March, 1992

Section 1367: Another Party Heard From

Joan E. Steinman, Chicago-Kent College of Law

Available at: https://works.bepress.com/joan_steinman/14/
SECTION 1367—ANOTHER PARTY HEARD FROM

Joan Steinman*

When I recently had lunch at the local Chinese restaurant, my fortune cookie said, "Strong and bitter words indicate a weak cause." That confirmed my predisposition as to how I should approach the debate over the new supplemental jurisdiction statute, 28 U.S.C. § 1367, that has appeared in this Journal between Professors Freer and Arthur on the one hand and Professors Burbank, Mengler, and Rowe on the other. So, I will offer here some of my thoughts about the new statute and will try to do it in (relatively) dulcet tones.

I. INTRODUCTION

It seems clear to me that in the wake of the Supreme Court’s decision in Finley v. United States it was appropriate, if not essential, for Congress to overturn the decision in that case and to negate the untoward implications for pendent and ancillary jurisdiction that both commentators and lower courts found in the reasoning and language of the opinion.

* Professor of Law, Norman and Edna Freehling Scholar, Chicago-Kent College of Law, Illinois Institute of Technology. The author thanks her colleagues, Richard Matasar and Margaret Stewart, for their valuable comments on a draft of this Essay, and the Marshall Ewell Research Fund for providing financial support.

1 An anonymous sage at Golden Dragon, Inc.


4 In Finley the Court refused to allow the exercise of pendent party jurisdiction over a state law claim asserted by a plaintiff against a nondiverse defendant whom plaintiff sought to sue along with the Federal Aviation Authority ("FAA"), notwithstanding that the claim against the FAA (brought under the Federal Tort Claims Act) was exclusively within the jurisdiction of the federal courts.

5 Through its adamant position "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," Finley, 490 U.S. at 549, the Court cast doubt on exercises of ancillary jurisdiction that had become routine, including ancillary jurisdiction over third-party claims, over compulsory counterclaims and cross-claims against additional parties, and over claims raised by intervenors of right. See 1 Federal Courts Study Committee Working Papers and Subcommittee Reports, at 554 (June, 1990) [hereinafter FCSC Working Papers]. For citations of cases affected by Finley, see Thomas D. Rowe, Jr., Stephen B. Burbank, & Thomas M. Mengler, Compounding or Creating Confusion about Supplemental Jurisdiction? A Reply to Professor Freer, 40 Emory L. J. 943, 945 nn.12 & 14 (1991). Taken to its logical limits, the Court's insistence upon statutory authorization of all aspects of federal jurisdiction also would require
Congress did respond, through the enactment of 28 U.S.C. § 1367. Professors Freer and Arthur have been critical of the process that led to its enactment, as well as of the end product. Perhaps the process can be faulted, perhaps a larger number of interested and knowledgeable persons should have been consulted, and perhaps a better statute would have resulted — maybe not. Perhaps members of Congress and their staffs should have scrutinized more carefully the bill that became § 1367; and if they had, perhaps they would have better appreciated all the subtleties of the bill, and altered the bill to change some of its effects. But all of that is water under the dam, except for the lessons that might be learned for the next time that Congress makes a foray into this field. For the present, students of § 1367 can help attorneys, courts, and legislators by illuminating the dark corners — revealing how § 1367 resolves certain issues, arguing for or against those resolutions, revealing what questions § 1367 poses or leaves unanswered, and taking a position on how those questions ought to be resolved. Professors Freer, Arthur, Burbank, Mengler, and Rowe have contributed valuably to that cause. In this volume of the Journal, a few more of us get to contribute some thoughts. We are other parties heard from, like the additional voices that § 1367 allows into lawsuits sometimes.

II. Section 1367 and Federal Question Cases

First, although the focus of the debate in the Emory Law Journal has been on the operation of § 1367 in diversity cases, the opportunities that it creates in federal question cases also warrant discussion. Section 1367(a) provides:

> Except as provided in subsections (b) [concerning civil actions of which the federal courts have jurisdiction founded solely on diversity] and (c) [which enumerates the circumstances in which district courts may decline to exercise supplemental jurisdiction] 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 abandonment of pendent claim jurisdiction.
the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.⁶

Never before has Congress conferred on the federal district courts a jurisdiction that expressly reaches to the constitutional limits.⁷ As a result, the lower federal courts and the Supreme Court have rendered most jurisdictional decisions at the statutory level. There have been some decisions, such as that in Osborn v. Bank of the United States,⁸ that addressed constitutional questions concerning the scope of the “arising under” language of Article III,⁹ but the focus there was on the role that federal law had to play in a civil action in order for Congress to act constitutionally in conferring federal jurisdiction to hear the action. The focus was not primarily on the measure of the radius from that center that the courts may go and still be hearing one constitutional case. The Osborn Court did hold that so long as a question to which the federal judicial power extends forms an ingredient of the plaintiff’s cause, “it is in the power of congress to give [the federal courts] jurisdiction of that cause, although other questions of fact or law may be involved in it.”¹⁰ Professor (now Dean) Matsasar concluded that:

Osborn suggests that ‘cause’ is equivalent to the ‘case’ or ‘controversy’ between the plaintiff and the defendant, and [that it] makes clear that ‘cause’ refers to matters included not only in the plaintiff’s claims, but also in the defendant’s defenses as well. Thus, Osborn

---

⁷ Although the Supreme Court always has construed the general federal question jurisdictional statute, 28 U.S.C. § 1331 (1988), far more narrowly than it has construed the “arising under” language of Article III, see, e.g., Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494-95 (1983), a number of commentators have argued that the Court’s statutory construction has been in error and that the jurisdiction conferred by § 1331 should be recognized to be coextensive with that available under Article III. See, e.g., James H. Chadbourn & A. Leo Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639 (1942); Ray Forrester, The Nature of a “Federal Question,” 16 Tul. L. Rev. 362 (1942). Even if they are correct, the statement in the text would remain accurate, because neither § 1331 nor any other jurisdictional statute (until § 1367) has explicitly conferred jurisdiction to the constitutional limits.
⁹ Article III, section 2, of the Constitution provides in pertinent part: “The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. CONST. art. III, § 2.
¹⁰ Osborn, 22 U.S. (9 Wheat.) at 258 (emphasis added).
indicates that a federal court has power to decide all questions — federal and nonfederal — involved in article III 'cases' and 'controversies.'

At this point, we have come full circle, back to the question with which we began. Dean Matasar views Osborn taken together with Wayman v. Southard as moving beyond the circle by suggesting that "case" is determined by reference to the procedural rules adopted by Congress to govern a federal action from commencement to termination. In other words, "matters would be within one 'case' or 'controversy' as long as lawfully adopted procedural rules permitted them to be brought together."

In United Mine Workers v. Gibbs the Court left a different impression, indicating that, in order for the relationship between or among claims to be such that they constitute a single constitutional "case," state law claims must derive from a nucleus of operative fact that is shared in common with a substantial federal question and the claims collectively must be such that a plaintiff ordinarily would be expected to try them all in one judicial proceeding.

