Articles

SUPPLEMENTAL JURISDICTION IN § 1441 REMOVED CASES: AN UNSURVEYED FRONTIER OF CONGRESS' HANDIWORK

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I. INTRODUCTION

Late in 1990, Congress passed a statute that confers on the district courts "supplemental jurisdiction" over a universe of claims that the courts otherwise would, or might, be unable to hear.[1] Essentially, 28 U.S.C. § 1367(a) authorizes the courts to exercise jurisdiction over claims that are part of the same case or controversy, under Article III of the Constitution, as a claim within the court's original jurisdiction. It explicitly grants jurisdiction over claims that in-

1. 28 U.S.C. § 1367 (1992). Section 1367 provides:
Supplemental jurisdiction.
(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 if 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.
(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
(d) The period of the limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
....

Id.

volve the joinder or intervention of additional parties, thereby authorizing what had been dubbed pendent party jurisdiction and some forms of ancillary jurisdiction. It also codifies traditional pendent jurisdiction and versions of ancillary jurisdiction that applied to claims among the original parties. In so providing, Congress recognized that,

> Supplemental jurisdiction has enabled federal courts and litigants to take advantage of the federal procedural rules on claim and party joinder to deal economically—in single rather than multiple litigation—with related matters .... Moreover, the district courts' exercise of supplemental jurisdiction, by making federal court a practical arena for the resolution of an entire controversy, has effectuated Congress's intent in the jurisdictional statutes to provide plaintiffs with a federal forum for litigating claims within original jurisdiction.[2]

It enacted § 1367 to provide the federal courts with statutory authority to hear claims lacking an independent basis of subject matter jurisdiction because the Supreme Court had cast doubt on the courts' authority to do so, absent congressional authorization.[3]

Section 1367(b) then curtails the power described in (a) by providing, as to civil actions in federal court solely by virtue of diversity jurisdiction, that district courts shall *not* have supplemental jurisdiction over specific varieties of claims there enumerated, *when* the exercise of such jurisdiction would be inconsistent with the jurisdictional requirements of § 1332. Subsection (c) sets forth the circumstances in which courts may decline to exercise their supplemental jurisdiction and (d) tolls the statute of limitations for claims that are dismissed.

A good deal of scholarly writing already has addressed the strengths and weaknesses of this deceptively simple supplemental jurisdiction statute.[4] I will not here attempt any exhaustive review of the many arguments about its meaning, virtues and vices that pertain to civil actions commenced in federal court or that pertain whether actions are commenced in federal court or arrive there through removal from state court. Although I make some observations that apply to those situations, especially with respect to contexts involving Rule 19 joinder and Rule 24 intervention, my focus is the interplay between the supplemental jurisdiction statute and the removal statutes, in particular 28 U.S.C. §§ 1441 and 1447.[5] The issues that are posed by this interaction have received

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2. H.R. Rep. No. 734, 101st Cong., 2d Sess. 28 (1990).

3. *Id. See infra* text accompanying note 11.

4. *See, e.g.*, Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute,* 40 EMORY L.J. 445 (1991); Thomas D. Rowe, Jr., et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer,* 40 EMORY L.J. 943 (1991) [hereinafter Rowe, Jr., et al., *Reply*]; Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute,* 40 EMORY L.J. 963 (1991) [hereinafter Arthur & Freer, *Burnt Straws*]; Thomas D. Rowe, Jr., et al., *A Coda on Supplemental Jurisdiction,* 40 EMORY L.J. 993 (1991) [hereinafter Rowe, Jr., et al., *Coda*]; Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do It's Job,* 40 EMORY L.J. 1007 (1991); Colloquy, *Perspectives on Supplemental Jurisdiction,* 41 EMORY L.J. 1 (1992); Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal,* 14 W. NEW ENG. L. REV. 1 (1992); Denis McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis,* 24 ARIZ. ST. L.J. 849 (1992).

5. Section 1441 provides in pertinent part:

very little attention from commentators. What's worse, they appear to have received virtually no attention from Congress, despite the fact that removed cases now constitute approximately 12% of the federal docket, or 25,000 cases per year.[6]

II. THE APPLICABILITY OF § 1367 TO REMOVED CASES

Logically, the first question is whether § 1367 even applies to removed cases. The statute's applicability is not a totally foregone conclusion, but the arguments against its applicability are weak.

First, looking to the language of the statute, one could argue that it does *not* apply, on the basis of the following: 1) it provides that it will apply to cases

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Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United states for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution or laws of the United states shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441 (1988 & Supp. III 1991).

Section 1447 provides in pertinent part:

Procedure after removal generally

...

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded ....

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title [civil rights cases] shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. § 1447 (1988 & Supp. III 1991).

Under section 1367 as enacted, "the federal courts may continue to develop a federal common law of supplemental jurisdiction in areas where section 1367 is either silent or ambiguous," as it is with respect to many issues raised by removed cases. Wolf, *supra* note 4, at 34–35.

6. In the 12-month period ended June 30, 1991, 24,803 cases were removed from state court to federal court. 1991 DIR. ADMIN. OFF. U.S. CTS., Table S-4, at 138 (1991). That constitutes 11.94% of the 207,742 total federal court filings that year. *Id.* In the 12-month period ending June 30, 1990, 25,924 cases were removed from state court to federal court. 1990 DIR. ADMIN. OFF. U.S. CTS., at 79 (1990). That constitutes 11.89% of the 217,879 total federal court filings that year. *Id.* The percentage of new filings represented by removals has been increasing in recent years. In 1987 and 1988, it hovered around 8.7%; it rose to 11.0% in 1989, and to 11.9% in 1990 and 1991, the last years for which data is available. *Id.*

commenced, not "commenced or removed," on or after the effective date;[7] 2) it grants supplemental jurisdiction only in civil actions of which the district courts have "original" jurisdiction; and 3) in providing for tolling of the statute of limitations, it ties the toll to the time at which claims were dismissed, never mentioning the possibility of remand.

Each of these arguments is flimsy. While it would have been preferable for Congress to expressly relate the statute's effective date to the time of removal, its failure to do so is a weak reed on which to predicate the conclusion that removed cases were not to be affected. All cases are "commenced" somewhere, so the language establishing the effective date of the statute works for removed cases, as well as for those filed in federal court, even if literal interpretation of the "commencement" language leaves the superseded case law on pendent and ancillary jurisdiction to govern more cases than would have been so governed had Congress used language expressly referring to removal. (For example, if a case was filed in state court on November 15, 1990, and was removed to federal court on December 15, 1990, the case law superseded by § 1367 will govern the case if § 1367's effective date of December 1, 1990, is linked to the date on which the action was commenced. Section 1367 will govern the case if its effective date is linked to the date on which the action was removed.)

Moreover, removed cases *are* cases of which the district courts have original jurisdiction. All cases removed pursuant to § 1441(a) are required, by its very terms, to be within the original jurisdiction of the federal courts. Even when removal statutes authorize the removal of congregations of claims that could not properly have been filed as a unit in federal court (*e.g.*, the removals authorized by 28 U.S.C. § 1441(c)), Congress's authorization for their removal renders those claim-groups civil actions of which the district courts have original jurisdiction. "Original jurisdiction" is not a synonym for "jurisdiction in which claims can be filed," as distinguished from "jurisdiction to which claims may be removed"; it distinguishes proceedings in which courts make the initial judicial determination of issues from those in which courts act in an appellate capacity.[8]

Last, it makes perfect sense for the tolling provision of § 1367(d) to mention and relate only to dismissed claims; if claims that had been removed were to be remanded, the statute of limitations would not be at issue. Tolling would not be necessary.

The legislative history of § 1367 is arguably ambiguous with respect to Congress's intent for the statute to apply to removed cases. As Professor Karen Nelson Moore has pointed out, "The initial language of the bill did specifically refer to removed cases, affording supplemental jurisdiction 'in any civil action of which the district courts have original jurisdiction, including an action removed from a State court.'[9] ... However, during the subsequent drafting pro-

7. *See* Freer, *supra* note 4, at 485.
8. Freeman v. Bee Mach. Co., 319 U.S. 448, 452 (1943); Railway Co. v. Whitton's Adm'r, 80 U.S. (13 Wall.) 270, 287 (1871).
9. H.R. 5381 § 120(a) [§ 1367(a)(1)] (1990), in Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 704 (1990) [hereinafter House Hearing]. The initial language also contained references to remand. For example, § 1367(c) provided in part:

cess[,] the specific reference to removal dropped out, without any discussion."[10] One cannot infer much from the elimination of the explicit reference to removal. Most likely, the drafters recognized that the clause regarding removal was superfluous, and cut it, with no intention to make the act inapplicable to removed cases.

Finally, it makes no sense as a matter of policy for § 1367 not to govern removed cases. If it did not do so, the federal courts would have to apply to removed cases a body of law governing supplemental jurisdiction that would not only be different from that which they apply when they adjudicate cases filed in federal court, but some aspects of which it was the very purpose of § 1367 to overturn.[11] Taking the rationale of *Finley v. United States*[12] to its logical extreme, federal courts could conclude that, in cases removed under 28 U.S.C. § 1441 (a) and (b), they do not have supplemental jurisdiction over any claims, including those that have been heard for decades or more under pendent and ancillary jurisdiction.[13] In view of these consequences, one should not ascribe to Congress the improbable intention to exclude removed cases from the kingdom of § 1367's rule without clear evidence of such an intent. That evidence is altogether lacking.[14]

> Dismissal Or Remand. If a non-Federal claim in an action is asserted under subsection (a), the district court shall, within [a prescribed time] determine whether the non-Federal claim should be dismissed or remanded. The court shall dismiss or remand the non-Federal claim if it is not a permissible claim under subsection (a). The court may dismiss or remand the non-Federal claim if ....

Id.

10. Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important but Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31, 59 (1992). *See generally* House Hearing, *supra* note 9.

11. The primary impetus for the enactment of § 1367 was the Supreme Court's decision in Finley v. United States, 490 U.S. 545 (1989). The legislative history makes clear that Congress was concerned that the Court had cast substantial doubt on the authority of the federal courts to hear some claims within supplemental jurisdiction, and that the rationale of *Finley* threatened to eliminate previously accepted forms of supplemental jurisdiction. The House Report declares, "legislation, therefore, is needed to provide the federal courts with statutory authority to hear supplemental claims. ... This section would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction." H.R. Rep. No. 734, 101st Cong., 2d Sess. 28 (1990).

12. 490 U.S. 545 (1989). *See supra* note 11.

13. Although the Court in *Finley* disavowed any intention to limit or impair the line of cases that began with United Mine Workers v. Gibbs, 383 U.S. 715 (1966), *see Finley*, 490 U.S. at 556, *Finley*'s emphasis upon the need for an act of Congress to create judicial jurisdiction and upon the prohibition against courts acting beyond their jurisdiction left all exercises of pendent or ancillary jurisdiction in a state of dubious legitimacy. *See* H.R. Rep. No. 734, 101st Cong., 2d Sess. 28 (1990) ("The Court's rationale ... threatens to eliminate other previously accepted forms of supplemental jurisdiction. Already ... some lower courts have interpreted *Finley* to prohibit the exercise of supplemental jurisdiction in formerly unquestioned circumstances.") (footnotes omitted); Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247 (supplemental jurisdiction is an unconstitutional usurpation of power); Wendy Collins Perdue, Finley v. United States, *Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539 (1990) (questioning continued viability of supplemental jurisdiction).

14. No judicial decision I have found seriously questions the applicability of 28 U.S.C. § 1367 to removed cases. A number of courts have applied the statute in removed cases, simply assuming its applicability.

III. Effective Date

Congress provided for § 1367 to apply to civil actions "commenced" on or after the date of enactment, December 1, 1990. How should this be construed in removed cases? It seems clear that § 1367 should not apply to cases that were removed to federal court before December 1, 1990,[15] and that it should apply to cases that were filed in state court (and hence also removed to federal court) on or after that date. Cases that were filed in state court before December 1, 1990, but were removed to federal court on or after December 1, 1990, constitute the problematic category.

A wooden reading of the statute would indicate that one should look to the commencement date in state court and conclude that the supplemental jurisdiction statute is inapplicable to these cases and that the pre-existing doctrines of pendent and ancillary jurisdiction should govern in the federal court proceedings that follow removal. The better rule would be that the supplemental jurisdiction statute does apply to these cases because the involvement of the federal court system commences at the time of removal, which, by hypothesis, was on or after December 1, 1990. If commencement of an action is understood as a surrogate or shorthand for the time at which the federal court system becomes the arena for a case, then focusing on the removal date in determining the applicability of the supplemental jurisdiction statute is most consistent with Congress's intent. In addition, by way of analogy, when statutory changes in the requirements for federal subject matter jurisdiction have had effective dates tied to the commencement of an action, the courts often have looked instead to the date of removal to decide the applicability of the changes.[16] One also might argue that selection of the removal date is most consistent with the practice of determining federal jurisdiction as of the date on which that jurisdiction is in-

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15. *Cf.* Rodriguez v. Pacificare of Texas, Inc., 980 F.2d 1014, 1018–19 (5th Cir. 1993). While recognizing that §1367 did not apply to the case, which was removed in 1989, the *Rodriguez* court held that the exercise of supplemental (pendent party) jurisdiction was not reversible error, despite the court's prior disapproval of the very claim configuration involved, reasoning that it would make no sense to reach a result that Congress deliberately repudiated for future cases.

Under 28 U.S.C. § 1446, in order to remove an action, defendants must file in the appropriate district court a notice of removal signed pursuant to Rule 11 of the *Federal Rules of Civil Procedure* and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon the defendant in the action; promptly thereafter, the defendants must give written notice of the filing to all adverse parties and must file a copy of the notice with the clerk of the State court in which the action has been pending, "which shall effect the removal." 28 U.S.C. § 1446(d) (1988 & Supp. III 1992).

16. For example, when Congress amended 28 U.S.C. § 1332 in 1988, it explicitly made some of the amendments applicable to "any civil action commenced in or removed to a United States district court on or after the 180th day after the date of enactment ...." Pub. L. 100-702, §§ 202(b), 203(b) (1988). Congress made the amendment raising the monetary minimum to $50,000 applicable to "any civil action commenced on or after" that same date. Pub. L. 100-702, § 201(b) (1988). In these circumstances, some courts held that removed actions were "commenced," for purposes of determining whether the increased jurisdictional amount requirement applied, on the date of removal. *See, e.g.*, Sayers v. Sears, Roebuck & Co., 732 F. Supp. 654 (W.D. Va. 1990). Others held the date of filing in state court to be the pertinent date. *See, e.g.*, Rhinehart v. Cincinnati Inc., 716 F. Supp. 7 (E.D. Mich. 1989). Siegel's Commentary on [the] 1988 Revision, 28 U.S.C.A. § 1332 (1966 & Supp. 1991), submits that the former is the sounder approach. David D. Siegel, Commentary on 1988 Revision [of 28 U.S.C. § 1332], *reprinted in* 28 U.S.C. § 1332 (1966 & Supp. 1992).

voked.[17] However, the latter is unqualifiedly the rule only in federal question cases; diversity of citizenship must exist both at the time an action was filed in state court and when removal was effected.[18] Finally, use of the removal date in determining the applicability of the supplemental jurisdiction statute better serves the purpose of the statute, to supplant the pre-existing state of the law with the statutory scheme.[19]

IV. THE INTERPLAY OF THE SUPPLEMENTAL JURISDICTION STATUTE AND THE REMOVAL STATUTES

A. *Section 1367 and Removed Federal Question Cases*

1. What is Removable? Who has to Join in the Notice of Removal?

Assuming that § 1367 applies to removed cases, I turn to the interplay between the supplemental jurisdiction statute and the removal statutes. Section 1441(a) says, "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts ... have original jurisdiction, may be removed by the defendant or defendants ...." Then, § 1367 empowers the district courts to hear various claims within that civil action, under their supplemental jurisdiction. But what is the scope of a removable "civil action"? Are pendent party claims included? And, in a federal question case, when non-diverse co-defendants are sued on state law claims that are part of the removable civil action, will all defendants have to join in the notice of removal? Is it possible that claims could be asserted in a state court lawsuit that would be outside the scope of a removable civil action composed of other claims filed therein? What would happen then?

Under the pre-§ 1367 law, the courts almost unanimously had agreed that, in authorizing removal of "civil actions," § 1441(a) both allowed and required pendent and ancillary claims to be removed along with the substantial

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17. *See, e.g.*, Cedillo v. Valcar Enters. & Darling Del. Co., Inc., 773 F. Supp. 932, 939 (N.D. Tex. 1991) (citing by analogy FDIC v. Loyd, 744 F. Supp. 126, 129–30 (N.D. Tex. (1990)) (Judicial Improvements and Access to Justice Act controlled case removed 15 days prior to effective date of law), *rev'd on other grounds*, 955 F.2d 316, 320 n.3 (5th Cir. 1992).

18. Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, the New Law, and Rule 19*, 38 KAN. L. REV. 863, 871–72 n.23 (1990). The purpose of this dual requirement is to prevent the manufacture of diversity jurisdiction through a change of domicile.

19. Courts have stretched the language of § 1367 in other ways to render it applicable to claims that might have been regarded as preceding the statute's effective date. *See, e.g.*, Greisbach Invs. Ltd. v. Compania Dominicana de Aviacion, No. 90-CV-1931 (DRH), 1992 WL 390242 (E.D.N.Y. Dec. 10, 1992) (regarding counterclaims filed after § 1367's effective date as "civil actions," and therefore governed by § 1367, although the complaint in the action had been filed prior to December 1, 1990; distinguishing inconsistent authority by noting (in its footnote 3) that the counterclaims independently satisfied the requirements for diversity jurisdiction; the court did not spell out the significance or implications of that fact); *In re* Joint E. & S. Dists. Asbestos Litig., 769 F. Supp. 85, 87 (E. & S.D.N.Y. 1991) (third-party complaints filed after § 1367's effective date would be governed by § 1367 although the complaint in the action had been filed prior to December 1, 1990); Fleming Cos. Inc. v. Hope Plaza, Inc., No. 90-6323, 1992 WL 30565, (E.D. Pa. Feb. 12, 1992) (same, as to third-party complaints). *But see* Brookfield–N. Riverside Water Comm'n v. Martin Oil Mktg., Ltd., 1992 WL 63274 (N.D. Ill. March 12, 1992) (refusing to regard a third-party complaint filed after § 1367's effective date as a "civil action" governed by § 1367, where plaintiff's complaint was filed before Dec. 1, 1990).

federal claim with which they shared a common nucleus of operative fact.[20] Decisions of the Supreme Court were in accord.[21] In light of this history, and the fact that the label "supplemental jurisdiction" used in § 1367 embraces the doctrines of pendent and ancillary jurisdiction,[22] it would seem to follow that § 1441(a) authorizes the removal of both the claims over which there is an independent basis of federal subject matter jurisdiction and the claims that are now within supplemental jurisdiction, as defined by § 1367.[23]

It is worthy of note that the combinations of claims that now are removable, pursuant to the interaction of §§ 1441(a) and 1367, include combinations that would not have been removable before. This is true primarily of federal question cases[24] and is largely attributable to § 1367's authorization of pendent party jurisdiction. Consequently, the expansion in the universe of actions removable under § 1441(a) is matched by an equal expansion in the universe of cases that can be heard after being filed directly in the federal court. Today, if P sues D1 on a federal question and D2 on a state law claim that is so related to the federal question that they form part of the same Article III case, both claims can be heard in federal court, whether the action is commenced there or was filed in state court and then removed. Prior to § 1367, and particularly post-*Finley*,[25] this set of claims would not have been removable to federal court, unless Congress had expressly authorized the exercise of pendent party jurisdiction over the claim against D2.[26] Moreover, D1 would not have been permitted to remove only the federal question claim, leaving the state claim in state court. Although one could have argued that the federal claim alone constituted the "civil action" that § 1441(a) made removable, because joinder of the state

20. *See* Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 931-32 (1988). For arguments in support of this conclusion, see *id.* at 933-37.

