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JURISDICTIONAL REFORM IN AND OUT OF CONGRESS: AN ESSAY FOR JUDGE WEIS

James E. Pfander*

Known to his clerks and the lawyers who appeared before him for his many accomplishments as an appellate judge, Judge Joseph Weis became a national figure as the chair of the Federal Courts Study Committee (FCSC).[1] Formed by an act of Congress and staffed by a blue-ribbon collection of judges, legislators, lawyers, and academics, the FCSC set out to study and recommend improvements to the jurisdictional rules that govern the federal judiciary.[2] After months of deliberation and drafting, the FCSC published its final report.[3] Owing to the efforts of the FCSC's legislative members, especially Representative Bob Kastenmeier,[4] the report quickly

* Owen L. Coon Professor, Northwestern University Pritzker School of Law. My thanks to the organizers of the Weis symposium and to the editors of the *Pittsburgh Law Review* for inviting me to participate; to my interlocutors at the symposium for their gracious hospitality and helpful comments; to the Northwestern faculty research fund for welcome support; and to Rachel Rucker and Samy Abdelsalam for indispensable research assistance. I served as a consultant to the Federal-State Jurisdiction Committee of the Judicial Conference of the United States during its work on jurisdictional reform leading to the adoption of the Jurisdiction and Venue Clarification Act of 2011 as described in part IV of this Article. The views I express here are my own.

[1] William M. Janssen, *Judicial Profile: Hon. Joseph F. Weis, Jr. Senior Circuit Judge, U.S. Court of Appeals for the Third Circuit*, FED. BAR ASS'N (Nov. 2012), https://www.fedbar.org/wp-content/uploads/2019/10/WeisOctNov2012-pdf-3.pdf.

[2] On the creation of the FCSC, see n.65 *infra*. Judge Weis discussed the aim of the committee and its congressional birth at a seminar sponsored by the Brookings Institute in April 1989; to view a transcript of his speech, see Joseph F. Weis Jr., *The Federal Courts Study Committee Begins Its Work.*, 21 ST. MARY'S L.J. 15, 16 (1989) ("The committee is instructed to . . . recommend revisions to the laws of the United States, to develop a long-range plan for the judicial system, and to make such other recommendations and conclusions as the committee deems advisable."). Judge Weis expressed concerns over the need for increased efficiency in the face of an overloaded federal docket. *See id.* at 18.

[3] The Office of Justice Programs has published the report. *See generally* FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

[4] For an example of Rep. Kastenmeier's efforts, consider Federal Courts Study Committee Implementation Act of 1990, H.R. 5381, 101st Cong. (1990).

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came to the attention of Congress. The Judicial Improvements Act of 1990 thus bore the distinctive impression of FCSC recommendations.[5]

No recommendation has attracted more attention than the FCSC's proposal that Congress codify the doctrines of pendent and ancillary jurisdiction.[6] The doctrines allowed the district courts, when hearing a dispute otherwise properly before them, to exercise jurisdiction over some related state law claims that would not qualify for federal adjudication on their own.[7] On the federal question side of the docket, the Supreme Court had approved of pendent claim jurisdiction[8] but had taken a limited view of pendent party jurisdiction, refusing in cases such as *Aldinger v. Howard* and *Finley v. United States* to authorize expansion of the litigation unit to encompass related state-law claims against a new nondiverse party.[9] On the diversity side of the docket, the Court had been equally circumspect, authorizing defensive forms of ancillary jurisdiction over cross-claims and third-party claims, but declining to authorize any erosion of the complete diversity requirement as it applied to claims by plaintiffs.[10]

Congress responded to the FCSC's proposal by adopting 28 U.S.C. § 1367, which went beyond the Court's doctrine in allowing broad pendent claim and pendent party jurisdiction in federal question cases but followed the Court's lead in

[5] *See* Judicial Improvements Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089 (1990). For an example of criticism of the statute, consider generally Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 856 (1992). The article "identifies the statute's problem areas" and analyzes "early judicial responses" to these problems. *Id.*

[6] The FCSC's proposal on the issue can be found at FED. CTS. STUDY COMM., *supra* note 3, at 15, 47–48. As an example of scholarly attention, consider Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247, 247–50 (1990) (agreeing with the tentative proposals of the Federal Courts Study Committee including the codification of ancillary and pendent jurisdiction).

[7] *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978).

[8] *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (permitting a federal district court to retain jurisdiction over a pendent state claim if it accompanies a federal claim "from a common nucleus of operative fact").

[9] *See* Aldinger v. Howard, 427 U.S. 1, 18–19 (1976) (observing a "more serious obstacle to the exercise of pendent jurisdiction" exists where a "new party sought to be joined is not otherwise subject to federal jurisdiction"); *see* Finley v. United States, 490 U.S. 545, 556 (1989) (deciding to retain the line set in *Aldinger* that refused to extend the *Gibbs* approach to the pendent-party field).

[10] *See Owen*, 437 U.S. at 375–77 (reasoning "neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case").

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seeking to preserve the complete diversity requirement.[11] But giving effect to the complete diversity preserving intent of Congress and the FCSC was to prove quite controversial. In the usually staid precincts of procedural scholarship, critics[12] of the new statute pointed out ambiguities in a text that could be read to overrule the Court's decision in *Zahn v. International Paper*, which required all members of a diverse-party class action to satisfy the amount-in-controversy requirement.[13] Not only that, one literal reading of the text would overrule the complete diversity requirement itself (by extending supplemental jurisdiction to related claims and failing to ward off the joinder of nondiverse plaintiffs under Rules 20 and 23).[14] Academics who had worked with legislative drafters defended the statute, calling on the courts to give effect to the diversity-preserving intent of the law in preference to the diversity-threatening text of the law.[15] The resulting exchange grew so testy that one participant later quoted his mother for the proposition that a "lot of fur [was] flying."[16]

Unfortunately for the fate of Section 1367, effectuating Congress's intent to preserve diversity implicated an increasingly contentious debate about the proper role of legislative history in the interpretation of statutes.[17] Textualists, of course,

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[11] *See* 28 U.S.C. § 1367(b) which provides for supplemental jurisdiction unless exercising supplemental jurisdiction over the additional claims or parties "would be inconsistent with the jurisdictional requirements of section 1332."

[12] Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 446 (1991) (criticizing the statute's language as creating "as much confusion and uncertainty as is wrought by *Finley*").

[13] *See* 414 U.S. 291, 301 (1973); *see also* Freer, *supra* note 12, at 485 (observing the plain text of section 1367(a) appears "to permit supplemental jurisdiction over claims by class members that did not meet the amount-in-controversy requirement" which would overrule *Zahn*).

[14] *See* 28 U.S.C. § 1367(b); *see also* James E. Pfander & Peter C. Douglas, *The Nature of the Federal Equity Power: Law, Equity, and Supplemental Jurisdiction*, 97 NOTRE DAME L. REV. 2115, 2131–32 (2022) (discussing the "threat to complete diversity posed by intervening plaintiffs" and Judge Posner's analysis of the issue in *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1025 (7th Cir. 2006)).

[15] *See* Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 943–44 (1991) (concluding the statute, while "concededly not perfect[,]" attempts to correct the direction *Finley* set us on and provide basic guidance but ultimately "trust[s] the federal courts under the changed direction to interpret the statute sensibly").

[16] Thomas D. Rowe, Jr., *Section 1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 IND. L.J. 53, 53 (1998).

[17] For a summary of the debate on the role of legislative history and textualism in statutory interpretation of Section 1367, see Richard D. Freer, *The Cauldron Boils: Supplemental Jurisdiction, Amount in Controversy, and Diversity of Citizenship Class Actions*, 53 EMORY L.J. 55, 58 (2004) (summarizing

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took the position that the terms of the statute controlled; the federal courts thus lacked power to ignore the text and give effect to legislative intent.[18] It was that text-based approach to jurisdictional law that led the Court to reject pendent-party jurisdiction in *Finley*, in an opinion written by the Court's then most ardent textualist, Justice Antonin Scalia.[19] On a similar text-based approach to the operation of Section 1367, much of the law of complete diversity, as it had developed over decades, would be up for grabs.

