Integrating Supplemeutal Jurisdiction aud Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute†

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INTRODUCTION

In 1995 the American Law Institute ("ALI" or "Institute") decided to take a second look at federal jurisdiction.[1] As Reporter for the ALI's Federal Judicial Code Revision Project ("Judicial Code Project" or "Project"),[2] I decided to look first at supplemental jurisdiction and its relationship to the other two major categories of jurisdiction statutorily conferred on the federal district courts: federal-question jurisdiction and diversity jurisdiction. This led me to conclude that something obvious about the conceptual structure of supplemental jurisdiction was fundamental to all forms of federal jurisdiction, but had been concealed by the language of the basic statutory grants of federal-question and diversity jurisdiction.

The general federal-question statute, § 1331[3] of the Judicial Code, purports to confer jurisdiction on the district courts to adjudicate "*all civil actions* arising under the Constitution, laws, or treaties of the United States,"[4] and the general diversity statute, 28 U.S.C. § 1332,[5] likewise confers jurisdiction "of *all civil actions*" involving a sufficient amount in controversy that are

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* Professor of Law, University of California, Davis. B.A. 1969, University of California, Berkeley; J.D. 1972, Yale University. I delivered an early version of this Article—consisting primarily of an abbreviated Part I and glimpses of Parts III and IV—in San Francisco on January 9, 1998, to the Section on Civil Procedure of the Association of American Law Schools at its program entitled "A Reappraisal of the Supplemental Jurisdiction Statute: Title 28 U.S.C. § 1367." I appreciate the insights and encouragement of moderator Gene Shreve and copanelists Rich Freer, Tom Rowe, and Joan Steinman.

1. The Institute's first look took ten years and produced a significant contribution to the literature on the law of federal courts. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).

2. This Article is the third in a series of recent publications in which I have discussed my work for the ALI. The background of the Institute's Judicial Code Project and the content of a "Prospectus" upon which it is founded are set forth in John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855 (1998) [hereinafter Oakley, *Prospectus*]. The relationship between supplemental jurisdiction and federal-question jurisdiction is discussed in John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law*, 76 TEX. L. REV. 1829 (1998) [hereinafter Oakley, *Litigative Unit*].

3. 28 U.S.C. § 1331 (1994).

4. *Id.* (emphasis added).

5. *Id.* § 1332 (1994).

"between . . . citizens of different States"[6] or between several other categories of diverse litigants. Despite this nominally "action-specific" language, I concluded that 28 U.S.C. §§ 1331 and 1332 had long been construed and applied in "claim-specific" terms, such that the claim rather than the civil action is the fundamental unit of litigation for purposes of federal jurisdiction.[7] I also concluded that much of the difficulty experienced in the construction and application of the current supplemental-jurisdiction statute, 28 U.S.C. § 1367[8]—particularly with respect to the scope of supplemental jurisdiction in diversity cases—could be attributed to the contradictory nature of a statutory regime that nominally confers jurisdiction in action-specific terms but then seeks to supplement that jurisdiction on a claim-by-claim basis.

One obvious way of redressing this incoherence would be to revise the basic jurisdictional statutes, such as §§ 1331 and 1332, to make clear that they confer jurisdiction only over particular claims within a given civil action, and that the jurisdictional posture of other claims in a civil action that do not independently qualify for federal jurisdiction is a function of the supplemental jurisdiction discretely conferred by present § 1367. That course was considered but rejected in the early stages of the ALI's Judicial Code Project.[9] What has emerged instead is the proposal of an expressly claim-specific revision of § 1367. This draft of a new supplemental-jurisdiction statute—which for expository convenience I shall refer to as "new section 1367," though of course it has not been enacted and there are no certain prospects that it will be—was presented to the Institute's membership as Tentative Draft No. 2 ("T.D. No. 2") of the Judicial Code Project.[10] After discussion at the ALI's Annual Meeting on May 14, 1998, it was unanimously approved.[11]

In Part I of this Article, I discuss the institutional and procedural history of T.D. No. 2 and new section 1367. Part II sets forth the full text of new section 1367 and its accompanying Explanatory Note, as approved and in minor respects amended during and after the May 1998 Annual Meeting. Part III provides an overview of the key features of new section 1367 that relate to diversity jurisdiction. That completes the "progress report" portion of this Article, and brings me to the remaining, crucial issue: whether what has been reported indeed constitutes progress toward "integrating supplemental jurisdiction and diversity jurisdiction."

There is a significant impediment to the success of my contention that the jurisdiction of the district courts should always be analyzed on a claim-specific rather than an action-specific basis. The jurisdiction conferred by the basic diversity statute, 28 U.S.C. § 1332, has long been deemed to be limited by the

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6. *Id.* § 1332(a)(1) (emphasis added).

7. In Part III, I return to and elaborate the distinction between an action-specific and a claim-specific model of federal jurisdiction. *See infra* Part III.A.

8. 28 U.S.C. § 1367 (1994).

9. *See infra* Part I, which discusses this turn of events.

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

11. *See ALI Advocates Proposed Amendment to Supplemental Jurisdiction Statute*, 66 U.S.L.W. (BNA) 2719 (May 26, 1998).

"rule of complete diversity" associated with Chief Justice Marshall's decision in *Strawbridge v. Curtiss*.[12] If it were true that a district court has no jurisdiction over any claim in a diversity case unless every claim in that case is between parties of fully diverse citizenship, § 1332 would indeed be an "action-specific" grant of jurisdiction in at least that negative sense, and my argument for the general applicability of a claim-specific model of federal jurisdiction would pro tanto be false. In my view, however, the rule of complete diversity has been misunderstood. Part IV sets forth my argument for a claim-specific reinterpretation of diversity jurisdiction in which the rule of complete diversity functions as a restrictive rule of supplemental jurisdiction rather than an action-specific constraint on the jurisdiction conferred by 28 U.S.C. § 1332.

I. DEVELOPMENT OF THE JUDICIAL CODE PROJECT[13]

The ALI is composed of about 2700 elected members as well as several hundred other members: life members (a status attained twenty-five years after election to membership), ex officio members (various leading judges, lawyers, and legal educators), a few honorary members, and a small but growing number of members of the legal profession of foreign countries. The goveruing body of the ALI is its Council, composed of about sixty members of the Institute elected by the membership.[14]

Planning for the Judicial Code Project began with the Institute's request in January 1994 that I prepare a prospectus for "'a project to formulate a revision of the Judicial Code, for possible enactment by Congress.'"[15] I submitted my "Prospectus" in September 1995,[16] in which I concluded that the Institute should limit its attention to Chapters 85 through 89 of the Judicial Code (Title 28 of the United States Code) dealing with the jurisdiction and venue of the district

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12. 7 U.S. (3 Cranch) 267 (1806).

13. Some of the material at the beginning of this part—describing the ALI, its operating procedures, and the inception of the Judicial Code Project—is adapted with revisions from the Epilogue that I added to the published version of my Prospectus. *See* Oakley, *Prospectus*, *supra* note 2, at 1020-22. Portions of the material describing the evolution of a revised supplemental-jurisdiction statute from AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, PRELIMINARY DRAFT NO. 1 (1996) [hereinafter P.D. NO. 1] through AMERICAN LAW INSTITUTE, FEDERAL CODE JUDICIAL PROJECT, TENTATIVE DRAFT NO. 1 (1997) [hereinafter T.D. NO. 1] are adapted from the memorandum to members of the Institute that I wrote as a preface to T.D. NO. 1. *See* T.D. NO. 1 at xv-xxiii. The views stated are my own, and not necessarily those of the Institute. *See infra* note 63 (discussing the Institute's practice of nonendorsement of annotative material included in drafts approved by the Institute).

14. *See* Oakley, *Prospectus*, *supra* note 2, at 1020 & n.716. *See generally* John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615, 625-28, 636-38 (1998) (describing the membership and leadership of the Institute).

15. Oakley, *Prospectus*, *supra* note 2, at 861 & n.1 (quoting letter from Geoffrey C. Hazard, Jr., Director, American Law Institute, to the author (Jan. 27, 1994)).

16. *See* JOHN B. OAKLEY, REVISION OF THE FEDERAL JUDICIAL CODE: A PROSPECTUS FOR THE AMERICAN LAW INSTITUTE (1995), *reprinted in revised form as* Oakley, *Prospectus*, *supra* note 2.

courts.[17] After a detailed survey of these chapters,[18] I recommended that the Institute undertake, on a modular but simultaneous basis, to propose a revision of the statutes dealing with supplemental and diversity jurisdiction (§§ 1367 and 1332), venue and transfers (§§ 1391-1392,[19] 1404,[20] 1406-1407,[21] and 1631[22]); and removal jurisdiction and procedure (§§ 1441-1442a[23] and 1445-1447[24]).[25]

In December 1995, the Council of the Institute decided to commence the Judicial Code Project along the general lines recommended in my Prospectus, appointed me as "Reporter," and for guidance in the initial development of the Project directed me to confer later that month with the Director and an ad hoc advisory panel.[26]

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17. *See* Oakley, *Prospectus*, *supra* note 2, at 864-65.

18. *See id.* at 873-1014. Chapters 85 through 89 consist only of Chapter 85 ("District Courts; Jurisdiction"), Chapter 87 ("District Courts; Venue"), and Chapter 89 ("District Courts; Removal of Cases from State Courts"). There is no Chapter 86 or Chapter 88.

19. 28 U.S.C. §§ 1391-1392 (1994).

20. *Id.* § 1404 (1994).

21. *Id.* §§ 1406-1407 (1994).

22. *Id.* § 1631 (1994).

