

# Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases<sup>†</sup>

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## I. INTRODUCTION

The supplemental-jurisdiction statute<sup>1</sup> has been on the books for eight years. Congress stated that its goals in passing the statute were to overrule *Finley v. United States*<sup>2</sup> and, in other respects, to restore pre-*Finley* practice.<sup>3</sup> Laudably, the statute achieved the first of these goals.<sup>4</sup> In other particulars, however, as evidenced by and in this Symposium, there is widespread agreement that the statute must be amended. Indeed, after two years of study, The American Law Institute (“ALI”) has proffered an amended statute.<sup>5</sup> Although several facets of § 1367 deserve attention,<sup>6</sup> I focus on the scope of supplemental jurisdiction in diversity of citizenship cases.

Section 1367(b) changes pre-*Finley* practice by restricting supplemental jurisdiction in diversity cases in two ways. First, it limits supplemental jurisdiction over claims asserted by a plaintiff acting in a defensive capacity. Second, it precludes supplemental jurisdiction over claims by or against an intervenor of right.<sup>7</sup> At the same time, though, the statute may *expand* supplemental jurisdiction in diversity cases in two ways. First, some courts conclude that § 1367 overrules the holding in *Zahn v. International Paper Co.*,<sup>8</sup> and permits class members whose

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<sup>1</sup>28 U.S.C. § 1367 (1990).

<sup>2</sup>490 U.S. 545 (1989) (rejecting pendent parties jurisdiction over state law claims asserted against a nondiverse defendant in a Federal Tort Claims Act case).

<sup>3</sup>See H.R. REP. NO. 101-734, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874.

<sup>4</sup>The statute also overruled the equally lamentable result in *Aldinger v. Howard*, 427 U.S. 1 (1976), in which the Court rejected pendent parties jurisdiction in a case involving a nonexclusive federal question jurisdiction.

<sup>5</sup>See AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2 (1998). I serve as an Adviser to the ALI Federal Judicial Code Project. Of course, the views expressed in this Article are solely mine. Although I have not hesitated to criticize the supplemental-jurisdiction statute, see, for example, Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991), my experience as an Adviser on the ALI Project has given me a much greater appreciation for the difficulty of drafting legislation.

<sup>6</sup>For example, there may be concern with the statement of the scope of the grant of supplemental jurisdiction, the circumstances justifying discretionary refusal to exercise supplemental jurisdiction, the operation of supplemental jurisdiction in cases removed from state court, and the application of supplemental jurisdiction in alienage cases.

<sup>7</sup>For general discussion of these two restrictions, see Freer, *supra* note 5, at 479-84.

<sup>8</sup>414 U.S. 291 (1973). The restrictions and confusion about *Zahn* were noted in Freer, *supra* note 5, at 475-86.

claims do not satisfy the amount in controversy requirement.<sup>9</sup> Similarly, some courts hold that the statute overrules the nonclass analog of *Zahn, Clark v. Paul Gray, Inc.*,<sup>10</sup> to permit joinder of plaintiffs whose claims fail to meet the amount in controversy requirement.<sup>11</sup> Second, in the same vein, the statute contains what three respected commentators call a “potentially gaping hole”<sup>12</sup> that could eviscerate the complete diversity rule of *Strawbridge v. Curtiss*.<sup>13</sup>

One of the most compelling arguments for revising § 1367 is to resolve the uncertainty about the continued viability of *Strawbridge* and the split of authority over whether all claimants must satisfy the amount in controversy requirement.<sup>14</sup> While doing so, Congress should reassess the appropriate rule as to supplemental jurisdiction over claims by plaintiffs acting in a defensive capacity and over claims by and against intervenors of right.

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<sup>9</sup>See, e.g., *In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995).

<sup>10</sup>306 U.S. 583 (1939).

<sup>11</sup>See, e.g., *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.* 77 F.3d 928 (7th Cir. 1996).

<sup>12</sup>Thomas Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 961 n.91 (1991).

<sup>13</sup>7 U.S. (3 Cranch) 267 (1806). It is worth noting that the statute might overrule *Zahn, Clark*, and *Strawbridge* only in cases involving a single defendant. Once a plaintiff’s claim invokes diversity jurisdiction, § 1367(a) grants supplemental jurisdiction over all claims by other plaintiffs (or class members) whose claims meet the nexus requirement constituting part of the same case or controversy as that claim. Section 1367(b) is relevant because the original claim invoked diversity of citizenship jurisdiction. That subsection precludes supplemental jurisdiction over particular claims, including claims by plaintiffs *against* persons joined under Rule 20. Rule 20 prescribes the requirements for joinder of *multiple* parties. Accordingly, if the plaintiffs’ claims are against a single defendant, nothing in § 1367(b) precludes the supplemental jurisdiction granted by § 1367(a). See 4 RICHARD D. FREER, MOORE’S FEDERAL PRACTICE § 20.07[3] (3d ed. 1998).

<sup>14</sup>Not all lower courts agree that the statute overrules the result in *Zahn* and *Clark*. See, e.g., *Mayo v. Key Fin. Servs., Inc.*, 812 F. Supp. 277 (D. Mass. 1993); see also *supra* notes 7-8.

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## II. THE STRUCTURE OF THE STATUTE

Congress passed the supplemental-jurisdiction statute in response to *Finley*. In *Finley* the Supreme Court precluded pendent parties jurisdiction in a case arising under the Federal Tort Claims Act,<sup>15</sup> which vests exclusive jurisdiction in the federal courts. As a result, the plaintiff in *Finley* was required to pursue her claim against the United States in federal court and her transactionally related state law claim against a utility company in state court. It would be impossible to devise a rule more wasteful of personal and judicial resources. More disturbing in the long run, however, was the Court's rejection of its traditional presumption that supplemental jurisdiction applied (over claims satisfying the constitutional nexus test) in the absence of legislation.<sup>16</sup> Before *Finley*, the Court had permitted supplemental jurisdiction over related claims unless Congress provided otherwise; it presumed that Congress permitted it unless Congress precluded it.<sup>17</sup> In *Finley*, however, the Court took a different tack, opining that supplemental jurisdiction required an affirmative grant by Congress.<sup>18</sup> Taken for all its worth, this change in position threatened all supplemental jurisdiction in diversity of citizenship cases, because no statute granted it in such cases.<sup>19</sup>

Congress could have crafted a statute overruling the result in *Finley* by granting pendent claim and party jurisdiction in federal question cases, leaving the rest of supplemental jurisdiction to case law. In retrospect, this course may have worked, since, as it turns out, *Finley* did not have much of an impact beyond its facts. In the wake of *Finley*, not a single court refused to permit supplemental jurisdiction over compulsory counterclaims, cross-claims, or claims by or against an intervenor of right. Indeed, the appellate courts uniformly continued to recognize supplemental jurisdiction over impleader claims, despite the fact that such claims (like the pendent parties assertion in *Finley*) involve joinder of an additional party.<sup>20</sup>

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<sup>15</sup>28 U.S.C. § 1346(b)(1) (Supp. II 1996).

<sup>16</sup>*See, e.g.*, Freer, *supra* note 5, at 464-69.