The sequence of events that prompted the debate over the meaning of Section 1367 and the debate's eventual resolution in *Exxon Mobil v. Allappatah Services* provides an entry point for this Essay in honor of Judge Weis.[20] By returning to *Finley*, the adoption of Section 1367, and the *Exxon Mobil* dispensation, we can learn much about the judicial role in jurisdictional law reform. This Essay offers an evaluation in three parts. Part I summarizes the various ways in which jurisdictional law gets reformed. Congressional enactment of new jurisdictional law represents the most obvious tool of reform, but Part I also explores reform by judicial action, through creative judicial reinterpretation of existing law.

Part II examines these two modes of reform in operation, focusing on the law of supplemental jurisdiction. It was creative reinterpretation that gave rise to pendent and ancillary jurisdiction in the first instance, as jurisdictional law flexed to take account of modern conceptions of the proper size of a litigation unit and the rules of joinder.[21] A reluctance to sanction that process of judicial interpretation led the textualist Court in *Finley* to call a halt to any further expansions.[22] The FCSC and

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academic development on the subject and noting that "[a]fter thirteen years and a five-to-three split in the circuits, the cauldron [of the supplemental jurisdiction debate] is at full boil."). Professor Freer describes how the eight circuit courts to consider the issue have either taken a textualist view, relied on legislative history, or concluded Section 1367 doesn't apply in cases like Zahn. *Id.* at 59.

[18] *See, e.g.*, *In re* Abbott Lab'ys, 51 F.3d 524, 528–29 (5th Cir. 1995) (reasoning "the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result" despite acknowledging congressional intent to the contrary of the plain text reading).

[19] Finley v. United States, 490 U.S. 545, 556 (1989) (adhering strictly to the text of the "present statute" because Congress can change the text if the Court's interpretation of its language is incorrect).

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

[21] *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (noting "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right" with justification "in considerations of judicial economy, convenience and fairness to litigants").

[22] *See Finley*, 490 U.S. at 556 (reasoning *Gibbs* marked a "departure from prior practice [which] . . . would not be extended to the pendent-party field").

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Judge Weis responded by encouraging Congress to supply the textual predicate that the Court identified as missing in *Finley*.[23] And it was the Court, in *Exxon Mobil*, that took up the task of interpreting the ambiguities in that statute.[24] Part II asks if the Court's approach can be better understood as the sort of faithful textualism it promised or the creative judicial reinterpretation that it supposedly decried. Part II ends by juxtaposing *Exxon Mobil* with two recent appellate court decisions, both of which begin with *Exxon Mobil* but head in radically different directions.

Part III concludes with a reflection on jurisdictional law reform. Judges have always played a central, if not a leading, role in jurisdictional reform, from Justice Story's drafting of the equity rules to Chief Justice Taft's work on the Judges' Bill.[25] One might ask today whether judges do their law reform work more effectively in the guise of legislative drafters or in the guise of law interpreters. Textualism rests on a precept of legislative primacy, but much of what one sees in the federal courts today, from snap removal to the erosion of complete diversity in the Second Circuit, represents a result that one cannot sensibly attribute to a congressional choice. One can see those decisions both as the product of the difficulty of securing "ordinary" law reform by statute and as an important source of the creative ideas that fuel jurisdictional evolution. Judge Weis deserves credit for his role in patiently bringing the statute into an increasingly textualist world. But paradoxically, that very textualism may well have prevented the development of the doctrine later codified in Section 1367.

I. SUPPLEMENTAL JURISDICTION BEFORE SECTION 1367

For much of the nation's history, the federal jurisdictional system had no substantial body of supplemental jurisdiction, known as such.[26] But a good many

[23] For a discussion of the FCSC and Weis's involvement, see Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 SETON HALL LEGIS. J. 157, 163 (1994).

[24] For a discussion of statutory interpretation challenges the Court faced from Section 1367, *see generally* Joel Schellhammer, *Defining the Court's Role as Faithful Agent in Statutory Interpretation:* Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S. Ct. 2611 (2005), 29 HARV. J.L. & PUB. POL'Y 1119 (2006).

[25] For a discussion of Chief Justice Taft's work on the Judges' Bill, *see generally* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1698 (2000) (describing Taft's arguments for change in the Judges' Bill including a '"greater need' for discretion as to cases" to take on appeal).

[26] Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 78 MARQ. L. REV. 973, 973–74 (1995) (discussing Section 1367's merger of the historic pendent, ancillary, and pendent-party jurisdiction doctrines under the name "supplemental jurisdiction").

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parties appeared before federal courts in connection with claims that did not, themselves, satisfy the requirements of federal question or diversity jurisdiction.[27] These expansions of the litigation unit were apt to occur on the equity side of the federal docket, where forms of ancillary jurisdiction took hold.[28] Once a court asserted control of property in an *in rem* proceeding that satisfied the elements of diversity, the court had the power to dispose of all claims to the property in question, including claims that did not themselves satisfy the requirements of diversity.[29]

On the law side, in suits for damages, jurisdictional expansion was much trickier. In matters of diversity jurisdiction, the courts hewed to a strict requirement of complete diversity and insisted that claims against every party independently satisfy the statutory amount-in-controversy threshold; aggregation across parties was impermissible.[30] In matters of federal question jurisdiction, where plaintiffs sought to pursue both a federal anchor claim and a related state-law claim against the same party, factual connections were not enough.[31] According to the Supreme Court's decision in *Hurn v. Oursler*,[32] what we now call pendent claim jurisdiction was quite limited. "[W]here two separate and distinct causes of action are alleged," one based on federal and one on state law, pendent claim jurisdiction was unavailable even though both claims arose from the same set of underlying facts.[33] By tying the scope of the litigation to the nature of the legal claim rather than to the underlying facts,

[27] *Id.* at 976–89 (discussing examples of pendent, ancillary, and pendent-party jurisdiction allowing federal courts jurisdiction over claims that do not themselves qualify under federal question or diversity jurisdiction); *see, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (reasoning pendent jurisdiction allowed the exercise of judicial power over a state claim with the proper relationship to a federal claim over which the court had jurisdiction).

[28] For an account of the jurisdiction-expanding features of ancillary jurisdiction in the nineteenth century that nominally continued to adhere to a complete diversity requirement, see Pfander & Douglas, *supra* note 14, at 2123.

[29] *See Ex parte* Tyler, 149 U.S. 164, 182 (1893) (explaining the power of a federal court, conducting an equity receivership, to expand its ancillary subject matter jurisdiction beyond that specified by statute). On the origins of this conception of property control as expanding the jurisdiction of the court to claims in the property, see James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723 (2020); *see* James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal—State Jurisdictional Overlap*, 92 TEX. L. REV. 1 (2013).

[30] Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973) (ruling "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case").

[31] Compare this with *Gibbs*, 383 U.S. at 725, decades later.

[32] 289 U.S. 238, 246 (1933).

[33] *Id.*

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the Court invited much arid theorizing about the scope and limits of the "cause of action."[34]

Academics tried to help, no one more insightfully than Herbert Wechsler. Writing in 1948, in response to the then-proposed and later enacted re-codification of the judicial code in Title 28, Wechsler mapped possible lines for the development of supplemental jurisdiction.[35] Wechsler argued against use of *Hurn*'s "cause of action" test as too restrictive.[36] Instead, he would define the scope of federal adjudication by reference to joinder provisions in the federal rules of civil procedure.[37] He proposed to accomplish the change with a focus on matters of "operative fact," shared between the state and federal claims, that would make it sensible and convenient to litigate all questions in a single proceeding.[38] He recognized the wisdom of allowing federal courts discretion to refrain from hearing unsettled state law questions and urged consideration of a tolling provision that would address any limitations problems that arose after discretionary dismissal of a state claim.[39]

Twenty years later, the Court followed Wechsler's lead in *United Mine Workers v. Gibbs*, a decision that rejected *Hurn*'s cause-of-action formulation as "unnecessarily grudging."[40] Instead of the cause of action, the *Gibbs* Court emphasized the underlying factual connection between an anchoring federal claim and a related state claim, and the expectation that both such claims could sensibly be

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[34] *Id.* The cause of action formulation owed something to conceptions of the scope of claim preclusion. As the Court explained, "where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground; in the latter it may not do so upon the nonfederal cause of action." *Id.* For discussion of the difficulty and confusion arising from the *Hurn* reasoning, consider John Henry Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 434–35 (1953) (observing the "scope of the pendent jurisdiction" had not clearly been defined by the Supreme Court but that it was clear "at least that some connection between the claims must exist"); *see* Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018, 1022–23, 1030 (1962) (observing academic and judicial analysis of the *Hurn* standards has been a difficult source of confusion).

