A SUMMARY JUDGMENT IS NOT A DISMISSAL!

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I. INTRODUCTION

A summary judgment is not a dismissal.

This proposition might be surprising to many. After all, summary judgments have been referred to as dismissals by countless lawyers, judges, and even law professors. But this practice is wrong. Summary judgments

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1. See, e.g., Bell v. Thompson, 545 U.S. 794, 798 (2005) (“In February 2000, the [district court] granted the State’s motion for summary judgment and dismissed the habeas petition.”); Smith v. City of Jackson, 544 U.S. 228, 231 (2005) (“The District Court granted summary judgment to the City on both claims. The Court of Appeals . . . affirmed the dismissal of the disparate-impact claim.”). In fairness, the Supreme Court may be merely describing what some subordinate court purported to do. See, e.g., Jones v. Clinton, 990 F. Supp. 657, 679 (E.D. Ark. 1998) (“For the foregoing reasons, the Court finds that the President’s and Ferguson’s motions for summary judgment should both be and hereby are granted. There being no remaining issues, the Court will enter judgment dismissing this case.”). Still, even the Supreme Court does not seem to be going out of its way to get this right.

2. See, e.g., 11 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 56.30[3][a], at 56-217 (3d ed. 2006) (“Summary judgment is often conflated with Rule 12(b)(6) motions to dismiss for failure to state a claim on which relief may be granted, because both motions when granted result in dismissal of a claim or case.” (footnote omitted)); Arthur R. Miller, Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come, 119 HARV. L. REV. 703, 707 (2006) (“The [district
and dismissals are not the same. In fact, when a motion for summary judgment is granted—even a motion granted in favor of a defendant—nothing is dismissed. It is true that both summary judgments and dismissals result in the termination, or disposition, of the underlying action;3 but that is essentially where the similarities end.

Because a summary judgment does not result in a dismissal, this practice of referring to a summary judgment as a dismissal should stop. Referring to a summary judgment as a dismissal not only is wrong, but it also can lead to significant problems.

In the next Part of this Article, I will attempt to show why a summary judgment is not a dismissal. After that, I will attempt to show the importance of maintaining this distinction.4

II. WHY A SUMMARY JUDGMENT IS NOT A DISMISSAL

The proposition that a summary judgment is not a dismissal is based primarily on the language and structure of the Federal Rules of Civil Procedure5 and on the distinctive characteristics of summary judgments and dismissals as ordinarily employed. Though referring to a summary judgment as a dismissal has some support in prior practice, the evidence supporting a distinction between these procedures is, on balance, overwhelming.

Perhaps the strongest evidence of a distinction between summary judgments and dismissals can be found in the language and structure of the Rules. A careful reading of the Rules reveals that they never refer to a summary judgment as a dismissal, nor do they provide that a dismissal includes a summary judgment.6 To the contrary, the Rules maintain a strict
separation between the rules governing dismissals and the rule governing summary judgments. This fact alone is strong evidence that summary judgments and dismissals represent distinct procedures.

Further evidence that summary judgments are not dismissals can be found in a comparison of the characteristics of the former with those of the latter.

Perhaps the most significant distinction between these procedures is that summary judgments always relate to the merits of the action, whereas argument, though, is that this is not true of a trial; nothing is dismissed there either. Indeed, virtually everything discussed in this Article regarding the distinction between summary judgments and dismissals is also true of trials and dismissals. See infra note 31 and accompanying text. Thus, this portion of Forms 31 and 32 is simply wrong. In 2002, I wrote to the Advisory Committee on Civil Rules regarding this error and suggested that it be corrected. See ADVISORY COMM. ON CIVIL RULES, CIVIL RULES SUGGESTIONS DOCKET (HISTORICAL) 32 (2006), http://www.uscourts.gov/rules/cvdocket.pdf. According to the Committee, my suggestion is still “pending further action.” Id.

7. See FED. R. CIV. P. 4(m), 12(b), 17(a), 25(a)(1), 37(b)(2)(C), 41, 71A(i). It is true that Rule 12(b) provides that if, on a motion to dismiss for failure to state a claim upon which relief can be granted, “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .” Id. R. 12(b). But this is certainly no indication that summary judgments and dismissals are interchangeable—indeed, it leans in the opposite direction.

