

1367 and All That: Recodifying Federal Supplemental Jurisdiction

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I. INTRODUCTION

When several authors of whom I was one participated in a heated exchange over the new federal supplemental-jurisdiction statute¹ in 1991,² about all we could agree on was to bind the articles together in a single reprint. I sent my parents a copy, and the response of my then eighty-one-year-old mother was a gem: “My, what a lot of fur is flying!” At that point much of the fuss was about whether the statute as written was well or poorly drafted and whether it lent itself

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1. 28 U.S.C. § 1367 (1994). Because the focus of this Article is on policy issues of what situations should and should not be included in a supplemental-jurisdiction statute’s coverage, and specifically on the limits for diversity cases in § 1367’s subsection (b), quotation of the statute in full here would be a waste of trees. The general authorization in subsection (a) and the diversity case limits in subsection (b) read as follows:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

Id. § 1367(a)-(b). Subsection (c), referred to in § 1367(a), deals with judicial discretion to decline the exercise of supplemental jurisdiction in enumerated types of circumstances.

2. See Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991); Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn’t Do Its Job*, 40 EMORY L.J. 1007 (1991); Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991) [hereinafter Rowe et al., *Reply*] (responding to Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991)); Thomas D. Rowe, Jr. et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991) [hereinafter Rowe et al., *Coda*].

to unfortunate or unintended interpretations, issues that still spark controversy.³ The ongoing Federal Judicial Code Revision Project of the American Law Institute ("ALI") to propose possible Judicial Code revisions in areas including supplemental jurisdiction,⁴ however, permits a shift in focus to how the statute might best be redrafted in light of the critiques, judicial experience, and policy considerations.

This Article will first offer some general comments on the codification of the supplemental-jurisdiction area. It then considers what coverage and exclusions would be desirable in a redrafting of § 1367(b), the provision that now restricts supplemental jurisdiction in diversity cases. An Appendix offers a draft to accomplish these changes if Congress were to choose limited revision within the framework of the existing supplemental-jurisdiction statute, rather than the more ambitious (and most admirable) recasting developed in the ALI Code Revision Project. Those who would relish more fireworks will perhaps be disappointed, for the level of agreement among some of the former combatants on what ends we should now seek to achieve may turn out to be surprisingly high. My mother, though, will probably be relieved.

II. THE SOMEWHAT REGRETTABLE NECESSITY OF CODIFICATION

The law governing the federal courts' supplemental jurisdiction, previously described in its various parts as pendent and ancillary jurisdiction,⁵ had long been

3. Compare, e.g., Ellen S. Mouchawar, Note, *The Congressional Resurrection of Supplemental Jurisdiction in the Post-Finley Era*, 42 HASTINGS L.J. 1611, 1613 (1991) ("Section 1367 . . . makes great strides in resolving much of the confusion surrounding the doctrines" of pendent and ancillary jurisdiction.), and Kristen M. Niemi, Note, *The "Noncontroversial" Statute: Have Expressed Concerns of 28 U.S.C. § 1367 Come to Light?*, 72 U. DET. MERCY L. REV. 397, 397 (1995) ("By implementing the supplemental jurisdiction statute, Congress has effectively responded to the problems that initially required the statute's creation."), with 16 ROBERT C. CASAD ET AL., MOORE'S FEDERAL PRACTICE § 106.40, at 106-55 (3d ed. 1998) (describing § 1367(b)'s diversity case limits as revealing the statute's "anti-diversity bias," the drafters' failure to extend those limits to removing defendants as "totally lacking in rationality," and the subsection's draftsmanship problems as making it "something of an interpretive nightmare"). As one who participated in the drafting, see Rowe et al., *Reply*, *supra* note 2, at 944 & n.4, and therefore must be totally lacking in rationality, I should perhaps spare readers by quitting now. But in the hope that some of this language may be academic hyperbole, or that I may have learned from the bracing experience of having mistakes I had a part in making find their way into the Judicial Code, I shall try to draw on that experience in discussing possible revisions to the statute.

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

5. "Pendent" or "pendent claim" jurisdiction generally referred to claims outside original jurisdiction, but related to claims within original federal question jurisdiction, that were added by plaintiffs against existing defendants. "Pendent party" jurisdiction referred mainly to efforts by plaintiffs to add similarly related claims but against a defendant not already before the court. Pendent jurisdiction in both these forms dealt with matters that were or could be part of a plaintiff's original complaint, at least as far as the rules on claim and party joinder were concerned. For the remaining large universe of claims added by defendants or later-joined parties such as

developed by judicial decision with virtually no direct legislative focus on the subject.⁶ Until 1989 there had been no major momentum toward codification, probably because the practical workings of judicially developed doctrine in the area had at least not been intolerable. To be sure, some Supreme Court decisions were questionable in their reasoning and effects,⁷ and the field suffered from lack of clarity in as yet unilluminated corners.⁸ Still, in broad outline, the Court's guidance seemed to have produced a more or less livable degree of accommodation between, on one hand, the limits on the federal courts' subject-matter jurisdiction and, on the other hand, the economy, convenience, and consistency offered by the rules on joinder of claims and parties.⁹ Case-by-case development also had the virtue of permitting consideration of discrete aspects of a complex area as they arose in concrete situations, rather than forcing an

third-party defendants, the term "ancillary jurisdiction" covered the addition of claims outside original federal question or diversity jurisdiction but related to claims within it.

6. A limited exception had been 28 U.S.C. § 1338(b) (1994), originally adopted in 1948, authorizing original district court jurisdiction over "any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws." *Id.* For pendent and ancillary jurisdiction in general, the Supreme Court had required "careful attention to the relevant statutory language." *Aldinger v. Howard*, 427 U.S. 1, 17-18 (1976) ("Before it can be concluded that [pendent] jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence.") For the most part, however, given the lack of other statutes like § 1338(b), the relevant statutes were those creating original jurisdiction, and the required judicial attention took the form of drawing inferences about pendent or ancillary jurisdiction from statutes in which Congress had focused only on original jurisdiction.

7. *See, e.g., Aldinger*, 427 U.S. at 27, 29 (Brennan, J., dissenting) (pointing out, in dissent from decision against pendent party jurisdiction over a related state law claim against the county in a federal civil rights action against a county official, that legislative history directly addressed possible state law claims against local governments); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (requiring unnamed class members with legally separate claims to satisfy the jurisdictional amount requirement individually, even though the class representatives themselves had claims for more than the amount in controversy and the citizenship of unnamed members would be disregarded for purposes of the complete diversity rule under *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)); *see also id.* at 305-12 (Brennan, J., dissenting) (discussing the ancillary jurisdiction analysis ignored by the majority).

