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GRASPING AT BURNT STRAWS: THE DISASTER OF THE SUPPLEMENTAL JURISDICTION STATUTE

*Thomas C. Arthur**
*Richard D. Freer***

Ah, the strawman mode! Where would Professors Rowe, Burbank, and Mengler be without it? At a minimum, they would have a much shorter article.[1] If Professor Freer in fact torched the entire farm, it is because there was so much dry straw lying around after the three drafters[2] finished tilting with the strawmen they created in their response to Professor Freer's article. The drafters spend more than half of their article arguing the irrelevant points that a statute was needed after *Finley*,[3] that the statute was consistent with recommendations of the Federal Courts Study Committee, and that Professor Freer "*really* doesn't like *Kroger*. . . ."[4]

In so doing, the drafters sidestep the two key points Professor Freer's

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* Associate Dean, Emory University School of Law. I would like to thank my friend Rich Freer for affording me this opportunity to express my criticisms of the supplemental jurisdiction statute, which I formed after struggling with its ambiguities in teaching my first year Civil Procedure class and in discussions with my former law partners.

** Associate Vice President for Academic Affairs and Professor of Law, Emory University. We benefited greatly from the thoughtful comments of Professor John Witte, Jr.

[1] Rowe, Burbank & Mengler, ***Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer,*** 40 EMORY L.J. 943 (1991). That piece is in response to Professor Freer's article, ***Compounding Confusion and Hampering Diversity: Life After*** Finley ***and the Supplemental Jurisdiction Statute,*** 40 EMORY L.J. 445 (1991).

[2] Professors Rowe, Burbank, and Mengler have noted their participation in the drafting of the supplemental jurisdiction statute, 28 U.S.C. § 1367 (1990). *See, e.g.*, Mengler, Burbank & Rowe, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction,* 74 JUDICATURE 213, 216 (1991) [hereinafter JUDICATURE]. Their spirited attempt to defend the statute and their obviously intimate knowledge of the legislative history seem to confirm that role, as does the fact that their *Judicature* article bears a striking resemblance to the legislative history.

[3] Finley v. United States, 490 U.S. 545 (1989).

[4] Rowe, Burbank & Mengler, *supra* note 1, at 952 (emphasis in original). The case referred to is Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). Only the last of the three irrelevant assertions is not open for debate. *See* Freer, *A Principled Statutory Approach to Supplemental Jurisdiction,* 1987 DUKE L.J. 34, 69-74. On the other two points, to the extent anyone cares, others have also concluded that the statute is inconsistent with the Federal Courts Study Committee recommendations, *infra* note 146, and the trio's response merely proves that the lower courts are forging a remarkable consensus under *Finley*, *infra* note 92. We do not agree that a statute was absolutely needed in the wake of *Finley*, although we do feel that a competently drafted statute, framed after meaningful debate, would be desirable. *See infra* notes 151-55 and accompanying text.

article made about the supplemental jurisdiction statute.[5] First, it is very poorly drafted, creating ambiguity for cases that formerly were clear and creating numerous problems in others. Second, the statute was passed without thorough public ventilation and congressional scrutiny. This flawed process not only failed to clarify the language, but also allowed controversial, largely anti-diversity, changes to be slipped through in the guise of legislation that merely codified pre-*Finley* practice.

Distinguished commentators already echo these criticisms. Professor Charles Alan Wright agrees that the statute "is so broadly worded as to call into question well established caselaw," and also questions the statute's restriction of supplemental jurisdiction in diversity cases.[6] Professors Field, Kaplan, and Clermont also apparently doubt that the statute addressed only noncontroversial issues.[7] Professors Rosenberg, Smit, and Dreyfuss note several problems, concluding that the statutory language "begs, rather than resolves" some important questions.[8] Professors Marcus, Redish, and Sherman question whether the statute radically alters jurisdictional requirements for diversity class actions.[9] Professors Fink and Tushnet suggest that the statutory language may accidently have repealed the complete diversity rule in some cases.[10] Professor Oakley criticizes the statute's "vague phrasing" and "oddities,"[11] and the accuracy of its codification of the caselaw's discretionary factors.[12] Professors Teply and Whitten note "many interpretive problems" caused by the language of the statute.[13]

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[5] 28 U.S.C. § 1367 (1990). Part (a) of the text of the statute is set forth at Rowe, Burbank & Mengler, *supra* note 1, at 943 n.2.

[6] C. McCormick, J. Chadbourne & C. Wright, Cases and Materials on Federal Courts 2, 5 (8th ed. Supp. Dec. 1990) (Professor Wright discusses caselaw concerning supplemental jurisdiction over claims by and against intervenors of right).

[7] R. Field, B. Kaplan & K. Clermont, Materials for a Basic Course in Civil Procedure 23 (Supp. 1991) ("supposedly noncontroversial proposal").

[8] M. Rosenberg, H. Smit & R. Dreyfuss, Elements of Civil Procedure 16 (Supp. 1991).

[9] R. Marcus, M. Redish & E. Sherman, Civil Procedure 120 (Supp. 1991).

[10] H. Fink & M. Tushnet, Federal Jurisdiction: Policy and Practice 34 (2d ed. Cum. Supp. 1991).

[11] 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, 736-37 n.2 (1991). Professor Oakley also comments on the late night legislative action, to which he attributes some of the oddities. *Id.*

[12] *Id.* at 765-68.

[13] L. Teply & R. Whitten, Civil Procedure Teacher's Notes 30 (1991). They echo the

In the wake of this emerging consensus, now even the drafters recognize serious shortcomings with their handiwork. They admit, among other problems, that the language of the statute rips a "potentially gaping hole in the complete diversity requirement" in some cases[14] and that it abrogates *Zahn*[15] in class action cases. They admit that their earlier attempt to reconcile statutory language with prior practice was "too facile."[16] Faced with these and several other admissions, they confess, in perhaps their only understatement, that their statute is "not perfect."[17] The drafters "can only hope" that the federal courts will find some way to avoid these and other unintended consequences.[18]

To aid the courts in this task, the drafters make the extraordinary suggestion that the supplemental jurisdiction statute is both a statute and a nonstatute. Where the statute leads to results the drafters like, it is a real statute, and binds the federal courts. Where it does not, it gives only "basic guidance" to federal judges, whom the drafters "hope" can be "trusted to make the best of it."[19] This seems a remarkably modest goal for what six months ago the trio told us was a "codification"[20] of the area "framed to restore and regularize supplemental jurisdiction,"[21] and a "model of successful dialogue between the judicial and legislative branches."[22]

Further, the ubiquitous guiding principle of the entire statute is the alleged "principal rationale of *Kroger*."[23] The drafters never define this

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charge in their Treatise. L. TEPLY & R. WHITTEN, CIVIL PROCEDURE 107 (1991) (discussing "interesting interpretation questions" posed by statutory language) [hereinafter TEPLY & WHITTEN TREATISE]. Professors Teply and Whitten conclude that these questions arise from Congress' errors "in translating the [Federal Courts Study] committee's recommendation into statutory form. . . ." TEPLY & WHITTEN TREATISE at 107. They also criticize section 1367's resolution of the Rule 19/ Rule 24 anomaly. *Id.* at 507-12.

[14] Rowe, Burbank, & Mengler, *supra* note 1, at 961 n.91.

[15] Zahn v. International Paper Co., 414 U.S. 291 (1973) (in diversity class action, each class member's claim must satisfy jurisdictional amount). *See also infra* notes 96-102 and accompanying text.

[16] Rowe, Burbank & Mengler, *supra* note 1, at 960 n.86. By no means do the points noted in text here exhaust the drafters' admissions of problems. *See infra* notes 84-89 and accompanying text.

[17] Rowe, Burbank & Mengler, *supra* note 1, at 961.

[18] *Id.* at 961 n.91.

[19] *Id.* at 961.

[20] JUDICATURE, *supra* note 2, at 213, 216.

[21] *Id.* at 215.

[22] *Id.* at 213.