<sup>17</sup>*See, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (rejecting supplemental jurisdiction on the theory that Congress precluded it); Aldinger v. Howard, 427 U.S. 1 (1976) (disallowing supplemental jurisdiction under the same theory).

<sup>18</sup>*See* Finley v. United States, 490 U.S. 545, 549 (1989).

<sup>19</sup>For an excellent discussion of this possibility, see Wendy C. Perdue, *Finley v. United States: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 540 (1990).

<sup>20</sup>*See* Alumax Mill Prods., Inc. v. Congress Fin. Corp., 912 F.2d 996 (8th Cir. 1990); King Fisher Marine Serv. Inc. v. 21st Phoenix Corp., 893 F.2d 1155 (10th Cir. 1990). In one case, a district judge noted the issue of whether *Finley* should affect the traditional rule in impleader, but did not rule on the issue. *See* Community Coffee Co. v. M/S Kriti Amethyst, 715 F. Supp. 772 (E.D. La. 1989). The only court to refuse supplemental jurisdiction over an impleader claim completely missed this point, and mistakenly concluded that the court in *Community Coffee* had rejected supplemental jurisdiction. *See* Aetna Cas. & Sur. Co. v. Spartan Mechanical Corp., 738 F. Supp. 664 (E.D.N.Y. 1990). One academic figure similarly misread *Community Coffee* in making his point that codification was necessary. *See* Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247, 259 & n.65. With these exceptions, the clear post-*Finley* consensus was that supplemental jurisdiction applied to impleader claims. *See, e.g.*, Huberman v. Duane Fellows, Inc., 725 F. Supp. 204 (S.D.N.Y. 1989).

On the other hand, *Finley* created sufficient confusion to justify Congress's ultimate decision to proceed with a statute that addressed the entire universe of supplemental jurisdiction. In my opinion, that decision locks future efforts into the same statutory model of granting supplemental jurisdiction broadly and then cutting back on it in prescribed circumstances in diversity cases. I am aware that some observers favor a statute reposing discretion in the district judge to determine when supplemental jurisdiction should apply. To me, such an approach is ill-founded. First, courts are not used to exercising discretion in this manner.<sup>21</sup> For nearly a decade, they have been operating under a statute that dictates an answer for every conceivable circumstance. Second, and more importantly, subject matter jurisdiction rules ought to be as clear as possible. It is difficult to conceive of a more wasteful enterprise than litigating over whether the parties are in the right court. This is an area for hard-and-fast rules; leaving the matter to the court's discretion opens the door to having like cases treated differently and to wasteful litigation over whether the court has subject matter jurisdiction.<sup>22</sup>

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<sup>21</sup>I am not speaking here of the discretionary refusal to exercise supplemental jurisdiction for various reasons such as dismissal of the underlying federal claim, issues now addressed in § 1367(c). Instead, I speak of proposals envisioning the judge's discretionary assessment as to whether supplemental jurisdiction should attach *ab initio*.

<sup>22</sup>Moreover, note that the Supreme Court rejected discretion of a different sort in favor of a hard-and-fast rule. In *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), the Court held that a claim by a plaintiff against a third-party defendant could not invoke supplemental jurisdiction. The Court was concerned that such a plaintiff could conceivably use such a claim to create jurisdiction which would not exist as an original matter, but declined to treat the issue under the collusive joinder statute, 28 U.S.C. § 1359 (1994). Thus, instead of leaving the question to case-by-case discretionary assessment, the Court imposed a bright-line rule.

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In other words, the fact that reasonable people may disagree about where a statute ought to draw lines does not indict the statutory model employed by Congress. Thus, I applaud the ALI decision to follow the same format as the present § 1367. Hopefully, through widespread discussion and careful amendment, the statute can strike the proper balance between the conflicting impulses of the complete diversity rule and supplemental jurisdiction.

III. UNDERLYING ASSUMPTIONS AND GENERAL PRINCIPLES  
FOR DETERMINING THE SCOPE OF SUPPLEMENTAL  
JURISDICTION IN DIVERSITY CASES

It is important to remember that supplemental jurisdiction does not operate in a vacuum. It facilitates the inclusive packaging of related parties and claims envisioned by the joinder provisions of the Federal Rules of Civil Procedure. By permitting joinder of claims transactionally related to the underlying dispute, supplemental jurisdiction brings substantial benefits to litigants and the judicial system.<sup>23</sup> But efficient packaging is not the sole concern. If it were, Congress could simply grant supplemental jurisdiction to the full extent of the Constitution. Such a plenary grant of supplemental jurisdiction in diversity cases, however, would override the complete diversity rule and vastly expand the caseload of the federal courts. So retention of the complete diversity rule requires that § 1367 impose restrictions on supplemental jurisdiction in diversity cases.

If the slate is now clean, though, must we adhere to the complete diversity rule? Some supporters of diversity jurisdiction might argue for the rejection of *Strawbridge*.<sup>24</sup> Although I am an ardent supporter of diversity jurisdiction, as a matter of political reality, I believe that Congress will never abolish the complete diversity rule for general diversity cases. At any rate, the debate over amendment of § 1367 is not the time to take up such a radical shift in jurisdiction. Doing so will simply mire the debate on § 1367 and delay ameliorative change. In my view, we should recognize that supplemental jurisdiction in diversity cases must be limited to preserve the complete diversity rule from ready evasion.

Just as those who favor diversity jurisdiction must accept limits, so its critics must realize that they have lost the battle on wholesale abolition of diversity. That being the case, it is inappropriate to use back-door methods—such as unnecessary restrictions on supplemental jurisdiction—to make diversity less attractive to litigants. Precluding the use of supplemental jurisdiction in diversity cases will bring one of two deleterious effects: it will either create overlapping litigation in federal and state court or it will cause the plaintiff to eschew the federal forum to

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<sup>23</sup>Many commentators have discussed the benefits of inclusive packaging. *See, e.g.*, Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809 (1989); John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707 (1976); Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231 (1991).

<sup>24</sup>I was quite surprised that several professors at the Association of American Law Schools Symposium in San Francisco expressed support for abolishing the complete diversity rule.

achieve unitary adjudication in state court.<sup>25</sup> Many anti-diversity commentators would applaud the latter, and Congress certainly could impose draconian restrictions on supplemental jurisdiction to reduce the diversity docket. If that is the goal, however, it should be forthrightly stated and debated as such.

I come to the task, then, with two underlying assumptions. First, diversity of citizenship is a legitimate head of federal jurisdiction. Second, it is properly limited by the complete diversity rule. Thus, for starters, § 1367 must be amended to close the “potentially gaping hole”<sup>26</sup> in *Strawbridge*. But what of the other difficult areas of supplemental jurisdiction in diversity cases? The answer should be informed by the policies underlying diversity jurisdiction and the complete diversity rule.