8. *See, e.g.,* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567.2, at 156 (2d ed. 1984) ("The *Aldinger* decision left much still to be answered on when pendent parties can be brought into a federal action. . . . The subsequent lower court decisions . . . do not fall into any single pattern."); 13 *id.* § 3523, at 104 (noting uncertainty about ancillary jurisdiction when plaintiff sought to assert claim against third-party defendant either as counterclaim or after removal). *See generally* 13 *id.* at 115 ("[I]t . . . is difficult to discern any single rationalizing [sic] principle that will explain [the] diverse rules" of ancillary jurisdiction.).

9. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 n.18 (1978) (listing the Supreme Court and lower federal court decisions upholding ancillary jurisdiction over compulsory counterclaims, impleader, cross-claims, and intervention of right); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (upholding the constitutional basis for pendent claim jurisdiction when "the relationship between [a federal question] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'").

attempt at broad codification with a comprehensive treatment of multifarious circumstances that had arisen in only a few lower-court cases—or perhaps were possible but had to be imagined in the abstract. Experience with the codification effort when it took place in 1990 had left me, even before controversy about the statute mounted in the following year, with doubts about whether the area was better treated by legislation or by decisional law.

In 1989, though, the Supreme Court's 5-4 decision in *Finley v. United States*¹⁰ made some form of codification virtually imperative. First, *Finley* rejected pendent party jurisdiction over a nondiverse state claim co-defendant in a Federal Tort Claims Act ("FTCA") suit against the United States. Federal court jurisdiction in FTCA actions being exclusive,¹¹ no single forum was available to hear the plaintiff's claims against both the government and a nonfederal defendant in such a case; the plaintiff had to forgo or postpone claims against one defendant, or bring parallel actions in state and federal court—with all the duplication and chance of inconsistency that such a course entails. Second, beyond the particular type of pendent party claim involved in *Finley*, the majority stated that "with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly."¹² This statement cast doubt on long-accepted ancillary jurisdiction over such joinder as that of third-party defendants, and further bespoke an interpretive approach that seemed to banish hope that the Court would minimize any practical harm resulting from its decision—or tolerate lower federal courts doing so.

Codification duly followed, and beyond the overruling of *Finley* it does have advantages such as the elimination of the bedeviling pendent-ancillary distinction and the addition in the present statute of clarity and definiteness in some respects. Still, the experience at once shows down sides of codification and raises questions about how the Court has often been coming at statutory interpretation in this and other areas. At least until Congress can be persuaded to revisit the statute, any error in drafting¹³ is chiseled in stone. Wooden interpretive approaches with heavy emphasis on plain language—whatever the apparent legislative intent—increase the possibility that any gap or ambiguity will have unintended consequences (be they fortunate or otherwise).

As a result, the care required in the drafting process can go beyond due to excruciating. We are fortunate to have had Reporter John Oakley and his advisers putting countless hours into the ALI's Revision Project, but Congress will not always be so blessed. Heavy plain-language emphasis in interpretation also creates an impulse toward great detail in drafting, with baleful effects in encouraging prolix statutes—which have their own difficulties of interpretation,

10. 490 U.S. 545 (1989).

11. See 28 U.S.C. § 1346(b)(1) (Supp. II 1996).

12. *Finley*, 490 U.S. at 549.

13. See, e.g., Rowe et al., *Reply, supra* note 2, at 961 n.91 (pointing out the "potentially gaping hole" in § 1367(b)'s failure to bar supplemental jurisdiction over a claim of a nondiverse co-plaintiff added under Rule 20 after the initial complete diversity filing).

including the likelihood of sheer misreadings.¹⁴ Although the urge toward detail may be resistible,¹⁵ it is compounded in this area by the great multiplicity of situations in which supplemental-jurisdiction issues can arise.¹⁶

The debate over interpretive methodology raises large questions beyond the scope of this Article, but for me the experience with drafting and observing judicial constructions of the supplemental-jurisdiction statute illustrates the virtues of an interpretive approach that does not adhere too rigidly to literalistic “plain meaning.”¹⁷ Some degree of flexibility in trying to take into account legislative intent—which can, after all, be deduced not only from legislative history with its dangers of manipulation but also from the broader historical background of an enactment and the mischiefs it seems to have been meant to counter, plus the general structure as well as the particular words of a statute itself—can result in greater fidelity to what the people’s representatives were trying to accomplish than judicial games of “gotcha.”¹⁸ Plain-language

14. Others may share my experience of seeing bright students—some of whom will shortly be drafting court opinions—stumble over the relatively concise provisions of present § 1367. I shudder to think of what they, and busy judges, might do with a considerably more complex statute.

15. See David L. Shapiro, *Supplemental Jurisdiction: A Confession, an Avoidance, and a Proposal*, 74 IND. L.J. 211, 218-20 & n.45 (1998) (arguing for less legislative detail and more judicial discretion in fine-tuning the contours of federal jurisdiction, and offering a brief draft statute codifying broad judicial discretion in exercise of supplemental jurisdiction).

16. See, e.g., Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 925-74 (1992) (discussing the application of § 1367(a)-(b) to many possible joinder situations).

17. For a sensitive discussion of approaches to an interpretation of aspects of § 1367, see Judge Louis Pollak’s decision in *Russ v. State Farm Mutual Automobile Insurance Co.*, 961 F. Supp. 808, 819-20 (E.D. Pa. 1997). In support of a non-literalistic method, the *Russ* opinion points to the technical nature of the statute and the unlikelihood that most members of Congress grasped its intricacies; the unambiguity of the legislative history on the point at issue; the lack of litigant reliance interests on such a procedural statute in planning real-world transactions; and the limited effect of the court’s judicial construction in changing only the forum where litigation would proceed, rather than governing substantive law. *Id.*

18. See *id.* at 820:

To retain this case in this court [by adopting a contested interpretation of § 1367 based on a literal reading] is to say to Congress: “We know what you meant to say, but you didn’t quite say it. So the message from us in the judicial branch to you in the legislative branch is: ‘Gotcha! And better luck next time.’” Such a message is not required by the separation of powers.