23. *Id.* §§ 1441-1442a (1994).

24. *Id.* §§ 1445-1447 (1994).

25. *See* Oakley, *Prospectus*, *supra* note 2, at 1018-19.

26. *See id.* at 861, 1020-21. All members of the ad hoc panel were (or, in one instance, were about to become) members of the ALI. In the following roster, an asterisk precedes the names of those members of the ad hoc panel who were also members of the Council:

*Richard S. Arnold, Judge (then Chief Judge), United States Court of Appeals for the Eighth Circuit, Little Rock, Arkansas;

*Bennett Boskey, Washington, District of Columbia (Treasurer of the ALI);

*Edward H. Cooper, The University of Michigan Law School, Ann Arbor, Michigan;

William A. Fletcher, Judge, United States Court of Appeals for the Ninth Circuit, San Francisco, California (at the time of his appointment to the ad hoc panel, Judge Fletcher was a Professor of Law at the University of California at Berkeley School of Law, Berkeley, California);

Charles Fried, Associate Justice of the Supreme Judicial Court of Massachusetts, Boston, Massachusetts;

Patrick E. Higginbotham, Judge, United States Court of Appeals for the Fifth Circuit, Dallas, Texas;

Patricia M. Hynes, New York, New York;

Larry Kramer, New York University School of Law, New York, New York;

*Vincent L. McKusick, Portland, Maine; Retired Chief Justice, Supreme Judicial Court of Maine;

Daniel J. Meltzer, Harvard University Law School, Cambridge, Massachusetts;

*Mary M. Schroeder, Judge, United States Court of Appeals for the Ninth Circuit, Phoenix, Arizona;

David L. Shapiro, Harvard University Law School, Cambridge, Massachusetts;

Joan E. Steinman, Chicago-Kent College of Law, Illinois Institute of Technology, Chicago, Illinois;

*Michael Traynor, San Francisco, California (then 2nd Vice President of the ALI); and

*Patricia M. Wald, Judge, United States Court of Appeals for the District of Columbia Circuit, Washington, District of Columbia (then 1st Vice President of the ALI).

Also attending the meeting of the ad hoc panel, ex officio, were the ALI's Director, Geoffrey C. Hazard, Jr., and both Deputy Directors, Elena A. Cappella and Michael Greenwald. Several

The action of the Council and the consensus of the panel departed somewhat from the recommendations of the Prospectus. By appointing a single Reporter, the Council necessarily contemplated that the various modules of the Project would be developed serially rather than simultaneously. The ad hoc panel supported the modular approach—by which the various modules would be submitted to the membership of the Institute for approval seriatim, without withholding until final completion of the Project as a whole the Institute's recommendation that a particular module be enacted by Congress—beginning with supplemental jurisdiction. But the consensus of the ad hoc panel was that the first phase of the Project should not focus narrowly on the reform of § 1367, together with incidental reform of the general diversity statute, § 1332. The preferred approach was to examine the proper scope and statutory authorization for supplemental jurisdiction in the context of a more general reexamination of the basic grants of original jurisdiction and rights of removal that would thus be supplemented. This consensus emerged as a resolution of conflicting opinions among members of the panel about the desirability of the Institute, on the one hand, avoiding frankly normative and hence politically contentious recommendations about the general scope of the original jurisdiction of the district courts, or, on the other hand, devoting its resources to a scrivener's effort of technical reform of the supplemental-jurisdiction statute bled dry of any ambition for theoretical improvement.

The Institute's projects proceed in annual or biennial cycles organized around the Annual Meeting of the Institute, a four-day event held in the second or third week of May. No draft speaks for the Institute until it has been affirmatively approved by a vote of the membership at an Annual Meeting. Drafts are developed for submission to and possible approval by the membership in a three-step process.

Initial treatments, called preliminary drafts, are submitted for review by a panel of "Advisers": generally about twenty lawyers, judges, and law professors expert in the field. Advisers are generally, but not always, members of the Institute. This leads to a particularly intensive form of peer review of the Reporter's work product. Preliminary drafts are circulated to the Advisers several weeks in advance, and the Advisers travel at the Institute's expense to its headquarters in Philadelphia, where they meet with the Reporter for two days to discuss the content of the preliminary draft.

Preliminary drafts are also circulated to the Members Consultative Group ("MCG") constituted for a particular project. Any member of the Institute can join the MCG for any ongoing project. The Reporter meets for one day to discuss the current preliminary draft with any members of the MCG willing to travel to Philadelphia at personal expense. The practice for the Judicial Code Project has been to schedule the conference with the MCG on the day immediately following

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other invitees were unable to attend, as was the Institute's President, Charles Alan Wright of the University of Texas School of Law.

the two-day conference with the Advisers, thus subjecting each preliminary draft to three successive days of intensive review.[27]

The Director of the Institute participates in the discussion of a preliminary draft with both the Advisers and the MCG, generally joined by one or both of the two Deputy Directors. Based on those discussions, the Director in consultation with the Reporter decides whether the preliminary draft is ready to be revised in light of discussion for presentation to the Council. A council draft is intended to be a working version of a draft for presentation to the membership. After advance review of a council draft and discussion of it with the Reporter, generally for several hours, the Council decides whether to authorize preparation of a draft for presentation to the membership, called a tentative draft.

The Judicial Code Project was launched with a sense of some urgency. The problems identified by the Prospectus with respect to the current law of supplemental jurisdiction, removal, and venue were sufficiently palpable that Congress might undertake to legislate in these areas sooner rather than later. It was also thought that some members of Congress might be receptive to the recommendations of the Institute. The Judicial Code Project was therefore assigned a fairly fast development cycle, calling for a preliminary draft to be considered by the Advisers and the MCG in September 1996 and each year thereafter, in the hope of generating a Council draft to be considered by the Council each December and a tentative draft to be considered by the membership the following May. That schedule has to date been maintained.

Preliminary Draft No. 1 ("P.D. No. 1")[28] was submitted to the Advisers and the MCG in September 1996. I responded to the ad hoc panel's concerns and embraced its more ambitious conception of the Project by proposing a ground-up revision in expressly claim-specific terms of the fundamental structure of the original jurisdiction of the district courts. P.D. No. 1 set forth draft revisions of the three most basic grants of original jurisdiction to the district courts, § 1331 (federal-question jurisdiction), § 1332 (general diversity jurisdiction), and § 1333 (admiralty jurisdiction),[29] together with revisions of § 1367 (supplemental jurisdiction) and §§ 1441 and 1445 (the basic removal statutes). P.D. No. 1 also set forth extensive comments that elaborated the case law construing the present text of these statutes and sought to demonstrate that the proposed revisions were more faithful to the actual administration of these statutes than their present text.

The membership of the panel of Advisers appointed by the Institute for this Project overlaps substantially but not completely with the membership of the ad

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27. There are occasional variations from this routine. Meetings with the Advisers and the MCG are sometimes held elsewhere than Philadelphia, and the length of the meeting may vary with the bulk and controversiality of the material to be reviewed. Some members may receive work-related reimbursement for the expense of attending MCG meetings, and in exceptional circumstances the Institute may provide financial assistance to defray part of the cost of travel to an MCG meeting.

28. P.D. No. 1, *supra* note 13.

29. 28 U.S.C. § 1333 (1994).

hoc panel of December 1995.[30] In light of the differences in the membership of the panel and the document under consideration, it is not surprising that the views expressed by the Advisers differed somewhat from that of the ad hoc panel. But it is fair to say that the waxing ambitions of the ad hoc panel with respect to the abstract scope of the Project were at odds with the waning ambitions of the Advisers with respect to the particular recommendations of P.D. No. 1. The consensus among the Advisers was that a formal revision of the basic statutes conferring original jurisdiction on the federal district courts would pose a grave risk of unintended consequences, especially in light of the present vogue for a "plain meaning" approach to legislative construction that might result in disregard of history and precedent as a guide to the interpretation of statutes revised only to make clear textually the conditions of their application long established by case law. The Advisers were enthusiastic, however, about the basic premise that federal jurisdiction operates in a claim-specific fashion, and the consensus was

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30. With the exception of Mr. Grinder, who represents the United States Department of Justice, all of the Advisers are members of the ALI. In the following roster, an asterisk designates those Advisers who also serve on the Council, and a dagger designates those who served previously on the ad hoc advisory panel:

*†Bennett Boskey, Washington, District of Columbia;

*†Edward H. Cooper, The University of Michigan Law School, Ann Arbor, Michigan;

†William A. Fletcher, Judge, United States Court of Appeals for the Ninth Circuit, San Francisco, California (at the time of his appointment as an Adviser, Judge Fletcher was a Professor of Law at the University of California at Berkeley School of Law, Berkeley, California);

Richard D. Freer, Emory University School of Law, Atlanta, Georgia;

Susan P. Graber, Judge, United States Court of Appeals for the Ninth Circuit, Portland, Oregon (at the time of her appointment as an Adviser, Judge Graber was serving as an Associate Justice of the Oregon Supreme Court);

Gary Grinder, Washington, District of Columbia;

Geoffrey C. Hazard, Jr., Philadelphia, Pennsylvania (ex officio as Director of the Institute);

†Patricia M. Hynes, New York, New York;

Renée M. Landers, Boston, Massachusetts;

David F. Levi, Judge, United Sates District Court for the Eastern District of California, Sacramento, California;

*†Vincent L. McKusick, Portland, Maine; Retired Chief Justice, Supreme Judicial Court of Maine;

†Daniel J. Meltzer, Harvard University Law School, Cambridge, Massachusetts;

Ronald L. Olson, Los Angeles, California;

*Roswell B. Perkins, New York, New York (ex officio as Chair of the Council);

Thomas R. Phillips, Chief Justice, Texas Supreme Court, Austin, Texas;

Mary Kristina Pickering, Las Vegas, Nevada;

*Louis H. Pollak, Judge, United States District Court for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania;

Joseph F. Spaniol, Jr., Bethesda, Maryland;

†Joan E. Steinman, Chicago-Kent College of Law, Illinois Institute of Technology, Chicago, Illinois;

*†Patricia M. Wald, Judge, United States Court of Appeals for the District of Columbia Circuit, Washington, District of Columbia; and

*Charles Alan Wright, Austin, Texas (ex officio as President of the Institute).

