

THE SIMMERING DEBATE OVER SUPPLEMENTAL JURISDICTION

James E. Pfander*

In this essay, Professor Pfander revisits the debate surrounding supplemental jurisdiction under 28 U.S.C. § 1337, specifically, § 1337's effect on Zahn v. International Paper Co. The Supreme Court held in Zahn that a federal court, sitting in diversity, may not exercise supplemental jurisdiction over claims by unnamed members of a plaintiff class that fail to satisfy the amount-in-controversy requirement. One account of § 1337 is that the statute overruled Zahn's restrictive view of supplemental jurisdiction. An alternative account, adopted by the Tenth Circuit in Leonhardt v. Western Sugar Co., is that the statute preserves Zahn's prohibition. Recent decisions by the Fourth and Ninth Circuits deepen a circuit split on the question, perhaps increasing the likelihood that the Supreme Court will address the question.

Professor Pfander defends the Leonhardt account. After providing a brief overview of the interpretive issues, Professor Pfander considers and rejects a variety of criticisms of the Tenth Circuit's approach that have appeared in recent decisions. This thoughtful essay offers the reader a textually credible account of § 1337 that squares with what Congress expected the statute to accomplish and refrains from unsettling the many jurisdictional distinctions that had emerged before the codification of supplemental jurisdiction.

Perhaps I should resist the temptation to add to the long running debate on the interpretation of the supplemental jurisdiction statute, 28 U.S.C. § 1337, especially since I have already said my bit.¹ But I am

* Prentice H. Marshall Professor of Law, University of Illinois College of Law.

Thanks to Willy Fletcher for his generosity in commenting on a draft of this Essay, and to the late Charles Alan Wright, who gave a sympathetic hearing to my account of the statute.

1. See James E. Pfander, *Supplemental Jurisdiction and Section 1337: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109 (1999). Others have had their say too, creating a voluminous and somewhat vituperative literature. See Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007 (1991) [hereinafter Arthur & Freer, *Close Enough*]; Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991) [herein after Arthur & Freer, *The Disaster*]; Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life after Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991) [hereinaf-

moved to write again by recent decisions of the Fourth and Ninth Circuits, both of which conclude that § 1367 overrules the restrictive view of federal diversity jurisdiction that the Supreme Court had adopted in *Zahn v. International Paper Co.*² The recent decisions—*Rosmer v. Pfizer Inc.*³ and *Gibson v. Chrysler Corp.*⁴—deepen a circuit split on the question of how best to read the language of § 1367 and increase the likelihood of a second trip to the Supreme Court.⁵ Apart from their likely function in precipitating further review, the decisions offer the first sophisticated critique of a competing account of the statute that had first appeared a few years ago in *Leonhardt v. Western Sugar Co.*⁶ Although the Court has yet to write the last word, the recent decisions help to sharpen the issues that the Court must one day resolve and give point to the notion that such ultimate resolution may benefit from a period of “percolation” in the lower courts.⁷

ter Freer, *Life After Finley*]; Thomas D. Rowe, Jr. et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991) [hereinafter Rowe et al., *A Coda*]; Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991) [hereinafter Rowe et al., *A Reply*]. Although some mellowing appears to have occurred in recent years, see Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 IND. L.J. 5 (1998); Thomas D. Rowe, Jr., *Section 1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 IND. L.J. 53 (1998), the volume remains. See AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2, *Supplemental Jurisdiction: Proposed Revision of 28 U.S.C. § 1367* (Apr. 14, 1998) [hereinafter ALI Draft] (offering a detailed overview of the law of supplemental jurisdiction, as well as a draft statute that proposes to clarify existing ambiguities).

2. 414 U.S. 291 (1973). For more on *Zahn*, see *infra* notes 36–37 and accompanying text.

3. 263 F.3d 110 (4th Cir. 2001).

4. 261 F.3d 927 (9th Cir. 2001).

5. On the division among the circuits, compare *In re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995) (holding that § 1367 overrules *Zahn*), *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930–33 (7th Cir. 1996) (agreeing with *Abbott Labs* in a Rule 20 joinder case), and *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 607 (7th Cir. 1997) (following *Stromberg* in a Rule 23 class action case), with *Trimble v. ASARCO, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000) (*Zahn* remains good law), *Meritcare Inc. v. St. Paul Mercury Insurance Co.*, 166 F.3d 214, 222 (3d Cir. 1999) (same), and *Leonhardt v. West Sugar Co.*, 160 F.3d 631, 640–41 (10th Cir. 1998) (same). The first trip to the Supreme Court resulted in a summary affirmation of the Fifth Circuit by an equally divided Court. See *Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000) (per curiam).

6. 160 F.3d 631, 640–41 (10th Cir. 1998) (urging that a literal and textually faithful reading of § 1367(a) could produce results in keeping with the apparent intent of the enacting Congress; basing such a reading on the reference in § 1367(a) to the requirement that the district courts first secure original jurisdiction of the claims in a civil action; and noting that prior decisions such as *Zahn* had foreclosed the exercise of pendent-style supplemental jurisdiction in diversity class actions and had relied instead on a restrictive reading of the “matter in controversy” requirement that governs original jurisdiction in diversity). The sophistication on display in the rejection of the *Leonhardt* account owes something to the fact that the authors of the lead opinions, Chief Judge J. Harvie Wilkinson of the Fourth Circuit and Judge William Fletcher of the Ninth Circuit, both specialized in the field of federal courts in their former lives as law professors. Chief Judge Wilkinson taught at the University of Virginia, and was the professor with whom I first studied federal courts. Judge Fletcher taught at Boalt Hall, where he still holds an adjunct appointment.

7. Although entitlement to percolating waters informs many of the Supreme Court’s decisions on the allocation of water rights in the West, see, e.g., *Washington v. Oregon*, 297 U.S. 517, 525–26 (1936), the metaphor of percolation to describe the process of lower-court disputation that precedes the Court’s ultimate resolution of a divisive question of law may owe less to water litigation than to a well-brewed pot of coffee. Percolation in this sense calls to mind the filtration process that brings boil-

Sensing that little time remains for further percolation, this essay assesses the *Rosmer* and *Gibson* critique of *Leonhardt*. The first part quickly retraces the history of pendent and ancillary jurisdiction and their codification in § 1367. Part II considers the new light that *Rosmer* and *Gibson* propose to shed on the interpretive question. Although both courts criticize *Leonhardt's* account of the text, and both trumpet textual clarity, Part III of the essay suggests that their more sophisticated analyses fail to provide a compelling textual basis for their account of the meaning of § 1367.⁸ Finally, the essay examines the sources of legislative history that appear to have informed the debate between *Rosmer* and *Gibson* on the one hand, and *Leonhardt* on the other. For the Fourth and Ninth Circuits, the drafters' admission that they had erred in failing to protect *Zahn* forms the centerpiece of the historical analysis.⁹ The Tenth Circuit, by contrast, downplayed the drafting error and emphasized statements in the House committee report. After a brief rumination on the role of drafters' statements in the interpretive process, the essay concludes that *Leonhardt* has the better of the argument.

I. SECTION 1367 AND THE CODIFICATION OF PENDENT AND ANCILLARY JURISDICTION

One can best understand the competing accounts of § 1367 by first taking a quick look back at the operation of pendent and ancillary jurisdiction before the statute's adoption in response to *Finley v. United States*.¹⁰ Under the doctrine of pendent jurisdiction, a plaintiff who filed a federal question claim in federal court could invoke the district court's pendent jurisdiction over related state-law claims against the named de-

ing water to the top of the pot, and then back down through a filter to produce a cleaner, more aromatic brew. *See, e.g.*, H.W. PERRY, JR., DECIDING TO DECIDE 230 (1991) (apparently invoking the coffee metaphor with the suggestion that the "Justices like the smell of well-percolated cases"). The term first began to appear in the Supreme Court's opinions in the mid-1980s, *see California v. Carney*, 471 U.S. 386, 398 (1985) (Stevens, J., dissenting) (quoting Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 761 (1984)), well after the percolator had given way to the espresso machine. *See generally* Todd J. Tiberi, Note, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITTS. L. REV. 861 (1993).

8. *See ANTONIN SCALIA, A MATTER OF INTERPRETATION* 29–37 (Amy Gutmann ed., 1997) (emphasizing the centrality of the text, and the dispensability of the legislative history, in statutory interpretation); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (tracing Justice Scalia's influence on the rise of textualism in statutory interpretation).

9. For the legislative history of the statute, see H.R. REP. NO. 101-734, at 28–29 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6874–75 (explaining that the legislation was not meant to change the rules governing the assertion of diversity jurisdiction over class actions). *See also* Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 215 (1991) (declaring their understanding as drafters of § 1367 that *Zahn* remained good law).

