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Supplemental Jurisdiction: A Confession, an Avoidance, and a Proposal

DAVID L. SHAPIRO*

I. THE CONFESSION

When I came to the Solicitor General's Office in 1988 (on leave from my teaching job), I was excited by the prospect of practicing before the Supreme Court, and especially by the opportunity not just to argue orally but to represent the United States—to make statements like "the United States contends . . . ," "Yes, Your Honor, the United States concedes . . . ," and such. But to my chagrin, the first case I was assigned to argue before the Court, for the perfectly valid reason that the case fell squarely within my bailiwick as a long-time teacher of Civil Procedure and Federal Courts, was *Finley v. United States*.[1]

The trouble was that, even though the government had won the case in the court of appeals, the case struck me at the outset as singularly unappealing. A suit against the United States under the Federal Tort Claims Act ("FTCA")[2] had been brought in a federal court—the only place the plaintiff could sue in light of the exclusive federal jurisdiction mandated by Congress.[3] The plaintiff had sought to add as "pendent parties" two nondiverse defendants who were alleged to be joint tortfeasors under state law, and the court of appeals had declined to permit the joinder.[4]

Because there was no other court in which the two nondiverse defendants could be joined in the action against the United States, and because the Supreme Court (quite properly, in my view) had indicated in an earlier decision that such a case might be an especially strong one in which to recognize pendent party jurisdiction,[5] I thought that we had an uphill fight on all fronts, that indeed the Republic would survive—might even be better off—if the decision below were reversed. And my worries were compounded by a personal concern: if my colleagues and I managed to persuade the Supreme Court that the judgment below was correct, would I ever again be able to raise my head in academia? Or would I, like some academics who had worked for the government during the Vietnam War, and like the Flying Dutchman (long before Vietnam), be condemned to wander the globe without purpose or direction, longing for the security of a familiar port but unable to find one that would have me?

But I was, after all, a lawyer for the United States, not a detached observer, and though I would surely balk at advocating a result that I found totally at odds with my basic principles, I could not see my way clear to rejecting this assignment on

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1. 490 U.S. 545 (1989).

2. 28 U.S.C. § 1346(b) (1994).

3. *See id.*

4. The court of appeals, in an unreported opinion, had summarily reversed the district court's decision allowing joinder of the nondiverse defendants.

5. *See* Aldinger v. Howard, 427 U.S. 1, 18 (1976).

such lofty grounds. Although a few federal jurisdiction buffs might be upset if the United States prevailed, the world would go on much as before, no less just or more brutal on the issues that *really* mattered. So I "girded my loins" (whatever that means), and went to work, content in the knowledge that a lawyer's calling imposes on him an obligation to do the best job he can for a client when he is representing that client in an adversary proceeding.[6]

Fortified by this rationalization, I joined with my colleagues in briefing the case, and then argued it before the Court. A few months later, we discovered that the government had squeaked through to a 5-4 victory. Thus when Professor Rowe said—at the 1998 Association of American Law Schools ("AALS") panel discussion that is the basis of this Symposium—that the troubled and still troublesome effort to deal with supplemental-jurisdiction issues by statute was largely due to the Court's unfortunate decision in *Finley*, I felt a familiar twinge of remorse. I do not know how much responsibility (or blame) lawyers can accept for judicial outcomes, especially in appellate litigation, but I had certainly done my best, and if the buck did not stop with me, it surely passed across my desk.

II. THE AVOIDANCE

All of us at the Department of Justice who worked on the *Finley* case knew we had a problem: the language of the jurisdictional statute was not without ambiguity;[7] a number of prestigious courts and commentators had endorsed pendent party jurisdiction (especially in federal question cases) as an appropriate and efficient next step under the powerful rationale of *United Mine Workers v. Gibbs*;[8] and our case was a particularly appealing one for the exercise of such jurisdiction because the alleged (nondiverse) tortfeasors could not be joined with the United States as defendants in a state court. Indeed, we weren't at all sure that it would be in the interest of the government, or of any potential litigant, to prevail on the theory that pendent party jurisdiction was never available unless specifically authorized by Congress. True, we had some recent Supreme Court

6. As stated in the Preamble to the Model Rules of Professional Conduct: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1983).