Although the issue has been debated for two centuries, the general view is that diversity jurisdiction is intended to provide an impartial tribunal, free from local bias or influence, to decide controversies between citizens of different states.<sup>27</sup> In other words, it gives a nonlocal litigant access to a federal court, to avoid being “hometowned” in litigation with a local litigant.<sup>28</sup> Notwithstanding strong attacks, diversity jurisdiction and its historic justification have remained intact since 1789.<sup>29</sup>

The complete diversity rule, the product of the *Strawbridge* case, limits diversity by requiring that all plaintiffs be citizens of different states from all defendants. Although the statutory grant of diversity jurisdiction has never mentioned complete diversity, there is no doubt that it is a statutory limitation.<sup>30</sup> In theory, the rule assumes that “the presence of [co-citizens] on both sides of a case will neutralize any possibility of bias affecting litigants from other states.”<sup>31</sup> Thus, if a citizen of Massachusetts sued two defendants, one a citizen of Massachusetts and the other a citizen of Vermont, the complete diversity rule would preclude diversity jurisdiction. Again, the assumption is that the Vermont defendant does not need the neutral federal forum because she is a coparty with one who is a co-

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<sup>25</sup>See Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1395-96 (1985) (stating that a plaintiff unable to achieve packaging in federal court will be tempted to abandon the federal forum).

<sup>26</sup>Rowe et al., *supra* note 12, at 961 n.91.

<sup>27</sup>See generally 15 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE § 102.03 (3d ed. 1998).

<sup>28</sup>This being the case, it is difficult to justify allowing any plaintiff to file in federal court in the state of her citizenship.

<sup>29</sup>Of course, the statute granting general diversity of citizenship jurisdiction has been amended several times, often with the goal of limiting the number of diversity cases filed. But in none of these adjustments has Congress indicated disagreement with the underlying rationale supporting the grant.

<sup>30</sup>See 15 REDISH, *supra* note 27, § 102.12, at 102-21.

<sup>31</sup>David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 18 (1968).

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citizen of the plaintiff. Although the assumption is not above criticism,<sup>32</sup> it remains part of the diversity landscape.<sup>33</sup>

The Supreme Court took an extraordinary step to protect the complete diversity rule from evisceration in *Owen Equipment & Erection Co. v. Kroger*.<sup>34</sup> There, the Court established a blanket rule that there can be no supplemental jurisdiction over a plaintiff's claim, asserted under Rule 14(a), against a nondiverse third-party defendant who had been impleaded by the defendant. *Kroger* was one of the rare instances in which pre-*Finley* practice rejected supplemental jurisdiction<sup>35</sup> over claims satisfying the nexus test of *United Mine Workers v. Gibbs*.<sup>36</sup> In *Kroger*, the Iowa plaintiff sued a Nebraska defendant, which then impleaded an Iowa third-party defendant. Plaintiff asserted a claim against the third-party defendant, seeking to invoke ancillary jurisdiction. The trial court entered summary judgment on the plaintiff's original claim against the defendant, so the actual dispute, as it developed, was between Iowa citizens. The Court rejected supplemental jurisdiction and the case was dismissed.<sup>37</sup>

The Court was concerned that a clever plaintiff could sue a diverse defendant, knowing that it would implead a third-party defendant who was a co-citizen of the plaintiff.<sup>38</sup> With supplemental jurisdiction over the latter claim, the plaintiff would be able to evade *Strawbridge* and proceed directly against the nondiverse party. The majority rejected the dissent's contention that any such behavior could be treated as collusive joinder.<sup>39</sup> Certainly, there was no evidence of such

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<sup>32</sup>After all, if the stated case were brought in a Massachusetts state court biased against outsiders, the Vermont defendant is not protected by the fact that she has a Massachusetts codefendant. In fact, "home cooking" might result in the Vermonter's being held liable for the entire judgment.

<sup>33</sup>Another justification for the complete diversity rule, of course, is docket control. As Professor Redish has observed, however, there is no logical relationship between the complete diversity rule and docket control. See 15 REDISH, *supra* note 27, § 102.12, at 102-23. "Apart from its obvious historical pedigree, it is unclear that the complete diversity requirement is any more rational a means of curbing diversity jurisdiction than an approach premised on the basis of a litigant's astrological sign." *Id.*

<sup>34</sup>437 U.S. 365 (1978).

<sup>35</sup>Before *Finley*, courts uniformly permitted supplemental jurisdiction over claims satisfying *Gibbs*, whether asserted by defendants, plaintiffs, or intervenors of right, except in the pendent parties area, *Aldinger*, the *Kroger* situation, and over claims by or against necessary parties. See generally Freer, *supra* note 5, at 449-64.

<sup>36</sup>383 U.S. 715 (1966).

<sup>37</sup>An interesting aside: the plaintiff in *Kroger* took advantage of an Iowa savings statute to refile her case against the erstwhile third-party defendant. By the time she did so, she had established citizenship in Texas, so she was able to invoke diversity jurisdiction in the same court in which she originally filed! Apparently, the parties ultimately settled the case. See RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 763 (2d ed. 1997).

<sup>38</sup>The Court also opined that supplemental jurisdiction usually was invoked over claims by parties acting in a defensive capacity, a point to which we will return below. See *infra* text accompanying notes 41-53.

<sup>39</sup>See 28 U.S.C. § 1359 (1994).

gamesmanship in *Kroger* itself.<sup>40</sup> Moreover, *Kroger* was not the typical case—the initial claim against the defendant had been dismissed, leaving only the claim between the plaintiff and the third-party defendant; without supplemental jurisdiction, nothing remained in federal court. In the more typical case, that claim would be one of three remaining before the court,<sup>41</sup> and the claim brought in by supplemental jurisdiction would play a more ancillary role than it would have in *Kroger*.

While there is much to criticize in the majority opinion in *Kroger*, and the wisdom of a blanket prohibition can be questioned, we have lived with the *Kroger* limitation for two decades—under both the common law and statutory regimes. Politically, it would be very difficult to abolish it in a revised § 1367. Beyond the political reality, however, even a *Kroger* critic<sup>42</sup> can admit that the holding of the case was not irrational. Reasonable people can conclude that exercising supplemental jurisdiction over a claim by the plaintiff against the third-party defendant could open the door to evasion of the complete diversity rule in a not insignificant number of cases.

While I would prefer a less draconian solution, I, for one, could accept a blanket prohibition against supplemental jurisdiction over such claims. We should realize, however, that accepting *Kroger* does impair efficient joinder in federal court and thus hampers the efficacy of diversity jurisdiction. That cost is acceptable, however, for the benefit of protecting *Strawbridge* from a colorable threat of evasion.

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<sup>40</sup>Indeed, it was not until trial that the plaintiff discovered the lack of diversity between herself and the third-party defendant. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 369 (1978).

<sup>41</sup>Namely, (1) the original claim against the defendant, (2) the impleader claim by the defendant against the third-party defendant, and (3) the claim by the plaintiff against the third-party defendant.

<sup>42</sup>See, e.g., Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 69-74.

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The problem with § 1367 is that it reaches much farther than *Kroger*. It precludes supplemental jurisdiction over claims for which it was routinely exercised in pre-*Finley* practice and, more importantly, imposes restrictions not necessary to protect the complete diversity rule from realistic threat. By doing so, § 1367 unduly restricts efficient joinder in diversity cases.