10. 490 U.S. 545, 552 (1990). On the role of *Finley* in moving Congress to enact § 1367, see Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute: A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 889 (1992).

fendants. In the leading case, *United Mine Workers v. Gibbs*,¹¹ the plaintiff joined two kinds of claims against the union defendants: claims under federal law for an unlawful secondary boycott, and claims under state law for interference with contractual relations. Although diversity jurisdiction was lacking over the state law claims, the Court nonetheless held that the district court could exercise pendent claim jurisdiction over such claims, so long as they arose from the same “common nucleus” of operative facts as the jurisdiction-conferring or “freestanding” federal law claims.¹²

Pendent claim jurisdiction had no analog on the diversity docket. Under settled principles of diversity jurisdiction, a plaintiff may bring suit on a state law claim only against citizens of different states and only where the plaintiff asserts claims that satisfy the amount-in-controversy requirement, now an amount greater than \$75,000.¹³ Once the plaintiff satisfies the diversity of citizenship requirement (a requirement unmet in *Gibbs*), the plaintiff may freely aggregate all of the claims he or she has against the defendant. This rule of permissive aggregation applies, even where the claims bear no transactional (“common nucleus”) relationship to one another.¹⁴ Diversity thus failed to develop any conception of pendent claim jurisdiction, but simply treated the aggregation of additional claims as a matter within the plaintiff’s discretion (provided, of course, that the aggregated claims were sufficient to satisfy the required amount in controversy).¹⁵

Just as pendent claim jurisdiction operated wholly within the federal-question context, so too with pendent party jurisdiction. In the textbook example of pendent party jurisdiction, *Aldinger v. Howard*,¹⁶ the plaintiff asserted a federal question (§ 1983) claim against one party and a related state law claim against a second nondiverse party over which the district court otherwise lacked jurisdiction. Although the Court in *Aldinger* did not rule out the assertion of pendent party jurisdiction as a general matter, it did suggest that district courts should look warily at the relevant statutes for evidence that Congress may have meant to foreclose its exercise in a particular case.¹⁷ Finding such evidence in the structure

11. 383 U.S. 715 (1966) (upholding assertion of pendent claim jurisdiction).

12. *See id.* at 721–29.

13. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.31 (3d ed. 1999). For an overview of the complete-diversity and amount-in-controversy requirements, see CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 156–57, 190–95 (5th ed. 1994).

14. WRIGHT, *supra* note 13, at 210 (noting absence of any required transactional relationship between aggregated claims).

15. On the inapplicability of pendent-style supplemental jurisdiction to diversity proceedings, see McLaughlin, *supra* note 10, at 869.

16. 427 U.S. 1 (1976).

17. *See id.* at 17–18. Indeed, *Aldinger* suggested that the argument for the exercise of pendent party jurisdiction would have been stronger in a situation (later presented in *Finley*) in which Congress gave the federal courts exclusive jurisdiction over the federal question claims. *See id.* at 18. In such a case of exclusive federal jurisdiction, plaintiff could not join related state and federal claims in a single

of § 1983, the Court in *Aldinger* refused to permit the district court to assert pendent party jurisdiction over state law claims against a defendant that was, at the time anyway, not subject to liability under § 1983 itself.¹⁸

Although the *Finley* Court ultimately foreclosed it altogether on the ground that Congress had failed to provide any statutory predicate for its exercise, pendent party jurisdiction did play a modest and short-lived role in expanding the scope of federal question litigation.¹⁹ But it never took root on the diversity side of the docket. The complete diversity requirement, which dated from the venerable *Strawbridge* decision during the Republic's toddlerhood, held that all opposing parties in diversity litigation must be citizens of different states.²⁰ It simply made no sense to speak of pendent party jurisdiction in the face of the complete diversity requirement; the presence of jurisdiction over a plaintiff's claims against a single diverse defendant could not provide a predicate for jurisdiction over the claims, related or otherwise, that one or more plaintiffs might assert against nondiverse defendants.²¹

Ancillary jurisdiction, by contrast, flourished on both the diversity and federal question sides of the docket.²² Referring to claims made in a defensive posture, ancillary jurisdiction applied to permit a district court to hear the state law compulsory counterclaim that a defendant set up in response to a federal question complaint under the antitrust laws.²³ Even in the context of diversity litigation, ancillary jurisdiction permitted defendants to expand the scope of the litigation. In *Owen Equipment & Erection Co. v. Kroger*, for example, the Court cited, with apparent approval, earlier decisions that had upheld the exercise of ancillary jurisdic-

state court proceeding, and the Court appeared to believe that considerations of fairness and efficiency in such a setting would justify an assertion of federal jurisdiction over pendent parties. *See id.*

18. *See id.* at 16 (citing *Monroe v. Pape*, 365 U.S. 167 (1961), for the proposition that local government entities were not subject to liability as persons within the meaning of § 1983). The Court overruled this aspect of *Monroe* in *Monell v. Department of Social Services*, 436 U.S. 658, 690–91 (1978). Today, one can sue local governments as defendants directly under § 1983, without the need to invoke pendent party jurisdiction over state-law claims against them as the plaintiff had sought to do in *Aldinger*.

19. *See generally* Richard Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34 (offering a pre-*Finley* account of pendent party jurisdiction). For situations in which the federal courts agreed to exercise pendent party jurisdiction, see *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989) (upholding assertion of pendent party jurisdiction over claims arising under federal law regulating carriage of goods in interstate commerce); *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508 (11th Cir. 1989) (upholding assertion of pendent party jurisdiction over claims arising under federal law regulating carriage of goods in interstate commerce); *Giardiello v. Balboa Insurance Co.*, 837 F.2d 1566 (11th Cir. 1988) (upholding assertion of pendent party jurisdiction under ERISA, which provides for exclusive jurisdiction in the federal courts, and thus precludes unitary litigation in state court).

20. *See* WRIGHT, *supra* note 13, at 156.

21. On the inapplicability of pendent-style supplemental jurisdiction in diversity litigation, see *id.* at 158.

22. *See* McLaughlin, *supra* note 10, at 869.

23. *See, e.g.*, *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593 (1926) (upholding the federal courts' ancillary jurisdiction over the defendant's compulsory state-law counterclaim to a federal antitrust complaint).

tion over a defendant's third-party claims under Rule 14 for contribution or indemnity.²⁴ As the Court explained, ancillary jurisdiction permissibly applies to "claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."²⁵ But the *Kroger* Court drew the line at an interpretation of ancillary jurisdiction that would erode the complete diversity requirement. It thus held that ancillary jurisdiction did not extend to the plaintiff's subsequent claims against an impleaded, and nondiverse, third-party defendant.²⁶

Finley led to the adoption of the new statute by threatening both pendent party and ancillary jurisdiction. Emphasizing the absence of a statutory warrant for the exercise of such jurisdiction, *Finley* refused to permit the district court to hear a suit that included both a claim against the United States under federal law, and state law claims against nondiverse defendants that arose from the same transaction or occurrence.²⁷ Although the Court purported to accept *Gibbs*, and the doctrine of pendent claim jurisdiction,²⁸ its decision foreclosed pendent party jurisdiction altogether and posed a threat to the exercise of ancillary jurisdiction over claims against third-party defendants that the Court had seemingly approved in *Kroger*.²⁹ Congress enacted the supplemental jurisdiction statute to supply the missing grant of statutory authority.³⁰

For much of the first ten years of the statute's life, the meaning of the text had been a matter of quite broad consensus. In § 1367(a), the statute confers supplemental jurisdiction over all claims that bear an appropriate relationship to the claims in a civil action over which the district court has original jurisdiction.³¹ The statute went on to declare that such supplemental jurisdiction applied to claims that involved the joinder or intervention of additional parties.³² Most everyone saw this grant of supplemental jurisdiction as applying with equal force on both the federal question and diversity side of the docket.³³ On such a view, the statute not only overruled *Finley* and codified *Gibbs*, but also extended the benefits of pendent party jurisdiction to plaintiffs in diversity cases. Provisions of § 1367(b), which articulated a series of exceptions to the grant

24. 437 U.S. 365, 373–77 (1978) (citing the complete diversity rule in refusing to permit district court to assert ancillary jurisdiction over nondiverse defendant impleaded under Rule 14).

25. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978).

26. *Id.* at 376–77.

27. See *Finley v. United States*, 490 U.S. 545, 555–56 (1989).

28. See *id.* at 556 (describing *Gibbs* as a departure from prior law that the Court had no current intention to limit or impair).

