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## Revisiting the Policy Case for Supplemental Jurisdiction

ROBERT G. BONE\*

The supplemental-jurisdiction statute, 28 U.S.C. § 1367, adopted in 1990, marked a watershed in both the law and scholarship of supplemental jurisdiction. The scholarly commentary before 1990 focused mainly on fundamental constitutional questions, such as the proper definition of a constitutional “case” and the legitimacy of supplemental jurisdiction in the absence of congressional authorization. Since the enactment of § 1367, the focus has shifted to the details of the statute and especially the puzzles created by § 1367(b). This recent work has been extremely helpful in clarifying the statute’s strengths and weaknesses.

It is now time, however, to return to basics and take a closer look at the policy case for supplemental jurisdiction. The American Law Institute (“ALI”) Federal Judicial Code Revision Project is currently considering a revision of § 1367.<sup>1</sup> The ALI has decided to track current law closely in order to minimize political controversy and maximize the chances of congressional adoption. However, it is important that the ALI’s efforts be guided by a clear view of the policy stakes so that informed judgments can be made about what is worth preserving and what can be sacrificed to political compromise.

With a few notable exceptions,<sup>2</sup> even the foundational work before 1990 tended to gloss over policy issues in favor of statutory, constitutional, and historical analysis.<sup>3</sup> Most commentators then and now simply assume that supplemental jurisdiction, at its core, rests firmly on well-settled policies of “judicial economy, convenience, and fairness to litigants.”<sup>4</sup> But the matter is not quite so straightforward, especially when the prevalence of settlement is taken into account. This brief Comment surveys some of the complex policy terrain. In the end, I conclude that supplemental jurisdiction is supportable, but that a clearer understanding at the level of policy can help to make improvements at the level of doctrine.

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\* Professor of Law, Boston University School of Law. Thanks to my colleagues, Fred Lawrence and Pete Farnsworth, for their helpful comments.

1. See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2 (1998) [hereinafter T.D. NO. 2].

2. See, e.g., Sidney Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale For Pendent Jurisdiction*, 75 NW. U.L. REV. 245, 289-305 (1980); Michael Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262, 265-68 (1968).

3. See, e.g., Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34; Richard A. Matasar, *Rediscovering “One Constitutional Case”: Procedural Rules and the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399 (1983); Mary Brigid McManamon, *Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History*, 46 WASH. & LEE L. REV. 863 (1989). But see Matasar, *supra*, at 1403 n.5, 1404 n.6 (reviewing the policies briefly).

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

## I. TWO TYPES OF SUPPLEMENTAL JURISDICTION

The standard account of supplemental jurisdiction justifies the doctrine as a way to facilitate the efficient packaging of litigation in federal court and to prevent unfairness to parties who would otherwise be forced to litigate claims in separate suits.<sup>5</sup> If a federal court has original jurisdiction over one claim, it makes sense on this view for the court to adjudicate all related claims, even those that do not fall within the federal court's original jurisdiction. This permits resolution of the entire controversy in a single proceeding.

In examining the policy arguments, it is useful at the outset to distinguish between two different types of supplemental jurisdiction. Section 1367 lumps all the cases together under the single rubric of "supplemental jurisdiction." There is a problem with this unitary approach, however. It obscures important distinctions. The policies underlying supplemental jurisdiction vary according to whether the party benefitted by the doctrine has the power to choose the forum.<sup>6</sup> Although § 1367's unitary approach does not prevent courts from taking account of these differences, the statute's uniform language makes it less likely they will.

When the party benefitted has no forum choice, supplemental jurisdiction is justified by more than litigation efficiency. Without supplemental jurisdiction, parties forced to litigate in federal court have no way to avoid the burden of duplicative litigation and the risk of inconsistent decisions. For example, in the absence of supplemental jurisdiction, a defendant *B* would have to sue a nondiverse tortfeasor *C* for contribution or indemnity in a separate action rather than join her to the same suit through impleader. In the second suit, *C* could relitigate the issues relevant to liability, and if she won, *B* would be forced to bear the full burden of the judgment.<sup>7</sup> This result strikes many as unfair, not just inefficient, and to the extent fairness values are implicated, the case for supplemental jurisdiction is quite strong.<sup>8</sup>

The normative stakes are different, however, when the party who benefits from supplemental jurisdiction has the power to choose the forum. This includes all traditional exercises of pendent jurisdiction over claims filed by plaintiffs, as well

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5. See, e.g., Freer, *supra* note 3, at 34 (noting that "supplemental jurisdiction permits the efficient packaging of litigation in federal court"); 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, 1816-17 (1992) (referring to the "principle of litigation efficiency" as the justification for supplemental jurisdiction); Schenkier, *supra* note 2, at 249 (noting "the common wisdom" that supplemental jurisdiction is "rooted in the practicality of judicial economy").

6. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376-77 (1978).

7. These burdens might not be so serious if the case settles, provided all interested parties are involved in the settlement. However, *B* will have a more difficult time persuading *C* to participate in a global settlement when *C* is not a party and has not yet even been sued.

8. Other examples include supplemental jurisdiction over compulsory counterclaims brought by defendants in a case filed originally in federal court and intervention of right sought by an absentee. In both of these examples, as in the impleader case, the party benefitted by supplemental jurisdiction has no power to choose the forum and stands to suffer what many believe is a kind of unfairness.

as exercises of pendent jurisdiction over claims removed to federal court by defendants. It also includes ancillary jurisdiction over claims that plaintiffs add to the suit in response to moves made by other parties—such as impleader by a plaintiff in response to a counterclaim—and claims brought by defendants in an action removed to federal court. At least if the additional claims or parties are reasonably foreseeable at the time the federal forum is chosen,<sup>9</sup> the benefitted party has an opportunity to avoid the cost and risk of duplicative litigation by choosing state court instead. Thus, fairness is not so obviously implicated in these situations.

I shall refer to the use of supplemental jurisdiction to benefit those with an option to choose the forum as “optional jurisdiction,” and its use to benefit those without such an option as “nonoptional jurisdiction.”<sup>10</sup>

## II. THE POLICY CASE FOR OPTIONAL JURISDICTION

The policy case for optional jurisdiction starts from the premise that separate adjudication of state and federal claims with common issues is wasteful. This premise is not sufficient to justify the doctrine, however, when, as in the typical case,<sup>11</sup> Congress grants concurrent jurisdiction over the federal claim. Under these circumstances, all claims can be adjudicated in state court without the waste of duplicative proceedings. Therefore, the case for optional jurisdiction must explain why federal court is superior. Proponents usually locate the explanation in the special value of adjudicating federal claims in a federal forum.<sup>12</sup>

There is a problem, however. By choosing concurrent jurisdiction, Congress left it to the parties to select the forum for their federal claims. Given this congressional decision, it is not apparent that anything has gone wrong when

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9. In fact, foreseeability should seldom be a significant limitation. Disputes tend to fall into fairly standard structural configurations. Thus, in many cases, parties should be able to anticipate at least the possibility of future joinder and intervention.

10. As the examples in the text indicate, my distinction between optional and nonoptional jurisdiction is not the same as the traditional pendent-ancillary divide. The distinction between pendent and ancillary has to do with the stage of the litigation at which the supplemental-jurisdiction doctrine applies: pendent jurisdiction applies to plaintiff's original suit, while ancillary jurisdiction applies to subsequent expansions (such as counterclaims, crossclaims, third-party claims, and intervention). The distinction between optional and nonoptional jurisdiction, on the other hand, depends on who has the power to choose the forum. As a practical matter, the two classification schemes diverge in the ancillary jurisdiction cases. Some of those cases involve optional jurisdiction, and others involve nonoptional jurisdiction. Examples in the first group include jurisdiction over an impleader brought by a plaintiff in response to a counterclaim (assuming foreseeability) and jurisdiction over a counterclaim or an impleader brought by a defendant who removes to federal court. In both of these examples, the party benefitted by supplemental jurisdiction had the power to choose the forum and could have selected state court instead.

11. See Redish, *supra* note 5, at 1811 (noting that most jurisdictional grants are concurrent). The case for supplemental jurisdiction is stronger when original jurisdiction over the federal claim is exclusive, but I deal here only with cases of concurrent jurisdiction.

12. See *id.* at 1817; Schenkier, *supra* note 2, at 254-56. It is important to bear in mind, however, that when removal of federal claims is possible, all claims will be adjudicated in state court only if both the plaintiff and the defendant prefer the state forum for the federal claims.

parties select state court. As a result, proponents of optional jurisdiction focus not so much on the particular forum choice itself, but on the conditions under which the choice is made. They argue that the added cost of duplicative litigation *improperly* burdens the choice of a federal forum for federal claims.<sup>13</sup>

Thus, if parties would split their suits between federal and state court in the absence of supplemental jurisdiction, the main reason for the doctrine is efficiency. But if they would not, the reason has to do with protecting the free choice of a federal forum for federal claims.

#### *A. The Efficiency Argument*

Suppose parties find a federal forum sufficiently attractive to warrant two lawsuits. Under these circumstances, the strength of the efficiency argument for supplemental jurisdiction depends on the benefit of avoiding two lawsuits compared to the cost of administering a supplemental-jurisdiction system and the cost of usurping state sovereignty over state claims.