[35] *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & CONTEMP. PROBS. 216, 232–33 (1948).

[36] *Id.* at 231–32.

[37] *Id.* at 233.

[38] *Id.* at 232.

[39] *Id.* at 233.

[40] 383 U.S. 715, 725 (1966).

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litigated in a single proceeding.[41] Invoking the language of Article III, the Court called for an evaluation of the relationship between the federal and state claims, to determine if "the entire action before the court comprises but one constitutional 'case.'"[42] The legal theory did not matter, so long as the anchoring federal claim and the state law claim arose "from a common nucleus of operative fact" and the plaintiff might "ordinarily be expected to try them all in one judicial proceeding."[43] The Court's justification for expansion to facilitate joinder and litigant convenience, its "operative fact" formulation, and its recognition that district courts were to have discretion to decline pendent claim jurisdiction over claims that implicated complex or unsettled state law, came straight from Wechsler.[44]

Much of what happened in the next twenty-five years was a working out of the implications of *Gibbs*. On the federal question side, pendent claim jurisdiction gave rise to proposals to join "pendent parties"—nondiverse parties joined as defendants on state law claims connected to a federal question proceeding.[45] The Court expressed some openness to such expansion, but not in circumstances where it might appear to threaten congressional policy.[46] On the diversity side, the Court hewed to its complete diversity formulations. Pendent claim jurisdiction had already been embedded to some extent in jurisdictional aggregation rules, and pendent party

[41] *Id.* at 727.

[42] *Id.* at 725.

[43] *Id.* After *Gibbs*, a plaintiff had to show (1) a common nucleus of operative fact between the federal and state claims, (2) the federal claim must have substance sufficient to provide the federal court jurisdiction, and (3) a plaintiff should "ordinarily be expected to try" all the federal and state claims in one proceeding. *Id.*

[44] *Id.* (adopting the operative fact formulation from Wechsler's account without attribution); *see* Weschler, *supra* note 35, at 232 (arguing for some relaxation of *Hurn*'s cause-of-action doctrine and its requirements of a "substantial identity" of "operative facts").

[45] Aldinger v. Howard, 427 U.S. 1, 6, 10–13 (1976) (defining pendent party jurisdiction as "the joining of additional *parties* with respect to whom there is no independent basis of federal jurisdiction" before discussing the ancillary jurisdiction doctrine and its relation to *Gibbs*) (emphasis added).

[46] The *Aldinger* Court avoided a "sweeping pronouncement" on pendent-party jurisdiction but noted both that jurisdiction over pendent parties faced more serious obstacles than pendent claims and that a court should consider whether jurisdiction is proper under both Article III and congressional statutes. *See id.* at 18–19 (limiting its decision to "so-called 'pendent party' jurisdiction with respect to a claim brought under [§§] 1343(3) and 1983" and concluding that Congress had seemingly foreclosed such expansion in the specific context of section 1983 litigation).

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jurisdiction was flatly inconsistent with the complete diversity rule.[47] Still, the Court in *Owen Equipment v. Kroger* found a middle ground, approving defensive forms of ancillary jurisdiction, such as cross-claims and third-party claims (even where they contemplated the joinder of additional parties), but declining to allow plaintiffs to circumvent the complete diversity rule.[48] Critics of *Owen* argued that the Court should extend its regime of joinder and litigant convenience by relaxing aggregation and other rules associated with the complete diversity requirement.[49]

These differing views reflected a disagreement about whether the party convenience and efficiency norms that guided the development of pendent jurisdiction over federal question claims should also govern in matters brought to federal court on the basis of diversity. In rejecting efficiency and cleaving to complete diversity, the Court drove a wedge between rules of jurisdictional expansion. As scholars observed, federal question jurisdiction evolved in a claim-specific way, meaning that a single federal claim would ground subject matter jurisdiction and set the stage for jurisdictional expansion.[50] In diversity, by contrast, jurisdictional analysis was action-specific.[51] Diversity analysis required an assessment of all the separate claims and parties in the action to ensure that the complete diversity and amount requirements were satisfied.

The Court might have managed that distinction through creative interpretation of the jurisdictional statutes.[52] But the *Finley* Court rejected that option.[53] Facing a

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[47] For discussion of the historical roots of aggregation rules and pendent party jurisdiction in U.S. jurisdictional law, consider *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 302 (1973), and *Snyder v. Harris*, 394 U.S. 332, 340–42 (1969). *See also supra* notes 13–14 and accompanying text.

[48] *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375–77 (1978).

[49] *See* Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 IND. L.J. 5, 17 (1998) (arguing for the broadening of supplemental jurisdiction in diversity proceedings).

[50] *See, e.g.*, James E. Pfander, *The Simmering Debate over Supplemental Jurisdiction*, 2002 U. ILL. L. REV. 1209, 1221 (discussing the evolution of the supplemental jurisdiction doctrine and section 1367, particularly in relation to diversity cases).

[51] *Id.* at 1222 nn.68–69 (observing the "action-specific" focus in diversity based in part on the ALI draft); AM. L. INST., FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2, 31–39 (1998).

[52] Focusing on the federal questions at the heart of Section 1331 and the party-alignment that grounds Section 1332, one can easily see a basis for the more generous treatment of party joinder where federal questions ground the district court's jurisdiction. For a similar discussion on the workings of these statutory provisions, consider Pfander, *supra* note 50, at 1218 n.55.

[53] Finley v. United States, 490 U.S. 545, 556 (1989) (noting previous cases were flexible in allowing jurisdiction where it was not "explicitly conferred" but declining to further extend the creativity).

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claim that indisputably implicated the district court's federal question subject matter jurisdiction, the Court refused to allow the joinder of related state law claims against nondiverse additional defendants.[54] That meant that the plaintiffs, seeking complete relief, were forced to litigate in both federal court (which had exclusive jurisdiction over claims against the United States) and in state court (which had jurisdiction over the nongovernmental defendants).[55] The Court justified that untoward result with an argument for adherence to the limits of the text, which said nothing expressly that would extend jurisdiction to claims based on state law.[56] While the Court did not say so, its rationale threatened pendent claim jurisdiction and all forms of ancillary jurisdiction that added new, nondiverse parties in diversity.[57]

II. SUPPLEMENTAL JURISDICTION AND SECTION 1367

Finley changed the law dramatically, both by narrowing pendent party jurisdiction and by ending the *Gibbs* era of judicial participation in the creative interpretation of jurisdictional statutes.[58] Once the Court disclaims any role in redefining the scope of jurisdiction, the task falls to Congress.[59] Unlike the Federal Rules of Civil Procedure, Congress has never entrusted the rules that govern federal jurisdiction to a committee of judges and experts.[60] Instead, exercising its authority

[54] *Id.*

[55] *Id.* at 555–56 (reasoning "efficiency and convenience of a consolidated action will sometimes have to be forgone in favor of separate actions" for purposes of pendent-party jurisdiction).

[56] *See id.* at 552–54 (finding the "text of the jurisdictional statute at issue" did not support pendent-party jurisdiction).

[57] For discussion on the oddities of the *Finley* reasoning, consider Wendy Collins Perdue, Finley v. United States*: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 540 (1990) (noting "in essence what the Court did [in *Finley*] was to announce that it has been unconstitutionally usurping power for years but that it was not going to do anything about this").

[58] *See Finley*, 490 U.S. at 556 (deciding to retain the line drawn in "*Aldinger* [which] indicated that the *Gibbs* approach would not be extended to the pendent-party field").

[59] *See id.* In *Finley*, the court notes its decision on the scope of jurisdiction can be changed by Congress and justifies its strict textual adherence as providing "a background of clear interpretive rules" to allow Congress to "know the effect of the language it adopts." *Id.*

[60] The exception which proves the rule is the congressional authorization of allowing the rule making process under the Rules Enabling Act to refine and supplement appellate jurisdiction. The FCSC recommended Congress amend sections 2071 and 1291 of title 28 to allow the rule making process to modify substantive rights to interlocutory appeal by refining grants. Congress approved of this recommendation and enacted the Federal Courts Administration Act of 1992. *See* 28 U.S.C. § 1292(e). For a discussion of the impact of this authorization, consider Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 U. KAN. L. REV. 1027, 1031–37 (2010)

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over tribunals inferior to the Supreme Court, Congress has chosen to retain law-making primacy. For the FCSC, that ongoing legislative control had a clear message: unlike changes proposed by the civil rulemakers (which take effect as law if neither the Supreme Court nor Congress intervenes within a stated period),[61] changes in the judicial code require affirmative legislative enactment.