29. See *id.* at 552 (emphasizing the failure of the statute to provide for jurisdiction over claims against parties other than the United States itself).

30. See Pfander, *supra* note 1, at 121–22.

31. See 28 U.S.C. § 1337(a) (1994). For the text of the statute, see *infra* text accompanying note 57.

32. See *id.*

33. See Pfander, *supra* note 1, at 115 & n.16 (describing the prevailing or standard account of § 1337 and collecting authorities).

of supplemental jurisdiction in diversity cases,³⁴ were seen as offering the primary bulwark against the invocation of pendent-party-style jurisdiction to broaden diversity litigation.³⁵

Such an account of the interplay between subsections (a) and (b) posed a threat to the Supreme Court's rule in *Zahn v. International Paper Co.*³⁶ In *Zahn*, the Court considered the scope of diversity jurisdiction over a state law class action in which the named plaintiff met both the diversity and amount-in-controversy requirements. Following earlier cases that had required the claims of each plaintiff to meet the statutory minimum, the Court held that the district court could not assert diversity jurisdiction over any unnamed members of the plaintiff class whose claims failed to meet the specified amount.³⁷ Under § 1367, however, district courts might arguably assert original jurisdiction over the claims of a single diverse class representative, and § 1367(a) could be read as conferring supplemental jurisdiction over the related (but monetarily insufficient) claims of the unnamed members of the class. Section 1367(b), moreover, failed to include any exception for claims and parties joined under Rule 23, the rule governing class actions in federal court. Together, these features of the statute seemed to extend supplemental jurisdiction into the *Zahn* setting.

After two circuits adopted this unsettling result,³⁸ a new interpretive possibility emerged. Building on a work in progress, the Tenth Circuit, in *Leonhardt v. Western Sugar Co.*, offered a literal reading of the language of § 1367(a) that proposed to preserve the result in *Zahn*.³⁹ Noting that the statutory grant of supplemental jurisdiction comes into play only after the district court acquires "original jurisdiction" of the claims in a civil action, the court concluded that one can literally read the reference to original jurisdiction as incorporating the *Zahn* rule.⁴⁰ *Zahn* had, after all, come down as an interpretation of the so-called matter in controversy requirement of § 1332, and thus provided a restriction on the scope of the district courts' original jurisdiction.⁴¹ Because such courts lacked original

34. See 28 U.S.C. § 1367(b) (1994). For the text of subsection (b), see *infra* text accompanying note 77.

35. See, e.g., Rowe, et al., *A Reply*, *supra* note 1, at 961 n.91 (noting the importance of § 1367(b) in defining exceptions to the grant of supplemental jurisdiction and its failure to guard against the use by plaintiffs of Rule 20 joinder to erode the complete diversity requirement).

36. 414 U.S. 291 (1973).

37. See *id.* at 298–301 (construing the "matter in controversy" language of 28 U.S.C. § 1332 to foreclose ancillary jurisdiction over claims of unnamed class members) (citing *Snyder v. Harris*, 394 U.S. 332 (1969); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939)).

38. See *Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 930–33 (7th Cir. 1996) (considering the possible interpretations of § 1367); *In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995) (holding that § 1367 overrules *Zahn*).

39. See *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 639–40 & n.6 (10th Cir. 1998) (citing a then unpublished draft of Pfander, *supra* note 1).

40. *Id.* (noting the possible incorporation of rules of joinder and aggregation by way of the statutory reference to "original jurisdiction").

41. *Zahn*, 414 U.S. at 300 (describing the congressional retention of the "matter in controversy" language in 28 U.S.C. § 1332 as incorporating judge-made rules of aggregation).

jurisdiction under *Zahn*, they seemingly lacked the necessary predicate for the exercise of supplemental jurisdiction.⁴² By reading established limits on diversity jurisdiction into the statutory reference to “original jurisdiction,” *Leonhardt* could preserve *Zahn* without bringing into play either the grant of supplemental jurisdiction in § 1367(a) or relying upon the incomplete list of exceptions in § 1367(b).⁴³

Such an interpretive approach had a number of advantages for a court that took seriously Congress’s apparent desire simply to preserve and codify the pre-*Finley* status quo. First, it suggested that the statute’s ambiguity could justify some consideration of legislative history that pointed toward the preservation of *Zahn*. Second, it appeared to produce results that conformed to the actual operation of original and supplemental jurisdiction in the years preceding *Finley*. Thus, it provided for the exercise of familiar pendent-style jurisdiction in the federal question context and for the exercise of ancillary jurisdiction in both federal question and diversity proceedings. Third, the *Leonhardt* approach made sense of the ancillary phrasing of the exceptions in § 1367(b), most of which refer to situations in which the plaintiff asserts claims against persons later “made parties” to the litigation by others.⁴⁴

The *Leonhardt* approach quickly gained adherents among federal judges. The Third Circuit’s decision in *Meritcare Inc. v. St. Paul Mercury Insurance Co.* stopped short of endorsing the Tenth Circuit’s account of the statute, but it did agree that the plausibility of the alternative reading furnished ample grounds for some consideration of the legislative history.⁴⁵ The Eighth Circuit went further, agreeing with *Leonhardt* that both the textual argument and the legislative history supported *Zahn*’s retention.⁴⁶ District court decisions in circuits that had yet to speak to the question tended to come down in favor of the *Leonhardt* approach,⁴⁷

42. See *Leonhardt*, 160 F.3d at 640 (noting that supplemental jurisdiction in diversity comes into play only after the plaintiff submits claims in a well-pleaded complaint that satisfy the requirements of original jurisdiction).

43. See *id.*; see also Pfander, *supra* note 1, at 127–53 (sketching the implications of the *Leonhardt* interpretation for the application of § 1367 in other contexts).

44. Even the reference in § 1367(b) to Rule 20 can be read as a restriction on ancillary, rather than pendent-party-style jurisdiction, and thus does not ambiguously point to a pendent party understanding of the operation of § 1367(a) in diversity matters. See *infra* notes 78–82 and accompanying text.

45. 166 F.3d 214, 222 (3d Cir. 1999).

46. See *Trimble v. ASARCO, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000).

47. Compare *Freeman v. Great Lakes Energy Partners, L.L.C.*, 144 F. Supp. 2d 201, 209–10 (W.D.N.Y. 2001) (noting circuit split and holding that *Zahn* survives), *Krieger v. Gast*, 197 F.R.D. 310, 315–16 (W.D. Mich. 2000) (same), *Knauer v. Ohio State Life Ins. Co.*, 102 F. Supp. 2d 443, 447 (N.D. Ohio 2000) (same), *Allendale Mut. Ins. Co. v. Excess Ins. Co. Ltd.*, 62 F. Supp. 2d 1116, 1129–30 (S.D.N.Y. 1999) (same), and *Kanter v. Warner Lambert Co.*, 52 F. Supp. 2d 1126, 1131–32 (N.D. Cal. 1999) (same), with *Poore v. American-Amicable Life Ins. Co.*, 125 F. Supp. 2d 1378, 1379–80 (S.D. Ga. 2000) (noting split and holding that the statute supersedes *Zahn*), *Williams v. Potomac Elec. Power Co.*, 115 F. Supp. 2d 561, 566–67 (D. Md. 2000) (same), and *Chiartas v. Bavarian Motor Works, AG*, 106 F. Supp. 2d 872, 874–75 (S.D. W. Va. 2000) (same). For post-*Gibson/Rosmer* decisions, see *Olden v. Lafarge Corp.*, 203 F.R.D. 254, 264 (E.D. Mich. 2001) (following *Rosmer* and *Gibson*), and *In re*

and the justices of the Supreme Court evenly divided in considering the question in *Free v. Abbott Laboratories, Inc.*⁴⁸ So matters stood until late August 2001, when the Fourth and Ninth Circuits returned to the earlier conclusion that the statute had overruled *Zahn*.⁴⁹

II. *LEONHARDT* REJECTED

At the heart of their disagreement with *Leonhardt*, the Fourth and Ninth Circuits both rejected the notion that § 1337(a)'s reference to "original jurisdiction" should be read to incorporate the jurisdictional rules that govern the joinder of parties and aggregation of claims in diversity litigation. Instead, both courts concluded that the preliminary inquiry into original jurisdiction ought to produce precisely the same results in both federal-question and diverse-party litigation.⁵⁰ Pointing to the example of *Gibbs*, the Ninth Circuit noted that a single federal question claim would plainly suffice to confer "original jurisdiction" on the district court, and would bring supplemental jurisdiction into play to govern the plaintiff's joinder of additional ("pendent") state law claims.⁵¹ If a single jurisdiction-conferring or, in the useful terminology of the American Law Institute project, "freestanding"⁵² claim sufficed as the predicate for supplemental jurisdiction in federal question proceedings, the courts reasoned, it should also suffice in diversity proceedings. Otherwise, the term "original jurisdiction" in the supplemental jurisdiction statute would mean different things, depending on the nature of the claim at issue.