8. See id. R. 56.

9. Of course, it might be observed that the Rules also fail to provide that a summary judgment is not a dismissal, and the fact that the Rules do not refer to a summary judgment as a dismissal does not necessarily mean that this is not so. On the other hand, if (as I suggest) a summary judgment is not a dismissal, it seems unlikely, given the general nature of legal drafting, that the Rules would so provide. After all, a summary judgment is not a lot of things—and given the other differences between these procedures, which this Part will address, the negative implication here seems strong.

10. See 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2712, at 212 (3d ed. 1998) (“A summary-judgment motion goes to the merits of the case . . . .”). Admittedly, one can find examples of motions not based on the merits that were termed motions for summary judgment; for instance, in Carnival Cruise Lines, Inc. v. Shute, a motion to dismiss based on a contractual forum selection clause was made as a motion for summary judgment. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 588 (1991). This was clearly wrong. As explained by the United States Court of Appeals for the Fifth Circuit,

[although [the defendant] called it a motion for summary judgment, the motion did not raise an objection or defense to the merits of [the plaintiff’s]
dismissals generally do not. 11 This distinction is important because “a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction).” 12 On the other hand, the Supreme Court has held that “a court may dismiss for lack of personal jurisdiction without first establishing subject-matter jurisdiction.” 13 Recently, it held that a court may decide a motion to

Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909 n.3 (5th Cir. 1993). Thus, just as a summary judgment is not a dismissal—meaning a summary judgment should not be sought through a motion to dismiss—a dismissal is not a summary judgment, and should not be sought thereby. 11. See, e.g., Semtek Int’l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506 (2001) (interpreting “adjudication upon the merits” for the purpose of Rule 41 as generally meaning only that the subject dismissal bars the relitigation of the issue decided). There are two exceptions to this general rule. The first consists of those dismissals that, for unrelated reasons, are “deemed” to be on the merits, such as a voluntary dismissal that expressly so provides, a second voluntary dismissal, or an involuntary dismissal precipitated by particularly egregious behavior on the part of the plaintiff. See FED. R. CIV. P. 41(a)(1), 41(b); Semtek, 531 U.S. at 509. Obviously, though, these sorts of dismissals do not actually involve the adjudication of the merits, but rather, for preclusive reasons, are given the same effect by operation of law. See infra note 19 and accompanying text. The second exception is the dismissal for failure to state a claim upon which relief can be granted, which has been regarded as relating to the merits of the action. See FED. R. CIV. P. 12(b)(6); Bell v. Hood, 327 U.S. 678, 682 (1946) (“[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits . . . .”). Indeed, a motion to dismiss for failure to state a claim is treated as a motion for summary judgment upon consideration of matters beyond the pleadings. See FED. R. CIV. P. 12(b); supra note 7. In a sense, the motion to dismiss for failure to state a claim has been misclassified; certainly, given its effect and relationship to a motion for summary judgment, such a motion would be more accurately termed a motion for judgment on the complaint, because that is essentially what it is. Cf. id. R. 12(c) (providing procedure for “judgment on the pleadings”). In any event, the fact that a dismissal for failure to state a claim somewhat resembles a summary judgment does not at all compel a conclusion that a summary judgment is also a dismissal. 12. Sinochem Int’l Co. v. Malasia Int’l Shipping Corp., 127 S. Ct. 1184, 1191 (2007) (citing Steel Co. v. Citizens for Better Env’t, 525 U.S. 83, 93–102 (1998)). Of course, because any objection to personal jurisdiction may be waived, a federal court has no affirmative duty to make such a determination absent a timely assertion of this defense. See FED. R. CIV. P. 12(h)(1). 13. Sinochem, 127 S. Ct. at 1191 (citing Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578 (1999)).
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dismiss under the doctrine of forum non conveniens without deciding whether it has subject matter or personal jurisdiction, at least if the court determines “that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.”

