaintiffs did not affect the jurisdiction of the federal court because of the federal court's authority as a court of law and equity, the history and purpose of the class action as a litigation device, and the fact that the named plaintiffs met the diversity jurisdiction requirements.[43] Therefore, the Court held in favor of the Supreme Tribe of Ben-Hur.[44] Although *Supreme Tribe of Ben-Hur* does not directly pertain to the amount-in-controversy requirement, it provides the reader with the complete picture of what was required for a class action based on diversity jurisdiction prior to the passage of § 1367.[45] Additionally, the holding, which made it easier for a district court to exercise jurisdiction over diversity-only class actions, stands in stark contrast to the strict amount-in-controversy rules that developed in later cases to limit diversity-only class actions.[46] Despite this contrast, *Supreme Tribe of Ben-Hur* still remains good law for determining if a federal court has subject matter jurisdiction over a class action.[47]

One example of a case that contributed to the development of these strict amount-in-controversy rules is *Clark v. Paul Gray, Inc.*[48] *Clark* is a general federal-question case, but the Court's holding is relevant to the amount-in-controversy requirement. The case involved multiple plaintiffs, joined in bringing suit against state officers challenging the constitutionality of a California statute known as the Caravan Act.[49] At the time the action

40. *Id.* at 363.

41. *Id.* at 366.

42. *Id.* at 367.

43. *Id.* at 363-67 (stating that the "[d]iversity of citizenship [of the named plaintiff] gave the District Court jurisdiction," that "[t]he District Courts of the United States are courts of equity jurisdiction, with equity powers as broad as those of state courts," and that class actions have "long been recognized in federal jurisprudence" to "prevent a failure of justice . . ." (quoting Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1854))).

44. *Id.* at 367.

45. *See* House Report No. 101-734, *as reprinted in* 1990 U.S.C.C.A.N. 6802, 6875 & n.17 (citing *Supreme Tribe of Ben-Hur* and *Zahn* to describe the "jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions").

46. *See infra* notes 48-71 and accompanying text.

47. YEAZELL, *supra* note 18, at 818-19.

48. 306 U.S. 583 (1939).

49. *Id.* at 586-87. The Caravan Act charged a $15 license fee every six months for transporting vehicles with the purpose of selling them inside or outside of the state. *Id.* at 586. The plaintiffs

was brought a claim based solely on general federal-question jurisdiction had to meet an amount-in-controversy requirement.[50] Each plaintiff was claiming a separate injury under the statute so the Court determined that the plaintiffs had "no joint or common interest or title in the subject matter of the suit."[51] The Court then went on to cite the "familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy jurisdictional requirements."[52] Except for Paul Gray, Inc., the Court dismissed all of the claims for want of jurisdiction because all of the other plaintiffs were unable to establish the amount-in-controversy for their respective claims.[53] The reasoning in this case became very influential in later Supreme Court decisions involving the diversity jurisdiction amount-in-controversy requirement even though it was a federal-question issue.[54]

The Court had the opportunity to apply the reasoning of *Clark* in *Snyder v. Harris*.[55] Like *Exxon Mobil*, *Snyder* was a consolidation by the Court of two lower court decisions in an effort to unify the courts.[56] In one case, the Eighth Circuit held that a class of stockholders could not aggregate their claims to meet the amount-in-controversy requirement for diversity jurisdiction.[57] In the other case, the Tenth Circuit affirmed a lower court

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were "numerous individuals, copartnerships and corporations" all claiming separate but similar injuries caused by the Caravan Act. *Id.* at 587. The main relief that was being asked for by the plaintiffs was "an injunction [to] restrain[] [state officers] from collecting the fees and enforcing the provisions of the statute in aid of their collection." *Id.*

50. *Id.* at 588 (stating that the amount-in-controversy had to exceed $3,000); *see also* FREER & PERDUE, *supra* note 21, at 222.

51. *Clark*, 306 U.S. at 588 (citations omitted). Notice that although the Court did not directly cite to *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39 (1911), the language regarding plaintiffs with separate claims, each having to establish the jurisdictional amount separately, is very similar.

52. *Clark*, 306 U.S. at 589.

53. *Id.* at 590 (stating that "[p]roper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved").

54. For example, when discussing the amount-in-controversy with respect to diversity jurisdiction, the Court in *Zahn* expressly states that "[t]he same jurisdictional-amount requirement has applied when the general federal-question jurisdiction of the district courts . . . is sought to be invoked." Zahn v. Int'l Paper Co., 414 U.S. 291,293 (1973).

55. 394 U.S. 332, 336-37 (1969) (citing *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), to support the application of the no-aggregation rule to a class action based on diversity jurisdiction).

56. Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968); Gas Serv. Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968).

57. *Snyder*, 394 U.S. at 332-33 (noting that the case before the Court is premised upon diversity jurisdiction as defined by 28 U.S.C. § 1332 which at the time had an amount-in-controversy requirement that had to "exceed[] the sum or value of $10,000 . . . ."

ruling that allowed a class of gas company customers to aggregate their claims.[58] The Court in *Snyder* determined that:

> [a]ggregation has been permitted only (1) in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest.[59]

Further, the Court developed a no-aggregation rule which required that "separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement."[60] Additionally, the Court emphasized that the no-aggregation rule was formed by the Court's interpretation of Congress' diversity jurisdiction statutes and not based upon the cause of action's status as a class action.[61] Fearing an ever expanding portion of federal court resources going to determine solely state law claims, the Court affirmed the Eighth Circuit's holding denying aggregation and reversed the Tenth Circuit's decision allowing aggregation.[62] Finally, the Court, most likely in response to this fear, stated that the no-aggregation rule

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58. *Id.* at 334. The Tenth Circuit determined that the class of plaintiffs could aggregate their claims based on the "1966 amendment to Rule 23 of the Federal Rules of Civil Procedure relating to class actions." *Id.* The Tenth Circuit found that the rules against aggregation no longer made sense after the elimination of class classifications "'true,' 'hybrid' and 'spurious'" from Rule 23 from which the no-aggregation rule developed. *Gas Serv. Co.*, 389 F.2d at 834. The Tenth Circuit then determined that, under the new Rule 23 as amended, once "a cause clearly falls within its terms as a class action . . . the claims of the entire class are in controversy" and, therefore, there is no bar to aggregation. *Id.* at 834-35.

59. *Snyder*, 394 U.S. at 335. The Court then went on to state that, although the 1966 amendments to Rule 23 eliminated the different classifications of class actions, the different treatment of different types of class actions pre-dated Rule 23 and, therefore, the no-aggregation rule that developed had nothing to do with Rule 23 but with whether the interests of the plaintiffs where "separate and distinct" or "common and undivided." *Id.* at 335-37.

60. *Id.* at 335.

61. *Id.* at 335-36. The Court further strengthened its position that its interpretation and aggregation rules regarding the amount-in-controversy requirement pre-dated the 1938 Federal Rules of Civil Procedure and were only based on the congressionally-granted diversity or federal jurisdiction statutes by citing *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40 (1911). *Snyder*, 394 U.S. at 336. The Court also went on to discuss that one reason that it felt that it could not allow aggregation in class actions was that "[a]ny change in the doctrine of aggregation in class action cases under Rule 23 would inescapably have to be applied as well to the liberal joinder provisions of Rule 20 and to the joinder of claims provisions of Rule 18." *Id.* at 340. The Court feared that this "inescapabl[e] . . . result would . . . allow aggregation of practically any claims of any parties that for any reason happen to be brought together in a single action [and] would seriously undercut the purpose of the jurisdictional amount requirement." *Id.* Additionally, the Court determined that it had to keep a more demanding amount-in-controversy interpretation because the diversity of citizenship requirement for a class action had been greatly liberalized by the holding in *Supreme Tribe of Ben-Hur*, 255 U.S. at 366, and, therefore, if aggregation was allowed the federal courts would be have to hear "numerous local controversies involving exclusively questions of state law." *Snyder*, 394 U.S. at 340.

62. *Snyder*, 394 U.S. at 335-36.

applied to Rule 23 and Rule 20 plaintiffs.[63] The result was that both class actions were unable to continue because none of the plaintiffs met the amount-in-controversy requirement.[64]

The Court in *Zahn v. International Paper Co.*[65] had to answer a slightly different question than in *Snyder*.[66] In *Zahn*, each of the named plaintiffs in the class action met both requirements of diversity jurisdiction.[67] The question before the Court was whether the unnamed plaintiffs had to be dismissed for not meeting the amount-in-controversy requirement.[68] The Court held that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'"[69] Ultimately, the Court found the argument that class actions required a more liberal interpretation of the amount-in-controversy requirement unpersuasive.[70] In support of its holding, the Court stated that it was consistent with its jurisprudence regarding "ordinary joinder of plaintiffs with separate and distinct claims" and that the rule must stand "absent further congressional action."[71]

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63. *Id.* at 337. The Court stated that there is "no reason to treat [Rule 23 or Rule 20 plaintiffs] *differently* . . . for purposes of aggregation." *Id.* The Court also recognized that the no-aggregation rule upheld in *Snyder* would apply equally to the amount-in-controversy requirement of general federal-question jurisdiction but dismissed the impact of its holding on such cases by pointing out that most federal-question matters where exempted from the amount-in-controversy requirement. *Id.* at 341. *But see id.* at 342 n.2, 354 (Fortas, J., dissenting) (disagreeing with the majority's characterization of the impact of the no-aggregation rule on federal-question matters, stating that some general constitutional cases would not be heard by a federal court).

64. *Id.* at 333-36.

65. 414 U.S. 291 (1973).

66. *Compare* Zahn v. Int'l Paper Co., 414 U.S. at 291 (stating that the named plaintiffs met the diversity jurisdiction requirements under the diversity jurisdiction statute but that the unnamed plaintiffs did not meet the amount-in-controversy requirement), *with Snyder*, 394 U.S. at 333-34 (stating that none of the named plaintiffs in either class action could meet the amount-in-controversy requirement without aggregation). Since *Zahn* presents a slightly different issue than that in *Snyder*, the Court felt that one of main issues before it was whether or not the "Court of Appeals . . . accurately read and applied *Snyder v. Harris*." *Zahn*, 414 U.S. at 301.

67. *Zahn*, 414 U.S. at 291-92

68. *Id.* The amount-in-controversy at the time the suit was brought was "in excess of $10,000." *Id.* at 292.

69. *Id.* at 301 (citing *Zahn v. Int'l Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)). The Court went on to state that its holding in *Zahn* would extend to "a class action invoking general federal-question jurisdiction" as well. *Id.* at 302 n.11.

70. *Id.* at 302.

71. *Id.* Justice Brennan in a dissenting opinion criticized the Court's lack of initiative and reliance on the absence of congressional action, stating that the Court ignored the possibility of allowing the claims under the theory of ancillary jurisdiction, that "[t]he Court's prior decisions upholding novel exercises of ancillary jurisdiction have made liberal use of the opportunities presented by the Civil Rules . . . ," and that the class action plaintiffs' main argument was not that

After *Zahn* was decided, each plaintiff joined under Rule 20[72] or in a class action under Rule 23(b)(3)[73] (named or unnamed), whether under diversity jurisdiction or general federal-question jurisdiction, had to meet the amount-in-controversy requirement or have his or her individual claim dismissed.

III. DEVELOPMENT OF ANCILLARY AND PENDENT JURISDICTION

Prior to the passage of section 1367 supplemental jurisdiction was separated into two separate categories: pendent and ancillary.[74]

> Pendent jurisdiction refers to claims that are joined in the plaintiff's complaint. Pendent claim jurisdiction allows a plaintiff to join to a federal claim a factually related state claim despite the absence of diversity. Pendent party jurisdiction permits a plaintiff to join to a federal claim a factually related state claim involving an additional, nondiverse party. Ancillary jurisdiction refers to additional claims that are joined after the complaint is filed.[75]

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aggregation should be allowed to support jurisdiction, but that "ancillary jurisdiction supports a determination that those claims be entertained." *Id.* at 305, 306 & n.7, 311 (Brennan, J., dissenting).

72. Rule 20 of the Federal Rules of Civil Procedure states in relevant part:

> (a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any *question of law or fact common to all these persons* will arise in the action . . . . A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective liabilities.

FED. R. CIV. P. 20(a) (emphasis added).

73. Rule 23 of the Federal Rules of Civil Procedure states in relevant part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the *questions of law or fact common to the members of the class predominate* over any questions affecting only individual members . . . . The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(a), (b)(3) (emphasis added).

74. FEDERAL COURTS STUDY COMMITTEE, 1 WORKING PAPERS AND SUBCOMMITTEE REPORTS 546 (1990) [hereinafter SUBCOMMITTEE REPORT].

75. *Id.*

The history of pendent and ancillary jurisdiction has been traced back by some scholars to *Osborn v. Bank of the United States*,[76] an 1824 decision.[77] In recent history some of the biggest supplemental jurisdiction cases are: *Owen Equipment & Erection Co. v. Kroger*,[78] *United Mine Workers of America v. Gibbs*,[79] *Aldinger v. Howard*,[80] and *Finley v. United States*.[81] These cases will be discussed in Part III to: (1) trace the development of supplemental jurisdiction; and (2) illustrate the differences between pendent-claim, pendent-party, and ancillary jurisdiction prior to the passage of § 1367.

A. Ancillary Jurisdiction

Owen Equipment & Erection Co. v. Kroger[82] is significant as an attempt to get the Court to recognize a new application of ancillary jurisdiction.[83] The plaintiff was a citizen of Iowa, the original defendant was a citizen of Nebraska; however, the defendant "then filed a third-party complaint pursuant to Fed. Rule Civ. Proc. 14(a) . . . against . . . Owen Equipment and Erection Co."[84] Subsequently, the plaintiff amended her complaint to include Owen Equipment, a citizen of Iowa, and in an unreported opinion the district court granted summary judgment in favor of the original defendant leaving only the case between plaintiff and Owen Equipment to

76. 22 U.S. (9 Wheat.) 738 (1824).

77. Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. NEW ENG. L. REV. 1, 4 (1992); *see also* Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 449 n.26 (1991) (stating that the quote by Chief Justice John Marshall that "'[t]here is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States' . . . opened the door for exercising supplemental jurisdiction") (quoting *Osborn*, 22 U.S. (9 Wheat.) at 820).

78. 437 U.S. 365 (1978).

79. 383 U.S. 715 (1966).

80. 427 U.S. 1 (1976).

81. 490 U.S. 545 (1989).

82. 437 U.S. 365 (1978).

83. *See id.* at 367. The Court stated that in previous cases it had already determined that ancillary jurisdiction could be used to sustain jurisdiction over cases that "typically involve[d] claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court" when such cases "involv[ed] impleader, cross-claims, and counterclaims." *Id.* at 375-76, 380-81.

84. *Id.* at 367-68 (footnote omitted). The plaintiff alleged that Owen Equipment was a citizen of Nebraska in her amended complaint. *Id.* at 368-69. Owen Equipment admitted that it was a Nebraska corporation in its answer but it was then disclosed on the third day of trial that its principal place of business was in Iowa. *Id.* at 369.

go to trial.[85] The Court summarized the question before it as: "In an action in which federal jurisdiction is based on diversity of citizenship, may the plaintiff assert a claim against a third-party defendant when there is no independent basis for federal jurisdiction over that claim?"[86] The Court reasoned that to determine whether or not ancillary jurisdiction could be properly exercised by a federal court, two "hurdle[s] . . . must be overcome:" the first is determining if a federal court has the "Constitutional power" to exercise ancillary jurisdiction; and the second being an "Act[] of Congress" that "confer[ed] jurisdiction over the federal claim" that "allow[ed for] the exercise of jurisdiction over the nonfederal claims."[87] The Court presumed that the district court had the constitutional power to hear the case and decided to focus on whether or not the diversity jurisdiction statute passed by Congress allowed for the exercise of that constitutional power.[88]

The Court turned to its diversity jurisdiction jurisprudence to determine if ancillary jurisdiction could be properly exercised in this case.[89] The Court reaffirmed the complete diversity rule and it made clear that "diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff."[90] The Court noted that had the plaintiff brought suit against Owen Equipment & Erection Co. initially that the district court could not have exercised federal jurisdiction over her case because of the complete diversity requirement.[91] Therefore, the Court felt that the plaintiff should not be allowed to "defeat . . . complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."[92] In denying the exercise of ancillary jurisdiction, the Court made it clear that it was upholding the traditional interpretation of the diversity jurisdiction statute and that there was no additional act of Congress which allowed the federal courts to exercise their constitutional power to hear the case.[93]

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85. *Id.* at 368-69.

86. *Id.* at 367.

87. *Id.* at 372 (footnote omitted). The Court throughout the opinion used "the term 'nonfederal claim' [to] mean[] one as to which there is no independent basis for federal jurisdiction [and c]onversely, a 'federal claim' [to] mean[] one as to which an independent basis for federal jurisdiction exists." *Id.* at 372 n.11.

88. *Id.* at 372-73.

89. *Id.* at 370, 373. The Court also made clear that although it would make use of the term "ancillary jurisdiction," it was not "necessary to determine here 'whether there are any "principled" differences between pendent and ancillary jurisdiction . . .'" and that pendent and ancillary jurisdiction are "species of the same generic problem." *Id.* at 370 & n.8 (quoting Aldinger v. Howard, 427 U.S. 1, 13 (1976)).

90. *Id.* at 373.

91. *Id.* at 374.

92. *Id.*

93. *Id.* at 377.

B. Pendent Jurisdiction

1. Pendent-Claim

United Mine Workers of America v. Gibbs[94] has been noted for its expansive approach to supplemental jurisdiction.[95] In *Gibbs*, the plaintiff brought both a federal claim under § 303 of the Labor Management Relations Act[96] and a state claim that involved many of the same facts necessary to prove the federal claim but without an independent basis for federal jurisdiction.[97] The Court determined that the district court properly exercised its pendent jurisdiction power because the "same nucleus of operative fact" gave rise to the two claims.[98] In its holding, the Court simplified years of pendent jurisdiction jurisprudence by creating the following definition:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[99]

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94. 383 U.S. 715 (1966).

95. Wolf, *supra* note 77, at 7-8. *See also* SUBCOMMITTEE REPORT, *supra* note 74, at 548 (noting that prior to the Court's decision in *Gibbs*, "federal courts exercised only a limited pendent jurisdiction").

96. H.R. 3020, 80th Cong., 61 Stat. 136, 158 (1947).

97. *Gibbs*, 383 U.S. at 717-18, 720, 722. The jury at the trial level returned a verdict for both the federal and the state claim. *Id.* at 720. However, the judge at the district court level set aside the jury verdict based on the federal claim upon the defendant's "motion for a directed verdict and a judgment n.o.v." *Id.* at 728. The Court determined that because the jury returned a verdict for both the federal and the state claim, it was not improper for the district court to consider the state claim as pendent to the federal claim, but had the federal claim not reached the jury, the appropriateness of considering the state claim pendent would have been questionable. *Id.* at 728-29.

98. *Id.*

99. *Id.* at 725 (citations & footnotes omitted) (quoting U.S. CONST. art. III, § 2).

The Court determined that its definition: (1) was an accurate summation of past cases; (2) was fully within the scope of its constitutional power; (3) was accommodating of the policy of more liberal joinder of claims embodied in the Federal Rules of Civil Procedure; and (4) that a more "limited approach [would be] unnecessarily grudging" with respect to "judicial economy, convenience and fairness to litigants."[100]

2. Pendent-Party

In *Aldinger v. Howard*,[101] the Court began to limit what appeared to be the expansive grant of pendent jurisdiction in *Gibbs*.[102] The plaintiff in *Aldinger* brought a claim against officials of Spokane County, Washington under the Civil Rights Act of 1871, 42 U.S.C. § 1983 with federal jurisdiction based on 28 U.S.C. § 1343(3).[103] The plaintiff also tried to bring related state law claims, for which there was no independent basis for federal jurisdiction, against Spokane County.[104] The question before the Court was whether a federal court could appropriately exercise pendent jurisdiction over the related state claims that were not supported by an affirmative grant of federal jurisdiction.[105]

One of the ways in which the Court differentiated *Gibbs* from *Aldinger* was that in *Gibbs* the plaintiff was attempting to assert an additional *claim* against a defendant over whom the federal court already had jurisdiction, whereas in *Aldinger*, the plaintiff was attempting to add an additional *party* over which a federal court had no independent jurisdiction.[106] The Court compared the relative fairness of allowing pendent-claim jurisdiction to

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100. *Id.* at 725, 726 & n.13. The Court eschewed a definition of pendent jurisdiction power derived from *Hurn v. Oursler*, 289 U.S. 238 (1933), that required a court to determine whether a non-federal claim vindicated the same right as the federal claim or was a separate "cause of action." *Gibbs*, 383 U.S. at 722-25. One of the main problems that the Court found with the *Hurn* test was its propensity to create confusion in its application by the lower courts, especially with respect to defining the term "cause of action." *Id.* at 724-25. The Court also went on to discuss possible factors that should be considered by a district court as to whether it *should* exercise its pendent jurisdiction power: (1) if "federal claims are dismissed before trial," (2) "if it appears that the state issues substantially predominate," or (3) if "the likelihood of jury confusion in treating divergent legal theories of relief . . . would justify separating state and federal claims for trial." *Id.* at 726-27.

101. 427 U.S. 1 (1976).

102. Wolf, *supra* note 77, at 12 (describing *Aldinger* as one of the cases "restricting supplemental jurisdiction" after *Gibbs*).

103. *Aldinger*, 427 U.S. at 3-4.

104. *Id.*

105. *Id.* The Court was not only concerned in this case that there was no independent grant of federal jurisdiction over the state law claims, but also that Congress, when passing 42 U.S.C. § 1983 (2000), expressly decided to "*exclude*[]" municipalities like Spokane County "from liability in § 1983," and that if the Court granted the exercise of pendent jurisdiction, it would be defeating the intent of Congress. *Aldinger*, 427 U.S. at 17.

106. *Aldinger*, 427 U.S. at 14.

allowing pendent-party jurisdiction.[107] The opinion of the Court was that allowing a pendent-claim that originated from the "'common nucleus'" of facts as the federal claim (a claim over which a federal court has jurisdiction) "would not be an 'unfair' use of federal power by the suing party, he *already* having placed the defendant properly in federal court for a substantial federal cause of action."[108] The Court determined that the decision in *Gibbs* was appropriate because "Congress was silent on the extent to which the defendant, *already* properly in federal court under a statute, might be called upon to answer nonfederal questions or claims."[109]

It is axiomatic that defendants in a pendent-claim situation are the type of people over whom Congress wanted federal courts to exercise jurisdiction.[110] However, the Court stated that "'pendent-party' jurisdiction—bringing in an additional defendant at the *behest* of the plaintiff—present[ed] rather different statutory jurisdictional considerations."[111] Therefore, the Court felt that the true question before it was whether Congress had spoken as to whether it would allow or not allow a federal court to exercise pendent-party jurisdiction over a municipality in a "deprivation[] of civil rights" case.[112]

After finding that Congress had already decided not to include municipalities as parties over whom federal jurisdiction could be asserted under 28 U.S.C. § 1343(3)[113] and 42 U.S.C. § 1983[114] the Court concluded

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107. *Id.* at 14-15.

108. *Id.* at 14 (quoting *Gibbs*, 383 U.S. at 725) (emphasis added).

109. *Id.* at 15 (emphasis added).

110. After all, they are always in federal court under some "particular [congressional] grant of subject-matter jurisdiction." *Id.* at 14.

111. *See id.* at 14-15 (emphasis added). The Court seemed concerned that if it allowed a plaintiff to exercise pendent-party jurisdiction too freely over additional defendants, such defendants would be unfairly haled into federal court on solely state-law claims over which there was no independent federal jurisdiction (i.e. diversity jurisdiction), and, therefore, the federal courts would no longer be acting as "courts of limited jurisdiction." *Id.* at 14-15. Further, the Court was of the opinion that pendent-party jurisdiction, as argued for by the plaintiff, was not based on the same issues of fairness underlying the similar doctrine of ancillary jurisdiction. *See id.* at 11-14 (noting that although there was "little profit in attempting to decide . . . whether there are any 'principled' differences between pendent and ancillary jurisdiction," the Court determined that when it had allowed additional defendants under the "doctrine of ancillary jurisdiction [it was] bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, the other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction;" the Court found the need to exercise jurisdiction over a new defendant "simply because [the state claim is] 'derive[d] from a common nucleus of operative fact'" less compelling (quoting *Gibbs*, 383 U.S. at 725)).

112. *Id.* at 16.

113. 28 U.S.C. § 1343(3) (2000).

114. 42 U.S.C. § 1983 (2000).

that it would be contrary to congressional intent to allow the plaintiff to circumvent the federal statutes by allowing a federal court to use pendent-party jurisdiction over the municipality.[115] Ultimately, the Court "concluded that [pendent-party] jurisdiction exists, [if] a federal court . . . satisf[ies] itself not only that Art[icle] III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."[116]

In *Finley v. United States*,[117] the Court further restricted the exercise of pendent-party jurisdiction by federal courts. The reasoning utilized by the Court was recognized by many as putting the doctrine of supplemental jurisdiction in jeopardy.[118] The plaintiff in *Finley* filed a federal claim against the United States in federal district court with jurisdiction based on the Federal Tort Claims Act (FTCA).[119] In addition to the federal claim, over which the district court had exclusive jurisdiction, the plaintiff "moved to amend . . . to include claims against . . . state-court defendants, as to which no independent basis for federal jurisdiction existed."[120] The Court

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115. *See Aldinger*, 427 at 16-17. Although the Court did not allow the exercise of pendent-party jurisdiction in this instance, it did indicate that it might allow pendent–party jurisdiction "when the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in federal court may all of the claims be tried together." *Id.* at 18.

116. *Id.* at 18.

117. 490 U.S. 545 (1989).

118. *See* SUBCOMMITTEE REPORT, *supra* note 74, at 554 (noting that "none of the existing jurisdictional statutes expressly confers [pendent-party jurisdiction] authority" as required under the holding in *Finley*); House Report No. 101-734, *as reprinted in* 1990 U.S.C.C.A.N. 6802, 6874 (reporting that "the Supreme Court cast substantial doubt on the authority of the federal courts to hear some claims within supplemental jurisdiction" and that "some lower courts have interpreted *Finley* to prohibit the exercise of supplemental jurisdiction in formerly unquestioned circumstances"); *see also* Freer, *supra* note 77, at 467 (stating the possibility that "*Finley* . . . presages the end of all forms of supplemental jurisdiction"). *See generally* Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31, 32 (1992) (stating that by its ruling in *Finley* "the Supreme Court markedly cut back upon, and probably eliminated, pendent party jurisdiction, and [raised] significant doubts about the proper jurisdictional rationale for all of pendent and ancillary jurisdiction").

119. *Finley*, 490 U.S. at 546; *see* 28 U.S.C. § 1346(b)(1) ("the district courts. . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment"). Notice that this case involved the joining of an additional party to a Federal Tort Claims Act (FTCA) claim, the exact hypothetical that the Court in *Aldinger* stated was more likely to prevail. *Aldinger*, 427 U.S. at 18.

120. *Finley*, 490 U.S. at 546. The plaintiff's claim arose from an airplane accident at a San Diego airfield. *Id.* She initially filed a claim against the San Diego Gas and Electric Company in state court but "later discovered that the Federal Aviation Administration (FAA) was in fact the party responsible" for the airfield and filed suit against them in the district court. *Id.* The state claim that the plaintiff wanted to amend was the original claim against San Diego Gas and Electric Company. *Id.*

emphasized that not only must there be constitutional power to exercise pendent jurisdiction but that there must also be congressional authorization for the exercise of such power.[121] The main question in *Finley* was whether Congress had authorized the exercise of pendent-party jurisdiction through the FTCA.[122] The Court determined that the answer to this question was no.[123] The Court stressed that its holding was entirely consistent with its

121. *Id.* 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 Chief Justice Swayne in The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1869)); *see also* Moore, *supra* note 118, at 37 (describing the "urgency of providing a principled statutory basis for supplemental jurisdiction" after the Court's decision in *Finley*).