An irony with plain-language interpretation in the context of § 1367 is that it can lead to expansive readings of federal jurisdiction, in arguable or even clear disharmony with the aim of Congress and in tension with judicial leanings—especially among conservative judges—toward narrow constructions of the federal courts’ jurisdiction. See, e.g., *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523 (1997) (Court opinion by Justice O’Connor for a seven-Justice majority) (reading § 1367(a) as establishing supplemental jurisdiction in a removed federal-question case over a related state law claim for an appellate-type, on-the-record review of local administrative action); *id.* at 535 (Ginsburg, J., dissenting, joined by Stevens, J.) (“The Court’s expansive reading . . . takes us far from anything Congress conceivably could have meant. Cross-system appeals, if they are to be introduced into our federal system, should stem from the National Legislature’s considered and explicit decision.”)

approaches, with their stress on the impropriety of other than highly literal readings of enacted text, may focus too narrowly and theoretically on the judicial role in isolation¹⁹—to the detriment of forging a workable, practical relationship between the federal courts and Congress.²⁰

III. POLICY DECISIONS IN THE RECODIFICATION OF § 1367(b)

When Congress adopted § 1367 in 1990 as part of a package of measures implementing recommendations of the Federal Courts Study Committee, one goal—however imperfectly achieved, as became apparent soon afterward—was to put through only noncontroversial aspects²¹ and save any foreseeably divisive issues for later debate. That intention, coupled with the somewhat hurried circumstances of the bill's adoption late in the 101st Congress,²² constrained the codification to making no major deliberate changes in preexisting decisional law apart from overruling *Finley*. The circumstances today eliminate those constraints and also provide the benefit of several years' experience under the new law, permitting reflection about what goals should be pursued in a revised statute. This part of the Article considers key issues in what should come within or fall outside supplemental jurisdiction in diversity cases.

A. Complete State-Citizen Diversity and the Kroger Rule

If there are serious advocates of entirely abandoning the complete diversity requirement for state-citizen diversity cases, they have escaped my attention. Given the way the system has developed in the almost two centuries since *Strawbridge v. Curtiss*²³ established the requirement that all plaintiffs must be of

(citation omitted).

19. See Recent Cases, 109 HARV. L. REV. 858, 858 (1996) ("Whatever its ideological end, a court usurps the lawmaking authority of Congress when it engages in rigid textualism to defeat a clearly expressed legislative intent.").

[R]igid adherence to the plain language of § 1367 is an inappropriate approach to statutory interpretation. Few would disagree that the role of courts in interpreting statutes is "to ascertain and effectuate the 'intentions' of Congress" and "to subordinate [judicial preferences] to the will of Congress." Indeed, textualists hold out this definition of the judicial role to justify limitations upon judicial discretion. When . . . a court permits strict textualism to trump unambiguous indications of legislative intent, it fails to enforce congressional will and thereby usurps lawmaking authority.

Id. at 861-62 (second alteration in original) (footnotes omitted).

20. See *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 820 (E.D. Pa. 1997) (noting that "Congress and the courts, however different their respective roles, are parts of a single government").

21. See, e.g., *id.* at 819 (referring to "assurances made by [Congressional sponsors] to their colleagues that the several provisions of Title III of the Judicial Improvement[s] Act of 1990 were 'noncontroversial'").

22. See Rowe et al., *Coda, supra* note 2, at 1004-05 (describing the process of introducing, considering, and enacting the supplemental-jurisdiction statute in July-October 1990).

23. 7 U.S. (3 Cranch) 267 (1806).

completely diverse citizenship from all defendants, it makes sense—despite the great arbitrariness of many of the rule’s applications—not to do away with the rule across the board now. Minimal diversity under the general diversity jurisdiction would likely lead to a large expansion in the federal courts’ caseload of state law disputes, many of them with little need for the federal forum—as would often be the case when just one or a few diverse parties were involved in litigation with several parties on both sides who all shared citizenship of the same state.

Assuming retention of the *Strawbridge* requirement, it is also defensible—and in my view preferable—to keep the basic rule of *Owen Equipment & Erection Co. v. Kroger*,²⁴ under which a diversity plaintiff who chose the federal forum may not use supplemental jurisdiction to add a claim against a nondiverse third-party defendant. Even absent collusion (which might, if detected, be dealt with under § 1359²⁵), it could be all too easy without the *Kroger* rule for a plaintiff to evade the complete diversity requirement by a fairly uncomplicated progression: sue a diverse defendant in federal court; wait for the predictable, if not certain, impleader of a reimbursement claim against a nondiverse third-party defendant against whom the plaintiff also wanted to bring a claim; and then add that claim under the seventh sentence of Federal Rule of Civil Procedure 14(a).²⁶ Indeed, to avoid a serious threat to the *Strawbridge* requirement, the supplemental-jurisdiction statute should also make it clear that a plaintiff may not bring a complete diversity case and then turn it into a minimal diversity one by amending the complaint and adding a nondiverse co-plaintiff under the first sentence of Federal Rule 20(a).²⁷ If nothing else, Congress should plug this “potentially gaping hole”²⁸ in the present statute.

B. Complete or Minimal Diversity in Alienage Cases

The application of the complete diversity requirement in cases involving alien parties is, to put it gently, curious. The lower federal courts have settled on interpretations that for original jurisdiction always require complete diversity among state-citizen adversaries in cases involving aliens and sometimes, but not always, regard the presence of aliens (without regard to whether they are citizens of the same or different foreign states) on both sides as destroying complete

24. 437 U.S. 365 (1978).

25. 28 U.S.C. § 1359 (1994) (“A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.”).

26. FED. R. CIV. P. 14(a) (“The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff . . .”).

27. FED. R. CIV. P. 20(a):

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

28. Rowe et al., *Reply, supra* note 2, at 961 n.91.

diversity.²⁹ Under § 1332(a)(2) with its authorization of jurisdiction over civil actions between “citizens of a State and citizens or subjects of a foreign state,” in general the complete diversity rule applies,³⁰ and in particular the presence of aliens of whatever nationality on both sides, with a state citizen or citizens on one side, means that there is no jurisdiction.³¹ In effect, the rest of the world functions as a single state for purposes of the complete diversity requirement in § 1332(a)(2) cases. But under § 1332(a)(3) on jurisdiction over actions between “citizens of different States and in which citizens or subjects of a foreign state are additional parties,” while complete state-citizen diversity *is* always required, the dominant interpretation plausibly reads the “additional parties” language as meaning that the involvement of aliens—of the same or different nationality from each other, and on either side *or both*—in the same case does not destroy federal jurisdiction.³²

“Exactly what sense all this makes rather eludes us.”³³ Me, too. Indeed, beyond its arbitrariness in producing “a dysfunctional crazy quilt of results,”³⁴ application of the complete diversity rule in many types of cases involving aliens conflicts with the reasons for the alienage jurisdiction, commonly taken to be protection of aliens against possible state court bias and concern for American relations with foreign governments. “The mere presence of aliens on both sides of the controversy does nothing to allay concerns that the in-state party will receive more favorable treatment. . . . More important, the international relations concerns remain. Indeed, the presence of aliens on both sides of the controversy

29. Special problems in applying the complete diversity requirement to alienage cases are raised by the resident-alien proviso in 28 U.S.C. § 1332(a) (1994), added in 1988: “For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.” *Id.* See generally, e.g., Saadeh v. Farouki, 107 F.3d 52, 57-61 (D.C. Cir. 1997) (discussing the legislative history of the 1988 revision and concluding that Congress did not intend to expand the scope of diversity jurisdiction with the amendment to § 1332). These issues largely deal with the initial invocation of original alienage jurisdiction, rather than supplemental jurisdiction, and the body of this Article will not deal with them.