21. *See* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) ("The state-law claims fell within the jurisdiction of the District Court to which the action was removed because they derived from the same nucleus of operative fact as the federal law claim."). *See also* Caterpillar Inc. v. Williams, 482 U.S. 386 (1987), Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987), and Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986), *all described in* Steinman, *supra* note 20, at 937 nn.81-86.

22. H.R. Rep. No. 734, 101st Cong., 2d Sess. 27 (1990).

23. Some courts have so construed § 1367. *See, e.g.*, Cedillo v. Valcar Enters. & Darling Del. Co., Inc., 773 F. Supp. 932, 939-42 (N.D. Tex. 1991); Alexander *ex rel.* Alexander v. Goldome Credit Corp., 772 F. Supp. 1217, 1219-20 (M.D. Ala. 1991); Doe v. Alpha Therapeutic Corp., 763 F. Supp. 1039, 1041-43 (E.D. Mo. 1991); Di Loreto v. Di Loreto, No. 90-8126, 1991 U.S. Dist. LEXIS 10075 (E.D. Pa. July 19, 1991).

24. It also may be that the combinations of claims that now are removable, pursuant to the interaction of §§ 1441(a) and 1367, include combinations that previously would not have been removable in the diversity context, in particular in diversity class actions. *See* Freer, *supra* note 4, at 485-86; Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 102-04 (1992); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1817-20 (1992).

25. *Finley* disapproved pendent party jurisdiction except when expressly authorized by Congress. *See* Finley v. United States, 490 U.S. 545, 549-56 (1989).

26. For cases rejecting pendent party jurisdiction in removed cases post-*Finley*, see, e.g., Sarmiento D.V.M. v. Texas Bd. of Veterinary Medical Examiners, 939 F.2d 1242 (5th Cir. 1991); Lewis v. Windsor Door Co., Div. of Ceco Corp., 926 F.2d 729 (8th Cir. 1991); Ortega v. Schramm, 922 F.2d 684 (11th Cir. 1991); Alumax Mill Prods., Inc. v. Congress Fin. Corp., 912 F.2d 996 (8th Cir. 1990); Johnson v. Reserve Life Ins. Co., 761 F. Supp. 93 (C.D. Cal. 1991); Admiral Ins. Co. v. L'Union des Assurances de Paris Incendie Accidents, 758 F. Supp. 293 (E.D. Pa. 1991); Perkins v. Halex Co. Div. of Scott Fetzer, 744 F. Supp. 169 (N.D. Ohio 1990).

law claim against D2 created something more than a "civil action" for federal jurisdictional purposes, that is not how § 1441(a) was construed. The whole lawsuit was regarded as a unit that either was or was not subject to removal under § 1441(a).[27]

It also should be noted that Congress's authorization of supplemental jurisdiction over pendent party claims obviates the problem that plaintiffs (sometimes) could prevent removal simply by joining with their federal claims a related state claim against another defendant. This machination worked particularly well in courts which construed § 1447(c) to require remand of the entire action.[28] That device will no longer work, for the case will be properly removable, and if the federal court decides not to hear the supplemental claim, it will do so as an exercise of discretion which will have no effect on its power and its duty to litigate the federal question claims.

One question that arises because of § 1367's recognition of pendent party jurisdiction is whether pendent defendants, those in the position of our friend D2, must join in the notice of removal. Section 1446(a) has long been construed to require all properly joined and served defendants to join in the notice of removal.[29] In the past, however, if the action was removable, all such defendants were the target of claims that had an independent basis of federal subject matter jurisdiction. Now, there will be purely tag-along defendants. Should a defendant against whom only state law claims are filed be able to thwart the desire to be in federal court of a defendant against whom a federal question claim is pending? Similarly, should a plaintiff who sues a defendant on a federal question be able to thwart the latter's anticipated preference for federal court by joining a defendant, believed to favor state court, against whom plaintiff pleads only a state law claim?

On the one hand, it always has been the case that co-defendants who saw their interests as best served by remaining in state court could thwart removal, and that plaintiffs could limit defendants' ability to remove in various ways: by suing only on state law claims, by joining co-defendants who were potential obstacles, by joining a non-diverse defendant or a defendant who was a citizen of the state in which the action was brought, in potential diversity actions—so long as the claim was not "fraudulent," among other devices. Arguably, the joinder of a pendent claim against a tag-along defendant would be just one more way in which plaintiffs could create a potential obstacle to removal.

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27. *See* Steinman, *supra* note 20, at 943–46.

28. *See, e.g.*, Gibson v. City of Glendale Police Dep't, 786 F. Supp. 1452 (E.D. Wis. 1992) (where court lacked pendent party jurisdiction, action asserting federal question claims against some defendants and state law claims against others was improperly removed and, there being no basis in the removal statutes for "partial remand," the case in its entirety had to be remanded). The strategy described in the text did not always work, however. In some instances, courts chose to remand only the state law claims against the pendent party defendant, rather than the entire action. *E.g.*, Charles D. Bonanno Linen Serv., Inc. v. McCarthy, 708 F.2d 1 (1st Cir.), *cert. denied*, 464 U.S. 936 (1983); Johnson v. AT&T Technologies, Inc., 713 F. Supp. 885, 892–93 (M.D.N.C. 1989); Contemporary Servs. Corp. v. Universal City Studios, Inc., 655 F. Supp. 885 (C.D. Cal. 1987); Adolph Coors Co. v. Sickler, 608 F. Supp. 1417 (C.D. Cal. 1985). *See* Steinman, *supra* note 20, at 979–90.

29. 28 U.S.C. § 1446(a) prescribes what "[a] defendant or defendants desiring to remove any civil action" must do. *See supra* note 15. *See, e.g.*, Gableman v. Peoria, D. & E. R.R., 179 U.S. 335, 337 (1900) (rule of unanimity requires all parties served with complaint to join or assent to removal); Garside v. Osco Drug, Inc., 702 F. Supp. 19, 21 (D. Mass. 1988) (same). *See* Steinman, *supra* note 18, at 878 & n.47.

On the other hand, when a set of claims falls within § 1441(c), where there is a federal question claim that is separate and independent of, but joined with, otherwise non-removable claims, the defendants on the federal claim may remove the entire case to federal court, without the cooperation of the other defendants.[30] One may well ask why federal question defendants should be less able to effectuate removal when joined with *pendent* tag-along defendants than when the state law claims asserted against their co-defendants are "separate and independent." Yet that would be the result if pendent tag-along defendants were required to join notices of removal, and therefore could thwart removal by their refusal to do so. From the perspective of the federal question defendant, the allure and propriety of the federal forum is no less in the former situation than in the latter. It is true that a plaintiff suing a "pendent party defendant" has a more obvious justification for the joinder than has a plaintiff suing different defendants on two truly separate and independent claims. The former plaintiff also has a stronger interest in not having the defendants be split, leaving the plaintiff with two duplicative cases to litigate, rather than one, more efficient, litigation package. However, the relationship between the claims will favor federal court adjudication of both claims, rather than remand of the state law claim, so plaintiff would seem to have little to worry about in this regard. The pendent defendant has a strong interest in whether the case is removed, again because the relationship between the federal question claim and the state law claim against him will favor federal court adjudication of both claims, rather than remand of the state law claim. Thus, the pendent defendant (like the plaintiff) is likely to lose the more appropriate state law forum for the state law claim. However, this is a price that Congress has indicated a willingness to have litigants pay; it is the other side of the coin from making the federal courts a practical arena for the resolution of an entire controversy.[31] Moreover, the federal court has the means to protect the interests of pendent defendants through its discretion not to exercise supplemental jurisdiction. If the federal court should decide under § 1367(c) to remand the state law claim, the latter returns to its "natural" home, but the court systems and the litigants sacrifice something in efficiency, and potentially in fair and complete relief, as well.

A caveat here is the possible non-applicability, through redundancy or unconstitutionality, of § 1441(c),[32] which would eliminate any anomaly. Even then, however, Congress's policy choice in § 1441(c) to allow only the defendants against whom federal question claims were asserted to determine whether a civil action should be removed, and the reasoning underlying that choice, would be relevant to the decision to be made under § 1446(a) as to who must join the removal notice.

It seems to me that because the federal question claims are the basis for and the *sine qua non* of removal, and for the other reasons stated above, only the defendants on the federal question claims should be entitled to remove and only they should need to join the notice of removal. I realize that my proposal

30. *See, e.g.*, Richards v. Harper, 864 F.2d 85 (9th Cir. 1988); Thomas v. Shelton, 740 F.2d 478 (7th Cir. 1984).

31. To the extent that the state law claim raised no novel or complex issues of state law, the "need" for state court adjudication would be lessened, and to the extent that the federal court took advantage of mechanisms allowing certification of questions to the state court, the absence of the state's authoritative voice would be cured.

32. *See infra* text accompanying notes 53–56.

argues for a deviation from the long-standing construction of the basic removal statute, but that statute has never before had to be applied to situations of congressionally authorized pendent party jurisdiction.[33]

Finally, it is important to recognize that despite the ways in which §§ 1441 and 1367 have expanded the claim combinations that are removable, even today, under state rules governing the joinder of claims and parties, com-

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33. There is at least one case tending against my position in the relatively few pre-§ 1367 cases in which federal courts were urged to exercise pendent party jurisdiction in removed actions. Reiken v. Nationwide Leisure Corp., 458 F. Supp. 179, 181–82 (S.D.N.Y. 1978) (remanding a case as improvidently removed where court assumed without deciding that pendent jurisdiction extended to confer jurisdiction over defendants joined only on state law claims, and these defendants had not joined in the removal petition and had moved to remand). The court cited in support Chicago, R. I. & P. Ry. Co. v. Martin, 178 U.S. 245 (1900), but it appears to be inapt. There, defendant receivers sought to remove. Assuming that as to the receivers the case arose under federal law, the Court asked whether it was necessary for the defendant railroad to join in the removal application. It concluded that it was necessary, the case having presented "a joint cause of action against all the defendants." *Id.* at 248. Martin would seem then to have been a situation in which, if a federal question were pleaded against any defendant, a federal question was pleaded against all; there were no pendent party defendants. The Court went on to conclude that no federal question was presented. *Id.* at 251.

Alexander *ex rel.* Alexander v. Goldome Credit Corp., 772 F. Supp. 1217, 1219–23 (M.D. Ala. 1991), discussed whether pendent party defendants had to join in a notice of removal. Plaintiffs sued Goldome on a federal Truth in Lending Act claim, for fraud and breach of contract, and sued other defendants (call them D2 and D3) on the state law claims only. Goldome filed a timely notice of removal. The court concluded that, in light of § 1367, it was possible that the court could exercise pendent party jurisdiction over D2 and D3, so that removal could be proper under § 1441(a) and (b). However, it concluded that the notice of removal was defective because it had not been joined in by all defendants over whom the state court had acquired jurisdiction, and the time had passed in which the notice could be amended to add D2 and D3. The court did not consider the possibility that for reasons such as those marshalled in the text above it was unnecessary for the pendent parties to have joined in the removal notice. The persuasiveness of the court's opinion is also weakened by the court's conclusion that the case nonetheless had been properly removed under § 1441(c), which required only Goldome (the defendant on the federal question claim) to remove. This latter holding weakens the former because, if the claims truly were separate and independent, the reasons for and against requiring the other defendants to join the removal notice would be supplanted by the policies that underlie § 1441(c)'s lesser requirement. In addition, although the court regarded § 1441(c) as superfluous in view of § 1367, and as supplanted by § 1441(a) and (b), it did not consider whether § 1441(c)'s lesser requirement, in regard to who must join the removal notice, was nullified, and implicitly held to the contrary.

More recently, Doe v. Kerwood, 969 F.2d 165, 167–69 (5th Cir. 1992), rejected the argument that unanimity is required only among those entitled to remove, in the context of an attempted removal by the American Red Cross, which invoked federal jurisdiction by virtue of the "sue and be sued" clause of its federal character, 36 U.S.C. § 2 (1988). The court reasoned that, under established precedent and because a defendant should not be permitted to impose his choice of forum on unwilling defendants and an unwilling plaintiff, the Red Cross had to obtain the consent of its co-defendants. However, other courts have declined to follow *Doe*. In Roe v. Little Company of Mary Hospital, 91 C 1781, 1992 WL 454141 (N.D. Ill. Dec. 18, 1992), the court held that the Red Cross was not required to gain the consent of its co-defendants in order to remove the action. The court based its conclusion on the circumstance that, "the Red Cross, by virtue of its independent party-based jurisdictional grant, is the only party with a substantive right to remove the matter." *Id. Accord* Raybould v. American Red Cross, No. H-91-754 (S.D. Tex. May 28, 1991); Parisi v. Rochester Cardiothoracic Assocs., P.C., No. 91-CV-6387T (W.D.N.Y. June 29, 1992); Garcia v. American Red Cross, No. CV-92 2513-WJR (TX) (C.D. Calif. Aug. 12, 1992); Murphy v. St. Vincent Hosp., Inc., C.A. No. 92-11671-Y (D. Mass. Sept. 12, 1992) *all cited in Roe.* Although some of the situations under consideration in this Article are distinguishable because federal jurisdiction is based on 28 U.S.C. § 1331 rather than on a party-based jurisdictional grant, in these situations too only the parties with a substantive right to remove should be required to join in the notice of removal. Merely pendent parties should not be viewed as having that right.

binations of claims can be filed in state court that exceed the scope of an Article III case or controversy, as those concepts have heretofore been understood. The simplest example might be an unrelated state law claim asserted by a plaintiff along with a federal question, or a permissive counterclaim that lacks an independent basis of federal subject matter jurisdiction which is asserted in response to a claim within federal question jurisdiction.[34] In such circumstances, I expect the "old" rules to apply.

> As a practical matter, courts deal with contentions of unauthorized removal in the context of motions to remand. ... Sections 1441(a) and (b) do not expressly address the scope of remand when a removal is unauthorized and brings before the federal court a claim or set of claims that exceeds the bounds of a civil action over which the federal courts have original jurisdiction. Section 1447(c) does address the question.[35]

It directs that, "[i]f ... it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Under this provision, if a defendant had filed a notice of removal in a case which included both a federal question claim and an unrelated state law claim filed by the plaintiff or a permissive counterclaim that lacked an independent basis of subject matter jurisdiction, the court could conclude that the entire case had to be remanded. When a permissive counterclaim has been filed, the courts typically do remand the entire case on the ground that the defendant waived its right to remove by filing the counterclaim.[36] When the plaintiff has filed a federal question claim and an unrelated state law claim, construing § 1447(c) to mean that all of what came "up" should go back "down" if the removal was improper would maintain symmetry between what was removed and what is remanded, and would keep together all the claims asserted in state court, but may have little else to recommend it. Since, by hypothesis, any problematic claims in the group will not have derived from a common nucleus of operative fact with the jurisdiction-grounding claims, little efficiency or fairness would be sacrificed by their separation. It

34. It should be noted, however, that ordinarily a defendant would not file a counterclaim that could impede her ability to remove or might endanger the removal and provoke a remand. To do so would obviously be counterproductive. A defendant who had filed a permissive counterclaim before the action became removable could voluntarily dismiss it so as not to cloud or destroy the removability of the action, and then file its removal notice. Of course, it is possible that the courts could define an Article III case to include permissive counterclaims or any and all unrelated claims that a plaintiff might assert, but that has not happened yet. One of the interesting aspects of § 1367(a) is the opportunity it presents to the courts to reexamine and redefine a constitutional "case" and "controversy." *See* Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1401, 1479 (1983) ("Supplemental 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."); Ellen S. Mouchawar, Note, *The Congressional Resurrection of Supplemental Jurisdiction in the Post-*Finley *Era*, 42 HASTINGS L.J. 1611, 1614 (1991) (§ 1367 "empowers federal courts to exercise supplemental jurisdiction whenever a logical relationship exists between the federal and nonfederal claims, thus providing an efficient and just litigation of claims in a single lawsuit."); Steinman, *supra* note 24, at 86–91.

35. Steinman, *supra* note 20, at 985.

36. *See, e.g.*, Morgan v. Nikko Secs. Co. Int'l, Inc., 691 F. Supp. 792, 799 (S.D.N.Y. 1988); Harris v. Brooklyn Dressing Corp., 560 F. Supp. 940, 942 (S.D.N.Y. 1983); Sood v. Advanced Computer Techniques Corp., 308 F. Supp. 239, 242 (E.D. Va. 1969). *See generally* 1A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.157[9], at 154 (2d ed. 1990 & Supp. 1989–90).

might therefore be preferable for the court simply to dismiss or remand[37] the unrelated nonfederal plaintiff's claim or any other claim outside the scope of an Article III case or controversy. A final possibility is that § 1441(c) might be applicable, in which case the court could remand all matters in which State law predominates.

2. Power and Discretion over Removed Claims

Whatever is decided as to who must join in the notice of removal, if there is a proper removal of an entire civil action, the next question that arises is what power and discretion the district court has *vis-à-vis* the claims. As to claims for which there is an independent basis of federal jurisdiction, the court has all the same powers and discretion it would have if the action had been commenced in federal court. As to claims which may be heard only as a function of supplemental jurisdiction, the court may decline to exercise that jurisdiction under the circumstances specified in § 1367(c).

When an action is commenced in federal court, a court implements its decision to decline to exercise jurisdiction over a claim by dismissing that claim. When an action is removed to federal court, one's intuition might lead to the conclusion that any claim rejected under § 1367(c) should merely be remanded. In fact, however, the statutes do not provide for remand in these circumstances. Section 1447(c) authorizes remand only for defects in removal procedure and "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction," in which circumstance, "the case shall be remanded."[38] When the court merely has concluded that, as a matter of discretion, it will not exercise its jurisdiction, § 1447(c) is inapplicable because there has been no determination that the court lacks jurisdiction, even over the rejected claim.[39] Moreover, § 1447(c) calls for remand of the entire case, but § 1367(c) authorizes the courts to decline jurisdiction over only the claims within supplemental jurisdiction, not to decline jurisdiction over claims over which there is an independent basis of jurisdiction.[40]

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37. *But see* my criticisms of remands lacking statutory authorization *in* Steinman, *supra* note 20, at 957–68. No remand of individual claims is authorized by § 1447(c), which authorizes only remands of entire cases.

38. 28 U.S.C. § 1447(c) (1990).

39. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 355 n.11 (1988) (§ 1447(c) does not apply to cases in which a federal court has pendent jurisdiction); *In re* Surinam Airways Holding Co., 974 F.2d 1255, 1257 (11th Cir. 1992) (a remand order pursuant to § 1367(c) is not premised on § 1447(c); it is not based on either a defect in removal procedure or a lack of jurisdiction); Administaff, Inc. v. Kaster, 799 F. Supp. 685, 688 (W.D. Tex. 1992) (same). *See* Steinman, *supra* note 20, at 962–63.