Also consider the manner in which factual disputes are resolved in connection with the typical motion to dismiss as opposed to a motion for summary judgment. Even when a jury trial has been demanded, it is the court— that is, the judge— that typically resolves factual disputes associated with motions to dismiss. Conversely, what happens when a court confronts a “genuine issue as to any material fact” in connection with a motion for summary judgment? The motion must be denied.

There are also differences in the preclusive effect of these dispositions. A summary judgment, because it relates to the merits, always precludes the relitigation of the underlying claims. A dismissal, on the other hand, does not always preclude the relitigation of the underlying claims.

14. *Id.* at 1188. Indeed, it might be that a federal court may decide *any* nonmerits-based dismissal without first assessing the propriety of subject-matter and personal jurisdiction because there is little reason to believe that forum non conveniens dismissals are distinguishable on this basis. Time will tell whether this proves to be true.

15. *See* e.g., *Arbaugh* v. Y & H Corp., 546 U.S. 500, 514 (2006) (“If subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own.”). *See also* 11 MOORE ET AL., supra note 2, § 56.30[6], at 56-230.5 to -230.6 (“Rule 12 motions attacking service, venue, or joinder of parties may entail the court’s determination of certain factual disputes.” (footnotes omitted)). Admittedly, this is not true with respect to a motion to dismiss for failure to state a claim, in which the court is required to accept the averments in the plaintiff’s complaint as true. *See Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508 n.1 (2002). But this is consistent with the exceptional nature of that dismissal. *See supra* note 11 and accompanying text.


17. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 635 (1953); *cf. Arbaugh*, 546 U.S. at 514 (“If satisfaction of an essential element of a claim for relief is at issue, however, the jury is the proper trier of contested facts.”).


19. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505–06 (2001); *Bradley Scott Shannon, Action Is an Action Is an Action Is an Action*, 77 WASH. L. REV. 65, 131–33 (2002) (discussing the preclusive effect—or lack thereof—of various dismissals). Indeed, the only exceptions appear to be the motion to dismiss for failure to state a claim and those dismissals “deemed” to be on the merits. *See supra* note 11. This, however, does not mean that dismissals have no preclusive effect whatsoever. To
What about waiver? It is well established that some dismissals, such as a dismissal for lack of subject matter jurisdiction, “because [they] involve[] a court’s power to hear a case, can never be forfeited or waived.”\textsuperscript{20} As a result, “courts, including [the Supreme] Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.”\textsuperscript{21} The same is not true with respect to a motion for summary judgment.\textsuperscript{22}

Moreover, if all claims having an independent basis for subject matter jurisdiction have been dismissed, a district court generally has the discretion to decline jurisdiction of any supplemental (primarily state law-based) claims.\textsuperscript{23} But when the court disposes of the former claims via summary judgment, it generally must retain any remaining supplemental claims.\textsuperscript{24}
And what about appeal? Without question, a grant of summary judgment is appealable by the adverse party. Some dismissals, on the other hand, are not appealable.

There are other less significant differences as well. A dismissal is almost always sought by a defending party, whereas a summary judgment may be sought by either party. Moreover, a dismissal is usually sought relatively early in the proceedings while a summary judgment is generally sought relatively late.

The various differences between dismissals and summary judgments may be summarized as follows:

Summary of Differences Between Dismissals and Summary Judgments

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Dismissal</th>
<th>Summary Judgment</th>
</tr>
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<tbody>
<tr>
<td>Moving party</td>
<td>Almost always defendant</td>
<td>Either party</td>
</tr>
<tr>
<td>Timing of motion</td>
<td>Usually early</td>
<td>Usually late</td>
</tr>
</tbody>
</table>

25. See 10A Wright et al., supra note 10, § 2715, at 253.
29. See Shannon, supra note 19, at 127.
30. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” (emphasis added)); see also Fed. R. Civ. P. 56(f) (“Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”).
31. Incidentally, for many of the same reasons, judgments on the pleadings under Rule 12(c), default judgments under Rule 55, judgments as a matter of law under Rule 50, and judgments on partial findings under Rule 52 also are not dismissals. (Query: what word does each of these procedures have in common?).
Indeed, the many differences between these procedures suggest a need for differential terminology. Stated another way, it appears quite likely that the reason the Rules refer to summary judgments as summary judgments, and dismissals as dismissals, is that they in fact refer to quite different things.