122. *Finley*, 490 U.S. at 549. The Court "assume[d], without deciding, that the constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction and that petitioner's state-law claims pass[ed] that test." *Id.* The Court also recognized that it had allowed the exercise of the pendent-claim jurisdiction to the full constitutional extent "without specific examination of jurisdictional statutes" but that for pendent-party jurisdiction the Court would "not assume that the full constitutional power [had] been congressionally authorized, and [would] not read jurisdictional statutes broadly." *Id.* at 548-49. The Court cited *Zahn* as an example of a case in which the jurisdictional statute granting diversity jurisdiction was not read broadly. *Id.* The Court stated that in *Zahn*, the diversity jurisdiction statute (the congressional grant of jurisdiction) was what limited the exercise of jurisdiction because, otherwise, the claims of the plaintiffs who did not meet the amount-in-controversy requirement in *Zahn* "would together [with the claims that did have an independent basis for federal jurisdiction] have amounted to a single 'case' under *Gibbs*," thereby establishing the constitutional power to hear the claim. *See id.* at 549-50.

123. *Id.* at 556. The Court came to this holding by balancing certain factors and considerations. The first of these factors was the similar facts shared by the FTCA and the state-law claims; however, the Court did not find this factor substantial enough to justify the extension of pendent-party jurisdiction. *Id.* at 552. The Court supported this position by pointing to the language in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 367-77 (1978), which stated that "neither the convenience of the litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction." *Finley*, 490 U.S. at 552. The Court also addressed the issue of judicial economy. *Id.* By being denied pendent-party jurisdiction the plaintiff had to bring two different court proceedings, one in federal court and another in state court, because the jurisdiction granting statute gave the federal courts *exclusive* jurisdiction over tort claims against the United States. *Id.* The Court determined that "[this] alone [was] not enough" and that "efficiency and convenience" cannot justify pendent-party jurisdiction without the necessary congressional authority. *Id.* at 552, 555-56. Additionally, the Court interpreted the language of the FTCA, which "confer[ed] jurisdiction over 'civil actions on claims against the United States,'" as not establishing a "minimum jurisdictional requirement [but] rather a definition of the permissible scope of FTCA actions." *Id.* (quoting 28 U.S.C. § 1346(b) (2002)). The Court defined the "permissible scope" as claims "against the United States and no one else" much like "'between . . . citizens of different States' has been held to mean citizens of different States and no one else." *Id.* (quoting 28 U.S.C. § 1332(a) (2000)). Lastly, the Court addressed the plaintiff's argument that the words "civil actions" in 28 U.S.C. § 1346 was meant to include civil actions which "*include*[] a claim against the United States." *Id.* at 554. This argument was based on the fact that the language of the statute used to read "*on any claim*" but was changed to "*civil actions*." *Id.* (quoting 28 U.S.C. § 931 (1946) & 28 U.S.C. § 1346(b) (1952)). The Court quickly dismissed this argument, emphasizing that the language was changed to be in conformance with the use of "civil action" in the Federal Rules of Civil Procedure

jurisprudence of requiring "that jurisdiction be explicitly conferred" by Congress and that "[t]he *Gibbs* line of cases [was] a departure from prior practice, and a departure that [the Court had] no intent[ion] to limit or impair."[124] At the end of the *Finley* opinion Justice Scalia writing for the Court sent the following invitation to Congress:[125]

> 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. All our cases—*Zahn*, *Aldinger*, and *Kroger*—have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.[126]

Congress was not long in sending its R.S.V.P. by enacting § 1367.

IV. THE CREATION OF 28 U.S.C. § 1367: A "NONCONTROVERSIAL" STATUTE

After *Finley* was decided on May 22, 1989, Congress enacted, on December 1, 1990, the Judicial Improvement Act of 1990, and included in that legislation was the Federal Courts Study Committee Implementation Act of 1990 (FCSC Act).[127] Included in the FCSC Act was an amendment to "Chapter 85 of title 28, United States Code" which codified the doctrine of supplemental jurisdiction under 28 U.S.C. § 1367.[128] The words of the supplemental jurisdiction statute, 28 U.S.C. § 1367, in relevant part, are as follows:

> (a) Except as provided in subsections (b) and (c) or as expressly provided . . . by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall

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and that it ran counter to "established canons of statutory construction" to infer a change in the law when Congress revises laws "unless such an intention is clearly expressed." *Id.* (quoting Anderson v. Pac. Coast S.S. Co., 225 U.S. 187, 199 (1912)).

124. *Id.* at 556.

125. *See* Wolf, *supra* note 77, at 15.

126. *Finley*, 490 U.S. at 556 (emphasis added).

127. *Id.* at 545; H.R. 5316, 101st Cong., 104 Stat. 5089, 5104 (1990). The FCSC Act implemented the "noncontroversial recommendations of the Federal Courts Study Committee." H.R. Rep. No. 101-734, at 16, *as reprinted in* 1990 U.S.C.C.A.N. at 6862. The Federal Courts Study Committee (FCSC) was created by the Federal Courts Study Act which was a part of the Judicial Improvements and Access to Justice Act. H.R. 4807, 100th Cong., 102 Stat. 4642, 4644 (1988). The FCSC was a "15 member Committee to study the Federal courts for 15 months and recommend reforms." H.R. Rep. No. 16; *see also* FCSC Report, *supra* note 18.

128. H.R. 5316, 101st Cong., 104 Stat. 5089, 5113-14 (1990).

> 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.[129]

Soon after the passage of the "noncontroversial" supplemental jurisdiction statute, debate and controversy arose over how much it broadened the scope of supplemental jurisdiction in federal courts.[130] This debate was not limited to legal scholars and it inevitably found its way into the courts.[131] Prior to the Supreme Court deciding the effect of 28 U.S.C. § 1367 on *Zahn*, every circuit court except for the Second Circuit had weighed in on the issue to some degree.[132]

It was in this context of intense disagreement that the Supreme Court of the United States decided to resolve the dispute in *Exxon Mobil Corp. v. Allapattah Services Inc.*[133]

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129. 28 U.S.C. § 1367(a)-(b) (2000).

130. H.R. Rep. No. 16. *See* Freer, *supra* note 77, at 471 ("The statute has several presumably unforeseen consequences as well, such as precluding supplemental jurisdiction in alienage cases and confusing areas that had been relatively clear even in the aftermath of *Finley*."); *see also* Rowe, Jr., Burbank & Mengler, *supra* note 16, at 961 (responding to Professor Freer's assertion that § 1367 is confusing and that although "[t]he statute is concededly not perfect" that "Section 1367 reflects an effort to provide sufficient detail without overdoing it").

131. *Compare* Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (1999) (holding that 28 U.S.C. § 1367 does not overturn *Zahn* in an opinion written by Circuit Judge Weis, who was also Chair of the Federal Court Study Committee), *with In re* Abbot Labs., 51 F.3d 524, 527-29 (1995) (discussing the disagreement between the district courts and legal scholars but determining that even if the overturning of *Zahn* was a "clerical error" that the language of the statute itself unambiguously required such a result).

132. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 550-51 (2005).

133. *Id.*

V. *EXXON MOBIL CORP. V. ALLAPATTAH SERVICES, INC.*

A. Facts & Procedural History

In *Exxon Mobil Corp. v. Allapattah Services, Inc.*,[134] the Supreme Court consolidated an Eleventh Circuit case, *Allapattah Services, Inc. v. Exxon Mobil Corp.*,[135] with a First Circuit case, *Ortega v. Star-Kist Foods, Inc.*[136]

Allapattah Services was a "class action suit filed by approximately 10,000 Exxon dealers who alleged that Exxon Corp. breached its dealer agreements by overcharging them for fuel purchases."[137] The dealers received a favorable special verdict from the jury in district court.[138] The class claimed that the district court had subject matter jurisdiction based on diversity jurisdiction.[139] However, some of the unnamed plaintiffs did not meet the amount-in-controversy requirement of 28 U.S.C. § 1332(a), thereby raising the specter of *Zahn v. International Paper Co.*[140] The district court certified the question of whether § 1367 overturned *Zahn* for interlocutory appeal because it was unsure if it could exercise supplemental jurisdiction over the unnamed plaintiffs under 28 U.S.C. § 1367, despite the holding in *Zahn*.[141] The Eleventh Circuit, upon reviewing the question, held that

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134. *Id.*

135. 333 F.3d 1248 (11th Cir. 2003).

136. 370 F.3d 124 (1st Cir. 2004).

137. *Allapattah*, 333 F.3d at 1251. The dispute was whether Exxon Mobil Corporation (Exxon), through its "Discount for Cash program," promised its dealers that it would reduce the price of wholesale gasoline and diesel fuel by the roughly the same percentage that it was charging for processing credit card receipts, thereby encouraging the use of cash. Allapattah Servs., Inc. v. Exxon Corp., 61 F. Supp. 2d 1308, 1311-12 (S.D. Fla. 1999). The plaintiffs alleged that Exxon breached the promise, that it did not lower the price of the wholesale gasoline and diesel fuel and that in essence they were charged the credit card fee twice. *Id.* at 1313. The plaintiffs claimed that Exxon engaged in this overcharging "between March 1, 1983 and August 31, 1994." *Allapattah*, 333 F.3d at 1252.

138. Allapattah Servs. v. Exxon Corp., 157 F. Supp. 2d 1291, 1294 (S.D. Fla. 2001). The dealers were made a class under the Federal Rules of Civil Procedure Rule 23(b)(3) and the plaintiffs asserted that the federal court had jurisdiction over their claims under 28 U.S.C. § 1332(a). *Id.* at 1306-07; *Allapattah*, 333 F.3d at 1253, 1255-56. The suit was originally filed by the dealers in May of 1991 but the case "was tried to a hung jury in September of 1999 . . . . It was retried in January of 2001, resulting in a unanimous jury verdict in favor of the dealers." *Id.* at 1252.

139. *Allapattah Servs.*, 157 F. Supp. 2d at 1294, 1306 n.14.

140. *Id.* at 1294, 1306 n.14, 1307. Recall that the Supreme Court in *Zahn* found that if an unnamed plaintiff did not independently meet the amount in controversy requirement that 28 U.S.C. § 1332 prevented a federal court from exercising jurisdiction over that claim. Zahn v. Int'l Paper Co., 414 U.S. 291, 302 (1973).

141. *Allapattah Servs.*, 157 F. Supp. 2d at 1326-27 (certifying its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b)); *Allapattah*, 333 F.3d at 1253 ("The first question certified for interlocutory review by the district court was whether it had supplemental jurisdiction over the claims of all the class members, including those who failed to meet the minimum amount in controversy requirement of 28 U.S.C. § 1332(a).").

"§ 1367 clearly and unambiguously overrules *Zahn* and allows a district court entertaining a diversity class action to exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional amount[-]in[-]controversy requirement."[142]

The facts of *Ortega v. Star-Kist Foods, Inc.*[143] are more dramatic than those in *Allapattah*.[144] The main plaintiff in *Ortega* was a then nine-year-old girl by the name of Beatriz Blanco-Ortega (Beatriz).[145] Beatriz cut her pinky finger on a can of tuna made by Star-Kist, the cut itself "was about a quarter of an inch deep, and about three-quarters of an inch long."[146] Other possible damages as a result of the injury were "additional reconstructive surgery," "a greater possibility of the development of degenerative joint disease at the affected finger joint," "a 3% partial impairment of her right dominant upper extremity," "a 2% impairment of her whole person," and emotional damages.[147] Beatriz's parents and older sister joined as Rule 20 plaintiffs with their own claims of emotional damages against Star-Kist.[148] The district court dismissed all of the claims for failing to meet the amount-in-controversy requirement of 28 U.S.C. § 1332(a).[149] Upon appeal, the First Circuit affirmed the dismissal of Beatriz's family members joined under Rule 20, but found that it could not be determined to a legal certainty that Beatriz's claim did not meet the amount-in-controversy requirement.[150] Therefore, the First Circuit held that Beatriz could either continue to pursue her claim in federal district court or "re-file in the Puerto Rico courts" with her family's claims.[151] In support of its holding, the First Circuit determined that supplemental jurisdiction could not be exercised by the district court over the independently insufficient claims.[152] The First Circuit came to this conclusion by "hold[ing] that by limiting supplemental jurisdiction to 'civil actions of which the district courts have original jurisdiction,' . . . Congress preserved the traditional rule that each plaintiff in a diversity action must separately satisfy the amount-in-controversy requirement."[153]

142. *Allapattah*, 333 F.3d at 1254.
143. 370 F.3d 124 (1st Cir. 2004).
144. Although arguably a matter of opinion, the author is confident that most readers will agree.
145. *Ortega*, 370 F.3d at 126.
146. Ortega v. Star Kist Foods, Inc., 213 F. Supp. 2d 84, 85 (D.P.R. 2002).
147. *Id.* at 86.
148. *Ortega*, 370 F.3d at 139; *see* FED. R. CIV. P. 20(a).
149. *Ortega*, 370 F.3d at 126-27.
150. *Id.* at 129, 131.
151. *Id.* at 144.
152. *Id.* at 127.
153. *Id.* The First Circuit determined that in this instance the requirement of *Clark* that every separate claim had to meet the amount-in-controversy requirement was not displaced by the passage

B. *Analysis of* Exxon Mobil Corp. v. Allapattah Services, Inc.

The Supreme Court had previously attempted to give a definitive answer on the effect of 28 U.S.C. § 1367 on *Zahn*; however, the result was a 4-4 split in *Free v. Abbot Laboratories, Inc.*, in which the judgment of the lower court was affirmed in an opinion per curiam.[154] Unknowingly, the Supreme Court, heeding the words of Simón Bolívar, that "to do something right it must be done twice,"[155] finally settled the dispute in *Exxon Mobil*.[156]

In a 5-4 decision, Justice Kennedy wrote the opinion for the majority of the Supreme Court in *Exxon Mobil*.[157] He was joined by then Chief Justice Rehnquist and Justices Scalia, Souter and Thomas.[158] The Court held that 28 U.S.C. § 1367 overruled both *Zahn* and *Clark*.[159] Justice Ginsburg wrote a dissenting opinion in which Justices Stevens, O'Connor and Breyer joined.[160] Her dissent disagrees with the Court's characterization of the statutory text as unambiguous, and she argues for the adoption of a 'sympathetic textualism' approach that would retain the jurisprudence of *Zahn* and *Clark* as part of 28 U.S.C. § 1367.[161] Justice Stevens also wrote a separate dissent, in which Justice Breyer joined, that criticized the Court's characterization of the statute as unambiguous and strenuously criticized the Court for ignoring language in the legislative history that he felt was a "virtual billboard of congressional intent."[162] The following sections will analyze and critique each of these opinions.