Commentators, including Dean Matasar, have questioned this interpretation of an Article III "case." Relying in part on counterexamples, that is on instances in which the Supreme Court has upheld exercises of supplemental jurisdiction in situations that do not meet the Gibbs requirements, Matasar has rejected the conclusion that Gibbs, or the fact relat-

---

13 Matasar, supra note 11, at 1409-10.
15 Id. at 725. For another view of the relationship between Osborn and Gibbs and a discussion of the evolution of ancillary jurisdiction, see Susan Bandes, The Idea of a Case, 42 STAN. L. REV. 227, 238-39, 271-75 (1990); Mary B. McManamon, Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History, 46 WASH. & LEE L. REV. 863 (1989). Although I stated the Gibbs requirements cumulatively, the "but if" language that connects them in the Gibbs opinion can be read so as to make the common nucleus and the expectation of trial together alternative ways of defining a "case." For a careful examination of the relationship between the sentences and an analysis of the expectation notion, see Matasar, supra note 11, at 1454-63.
16 Dean Matasar identifies three types of diversity actions in which, in his view, fact relatedness is not a prerequisite to supplemental jurisdiction: cases involving claims to property such as were adjudicated in Freeman v. Howe, 65 U.S. (24 How.) 450 (1860), receivership actions such as White
edness of claims, sets the constitutional limits on supplemental jurisdiction.17 His view is that "[s]upplemental jurisdiction ... is constitutionally permissible whenever the rules governing federal procedure permit the joinder in one action of jurisdictionally insufficient nonfederal claims or parties with a jurisdictionally sufficient federal claim."18 Under this view, when a federal court has jurisdiction over a plaintiff's federal question claim, the court could adjudicate, for example, any counterclaim, permissive or compulsory, even if the counterclaim arose under state law and required the joinder of additional nondiverse parties; indeed, it could adjudicate any claim that any party asserting a claim to relief had against any opposing party.19 Further, the court could adjudicate the claims of permissive intervenors, as well as those of intervenors of right.20

The Court itself has indicated that the constitutional criteria for pendent party jurisdiction may or may not be analogous to that for pendent claim jurisdiction. In Finley, it assumed without deciding that the constitutional criteria were analogous.21

It would not be practical for me to attempt to use this opportunity to

v. Ewing, 159 U.S. 36 (1895), and the cases decided under the general rule that a single plaintiff may aggregate his or her claims against a single defendant to meet the amount in controversy requirement, regardless of whether the claims are factually related. Dean Matasar identifies bankruptcy jurisdiction as a type of federal question jurisdiction in which fact relatedness is not required. With respect to cases that can arise in either diversity or federal question actions, he identifies cases applying the rule that setoffs that lack an independent basis of jurisdiction and attorney's fee disputes may be heard by a federal court, even if they are unrelated to the underlying claim. See Matasar, supra note 11, at 1462-77. Arguments for the constitutionality of 28 U.S.C. § 1441(c) (1988), which requires separate and independent claims, typically also depend upon an understanding of "case" that is broader than claims that share a common nucleus of operative fact.

17 Matasar, supra note 11, at 1417-77.
18 Id. at 1479.
19 See Fed. R. Civ. P. 13(a), (b) and 18(a).
20 See Fed. R. Civ. P. 24. Although ancillary jurisdiction has been asserted over the claims of permissive intervenors when those claims arose out of a common nucleus of operative fact with the jurisdictionally sufficient claim, see, e.g., Usery v. Brandel, 87 F.R.D. 670 (W.D. Mich. 1980), under Rule 24(b) claims of permissive intervenors need only have a question of law or fact in common with the main action.

By contrast, the federal courts would be unable to hear a claim by a third-party defendant against a plaintiff that did not arise out of the transaction or occurrence that is the subject of the plaintiff's claim against the third-party plaintiff, or a claim by the plaintiff against the third-party defendant that is not similarly based. These claims would be outside federal jurisdiction because the Federal Rules do not allow them to be brought. See Fed. R. Civ. P. 14(a).

21 Finley, 490 U.S. at 549.
briefly comment on § 1367 to critique Matasar's or competing\textsuperscript{22} views of what a constitutional "case" is, or to present a novel analysis of the question. The infinitely more modest point I seek to make here is that § 1367 provides litigants with an unparalleled opportunity to press the courts to reconsider the scope of a constitutional case. Because it declares that the federal courts shall have supplemental jurisdiction over all claims that are so related to federal questions that they form part of the same case or controversy, even when those nonfederal claims involve the joinder or intervention of additional parties, § 1367 invites lawsuits that test the limits of traditional thought and thereby invites fresh thinking about the issue.

It will be interesting to see what the Court does when presented with opportunities to revisit the question of the scope of a constitutional "case." It is conceivable that, despite the language of § 1367, the Court will avoid the issue by concluding that Congress did not intend any extension of supplemental jurisdiction beyond claims that derive from a common nucleus of operative fact with the original federal claim or, as recommended by the Federal Courts Study Committee, beyond claims that arise out of the same "transaction or occurrence" as a claim within federal question jurisdiction.\textsuperscript{23} Section 1367 is, after all, part of a statute entitled the Federal Courts Study Committee Implementation Act of 1990.\textsuperscript{24} Congress apparently believed that the "same transaction or occurrence" test is synonymous with the Gibbs test and that both define the scope of an Article III case.\textsuperscript{25} To the extent that the Court will seek to implement the recommen-

\textsuperscript{22} See, e.g., Bandes, supra note 15. Bandes argues that to determine what parties should participate in a case, it is necessary to decide whose interest a case should serve, and that to determine what issues should be part of a case, it is necessary to define the role of the court. Id. at 234. Bandes asserts that the best, highest, and most sensible role for the federal courts is interpreting and enforcing the Constitution, and she argues that the case limitation should be interpreted to permit inclusion of those parties and claims most likely to enable the Court to perform this role. Id. at 282. \textit{Inter alia}, Bandes argues that "the Court should not be bound by Congress's conceptions of a case, [although] the idea of a case may be informed by procedural values. Legislative determinations about the scope of a case, as indicators of societal conceptions of the role of the courts, are entitled to great weight." Id. at 291 (citations omitted).


\textsuperscript{25} The House Committee report, which described § 1367 as implementing the recommendation of the FCSC on pages 47-48 of the FCSC's Report, also described § 1367(a) as codifying the scope of
ations of the FCSC on this point, it may depart from what § 1367 says, or it may be disposed to affirm the identity between a "case," a common nucleus of operative fact, and a transaction or occurrence.²⁶

If one is concerned with the intent of the FCSC, it is also noteworthy that the Report of the FCSC qualified its recommendation that Congress expressly authorize federal courts to hear transactionally related claims by adding, "including claims, within federal question jurisdiction, that require the joinder of additional parties, namely, defendants against whom that plaintiff has a closely related state claim."²⁷ The Committee thereby suggested that it was not recommending that Congress authorize other conceivable varieties of pendent party jurisdiction, such as jurisdiction over a transactionally related state law claim of an additional plaintiff, but was recommending merely pendent party jurisdiction over claims against additional defendants, in federal question cases. However, in contrast to this very limited proposal, the Committee's formal, black letter recommendation more broadly stated, "Congress should expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base."²⁸ Moving beyond the work of the FCSC to that of Congress, one finds that nothing in the language of § 1367 and little, if anything, in its legislative history is as limiting as the above-quoted explanatory text accompanying the FCSC's recommendation. The House Report says,

In federal question cases, it [the legislation] broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims, including claims involving the joinder of additional parties.

[The legislation] generally authorizes the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim or claims that

²⁶ supplemental jurisdiction first articulated in Gibbs. H.R. REP. No. 734, supra note 23, at 29 n.15. Despite Congress' equation of the two word formulas and a constitutional "case," it is not at all clear that claims sharing a common nucleus of operative fact always arise out of the same transaction or occurrence, although the convergence increases if one adds "or series of transactions or occurrences." Claims that do arise out of the same transaction or occurrence may not share many material facts, particularly if the former phrase is broadly defined. The Essay has already noted commentators' criticisms of the Gibbs test of a "case." See supra notes 15-22 and accompanying text.