7. The statutory text is discussed *infra* text accompanying notes 10-17.

8. 383 U.S. 715 (1966). For discussion of the federal decisions embracing pendent party jurisdiction after *Gibbs*, see Justice Stevens' dissent in *Finley*, 490 U.S. at 565-69 (Stevens, J., dissenting). And a list of law review articles on the subject between *Gibbs* and *Finley*, most of which dealt with and favored pendent party jurisdiction, may be found in the AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2., at 21-22 (1998) [hereinafter T.D. NO. 2].

decisions that were helpful,[9] but those decisions were certainly distinguishable, and were not all that attractive in themselves.

What, then, was to be done? Could we make an argument that focused on the special qualities of the FTCA, so that the Court could decide the case our way without any broad pronouncements that condemned pendent party jurisdiction to the scrap heap on a broader front? The more we delved into the case, the more we concluded that we could, and should, and the more I became comfortable with the position we were taking. Perhaps this is the way lawyers operate in the service of a client—engaging in self-serving rationalizations of questionable positions—but in this instance we were sure we had a point.

Our contention that pendent party jurisdiction was not available in the specific context of the FTCA had three "prongs" (to borrow a word from the constitutional lawyers), and each of these was pursued with vigor in our brief and at oral argument. First, aware of the Court's increasing interest in statutory texts, we argued that the language of the jurisdictional statute itself (§ 1346(b)[10]), in contrast to the more general language of § 1331,[11] was difficult to interpret as authorizing suit against anyone but a single defendant (the United States). Section 1346(b), we said, confers jurisdiction over "*claims* [in tort] *against the United States*,"[12] and "the most natural reading—perhaps the only natural reading—of that language is that it extends only to the adjudication of claims against the United States [and not against other persons]."[13]

Second, any policy arguments favoring the plaintiff were outweighed by policy considerations favoring the government—in particular the confusion that might be engendered if a claim against the United States were tried to a judge while a claim against a private party were tried to a jury,[14] and the further confusion that would be caused by the significant differences between the criteria governing the liability of the United States and the criteria governing the liability of private entities.[15]

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9. Despite the dictum in *Aldinger v. Howard*, 427 U.S. 1, 6-7 (1976) (case discussed *supra* text accompanying note 5), the holding of the case—that a federal claim against a state officer under 42 U.S.C. § 1983 (1994) could not serve as a basis of pendent party jurisdiction over a local government entity—appeared to be helpful, as did such other Supreme Court decisions taking a similarly dim view of claims of supplemental jurisdiction as *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

10. 28 U.S.C. § 1346(b) (1994).

11. *Id.* § 1331 (the general grant of federal question jurisdiction) speaks of civil actions "arising under" the laws of the United States. Thus the language is not as claim-specific as that of the FTCA, discussed below.

12. Brief for the United States at 17, Finley v. United States, 490 U.S. 545 (1989) (No. 87-1973) [hereinafter U.S. Brief] (emphasis in original).

13. *Id.*

14. *See id.* at 28-30. An FTCA claim against the government must be tried without a jury, 28 U.S.C. § 2402 (1994), while the Seventh Amendment jury trial right applies to private party disputes in federal court.

15. Although the FTCA refers in general to state law, it protects the government against an award of punitive damages, as well as recovery on a "strict liability" theory, and also provides the government with certain special defenses. *See* U.S. Brief, *supra* note 12, at 29-30.