Congressional engagement poses a challenge for jurisdictional reform. The nuances of federal jurisdictional law rarely attract the attention of interest group lobbyists.[62] Sure, exceptions exist, like the jurisdictional rules governing class actions that Republicans pushed forward at the behest of the Chamber of Commerce,[63] and the jurisdictional fix to the snap removal problem that some Democratic legislators explored at the instance of the trial lawyers.[64] Without the goad of interest group pressure, legislators might understandably devote their scarce time and attention to matters other than engagement with wonky aspects of Title 28 in which they have little interest or expertise.

Congress put together the Federal Courts Study Committee with just these sorts of concerns in mind and the Committee was still conducting its business when the *Finley* decision came down in 1989.[65] Proposals to establish a statutory predicate for supplemental jurisdiction naturally followed *Finley*, and the Committee provided a

(describing the FCSC's recommendations, the amendment of section 1292, and the Advisory Committee on Civil Rules subsequent "seven-year odyssey of Rule 23 rulemaking"), and Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 722–26 (1993) (describing the FCSC's recommendations and subsequent congressional approval).

[61] Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–04 (2002) (providing an overview of the Rules Enabling Act and the current system for a proposal to become a rule).

[62] *See, e.g.*, Freer, *supra* note 17, at 59–60 (characterizing the eventual intervention of Congress into jurisdictional law in section 1367 as rushed and flawed).

[63] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); Joanne Doroshow, *Federal Legislative Attacks on Class Actions*, 31 LOY. CONSUMER L. REV. 22, 34, 42–44 (2018) (noting how "lobbying pressure from the U.S. Chamber of Commerce" drove Republican efforts to reduce access to class actions).

[64] *See Examining the Use of "Snap" Removals to Circumvent the Forum Defendant Rule: Hearing Before the Subcomm. on Cts, Intell. Prop., and the Internet of the H. Judiciary Comm.*, 116 Cong. (2019).

[65] The Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4644–45 (1988) created the Federal Courts Study Committee. For a discussion of the purposes and aim of the Federal Courts Study Committee and the impact of *Finley* on its work, consider Joel E. Tasca, Comment, *Judicial Interpretation of the Effect of the Supplemental Jurisdiction Statute on the Complete Amount in Controversy Rule: A Case for Plain Meaning Statutory Construction*, 46 EMORY L.J. 435 (1997).

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natural forum for deliberations about how Congress might wish to respond. The Committee's final report, issued in 1990, recommended that Congress codify supplemental jurisdiction.[66] Adoption of Section 1367 followed in due course as part of legislation designed to implement many of the Committee's recommendations.[67] The fact that members of Congress served on the FCSC surely streamlined the legislative process.

Since the story has been told before,[68] we can briefly summarize the high points of the controversy that emerged after Congress enacted the statute. Some followed the textualism of *Finley* into an account of Section 1367 as posing a threat to the complete diversity rule.[69] Others, including the law professors who had joined in drafting the statute, urged creative interpretation to ensure the preservation of complete diversity, a concept that the statute had obviously viewed as controlling.[70] Still others argued for a sympathetic interpretation of the statute—one that would preserve both the expansive account of supplemental jurisdiction in federal question cases and protect complete diversity from erosion.[71] The lower federal courts chose sides in the debate that emerged, setting the stage for eventual Supreme Court resolution.[72]

Judge Weis, having completed his work on the Committee, offered among the most incisive contributions to the interpretive debate. In *Meritcare Inc. v. St. Paul Mercury Insurance*, the plaintiffs satisfied the complete diversity requirement in a suit against the insurance carrier seeking compensation for the collapse of a roof; but, one of the plaintiffs, Quinlan, sought damages of no more than $5,000.[73] Judge Weis ruled that aggregation across plaintiffs was unavailable as a matter of settled

[66] *See* FED. CTS. STUDY COMM., *supra* note 3, at 47–48.

[67] *See id.*; 28 U.S.C. § 1367.

[68] For a discussion of this debate, see Pfander, *supra* note 50.

[69] *See* Freer, *supra* note 12, at 474–75.

[70] *See* Rowe et al., *supra* note 15, at 943–44.

[71] James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 114 (1999).

[72] *See, e.g.*, Rosmer v. Pfizer Inc., 263 F.3d 110, 122 (4th Cir. 2001) (holding supplemental jurisdiction conferred over class members not individually meeting amount-in-controversy requirement); Russ v. State Farm Mut. Auto. Ins., 961 F. Supp. 808, 822 (E.D. Pa. 1997) (requiring each plaintiff to meet amount-in-controversy requirement for supplemental jurisdiction).

[73] 166 F.3d 214, 216 (3d Cir. 1999).

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law and then considered Quinlan's argument that Section 1367 supplied supplemental jurisdiction.[74] Weis recounted the story of the FCSC's work, its proposal on supplemental jurisdiction, its general antipathy to expansion of diversity jurisdiction, and its refusal to endorse a suggestion in the working papers that Congress overrule *Zahn*.[75] With so much history favoring preservation of complete diversity, Weis concluded that Section 1367 was "not intended" to expand diversity jurisdiction or set aside existing no-aggregation rules.[76]

In reaching that conclusion, Judge Weis found "much to be said" for the Tenth Circuit's decision in *Leonhardt v. Western Sugar*, which similarly declined to view Section 1367 as overruling the complete diversity/no-aggregation rules.[77] *Leonhardt* relied on an early draft of a law review article setting out a diversity-preserving account of the statute.[78] While Judge Weis did not squarely rule that the *Leonhardt* interpretation provided the best account of the meaning of the text, the interpretation created sufficient ambiguity to warrant resort to legislative history that pointed squarely in the direction of preserving the no-aggregation rule.[79] After two more circuits, the First[80] and Eleventh,[81] weighed in on the interpretive question, the Supreme Court granted review in both and consolidated them on appeal.[82]

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[74] *Id.* at 218–19.

[75] *Id.*

[76] *Id.* at 219–22 (emphasizing the "full Federal Courts Study Committee recommended that Congress substantially reduce diversity jurisdiction because of its expense to the federal system" when there are state alternatives).

[77] *Id.* at 222; Leonhardt v. W. Sugar Co., 160 F.3d 631, 641 (10th Cir. 1998) (explaining that "the enactment of § 1367 did not overrule *Zahn*'s holding that each plaintiff in a diversity-based class action must meet the jurisdictional amount in controversy").

[78] *Leonhardt*, 160 F.3d at 639 n.6, 640–41 (relying generally on an early draft of Pfander, *supra* note 71, in a discussion of the division of courts and academics on the interpretation of § 1367 before holding legislative history indicates Congress did not intend to overrule longstanding diversity jurisdiction requirements).

[79] *Meritcare Inc.*, 166 F.3d at 221–22.

[80] Ortega v. Star-Kist Foods, Inc., 370 F.3d 124 (1st Cir. 2004), *rev'd and remanded sub nom.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

[81] Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248 (11th Cir. 2003), *aff'd sub nom.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

[82] *Exxon Mobil Corp.*, 545 U.S. at 549–50.

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In *Exxon Mobil v. Allappatah Services*, the Court rejected the views of Judge Weis and others who urged the preservation of existing no-aggregation rules.[83] In one of the two consolidated cases, the aggregation issue arose from the joinder of parties in the Rule 23 class action context, where one or more of the plaintiff class members satisfied the amount-in-controversy but other members of the class did not.[84] In the second case, the aggregation issue arose from the joinder of parties in the Rule 20 context; one of the plaintiffs had suffered a serious injury but the related claims of family members did not meet the threshold.[85] As the Court's majority viewed matters, Congress had authorized supplemental jurisdiction over related claims and parties in Section 1367(a) and had failed to foreclose such jurisdiction in Section 1367(b).[86] While subsection (b) foreclosed suits by plaintiffs against parties joined under Rule 20, it said nothing about claims by plaintiffs themselves, joined under Rule 20 or Rule 23.[87] Hence, the no-aggregation rules were overruled.