1. Justice Kennedy's Majority Opinion

At the beginning of his opinion, Justice Kennedy gives a brief factual and procedural synopsis of each case and reemphasizes the importance of resolving the question before the Court by describing the widespread

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of 28 U.S.C. § 1367. *Id.* at 136-38. The First Circuit then determined that since all of the plaintiffs' claims constituted the "civil action," and *Clark* required that every claim in that "civil action" independently meet the amount-in-controversy requirement, and Beatriz's family members did not independently meet the amount-in-controversy requirement, the "civil action" embodied by all the claims was not one "of which the district courts have original jurisdiction" and, therefore, the requirement of § 1367(a) was not met and supplemental jurisdiction could not be exercised over the family member claims joined under Rule 20. *Id.* at 137. The First Circuit declined, however, to determine whether its sympathetic textualism would also overturn *Zahn*. *Id.* at 136.

154. 529 U.S. 333 (2000); *see Ortega*, 370 F.3d at 132 ("The Supreme Court once granted certiorari to resolve the matter, but it ultimately split 4-4 and affirmed without opinion").

155. Wikiquote, Simón Bolívar, http://en.wikiquote.org/wiki/Sim%C3%B3n_Bol%C3%ADvar (last visited Feb. 12, 2005) (English translations of Simón Bolívar quotes).

156. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

157. *Id.* at 548.

158. *Id.*

159. *Id.* at 571.

160. *Id.* at 577 (Ginsburg, J., dissenting).

161. *Id.*

162. *Id.* at 572, 575 (Stevens, J., dissenting).

disagreement among the circuit courts as to the effect of 28 U.S.C. § 1367 on *Zahn* and *Clark*.[163] Justice Kennedy's opinion can be separated into the following five categories: (1) a historical analysis of diversity and supplemental jurisdiction; (2) the Court's interpretation of § 1367; (3) an explanation as to why the definition of a "civil action" in the two dissenting opinions is anathema to the concept of supplemental jurisdiction and, therefore, cannot be used to interpret a supplemental jurisdiction statute; (4) an explanation of why the Court did not look to the legislative history and arguing that, even if they did, the legislative history leads to an inconclusive result; and (5) an explanation as to why the Class Action Fairness Act (CAFA) does not affect the Court's interpretation of § 1367.[164]

a. A History of Federal Court Jurisdiction Jurisprudence According to Justice Kennedy

Justice Kennedy reconfirms the Court's commitment to the maxim that "[t]he district courts of the United States . . . are 'courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.'"[165] Justice Kennedy admits that certain cases, like *Gibbs*, seem to conflict with this principal.[166] However, he explains that *Finley* rationalized the *Gibbs* decision as standing for the principle that pendent-claim jurisdiction could be exercised because such power was impliedly granted to the federal courts by the jurisdictional statute that brought the parties properly within the federal court's jurisdiction in the first place.[167] Although the *Gibbs* approach is expansive as to pendent-claims, Justice Kennedy notes that the Court has been reluctant to apply this expansive approach when additional parties are necessary to pursue supplemental claims.[168]

As an example of a statutory limitation on the expansive approach in *Gibbs*, Justice Kennedy cites the "complete diversity requirement" that has been read into § 1332.[169] When Justice Kennedy describes the "complete diversity requirement," he focuses on the need for complete diversity of

163. *Id.* at 550-51.

164. *Id.* at 550-51, 556-60, 567-68, 570-73.

165. *Id.* at 552 (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)). Justice Kennedy cites both the general federal-question statute, 28 U.S.C. § 1331, and the federal diversity jurisdiction statute, 28 U.S.C. § 1332, as examples of how federal courts must look to congressional grants to exercise jurisdiction even if the power to do so already lies in the Constitution. *Id.*

166. *Id.* at 552-53.

167. *Id.* at 553.

168. *Id.*

169. *Id.*

citizenship.[170] It is because of the complete diversity of citizenship required by § 1332, Justice Kennedy explains, that *Gibbs* cannot be applied to allow nondiverse parties.[171] Such parties destroy the "original jurisdiction with respect to all claims, so there is nothing to which supplemental jurisdiction can adhere."[172]

Justice Kennedy then compares the complete diversity of citizenship requirement with the statutory requirements of federal-question and amount-in-controversy.[173] He asserts that unlike the diversity requirement, in which one claim not meeting the requirement destroys diversity jurisdiction for all claims in the action, that "federal-question and amount-in-controversy requirements . . . can be analyzed claim by claim."[174] Because the requirements are analyzed claim by claim, Justice Kennedy posits that the failure of one claim to meet the requirement does not affect the jurisdictional standing of other claims in the action.[175]

The opinion notes that the Court has not applied *Gibbs* to "so-called pendent-party cases" even though the application of *Gibbs* to an insufficient claim does not destroy another claim's fulfillment of the federal-question or amount-in-controversy requirements.[176] Justice Kennedy explains that *Clark* established the need for each Rule 20 plaintiff to independently meet the jurisdictional requirements.[177] Further, he finds the holding in *Clark* significant because the Court relied on it heavily when it determined that each plaintiff must meet the amount-in-controversy requirement "in the context of a class action brought invoking § 1332(a) diversity jurisdiction."[178] Justice Kennedy characterizes cases like *Aldinger* and *Kroger* as cases that denied "supplemental jurisdiction over claims against

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170. *Id.* at 553-54 ("In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original jurisdiction over the entire action. The complete diversity requirement is not mandated by the Constitution, or by the plain text of § 1332(a). The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action.") (citations omitted). In fact, Justice Kennedy refers to the amount-in-controversy as a separate "statutory prerequisite[] for federal jurisdiction." *Id.* at 554.

171. *Id.* at 553-54.

172. *Id.* at 554.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* Justice Kennedy defines "so-called pendent-party cases" as "[cases] involving supplemental jurisdiction over claims involving additional parties—plaintiffs or defendants—where the district courts would lack original jurisdiction over claims by each of the parties standing alone." *Id.*

177. *Id.*

178. *Id.* at 555 (noting that although *Clark* was a federal-question case, the Court in *Zahn* relied heavily on *Clark*'s reasoning regarding the amount-in-controversy requirement).

additional defendants that fall outside the district courts' original jurisdiction" because the underlying statute granting original jurisdiction over the main claim did not allow it.[179]

It is the belief of Justice Kennedy that the Court's decision in *Finley* is the culmination of the Court's reasoning in cases like "*Zahn*, *Aldinger*, and *Kroger*," and that the holding in *Finley* did not prevent the application of *Gibbs* to pendent-claims.[180] He is also of the belief that the decision prevented courts from presuming that a statute granting federal jurisdiction authorized a federal court to exercise its full constitutional power over pendent-parties (plaintiff or defendant).[181]

Justice Kennedy ends his explanation of the history of supplemental jurisdiction prior to the passage of 28 U.S.C. § 1367 as follows:

> First, the diversity requirement in § 1332(a) required complete diversity; absent complete diversity, the district court lacked original jurisdiction over all of the claims in the action. Second, if the district court had original jurisdiction over at least one claim, the jurisdictional statutes implicitly authorized supplemental jurisdiction over all other claims between the same parties arising out of the same Article III case or controversy. Third, even when the district court had original jurisdiction over one or more claims between particular parties, the jurisdictional statutes did not authorize supplemental jurisdiction over additional claims involving other parties.[182]

b. 28 U.S.C. § 1367 and Its Meaning

Justice Kennedy briefly discusses how "Congress accepted the [Court's] invitation" in *Finley* and passed 28 U.S.C. § 1367.[183] He also states that, regardless of the current disagreement on the effect of § 1367, the litigants

179. *Id.* at 555 (noting that the holding in *Aldinger* did not require an express authorization for supplemental jurisdiction to be exercised over the additional defendant, but that a court had to determine if Congress impliedly or expressly denied the court the use of its constitutional power to hear such a supplemental claim).

180. *Id.* at 556.

181. *Id.* at 556-57.

182. *Id.* (citations omitted) (citing Strawbridge v. Curtiss, 7 U.S. 267 (1806); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Zahn v. Int'l Paper Co., 414 U.S. 291 (1973); Finley v. United States, 490 U.S. 545 (1989)).

183. *Exxon Mobil*, 545 U.S. at 557; *see supra* Part IV.

and "all courts . . . agree that § 1367 overturned the result in *Finley*."[184] While noting the agreement, Justice Kennedy stresses that just as statutes should not be given "a more expansive interpretation than their text warrants . . . that it is just as important not to adopt an artificial construction that is narrower than what the text provides."[185]

Justice Kennedy analyzes § 1367 by subsection, starting with § 1367(a).[186] He describes § 1367(a) as a "broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the *action* is one in which the district courts would have original jurisdiction."[187] He also states that the last sentence of § 1367(a) clearly establishes that "supplemental jurisdiction extends to claims involving joinder or intervention of additional parties."[188] Further, he argues that because it is undisputed that the additional claims, in the cases before the Court, constitute the same "case or controversy" within the meaning of § 1367, the mere fact that the independently insufficient claims require the addition of parties does not, in and of itself, violate § 1367(a) because the last sentence allows for additional parties.[189] For these reasons, Justice Kennedy explains, the only real question before the Court is "whether a diversity case in which the claims of some plaintiffs satisfy the amount-in-controversy requirement, but the claims of other plaintiffs do not, presents a 'civil action of which the district courts have original jurisdiction.'"[190]

Justice Kennedy answers this question in the affirmative.[191] He argues that as long as there is one claim which meets all the jurisdictional requirements, including the amount-in-controversy, that a federal court has jurisdiction over that claim, regardless of other defective claims.[192] Therefore, "[i]f the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a 'civil action' within the meaning of § 1367(a)."[193] According to Justice Kennedy, once a court has found *one claim* over which it has original jurisdiction, it can then turn to the

184. *Exxon Mobil*, 545 U.S. at 558.

185. *Id.* Justice Kennedy states that § 1367 "must [be] examine[d] . . . in light of context, structure, and related statutory provisions." *Id.*

186. *Id.*

187. *Id.* (emphasis added).

188. *Id.*

189. *See id.*

190. *Id.* (quoting 28 U.S.C. § 1367(a) (2002)).

191. *Id.* at 558-59 (admitting that "[i]f the answer is no, § 1367 is inapplicable and, in light of our holdings in *Clark* and *Zahn*, the district court has no statutory basis for exercising supplemental jurisdiction over the additional claims").

192. *Id.* at 559.

193. *Id.* (dismissing the notion that because the civil action over which the federal court has original jurisdiction does not include all of the claims in the complaint that it is not a "civil action" for purposes of 28 U.S.C. § 1367(a)).

rest of subsection 1367(a) and the other subsections of § 1367 to determine if exercising supplemental jurisdiction is appropriate.[194]

Satisfied that both cases before the Court represent a "civil action" within the meaning of § 1367(a), Justice Kennedy strengthens his argument that §1367(a) is a broad grant of supplemental jurisdiction.[195] He does this by pointing to the blanket reference the statute makes to supplemental jurisdiction and that "[n]othing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary."[196]

Justice Kennedy, following the statutory structure, next turns to § 1367(b) to determine if any of the exceptions found within would prevent a federal court from exercising supplemental jurisdiction over the claims which are otherwise included in § 1367(a)'s grant of jurisdiction.[197] Although the exceptions found in § 1367(b) pertain to causes of action in which original jurisdiction is based on diversity jurisdiction under § 1332 (as the cases before the Court in this instance are), Justice Kennedy finds that "[n]othing in the text of § 1367(b) . . . withholds supplemental jurisdiction over the claims of plaintiffs permissively joined under Rule 20 (like the additional plaintiffs in [*Allapattah*]) or certified as class-action members pursuant to Rule 23 (like the additional plaintiffs in [*Ortega*])."[198]

c. *Neologism Du Jour: Indivisibility Theory and Contamination Theory*

After determining that § 1367 provides the statutory authority to assert supplemental jurisdiction over the additional plaintiffs in the consolidated cases, Justice Kennedy turns his attention to the alternative view of the dissent and others that a "civil action" as used in § 1367(a) refers

194. *Id.* at 559.

195. *Id.*

196. *Id.* Justice Kennedy also attempts to minimize the importance of the distinction in the Court's jurisprudence by asserting that although "the doctrines of pendent and ancillary jurisdiction developed separately as a historical matter, the Court has recognized that the doctrines are 'two species of the same generic problem.'" *Id.* (quoting Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978)). Justice Kennedy did not discuss the other limitations on § 1367(a)'s broad grant of supplemental jurisdiction because he found them to be inapplicable to the question before the Court. *Id.* at 557-58.

197. *Id.* at 560.