Such an argument for interpretive consistency has an obvious appeal, but does little on its own to undermine the *Leonhardt* account of the statute. For one thing, as this essay discusses below, one can find evidence that the statute simply codifies the somewhat messy distinctions in existing law, rather than striving for a neat consistency.⁵³ As we have seen, the pre-*Finley* cases drew the distinction by rejecting pendent juris-

Ciprofloxacin Antitrust Litigation, 166 F. Supp. 2d 740, 755 (E.D.N.Y. 2001) (rejecting *Rosmer* and *Gibson*).

48. 529 U.S. 333 (2000).

49. See *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 114 (4th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 940 (9th Cir. 2001).

50. See *Rosmer*, 263 F.3d at 115–16 (noting that the *Leonhardt* analysis falters in attributing a difference in meaning to the statute depending on whether the claims in question invoke federal question or diversity jurisdiction); *Gibson*, 261 F.3d at 935–36 (arguing that *Leonhardt* implies that "the term original jurisdiction . . . must mean something different in diversity and federal question cases," but finding no such difference in meaning). In anticipation of, and in response to, this argument, see Pfander, *supra* note 1, at 141–43.

51. See *Gibson*, 261 F.3d at 936 (arguing that the *Leonhardt* interpretation, as applied in the federal question context, would overrule *Gibbs*). For doubts that such would follow, see *infra* note 72.

52. For an overview of the various phrases that have developed to describe what the *ALI Draft* has usefully termed a "freestanding" claim for purposes of supplemental jurisdiction analysis, see Pfander, *supra* note 1, at 117, 126–27 & nn.24, 71.

53. See *infra* notes 65–71 and accompanying text.

dition in diversity matters.⁵⁴ For another, one can find a kind of rough and ready consistency in *Leonhardt's* account. As construed in *Leonhardt*, the term "original jurisdiction" does not change, depending on the context, as the Fourth and Ninth Circuits would have it. Rather, the term means the same thing in both contexts, directing the district court to determine the existence of its original jurisdiction by reference to otherwise applicable law. Two obvious sources of such otherwise applicable law, the federal question grant in § 1331 and the diversity grant in § 1332, provide that the district courts shall have "original jurisdiction" of the civil actions those statutes describe. The rules that govern the assertion of original jurisdiction under these two workhorse statutes obviously differ; the federal question grant requires only a case arising under the constitution, laws, and treaties of the United States and, unlike the diversity grant, includes no requirements of diverse citizenship or a specified matter in controversy.⁵⁵ Section 1367 does not create these differing provisions for the assertion of "original jurisdiction" but simply incorporates existing differences into a new statutory context.

In this respect, § 1367(a) operates much like the removal statute,⁵⁶ on which it was apparently modeled. Closely examined, the language and structure of the two statutes look strikingly similar:

[1367(a):] Except as provided in subsection (b) or (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case.

[1441(a):] Except as otherwise expressly provided by an Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court.⁵⁷

Structural parallels seem obvious, both in the limiting reference to "expressly provided" exceptions and in the use of the phrase "civil action of which the district courts have original jurisdiction" to describe the predicate for the exercise of both supplemental and removal jurisdiction. Such parallelism suggests that § 1367's reference to "original jurisdic-

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

55. See 28 U.S.C. § 1331 (1994) (providing that the district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"); 28 U.S.C. § 1332 (1994 & Supp. V 1999) (providing that the district courts "shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between [diverse parties]"). One can see on the face of these statutes a distinction between the federal question grant's focus on the subject in dispute and the diversity grant's focus on the amounts in controversy and the identity of the parties. Cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821) (drawing a similar distinction about the subject matter and party-based jurisdictional categories in Article III).

56. Compare 28 U.S.C. § 1367(a) (1994), with *id.* § 1441(a) (1994).

57. 28 U.S.C. §§ 1367(a), 1441(a) (1994).

tion" was to carry much the same meaning as the similar reference in the removal statute.⁵⁸

If we examine the role that the reference to "original jurisdiction" performed in removal law at the time of § 1367's enactment, we find it playing much the same incorporation function that the *Leonhardt* court proposed. Removal law has long held that the district courts must determine the existence of "original jurisdiction," and hence removability, by reference to the all of the familiar rules of joinder and aggregation that make up the complete diversity and amount-in-controversy requirements.⁵⁹ To remove a diversity proceeding, therefore, the defendant must show that the plaintiff's well-pleaded complaint asserts claims and aligns parties in ways that satisfy both requirements. State court complaints that join a nondiverse defendant, or assert claims in amounts below the required threshold, simply lie outside the district court's original jurisdiction. In cases such as *Zahn*, therefore, the district courts would have clearly lacked removal jurisdiction (at least before the adoption of the supplemental jurisdiction statute).⁶⁰ The presence of unnamed class members with claims below the jurisdictional threshold would have precluded original jurisdiction from attaching to the state court complaint and would have barred removal.

Just as the removal statute's reference to "original jurisdiction" incorporated the *Zahn* rule and other elements of the complete diversity requirement, so too did the reference incorporate the pendent claim jurisdiction of cases such as *Gibbs*. In the years preceding § 1367's enactment, district courts routinely exercised removal jurisdiction over suits in state court that asserted both federal question claims, and pendent state law claims.⁶¹ To be sure, the district courts often faced motions to dis-

58. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991) (relying upon specific references in other statutes to conclude that the omission of any reference to expert witness fees foreclosed their recovery under a statute that provides for the award of a "reasonable attorney's fee"); *Lorillard v. Pons*, 434 U.S. 575 (1978) (ascribing interpretive weight to the fact that Congress had apparently based the statute under review on the terms of another statute with an established meaning). Cf. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (arguing that interpretation of the Constitution might similarly benefit from a consideration of the consistent use of language in that document).

59. See *WRIGHT*, *supra* note 13, at 224, 227–29 (noting the general rule of removability as determined by reference to the existence of original jurisdiction, as well as certain exceptions in the removal statute itself).

60. The bar to removal in a *Zahn* setting explains why the district court in *Gibson* remanded the action to state court after finding that § 1367 had left the *Zahn* rule intact. See *Gibson v. Chrysler Corp.*, No. C-99-1047-49 MHP, 1999 WL 1045972, at *7 (N.D. Cal. May 28, 1999), *aff'd on other grounds*, 261 F.3d 927 (9th Cir. 2001).

61. See, e.g., *Allor v. Amicon Corp.*, 631 F. Supp. 326, 332 n.4 (E.D. Mich. 1986) (noting routine availability of pendent claim removal jurisdiction over state-law claims that satisfy the *Gibbs* test); *Fritts v. Niehouse*, 604 F. Supp. 823, 825 n.1 (W.D. Mo. 1984) (same). In addition to the availability of pendent claim jurisdiction as part of the district court's original jurisdiction in removal, the removal statute provided for removal jurisdiction over so-called separate and independent claims. For a summary of "separate and independent" claim removal, and its increasingly anomalous status after *Gibbs* broadened the scope of pendent claim jurisdiction, see *WRIGHT*, *supra* note 13, at 233–40. The same statute that codified supplemental jurisdiction also restricted the scope of separate and independent claim removal to civil actions that assert federal question claims. See 28 U.S.C. § 1441(c) (1994),

miss or remand the state law claims and were thus required to consider the factors that, under *Gibbs*, were to inform the discretionary side of pendent claim analysis.⁶² But, as a threshold matter of removal law, the district courts clearly enjoyed original jurisdiction over the entire case, including both the federal question and related state law claims.

As this brief summary reveals, § 1441's requirement of "original jurisdiction" performed different work, depending on the nature of the litigation at hand. In diversity proceedings, the requirement that the district court secure "original jurisdiction" incorporated the restrictive complete diversity and matter-in-controversy rules that had foreclosed expansive use of pendent-style supplemental jurisdiction in that setting.⁶³ A single, freestanding diversity claim was insufficient to ground the original jurisdiction of the district court for removal purposes and to make such jurisdiction available. In federal question proceedings, by contrast, the term "original jurisdiction" enabled the district courts to exercise removal jurisdiction over both a single, freestanding federal question claim and related (i.e., pendent) state law claims.⁶⁴ One can scarcely find in such a regime the sort of logical consistency that the Fourth and Ninth Circuits looked for in their review of the supplemental jurisdiction statute. One finds instead the simple incorporation of the established, though messy and somewhat inconsistent, rules of "original jurisdiction."