Finally—and for us, this was the clincher—we had proof positive that in enacting the FTCA, Congress considered, and rejected, the notion of pendent party jurisdiction. To cut to the chase of an argument of some eight pages in the government's brief, the Supreme Court in 1941 had held, in *United States v. Sherwood*,[16] that in Tucker Act (breach of contract) actions against the United States, a private party could not be joined as a co-defendant.[17] Then in 1942, and again in 1945, House Reports on proposed legislation that later became the FTCA expressly stated, citing *Sherwood*, that the Act "does not permit any person to be joined as a defendant with the United States."[18] "This history," we gloated in our brief, "confirms that Congress was fully aware of the limited nature of the FTCA's waiver of sovereign immunity. It makes clear that the FTCA jurisdictional provision . . . is, as *Sherwood* held of the Tucker Act, 'narrowly restricted to the adjudication of suits brought against the Government alone.'"[19] Indeed, Finley's counsel conceded at oral argument that the legislative history on which we relied was the most difficult obstacle he had to face.[20]

Imagine, then, my surprise (and even dismay) when in a 5-4 decision in our favor, Justice Scalia wrote an opinion for the Court relying almost exclusively on the statutory language, and at least strongly hinting that pendent party jurisdiction would *never* be available unless explicitly authorized by the legislature. While citing *Sherwood*, the opinion[21] contained nary a word about either the policy arguments rooted in the nature of the FTCA, or the virtually conclusive legislative history. Rather, the Court suggested, Congress needed clear guidance and a firm hand: the rule was to be that "a grant of jurisdiction over claims involving particular parties does not in itself confer jurisdiction over different claims by or against different parties."[22] And thus with one swoop, Justice Scalia threw into doubt all potential uses of "ancillary" or "pendent" jurisdiction to add parties to a litigation, no matter what the context or the demands of judicial economy and efficiency.

Now that I am more sophisticated about the judicial approach of some of the Justices (and especially Justice Scalia) than I was then, I can more readily understand what happened: Justice Scalia used the opportunity to ride two of his favorite horses: his aversion to virtually any reliance on legislative history, and

16. 312 U.S. 584 (1941).

17. In *Sherwood*, the Court required dismissal of a Tucker Act suit against the United States in which a private person was an indispensable party. The Court said that the government's consent to be sued "may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government." *Id.* at 591.

18. H.R. REP. NO. 77-2245, at 9 (1942), repeated in H.R. REP. NO. 79-1287, at 5 (1945), both discussed at U.S. Brief, *supra* note 12, at 23-24. The FTCA was ultimately enacted in 1946.

19. U.S. Brief, *supra* note 12, at 23-24.

20. This concession was made at the outset of petitioner's rebuttal.

21. *See* Finley v. United States, 490 U.S. 545, 552 (1989).

22. *Id.* at 556.

his desire to lay down rules of interpretation that tell the legislature just what it must do if it wants to reach a particular result.[23]

Yet I still marvel at the fact that the *only* reference to the legislative history in any of the opinions in *Finley* was in a footnote in Justice Stevens' dissent.[24] And with respect, I don't believe he laid a glove on us. First, he observed that "[i]ronically, the Court does not rely on the legislative history that could support its judgment."[25] Then he noted that in *United States v. Yellow Cab Co.*,[26] the Court itself had decided not to rely on the language we had quoted because it was omitted from a Senate committee's analysis in 1946 when the measure was incorporated in (and enacted as part of) the Reorganization Bill. But as we had explained in our brief, the Court in other contexts had "repeatedly relied on [the 1945 House Report] and not merely on the [1946] Senate Report as weighty legislative history," and furthermore, in *Yellow Cab Co.*, the Court was dealing with an entirely different question not squarely addressed by any legislative history: the availability of the FTCA for the assertion against the United States of a claim for contribution.[27]

In sum, we were there at the scene of the debacle, but it was really not our fault. Our valiant efforts to give the Court a case-specific basis for deciding against pendent party jurisdiction were disdainfully rebuffed, and as a result, a great deal of time and talent during the past several years has been devoted to an effort to clarify what the proper rule should be. But more of that in the next section.

III. THE PROPOSAL

Lawyers, judges, and academics are still trying to come to grips with the aftermath of *Finley*. And whatever the outcome of the current project to persuade Congress to reconsider its legislative response to the decision, that aftermath has generated considerable confusion and caused a good deal of clear cutting of forest land in order to meet the demand for paper in a host of reports and law review articles.[28]

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23. For discussion of Justice Scalia's commitment to what has been called the "new textualism," and his opposition to the use of legislative history in interpreting legislation, see WILLIAM N. ESKRIDGE, JR. & PHILIP R. FRICKEY, CASES AND MATERIALS ON LEGISLATION 568-88, 624 & n.2, 750-52, 797 (2d ed. 1995), and other materials cited therein.