In reaching this conclusion, the Court claimed to rely on the textualism of *Finley*.[88] The majority thus recounted the story of Section 1367's adoption, its criticism, and the suggestion by its drafters that the federal courts should fix the problem through interpretation.[89] This was textualist apostasy and the majority opinion, written by Justice Kennedy, dismissed it as such.[90] But Justice Kennedy had a less effective rejoinder to the dissenting opinion of Justice Ginsburg, who skillfully deployed the *Leonhardt* interpretation in urging that the statute be read to preserve much of the status quo in diversity.[91] Ginsburg offered a textualist defense of the

[83] *See id.* at 560–61 (characterizing this preservation as an "indivisibility theory" that was "easily dismissed" as "inconsistent with the whole notion of supplemental jurisdiction").

[84] *Id.* at 550.

[85] *Id.* at 551.

[86] *Id.* at 558, 560.

[87] *Id.* at 560.

[88] *Id.* at 556–59.

[89] *Id.* at 557–58.

[90] *Id.* at 560–61.

[91] *Id.* at 589–90 (Ginsburg, J., dissenting).

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preservation of complete diversity, the one that Judge Weis had found persuasive.[92] But the majority found it less persuasive than the alternative.

Yet in doing so, the Court introduced a substantial jurisdictional spanner into the works. The majority's reading, unlike that of the dissent, would apparently overturn both the no-aggregation rules and the complete diversity rules. In other words, it would seemingly allow the joinder of additional plaintiffs under both Rules 20 and 23 whose joinder would otherwise destroy complete diversity. That issue was not squarely presented in *Exxon Mobil*, but it was among the concerns that led Judge Weis and other judges to shy away from the textualist account of the statute the Court embraced in *Exxon Mobil*.[93]

To ward off the disruptive effect of an erosion of complete diversity, the *Exxon Mobil* Court pulled a rabbit out of its hat.[94] It explained that the rules governing original jurisdiction in diversity had long been viewed as requiring complete diversity of citizenship, so much so that the joinder of any nondiverse plaintiff contaminated the litigation and foreclosed the exercise of jurisdiction.[95] But oddly, the Court found that its no-contamination rule did not extend to the requirement that each plaintiff under Section 1332 satisfy the amount in controversy.[96] In short, the Court introduced a judicial construct, contamination, and used it as a device to ignore the text of the statute;[97] after all, Section 1332 treats both diverse citizenship and the amount in dispute as jurisdictional and therefore as contaminating; it furnishes no basis for distinguishing between the two requirements.[98] Justice Ginsburg would

[92] *See id.* (relying on the First and Tenth Circuits' logic to "sensibly read" the plain language of the statute to prevent the erosion of the complete diversity and amount-in-controversy requirements).

[93] For the discussion in *Exxon*, see Justice Ginsburg's dissent in *Exxon Mobil Corp.*, 545 U.S. at 589, 592. For an example of judicial opinions straying away from *Exxon*'s textualism, see Judge Pollak in *Russ v. State Farm Mutual Automobile Insurance Co.*, 961 F. Supp. 808, 819–20 (1997) (justifying reliance on legislative history because otherwise the court was telling Congress it knew what Congress "meant to say, but [they] didn't quite say it" so "Gotcha! And better luck next time."). Judge Anderson similarly relied on legislative history in *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 639–41 n.8 (1998), to find "Congress did not intend" to overrule the historical rules and erode the requirements of diversity jurisdiction.

[94] *See* Pfander & Douglas, *supra* note 14, at 2119–20 (describing the textualism in the Exxon Mobil opinion as "something of a distraction" to implement "judge-made preference").

[95] *Exxon Mobil Corp.*, 545 U.S. at 562.

[96] *Id.*

[97] *See id.*

[98] *See* 28 U.S.C. § 1332 (requiring the amount in controversy to "exceed the sum or value of $75,000" and the action be between "citizens of different States").

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have given effect to both elements of the jurisdictional statute,[99] thereby following Judge Weis in foreclosing jurisdiction over the related claims of additional parties whose claims fall below the statutory threshold.

One has difficulty accepting the majority's rationale with a straight face and greater difficulty still in understanding the *Exxon Mobil* decision as an application of the best textual account of the statute. One possibility presents itself: that the Court was fashioning jurisdictional policy and concluded that the aggregation of related claims makes sense in the diversity context, so long as one claim meets the threshold. After all, if a federal district court must assign fault to the manufacturer of a defective tuna can in a diversity action brought by a child with serious injuries, it might as well hear the related, if perhaps more modest, claims of the family members. Efficiency and convenience seemingly support that result, however well it matches the language of the statute or the avowed intent of Congress.

In addition to jurisdictional policy, the Court may have found the intervening adoption of the Class Action Fairness Act of 2005 (CAFA) a useful indication of a changing congressional attitude.[100] Unlike the Congress that adopted Section 1367 in 1990, the Congress of 2005 deliberately expanded the diversity jurisdiction of federal district courts by abandoning complete diversity in favor of minimal diversity and authorizing the aggregation of claims.[101] No single plaintiff was required, under the statute, to assert a claim in excess of $75,000, so long as all the claims together met a much larger $5 million threshold.[102] With CAFA on the books, the Court's extension of jurisdiction over aggregated class actions in *Exxon Mobil* posed little threat to any settled congressional policy. The Court disclaimed any reliance on CAFA, but observers suspect it may have protested too much.[103]

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[99] *Exxon Mobil Corp.*, 545 U.S. at 589–90 (Ginsburg, J., dissenting).

[100] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

[101] For a discussion of congressional intent to broaden federal jurisdiction over class actions in CAFA, consider Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 FORDHAM L. REV. 1875, 1884–87 (2010).

[102] *Id.*

[103] *See, e.g.*, Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction:* Exxon Mobil v. Allapattah *and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 319–22 (2006) (criticizing the Court's supposedly textualist approach as being guided by what Congress indicated it would support).

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III. SUPPLEMENTAL JURISDICTION AFTER *EXXON MOBIL*

Supplemental jurisdiction continues to evolve, reflecting both the textualist and jurisdictional policy-making strands of *Exxon Mobil*. Hard-edged textualism best explains the Fifth Circuit's rejection of a recognized form of ancillary jurisdiction in *Griffin v. Lee*.[104] Jurisdictional policy, and in particular, a more welcoming attitude toward minimal diversity, informed the Second Circuit's approach in *F5 Capital v. Pappas*.[105] Quick summaries reveal the legacy of the *Exxon Mobil* approach.

Consider *Griffin v. Lee*.[106] There, a citizen of Mississippi (Griffin) commenced an action in Louisiana state court to reform a trust and recover for fraud.[107] Following removal to federal court based on diversity, Griffin prevailed, and the district court ordered the payment of proceeds from a reformed trust as compensation.[108] The lawyer who represented Griffin (Lee) would withdraw from the representation but nonetheless filed an application to recover his fee from the proceeds of any money Griffin recovered from the defendants.[109] After a bench trial, the district court awarded Lee $16,000.[110] But the Fifth Circuit overturned that award, finding (on its own motion) that the district court lacked supplemental jurisdiction over Lee's claim.[111] Lee lacked citizenship diversity with the opposing individual trust fund defendants (all of whom were from Louisiana) and his claim did not meet the diversity statute's $75,000 threshold.[112]

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[104] 621 F.3d 380, 389–90 (5th Cir. 2010). For a criticism of the supposed textualism in *Griffin*, see Pfander & Douglas, *supra* note 14, at 2121–22 (expressing frustration at the Fifth Circuit's "lecture on limited judicial power" that "overlooked both historic and statutory guideposts").

[105] *See* 856 F.3d 61, 80 (2d Cir. 2017) (reasoning "CAFA is an independent anchor of jurisdiction . . . that requires only minimal diversity in certain state-law cases that satisfy the requirements of a class action").

[106] 621 F.3d at 380.

[107] *Id.* at 382.

[108] *Id.*at 382–83.

[109] *Id.* at 382.

[110] *Id.*

[111] *Id.* at 390.