30. See, e.g., Simon Holdings PLC Group v. Klenz, 878 F. Supp. 210, 211 (M.D. Fla. 1995).

31. See, e.g., *id.*; Dresser Indus., Inc. v. Underwriters at Lloyd’s of London, 106 F.3d 494, 498-99 (3d Cir. 1997).

32. See *Dresser*, 106 F.3d at 497-500. A competing interpretation rejected in *Dresser*, *id.* at 500, is that the reference to aliens as “additional parties” in § 1332(a)(3) means that there may or may not be jurisdiction over a case involving completely diverse state-citizen adversaries and aliens on both sides, with jurisdiction existing only if the aliens are not among the *principal* adverse parties. See also *L’Européenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 126-27 (S.D.N.Y. 1988) (finding the presence of diverse U.S. corporations insufficient for jurisdiction when aliens were in fact the principal adverse parties).

33. *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 428 (7th Cir. 1993) (Posner, C.J.) (concluding a discussion of the application of § 1332(a)(2)-(3) to cases involving aliens on both sides).

34. Rowe et al., *Reply, supra* note 2, at 954; see also Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 967-68 (1979) (discussing the application of the complete diversity rule in alienage cases and its misfit with purposes of alienage jurisdiction).

heightens those federal concerns.”³⁵ Further, a plaintiff’s ability to destroy diversity in a case involving an alien or aliens on only one side by joining a co-defendant of the same state citizenship as the plaintiff, or to prevent removal even in a complete diversity case by naming a home-state co-defendant,³⁶ lets citizens manipulate their actions to keep an alien from federal court, no matter how serious the potential bias or the foreign relations implications.³⁷ Accordingly, if it is politically feasible in light of caseload concerns, it would be highly desirable for minimal rather than complete diversity to become the rule for alienage cases. That end might be attained by an unlikely (but conceivable, in light of the concerns underlying alienage jurisdiction) Supreme Court reinterpretation of § 1332(a)(2), or by a rewriting of § 1332—or, at least in large part, by the currently contemplated revision of § 1367 on supplemental jurisdiction.

Without going into technical details,³⁸ suffice it to say here that the supplemental-jurisdiction statute could—and in my view should—go far toward making minimal rather than complete diversity the rule for all alienage cases. Any properly joined alien opposing any properly joined state citizen for the amount in controversy should suffice, no matter who else was involved.³⁹ The use of supplemental jurisdiction to abandon the complete diversity rule for alienage cases would have the virtue of permitting judicial control over too-ready use of alien parties to invoke § 1332 jurisdiction, because federal courts under § 1367(c) have discretion not to invoke supplemental jurisdiction even when it technically exists.

C. Claims for Less Than the Jurisdictional Amount

When it comes to the general state-citizen diversity jurisdiction, I remain a confirmed abolitionist.⁴⁰ As long as the jurisdiction remains on the books, though (and that is likely to be a very long time, given the sentiments and political effectiveness of the trial bar), supplemental jurisdiction should be so defined as not to hamper unduly its workability by trammeling the appropriate use of joinder devices. Avoiding truck-sized holes in the complete diversity requirement by maintaining the *Kroger* principle is one thing; excluding below-limit claims

35. *Dresser*, 106 F.3d at 499-500.

36. See 28 U.S.C. § 1441(b) (1994) (allowing removal in other than federal question cases “only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought”).

37. See *Rowe*, *supra* note 34, at 967-68.

38. See *infra* Appendix.

39. Difficulties would arise with initially establishing jurisdiction in cases involving parties such as corporations and associations having multiple citizenships, which could be a mix of citizen and alien. Here, supplemental jurisdiction seems likely to be no help because the matter would not involve adding related claims to matters already before a federal court. Leaving such cases outside the federal courts’ alienage jurisdiction, however, should be at worst a tolerable result; when a party has mixed state and alien citizenship to begin with, the concerns for anti-alien bias and foreign relations effects are lessened, and the justifications for a minimal rather than complete diversity regime thus diminished.

40. See generally *Rowe*, *supra* note 34 (advancing arguments for abolishing general diversity jurisdiction).

related to those already before a federal court in a diversity case—which the law at least before § 1367 generally had done⁴¹—is another. For clarity, I should stress that I see no need to change the present aggregation rules governing what is required for initial invocation of original diversity jurisdiction. These rules generally forbid summing up below-limit claims of different parties for purposes of the amount in controversy requirement, except in the relatively few types of cases (such as suits by joint property owners or partnerships) where claims are regarded as legally joint.⁴²

I. Class Actions

At least before § 1367, three key Supreme Court decisions governed federal court jurisdiction over diversity class actions.⁴³ Under *Supreme Tribe of Ben-Hur v. Cauble*⁴⁴ it has been the law for almost eighty years that for purposes of complete diversity, the only citizenships of class members that count are those of the named representatives. The rule is arbitrary and subject to manipulation by choice of the representatives to create or destroy complete diversity, but it has virtues enough to warrant its retention. It provides definiteness and relative ease of administration as opposed to the difficult or impossible job of figuring out the

41. See *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (requiring unnamed class members with legally separate claims to satisfy the jurisdictional amount requirement individually, even though class representatives themselves had claims for more than the amount in controversy and the citizenship of unnamed members would be disregarded for purposes of the complete diversity rule under *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 590 (1939) (dismissing the case as to all individual plaintiffs who could not show that their claims involved the jurisdictional amount). Some cases under § 1367 hold that the statute has overruled *Zahn* and *Clark*, permitting the inclusion of related below-limit claims when the individual claims of the class representatives or of some individual plaintiffs in a non-class action do satisfy the amount requirement. Most prominent among these are *Stromberg Metal Works v. Press Mechanical, Inc.*, 77 F.3d 928, 930-31 (7th Cir. 1996) (stating that in a non-class action, § 1367 overrules *Clark*), and *In re Abbott Laboratories*, 51 F.3d 524, 527-29 (5th Cir. 1995) (stating that in a class action, § 1367 overrules *Zahn*). My concern in this part of the Article is not with the rightness or wrongness of these results under present law, but with what—as a matter of policy—a revised § 1367 should seek to achieve on the issues faced in these cases. For an argument that *Abbott* and *Stromberg* reach a result consistent with the purposes of § 1367, but for overly text-bound reasons, see Mark C. Cawley, Note, *The Right Result for the Wrong Reasons: Permitting Aggregation of Claims Under 28 U.S.C. § 1367 in Multi-Plaintiff Diversity Litigation*, 73 NOTRE DAME L. REV. 1045 (1998).