40. *But see Administaff, Inc.*, 799 F. Supp. at 688–89 (interpreting § 1367(c) to authorize remand of an entire case whenever it may decline to exercise supplemental jurisdiction over a state claim under § 1367(c). The court held in the alternative that the case ought to be remanded as a matter of abstention under Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941)). If a case containing substantial federal question claims and pendent claims were commenced in federal court, the court would not have discretion to dismiss the federal claims because the state claims predominated, the state law issues were novel or complex, or economy and efficiency would be served by keeping the claims together. The federal court could dismiss the federal claims only if one of the abstention doctrines that is implemented by dismissal applied; *Pullman* abstention is supposed to be implemented by a stay of the federal action. The Kaster court's construction of § 1367(c) denigrates defendants' historic right to a federal forum for the federal claims asserted against them. Denial of the federal forum to federal claims, particularly to claims that constitutional rights were violated under color of state law (as

In *Carnegie–Mellon University v. Cohill*,[41] a pre-§ 1367 case, the Court rejected the argument that the grounds for remand specified in the removal statute are exclusive, and it justified remand of pendent claims by reference to the *Gibbs*[42] doctrine, which it found was designed to enable courts to handle cases involving state law claims in the way that best accommodates the policies of economy, convenience, fairness, and comity. The Court opined that *Gibbs* established that the judicial branch is to shape and apply the pendent jurisdiction doctrine in light of the doctrine's purposes.[43] Some years ago, I criticized *Carnegie–Mellon* as making unwarranted inferences from the pendent jurisdiction doctrine because none of the underlying policies justifies remand as opposed to dismissal and because, in the statutes articulating when courts may order remands, Congress constrained the courts' freedom to handle pendent claims in whatever way they believe best.[44] Today, I would add that *Finley* may have weakened the legitimacy of the remand power recognized in *Carnegie–Mellon* since the source of that judge-made remand power was the common law doctrine of pendent jurisdiction, and *Finley* undermined all supplemental jurisdiction that is not Congressionally conferred. Consequently, it is perhaps less clear than it was before that the courts have the authority to express their decision to decline supplemental jurisdiction over a removed claim by remanding it when no statute authorizes remand.[45]

My conclusion is further bolstered by the enactment of § 1367(d).

> [T]he Supreme Court in *Carnegie–Mellon* explained its preference for an option to remand by reference to the benefits inherent in avoiding the possible interdiction of the statute of limitations, and in avoiding federal court adjudication of state claims out of concern that the claims would be time barred from the state courts.[46]

With the enactment of § 1367's tolling provision, it is no longer necessary to recognize a court-made right to remand in order to save from oblivion the claims that are disgorged from federal court. The directness of remand and reduced costs to the litigants, as compared with those entailed in dismissal and refiling, may make remand marginally preferable; but that argument should be addressed to Congress.

Finally, it is worthwhile to note one important difference between the consequences that will flow from expansion into the post-§ 1367 world of the discretion-to-remand recognized in *Carnegie–Mellon* and the consequences that will flow if that discretion is rejected as erroneous or now unnecessary. Either

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was alleged in Kaster) seems highly questionable. *See* Gibson v. Glendale Police Dep't, 786 F. Supp. 1452, 1457 (E.D. Wis. 1992) (noting, however, that the troublesome nature of forcing parties to litigate federal civil rights in state court is lessened when the civil rights plaintiff, the intended beneficiary of § 1983, has elected to sue in the state forum).

41. 484 U.S. 343 (1988).

42. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

43. *Cohill*, 484 U.S. at 351.

44. *See* Steinman, *supra* note 20, at 968–70.

45. One might respond that *Finley* reflects concern about judicial aggrandizement of judicial power beyond that clearly conferred by Congress, whereas *Gibbs* exemplifies discretionary doctrines that reduce federal judicial power to less than Congress authorized, a matter about which the Court is less concerned. At worst, the implication is that *Finley* does not strengthen my argument against a judicially created power to remand; it does not weaken the argument in any way.

46. Steinman, *supra* note 20, at 970–71.

way, a court will be able to rid itself of pendent party claims while retaining pendent claims, do the opposite, or retain some claims in each category while ridding itself of the others. If the *Carnegie-Mellon* model is followed, the court can remand some or all of the claims that it declines to hear, dismissing any it does not remand or adjudicate. If the *Carnegie-Mellon* model is rejected, the court can only dismiss any claims it does not adjudicate. The significance of this difference is that the choice of remand versus dismissal may determine the reviewability—ever—of the district court's decision not to hear claims within its supplemental jurisdiction.[47] The key issue is whether discretionary remands of claims within the courts' supplemental jurisdiction are governed by § 1447(d)'s prohibition[48] or fall within an exception to, or outside of, that rule. If discretionary remands are unreviewable, while discretionary dismissals are subject to appellate review, the method of disgorgement from federal court will matter. If discretionary remands are reviewable, that concern will drop away, but other questions will arise, including how review will come about.[49] In addition, we have a system which provides appellate review for discretionary dismissals (and perhaps discretionary remands) of supplemental claims, but which denies appellate review to nondiscretionary decisions against the constitutional or statutory authority of the federal courts to hear removed claims. While I support greater access to the appellate court,[50] a set of rules that allows appellate courts to review remands based on technical defects in removal procedure[51] or ordered in the exercise of discretion but denies them the ability to review remands based on the fundamental question of federal jurisdiction is most peculiar. It is hard to fathom that Congress would have intended such a scheme. The system is perverse, and ought to be fixed. In my view, Congress ought to repeal § 1447(d)'s prohibition against appellate review of remand orders.[52]

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47. *Id.* at 991–1010.

48. "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise ...." 28 U.S.C. § 1447(d) (1988).

49. *See* Steinman, *supra* note 20, at 1005–06 (mandamus is unlikely for abuse of discretion; it is unclear whether remand orders are final judgments, *see* Railroad Co. v. Wiswall, 90 U.S. (23 Wall.) 507, 508 (1875), or appealable collateral orders, and once claims are remanded, a federal appellate court no longer has jurisdiction to review the remand, while a state appellate court cannot review the federal court's decision to remand). *But see In re* Surinam Airways Holding Co., 974 F.2d 1255, 1257 (11th Cir. 1992) (§ 1441(d) did not bar the appellate review, on petition for writ of mandamus, of a § 1367(c) discretionary remand because such a remand was not authorized by § 1447(c)); Hays County Guardian v. Supple, 969 F.2d 111, 124–25 (5th Cir. 1992) (§ 1441(d) did not bar appellate review of remand order that was part of the final judgment on the merits, and consequently was not authorized by § 1441(c); since remand of state law claims against defendants in their official capacities was proper under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), remand of state law actions against state officials in their individual capacity was proper under §1367(c)(4)).

50. *See* Steinman, *supra* note 20, at 1007–10.

51. *See infra* note 52.

52. For a further elaboration of the issues and recommendations as to how they should be resolved, see Steinman, *supra* note 20, at 991–1010. A further twist in the interpretation of the removal statutes as they relate to reviewability has developed since the publication of my Vanderbilt article. The Court had construed § 1447(d) to prohibit review of all remand orders issued pursuant to § 1447(c) during a period in which the latter provided for the remand of cases that had been "removed improvidently and without jurisdiction." *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976). Section 1447(c) has since been amended to eliminate reference to improvident removals and to permit motions to remand cases on the basis of defects in removal procedure, but only within 30 days after the filing of the notice of removal,

3. Supplemental Jurisdiction and § 1441(c) Removal

Section 1441(c) provides:

> (c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

There are a number of questions raised by § 1441(c),[53] not the least of which is whether it is either superfluous, in view of the combined effect of § 1441(a) and § 1367, or unconstitutional. As in the rest of this Article, I will make no effort to canvass all of the questions that § 1441(c) raises, but will focus upon those issues that are influenced by § 1367.

The argument as to § 1441(c)'s superfluity or unconstitutionality has been put succinctly by Professors Teply and Whitten:

> If wholly unrelated federal and state claims are within the same constitutional case or controversy, then original jurisdiction exists over such claims under 28 U.S.C. § 1331 and 1367(a), with the result that a case involving such claims is removable under 28 U.S.C. §§ 1441 (a) and (b). In this event, 28 U.S.C. § 1441(c) is superfluous. On the other hand, if to be within the same constitutional case or controversy, joined federal and state claims must arise from the same facts, then amended section 1441(c) can have no constitutional applications.[54]

There are arguments that "save" the constitutionality of § 1441(c), but they depend upon restrictive readings of other provisions. For example, as Teply and Whitten point out, one can argue that,

> Article III should be interpreted to permit joinder of factually unrelated federal and state claims when ... Congress has a legitimate reason for authorizing joinder, linked to policies designed to protect or enhance the operation of federal jurisdictional grants within Article III ... [and] that Congress has such legitimate purposes in precisely the situation now governed by 28 U.S.C. § 1441(c). ... [D]espite the Article III case or

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whereas it commands that a case shall be remanded if at any time before final judgment it appears that the district court lacks subject matter jurisdiction. Some courts have concluded (incorrectly, I believe) that the statutory changes

> reflect a congressional intent to delete improvident removal as an unreviewable basis for remand, at least when a motion to remand based on such improvident removal is made outside the 30-day time limit. This leaves remand orders for lack of subject matter jurisdiction as the only clearly unreviewable remand orders.

In re Shell Oil Co., 932 F.2d 1518, 1520 (5th Cir. 1991) (footnote omitted), *reh'g en banc denied,* 940 F.2d 1532 (5th Cir. 1991), *cert. denied,* 112 S. Ct. 914 (1992). *Accord* FDIC v. Loyd, 955 F.2d 316, 319–21 (5th Cir. 1992); *In re* Administrators of the Tulane Educ. Fund, 954 F.2d 266, 269 (5th Cir. 1992); Air–Shields, Inc. v. Fullam, 891 F.2d 63 (3d Cir. 1989).

53. *See, e.g.*, the questions posed in RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 28 (6th ed.) (Supp. 1991) (including questions concerning the applicability of § 1441(c) when the claim within the jurisdiction of § 1331 is nonremovable under § 1445; the authors arguing that "§ 1441(c) must mean that the entire case is removable only if the federal question claim 'would be removable if sued upon alone,' as the statute provided before the 1990 amendment"); and questions whether third-party defendants, or any parties other than defendants on the plaintiffs' claims, may remove under § 1441(c).

54. LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 125 (1991) (footnote omitted).

> controversy language found in 28 U.S.C. § 1367(a), Congress [arguably] did not mean to extend jurisdiction under that section to factually unrelated claims. Rather, Congress intended only to provide for "supplemental jurisdiction" over cases in which the federal and non-federal claims arise out of the same transaction or occurrence. If section 1367(a) is limited in its operation to factually related claims, and if Article III of the Constitution is interpreted to permit jurisdiction over factually unrelated claims in the situation now covered by 28 U.S.C. § 1441(c), the latter section will be neither superfluous nor unconstitutional.[55]

The debate over the superfluity or unconstitutionality of § 1441(c), along largely the same lines (although made more urgent by the expansive codification of supplemental jurisdiction in § 1367(a)), has been simmering for years in treatises, articles, and cases.[56] I refer my readers to other writings on Article III and § 1367(a) for discussion of how expansively or narrowly each of those provisions ought to be construed.[57] Although I make no effort to settle the issue here, I note the controversy as one influenced by § 1367.

Assuming a construction of Article III, § 1367(a) and § 1441(c) that renders the latter both constitutional and useful, another question is the fit between the latter two, on a purely statutory level. It should be noted, first, that § 1367(a)'s authorization of supplemental jurisdiction over certain claims is subject to the proviso, "[e]xcept ... as expressly provided otherwise by Federal statute." This exception clause permits Congress to curtail the supplemental jurisdiction that the courts otherwise would have, but it also permits Congress to expand the supplemental jurisdiction that courts otherwise would have.[58] Section 1441(c) can be viewed as an expansion of supplemental jurisdiction to situations in which it would not otherwise exist, to situations of claims that do not arise from the same transaction or occurrence as, or from a common nucleus of operative fact with, the federal question claim upon which the

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55. *Id.* at 125–26. There is support for this restrictive reading of § 1367 in its legislative history. Among other things, the House Committee Report described § 1367(a) as codifying the scope of supplemental jurisdiction first articulated in *Gibbs*. H.R. Rep. 734, 101st Cong., 2d Sess. 29 n.15 (1990).

56. *See, e.g.*, Thomas v. Shelton, 740 F.2d 478, 483 (7th Cir. 1984); Adolph Coors Co. v. Sickler, 608 F. Supp. 1417, 1428 (C.D. Cal. 1985); William Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 MINN. L. REV. 1, 25–26 (1961); Marilyn J. Ireland, *Entire Case Removal Under 1441(c): Toward a Unified Theory of Additional Parties and Claims in Federal Courts,* 11 IND. L. REV. 555, 571 (1978); John Henry Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action,* 66 HARV. L. REV. 423, 431–32 (1953); 14A CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3724, at 402–03 (2d ed. 1985 & Supp. 1991). For examples of arguments in support of the constitutionality of § 1441(c), prior to its amendment in 1990 and the enactment of § 1367, see Matasar, *supra* note 34; Steinman, *supra* note 20, at 935 n.72.

57. *See supra* note 4; Matasar, *supra* note 34.

58. The legislative history is silent on this matter. While this proviso probably was intended primarily to allow Congress to restrict supplemental jurisdiction, as it did in § 1367(b), *see* Wolf, *supra* note 4, at 33 ("The predicate clause in subsection (a) simply recognizes the power of Congress expressly to *limit* the exercise by the courts of supplemental jurisdiction."), if the courts read § 1367(a) narrowly (to go less far than the Constitution would permit, authorizing supplemental jurisdiction only when claims arise from a common nucleus of operative fact or from the same transaction or occurrence, for example—as Teply and Whitten argue) there could be reason to read the proviso clause to permit Congress to expand supplemental jurisdiction to situations that would be outside § 1367(a)'s ambit.

removal hinges.[59] Indeed, prior to the enactment of § 1367 and particularly post-*Finley*, a number of courts held § 1441(c) to be an affirmative Congressional authorization of supplemental jurisdiction of the kind that the Court in *Finley* insisted must exist.[60] In this respect, the sections fit together fine, complementing one another.

Similarly, when one considers the power and discretion of the district court over claims properly removed under § 1441(c), the provisions of § 1367 and of § 1441(c) do not contradict one another. Section 1367(c) is not prefaced by any "unless otherwise provided" clause and it spells out substantially more inclusive circumstances under which district courts may decline to exercise supplemental jurisdiction[61] than those authorized by § 1441(c) as grounds to remand matters, the latter authorizing remand only when State law predominates. However, the two provisions are not in conflict, *assuming* that § 1441(c) authorizes the removal of sets of claims that are beyond the scope of § 1367(a), because § 1367(c) applies only to exercises of supplemental jurisdiction "under subsection (a) [of § 1367]." So, § 1367(c) notwithstanding, courts dealing with claims removed pursuant to § 1441(c) continue to have discretion to remand matters only when state law predominates. For the same reason, there is no conflict between §§ 1367(c) and 1441(c) despite the fact that the former authorizes courts to decline jurisdiction only with respect to claims within supplemental jurisdiction (not with respect to those with an independent basis of jurisdiction),[62] while the latter allows remand of "all matters in which State law

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59. *See supra* note 55.

60. *See, e.g.*, Ortega v. Schramm, 922 F.2d 684, 691 n.8 (11th Cir. 1991) (per curiam); Watkins v. Grover, 508 F.2d 920 (9th Cir. 1974); Albar v. Illinois Dep't of Mental Health and Dev. Disabilities, 786 F. Supp. 1340, 1350, 1359 (N.D. Ill. 1992) (§ 1441(c) appears to contain an "affirmative grant" of pendent-party jurisdiction within the meaning of *Finley*; regardless of the availability *vel non* of pendent-party jurisdiction under § 1983, it is permissible to assert jurisdiction over a pendent-party plaintiff or defendant in a § 1983 case removed from state court); Simmons v. California Dep't of Indus. Relations, Div. of Labor Standards Enforcement, 740 F. Supp. 781, 789 n.15 (E.D. Cal. 1990).

61. *See supra* note 1.

62. Senator Grassley, a member of the Senate Judiciary Committee, took the position that "a district court *must* remand state claims that are so unrelated to the federal claim that they do not form part of the same Article III case or controversy." 136 Cong. Rec. S17581 (daily ed. Oct. 27, 1990) (Statement of Sen. Grassley) (emphasis added).

In Roe v. Little Company of Mary Hospital, 800 F. Supp. 620 (N.D. Ill. 1992), the court applied § 1367 to a removed case in which federal subject matter jurisdiction was present by virtue 36 U.S.C. § 2's grant where the American Red Cross is a party. The Red Cross was sued for negligence as a supplier of blood that was contaminated with the HIV virus. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465 (1992). The court determined that the negligence claims asserted against doctors, a hospital and other suppliers of blood were within the court's supplemental jurisdiction. Initially, the court apparently believed nonetheless that it had § 1441(c) discretion to remand the claims against the non-Red Cross defendants, *Roe*, 800 F. Supp. at 625, failing to appreciate that § 1441(c) applies only when separate and independent claims within the jurisdiction conferred by 28 U.S.C. § 1331 have been joined with otherwise non-removable claims. Here the claims were not separate and independent, nor was jurisdiction over the claim against the Red Cross conferred by § 1331. The court concluded at the same time, however, in light of § 1441(c)'s inapplicability to the case (because the removal had not been pursuant to § 1331), that § 1441(c) did not authorize the remand of the claim against the Red Cross. Despite the predominance of state law issues, the court ultimately decided to exercise supplemental jurisdiction over the non-Red Cross claims to avoid the problems that might be created by splitting the litigation into separate cases running parallel in the federal and state courts.

In a later decision, on a renewed motion to remand, the court again upheld the removal and found no reason under § 1367(c) to decline to exercise supplemental jurisdiction over the predominates." Some courts have interpreted that language to allow them to remand the entire removed set of claims, including the claims that fall within their § 1331 jurisdiction,[63] even though that interpretation arguably undermines the overall intent of § 1441(c).[64] Of course, if the claims that § 1441(c) authorizes to be removed are claims *within* the scope of § 1367(a), the provisions of the former regarding the occasions for remand and/or the scope of what may be remanded may be superseded by the more recent enactment; alternatively, the courts might hold that § 1441(c) trumps § 1367(c) in view of the former's greater specificity in dealing with particular kinds of removed cases.

An apparent consequence of §§ 1441(a), (b), (c) and 1367 is that plaintiffs will have no way to ensure that federal claims they file in state court will stay there. Under the new regime, a plaintiff who wants to prevent removal will have to refrain altogether from asserting claims within federal jurisdiction, and this is true in single plaintiff/single defendant cases as well as in multi-party cases. Consider the permutations. If a plaintiff sues a defendant on related federal and state claims, the defendant may remove the civil action pursuant to § 1441(a). Unless § 1441(c) is held unconstitutional, if a plaintiff sues a defendant on unrelated federal and state claims, the defendant will have a removable case, all of which the court can hear, pursuant to either § 1441(a) or § 1441(c), depending upon how §§ 1367 and 1441(a) are construed. Similarly, if a plaintiff sues a defendant on a federal question and a second defendant on a related state law claim, the defendant or defendants[65] may remove the civil action pursuant to § 1441(a). If a plaintiff sues a defendant on a federal question and a separate and independent state law claim and a second defendant on the latter only, then unless § 1441(c) is held unconstitutional, the federal defendant (or perhaps the defendants together) will have a removable case, all of which the court can hear, pursuant to either § 1441(a) or § 1441(c), depending upon how §§ 1367 and 1441(a) are construed.[66] If a plaintiff sues on a federal question and the defendant asserts (and doesn't voluntarily dismiss) an unrelated

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co-defendants. Roe v. Little Co. of Mary Hosp., 91 C 1781, 1992 WL 454141 (N.D.Ill. Dec. 18, 1992); *cf. In re* Surinam Airways Holding Co., 974 F.2d 1255 (11th Cir. 1992) (in a case removed by a third-party defendant foreign state pursuant to 28 U.S.C. § 1441(b) and (d), the court had no discretion to remand plaintiff's claims pursuant to § 1441(d) or § 1367(c), so long as the third-party claims were pending).