198. *Id.*

to "every claim in the complaint."[199] Justice Kennedy is of the opinion that this position:

> requires assuming either that all claims in the complaint must stand or fall as a single, indivisible "civil action" [to be] refer[red] to as the "indivisibility theory" . . . or . . . that the inclusion of a claim or party falling outside the district court's original jurisdiction somehow contaminates every other claim in the complaint [to be]. . . refer[red] to as the "contamination theory."[200]

Justice Kennedy quickly dismisses the "indivisibility theory" as being incongruent with the doctrine of supplemental jurisdiction.[201] He admits, however, that the "contamination theory" does have some validity in the "special context of the complete diversity requirement" because if a nondiverse party is allowed to join the lawsuit this would destroy the purpose of "providing a federal forum."[202] Except for protecting the rationale behind diversity jurisdiction with respect to nondiverse parties, Justice Kennedy fails to see the logical relevance of the "contamination theory" to the amount-in-controversy requirement, because he does not find an "inherent logical connection between the amount-in-controversy requirement and § 1332 diversity jurisdiction."[203]

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199. *Id.* (stating that this definition of a "civil action" is "urged by some of the parties, commentators, and Courts of Appeals").

200. *Id.*

201. *Id.* at 561. For example, Justice Kennedy assails the "indivisibility theory" as forcing such a narrow construction that it would not even allow pendent-claims as defined in *Gibbs* because in that case "there was no civil action of which the district court could assume original jurisdiction under § 1331 [because of the independently insufficient state claim], and so no basis for exercising supplemental jurisdiction over any of the claims." *Id.* Another problem that Justice Kennedy finds with the "indivisibility theory" is that it is incompatible with the Court's prior practice of only dismissing those claims which do not independently meet the federal jurisdiction requirements instead of "dismissing the entire action." *Id.* (citing Clark v. Paul Gray, Inc., 306 U.S. 583, 590 (1939)). Justice Kennedy argues that if the presence of the defective claims do in fact prevent a federal court from asserting original jurisdiction over the "indivisible civil action before it, then the district court would have to dismiss the whole action rather than particular parties." *Id.* Finally, Justice Kennedy is "unconvinc[ed]" that the "indivisibility theory" should apply to diversity jurisdiction but not federal-question. *Id.* This objection to the "indivisibility theory" is based on Justice Kennedy's belief that the opposing view defines original jurisdiction over a civil action differently for § 1331 ("original jurisdiction in all actions where at least *one* claim in the complaint meets the . . . requirements") and § 1332 ("original jurisdiction in all actions where *every* claim in the complaint meets the . . . requirements") and that there is no compelling reason to give two separate meanings to the same words. *Id.* (emphasis added).

202. *Id.* at 562 (noting that the "presence of a single nondiverse party may eliminate the fear of bias with respect to all claims"). Note that when Justice Kennedy refers to a "nondiverse party" he means that the party would destroy the complete diversity of citizenship of the parties. *Id.* at 552.

203. *Id.* at 562. Justice Kennedy explains that the purpose of the amount-in-controversy requirement is to insure that cases that come before the federal court are not inconsequential and that he fails to see how allowing a smaller additional claim would diminish the overall financial importance of the case because the case would already include a claim which independently met the amount-in-controversy requirement. *Id.* Justice Kennedy adds further support to his contention that

Justice Kennedy not only has difficulty with the theories, as defined by him, underlying the alternative view of § 1367, but he views the argument as analogous to an argument that was rejected by the Court in *City of Chicago v. International College of Surgeons*.[204] The plaintiff in *International College* challenged the removal of his case, which included a federal claim and a state-law claim with no independent basis for federal jurisdiction, from state to federal court under 28 U.S.C. § 1441(a).[205] One of the plaintiff's arguments centered on the fact that the state-law claim did not independently come within federal jurisdiction and, therefore, the entire "civil action" could not be removed to federal court regardless of the federal claim.[206] Justice Kennedy notes that the Court found this argument unpersuasive, that the state-law claim did not affect the status of the federal claim as a "civil action" over which a federal court had "original jurisdiction" and that the district court, after removal of the federal claim, exercised supplemental jurisdiction over the state-law claim under 28 U.S.C. § 1367.[207] Translating the reasoning of *International College* to the case at hand, Justice Kennedy believes that the term "civil action" does not require that every claim asserted meet the amount-in-controversy requirement, even if the insufficient claim requires an additional party (so long as that party does not destroy diversity of citizenship).[208]

Finally, Justice Kennedy addresses the argument that the Court's interpretation of § 1367(a) leads to anomalous results with respect to the exceptions found in § 1367(b).[209] The anomaly would be that § 1367(b) prevents Rule 19 plaintiffs, who are "indispensable," from joining if they do not meet the amount-in-controversy requirement, but allows permissive

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there is no logical connection between the amount-in-controversy requirement and § 1332 diversity jurisdiction by recalling that federal-question jurisdiction once had an amount-in-controversy requirement. *Id.* On a related point, Justice Kennedy argues that since both sides agree that § 1367 grants supplemental jurisdiction to related claims when at least one claim independently meets the federal-question requirements, if the amount-in-controversy requirement were added back to § 1331, under § 1367 a federal court could have supplemental jurisdiction over claims that did not meet the amount-in-controversy requirement so long as there was one federal-question claim that did. *Id.* This result means that *Clark* has been "unambiguously" overruled and, because the reasoning in *Zahn* is based heavily on *Clark*, it would be difficult to "say that § 1367 did not also overrule *Zahn*." *Id.*

204. 522 U.S. 156 (1997).

205. *Exxon Mobil*, 545 U.S. at 562-63; *see International College*, 522 U.S. at 162-65; *see also* 28 U.S.C. § 1441(a) (2000) ("any civil action . . . of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court . . .").

206. *Exxon Mobil*, 545 U.S. at 563.

207. *Id.* (citing *International College*, 522 U.S. at 166).

208. *Id.* at 564-65.

209. *Id.* at 565.

joinder of plaintiffs under Rule 20, who are *not* indispensable.[210] Justice Kennedy does not consider this anomaly important and, further, he asserts that the alternative view would lead to an anomalous result as well.[211] Therefore, according to Justice Kennedy, the anomaly argument cuts both ways and does little to weaken the Court's opinion or strengthen that of the dissent.[212] Left unswayed by the alternative view, Justice Kennedy makes it clear that "§ 1367 by its plain text overruled *Clark* and *Zahn*."[213]

d. The Legislative History is Murky at Best

Justice Kennedy also addresses the legislative history, although not pertinent to his main point, due to Justice Stevens' reliance on it in his dissenting opinion and Justice Ginsburg's use of it to add credence to her statutory interpretation.[214] Even though the House Report contains language indicating that § 1367 was not intended to overrule *Zahn*, Justice Kennedy points to conflicting statements in the Federal Court Study Committee Subcommittee's Report with respect to a proposal that had substantially similar language to § 1367.[215] Additionally, Justice Kennedy expresses a general concern that giving legislative history too much weight will allow non-democratically elected special interests to shape and mold the effect of legislation simply by affecting the legislative history.[216] Ultimately, Justice Kennedy determines that the legislative history is exceptionally murky and that even if it were appropriate to look to the legislative history in this case, that it does not deserve much weight.[217]

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210. *Id.* at 566; *see* FED. R. CIV. P. 19(b); FED R. CIV. P. 20(a).

211. *Exxon Mobil*, 545 U.S. at 566. Justice Kennedy argues that if the alternative view were to be used, every claim under diversity jurisdiction would have to meet every requirement of diversity jurisdiction, and the inclusion of Rule 19 plaintiffs in the § 1367(b) list of exceptions to supplemental jurisdiction would be redundant and anomalous because they would already be excluded by § 1367(a). *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 567.

215. *Id.* at 567-71.

216. *Id.* Justice Kennedy cites Rowe, Jr., Burbank & Mengler, *supra* note 16, at 960-61 n.90 as evidence of the fulfillment of the fear that reliance on "legislative history will be used to circumvent the Article I process." *Exxon Mobil*, 545 U.S. at 570. Justice Kennedy states that the authors of the article were involved in the drafting of § 1367 and, in their article, "were frank to concede that if one refuses to consider the legislative history, one has no choice but to 'conclude that section 1367 has wiped *Zahn* off the books.'" *Id.* (quoting Rowe, Jr., Burbank & Mengler, *supra* note 16, at 960 n.90). Justice Kennedy sees this language as an admission by the authors that the "plain text of § 1367 overruled *Zahn* and that language to the contrary in the House Report was a *post hoc* attempt to alter that result." *Id.*

217. *Id.* at 571. Justice Kennedy reinforces throughout this portion of the opinion that he finds the language of § 1367 unambiguous and, therefore, the resort to legislative history unnecessary. *Id.* at 567-570.

e. The Class Action Fairness Act of 2005 (CAFA)

Justice Kennedy makes it clear that CAFA[218] does not affect the Court's interpretation of § 1367 because it does not apply retroactively to the consolidated cases before the Court and "the views of the 2005 Congress are not relevant to [the] interpretation of a text enacted by Congress in 1990."[219] Additionally, he states that cases that fall within § 1367 do not necessarily meet CAFA's $5 million dollar requirement to abrogate the no-aggregation rule of *Zahn*.[220] For these reasons, Justice Kennedy claims that the Court's holding in *Exxon Mobil* is still significant because it will affect future cases, including class actions, which do not meet CAFA's requirements.[221]

2. Critique of Justice Kennedy's Majority Opinion

"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."[222] These are the words the Court itself spoke when it reached its holding in *Finley*.[223] In *Exxon Mobil*, Justice Kennedy, in an effort to simplify his analysis of the alternative view of § 1367, defines two "theories" which he determines the alternative approach must use as a basis for its rationale.[224] One of the problems with this approach is that it *oversimplifies* the argument of the alternative view and puts words in the mouths of its proponents.[225] The main argument of the proponents of the alternative view is that Congress intended, through § 1367, to freeze the doctrines of pendent and ancillary jurisdiction (including their application to diversity jurisdiction cases), in essence the "background," as it existed prior to *Finley*.[226] After all, the "background"

218. Class Action Fairness Act of 2005, S. 5, 109th Cong. § 4(a)-(b) (2005) [hereinafter CAFA]. CAFA inserted into § 1332 language which allows a district court to exercise jurisdiction over a class action when there is minimum diversity, there are 100 or more plaintiffs, and the *aggregated* amount-in-controversy of all the claims is greater than $5,000,000. *See* 28 U.S.C. § 1332(d).

219. *Exxon Mobil*, 545 U.S. at 572.

220. *Id.* at 571-72.

221. *Id.*

222. Finley v. United States, 490 U.S. 545, 556 (1989) (emphasis added).

223. *Id.*

224. *Exxon Mobil*, 545 U.S. at 559-60.

225. *Id.* at 577 (Ginsburg, J., dissenting) (making no mention of the "indivisibility theory" or "contamination theory"). *See generally* Pfander, *supra* note 16 (relying on the history of the Court's diversity, pendent and ancillary jurisdiction and making no mention of either "theory"); Rowe, Jr., Burbank & Mengler, *supra* note 16 (citing the legislative history as the support for their opinion that *Zahn* has not been overruled).

226. *Exxon Mobil*, 545 U.S. at 579-80 (Ginsburg, J., dissenting); *see also* Pfander, *supra* note 16,

which Congress legislated against in 1990 did not include the terms "indivisibility theory" or "contamination theory" when describing the requirements of what constituted "original jurisdiction" over a "civil action."[227] In fact, the holding in *Zahn v. International Paper Co.* makes no mention of either of these so-called theories.[228] The history of diversity, pendent and ancillary jurisdiction is complex and cannot be distilled down to one theory.[229] The "indivisibility theory" and "contamination theory" both contradict the reasoning and result in *Supreme Tribe of Ben-Hur*, yet, under the alternative approach to § 1367, such a result would be part of the "background" that has been frozen by the statute to determine when a federal court has "original jurisdiction."[230]

Other criticisms that could be leveled against Justice Kennedy's opinion are ones that are leveled at the textualist approach in general.[231] One of these criticisms is that the textualist approach will actually lead to a greater expansion of judicial discretion in determining the meaning of a statute because the reason that Congress makes the legislative history available is for the purpose of aiding interpretation.[232] Therefore, to ignore the legislative history is to ignore the will of Congress.[233] Specific criticisms of

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at 134 ("the sympathetic reading preserves the rules of complete diversity and aggregation that the Court had developed in the course of construing section 1332 [and] leaves in place a distinction between pendent and ancillary jurisdiction that had grown up in prior cases. As we have seen, the pre-Finley decisions steadfastly refused to apply pendent jurisdiction concepts to diversity matters. Rather, the established body of law governing complete-diversity and aggregation continued to govern the plaintiff's initial assertion of claims").

227. *Exxon Mobil*, 545 U.S. at 560-61. *See generally* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978), Zahn v. Int'l Paper Co., 414 U.S. 291 (1973), Snyder v. Harris, 394 U.S. 332, 339-40 (1969), Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).

228. *See Zahn*, 414 U.S. at 299-302 (reasoning that the Court's *no-aggregation* rule predated any changes to Rule 23 because it was based on the federal diversity jurisdiction statute, as codified in 28 U.S.C. § 1332 and, therefore to have jurisdiction over a claim, each claim must meet the amount-in-controversy requirement of § 1332 in accordance with the *no-aggregation* rule that the Court had read into the amount-in-controversy requirement). *But see id.* at 305-07 (Brennan, J., dissenting) (noting that the Court mechanically applied the no-aggregation rule and effectively ignored the possibility of applying ancillary jurisdiction and noting that the doctrine of ancillary jurisdiction would be highly appropriate in a case such as *Zahn*).

229. *See supra* Parts II & III; *see also* Freer, *supra* note 77, at 445 (noting that beginning with *Gibbs* the doctrine of supplemental jurisdiction was becoming "somewhat *less* confusing" (emphasis added)).