[23] Rowe, Burbank & Mengler, *supra* note 1, at 960.

amorphous term, but invoke it whenever they wish to reach an anti-diversity result. More importantly, the purported codification of this amorphous "rationale" is inconsistent with the ostensible goal of codifying pre-*Finley* practice. Federal courts, including the Supreme Court, have steadfastly limited *Kroger* to its facts. The trio's invocation of a broader "rationale" simply creates a penumbra to the *Kroger* case that never existed and slips it into a statute that was billed as "noncontroversial."[24]

But enough generalizations. Let us turn to the specific responses proffered by the trio when they could avoid the merits no longer. With these responses, the drafters merely grasp at straws; unfortunately, however, the straws had already been burned. But don't take our word — or those of the other critics — for it. Just as the proof of the pudding is in the eating, so the proof of this statute is in the application. You — as the judge or lawyer trying to apply the statute in a case, or as the professor struggling to teach the statute in your law school classes (as we had to last semester) — decide for yourself whether the statute is a poorly drafted attempt to contract pre-*Finley* supplemental jurisdiction.

I. Touring the Ruins of the Statute

A. *Rules 19 and 24: The "Nonclaim" Claim and the New Anomaly*

There is no dispute that Section 1367(b) altered the law of supplemental jurisdiction over parties joined under Rules 19 and 24. Professor Freer criticized this as a prime example of both confusing statutory language and a major change in the law that should not have been made without adequate public and congressional scrutiny.[25] The three drafters disagree, arguing that these provisions are not ambiguous, and were but a minor change to remedy the widely criticized Rule 19/24 supplemental jurisdiction anomaly, which under "*Kroger*'s rationale" could be addressed only

[24] Section 1367 was part of legislation aimed at implementing the "less controversial" aspects of the report of the Federal Courts Study Committee. Less controversial in this context apparently meant that it was not opposed by any of the legislative members of that part of the Committee dealing with the issue. Obviously, that standard for less controversial is open to debate. *Cf.* R. Field, B. Kaplan & K. Clermont, *supra* note 7 ("supposedly noncontroversial proposal"). *See also infra* notes 65-83 and accompanying text. The drafters refer to the statute as "noncontroversial." Rowe, Burbank & Mengler, *supra* note 1, at 950.

[25] Freer, *supra* note 1, at 476-79, 486.

their way.[26] The three drafters' response, which centers on the bizarre notion of a "nonclaim" claim, is not convincing.

1. *Statutory Ambiguity and the "Nonclaim" Claim*

Section 1367(b)'s treatment of supplemental jurisdiction over Rule 19/24 defendants is ambiguous. The problem stems from section 1367(b)'s preclusion of supplemental jurisdiction "over claims by plaintiffs against persons made parties" under, *inter alia*, Rules 19 and 24. On its face, this provision presents a paradox. It seems to contemplate that persons can be joined as *defendants* under Rules 19 and 24, and thus that there is supplemental jurisdiction over at least some claims against them. This reading is bolstered by the separate provisions in section 1367(b) precluding supplemental jurisdiction over claims by proposed Rule 19/24 *plaintiffs*. But how can new parties be joined as *defendants* without automatically providing supplemental jurisdiction over some plaintiffs' claims against them?

Two possible readings come to mind. 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. 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.

Of these two readings, the second appears more consistent with the statutory language. But the first better fits the House Report's statement that the provision's purpose was to prevent the district courts from:

> hear[ing] plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdictional requirement of 28 U.S.C. § 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.*[27]

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[26] Rowe, Burbank & Mengler, *supra* note 1, at 955-56.

[27] H.R. REP. No. 734, 101st Cong., 2d Sess. at 29, *quoted in* R. MARCUS, M. REDISH & E.

The second reading would severely contract supplemental jurisdiction over Rule 19/24 defendants from its pre-*Finley* state, retaining it for only a very small percentage of real world cases, while the first reading might provide a net gain of jurisdiction in these cases.[28]

The three drafters, however, assert a different reading which falls between these two: section 1367 "generally"[29] precludes supplemental jurisdiction over any claim by the original plaintiff against new Rule 19/24 defendants, but nevertheless "does not prohibit [their] joinder."[30] Professor Freer attacked the inconsistency in this view.[31] The drafters attempt to explain this apparent paradox by asserting that there can be defendants adverse to the original plaintiff against whom he can assert no claim.

The drafters never state what they mean by a "claim." They baldly assert that absent third parties "often have interests that might be affected" if the plaintiff was to prevail, "even though the plaintiff has no claims against" them,[32] citing *Martin v. Wilks*[33] and *Helzberg's Diamond Shops v. Valley West Des Moines Shopping Center*,[34] as their only examples.

But these cases do not say this. *Martin v. Wilks* in no way suggests that there can be defendants against whom no plaintiff has a claim. The black plaintiffs who sued their employer under Title VII *did* have a potential

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SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH (Supp. 1991) at 148 (emphasis added).

[28] Specifically, the first reading would, for the first time, provide supplemental jurisdiction over plaintiffs' claims proposed to be joined under Rule 19(a), so long as those claims had already been asserted against the original defendant. No new claim could be added against the new defendant, however. The first reading would contract supplemental jurisdiction over defendants intervening as of right under Rule 24(a) by precluding the plaintiff from adding any new claims (*i.e.*, ones not already asserted against the original defendant) against the intervenor. The net result would probably be an expansion of supplemental jurisdiction over Rule 19/24 defendants.

[29] Rowe, Burbank & Mengler, *supra* note 1, at 957. Although use of the word "generally" implies that in at least some situations, there would be supplemental jurisdiction over plaintiffs' claims against a new defendant joined under Rules 19 or 24, the drafters fail to specify either the situations in which this would be permitted or the proposed construction of section 1367(b) that would permit them.

[30] *Id.*

[31] Freer, *supra* note 1, at 478-79. The drafters' view "simply does not make sense. How can an absentee be a necessary *defendant* without the plaintiff's having a claim against him?" *Id.* at 479 (emphasis in original).

[32] Rowe, Burbank & Mengler, *supra* note 1, at 957.

[33] 490 U.S. 755 (1989).

[34] 564 F.2d 816 (8th Cir. 1977).

claim for relief against the defendant's white employees. To borrow Professor Laycock's cogent analysis, Title VII plaintiffs seek relief against the joined white employees who may be adversely affected "just as much as [they are] seeking relief against" the employer.[35] If joined, the white employees "have all the rights of a defendant," and the other parties cannot bind them to an affirmative action remedy without either obtaining their consent or "prov[ing] the prerequisites to a litigated judicial order against" them.[36] Specifically, the plaintiffs "must prove all elements of a *claim* that [the joined parties have] no rights in the matter or that [their] rights can be overridden."[37]

Indeed, unless the plaintiffs do seek relief which may invade their legally protectable interests, the white employees cannot be joined as defendants under Rules 19 and 24.[38] In fact, the white employees in *Martin v. Wilks* did claim a protected interest under Title VII. They based their lawsuit challenging the consent decree between the black employees and the city upon it. And the Supreme Court held that this interest could not be overridden in a suit where they had not been joined as co-defendants.[39]

The same analysis applies to *Helzberg's Diamond Shops*. Plaintiff Helzberg *did* have a potential claim for relief against the absent third party (Lord's). Helzberg sought an injunction forbidding Valley West from adhering to its lease agreement with Lord's, and thus to deprive Lord's of its legal right under the agreement to space in Valley West's shopping center.[40] If Lord's were joined as an additional defendant, Helzberg would be required to prove, over Lord's opposition, that Lord's rights to the premises were overridden by Valley West's alleged violation of the noncompetition clauses of *its* lease with Helzberg.

In both cases, the whole point of joining the absentee under Rule 19, at

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[35] Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103, 142.

[36] *Id.* at 131.

[37] *Id.* at 129 (emphasis added).

[38] Injury to a non-protected interest might justify amicus status, but should not justify party rights.

[39] 490 U.S. at 761-65. Significantly, the drafters themselves state that the white employees had "*protectable interests* that might have been impaired by an affirmative action decree," permitting them to be "joined as Rule 19 defendants . . . ." Rowe, Burbank & Mengler, *supra* note 1, at 957 (emphasis added).