63. *See, e.g.*, Moralez v. Meat Cutters Local 539, 778 F. Supp. 368, 371 (E.D. Mich. 1991); Moore v. DeBiase, 766 F. Supp. 1311, 1320–21 (D.N.J. 1991); Alexander *ex rel.* Alexander v. Goldome Credit Corp., 772 F. Supp. 1217, 1223–25 (M.D. Ala. 1991).

64. *Accord* Thomas M. Mengler et al., *Recent Federal Court Legislation Made Some Noteworthy Changes*, NAT'L L.J., Dec. 31, 1990, at 20–21 (arguing for construction of "matters" to mean discrete claims to relief, even though state law predominates in every state law claim, and suggesting that courts might remand only those state claims that it is unconstitutional for them to hear and, consistent with the standards set forth in § 1367(c), those that predominate over the federal question claim).

65. *See supra* text at 29–33.

66. As experts in the field wrote years ago,

> This result may appear strange, but an even stranger result would be reached if "separate and independent" for purposes of Section 1441(c) is construed to require something more separate than is necessary for deciding that the claim does not fall within the ambit of pendent jurisdiction [today we would say "supplemental jurisdiction"]. This approach would create a tripartite classification. ... [I]f the relation between the claims is too close for Section 1441(c), but yet not close enough for Section 1441(b), no portion of the case would be removable. This result seems absurd, but reputable scholars have so read the statute.

14A WRIGHT ET AL., *supra* note 56, § 3724, at 401 (footnotes omitted).

state law counterclaim before the removal, the court may hold the action removable pursuant to § 1441(c), if not (a).[67]

While this scheme reflects a very broad policy of allowing either side's preference for federal court to prevail, trumping the preference of the opposition for state court, this is really as it has been since removal was created in 1789.[68] The only difference that § 1367 makes is that it expands defendants' trumping power to situations in which plaintiffs have sued some defendants on federal claims and other defendants on related state law claims only. In that situation, if the federal court believes that some or all of the state law claims should be heard in state court for any of the reasons enumerated in § 1367(c), it may decline to exercise supplemental jurisdiction over them.

B. Section 1367(b) and Removed Diversity Cases

Introduction

As a result of the particular focus of this project, I have not undertaken to question the very existence of diversity jurisdiction, nor have I broadly challenged the complete diversity requirement that, by judicial construction, applies to cases in federal court by dint of 28 U.S.C. § 1332. For the most part, I have taken both as givens, although in certain claim configurations I question the interpretations that some courts and commentators have given to the complete diversity requirement. Ultimately, this is unsatisfying. As Professor Chemerinsky has noted, "the law of diversity jurisdiction is filled with irrational and logically indefensible rules ... [and] the Supreme Court never has articulated a coherent theory for the concepts of pendent and ancillary jurisdiction."[69] Put the two together, as § 1367 does, and the result is necessarily problematic. There simply is no way to maximize judicial economy, convenience and fairness, and do complete justice among interested parties, policies that underlie supplemental jurisdiction, and at the same time stringently apply the complete diversity requirement and vindicate the notions of federal-state comity that may underlie it. But, while "the real problems lie ... deep[] ... in the law of federal jurisdiction,"[70] and are beyond the capacity of the lower federal courts to fix, those courts have to apply § 1367 to cases. They deserve some assistance, especially in applying it to special circumstances such as those presented by removed cases, in which the positions of plaintiffs and defendants are, in respects that are pertinent to jurisdiction, reversed from the parties' usual positions. This part of the Article is an effort to provide some of that assistance.

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67. *See* Continental Cablevision of Mich., Inc. v. Edward Rose Realty, Inc., No. L 87–17 CA 5, 1988 U.S. Dist. LEXIS 18088 (W.D. Mi. Aug. 26, 1988) (where plaintiff sued asserting rights under *inter alia* federal statutory and constitutional law and case was removed, court remanded counterclaims that replicated state court condemnation proceedings and others that court held to be permissive; at no point did it indicate that the removal had not been proper; however, the opinion is not clear as to whether the counterclaims were filed before or after the removal). *But see supra* text accompanying note 36.

68. For arguments in support of this policy choice, see Steinman, *supra* note 20, at 938–43, 986–90. I used the word "side" here but, as discussed earlier in the text, it remains to be seen whether in pendent party cases all defendants or only those against whom a federal claim has been asserted will be required to join in the notice of removal.

69. Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3, 5 (1992).

70. *Id.*

The discussion, earlier in this paper, of the applicability of § 1367 to removed cases and of the effective date of § 1367 *vis-à-vis* removed cases applies to cases within diversity jurisdiction as well as it does to federal question cases. The scope of removable actions and the power and discretion of the district courts over removed claims and subsequently joined claims pose somewhat different issues in diversity cases than they pose in federal question cases, however.

It is essential to keep in mind that, in determining removability, the courts look only at the claims that the plaintiffs have filed against the defendants.[71] As in cases initially filed in federal court, it is those claims that determine whether there is original jurisdiction, and hence removability. Historically, if the requirements of complete diversity and the statutorily specified amount in controversy were met by these claims, the civil action was removable; otherwise not.

Typically, the plaintiffs' claims against the defendants will be the only claims that have been filed in the state court suit when the notice of removal is filed, for the notice ordinarily must be filed within thirty days after the receipt by the defendant of a copy of the initial pleading setting forth the claim for relief upon which the action is based.[72] However, it is possible for additional claims to have been filed among the parties to the state court suit, particularly if the suit, as originally filed, was not removable and only became removable during the ensuing year.[73] In diversity cases, as in federal question cases, the "civil action" that § 1441(a) authorizes to be removed has included any and all claims within the federal courts' ancillary jurisdiction that had been filed in the state court action. These claims included compulsory counterclaims, cross-claims and third-party claims, among others.

Now, courts have to deal with § 1367(b), which provides:

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

71. Some courts have permitted removals pursuant to § 1441(c) at the behest of others, in particular third-party defendants, *see, e.g.*, Jones v. Petty-Ray Geophysical GeoSource, Inc., 954 F.2d 1061, 1066 (5th Cir. 1992); Carl Heck Eng'rs, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133, 136 (5th Cir. 1980), but the majority view is that third-party defendants may not effect a removal. *See generally* 14A WRIGHT ET AL., *supra* note 56, § 3724.

72. 28 U.S.C. § 1446(b) continues, "or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. ..." 28 U.S.C. § 1446 (1988).

73. Section 1446(b) provides in part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b) (1988).

> supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.[74]

Even in diversity cases filed in federal court, it is not clear which of plaintiffs' claims the courts will hold they have supplemental jurisdiction to hear under § 1367(b). By virtue of *Owen Equipment & Erection Co. v. Kroger*,[75] the federal courts did not have ancillary jurisdiction over the claims of plaintiffs against third-party defendants. Many courts did take ancillary jurisdiction over such claims if they were counterclaims, however.[76] Courts also accepted ancillary jurisdiction over a plaintiff's impleader claims against a non-diverse third-party when asserted in reaction to a counterclaim, and over cross-claims against a non-diverse co-plaintiff.[77]

To prevent circumvention of the complete diversity requirement, a long-standing judicial gloss upon § 1332 which appears to have Congress's approval, federal courts also disavowed and disallowed ancillary jurisdiction over the claims of plaintiffs against non-diverse Rule 19 and Rule 20 co-defendants. However, some courts did assert ancillary jurisdiction over the claims of plaintiffs against non-diverse intervening defendants,[78] particularly if the latter were not indispensable parties.[79] Similarly, courts asserted ancillary jurisdiction over claims asserted against defendants by non-diverse, non-indispensable intervening plaintiffs, particularly when the intervention was "of right." [80]

Section 1367(b) was intended to codify many of these outcomes and, although nothing in the statute *requires* any further constriction, it *could* be construed to limit even further (than prior case law had done) the supplemental jurisdiction of the district courts in diversity cases.[81] A general discussion of

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74. 28 U.S.C. § 1367(b) (Supp. III 1991) (emphasis added).

75. 437 U.S. 365 (1978).

76. *See, e.g.*, Hyman-Michaels Co. v. Swiss Bank Corp., 496 F. Supp. 663 (N.D. Ill. 1980), *aff'd sub nom.*, Evra Corp. v. Swiss Bank Corp., 673 F.2d 951, 959 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982) (plaintiff's compulsory counterclaim to third-party defendant's claim was within ancillary jurisdiction).

77. *See* authorities cited in Freer, *supra* note 4, at 463 n.103.

78. *See* Phelps v. Oaks, 117 U.S. 236 (1886), *infra* text accompanying notes 140–43. *Cf.* Schneider v. Dumbarton Devs., Inc., 767 F.2d 1007, 1017 (D.C. Cir. 1985) (ancillary jurisdiction over breach of contract claim against intervening assignee of contract); District of Columbia v. Merit Sys. Protection Bd., 762 F.2d 129, 132 (D.C. Cir. 1985) (in a case removed pursuant to 28 U.S.C. § 1442(a)(1), court had ancillary jurisdiction over plaintiff's claim for judicial review of a fee award to an intervening defendant, but should have remanded it as a matter of discretion; the court noted that the "price" of intervention is the possibility that the plaintiff will be able to obtain relief against the intervenor-defendant).

79. Many courts refused to permit the intervention of a person who is an indispensable party. In an alternative formulation, they refused to assert ancillary jurisdiction over such an intervenor's claims or defenses. *See, e.g.*, Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815, 819–21 (9th Cir. 1985); Chance v. County Bd. of Sch. Trustees, 332 F.2d 971, 973 (7th Cir. 1964); Kentucky Natural Gas Corp. v. Duggins, 165 F.2d 1011, 1015 (6th Cir. 1948). *See generally* 7C CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 1917, at 477–79 (1986 & Supp. 1991) . Of course, if the intervention was not permitted or ancillary jurisdiction over it was refused, the question never arose whether the court also would assert ancillary jurisdiction over the claims of plaintiffs against such intervenors.

80. Freeport-McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426 (1991) (reversing a dismissal for want of jurisdiction where a nondiverse plaintiff, who was not an indispensable party when the action was filed, was added after commencement of the suit and asserted a state law claim against the defendant).

81. Its legislative history states that,

the meaning and intent of § 1367(b) and of how it ought to be construed is beyond the scope of this paper, and can be found elsewhere.[82] Here, I want to focus upon issues that are unique to removed litigation or whose analysis and resolution may be influenced by the removal context, although I will address some issues that § 1367(b) raises generally and which have not been adequately analyzed elsewhere.

1. The Applicability of § 1367(b)

Having earlier discussed the applicability of § 1367(a) to removed cases, the first question that arises is the applicability of § 1367(b) to those cases. Subsection (b) declares that the district courts shall not have supplemental jurisdiction over specified claims, but its limitations apply only in civil actions of which the district courts "have original jurisdiction founded solely on section 1332." Some commentators have questioned whether this language includes removed diversity actions, over which the district courts arguably have jurisdiction *not solely* by virtue of 28 U.S.C. § 1332, but by virtue of the combination of §§ 1332 and 1441(a), (b).[83] If § 1367(b) applies to removed diversity actions, its limitations will apply to them, although the limitations may or may not apply in precisely the same manner as they will apply to diversity cases filed in federal court. The consequence of holding (b) inapplicable would be that supplemental jurisdiction would be available in removed diversity actions to the full constitutional limit, as provided in § 1367(a),[84] while more limited supplemental jurisdiction would be available in diversity cases filed in federal court. This would constitute a significant change in the law.

We should look first to the manifested intent of Congress. Looking exclusively to the language of § 1367(b), the matter can be argued either way. One can argue as above (with reference to the "founded solely on section 1332" language) that (b) is inapplicable. Alternatively, one can argue (as Professor Karen Nelson Moore has done) that "removal is simply the technique for moving a case from state to federal court and is not a source of original jurisdiction."[85] This reading is more consistent with the language of § 1441 itself. Section 1441 authorizes removal, without regard to the citizenship or residence of the parties, of civil actions of which the district courts have *original jurisdiction founded on a claim or right arising under the* Constitution, treaties or *laws of the United States*. It makes other actions removable only if none of the properly joined and served defendants is a citizen of the State in which such action was brought. Thus, Congress apparently did not view the removal statutes as a foundation of original jurisdiction. Moreover, language very much like the above-quoted language from § 1367 is most commonly understood to refer to

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> This section would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction. ... Subsection (b) makes one small change in pre-*Finley* practice ... Subsection (b) would ... exclud[e] Rule 23(a) [sic, intending Rule 24(a)] plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19.

H.R. Rep. No. 734, 101st Cong., 2d Sess. 28 (1990).

82. A many-faceted exploration of these issues may be found in the series of papers published by the Emory Law Journal and elsewhere; *see supra* note 4.

83. *See* Freer, *supra* note 4, at 485; Moore, *supra* note 10, at 58.

84. *See* Freer, *supra* note 4, at 485; Moore, *supra* note 10, at 58.

85. Moore, *supra* note 10, at 58.

cases that are not supported by any other, additional, basis of jurisdiction, such as federal question jurisdiction.[86] A failure to limit the operation of § 1367(b) to civil actions founded solely on diversity jurisdiction *in this sense* would have undermined the purpose of § 1367(a) to authorize supplemental jurisdiction, whenever constitutionally permissible, when a federal question claim was presented or federal actors were parties.

When one looks to the legislative history, one finds some tracks in the snow, but they are hard to interpret. The initial language of the bill that became § 1367(b) expressly excepted removed cases from the limitations on supplemental jurisdiction. It provided that, "If the original Federal claim in a civil action is founded solely on diversity of citizenship under § 1332, the original plaintiff may assert a non-Federal claim under paragraph (1) only against the original defendant or against a party or person who has been brought into the action by a party or person other than the plaintiff, *unless the action was removed from a State court.*"[87] However, as this provision was revised, the exception for removed cases was dropped, without explanation in the record.[88] It could be that the drafters dropped this reference at the same time they eliminated the reference to removed cases in then § 1367(a)(1),[89] in the belief that both were superfluous. It also could be that the drafters decided to drop this reference because of the difficulties of interpretation posed by the above quoted phraseology.[90] Alternatively, the drafters may have decided to just let the

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86. *Cf.* 28 U.S.C. § 1391 (Supp. III 1991) titled, "Venue generally." It provides:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) ...,(2) ..., or (3) ....
>
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in ... (1) ...,(2) ...,or (3) ....

Similarly, before the revision of section 1391 in 1990, it provided:

> (a) A civil action wherein jurisdiction is founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.
>
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law. ...

28 U.S.C. § 1391 (1988) (amended 1990).

87. H.R. 5381 § 120(a) [§ 1367(a)(ii)] (1990), *in* House Hearing, *supra* note 9; (emphasis added). This provision was supported by testimony in the hearings. *See id.* at 217, 226–27 (testimony of Alan Morrison, Director, Public Citizen Litigation Group) ("We agree that this prohibition against the joinder of non-diverse parties by the plaintiff should not apply if the plaintiff originally filed suit in state court and the case was removed to federal court by the defendant. In such situations, where the plaintiff has been forced into a forum not of its choosing, the plaintiff should not be penalized by the complete diversity rule by being required to pursue its case in more than one court when it would not have happened had it been able to keep its case in a state court of general jurisdiction."). It should be noted, however, that at the time of Mr. Morrison's comments, the bill also permitted a plaintiff whose complaint was based solely on state law to assert state law claims against any party brought into the action by the defendant, such as a third-party defendant, a provision that would have overruled Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). Consequently, his comments must be read against a legislative backdrop that was not nearly so forcefully supportive of the complete diversity rule as the ultimate legislation became. *See* Moore, *supra* note 10, at 59.

88. *See generally* House Hearing, *supra* note 9; Moore, *supra* note 10, at 59.

89. *See supra* text accompanying notes 9–10.

90. The initial language left it unclear what the rules were to be when an action was removed. The language seems to have been intended to allow plaintiffs to assert "non-federal" claims against persons other than the original defendant and against persons brought into the

courts figure out when an exercise of supplemental jurisdiction in a removed case would be inconsistent with the jurisdictional requirements of § 1332, or they may have concluded that supplemental jurisdiction should not be treated any differently in removed diversity cases than in diversity cases filed in federal court and have attempted to express this intent by eliminating the express exception for removed cases. Unfortunately, we can only guess what went through their minds. In light of the long history of keying jurisdiction in cases removed under § 1441(a) to jurisdiction in cases commenced in federal court, it seems highly unlikely that Congress intended to free supplemental jurisdiction in removed cases from the constraints that apply in cases filed in federal court. It also seems unlikely that, if Congress had so intended, it would have expressed its intent obscurely at best, by confining the limitations set in § 1367(b) to civil actions of which the district courts "have original jurisdiction founded solely on section 1332." I therefore conclude that Congress's intent was for § 1367(b) to apply to removed cases. Discussion of *how* it should apply can best proceed through examination of the various permutations that cases may present. However, I first interject an important caveat regarding § 1367(b), that will be of importance whether or not the subsection is held to apply to removed cases.

2. *An Important Caveat: Section 1367(b) Does Not Govern Claims Asserted Prior to Removal*

One interesting feature of the early version of the bill quoted above is that it seems to envision (and obscurely direct a court how to handle) a situation in which a plaintiff seeks to assert additional claims post-removal. The same is true of the § 1367(b) that was enacted. That section qualifiedly denies supplemental jurisdiction over claims by plaintiffs against persons made parties under one of several *Federal* Rules of Civil Procedure, and over claims by persons proposed to be joined as plaintiffs or seeking to intervene as plaintiffs under other of the *Federal* Rules. The referenced claims can be asserted only after a case is in federal court. Consequently, § 1367(b)'s limitations can apply only to claims asserted or proposed to be asserted post-removal; it does not govern claims (such as counterclaims, cross-claims or third-party claims) asserted in a state court action prior to its removal. If, as argued above, § 1367(a) does apply to removed diversity actions, then the federal courts will have supplemental jurisdiction over all the claims filed pre-removal that are so related to the claims within statutory diversity jurisdiction that they form part of the same case or controversy under Article III of the Constitution, regardless of whether the supplemental claims involve the joinder or intervention of additional parties. This will give the federal courts a very interesting opportunity to construe the Article III limits on a diversity controversy.[91] The Court has never decided, for example, whether in a diversity context a claim must arise from a common nucleus of operative fact with the claim that grounds jurisdiction, in order for the court to hear it.[92] If the common nucleus test need not be met, then in a re-

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action by persons other than the plaintiff, but would not have excluded the possibility that some, unspecified, limits on supplemental jurisdiction would have been appropriate.

91. Section 1367(a) already gives the courts a like opportunity to re-examine the scope of an Article III case in federal question cases. *See* Steinman, *supra* note 24, at 86–91.

92. In Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 371 n.10 (1978), the Court noted that the court of appeals had believed that the common nucleus of operative fact test determined the outer boundaries of constitutionally permissible federal jurisdiction based upon diversity of citizenship. The Supreme Court assumed without deciding that the court of appeals

moved diversity case, the court might well be able to hear every claim that state joinder rules permit to be asserted.[93]

One particular application of this important caveat is that if a state law class action is filed in state court, and the named parties are diverse and have the requisite amount in controversy, the case will be removable and within the jurisdiction of the federal court. Because only the requirements of § 1367(a) will apply, the court will have supplemental jurisdiction over the claims of class members regardless of their citizenship (which is not a change from earlier law) and of the size of their claims (which is a change from prior law).[94]

Consider how the courts should deal with the simple situation of a single plaintiff suing two defendants in state court, one diverse and the other not, and more than $50,000 in controversy as to the diverse defendant (P v. diverse D1 and non-diverse D2). One could say that this is a nonremovable civil action under § 1441(a) and (b) because it is not an action of which the district courts have original jurisdiction under § 1332, and therefore that the entire case should be remanded pursuant to § 1447(c), if it is removed. Alternatively, one could say that P v. D1 constitutes a removable civil action and that after removal is effectuated the court should determine under § 1367(a) whether the other claim asserted in the action is within its supplemental jurisdiction. Under state joinder rules, the claims typically, and perhaps always, will have arisen from the same transaction, occurrence, or series thereof (if they are properly joined), and minimal diversity has been held to satisfy Article III.[95] Consequently, under § 1367(a), the court pretty clearly will have supplemental jurisdiction over the claim against D2. On this reasoning, the federal court should hear both claims, rather than neither. By the same reasoning, if two plaintiffs, one diverse and the other not, sue a defendant in state court, with

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was correct in this regard. Commentators do not all agree. *See, e.g.*, Matasar, *supra* note 34, at 1479 ("Supplemental 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."); Steinman, *supra* note 24, at 97–99.