42. See generally 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3704 (2d ed. 1985) (describing aggregation doctrines).

43. Actually, the *Snyder* and *Zahn* decisions on jurisdictional amount issues, discussed below in the text, technically governed in some federal question cases when they were rendered in 1969 and 1973 respectively. But the virtually complete elimination in 1980 of the amount in controversy requirements for federal question cases, see 28 U.S.C. § 1331 (1994) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”), has confined the effect of these decisions almost exclusively to diversity class actions.

44. 255 U.S. 356 (1921).

citizenship of each unnamed class member, and the contrary rule would largely eliminate diversity class actions even when federal jurisdiction over a far-flung class in a state law matter might be useful. By contrast to the jurisdiction-widening effect of *Ben-Hur*, *Snyder v. Harris*⁴⁵ in 1969 restricted federal jurisdiction over class actions by forbidding in most cases the aggregation of below-limit claims to satisfy an applicable amount in controversy requirement. Although criticized,⁴⁶ *Snyder* keeps out of federal court agglomerations of small state law claims that could not be there individually. With *Ben-Hur* on the books, the opposite outcome in *Snyder* would have let in such cases (for example, a rate overcharge claim against a local utility) even if they were highly localized—as long as an adequate out-of-state member of a dominantly in-state class could be found to serve as the named representative.

The third and most restrictive decision, *Zahn v. International Paper Co.*,⁴⁷ has few defenders.⁴⁸ *Zahn* held that in a class action involving legally separate claims, even when all the named representatives have claims satisfying the amount requirement, unnamed members with jurisdictionally insufficient claims could not tag along in federal court; only unnamed class members with jurisdictionally sufficient claims could be part of the class. The *Zahn* rule poses the danger of forcing separate litigation in federal and state court if those with large enough claims proceed individually or as part of a heavy-hitters-only class in federal court, and it can trigger litigation over the size of unnamed members' claims in a mass tort.⁴⁹ Leaving *Ben-Hur* and *Snyder* intact for original jurisdiction, while unmistakably overruling *Zahn* in a revised supplemental-jurisdiction statute, then, should produce a coherent and workable jurisdictional scheme for diversity class actions. And again, the discretionary nature of supplemental jurisdiction would let federal courts control overzealous efforts to gain access to the federal forum; in addition, of course, cases coming within federal jurisdiction with *Zahn* overruled would still have to clear considerable hurdles for class certification.

45. 394 U.S. 332 (1969).

46. See, e.g., 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1756, at 71 (2d ed. 1986) (viewing the *Snyder* result as “somewhat at variance with the broad binding effect given to judgments under the amended [class action] rule” and “insensitive to a major purpose of the amendment to Rule 23”).

47. 414 U.S. 291 (1973).

48. See 7A WRIGHT ET AL., *supra* note 46, § 1756, at 75-76 nn.31-32 (citing and quoting several critical articles, and two favorable ones); McLaughlin, *supra* note 16, at 972-73 (citing the criticism of *Zahn* for being “unduly restrictive,” and pointing out the anomaly that it mandates the application of the jurisdictional amount requirement to the claims of unnamed class members, whereas *Ben-Hur* calls for looking to citizenships of the named class representatives only).

49. See Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. REV. 186, 193-94 & n.43 (1996) (criticizing *Zahn* for creating the danger of splitting related litigation, and citing case law and commentary on the difficulties of applying the *Zahn* requirement to absent class members).

2. Non-Class Actions

Although the problem of below-limit claims in multiparty, non-class litigation has received less attention in commentary⁵⁰ than has the parallel issue in the class context, case law under the present supplemental-jurisdiction statute has highlighted the matter and has illustrated the practicality of a change in pre-§ 1367 doctrine. Under *Clark v. Paul Gray, Inc.*,⁵¹ even fully diverse claimants with below-limit claims related to those of diversity plaintiffs could not be joined to an action otherwise properly in federal court. Several decisions have found this restriction to be lifted by § 1367; and whatever their defensibility as a matter of statutory interpretation, the Republic has not tottered.⁵²

Like overruling *Zahn*, eliminating the *Clark* limit—and also permitting the addition of related below-limit claims by a plaintiff against a diverse co-defendant—would let federal courts (with the discretionary control authorized by the supplemental-jurisdiction statute) resolve all aspects of a related controversy, in contrast to the action-splitting effect of pre-§ 1367 law. In contrast to the class action context, though, complete diversity should still be required as to all adversaries. Overruling *Clark* while also extending to non-class actions the *Ben-Hur* practice of overlooking the citizenship of others than the initial adversaries would create a huge gap in the *Strawbridge* rule, along with an anomaly in letting smaller claims by and against nondiverse parties tag along while larger ones could not.

D. Rule 19, Rule 24, and Supplemental Jurisdiction

Speaking of anomalies, there is the vexed question of what to do about one that existed in prior case law and that the supplemental-jurisdiction statute attempted to abolish. Under governing decisional law before 1990, a nondiverse intervenor under Rule 24(a)(2)⁵³ could be joined as a plaintiff or a defendant (and, in the case of a defendant, then claimed against by the plaintiff) as long as the

50. For a recent discussion of the issue and some of the cases, see Michael A. Baldassare, Comment, *Pandora's Box or Treasure Chest?: Circuit Courts Face 28 U.S.C. § 1367's Effect on Multi-Plaintiff Diversity Actions*, 27 SETON HALL L. REV. 1497, 1517-24 (1997).

51. 306 U.S. 583 (1939).

52. See, e.g., *Gandolfo v. U-Haul Int'l, Inc.*, 978 F. Supp. 558, 561-62 (D.N.J. 1996). The cases are divided, see *id.*, but the division has been over the construction of the existing statute and has largely not addressed the policy issue considered here.

53. FED. R. CIV. P. 24(a)(2):

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

intervenor did not meet the standards for “indispensability” under Rule 19(b).⁵⁴ But if the question of that same outsider’s joinder arose at the initiative of one already a party to the action, under the very similar terms of Rule 19(a)(2)(i),⁵⁵ joinder had to be denied.⁵⁶ Section 1367 sought to eliminate this anomaly in diversity cases by excluding from supplemental jurisdiction

claims by plaintiffs against persons made parties under Rule . . . 19 . . . or 24 of the Federal Rules of Civil Procedure, or . . . claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.⁵⁷

The rationale behind thus resolving the anomaly by restricting supplemental jurisdiction, rather than broadening it, was that—like failing to codify the *Kroger* rule barring supplemental jurisdiction over plaintiffs’ claims against nondiverse third-party defendants⁵⁸—it could make evasion of the complete diversity rule too easy. Nondiverse outsiders could wait for a diverse plaintiff to sue and then seek to intervene as plaintiffs, or a diverse plaintiff could sue and then wait for an intervenor-defendant to join and be subject to addition of the plaintiff’s claim.⁵⁹

Eliminating the pre-§ 1367 anomaly seems to make sense, because the underlying reality of the outsider’s relation to existing litigation can be the same whether the source of the initiative for possible joinder comes from the outsider under Rule 24 or from insiders under Rule 19.⁶⁰ The present absolute bar,

54. FED. R. CIV. P. 19(b):

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person’s absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person’s absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

55. FED. R. CIV. P. 19(a)(2)(i):

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest . . .

56. *See, e.g.,* 7C WRIGHT ET AL., *supra* note 46, § 1917, at 472-81; McLaughlin, *supra* note 16, at 952.

57. 28 U.S.C. § 1367(b) (1994).

58. *See supra* text accompanying notes 24-26.

59. *See Rowe et al., Reply, supra* note 2, at 956-57.

60. For this reason, I question the proposal in the ALI’s Revision Project to reinstate the pre-§ 1367 rule. *See* T.D. NO. 2, *supra* note 4, at 2 (proposed 28 U.S.C. § 1367(c)(3)); *id.* at 70 (Comment c-9). A point that can be made in defense of the anomaly is that it is harsher to

however, may be too harsh. Satisfying the requirements for intervention of right implies inadequacy of the outsider's representation by existing parties.⁶¹ Moreover, although the federal courts may sometimes avoid prejudice to outsiders (and possibly also to existing parties) by finding the outsiders indispensable and thus dismissing the case for refile in a state court where all may be joined without jurisdictional difficulties, a single nonfederal forum may not always be available; reliance on such dismissals could put artificial pressure on the indispensable-necessary distinction. Accordingly, a softening of the joinder limit for Rule 19 and Rule 24 cases alike seems in order. A good way to do that may be by adopting language found in a draft prepared for the Federal Courts Study Committee, permitting supplemental jurisdiction in such cases "if necessary to prevent substantial prejudice to a party or third-party."⁶² Further, given the focus in Rules 19 and 24 on possible effects on interests of both insiders and outsiders without regard to their alignment, the qualification should apply alike to parties intervening or being joined whether as plaintiffs or defendants.⁶³

exclude one who is seeking to intervene than one whose joinder is sought only by existing parties. See *McLaughlin*, *supra* note 16, at 966. But the relationship of the outsider to the litigation, and the effects on the interests of the outsider and the existing parties, can be identical—and it is on these effects, not the source of the initiative for the joinder, that Rules 19 and 24 mainly focus. The anomaly also means that the addition of the same outsider might be sought successively in the same case under Rule 19 and then Rule 24, with joinder first denied and intervention later allowed. See *Aman v. Kelbaugh*, 16 Fed. R. Serv. 2d 1314, 1315 (4th Cir. 1973) (per curiam):

The [intervenor] could not have been joined under Rule 19(a) of the Federal Rules of Civil Procedure because joinder would have destroyed diversity jurisdiction. However, tested by the factors mentioned in Rule 19(b), they were dispensable. Though their joinder was unnecessary, they were not precluded from intervening as a matter of right under Rule 24(a)(2) when it became apparent that they were not adequately represented by the existing parties.

Cf. *Drumright v. Texas Sugarland Co.*, 16 F.2d 657, 657-58 (5th Cir. 1927) (allowing intervention by a nondiverse party that had previously been dismissed to retain jurisdiction). See generally *Wichita R.R. & Light Co. v. Public Util. Comm'n*, 260 U.S. 48, 54 (1922) (stating that diversity jurisdiction is not "defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties").

61. See FED. R. CIV. P. 24(a)(2) (permitting intervention of right when an outsider satisfies the rule's criteria for interest that may be affected by litigation, "unless the applicant's interest is adequately represented by existing parties").

62. 1 FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 568 (1990). The reference to its being "necessary" to prevent prejudice would preserve the principle of dismissing when the party seeking to intervene or sought to be joined was regarded as "indispensable," because the Rule 19(b) factors that can favor dismissal include the extent of prejudice, the possibility of reducing or avoiding the prejudice, and the adequacy of other remedies (most commonly, the availability of a state court forum). See *supra* note 54 (text of Rule 19(b)).

63. See generally *McLaughlin*, *supra* note 16, at 952-70 (canvassing the several alignments of plaintiff and defendant joinder under Rules 19 and 24).

E. Claims by Diversity Plaintiffs in a Defensive Posture

Before the adoption of § 1367, the lower federal courts had generally refused to apply *Kroger's* bar on ancillary jurisdiction over diversity plaintiffs' claims against nondiverse third-party defendants to cases in which the plaintiff's claim was a compulsory counterclaim to a claim already added by the third-party defendant against the plaintiff.⁶⁴ That seemed sensible, even when the plaintiff had chosen the forum by filing in federal court, to promote efficiency and fairness and also because the danger of plaintiffs easily circumventing the complete diversity rule is considerably less than in the *Kroger* situation itself: there, the plaintiff need not depend on—and pay the price of—being claimed against in order to add the claim against the third-party defendant.⁶⁵ The same went for another prominent instance of diversity plaintiffs asserting claims in a defensive posture—when they were counterclaimed against and sought under Federal Rule 14(b)⁶⁶ to assert an indemnity claim against a nondiverse third party.⁶⁷

Limited case law under § 1367, however, has read the terms of the statute as banning such claims by plaintiffs even though the claims are brought defensively.⁶⁸ Whatever the interpretive pros and cons of these decisions, the results seem unfortunate and worth overruling in a revised § 1367. One way or another—subject, as always, to the discretionary control allowed by the statute—supplemental jurisdiction should be defined to include claims asserted by plaintiffs in a defensive posture in response to claims against them.

F. Application of § 1367 in Removed Cases

The number of supplemental-jurisdiction issues that can arise because of removal from state to federal court is surprisingly large,⁶⁹ and for the most part I am happy to leave them to the contributions of the unsurpassed expert on the

64. See, e.g., *Finkle v. Gulf & Western Mfg. Co.*, 744 F.2d 1015, 1018-19 (3d Cir. 1984); *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 959-60 (7th Cir. 1982); see also, e.g., *FED. R. CIV. P. 14(a)* ("The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.").

65. See *McLaughlin*, *supra* note 16, at 945-48.

66. *FED. R. CIV. P. 14(b)* ("When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.").