See T.D. NO. 2, *supra* note 10, at v.

that the best means to introduce this insight into the statutory law of federal jurisdiction was by reform of the supplemental-jurisdiction statute, leaving the underlying grants of original jurisdiction to the district courts untouched but reinterpreted by means of explanation of the terms of a new section 1367.

Council Draft No. 1 ("C.D. No. 1")[31] was submitted to the Council in December 1996 and approved in principle, with final approval contingent on incorporation into the proposed statute of several textual changes and completion of the accompanying commentary and annotative material. Like P.D. No. 1, it was premised on a claim-specific approach to federal jurisdiction, but otherwise C.D. No. 1 was a completely rewritten document. After further refinement it was approved by the Council for submission to the membership as Tentative Draft No. 1 ("T.D. No. 1").[32]

Two features of P.D. No. 1's draft of a new section 1367 survived in T.D. No. 1 (and were carried forward to T.D. No. 2): first, the creation of a new terminological category of "freestanding" claims qualifying directly for federal jurisdiction;[33] and second, the reformulation of the rule of complete diversity as a restriction on supplemental jurisdiction over additional, nonfreestanding claims that have been formally or functionally joined in the complaint to freestanding claims supported only by diversity jurisdiction. A third significant feature of P.D. No. 1's draft of a new section 1367 sought expressly to codify and thus restore the regime of judicial discretion to exercise or decline supplemental jurisdiction as it had existed prior to the Supreme Court's decision in *Finley v. United States*,[34] which had prompted the 1990 enactment of present § 1367 by calling into question the constitutionality of this nonstatutory regime. This feature[35] was

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31. *See* AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, COUNCIL DRAFT NO. 1 (1996) [hereinafter C.D. No. 1].

32. T.D. No. 1, *supra* note 13.

33. P.D. No. 1 referred to such a claim as an "independent" claim, and C.D. No. 1 substituted the term "jurisdictionally self-sufficient" claim. With respect to both drafts, there was wide support for the concept addressed by the definition but disagreement about the means of expression. T.D. No. 1 settled on "freestanding" claim as the operative term, and that is the term used by T.D. No. 2.

34. 490 U.S. 545 (1989).

35. *Finley* was decided on May 22, 1989. *Id.* Subsection (e) of P.D. No. 1's first draft of new section 1367 provided:

> (e) In deciding whether to exercise or to decline to exercise the jurisdiction over a supplemental claim conferred by subsection (b), the district court shall be governed by the principles of federalism and sound judicial administration applied by the courts of the United States in cases of ancillary and pendent jurisdiction prior to May 22, 1989, subject to the further elaboration of these principles in the exercise of appellate jurisdiction over the judgments and decrees of the district courts. When the court lacks jurisdiction over a supplemental claim or when the exercise of jurisdiction over a supplemental claim would be inappropriate, the district court shall dismiss the supplemental claim unless that claim was joined prior to removal of the civil action to the district court, in which case the district court shall remand that claim to the State court from which it was removed.

P.D. No. 1, *supra* note 13, at 80.

viewed unenthusiastically by the Advisers and was dropped from subsequent drafts.

The feature of T.D. No. 1 that generated the most controversy when it was discussed with the membership at the 1997 Annual Meeting was its proposed reintroduction of the distinction between "pendent" and "ancillary" jurisdiction that current § 1367 abrogated in favor of a unified doctrine of supplemental jurisdiction.[36] I had included this feature for two reasons. I thought that it would simplify the preservation of the rule of complete diversity recast as a limitation on pendent but not ancillary jurisdiction, and that it would permit the statute to replicate pre-1990 case law by granting the district courts much broader discretion to decline pendent jurisdiction than ancillary jurisdiction. I was persuaded during the floor debate that neither reason was sufficient to justify the complexity of the distinction that the draft statute sought to reintroduce, and that the goal of limiting judicial discretion to decline supplemental jurisdiction over compulsory counterclaims, cross-claims, and claims by third parties—the three classic categories of what were once deemed ancillary claims—could be served as well by providing a more detailed list of statutory considerations bearing on the exercise of such discretion.

Another controversial feature of T.D. No. 1 had been approved by the margin of a single vote when considered by the Council.[37] This would have exempted alienage cases from the restriction on supplemental jurisdiction applicable to ordinary diversity cases, in effect abrogating the rule of complete diversity in any case to which an alien was a party. Serious concerns were raised during the floor debate that this feature, while perhaps justified in principle given the federal interest in providing a fair forum to foreign litigants, might operate too broadly, particularly in cases by or against unincorporated associations lacking any genuinely foreign character but including among their ranks one or more aliens whose citizenship status would be imputed to the association as a whole.[38]

Although there was general sentiment that T.D. No. 1 would benefit from the stylistic improvement of both its statutory text and its commentary, there was general support for the remaining features of T.D. No. 1 that departed from current law, including three specific exemptions from its general restriction of

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36. An edited transcript of the entire discussion of T.D. No. 1 is printed in *Discussion of Federal Judicial Code Revision Project*, 74 A.L.I. ANN. MEETING PROC. 1997, at 420-62 (1998). For the discussion of the proposed reintroduction of the pendent/ancillary distinction, see *id.* at 433-37.

37. My reference here to a "single-vote margin" conforms to my description of the vote during the discussion of T.D. NO. 1 at the 1997 Annual Meeting. *See id.* at 423, 449. This is technically incorrect. My notes show that the vote in Council during discussion of C.D. NO. 1 was 9-7 in favor of unrestricted supplemental jurisdiction in alienage cases, with President Wright (who was presiding) not voting except as a tie breaker. But President Wright thereafter indicated that he strongly opposed this exceptional treatment of alienage cases, and would have voted in the negative. Effectively, if not technically, the Council thus divided on the matter by the single-vote margin of nine members in favor and eight members opposed. President Wright chose not to preside during the discussion of T.D. NO. 1 at the 1997 Annual Meeting in order to participate actively in the discussion, *see id.* at 420, and spoke against "allow[ing] minimal diversity because of alienage." *Id.* at 451-52.

38. *See id.* at 420-62.

supplemental jurisdiction in diversity cases: (1) with respect to claims by or against unnamed class members; (2) with respect to non-class claims between diverse parties for less than the amount in controversy required for a freestanding claim; and (3) with respect to claims by or against intervenors as of right who are not indispensable parties.[39]

Preliminary Draft No. 2 ("P.D. No. 2")[40] was submitted to the Advisers and MCG in September 1997. It consisted of a revised draft of new section 1367 as well as a first draft of a set of revised removal statutes. P.D. No. 2's version of new section 1367 drew no distinction between pendent and ancillary jurisdiction or between conventional diversity jurisdiction and alienage jurisdiction, set forth an expanded list of factors to be considered in the exercise of discretion to decline supplemental jurisdiction, and incorporated numerous expository and stylistic changes. After a substantial discussion of the draft removal statutes with the Advisers and the MCG, I decided to defer further work on removal until the membership of the ALI had decided whether to approve or reject my approach to supplemental jurisdiction.

Council Draft No. 2 ("C.D. No. 2"),[41] approved by the Council in December 1997, was thus limited to new section 1367, further revised by my decision that the "list of factors" approach to controlling district court discretion to decline supplemental jurisdiction was too prolix to reconcile with the membership's desire for a relatively succinct statute. C.D. No. 2's version of new section 1367 authorized district courts to decline supplemental jurisdiction in terms similar to but substantially narrower than those set forth in subsection (c) of current § 1367. This proved to be the most controversial feature of C.D. No. 2 when considered by the Council, which voted 13-11 for alternative language that, while more restrictive than current § 1367(c), left district courts with greater discretion to decline supplemental jurisdiction than C.D. No. 2's language would have provided. T.D. No. 2[42] presented new section 1367 for consideration by the membership in this revised form, together with revised and expanded commentary and annotations. Subject to my Reporter's prerogative to make the minor amendments noted in Part II below (in notes 44-50), this was the draft of new section 1367 that received the Institute's unanimous approval on May 14, 1998.

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39. *See* T.D. No. 1, *supra* note 13.

40. AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, PRELIMINARY DRAFT NO. 2 (1997) [hereinafter P.D. NO. 2].

41. AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, COUNCIL DRAFT NO. 2 (1997) [hereinafter C.D. NO. 2].

42. T.D. NO. 2, *supra* note 10.

II. TEXT OF NEW SECTION 1367 AND EXPLANATORY NOTE[43]

A. Statutory Change

Title 28 of the United States Code is amended by repealing section 1367 of Chapter 85 and subsection (e) of section 1447 of Chapter 89, and by adding to Chapter 85 a new section 1367 as follows:

§ 1367. Supplemental jurisdiction

(a) *Definitions.* As used in this section:

(1) A "freestanding" claim means a claim for relief that is within the original jurisdiction of the district courts independently of this section.

(2) A "supplemental" claim means a claim for relief, not itself freestanding, that is part of the same case or controversy under Article III of the Constitution as a freestanding claim that is asserted in the same civil action.