93. As a practical matter, state joinder rules may not permit the joinder of factually unrelated claims against different defendants, in which case no very challenging situations will be presented.

94. Whether the same will be true of class actions filed in federal court is a disputed matter. Literally read, § 1367 seems to so provide by virtue of the drafters' failure to list Rule 23 in § 1367(b). The legislative history, however, indicates that there was no Congressional intent to alter prior law. *See* H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 (1990). *But see* discussion *infra* text accompanying notes 161–62 (questioning the propriety of reliance upon such legislative history).

A number of courts have failed to see that a removed class action may be subject to § 1367(a) but not to § 1367(b). They have decided the cases as if they were diversity cases begun in federal court and seem uniformly to have rejected the argument that § 1367 overturned Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) (disallowing ancillary jurisdiction over the claims of class members whose claims fail to satisfy the jurisdictional amount requirement). *See, e.g.*, Mayo v. Key Fin. Servs., Inc., Civ. A. No. 92-12797-H, 1993 WL 41771 (D. Mass. Feb. 18, 1993); Averdick v. Republic Fin. Servs., Inc., 803 F. Supp. 37, 45–46 (E.D.Ky 1992); Bradbury v. Robertson-Ceco Corp., No. 92 C 3408, 1992 WL 178648 (N.D. Ill. July 22, 1992). *But see* Garza v. National Am. Ins. Co., 807 F. Supp. 1256 (M.D. La. 1992) (dicta that § 1367 repealed Zahn).

95. *See* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530–31 (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. at 373 n.13 (stating "that complete diversity is not a constitutional requirement").

more than $50,000 in controversy on the former claim (diverse P1 and non-diverse P2 v. D), one could conclude that the district court can hear the entire action pursuant to §§ 1441(a) and (b) and 1367(a).

Although this viewpoint and reasoning is plausible, it seems to me that the less imaginative, and more restrictive, construction of the statutes is probably correct. Certainly, that construction is more consistent with the traditional view that the entire state court action must constitute a civil action of which the district courts have original jurisdiction in order for it to be removable pursuant to § 1441(a) and (b).

If I am correct in this conclusion, the more important point is that, when the claims of all plaintiffs against all defendants present an incontrovertibly removable civil action, a similar analysis should be undertaken with respect to any *other* claims filed in the case pre-removal, and will likely lead to the conclusion that the claims can be heard. Thus, for example, if a third-party complaint was filed pre-removal, § 1367(a) would authorize supplemental jurisdiction over a claim by the plaintiff against the third-party defendant that also was filed pre-removal. Section 1367(a) would govern, rather than the doctrine of *Owen Equipment & Erection Co. v. Kroger*,[96] which construed § 1332, and did not purport to reflect constitutional limits on federal jurisdiction.

Of course, one could contend that Congress really intended the limitations expressed in § 1367(b) to be applied to claims of the sort there described, whether those claims were asserted post-removal or pre-removal, and just did not express its intent very clearly; or, in a similar vein, that Congress would have provided identically for the same sort of claims, regardless of whether they were asserted pre-removal or post-removal, had it thought about the matter (after all, the pre-removal assertion of supplemental claims does not arise terribly often). This argument would, in effect, read § 1367(b)'s references to particular Federal Rules as incidental and non-exhaustive, and construe § 1367(b) as if it read, "In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) when exercising supplemental jurisdiction over a claim would be inconsistent with the jurisdictional requirements of section 1332." This result might well avoid results that have no obvious justification in policy, and that arguably flout Congress's intent—to follow *Owen Equipment*, for example. Nonetheless, if matters of supplemental jurisdiction are to be left to Congress (as the Court decided in *Finley*[97]) and if there is good reason generally to rely on the meaning of a statute's terms that is most in accord with context and ordinary usage,[98] then there is reason to take Congress at its word. The best indication of

96. 437 U.S. 365 (1978).

97. Finley v. United States, 490 U.S. 544 (1989). I should acknowledge, however, that *Finley*'s preference for Congress related to expansions of federal jurisdiction, the Court's refusing to approve further judicial expansions upon what statutes expressly authorize, whereas we are here considering whether courts should be able to restrict federal jurisdiction to a scope less than Congress's language has provided.

98. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("The meaning of terms on the statute books ought to be determined ... on the basis of which meaning is ... most in accord with context and ordinary usage ...."). *See generally* William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113 (1992); William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990).

Congress's intent is what its legislation says and, by its terms, § 1367(b) does not apply to claims asserted pre-removal; as to them § 1367(a) alone must be one's guide.

3. *When § 1367(b) Does Apply*

Let us return to the circumstances in which § 1367(b) presumably does apply, that of the post-removal assertion of claims by a plaintiff or a proposed Rule 19 or Rule 24 plaintiff. I would like to examine how § 1367(b) should apply as a matter of policy in the context of various configurations of claims. Because it is easy to get lost in the "trees," however, I will offer a few remarks so that the main features of the forest are not missed.

First, there is no reason a plaintiff in a removed case should be afforded any fewer benefits of supplemental jurisdiction than would be afforded a plaintiff who commenced her action in federal court. If the removal is to have any effect at all, it should strengthen the case for exercise of supplemental jurisdiction over claims asserted by plaintiffs. Thus, since courts typically have asserted supplemental jurisdiction over a compulsory counterclaim asserted by a plaintiff in reaction to a claim by a non-diverse third-party defendant against the plaintiff, and over a claim by which a plaintiff seeks to implead a non-diverse third-party, or assert a cross-claim against a non-diverse co-plaintiff, in response to a counterclaim,[99] courts should do the same after a removal. The exercise of supplemental jurisdiction facilitates judicial economy, convenience and the doing of complete justice among the interested parties. I have concluded, however, that, despite the invocation of federal jurisdiction by defendants rather than by plaintiffs, the doctrines that limit the existence and exercise of supplemental jurisdiction in cases commenced in federal court should govern *and* should lead to the same outcomes in cases removed to federal court *except* when plaintiffs establish that they did not act strategically in filing in state court, as a first step in a series of events calculated to obtain federal court jurisdiction that would be *ultra vires* if the action had been commenced in federal court initially. The pages that follow indicate how plaintiffs can make such a showing.

My conclusions are predicated on my understanding that Congress (wisely or not) wants the complete diversity requirement to be stringently enforced, and on my belief that that goal can be accomplished only if state court filing is not seen as obviating Congress' and the courts' concerns about plaintiffs' efforts to circumvent the complete diversity requirement. At the same time, I have rejected an absolute rule against supplemental jurisdiction over claims that plaintiffs seek to assert post-removal in order to avoid unduly harsh treatment of plaintiffs who did not act strategically and who have legitimate grounds for belated assertion of their claims. Although the system I recommend will impose burdens and inconveniences when plaintiffs cannot make the requisite showing, these will flow from the limitations on federal subject matter jurisdiction *and* from plaintiffs' failures to join non-diverse parties in the first instance; for if such parties had been joined to begin with, defendants would not have been able to remove, and federal subject matter limitations would have

99. *See* authorities cited in Freer, *supra* note 4, at 463–64 nn.103–04. *See also id.* at 481–84.

posed no obstacle to the joinder of parties and claims in the ensuing state court proceeding.[100]

Some of the complications that are presented below in analyzing particular fact patterns arise from the subtleties of applying § 1367(b) to cases involving Rule 19 joinders and Rule 24 interventions, whether or not a case has been removed. Because I do not believe these matters have been adequately explored elsewhere, I have discussed them in considerable depth here.

a. Plaintiffs' Claims Against Persons Made Parties Under Rule 14

Assume that after a diversity action has been removed, the plaintiff seeks to assert a claim against a third-party defendant, impleaded by the defendant/third-party plaintiff.[101] Under § 1367(b), the court shall not have supplemental jurisdiction over that claim if exercising jurisdiction would be inconsistent with the jurisdictional requirements of § 1332. When the Supreme Court held that § 1332 gave the courts no power to hear such claims, it did so in order to prevent circumvention of the complete diversity requirement, fearing that a different rule would encourage plaintiffs to forgo joinder of non-diverse defendants whom plaintiffs could expect diverse defendants to implead.[102] The Court's decision was defensible only if the complete diversity rule is correct or desirable, and that may be questioned.[103] Nonetheless, § 1367 did nothing to alter this state of the law. In the removal context, however, one can argue that plaintiff has made no such effort to circumvent the complete diversity requirement; indeed, plaintiff chose to sue in state court and has been haled into federal court by his or her adversary. The reason for the *Owen* rule is absent, and one should therefore conclude that there would be nothing inconsistent with § 1332 in the court's exercise of supplemental jurisdiction over the plaintiff's claim against a third-party defendant. But there are arguments the other way, which are presented in the section that follows.[104]

b. Plaintiffs' Claims Against Persons Made Parties Under Rule 20

Assume that after removal, the plaintiff seeks to assert a claim against a non-diverse defendant whom the plaintiff seeks to join. One question that arises, independent of removal, is whether § 1367(b) qualifiedly denies supplemental

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100. *See supra* text following note 95.

101. Under FED. R. CIV. P. 14(a), "The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff ...."

102. *Id.* at 374–77.

103. For criticisms of the complete diversity requirement, see, e.g., Redish, *supra* note 24, at 1803–06; Chemerinsky, *supra* note 69, at 6–8. *See also* Rochelle Cooper Dreyfuss, *The Debate over § 1367: Defining the Power to Define Federal Judicial Power*, 41 EMORY L.J. 13, 18–21 (1992) (discussing the contemporary significance of diversity jurisdiction and its utility in cases involving impleaded, intervening and necessary parties, in particular); A.L.I., STUDY OF THE ALLOCATION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 16–17, 144 (1969) (because of the risk of local bias, recommending that a state court action be removable by an out-of-stater who ordinarily would be permitted to remove if sued alone and who has been joined with a defendant who is a co-citizen of the plaintiff).

104. Additional points that might be made here are elaborated in the discussion of plaintiffs' claims against persons made parties under Rules 19, 20 and 24. *See infra* text at note 109, text following note 111, text at and following note 112.

jurisdiction over such claims.[105] Section 1367(b) declares that "district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule ... 20 ...." Rule 20 cannot be used to add parties, however; it merely describes the circumstances under which multiple plaintiffs or defendants may be joined in one action. Parties are added or substituted under Rule 15(a) or Rule 21, and § 1367(b) says nothing about additions pursuant to either of those Rules.[106] Consequently, under a strict construction of § 1367(b), one could conclude that only the constitutional limitation set out in § 1367(a) controls the power of the federal courts to hear such claims.[107] With minimal diversity sufficing, the joinder would be permissible. However, there are reasons why courts might choose not to interpret § 1367(b) in this way. As I wrote elsewhere,

> 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.[108]

If we read § 1367(b) to "list" plaintiffs' claims against merely "proper" or "permissive" non-diverse defendants whom plaintiffs seek to add after the initiation of proceedings in federal court, we reach the question whether, when a diversity case has been removed, the court should similarly hold that supplemental jurisdiction over such proposed claims would be inconsistent with § 1332. In an article I wrote before the enactment of § 1367, I offered the following thoughts:

> It is noteworthy that a plaintiff did not seek the federal forum and thus could not unilaterally circumvent the complete diversity requirement by belatedly joining a nondiverse defendant. To the extent that the courts should construe congressional intent [as intent] to prohibit ancillary jurisdiction over a plaintiff's claim [when necessary] to deter and prevent successful circumvention of the complete diversity requirement, one could argue that this purpose is not implicated in the removal context because it is the defendants who have sought refuge in federal court. Additionally, while the plaintiff was not haled into court unwillingly, the plaintiff was haled into *federal* court against its will. Moreover, the reasoning that a plaintiff cannot complain if ancillary jurisdiction does not encompass all possible claims, because the plaintiff

105. Another question, and one that is distinguishable from jurisdictional issues, is whether the plaintiff should be permitted to belatedly assert a claim against a new defendant under the Federal Rules that deal with amendment of pleadings and with joinder of parties generally. *See* Steinman, *supra* note 18, at 927–40; *infra* text accompanying note 123. Even if § 1367(b) does not preclude supplemental jurisdiction over the claim, it could be an abuse of discretion under Rule 15 or 21 to allow the joinder.

106. *See* TEPLY & WHITTEN, *supra* note 54, at 114 n.198, 486 n.118; Steinman, *supra* note 24, at 100–02.

107. Nor would such a reading render the language of § 1367(b) meaningless. It would apply to proposed additional claims against defendants who had been joined pursuant to Rule 20 at the commencement of the action. Since the common law aggregation rules would allow jurisdiction over such claims in any event, it seems unlikely that the language under discussion was intended to govern only that situation, however.

108. Steinman, *supra* note 24, at 102. *But see* the discussion *infra* text accompanying notes 161–62 (questioning the propriety of reliance upon legislative history).

chose the federal forum over the state forum and thus must accept its limitations, does not fit in this context. Plaintiff chose the state forum, which could exercise subject matter jurisdiction over claims against a nondiverse defendant. Finally, the plaintiff typically does not urge the federal court to assert ancillary jurisdiction over the claim against a proposed nondiverse defendant. Indeed, if the plaintiff has any tactical motivation in the assertion of such a claim, it is to give the federal court a reason to rid itself of the case. The original defendants, if anyone, urge the federal court to exercise ancillary jurisdiction over the plaintiff's proposed new claim. For this reason as well, the argument against ancillary jurisdiction is inapplicable in the removal context.

On the other hand, one could argue that recognition of ancillary jurisdiction over a plaintiff's claim against a nondiverse defendant brought in after removal would enable a plaintiff to elect to sue only diverse defendants, and either collude with them to remove the action, arguably in violation of Title 28, section 1359 of the United States Code, or merely foresee or gamble that they would remove the case. The Supreme Court's reasoning in *Owen Equipment & Erection Co. v. Kroger* suggests that the Court would find, under sections 1441(a) and (b), that Congress impliedly intended to revoke ancillary or pendent party jurisdiction in these circumstances.[109]

Now we have § 1367, but I do not think that it changes any of the foregoing analysis. A court would now ask whether the exercise of supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of § 1332, rather than whether Congress impliedly intended to revoke ancillary or pendent party jurisdiction in these circumstances, but the resolution would be the same because these are functionally equivalent inquiries.

Plaintiffs either will seek to join claims against a non-diverse defendant in an effort to "oust" federal jurisdiction as they have done in the past, something that they should not be permitted to do except when the missing party is indispensable,[110] or in light of § 1367 they may seek to join such additional claims to have them heard under an expanded federal jurisdiction. The legislative history of § 1367(b) states that,

> In diversity-only actions the district courts may not hear 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.[111]

It is true that this rationale does not quite fit the removal situation; the evasion of § 1332 has to be more elaborate in that context. But the crux of the matter does seem to be whether the courts should irrebuttably view a plaintiff's state

109. Steinman, *supra* note 18, at 902–03 (footnotes omitted).

110. *Id.* at 908–27. *But see* Amon v. Nelson, No. 91 Civ. 3844 (MBM), 1992 U.S. Dist. LEXIS 280 (S.D.N.Y. January 13, 1992) (rejecting the indispensability test as overemphasizing the need to protect defendants' right to remove, and adopting a "fundamental fairness" test as preferable).

111. H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 (1990).

court filing, when followed by removal *and* by the plaintiff's effort to assert claims against non-diverse defendants, as the first step in a series of events calculated to obtain federal court jurisdiction that would be *ultra vires* if the action had been commenced in federal court initially. If the state court filing is such a first step, then plaintiff *has* sought to circumvent the complete diversity requirement; plaintiff really was *not* haled into federal court against her will; and the argument that the plaintiff cannot complain that supplemental jurisdiction will not support all her claims *does* "fit."

If in fact plaintiffs rarely will file state court actions with the strategic intent described above, courts should not indulge irrebuttable presumptions against them. I do not think that anyone knows whether whether plaintiffs will behave in that strategic manner, however. Indeed, whether they will do so is likely to be influenced by how the courts apply § 1367(b) to claims that plaintiffs seek to assert in removed cases. That is, if courts prove hospitable to claims that plaintiffs seek to assert against non-diverse defendants that plaintiffs seek to add post-removal, plaintiffs will have some incentive to act in the strategic fashion described above. If the courts reject supplemental jurisdiction over such claims, plaintiffs will have no such incentives.

The courts could take a middle road and analyze on a case-by-case basis whether such strategic conduct was present, refusing to exercise supplemental jurisdiction in those cases where it is found. But this approach has costs in generating satellite issues, uncertainty and delay, and would be similar to an approach (based on 28 U.S.C. § 1359[112]) that the *Owen* Court rejected. In a variation on this theme, courts could *rebuttably* presume that such strategic conduct was present and impose on the plaintiff the burden of establishing that it was not; that, for example, at the time of the state court filing and despite a reasonable inquiry, plaintiff did not know of the existence or citizenship of the non-diverse defendant (or third-party defendant) against whom plaintiff now seeks to assert a claim.

While I find it a difficult judgment call, I tentatively conclude that plaintiffs should not be permitted to join additional claims against non-diverse defendants post-removal, unless they can show that the joinder was not strategically motivated. I come down on plaintiffs as hard as I do in part because it is so difficult to distinguish the series of steps involved in a removal situation from the circumvention of the complete diversity requirements that Congress apparently sought to guard against through enactment of § 1367(b), and in part because one has to wonder why a well-informed plaintiff would not have sued the non-diverse defendant to begin with, if not as part of a scheme to facilitate removal and then seek to expand federal jurisdiction beyond its otherwise permissible bounds. Moreover, unless the plaintiff is up against the statute of limitations or has to be careful because of prior voluntary dismissals, she has nothing to lose in suing in state court and hoping that the defendants will remove; if they do not, the plaintiff can voluntarily dismiss her action and begin again in federal court, if that is really where she prefers to be.

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112. Section 1359 provides: "Parties collusively joined or made. A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359 (1948).

On the other hand, I come down on plaintiffs as easily as I do because the equities of some situations argue strongly for supplemental jurisdiction over the claims they seek to assert. The position that I have espoused carries the vice of creating some satellite litigation, uncertainty and delay, but it has the virtue of protecting against and deterring strategic state court filings without rewarding ill-preparedness on the part of plaintiffs and their lawyers *and* without being unduly punitive to plaintiffs who neither knew nor should have known of non-diverse parties who could have been made defendants when suit was initiated. It allows the courts to afford the benefits of supplemental jurisdiction (which redound both to the parties *and* to the state and federal court systems) to plaintiffs who chose a state court system without thought of exploiting supplemental federal jurisdiction, and thereby allows the courts to eliminate any unfairness that might inhere in forcing such a plaintiff to either engage in duplicative litigation or to forgo assertion of some claims.