IV. SPECIFIC ISSUES OF SUPPLEMENTAL JURISDICTION IN  
DIVERSITY CASES

A. *Claims by Plaintiff in a Defensive Capacity*

Section 1367(b) precludes supplemental jurisdiction in diversity cases over claims asserted “by plaintiffs” against parties joined under Rules 14, 19, 20, and 24.<sup>43</sup> Some of this is familiar ground. The reference to Rule 19 reflects the longstanding traditional rule that claims by or against necessary parties do not invoke supplemental jurisdiction.<sup>44</sup> The reference to Rule 20 seems to reflect the familiar understanding that there is no pendent parties jurisdiction in diversity cases, and the reference to Rule 14 seems to reflect the *Kroger* holding. On the other hand, the reference to Rule 24 is an overt departure from prior practice, which I will address below.

In addition to the reference to Rule 24, and despite the familiar ground, § 1367(b) imposes unprecedented restrictions on a plaintiff’s ability to invoke supplemental jurisdiction, because it fails to recognize that a plaintiff may assert some claims defensively—that is, after having a claim asserted *against* her. For example, assume that the defendant asserts a counterclaim against the plaintiff and that the plaintiff wants to implead a third-party defendant who may owe her indemnity or contribution on the counterclaim. If the third-party defendant is a co-citizen of the plaintiff (or if the claim does not exceed \$75,000), the impleader claim can be asserted only through supplemental jurisdiction. Although pre-*Finley* practice routinely supported supplemental jurisdiction in this situation,<sup>45</sup> § 1367(b) precludes it, because this is a claim by a plaintiff against “one made a party under Rule 14.”<sup>46</sup> The same problem befalls a plaintiff who, in response to a counterclaim, asserts a cross-claim against a nondiverse co-plaintiff. Although pre-*Finley* practice supported supplemental jurisdiction, such a claim is by a plaintiff against “one made a party under . . . Rule 20” and thus runs afoul of § 1367(b).

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<sup>43</sup>28 U.S.C. § 1367(b) (1990).

<sup>44</sup>See 4 FREER, *supra* note 13, § 19.04, at 19-70.

<sup>45</sup>See, e.g., *Brown & Caldwell v. Institute for Energy Funding, Ltd.*, 617 F. Supp. 649, 651 (C.D. Cal. 1985). While I do not believe that pre-*Finley* practice should bind Congress in considering revisions to § 1367, we should remember that Congress purported to be codifying that practice in the present statute. See *supra* text accompanying note 3.

<sup>46</sup>See *Chase Manhattan Bank v. Aldridge*, 906 F. Supp. 866, 868-69 (S.D.N.Y. 1995); *Guaranteed Sys., Inc. v. American Nat’l Can Co.*, 842 F. Supp. 855, 857 (M.D.N.C. 1994) (recognizing unfortunate result but feeling “bound by the plain terms of the statute”).

These limitations make no sense.<sup>47</sup> Indeed, they are *contrary* to the complete diversity rule. In each situation, the plaintiff is asserting a claim against a co-citizen—but one who is diverse from the defendant. Thus, in each, both parties on the plaintiff's side of the case (the plaintiff and the third-party defendant or the co-plaintiff) are completely diverse from the defendant. To be sure, the plaintiff's new claim itself could not invoke diversity jurisdiction, but after joinder of the third-party defendant and exercise of supplemental jurisdiction, this remains a diversity case. While there is a dispute between them, they are united in interest against the defendant. Moreover, the impleader claim rises or falls on the underlying dispute, which invoked diversity jurisdiction. Exercising supplemental jurisdiction over these claims does no violence to *Strawbridge*. Failing to do so, however, imperils efficient joinder in diversity cases.

Another defensive claim by the plaintiff may present a closer question. Suppose the defendant impleads a third-party defendant, who then asserts a claim under Rule 14(a) against the plaintiff. Procedurally, such claims are proper if they arise from the same transaction or occurrence as the underlying dispute.<sup>48</sup> If the third-party defendant and the plaintiff are co-citizens, pre-*Finley* law permitted the third-party defendant to invoke supplemental jurisdiction.<sup>49</sup> The statute leads to the same result, because nothing in § 1367(b) removes supplemental jurisdiction over claims by third-party defendants.<sup>50</sup> Suppose, however, that the plaintiff asserts a compulsory counterclaim in response to the third-party defendant's Rule 14(a) claim. Should that claim invoke supplemental jurisdiction?

Courts addressing the question before *Finley* concluded uniformly that the plaintiff's claim should be supported by supplemental jurisdiction.<sup>51</sup> Section 1367(b) changes that result, however, and precludes supplemental jurisdiction because this is a claim by a plaintiff against "one made a party under Rule 14." This situation is more troublesome than the prior examples because here co-citizens are on opposite sides of the underlying dispute. Nonetheless, this is a far cry from *Kroger*, and the statute should be amended to permit supplemental jurisdiction.

In *Kroger*, a plaintiff might easily foresee that the defendant would implead a nondiverse third-party defendant. She could anticipate that move when she invoked diversity jurisdiction by suing only the diverse defendant. In other words, the evasion of *Strawbridge* depended only on the readily foreseeable action of one other person. In the present case, however, two other people have to file claims before the plaintiff can attempt to use supplemental jurisdiction. In other words, the plaintiff would have to foresee not only the impleader of the third-party defendant, but that the third-party defendant would assert a claim against the

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<sup>47</sup>Judge Bullock expressed this sentiment in holding that § 1367(b) precluded supplemental jurisdiction over a claim by the plaintiff against a nondiverse third-party defendant. *See Guaranteed Sys.*, 842 F. Supp. at 857.

<sup>48</sup>*See* FED. R. CIV. P. 14(a).

<sup>49</sup>*See, e.g., Finkle v. Gulf & W. Mfg. Co.*, 744 F.2d 1015, 1018-19 (3d Cir. 1984); *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709 (5th Cir. 1970).

<sup>50</sup>*See* 3 WAYNE D. BRAZIL ET AL., *MOORE'S FEDERAL PRACTICE* § 14.41[4][d][iii] (3d ed. 1998).

<sup>51</sup>*See, e.g., Finkle*, 744 F.2d at 1018-19; *Berel Co. v. Sencit F/G McKinley Assocs.*, 125 F.R.D. 100, 102-03 (D.N.J. 1989).

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plaintiff. Do we really think that a plaintiff, desiring to proceed in federal court against the third-party defendant, would sue the defendant, hoping that she would implead the third-party defendant and hoping further that the third-party defendant would assert a claim against the plaintiff, all so the plaintiff could then assert a compulsory counterclaim against the third-party defendant? Because the threat to *Strawbridge* is so attenuated, the policy underlying diversity of citizenship jurisdiction and the efficiency underlying supplemental jurisdiction ought to prevail.

Even if the plaintiff did foresee all of these machinations, refusing to allow supplemental jurisdiction does too much violence to efficient joinder. The plaintiff's original claim (and any counterclaim), the impleader claim, and the third-party defendant's claim against the plaintiff are all properly before the federal court. Yet the transactionally related claim by the plaintiff against the third-party defendant would have to go to state court. And why? As it is noted, not to avoid any realistic threat to *Strawbridge*. The case that remains in federal court is a dispute between citizens of different states; unlike *Kroger*, there is a huge "center of gravity" in federal court.