On the benefit side, proponents of supplemental jurisdiction tend to assume substantial cost savings in individual cases. Under the traditional doctrine, for example, trial judges have broad discretion to decline supplemental jurisdiction whenever they believe that the savings will not be very high *in the particular case*. This case-specific focus makes sense if both suits go to trial, for then supplemental jurisdiction avoids the waste of putting on witness testimony and documentary evidence twice. In fact, however, most lawsuits settle. As a result, the cost savings that matter most to an efficiency analysis are those at the pretrial stage, and focusing on those savings weakens the case-specific benefit of supplemental jurisdiction considerably.

The costs of filing and litigating pretrial motions will be somewhat higher for two lawsuits, but the difference should not be exaggerated since the legal and factual research must be done in any event. Discovery accounts for the bulk of pretrial expense,<sup>14</sup> and the discovery process is likely to be somewhat more complicated when split between two suits. At the same time, however, discovery on common questions is useful in both suits so there should be no reason to duplicate it, and trial judges have the power to limit excessive and abusive discovery requests.<sup>15</sup> Moreover, adjudicating state claims in state court avoids the

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13. See, e.g., Schenkier, *supra* note 2, at 256, 283-84; Matasar, *supra* note 3, at 1403 n.5, 1406 n.6.

14. See, e.g., THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 3-4, 15 tbl. 4 (1997) (reporting that discovery consumes 50% of total private litigation costs in the median case).

15. To be sure, complex cases can generate high discovery costs, but this is likely whether or not suit is split. Still, it is possible that the additional costs of splitting are unusually high for supplemental-jurisdiction cases. Perhaps such cases tend to involve more burdensome motion practice or discovery that is more difficult to coordinate. But from an efficiency perspective it is the *average* case that matters, not the exceptional case, and I know of no empirical evidence suggesting unusually high additional litigation costs for the average supplemental-jurisdiction case.

cost of litigating tricky *Erie* questions and enlists the expertise of state judges on pretrial motions dealing with state claims.

It is possible that splitting the case between two forums will increase the transaction costs of settlement. However, the bargaining process should proceed in much the same way whether or not suit is split, so long as the same parties and lawyers are involved in both suits.<sup>16</sup> And insofar as state court judges are more adept with state law, legal uncertainty is reduced and the prospects for settlement correspondingly improved.<sup>17</sup>

Settlement bargaining might be more difficult in cases where the state claims involve new parties not joined to the federal suit. A global settlement of state and federal claims requires the consent of all the parties, and the transaction costs of coordinating negotiations necessary to obtain that consent might be higher when some of the lawyers are involved in only one suit. If this is so, however, the policy implications run counter to the prevailing view, for they suggest that the case for pendent party jurisdiction is stronger than the case for pendent claim.

Cost savings are likely to be especially thin in those cases where state and federal claims have little factual or evidentiary overlap. Under the "logical relationship" test, supplemental jurisdiction extends to state claims with a "loose factual connection" to the federal suit.<sup>18</sup> The looser the factual connection, the weaker the efficiency gains from joinder, whether or not the suits actually settle.<sup>19</sup>

However, even small savings in individual cases can add up to substantial savings in the aggregate when the total number of cases is large. While I have no empirical evidence to support it, my impression is that litigants today rely on supplemental jurisdiction quite frequently. If I am correct—and if those litigants would otherwise still litigate their state claims—then the total savings from supplemental jurisdiction could be quite large.

Still, this aggregate benefit must be compared to the cost of administering a supplemental-jurisdiction system and the cost of intruding on state sovereignty over state claims. As I discuss in Part III below, traditional supplemental-

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16. Moreover, if splitting increases litigation costs, then it should also increase the settlement surplus and thus the parties' willingness to settle. At the same time, however, the settlement amount might be adversely affected. But this effect would be significant only if the additional costs of splitting (both pretrial and trial) were high, and substantially and systematically skewed in favor of one side.

17. However, uncertainty might also increase because parties must anticipate the reactions of two judges rather than one.

18. See, e.g., 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567.1, at 117 (2d ed. 1984); Redish, *supra* note 5, at 1823-24.