(3) "Asserted in the same pleading" means that the relevant claims have been asserted[44] either in the pleading as originally filed with the court, or by amendment of the pleading, or by the pleader's assertion of a claim other than a counterclaim or a claim for indemnity or contribution[45] against a third party impleaded in response to the pleading, or by order of the court

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43. Part II consists of copyrighted material reprinted verbatim from T.D. NO. 2, *supra* note 10, at 1-9, except as indicated in the footnotes discussing amendments adopted pursuant to discussion at the Annual Meeting of the Institnte on May 14, 1998. This version of new section 1367 and the accompanying Explanatory Note, as amended and annotated to reflect the proceedings of May 14th, was previously printed in Oakley, *Prospectus, supra* note 2, at 1023-32. The owner of the copyright is The American Law Institnte, which has granted permission for this material to be republished here without waiver of its copyright as to any other publication or republication. Because the Explanatory Note is reprinted from another source, its text does not conform to the convention otherwise followed in this Article: "new section 1367" is sometimes referred to as "revised § 1367."

44. Pursuant to discussion with the membership of the Institute on May 14, 1998, T.D. NO. 2 was amended by the Reporter to substitute the word "asserted" for the word "joined" that appears at this point in the text of new section 1367 as printed in T.D. NO. 2. The intent of the amendment is to refer consistently to the connection between a freestanding and a supplemental claim that invokes the jurisdictional restriction of subsection (c) as the statns of having been "asserted" in what is defined to be the "same pleading" rather than the more ambiguous status of the two claims having been "joined."

45. Pursuant to discussion with the membership of the Institute on May 14, 1998, T.D. NO. 2 was amended by the Reporter to insert the words "other than a counterclaim or a claim for indemnity or contribution" at this point in the text of new section 1367 as printed in T.D. NO. 2. The intent of the amendment is to make clear that subsection (c)'s restriction of supplemental jurisdiction in diversity litigation does not apply to a counterclaim or claim for indemnity or contribution that a plaintiff might assert against a previously impleaded third-party defendant as a result of the plaintiff having first been placed in a defensive posture by the assertion against the plaintiff of a claim by a defendant or third-party defendant.

reformulating the pleading, or by the assertion of the claim or defense of an intervenor who seeks to be treated as if the pleading had asserted[46] a claim by or against that intervenor.

(4) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(b) *General grant of supplemental jurisdiction.* Except as provided by subsection (c) or as otherwise expressly provided by statute, a district court shall have original jurisdiction of all supplemental claims, including claims that involve the joinder or intervention of additional claiming or defending parties.

(c) *Restriction of supplemental jurisdiction in diversity litigation.* When the jurisdiction of a district court over a supplemental claim depends upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title, the court shall have jurisdiction of the supplemental claim under subsection (b)[47] only if it—

(1) is asserted representatively by or against a class of additional unnamed parties; or

(2) would be a freestanding claim on the basis of section 1332 of this title but for the value of the claim; or

(3) has been joined to the action by the intervention of a party whose joinder is not indispensable to the litigation of the action.

(d) *Discretion to decline to exercise jurisdiction.* This section does not permit a district court to decline to exercise jurisdiction of any freestanding claim except as provided by subsection (e). A district court may decline to exercise jurisdiction of a supplemental claim if—

(1) all freestanding claims that are the basis for its jurisdiction of a supplemental claim have been dismissed before trial of that claim; or

(2) the supplemental claim raises a novel or complex issue of State law that the district court need not otherwise decide; or

(3) the exercise of supplemental jurisdiction would substantially alter the character of the litigation; or

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46. Pursuant to discussion with the membership of the Institute on May 14, 1998, T.D. NO. 2 was amended by the Reporter to substitute the word "asserted" for the word "joined" that appears at this point in the text of new section 1367 as printed in T.D. NO. 2. The intent of the amendment is to refer consistently to the connection between a freestanding and a supplemental claim that invokes the jurisdictional restriction of subsection (c) as the status of having been "asserted" in what is defined to be the "same pleading" rather than the more ambiguous status of the two claims having been "joined."

47. Pursuant to discussion with the membership of the Institute on May 14, 1998, T.D. NO. 2 was amended by the Reporter to insert the words "under subsection (b)" at this point in the text of new section 1367 as printed in T.D. NO. 2. By stating expressly that the jurisdictional restriction of subsection (c) qualifies only the scope of the supplemental jurisdiction conferred by subsection (b), the amendment is intended to avoid a construction of subsection (c) that would conflict with the supplemental jurisdiction independently granted by 28 U.S.C. § 1332(a)(3). *See generally* T.D. NO. 2, *supra* note 10, at 20-21 (discussing § 1332(a)(3)'s grant of supplemental jurisdiction).

(4) in exceptional circumstances, there are other compelling reasons for declining supplemental jurisdiction.

(e) *Joinder of additional defendant after removal.* If after removal of a civil action the plaintiff moves to amend the complaint to join a supplemental claim against an additional defendant that is subject to the jurisdictional restriction of subsection (c), the district court may either deny such joinder, or permit such joinder and remand the entire action to the State court from which the action was removed, or permit such joinder without remanding the action. In exercising its discretion the district court shall consider judicial economy, convenience, and fairness to litigants, as well as the reasons permitting supplemental jurisdiction to be declined under subsection (d). If the district court decides to permit such joinder without remanding the action, it may exercise supplemental jurisdiction of the claim so joined as provided by subsections (b) and (d) without regard to the jurisdictional restriction of subsection (c).

(f) *Disposition of supplemental claims; tolling of limitations period.* When a district court lacks or declines to exercise supplemental jurisdiction, the court shall dismiss the supplemental claim unless it was joined before removal of the action, in which case the district court shall remand the claim to the State court from which it was removed. The period of limitations for the following claims shall be tolled until 30 days after their dismissal becomes final, unless the applicable law provides for a longer tolling period:

(1) any supplemental claim dismissed because the district court lacks or declines to exercise supplemental jurisdiction; and

(2) any other claim in the same civil action that is voluntarily dismissed as the result of a notice or stipulation of dismissal, or motion for order of dismissal, filed within 30 days after—

(A) the dismissal or remand of a supplemental claim because the district court lacks or declines to exercise supplemental jurisdiction; or

(B) the court's decision under subsection (e) to refuse to permit the joinder of a supplemental claim against an additional defendant.

B. Explanatory Note

Subsection (a) has no direct counterpart in present § 1367. As with all other subsections of the revised statute, subsection (a) is introduced by a topical catchline.

Subsections (a)(1) and (a)(2) distinguish between the jurisdictional posture of a "freestanding" claim and a "supplemental" claim. This distinction is employed by subsections (b)-(f) as the basis for defining and limiting the scope and administration of the supplemental jurisdiction of the district courts. It reflects and ratifies current practice under the various statutes that confer original jurisdiction of specified "actions" on the district courts. Despite the "action-specific" language of these statutes, original jurisdiction attaches on a claim-by-claim or "claim-specific" basis.

Subsection (a)(2) follows current law by defining the relationship between freestanding and supplemental claims in terms of the constitutional concept of a single "case or controversy" that embraces both claims.

Subsection (a)(3) defines comprehensively and in detail the key concept of "asserted in the same pleading" that subsection (c) uses to replicate the effect of the rule of complete diversity. Taken together, subsections (a)(3) and (c) form one of the two most important new features of the revised statute.

The rule of complete diversity has conventionally but mistakenly been understood as requiring an "action-specific" application of the general diversity statute, 28 U.S.C. § 1332. If this were true, there would be inherent tension between the claim-specific operation of supplemental jurisdiction and the action-specific effect of the rule of complete diversity. But in fact the rule of complete diversity is a rule *about* supplemental jurisdiction, which operates to bar the exercise of supplemental jurisdiction as to some but not all supplemental claims that may be joined in certain procedural contexts to freestanding claims in diversity cases.

The critical challenge is to limit the scope of supplemental jurisdiction in diversity cases in a way that limits initial access to federal court but does not impede the joinder of what used to be called "ancillary" claims. Such claims—compulsory counterclaims, cross-claims, claims against third parties, and claims by or against intervenors as of right—should generally qualify for supplemental jurisdiction when filed in reaction to litigation that has survived the initial jurisdictional filter of the rule of complete diversity.

In the vast preponderance of cases, this goal would be achieved if subsection (c) merely withdrew supplemental jurisdiction in diversity cases with respect to any supplemental claim that qualifies for supplemental jurisdiction on the basis of a freestanding claim to which it was joined *in the complaint.* In the standard case, the jurisdictional restriction of subsection (c) would thus operate to negate jurisdiction over a supplemental claim between a plaintiff and a nondiverse defendant that is (or but for the restriction would be) asserted in the original complaint. But comprehensive protection of the rule of complete diversity requires that subsection (c) operate more broadly. This requires the careful but unfamiliar language used in subsection (a)(3) to define the scope of the jurisdictional restriction of subsection (c).

Subsection (a)(3) must refer to "asserted in the same pleading" rather than "joined in the complaint" because the package of a freestanding diversity claim and some jurisdictionally dependent supplemental claim may occasionally be joined to unrelated litigation by some pleading analogous to but distinct from the complaint—such as an answer asserting a set of permissive counterclaims between partially diverse parties.