In the case of plaintiffs' claims against third-party defendants (the first permutation examined above), I might be even more permissive. Consider a plaintiff who prefers state court, whose first preference is to keep her action simple and bipolar, and who consequently sues a single diverse defendant in state court. If the defendant removes and impleads a third-party defendant ("X") against whom the plaintiff has a claim, that changes the calculus for the plaintiff. Once X has been brought into the action by the unilateral act of the defendant, plaintiff may reasonably conclude that her interests would be prejudiced by failure to assert her claim, and consequently are best served by asserting her claim, against X in the action, rather than not at all, or in a duplicative state court suit. In such circumstances, it does not seem to me that enforcement of the complete diversity rule, or vindication of the policies against its circumvention, *necessarily* require the federal courts to refuse to adjudicate plaintiff's claim against the third-party defendant. I would prefer to allow the courts freedom to determine whether, on the facts put before them—and with the burden of persuasion on plaintiffs—exercising supplemental jurisdiction over plaintiff's claim would be inconsistent with the jurisdictional requirements of § 1332.

It would be tidy if the decision whether to assert supplemental jurisdiction over a plaintiff's claims would parallel the courts' conclusion as to how they would treat the same set of claims if it had existed in state court prior to the removal. We do not have that tidy a situation, however, and would not have it even if the courts gave an absolute "no" to supplemental jurisdiction over claims that plaintiffs sought to assert against defendants post-removal. In support of symmetry, one would argue that *if* the combination of claims would have constituted a *non*removable unit, subject to remand under § 1447(c), then the courts should not permit a plaintiff to bring into federal court a set of claims that neither the plaintiff nor the defendant could have brought there, via commencement or removal, respectively. The proposed claims should be disallowed, while the removed action remains in federal court.[113] This view does not give any "break" to the innocent plaintiff, however. *If*, on the other hand,

113. Steinman, *supra* note 18, at 912–14. The Article will deal later with the situation in which the proposed defendant would come in not merely as a proper party but as a Rule 19 party, particularly an indispensable one. *See infra* text accompanying notes 116–32. For a discussion of the non-jurisdictional aspects of the circumstances under which federal courts should allow the post-removal joinder of nondiverse defendants, see Steinman, *supra* note 18, at 908–43.

the courts conclude that the proposed set of claims *would* have been removable and adjudicable in federal court through § 1441(a) and (b) plus supplemental jurisdiction,[114] then there would seem to be little reason to reach a different result when plaintiff belatedly seeks to join a defendant whom she could have joined earlier. The difficulty with the second half of this neat solution is that § 1367(b) does not apply to pre-removal joinders and it does apply to post-removal joinders. As a result, that subsection will militate against supplemental jurisdiction over the belatedly proposed claims, if courts fear that plaintiffs will file in state court as a strategic step ultimately leading to their assertion of more claims in federal court than they otherwise could bring.

The situation is quite different when plaintiff, in her capacity as a counter-defendant, impleads a third party in response to a counterclaim. Several post-*Owen* decisions authorize supplemental jurisdiction over the plaintiff's impleader claim, asserted in this context, even when plaintiff was the party who chose federal court.[115] When a case was removed, the equities in favor of supplemental jurisdiction are even stronger.

c. Plaintiffs' Claims Against Persons Made Parties Under Rule 19

There is no question that if, after a diversity action has been removed, the plaintiff seeks to assert a claim against a non-diverse defendant who has been joined under Rule 19, that claim is on § 1367(b)'s list. With that exception, the arguments made in the preceding section continue to pertain in this context, subject to a few caveats.

The first caveat: Whether the context is removal or not, there can be persons who ought to be joined if feasible, under the standards of Rule 19(a), and who could properly be held to be indispensable under the standards of Rule 19(b), even though the plaintiff is asserting no claim against them.[116] Indeed, the joinder of an additional defendant under Rule 19 may be urged by the defendants, rather than by the plaintiff, particularly where the existing defendants fear that disposition of the action without the proposed party would leave them subject to a substantial risk of incurring multiple or inconsistent obligations. This may be the situation when the absentee would be harmed by the entry of an injunction or declaratory relief sought by the plaintiff against the

114. *See supra* text accompanying note 91.

115. *See, e.g.*, Basic Mach. Co., Inc. v. Ketom Constr., Inc., 686 F. Supp. 542, 544 (M.D.N.C. 1988); Brown & Caldwell v. Institute for Energy Funding, Ltd., 617 F. Supp. 649, 651 (D.C. Cal. 1985); United States *ex rel.* Robert A. LaCentra Co. v. Edward R. Marden Corp., 294 F. Supp. 21 (D.R.I. 1968); the latter two cases are *cited in* Freer, *supra* note 4, at 463 n.103. *Accord* Mouchawar, *supra* note 34, at 1661–62 (arguing for an interpretation of § 1367(b) that limits its application to situations in which plaintiffs are in an offensive position, as well as an offensive posture; thus, it would not preclude supplemental jurisdiction over a plaintiff's compulsory counterclaim to a third-party defendant's claim against the plaintiff, nor over a plaintiff's impleader of a third-party defendant in response to a defendant's claim against the plaintiff).

116. This proposition is somewhat controversial, but it was the view of § 1367's drafters and it is mine. For competing views on the subject, *see* Freer, *supra* note 4, at 478–79; Rowe, Jr. et al., *Reply*, *supra* note 4, at 957–59; Arthur & Freer, *Burnt Straws*. *supra* note 4, at 966–72; Rowe, Jr., et al.,*Coda*, *supra* note 4, at 999–1003; Steinman, *supra* note 24, at 107–11. *See also* Steinman, *supra* note 18, at 911–12.

existing defendants.[117] An example can be found in the familiar case of *Martin v. Wilks*,[118] although it was a federal question case, rather than a diversity case.

> White firefighters sued the City of Birmingham, Alabama, and a county personnel board, alleging that the plaintiffs were being denied promotions in favor of less qualified black firefighters. The city and the board were basing promotion decisions on race, relying on certain consent decrees that had been entered into with black individuals as a result of previous litigation in which the present white plaintiffs had not been parties, and into which they had failed to make timely motions to intervene. In holding that the district court had erred in precluding the white firefighters from challenging employment decisions taken under the consent decrees, the Court relied upon the failure of the parties to the prior litigation to join white firefighters pursuant to Rule 19. Clearly, the black plaintiffs in the earlier case had no cause of action against the white firefighters. As dissenting Justice Stevens noted, the white firefighters were not responsible for the history of discrimination considered in the first suit, although they nevertheless had benefited from it. The clear implication is that the white firefighters were persons to be joined if feasible, if not indispensable parties, in the first litigation, although the plaintiffs had no cause of action against them.[119]

In situations like this, where the plaintiff is not the proponent of Rule 19 joinder and has no claim against the Rule 19 defendant, the plaintiff clearly is not seeking to circumvent the complete diversity requirement of § 1332 insofar as the Rule 19 joinder is concerned, and § 1367(b) does not purport to limit the exercise of supplemental jurisdiction over the involvement or interests of such Rule 19 parties. Even in the relatively unlikely event that it is the plaintiff who argues for the Rule 19 joinder on the defense side of someone against whom plaintiff asserts no claim (as could happen in a case like *Martin v. Wilks*),[120] § 1367(b) does not purport to limit the exercise of supplemental jurisdiction over the involvement or interests of such parties. Its limitations apply only to the *claims*, if any, that the plaintiff would assert against such defendants.

The second caveat: It also should be noted that the ability of the court to assert supplemental jurisdiction over the interests described in Rule 19(a) may render the notion of indispensability inapt in situations to which it would have applied in the past. The plan of Rule 19 is that when a person described in Rule 19(a) ("persons to be joined if feasible") cannot be made a party, the court should determine, by reference to several factors which are non-exhaustively set forth in Rule 19(b), whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. When, by virtue of § 1367(a) and (b), subject matter jurisdiction is eliminated as an obstacle to making an absentee a party, some absentees who previously would have been indispensable will become people whose joinder is feasible, and the indispensability question will not have to be reached.

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117. Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1083 (1985).

118. 490 U.S. 755 (1989).

119. Steinman, *supra* note 18, at 911–12 (citations omitted).

120. *See id.* at 917–18.

Of course, in other situations the absentee will remain someone who cannot be made a party by virtue of his or her objections based on absence of personal jurisdiction or improper venue; in those cases, whether that absentee is indispensable will have to be determined. If she is held to be indispensable, the court may deny joinder and dismiss the action under Rule 19(b). Section 1447(e) permits joinder and remand of an action to State court when, after removal, plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction.[121] However, our hypothesis here is that the mere joinder of non-diverse defendants would not destroy subject matter jurisdiction *inter alia* because of the court's power to exercise supplemental jurisdiction over the interests of such defendants.[122] Hence, § 1447(e) is inapplicable, and any power to remand would have to be extra-statutory and predicated on the doctrine of supplemental jurisdiction itself.

If the plaintiff seeks to assert a claim against a non-diverse person who has been joined pursuant to Rule 19, the court will have to determine two things: whether the plaintiff should be permitted to assert the claim under the Federal Rules that deal with amendment of pleadings generally, and whether the exercise of supplemental jurisdiction over the claim would be inconsistent with the jurisdictional requirements of § 1332. When the court considers (a) whether the plaintiff deserves to be permitted to file a proposed claim (in terms of such factors as plaintiff's motivation and promptness, and the nature and extent of prejudice plaintiff will suffer if its motion to amend is denied), (b) the prejudice that the opposing parties, including both the "old" and the new defendants will suffer if the amendment is permitted, and (c) systemic interests in the claims in question and in the efficiencies that may be gained by their inclusion in the case, it may conclude that the amendment should not be permitted, for reasons that are independent of subject matter jurisdiction concerns.[123] Only if it decides otherwise need it reach the second question, whether the exercise of supplemental jurisdiction over the claim would be inconsistent with the jurisdictional requirements of § 1332.

Of course, if the proposed claim is unrelated to the underlying action, supplemental jurisdiction over it would likely be held impermissible under § 1367(a);[124] an independent basis of jurisdiction would be necessary. So, for example if, in a diversity case modelled after *Martin v. Wilks*, white firefighters had been made Rule 19 defendants in the original action and a black plaintiff firefighter had sought to assert an unrelated tort claim against a non-diverse white Rule 19 defendant firefighter, the court would have lacked any basis of subject matter jurisdiction, independent or supplemental, over that claim.

By contrast to the situations in which the plaintiff has no claim or only an unrelated claim against a Rule 19 defendant, the plaintiff may seek to assert a claim that *is* part of the same case or controversy as the underlying action. Supplemental jurisdiction will then be possible under § 1367(a). In many, if not all, of these situations, the new defendant is a person to be joined if feasible under Rule 19(a) *because* the plaintiff has a claim against him, and his ability to

121. *Id.* at 943–44. This course of action has consequences in regard to appellate reviewability. *See id.* at 951–54.
122. For additional reasons, see *id.* at 894–97.
123. *See id.* at 927–40.
124. *See supra* text accompanying notes 91–92.

protect his interests will be impaired or impeded if he is not a party to the action *because* of that very claim. In that situation, *if* § 1367(b) denies supplemental jurisdiction over the plaintiff's *claim* against a proposed Rule 19 defendant, it really makes no sense to speak of § 1367(b) allowing the court to exercise supplemental jurisdiction over the *interests* of the Rule 19(a) defendant. The two are inseparable, and the court really can't exercise jurisdiction over the latter without exercising it over the former.

The situation contemplated here can be illustrated by reference to the facts of *Steel Valley Authority v. Union Switch & Signal Division*.[125] Steel Valley Authority ("SVA"), an organization formed by nine municipalities, sought to salvage jobs that it feared would be lost if certain industrial plants were closed, and sued to maintain the status quo so that it might ultimately acquire and operate the plants itself. SVA sued two divisions of American Standard Corporation and others, seeking an injunction to prohibit the waste that it alleged would result if American Standard removed specialized machinery and equipment from the property. SVA also sought to enjoin destruction or razing of the buildings or fixtures, and affirmatively sought protection and maintenance of the property. After the case was removed as a diversity action, plaintiff amended its complaint "as of right" to substitute Radice-East Hills, Inc. ("R-E"), for one of the codefendants originally sued, claiming that it had mistaken the identity of the record owner of the property. Plaintiff argued that R-E was an indispensable party, sought to require R-E to maintain the condition of the property, and sought remand because R-E was not diverse from the plaintiff.[126]

One could certainly conclude that R-E was a party to be joined if feasible since, as record owner of the property, any injunction against American Standard's dismantling, razing, or demolishing buildings on the property could have had an impact on R-E's interests. Moreover, arguably R-E's status as a Rule 19 defendant and the plaintiff's claim against R-E were inextricably connected so that the question whether the court could assert supplemental jurisdiction over R-E's interests could not be decided independently of whether it could assert supplemental jurisdiction over the plaintiff's claim against R-E. Under § 1367(b), the court has to decide whether assertion of supplemental jurisdiction over the plaintiff's claim against R-E would be consistent with the jurisdictional requirements of § 1332. If jurisdiction is permissible, the court can proceed to hear the whole matter. If the court decides against jurisdiction over the plaintiff's claim against R-E because of R-E's shared citizenship with the plaintiff (and against jurisdiction over R-E's interests, because of the inseparability of the interests and the claim), it should consider the absent party's indispensability, and proceed accordingly.[127]

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125. 809 F.2d 1006 (3d Cir. 1987), *cert. dismissed*, 484 U.S. 1021 (1988).

126. *Id.* at 1008–09. The entire preceding case description was taken verbatim from Steinman, *supra* note 18, at 932–33.

127. Professors Freer and Arthur have argued that in Martin v. Wilks, 490 U.S. 755 (1989), as well, the black plaintiffs did have a potential claim against the defendant's white employees. Arthur & Freer, *Burnt Straws*, *supra* note 4, at 968–72. Although I don't agree with that view, I do find insightful and instructive their analogy to interpleader suits with the employer as stakeholder and the black plaintiffs and the white absentees as rival "claimants" of jobs, contending for different decision-making processes or allocation mechanisms. *See* Steinman, *supra* note 24, at 110. Pursuing the interpleader analogy, one finds that the Federal Interpleader Act, 28 U.S.C. §§ 1397, 2361 (1982), allows a defendant to join an absentee by

Our focus must next be on whether any of the foregoing analysis changes in removed actions. The arguments presented above, in the discussion of claims proposed to be asserted against defendants who could be joined under "Rule 20," will apply here as well. The crux will again be whether supplemental jurisdiction over a plaintiff's claim against a person joined (or proposed to be joined) under Rule 19 should be liberally exercised in removed cases because of the *prima facie* absence of effort by the plaintiff to circumvent the complete diversity requirement, whether the courts should irrebuttably treat state court filing followed by removal and by the plaintiff's effort to assert a claim against a party who has been or arguably should be joined under Rule 19 as just another maneuver to expand federal jurisdiction against which the courts should vigilantly guard, or whether the courts should take a more flexible intermediate position. My own conclusion again is that plaintiffs should be permitted to add claims against non-diverse defendants after removal *only* when they persuade the court that they did not engage in strategic behavior to circumvent the complete diversity requirement, but rather (for example) at the time of the state court filing, despite a reasonable inquiry, did not know of the existence or citizenship of the non-diverse defendant against whom plaintiff now seeks to assert a claim.[128] (*Steel Valley Authority* exemplifies cases in which the plaintiff might have been able to make the requisite showing.)

If the court were to decide in favor of exercising supplemental jurisdiction over the proposed claim by plaintiff, it could simultaneously adjudicate the original civil action, safeguard the defendant's removal, and allow all of plaintiff's related claims to be heard in one suit.[129] If the court decides against the exercise of supplemental jurisdiction over the proposed claim by plaintiff, it should disallow addition of that claim but should continue to exercise jurisdiction over the properly removed claims and over any additional matters (claims and interests) that it has supplemental jurisdiction to hear,[130] the latter including the interests that rendered the new defendant a person to be joined if feasible, if these are distinguishable from plaintiff's unassertable claim. In other words, in

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counterclaim, when the absentee claims or may claim to be entitled to money or property worth $500 or more, which the plaintiff claims. Subject matter jurisdiction is present so long as any two claimants are of diverse citizenship. So, in *Martin v. Wilks*, jurisdiction would be present if any black plaintiff were of a different citizenship than any white job competitor. Moreover, case law exists that supports ancillary jurisdiction over claims that the original plaintiff has against another claimant. Consequently, in fact patterns of this sort, the court need not lose its jurisdiction because of a nondiverse person whose absence could subject the defendant to a substantial risk of multiple or inconsistent obligations. *See* Steinman, *supra* note 18, at 922–24, from which the discussion regarding the interpleader statute was taken.

128. *See supra* text following note 112. This position is not inconsistent with the stance I took in my *Postremoval Changes* article. Steinman, *supra* note 18. There, I argued for recognition of ancillary jurisdiction over Rule 19 parties to the same extent that it had been recognized for intervenors, but my focus was on these parties' involvement as such Rule 19 or Rule 24 parties. I distinguished the question whether plaintiffs should be permitted to assert claims against Rule 19 or 24 defendants, and assumed that the courts could not assert ancillary jurisdiction over such claims against Rule 19 defendants, as they could not prior to 28 U.S.C. § 1367. *See* Steinman, *supra* note 18, at 926, 955.

129. In Professor Redish's taxonomy, this approach would further intersystemic cross-pollination, fulfill the forum choice of defendants, and yield litigation efficiencies, but it would not serve "systemic representativeness"—the desirability of having a sovereign's courts be primarily responsible for adjudication of that sovereign's law, or plaintiffs' forum choice, and might undermine "institutionalism"—deference to Congressional choice in a matter of federal jurisdiction. *See* Redish, *supra* note 24, at 1772–84.

130. To this point, this paragraph applies to "Rule 20" situations, as well.

certain circumstances (think again of the hypotheticals built on *Martin v. Wilks*), the court may join the absentee as a Rule 19 party, but disallow any claim by plaintiff against the absentee. This resolution safeguards the defendant's removal, but prevents all of plaintiff's claims from being heard in one suit. Although it results in a loss of efficiency and prevents the court from doing complete justice among all interested parties, this resolution enforces the jurisdictional requirements of § 1332, but not beyond the dictates of § 1367(b); that is, it enforces those requirements to bar plaintiff's claim against the Rule 19 party but not to bar the participation of a party who should be joined under Rule 19 in order to protect his own interests or to protect the pre-existing parties from a substantial risk of incurring multiple or inconsistent obligations.[131] In other circumstances (think of the situation illustrated by the *Steel Valley* case),[132] if the complete diversity requirement bars consideration of the plaintiff's claim against a proposed Rule 19 party, it will also preclude jurisdiction over the interests of the latter party. The federal action may either proceed without him or be dismissed or remanded pursuant to § 1447(e) as a result of the absentee's indispensability.

d. Plaintiffs' Claims Against Persons Made Parties Under Rule 24

By analogy to what was said in the preceding section, it should be noted first that, whether the context is removal or not, there can be persons who intervene on the side of the defendants, either as a matter of right under Rule 24(a) or permissively pursuant to Rule 24(b), against whom the plaintiff has no claim to assert.[133] Indeed, the intervention of persons under Rule 24 typically will be at the instigation of the intervenors, and not at the urging of the plaintiff, and will be precipitated by the persons' concern that disposition of the action in their absence will as a practical matter impair or impede their ability to protect their interests. An example of such an intervention would be that of white firefighters in the black firefighters' original action in *Martin v. Wilks*. In these situations where the plaintiff does not seek to assert a claim against the defendant intervenor, the plaintiff has not sought to circumvent the complete diversity requirement of § 1332, and § 1367(b) does not purport to limit the exercise of supplemental jurisdiction over the involvement or interests of such

131. In Professor Redish's taxonomy, this approach would further systemic representativeness and perhaps institutionalism while leaving defendant's forum choice intact, but it would not serve intersystemic cross-pollination, or yield maximum litigation efficiencies. *See* Redish, *supra* note 24, at 1772–84.