19. Some commentators rely on the broad scope of permissive joinder in the Federal Rules of Civil Procedure to support the conclusion that there are significant efficiency benefits from even the broadest extensions of supplemental jurisdiction. See Matasar, *supra* note 3, at 1454 & n.252; Redish, *supra* note 5, at 1823-24. However, the Federal Rules drafters did not allow broad permissive joinder because they believed that a complex lawsuit bound together by weak transactional ties was necessarily an efficient litigating unit. They allowed broad joinder so that federal court judges could use their expertise to carve the complex suit up into smaller units that promised maximal efficiency benefits. See Robert G. Bone, *Mapping the Boundaries of A Dispute: Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 104-07 (1988).

jurisdiction doctrine has the potential to create high administrative costs, especially over the aggregate of cases, because it relies extensively on judicial discretion. However, this does not mean that supplemental jurisdiction should be eliminated; rather it means that the discretionary prong of the doctrine should be confined.<sup>20</sup>

Assessing the cost to state sovereignty interests is a more difficult matter. To do this, we need a coherent theory of federalism in the supplemental-jurisdiction context, and no such theory has yet been developed.<sup>21</sup> Nevertheless, we can make some general observations.

Conceivably, the prevalence of settlement might weaken the state's interest in adjudicating state claims even as it reduces the cost-saving benefit. This would be so if we assumed, for example, that state interests are strong only when state judges perform their traditional role in adversarial adjudication and not when they oversee settlements. However, this assumption is hard to defend. Even cases that settle can require decisions of state law issues in connection with pretrial motions, such as motions to dismiss or for summary judgment, and the state clearly has an interest in how those decisions are made. Moreover, states *do* have an interest in settlement, because in a world of settlement, enforcement of state substantive law policies depends crucially on the quality of settlements that are reached.<sup>22</sup>

On the other hand, there is some force to the contractarian argument that all states would agree to some form of supplemental-jurisdiction doctrine if they could negotiate in advance of knowing what kind of state claims would be involved. States reap benefits from the doctrine in terms of reduced caseload. Moreover, they can minimize inroads on sovereignty by recognizing exceptions for cases implicating serious state policy concerns. Nevertheless, it is worth noting that even strong efficiency gains have been thought insufficient to justify sacrificing state sovereignty in other areas.<sup>23</sup>

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20. See *infra* text accompanying notes 42-48.

21. Section 1367(c) lists four reasons that a federal judge may decline to exercise supplemental jurisdiction. Two of these clearly implicate federalism values on the state sovereignty side: dismissal is warranted when the state claim raises a novel or complex issue of state law, 28 U.S.C. § 1367(c)(1) (1994), or when state claims substantially predominate over federal claims, *id.* § 1367(c)(2). Subsection (c)(4) authorizes a federal judge to dismiss in "exceptional circumstances" for "compelling reasons," but provides no guidance as to the nature of such circumstances or reasons.

22. Settlements take place in the shadow of trial and depend on the parties' expectations about likely trial outcome and costs. To be sure, the *Erie* doctrine reduces federal-state divergence, but there are still important "procedural" differences that survive *Erie* and can influence outcome and costs. See *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

23. One prime example is the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), which imposes strict limits on a federal court's power to enjoin parallel state court proceedings even when an injunction would yield substantial efficiency gains. The Act is not a perfect analogy since it applies only to state proceedings that are already pending, when federal intervention is more likely to produce friction. Nevertheless, the Anti-Injunction Act reflects a congressional judgment that efficiency should not easily outweigh federalism values. See C. Douglas Floyd, *The ALI, Supplemental Jurisdiction, and the Federal Constitutional Case*, 1995 BYU L. REV. 819, 860-67 (arguing by analogy to the Anti-Injunction Act that the ALI's complex litigation proposal gives inadequate weight to federalism values in its effort to achieve efficiency through

### *B. The Forum Selection Argument*

The second argument for supplemental jurisdiction emphasizes the importance of assuring a federal forum for federal claims. There are two different versions of this argument. One version focuses on the parties' forum-shopping incentives. The other version focuses on the internal consistency of a legal system that holds out the promise of a federal forum but does not support it with a grant of supplemental jurisdiction. I discuss each version in turn.

#### 1. Forum-Shopping Incentives

The forum-shopping argument assumes that the additional costs of splitting are substantial enough to induce parties to litigate federal claims in state court.<sup>24</sup> There are several problems with this assumption. A rational plaintiff chooses between federal and state court by comparing the expected costs and benefits of each forum. While there is a cost to splitting the suit, there is also a benefit: the value of having a federal court adjudicate the federal claims. Thus, for a party to choose state court, the costs of splitting must be large enough to outweigh the opportunity cost of the federal forum.

Proponents of the forum selection argument simply assume that the private cost of splitting is substantial. But this is hardly obvious. Because most suits settle before trial, a rational plaintiff calculating the additional cost of splitting will focus primarily on expected costs at the pretrial stage. For the reasons discussed above, it is not clear that those costs are much higher for two suits. Parties have to research all the factual and legal issues in any event, and they can coordinate discovery to minimize additional expense.<sup>25</sup>

However, there is another source of cost that can have a more serious effect on forum choice. Whenever two lawsuits are filed, there is always a risk that one will be precluded if the other reaches final judgment first. Thus, parties fearful of preclusion might decide to bring their federal and state claims in state court. To see how these incentives operate, we must examine each type of preclusion—issue and claim—separately.