A second source of the complexity that subsection (a)(3) must exhibit is the possibility that the scope of the complaint or analogous pleading may be expanded by a variety of means that functionally if not formally add to the complaint a supplemental claim that implicates the rule of complete diversity. Most obviously, a complaint that asserts a claim between diverse parties may be amended to assert a claim by or against an additional, nondiverse party. Subsection (a)(3) makes clear that, regardless of the form of such amendment as superseding or merely expanding the original complaint, the newly added claim is to be treated jurisdictionally as if it had been asserted in the complaint at the commencement of the action. Other joinder scenarios that subsection (a)(3) anticipates and subjects to the jurisdictional restriction of subsection (c) are the

assertion by a plaintiff of a supplemental claim (other than a counterclaim or a claim for indemnity or contribution)[48] against a previously impleaded third party, the reformulation of the complaint or analogous pleading by order of the court directing the addition of claims by or against new parties under the compulsory-joinder provisions of Rule 19, and the intervention of new parties who wish to participate in the litigation as if they had been joined as parties by the complaint or analogous pleading.

Subsection (a)(4) is identical to present § 1367(e), but is relocated from the end of the statute to the end of the definitional subsection with which the statute now begins.

Subsection (b) sets forth in claim-specific terms a general grant of supplemental jurisdiction that is functionally identical to that of present § 1367(a), with one important clarification that would undermine[49] a recent, controversial decision of the Supreme Court. The Court there held that the "supplemental jurisdiction" granted by present § 1367(a) is not necessarily limited to "original jurisdiction," and thus embraces state-law claims for on-the-record judicial review of rulings by local administrative agencies even if such claims require federal district courts to exercise cross-system appellate jurisdiction. Revised § 1367(b) makes clear, as present § 1367(a) does not, that the supplemental jurisdiction it grants is a form of original jurisdiction. Nothing in the literal terms of revised § 1367(b) permits district courts to exercise cross-system appellate jurisdiction. This is the second of the important new features of revised § 1367.

The final clause of subsection (b) follows the final sentence of present § 1367(a), but changes the reference in current law to "additional parties" to read "additional claiming or defending parties." This recognizes, as does the related language of subsection (a)(3) dealing with claims joined constructively by an intervenor, that from a claim-specific perspective the intervention of an additional defending party constructively results in the joinder of a claim against that party. If this constructive claim is a supplemental claim, it is within the supplemental jurisdiction conferred by subsection (b).

Subsection (c) is functionally analogous to present § 1367(b) but differs substantially in its terms and, to a lesser degree, in its scope. In most fundamental respects its restriction of supplemental jurisdiction preserves the present operation of the rule of complete diversity.[50] Subsection (c) broadens the scope

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48. The Reporter has added this parenthetical qualification to the text of the Explanatory Note as printed in T.D. NO. 2 in order to conform the Explanatory Note to the amended statutory text of proposed subsection (a)(3). *See supra* note 45 (specifying and explaining the Reporter's amendment of subsection (a)(3)).

49. As printed in T.D. NO. 2, this sentence concludes: "with one important clarification that would effectively overrule a recent, controversial decision of the Supreme Court." Pursuant to discussion with the membership of the Institute on May 14, 1998, the Reporter has replaced the words "effectively overrule" with the word "undermine" in referring to the impact that subsection (b) of new section 1367 would have on the recent decision of the Supreme Court in *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523 (1997).

50. As printed in T.D. NO. 2, this sentence reads: "In most fundamental respects its restriction of supplemental jurisdiction preserves the present operation of the rule of complete diversity as applied to actions between citizens of different states." *Id.* at 7. The concluding words, "as applied to actions between citizens of different states," have been deleted by the

of supplemental jurisdiction in diversity actions beyond that authorized by present § 1367(b) with respect to nondiverse intervenors and claims for less than the jurisdictional amount by or against diverse co-parties.

Subsection (d) is substantially similar in form and effect to present § 1367(c), but with greater emphasis on the specific circumstances that may justify a district court in declining to adjudicate a particular supplemental claim. The new first sentence makes clear what current law merely implies: that the discretion to decline to exercise jurisdiction applies only to supplemental claims. The four categories of circumstances permitting supplemental jurisdiction to be declined parallel those specified by current law, but the first three have been refined and reorganized.

As under current law, only the fourth category requires the district court to conclude that "exceptional circumstances" exist. While any of the first three categories may thus justify a district court in declining to exercise supplemental jurisdiction in an otherwise unexceptional case, these three categories vary markedly in the degree to which the qualifying circumstances exist objectively or only in the subjective judgment of the district court. The revised order in which these three categories are specified reflects the increasingly subjective nature of each ground for declining supplemental jurisdiction.

Subsection (e) replaces present 28 U.S.C. § 1447(e) and expands the scope of discretion of a district court to respond fairly and efficiently to a postremoval motion in a diversity case by which the plaintiff seeks to amend the complaint so as to join a claim against an additional, nondiverse defendant. Present § 1447(e) is indifferent to whether the claim in question has any relationship to other claims in the previously removed action, and permits the district court to respond to such a motion in only two ways, either by denying the motion to amend, or by granting it and remanding the entire action. New § 1367(e) requires that the claim in question be a supplemental claim, and gives the court the third option of granting the motion and adjudicating the claim against the nondiverse defendant pursuant to a special grant of supplemental jurisdiction.

Present § 1447(e) provides no standards for the court to consider in weighing the two options it permits. By contrast, new § 1367(e) directs the court to choose in its discretion among the three options it permits after considering judicial economy, convenience, and fairness to litigants—the general justifications for supplemental jurisdiction—as well as the reasons permitting supplemental jurisdiction to be declined under new § 1367(d). In thus choosing among the three options provided by subsection (e), the court is not subject to subsection (d)'s presumption in favor of the exercise of supplemental jurisdiction. Should the court decide to permit the joinder without remanding the entire action, however, subsection (d) governs the subsequent exercise of the district court's jurisdiction. The court may later decline to exercise supplemental jurisdiction if authorized to

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Reporter. They had significance in an earlier draft, which would have preserved the rule of complete diversity with respect to a suit between citizens of different states but not with respect to suits between state citizens and aliens. *See* T.D. No. 1, *supra* note 13, at 6, 10, 98-102. They were carried forward inadvertently to T.D. No. 2, which draws no such distinction between diversity suits in which aliens are and are not parties.

do so by subsection (d), but may not later decline to exercise jurisdiction with respect to any freestanding claims.

Subsection (f) begins with a new sentence making clear that when the district court declines to exercise supplemental jurisdiction in a removed case, the supplemental claim in question should be remanded to state court rather than dismissed. The balance of subsection (f) follows present § 1367(d) in providing a mimimum of 30 days in which a dismissed claim can be filed in state court free of the bar of an otherwise applicable statute of limitations, but expands this tolling provision to embrace supplemental claims dismissed because the district court lacks supplemental jurisdiction as well as claims dismissed because the district court has declined to exercise its supplemental jurisdiction.

Subsection (f) also follows present law in extending the tolling provision to embrace claims voluntarily dismissed after other claims are dismissed on jurisdictional grounds, but broadens the scope of this secondary tolling provision in two respects. First, it is made applicable when the predicate dismissal of a supplemental claim is for the nondiscretionary reason that there is a lack of supplemental jurisdiction. Second, it is made applicable when the refusal to exercise supplemental jurisdiction takes the form of the denial of joinder under subsection (e).

The effect of these expanded tolling provisions is to give district courts greater flexibility in the administration of supplemental jurisdiction by assuring that related claims can be prosecuted together in state court should some but not all such claims be excluded from federal court on jurisdictional grounds. In order to avoid undue disruption of state-court proceedings, however, subsection (f) limits the time in which the secondary tolling provision may be invoked to a 30-day period following the predicate action by the district court. Because most voluntary dismissals in mature actions require leave of court, only the filing of the requisite motion need occur within the specified period. The moving party should not be held accountable for whatever additional time it takes for the court to rule on the motion.

III. OVERVIEW OF NEW SECTION 1367'S RELATIONSHIP TO DIVERSITY JURISDICTION[51]

A. Conceptual Structure

T.D. No. 2 begins with a set of definitions that confront and rectify a fundamental incoherence in the statutory scope of the original jurisdiction of the federal district courts. The statutes conferring such jurisdiction, most familiarly the general federal-question and general diversity statutes, 28 U.S.C. §§ 1331 and 1332, confer original jurisdiction over designated "civil actions." But a civil

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51. Part III is adapted from the memorandum to members of the Institute that I wrote as a preface to T.D. No. 2. *See* T.D. No. 2, *supra* note 10, at xv-xxv. The views stated are my own, and not necessarily those of the Institute. *See infra* note 63 (discussing the Institute's practice of nonendorsement of annotative material included in drafts approved by the Institute.).

action commenced in or removed to a district court may and generally does consist of a cluster of claims, often involving different sets of claiming and defending parties. As noted above in the Introduction, these statutes operate in a "claim-specific" rather than an "action-specific" way. Rules of joinder and the impetus of preclusion doctrine define the scope of a civil action, but the rules of federal subject-matter jurisdiction apply on a claim-by-claim basis influenced, but not controlled by, the scope of allowable joinder.

The proposition that the claim and not the civil action is the fundamental unit of litigation for purposes of federal jurisdiction fits comfortably within the established analytical structure of federal-question jurisdiction under § 1331. It does no more than restate, as an insight rather than a discovery, the essential teaching of *United Mine Workers v. Gibbs*[52] and its distinction between a claim arising under federal law and a possibly "pendent" claim arising under state law. The conceptual advance proposed by new section 1367 is acknowledgment that the claim-specific structure of federal jurisdiction pertains to diversity jurisdiction as well, despite the seemingly action-specific operation of the rule of complete diversity that by decisional gloss has long qualified the scope of the jurisdiction conferred by § 1332.