Before leaving this discussion, one might be inclined to ask: “In light of what seems to be strong evidence supporting a distinction between summary judgments and dismissals, why do so many lawyers continue to conflate these terms?”

One reason so many lawyers continue to confuse these terms might be that, at one time, the Rules did not draw as sharp of a distinction between dismissals and non-dismissals. A more likely explanation is simply a desire on the part of lawyers— and, for that matter, non-lawyers— to describe the status of an action following an entry of summary judgment. In a non-technical sense, “dismissed” certainly bears that meaning. But

32. See Shannon, supra note 19, at 119–25 (discussing the history of involuntary dismissals); see also supra note 6 (discussing Official Forms 31 and 32).

33. See, e.g., WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 652 (1993) (defining “dismiss” as “grant or furnish leave to depart: permit or cause to
as suggested previously, there is a more technically appropriate term for describing a court’s ruling in this context: disposition.\textsuperscript{34} In other words, what motions to dismiss and motions for summary judgment do have in common is that both motions are \textit{dispositive} of one or more claims or defenses.\textsuperscript{35} Disposition, then, is the term used in the Rules for the larger group that includes as subsets both summary judgments and dismissals. Thus, one type of disposition is a summary judgment. Another type is a dismissal. Yet another is a trial.\textsuperscript{36}

Therefore a summary judgment results in the \textit{disposition} of the action. That is it—nothing is dismissed. Only following a dismissal is anything truly dismissed.

\textbf{III. WHY THIS DISTINCTION MATTERS}

The foregoing discussion suggests several reasons why lawyers should stop referring to summary judgments as dismissals. The most obvious reason is that such references are simply wrong. Unless one is able to articulate sufficient countervailing reasons for referring to summary judgments as dismissals, the continuation of this practice can only be described as fatuous.

But perhaps a better reason why lawyers should stop referring to summary judgments as dismissals relates, again, to the many important differences between these procedures. The problem is that the conflation of these terms increases the risk that actual confusion will arise as to the proper trier of disputed facts, the preclusive effect of the disposition at issue, and many of the other characteristics associated with each of these procedures.

\textsuperscript{34} See, \textit{e.g.}, FED. R. CIV. P. 13(i) (providing for the entry of judgment on a severed counterclaim or cross-claim “even if the claims of the opposing party have been dismissed \textit{or otherwise disposed of}” (emphasis added)). “Termination,” “adjudication” (at least with respect to summary judgment), and perhaps other words also accurately describe what is occurring, though none of these was the term selected by the drafters of the Rules.

\textsuperscript{35} See, \textit{e.g.}, id. R. 72(b) (providing procedure for “[a] magistrate judge assigned without consent of the parties to hear a pretrial matter \textit{dispositive} of a claim or defense of a party” (emphasis added)). Such motions stand in contrast to \textit{nondispositive} motions, such as a motion for an enlargement of time under Rule 6(b), which are not dispositive of any claim or defense.

\textsuperscript{36} For more examples, see \textit{supra} note 31.
Consider, for example, the confusion that has been wrought in the area of supplemental jurisdiction. Generally, 28 U.S.C. § 1367(a) provides that when a district court has “original” subject matter jurisdiction of an action—based on the presence of a federal question, satisfaction of diversity of citizenship and amount in controversy requirements, or some other independent basis for federal subject matter jurisdiction—it also has “supplemental jurisdiction over all other claims that are so related . . . that they form part of the same case or controversy under Article III of the United States Constitution.”

But, § 1367(c)(3) provides that a district court may decline to exercise supplemental jurisdiction of any supplemental claim if the court has “dismissed” all claims of which it has original jurisdiction. The plain meaning of the term “dismissed” as it is used in § 1367(c)(3) is the same as it is defined under the Rules. Certainly, it cannot mean dismissed in some general—that is, dispositive—sense. After all, it is primarily the Rules that prescribe how and when claims are dismissed, and § 1367—a statute written primarily by lawyers (law professors, actually) for lawyers—gives no indication that the meaning of this term suddenly shifts in this context.

