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An Alternative and Discretionary § 1367

EDWARD H. COOPER*

Supplemental jurisdiction is a concept too complex to be captured by complicated statutory drafting. That is my proposition. Or, somewhat more accurately, that is my tentative proposition, advanced for consideration alongside the elegant but intricate statutory proposals emerging from the American Law Institute's Federal Judicial Code Revision Project. Professor John Oakley, the Reporter, knows more about supplemental jurisdiction, and has thought more deeply about it, than anyone. He has traveled many roads in continually refining proposed revisions of 28 U.S.C. § 1367. If anyone can capture all the nuances of supplemental jurisdiction in a statute, it is he, assisted by such aid as emerges from the consultative group, advisers, Council, and annual meeting. But the very virtuosity of the talents brought to bear suggests that the continuing need for refinement demonstrates the intransigent problems that defeat detailed codification. The nuances cannot all be captured by specific provisions that answer every question. The mediating forces of generality and discretion must be introduced. All of the drafts recognize this need. The remaining question is whether an intermediate blend of specification and discretion is the best answer. The answer depends on at least two things: the conceptualization chosen to "extend" subject-matter jurisdiction beyond the circumstances that initially define it, and the wisdom of federal judges in exercising discretion.

I. THE PROPOSAL IN BRIEF

To frame the discussion that follows, let me offer a very rough draft statute cast in one sentence, with an optional second sentence:

> § 1367. A court that has original jurisdiction of a civil action may implement the statutory and constitutional purposes that define and limit its jurisdiction by employing the discretionary concepts of ancillary, pendent, and supplemental jurisdiction. [The decisions in *Finley v. United States*, 490 U.S. 545 (1989), and *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), are repudiated.]

This draft relies on the traditional phrases of ancillary and pendent "jurisdiction," and adds the newer supplemental "jurisdiction," as a means of invoking the concepts used first by judges, and then by Congress, to develop the scope of original jurisdiction. Because the purpose is to return to the course of evolution through the common-law process of judicial elaboration, the traditional

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* Professor of Law, University of Michigan. The author believes that it would be redundant to add footnotes as if this were a stand-alone article. Other contributions to this Symposium will provide all of the conventional citations, and all should be read before turning to this modest suggestion that perhaps it is better to rely on the common-law process to develop the concepts of ancillary, pendent, and supplemental jurisdiction. Those who want full-blown development may look to 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523 (2d ed. 1984), and 13B *id.* §§ 3567-3567.2, together with the current supplements. The ALI Project that stimulated this Symposium is in any event a remarkably thorough and wise source of authority as well as analysis and recommendations.

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phrases are justified despite the risk that wrong implications will be read into the reference to "jurisdiction." What remains is to explore the virtues of relying on judicial development.

II. THE NATURE OF SUPPLEMENTAL JURISDICTION

The concepts that came to be known as pendent and ancillary jurisdiction evolved without separate statutory authority. They were in some ways more fundamental than a separate statute might imply. They rested on the statutes that established subject-matter jurisdiction. Having jurisdiction of something, the courts had to determine just what they had jurisdiction of. Often enough, nonjurisdictional issues were inseparable from the matters that established jurisdiction. These issues were decided as an exercise of the statutory original jurisdiction, without more ado. Eventually this unavoidable practice evolved into the more readily avoidable but highly useful concepts of pendent and ancillary jurisdiction. Independent claims, remedies, and even parties came to be within the evolving expansions of jurisdiction. The justification, however, remained the same—the courts were making good sense of the statute that established subject-matter jurisdiction, not creating an independent "jurisdiction" outside of any statute. The broad run of decisions, moreover, clearly recognized the discretionary character of pendent and ancillary jurisdiction. No attempt was made to define circumstances in which pendent or ancillary jurisdiction must be exercised, nor other circumstances in which they must not be exercised.