The reconceptualization of the operation of the rule of complete diversity cannot be avoided if a general grant of supplemental jurisdiction is to be melded satisfactorily with retention of the complete-diversity rule. New section 1367 is predicated on a more accurate conception of that rule. Across the full range of its application and exceptions, the rule of complete diversity cannot coherently be understood to require that every claim joined in a civil action be between parties of fully diverse citizenship if any claim in that action is to be within federal jurisdiction under § 1332. Like § 1331, its federal-question counterpart, § 1332 confers diversity jurisdiction on a claim-by-claim basis.

Of course, if supplemental jurisdiction were generally available to permit federal district courts to adjudicate claims between nondiverse parties based on some factual or transactional relationship between such claims and at least one claim between fully diverse parties joined in the same civil action, so-called "minimal diversity" rather than "complete diversity" would characterize the scope of federal jurisdiction in all diversity cases, and not just those brought under 28 U.S.C. § 1335,[53] the special grant of diversity jurisdiction in interpleader cases. The crucial point is that supplemental jurisdiction is not and never has been generally available to support the claim-specific jurisdiction granted by § 1332. The rule of complete diversity is not in tension with the concept of supplemental jurisdiction in diversity cases—it is, rather, itself a rule of supplemental jurisdiction that restricts its scope in diversity cases.

Once this fundamental point is understood and its significance appreciated, diversity jurisdiction and supplemental jurisdiction can be reconciled less awkwardly than is provided by present 28 U.S.C. § 1367(b),[54] the most problematic subsection of the current supplemental-jurisdiction statute. The key

52. 383 U.S. 715 (1966).
53. 28 U.S.C. § 1335 (1994).
54. *Id.* § 1367(b) (1994).

lies in identifying just what sorts of supplemental claims must be excluded from supplemental jurisdiction in order to preserve the effect of the rule of complete diversity. The array of definitions set forth at the beginning of T.D. No. 2's proposed new section 1367 seeks to do just that.

First, the new statute defines a "freestanding" claim as one that is within the original jurisdiction of the district courts without reliance on supplemental jurisdiction.[55] Second, the new statute defines a "supplemental" claim[56] in terms of two characteristics: such a claim is not a freestanding claim, but is related to a freestanding claim asserted in the same civil action in the sense required for it, *Gibbs*-style, to be part of the same case or controversy under Article III of the Constitution.[57] Third, and most unfamiliarly, the new statute creates a new term of art, "asserted in the same pleading," which it then defines in tedious but comprehensive detail.[58]

Conceptual change comes at a price. Until new section 1367's reconceptualization of diversity jurisdiction commands general understanding and acceptance, the reader of new section 1367(a)(3) may feel like the proverbial snake after dining on a pig. But the antidote to that sense of indigestion is provided by new section 1367(c)'s much simplified restriction of supplemental jurisdiction in diversity cases, which turns entirely on the definition of "asserted in the same pleading" provided by new section 1367(a)(3).

B. Supplemental Jurisdiction in Diversity Cases

T.D. No. 2 conforms closely to T.D. No. 1 with respect to proposed new section 1367(c)'s restriction of supplemental jurisdiction in diversity cases, with one significant change. T.D. No. 1 would have repealed the rule of complete diversity in alienage cases by making supplemental jurisdiction freely available to support nondiverse claims if they were joined to and related to a claim of sufficient value between a citizen of a state and an alien. This followed from the intended literal effect of T.D. No. 1's version of new section 1367(c), which tied the restriction of supplemental jurisdiction to cases in which the only relevant freestanding claim was within federal jurisdiction "solely on the basis of section 1332(a)(1) of this title." The counterpart text of T.D. No. 2's black letter refers only to "section 1332(a)" without the further restriction to paragraph (1) of subsection (a). This makes alienage litigation, as well as conventional diversity litigation between citizens of different states, fully subject to the restriction of supplemental jurisdiction by which proposed new section 1367(c) preserves the rule of complete diversity.

T.D. No. 2 carries over without substantial change, but with slightly different wording, the terms of T.D. No. 1's three exceptions to the restriction of supplemental jurisdiction in diversity cases.

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55. *See* T.D. No. 2, *supra* note 10, § 1367 (a)(1), at 1.
56. *See id.* § 1367(a)(2), at 1.
57. U.S. CONST. art. III.
58. T.D. No. 2, *supra* note 10, § 1367(a)(3), at 1.

The first exception applies to class actions. It codifies long-settled decisional law that determines the diversity status of a class action without reference to claims by or against unnamed class members. It also specifies expressly what some courts have deemed to be the inadvertent result of present § 1367(b), literally construed: supplemental jurisdiction extends to claims by or against unnamed class members for less than the amount in controversy required by § 1332, countermanding the rule of *Zahn v. International Paper Co.*[59]

The second exception similarly extends supplemental jurisdiction to claims by or against a named party for less than the amount in controversy required by § 1332, countermanding the rule of *Clark v. Paul Gray, Inc.*[60]

The third exception extends supplemental jurisdiction to claims by or against intervenors whose joinder is not indispensable to a district court's continued adjudication of a civil action. Present § 1367(b) is more restrictive of supplemental jurisdiction with respect to claims by or against intervenors in diversity litigation than had been the case under prior decisional law. New section 1367(c)(3) would restore the status quo ante, with the additional but insignificant expansion of supplemental jurisdiction to embrace claims by or against permissive intervenors as well as intervenors as of right. Given the discretionary control that district courts already possess to exclude permissive intervenors, no practical purpose is served by creating a situation in which permissive intervention is desirable and favored by the court, but is impossible for lack of supplemental jurisdiction.

New section 1367 preserves the rule of *Owen Equipment & Erection Co. v. Kroger*.[61] Although controversial, this rule justifiably avoids evasion of the rule of complete diversity by treating the assertion of a claim by a plaintiff against a nondiverse, impleaded third-party defendant as if that third-party defendant had in fact been joined to the litigation as a codefendant in the plaintiff's original complaint. To this extent, new section 1367 would have the same effect as current law. But unlike current law, new section 1367 preserves *Kroger*'s precise application of the rule of complete diversity without restricting supplemental jurisdiction of claims asserted by plaintiffs who have been placed in a defensive posture. Under new section 1367 such a plaintiff may invoke supplemental jurisdiction to implead third-party defendants in its own right, and to assert a compulsory counterclaim against a third-party defendant who has chosen to assert a claim directly against the plaintiff.[62]

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59. 414 U.S. 291 (1973).

60. 306 U.S. 583 (1939).

61. 437 U.S. 365 (1978).

62. Such supplemental claims by a plaintiff who has been placed in a defensive posture fall within the supplemental jurisdiction that subsection (b) of new section 1367 grants in global terms. Subsection (c) of new section 1367 restricts this global grant of supplemental jurisdiction in diversity litigation only when the supplemental claim in question has been "asserted in the same pleading" as the relevant freestanding claim. Subsection (a)(3) of new section 1367 as amended by the Reporter, *see supra* note 45, excludes from the definition of "asserted in the same pleading" counterclaims and claims for indemnity or contribution asserted by a plaintiff against a previously impleaded third-party defendant.

Subsection (e) of new section 1367 also qualifies the rule of complete diversity as applied in *Kroger* by giving a district court the discretion to exercise supplemental jurisdiction over a

IV. REINTERPRETATION OF THE RULE OF COMPLETE DIVERSITY[63]

It takes little more than a citation to *Gibbs* to support the assertion that § 1331's grant of federal-question jurisdiction is claim-specific.[64] The general diversity statute, § 1332, poses a far sterner test for the contention that the jurisdiction of the district courts can be conceived in claim-specific terms without altering the familiar scope of that jurisdiction. In *Kroger*, the Supreme Court specifically refused to extend the claim-specific jurisprndence of *Gibbs*, holding that the action-specific scope of the general diversity statute ruled out the assertion of ancillary jurisdiction over a claim by a plaintiff against a nondiverse defendant. The *Kroger* Court declared:

> [Section 1332 and its predecessors] have consistently been held to require complete diversity of citizenship. That is, diversity jurisdiction does not exist unless each defendant is a citizen of a different State from each plaintiff. Over the years Congress has repeatedly re-enacted or amended the statute conferring diversity jurisdiction, leaving intact this rule of complete diversity. Whatever may have been the original purposes of diversity-of-citizenship jurisdiction, this subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant.[65]

But it does not follow that a claim-specific conception of the original jurisdiction of the district courts is incompatible with the rule of complete diversity. This supposed "statutory mandate" can be understood and honored—indeed, better understood and more coherently and consistently honored—when viewed through the lens of the claim-specific model of original jurisdiction. That view reveals that the rule of complete diversity, both as articulated by Chief Justice Marshall in 1806 in *Strawbridge v. Curtiss*,[66] and as

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claim against a nondiverse defendant that is added to litigation by postremoval amendment of the complaint.

63. Part IV is adapted from Section D of my "Reporter's Mcmorandum on the Claim-Specific Nature of the Original Jurisdiction of the District Courts," which appears in T.D. No. 2 after the proposed statutory text and associated commentary. *See* T.D. No. 2, *supra* note 10, at 114-25. The convention of the Institute is that material thus presented in memorandum form as the opinion of the Reporter is not subject to approval by the membership of the Institute, and thus is not endorsed by the Institute even when it approves the associated statements of "black-letter" law or proposed statutory text and supporting commentary that constitute the balance of a tentative or final draft. In contrast to the material presented in Part II, which does bear the imprimatur of ALI approval, the material presented in Part I and Parts III and IV thus represents my views but not necessarily those of the Institute.