132. I believe that Professors Freer and Arthur would think that the situation presented by *Martin v. Wilks* is in this category as well. *See supra* note 127.

133. *See, e.g.*, Wichita R.R. & Light Co. v. Public Utils. Comm'n, 260 U.S. 48 (1922) (allowing intervention and asserting ancillary jurisdiction over nondiverse defendant intervenor which sold electrical energy to the plaintiff, had petitioned for a rate increase over the contract price with plaintiff, and which intervened in plaintiff's equity action brought to enjoin the defendant from putting new rates into force against plaintiff); Diamond v. Charles, 476 U.S. 54, 57–58, 61, 64–65 (1986); Planned Parenthood v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977); United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972); *all described in* Steinman, *supra* note 24, at 108–09 n.95. *See* David Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 726, 737–38, 740, 759 (1968) (writing of this and offering several cases which he regarded as examples); 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).

intervening parties. Its limitations apply only to the *claims*, if any, that the plaintiff would assert against such intervening defendants.

It should be noted parenthetically that under Rule 24(b) a person may be permitted to intervene when the "applicant's claim or defense and the main action have a question of law or fact in common" or when a statute of the United States confers a conditional right to intervene.[134] In the circumstances described by Rule 24(b), the matters that the applicant proposes to bring before the court often will not be so related to the claims within the court's original jurisdiction that they form part of the same case or controversy under Article III of the Constitution. In that situation, the court will not have power to exercise supplemental jurisdiction over them and it will be able to hear them only if they present an independent basis of subject matter jurisdiction. Of course, if the constitutional test is met on the facts of a particular case, then § 1367(b) will be relevant,[135] as it typically will be in situations described by Rule 24(a).[136]

If the plaintiff does seek to assert a claim against a non-diverse person who has intervened on the defendants' side pursuant to Rule 24,[137] the court will again have to determine whether the plaintiff should be permitted to assert the claim under the Federal Rules that deal with amendment of pleadings generally,[138] and whether the court has jurisdiction to hear the claim.[139] If the pro-

134. FED. R. CIV. P. 24(b).

135. Because of this, I question Professor Perdue's view that the statute seems to expand supplemental jurisdiction to permissive intervenors because it fails to differentiate between intervenors of right and permissive intervenors, grants supplemental jurisdiction as to intervening defendants and (qualifiedly) prohibits supplemental jurisdiction over plaintiff's claims against intervening defendants. Wendy Collins Perdue, *The New Supplemental Jurisdiction Statute—Flawed but Fixable*, 41 EMORY L.J. 69, 81 (1992). In the situations where the claim of a permissive intervenor does share a common nucleus of operative facts with the original claim (or under some other test is part of the same "case or controversy") at least some courts already recognized ancillary jurisdiction over the intervenor's claim. *See, e.g.*, Usery v. Brandel, 87 F.R.D. 670 (W.D. Mich. 1980).

136. FED. R. CIV. P. 24(a), provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

137. Such claims are quite possible since, once intervention has been allowed, the intervenor is normally treated as a full participant and a party. *See supra* note 78. *See generally* 3B JAMES W. MOORE & JOHN E. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 24.16[6], at 24–160 (2d ed. 1990).

138. *See* Steinman, *supra* note 18, at 927–40.

139. If someone has intervened on the plaintiff's side and the plaintiff seeks to assert a claim against him, there should be no problem with a court's exercise of supplemental jurisdiction so long as the cross-claim conforms with the requirements of Rule 13(g) that it arise out of the transaction or occurrence or property that is the subject of the original action or of a counterclaim with an independent basis of subject matter jurisdiction. *See* FED. R. CIV. P. 13(g). Supplemental jurisdiction over cross-claims in no way threatens the complete diversity that § 1332 has been construed to require. *See infra* text accompanying notes 175–78. One could argue an analogy to the Court's concerns in *Owen*, that plaintiff could refrain from joining the non-diverse party, await its intervention, and then assert a claim, but even then there would seem to be no circumvention of diversity jurisdiction unless the true interests of the intervening plaintiff are such that she ought to be aligned as a defendant. In that case, we are back to the problem discussed in the text.

posed claim is unrelated to the underlying action, supplemental jurisdiction over it will likely be impermissible under § 1367(a); an independent basis will be necessary. If it is part of the same case or controversy as the underlying action, supplemental jurisdiction is possible and the question will be whether exercise of that jurisdiction would be consistent with § 1332.

By analogy to what was said concerning Rule 19 joinders, when a party has intervened on the defendants' side, she may have done so where the plaintiff has a claim (as yet unasserted) against her, which is closely connected with the claims that previously were asserted in the action, and these previously asserted claims may well have been the source of the intervenor's contention that her ability to protect her interests would be impaired or impeded if she were not a party to the action. (Think of an intervention by R-E in *Steel Valley*, for example.) In that situation, *if* § 1367(b) denies supplemental jurisdiction over the plaintiff's claim against the intervening defendant, it may make no sense to speak of § 1367(b) allowing the court to exercise supplemental jurisdiction over the interests of the intervening defendant. If the two are inseparable, the court really can't exercise jurisdiction over the latter without exercising it over the former.

But one mustn't go blindly down this path and assume that the court should conclude that the exercise of supplemental jurisdiction over plaintiff's claim would be inconsistent with § 1332. Venerable Supreme Court authority suggests the contrary. In *Phelps v. Oaks*,[140] the Court held not only that the addition of a non-diverse defendant by intervention did not destroy diversity jurisdiction, but also that the court could take ancillary jurisdiction over the added elements of the case.[141] *Phelps* was an ejectment action brought against a tenant for possession of real estate. After removal to federal court, the landlords were permitted to intervene for the purposes of defending the tenant's possession *and* their own title, raising such issues as their own rights and interests might dictate.[142] It appears to me, although I am not certain, that the plaintiffs were asserting a claim against the landlords, as well as against the tenant. The Court held that no ouster of subject matter jurisdiction was effected by the intervention of the landlords, who were of the same citizenship as the plaintiffs, and that all of the proceedings generated by the intervention would be treated as incidental to the jurisdiction previously acquired and auxiliary to it.[143] Putting aside for the moment the long-debated question whether one can make any sense of the combination of results reached regarding intervenors and Rule 19 parties, on this reading of *Phelps* the Court has held that the assertion of ancillary jurisdiction over plaintiffs' claims against intervening defendants does not violate § 1332. That should be a central fact in the application of § 1367(b), even in cases commenced in federal court, *unless* Congress in § 1367(b) has overturned *Phelps* and its progeny. Nothing in the language of § 1367(b) does so. Nowhere in the statute does Congress purport to decide when exercising supplemental jurisdiction would be inconsistent with the jurisdictional requirements of § 1332.

140. 117 U.S. 236 (1886).
141. *Id.* at 240–41. The Court observed that the plaintiffs had a real and substantial controversy with the original defendant, and that persons who were permitted to intervene to defend their own interests could not defeat the vested jurisdiction of the federal court. *Id.*
142. *Id.* at 240.
143. *Id.* at 241.

The only suggestion that Congress might have intended to alter this long-standing authority is a sentence in the legislative history:

> In diversity-only actions the district courts may not hear 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.[144]

However, the notion that Congress intended to alter the law in this regard is undercut by other statements in the legislative history. Those statements describe the section as essentially restoring the pre-*Finley* understandings of the authorization for and limits on forms of supplemental jurisdiction, and observe that subsection (b) makes only "one small change" in pre-*Finley* practice, which relates to *plaintiff* intervenors.[145] Thus, nothing in the legislative history indicates that Congress consciously intended to make any change in that aspect of the law we are now discussing.[146] The above quoted sentence may reflect only what the drafters of the legislative history believed the law to be. Absent any clear expression of Congressional intent to overturn Supreme Court precedent such as *Phelps*, the courts should continue to respect and follow that authority.

When one turns to removed cases, one again has the argument that supplemental jurisdiction should be liberally exercised—in this case, over plaintiff's claims against intervening defendants—because of the *prima facie* absence of effort by the plaintiff to circumvent the complete diversity requirement. Moreover, in this context, (on the above reading of *Phelps*) one can not counter that the courts should treat state court filing followed by removal and by the plaintiff's effort to assert a claim against a non-indispensable intervening defen-

144. H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 (1990).

145. *Id.* at 28–29 ("Subsection (b) makes one small change in pre-*Finley* practice. ... Subsection (b) would ... exclud[e] Rule 24(a) plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19."). *But see* discussion *infra* text accompanying notes 161–62 (questioning the propriety of reliance upon legislative history).

146. The legislative history of § 1367(b) describes the section as eliminating the anomaly that the same party could intervene of right and take advantage of supplemental jurisdiction but not come within such jurisdiction if parties already in the action sought to effect his joinder under Rule 19. The drafters appear to have been thinking about plaintiff-intervenors, however, since they follow up by saying that § 1367(b) would exclude Rule 24(a) plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19. H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 (1990) (footnotes omitted). In any event, § 1367(b) itself furnishes no reason why courts should stop regarding supplemental jurisdiction over the claims of plaintiffs against defendant intervenors of right as consistent with § 1332, insofar as this has been the practice. While § 1367(b) makes no differentiation between defendant-intervenors and persons proposed to be joined as defendants under Rule 19 in directing the courts how to go about making their decision on requests for the exercise of supplemental jurisdiction, § 1367 excludes supplemental jurisdiction over neither. It leaves to the courts the decision whether the exercise of that jurisdiction would be inconsistent with § 1332 and in no way prevents them from either maintaining the "anomaly" (which some scholars believe is a warranted and principled distinction, *see* Perdue, *supra* note 135, at 78–79) or curing it by more generous use of supplemental jurisdiction in appropriate circumstances. Steinman, *supra* note 24, at 105–07. It seems to me that the courts cannot cure the "anomaly" by restricting supplemental jurisdiction in situations involving defendant intervenors without disrespecting Supreme Court precedent in a way that it is not clear that Congress has prescribed. These observations apply in the context of removed cases, as they do when litigation was commenced in the federal court.

dant as a maneuver to expand federal jurisdiction, because that series of events will *not* expand federal jurisdiction beyond the bounds that the Court has recognized. If the court exercises supplemental jurisdiction over the proposed claim by plaintiff, it can simultaneously adjudicate the original civil action, safeguard the defendant's removal, and allow all of plaintiff's related claims to be heard in one suit. All this serves fairness and efficiency, without sacrificing enforcement of the jurisdictional requirements of § 1332, as the Supreme Court has construed them.

It is possible, however, that I am over-reading *Phelps*, and that similar cases, being less than Supreme Court authority, are not determinative. One might conclude that although in the past the courts generally asserted ancillary jurisdiction when defendants intervened of right, the courts did not clearly distinguish between such intervention and plaintiffs' assertion of claims against intervenors, and that the courts may not have thoughtfully analyzed supplemental jurisdiction over the latter. The courts are, however, invited by § 1367(b) to make that distinction and to decide whether to exercise supplemental jurisdiction over such plaintiffs' claims. If we read the law as open on the question, then in deciding whether the assertion of supplemental jurisdiction over a plaintiff's claim against an intervening defendant would be inconsistent with the requirements of § 1332 in a removed case, the arguments (once again) essentially would be the same as those elaborated in connection with Rule 19 and "Rule 20" joinders, subject to certain modifications. The crux would again be whether supplemental jurisdiction should be liberally exercised in removed cases because of the *prima facie* absence of effort by the plaintiff to circumvent the complete diversity requirement, whether the courts should irrebuttably treat state court filing followed by removal and by the plaintiff's effort to assert a claim against an intervening defendant as a maneuver to expand federal jurisdiction, or whether the courts should take a more flexible intermediate approach. The efficiency and the fairness inherent in having a single decisionmaker resolve related disputes at the same time would favor recognition of supplemental jurisdiction over plaintiffs' claims against intervenors. However, the risk that such a generous interpretation of federal jurisdiction will encourage (what Professor Wendy Collins Perdue has dubbed) the sneaky plaintiff[147] to sue in state court and await the postremoval intervention of a non-diverse "defendant" to assert a claim against that party would argue the other way. Consequently, if the Court's decisions do not require greater liberality, I recommend that plaintiffs should be permitted to add claims against non-diverse intervening defendants after removal *only* when they persuade the court that they did not engage in strategic behavior to circumvent the complete diversity requirement, but rather (for example) at the time of the state court filing, despite a reasonable inquiry, did not know of the existence or citizenship of the non-diverse intervening defendant against whom plaintiff now seeks to assert a claim.

If the court decides against the exercise of supplemental jurisdiction over the proposed claim by plaintiff, it should disallow addition of that claim but should continue to exercise jurisdiction over the properly removed claims and over any additional matters (claims and interests) that it has supplemental jurisdiction to hear, including the interests that rendered the absentee a person

147. Perdue, *supra* note 135, at 72.

with a right to intervene (or someone who warranted permission to intervene), if these are distinguishable from plaintiff's unassertable claim. In other words, the court may allow an absentee to intervene on the defendant's side under Rule 24, but may disallow any claim by plaintiff against the intervenor. This resolution safeguards the defendant's removal, but prevents all of plaintiff's claims from being heard in one suit. It enforces the jurisdictional requirements of § 1332 (which we are at this point assuming would bar supplemental jurisdiction over the plaintiff's proposed claim against the Rule 24 party) but does not necessarily bar participation by a party who intervenes in order to protect his own interests. If the intervenor is an indispensable party, the court should proceed as described above in the discussion of such parties.

e. Unfairness to Plaintiffs?

Before going on to consider the other claims that are listed in § 1367(b), I would like to respond to the argument that prohibiting a plaintiff from adding claims against non-diverse defendants while keeping the case in federal court may be unfair.[148] I have recommended an approach to supplemental jurisdiction that seeks to avoid unfairness, but even if the approach were universally accepted, some of its applications undoubtedly would yield results that observers would regard as unfair. It certainly is true that under this approach the plaintiff will not always be able to join claims in federal court that she would have been permitted to join in state court. When that occurs under this approach, however, it will occur as a result of the plaintiff's failure to assert her claims against non-diverse parties in state court, when with due diligence she could have done so, taken together with the limitations on federal subject matter jurisdiction. Had the claims initially been asserted, the removal and the problems it creates for plaintiff would have been obviated.[149]

In order to cure the unfairness that Professor Perdue sees lurking in § 1367(b), she has proposed that § 1447(e) be amended to read, "If after removal the plaintiff seeks to join additional claims or defendants where there is no subject matter jurisdiction over those claims or defendants, the court may deny joinder, or permit joinder and remand the action to the State court."[150] I have a couple of problems with this suggestion. The first is a basic philosophical disagreement. I do not believe that plaintiffs who filed removable diversity actions should be able to force remand by post-removal addition of claims against non-diverse defendants, except in very limited circumstances. Plaintiffs should be able to knock a case out of federal court only if in equity and good conscience the action should not go forward without the claim they seek to assert against the non-diverse party *and* for lack of either subject matter jurisdiction (an independent ground *or* supplemental) or personal jurisdiction the federal court cannot hear the claim.[151] Otherwise, defendants who prefer federal court should continue to be able to trump the plaintiff's choice of state court when plaintiffs have filed removable diversity actions. A more technical prob-

148. *Id.* at 83.
149. *See supra* text following note 95.
150. *Id.* (emphasis deleted).
151. If personal jurisdiction is the problem, remand is not going to help, because the state court will lack it as well, although some other state court might be able to assert personal jurisdiction over all the would-be defendants. In that case, it would be more efficient for the federal court to dismiss than for it to remand.

lem I have with the proposed amendment is that it is unclear whether the jurisdiction of which it speaks includes only an independent ground of jurisdiction or also includes supplemental jurisdiction. As indicated above, I believe any such provision should apply only if the court can assert neither an independent basis of, nor supplemental jurisdiction over, the claim in question.

f. Claims by Persons Proposed to Be Joined as Plaintiffs Under Rule 19 or Seeking to Intervene as Plaintiffs Under Rule 24

Assume that after a diversity action has been removed, it is proposed that a person be joined as a plaintiff under Rule 19, or seeks to intervene as a plaintiff, and seeks to assert a claim against a non-diverse defendant.[152]

A preliminary point worth making is one that Professor Perdue has raised. While § 1367(b) constrains the exercise of supplemental jurisdiction over *claims* by persons proposed to be joined as plaintiffs under Rule 19 or seeking to intervene as plaintiffs under Rule 24, nothing in it constrains the joinder of plaintiffs under Rule 19 or the intervention of plaintiffs under Rule 24 *per se.*[153] I have taken the position that the parallel distinction with respect to defendants is not nonsensical,[154] and I think this one is tenable as well, although ordinarily a Rule 19 plaintiff and a proposed plaintiff intervenor will want to vindicate their interests by asserting a claim. There are situations in which people have a sufficient *interest* in civil litigation and in the judgment to which it may lead that they should be found to be persons to be joined if feasible or to have a right to intervene, or should be permitted to intervene, on the plaintiffs' side, even though they choose not to assert a claim or have no legal or equitable claim that they can assert.[155] By virtue of § 1367(b)'s terminol-

152. One preliminary point is "the Rule 20 question." For reasons I have explained elsewhere, I believe that the statute *does* qualifiedly deny supplemental jurisdiction over the claims that "proper" plaintiffs, proposed to be joined post-removal, could assert, so I will not linger over what others have viewed as a statutory gaffe in failing to bar an original complete diversity filing and subsequent amendment to add a nondiverse plaintiff under Rule 20, taking advantage of supplemental jurisdiction over the claim of the new plaintiff against a pre-existing defendant. Much of what is said in the text regarding proposed joinder of plaintiffs under Rule 19 or 24 would also apply to the proposed joinder of plaintiffs under "Rule 20." *See* Steinman, *supra* note 24, at 99–102.

153. Perdue, *supra* note 135, at 79–81.

154. Steinman, *supra* note 24, at 107–11; Steinman, *supra* note 18, at 911–12, 916–22, 926.

155. *See, e.g.*, Chiles v. Thornburgh, 865 F.2d 1197, 1213–14 (11th Cir. 1989) (intervenor need not demonstrate standing; detainees who contended that the government's operation of the institution in which they were confined violated prison standards and threatened them with harm had right to intervene); United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972) (intervention of right on the plaintiff's side permitted by environmental groups that would not have standing to sue on their own). *Accord* David Shapiro, *supra* note 133, at 726, 736–38, 740, 759; 3B MOORE, *supra* note 137, ¶ 24.10[2], at 24–84 ("permissive intervention has often been allowed even though the existence of any 'claim' or 'defense' is difficult to find," citing examples); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 288, 312 (1990) (the intervenor who cannot satisfy the requisites of Article III should not be barred from court if the intervenor can contribute to the court's understanding of the issues; "intervention ... can adequately perform this function only if it is released from the common law notion of legally protectable rights." *Id.* at 288). Professor Bandes has noted that application of the criteria for intervention of right "depends on a workable definition of the interest requirement, yet no such definition has found acceptance," nor is there agreement on the meaning of various definitions that courts have proffered. *Id.* 250–51. If she is correct that the analysis of jurisdiction in intervention situations seldom has been linked to the constitutional boundaries of the "case" limitation, *id.* at 253, then § 1367 may encourage courts to specify and

ogy, such jurisdiction is authorized. Furthermore, the ability of the court to assert supplemental jurisdiction over the interests described in Rule 19 and Rule 24 will render the notion of indispensability inapplicable in some situations to which it would have pertained in the past. It appears, for example, that the proposed additional plaintiff who may intervene of right will never be indispensable. Supplemental jurisdiction over her *interests* will be proper under § 1367(a) and (b) and, by seeking to become a plaintiff intervenor, she will have waived any objections to personal jurisdiction or venue. Hence, nothing will render the absentee unjoinable and therefore potentially indispensable. By contrast, a person proposed by others to be joined as a plaintiff under Rule 19 may be indispensable. If she is found to be a party to be joined if feasible, supplemental jurisdiction over her interests will be proper, but the proposed party may be beyond the court's reach as a matter of personal jurisdiction or venue, and she could be indispensable under Rule 19(b)'s standards. If she is held to be indispensable, the court may deny joinder and dismiss the action. Section 1447(e) does not encompass this fact pattern, and consequently would not authorize remand.[156]

If the proposed Rule 19 or Rule 24 plaintiff does seek to assert a *claim*, the court should consider the propriety of her doing so as a matter of the Federal Rules governing amendment of pleadings and joinder of parties and claims, generally.[157] If it concludes that the equities are in her favor, it must address the jurisdictional questions raised by the claims she would assert.