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aggregation).

24. See, e.g., Schenkier, *supra* note 2, at 255.

25. For example, scheduling depositions of common witnesses for the same block of time should save litigation costs for all parties. However, strategic behavior can frustrate cooperative solutions of this sort. See, e.g., Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 520 (1994). Even so, joining claims also creates opportunities for wasteful strategic maneuvering. There is another way that additional litigation costs from splitting can influence forum choice for federal claims—by affecting settlement frequency and amount. It is not clear, however, that these effects are significant. See *supra* note 16 (discussing possible settlement effects). Moreover, procedural differences between federal and state court that may affect settlement, see *supra* note 22, should bolster incentives to bring federal claims in federal court, at least when state procedures disadvantage one of the parties.

Issue preclusion should not have a major impact. Since issue preclusion bars relitigation only if the person being precluded has already had a full and fair chance to litigate the issue, no one sacrifices litigation opportunities by splitting claims between federal and state court. Everyone is guaranteed one and only one chance to litigate the common issues. On the other hand, issue preclusion can reduce the expected benefit of a federal forum by imposing a state court's determination of common issues. But this effect is limited, since the potential loss must be discounted by the probability that the state suit will be adjudicated rather than settled and will reach final judgment before the federal suit.<sup>26</sup>

Claim preclusion is a different matter. If plaintiff chooses to split her suit and her state action reaches final judgment first, the federal court is required under the Full Faith and Credit statute, 28 U.S.C. § 1738, to apply the preclusion law of the state, unless there is clear congressional intent to the contrary.<sup>27</sup> When plaintiff could have brought her federal claims in state court, § 1738 can end up barring those claims in federal court.<sup>28</sup> On the other hand, most cases settle, and parties can avoid the effects of claim preclusion by stipulating that settlement of the state suit does not include the federal claims.<sup>29</sup> Even so, the risk of claim preclusion can still discourage splitting by reducing the amount of the likely settlement.<sup>30</sup>

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26. A similar analysis applies to stare decisis, since parties usually have a chance to participate in the decision that gives rise to stare decisis effects. To be sure, stare decisis can operate even when a suit settles, but unlike preclusion, it leaves the federal court free to reconsider the matter. Moreover, it does not affect the federal court's power to decide pure questions of federal law since the state court will not have addressed those questions in the state suit.

27. See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 801-05 (1986).

28. See, e.g., *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 82 (1984).

29. See generally 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4443, at 384-87 (2d ed. 1981) (noting that the claim preclusive effects of a settlement are usually determined by party intent).

30. This effect depends on the degree of outcome correlation between the federal and state claims. For simplicity of illustration, suppose that there are two claims, one federal and one state, and that the correlation between the claims is zero (admittedly not very likely in a supplemental-jurisdiction situation). Also suppose that the plaintiff enjoys the same probability of success on each claim, and that this probability is known to all the parties. Finally, assume that the plaintiff can recover complete relief on either claim. Intuitively, a plaintiff who is not subject to claim preclusion has two chances to win, while a plaintiff who is subject to claim preclusion has only one chance. A plaintiff with two chances is better off going to trial than a plaintiff with one chance and thus is in a superior position to extract a favorable settlement. One can see the same point mathematically as follows. Let  $p$  be the probability of success on each claim. Bringing the two claims together gives plaintiff a probability of recovering equal to  $p^2 + 2p(1-p) = p(2-p)$ . Splitting the claims where one suit will be precluded by the other gives plaintiff a probability equal to  $p$ . Since  $p < 1$ , it follows that  $p(2-p) > p$ , so plaintiff has a higher expected value of suit when she joins both claims together in state court (and defendant has a higher expected loss). Thus, plaintiff should expect a higher settlement, all other things being equal.