²⁷ REPORT, supra note 23, at 47 (emphasis added).

²⁸ Id.
provide the basis of the district court's original jurisdiction. In providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley v. United States*.  

Only by reading that last sentence to imply that subsection (a) is *limited* to filling the statutory gap found in *Finley* could one find support in the legislative history for the narrow construction of § 1367(a) that may have been intended by the FCSC.

Although, as a practical matter, I fear most everything the current Court does and I am concerned about how it will define a “case,” as a matter of principle, I hope that the Court will not use the escape hatch of legislative or FCSC intent to avoid reconsidering the scope of a constitutional “case.” A reconsideration that would rationalize the exceptions to the *Gibbs* test, put the scope of a “case” on firmer ground and, more ambitiously, bring coherence to the idea of a case across doctrinal fields — from ancillary jurisdiction through mootness to third-party standing — would be a real contribution.

Before leaving the subject of § 1367 in the context of federal question cases, I want to add a few observations about § 1367(c). Section 1367(c) sets forth the circumstances in which district courts may decline to exercise supplemental jurisdiction over a claim. The second and third of the four circumstances — “the claim substantially predominates over the claim or claims over which the district court has original jurisdiction” and “the district court has dismissed all claims over which it has original jurisdiction” — derive from *Gibbs*, and the courts are familiar with applying these notions to pendent and ancillary claims. The first, that “the claim raises a novel or complex issue of State law,” may have roots in *Gibbs* as well, where the Court spoke of the federal courts’ avoiding needless decisions of state law “as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.” However, it also is redolent of language used in abstention cases, where substantial uncertainty as to the proper resolution of a state law question may be necessary, but never has been sufficient, to justify abstention.

---

29 See *Gibbs*, 383 U.S. at 726-27.
31 *Id.* at 726.
tion in favor of state court proceedings. The similarity of the inquiries may lead to a spillover effect in the interpretation of "novel or complex issues of State law" from each of the two contexts into the other, for better or worse. I would echo the hope that some others have expressed that the similarity in concepts will not encourage freer invocations of the abstention doctrines, but that the courts will be at least as circumspect in the future as they have been until now when abstention under purely judge-made doctrines is under consideration.

The fourth situation, "in exceptional circumstances, there are other compelling reasons for declining jurisdiction," simultaneously gives color to the preceding three by indicating that jurisdiction should be declined only when there are compelling reasons and provides some flexibility for courts to decline to exercise jurisdiction in situations that the drafters did not foresee and that likewise provide compelling reasons to decline. The legislative history says that subsection (c) "codifies the factors that the Supreme Court has recognized as providing legitimate bases upon which the district court may decline jurisdiction over a supplemental claim," as well as acknowledging that there may exist other compelling reasons to decline supplemental jurisdiction. I wonder whether the language of the statute curtails the discretion that the courts have exercised under Gibbs.

---

32 The abstention doctrines deriving from Railroad Comm'n v. Pullman, 312 U.S. 496 (1941), Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959), all require an issue of state law, the proper resolution of which is a matter of substantial uncertainty, and more. See generally Erwin Chemerinsky, Federal Jurisdiction 593-612 (1989).

33 See 28 U.S.C.A. § 1367 practice commentary at 219, 224 (West Supp. 1991) (David D. Siegel, The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction). Other commentators may disagree. I do not know how far Professor Mengler intends courts to go, for example, when he advises:

"Federal courts should refrain from embracing suits that, although stating some plausible or nonfrivolous federal question, are in reality state law suits. Federal courts should also be reluctant to decide pendent state claims on the cutting edge when the federal questions are garden variety and not exclusively federal. . . . [W]here the significant claims raised are state, not federal, claims . . . the federal procedural system should be designed to encourage those suits to be litigated in state court."


Gibbs recognized, for example, that "there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent theories of relief, that would justify separating state and federal claims for trial. If so, jurisdiction should ordinarily be refused."\textsuperscript{36} It is not apparent to me that such a consideration would constitute a compelling reason within § 1367.\textsuperscript{37} However, if situations (1), (2), and (3) provide compelling reasons per se that allow a district court to decline jurisdiction, perhaps trial management concerns, such as those described in Gibbs, will suffice.

If Congress has curtailed, or sought to curtail, the courts’ discretion in this regard, it is not clear that there was warrant for that change in the Report of the FCSC. All the FCSC said was that Congress should direct federal courts to dismiss state claims "if dismissal is warranted in the particular case by considerations of fairness and economy,"\textsuperscript{38} language reminiscent of the Court’s reminder in Gibbs that the justification of pendent jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants."\textsuperscript{39} It is a more difficult question whether such a curtailment of the courts’ discretion is or would be a good thing. Because of my desire to discuss other matters and because I think that few judicial decisions are likely to be altered by § 1367(c)(4)’s language, I will not delve any further into this matter here.

III. Section 1367 and Diversity Cases

Instead of granting the district courts authority to go to the constitutional limits of their power when their jurisdiction is found solely on diversity, § 1367(b) ordains that they shall not have supplemental jurisd-

\textsuperscript{36} Gibbs, 383 U.S. at 727 (citation omitted).
\textsuperscript{37} My concerns that abstention doctrines should not be "loosened," so as to be more readily invoked and yet that Congress may have curtailed the courts’ discretion to decline to hear supplemental claims are reconcilable. There are many valid objections to the abstention doctrines, see, e.g., 1 FCSC WORKING PAPERS, supra note 5, at 612-17, 620-21, which lead me to believe that those doctrines ought to be curtailed or eliminated, but certainly not expanded. Those factors simply have no relevance to the circumstances under which federal courts should exercise or decline supplemental jurisdiction. The argument for abstention may be strongest with respect to pendent and ancillary claims, id. at 612, in which case a limitation of the courts’ discretion to dismiss to situations in which "compelling reasons" are present may be unwise.
\textsuperscript{38} Report, supra note 23, at 48.
\textsuperscript{39} Gibbs, 383 U.S. at 726.
diction 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 1332.40

Thus, although the limits on Article III’s grant of federal judicial power in diversity settings41 are unclear, § 1367(b) does not provide the same breadth of opportunity for clarification and development of the law on that constitutional subject as § 1367(a) provides as to cases arising under federal law. In deciding whether supplemental jurisdiction may be exercised over claims asserted in a diversity case, the courts will have to make their decisions with reference to the jurisdictional requirements of § 1332 whenever the claims in question are listed in § 1367(b).42 Section 1367(b) maintains consistency with § 1332 as the fundamental inquiry for the listed categories of claims.

Sections 1367 (a) and (b) together, however, do provide some opportunities for the clarification and refinement of the scope of Article III controversies. When the claim in question is not listed in § 1367(b), then under § 1367(a) the question is no longer43 whether an assertion of jurisdiction would be inconsistent with § 1332, but becomes whether the claim is “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

---

41 See U.S. Const. art. III, § 2 (granting judicial power over “Controversies ... between Citizens of different States; ... and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects”).
43 In saying, “no longer,” I mean to compare both to the listed claims and to what the pre-§ 1367 approach would have been. Although in Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978), the Court did not speak in terms of “inconsistency,” but of whether in § 1332 Congress had “expressly or by implication negated” the exercise of jurisdiction over a particular nonfederal claim, the two are very similar, if not identical, in their meaning and application.
claims that involve the joinder or intervention of additional parties.”