24. *Finley*, 490 U.S. at 571 n.25 (Stevens, J., dissenting). As to our policy arguments, Justice Stevens said briefly that they were "not insurmountable." *Id.* at 570 n.24 (quoting United States v. Yellow Cab Co., 340 U.S. 543, 555 (1951)).

25. *Id.* at 571 n.25.

26. 340 U.S. 543 (1951).

27. U.S. Brief, *supra* note 12, at 23-24 n.14. As we observed in that footnote, the Court in *Berkovitz v. United States*, 486 U.S. 531, 539 n.4 (1988), had only the previous Term referred to H.R. REP. NO. 79-1287, *supra* note 18, as "[t]he House of Representatives Report on the final version of the FTCA." U.S. Brief, *supra* note 12, at 23 n.14.

28. The plethora of post-§ 1367 commentary is collected in a two-and-one-half page bibliography in T.D. NO. 2, *supra* note 8, at 22-24.

Phase I, which followed hard on the decision, was the report of the Federal Courts Study Committee in 1990.[29] That study, which by coincidence was already underway when *Finley* was decided, concluded that Congress should overrule the decision by "expressly authoriz[ing] federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction," but without upsetting the apple cart of existing law in the area of diversity jurisdiction.[30] And with the assistance of some knowledgeable academics, a statute (§ 1367 of the Judicial Code) was enacted in late 1990 that was designed to fulfill the Committee's objective—to establish what was to be appropriately called "supplemental jurisdiction" as a concept broad enough to embrace pendent party jurisdiction, but with enough qualifications to preserve (some? all?) existing limitations in the diversity area, and to add some new ideas, particularly the tolling of the statute of limitations to permit the refiling in a proper court of claims that failed to clear the statutory hurdles.[31]

Before the ink was dry, Phase II began. Observers began to note a number of problems with the statute—especially with the qualifications that were designed not to rock the boat (too much?) in diversity cases. In some instances, these observers suggested, the new provisions might be *more* restrictive than under prior law in most lower federal courts, and in some instances less.[32] (And with one—not insignificant—exception,[33] the Supreme Court has yet to comment on the new statute at all.)

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29. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

30. *Id.* at 47-48. This proposal was, I believe, one of the very few in the Committee's report that recommended the *expansion* of federal jurisdiction.

31. Present § 1367 was enacted December 1, 1990, as part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089. Academics closely involved in the drafting process included Professors Rowe, Burbank, and Mengler. For their joint discussion of the provision shortly after its enactment, see Thomas D. Rowe, Jr. et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991).

32. The range of views expressed by commentators on § 1367 may be found in the articles cited in T.D. NO. 2, *supra* note 8, at 22-24. Two follow-up articles by Rowe, Burbank, & Mengler to their original article, *supra* note 31, which sought to respond to some of the criticisms of the new statute, were: Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991), and Thomas D. Rowe, Jr. et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991).

One friend who also worked with the Federal Courts Study Committee told me orally that he hoped (despite legislative history to the contrary) that the language of the new statute would be read as overruling *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which held that in a diversity class action—at least one brought under Fed. R. Civ. P. 23(b)(3)—each member of the class must have the requisite amount in controversy.

33. In *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523 (1997), the Court did answer in the affirmative one question under § 1367 that was not squarely resolved by the text: whether the provision is applicable to removed as well as original actions. On a more esoteric but still interesting issue, the Court held, 7-2, that a state law claim for on-the-record appellate review of a state agency decision, though not falling within the original jurisdiction of the district courts, did come within their supplemental jurisdiction under the new statute. *See id.* at 531-42 (Ginsberg, J., dissenting).