There are other important differences between this scenario and *Kroger*. First, the plaintiff's claim is asserted in a defensive capacity. In rejecting supplemental jurisdiction in *Kroger* itself, the Court noted that supplemental jurisdiction was most appropriate for claims asserted by parties against whom relief had been sought.<sup>52</sup> Second, the plaintiff's claim here is a compulsory counterclaim; refusing supplemental jurisdiction eviscerates that rule. It creates overlapping state court litigation, and, importantly, robs the third-party defendant of the protection intended by the compulsory counterclaim rule. The third-party defendant, who had no role in choosing a federal forum, now must defend the impleader claim and prosecute her claim against the plaintiff in federal court; yet, the third-party defendant must defend a claim against her (by the plaintiff) in state court.

Some have argued that the "rationale" of *Kroger* might prohibit supplemental jurisdiction for all claims by plaintiffs, even if asserted in a defensive capacity.<sup>53</sup> There are two problems with this assertion. First, the federal courts never found such a broad emanation from *Kroger*. After the dust settled, *Kroger* was limited to its facts.<sup>54</sup> There is not a single published opinion in which a court invoked *Kroger*—expressly or in spirit—to deny supplemental jurisdiction over a compulsory counterclaim asserted by a plaintiff. Second, as noted above, a blanket provision such as the holding in *Kroger* exacts a price—it hampers efficient joinder and maims diversity jurisdiction. In the *Kroger* situation itself, the Court, joined subsequently by many commentators, concluded that this price was necessary to protect *Strawbridge* from ready evasion. But as we move farther from *Kroger*—as we need to anticipate more parties' actions and reactions and as we have more and more claims properly in federal court—it is increasingly difficult to justify paying that price, especially where doing so harms litigants who had no role

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<sup>52</sup>Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978).

<sup>53</sup>See Rowe et al., *supra* note 12, at 956.

<sup>54</sup>See Thomas C. Arthur & Richard D. Freer, *Grasping At Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963, 975-78 (1991).

in choosing the forum, whom the *Kroger* Court said supplemental jurisdiction was meant to protect!

It is one thing to tell the diversity plaintiff—as *Kroger* did—that she will not be able to file a Rule 14(a) claim against a nondiverse third-party defendant impleaded by the defendant. It is quite another to tell the diversity plaintiff what § 1367(b) tells her: (1) that if a claim is asserted against her, she cannot implead a nondiverse third-party defendant who may owe her indemnity or contribution; (2) that if a claim is asserted against her, she cannot assert a cross-claim against a nondiverse co-plaintiff; (3) that a nondiverse third-party defendant may assert a claim against her, but that she cannot assert a compulsory counterclaim in response; and (4) that she cannot assert a claim against a nondiverse intervenor or necessary party, even though their claims against her will invoke supplemental jurisdiction. This is a formidable set of roadblocks, unknown to pre-*Finley* law and unnecessary to protect the complete diversity rule.

*B. Supplemental Jurisdiction for Claims By and Against  
Intervenors of Right*

Whenever it is invoked, supplemental jurisdiction facilitates joinder and avoids duplication of effort and the potential for inconsistent results. Strong as these policies are, there is even stronger justification for fostering inclusive packaging when joinder is necessary to avoid harm to the interest of an absentee. Two joinder rules reflect this concern in virtually identical operative language. An absentee who claims an interest relating to the subject matter of a pending case and who is so situated that her nonjoinder may “as a practical matter impair or impede [her] ability to protect that interest,” may be joined as one “needed for a just adjudication” under Rule 19(a)(2)(i)<sup>55</sup> or may intervene of right under Rule 24(a)(2).<sup>56</sup> In either event, joinder achieves not only efficiency and consistency, but protects the interest of a nonparty from potential impairment. This protection of the absentee is such a strong policy that it constitutes one of the situations in which our system justifies overriding the plaintiff’s party structure of the suit.<sup>57</sup>

Historically, there were significant differences in practice when joinder of the absentee would destroy diversity of citizenship jurisdiction. Under Rule 19, supplemental jurisdiction has not been permitted.<sup>58</sup> Thus, if the joinder of an absentee who satisfies Rule 19(a)(2) would destroy subject matter jurisdiction, the court’s only options are (1) to proceed without the absentee or (2) to dismiss the pending case. The court makes this determination “in equity and good conscience,” guided by factors set forth in Rule 19(b). Rule 19 thus provides sporadic protection for the absentee’s interest. First, the defendant generally will have no incentive to raise the issue unless she can “get” something, such as a

<sup>55</sup>FED. R. CIV. P. 19(a)(2)(i).

<sup>56</sup>FED. R. CIV. P. 24(a)(2). In addition, the intervenor of right must show that her interest is not adequately protected by the extant parties. In practice, however, this has been a minimal requirement. See *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

<sup>57</sup>Rule 19 also permits joinder to avoid hollow or incomplete judgments, FED. R. CIV. P. 19(a)(1), and to avoid imposition of double, multiple, or inconsistent obligations on a party (usually the defendant) because of some interest held by the absentee, *id.* (a)(2).

<sup>58</sup>See 4 FREER, *supra* note 13, § 19.04, at 19-64.

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dismissal. Typically, then, defendants raise the issue only when joinder of the absentee is *not* possible—that is, when it will destroy diversity.<sup>59</sup> Second, even if the issue is raised, Rule 19 cannot effect joinder if it would destroy subject matter jurisdiction.

Traditionally, however, the absentee did not have to rely upon the defendant and the sporadic protection accorded by Rule 19. Instead, she could intervene of right under Rule 24(a)(2) and, if her joinder destroyed diversity of citizenship, invoke the court's supplemental jurisdiction.<sup>60</sup> The exercise of supplemental jurisdiction in this circumstance permitted vindication of the joinder goal of avoiding the imposition of harm on the absentee, but also pointed out an anomaly. Although the absentee was situated identically under Rule 19 and Rule 24, her joinder could be effected in the pending case only under Rule 24. Put another way, whether the absentee could actually be joined in the pending case depended upon who initiated her joinder. If the defendant raised the issue, joinder could not be achieved because Rule 19 would not invoke supplemental jurisdiction. On the other hand, if the same absentee in the same predicament intervened, supplemental jurisdiction would facilitate her joinder.

Many commentators noted the anomaly and called for uniform treatment by extending supplemental jurisdiction over claims involving joinder under Rule 19.<sup>61</sup> To my knowledge, not one commentator urged resolving the anomaly by *denying* supplemental jurisdiction for intervention. Nonetheless, Congress did exactly that and precluded supplemental jurisdiction in diversity cases over claims by persons “seeking to intervene as plaintiffs under Rule 24.”<sup>62</sup> The message has been received; courts routinely now reject supplemental jurisdiction over claims by intervenors.<sup>63</sup>

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<sup>59</sup>See *Scott Paper Co. v. National Cas. Co.*, 151 F.R.D. 577, 579 (E.D. Pa. 1993) (stating that defendant will “not advocate for the interests of others as a matter of altruism”).