Claim preclusion is not always a risk, however. If the plaintiff brings all her claims in state court and the defendant removes the federal claims to federal court—assuming Congress authorizes this kind of removal<sup>31</sup>—claim preclusion should not apply, since the plaintiff had no alternative but to split her suit. Indeed, in the absence of supplemental jurisdiction, this result might encourage filings in state court followed by removal of federal claims to federal court.<sup>32</sup>

The point of this brief discussion is to show that the cost of splitting claims is not necessarily high enough to induce frequent filing of federal claims in state court. This is especially true of the broadest applications of supplemental jurisdiction, those that extend jurisdiction on a logical relationship test,<sup>33</sup> at least assuming the nexus between the two suits is not close enough for claim preclusion to apply.<sup>34</sup> When the cost of splitting is small (and removal of federal claims is feasible), federal claims would end up in state court (by plaintiff filing there originally and defendant choosing not to remove) *only if* both parties placed a relatively low value on a federal forum.<sup>35</sup>

To be sure, the fact that the parties discount the federal forum does not necessarily mean that federal court adjudication has little value from a *social* point of view. Since litigation is rife with externalities, private incentives are not always socially optimal.<sup>36</sup> Nevertheless, when Congress selects concurrent rather

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31. I assume that in the absence of supplemental jurisdiction, Congress would revise the removal statute, 28 U.S.C. § 1441 (1994), to clarify that federal claims can be removed to federal court—either by allowing removal of the whole suit and remand of the state claims, or by allowing removal of the federal claims alone. The current statute operates against the backdrop of supplemental jurisdiction. Thus, § 1441(a) authorizes removal of both federal claims and state claims over which there is supplemental jurisdiction. Section 1441(c) allows removal of state claims with no supplemental jurisdiction, but this provision is limited by the requirement that the federal claims be “separate and independent.” See 16 ROBERT C. CASAD ET AL., *MOORE’S FEDERAL PRACTICE* § 107.14[6][a], at 107-100 to -101 (3d ed. 1998); Joan Steinman, *Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress’ Handiwork*, 35 ARIZ. L. REV. 305, 316-18, 321-25 (1993).

32. This strategy can backfire. Plaintiffs who prefer the federal forum even with the risk of claim preclusion might choose instead to sue in state court in the hope that the defendant will remove the federal claims to federal court. When plaintiffs guess wrong, the federal claims remain in state court.

33. See *supra* text accompanying note 18.

34. Even the broadest test for claim preclusion, the so-called “transaction” test, see RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982), may require a tighter nexus than the most expansive applications of the logical relationship test for supplemental jurisdiction. See *Wilson v. City of Chicago*, 900 F. Supp. 1015, 1021-22 (N.D. Ill. 1995) (concluding that a decision that a state law claim is pendent to a federal claim is not tantamount to a decision that the state law claim would be precluded by *res judicata*); cf. *Manego v. Orleans Bd. of Trade*, 773 F.2d 1, 6-7 (1st Cir. 1985) (explaining why the transaction test for claim preclusion was not satisfied in *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980), “although the events in question are closely connected in time and space”).

35. Technically, all defendants must join in the removal petition before a case can be removed to federal court. Therefore, in a state suit with multiple defendants, only one of those defendants need place a low value on federal court for the case to remain in state court.

36. For example, if federal courts generate better quality federal law precedent than state courts, relying on party choice might not produce a socially optimal pattern of federal court use, since private parties do not internalize the full social benefit of their forum choices.

than exclusive jurisdiction, it chooses to rely on private forum-shopping incentives to protect the federal interest in proper adjudication of federal claims. Concurrent jurisdiction reflects a congressional judgment that, while a federal forum is important, private parties can be counted on to choose federal court when the choice matters from a social point of view.

One final point deserves mention. Even if the cost of splitting is high enough to divert federal claims to state court, it does not necessarily follow that supplemental jurisdiction is warranted. Litigation costs are rarely the same between federal and state court. Many factors contribute to cost differences: differences in procedural rules, differences in reliance on court-annexed alternative dispute resolution, and differences in case backlog and delay. Whenever the expected cost is lower in state court, parties have a reason to choose state court for their federal claims. Ordinarily, these cost differences do not trouble us; we treat them simply as background facts relevant to a rational choice among alternative forums. In other words, the legal system recognizes a normatively acceptable baseline of cost difference between federal and state court. It follows that proponents of the forum selection argument must explain why the cost of splitting is not part of this baseline when other costs are.<sup>37</sup>

## 2. Normative Consistency

The second version of the forum-selection argument does not depend on baselines or on party incentives to choose federal court. This version instead focuses on the internal coherence of a legal system that recognizes concurrent jurisdiction and interjurisdictional claim preclusion, but does not recognize supplemental jurisdiction. Claim preclusion stands for the principle that parties should adjudicate their entire dispute in one legal proceeding. As such, it does not simply put a *price* on splitting; it *forbids* splitting—and it does so by cutting off legal rights.<sup>38</sup> Concurrent jurisdiction stands for the principle that parties should have the freedom to choose federal or state court for their federal claims.