Drafting history supports the notion that § 1367 used the term "original jurisdiction" to incorporate these familiar, if inconsistent, rules into the supplemental jurisdiction statute. An early draft of a more internally consistent version of the supplemental jurisdiction statute had appeared in the working papers of the Federal Courts Study Committee and read as follows:

- (a) Except as provided in subsections (b) and (c) or in another provision of this Title, in any civil action on a claim for which jurisdiction is provided, the district court shall have jurisdiction over all other claims arising out of the same transaction or occurrence, including claims that require the joinder of additional parties.⁶⁵

amended by Act of Dec. 1, 1990, tit. III, § 312, 104 Stat. 5114, 5114. Substantial doubts persist as to the constitutionality of such separate claim removal jurisdiction, at least where it purports to confer jurisdiction over state-law claims so unrelated to the federal claim as to exceed the *Gibbs* definition of the breadth of a case under Article III. *See WRIGHT, supra* note 13, at 238–39.

62. The *Gibbs* factors, codified with some slight modifications in § 1367(c), invite the district court to consider whether to refrain from asserting pendent jurisdiction in situations where the state-law claims predominate or present complex and novel issues that the state courts might better handle in the first instance. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). On the connection, see *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 165 (1997) (describing § 1367(c) as a codification of discretionary regime of *Gibbs*).

63. *See supra* notes 59–60 and accompanying text.

64. *See supra* notes 61–62 and accompanying text.

65. 1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 567–68 (1990) [hereinafter WORKING PAPERS]. Although the working papers recommended a variety of changes in federal jurisdiction, a smaller subset of those proposals actually appeared in the final report of the Study Committee. Among the recommendations, the Committee proposed that Congress re-

The working papers described this draft version of the statute as a general grant of supplemental jurisdiction, and it was followed by subsections that narrowed the scope of the general grant. The draft thus does bear some structural resemblance, as the Ninth Circuit recently suggested, to the final version of § 1367.⁶⁶

Despite structural similarities, however, the operative language of the draft and final versions of § 1367 differ quite significantly. As quoted above, the draft would have required only that the district court identify a single “claim” within its jurisdiction and would have then conferred jurisdiction over “all other claims” that meet the draft’s transaction-or-occurrence test. One might well interpret such a “claim-specific” approach as overruling *Zahn*—a goal the working papers had set out to achieve⁶⁷—by making the presence of a single, freestanding claim the predicate for the exercise of broader jurisdiction.⁶⁸ Notably, however, the final text of § 1367 abandoned the claim-specific approach of the working papers for a more “action-specific” focus on the existence of “original jurisdiction.” In particular, the statute provides that the district court must first obtain “original jurisdiction” of a “civil action,” rather than simply “jurisdiction” over a “claim.”⁶⁹ Such phrasing appears to suggest that district courts must determine the existence of their jurisdiction by initial reference to all of the claims in the complaint and not just to a single claim that itself fits within the court’s jurisdiction. The remainder of the statute confirms this conclusion; it makes supplemental jurisdiction available over “all other claims” that are “so related to claims in the action within such original jurisdiction” as to form a single constitutional case.⁷⁰ Here again, the statute suggests that district courts

store and codify supplemental jurisdiction in the wake of *Finley*. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47–48 (1990).

66. See *Gibson v. Chrysler Corp.*, 261 F.3d 927, 936–37 (9th Cir. 2001) (describing the draft in the Working Papers as a model for the drafting of § 1367); cf. *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, & the Admin. of Justice of the Comm. on the Judiciary*, 101st Cong. at 716–18 (1990) (reprinting letter dated Aug. 28, 1990, from Thomas Mengler to Tom Rowe that describes the drafters’ reliance on the working papers and their deliberate decision to depart from that approach in the phrasing of subsection (a)).

67. See WORKING PAPERS, *supra* note 65, at 561 n.33 (describing the draft statute as aimed at restoring the law prior to *Finley* with the exception of *Zahn*, which it proposed to overrule). In truth, though, the working papers draft would have apparently abrogated the complete diversity requirement itself by failing to include an exception to foreclose supplemental jurisdiction over parties joined under Rule 20. See *id.* at 568 (setting forth exceptions in subsection (b) but failing to include a Rule 20 exception).

68. Here, I borrow the terminology of the *ALI Draft*, which offers a useful distinction between the claim-specific approach that governs supplemental jurisdiction in federal question cases and the action-specific approach in diversity. In brief, a claim-specific approach treats a single “freestanding” claim as sufficient to confer jurisdiction and treats all related claims as supplemental claims. In contrast, the action-specific approach of diversity focuses on the entire action to determine the existence of jurisdiction. The *ALI Draft* proposes to achieve logical consistency by making the claim-specific approach applicable to both freestanding federal question and diversity claims.

69. See 28 U.S.C. § 1367(a) (1994).

70. *Id.*

should determine the “original jurisdiction[al]” predicate for supplemental jurisdiction by reference to all of the claims in the complaint.⁷¹

Although the text and drafting history provide substantial support for *Leonhardt*'s argument that § 1367(a) incorporates the rules of complete diversity and preserves the result in *Zahn*, one must recognize that ambiguities crop up on the federal question side. A requirement that the district courts determine their original jurisdiction by reference to rules that previously governed such civil actions as *Gibbs* and *Finley* would produce curious results. In *Gibbs*, the Court upheld the assertion of original jurisdiction over both the freestanding and the pendent claim; a formalistic extension of the *Leonhardt* focus on the availability of original jurisdiction under prior law would seemingly make the statutory grant of supplemental jurisdiction superfluous in the *Gibbs* context.⁷² In *Finley*, by contrast, the Court rejected pendent party jurisdiction and thus deprived the district courts of original jurisdiction over the proceeding.⁷³ Without original jurisdiction, district courts would apparently lack the predicate for the exercise of pendent-party-style supplemental jurisdiction. A wooden application of the *Leonhardt* focus on the prior rules of original jurisdiction would thus produce results inconsistent with Congress's apparent goal of overruling *Finley*.

One can work around this seeming anomaly only through an interpretation that takes account of the fundamental differences in the pre-*Finley* analysis of original and supplemental jurisdiction on the federal question and diversity sides of the docket. On the federal question side, a single, freestanding claim sufficed to confer original jurisdiction, and pendent claim jurisdiction governed the joinder of additional claims in the plaintiff's complaint.⁷⁴ One can read § 1367(a) as adopting this division, defining such pendent jurisdiction as an element of supplemental jurisdiction, and including pendent party jurisdiction as part of the bargain. On the diversity side, original jurisdiction did a good deal more work in defining the joinder and aggregation of claims in the plaintiff's complaint, and ancillary jurisdiction came into play only later in the

71. *Id.* The statutory assumption that multiple claims make up the civil actions over which the district courts must first secure original jurisdiction before exercising supplemental jurisdiction provides a complete answer to one curious argument in *Rosmer*. The court argued that the statute “contemplates that a ‘civil action’ refers to *one* claim in which original jurisdiction is proper.” See *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 116 (4th Cir. 2001). But the court failed to offer any support for this implausible reading of the text, which plainly refers to multiple claims rather than to a single claim.

72. Contrary to the Ninth Circuit, see *Gibson v. Chrysler Corp.*, 261 F.3d 927, 935 (9th Cir. 2001) (suggesting that the adoption of *Leonhardt*'s approach would overrule *Gibbs*), extension of the *Leonhardt* rule to the federal question context would approve the *Gibbs* result but would make supplemental jurisdiction irrelevant. In *Gibbs*, the Court held that the district court could exercise pendent claim jurisdiction over the claims at issue in that case. If one conceptualizes *Gibbs* as upholding the exercise of original jurisdiction over both the federal question and pendent state-law claims, then an interpretation of § 1367(a) as incorporating the existing rules of original jurisdiction would seemingly codify the *Gibbs* result as part of original jurisdiction.

73. See *supra* notes 19–21, 27–30 and accompanying text.

74. See *supra* notes 10–12 and accompanying text.

analysis of the defensive joinder of claims and parties.⁷⁵ One can read § 1367 to incorporate these rules of original jurisdiction, and to make only ancillary style supplemental jurisdiction available in diversity. Although it would thus produce different approaches in federal question and diversity litigation, such a reading of § 1367(a) would simply incorporate differences under existing law and would have the virtue of producing results that conform to the apparent desire of Congress to codify the pre-*Finley* doctrines of pendent and ancillary jurisdiction.