Clearly, there are claims that parties in a diversity suit might seek to have the court hear under its supplemental jurisdiction and which are not listed in § 1367(b). Putting aside for now the question of whether some of these instances include legislative glitches that do not reflect the true subjective intentions of Congress, the drafters, the FCSC, or some combination of the above — a circumstance that may not matter, even if it is established, these candidates for supplemental jurisdiction include: (1) counterclaims, whether compulsory or permissive, for less than the jurisdictional amount, including those that may be asserted against additional parties who are not diverse from the defendant and who may be joined pursuant to Rule 13(h); (2) arguably, claims asserted against original defendants by nondiverse plaintiffs who were joined after initial filing; (3) arguably, claims asserted by plaintiffs against nondiverse defendants made parties under Rules 15 or 21 after initial filing; (4) claims for less than the jurisdictional amount which are asserted by the absent members of a plaintiff class in a case grounded solely on diversity jurisdiction; (5) cross-claims between co-parties, including those that also may be asserted against additional parties who are not diverse from the cross-claimant and who may be joined pursuant to Rule 13(h); and (6) third-party claims, among others. All, or at least some, of these are situations in which the courts now have been instructed by § 1367 to ask the constitutional question, and only the constitutional question — whether these claims form part of the same controversy as a claim over which the district court has original jurisdiction. Congress has made irrelevant whether exercise of jurisdiction over such claims would be inconsistent with § 1332 as well as “the posture in which the nonfederal claim is asserted.”

Case law to date has provided little illumination on the scope of an Article III controversy. In Owen Equipment & Erection Co. v. Kroger, where the Court was deciding whether the district court could exercise ancillary jurisdiction over the state law claim of a plaintiff against a third-

---

45 See infra text at notes 59-68.
46 See infra text at p. 102.
47 Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978); see also Finley v. United States, 490 U.S. 545, 551 (1989) (also focusing on the posture or context in which claims argued to be within supplemental jurisdiction have been presented).
party defendant in an action in which jurisdiction was based on diversity, the Court assumed without deciding that the "common nucleus of operative fact" test also determines the outer boundaries of constitutionally permissible federal jurisdiction when that jurisdiction is based upon diversity of citizenship. The Court never has decided that such factual relatedness is essential in an action between diverse parties, and it is quite possible that, at least as to some configurations of claims, the Court might hold that a single controversy exists in the absence of factually related claims. Perhaps the easiest situation in which to imagine such a holding is that of the permissive counterclaim. Federal Rule of Civil Procedure 13(b) permits a defendant to assert against a plaintiff any claim not arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim. The underlying policies—permitting complete justice to be done between the parties, allowing reprisal, and conserving the resources of both the courts and the parties—might well suffice as sound bases to hold permissive counterclaims to be within a single Article III controversy.

A second class of claims as to which the definition of an Article III controversy might be critical would be claims of nondiverse absent plaintiff class members that are unrelated to their class claims. Of course, before reaching that question, the court would have to decide that such claims may be asserted under the Federal Rules. When one adds that Article III requires only minimal diversity (one plaintiff diverse from one

49 Id. at 371 n.10.
50 See Fed. R. Civ. P. 13(b).
51 See Joan Steinman, The Party Status of Absent Plaintiff Class Members: Vulnerability to Counterclaims, 69 Geo. L.J. 1171, 1184-85, 1196, 1207 (1981); see also 3 Moore's Federal Practice ¶ 13.19[1], at 131 (1990) (the "same procedural policies which favor disposal of all questions between the same parties in one suit should create federal jurisdiction over . . . permissive [counter]claims as part of the whole 'case.'").
52 Whitten and Teply argue that, even if the scope of a case or controversy under Article III is coextensive with the same transaction or occurrence test, Congress might be able to authorize jurisdiction over permissive counterclaims in diversity cases because Congress has constitutional power to authorize the federal courts to hear each of the claims separately and there seems not to be any valid constitutional objection to Congress authorizing two separate cases or controversies to be joined in a single proceeding. Larry L. Teply & Ralph U. Whitten, Civil Procedure, at 111 n.189 (1991). They agree, however, that on this "even if" hypothesis, Congress would not have authorized jurisdiction over a factually unrelated permissive counterclaim in § 1367(a). Id.
53 The court would have to decide that absent plaintiff class members are parties for purposes of Rule 18, which allows parties to join as many claims for relief as they have against an opposing party. Cf. Steinman, supra note 51.
that there is no constitutional basis for an amount in controversy requirement, and that the Court recently reaffirmed the principle that diversity of citizenship is to be assessed only at the time an action is filed, it appears that the opportunities for exercise of supplemental jurisdiction in diversity cases, with respect to claims not enumerated in § 1367(b), are considerable. Of course, under the pre-§ 1367 law, the courts already were hearing a great many claims under their ancillary jurisdiction. They were hearing all the claims a plaintiff asserted against a particular defendant, regardless of the factual relatedness of the claims. They were asserting ancillary jurisdiction over compulsory counterclaims and cross-claims, including those that entailed the joinder of counterdefendants or cross-claim “defendants” who were not diverse from the counter- or cross-plaintiff, and over third-party claims and “same transaction” claims by third-party defendants against both third-party plaintiffs and the original plaintiffs, as well as over other claims such as those of intervenors of right. In all of these situations, the claims arose from the same transaction or occurrence as a claim over which the court had original jurisdiction and their adjudication in federal court had been held to be consistent with § 1332. Thus, power to hear them had been recognized.

---

54 See State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 531 (1967) (upholding a statute conferring federal jurisdiction over interpleader suits in which any two adverse parties were of diverse citizenship); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 n.13 (1978) (stating “that complete diversity is not a constitutional requirement”).

Professor Richard Epstein recently wrote that Tashire’s statements concerning minimal diversity could plausibly be read as tied to the special factual and legal context of interpleader suits, and not be extended more generally, although he concluded that “it seems highly likely today that minimum federal diversity will, as a constitutional matter, be held to go beyond the interpleader situation that gave rise to its birth.” Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J.L. & Com. 1, 37-38 (1990). He also emphasized that minimal diversity will be tolerated only when the adverse parties are parties to the same case (I would say to the same controversy). He defined “case” in terms of the Gibbs test, id. at 38-39, an assumption that this Essay has questioned.


56 My generalization may be overbroad as to third-party claims. Although ancillary jurisdiction is almost always asserted over third-party claims, there are situations in which it can be argued that the claim of a defendant (“B”) against a third-party defendant (“C”) does not arise out of a common nucleus of operative fact with (or the same transaction or occurrence as) the main action, in the sense most relevant to the actual conduct of the litigation. For example, when a third-party claim arises out of a pre-existing contract of insurance and the only contested issue between B and C is whether the contract is valid or whether it is voidable for reasons that have nothing to do with plaintiff A’s claim against B, there is no factual or legal overlap in the issues to be determined in adjudicating A’s claim against B and B’s claim against C. The logical overlap that derives from the circumstance that C can
On the other hand, permissive counterclaims, claims asserted against defendants by nondiverse proper plaintiffs who joined after filing, claims asserted by plaintiffs against nondiverse proper defendants who were joined after filing, and claims of proposed nondiverse plaintiff class members — all of which are at least arguably not listed in § 1367(b) — are claims that the federal courts refused to hear under their ancillary jurisdiction because one or both of the aforementioned requirements were not met. Permissive counterclaims ordinarily do not arise from the same transaction or occurrence as the jurisdiction creating claim. The rejected claims of absent class members usually arise from the same transaction or occurrence that grounded the representative’s claims, but ancillary jurisdiction has been held to be inconsistent with § 1332’s amount in controversy requirement. Similarly, in the middle two of the above four categories, the issue has not been whether such claims arose out of the same transaction or occurrence or shared a common nucleus of operative fact with the main claim; the Rules required that. The problem has been that assertions of ancillary jurisdiction in those circumstances were viewed as flagrant circumventions of the complete diversity requirement.