[40] 564 F.2d at 817.

least from the standpoint of the existing parties, is to bind the joined defendant by the resulting decree if the plaintiff wins the case. Certainly this is the aim of plaintiffs joining majority employees as defendants in affirmative action cases after *Martin v. Wilks*. Otherwise, they run the risk of winning the case against the employer but failing to obtain effective relief, since the absent white employees will be free to pursue a Title VII suit against the relief awarded against the employer. A decree precluding such a future suit, binding on the white employees, can certainly be sought by a claim in federal court.

The three drafters apparently proceed from an antiquated, narrow, nonfunctional view of "claim." They seem to regard a claim as some sort of formal "cause of action" akin to the concepts that so plagued common law and code pleading. Those confusing notions have been supplanted by a more functional definition in modern procedure: a claim is simply a fact-based request to a court for relief against a particular defendant who contends, at least implicitly, that this relief would invade his legally protected rights. There can be no defendant against whom no plaintiff asserts a claim for relief.

The Federal Rules make no sense otherwise. To stay in court, a plaintiff must "state a claim upon which relief can be granted."[41] Unless defendant can persuade the court that plaintiff has not stated such a claim, he must file an answer stating his "defenses to each *claim* asserted"[42] or suffer a default judgment granting the relief requested against him. Parties joined as defendants under Rules 19 and 24 bear the same pleading burden. Rule 24(c) requires that a motion for intervention as a defendant "be accompanied by a pleading setting forth the claim or defense for which intervention is sought."[43] When a court decides that an absentee is a necessary party under Rule 19(a),[44] it typically orders the plaintiff to amend its complaint to add the absentee as a party.[45] Upon being properly served with the complaint, Rule 8 requires the absentee to file an answer stating its defenses to the plaintiff's claims (unless, of course, it

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[41] FED. R. CIV. P. 12(b)(6).

[42] FED. R. CIV. P. 8(b) (emphasis added).

[43] FED. R. CIV. P. 24(c).

[44] FED. R. CIV. P. 19(a).

[45] Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1076-77 (1985).

can persuade the court that the complaint fails to state a *claim* upon which relief can be granted).[46]

This basic primer on pleading requirements refutes the drafters' bald assertion that there can be a defendant against whom no plaintiff asserts a claim. If the plaintiff in cases like *Martin* and *Helzberg* really has no claim against the absentee, how under the Federal Rules can the absentee be joined as a defendant? How can it be included in the plaintiff's complaint? How can it file an answer asserting its defenses to the plaintiff's claims if there are none? What does it file? What does it say? Why does it say it?

To be sure, the black plaintiffs in *Martin* could not claim that the white absentees had discriminated against them in violation of Title VII. Nor could Helzberg claim that Lord's had violated Helzberg's lease agreement with Valley West.[47] But that simply means that the plaintiff does not have the *same* claim against the absentee as he did against the original defendant. That is a far cry from saying that the plaintiff had *no* claim against the absentee.

Obviously, the plaintiffs in *Martin* and *Helzberg did* have property-type claims against the absentees. The cases are very similar to interpleader suits, with the city and Valley View being in the place of the stakeholder, the black plaintiffs and Helzberg as the first claimant, and the absentees as the rival claimant.[48] In each case the claimants make *mutually exclusive claims to a legal entitlement* — a property or status — that only one can have.[49] Indeed, the only reason the defendants in

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[46] FED. R. CIV. P. 8(b), 12(b).

[47] It is true that the plaintiffs in cases like these do not have the *same* full-blown "cause of action" against the absentees as they do against the original defendants, nor are they entitled to *all* the relief available against the wrongdoing defendant, particularly damages and back pay. But one party can seek relief against another without claiming that the other violated its rights by committing a tort or breaching a contract.

[48] *See* 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, 922-23 (1990). Although Professor Steinman characterizes the absentees as ones against whom the plaintiff lacks a claim, *id.* at 911-12, her detailed analysis belies this statement. *See id.* at 917 (*Martin v. Wilks* analysis: "legal rights" of majority employees "could not be determined in their absence"); 920-21 (using real property case as another example of *Martin v. Wilks* situation); 922-24 (discussing interpleader as a remedy to this problem where *res* or fund is involved).

[49] In these property disputes, where a third party is "in possession" of the entitlement sought by the rival claimants, the terms plaintiff and defendant become arbitrary. Either could be the plaintiff if

those cases could not employ interpleader was the fact that no *res* or fund was involved, as required by the interpleader statute.[60] Thus, the reason for joining the absentee is to bind him regarding his *claim* to what the plaintiff seeks against the original defendant.

Another reason to reject the drafters' non-functional definition of "claim" is its inherent vagueness, which would render the statute unworkable in everyday litigation. Courts would be forced in every case of proposed Rule 19/24 defendant joinder to determine whether the plaintiff does or does not have a particular kind of "claim" against the proposed new defendant, inasmuch as jurisdiction turns on that determination. For judges who believe, as we do, that the nonclaim situation does not exist, this will be an impossible task to perform. For others, it will be at best a metaphysical inquiry.

The federal courts must first determine, of course, whether the drafters' metaphysical claim/nonclaim inquiry is required by the statute at all. This question can only be settled by a definitive decision of the Supreme Court or by a consensus of decisions of the lower courts. Neither will come without years of uncertainty and wasteful jurisdictional litigation which, after all, resolves no real world dispute. This brings us back, of course, to our main point: Section 1367 is a drafting disaster, which could have been avoided if it had been subjected to thorough public scrutiny of the type it is now belatedly receiving from the profession.[61]

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he is the first to bring suit. Perhaps this is what misled the drafters into believing that the black employees in *Martin v. Wilks* lacked a claim against their white co-workers. Their property claim was that the contested promotions "belonged" to them and not to the white employees. Since they failed to assert it in their litigation against the city, it fell to the white employees to be the plaintiffs and to assert their opposing claim, that under Title VII the promotions belonged to *them* and not to the blacks, in their case against the city. Significantly, the black employees were immediately permitted to intervene to defend their consent decree with the city, *i.e.*, to defend *their* asserted right to the contested promotions. 490 U.S. at 760.

[60] The interpleader statute requires that the conflicting claims be to a *res*, fund, or obligation to pay a sum certain. 28 U.S.C. § 1335(a). "Rule interpleader" under Fed. R. Civ. P. 22 is interpreted to require the same. *See* Freer, *supra* note 45, at 1094 n.160.

[61] *See supra* notes 6-13 and accompanying text.

2. *Fixing the Anomaly the Wrong Way and Replacing It with a New One*

Professor Freer argued that section 1367 fixes the Rule 19/24 supplemental jurisdiction anomaly the wrong way.[52] The statute precludes supplemental jurisdiction for plaintiff joinder under either rule and, unless our first proposed reading is adopted, for almost all defendants.[53] Whichever reading is finally adopted, section 1367 does no more than replace the old anomaly with a new one, which arbitrarily favors at least some Rule 19/24 defendants over equally deserving Rule 19/24 plaintiffs and other Rule 19/24 defendants.[54] The three drafters dismiss this problem as an insignificant change, stating that the contraction of jurisdiction over Rule 19 and 24 plaintiff joinder and the supposed expansion of supplemental jurisdiction over their favored defendants in cases like *Martin v. Wilks* and *Helzberg's Diamond Shops* "may be a wash."[55] We cannot agree.

First, unless the courts accept our first reading or the drafters' concept of defendants who defend against no claims, there will be no supplemental jurisdiction over *any* parties joined under Rules 19 and 24, save for the handful who are sued by someone other than the original plaintiff. The result, of course, is a drastic contraction of supplemental jurisdiction, not the "wash" alleged by the drafters.

Second, even if the statute provided supplemental jurisdiction for *all* Rule 19 defendants (and the drafters agree that it does not),[56] the price — losing it over all Rule 24(a) plaintiff-intervenors — is too high. Under the former law, non-diverse absentees could readily protect their interests in a diversity suit by intervention of right under Rule 24(a).[57] Now it is clear that they cannot if they must intervene as plaintiffs.[58] It is far from clear

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[52] Freer, *supra* note 1, at 476-78.