III. *LEONHARDT* DEFENDED

Once one perceives the difference in the meaning of original jurisdiction as consistent with much of the pre-*Finley* status quo, and as flowing from § 1367's incorporation of the differences in other statutory provisions, many of the criticisms of the *Leonhardt* approach simply fall away. Instead of a crisp and logically consistent line between original jurisdiction over a particular freestanding claim, and supplemental jurisdiction over everything else, § 1367 simply picks up the distinctions in judge-made jurisdictional law. With those distinctions in mind, one can offer persuasive answers to the various criticisms that the Fourth and Ninth Circuits have made of the *Leonhardt* approach.

For starters, both opinions suggest that the exceptions sketched in § 1367(b) help to confirm that Congress must have contemplated the exercise of broad-ranging, *Gibbs*-style pendent party jurisdiction in diversity matters. Absent broad pendent-style jurisdiction, the opinions argue, Congress would have had no occasion to fashion the particular exceptions for diversity litigation.⁷⁶ But a careful review of the operation of the exceptions in § 1367(b) actually tends to confirm the *Leonhardt* approach. Consider again the language of the provision:

(b) In any civil action of which the district courts have original jurisdiction founded solely on [diversity], the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of [diversity].⁷⁷

Notice first that this list of exceptions generally ignores the plaintiff's joinder of claims and parties in the initial complaint.⁷⁸ Rather, the excep-

75. See *supra* notes 13–15 and accompanying text.

76. See *Rosmer*, 263 F.3d at 120; *Gibson*, 261 F.3d at 937–38.

77. 28 U.S.C. § 1367(b) (1994).

78. Under the standard account, which reads § 1367(a) as conferring a broad grant of pendent-style supplemental jurisdiction in diversity cases, the exception for Rule 20 joinder in § 1367(b) plays an important role in preserving the complete diversity requirement. As conventionally read, the Rule

tions address situations in which district courts have agreed to hear additional claims against newly joined parties in the exercise of ancillary jurisdiction; the subsection attempts to clarify that such ancillary jurisdiction should not extend so far as to include the claims that the plaintiff asserts against such newly joined parties. Such a reading explains why the statute refers to claims by plaintiffs "against persons made parties" under various rules of procedure. Its use of the passive voice here clarifies that the exceptions apply not to the plaintiff's initial assertion of claims but to the plaintiff's subsequent assertion of claims against those that the initial defendants have added to the litigation.⁷⁹

A second feature of § 1367(b), largely overlooked in the literature, confirms that the drafters did not read § 1367(a) as conferring pendent-style supplemental jurisdiction in diversity. Subsection (b) includes an exception for claims by plaintiffs joined as such under Rules 19 and 24—rules that govern the joinder of indispensable parties and the intervention of additional parties, both permissively and as of right.⁸⁰ Such an exception, especially as to plaintiffs seeking intervention as of right, makes little sense under the interpretive rule that emerges from *Rosmer* and *Gibson*. Both decisions read § 1367(a) as conferring broad, pendent-party-style supplemental jurisdiction on the district courts.⁸¹ Under such jurisdiction, a single diverse plaintiff may join additional nondiverse plaintiffs under Rule 20 and prosecute claims against a single defendant in apparent disregard of the complete diversity rule. One wonders why Congress would have bothered to protect against the possibility of nondiverse intervening plaintiffs if it understood § 1367(a) to have pro-

20 exception precludes the exercise of supplemental jurisdiction as to any claims by plaintiffs against persons made parties under Rule 20, including the claims that plaintiffs might assert in the first instance against two or more defendants joined under Rule 20. So read, the Rule 20 reference seemingly applies to the initial joinder of claims and parties in the plaintiff's complaint and may thus appear as an exception to the generally ancillary thrust of the other exceptions in § 1367(b). One can, however, offer an alternative account of the Rule 20 reference that preserves its ancillary quality. See Pfander, *supra* note 1, at 143–47 (portraying the Rule 20 reference as a limit on the assertion of claims by plaintiffs against parties brought into the litigation as additional defendants to compulsory counter-claims and cross-claims by the initial defendants; noting that the transactional test of Rule 20 governs such joinder issues under Rules 13 and 14).

79. The Court's decision in *Kroger*, itself a diversity case, offers the definitive illustration of the operation of this exceptional language. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978). There, the Court approved the exercise of ancillary jurisdiction over the defendant's joinder under Rule 14 of a nondiverse third-party defendant. See *id.* at 375 n.18. But the Court ruled that such ancillary jurisdiction did not extend to the plaintiff's claims against such a person, reasoning that an extension of ancillary jurisdiction would undermine the complete diversity requirement. *Id.* at 373–74. Section 1367(b) codifies the *Kroger* result by foreclosing the exercise of supplemental jurisdiction over claims by the plaintiff against persons made parties under Rule 14. As a restriction on the exercise of ancillary jurisdiction, the Rule 14 exception confirms that the drafters understood that the statutory grant of supplemental jurisdiction in § 1367(a) would operate as a source of ancillary jurisdiction in diversity matters.

80. See FED. R. CIV. P. 19 (providing for the joinder of parties necessary for a just adjudication but recognizing that the absence of jurisdiction might foreclose such joinder and necessitate an assessment of whether the litigation should continue in the party's absence); FED. R. CIV. P. 24 (providing for intervention as of right, and permissively, for parties that claim an interest in the litigation).

81. *Rosmer*, 263 F.3d at 120; *Gibson*, 261 F.3d at 937–38.

vided such plaintiffs with a more straightforward, Rule 20 method to skirt the complete diversity rule. Here again, the fact that the subsection (b) exceptions seek to rein in the exercise of ancillary jurisdiction tends to confirm that subsection (a) confers only that variety of supplemental jurisdiction in diversity.

Such an understanding of the operation of § 1367(b) provides a complete answer to the *Rosmer* court's suggestion that the *Leonhardt* account leaves the existence of § 1367(b) unexplained. To be sure, as *Rosmer* suggests, the simple presence of subsection (b) makes it absolutely clear that the grant of supplemental jurisdiction in subsection (a) applies to diversity litigation.⁸² But the presence of exceptions does not prove that the grant of supplemental jurisdiction in subsection (a) operates as a grant of pendent-style supplemental jurisdiction, as the Fourth Circuit apparently assumed. Rather, the exceptions plausibly appear as limits on the scope of ancillary jurisdiction in diversity. Thus, one can follow *Leonhardt* in reading subsection (a) as codifying ancillary jurisdiction in diversity and still make sense of subsection (b) as fashioning exceptions to such ancillary jurisdiction that seek to preserve complete diversity.

The Ninth Circuit's analysis of the supposed flaws in *Leonhardt*'s account of the function of the exceptions similarly fails to demonstrate that § 1367(a) confers pendent-style supplemental jurisdiction in diversity matters. The Ninth Circuit first emphasized the inclusion of the Rule 20 exception in § 1367(b), arguing that its presence tends to confirm a desire to cut back on pendent-style supplemental jurisdiction over claims that the plaintiffs asserts against parties joined as defendants under Rule 20 in the initial complaint.⁸³ As I have suggested elsewhere, however, the language of the Rule 20 exception may be read to refer not to the claims that the plaintiff asserts initially, but to those that the plaintiff later asserts against persons "made parties" by others under the transaction test of Rule 20.⁸⁴ This ancillary phrasing suggests a reading of the statute as foreclosing ancillary jurisdiction over claims by plaintiffs against new parties joined as additional defendants to one defendant's counterclaims and cross-claims under the transactional test of Rule 20.⁸⁵ Simple inclusion of Rule 20 in the list of exceptions thus does not establish the presence of pendent-style jurisdiction in § 1367(a).

82. See *Rosmer*, 263 F.3d at 120 (arguing that the statute would have had no occasion to include exceptions unless the grant of supplemental jurisdiction applied in diversity).

83. See *Gibson*, 261 F.3d at 936 (noting the Rule 20 exception and arguing that it establishes the existence of pendent-party-style supplemental jurisdiction).

84. See Pfander, *supra* note 1, at 143–47.

85. *Id.* at 145–46 (noting that Rule 13(h) allows a defendant to join additional defendants as parties to compulsory counterclaims and cross-claims, so long as such joinder satisfies the transaction or occurrence test of Rule 20).