The question now is whether § 1367(b), properly construed, lists these various claims, thereby maintaining the relevance of § 1332. As was the situation with § 1367 as applied to federal question cases, it is possible that the courts will not regard the constitutional question as being put by all of these fact patterns because the courts may construe the statute as not intended to confer jurisdiction in some or all of the above circumstances.

A. “Rule 20” Additions

When parties are added post-filing, there is clearly no Article III problem. At the statutory level, Professors Burbank, Mengler, and Rowe [sometimes hereinafter referred to as “BMR’’] acknowledge that “[i]t is clear that section 1367(b) does not bar an original complete diversity filing and subsequent amendment to add a nondiverse co-plaintiff under

---

be liable to B only if B is held liable to A provides a reason for litigating the claims together, but it is perhaps formalistic to assert that the claims arise out of the same transaction or occurrence.

77 See supra notes 50-52 and accompanying text.

78 As previously noted, when there is an independent basis of jurisdiction over the nondiverse plaintiff class members’ claims, the question could arise whether the court would allow the joinder of unrelated claims under Fed. R. Civ. P. 18, as it does with non-class action plaintiffs.
Rule 20, taking advantage of supplemental jurisdiction over the claim of the new plaintiff against the existing defendant. They hope that the federal courts will plug the hole, "either by regarding it as an unacceptable circumvention of original diversity jurisdiction requirements, or by reference to the intent not to abandon the complete diversity rule that is clearly expressed in the legislative history of section 1367."

BMR may "acknowledge" either the wrong error or too much, however. Rule 20 defines the circumstances under which, in one civil action, plaintiffs may sue, and defendants may be sued, together. As Professors Teply and Whitten have noted, Rule 20 cannot be used to add parties post-filing. Parties are added, substituted or dropped under Rule 15(a), and sometimes under Rule 21. Consequently, § 1367(b)'s failure is not really a failure to qualify. The failure to qualify at law would deny supplemental jurisdiction over claims by non-diverse plaintiffs added under Rule 20. It is a failure to

---

90 Rowe, Burbank & Mengler, supra note 5, at 961 n.91.
91 Id.
92 Rule 20(a) provides in pertinent part,

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. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief 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 defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

FED. R. CIV. P. 20.

93 TEPLY & WHITTEN, supra note 52, at 114 n.198, 486 n.118.
94 Rule 15(a) provides in pertinent part, "A party may amend the party's pleading once as a matter of course . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." FED. R. CIV. P. 15(a). See, e.g., Haskell v. Washington Township, 864 F.2d 1266, 1279 (6th Cir. 1988) (allowing addition of a party plaintiff, citing Rule 15); American Nat'l Bank & Trust Co. v. Bailey, 750 F.2d 577, 584 (7th Cir. 1984), cert. denied, 471 U.S. 1100 (1985) (discussing Rule 15 amendments to add a party and Rule 21 additions of a party); see generally 6 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d §§ 1474, 1479 (1990).

95 Rule 21 provides in pertinent part, "Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just." FED. R. CIV. P. 21.

96 See infra text at note 80.
qualifiedly deny supplemental jurisdiction over claims by nondiverse plaintiffs added under Rule 15 or 21. So far, we seem to have a distinction that makes no difference, but the courts could interpret § 1367's reference to "plaintiffs" to include plaintiffs joined pursuant to Rules 15 or 21. Then, under § 1367(b), supplemental jurisdiction would be qualifiedly denied over the claims of all plaintiffs, whenever joined, against, *inter alia*, properly joined defendants, that is defendants made parties pursuant to Rule 20. Such claims would be listed. This interpretation would solve the problem that BMR acknowledged.\(^6^6\)

If my interpretation is rejected, the opponents of the "acknowledged" extension of federal jurisdiction are left to argue that a statute governing *supplemental* jurisdiction over post-filing claims should not be construed to undermine policies that concern *original* jurisdiction over the initially filed claims, despite the fact that the statute does not direct the courts to consider those policies in this situation, but rather to consider constitutionality only. Although this might seem to be an uphill battle and the Court would have to read the statute other than literally, the Court could rely on the circumstantial evidence in the remainder of § 1367(b), the legislative history, and the Report of the FCSC to conclude that supplemental jurisdiction over the claims of subsequently added plaintiffs was not intended. It could reason that it would be anomalous — and therefore could not have been intended — to deny supplemental jurisdiction over claims by persons proposed to be joined as plaintiffs under Rule 19 and over claims by persons seeking to intervene as plaintiffs under Rule 24, when such jurisdiction would be inconsistent with § 1332, and yet to authorize jurisdiction over claims by persons joined as merely proper plaintiffs, post-filing, when such jurisdiction would be inconsistent with § 1332.

On the other side of the argument, one has the literal language of the statute and a recent rejection of the supposed inconsistency between § 1332 and post-filing joinder of nondiverse plaintiffs. In *Freeport-McMoRan, Inc. v. K N Energy, Inc.*,\(^6^7\) the Court reversed a dismissal for

\(^6^6\) Picking up on another possible glitch in the statute, co-plaintiffs in *Griffin v. Dana Point Condominium Ass'n*, 768 F. Supp. 1299, 1301-02 (N.D. Ill. 1991), argued that it was unnecessary for an original co-plaintiff's claim to exceed the jurisdictional amount because his claim is not listed in § 1367(b) and that he was not a party proposed to be joined under Rule 19 nor seeking to intervene under Rule 24. The court rejected the arguments, finding no intention to overrule *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

\(^6^7\) 111 S. Ct. 858 (1991).
want of jurisdiction where a nondiverse plaintiff, who was not an "indispensable" party at the time the complaint was filed, was added after commencement of the action. The Court emphasized that diversity is assessed at the time an action is filed and that jurisdiction is not divested by subsequent events.88 Most importantly for present purposes, the Court nowhere indicated that the district court had erred in allowing the new plaintiff (to whom the original plaintiff's interest in the contract in question had been assigned for business reasons unrelated to the litigation) to be added or in asserting jurisdiction over its breach of contract claim against the defendant. While *Freeport-McMoRan* was not decided under § 1367, and certainly does not purport to construe or apply that statute, it at least suggests that the Court does not always regard the post-filing joinder of a nondiverse plaintiff, and the assertion of jurisdiction over its claim, as inconsistent with the jurisdictional requirements of § 1332.

Returning to my interpretation of § 1367(b), a new problem arises that has yet to be described. If one reads the statute as I proposed in order to solve the problem that BMR “acknowledged,” then § 1367(b) no longer lists (i.e., no longer qualifiedly denies supplemental jurisdiction over) claims by plaintiffs against persons added as defendants after filing, for they are not made parties under Rule 20 but under Rule 15 or 21. A different, but equally large, gaping hole has been created. One could argue against it along lines precisely analogous to those suggested above; that is, neither the legislative history nor the FCSC Report indicate any intention to authorize supplemental jurisdiction over plaintiffs' claims against subsequently added defendants. It would be anomalous to qualifiedly deny supplemental jurisdiction over claims against persons made parties under Rules 14, 19, or 24 and yet to authorize supplemental jurisdiction over claims against defendants joined post-filing, pursuant to Rule 15 or 21, when such jurisdiction would be inconsistent with § 1332.