64. I do not mean to imply that my analysis of the claim-specific nature of federal-question jurisdiction consists only of a citation to *Gibbs*. But having written elsewhere of the general features of the claim-specific model of federal jurisdiction, *see* T.D. No. 2, *supra* note 10, at 18-20, 29-35, 101-14, and having elaborated this model with special reference to federal-question jurisdiction, *see* Oakley, *Litigative Unit*, *supra* note 2, at 1832-61, I wish to focus here on the applicability of that model to diversity jurisdiction.

65. *Kroger*, 437 U.S. at 373-74 (footnotes omitted).

66. 7 U.S. (3 Cranch) 267.

applied by him and other judges for at least the past 175 years, did not prohibit the exercise of original jurisdiction over a claim between diverse parties when joined in the complaint with a claim between nondiverse parties. What it did prohibit was the exercise of original jurisdiction over the claim between nondiverse parties—what in modern parlance would be called "supplemental jurisdiction" of the sort that *Kroger* held was unavailable in a diversity action. Of course, there may be good reason for a court to dismiss the entire action when claims against nondiverse parties are joined in the complaint with claims against diverse parties, but as a function of the law of compulsory joinder rather than a function of some supposed action-specific lack of jurisdiction pursuant to the rule of complete diversity.

This is a bold claim, and demands a lengthy explication. It requires working backwards from the operation of the concept of "minimal diversity" to an improved understanding of the rule of complete diversity.

It cannot be true that Congress has the power to authorize the exercise of original jurisdiction over the entirety of any civil action in which claims between diverse parties are joined with claims between nondiverse parties. Suppose *A* from Alabama sues *B* from Wyoming and *C* from Alabama, properly joining *B* and *C* under Rule 20[67] by asserting claims against each arising from a breach of a contract entered into between all three parties. While all would agree that § 1332 does not confer jurisdiction to adjudicate *A*'s claim against *C*, and conventional doctrine would insist that § 1332 also does not confer jurisdiction to adjudicate *A*'s claim against *B* (regardless of the amount in controversy between *A* and *B*), the dawning of the constitutional age of minimal diversity leaves no room for doubt that by some special grant of diversity jurisdiction less cabined than § 1332, such as the grant of interpleader jurisdiction under § 1335, Congress could authorize the adjudication of *A*'s claims against both *B* and *C* in a single civil action in the federal district courts. But suppose *A* has invoked Rule 18[68] to join in the complaint a claim against *C* for some tort that has nothing to do with *B* or the contract between *A*, *B*, and *C*.

The mere existence of a minimal diversity statute that extends to the district courts the full scope of federal judicial power under Article III to a "Controvers[y] . . . between Citizens of different States"[69] cannot constitutionally grant jurisdiction to the district courts of the tort claim by *A* against co-citizen *C*. Minimal diversity jurisdiction is limited by the same constitutional premise of a single "case or controversy" as served under *Gibbs* to limit pendent jurisdiction. There must be a transactional or at least factual relationship between claims independently subject to federal jurisdiction and claims contingently or supplementally subject to federal jurisdiction, and this transactional or factual

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67. FED. R. CIV. P. 20(a) (permitting permissive joinder of parties provided that at least one claim by or against eaeh party is based on "the same transaction, occurrence, or series of transactions or occurrences" and that at least one "question of law or fact common to all" the joined parties "will arise in the action").

68. FED. R. CIV. P. 18(a) (permitting unlimited joinder of claims by a particular claiming party as against a particular opposing party, with no requirement that the claims be related in any way other than that they are between the same parties).

69. U.S. CONST. art. III.

relationship cannot be supplied by the mere fact of the permissible joinder of claims in a civil action. Minimal diversity jurisdiction cannot operate at the level of the civil action alone; it must attach initially or originally to a claim between diverse parties, and then extend secondarily or supplementally only to such other claims in the same action as have the requisite transactional or factual relationship to the jurisdiction-conferring claim.

It does not follow necessarily from the intrinsically claim-specific nature of diversity jurisdiction under Article III that the vesting of some more limited scope of diversity jurisdiction in the district courts under a statute such as § 1332 must also be claim-specific and not action-specific. It could be both.

Among the potential alternative schemes for such an action-specific regime of diversity jurisdiction under § 1332 are the following: (1) no diversity jurisdiction may be exercised over any claim in an action unless every claim in that action qualifies independently for diversity jurisdiction; (2) no diversity jurisdiction may be exercised over any claim in an action unless every claim asserted in the complaint in that action qualifies independently for diversity jurisdiction; (3) no diversity jurisdiction may be exercised over any claim in an action unless every claim asserted in the complaint in that action is between diverse parties; and (4) no diversity jurisdiction may be exercised over any claim in an action unless every claim asserted in the complaint in that action qualifies independently for some form of statutory original jurisdiction, but not necessarily diversity jurisdiction.

If the rule of complete diversity makes § 1332 both claim-specific and action-specific in the original jurisdiction it vests in the district courts, it cannot be in the sense of alternative (1). That would rule out any exercise of original jurisdiction over what used to be called ancillary claims, in contradiction of established practice that *Kroger* found consistent with the statutory rule of complete diversity.[70]

Alternative (2) is also incompatible with established practice under § 1332. It would require dismissal of the entire complaint for lack of jurisdiction, notwithstanding complete diversity between all plaintiffs and all defendants, if the claim of any plaintiff failed to satisfy the jurisdictional amount required by § 1332. But it is incontrovertible that while § 1332 forbids the "aggregation" of the amounts in controversy under the claims of multiple parties such that the jurisdictionally insufficient claims are adjudicated on an ancillary or supplemental basis, it requires only the dismissal of the jurisdictionally insufficient claims, not the entire action.[71]

Section 1332's rule of complete diversity is often stated in the terms of alternative (3), which permits jurisdiction to be exercised over ancillary claims (i.e., claims asserted by a pleading other than the complaint) and does not require dismissal of the action when some claims are jurisdictionally insufficient for reasons of the amount in controversy rather than the lack of diversity of the

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70. *Kroger*, 437 U.S. at 375.

71. *See* Zahn v. International Paper Co., 414 U.S. 291, 295 (1973); Clark v. Paul Gray, Inc., 306 U.S. 583, 589-90 (1939).

parties.[72] But alternative (3) is incompatible with the "*Romero* exception" to the rule of complete diversity,[73] which permits a district court to exercise original jurisdiction over an action in which the complaint asserts both claims between nondiverse parties that qualify for original jurisdiction under § 1331 (or some other nondiversity-based grant of jurisdiction) and claims between diverse parties that qualify for original jurisdiction only under § 1332.

That leaves alternative (4) as the last available formulation of the supposedly action-specific effect of the jurisdictional bar of the rule of complete diversity that might conform to the settled construction of § 1332. But even alternative (4) fails to account for the actual application of the rule of complete diversity.

In *Newman-Green, Inc. v. Alfonzo-Larrain*, the Supreme Court ratified the "well-settled" principle[74] that "Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered,"[75] and concluded that appellate courts have inherent authority to likewise cure the problem of "jurisdictional spoilers"[76] in order to "preserve" diversity jurisdiction. It is significant that *Newman-Green* was no "sport" or abrupt departure from the historic operation of the general diversity statute. *Newman-Green*'s holding that appellate courts as well as trial courts may preserve diversity jurisdiction by dismissing dispensable jurisdictional spoilers reaffirmed *Carneal v. Banks*,[77] written 174 years previously by Chief Justice Marshall. *Newman-Green* also quoted approvingly the language of *Horn v. Lockhart*,[78] in which 126 years previously the Court had approved a trial court's dismissal of jurisdictional spoilers in overtly claim-specific terms:

> [T]he question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of the parties, whether . . . they are indispensable parties, for if their interests are severable and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them.[79]

Newman-Green and its antecedents cannot be squared with any action-specific conception of § 1332. The dismissal of a jurisdictional spoiler "preserves" diversity jurisdiction over an already-litigated action to which a nondiverse party had been joined. If indeed § 1332 confers no jurisdiction over any claim unless all claims in an action qualify independently for federal jurisdiction, the effect of the dismissal of the jurisdictional spoiler would be to confer retroactively and

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72. *See, e.g., Kroger*, 437 U.S. at 373-74; ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 280 (2d ed. 1994).

73. *See* Romero v. International Terminal Operating Co., 358 U.S. 354, 380-81 (1958).

74. 490 U.S. 826, 833 & n.7 (1989).

75. *Id.* at 832; *see* FED. R. CIV. P. 21 (permitting parties to "be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just").

76. *Newman-Green*, 490 U.S. at 830.

77. 23 U.S. (10 Wheat.) 181 (1825).

78. 84 U.S. (17 Wall.) 570 (1873).

79. *Newman-Green*, 490 U.S. at 835 (quoting *Horn*, 84 U.S. at 579) (omission and alteration in original).

nonstatutorily the power to adjudicate the previously adjudicated claims between the diverse parties.

But *Newman-Green* makes eminent sense if § 1332 is understood to vest the district court with original jurisdiction of all claims between diverse parties, with the joinder of claims between nondiverse parties raising the distinct issues of the scope of the district court's supplemental jurisdiction over such claims and the necessity of their joinder. So conceived, the mandate of the rule of complete diversity restricts the scope of the supplemental jurisdiction of the district courts in diversity cases. Incomplete diversity does not divest the district court of original jurisdiction over claims for which supplemental jurisdiction is not required. Given that supplemental jurisdiction cannot be exercised over the claims between nondiverse parties, whether the jurisdiction conferred by § 1332 should be exercised to retain and adjudicate the claims between diverse parties turns on the indispensability of the nondiverse parties.