[53] *See supra* text accompanying notes 27-28.

[54] *See* TEPLY & WHITTEN TREATISE, *supra* note 13, at 510 (statute "partly addresses one anomalous situation . . . but it creates some additional problems of interpretation . . . .").

[55] Rowe, Burbank and Mengler, *supra* note 1, at 958.

[56] *Id.* at 957 ("Section 1367 generally prohibits supplemental jurisdiction over a diversity plaintiff's claim against a nondiverse defendant joined as a necessary party under Rule 19"); *id* at 957 n.68 (same for Rule 24).

[57] Freer, *supra* note 45, at 1087 & n.126.

[58] As Professor Freer noted, the statute's preclusion of supplemental jurisdiction over claims by those "seeking to intervene as plaintiffs," 28 U.S.C. § 1367(b), does not necessarily mean intervenors whom the court would align as plaintiffs. Freer, *supra* note 1, at 484.

why a plaintiff who, for example, seeks to intervene in a tort suit against a defendant with limited assets and who may be unable to recover after the original plaintiff's judgment exhausts those assets, is any less deserving than the absentees in the *Helzberg*-type situation for which the drafters would permit intervention.[59] Nor can these now-excluded intervenors safely rely upon the "federal courts' ability to protect them from harm in their absence by dismissing the federal action for refiling in state court," as the drafters glibly assert.[60] There may well be no state court where all interested parties can be served. Even if there is, there is no guarantee that the federal court will dismiss the case. Under Rule 19(b) the court has discretion to proceed, as the court in *Helzberg* did proceed without Lord's[61] — despite the fact that Helzberg could have sued both Valley View and Lord's in state court in Iowa.[62]

In short, section 1367 *at best*[63] replaces the old anomaly with a new one — an arbitrary distinction between proposed plaintiffs and proposed defendants. More likely, it "fixes" the anomaly by destroying supplemental jurisdiction over all but a handful of potential Rule 19/24 parties. While harm to some of these absentees or to defendants who may be subjected to conflicting obligations or multiple liabilities in their absence may be avoided by dismissal under Rule 19(b), the *Helzberg* court's decision to plow ahead without Lord's shows that innocent parties may well be hurt by this change. We continue to believe that the anomaly was "fixed" the wrong way. Distinguished commentators such as Professor Wright, who could have helped in the codification of supplement jurisdiction under a public process, agree with us.[64]

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[59] Rowe, Burbank & Mengler, *supra* note 1, at 957-58.

[60] *Id.* at 956.

[61] *Helzberg*, 564 F.2d at 819-20.

[62] Both Valley View and Kirk's Incorporated, Jewelers, the corporation that did business as Lord's, were Iowa corporations. *Id.* at 817.

[63] Under our first interpretation of section 1367(b), it would permit most Rule 19/24 defendant joinder. *See supra* text accompanying note 27.

[64] *See* C. McCormick, J. Chadbourne & C. Wright, *supra* note 6, at 5. *See also* Teply & Whitten Treatise, *supra* note 13, at 507-12 (uncertainty of supplemental jurisdiction in intervention under statute).

3. Maiming Diversity Under the Guise of a Noncontroversial Statute

This public disagreement between the drafters and us proves our point that the anomaly should not have been fixed without thorough public ventilation and congressional scrutiny. This simply was not an insignificant change in the law. While most commentators may agree that the anomaly should be eliminated, they did not agree that it should be eliminated this way. Indeed, most of those taking a position go the *other* way. The drafters point to *no* commentator who disagrees with Dean Steinman,[65] Professor Fraser,[66] and Professor Freer,[67] each of whom concludes that the anomaly should be fixed by *expanding* supplemental jurisdiction to cover necessary parties added under Rule 19(a).[68] The assertion that the statute is noncontroversial on this point is untenable.

Further, the drafters' claim that resolving the anomaly their way "is the only resolution that takes seriously the Supreme Court's treatment of supplemental jurisdiction before *Finley*"[69] is not only controversial, but just plain wrong. The drafters confuse *Kroger*'s specific result with some far-broader anti-diversity *Kroger* penumbra. We agree that a good faith codification of pre-*Finley* law would include the *Kroger* result, despite our distaste for it.[70] But it certainly does *not* require *Kroger*'s expansion to wipe out supplemental jurisdiction over almost all claims by or against intervenors of right. The federal courts apparently agree with us, for the lower courts have continued to uphold supplemental jurisdiction over such claims after *Kroger*,[71] and the Supreme Court has done nothing to stop them. The simple fact is that *Kroger*'s "rationale," whatever it was and

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[65] Steinman, *supra* note 48, at 950.

[66] Fraser, *Ancillary Jurisdiction of Federal Courts of Persons Whose Interests May Be Impaired If Not Joined*, 62 F.R.D. 483, 485-87 (1974).

[67] Freer, *supra* note 45, at 1088.

[68] We know of no commentator who has taken the position that the anomaly should be eliminated the drafters' way, except perhaps Professor Mengler. Even Professor Mengler does not propose the alternative adopted by the statute. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247, 285.

[69] Rowe, Burbank & Mengler, *supra* note 1, at 956-57.

[70] Despite the trio's charge, there is nothing inconsistent in Professor Freer's position that *Kroger* is wrongly decided and that its holding must be codified. If there were full debate, Professor Freer would argue that *Kroger* ought not be codified. If, on the other hand, Congress decided to codify pre-*Finley* practice, the *holding* of *Kroger* would have to be included. The trouble with section 1367 is that (1) there was no debate, and (2) it did *not* codify pre-*Finley* practice.

[71] *See* Freer, *supra* note 4, at 74-77.

no matter how much the drafters *really* like it, was not the pre-*Finley* law.

In the *Kroger* opinion *itself*, the Supreme Court recognized the propriety of supplemental jurisdiction over claims by plaintiff-intervenors.[72] Indeed, Professor Mengler himself has admitted that "in *Kroger* . . . the Supreme Court *signalled its approval* of ancillary jurisdiction over claims by intervenors of right."[73] In light of this admission, how can Professor Mengler and his cohorts now argue that *Kroger* emanated a "rationale" compelling precisely the opposite conclusion?

To the contrary, the *Kroger* Court recognized the need for supplemental jurisdiction over "claims by a defending party haled into court against his will, *or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court.*"[74] A plaintiff intervenor is precisely such a person; he did not file the case in federal court and is not necessarily motivated by jurisdictional strategy, but, as the example of a tort defendant with limited assets shows, may have had no choice but to intervene to protect his interest.

Thus, the express language of *Kroger* refutes the drafters' position on intervention. Unlike the drafters, the Court recognized 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."[75]

To this day, the Court has recognized no penumbra to *Kroger*. Indeed, it has recently limited the case to its facts. In its unanimous 1991 decision in *Freeport-McMoRan, Inc. v. K N Energy, Inc.*,[76] the Court upheld supplemental jurisdiction over a claim by a non-diverse plaintiff added to a diversity contract action shortly before trial, and *expressly rejected* the

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[72] The Court referred to a prior note listing cases in which supplemental jurisdiction had been upheld, *Kroger*, 437 U.S. at 376 n.19 (referring to n.18 at 376). One of these cases involved a plaintiff-intervenor under Fed. R. Civ. P. 24(a), Smith Petroleum Service, Inc. v. Monsanto Chemical Co., 420 F.2d 1103, 1113-15 (5th Cir. 1970).

[73] Mengler, *supra* note 68, at 285 (footnote omitted).

[74] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978) (emphasis added) (footnote omitted). The Second Circuit recently quoted this language in rejecting the notion that *Finley* precluded supplemental jurisdiction over impleader claims. Associated Dry Goods v. Towers Fin. Corp., 920 F.2d 1121, 1126 (2d Cir. 1990).

[75] *Kroger*, 437 U.S. at 377.