### B. Claims of Absent Plaintiff Class Members

Section 1367 does not mention Rule 23; it is not on the list. Consequently, subsections (a) and (b) together apparently grant supplemental jurisdiction over the class claims of class members whose claims do not meet the amount in controversy requirement, as it was interpreted in

---

88 *Id.* at 860.
Zahn v. International Paper Co.\(^8\) In deciding whether to construe §1367 literally, the courts will face not only the contradiction of the statute by the belatedly written legislative history,\(^9\) but also the inconsistency between the legislative history and the intent expressed in the Working Papers and Subcommittee Reports of the FCSC.\(^7\) Although it is unclear whether the FCSC agreed with the policy decision reflected in the Working Papers, the latter expressly recognized that its proposal\(^8\) would overrule Zahn. The Working Papers say, “From a policy standpoint, [Zahn] makes little sense, and we therefore recommend that Congress overrule it.”\(^7\)

I hope that the courts will take the statute at its word and hold it to have overruled Zahn, because I think (for reasons I need not elaborate here) that is the way the law ought to be. However, that result may or may not be more consistent than a “reading” of §1367(b) to maintain Zahn would be with other current developments in the law. For example, the FCSC recommended that Congress “should create a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party,

\(^8\) 414 U.S. 291 (1973). In Zahn, the Court held that in a diversity class action under Rule 23(b)(3), the claim of each member of the plaintiff class must independently satisfy the minimum jurisdictional amount set by §1332(a) and that ancillary jurisdiction was unavailable for those claims that involved $10,000 or less.

\(^9\) The House Report declares that §1367(b) was not intended to affect the jurisdictional requirements of §1332 in class actions, as those requirements had been interpreted. H.R. Rep. No. 734, supra note 23, at 29 (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (the diversity statute is satisfied in a class action so long as the named plaintiffs are diverse from all the named defendants) and Zahn). BMR describe the legislative history as an attempt to correct the oversight in the statute. Rowe, Burbank & Mengler, supra note 5, at 960 n.90.

\(^7\) The introduction to this set of materials, published as Part III of the FCSC Report, states that, “These materials were valued background materials which the Committee determined should be published for general consideration whether or not the Committee agreed with their substantive proposals. . . . In no event should the enclosed materials be construed as having been adopted by the Committee.” 1 FCSC WORKING PAPERS, supra note 5, at frontispiece. The FCSC Report itself does not expressly indicate whether it agreed with the material I have cited in the text.

\(^8\) Its proposal, in pertinent part, was as follows:

(b) In civil actions under §1332 of this Title, jurisdiction shall not extend to claims by the plaintiff against parties joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or to claims by parties who intervene under Rule 24(b) of the Federal Rules of Civil Procedure, provided, that the court may hear such claims if necessary to prevent substantial prejudice to a party or a third-party.

1 FCSC WORKING PAPERS, supra note 5, at 567-68.

\(^7\) Id. at 561 n.33.
multi-forum litigation."74 Congress has not yet acted on that recommenda-
tion. If it enacts any statute of that sort in the near term, however, it is
likely to be the now pending "Multiparty, Multiforum Jurisdiction Act of
1991."75 It would grant federal courts jurisdiction over civil actions aris-
ing out of a single accident that resulted in the death or injury of twenty-
five or more natural persons, provided that the amount in controversy ex-
ceeds $50,000 per person and minimal diversity of citizenship exists.76
While the actions brought under H.R. 2450 would not apparently be
class actions, it might seem peculiar that Congress would require that
more than $50,000 be in controversy for each plaintiff in federal court
under H.R. 2450 and yet have effectively eliminated the amount in con-
troversy requirement for diversity class members. The difference can be
rationalized, however. In a class action, the class representative and her/
his counsel are responsible for litigating the case. So long as the represen-
tative has a claim that satisfies the jurisdictional amount requirement,
class members can go along for the ride. By contrast, in suits in which
individuals are joined, each is responsible for litigating his own claim;
consequently, a separate amount in controversy requirement may be ap-
propriate for each plaintiff.

C. Claims on § 1367(b)'s List

In the discussion of diversity cases, I have thus far focused on the possi-
bilities created by what Congress did not exclude, or may not have ex-
cluded, from supplemental jurisdiction by § 1367(b). I want to add some
thoughts on the claims which § 1367(b) does list and exclude from supple-
mental jurisdiction, subject to the caveat of the final clause of the section.

Everyone agrees that § 1367(b) went beyond Owen Equipment77 and
sought to implement the rationale of that case in the context of additional
configurations of claims and parties.78 If for no other reason, the view that
the statute is uncontroversial (and its advertisement as such) was naive, if
not disingenuous.79 Nonetheless, I do not subscribe to the view that sub-

74 Report, supra note 23, at 44.
76 Id. § 2.
79 Similarly, the fact that the statute could not purport to effect major changes in existing prac-
section (b) of the statute is awful. In part, my evaluation is predicated on my understanding of its final clause to modify everything that precedes it. Thus, district courts are told that they shall not have supplemental jurisdiction over claims by (1) plaintiffs against persons made parties under Rules 14, 19, 20, and 24, (2) persons proposed to be joined as plaintiffs under Rule 19, and (3) persons seeking to intervene as plaintiffs under Rule 24, subject to the qualification as to all of the foregoing "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."80

Section 1367(b) clearly does not command extensive use of supplemental jurisdiction in the way that § 1367(a) does in federal question cases. And it may be criticized for begging all of the hard statutory questions that arise in determining when supplemental jurisdiction may be invoked to enable a federal court to hear a claim that lacks an independent jurisdictional basis in a diversity suit. But, the language need not (and I would say, "should not") make it any more difficult to persuade a court to assert supplemental jurisdiction than it had been before § 1367.

1. The Rule 19/24 Anomaly

For years courts have regarded ancillary jurisdiction over the claims of intervenors of right as consistent with § 1332. Section 1367(b) furnishes no reason why they should stop; indeed, the Supreme Court's recent decision in Freeport-McMoRan, Inc. v. K N Energy, Inc.81 should encourage them to continue. As noted earlier, Freeport-McMoRan reaffirmed that diversity is assessed at the time an action is filed and may not be divested by subsequent events. It also cited with approval a case in which jurisdiction was taken over the claims of non-indispensable intervening parties.82 I appreciate that, according to Professors Burbank, Mengler, and Rowe, the drafters sought to eliminate the Rule 19/Rule 24 anomaly83 and to

80 28 U.S.C.A. § 1367(b) (emphasis added).
83 The anomaly is described in Richard D. Freer, Compounding Confusion and Hampering

HeinOnline -- 41 Emory L. J. 105 1992
resolve it against supplemental jurisdiction — over the claims of plaintiff intervenors as well as over the claims of plaintiffs proposed to be joined under Rule 19, and over the claims of plaintiffs against those who intervene, as well as over claims against persons joined under Rule 19 — and I know that others have concluded that the statute does just that. I do not see, however, that the language of the statute, or its legislative history, compels the courts to alter what they have been doing or prevents them from curing the anomaly the other way, by more generous use of supplemental jurisdiction in what they see as appropriate circumstances.\footnote{It seems to me that each of the following sentences (which together constitute the legislative history on this point) is consistent with my reading of \S\ 1367(b):

\text{(b) prohibits a district court in a case over which it has jurisdiction founded solely on . . . \S\ 1332, from exercising supplemental jurisdiction in specified circumstances [which I understand to include the exercise being inconsistent with \S\ 1332]. In diversity-only actions the district courts may not hear plaintiffs' supplemental claims \textit{when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdictional requirement of . . . \S\ 1332 by the simple expedient of naming initially only those defendants whose joinder satisfies section 1332's requirements and later adding claims not within original federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis. In accord with case law, the subsection also prohibits the joinder or intervention of persons a[sic] plaintiffs \textit{if} adding them is inconsistent with section 1332's requirements.}}


The House Report continues:

Subsection (b) makes one small change in pre-\textit{Finley} practice. Anomalously, under current practice, the same party might intervene as of right under Federal Rule of Civil Procedure 23(a)[sic] and take advantage of supplemental jurisdiction, but not come within supplemental jurisdiction if parties already in the action sought to effect the joinder under Rule 19. Subsection (b) would eliminate this anomaly, excluding Rule 23(a)[sic] plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19.