[112] *Id.* at 384. Jurisdictional law offers a range of doctrines that seek to avoid the necessity for litigation in both state and federal court and to ward off the wasteful effects of repetitive litigation when jurisdictional requirements fail. As Part II explains, the rise of ancillary jurisdiction and its codification in Section 1367 were informed by notions of litigation efficiency to stave off duplicative proceedings. In addition, the Supreme Court has sought to narrow the scope of jurisdictionality, and the dysfunctional results such characterizations produce, by treating statutory elements as mandatory rather than jurisdictional. For an overview and critique of the Court's attempt to cabin the disruptive effects of jurisdictional failure, see

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As another work explains, the Fifth Circuit displayed no interest in or curiosity about the history of ancillary jurisdiction.[113] Had it done so, it would have learned that federal courts in diversity had long exercised precisely the form of ancillary jurisdiction that Lee invoked, on the theory that the district court was exercising authority over the distribution of property and empowered to protect the rights of lawyers as officers of the court.[114] Equally puzzling, the Fifth Circuit aligned Lee in opposition to the original defendants instead of viewing the dispute as one with his (diverse) former client.[115] Such an alignment would have brought the matter well within the *Exxon Mobil* framework in allowing below-threshold claims so long as citizen diversity has been satisfied. Without taking account of these considerations, the Fifth Circuit viewed the lawyer as invoking concerns of fairness and efficiency, concerns that the court dismissed in deference to what it viewed as Congress's unambiguous limits on district court jurisdiction.[116] Precisely where those limits appeared in the text the court did not bother to say.[117]

If text, however clear, was thought to override concerns of good jurisdictional policy in *Griffin*, policy took center stage in F5 Capital's derivative action against

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Scott Dodson, *A Critique of Jurisdictionality*, 39 REV. LITIG. 353 (2020). In an earlier era, the Fifth Circuit itself understood these considerations. *See* Mas v. Perry, 489 F.2d 1396, 1401 (5th Cir. 1974) (concluding that the husband's claim met the diversity requirement and adding that the complete interdependence of their claims made it sensible for the district court to adjudicate the wife's claim as well as a matter of "sound judicial administration").

[113] Pfander & Douglas, *supra* note 14, at 2121–22.

[114] One commentator summarized this historically accepted practice as follows:

> [W]here, subsequent to the filing of the original bill, inchoate or contingent interests involved in the suit have . . . become vested; or, where such interests have, by the occurrence of new facts, devolved upon other persons, such enlarged interests or new parties should be brought before the court by a supplemental bill.

W.M. LILE, LECTURES ON EQUITY PLEADING AND PRACTICE WITH FORMS AND THE NEW FEDERAL EQUITY RULES 55 (1916). Notice *Gibbs*, *Finley*, *Owen*, and *Exxon Mobil* all involve plaintiffs seeking judgments for money against a specified defendant. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 720 (1966); Finley v. United States, 490 U.S. 545, 546 (1989); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 367 (1978); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 550 (2005).

[115] *Griffin*, 621 F.3d at 384.

[116] *See id.* at 389.

[117] *See id.*

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the officers and directors of another firm.[118] F5 Capital brought two sorts of claims: a class action on behalf of fellow shareholders and a variety of additional state law claims against a host of nondiverse defendants.[119] Defendants removed, arguing that CAFA conferred subject matter jurisdiction over the class allegations and that the remaining claims met the transactional test of Section 1367(a).[120] True enough, but on the face of the complaint, those additional nondiverse claims would apparently run afoul of Section 1367(b)'s provision, foreclosing jurisdiction over claims by plaintiffs against parties joined under Rule 20.[121] *Exxon Mobil* viewed the contamination theory as foreclosing any erosion of the complete diversity requirement in that context.[122]

Yet the Second Circuit concluded that CAFA changed everything.[123] Even though it was codified in Section 1332(d) and falls squarely within the reference to the preservation of complete diversity jurisdictional limits in Section 1367(b), the court found that CAFA expressed a policy of assuring federal court adjudication of class actions that meet the $5 million threshold without regard to complete diversity.[124] The court accordingly viewed the CAFA claim as anchoring district court jurisdiction over substantial class action disputes and read Section 1367 as both authorizing joinder of nondiverse defendants on related claims in subsection (a) and as failing to foreclose jurisdiction over those defendants in subsection (b).[125] The rejection of complete diversity in CAFA was thus thought to countermand concerns

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[118] *See* F5 Capital v. Pappas, 856 F.3d 61, 78–82 (2d Cir. 2017). The court in *F5 Capital* begins by providing legislative history for Section 1367(b) as a move by Congress to overrule *Finley*. *Id.* at 78. Then, the court discusses the contamination theory from *Exxon*, reasoning determining the amount-in-controversy by claim and complete diversity as to the entire action "makes sense in light of the different purposes of each requirement." *Id.* at 80. The court then applies the precedent to CAFA seeking to give effect to the "purpose" of both CAFA and Section 1367(b) in its statutory interpretation. *Id.* at 81–82.

[119] *Id.* at 71.

[120] *Id.*

[121] *Id.* at 78.

[122] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 562–63. F5 Capital discusses this theory as applying "only to the complete diversity requirement . . . in the typical case, where complete diversity is essential to getting the matter in federal court in the first instance." 856 F.3d at 80.

[123] *See F5 Capital*, 856 F.3d at 81–82 (reasoning "CAFA is an independent anchor of jurisdiction . . . embod[ying] Congress's judgment that complete diversity is not essential in class actions that meet its requirements").

[124] *Id.*

[125] *Id.* at 79, 82.

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with contamination that *Exxon Mobil* confected to ward off erosion of citizenship diversity requirements.

IV. ON THE WAY JURISDICTIONAL LAW CHANGES

The history of the 1990 adoption of Section 1367 casts a long shadow over jurisdictional reform projects in the federal judiciary. After Judge Weis's service ended on the FCSC, the task of jurisdictional reform fell to the Federal-State Jurisdiction Committee of the Judicial Conference of the United States (Fed-State Committee). The Fed-State Committee bore responsibility for developing proposed Judicial Conference policy on issues broadly related to the allocation of jurisdiction between state and federal courts.[126] As a result, many jurisdictional proposals came to the Committee for consideration, including those to contract federal habeas jurisdiction, to expand federal diversity jurisdiction, and to recognize new rights of action in a field that had previously been left to state law.[127]

In the course of that work, much of it in reaction to jurisdictional proposals developed elsewhere, the Fed-State Committee also considered and worked to develop solutions to jurisdictional problems that had no sponsor in Congress. Over the course of the first decade of the twenty-first century, the Committee developed a list of jurisdictional fixes.[128] After securing Judicial Conference approval, the Committee spearheaded efforts to build the approved proposals into a package for

[126] For a discussion of the Committee's concerns with judicial economy and docket control, see Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1514–15 (2008).

[127] *See* JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 15–16 (Mar. 2002) (reporting a proposed change in habeas corpus proceedings raised "serious federalism, resource, and practical concerns"); *see also* JUD. CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 134–35 (Dec. 1995) (urging restriction of access to the federal courts might be necessary due to the limited resources of the federal courts).

[128] The Committee made many recommendations to the Judicial Conference which approved some to be recommended to Congress. For example, the Fed-State Committee recommended Congress "be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened" in response to discussion in Congress to codify minimal diversity requirements in class actions. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14 (Mar. 2003). For an example of a recommendation that was made and later rescinded after congressional inaction, consider the following report: JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (Mar. 2010) (deciding to withdraw its recommendation supporting "elimination of non-economic damages from the calculation of the amount in controversy for cases based on diversity").

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adoption by Congress.[129] In one example of how that process can lead to jurisdictional reform, Congress took up and eventually adopted the Jurisdictional and Venue Clarification Act of 2011 (JVCA), implementing a set of reforms that the Committee had developed and the Conference had approved.[130] Like the legislation that implemented the proposals of the FCSC, in short, the JVCA represented the culmination of court-reform efforts that were driven at least in part by the judiciary itself.

Drafting the particulars of those reforms attracted the able attention of another Pittsburgh lawyer, Arthur Hellman. Professor Hellman had a well-earned relationship with members of Congress and a sound command of legislative drafting.[131] In addition, the American Law Institute had put together a collection of principles to guide reform of jurisdiction and venue statutes.[132] As a result, the JVCA was drafted by expert hands with sound command of jurisdictional nuance and was vetted by experienced scholars. The resulting statute specifies much by way of detail and apparently leaves little room for the play of jurisdictional policymaking. Enacted in the shadow of *Finley*'s textualism and perceived concerns with the judicial reception of Section 1367, the 2011 reforms aimed to achieve textual clarity in fixing problems and to avoid unintended consequences.[133]

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[129] For a peek into the enactment process, see the discussion in Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673, 693–97 (2009) (discussing the enactment of Federal Rule of Evidence 502 based on recommendations from a Judicial Conference Committee).