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37. Thus, arguments that the cost of splitting creates a “fundamental bias” against a federal forum or imposes a “penalty” on the choice of federal court simply beg the question. *See* Schenkier, *supra* note 2, at 256, 284. So too does the assumption that splitting frustrates a “true choice” between federal and state court for federal claims. *Id.* at 283; Matasar, *supra* note 3, at 1403 n.5, 1406 n.6 (referring to a “free choice” of federal court). One must first define what kind of cost differential constitutes “fundamental bias,” creates a “penalty,” or interferes with “true choice” in a world where cost differences are inevitable. Furthermore, it is not possible to anchor the argument in congressional intent since there is no evidence that Congress made the highly implausible assumption that costs are identical between federal and state court or that it singled out the cost of splitting as especially problematic. Indeed, splitting must have been quite common around 1875, when the general federal question jurisdiction statute, 28 U.S.C. § 1331 (1994), was first adopted, since supplemental jurisdiction was a very limited doctrine at that time. *See also* Hurn v. Oursler, 289 U.S. 238 (1933) (adopting a narrow pendent jurisdiction doctrine).

38. I have in mind the distinction between prices and sanctions developed in other areas of law. *See generally* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984). It is nonsensical to argue that a party is free to split her suit so long as she pays the price of sacrificing one of her claims, for she needs that claim in order to split her suit.

However—and here is the important point—parties without access to supplemental jurisdiction can choose federal court only if they split their suit. Thus, claim preclusion and concurrent jurisdiction seem to rest on directly conflicting principles. Supplemental jurisdiction removes the conflict by making it possible to bring federal claims in federal court without offending the anti-splitting principle.<sup>39</sup>

The full argument needs further development, of course. For one thing, if claim preclusion only applies in the state-federal direction, a plaintiff can split her suit without forfeiting any claims so long as her federal claims reach final judgment first.<sup>40</sup> Furthermore, it is possible that other principles, such as federalism, might mediate the apparent conflict. And even if the conflict remains, supplemental jurisdiction is not the only way to resolve it. Eliminating interjurisdictional claim preclusion would do just as well.<sup>41</sup>

This is not the place to discuss these points in detail. My goal is simply to show that there are two distinct versions of the forum selection argument, and that only one of the two turns on empirical facts about party incentives. The consistency argument does not depend on how well rules work in practice; it depends instead on whether the principles that justify those rules form a sufficiently coherent whole.

### III. SOME IMPLICATIONS FOR REFORM

Given limited space, I can do no more than offer a few general remarks on how these insights might affect reform of supplemental-jurisdiction law. First, the case for what I have called “nonoptional jurisdiction” is strong to the extent fairness is implicated when the party benefitted by supplemental jurisdiction cannot choose the federal forum—as when a defendant relies on supplemental jurisdiction to implead a nondiverse third-party defendant. Moreover, in those cases where nonoptional jurisdiction adds new parties, such as when absentees are impleaded or seek to intervene, there can be efficiency gains even from the perspective of settlement, since joinder avoids the additional transaction costs of dealing with a nonparty.

Second, the case for optional jurisdiction is unclear. The costs of splitting are probably lower than commonly supposed, and the costs of supplemental jurisdiction are probably higher. Even so, this does not mean that the doctrine

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39. The Supreme Court’s pendent jurisdiction decisions recognize the close connection between claim preclusion and supplemental jurisdiction. *See* Floyd, *supra* note 23, at 832, 835.

40. However, it is not clear why the principle against splitting would entail only one way preclusion. Moreover, it seems odd that freedom to choose the forum would turn on the arbitrary fact of which suit reaches final judgment first.

41. Since the Full Faith and Credit Clause of the United States Constitution does not apply to preclusion between federal and state court, Congress can eliminate the claim preclusive effect of a state court judgment by amending § 1738 to create an exception when there is no original jurisdiction over state claims and federal claims are filed in federal court. Moreover, Congress also has the power to eliminate claim preclusion when the federal suit reaches final judgment first. Under the Supremacy Clause, state courts are obliged to give a federal court judgment whatever preclusive effect Congress specifies.

should be eliminated. It might still be justified, especially if interjurisdictional claim preclusion rules remain unchanged.

However, one thing *is* relatively clear: if optional jurisdiction is retained, the open-ended discretion traditionally associated with the doctrine should be substantially curtailed.<sup>42</sup> There are benefits to discretion; it allows for case-specific balancing of competing policies. But there are also problems. For one thing, it is not obvious that case-specific discretionary balancing is the best way to do the policy analysis, especially if the potential benefits and costs are clear only in the aggregate of cases and difficult to assess in the context of an individual case taken separately.<sup>43</sup>

More importantly, reliance on discretion can generate high costs of its own. Parties who oppose the federal forum or who wish for strategic reasons to impose costs on their opponents have strong incentives to litigate jurisdiction in a discretionary system. This fact, coupled with the inevitable uncertainty of discretionary judgment, is bound to increase litigation and risk-bearing costs.<sup>44</sup> These costs in turn undermine the efficiency benefits of supplemental jurisdiction and add to the burden of choosing a federal forum. Even a plaintiff who believes her case meets the standards for supplemental jurisdiction might choose state court rather than invest in persuading an overworked federal court judge to take her state claims. Settlement will not avoid these costs since jurisdictional disputes are likely to be adjudicated early in a lawsuit before settlement discussions have a chance to mature. Thus, proponents of both the efficiency and forum selection arguments have reason to be concerned about broad discretion.