230. *Exxon Mobil*, 545 U.S. at 566. *But see id.* at 577-79 (Ginsburg, J., dissenting) (arguing that § 1367 only overruled *Finley* and left pre-*Finley* jurisprudence intact; this impliedly includes *Supreme Tribe of Ben-Hur*). *See also id.* at 573-75 (Stevens, J., dissenting) (citing the House Report as supporting the conclusion that *Supreme Tribe of Ben-Hur* was meant to survive the passage of 28 U.S.C. § 1367).

231. *See id.* at 572 (Stevens, J., dissenting) (arguing that the term "'ambiguity' is a term that may have different meanings for different judges [and b]ecause ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity . . . as determinative of whether legislative history is consulted").

232. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 303-08 (1990).

233. *Id.* (arguing that words such as "reasonable" and "consistent" as utilized by textualists lend

the textualist approach that are particularly applicable here are the "unfairness of change" argument and the argument that courts should be more responsive to looking at the legislative history when the plain meaning of the text of the statute is contradicted or inconsistent with the legislative history.[234] The critics of textualism might consider the application of the textualist approach in this instance as unfair because when the statute was passed in 1990, it was a period of time in which the majority of Supreme Court's statutory interpretation cases used the legislative history to some extent.[235] Additionally, critics of textualism would be troubled by Justice Kennedy's lack of concern for the contradiction between the Court's interpretation and the House Report.[236] This final criticism is the weakest because the ambiguity of the entire legislative history of 28 U.S.C. § 1367 is an open question and will be discussed further with respect to Justice Stevens' dissenting opinion.

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themselves to replacing the beliefs of the judge over that of the Congress and that the legislative history should be given deference in determining the meaning of a statute passed by Congress because the "legislative history, in the form of committee reports, hearings, and floor remarks is available to courts because Congress has made those documents available to [them]").

234. *See* Stephen Breyer, Lecture, *On the Uses of Legislative History in Interpreting Statutes*, *in* 65 S. CAL. L. REV. 845, 850-52, 871-73 (1992) (arguing that use of legislative history is necessary because: (1) legislative history can "illuminate drafting errors" from otherwise plain text which, if its commonplace meaning was applied there would be no "absurd" result; (2) legislative history provides the proper background as to the statute's purpose which aids in determining the meaning of the text; and (3) in the past the Court has relied heavily on legislative history and it would be unfair "[t]o change interpretive horses in midstream" because it "would defeat the expectations of the legislators who enacted a statute . . ."); *see also* Wald, *supra* note 232, at 300-02 (expressing the opinion that judges should determine if the interpretation of the plain text of the statute conforms or contradicts the legislative history and that judges should "worry . . . when it contradicts the text"); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 453 n.9 (1989) (criticizing Justice Kennedy's opinion concurring in the judgment that the interpretation of the plain text of the statute must be "absurd" before using the legislative history and asserting that the "Court has never adopted so strict a standard for reviewing committee reports, floor debates, and other nonstatutory indications of congressional intent, *and we explicitly reject that standard today*").

235. *See* Wald, *supra* note 232, at 287-90 (cataloging the "use of legislative history in opinions throughout the 1988-89 [Supreme Court] Term" and determining that in "*almost three-fourths of those [cases] involving statutory construction and over one-third of all the opinions of the Court-legislative history was relied upon in a substantive way to reach the Court's decision*"); *see also* Breyer, *supra* note 234, at 872 (arguing that "[w]hen legislators enact statutes against the backdrop of current judicial practice, they know that they need not spend scarce time entering thorny, technical, legal debates about language when all concerned agree about substance").

236. *See* Wald, *supra* note 232, at 300-02; *see also* Breyer, *supra* note 234, at 856 (opining that adoption of a literal interpretation that is inconsistent with the legislative history "denies the public a significant part of the benefit of [the] expertise [of] individuals and groups" who contribute to the creation of the legislation and whose opinions are found within the legislative history); Jacobs v. Bremner, 378 F. Supp. 2d 861, 865 & n.4 (N.D. Ill. 2005) (criticizing the Court's decision in *Exxon Mobil* for ignoring what Judge Shadur felt was a clear and unambiguous contradiction found in the House Report).

3. Analysis of Justice Stevens' Opinion

While Justice Stevens begins his opinion by making it clear that he agrees with the reasoning in Justice Ginsburg's dissent regarding the interpretation of the text of the statute, his dissent centers mostly on the Court's refusal to consider the legislative history in interpreting the statute.[237] Justice Stevens is not persuaded by the majority's characterization of § 1367 as unambiguous.[238] Additionally, he does not agree that ambiguity alone should determine whether or not the legislative history is consulted and he attacks the majority's characterization of the legislative history as murky or unreliable, describing it as a "virtual billboard of congressional intent."[239]

Justice Stevens attacks the majority's reasoning by stating that its use of the Subcommittee Report was overreaching because the report was never adopted by the FCSC.[240] In addition, he argues that the fact that the Subcommittee Report came to a different conclusion than the House Report, regarding language substantially similar to § 1367, is additional proof that § 1367 is ambiguous.[241] Justice Stevens also finds the Court's analysis of the article written by "three law professors who participated in drafting § 1367" to be inappropriate and a mischaracterization.[242]

Finally, Justice Stevens lobs one last volley against the Court's opinion. He summarizes his dissatisfaction with defining § 1367 as unambiguous, and concludes that § 1367 does not overrule *Zahn* or *Clark* because of Justice Ginsburg's "persuasive account of the statutory text and its jurisprudential backdrop, and given the *uncommonly clear* legislative history . . . ."[243]

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237. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 572-75 (2005) (Stevens, J., dissenting).

238. *Id.* at 572.

239. *Id.* at 575. Justice Stevens believes that "ambiguity is . . . in the eye of the beholder" and the fact that Justice Ginsburg can make such a well reasoned argument that the statute has another meaning is, in and of itself, evidence of ambiguity. *Id.* Justice Stevens is also incredulous of the Court's characterization of the legislative history as murky, and states that "[i]n Congress, committee reports are normally considered the authoritative explication of a statute's text and purpose, and busy legislators and their assistants rely on that explication in casting their votes." *Id.* (citing Garcia v. United States, 469 U.S. 70, 76 (1984)).

240. *Id.*

241. *Id.*

242. *Id.* at 576 (referring to the Court's discussion of Rowe, Jr., Burbank & Mengler, *supra* note 16, at 943, and that in Justice Stevens opinion "the professors were merely saying that the text of the statute was susceptible to an overly broad (and simplistic) reading, and that clarification in the House Report was therefore appropriate").

243. *Id.* at 577 (emphasis added) (implying that "[a]fter nearly 20 pages of complicated analysis, which explores subtle doctrinal nuances and coins various neologisms" the Court is disingenuous when it describes § 1367 as unambiguous).

4. Critique of Justice Stevens' Dissent

Justice Stevens' main disagreement with Justice Kennedy's opinion, other than his support for Justice Ginsburg's dissenting opinion, is Justice Kennedy's failure to follow the "virtual billboard of congressional intent" found in the legislative history.[244] However, most of what Justice Stevens points to in support of his "billboard" analogy is found in the House Report and is without direct support in the FCSC Report and contradicted in the Subcommittee Report.[245] The problem with his sole reliance on the House Report and his criticism of Justice Kennedy's use of the Subcommittee Report is that it seems to be an artificial limitation of what constitutes "legislative history."[246] Additionally, Justice Stevens seems to want it both ways. The Court cannot use the Subcommittee Report to show the ambiguity of the legislative history, but he can use it to show the ambiguity of the statute.[247] The reasoning of this result is unclear.

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244. *Id.* at 575.

245. *See id.* at 573-74 (supporting his analogy by quoting H.R. Rep. No. 101-734 at 29 & n.17 which states that "section [1367] is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to Finley,"; following this quote is a footnote which cites both *Supreme Tribe of Ben-Hur* and *Zahn*); *see* FCSC Report, *supra* note 18, at 47-48 (the only section of the FCSC Report referring to supplemental jurisdiction and not taking a stance on the effect of the statute on *Zahn*); *see* SUBCOMMITTEE REPORT, *supra* note 74, at 561 n.33 (noting that the language of the proposed statute, which is very similar to 28 U.S.C. § 1367, "would overrule the Supreme Court's decision in" *Zahn*). The language of the proposed supplemental jurisdiction statute in the Subcommittee Report states in relevant part:

> (a) Except as provided in subsections (b) and (c) or in another provision of this Title, in any civil action on a claim for which jurisdiction is provided, the district court shall have jurisdiction over all other claims arising out of the same transaction or occurrence, including claims that require the joinder of additional parties.
>
> (b) In civil actions under § 1332 of this Title, jurisdiction shall not extend to claims by the plaintiff against parties joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or to claims by parties who intervene under Rule 24(b) of the Federal Rules of Civil Procedure, provided, that the court may hear such claims if necessary to prevent substantial prejudice to a party or third-party.

SUBCOMMITTEE REPORT, *supra* note 74, at 567-68.

246. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 453-54 n.9 (1989) (listing as legislative history "committee reports, floor debates, and other nonstatutory indications of congressional intent"); *see also* Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 836-37 (1991) (including "talk on the floor of legislatures, or . . . committee meetings" among the various types of legislative history); Wald, *supra* note 232, at 306 (describing legislative history as including "committee reports, hearings, and floor remarks"); Breyer, *supra* note 234, at 845, 864 (listing as types of legislative history, "congressional floor debates, committee reports, hearing testimony, and presidential messages" and that legislators generally do "not distinguish between different kinds of documents").

247. *Exxon Mobil*, 545 U.S. at 575 (Stevens, J., dissenting) (stating that the Subcommittee Report "only highlights the fact that the statute is ambiguous").

Justice Stevens also criticizes Justice Kennedy's use of a law review article written by "three law professors who participated in drafting § 1367" to show that the legislative history is unreliable.[248] Justice Stevens believes that the law professors, in their article, were simply making the point that "the statute was susceptible to an overly broad (and simplistic) reading, and that clarification in the House Report was therefore appropriate."[249] The language quoted by Justice Kennedy, however, is a clear fulfillment of the fear that the legislative history can be manipulated to achieve a result contrary to the plain language of the statute; how else can the following sentence be explained?

> It would have been better had the statute dealt explicitly with this problem, and the legislative history was an attempt to *correct the oversight.* The resulting *combination* of statutory language and legislative history, however, creates the *delicious* possibility that *despite* Justice Scalia's opposition to the use of legislative history, he will *have to look to the history or* conclude that *section 1367* has *wiped Zahn off the books.*[250]

The use by Justice Stevens of the phrase "merely saying" to minimize the preceding passage does little to change the message: that some of those involved in drafting § 1367 did not like the product of the legislative process, the text of 28 U.S.C. § 1367, and decided to "fix" the result by *adding* legislative history.[251]

5. Analysis of Justice Ginsburg's Dissent

Justice Ginsburg begins her dissent with a summary of the diversity and supplemental jurisdiction case law that lead to the passage of 28 U.S.C. § 1367, a summary not materially different from the majority's.[252] Finding the Court's interpretation of § 1367 to be "plausibl[e]" but also "broad," Justice Ginsburg suggests "another plausible reading" that is "less disruptive of [the Court's] jurisprudence regarding supplemental jurisdiction."[253] The "narrower construction," according to Justice Ginsburg, "reads § 1367(a) to instruct . . . that the district court must first have 'original jurisdiction' over a 'civil action' before supplemental jurisdiction can attach" and that such a reading preserves "*Clark* and *Zahn*" preventing the "joinder of plaintiffs, or

248. *Id.* at 576.
249. *Id.*
250. Rowe, Jr., Burbank & Mengler, *supra* note 16, at 960 n.90 (emphasis added).
251. *Exxon Mobil*, 545 U.S. at 576.
252. *Id.* at 577-79 (Ginsburg, J., dissenting).
253. *Id.* at 579.

inclusion of class members, who do not independently meet the amount-in-controversy requirement."[254]

After describing her construction of § 1367, Justice Ginsburg describes the nuances of, and differences between, the development of pendent and ancillary jurisdiction.[255] Justice Ginsburg then describes: (1) the formation of the FCSC; (2) the Subcommittee Report; (3) that the FCSC Report made no mention of overruling *Zahn*; and (4) that the House Report characterized the recommended statute as "modest" and "noncontroversial."[256]

Justice Ginsburg believes that to apply § 1367 properly, it must be understood that the statute "operates only in civil actions 'of which the district courts have original jurisdiction'" and, therefore, it is important to determine when a federal court has original jurisdiction over a civil action.[257] Essentially, Justice Ginsburg believes that the phrase "original jurisdiction" in § 1367(a) requires a different analysis depending on which statute confers jurisdiction over the action (i.e. diversity or federal-question).[258] For this reason, she believes that past jurisprudence, like *Zahn*, must be consulted to determine if, under § 1367(a), a federal court has "original jurisdiction" over the "civil action" when such original jurisdiction is based on the diversity jurisdiction statute.[259]

a. Justice Ginsburg Focuses on the No-Aggregation Rule

Justice Ginsburg, in an effort to explain why § 1367 does not allow the exercise of supplemental jurisdiction in the consolidated cases, gives her own summation of the requirements of diversity jurisdiction.[260] With

254. *Id.* (describing the "narrower construction" as "better" than the construction of § 1367 by the Court).

255. *Id.* at 579-82. Justice Ginsburg's summary of pendent jurisdiction is very similar to that of the Court. *Id.* at 580. However, Justice Ginsburg spends much more time explaining the development of ancillary jurisdiction and the rationale on which the doctrine is based. *See id.* at 581. Justice Ginsburg uses *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), to illustrate the limitations that had developed around the doctrine of ancillary jurisdiction and that one of the primary concerns surrounding the doctrine was preventing plaintiffs from circumventing diversity jurisdiction requirements and that "throughout the litigation, all plaintiffs must remain diverse from all defendants." *Exxon Mobil*, 545 U.S. at 582 (Ginsburg, J., dissenting) (citing *Owen*, 437 U.S. at 374).