[130] *See* Federal Courts Jurisdiction and Venue Clarification Act of 2011, 28 U.S.C. §§ 1390, 1455, 1446. For an example of recommendations made by the Judicial Conference, consider this report from the September 2003 session of the Judicial Conference: JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22–23 (Sept. 2003) (listing "seven amendments to title 28 of the United States Code to improve the clarity of the law and increase judicial efficiency" in both removal and remand procedures as well as the definition of citizenship for purposes of diversity jurisdiction).

[131] *Arthur Hellman Biography*, UNIV. OF PITT SCH. OF L., https://www.law.pitt.edu/people/arthur-hellman (last visited Jan. 17, 2024).

[132] *See generally* AM. L. INST., FEDERAL JUDICIAL CODE REVISION PROJECT (2004); *see also* John B. Oakley, *Supplemental Jurisdiction, the ALI, and the Rule of the* Kroger *Case:* Kroger *Redux*, 51 DUKE L.J. 663, 664, 671–75 (2001) (discussing the ALI Report and the problems with the codification of *Kroger* in § 1367).

[133] For doubts as to its success, consider William Baude, *Clarification Needed: Fixing the Jurisdiction and Venue Clarification Act*, 110 MICH. L. REV. FIRST IMPRESSIONS 33, 34–36 (2012) (critiquing the JVCA for not: (i) providing a rule when state law permits but does not require the plaintiff to demand a specific amount of damage in the complaint; (ii) defining or explaining the preponderance of the evidence standard for demonstrating the amount in controversy; or (iii) addressing the fact it is difficult to know

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However successful in addressing the problems identified, the JVCA illustrates both the possibilities and limits of jurisdictional reform. For starters, the Fed-State Committee has no statutory mandate.[134] Unlike the FCSC, no members of Congress serve on the Committee and its meetings take place behind closed doors.[135] To be sure, its proceedings become public after its reports have been acted upon by the Judicial Conference.[136] But it operates behind a veil that shields more of its work from public scrutiny than, say, the work of the Civil Rules Advisory Committee.[137]

On the other hand, unlike the rules advisory process, the Fed-State Committee does not view itself as charged with developing policy. Rather, the Committee proposes non-controversial fixes to the jurisdictional statutes. For example, the Committee supported the creation of an indexing system that would, every five years, adjust the amount-in-controversy threshold for diversity litigation to keep abreast of inflation.[138] Even that rather modest recommendation was omitted from the final text

whether and when a case is removable, making it hard to comply with the removal deadlines); Paul E. Lund, *The Timeliness of Removal and Multiple-Defendant Lawsuits*, 64 BAYLOR L. REV. 50, 95–112 (2012) (criticizing the codification of the last-served defendant rule and arguing that the rule was adopted in response to an overstated fear of forum manipulation by plaintiffs); Jayne S. Ressler, *Removing Removal's Unanimity Rule*, 50 HOUS. L. REV. 1391, 1430–31 (2013) (criticizing the codification of the rule of unanimity because it provides an opportunity for forum manipulation by plaintiffs).

[134] For discussion on the formation and development of today's Judicial Conference, including its chartering of committees, see Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 171–74 (1997).

[135] For information on the structure of the Judicial Conference and its Committees, including the Committee on Federal-State Jurisdiction, see *About the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference (last visited Jan. 19, 2024).

[136] These reports are published bi-annually. *See, e.g.*, JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22–23 (Sept. 2003).

[137] *See* Struve, *supra* note 61, at 1110–12 (discussing public interaction with the Civil Rules Advisory Committee's rulemaking process).

[138] *See Federal Courts Jurisdiction Clarification Act Hearing Before the Subcomm. On Cts., the Internet, and Intell. Prop. of the H. Judiciary Comm.*, 109th Cong. 5, 13 (2005) (prepared statement of Judge Janet C. Hall, a member of Judicial Conference Committee on Federal-State Jurisdiction, proposing "to enable the minimum amount in controversy for diversity of citizenship jurisdiction . . . to be adjusted periodically in keeping with the rate of inflation"). *See Federal Courts Jurisdiction Clarification Act Hearing Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Judiciary Comm.*, 109th Cong. 5, 13 (2005) (statement of Judge Janet C. Hall, a member of Judicial Conference Committee on Federal-State Jurisdiction, proposing "to index the [monetary threshold for diversity jurisdiction] using a consumer price

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of the JVCA when some groups questioned its wisdom.[139] Congress, in short, remains responsible for updating jurisdictional law and the Fed-State Committee process operates in deference to that sense of congressional primacy.

Consequently, the federal system has yet to identify any institution, aside from Congress, with ongoing responsibility for the clarity and proper function of the jurisdictional rules. Without ongoing oversight and with the rise of what one might call "gotcha" or normative textualism,[140] ludicrous jurisdictional doctrines take root in federal law. Among wholly indefensible jurisdictional doctrines, one holds that defendants may escape the forum defendant bar to removal of an action from state to federal court by perfecting removal after the complaint was filed in state court but before the defendants have been served with process.[141] Such snap removals have now been approved by several federal appellate courts,[142] despite the utter absence of any conceivable policy justification. Congress chose to block removal by forum defendants on the theory that they face no threat of bias in their own home state's court system.[143] But no one suggests that forum defendants who have the resources

index; allowing it to change, in effect, with the value of the dollar, and thereby keeping the jurisdictional limit as a meaningful threshold").

[139] *Id.* at 13; *see also* Nima Mohebbi, *Craig Reiser & Samuel Greenberg, A Dynamic Formula for the Amount in Controversy*, 7 FED. CTS. L. REV. 96, 101–02 (discussing the proposal to index the amount in controversy to the consumer price index but the ultimate omission of that provision from the final statute).

[140] Judge Weis recognized one such example in *Meritcare Inc. v. St. Paul Mercury Ins.*, 166 F.3d 214, 221 (1999) (quoting Russ v. State Farm Mut. Ins., 961 F. Supp. 808, 820 (E.D. Pa. 1997)) (describing a textualism in which federal courts reach incongruous results due to a failure by Congress to achieve the necessary precision—resulting in a judicial message of "Gotcha! And better luck next time.").

[141] For discussion on the rise of snap removal and its approval in recent appellate decisions, see Jeffrey W. Stempel, Thomas O. Main & David McClure, *Snap Removal: Concept; Cause; Cacophony; and Cure*, 72 BAYLOR L. REV. 423, 467–76 (2020) (criticizing the use of so-called textualism in appellate decisions). For further critique, see E. Farish Percy, *It's Time for Congress to Snap to It and Amend 28 U.S.C. § 1441(1)(b)(2) to Prohibit Snap Removals That Circumvent the Forum Defendant Rule*, 73 RUTGERS U. L. REV. 579, 582–83, 587 (2021).

[142] Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 706 (2d Cir. 2019) ("Allowing a defendant that has not been served to remove a lawsuit to federal court 'does not contravene' Congress's intent to combat fraudulent joinder."); Encompass Ins. v. Stone Mansion Rest., Inc., 902 F.3d 147, 152 (3d Cir. 2018) (finding the plain meaning of § 1441(b)(2) "precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served"); Texas Brine Co. v. Am. Arbitration Ass'n, 955 F.3d 482, 486 (5th Cir. 2020) ("[T]his case would not have been removable had the forum defendants been 'properly joined and served' at the time of removal."). *But cf.* Woods v. Ross Dress for Less, Inc., 833 Fed. Appx. 754, 759 (10th Cir. 2021) (finding "federal diversity jurisdiction under § 1441(a) [needed to be shown] before § 1441(b)(2)'s limitation on diversity-based removal could even come into play.").