Nor does its analysis of the final qualifier in § 1367(b) add much to the Ninth Circuit's critique of the *Leonhardt* approach.⁸⁶ The *Gibson* court observes, quite correctly in my judgment, that the exception for circumstances that do not threaten the complete diversity requirement has the effect of bringing nonthreatening claims by the plaintiff back within the scope of supplemental jurisdiction that § 1367(b) might otherwise place beyond federal diversity jurisdiction.⁸⁷ *Gibson* goes on to illustrate the idea, again quite correctly, by noting the possibility that plaintiffs might assert claims in the nature of compulsory counterclaims in response to those that third-party defendants have asserted against them under Rule 14.⁸⁸ *Gibson* suggests that its reading of § 1367(b) has the advantage of preserving supplemental jurisdiction over these compulsory counterclaims, and thus avoids the unfairness and inefficiency of denying the plaintiff an opportunity to set up defensive claims that pose a reduced threat to the complete diversity requirement.⁸⁹

Although *Gibson* correctly notes the desirability of preserving this "small slice of supplemental jurisdiction,"⁹⁰ the court wrongly assumes that its approach would uniquely achieve this goal and that *Leonhardt*'s would fail. *Gibson* appears to believe that *Leonhardt*'s refusal to find a grant of pendent-style supplemental jurisdiction in § 1367(a) would mean that the plaintiff's Rule 14 compulsory counterclaim would lack any jurisdictional foundation. Seeing it as lacking a foundation in § 1367(a), the *Gibson* court views the plaintiff's claim as one that the *Leonhardt* interpretation would place beyond the saving power of the § 1367(b) exception for nonthreatening claims.⁹¹ But the *Leonhardt* court's rejection of pendent-style supplemental jurisdiction would not deprive the district courts of a supplemental jurisdiction foundation for the plaintiff's Rule 14 compulsory counterclaim. As the Ninth Circuit itself recognizes, prior decisional law took the position that such compulsory counterclaims came within the scope of the district court's ancillary jurisdiction; plaintiffs were, after all, setting up such claims in a defensive posture.⁹² If one reads the grant of supplemental jurisdiction in § 1367(a) as codifying the operation of ancillary jurisdiction in diversity cases, the statute provides ample foundation for the evidently ancillary compulsory counterclaim in

86. See 28 U.S.C. § 1367(b) (1994) (limiting the exceptions to situations in which "exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of [diversity]").

87. See *Gibson*, 261 F.3d at 937–38 (analyzing the "last phrase" of § 1367(b)).

88. See *id.* at 938.

89. *Id.*

90. *Id.*

91. *Id.* (suggesting that its reading would "preserv[e] a small slice of supplemental jurisdiction that would otherwise have been lost;" assuming that the *Leonhardt* interpretation would produce this loss).

92. *Id.* (citing *Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709 (5th Cir. 1970), to illustrate the possibility that supplemental jurisdiction might well extend a plaintiff's compulsory counterclaim to the claims of a third-party defendant under Rule 14).

question. On such a reading, the final exception for claims that pose no threat to complete diversity would perform precisely the same function under both the *Gibson* and *Leonhardt* approaches. The *Gibson* account of the last phrase of the exception thus lacks resolving power in a debate over which interpretation best fits the text and history of the statute.

Finally, the *Gibson* court errs in suggesting that the procedure that governs class action certification practice compels a rejection of the *Leonhardt* holding.⁹³ *Gibson* focuses on the status of the litigation at the time of filing; as of that date, only the named representative of the plaintiff class actually appears as a party to the litigation. The remaining, unnamed members of the plaintiff class do not actually become parties until such time (often much later) when the district court certifies the class as such and sends out any required notices.⁹⁴ Building on the absence of the unnamed class members, the *Gibson* court suggests that original jurisdiction plainly exists as between the parties before the court in a *Zahn* situation.⁹⁵ *Gibson* concludes that the presence of diverse parties confers “original jurisdiction” on the district court even under *Leonhard*’s restrictive reading of § 1367(a).

Although *Gibson* rightly describes class action practice,⁹⁶ its conclusion as to original jurisdiction does not necessarily follow. Consider a *Zahn* class action, filed in state court and removed to federal court under § 1441(a). Leaving aside § 1367, district courts would routinely refuse to accept removal jurisdiction of such a class action, no doubt because they would conclude that the putative class action lay beyond their “original jurisdiction” as defined in *Zahn*.⁹⁷ Such a rejection of jurisdiction would hold, even where the court had yet to reach any decision about the certification of the plaintiff class.⁹⁸ In other words, one ordinarily determines the existence of “original jurisdiction” by assuming the truth of the well-pleaded *claims* in the plaintiff’s complaint, or by assuming that the class

93. *Id.* at 937.

94. *Id.*

95. *Id.*

96. For an overview of the factors that govern certification under Rule 23 and a recognition that such determinations may come well after the filing of the complaint, see JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 740–52, 759–60 (3d ed. 1999).

97. Thus, in *Gibson* itself, the district court refused (prior to certification) to accept jurisdiction over an action removed from state to federal court on the ground that *Zahn* remained good law. It thus concluded, implicitly but unmistakably, that the presence of diverse parties in the precertification stage did not suffice to confer original jurisdiction. Although the Ninth Circuit reversed on the *Zahn* issue, its agreement with the district court on other issues of aggregation led it to uphold a remand of the action to state court. *See Gibson*, 261 F.3d at 943, 950 (affirming the remand on aggregation grounds separate from the *Zahn* issue).

98. Indeed, given the time lag that *Gibson* identifies between filing and certification, and the relatively short window for removal, one would expect that most defendants would have removed the action before the state court would reach the class certification issue. *See* 28 U.S.C. § 1446(b) (1994) (specifying a thirty-day period from the receipt of the initial pleading during which the defendants may remove the action to federal court). *But cf.* S. REP. NO. 106-420, at 16–19 (2000) (finding state court judges to be “lax about following the strict requirements of rule 23” and criticizing some state courts for certifying class actions before defendants have been notified of the pendency of the claims).

would be certified in due course.⁹⁹ It would simply make no sense to assert jurisdiction over the case based on the parties before the court, reach the certification issue, and then dismiss on jurisdictional grounds if class certification were proper. The purely hypothetical “original jurisdiction” that *Gibson* would have the district courts exercise over the parties named in a *Zahn* action as filed has had but little practical relevance to the determination of either removal or supplemental jurisdiction. Why it should play a more central role in § 1367, *Gibson* fails to show.

IV. LEONHARDT AND LEGISLATIVE HISTORY

The puzzle of the text of § 1367 thus remains. One can read it either as the *Leonhardt* and *Trimble* courts did, to preserve the messy rules of original jurisdiction in diversity with some threat to logical consistency, or as the *Rosmer* and *Gibson* courts did, as a consistently broad grant of supplemental jurisdiction that poses a major threat to the rules of complete diversity. Faced with the puzzle of the text,¹⁰⁰ the Tenth Circuit turned to the legislative history of the statute—a traditional, if still controversial,¹⁰¹ point of reference in cases that call for the interpretation of ambiguous statutes. Like the Third Circuit in *Meritcare*, *Leonhardt* concluded that the House committee report and other reliable sources pointed unambiguously to the preservation of *Zahn* and to that of other generally restrictive rules of diversity jurisdiction.¹⁰²

Although *Rosmer* and *Gibson* both declined to do so directly, one cannot quite escape the sense that they too drew on an understanding of the legislative history to inform their answer to the statutory puzzle. To

99. In general, federal courts determine the existence of diversity jurisdiction as of the date of filing based upon the facts disclosed in the complaint. *See generally* WRIGHT, *supra* note 13, at 171–79. But jurisdiction does not attach at the outset for all time. Thus, a plaintiff's proposed joinder of a nondiverse defendant would ordinarily require the district court either to reject the joinder or dismiss the action on jurisdictional grounds. *See, e.g.*, Hengens v. Deere & Co., 833 F.2d 1179, 1181–82 (5th Cir. 1987). It thus makes little sense to adopt a rule that would rely solely upon the named plaintiff to determine the existence of diversity jurisdiction at the outset of class litigation; subsequent decisions about the joinder through certification of unnamed plaintiffs would require the court to revisit its jurisdictional determination. Not surprisingly, then, the federal courts generally consider the parties in the putative class at the threshold of the litigation to determine the existence of jurisdiction. *See Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1263 n.7 (11th Cir. 2000) (treating the putative class suit as such for purposes of jurisdictional inquiry into *Zahn* issues, despite the fact that it had not yet been certified as such); *see also* 3B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.50 (2d ed. 1996) (suggesting that a district court should analyze the existence of jurisdiction by reference to the class allegations in the complaint).

100. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963) (1881) (famously opining the life of the law has not been logic, but experience).

101. On the controversy over the use of legislative history, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); and William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1996).