38. Id. § 1332.
39. Id. § 1367(a). To a large extent, § 1367 represents a codification of the Supreme Court’s jurisprudence with respect to “pendent” claims, which was articulated in United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725–27 (1966); see also 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 106.21, at 106-34.5 (3d ed. 2006).
40. 28 U.S.C. § 1367(c)(3); see also Gibbs, 383 U.S. at 726 (“Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.”). Subsection 1367(c) also permits a district court to decline jurisdiction of a supplemental claim if that claim “raises a novel or complex issue of State law,” if the supplemental claim “substantially predominates over the claim or claims over which the district court has original jurisdiction,” or if, “in exceptional circumstances, there are other compelling reasons for declining jurisdiction.” 28 U.S.C. §§ 1367(c)(1), (2), (4). Absent an applicable provision in § 1367(c), though, supplemental claims generally must be retained. See 16 MOORE ET AL., supra note 39, § 106.62, at 106-81.
42. Indeed, § 1367 elsewhere expressly refers to the Rules. See 28 U.S.C. § 1367(b). Moreover, this interpretation of “dismissed” is consistent with the only other usage of this term in this statute, that found in § 1367(d), which provides:

The period of limitations for any claim asserted under subsection (a), and for
Such a reading also makes sense from a purposive perspective. Motions to dismiss tend to be made relatively early in the proceedings and typically involve little investigation into the merits of the action. As a result, the dismissing court has little invested in the action. Moreover, because dismissals tend to lack claim preclusive effect, many, if not most, dismissed actions may be recommenced, at least in some courts. Presumably, the dismissed plaintiff would prefer to litigate all claims—original and supplemental—in the second action.

If this interpretation is correct, one would expect that the disposition of original claims at trial would fail to trigger § 1367(c)(3). And indeed, the Eleventh Circuit recently held precisely that. In *Parker v. Scrap Metal Processors, Inc.*, the court reversed the district court’s dismissal of the plaintiff’s supplemental claims pursuant to § 1367(c)(3) following the trial of the plaintiff’s original claims. As explained by the court:

The district court reasoned that even though [§ 1367(c)(3)] reads that when “the district court has dismissed all claims over which it has original jurisdiction,” it applies in this case because “judgment has been entered on [the federal claims] and they are no longer the subject of this proceeding.” We disagree.

A plain reading of the word “dismissed” in section 1367(c)(3) does not include when all federal claims have been tried and resolved in favor

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*Id.* § 1367(d) (emphasis added). Obviously, the meaning of the term “dismissed” (and its variants) in this subsection must be the same as it is defined under the Rules, because those are the only claims that may be recommenced in a later action. *See supra* notes 18–19 and accompanying text.

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43. *Cf.* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988) (“When the balance of these factors [judicial economy, convenience, fairness, and comity] indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.” (footnote omitted) (emphasis added)).

44. *See supra* note 42 (discussing 28 U.S.C. § 1367(d)).

of the plaintiff. We can find no authority so holding.46

The Parker court’s holding is also consistent with the purpose of this provision. At this late stage in the proceedings, the district court, which is by now well acquainted with the merits of the action, has much invested. The trier of fact likely has seen and heard much of the evidence relating to those supplemental claims that remain.47 Under these circumstances, conferring broad discretion to decline jurisdiction over the plaintiff’s supplemental claims makes little sense.48

But what about summary judgment? Given the clarity of the language used in § 1367(c)(3) and the obvious purpose behind this provision, the answer should be easy. Because a summary judgment is not a dismissal, § 1367(c)(3) is not applicable in this context. Yet, apparently because of the widespread conflation of these terms, federal courts overwhelmingly have held, pursuant to § 1367(c)(3), that jurisdiction of supplemental claims may be declined following a grant of summary judgment as to a plaintiff’s original claims.49 Innumerable supplemental

46. Id. at 744–45 (citation omitted).
47. See id. at 745 (“In the instant case, the federal claims were tried and resolved in favor of the plaintiff, and did not drop out of the lawsuit in its early stages.”).
48. A similar conclusion was reached by the Ninth Circuit, which held that supplemental claims may not be dismissed pursuant to § 1367(c)(3) following the entry of a default judgment on the plaintiff’s original claims. Trustees v. Desert Valley Landscape Maint. Inc., 333 F.3d 923, 925–26 (9th Cir. 2003). The court explained:

To decline jurisdiction under § 1367(c)(3), the district court must first identify the dismissal that triggers the exercise of discretion . . .