The origin of the basic subject-matter jurisdiction statutes illuminates the central purpose of pendent and ancillary jurisdiction. These doctrines directly fulfill the purposes that underlie the grant of jurisdiction, ensuring that the court is able to provide full justice. In addition, by enabling the federal courts to provide a comprehensive litigation package comparable to those available in state courts of general jurisdiction, these doctrines reduce artificial barriers that might deter litigants who prefer federal adjudication of matters that support federal jurisdiction. In the special cases of exclusive federal jurisdiction, these doctrines provide the only opportunity for coherent litigation of related matters—the *Finley* decision was properly overruled by present § 1367, and nothing should be done that threatens to restore it.

If pendent and ancillary jurisdiction spring from the purposes that animate the statutes establishing federal subject-matter jurisdiction, their limits spring from the purposes that limit the grants of federal subject-matter jurisdiction. Neither the diversity nor the general federal-question jurisdiction statutes extend to the limits of Article III, nor even close to those limits. The policies that limit jurisdiction must be respected as well as the policies that establish it. These complex policies may be summarized as reflecting respect for state law and the role of state courts in defining and applying state law. Federal courts may fail to understand state law, are poorly equipped to develop or change state law, and in any event cannot act with authority in matters of state law. Federal courts assert strong and legitimate interests in adhering to federal procedure, and at times may overlook or choose to ignore the ways in which state substantive law is interdependent with state procedure. In addition, limits on federal jurisdiction reflect concern for litigants who prefer state courts not only for authoritative

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disposition of state law but also for reasons of familiarity and convenience. This concern for party preferences is enhanced when it is proposed to bring into federal court a party who is not subject to any independent basis of federal jurisdiction. Finally, and not least, federal courts must first husband their resources to dispose of the matters that establish federal jurisdiction. The threshold of convenience and fairness that justifies disposition of related matters must be adjusted accordingly.

It would be better if the scope of original jurisdiction could be worked out as a continual and often case-specific balancing of these competing policies without resort to any subordinate but independent "jurisdiction" terminology. The difficulty, of course, is caused by the ineradicable habit of lawyers to confuse the meanings and incidents of different concepts that masquerade under a common label. This habit is encouraged by codifying supplemental jurisdiction in a statute. Section 1367(a) provides that the district courts "shall have supplemental jurisdiction." The very codification of the jurisdiction terminology encourages judges and lawyers to invoke the conveniently hyperbolic adage that existing jurisdiction cannot be declined.[1] To be sure, § 1367(c) describes circumstances in which the district courts may decline to exercise supplemental jurisdiction, but the largely closed category of circumstances that justify this course threatens to reduce discretion in undesirable ways.

In the face of this threat to discretion, reliance on the traditional phrases, including the jurisdiction component, reflects the belief that on the whole the federal courts were doing a good job of implementing the traditional concepts until the Supreme Court intervened in the *Owen* and *Finley* decisions. The *Gibbs* decision characterized pendent jurisdiction as "a doctrine of discretion," shaped on the one hand by "judicial economy, convenience and fairness to litigants," and on the other by comity toward state courts and state law.[2] Lower courts exercised their discretion, as informed by these shaping concerns, intelligently. The *Finley* decision—which itself recognized and perhaps even invited the possibility of legislative repudiation—provided the immediate impetus for enactment of § 1367. In many ways, it would have been better—if only Congress could feel its way free—to respond, not by attempted codification, but by simple repudiation

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1. The classic statement of Chief Justice Marshall is oft-quoted:

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

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

> It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

Id. (citations omitted).

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of the unduly narrowing approaches taken in the *Finley* decision and also in the *Owen* decision.

Nearly a decade has passed, however, under the influence of § 1367. It is too late simply to repeal present § 1367 and repudiate the *Owen* and *Finley* decisions. But it is not too late to return to an era of discretionary judicial development and implementation of the policies originally expressed in terms of ancillary and pendent jurisdiction. That is all the proposed statute aims at. All three adjectives are used. Pendent and ancillary jurisdiction emphasize continuity with historic roots. Supplemental jurisdiction recognizes that the never-clear distinction between pendent and ancillary jurisdiction has largely faded from practicing usage, and encourages focus on the common purpose that supports both traditional doctrines.