[143] Stempel, Main & McClure, *supra* note 141, at 431 n.22, 430–31 (arguing the snap removal process runs directly against legislative intent—allowing "forum state citizens the option of state or federal court

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to monitor state dockets and game the removal system face the sort of bias that warrants access to a federal diversity docket. The House has held hearings, but Congress cannot muster the votes to clarify the rules.[144]

Congressional dysfunction may help to explain both the kind of normative textualism that underlies snap removal and the policy-inflected refusals to credit governing text that one sees in *F5 Capital*.[145] (One must work harder to identify a justification for the supposed demands of the text in *Griffin v. Lee*.) Obviously corporate defendants prefer to litigate in federal court; some federal courts lean toward making diversity dockets more widely available to them.[146] In doing so, federal courts appear to respond to a perceived threat of bias that has nothing to do with the defendant's state of citizenship.[147] Rather, some federal courts worry that national corporations face bias anytime they must appear before state courts and state juries.[148] Without a reliable partner in Congress to update jurisdictional policy, both normative textualists and jurisdictional policy-makers may feel that expanded access

is . . . not particularly consistent with the protection-against-prejudice rationale of diversity jurisdiction"). For an example of this in practice, see *Morris v. Nuzzo*, 718 F.3d 660, 665 (7th Cir. 2013) (reasoning the forum defendant rule does not allow federal removal for diversity when one defendant is a citizen of the forum state because the need to "protect defendants against presumed bias of local courts" is not a concern).

[144] *See generally* Removal Jurisdiction Clarification Act of 2020, H.R. 5801, 115th Cong. (2020) (proposed reform to codify snapback procedure—return to state court if defendant is served within statutorily designated timeframe after snap removal—but so far unable to be passed into law); KEVIN M. LEWIS, CONG. RSCH. SERV., MAKE IT SNAPPY? CONGRESS DEBATES "SNAP" REMOVALS OF LAWSUITS TO FEDERAL COURT (2020) (reviewing the development of the snap removal doctrine and debate in Congress to reform the statute).

[145] *See* F5 Capital v. Pappas, 856 F.3d 61, 80–82 (2d Cir. 2017) (relying on "context" including legislative history, structure, and other related provisions to justify interpreting CAFA to find supplemental jurisdiction authorized despite noting the statutory text of § 1367 might indicate otherwise).

[146] *See, e.g.*, Arlington Cmty. Fed. Credit Union v. Berkley Reg'l Ins., 57 F. Supp. 3d 589, 594–95 (E.D. Va. 2014) (justifying a finding of jurisdiction by relying on factors from the Eleventh Circuit to determine a corporation is localized out of state).

[147] *See* Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 553–54 (2005) (noting diversity jurisdiction provides "a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants"); *see also* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 483 n.4 (1928) ("It is true, of course, that [Hamilton's] explanation of diversity jurisdiction on the basis of local prejudice has been written into the Constitution by judicial decision.").

[148] *See* Arlington Cmty. Fed. Credit Union, 57 F. Supp. 3d at 594–95 (noting that "the underlying rationale for diversity jurisdiction points convincingly to the conclusion" the corporation is out of state); *see also* Firstar Bank, N.A. v. Faul, 253 F.3d 982, 993 (7th Cir. 2001) (rejecting the argument a national bank would not be subjected to local bias in a state where they maintain branches).

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to a federal court serves the "evident purpose" of Congress "to expand federal jurisdiction."[149] Diversity-based consolidation, both under CAFA and in multi-district litigation, exerts a kind of hydraulic pressure in favor of expanded jurisdiction.[150]

One might try to address creeping jurisdictional expansion through the revival of the presumption against federal jurisdiction. Once widely accepted as a corollary to the idea that federal courts operate as courts of limited jurisdiction, the presumption would require parties seeking access to federal court to identify clear evidence of congressional authorization. In case of doubt, the matter would stay in state court. Such an approach would require Congress to address jurisdictional expansion, instead of allowing the federal courts to broaden their own adjudicative power through policy analysis or normative textualism. But the presumption might grow unwieldy, especially in a world of hyper-partisan legislative gridlock.

The Supreme Court often plays an important role in the evolution of jurisdictional policy. Sometimes these policy decisions come in the form of adjudication, sometimes in the form of lobbying. As for lobbying, the Judges' Bill of 1925 represents a clear example as does the 1988 decision of Congress to make the Court's appellate docket in respect of state courts entirely discretionary.[151] On the adjudicative side, one can hardly see the pleading decision in *Iqbal v. Ashcroft* as an exercise of anything other than a rather unbridled form of judicial lawmaking.[152] Other familiar examples include the Court's administration of its collateral order doctrine, which operates to define appellate jurisdiction in important ways; its assertion of screening authority over its original docket, which lacks any obvious statutory warrant; and its creation of a complete preemption removal

[149] *F5 Capital*, 856 F.3d at 81.

[150] For a critique of the practice of multi-district litigation and the pressure it exerts on traditional forms of litigation, see Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 BOSTON U. L. REV. 109 (2015).

[151] *See* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 29–59 (2023) (discussing the rise of the Court's discretionary intervention in major constitutional issues through the deployment of its power over emergency stay applications).

[152] *See* Ashcroft v. Iqbal, 556 U.S. 662, 678–84 (2009). For discussion on the policy implications of judicial lawmaking in *Iqbal* as well as Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), see Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 116–120 (2009).

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doctrine.[153] As we have seen, the Court's decision in *Exxon Mobil*, though couched in textualist terms, embeds a substantial dose of judicial policy in an unruly doctrine of contamination.[154] Justice Kennedy's normative textualism had a hand in both *Iqbal* and *Exxon Mobil*.

However effective in shaping policy through adjudication and lobbying, the Court has been relatively inactive as the supervisor of the rules enabling process. Rulemaking occurs within Judicial Conference committees subject to the approval of the Court before proposed amendments go to Congress for final consideration and entry into effect.[155] The Court might nudge and signal to secure changes it regards as needed but has largely declined to do so.[156] (The Chief's interest in discovery reform offers a counterexample.)[157] Justices occasionally dissent from the promulgation of new rules, as Justice Scalia did when the Conference moderated the sanction regime in Rule 11.[158] But the Court does not appear to view its status as the final judicial arbiter of civil rules as a site for effective law reform. Notably, the Court might have secured some changes in the pleading regime by signaling such a desire instead of relying in *Iqbal* on adjudication to achieve a result that appeared, in that context, quite injudicious.

V. CONCLUSION

In the end, then, the puzzle of how to update jurisdictional law remains. Congress has other fish to fry and little institutional interest in the nuances of jurisdictional law. Members of the judiciary have some obvious advantages as agents

[153] For an account and criticism of complete preemption removal, see JAMES E. PFANDER, THE PRINCIPLES OF FEDERAL JURISDICTION 175–77 (4th ed. 2021).

[154] *See* Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 560–63 (2005).

[155] *Overview for the Bench, Bar, and Public*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public(last visited Jan. 20, 2024).

[156] Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1061, 1064–65 (1993).

[157] *See* JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2015) (praising the 2015 amendments to the Federal Rules of Civil Procedure as a "major stride toward a better federal court system"). For a critique of Chief Justice Robert's praise and advocacy, see Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 48–52 (2016).

[158] *See Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 507, 507–09 (1993) (Scalia, J., dissenting) (noting he dissented because there was not "convincing indication that the current Rule 11 regime is ineffective").

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of jurisdictional development. As Judge Weis's example reveals, federal judges have an undoubted expertise in the issues and a strong interest in getting them right. But one might well reject a model that put federal judges in charge of defining the scope of their own authority. On one view, judges might tend to aggrandize themselves by expanding their authority; that was the fear articulated most insistently by the anti-Federalist Brutus as he reflected on the proposed federal judiciary.[159] On another view, judges might shirk and reimagine their offices as sinecures, with an assured salary for life. The natural tendency of the federal judiciary to resist new assignments may reflect budget consciousness and a desire to maintain a status quo workload.

Judge Weis's experience with the FCSC offers one example of effective jurisdictional development. The relatively open nature of the Committee's processes and its inclusion of members of Congress enabled a more seamless translation of the Committee's recommendations into law. One can of course criticize the language of Section 1367, but one can hardly blame the Committee for the choices Congress made. Shifting responsibility for jurisdictional change to blue-ribbon panels, perhaps modeled on the rules advisory committees, thus makes a certain amount of sense as the least worst option available. If Congress were concerned that federal judges would play too outsized a role, it might structure the committee to ensure a stronger presence of academics and practitioners. By mandating review in both the Supreme Court and in Congress, a jurisdictional enabling act would sensibly preserve institutional vetoes on jurisdictional changes perceived as too cushy or expansive.

[159] BRUTUS, BRUTUS XV (Mar. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST §§ 186–189, at 437–39 (Herbert J. Storing ed., 1981) (remarking the power given to the Supreme Court under the Constitution "transcends any power before given to a judicial by any free government under heaven" and warning the Justices would "soon feel themselves independent of heaven itself").

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