That brings us to Phase III: the exhaustive effort now underway to regroup, reanalyze, synthesize, and redraft. This phase, under the sponsorship of the American Law Institute ("ALI"), has now passed its second year. The first attempt to draft a substitute for § 1367, itself a statute of some 300 words, ran to some 1000 words,[34] and also ran into some strong headwinds at the ALI membership meeting in 1997. The Reporter, John Oakley, a man of great knowledge, skill, and energy, went back to the drawing board, and came up, in the second try, with a somewhat shorter version that was designed to meet the objections but to preserve the essence of the earlier draft. That proposal progressed through the cumbersome but (and?) exhaustive processes of the ALI in late 1997 and 1998, and finally met with the approval of the membership (with only minor changes) at the annual meeting in 1998. Of course, it still must survive the rapids of consideration and enactment by both Houses of Congress.

So far, I have avoided going into the details of § 1367 and the various proposals for change, partly because the word limit on this Comment stands in the way, and partly because so much has already been written on these issues, including other articles in these pages. A few points are worth noting, however. First, like the statute now on the books, the proposal seeks to establish the notion of supplemental jurisdiction as one embracing pendent party jurisdiction. Second, the proposal seeks to correct the inadvertent gaps or changes in the existing statute, especially with respect to a range of supplemental claims in diversity cases that do not threaten an "end run" around the established rule that the general diversity statute requires complete diversity between opposing parties.[35] Third, the new proposal deliberately preserves the existing limitation on supplemental jurisdiction adopted (prior to *Finley*) by the Supreme Court in *Owen Equipment & Erection Co. v. Kroger*,[36] as well as the existing rule that claims of separate parties, whether they are members of a class or acting as individuals, may not ordinarily be aggregated for purposes of meeting the jurisdictional amount threshold.[37] Finally, the drafters have deliberately authorized the exercise of supplemental jurisdiction when the only barrier to the exercise of independent federal jurisdiction over the supplemental claim is the lack of the requisite amount in controversy.[38]

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34. *See* T.D. No. 2, *supra* note 8 app. C (the statutory text proposed by Tentative Draft No. 1 (April 8, 1997)).

35. *See* T.D. No. 2, *supra* note 8, at 58-77 (proposed § 1367(c) and accompanying commentary).

36. In *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), the Supreme Court held that in a federal diversity case, a plaintiff could not make a claim against a co-citizen third-party defendant, although the claim arose out of the same events as the plaintiff's claim against the original defendant. How this result is preserved by proposed § 1367(c) is explained in T.D. No. 2, *supra* note 8, at 59-64.

37. *See infra* note 38.

38. *See* T.D. No. 2, *supra* note 8, at 53, 67-68 (proposed § 1367(c)(2) and accompanying commentary). In a closely related change, the proposal, in subsection (c)(1), would overrule *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *See* T.D. No. 2, *supra* note 8, at 65-66. But the proposal would preserve the rule of *Snyder v. Harris*, 394 U.S. 332 (1969) (refusing to allow aggregation of class members' claims for purposes of the requirement), since in *Snyder*, no individual class member's claim would satisfy the jurisdictional amount

I have one additional reason for not going into greater detail on the present state of the legislative process after over seven years of drafting, debate, and further drafting. As great as is my respect for the knowledge, ability, and dedication of those who have devoted their time and energy to this project, I think they have taken a wrong tack in an effort to rid us of the *Finley* scourge. Once again, I believe Tom Rowe had it right when he said, at the 1998 AALS panel discussion, that this would have been a matter best left to "common law" development.[39] My own view is that this approach is still desirable, and is not foreclosed either by *Finley* itself or by evidence of the present Court's general view of its proper role.