III. THE DANGERS OF CODIFICATION

The principal papers and other comments in this Symposium, along with a wealth of earlier literature, explore in exquisite detail the shortcomings of the present § 1367. Particularly with the benefit of some years of reflection and experience, it is tempting to apologize that these shortcomings simply illustrate the ways in which very good drafters, acting in a hurry, may fail to foresee all ramifications of a complex subject. This apology suggests that the appropriate cure is revision within the same format, taking account of the afterthoughts. At least two difficulties must be surmounted to justify this course. The more detailed difficulty is also the more obvious—there are many possible combinations of original jurisdiction, claims, and parties. The responsibility of foreseeing all of them, or even all of the more important ones, and providing wise answers, is daunting even if it is approached in detailed categories. The more fundamental difficulty is that the format itself increases the simultaneous risks of being too broad and too narrow. These difficulties feed on each other.

The difficulties of foresight blend with the drafting challenge. Inescapably clear drafting requires foreseeing every possible combination of claims and parties that may arise. Unless that happy state is reached, the best that can be hoped for is that a statute will speak clearly to all of the circumstances that the drafters have contemplated. Words that speak clearly to these circumstances, however, can easily have unintended meaning for circumstances that were not contemplated. The range of possible unforeseen circumstances defines the gravity of this risk. And across the full range of federal litigation as we know it, and as we will come to know it, the range of possible unforeseen circumstances seems broad indeed.

The drafting technique adopted by present § 1367 exacerbates the difficulties of foresight. It begins in subsection (a) with a blanket provision that establishes supplemental jurisdiction to the limits of "the same case or controversy under Article III." Then subsection (b) provides categorical exceptions for cases founded solely on diversity jurisdiction, and subsection (c) follows these exceptions with a list of circumstances that allow a district court to decline to exercise supplemental jurisdiction. This structure reinforces the risks that follow from characterizing the authority to adjudicate supplemental matters as a matter of "jurisdiction." Exceptions that are limited to diversity cases imply that similar exceptions are not appropriate in federal-question cases. The necessarily opaque

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list of circumstances that justify refusal to exercise existing supplemental jurisdiction seems to narrow discretion still further by the terms of the residual category, which applies when "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." Some hope may be found in the Supreme Court's recent discussion of subsection (c), which suggests that it may be read to confirm the full sweep of discretion recognized by the pre-1990 decisions.[3] As desirable as that reading is, the possibility remains that it will not prevail.

IV. THE RISKS OF DISCRETION

The risks that discretion will be poorly used are different from the risks of detailed drafting. In some ways they seem greater. We are particularly sensitive to mistakes in defining federal jurisdiction, whether poor judgment is exercised to expand or restrict the scope of the court's original jurisdiction. This sensitivity is rooted in the subordinate role of federal courts, whose very being and jurisdiction are controlled by Congress. A denial of jurisdiction may seem shirking, and an assertion may seem usurpation. The argument for discretion in supplemental jurisdiction cannot be made solely by pointing to the difficulties of defining the jurisdiction.

Part of the case for discretion is made by reflecting on the brevity of 28 U.S.C. §§ 1331 and 1332, the statutes that establish general federal-question and diversity jurisdiction. The meaning of these spare statutes has evolved over generations into an intricate structure that could not be guessed from their words alone. Treatises have been filled by the effort to describe the structure, and the effort continues. Most of this vital jurisprudence has been made by judges, not Congress. If judges can be trusted with much of the responsibility for defining the original jurisdiction, the added responsibility to define supplemental jurisdiction is readily justified.

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3. *See* City of Chicago v. International College of Surgeons, 118 S. Ct. 523, 533-34 (1997).