. . . .

The district court did not dismiss the federal claim in this case. To the contrary, it granted a default judgment in favor of the plaintiff. . . . The simple fact that there was nothing left to litigate on the merits of that claim does not mean that claim was dismissed. As the federal claim here was not dismissed, the exercise of discretion was not authorized by § 1367(c)(3).

Id. at 925–26. Though not as clear as the trial context, construing § 1367(c)(3) as inapplicable in the default judgment context also makes sense from a purposive perspective, because it would be unusual to enter such a judgment as to some claims but not to all.

49. See, e.g., McWilliams v. Jefferson County, 463 F.3d 1113, 1117 (10th Cir. 2006); Orta-Castro v. Merck, Sharp & Dohme Química P.R., Inc., 447 F.3d 105, 114–15 (1st Cir. 2006); Thurman v. Vill. of Homewood, 446 F.3d 682, 687 (7th Cir. 2006); May
claims have been dismissed on this basis. 50

This interpretation of § 1367(c)(3) seems wrong. If Congress intended to include summary judgments within the scope of this provision, it could have said that or something closer to that; however, it did not, or at least did not do so very clearly. This interpretation also seems wrong from a purposive perspective. Aside from being dispositive, a summary judgment bears little resemblance to the typical dismissal. Conversely, a summary judgment is indistinguishable from a trial in almost all material respects—both tend to occur late in the proceedings and both relate to the merits of the plaintiff’s claims, meaning they cannot be relitigated. 51

v. Franklin County Comm’rs, 437 F.3d 579, 586–87 (6th Cir. 2006); Gibson v. Weber, 433 F.3d 642, 647 (8th Cir. 2006); Shekoyan v. Sibley Int’l, 409 F.3d 414, 423–24 (D.C. Cir. 2005); Michael Linet, Inc. v. Vill. of Wellington, 408 F.3d 757, 763 (11th Cir. 2005); Priester v. Lowndes County, 354 F.3d 414, 425 (5th Cir. 2004); Lamps Plus, Inc. v. Seattle Lighting Fixture Co., 345 F.3d 1140, 1147–48 (9th Cir. 2003); Rocco v. N.Y. State Teamsters Conf. Pension & Ret. Fund, 281 F.3d 62, 71–72 (2d Cir. 2002); Hedges v. Musco, 204 F.3d 109, 122–24 (3d Cir. 2000); Gasner v. Bd. of Supervisors, 103 F.3d 351, 362 (4th Cir. 1996). Somewhat surprisingly, even those courts that held that a disposition by trial or by default judgment failed to trigger § 1367(c)(3) simultaneously acknowledged the applicability of this provision in the summary judgment context. See Parker, 468 F.3d at 744–45; Desert Valley, 333 F.3d at 926.

50. To get some idea of the scope of this problem, consider that a January 15, 2007, Westlaw search conducted in the ALLFEDS database for cases decided after 1989 (on or after the year in which § 1367 was enacted) that included the terms “1367(c)(3)” and “summary judgment” yielded 3,473 cases. The vast majority of the courts deciding these cases (including the Supreme Court in Jinks v. Richland County, 538 U.S. 456, 460 (2003)) either presumed or acknowledged the propriety of declining jurisdiction of supplemental claims under § 1367(c)(3) following the disposition, on summary judgment, of all original claims.