[76] 111 S. Ct. 858 (1991).

defendant's contention that *Kroger*'s rationale precluded jurisdiction.[77] The Court stated the general rule that "[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action."[78] The Court distinguished *Kroger* on the ground that it had held only that supplemental jurisdiction did not extend to a "claim by an *original plaintiff* . . . against a nondiverse third-party defendant impleaded by the original defendant. . . ."[79] There is no *Kroger* "rationale" beyond claims asserted by the original plaintiff. The drafters' preclusion of supplemental jurisdiction over Rule 19/24 plaintiffs was not dictated by fealty to pre-*Finley* law; it was contrary to it.

If it were *really* important to protect the *Kroger* "rationale," the drafters should have focused on the possibility that the *original* plaintiff might strategically employ supplemental jurisdiction to evade the complete diversity requirement. In that case, the drafters' claim that section 1367 provides supplemental jurisdiction over absentees such as those in *Martin* and *Helzberg* is a far more serious problem than any presented by the joinder of additional plaintiffs. To see why, just change the *Helzberg* facts slightly, so that Helzberg and Lord's are co-citizens. All plaintiff Helzberg needs to do in order to avoid the complete diversity requirement is (1) sue Valley View in federal court under diversity and (2) file a statement with the complaint, as required by Rule 19(c),[80] explaining that Lord's is a necessary party per Rule 19(a) but has not been sued because it is a co-citizen of the plaintiff and thus would destroy diversity jurisdiction. Under Rule 19(a) the court then *must* add Lord's so long as it can be served and there is subject matter jurisdiction,[81] which the drafters claim that their new statute provides.

This ploy would be a far easier end-run of the complete diversity requirement than the supposed one in *Kroger* itself, for it does not depend at all on the actions of any third party. It only requires that the court do its duty under Rule 19(a). This is a much more serious threat to the *Kroger* rationale than any supposed strategy by plaintiff-intervenors,

[77] One of the plaintiffs had assigned its interest in the on-going contract to the new plaintiff, who was added under Fed. R. Civ. P. 25(a). None of the original plaintiffs was dropped from the suit. *Id.* at 859.

[78] *Id.* at 860.

[79] *Id.* (emphasis added).

[80] FED. R. CIV. P. 19(c).

[81] FED. R. CIV. P. 19(a). *See* Freer, *supra* note 45, at 1076-77.

whom no one seems to have worried about before despite the long-settled rule that there was supplemental jurisdiction over their claims.[82]

Finally, of course, this entire discussion assumes the most controversial premise of all: whether Congress should pay *any* attention to either the result or the rationale of *Kroger*. After all, article III empowers Congress, not the Court, to decide the scope of federal jurisdiction. It is obvious that any attempt to codify the scope of supplemental jurisdiction, as section 1367 so clearly does, must address the question of whether and to what extent the complete diversity requirement should extend to claims by and against subsequently joined parties. As Professor Mengler himself stated in an article adapted from a report he wrote for the Federal Courts Study Committee, "one possibility, *though certainly not the only one*, is for Congress to focus consistently on *Kroger*'s overarching goal."[83] As this statement concedes, these key questions are controversial. They should not have been decided without full debate and serious congressional deliberation.

B. The Alienage Oversight

Although it seems clear that the drafters wanted to preclude supplemental jurisdiction only in certain situations in diversity of citizenship cases, they did not say that; instead, section 1367(b)'s restrictions apply to *all* cases brought under 28 U.S.C. § 1332, including alienage cases under section 1332(a)(2). Thus, as Professor Freer demonstrated, section 1367(b) precludes the use of pendent parties jurisdiction in alienage cases.[84] Trapped by the language of the statute, the trio can proffer only interpretive contortions to avoid this unfortunate and obviously unforeseen result.

First, they make the bizarre statement that "[t]he complete diversity rule is a product of judicial interpretation, found nowhere in statutory text

[82] The same can be said of the "potentially gaping hole in the complete diversity requirement" which, as the drafters belatedly recognize, may result from section 1367(b)'s failure to preclude supplemental jurisdiction over non-diverse plaintiffs added under Rule 20. Rowe, Burbank & Mengler, *supra* note 1, at 961 n.91. *See infra* text accompanying notes 103-04. While we share their hope that this result can be avoided, we do not see how the courts can find a principled way to do so. *See infra* text accompanying notes 105-09.

[83] Mengler, *supra* note 68, at 285-86 (emphasis added).

[84] Freer, *supra* note 1, at 474-75.

before or after the adoption of section 1367."[85] Thus, they conclude, it can be ignored as readily after adoption of the statute as before. This is no answer. Surely, the trio does not seriously contend that courts can simply ignore the complete diversity rule after passage of a statute which, they tell us,[86] is designed to preclude its evasion. If the complete diversity rule can be ignored in alienage cases, it can be ignored in diversity of citizenship cases as well; it is equally "non-statutory" there.[87] If so, the three drafters have resolved a good many problems, including the one that gave rise to both the holding and the "rationale" of *Kroger*.

Second, the trio suggests that section 1367 does nothing to change the status quo in alienage cases. Abolishing the complete diversity rule in alienage cases might be a good step, they say, but should be taken only "after careful assessment of its likely impact."[88] They admit that such careful assessment was impossible in the hurried passage of section 1367, and imply that they properly left the issue alone.[89]

This is an example of the "nonstatute statute" at work. But how can the statute not apply here? Section 1367(a) grants supplemental jurisdiction to the constitutional limit in *every case in federal court,* subject only to the specific restrictions in section 1367(b).[90] As Professor Siegel notes, the grant is broad and mandatory.[91] One cannot argue seriously that the courts will, or should, feel free to ignore a statute so clearly on point. Yet, before the statute, the courts were free to consider whether to permit pendent party claims in such cases.[92]

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[85] *See* Rowe, Burbank & Mengler, *supra* note 1, at 954. The suggestion is bizarre because the statute has been re-enacted several times without attempting to change the complete diversity rule. Under basic canons, it is considered (we thought universally) to be "statutory." *See* Freer, *supra* note 4, at 41-44.

[86] Rowe, Burbank & Mengler, *supra* note 1, at 952-53.

[87] Regarding the complete diversity rule in alienage cases, see generally 1 J. MOORE, J. LUCAS, H. FINK, R. FREER, D. WECKSTEIN & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.75 [1.-2- 3] (2d ed. 1991) [hereinafter 1 MOORE'S FEDERAL PRACTICE].

[88] Rowe, Burbank & Mengler, *supra* note 1, at 955.

[89] *Id.*

[90] The court also has discretion to refuse to exercise supplemental jurisdiction in certain circumstances. 28 U.S.C. § 1367(c).

[91] Siegel, Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements Act, 133 F.R.D. 61, 65 (1991). Professors Marcus, Redish, and Sherman note this point in suggesting that the statute overrules *Zahn*. R. MARCUS, M. REDISH & E. SHERMAN, *supra* note 27, at 120.

[92] The trio's assertions that *Finley* automatically swept away broad chunks of supplemental jurisdiction and that any exercise of such jurisdiction constitutes insubordination are naive. *Finley* was a

Thus the suggestion that the statute does not alter the pre-*Finley* status quo simply fails to pass the straight-face test. Moreover, the change was admittedly undertaken in hurried circumstances and without "careful assessment of its likely impact."[93] The plain fact of the matter is that nobody thought about the alienage point. Had the statute been circulated to the larger community for comment, the overbroad exclusion of supplemental jurisdiction in section 1367(b) could have been corrected.

Of course, the statute did not have to be set up in this fashion. As we show in our concluding section and recommendation, Congress could have overruled the holding in *Finley* quite simply and cleanly, without affecting other areas.[94] We agree with the trio that "*Finley*'s *holding itself* was well worth overruling."[95] Why the statute had to go further, we do not know. That the statute went further, there can be no doubt. Because of section 1367(a), every case in the federal courts is affected. Underinclusion in section 1367(b) results in an unduly broad grant of jurisdiction. Overinclusion in section 1367(b) results in undue constriction of federal jurisdiction. The statute suffers from some of each. Thus, once section 1367(a)

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five-to-four decision in which the majority made sweeping statements about the need for statutory authorization and yet recognized pendent claim jurisdiction as "a departure" from any requirement for such authorization, and distinguished pendent parties from ancillary jurisdiction. Finley v. United States, 490 U.S. 545, 556 (1989).