I have written elsewhere of the existence and desirability of principled judicial discretion with respect to both the dimensions of federal subject matter jurisdiction and the appropriateness of its exercise,[40] and the reader who is interested in a fuller statement of that position is encouraged to consult that essay. Suffice it to say here that the existence of such discretion, in my view, has a long and noble heritage, and that courts are singularly suited to the task of fine tuning the broad sweep of the jurisdiction that is conferred on them (subject always, and crucially, to legislative review). Thus my response to the unwarranted expansiveness of *Finley*, were I ruler of the universe, would have been to enact a law establishing the principle of supplemental jurisdiction, and then to leave all or most of the details to be worked out by the courts.[41]

Sadly, the Supreme Court itself, in its more recent decisions, seems to have taken a more cramped view of its discretion in this area than it did in former years.[42] And the response, at least with respect to § 1367 and subsequent efforts to reshape it, has been the formulation of jurisdictional rules in elaborate detail—detail that has managed to solve some problems only to create others. At the same time, the drafters of this particular legislation have taken more or less

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requirement for federal diversity jurisdiction.

39. Professor Rowe advises me that (as indicated by his article in this Symposium) he has "softened somewhat" on the question whether decisional development is preferable to codification.

40. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

41. A similar approach, which would have conferred "substantial discretion on the federal trial judges," was evidently considered and rejected during the ALI deliberations. *See* T.D. NO. 2, *supra* note 8, at x-xi. And the ALI did decide in the course of those deliberations to broaden the scope of discretion conferred on the courts not to entertain a supplemental claim. *See id.* at xxiv-xxv.

42. In addition to the *Finley* case and its predecessors (like Aldinger v. Howard, 427 U.S. 1 (1976) (case discussed *supra* text accompanying note 5)), see *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712, 1728 (1996), holding that abstention is not available (but a federal court may stay its hand) when the federal court action does not seek a form of equitable relief. In denying discretion to abstain on a ground that both disregarded precedent and relied on a formalistic and essentially meaningless distinction in a merged procedural system, the Court indicated a distressing aversion to the exercise of judicial discretion in such cases.

I admit to possible bias in this matter, since I participated in *Quackenbush* on behalf of the petitioner (who lost), but colleagues who were not involved in the case have indicated similar surprise at and disagreement with the result. That result is rendered especially puzzling by the Court's recognition that despite its rejection of the possibility of dismissal or remand, a stay of federal proceedings may be appropriate.

as gospel at least some of the judicial pronouncements that preceded enactment, especially the existence and ramifications of the complete diversity requirement, and the view that at least some attempts to litigate an entire controversy involving parties *already* in court constitute an unacceptable evasion of that requirement.[43] As a result, the proposed legislation not only gives the seal of approval to both the complete diversity requirement *and* (what I view as) the pernicious application of it in *Kroger*, but puts any modification or rejection beyond the power of the judiciary.

Not all of this wheel spinning and unraveling can, I believe, be laid at the door of those (including me) who must accept some responsibility for *Finley*. Rather, it stems also from what strikes me as a mistaken allocation of institutional responsibility in the realm of subject matter jurisdiction. The proper role of the legislature, I submit, is to establish the general contours of that jurisdiction, and to correct perceived errors in the federal courts' efforts to work out the details. But the correction of such errors need not, and should not, entail the assumption by the legislature of the kind of responsibility for detail that is still best left to the courts. Yet that is exactly the premise on which the current ALI project is based.[44]

A friend who is involved in this project indicated some sympathy with this view when I raised it with him, and shared my unhappiness with the decision to codify the unfortunate decision in the *Kroger* case. But, he said, while the approach I advocate might have worked at the outset, we have passed the point of return. We are—to paraphrase Macbeth and to overstate the problem—too steeped in blood to do anything but grope our way to the other shore. And if reaching the other shore means persuading Congress to restate and "clarify" all the details, so be it.

With respect once again, I don't see why that is so. The effort to fine tune supplemental jurisdiction in § 1367 succeeded in some ways, and came a cropper in others. Would it be beyond the pale for the responsible committees to write a report saying, in essence, (1) that the fine tuning of jurisdictional statutes is a job in the first instance for the courts, and (2) that the sole purposes of the revised legislation are (a) to broaden supplemental jurisdiction to embrace pendent party jurisdiction while preserving existing discretion in the area, and (b) to make it clear that this authority should be used to allow the inclusion of related claims that fail as independent claims only because of the lack of the requisite amount in controversy? A brief draft to that effect, which I know could stand

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43. The Court in *Kroger* suggested that allowing a plaintiff to assert a claim against a third-party defendant in such a case would foster collusion between a plaintiff and a diverse defendant to bring in a nondiverse third-party defendant as the real adversary (whereupon the original defendant would presumably step to the sidelines). I have never seen any empirical support for this theory and it strikes me as a highly unlikely event, which can be dealt with (if necessary) by application of 28 U.S.C. § 1359 (1994). To be sure, a plaintiff might simply hope that the third-party defendant will be brought in, but that is a risky undertaking at best, and one I do not find especially troublesome.