67. See, e.g., *Basic Mach. Co. v. Ketom Constr., Inc.*, 686 F. Supp. 542, 543-45 (M.D.N.C. 1988) (involving a third party, against which the plaintiff wished to add its own third-party claim that had already been joined as a third-party defendant by the original defendant, but the court viewed the plaintiff's claim as coming under Rule 14(b)).

68. See *Chase Manhattan Bank v. Aldridge*, 906 F. Supp. 866, 867-69 (S.D.N.Y. 1995); *Guaranteed Sys., Inc. v. American Nat'l Can Co.*, 842 F. Supp. 855, 856-58 (M.D.N.C. 1994). Both cases involved attempts by plaintiffs facing counterclaims from original defendants to add claims against new third-party defendants under Rule 14(b).

69. See generally *Joan Steinman, Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress' Handiwork*, 35 ARIZ. L. REV. 305 (1993).

subject, Professor Joan Steinman.⁷⁰ Here, I offer three brief points. First, barring unlikely revisions of a sort that would create new doubt, there is no need to include in the text of § 1367 anything making it explicit that it applies to removed cases as well as to those originally filed in federal court. The Supreme Court has recently settled that the supplemental-jurisdiction statute “applies with equal force to cases removed to federal court as to cases initially filed there; a removed case is necessarily one ‘of which the district courts have original jurisdiction.’”⁷¹ Second, the statute needs no provisions limiting the use of supplemental jurisdiction by removing defendants; the complete diversity rule, and efficient judicial administration, do not require such complications.⁷²

A third and somewhat more vexing issue is whether diversity plaintiffs in removed cases, not having chosen the federal forum, should be under fewer restraints when it comes to adding either new nondiverse parties or claims against nondiverse parties added by others.⁷³ Here, the ALI Project offers a cogent new proposal, providing a wide range of options to the district judge when a plaintiff seeks to add a supplemental claim that would not be allowed in an originally filed case:

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) [counterpart in the ALI proposal to present § 1367(b)], 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.⁷⁴

The proposal goes on to give guidance for the exercise of judicial discretion in such cases and to make it clear that the court would have power to retain the case with the added claim despite a failure to satisfy diversity requirements. This approach would replace current § 1447(e)⁷⁵ and would provide a sensible compromise between, on the one hand, carte blanche for plaintiffs who were clever enough to file a case likely to get removed and, on the other hand, overly stiff restrictions on those who neither wanted nor sought to be in federal court. It appeals to me, and it might even satisfy Professor Steinman.

70. See *id.*; Joan Steinman, *Crosscurrents: Supplemental Jurisdiction, Removal, and the ALI Revision Project*, 74 IND. L.J. 75 (1998).

71. *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 530 (1997) (quoting 28 U.S.C. § 1441(a) (1994)).

72. See Steinman, *supra* note 69, at 356-58.

73. See *generally id.* at 333-55 (surveying various configurations of possible added claims by plaintiffs in removed diversity cases); *id.* at 355-56 (concluding that § 1367(b) should apply identically in originally filed and removed cases “*unless* plaintiffs could establish that they had not acted strategically in filing in state court,” but also expressing doubt that these “negative answers to the questions of supplemental jurisdiction . . . are the optimal answers”) (emphasis in original).

74. T.D. NO. 2, *supra* note 4, at 3 (proposing 28 U.S.C. § 1367(e)).

75. 28 U.S.C. § 1447(e) (1994) (“If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.”).

IV. CONCLUSION

The voices offering suggestions on how best to revise § 1367 are appropriately many, and this Article offers one kibitzer's advice. In large part my views square with positions taken in the ALI Revision Project, which of course covers much more than the diversity case restrictions focused on here and treats those other areas admirably. The only two significant points on which I question the ALI Project are its retention of the complete diversity rule for alienage cases⁷⁶ and its reintroduction of the Rule 19-Rule 24 anomaly.⁷⁷ The former involves a major policy decision, about which there can be appropriate concern both for expansion of federal jurisdiction by a leap into somewhat unknown territory and for the political viability of a proposal that would make minimal diversity the rule in alienage cases. The latter is a secondary issue that rarely arises. We can all be glad that the current process, in contrast to the circumstances surrounding passage of the original § 1367, not only permits the consideration of policy issues such as these, but also provides the time and atmosphere for deliberation in which we can transcend yesterday's battles and focus on what now counts most—doing the job as well as possible.

76. Compare T.D. NO. 2, *supra* note 4, at xx-xxi (describing a change from an earlier draft that would have repealed the complete diversity rule for alienage cases), with *supra* text accompanying notes 29-39 (arguing for minimal diversity in alienage cases).

77. Compare T.D. NO. 2, *supra* note 4, at 2 (proposing 28 U.S.C. § 1367(c)(3) allowing jurisdiction in a diversity case over a supplemental claim if joined by a nonindispensable intervenor), with *supra* text accompanying notes 53-63 (arguing for parallel treatment of Rule 19 necessary parties and Rule 24 intervenors).

APPENDIX

THE DEVIL WE KNOW: A LIMITED REVISION OF § 1367(b)

The ALI Project's comprehensive proposal is an excellent job and in my view deserving of adoption. It would also be understandable, however, if practitioners, judges, legislators, and even academics felt concern at the degree of conceptual change it would bring about in an area where we are still settling in with a relatively new statute. If it were felt preferable to make more incremental changes to carry out revisions along the lines of those urged in this Article, it should be possible to do so with some amendments to the text of the existing § 1367(b). The ALI Project's proposals for subsequent parts of the statute—on discretion, removed cases, and tolling—all seem to be improvements well worth adopting no matter how the earlier definitional and diversity restriction subsections are treated. What follows as a starting point is a possible revision of § 1367(b) that adheres as closely as possible to the present provision while making the changes discussed in this Article, along with explanatory notes. Additions are underscored; language taken from the present statute but shifted in position is [bracketed]; deletions are ~~stricken through~~.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, [when exercising supplemental jurisdiction over ~~such~~ the following claims would be inconsistent with the jurisdictional requirements of section 1332(a)(1),] the district courts shall not have supplemental jurisdiction under subsection (a)—

(1) over claims by persons named or proposed to be joined as plaintiffs under Rule 20 of such rules, or

(2) except as to claims asserted by plaintiffs in a defensive posture in response to claims made against them.

(A) over claims by plaintiffs against persons made parties under Rule 14, 19, or 20, or 24 of the Federal Rules of Civil Procedure,

(B) or unless necessary to prevent substantial prejudice to a party or third party, over claims by plaintiffs against, or as plaintiffs by, persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules.

Notes on the statutory draft:

1. *Retention of rule references.* This revision would retain the present statute's practice of referring to various Federal Rules of Civil Procedure. The ALI Project's proposal would eliminate all such references, making the statute perhaps more accessible to those not steeped in federal civil practice and also saving it from obsolescence in case of major revisions in the joinder rules. The rule references do provide some specificity, and so far reliance on them by itself (as opposed to omissions that may have led to unintended results) does not seem to have been problematic.