While the case certainly raised questions, the trio points to *no case* brought under diversity jurisdiction denying supplemental jurisdiction over counterclaims, cross-claims or claims by intervenors of right. The drafters also do not contest that courts have continued to recognize pendent parties jurisdiction under a variety of statutes. It is also clear that the courts are forging a clear consensus on impleader. The sole appellate authority supports supplemental jurisdiction. The most recent rejection of a broad reading of *Finley* in this context is *In re* Joint Eastern and Southern District Asbestos Litigation, 769 F. Supp. 85, 86-87, 1991 U.S. Dist. LEXIS 8956 (S.D.N.Y. and E.D.N.Y., July 2, 1991), by Judge Weinstein (who is a co-author of a leading Civil Procedure casebook). We doubt that the courts can reach such consistency under section 1367. *See infra* text accompanying notes 134-43.

Moreover, the lower courts simply are not "inappropriately insubordinate" in declining to follow *Finley*'s sweeping language rather than its actual holding. The Supreme Court often speaks loosely, failing to follow up in later cases on the implications of its broad language. As all civil procedure teachers know, after the Court's sweeping statements in Shaffer v. Heitner, 433 U.S. 188 (1977) led academic commentators to predict the imminent demise of transient jurisdiction, nothing happened. Fourteen years later the Court, rather than punish the rebels, joined them by upholding transient jurisdiction in Burnham v. Superior Court, 110 S. Ct. 2105 (1990). As we already have shown, *see supra* text accompanying notes 71-79, the lower courts failed to follow *Kroger*'s broad language, and the Supreme Court followed their lead in its unanimous *Freeport-McMoRan* opinion last term.

[93] Rowe, Burbank & Mengler, *supra* note 1, at 955.

[94] *See infra* notes 151-52 and accompanying text.

[95] Rowe, Burbank & Mengler, *supra* note 1, at 945 (emphasis added).

was included, it was incumbent on Congress to exercise special care with section 1367(b). Unfortunately, as we see with alienage cases and as the trio admit in other areas, it did not.

C. *Abrogating* Zahn, *Maiming* Strawbridge, *and Other Adventures of the Nonstatute Statute*

1. *Abrogating* Zahn

As Professor Freer explained, the statutory language of section 1367 overrules *Zahn*[96] and permits jurisdiction over diversity of citizenship class actions, even when the claims of some class members do not satisfy the jurisdictional amount in controversy.[97] In an earlier piece, the drafters themselves noted the point, but glibly asserted that the oversight was fixed by the legislative history.[98] But as Professors Marcus, Redish, and Sherman pointedly ask, "How could this be?"[99] They apparently recognize, as we show below,[100] that there is a powerful movement against the use of legislative history to nullify statutory language.

Perhaps in response to such criticisms, the drafters now concede that "[i]t would have been better had the statute dealt explicitly with this problem," and the drafters describe the legislative history as merely "an attempt to *correct the oversight*."[101] But they never explain why the oversight was not corrected in the statutory text, which would have left no ambiguity.

Despite the serious possibility that the history will not save *Zahn*, the three drafters joke about the "delicious possibility" that Justice Scalia would either have to resort to legislative history or overrule *Zahn*.[102] Is it really so amusing that the statute's text and history so contradict each other that it will take a Supreme Court decision to resolve this mess? Would it have been so difficult to frame a statute whose history *confirmed* its language?

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[96] Zahn v. International Paper Co., 414 U.S. 291 (1973).

[97] Freer, *supra* note 1, at 485-86.

[98] JUDICATURE, *supra* note 2, at 215 ("legislative history makes clear that section 1367 is not intended to affect" class actions; *Zahn* "remain[s] good decisional law").

[99] R. MARCUS, M. REDISH & E. SHERMAN, *supra* note 27, at 120.

[100] *See infra* text accompanying notes 123-30.

[101] Rowe, Burbank & Mengler, *supra* note 1, at 960 n.90 (emphasis added).

[102] *Id.*

2. *Maiming* Strawbridge

The drafters themselves point to a failure of draftsmanship that creates a "far more serious" problem than any raised by Professor Freer.[103] Section 1367(a) grants jurisdiction over all claims satisfying the constitutional test for supplemental jurisdiction, subject to the specific exceptions of section 1367(b). Those exceptions do not preclude supplemental jurisdiction over claims by a nondiverse plaintiff joined subsequently under Rule 20. This oversight eviscerates the complete diversity rule in such cases. Helpless before their statutory language, the drafters "can only hope that the federal courts will plug that potentially gaping hole in the complete diversity requirement."[104]

The trio suggests two strategies for realizing this hope. First they suggest that courts can "plug" the "gaping hole" by "regarding it as an unacceptable circumvention of original diversity jurisdiction requirements . . . ."[105] By fiat they would thus elevate the diversity statute, as interpreted by *Strawbridge*, to a constitution-like status which trumps mere statutes such as section 1367. Not surprisingly, they cite no authority for this novel premise.

Second, they "hope" that courts will be encouraged to ignore the statutory language "by reference to the intent not to abandon the complete diversity rule" in the legislative history.[106] The House Report, however makes clear that preservation of complete diversity is the intent behind only *part* of the statute, section 1367(b).[107] The Report also refers to the fact that section 1367(b) precludes supplemental jurisdiction only "in specified circumstances."[108] The Rule 20 "gaping hole" simply is not one of those "specified circumstances." Under traditional principles of statutory interpretation, it will be difficult for the courts to use the legislative history of section 1367(b) to nullify the jurisdiction apparently granted by section 1367(a) to claims by plaintiffs added under Rule 20. It certainly will be difficult for courts both to rely on the complete diversity require-

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[103] *Id.* at 961, n.91.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] H. R. REP. No. 734, 101st Cong., 2d Sess. (1990), *quoted in* R. MARCUS, M. REDISH & E. SHERMAN, *supra* note 9, at 148.

[108] *Id.*

ment to preclude Rule 20 plaintiffs and to follow the drafters' suggestion that they might ignore it in alienage cases, over which section 1367(b) *does* retain the complete diversity requirement.[109]

3. *Unanswered Exam Questions*[110]

Section 1367(b) precludes supplemental jurisdiction over various claims by "plaintiffs." As Professor Freer explained, this language may create a problem when another party has filed a claim against the original plaintiff. Examples include (1) claims by a plaintiff against a third-party defendant who has asserted a downsloping 14(a) claim[111] against the plaintiff and (2) cross-claims or counterclaims by the plaintiff after being served with a counterclaim by the defendant. Case law generally has permitted supplemental jurisdiction over such claims.[112] By its terms, however, section 1367(b) precludes supplemental jurisdiction over such claims because they are asserted by "plaintiffs."

This is one of the few problems the trio foresaw in their prior publications about the statute. They asserted that the statute did not apply; while the statute precluded jurisdiction over "claims by plaintiffs," the assertions in question were "*counterclaims* by plaintiffs."[113] After Professor Freer's article, the trio now admits that this "distinction" is "too facile."[114]

Undaunted, they throw together a parade of prior arguments. First, the trio suggests that courts should give "sympathetic attention" to the statutory language that supplemental jurisdiction is precluded if its exercise "would be inconsistent with the jurisdictional requirements of section 1332."[115] As we have seen, the trio reads this language to invoke the complete diversity rule when it wants to invoke it, and to ignore it other-

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[109] *Id. See also supra* text accompanying notes 85-87.

[110] The trio never explains how these questions can be nothing more than law school exam hypotheticals yet still be too important to codify without the benefit of extensive case by case development by the lower courts. Rowe, Burbank & Mengler, *supra* note 1, at 959. Nor do they explain how this development can take place now that section 1367 has occupied the field. *See supra* text accompanying notes 90-91.

[111] The downsloping 14(a) claim is asserted by the third-party defendant against the plaintiff and is transactionally related to the underlying dispute. *See* Freer, *supra* note 1, at 448 n.20.

[112] *See id.* at 481-84.

[113] JUDICATURE, *supra* note 2, at 215 n.17 (emphasis added).