102. *See Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 219–21 (3d Cir. 1999) (sketching the drafting of the statute with an emphasis on restricting the scope of diversity; citing House committee report to same effect); *Leonhardt v. W. Sugar Co.*, 160 F.3d 631, 639–40 & n.7 (10th Cir. 1998) (citing House committee report statement about the intent to preserve *Zahn* and the other jurisdictional requirements in diversity).

be sure, both courts emphasized the supposed clarity of the statute in refusing to give much, let alone dispositive, weight to the sorts of signals that had proven crucial in *Leonhardt*, *Meritcare*, and *Trimble*.¹⁰³ But both courts subscribed to a commonplace account of the statute as the product of drafting errors.¹⁰⁴ Largely academic, this standard account portrayed the drafters of the statute as having attempted to preserve diversity but as having failed to include the sorts of exceptions in § 1367(b) that would do the job.¹⁰⁵ Even the drafters themselves appeared to agree with this perception of their handiwork, and they expressed the hope that the federal courts would decide to ignore the inadvertent consequences of their drafting mistakes.¹⁰⁶

Both *Rosmer* and *Gibson* picked up this theme of botched drafting. *Rosmer* quoted at some length the drafters “admirabl[y] cand[id]” admission that the text of the statute would appear to overrule *Zahn*.¹⁰⁷ Thus, the court argued that it simply reached the conclusion that the “esteemed drafters” of the statute concede to be inescapable.¹⁰⁸ Although the *Gibson* court stopped short of placing its thumb quite so directly in the drafters’ eye, it did appear to subscribe to the same understanding of the statute as a poor job of statutory drafting. It summarized the legislative history by noting its agreement with the perception that the omission of Rule 23 from the list of exceptions in § 1367(b) “was an oversight.”¹⁰⁹ Having subscribed to this account, the court declined to work around what it deemed the clear consequences of the drafting mistake. It noted in particular that a congressional decision to overrule *Zahn* would stop well short of producing the sorts of absurd results that would justify a decision to ignore plain statutory text.¹¹⁰

One can, however, ask why the considerations that they relied upon in arguing for the interpretive primacy of the text in the first place do not also foreclose the *Rosmer* and *Gibson* courts from according weight to the drafters’ own characterization of their work as flawed. Debates over legislative history emphasize the fact that Congress enacts the text alone, and not the content of the committee reports and the other sources that the Court has occasionally drawn upon in exploring legislative history.¹¹¹

103. See *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 114, 118 (4th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F.3d 927, 938 (9th Cir. 2001).

104. See *Rosmer*, 263 F.3d at 121; *Gibson*, 261 F.3d at 939.

105. For a summary, see Pfander, *supra* note 1, at 110 n.3.

106. See, e.g., Rowe et al., *A Reply*, *supra* note 1, at 961 n.91 (inviting the courts to fill the gaping hole that § 1367 had opened in the complete diversity requirement).

107. See *Rosmer*, 263 F.3d at 121.

108. *Id.*

109. See *Gibson*, 261 F.3d at 939.

110. See *id.* at 940 (noting that other courts had admitted that a statutory decision to overrule *Zahn* would not be absurd); cf. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (noting the appropriateness of examining legislative history when confronted by a statute that, interpreted literally, would produce “an absurd and perhaps unconstitutional result”).

111. Compare John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (arguing that reliance upon committee reports improperly delegates the lawmaking function to

Arguments for textual centrality appropriately describe the many ways in which legislative history of various sorts may tend to distort, often intentionally but perhaps through simple misunderstanding, the text, purpose, and function of a statute.¹¹² Such possible distortions in meaning might emerge equally from the pen of the drafters as from the planted colloquies of interested legislators.¹¹³ However one wishes to parse the history,¹¹⁴ the drafting error account that informs *Rosmer* and *Gibson* does not seem any more relevant or authoritative than the legislative history on which *Leonhardt* relied.

Indeed, most analysts would rate the House committee report on which *Leonhardt* relied as more authoritative than the account of nonlegislative drafters. Committee reports appear at a time when interested legislators continue to monitor legislative developments and may react to certain statements in the report either by pushing for curative language or by advancing competing accounts of legislative purpose. The prospect of such monitoring, especially by those with opposing interests, may ensure a degree of accuracy in the representations of the statute's purpose or function, and such statements form a part of the public record on which subsequent legislation may rest. Explanatory accounts from the drafters that appear after the statute has become law, by contrast, do not necessarily attract the attention of interested legislators, and do not form a part of the public record of the statute.¹¹⁵ Moreover, coming as they do after the fact, such drafters' accounts may raise the sorts of issues the courts must confront any time they propose to interpret a statute based upon subsequent developments that may or may not have informed the views of the enacting Congress. Even where the drafters have no obvious interest in a particular interpretation (as they might, say, if they were associated with a particular interest group and not affiliated with law schools), one can find reasons to worry about an uncritical acceptance of their account.¹¹⁶

a subset of the legislative body), with Peter L. Strauss, *The Courts and Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242 (1998) (defending a role for legislative history).

112. See, e.g., Breyer, *supra* note 101 (acknowledging problems with reliance upon certain kinds of legislative history, but defending a judicious reliance upon committee reports in part on the ground that Congress itself regards such reliance as a key to understanding).

113. On the problems of manufactured legislative history, see Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377 (suggesting that lobbyists and attorneys have created a virtual "cottage industry" in the manufacture of legislative history).

114. Perhaps the drafters and the enacting Congress actually adopted language that achieved the goal of diversity preservation, as *Leonhardt* would have it and in contrast to the drafters' own immediate reaction to their own handiwork. Perhaps the mistake came with their last-second addition of Rule 20 to the list of exceptions in § 1367(b), rather than with their last-second failure to include Rule 23 as well. See Pfander, *supra* note 1, at 145 n.132.

115. See Allison C. Giles, *The Value of Nonlegislators' Contributions to Legislative History*, 79 GEO. L.J. 359, 380–83 (1990).

116. The array of difficulties that arise from reliance upon the statements of nonlegislative drafters suggests a model for the integration of such statements into the interpretive process that would likely result in our discarding such statements from accounts of § 1367. One plausible model in a leading casebook on the legislative process proposes to treat the statements of nonlegislative drafters

Apart from questions about the authoritativeness of drafters' history, one might fairly ask why the federal courts should base their interpretation of § 1367 on the premise of a drafting error. Leave aside the fact that such an admission provides a somewhat dispiriting foundation for the exercise of the creative function that had once informed the business of interpretation.¹¹⁷ Consider instead the fact that even the most committed textualists agree that the interpretive process must take account of how well competing accounts fit "with the rest of the law."¹¹⁸ Such a conception of "fit" would seem to argue for some consideration of whether a particular account achieves what Justice Scalia calls "compatib[ility] with the surrounding body of law" into which the new provision must be integrated.¹¹⁹ From such a perspective, *Rosmer* and *Gibson* fare rather poorly; both adopt a view of the statute that would uproot the established distinctions between pendent and ancillary jurisdiction and (mistakenly, according to its drafters) sweep away established rules of diversity jurisdiction.

V. CONCLUSION

Unlike the approach of its most recent critics, the *Leonhardt* account combines textual plausibility and deep compatibility with the law in place at the time of § 1367's enactment. To be sure, *Leonhardt* offers an interpretation of the term "original jurisdiction" that picks up distinctions that had emerged on the federal question and diversity sides of the district court dockets. But its incorporation of such distinctions produces results quite similar to those that were obtained by the similar reference to "original jurisdiction" in the removal statute, on which § 1367 was apparently modeled. In picking up messy but established distinctions, *Leonhardt's* account thus achieves the apparent congressional goals of codifying pendent party and ancillary jurisdiction and leaving everything else pretty much alone. One could find a worse resolution of the long running debate over supplemental jurisdiction.

much the way it would treat other interpretive accounts that appear in law review articles or other learned publications. See WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 1002 (3d ed. 2001) (raising such questions). Such law review accounts might well enjoy a measure of influence in the interpretive process, not by virtue of their author's involvement in drafting the legislation, but by virtue of the cogency of the interpretation they offer. So while the drafters' statements in the wake of the statute's enactment might have accurately reflected their thinking at the time, one cannot uncritically attribute those views to the members of Congress or to the statute itself. Indeed, one should not assume that those earlier views reflect the drafters' own best judgment about how to read the statute today. Just as the drafters themselves remain free to rethink their views, the federal courts may discount such views in choosing among competing explanations of the statute and need not treat them as a part of the statute's official legislative history. *See id.*

117. See generally BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 125-37 (1921).

118. *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

119. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

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