44. Perhaps the theory behind the ALI project is that the courts today would not be willing to accept that responsibility. That might well be so if Congress were silent on the subject, but I do not think the courts would, or could, refuse to exercise a discretion that has been explicitly delegated to them by the legislature.

improvement, is set forth in the margin.[45] One unique advantage I can claim for it is that it is not only considerably shorter than all pending proposals, but is shorter than the present § 1367 itself. Polonius was surely right about the virtues of brevity, even if he didn't practice what he preached.

What would happen were such a general directive to be enacted? First, I am sure the sky would not fall. Second, the principal problem—that created by *Finley*—would be resolved. Third, the courts would undoubtedly continue to adhere to the core of the complete diversity requirement, partly because it has become a part of our jurisdictional canon and partly to defend against an undue increase in the burden of diversity litigation. Fourth, the federal courts would retain valuable flexibility to adjust the jurisdictional rules in particular instances to reflect current perceptions of the costs and benefits of asserting supplemental jurisdiction in a range of particular situations. And who knows? They might even see their way clear to rethinking the *Kroger* decision and allowing the complete resolution of a controversy when the parties to that controversy are all properly before the Court. And fifth, we would avoid the growing disposition to make the jurisdictional charter of the federal courts resemble the murkier provisions of the Internal Revenue Code.

* * *

I am evidently out of step with the prevailing view of the proper allocation of responsibility in jurisdictional matters between the courts and the legislature—a view that has at least the implicit approval of the current ALI redrafting project. Thus the likelihood is that § 1367, and other jurisdictional statutes, will continue to grow longer, more elaborate, and more complex, inducing courts to follow their orders to the letter (and the hell with the spirit). I think that would be a loss in several ways: it would commit legislative time and energy to problems more suitable for the courts, and it would deprive the courts of a function they have long—and on the whole ably—performed.

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45. There are some respects in which the wording of the ALI's proposed changes in § 1367 may well improve on the original, particularly in the adoption of what is described as a "claim specific" terminology. *See* T.D. NO. 2, *supra* note 8, at 29-30. But I start with the proposition that one should change as little as possible when revising a statute, and avoid tampering with text that seems to have worked reasonably well. On that theory, and in the light of the approach urged in the text, I would:

- Retain § 1367(a) in its present form;
- Combine § 1367(b) and (c) into the following simple grant of district court discretionary authority (subject to appellate review):

> (b) a district court may, in its discretion, decline to exercise supplemental jurisdiction over a claim falling within subsection (a) if—in considering the interests in judicial efficiency, the limitations (other than amount in controversy) on the original jurisdiction of the federal courts under § 1332 of this title, and other relevant factors—it is concluded that the claim should not be adjudicated in the pending action. The exercise of such discretion shall be governed by standards developed in the course of appellate review.

- Redesignate as subsection (c) present subsection (d) (tolling), and delete present subsection (e) (definition of "State") as no longer relevant.

I am bemused by the thought that had the *Finley* case arisen the year after *United Mine Workers v. Gibbs*,[46] it probably would have come out the other way. My work on the case persuades me that to have upheld supplemental jurisdiction in *Finley* would have been a misinterpretation of the FTCA, for reasons we tried so hard to explain in our brief. But such a result would have met the demands of judicial economy, would have fallen well within the scope of judicial discretion, and would have helped maintain the proper balance between courts and legislatures in the working out of thorny jurisdictional problems.

46. 383 U.S. 715 (1966).