[114] Rowe, Burbank & Mengler, *supra* note 1, at 960 n.86.

[115] *Id.* at 959-60.

wise.[116] It is not clear whether the courts will follow their lead.

Second, of course, they reinvoke the "expressed congressional intent" to implement the principal rationale of *Kroger* to resolve all dilemmas.[117] As we have also seen, the trio has seized the right to codify the penumbra of *Kroger* that no court ever divined, and apparently to define its scope as well.[118] The drafters cannot conceive that courts might read the "rationale" of *Kroger* as precluding supplemental jurisdiction over a counterclaim by the original plaintiff in response to a downsloping 14(a) claim. Nevertheless that argument will be made by impleaded defendants asserting such claims against the original plaintiff. After all, the original plaintiff's claim is not asserted by one defending in a court into which he was haled against his will. Moreover, he might have foreseen that the third-party defendant would assert a downsloping 14(a) claim against him. In such a case the plaintiff may be playing games with the complete diversity rule.[119]

Of course, the trio's arguments are nothing more than our old friend the nonstatute statute, of which we get one last dose here. "Legislating on such specifics" as those raised by Professor Freer, we are told, "without more concrete case law experience would have risked the very statutory rigidity that Professor Freer . . . imputes to section 1367."[120] But again Professor Freer imputes statutory rigidity for a simple reason the trio would like to ignore; the statute *is* legislation on "such specifics."

II. WHAT MUST BE DONE

The bottom line of the drafters' response to Professor Freer's criticisms is that we can live with section 1367. We should all share their "hope" and faith that the federal courts "can be trusted to make the best of it."[121]

We cannot make this leap of faith. Once again, we ask our readers, especially those of the bench and bar who must live with section 1367's defects, to decide for themselves: will it be easy, or even possible, for the

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[116] *See supra* text accompanying note 106 and text accompanying notes 85-87.
[117] Rowe, Burbank & Mengler, *supra* note 1, at 960.
[118] *See supra* text accompanying notes 69-79.
[119] *See* Freer, *supra* note 4, at 73 n.211.
[120] Rowe, Burbank & Mengler, *supra* note 1, at 959.
[121] *Id.* at 961.

courts to "interpret the statute sensibly"[122] in light of all the problems that we have demonstrated with the specific interpretations proffered by the drafters?

In this concluding section, we make two more general points. First, the drafters seek to impose an impossible and inappropriate burden on the federal courts. Second, the only sensible course is for Congress to clean up the section 1367 mess by replacing it with a properly thought-out supplemental jurisdiction statute on which all interested parties are afforded a fair opportunity to comment.

A. *The Burden of Fixing Section 1367 Should Not Be Imposed on the Federal Courts*

We have already shown the difficulties with each of the drafters' specific proposed interpretations. There are three larger, more basic reasons why cleaning up the mess created by section 1367 should not be dumped on the courts leaving the rest of us to hope passively for the best.

First, basic principles of statutory construction militate against the drafters' hopes. It is not so easy for judges to ignore the specific commands of a statute in favor of "basic guidance" arguably gleaned from the vague statements found in legislative history.[123] Justice Scalia is leading a campaign to restore the primacy of statutory language,[124] which, as he points out, is all that Congress actually adopts.[125] This campaign is a reaction against the perceived abuse of legislative history to construe statutes contrary to their enacted language.[126] In such cases, Scalia and others argue that it is by no means certain that Congress really "intended" the result.[127] In any event, Article I makes no provision for the enactment of

[122] *Id.*

[123] *Id.*

[124] *See generally* Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990); Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277 (1990).

[125] *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

[126] *Id.* at 529; Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 469-73 (1989) (Kennedy, J., concurring, joined by Rehniquist, C. J. and O'Connor, J.). *See also* Eskridge, *supra* note 124, at 626-30; Wald, *supra* note 124, at 280-81.

[127] *Public Citizen*, 491 U.S. at 470-71 (Kennedy, J., concurring); Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring).

legislative intent — other than the constitutional process of putting it into statutory language.[128]

While we doubt that the courts will discard the use of legislative history altogether, we do expect that they will begin to adhere more faithfully to the traditional rule that legislative history is used only to clarify ambiguities,[129] not to alter what Congress did on the grounds that it surely "intended" something else that better accords with the policy notions of commentators and courts.[130]

In particular, courts will be hard pressed to ignore section 1367(b)'s specifics in deciding such questions as whether alienage jurisdiction requires complete diversity or whether section 1367(a) now permits nondiverse plaintiffs to be added under Rule 20. The courts will not feel free to use their discretion to reach what they see as "sensible" results in the face of a statute which, as we have shown,[131] clearly occupies the field by section 1367(a)'s extension of supplemental jurisdiction to constitutional limits. This is *not* a case, therefore, where Congress has implicitly delegated the major policy choices to the courts with only general or even no guidance, as it allegedly did with the Sherman Act[132] and as it did in the supplemental jurisdiction area by failing to define the scope of "civil action" in the jurisdictional statutes (and its predecessors in prior jurisdictional statutes).[133] Courts can fill in statutory gaps only where they exist. Here there is none; by its terms the statutory language governs these questions, applying section 1332's standards to alienage cases, but not to new plaintiffs added under Rule 20.

Second, even if section 1367 *had* delegated the task to the judges as the drafters belatedly wish it had, consistent results are unlikely. Broad dele-

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[128] *See, e.g., In re* Sinclair, 870 F.2d 1340, 1343-44 (7th Cir. 1989) (Easterbrook, J.).

[129] *See* Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 IOWA L. REV. 195, 197 (1983).

[130] Judge Wald, an astute observer, shares our opinion. Wald, *supra* note 124, at 309-10. Professor Eskridge adds that a more skeptical approach to legislative history would be a good thing. Eskridge, *supra* note 124, at 684-90. We agree.

[131] *See supra* text accompanying notes 90-91.

[132] *See* Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act,* 74 CAL. L. REV. 263, 266-68 (1986) (collecting sources); *but see id.* at 277-309 (rebutting standardless delegation view of Sherman Act); R. POSNER, THE PROBLEMS OF JURISPRUDENCE 289 & n.7 (1990) (accord).

[133] Freer, *supra* note 4, at 56-58.

gations simply cannot produce consistent results.[134] As our exchange with the three drafters shows, reasonable persons can disagree on the meaning of vague concepts like the "principal rationale of *Kroger*,"[135] especially when applying them to actual cases. It remains true that "[g]eneral propositions do not decide concrete cases."[136]

It is surely true here. Over seven hundred different district judges cannot be expected to apply so formless a delegation the same way; only a definitive decision of the Supreme Court can impose uniformity on any specific question. This may be tolerable where the gaps to be filled are minor, affecting only a few cases.[137] However, it is not tolerable here, where the gaps are gaping, affecting literally hundreds, if not thousands, of cases.

In these cases, as the sad history of the antitrust statutes has shown, the resulting confusion[138] will create wasteful and protracted litigation, and impose unnecessary costs on both society and the courts.[139] The confusion may be even worse here. As first year students learn from *Pennoyer*'s[140] insistence that the *res* be seized at the outset of the case, it is important to determine jurisdiction once and for all at the beginning of a suit. This is especially true for subject matter jurisdiction which cannot be waived. As the litigants in *Mottley*[141] discovered when the Supreme Court raised the jurisdictional issue *sua sponte* and dismissed their case without resolving their dispute,[142] uncertainty as to subject matter jurisdiction can be costly indeed.

Again, we invite our readers to judge for themselves. Prior to section 1367, the federal courts had no choice but to determine the scope of supplemental jurisdiction without specific statutory guidance. Were the re-

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[134] Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163, 1213-17; Arthur, *supra* note 132, at 317-21.

[135] Rowe, Burbank & Mengler, *supra* note 1, at 960.

[136] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[137] Every statute presents at least a few small gaps, to be filled by the unavoidable judicial lawmaking inherent in the task of statutory interpretation.

[138] Arthur, *supra* note 134, at 1191-1201 (doctrinal disarray on major antitrust issues).