2. *Moving the "when exercising supplemental jurisdiction . . . would be inconsistent" language from back to front.* This proviso, at the end of present §

1367(b), may have been ignored or given insufficient effect by some courts, although it could permit exercises of supplemental jurisdiction over claims between nondiverse parties in situations that were allowed by case law before *Finley* and codification.⁷⁸ Moving the clause from the end of subsection (b) to near the beginning would formally make no substantive change but should at least highlight language that is now too readily ignored.

3. *Limiting applicability to jurisdictional requirements of subparagraph 1332(a)(1)*. This deceptively small addition takes advantage of the structure of the provision conferring original diversity jurisdiction to allow supplemental jurisdiction over below-limit claims by or against parties permissively joined under Rule 20 and unnamed members in a Rule 23 class action, and also to make minimal diversity the rule for supplemental jurisdiction in alienage cases (without creating original jurisdiction over cases involving mixed-citizenship entities⁷⁹). The latter is achieved because state-citizen diversity is conferred by subparagraph (a)(1) of § 1332, with the alienage provisions in subparagraphs (a)(2)-(3)—so that complete diversity would limit supplemental jurisdiction only in state-citizen diversity cases under (a)(1). Letting below-limit claims tag along is accomplished by the reference to subparagraph (a)(1) because the jurisdictional amount requirement is in the text at the beginning of § 1332(a) before its breakdown into subparagraphs. The complete diversity requirement continues to apply in permissive-joinder situations because of the mention of Rule 20 in § 1367(b)'s limits, but does not constrain unnamed class members because of the omission of Rule 23. And the *Snyder v. Harris* limit on aggregating class claims for invoking original jurisdiction⁸⁰ survives because § 1367 affects only supplemental jurisdiction once original jurisdiction properly attaches.

If any move were made toward minimal diversity in alienage cases, it would be wise at the same time to deal with the problems caused by the resident-alien proviso in 28 U.S.C. § 1332(a).⁸¹ (Even if nothing is done about supplemental jurisdiction, the problems are messy enough to be worth cleaning up.⁸² For present purposes, suffice it to say that the proviso, meant to deny diversity jurisdiction over an action between a state citizen and a resident alien domiciled in the same state, used broad language that could unintentionally expand diversity jurisdiction in cases involving other alignments and in some instances could even raise constitutional problems.) One articulation that might do the job of confining the proviso to excluding the situations it was meant to cover would be to replace the present language in § 1332(a) with, "Original jurisdiction under this section or section 1335 shall not rest upon adversity between an alien admitted to the United States for permanent residence and a citizen of the State in which such

78. See, e.g., Rowe et al., *Reply*, *supra* note 2, at 959-60. For a lucid discussion of the text and legislative history of this clause of § 1367(b) and how it might be given effect under the current statute, see Darren J. Gold, Note, *Supplemental Jurisdiction over Claims by Plaintiffs in Diversity Cases: Making Sense of 28 U.S.C. § 1367(b)*, 93 MICH. L. REV. 2133, 2150-57 (1995).

79. See *supra* note 39.

80. See *supra* text accompanying note 45.

81. See *supra* note 29.

82. See, e.g., *Arai v. Tachibana*, 778 F. Supp. 1535 (D. Haw. 1991).

alien is domiciled." Another possibility appeared in an early draft for the ALI's Revision Project: "A person who has been admitted to the United States for permanent residence is not eligible for the jurisdiction conferred by subsection (a) [of § 1332] with respect to any claim between such person and a citizen of the State in which such person is domiciled."⁸³

4. *Claims by plaintiffs joined under Rule 20.* Subparagraph (1) would plug the "potentially gaping hole"⁸⁴ in the *Strawbridge* complete diversity rule created by the omission of a restriction on nondiverse parties seeking to join as plaintiffs under Federal Rule 20. The "named or proposed to be joined" language is intended to overcome a possible ambiguity that let one court reason that joinder would be permissible as to originally named parties but not subsequently joined ones.⁸⁵ Treatment of claims by plaintiffs joined under Rule 20 is in a separate subparagraph because the "defensive posture" and "substantial prejudice" softeners should not apply to permissive joinder of plaintiffs, a context with great potential for easy and widespread circumvention of the complete diversity rule.

5. *Claims asserted by plaintiffs in a defensive posture.* This language at the beginning of subparagraph (2) attempts to implement the change advocated in the text accompanying notes 64-68 *supra*. The "nesting" of two clauses under this introductory "defensive posture" language makes it applicable to both clauses (A) and (B), with the further "substantial prejudice" alternative basis for an exception allowing supplemental jurisdiction applicable only to necessary parties and intervenors under clause (B).

6. *Deletion of Rules 19 and 24 from subparagraph (2)(A).* Treatment of these rules would be moved to subparagraph (2)(B) so as to bring all cases of necessary-party joinder and intervention under a single standard.⁸⁶

7. *Claims by and against Rule 19 parties and Rule 24 intervenors.* Subparagraph (2)(B) would maintain the present statute's abolition of the necessary party/intervenor anomaly while providing an escape hatch allowing supplemental jurisdiction when necessary to prevent substantial prejudice. The escape clause would also reduce pressure on the "indispensable-necessary" party distinction, freeing federal courts from the temptation to engage in the mind-bending exercise of straining to find a nondiverse outsider not "indispensable" but merely "necessary" so as not to have to dismiss a case.⁸⁷ At the same time, by providing for uniform treatment of joined and intervening plaintiffs and defendants, this subparagraph is meant to avoid creation of other anomalies.⁸⁸ The "defensive posture" exception made applicable by its position at the beginning of subparagraph (2) might rarely be necessary, but it seems as sensible here as in connection with the types of joinder covered in subparagraph (2)(A).

83. AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, PRELIMINARY DRAFT NO. 1, at 62 (1996) (draft 28 U.S.C. § 1332(b)(1)(B)).

84. *See supra* text accompanying notes 27-28.

85. *See Patterson Enters., Inc. v. Bridgestone/Firestone, Inc.*, 812 F. Supp. 1152, 1154 (D. Kan. 1993).

86. *See supra* text accompanying note 63.

87. *See Rowe, supra* note 34, at 979 & n.58.

88. *See supra* text accompanying notes 53-63.

In some situations, courts may wish to join necessary parties because of effects on their interests if they are not joined, even though they would not be parties to a “claim.”⁸⁹ Such joinder would be possible even without complete diversity because the draft restricts only claims between nondiverse parties, without barring the presence of such outsiders.

89. *See* Rowe et al., *Reply*, *supra* note 2, at 957-58.