<sup>60</sup>See, e.g., *Curtis v. Sears, Roebuck & Co.*, 754 F.2d 781, 783 (8th Cir. 1985); *Burger King Corp. v. American Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 678 (N.D. Ill. 1988).

<sup>61</sup>See George B. Fraser, *Ancillary Jurisdiction of Federal Courts of Persons Whose Interest May Be Impaired if Not Joined*, 62 F.R.D. 483, 485-87 (1974); Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1085-88 (1985); John E. Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 362-63 (1969); Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, The New Law, and Rule 19*, 38 U. KAN. L. REV. 864, 950 (1990).

<sup>62</sup>28 U.S.C. § 1367(b) (1990).

<sup>63</sup>See, e.g., *Krueger v. Cartwright*, 996 F.2d 928, 933 n.6 (7th Cir. 1993); *MCI Telecomms. Corp. v. Logan Group, Inc.*, 848 F. Supp. 86, 88-89 (N.D. Tex. 1994). Distinguished defenders of the statute conclude that it expands supplemental jurisdiction by permitting the joinder of a defendant who is a co-citizen of the plaintiff under either Rule 24 or Rule 19. See *Rowe et al.*, *supra* note 12, at 957-58. It is true that nothing in § 1367(b) precludes joinder of a defendant under either rule, but the statute provides that the plaintiff cannot assert a claim—even a compulsory counterclaim—back against the newly joined defendant. Such an assertion is precluded under § 1367(b), because it is a claim by a plaintiff against one joined under Rule 19 (and the same is true of intervention under Rule 24). See *Krueger*, 996 F.2d at 933 & n.6. So it is not clear that joinder of the absentee as a defendant, even if supported by supplemental jurisdiction, accomplishes much.

Some have defended the statute in this regard as effecting a minor change mandated by the “rationale” of *Kroger*.<sup>64</sup> It is a difficult argument to sustain, however, in part because the opinion in *Kroger* itself recognized without criticism that courts routinely permitted supplemental jurisdiction over claims by and against intervenors of right.<sup>65</sup> More importantly, removing supplemental jurisdiction here (in combination with the historic limitation on supplemental jurisdiction under Rule 19) leaves the nondiverse absentee without the protection intended by Rules 19 and 24. Further, because the absentee cannot be joined and thus cannot be bound by collateral estoppel, her nonjoinder may promote prolonged duplicative litigation. Not surprisingly, the overwhelming response to the present § 1367(b) on this point has been critical.<sup>66</sup>

If the statute is to be amended in this regard, Congress should give serious consideration to avoiding the anomaly by granting supplemental jurisdiction in both the Rule 19 and Rule 24 contexts. Politically, an expansion into the necessary parties area would probably prove difficult because it is contrary to the historic practice. At the very least, Congress should return to the pre-*Finley* rule and permit supplemental jurisdiction over claims by and against intervenors of right. This should be an easy political “sell.” Although this course will resurrect the anomaly, it will provide protection to the absentees that is now wholly lacking.

<sup>64</sup>See Rowe et al., *supra* note 12, at 955-57; see also *supra* text accompanying note 41.

<sup>65</sup>See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 & n.18 (1978). It is also interesting to note that the Court’s first recognition of supplemental jurisdiction involved a claim by a plaintiff-intervenor. See *Freeman v. Howe*, 65 U.S. (1 How.) 450 (1860).

<sup>66</sup>See, e.g., 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1917 (2d ed. Supp. 1998); CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 545 & n.42 (5th ed. 1994) [hereinafter FEDERAL COURTS]; Arthur & Freer, *supra* note 54, at 966-74; Christopher Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute*, 19 SETON HALL LEGIS. J. 157, 185-88 (1994); Marilyn J. Ireland, *Supplemental Jurisdiction Over Claims in Intervention*, 23 N.M. L. REV. 57, 72-74 (1993); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 860 (1992); John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 764-66 (1991).

Moreover, § 1367(b) creates confusion by precluding supplemental jurisdiction over claims by persons “seeking to intervene as plaintiffs.” 28 U.S.C. § 1367(b) (emphasis added). The language seems to preclude the court from realigning the intervenor to assess jurisdiction. Nonetheless, some courts have been willing to realign an intervening plaintiff as a defendant to save jurisdiction. See, e.g., *Development Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 159-60 (3d Cir. 1995). Others have not, feeling bound by the intervenor’s choice. See, e.g., *Maryland Cas. Co. v. W.R. Grace & Co.*, No. 88-C4337, 1996 U.S. Dist. LEXIS 868 (S.D.N.Y. Jan. 30, 1996). In one case, which demonstrates the kinds of permutations possible under the statute, the plaintiff sued for wrongful death of a woman he claimed was his wife. The woman’s mother intervened as a plaintiff to assert wrongful death claims against one defendant and also to assert that the plaintiff was not the decedent’s husband. The court held that the intervenor was indeed a plaintiff on the wrongful death claim; however, it denied the intervenor status as a plaintiff on her second claim—the claim asserting that the plaintiff was not the decedent’s husband. The court thus rejected supplemental jurisdiction over the wrongful death claim but permitted the claim regarding plaintiff’s capacity to remain in the action. See *Atherton v. Casey*, No. 92-1283, 1992 U.S. Dist. LEXIS 9976 (E.D. La. June 24, 1992). It would be difficult to devise a less efficient result.

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The ALI draft would return to pre-*Finley* practice, including an important limitation recognized in case law from the era before passage of present § 1367. Specifically, supplemental jurisdiction is available over claims by or against intervenors of right *unless* the intervenor would be an indispensable party under Rule 19(b). In other words, when intervention of right would destroy diversity of citizenship jurisdiction, the court will exercise supplemental jurisdiction unless it concludes—based upon the analysis of “equity and good conscience” in Rule 19(b)—that it would dismiss the case rather than proceed without joining the absentee. This exception seems odd, because it allows joinder in those cases in which the intervenor is merely “necessary” but denies it in those cases in which the intervenor’s interest is more immediate and central. Nonetheless, it may afford appropriate flexibility to avoid ready evasion of the complete diversity requirement.<sup>67</sup> Rule 19(b) practice is sufficiently elastic to permit a conclusion that the absentee is merely necessary when the exercise of supplemental jurisdiction would be ameliorative.<sup>68</sup>

*C. The Zahn Issue in Class Actions*

The Supreme Court has sent conflicting signals regarding invocation of diversity of citizenship jurisdiction through a class action. In *Supreme Tribe of Ben-Hur v. Cauble*, decided in 1921, the Court held that the citizenship of the representative—not the class members—is relevant for determining diversity.<sup>69</sup> The courts have never seriously questioned the *Ben-Hur* rule.<sup>70</sup> In *Zahn v. International Paper Co.*,<sup>71</sup> decided in 1973, however, the Court held that every member of the class must satisfy the amount in controversy requirement for a diversity case.

Thus, before § 1367, the law was not logical, but it was certain. All observers agree that the supplemental-jurisdiction statute, on its face, overrules *Zahn*. Section 1367(a) grants supplemental jurisdiction to the full extent of Article III, which includes claims by class members, so long as the representative’s claim exceeds the amount in controversy and the claims are so closely related as to be part of the same case or controversy. Section 1367(b) then cuts back on this grant by precluding supplemental jurisdiction over certain claims in diversity of

<sup>67</sup>See 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1610, at 17 (2d ed. Supp. 1998).