256. *Exxon Mobil*, 545 U.S. at 583-84 (Ginsburg, J., dissenting) (contrasting Congress' passage of § 1367 with its failure to implement the "immodest proposal" of the FCSC to eliminate diversity jurisdiction).

257. *Id.* at 584.

258. *See id.*

259. *See id.*

260. *Id.* at 584-87 Justice Ginsburg's explanation of the "complete diversity" rule is similar to that of the Court, however, she goes on to emphasize that the Court has held that as a requirement

respect to the amount-in-controversy requirement Justice Ginsburg states that the Court's jurisprudence stands for the proposition that "a single plaintiff may aggregate two or more claims against a single defendant [to meet the amount-in-controversy requirement] . . . [b]ut in multiparty cases, including class actions, [the Court has] unyieldingly adhered to the nonaggregation rule stated in *Troy Bank*."[261] Justice Ginsburg is troubled by what she views as the Court's description of the "complete diversity" requirement as more important than the amount-in-controversy requirement.[262] She fails to see what "allows the Court to slice up § 1332" to not allow claims that violate the "complete diversity" requirement but allow those claims that do not meet the amount-in-controversy requirement.[263] In support of her view that the "complete diversity" and amount-in-controversy requirements should not be treated differently, she points to the fact that the Court has cured both jurisdictional defects the same way, by dismissing the independently insufficient claim.[264] Regardless of the Court's decision in the present case to treat the two requirements of diversity jurisdiction differently, Justice Ginsburg asserts that prior to the passage of § 1367, "[t]he rule that each plaintiff must independently satisfy the amount-in-controversy requirement, unless Congress expressly orders otherwise, was . . . the solidly established reading of § 1332."[265]

b. § 1367, No-Aggregation & "Original Jurisdiction"

Justice Ginsburg further refines her argument by acknowledging that the "complete diversity" requirement is not at issue in the present cases and that "the question [is] whether Congress abrogated the nonaggregation rule long tied to § 1332 when it enacted § 1367."[266] According to Justice Ginsburg, the Court should presume that Congress enacted § 1367 "against a background of law already in place and the historical development of that law" and that the Court regularly engages in such an interpretive presumption.[267]

Just as Justice Kennedy, Justice Ginsburg finds no disagreement regarding the effect of § 1367(a) "to permit pendent-party jurisdiction in federal-question cases, and thus, to overrule *Finley*."[268] Therefore, her main

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for diversity jurisdiction "each plaintiff's stake must independently meet the amount-in-controversy" requirement. *Id.* at 585 (citing Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40 (1911)).

261. *Id.* at 585-86 (Ginsburg, J., dissenting) (citing Clark v. Paul Gray, Inc., 306 U.S. 583, 589 (1939); Snyder v. Harris, 394 U.S. 332, 339-40 (1969)).

262. *Exxon Mobil*, 545 U.S. at 586 n.5 (Ginsburg, J., dissenting).

263. *Id.*

264. *Id.*

265. *Id.* at 586-87.

266. *Id.* at 587.

267. *Id.* (citing Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 169 (2004)).

268. *Id.* at 587.

disagreement with the majority centers on § 1367(a)'s impact on § 1332 diversity cases.[269] She believes that there is nothing to indicate that the no-aggregation rule has been rejected by Congress.[270] For this reason, Justice Ginsburg finds that the term "original jurisdiction" as a matter of jurisprudence contains the no-aggregation rule and because the no-aggregation rule requires each individual plaintiff to meet the amount-in-controversy, *Zahn* is not overruled by § 1367(a).[271]

c. The Anomaly

Justice Ginsburg finds that the alternative approach espoused by the Court leads to the anomalous result of not allowing supplemental jurisdiction over Rule 19 plaintiffs who are indispensable parties but allows Rule 20 permissive plaintiffs.[272] Justice Ginsburg then tackles the issue of what the purpose of § 1367(b) is under her interpretive scheme.[273] She explains that § 1367(b) does not include Rule 20 or 23 plaintiffs because they are already precluded by § 1367(a).[274] According to Justice Ginsburg's interpretation, the other exceptions are listed to safeguard against any temptation of the federal courts to expand the accommodation of ancillary claims in a way that alters § 1332's requirements, even though § 1367(a) maintains the distinctions between pendent and ancillary jurisdiction.[275]

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269. *Id.* at 587-88.

270. *Id.* at 587-90.

271. *Id.* Justice Ginsburg does not only find her interpretation better than the alternative because she believes that it is less disruptive to the Court's diversity jurisdiction jurisprudence, but she also believes that it retains more of the distinctions between the doctrines of pendent and ancillary jurisdiction. *Id.* at 590-91. She believes the retention of the distinction (which in her opinion the Court rejects) is better because then the only effect of the statute would be to overrule *Finley*, which all agree was the main purpose of § 1367. *Id.* at 590 & n.10. Additionally, Justice Ginsburg mentions that "[t]he point of the Court's extended discussion of *Chicago v. International College of Surgeons* . . . slips from [her] grasp" because there is no disagreement as to whether § 1367(a) can be used to "exercise . . . supplemental jurisdiction in removed cases." *Id.* at 592 n.11. Further, she believes that her approach to § 1367 "would . . . synchronize § 1367 with the removal statute, 28 U.S.C. § 1441" because "the Supreme Court has interpreted § 1441 to prohibit removal unless the *entire* action, as it stands at the time of removal, could have been filed in federal court in the first instance." *Id.* at 591-92 & n.11 (emphasis added).

272. *Id.* at 589 n.8 (Ginsburg, J., dissenting) (referring to the same anomaly that Justice Kennedy admitted that his approach would create, that Rule 19 plaintiffs who are indispensable parties could not have supplemental jurisdiction exercised over their claims but a court could exercise jurisdiction over permissive (unnecessary) parties joined under Rule 20).

273. *Id.* at 593.

274. *Id.*

275. *Id.*

d. The Class Action Fairness Act of 2005 (CAFA)

Unlike Justice Kennedy, Justice Ginsburg does not find the passage of CAFA irrelevant to the analysis at hand.[276] In fact, because CAFA directly amends § 1332, Justice Ginsburg sees CAFA as evidence that if Congress intended to change the well established jurisprudence of § 1332, that it would have done so directly—not through the backdoor of § 1367.[277]

Ultimately, Justice Ginsburg concludes that § 1367 does not overrule *Clark* or *Zahn*.[278] In addition, even though the legislative history was not necessary to her interpretation of the statute, because the legislative history is "corroborative of [her] statutory reading" she is confident that the Court should have adopted her analysis.[279]

6. Critique of Justice Ginsburg's Dissent

Justice Ginsburg's interpretation is heavily based on the assumption that all Congress intended to do by passing 28 U.S.C. § 1367 was to overrule *Finley* and essentially restore pre-*Finley* jurisprudence.[280] This assumption is central to Justice Ginsburg's interpretation because once this assumption is made, then the phrases "original jurisdiction" and "civil action" acquire the meanings of pre-*Finley* jurisprudence, which includes *Zahn*. The main problem with this assumption is that it assumes that Congress could freeze time and evolving judicial doctrines.

In *Zahn*, the Court only looked to support supplemental jurisdiction through the diversity statute. There was no supplemental jurisdiction statute to speak of and, therefore, no other statutory basis for the insufficient claims except for § 1332.[281] Similarly, the Court in *Finley* dismissed a jurisdictionally insufficient claim against an additional defendant because the Federal Torts Claim Act upon which federal jurisdiction was based did not include any allowance for supplemental jurisdiction.[282] Not only does the reasoning of the two cases seem parallel, but the Court in *Finley* expressly states a connection between the result in *Finley* and the holding in *Zahn*: "All our cases—*Zahn*, *Aldinger*, and *Kroger*—have held that a grant of jurisdiction over *claims* involving particular parties does not itself confer jurisdiction over additional *claims* by or against different parties. Our

276. *Id.* at 595 n.12.

277. *Id.*

278. *Id.*

279. *Id.* at 595 n.14.

280. *Id.* at 579, 584-89.

281. Zahn v. Int'l Paper Co., 414 U.S. 291, 299 (1973); *see also id.* at 305 (Brennan, J., dissenting) (arguing that the Court should not have only applied the requirements of § 1332 but should have also considered whether or not to allow ancillary jurisdiction to be exercised over the insufficient claims).

282. Finley v. United States, 490 U.S. 545, 555-56 (1989).

decision today *reaffirms* that interpretative rule."[283] In other words, the reasoning behind the holding in *Finley* is the reasoning behind the holding in *Zahn*. It is incongruous to say that the exact same reasoning is overturned in one instance and not the other.

The answer that the result is different because original jurisdiction founded under § 1332 has different requirements than federal-question jurisdiction is insufficient, though relied upon by Justice Ginsburg.[284] In *Zahn*, a diversity case, the sufficient claims were not dismissed, the insufficient ones were dismissed; therefore, the insufficient claims did not affect the jurisdiction of a federal court over the sufficient claims.[285] In *Finley*, a federal-question case under FTCA, the sufficient claim was not dismissed, the insufficient ones were dismissed; therefore, the insufficient claims did not affect the jurisdiction of the federal court over the sufficient claims.[286] Even with different requirements, it seems that once one claim meets the jurisdictional requirements, whether in a diversity action, like *Zahn*, or in a federal-question, like *Finley*, the court has jurisdiction over that claim and, therefore, has jurisdiction over *a* civil action.[287]

Another weakness of Justice Ginsburg's argument is relying on the characterization of the dismissal of the plaintiff with the insufficient amount-in-controversy as "[t]he *cure* for improper joinder of a plaintiff who does not satisfy the jurisdictional amount" to "*preserve*[]" original jurisdiction.[288]

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283. *Id.* at 556 (emphasis added).

284. *Exxon Mobil*, 545 U.S. at 592-93 (Ginsburg, J., dissenting).

285. *Zahn*, 414 U.S. at 302.

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

287. It is also curious to note that Justice Ginsburg spends much of her opinion asserting that the nonaggregation rule is alive and well. *Exxon Mobil*, 545 U.S. at 588-89 (Ginsburg, J., dissenting). However, the Court never disputes this assertion. *Id.* at 549-73. In fact, no one is making the argument that the federal courts have jurisdiction over the insufficient claims under § 1332 or due to aggregation. *Id.* As discussed above in the text, *Zahn* stands for the proposition that when a jurisdictionally sufficient claim is mixed with claims that are insufficient due to failure to fulfill the amount-in-controversy, the federal court still has "original jurisdiction" as to that sufficient claim. *Zahn*, 490 U.S. at 302. In *Zahn*, the insufficient claims were dismissed because their was no *independent statutory basis* to support them; however, § 1367 is an independent statutory basis and, there is no doubt that the insufficient class-action plaintiffs' claims are part of the "same case or controversy under Article III of the United States Constitution" and that the sufficient claims comprise a "civil action of which the district courts have original jurisdiction." *See* 28 U.S.C. § 1367(a). Additionally, Justice Ginsburg's use of a quote from *Snyder v. Harris*, 394 U.S. 332, 339-40 (1969) to show that "abandonment of the nonaggregation rule in class actions would undercut the congressional 'purpose...to check, to some degree, the rising caseload of the federal courts'" is misleading. *Exxon Mobil*, 545 U.S. at 586. The quote is in reference to the argument by the plaintiffs in *Snyder*, all of whom had insufficient claims, to allow aggregation of all of their claims to meet the amount-in-controversy requirement, a much different argument than that put forth in *Exxon Mobil* where only unnamed plaintiffs did not meet the amount-in-controversy requirement. *Id.*

288. *Exxon Mobil*, 545 U.S. at 586 n.5 (Ginsburg, J., dissenting) (emphasis added). Justice

Using the word "cure" does not mean that the federal court "found" original jurisdiction in the jurisdictionally sufficient claim where there was none because it had been magically "cured" by the dismissal of the insufficient claim. The jurisdiction of the independently sufficient claim was always present.[289] Additionally, it seems that Justice Ginsburg is attempting to connect the words "cure" and "civil action" in her argument, and that somehow, to allow the insufficient claim back in would "un-cure" the "civil action."[290] However, the problem with this interpretation of § 1367(a) is that it substitutes the words "civil action as originally filed" or "the civil action comprising all of the original claims" for the words of the statute, which state that § 1367 operates when there is "*any* civil action of which the district courts have original jurisdiction."[291] Although a district court cannot exercise original jurisdiction over some of the original claims under § 1332 because the amount-in-controversy requirement is not met, the claims over which the district court does have jurisdiction is "*any* civil action" even if it is not the civil action as originally filed.[292] Also, Justice Ginsburg gives too much weight to the words "civil action," by using those words as criteria to determine when a federal jurisdiction has "original jurisdiction" under § 1367. The Court in *Finley* reminds us that the use of the words "civil action" in most jurisdictional statutes has less to do with expanding or contracting jurisdiction and has more to do with conformity with the Federal Rules of Civil Procedure.[293]

Justice Ginsburg also claims that her anomaly, that § 1367(b) is superfluous, is explainable as an additional safeguard to make sure *Kroger* stayed in place (although as a pre-*Finley* case already included in § 1367(a)

Ginsburg also argues that since jurisdiction is "cured" by dismissing both nondiverse and insufficient amount-in-controversy plaintiffs, both requirements are the same and, therefore, the Court was wrong to separate them. *Id.* The logical connection between the dismissal for nondiversity or insufficient amount-in-controversy is weak, other than the fact that they are both requirements of § 1332. *See* 28 U.S.C. § 1332. After all, a nondiverse party destroys the "complete diversity" of all the claims, while the insufficiency of the amount of the claim only affects that particular claim; therefore, all the claims in the complaint are "cured" by the nondiverse dismissal but only the insufficient claim, with respect to the amount-in-controversy, is "cured" by its dismissal. *Compare* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530 (1967), *with Zahn*, 414 U.S. at 302.

289. *Zahn*, 414 U.S. at 302.

290. *Exxon Mobil*, 545 U.S. at 584-85, 589-90 (Ginsburg, J., dissenting).