There is perhaps some tension between the reasoning of *Newman-Green* and that of *Finley v. United States*,[80] with respect to the scope of the supplemental jurisdiction of the district courts and the discretionary power of judges to dismiss nondiverse parties. Just three weeks before its judgment in *Newman-Green*, the Court had decided *Finley* in an opinion written by Justice Scalia and joined by Justice Kennedy, who provided the fifth vote needed for Justice Scalia to speak for the Court. These Justices, decisive in *Finley*, were dissenters in *Newman-Green*. Justice Kennedy, joined by Justice Scalia, expressed grave concern that "[t]he charming utility of the nunc pro tunc device cannot obscure its outright fiction."[81] Justice Kennedy declared it

> disturbing that the Court does not address in a substantive way the grave, brooding question whether Federal Rule of Civil Procedure 21 affords even the district courts the power to confer jurisdiction retroactively by dismissing a nondiverse party. On this critical point, the Court states only that this question is "well settled" in the lower courts. But it has never been the rule that federal courts, whose jurisdiction is created and limited by statute, acquire power by adverse possession.[82]

In addition to discounting *Carneal* and *Horn* as "19th-century cases,"[83] the dissent sought to avoid the claim-specific implications of *Carneal* by looking beyond its holding to its facts. That case involved the assertion of claims for equitable relief against two sets of parties, with the rescission of a contract prayed for as to one set and the conveyance of equitable title prayed for as to the other set. Although it appears that the relief was sought in a single bill, the dissent questioned whether *Carneal* should be read as having "involved a single action in which this Court dismissed on its own the nondiverse parties."[84] Referring to a theory advanced below by Judge Posner, Justice Kennedy argued that in *Carneal*, Chief Justice Marshall "may have in fact 'treated the suit as it were two

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80. 490 U.S. 545 (1989).
81. *Newman-Green*, 490 U.S. at 840 (Kennedy, J., dissenting, joined by Scalia, J.).
82. *Id.* at 839 (citations omitted).
83. *Id.* at 840.
84. *Id.* at 841.

suits, one satisfying the requirement of complete diversity, the other dismissible and dismissed.'"[85]

Of course an action-specific conception of diversity jurisdiction can always be defended in the manner of the pre-Galilean conception of a universe revolving around the Earth, by the invention of mathematical epicycles that make the sun and the planets behave like the moon. Insisting whenever convenient that one action be treated like two—so that the freestanding claims revolve in a separate orbit from the related but nonfreestanding claims to which they have been joined—has just this character of avoiding the ineffable by conforming to the command of a medieval Pope. But since Chief Justice Marshall was also the author of *Strawbridge v. Curtiss*,[86] the fountainhead of the supposedly action-specific rule of complete diversity, it makes more sense to reexamine *Strawbridge* to see if there is any less implausible basis for reconciling Chief Justice Marshall's two opinions in *Strawbridge* and *Carneal*, and thus exonerating *Carneal*, *Horn*, and *Newman-Green* from the *Newman-Green* dissenters' charge that they have resorted to fiction in subversion of a statutory constraint on the jurisdiction of the district courts.

A curious but neglected feature of *Strawbridge* is its reservation of an important issue: whether jurisdiction might be exercised in an "incomplete" diversity case if the interests of the nondiverse parties were "several" rather than "joint." *Strawbridge* did not suffer from a lack of brevity, and hence it is practicable to quote in its entirety Chief Justice Marshall's opinion for a unanimous Court. The opinion was preceded by an equally brief statement of the case, which began: "This was an appeal from a decree of the circuit court, for the district of Massachusetts, which dismissed the complainants' bill in chancery, for want of jurisdiction."[87] The statement of the case went on to note that some of the complainants and all of the defendants except Curtiss were alleged to be co-citizens of Massachusetts. Chief Justice Marshall's opinion followed:

> The court has considered this case, and is of opinion that the jurisdiction cannot be supported.
>
> The words of the act of congress are, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state."
>
> The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.
>
> But the court does not mean to give an opinion in the case where several parties represent distinct interests, and some of those parties are, and others

85. *Id.* (quoting Newman-Green, Inc. v. Alfonzo-Larrain R., 854 F.2d 916, 921 (7th Cir. 1988) (en banc)).

86. 7 U.S. (3 Cranch) 267 (1806).

87. *Strawbridge*, 7 U.S. at 267.

> are not, competent to sue, or liable to be sued, in the courts of the United States.
>
> Decree affirmed.[88]

It makes little sense for the *Strawbridge* Court to have reserved the question of the status of statutory diversity jurisdiction over nondiverse several claims if the statute itself conferred jurisdiction only over actions in which all joined claims were between diverse parties. If a lack of complete diversity condemns to dismissal an action in which diverse and nondiverse parties assert "joint" claims, there would seem little reason to preserve the possibility of retaining jurisdiction over an action in which the looser joinder of parties asserting "several" claims includes in the mix some nondiverse parties. Unless, that is, the jurisdiction conferred by the statute attaches at the level of the claim rather than the action as a whole. If jurisdiction cannot be exercised over a claim by or against a party with respect to an interest jointly asserted by or against that party, that party would be not just permissibly joined but in modern parlance a necessary party, likely but for the modern refinement of compulsory-joinder doctrine to be regarded as indispensable. Thus, *Strawbridge* has overtones of what has since been treated as a bifurcated issue: if a nondiverse party is a necessary party, should the action be dismissed because of the lack of jurisdiction over the claim by or against the nondiverse party? *Newman-Green* limits the power of a court to dismiss the claim by or against a jurisdictional spoiler to claims involving "dispensable" jurisdictional spoilers. The *Strawbridge* distinction between joint and several claims echoes this concern. The *Strawbridge* distinction makes eminent sense if the general diversity statute is construed in a claim-specific fashion and if the failure to join a jointly-interested party was then viewed per se as the failure to join an indispensable party. The assertion of a claim by or against a party whose interest was merely several would then require consideration of the dispensability of that party—exactly the consideration that is deemed a prerequisite to the jurisdiction-saving dismissal of that claim under *Newman-Green.*

It remains only to synthesize diversity doctrine and compulsory-joinder doctrine to arrive at a claim-specific construction of the general diversity statute that coheres with *Newman-Green.* In *Strawbridge,* Chief Justice Marshall read the predecessor of § 1332 to require "complete diversity" at least in actions involving claims by or against jointly interested parties, leaving open the status of actions involving the joinder of claims between nondiverse parties where the interests of the diverse as opposed to nondiverse parties were several rather than joint. Obviously this entails a construction of the general diversity statute as far more limited than a hypothetical, "minimal diversity" statute. But something more is at work, for if no jurisdiction were conferred over any action not featuring complete diversity, there would be no reason to pause as to the application of the statute to claims involving several interests. Such nondiverse parties would be more loosely connected to claims between diverse parties if their interests were several rather than joint, and if jurisdiction does not exist over claims involving nondiverse, jointly interested parties, it ought a fortiori not exist over claims

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88. *Id.* at 267-68.

involving nondiverse severally interested parties. Moreover, a construction of the statute as requiring the dismissal of any diversity action in which there is a lack of complete diversity would be radically inconsistent with the line of cases to which Chief Justice Marshall himself contributed that was reaffirmed by *Newman-Green*'s approval of the retroactive dismissal of a jurisdictional spoiler.

Strawbridge escapes these inconsistencies when viewed from a claim-specific perspective. The rule of complete diversity does not require the dismissal of the entire action when some nondiverse parties are joined to that action. But it does require the dismissal of the jurisdictional spoilers, even when the claims by or against the nondiverse parties are so related to the claims involving diverse parties that they could be adjudicated were the statute to call merely for minimal rather than complete diversity among all parties joined in the complaint. The question then becomes whether the dismissal of the nondiverse claims precludes the exercise of jurisdiction over the remaining claims. Today we would view this question as governed by Rule 19[89] and the law of compulsory joinder: if the nondiverse parties are indispensable parties, the entire action must be dismissed. At the time of *Strawbridge*, however, this question was conceived in jurisdictional terms, and it was only in the decades immediately following *Strawbridge* that it came gradually to be recognized that the retention and exercise of jurisdiction as against those parties properly before the court was not, strictly speaking, a matter of jurisdiction as opposed to equitable discretion.[90]

The reason for the *Strawbridge* reservation of the jurisdictional status of incomplete-diversity actions involving several rather than joint interests was that jointly-interested parties were (and are) regarded per se as necessary parties, but there was then no second step to compulsory-joinder analysis at which the "dispensability" of a necessary party could be debated. The dismissal of the claims against nondiverse parties jointly concerned in the litigation of the action therefore required the dismissal of the entire action. The rule of complete diversity also required dismissal of severally interested nondiverse parties, but it did not follow that a court exercising equitable jurisdiction (as was the case in *Strawbridge*) would act in excess of its jurisdiction by proceeding with the action as against the remaining, completely diverse parties. Under the modern conception of compulsory-joinder doctrine, of course, the action may continue so long as any absentees, even if necessary parties, are nonetheless "dispensable," and it is accordingly dispensability, not necessary-party status, that limits the power to drop a jurisdictional spoiler under *Newman-Green*.

89. FED. R. CIV. P. 19 (governing "joinder of persons needed for just adjudication").

90. *See* Mallow v. Hinde, 25 U.S. (12 Wheat.) 193, 198-99 (1827); Cameron v. McRoberts, 16 U.S. (3 Wheat.) 591, 592 (1818); Morgan's Heirs v. Morgan, 15 U.S. (2 Wheat.) 290, 298 & n.b (1817) (Marshall, C.J.).