It is difficult to determine when the benefits of discretion outweigh the costs. Yet given the potentially high costs of a discretionary system, it simply does not make sense to try to get the jurisdictional decision "right" in each individual case. Indeed, it probably makes sense to license discretion only when the benefits are clearly strong. This means that Congress should reject the open-ended approach endorsed in *United Mine Workers v. Gibbs*.<sup>45</sup> Congress instead should make clear that there is a *very strong* presumption in favor of supplemental jurisdiction whenever Article III requirements are met and specify as clearly as possible only limited grounds for declining jurisdiction.<sup>46</sup>

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42. See *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 533-34 (1997) (describing the broad scope of discretion).

43. See *supra* Part II.A.

44. A LEXIS search for opinions over the past two years mentioning "supplemental jurisdiction" at least five times turned up 247 federal district court opinions and 50 Court of Appeals opinions. I conducted the search on 11/2/98 in the Genfed Library and "Dist" and "USApp" files using the following search: "date aft 11/1/1996 and atleast5(supplemental jurisdiction)." While this is a very crude way to measure the frequency of disputes over supplemental jurisdiction, it does indicate that disputes are not uncommon.

45. 383 U.S. 715, 726-27 (1966).

46. Although current § 1367(c) may appear to adopt an approach along these lines, some courts have interpreted it to codify the open-ended *Gibbs* approach. See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 445-48 (2d Cir. 1998) (summarizing the competing interpretations of §1367(c)). Congress should make clear that it intends to adopt the restrictive approach and should also consider further limiting the § 1367(c) grounds. The two Tentative Drafts generated so far by the ALI's Federal Judicial Code Revision Project fall short

Moreover, nonoptional and optional jurisdiction should be treated differently with regard to discretion. Since the policy case for nonoptional jurisdiction is generally stronger than for optional jurisdiction, there is much less reason to decline nonoptional jurisdiction. Thus, Congress should consider eliminating the discretionary prong altogether for these cases.<sup>47</sup> Even without such discretion, courts could still employ abstention doctrines in those special situations that involve particularly strong state interests.<sup>48</sup>

### CONCLUSION

Courts and commentators have for years assumed that the basic policy case for supplemental jurisdiction is sound. In a litigation system where most suits settle, however, the traditional efficiency and forum selection arguments are more complex than commonly supposed. Even the brief analysis offered here shows that parsing this complexity has significant benefits for an improved supplemental-jurisdiction doctrine.

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of this goal. Tentative Draft No. 1 moved in the right direction by including an express presumption in favor of supplemental jurisdiction (though the presumption could have been stated in stronger terms). See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 1, at 7 (1997) [hereinafter T.D. NO. 1]. But T.D. NO. 1 significantly undercut its own presumption by authorizing an open-ended *Gibbs*-style discretionary analysis. *Id.* at 122. T.D. NO. 2 mainly follows the discretionary approach of current § 1367(c), although with a much clearer intent of confining discretion more narrowly than *Gibbs*. See T.D. NO. 2, *supra* note 1, at xxiii-xxiv, 77-92. While this is in some respects an improvement over T.D. NO. 1, the grant of discretion is still far too broad.

47. T.D. NO. 1 proposed something like this, but marked the distinction in terms of ancillary versus pendent when optional versus nonoptional would better track the relevant policies. See T.D. NO. 1, *supra* note 46, at 8, 127-28. T.D. NO. 2 backslides, however. It abandons any attempt to vary discretion with the type of supplemental jurisdiction and instead applies a uniform approach similar to that in current § 1367(c). See T.D. NO. 2, *supra* note 1, at xxiii-xxv. This is an unfortunate development.

48. Litigation over abstention issues can also be expensive, but abstention doctrines are much narrower than § 1367(c)'s discretionary factors, so abstention should be invoked much less frequently. See *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1256 (6th Cir. 1996) (noting that the facts do not support the "rigorous test" for abstention, but that they do support discretionary dismissal under § 1367(c)); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 92-93 (1992) (noting that abstention is narrower than discretionary dismissal).