\textit{Id.} The first of these sentences is true. The second sentence is accurate insofar as it indicates that \S\ 1367(b) makes no differentiation between plaintiff-intervenors and persons proposed to be joined as plaintiffs under Rule 19 in directing the courts how to go about making their decision on requests for the exercise of supplemental jurisdiction. However, it seems to me that \S\ 1367(b) does not exclude claims by plaintiff intervenors or by anyone else, because it nowhere decides or purports to decide when exercising supplemental jurisdiction would be inconsistent with \S\ 1332. If Congress had decided that some or all of the claims that are listed in \S\ 1367(b) are inconsistent with \S\ 1332, Congress presumably would have said without qualification that the district courts shall not have supplemental jurisdiction over them. It did not do that.

For the record, I have been among those who have argued for "fixing" the anomaly by expansion, rather than by constriction, of ancillary jurisdiction. I have argued that district courts should have ancillary jurisdiction over indispensable parties intervening of right or whose joinder is advocated in the situations described in Rules 19(a)(2)(i) and 24(a)(2), i.e., where persons claim an interest relat-
statute leaves the courts free to make case-by-case determinations as to whether exercises of supplemental jurisdiction would be inconsistent with § 1332. In light of this, I am less concerned than Professor Freer about how the courts will respond to the hypotheticals he poses concerning counterclaims, cross-claims, and impleader claims that plaintiffs may seek to assert in response to claims asserted against them.\textsuperscript{86} Nonetheless, I realize that the structure of § 1367(b), i.e., the order in which its clauses appear, may send an anti-diversity message that adversely affected litigants will have to overcome.\textsuperscript{86} It remains to be seen whether the statute will cause retrenchments in the law.

2. \textit{Defendants Against Whom No Claims Have Been Asserted}

The last issue raised by § 1367 that I will address here\textsuperscript{87} is its apparent contemplation that, post-filing, persons can be made defendants under Rule 19 and be allowed to intervene as defendants under Rule 24, and yet the court will not have supplemental jurisdiction over claims that plaintiffs would assert against such newcomers.\textsuperscript{88} Professor Freer asks, "How can an absentee be a necessary defendant without the plaintiff’s having a claim against him?"\textsuperscript{89} Arguing that such a situation cannot be, he concludes that the statute makes no sense. His co-authored piece with Professor Arthur offers two alternative readings of § 1367(b),\textsuperscript{90} but I find these

\textsuperscript{85} See Freer, supra note 83, at 481-84.

\textsuperscript{86} Imagine how differently one would react if subsection (b) said, “when exercising supplemental jurisdiction over the following claims would be inconsistent with the jurisdictional requirements of section 1332, the district courts shall not have supplemental jurisdiction over the claims: claims by plaintiffs against persons made parties under Rule 14 . . . .”

\textsuperscript{87} The limitation on the number of pages permitted prevents me from touching on all the issues. I leave to others or to another day the comments I might make concerning § 1367’s effect on alienage cases and removed cases, and other issues.

\textsuperscript{88} Earlier, I argued that the prohibition is not absolute, see supra note 80 and accompanying text, but for present purposes I will assume that the prohibition is complete.

\textsuperscript{89} Freer, supra note 83, at 479; see also Thomas C. Arthur & Richard D. Freer, Grasping at Burnt Straits: The Disaster of the Supplemental Jurisdiction Statute, 40 Emory L.J. 963, 966-74 (1991).

\textsuperscript{90} Arthur & Freer, supra note 89, at 967.
alternatives entirely unsupported by the language of § 1367.91 More importantly, I do not think that the plain meaning, Professor Freer's initial reading, of § 1367 is nonsensical.

In the context of intervention, it has long been recognized that one who seeks to intervene on the side of the defendant in civil litigation may have a sufficient interest in the underlying civil action and in the judgment to which it may lead that s/he should be found to have a right to intervene, or should be permitted to intervene, even though s/he has no claim that could be asserted against any of the parties and they have none that could be asserted against her/him. Professor David Shapiro wrote of this twenty-four years ago92 and offered several examples which he regarded as examples, including: a suit by property owners to enjoin a railroad from maintaining storage tracks in a residential neighborhood, in which a local businessperson who was heavily dependent on the use of that trackage was held to have a right to intervene;93 an action by the United States to enforce a summons of the I.R.S. seeking documents in the possession of a bank, involving transactions between taxpayers and the bank, in which the taxpayers were held to have a right to intervene to protect their interests;94 and others.95

91 Professors Arthur and Freer propose: "First, there could be supplemental jurisdiction for adding a new defendant to the plaintiff's original claims against the original defendant, but no supplemental jurisdiction over any further claims which the original plaintiff might wish to assert against the new defendant." Id. But that's not what § 1367(b) says. Moreover, supplemental jurisdiction over plaintiff's original claim, expanded to be against the new defendant, would seem to be a pretty obvious circumvention of the complete diversity requirement, as Professor Freer recognized in his earlier article. See Freer, supra note 83, at 479 & n.181.

"Second, perhaps the statute provides supplemental jurisdiction only for defendants who are adverse to a party other than the original plaintiff, such as those joined as additional defendants to a counterclaim against the original plaintiff or as third-party defendants." Arthur & Freer, supra note 89, at 967. I just do not see where or how Professors Arthur and Freer see any basis for this interpretation in the language of § 1367.

92 David Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 726, 737-38, 740, 759 (1968); see also Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1290 (1976) (noting that the right to participate in a case has ceased to depend on having a right to relief or liability to satisfy a claim asserted therein).

93 Shapiro, supra note 92, at 726 & n.21 (citing Ford Motor Co. v. Blaszczak Bros., 249 F.2d 22 (8th Cir. 1957)).

94 Id. at 737-38 (citing Justice v. United States, 365 F.2d 312 (6th Cir. 1966)).

95 Additional illustrative cases are described in Shapiro's article. See id. at 737-38. Numerous additional examples could be given. E.g., Diamond v. Charles, 476 U.S. 54, 57-58, 61, 64-65 (1986) (in a constitutional challenge by physicians to an Illinois abortion law, in which state officials were the defendants, Diamond was permitted to intervene at trial on behalf of the defendants, based on his
This Essay cannot scrutinize large numbers of cases that appear to fit Professor Shapiro’s description. The mere fact that sophisticated commentators, including Professors Shapiro, Chayes, Marcus, and Sherman, believe that there are numerous cases in which defendants have properly been found entitled to intervene or have been permitted to intervene although they had no claim on which relief could be granted and when no such claim could be asserted against them, is itself substantial circumstantial evidence that Congress was not speaking nonsensically in providing for supplemental jurisdiction over interventions on the side of defendants while qualifiedly denying supplemental jurisdiction over a plaintiff’s claims against “defendant” intervenors.