51. Cf. 16 MOORE ET AL., supra note 39, § 106.66[3][a], at 106-91 to -92 (“One reason that a federal court will retain jurisdiction over a supplemental claim after dismissal of all jurisdiction-conferring claims is if substantial judicial resources have already been committed, resulting in a substantial duplication of effort if the matter is now to be adjudicated in another court.”). This plain meaning-plus-purposive approach to distinguishing those dispositions that fall outside the purview of § 1367(c)(3) certainly makes more sense than that proffered by the court of appeals: whether the plaintiff’s original claims proved to be “unfounded”—see Desert Valley, 333 F.3d at 926—or were resolved in favor of the plaintiff—see Parker, 468 F.3d at 745. How could the entry of summary judgment in favor of a defendant (or the entry of a judgment in favor of a defendant following a trial) possibly constitute a “dismissal” for the purpose of this statute, and yet the entry of summary judgment in favor of a plaintiff (or the entry of a judgment in favor of a plaintiff following a trial) not? In both contexts, the original claims have been adjudicated, and the relative stage in the proceedings should be essentially the same.
This does not necessarily mean that supplemental jurisdiction could never be declined in this context. In particular, § 1367(c)(4) provides that supplemental jurisdiction may be declined in “exceptional circumstances” in which there are “other compelling reasons for declining jurisdiction.” Section 1367(c)(4) seems to provide some discretion to decline jurisdiction of supplemental claims following the disposition of all original claims by summary judgment or even at trial. Presumably, though, declining jurisdiction here would be appropriate (as the statute suggests) in only the most exceptional of circumstances. As explained by the Court in *United Mine Workers of America v. Gibbs*:

The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. *Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation*, dismissal of the state claim might even then be merited.

Thus, the *Gibbs* Court seemed to contemplate something of a two-tiered approach to the treatment of supplemental claims following the disposition of all original claims: a fairly broad discretion to decline jurisdiction of supplemental claims following the dismissal of the original claims (now codified at § 1367(c)(3)), and a much narrower discretion to decline jurisdiction of supplemental claims following some later adjudication of the original claims (now codified at § 1367(c)(4)).

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52. 28 U.S.C. §1367(c)(4) (2000). There also remain the statutory exceptions for novelty or substantial predominance described in § 1367(c)(1) and (2). *See supra* note 40. It seems, though, that these exceptions ordinarily would be considered at a much earlier stage in the proceedings.

53. *See, e.g.*, *Parker*, 468 F.3d at 745–47 (describing reasons to decline jurisdiction). Indeed, this was essentially the issue in *Gibbs*: whether the district court “exceeded its discretion in proceeding to judgment on the state claim” following the entry of a judgment notwithstanding the verdict in favor of the defendant as to the plaintiff’s original claim. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 728 (1966).


55. This explanation also helps to make some sense of the Court’s rather regrettable use of the word “dismissed” to describe the district court’s disposition of
Regrettably, the lower federal courts have largely failed to appreciate this distinction. Given the weight of contrary authority, Supreme Court review might be necessary to correct this error.

IV. CONCLUSION

A summary judgment is not a dismissal. The evidence in support of this proposition is strong; indeed, aside from prior practice, there is nothing to the contrary. Thus, all one may properly say regarding a grant of summary judgment is that it results in the disposition of the action.

Continuing to refer to a summary judgment as a dismissal can only lead to problems. In the area of supplemental jurisdiction in particular, the conflation of these terms has almost certainly led to the dismissal of numerous state law claims that, by statute, should have been retained and adjudicated by federal courts.

one of the original claims in that case on a motion for a directed verdict. See id. at 728. It would be a mistake to interpret this passage as conferring broad discretion to decline jurisdiction of supplemental claims following any disposition of original claims, because the Court clearly suggested that any such discretion is much more limited at this relatively late stage in the proceedings than it would be following a true dismissal of original claims early in the proceedings. See id. at 728–29.

56. Consider that a January 15, 2007, Westlaw search conducted in the ALLFEDS database for cases decided after 1989 that included the terms “1367(c)(4)” and “summary judgment” yielded only eighty cases, and none contained any discussion as to why this provision, rather than § 1367(c)(3), was the appropriate section to apply for declining supplemental jurisdiction in the summary judgment context.