<sup>68</sup>In analyzing the case under Rule 19(b), the court is permitted to consider whether the absentee can protect herself, for example, through intervention. If intervention is not permitted because there would be no supplemental jurisdiction, the court would then look to other Rule 19(b) factors. One of these is whether the plaintiff has a sufficient remedy if the case is dismissed. Thus, for example, if there were a state court in which all parties and the absentee could be joined in a single proceeding, the court might easily conclude that the absentee was indispensable and dismiss the pending case. If there were no such alternative forum, or if other factors augured toward joinder, the court could conclude that the absentee was merely necessary, and thus that supplemental jurisdiction was appropriate. In either event, the case can be funneled to the court best able to resolve the entire dispute.

<sup>69</sup>255 U.S. 356, 365-67 (1921).

<sup>70</sup>See also *In re School Asbestos Litig.*, 921 F.2d 1310, 1317-18 (3d Cir.), cert. denied, 499 U.S. 976 (1990) (rejecting the contention that changes in the class action provisions affected the *Ben-Hur* rule).

<sup>71</sup>414 U.S. 291 (1973).

citizenship cases. Nowhere in the list of prohibited claims, however, does § 1367(b) refer to class actions.<sup>72</sup> Curiously, the legislative history to the statute addressed the question directly, and said that the statute was “not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*.”<sup>73</sup> In other words, the legislative history embraced the continued vitality of *Zahn*. Some commentators felt that the legislative history “fixed” the problem and that *Zahn* could be saved.<sup>74</sup> Other commentators concluded that the contemporary judicial emphasis on textualism might preclude use of the legislative history to avoid the terms of the legislation.<sup>75</sup>

Not surprisingly, courts have not reached a consensus. The district courts have split, with most seeming to conclude that *Zahn* survives.<sup>76</sup> On the other hand, the only appellate court to decide the issue concluded in *In re Abbott Laboratories*<sup>77</sup> that the plain meaning of the statute should govern over contrary legislative history, so long as the statutory language did not mandate an absurd result. Because overruling the much-criticized *Zahn* rule was not absurd, the court upheld supplemental jurisdiction in a case in which the representative’s claim exceeded the amount in controversy but in which each class member’s claim was limited by state law to \$20,000.

Obviously, the split of authority on this issue requires legislative action. I applaud the ALI proposal for taking the bold step of overruling *Zahn* and permitting class actions to proceed when the representative meets the amount in controversy, regardless of the amount of the class members’ claims. There are several reasons Congress should proceed in this way. First, the majority opinion in *Zahn* was not impressive, a fact made brutally clear by Justice Brennan’s strong dissent. Although the pleadings framed the case as one involving supplemental jurisdiction, the majority failed to address that topic. Instead, it discussed the inapt issue of claim aggregation.<sup>78</sup> It also failed to mention—let alone distinguish—*Ben-Hur*, which would seem to have been binding precedent. The overwhelming

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<sup>72</sup>Apparently, however, *Zahn* would retain vitality if the class asserted claims against multiple defendants. In that case, § 1367(b) would preclude supplemental jurisdiction because the claims are by plaintiffs against persons joined under Rule 20. This is another area of uncertainty in present practice—why should the availability of supplemental jurisdiction depend upon the number of defendants joined?

<sup>73</sup>H.R. REP. NO. 101-734, at 29 (1990), reprinted in 1990 U.S.C.A.N. 6860, 6875.

<sup>74</sup>See, e.g., McLaughlin, *supra* note 66, at 972-74; Rowe et al., *supra* note 12, at 960 n.90.

<sup>75</sup>See, e.g., Arthur & Freer, *supra* note 54, at 981; Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 102 (1992); see also, e.g., 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 6.11, at 6-48 to 6-49 (3d ed. 1992).

<sup>76</sup>Compare, e.g., *Riverside Trans., Inc. v. Bellsouth Telecomms., Inc.*, 847 F. Supp. 453, 456 (M.D. La. 1994) (holding that *Zahn* applies), with *Lindsay v. Kvortek*, 865 F. Supp. 264 (W.D. Pa. 1994) (holding that *Zahn* is eviscerated).

<sup>77</sup>51 F.3d 524 (5th Cir. 1995).

<sup>78</sup>See FEDERAL COURTS, *supra* note 66, at 214 (stating that “*Zahn* is a puzzling case, particularly because of its failure even to consider the argument of three dissenters that recent principles of ancillary jurisdiction, which had been held to overcome the jurisdictional-amount requirement in other contexts, should do so also in connection with joinder of parties”) (footnote omitted).

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majority of academic commentary has criticized *Zahn*.<sup>79</sup> In short, nothing in *Zahn* warrants unfeigned obeisance.

Second, and more fundamentally, *Zahn* is not necessary to protect *Strawbridge*. The debate over *Zahn* concerns only the amount in controversy, not the citizenship of the parties. Indeed, under *Ben-Hur*, the courts have exercised supplemental jurisdiction as to citizenship for nearly eighty years. Regardless of the outcome of the debate over *Zahn*, the cases affected are disputes between citizens of different states, consistent with the policy underlying diversity jurisdiction.

Third, overruling *Zahn* will better equip federal courts to resolve complex interstate disputes that may not be well handled in the courts of some states. In those states that have not adopted Federal Rule 23, it may prove difficult to maintain a class action in state court.<sup>80</sup> Fourth, while one court fears that overruling *Zahn* will “allow[] thousands of small claims into federal court via the class device,”<sup>81</sup> the risk of inundation seems quite remote. Presumably, there will be few cases in which the representative claims more than \$75,000 and the class members have “small claims.” Indeed, such cases may be limited to those involving a statutory limitation such as that in *In re Abbott Laboratories*.<sup>82</sup> If the class members’ claims are substantial, they may well opt out of a Rule 23(b)(3) class to pursue individual litigation. If they do not, overruling *Zahn* permits realization of the economies of the class device. Further, overruling *Zahn* is consistent with the notion that class members are not full-fledged parties. For example, they are not automatically subject to the full panoply of party discovery.<sup>83</sup> Overruling *Zahn* may also avoid overlapping class actions in federal and state court—one involving claims in excess of \$75,000 and one involving claims of less. This result benefits not only the defendant but the societal interest in efficient administration of justice. Finally, experience in those courts that have concluded that the supplemental-jurisdiction statute abrogated *Zahn* gives no hint of a docket crisis.

Overruling *Zahn* makes good sense. Indeed, it is very curious that the Congressional Subcommittee Working Papers for what became § 1367 indicated a clear intention to overrule *Zahn*.<sup>84</sup> How and why Congress went the other way, we do not know, but now is a propitious time to do the right thing. Even one

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<sup>79</sup>See, e.g., 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1756, at 74-76 (2d ed. 1986); 16 ROBERT C. CASAD ET AL., *MOORE’S FEDERAL PRACTICE* § 106.44, at 106-61 to 106-64.1 (3d ed. 1998); Arthur & Freer, *supra* note 54, at 1008; Brian Mattis & James S. Mitchell, *The Trouble with Zahn: Progeny of Snyder v. Harris Further Cripples Class Actions*, 53 NEB. L. REV. 137, 191-94 (1974); 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, 194 (1996).