The Arthur/Freer analysis fails to establish that such a regime is “nonsense.” Professors Arthur and Freer seek to illustrate the error of Congress’ ways by discussing two cases, one of which is Martin v. Wilks. They argue that the black employees who sued their employer under Title VII did have a “potential” claim for relief against the defendant’s white employees. However, they never identify that claim with sufficient clarity to satisfy me that it exists. Their assertion that, if joined, the white opposition to abortion, his status as a physician, and as a parent of a minor daughter. The majority seemed to endorse his original intervention, noting that he would have been permitted to “piggyback” on the state had it remained an appellant); Planned Parenthood v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977) (a neighborhood association whose professed purpose was to preserve property values and insure that abortion facilities would not affect the health, welfare, and safety of citizens was held to have a right to intervene on the defendant’s side in a suit challenging the constitutionality of an ordinance that imposed a moratorium on the construction of certain abortion facilities); United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972) (intervention of right on the defendant’s side recognized for chambers of commerce, municipalities and counties that contended that they had economic interests that were inextricably intertwined with the fate of the defendant).


88 Arthur & Freer, supra note 89, at 968.
89 I will leave it to others to decide whether my unconvincingness flows from an “antiquated, narrow, nonfunctional view of ‘claim.’” Id. at 970. Perhaps Professors Arthur and Freer suffer from a similar myopia in regard to the circumstances under which one may participate in a lawsuit. Or perhaps we are ultimately getting to the same place by different roads. As Professor Shapiro wrote, One alternative . . . is to stretch the language of the rule [in regard to having a “claim or defense”], and to give the words a meaning quite different from that given them in other contexts. A better approach . . . would be to free the question of intervention from this conceptual limitation and to recognize that even one lacking a claim or defense may have a good case for intervention.
employees will have all the rights of a defendant\textsuperscript{100} is not necessarily correct; courts often limit the participation rights of intervenors. Moreover, even if true, it does not establish that plaintiffs have a claim against the white employees. The proposition that the white employees can be bound by the judgment only if the plaintiffs prove "a claim that [the joined parties have] no rights in the matter or that [their] rights can be overridden"\textsuperscript{101} is simply conclusory.

By contrast, I believe that their analogy to interpleader suits is insightful and instructive. Under it, the employer is viewed as a disinterested stakeholder, while the black plaintiffs and white (would be) intervenors are seen as rival "claimants" of jobs, contending for different decision-making processes or allocation mechanisms. However, the claim that the black employees are asserting has traditionally been viewed as a claim against the stakeholder, the employer, and not as a claim against rival claimants even though the plaintiffs' claim implies a contention of rights superior to those of their rivals. (Thus, there is no claim by the plaintiffs against the defendant intervenors.) Similarly, on this view, one would conclude that the white employees have a claim against the stakeholder-employer, not a claim against their black rivals.

One of the convenient consequences of this analysis is that (when it fits the facts, and it often may) it allows one to reconcile the intervention with the pleading aspects of Rule 24. The intervening white employees, though intervening on the side of the defendant employer when they support the position it has taken, can file a claim against the defendant employer seeking what they claim to be entitled to from the employer. Thus, the intervenor does have a pleading to file and to which the other litigants can respond.

When this analysis does not work, I acknowledge that it may be difficult to reconcile intervention cases with the pleading requirements of Rule 24. Perhaps these requirements are out of sync with the reality of intervention practice and ought to be altered.

The Arthur/Freer analysis also fails to reflect that, in order for a

\textsuperscript{100} Arthur & Freer, supra note 89, at 969.

\textsuperscript{101} Id. (alteration in original) (quoting Douglas Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. CHI. LEGAL F. 103, 129).
plaintiff to state a claim against a defendant, the defendant must already have committed some wrong that has injured the plaintiff or have threatened to do so in a manner that justifies injunctive or declaratory relief. By contrast, Rules 19 and 24 contemplate participation in a lawsuit by persons who have not yet either inflicted or suffered any injury nor threatened or been threatened with any injury extrinsic to the litigation, but who are so situated that "the disposition of the action may as a practical matter impair or impede" their ability to protect their interests. In light of this fundamental difference, it seems not at all surprising that a person would have a right to intervene, or be a person to be joined if feasible, and yet not be a person against whom the plaintiff has a claim. Thus, in Martin v. Wilks, the white employees, while not subject to claims by the black employees, had an interest in the way promotion decisions would be made, which rendered them persons to be joined if feasible and intervenors of right, upon timely application.

Given my view of these matters, I do not share Professors Arthur and Freer's view that the statute is unworkable and requires courts to engage in metaphysical inquiries. The court can decide the claims before it, with the Rule 19 or 24 party present to advocate positions in support of its own interests. If the plaintiff has a claim it wishes to assert against the Rule 19 or 24 party, the court is free to hear it if the court concludes that exercising supplemental jurisdiction over the claim would not be inconsistent with the requirements of § 1332. Even in the Owen Equipment case, whose rationale BMR sought to implement in § 1367, the Court cautioned,

It is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction.103

Nothing in § 1367 abrogates that philosophy or prevents a court from hearing a plaintiff's claim against a Rule 19 or Rule 24 "defendant" in appropriate circumstances.

102 Fed. R. Civ. P. 24(a) (emphasis added); see also Fed. R. Civ. P. 19(a).
IV. Conclusion

In the universe of cases in federal court as a matter of diversity jurisdiction, § 1367 poses a number of questions and leaves posed a number of questions that existed before its enactment. On the other hand, in the realm of federal question cases, § 1367 desirably directs the court to assert supplemental jurisdiction to the limits of Article III. In my view, its salutary affects are too valuable to jettison. A repeal of the statute, particularly with no substitute contemporaneously provided, would confuse matters terribly. My preference would be to allow the courts to work with the statute; then we can see what actual undesirable results ensuing, and Congress can take any necessary corrective action after careful and informed consideration of the policy choices that any changes would reflect. I appreciate that such a course entails costs to litigants and to the courts, but a hasty repeal or hastily crafted substitute provision could well result in even greater costs and confusion, and in less desirable outcomes.104 It seems to me that the better course at this point is to allow the courts to interpret and apply the statute. They need to be the next party from which we hear.105

---

104 Professors Freer and Arthur believe that a statutory restoration of the pre-Finley status quo would be easy to enact, and would be a preferable interim measure. Arthur & Freer, supra note 89, at 989-90. Their stabs at legislative language indicate that it would not be so easy. They suggest that a statute could provide that in all actions over which the federal courts have original jurisdiction, including diversity actions, the mere addition of additional parties without more does not deprive the court of jurisdiction; the legislative history could confirm that the statute's purpose is to eliminate both Finley's result and its broader rationale, without modifying the pre-Finley law. Id. at 990. I, for one, would not find this a satisfactory codification. The proposed statutory language itself provides no guidance as to when exercises of supplemental jurisdiction are or were appropriate and the whole intent of the provision would be discoverable in, and only in, its proposed legislative history. In view of Arthur and Freer's criticism of reliance on legislative history, id. at 985-89, it is hard to imagine that they really would be satisfied with their own proposal.

105 I would like readers to be aware that the Journal did not furnish me (or the other Colloquy writers) with the final two Debate Essays by BMR and Arthur/Freer, respectively, until after my own Essay had been in galleys for some time. (For your information and with no criticism intended, I also note that the Journal did not circulate the writings of the additional Colloquy commentators among us.) Although my contribution would have been somewhat different had I seen the final Debate Essays earlier, at this point I have chosen to let my remarks stand as is.