291. *See* 28 U.S.C. § 1367(a) (emphasis added).

292. *See id.*

293. Finley v. United States, 490 U.S. 545, 554-55 (1989) (explaining that the 1948 recodification of the Judicial Code "inserted the expression 'civil action' throughout the provisions governing district-court jurisdiction" and that it was to bring those statutes into conformity with the "Federal Rules of Civil Procedure which provide that '[t]here shall be one form of action to be known as "civil action"'"); *see also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978) ("it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction"); FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action.'"); FED. R. CIV. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts").

under her reading) and forgivable because "§ 1367's enigmatic text defies flawless interpretation."[294] However, Justice Ginsburg does not attempt to explain why her anomaly, that a whole subsection of § 1367 is an unnecessary safeguard, is superior to Justice Kennedy's anomaly that Congress omitted Rule 20 plaintiffs from § 1367(b)'s exception but included Rule 19 plaintiffs.[295] Finally, Justice Ginsburg's argues that the passage of the Class Action Fairness Act[296] strengthens her position because it shows that when Congress intends to change the jurisdictional requirements of a statute, that it will do so "clearly and conspicuously."[297] This argument is flimsy: one could make the same argument for any statute for which § 1367 supplements jurisdiction.[298]

VI. THE IMPACT OF *EXXON MOBIL CORP. V. ALLAPATTAH SERVICES, INC.*

The result of *Exxon Mobil* is to greatly reduce the difficulty on plaintiffs to bring suit in federal court. Before *Exxon Mobil*, plaintiffs with claims who did not meet the amount-in-controversy had to be dismissed. Now a federal court can exercise supplemental jurisdiction over these claims under 28 U.S.C. § 1367.[299] Applying the Court's interpretation of § 1367, there could be a class action under Rule 23 with a named plaintiff who just meets the amount-in-controversy requirement ($75,001) and thousands of unnamed plaintiffs with claims well below the amount-in-controversy ($1, $5, $10, etc.).[300] In conjunction with *Supreme Tribe of Ben-Hur*, where it was

294. *Exxon Mobil*, 545 U.S. at 594 (Ginsburg, J., dissenting) (footnote omitted) (happy with the result that § 1367 produces less disruption of the Court's supplemental jurisdiction jurisprudence).

295. *Id.* at 565-66. Though it is still unclear to the author how Justice Kennedy could argue that § 1367 is meant to overturn *Zahn* and *Clark* and then state that the omission of Rule 20 and 23 plaintiffs is an anomaly. *Id.* After all, if § 1367 was intended to overrule *Zahn* and *Clark*, then placing Rule 20 and 23 plaintiffs in § 1367(b) would defeat this purpose. *Id.* Their absence from § 1367(b) confirms Justice Kennedy's interpretation, therefore, his need to justify it with a similar "double sure" argument regarding the presence of Rule 19 plaintiffs is unclear. *Id.*

296. *See supra* note 218.

297. *Exxon Mobil*, 545 U.S. at 594 (Ginsburg, J., dissenting).

298. 28 U.S.C. § 1331; Aldinger v. Howard, 427 U.S. 1 (1976) (28 U.S.C. § 1343(3)); Finley v. United States, 490 U.S. 545 (1989) (28 U.S.C. § 1346(b)).

299. *Exxon Mobil*, 545 U.S. at 572.

300. *Id.* This result is not simply theoretical. Two recent cases, a district court case in the Southern District of New York and a Sixth Circuit appellate case, have applied the *Exxon Mobil* interpretation of § 1367 to exercise supplemental jurisdiction in situations in which *Zahn* would have previously prevented the courts from doing so. *See* Feinberg v. Katz, 2005 U.S. Dist. LEXIS 26954, at *36-*42 (S.D.N.Y. Nov. 3, 2005) (finding supplemental jurisdiction over the claims of 64 creditor assignors who did not meet § 1332's amount-in-controversy requirement because six claims did); *see also* Engstrom v. Mayfield, 2005 U.S. App. LEXIS 27854, at *10 (6th Cir. Dec. 15, 2005) (applying § 1367 after the decision in *Exxon Mobil* and allowing supplemental jurisdiction to be

decided that unnamed plaintiffs in a class action can be nondiverse, *Exxon Mobil* creates a potent weapon for plaintiffs who fail to meet either of the requirements of federal diversity jurisdiction under § 1332, "complete diversity" and amount-in-controversy, to find their way into federal court.[301]

Another significant consequence of the Court's decision is that it makes it easier for a defendant to remove a case to federal court under 28 U.S.C. § 1441(a) in addition to giving the plaintiff more options of where to bring a cause of action.[302] Plaintiffs who are careful to include an additional plaintiff under Rule 20 or 23, whose claim failed to meet the amount-in-controversy, can no longer avoid the specter of removal. The "propriety of removal . . . depends on whether the case originally could have been filed in federal court."[303] Now that *Zahn* is no longer an obstacle, once the jurisdictionally-sufficient plaintiffs are removed to federal district court the same district court can utilize § 1367(a) to exercise jurisdiction over the insufficient claims.[304]

Finally, the Court's express rejection of the legislative history, even when it is in direct conflict with the unambiguous statutory text, will have repercussions beyond § 1367. In fact, it has already begun to affect how

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exercised over claims that had the following amounts in controversy: $75,000; $10,000; $8,000; $7,000; $10,000; and $10,000 because one claim met the amount-in-controversy requirement with an $80,000 claim).

301. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); *Exxon Mobil*, 545 U.S. at 572. However, there still are limits on the supplemental jurisdiction statute's, 28 U.S.C. § 1367, affect on the federal diversity statute requirements, 28 U.S.C. § 1332. *See* Reinke v. Bank of Am., 2005 U.S. Dist. LEXIS 33400, at *6, *14 (E.D. Mo. Dec. 16, 2005) (citing *Exxon Mobil* for the proposition that plaintiffs need at least one claim to meet the amount-in-controversy for there to be original jurisdiction); *see also* State Farm Mut. Auto. Ins. v. Greater Chiropractic Ctr. Corp., 393 F. Supp. 2d 1317, 1322-23 (M.D. Fla. 2005) (stating that although the Court in *Exxon Mobil* had interpreted § 1367(a) to be a broad grant of supplemental jurisdiction, § 1367(b) still prevented the adding of jurisdictionally insufficient claims against defendants joined under Rule 20); Employers Ins. Co. of Wausau v. Certain Underwriters at Lloyd's London, 2005 U.S. Dist. LEXIS 13233, at *6-*7 (W.D. Wis. June 30, 2005) (denying claims against additional defendants because of § 1367(b), even though plaintiff relied on decision in *Exxon Mobil* to try to convince district court to exercise supplemental jurisdiction); Snyder v. Harris, 394 U.S. 332 (1969) (holding that plaintiffs cannot aggregate individual claims to meet amount-in-controversy requirement, that this nonaggregation rule was not overturned by the decision in *Exxon Mobil* and that it still imposes a stumbling block for parties wishing to get federal jurisdiction over diversity of citizenship claims).

302. 28 U.S.C. § 1441(a) (2000). *See* Longo v. Monson, 2005 U.S. Dist. LEXIS 33401, at *1-*4 (E.D. Mo. Dec. 16, 2005) (denying plaintiffs' motion to remand case to state court because one of the plaintiff's claims met the jurisdictional amount-in-controversy even though the other plaintiff's claim did not; the district court supported its finding that the case had been properly removed by relying on *Exxon Mobil*); *see also* Ingersoll-Rand Co. v. Barnett, 2005 U.S. Dist. LEXIS 20026, at *14-*15 (D.N.J. Sept. 7, 2005) (not to be published) (denying plaintiff's motion for remand to state court because removal was proper under reasoning in *Exxon Mobil*).

303. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 163 (1997).

304. *See id.* at 165-66; *see also Exxon Mobil*, 545 U.S. at 562-63 drawing parallels to the definition in *City of Chicago* of what a "civil action" over which a federal district court has "original jurisdiction" means with respect to federal-question and diversity jurisdiction).

lower courts interpret statutes and marks a further departure from past interpretive practice.[305]

VII. CONCLUSION

It is often repeated by the justices of the Supreme Court that the federal courts are courts of limited jurisdiction. While none disagree with this statement, there are real disagreements as to what the limits are. Prior to the Court's decision in *Finley*, the doctrines of pendent and ancillary jurisdiction, especially after *Gibbs*, had put the judge in the position of soothsayer, attempting to divine whether Congress implied, in the various jurisdictional statutes, that the federal courts could exercise or could not exercise supplemental jurisdiction. The Court in *Finley* made clear that this was no longer allowed and that Congress had to expressly authorize a federal court to exercise supplemental jurisdiction. Congress answered by passing the supplemental jurisdiction statute 28 U.S.C. § 1367, the full effect of which was finally decided by the Court in *Exxon Mobil*.

Despite the fears of those who advocated for "sympathetic textualism" it does not appear that the litigation flood gates have been opened. Further, now that Congress has passed the Class Action Fairness Act of 2005, it seems as if the current perception of the national legislature is not that

305. *See* Davis v. Bailey, 2005 U.S. Dist. LEXIS 38204, at *13-*15 (D. Colo. Dec. 22, 2005) (refusing to look to the legislative history to find a private right of action supported by Section 36(a) of the Investment Company Act of 1940, H.R. 10065, 76th Cong., 54 Stat. 789, 841 (1940), because not found explicitly stated in the text and supporting this method of interpretation by citing the Court's decision in *Exxon Mobil*); Hernandez v. Citifinancial Servs., Inc., 2005 U.S. Dist. LEXIS 32532, at *17-*19, *21 (N.D. Ill. Dec. 9, 2005) (assuming that plaintiff is correct in asserting that there is a drafting error in 15 U.S.C. § 1681 that denies him a private cause of action, but that so long as the result is not absurd, because of Court's holding in *Exxon Mobil* the district court cannot use legislative history to correct the drafting error); Pietras v. Curfin Oldsmobile, 2005 U.S. Dist. LEXIS 26510, at *10, *13 (N.D. Ill. Nov. 1, 2005) (refusing to look to legislative history to determine if there is "a private right of action against willful violators of the" Fair Credit Reporting Act.); *see also* Consumer Credit Protection Act, S.5, 90th Cong., 82 Stat. 146 (1968); H.R. 3610, 104th Cong., 110 Stat. 3009-443 to 3009-446 (1996); Fair and Accurate Credit Transactions Act of 2003, H.R. 2622, 108th Cong., 117 Stat. 1952, 1960 (2003)); Murray v. Household Bank, N.A., 386 F. Supp. 2d 993, 998-99 (N.D. Ill. 2005) (supporting its decision that 15 U.S.C. § 1681m does not provide for a private right of action because the ruling in *Exxon Mobil* established that a court cannot look to legislative history, even if legislative history is in direct opposition to the result of interpreting the plain text of the statute); Jacobs v. Bremner, 378 F. Supp. 2d 861, 864, 865 n.4, 866 (N.D. Ill. 2005) (refusing to look to legislative history because of the ruling in *Exxon Mobil* even though the judge personally agreed with Justice Stevens' dissenting opinion in the case); Breyer, *supra* note 234, at 850 (arguing that legislative history can "illuminate drafting errors" from otherwise plain text which if its commonplace meaning was applied there would be no "absurd" result); *see* Wald, *supra* note 232, at 287-90 (stating that the Supreme Court in its 1988-89 term used legislative history in "*almost three-fourths of those* [*cases*] *involving statutory construction and over one-third of all the opinions of the Court-legislative history was relied upon in a substantive way to reach the Court's decision*").

diversity jurisdiction is unimportant, but that it is a useful tool to insure that both plaintiffs and defendants have ample opportunity to get the fairest forum possible. The Court's interpretation of § 1367 in *Exxon Mobil* conforms with this view as evidenced by lower court holdings that have allowed plaintiffs to bring their action in federal court and that have allowed defendants to remove once un-removable cases into what they perceive as a fairer federal forum.

Finally, *Exxon Mobil* has impacted more than just questions of federal jurisdiction. The Court's refusal to consider the legislative history forces lower courts to apply a more textualist approach to statutory interpretation. The most recent results have been to deny private right of action to plaintiffs seeking relief under the Fair Credit Reporting Act and the Investment Company Act of 1940. It will be interesting to see if Congress' antennae have picked up the signal and will begin to place less importance on explanations in the legislative history as well as what impact this will have on the different groups who attempt to mold and shape the legislative history in hopes that the statute will be construed in a light more favorable to them.

Was the Congress of 1990 made up of civil procedure radicals, out on a rampage to destroy Supreme Court jurisprudence? The answer is no. Their purpose was to promote fairness and convenience and to give the federal courts the statutory authority to pursue those goals. The doctrines of ancillary, pendent, and even diversity jurisdiction are not "sacred cows." They developed around limits that Congress set by statute (within the bounds of the Constitution) and can be changed at the determination of Congress. The plain words of a *congressional* jurisdiction statute should not be thwarted simply to avoid "disrupting" the Court's pendent and ancillary jurisdiction doctrines that developed absent an express statutory basis. The Court recognized this principal in *Exxon Mobil*. To have held otherwise would have been to allow judicial doctrine to trump congressional mandate, running counter to the mantra that almost every judge recites prior to deciding a subject matter jurisdiction case, "that the federal courts are courts of limited jurisdiction."

Gunnar García Gundersen, IV[306]

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306. J.D. Candidate, Pepperdine University School of Law, May 2007. I would like to thank the Lord for the gifts of patience and wisdom that helped me complete this article and for all of the blessings He has given me, including my beautiful wife Wendi who has supported me in all my endeavors and was kind enough to read rough drafts and give me feedback. Also, I would like to thank my parents Gunnar and Xiomara for their continued support of my academic pursuits and my little brother Erik for inspiring me to be a role model. Finally, I would like to thank Professor Anthony X. McDermott for his support, encouragement, and a great first year course that got me excited about supplemental jurisdiction.