<sup>80</sup>In Georgia, for example, there is no effective counterpart to the Federal Rule 23(b)(3) class action.

<sup>81</sup>*Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 931 (7th Cir. 1996).

<sup>82</sup>51 F.3d 524, 526 (5th Cir. 1995).

<sup>83</sup>See *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1004-05 (7th Cir. 1971) (holding that class members may, under certain circumstances, be required to submit to discovery requests).

<sup>84</sup>For a discussion, see Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important but Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31, 57 (1992).

distinguished commentator who favors abolition of diversity jurisdiction supports the move to overrule *Zahn*.<sup>85</sup>

#### D. *The Clark Issue in Nonclass Cases*

In *Clark v. Paul Gray, Inc.*,<sup>86</sup> the Supreme Court held that each plaintiff's claim in a nonclass case must satisfy the amount in controversy requirement for the invocation of diversity jurisdiction. (In essence, *Zahn* simply extended the *Clark* rationale to claims by members of a class.<sup>87</sup>) Just as the language of § 1367(b) overrules *Zahn*, so it overrules *Clark*. For example, assume that one plaintiff asserts a claim in excess of \$75,000 against a diverse defendant, and that a co-plaintiff (also of diverse citizenship from the defendant) asserts a claim failing to meet the amount in controversy. Assuming the claims meet the nexus test of *Gibbs*,<sup>88</sup> § 1367(a) will grant supplemental jurisdiction over the second plaintiff's claim. Nothing in § 1367(b) removes the grant.<sup>89</sup>

Still, the novelty of what is essentially pendent parties jurisdiction in a diversity case, coupled with the legislative history about *Zahn*, has led to a split of authority. The only appellate decision is *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*,<sup>90</sup> in which the Seventh Circuit upheld supplemental jurisdiction in this situation.

*Clark*, like *Zahn*, was an unfortunate opinion that deserves to be overruled. The Court did not give sufficient consideration to supplemental jurisdiction. As that doctrine developed in the decades after *Clark* was decided, however, several courts came to exercise jurisdiction over a second plaintiff's claim, although it did not meet the amount in controversy requirement, when it was joined with a jurisdictionally sufficient claim of another plaintiff. (Of course, the cases required that the claims be part of the same case or controversy for Article III purposes.<sup>91</sup>) *Zahn* ended this trend, and the demise of *Zahn* should rekindle it. For the reasons discussed with regard to *Zahn*, then, the revised supplemental-jurisdiction statute should reject the *Clark* rule.

<sup>85</sup>See Thomas D. Rowe, Jr., *1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 IND. L.J. 53, 63 (1998).

<sup>86</sup>306 U.S. 583 (1939).

<sup>87</sup>See *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 931 (7th Cir. 1996) (stating that *Zahn* "holds that the unnamed class members remain 'parties' for this purpose").

<sup>88</sup>*United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). They should easily meet the *Gibbs* test, because joinder as co-plaintiffs under Rule 20 requires, in addition to the presentation of a common question of law or fact, that the claims arise from the same transaction or occurrence. FED. R. CIV. P. 20(a).

<sup>89</sup>This assumes that there is a single defendant. If there are multiple defendants, the second plaintiff's claim would be by a plaintiff against a person joined under Rule 20, and thus the claim would be prohibited under § 1367(b). As noted in the class action discussion, it makes no apparent sense that the invocation of supplemental jurisdiction depends on the number of defendants. See *supra* note 72.

<sup>90</sup>77 F.3d 928 (7th Cir. 1996).

<sup>91</sup>See, e.g., *Niebuhr v. State Farm Mut. Auto. Ins. Co.*, 486 F.2d 618, 621 (10th Cir. 1973); *Beautytuft, Inc. v. Factory Ins. Ass'n*, 431 F.2d 1122, 1128 (6th Cir. 1970).

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Exercising supplemental jurisdiction in this situation avoids overlapping litigation and the threat of inconsistent results.<sup>92</sup> Without supplemental jurisdiction, the insufficient claim would be filed in state court. The state court plaintiff cannot be bound by claim or issue preclusion from judgment in the federal case. Further, the policy of requiring an amount in controversy is not thwarted by permitting addition of claims, since the underlying claim will satisfy the amount requirement. Moreover, it is interesting to note that several of the cases upholding supplemental jurisdiction under the present § 1367 involve claims by family members.<sup>93</sup> While this is an especially compelling situation for invoking supplemental jurisdiction, the revised statute should not limit its operation to such cases.<sup>94</sup> Also, it seems clear that supplemental jurisdiction here does not risk serious inundation of the federal courts.<sup>95</sup> Indeed, experience with the practice thus far indicates that there is no caseload problem. There is simply no principled reason for treating the class and nonclass cases differently on the amount in controversy issue; this is now a point on which all seem to agree.<sup>96</sup>

## CONCLUSION

It seems clear that § 1367 will be amended. Among the important issues to reconsider is the scope of supplemental jurisdiction in diversity cases. The present statute imposes restrictions that make diversity jurisdiction less effective and less desirable. While this result may have been proper if the goal of § 1367 were to reduce the diversity docket, Congress never espoused such a goal. The statute's restrictions against claims asserted by plaintiffs acting in a defensive capacity and by and against intervenors of right should be scuttled in favor of the pre-*Finley* practice. In addition, the expansion of supplemental jurisdiction that Congress apparently did not intend but unwittingly created—overruling *Zahn* and *Clark*—has met with approval, and should be codified. Ironically, then, a statute that at first seemed to hamper joinder in diversity cases may, at the end of the day, actually expand it.

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<sup>92</sup>See FEDERAL COURTS, *supra* note 66, at 213.

<sup>93</sup>See, e.g., *Lewis v. Richardson*, No. 94-509-JD, 1995 U.S. Dist. LEXIS 16607 (D.N.H. Nov. 8, 1995); *Patterson Enters., Inc. v. Bridgestone/Firestone, Inc.*, 812 F. Supp. 1152 (D. Kan. 1993); *Garza v. National Am. Ins. Co.*, 807 F. Supp. 1256 (M.D. La. 1992) (upholding supplemental jurisdiction).

<sup>94</sup>See FEDERAL COURTS, *supra* note 66, at 214 (“But if, as is thought, the principle is sound, there seems no reason to limit it to family cases, since they differ from other cases only in degree . . .”). In 1969, the ALI proposed a codification of pendent parties jurisdiction for claims by members of a single family living in the same household. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1301(e) (1969).

<sup>95</sup>See *Stromberg*, 77 F.3d at 931 (The court remarked that the evisceration of *Zahn* would impose a greater burden in class action litigation than would supplemental jurisdiction in the nonclass case; “[i]t is therefore easy to imagine wanting to overturn *Clark* but not *Zahn*; it is much harder to imagine wanting to overturn *Zahn* but not *Clark* . . .”).

<sup>96</sup>See *Rowe*, *supra* note 85, at 63.