> Our decisions have established that pendent jurisdiction "is a doctrine of discretion, not of plaintiff's right," *Gibbs*, 383 U.S., at 726, and that district courts can decline to exercise jurisdiction over pendent claims for a number of valid reasons . . . . [W]e have indicated that "district courts [should] deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine." [Carnegie-Melon Univ. v. Cahill, 484 U.S. 343, 357 (1988).]
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> The supplemental jurisdiction statute codifies these principles. . . .
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> . . . The statute . . . reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, "a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity." [*Id.* at 350.]

International College of Surgeons, 118 S. Ct. at 533-34 (1997) (second alteration in original) (citation omitted).

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The positive case for discretion is made by experience with the lower-court development of pendent and ancillary jurisdiction under the liberating influence of the *Gibbs* decision. One of the liberating things said by Justice Brennan was that there is power to hear a whole case "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."[4] The full opinion shows that the "one judicial proceeding" test is shaped not by the rules of claim preclusion but by the expanding authority conferred by procedural rules that empower litigants to shape sensible litigation packages according to the needs of their unique circumstances.[5] Whether or not this text was consulted, lower courts began to work their way toward this functional goal. On the whole, discretion was exercised wisely. The least functional results flowed from regard for the policy of complete diversity, a problem that was augmented by the *Owen* decision. There is little reason, however, to hope that Congress can make better sense of the complete diversity policy than courts have done. The political controversies that swirl around possible restrictions or repeal of diversity jurisdiction are likely to prevent dispassionate consideration of the best ways to make sense of diversity jurisdiction so long as it persists. But it may be possible to repeal the *Owen* decision, freeing the lower courts to resume the process of gradual development.

And so the question may be repeated as a suggestion: the dangers of detailed drafting are greater than the dangers of discretion. Supplemental jurisdiction should be restored to its functional and substantially discretionary roots.

V. OTHER SUGGESTIONS

A brief note may be made of three other issues: the interplay between supplemental jurisdiction and claim preclusion; the desirability of transfer from federal courts to state courts; and the need to separate pendent appeal jurisdiction from supplemental original jurisdiction.

Claim preclusion rules are defined and limited in part by the opportunity to bring multiple aspects of a single "claim" before a single court. Supplemental jurisdiction expands the opportunity to advance theories and claim remedies in a federal court. The greater the degree of discretion that surrounds supplemental jurisdiction, however, the greater the potential confusion for claim preclusion. There are many possible combinations of exclusive original federal jurisdiction, concurrent original federal jurisdiction, and supplemental jurisdiction. It may be clear that one court, state or federal, can entertain a broader proceeding than the other. Often a federal court can choose whether to entertain as broad a proceeding as a state court clearly can entertain. Without attempting to work out the best claim preclusion rules for these circumstances,[6] it is enough to suggest that the rules should be controlled by federal law. The consequences of the supplemental-jurisdiction power are so tightly bound to federal interests that state courts should

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

5. *See id.*

6. *See* 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4412 (1981).

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not be free to adopt preclusion rules that either expand or reduce the pressure to invoke supplemental jurisdiction.

Supplemental jurisdiction underscores the desirability of adopting a system that allows a federal court to transfer state-law matters to a willing state court. The Uniform Transfer of Litigation Act[7] provides a framework that could be adopted by state courts. Implementing federal legislation would free federal courts to shape supplemental jurisdiction without fear of the great inefficiencies that may follow discretionary dismissal of a state claim with no other recourse than institution of a new and independent state action.

Finally, the policies that shape pendent appeal jurisdiction are as different from the policies that shape supplemental original jurisdiction as all policies of appeal jurisdiction are different from all policies of original federal jurisdiction. It would be a grave mistake to analogize from one to the other, except to recognize that each turns on the need to define the scope of an existing jurisdiction in light of the relevant defining and restricting policies.

7. UNIF. TRANSFER OF LITIGATION ACT, 14 U.L.A. 78 (1992).

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