[139] Arthur, *supra* note 132, at 322-28 (costs of unguided judicial discretion in Sherman Act cases).

[140] Pennoyer v. Neff, 95 U.S. 714 (1877).

[141] Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

[142] *Id.* at 152.

sults satisfactory? Were they consistent? The drafters themselves tell us that *Finley*, the last product of the Supreme Court in this process, was so ill-conceived as to require legislative codification of the area.[143]

Third, defining their own jurisdiction by ignoring contrary statutory provisions in the guise of interpretation is an inappropriate role for the federal courts. Even at Congress' behest, it is inappropriate. For under article III[144] that job belongs to Congress. In a representative democracy, the task of writing statutes belongs to the people's representatives.[145] We can vote them out of office if we do not like their handiwork. We cannot vote for federal judges, or for that matter, Federal Courts Study Committee members and their advisors.[146]

The task of defining their own jurisdiction is an especially inappropriate task to impose on the federal courts. One of the most important compromises in the Constitutional Convention left to Congress the questions of whether there should be inferior federal courts and, if so, what should be the scope of their original jurisdiction. Then, as now, the scope of fed-

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[143] Rowe, Burbank & Mengler, *supra* note 1, at 947-48.

[144] U.S. CONST. art. III, § 1.

[145] *See generally* Arthur, *supra* note 132, at 327-28.

[146] This is why the drafters' preoccupation with the recommendations of the Committee is irrelevant. Rowe, Burbank & Mengler, *supra* note 1, at 948-51. The Committee's place is to provide input for the legislative process, not to displace it. Whether the drafters of Section 1367 followed the Committee's recommendations does not matter.

We note, however, that Professor Freer is not the only commentator to conclude that the statute was inconsistent with the Committee's recommendations. *See* TEPLY & WHITTEN TREATISE, *supra* note 13, at 107. The Committee recommended jurisdiction over "any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties . . . ." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990). Obviously, the phrase "federal question jurisdiction" is merely an example, and does not limit the entire grant. If it were as the drafters contend, the phrase "federal jurisdiction" in the grant would have read "federal question jurisdiction."

More interestingly, the trio itself recognized that reasonable people can interpret the Committee's language to overrule *Kroger*. Note their admission that the first draft of a statute — prepared to mesh with the Committee's language — would indeed have overruled *Kroger*. It was not until Professor Kramer noted the problem in a letter to Judge Weis that anyone seemed to criticize the draft. Even then, the criticism was limited to political points. The trio points to no criticism based on inconsistency with the language of the Committee's report. Rowe, Burbank & Mengler, *supra* note 1, at 949, 952.

Amusingly, the trio finds it "baffling" that Professor Freer could conclude that the Committee would adopt such contradictory proposals as the abolition of diversity and the abrogation of *Kroger*. *Id.* at 949. The drafters fail to assess, however, whether we should be more baffled by the fact that they — trenchant opponents of diversity jurisdiction — drafted a statute that admittedly abrogates the complete diversity rule in some cases, *id.* at 961 n.91, thereby opening wide the diversity gate.

eral jurisdiction was controversial, involving delicate questions of the proper allocation of authority between the central and state governments. For this reason, it was agreed that article III would merely delineate the permissible scope of federal subject matter jurisdiction, leaving Congress, where the states are equally represented in the Senate, to determine — for each generation if need be — how much of this jurisdiction should be actually exercised by the federal rather than by the state courts.[147] The scope of diversity jurisdiction was a particularly divisive issue in the formative years of the Republic,[148] as it is today.[149] It is not appropriate to evade this historic and still vital compromise, no matter how much we "hope" and "trust" the courts will define their own jurisdiction sensibly without specific congressional direction. The job belongs to Congress. We should hold them to it.[150]

B. *How to Solve These Problems*

New legislation is the obvious solution to the problems created by section 1367. We propose that Congress proceed in two stages.

First, Congress should immediately repeal section 1367 or adopt a simple amendment which restores the pre-*Finley* status quo. Litigants and the lower courts are struggling with its ambiguities *now*. There is no reason why this wasteful process should continue while Congress wrestles with the difficult task of codifying supplemental jurisdiction properly. One way to proceed would be simply to repeal section 1367. Despite the drafters' cries that we need a statute to deal with *Finley*, we do not need *this* statute, which creates far more problems than *Finley* ever could.

Alternatively, if *Finley* really presents a problem, a simple repealer of *Finley* which *really* does no more than restore the pre-*Finley* status quo

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[147] Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-55 (1975).

[148] 1 MOORE'S FEDERAL PRACTICE, *supra* note 87, at ¶ 0.71[2]; Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 487-92, 499-503 (1928); Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 3-5 (1964).

[149] 1 MOORE'S FEDERAL PRACTICE, *supra* note 87, at ¶ 0.71[3].

[150] To be sure, even in the jurisdictional statutes Congress cannot be expected to resolve every question of application. The courts, as we have said, inherently must engage in interstitial lawmaking in interpreting and applying these statutes. The problem is a matter of degree. Interstitial, "retail," judicial lawmaking is inevitable and appropriate. Wholesale judicial lawmaking is not.

could easily be substituted for section 1367. For example, Congress could enact a statute providing that in cases where the federal courts have exclusive jurisdiction, they also have supplemental jurisdiction over all state law claims that are so related to the exclusive federal claim as to constitute a single case under *Gibbs*, even if those claims involve additional parties. This would repeal the actual *Finley* result. If *Finley*'s rationale presents an additional threat, the statute could go on to provide that in *all* actions over which the federal courts have original jurisdiction, including diversity, the mere addition of additional parties *without more* does not deprive the court of jurisdiction. The provision's legislative history could confirm that the statute's express purpose is to eliminate both *Finley*'s result and its broader rationale, without modifying the pre-*Finley* law (including the *Kroger result* as explained by the Supreme Court in *Freeport-McMoRan*).[151]

Another way to get rid of *Finley*, provided that the extension of pendent party jurisdiction to all nondiversity cases is *really* noncontroversial, would be to retain sections 1367(a), (c) and (d), while amending section 1367(b) to provide that the mere fact that additional nondiverse parties are joined to a case properly originated under the diversity statute does not, *without more*, divest the court of jurisdiction. The legislative history could confirm the statutory purpose to provide pendent party jurisdiction in nondiversity cases and to otherwise restore supplemental jurisdiction in diversity cases to its pre-*Finley* state (including the result in *Kroger* as explained by the Supreme Court in *Freeport-McMoRan*).[152]

After solving the immediate problems caused by section 1367 (and possibly *Finley*), Congress should proceed to an appropriate codification of supplemental jurisdiction. We agree that codification is preferable to the pre-*Finley* status quo. As argued above,[153] the federal courts should decide only interstitial questions in interpreting the jurisdictional statutes. Supplemental jurisdiction started out that way,[154] but has grown too important in modern times to be left to the courts, as the controversies surrounding *Kroger*, *Aldinger*, *Zahn* and *Finley* illustrate.

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[151] *See supra* notes 76-81 and accompanying text.

[152] *Id.*

[153] *Id.*

[154] Freer, *supra* note 4, at 49-54 (tracing judicial development of supplemental jurisdiction doctrines).

Because "codifying a complex area like supplemental jurisdiction," as the drafters now recognize, "is itself complex business,"[155] we do not attempt here to propose the specifics of an appropriate statute. Many questions should prove non-controversial; for example, everyone seems comfortable with supplemental jurisdiction over compulsory counterclaims, cross-claims, and impleader claims. Other questions, of course, are more contested, as our disputes with the drafters over *Kroger* and the Rule 19/24 anomaly demonstrate.

The important thing is not whether these questions are settled to the trio's satisfaction or to ours. What *is* important is that the result be a workable statute, providing the necessary guidance to the courts and to litigants, and that it be the product of a careful deliberative process in which *all* interested parties have a fair opportunity to participate. If the *Kroger* "rationale," even as idiosyncratically defined by the trio, can prevail in a *fair* fight, so be it. If we go about it in the right way, perhaps this time we can get a supplemental jurisdiction statute that works.

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[155] Rowe, Burbank & Mengler, *supra* note 1, at 961.