The arguments that were made earlier in this paper, where the focus was claims against additional non-diverse defendants, very largely apply, with appropriate adaptations, when the focus is claims by persons proposed to be joined as plaintiffs under Rule 19 or seeking to intervene as plaintiffs under Rule 24. If the proposed claim is unrelated to the underlying action, supplemental jurisdiction over it will be impermissible under § 1367(a), an independent basis of jurisdiction will be necessary, and the intervention will likely be permissive. If the proposed claim *is* part of the same case or controversy as the underlying action, supplemental jurisdiction will be possible under § 1367(a). However, the proposed claim and the interests that it represents may be the very factors that rendered the person a Rule 19 party or an intervenor of right; it may be these very claims and interests that the Rule 19 or 24 party would have been unable to protect if she were not a party or that would have left the defendants subject to a risk of multiple or inconsistent obligations. In that situation, *if* § 1367(b) denies supplemental jurisdiction over the Rule 19 or 24 plaintiff's *claim* against a defendant, it really makes no sense to speak of § 1367(b) allowing the court to exercise supplemental jurisdiction over the *interests* of the Rule 19 or 24 plaintiff. If the two are inseparable, the court can not exercise jurisdiction over the latter without exercising it over the former. However, the court may be able to assert jurisdiction over both, rather than neither. The question is *whether* § 1367(b) disallows supplemental jurisdiction

clarify the linkages so that the exercises of supplemental jurisdiction over proposed interventions and the claims of intervenors will be more satisfactorily defended with reference to an articulated idea of a case and its relationship to federal power.

156. While these observations are not limited to the context of removed cases, they do apply to it.

157. *See supra* text accompanying note 123.

over a proposed Rule 19 or Rule 24 plaintiff's claim in these circumstances, particularly in removed cases.

> The Court ... has been averse to ancillary jurisdiction over plaintiffs' claims, particularly when they are not logically dependent upon the claim stated in the original complaint. The Court has said, however, that "ancillary jurisdiction typically involves *claims* by a defendant 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.*"[158]

The Supreme Court has long approved the exercise of ancillary jurisdiction over claims asserted by plaintiff intervenors whose claims arose from the same case or controversy as the underlying action, as consistent with § 1332.[159] That should be a central fact in the application of § 1367(b), even in cases commenced in federal court, *unless* Congress in § 1367(b) has overturned seminal cases like *Freeman v. Howe*, *Stewart v. Dunham*, and their progeny. Certainly, nothing in the language of § 1367(b) does so. Nowhere in the statute does Congress purport to decide when exercising supplemental jurisdiction would be inconsistent with the jurisdictional requirements of § 1332.

The only indication that Congress intended to alter this long-standing line of authority is the legislative history. It describes § 1367(b) as eliminating the anomaly that the same party could intervene of right and take advantage of supplemental jurisdiction but could not come within such jurisdiction if parties already in the action sought his joinder under Rule 19. The history says that § 1367(b) would exclude Rule 24(a) plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19.[160] This gloss raises the question of the relevance and weight such legislative history should be given. "Because it consists of text that is not collectively produced by the legislature, ... legislative history is bound to be comparatively inferior evidence of the legislature's intent ...."[161] In addition, "The danger is that when a court uses legislative history ..., the statute is nudged off-center in relation to the compromise in Congress. ... [T]he court is backing off the statute, likely along a special interest vector. ... Instead, and as the Supreme Court has said (but not always done), the court should 'respect the compromise embodied in the words chosen by Congress.'"[162]

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158. Steinman, *supra* note 18, at 949–50 (quoting Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374–76 (1978) (emphasis added) (other footnotes omitted)).

159. *See, e.g.*, Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861) (allowing claimants to assert their claims without regard to whether an independent basis of jurisdiction existed when federal jurisdiction effectively controlled property in dispute); Stewart v. Dunham, 115 U.S. 61, 64 (1885) (approving ancillary jurisdiction over the claims of nondiverse plaintiffs added postremoval in a creditors' suit to set aside a fraudulent conveyance, where the suit had been brought on behalf of all other creditors choosing to come in and share litigation expenses).

160. H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 (footnotes omitted.)

161. Mayton, *supra* note 98, at 115. *See* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371. Legislative history also is relatively inaccessible, which makes judicial reliance upon it problematic in part because it may lead to a different construction than normally would be accorded by those whom the statute governs, to whom the statute is more readily available. Mayton, *supra* note 98, at 133–34.

162. Mayton, *supra* note 98, at 136–37 (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 818 (1980) (other footnotes omitted)). *See also* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1012 (1992) ("Although neither constitutional nor precedential arguments should dissuade Judge Hand's congressional agent

While I am not attempting here any thorough analysis of the relevance and weight that legislative history should be given by the courts, I offer the foregoing comments because it seems particularly questionable for courts to credit legislative history which purports to resolve issues which the legislation itself gives no hint of even attempting to resolve. That would be the situation if the courts relied upon legislative history to conclude that supplemental jurisdiction cannot support an intervening plaintiff's claim against a non-diverse defendant.

It also would be inappropriate for courts to attempt to justify disobedience to Supreme Court precedent on the basis of such legislative history as exists here, particularly in view of the context within which Congress passed the statute. As others have detailed,

> [T]he statute was drafted and passed quickly without much opportunity for public debate. ... Congress was presented with a statute that purported to overrule a troublesome case [*Finley*] and restore prior practice. Third, the statute was said to be part of the "less controversial" proposals of the much-acclaimed Federal Courts Study Committee ..., although that Committee never drafted a statute on supplemental jurisdiction. Fourth, the statute was considered with a bill creating judgeships, which had a good bit of political steam .... And fifth, the bill came to a vote in the last days of the 1990 session, when it was waging the very public battle of the budget.[163]

Earlier, I observed that the Court has acknowledged, with seeming approval, the exercise of ancillary jurisdiction over claims by persons whose rights might be irretrievably lost unless they could assert them in an ongoing federal court action.[164] Plaintiff intervenors sometimes fall within that category, but non-diverse Rule 19 plaintiffs also can be such persons, whose entry into federal court is not truly a matter of free choice, but is a necessity to protect their rights. Before the enactment of § 1367, I argued that Rule 19 joinder of a non-diverse, claim-asserting, plaintiff should be permitted if, but only if, the proposed plaintiff met the requirements for a plaintiff intervenor of right.[165] In legislatively authorizing the courts to assert supplemental jurisdiction whenever an additional plaintiff's claim is part of the same constitutional case or controversy as that already pending, § 1367 invites a liberalization of that view. However, with one modification, I adhere to it as a matter of policy, and as a reasonable accommodation with the jurisdictional requirements of § 1332. Being merely a proper party should not be enough to weaken the complete diversity requirement, so long as it is the law. However, if one is a Rule 19(a)(2)(ii) party, so situated that disposition of the action in one's absence will leave any of the existing parties subject to a substantial risk of incurring

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from referring to legislative history, prudential considerations should. ... In particular, the widespread expectation that judges will consult legislative histories leads to distortion of the histories and makes them unreliable indicators of congressional intent.").

163. Freer, *supra* note 4, at 470–71 (footnote omitted).

164. *See supra* text accompanying note 158.

165. Steinman, *supra* note 18, at 949–50. I wrote that it would be inappropriate to require any less and fruitless to require any more, and noted that this proposal would, for example, allow the joinder of a nondiverse plaintiff if a diverse plaintiff had sued to recover from a limited fund, against which the absentee also had a claim, if a judgment for the initial plaintiff might harm the absentee by depleting or exhausting the fund. *Id.*

multiple or otherwise inconsistent obligations, then too there is good reason for supplemental jurisdiction over one's claims to be permitted.[166]

Before § 1367, as the law actually stood:

> [I]f the absentee intervenes of right as a plaintiff under Rule 24(a)(2), the court may exercise ancillary jurisdiction, but ancillary jurisdiction has not otherwise been permitted over a plaintiff's claim. Believing that ancillary jurisdiction would not be permissible, the courts generally have not permitted joinder of a nondiverse plaintiff.[167]

As previously noted, the legislative history describes § 1367(b) as eliminating an anomaly by denying supplemental jurisdiction over the claims of Rule 24(a) plaintiff-intervenors to the same extent as such jurisdiction is denied to claims by prospective plaintiffs whose joinder is sought under Rule 19.[168] However, as previously argued, § 1367(b) itself furnishes no reason why courts should stop regarding supplemental jurisdiction over the claims of intervenors of right as consistent with § 1332, and Supreme Court precedent supports such supplemental jurisdiction. Moreover, § 1367(b) itself does not differentiate 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. It excludes supplemental jurisdiction over neither. It leaves to the courts the decision whether the exercise of that jurisdiction would be inconsistent with § 1332 and in no way prevents them from either maintaining the "anomaly" (which some scholars believe is a warranted and principled distinction) or curing it by more generous use of supplemental jurisdiction in appropriate circumstances.[169] I would urge the latter course.

In removed actions, the situation from the perspective of a potential Rule 19 plaintiff or Rule 24 intervenor really is no different than it would have been if the action had been commenced in federal court. By the time entry into the action and assertion of a claim therein is contemplated, the action is in federal court. Absent collusion with the parties, the proposed plaintiff will have had no control over the forum in which the action is pending. However, the new plaintiff ordinarily will enter the federal court voluntarily and will urge the court to assert ancillary jurisdiction over its claim against a non-diverse defendant. Consequently, I would not treat these situations any differently when cases have been removed than when they were originally filed in federal court.

If the court decides in favor of exercising supplemental jurisdiction over the proposed claim by the new Rule 19 or 24 plaintiff, it can simultaneously adjudicate the original civil action, safeguard the defendants' removal, and allow all of plaintiffs' related claims to be heard in one suit. If the court declines to exercise supplemental jurisdiction over the proposed claim by the new plaintiff, it should disallow addition of that claim. It should continue, however, to

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166. Parenthetically, it should be noted that when a court does take supplemental jurisdiction over such a claim, it should reject any argument that the case then falls within § 1447(c)'s dictate that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." It is debatable whether postremoval events should be considered in determining whether a case falls within § 1447(c)'s dictate, in any event. *See* Steinman, *supra* note 18, at 945–49.

167. Steinman, *supra* note 18, at 949–50 (footnotes omitted).

168. H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 (1990) (footnotes omitted).

169. Steinman, *supra* note 24, at 105–07.

exercise jurisdiction over the properly removed claims and over any additional matters (claims and interests) that it has supplemental jurisdiction to hear, including the interests that rendered the new plaintiff a person to be joined if feasible or an intervenor of right, if these are distinguishable from plaintiff's unassertable claim. This resolution safeguards the defendant's removal, but prevents all of plaintiffs' claims from being heard in one suit. Although it entails a loss of efficiency and precludes the court from doing complete justice among all interested parties, it enforces the jurisdictional requirements of § 1332. In other circumstances, if the complete diversity requirement bars consideration of the Rule 19 or 24 plaintiff's claim, it also will preclude jurisdiction over the interests of that party. The federal action may either proceed without him or be dismissed as a result of the absentee's indispensability.

g. Perspective

The bottom line is that, in all of the circumstances enumerated in § 1367(b), I would resolve the issue whether exercise of supplemental jurisdiction would be inconsistent with the jurisdictional requirements of § 1332 the same way, whether cases had been removed from state court or filed originally in federal court, *unless* plaintiffs could establish that they had not acted strategically in filing in state court, as a first step in a series of events calculated to obtain federal court jurisdiction that would be *ultra vires* if the action had been commenced in federal court initially. When plaintiffs can make that showing, however, the federal courts should construe § 1367(b) to empower them to assert supplemental jurisdiction over plaintiffs' claims that would be beyond their authority if the case had been commenced in federal court. Such claims could include, for example, the claim of a plaintiff against a third-party defendant.

More fundamentally, although I have stated how I believe cases should be decided under the existing statutory framework, I am not satisfied with that framework. Like Professor Rochelle Cooper Dreyfuss, I believe that diversity jurisdiction has contemporary utility.[170]

> [O]ne could easily argue that cases involving impleaded, intervening, and necessary parties are precisely the state-law cases that should be within federal reach, if diversity cases are going to remain on the docket at all. They not only involve litigants from more than one state or nation, but they also align the parties against each other in complicated ways. ... [T]he complex alignment gives the federal court an especially rich opportunity to examine how state law works in the multistate and multinational context. ... [T]he necessary party and impleader cases excluded by § 1367 also present questions of special interest to the federal system[:] ... issues involving interaction between state long-arm statutes and constitutional limitations and [which] raise federalism and comity concerns along with familiar due process issues. ... Similar remarks can be made about choice of law issues. ... Providing a federal voice in the debate over state choice of law rules makes sense because of the federalism and comity concerns raised.[171]

Consequently, I am not at all confident that the negative answers to the questions of supplemental jurisdiction, to which § 1367(b) and the complete di-

170. *See* Dreyfuss, *supra* note 103, at 13–21.
171. *Id.* at 18–19 (footnotes omitted).

versity rule lead us, are the optimal answers. They are nonetheless the answers that Congress has mandated, for the present.

One more multi-faceted question remains to be asked:

4. Are There Other, Different Situations Than Are Listed in Which § 1367(b) Should Limit Supplemental Jurisdiction in the Removal Context?

Not surprisingly, the question has been asked and the argument has been made:

> What about those diversity defendants who have chosen to remove a state case to federal court? Should we not logically attempt to deter their resort to federal court, by removing from *them* the strategic benefits of supplemental jurisdiction? ... [W]e could say to would-be diversity defendants who seek the benefits of federal court jurisdiction just what we say to diversity plaintiffs: 'the efficiency [you] seek[] so avidly is available without question in the state courts.'... [E]fforts to deter resort to the diversity jurisdiction should logically apply to either party who seeks that benefit.[172]

This argument clearly has some bite. Nonetheless, I believe that, just as plaintiffs' presence in federal court in removed cases (apparently) against their will should not result in the exercise of supplemental jurisdiction over any and all claims they might want to add, so defendants' choice to be in federal court in removed cases should not lead the courts to decline to exercise supplemental jurisdiction over any and all claims they might want to assert. I arrive at this conclusion for one fundamental reason, and some subsidiary reasons.

The question under § 1367 is whether the exercise of supplemental jurisdiction would be inconsistent with the jurisdictional requirements of § 1332. This "translates" into concern primarily with the "complete diversity" requirement although the amount in controversy requirement also is implicated. The complete diversity requirement is entirely a judge-made doctrine, without roots in the Constitution and without any discernible textual basis in the statute. While one can certainly infer Congress's acceptance of it, particularly from § 1367(b) itself (indeed, § 1367(b) suggests that Congress views the complete diversity requirement as now having legislative status),[173] the question remains: What does the complete diversity rule require? The answer is that it requires each plaintiff to be diverse from each defendant.[174]

a. Defendants' Counterclaims, Cross-claims, Third-Party Claims

Exercises of supplemental jurisdiction over compulsory counterclaims against the original plaintiffs, cross-claims, and third-party claims are consis-

172. Redish, *supra* note 24, at 1822 (footnotes omitted). *Accord*, in regard to ancillary jurisdiction over impleader claims, Perdue, *supra* note 13, at 565 ("Whatever fairness arguments can be made to support jurisdiction over impleader claims when the defendant is involuntarily haled into federal court seem far less compelling when the defendant selects the forum.").

173. *See* Redish, *supra* note 24, at 1804 n.179.

174. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828-29 (1989); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978); City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941); Strawbridge v. Curtis, 7 U.S. (3 Cranch.) 267, 267-68 (1806); State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967).

tent with the complete diversity requirement, so understood.[175] It is only when one loses sight of this and transforms the complete diversity requirement into something it never has been, a requirement that no party who asserts a claim of any sort in a diversity suit may be of the same citizenship as the party against whom she claims, that one can conclude that the exercise of supplemental jurisdiction over counterclaims, cross-claims, or third-party claims would violate the complete diversity rule, hence be inconsistent with section 1332, and consequently be something that § 1367(b) should prohibit.[176] In view of this, the argument quoted above fails in its universal and "strong" version, for all of the points marshalled there work only when they support the complete diversity requirement, and it is not at risk in these situations. One *can* still argue that when a court exercises its discretion, "[w]hatever fairness arguments can be made to support jurisdiction over impleader [and other defendants'] claims when the defendant is involuntarily haled into federal court seem far less compelling when the defendant selects the forum."[177] But if the fairness argument is less compelling, other arguments for supplemental jurisdiction are not; such policies as "ensuring effective functioning of the federal courts and preserving free choice of a federal forum"[178] remain in full force.

I believe that the complete diversity rule is likewise not violated when a defendant seeks to assert a counterclaim or cross-claim and make a non-diverse person an additional party to that claim. The new party will be a counter- or cross-defendant, but not a plaintiff. Each plaintiff will continue to be diverse from each defendant. The joinder in question thus will not be inconsistent with the jurisdictional requirements of § 1332.[179] Moreover, even if the fairness argument is less compelling because the defendant has chosen the federal court, the policies that were cited in the preceding paragraph, as well as those that favor one who has been haled into court against his will, support supplemental jurisdiction. I do not see any greater intrusion on state judicial power in the

175. *Accord* United States *ex rel.* Foster Wheeler Corp. v. American Surety Co., 25 F. Supp. 700 (E.D.N.Y. 1938), *aff'd,* 142 F.2d 726 (2d Cir. 1944) (intervenor of right permitted to assert counterclaim against the plaintiff arising out of breach of the same contract upon which plaintiff sued; ancillary jurisdiction asserted, where plaintiff's action was brought under a federal statute). *See generally* 3B MOORE, *supra* note 137, ¶¶ 24.17[3.–1] Counterclaims, [3.–2] Cross-claims, [3.–3] Third-Party Claims, and cases therein cited, at 24–170 to 24–177.

176. *Accord Owen Equipment*, 437 U.S. at 380–81 (White, J., dissenting) (noting that even the majority in *Owen* refused to read the complete diversity requirement so broadly and recognized with seeming approval the exercise of ancillary jurisdiction over nonfederal claims in situations involving impleader, cross-claims and counterclaims). Section 1367(b) does not purport to limit exercises of supplemental jurisdiction over counterclaims or cross-claims, but it does limit supplemental jurisdiction over claims against persons made parties under FED. R. CIV. P. 14.

177. Perdue, *supra* note 13, at 565.

178. Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 173 (1983).

179. *E.g.*, Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329 (1887) (exercising ancillary jurisdiction over a counterclaim—for recovery of a fraudulent conveyance, in a breach of contract action—to which a new non-diverse party was added); Webb v. Just In Time, Inc., 769 F. Supp. 993, 997 (E.D. Mich. 1991) ("There are no compelling reasons to distinguish between a party joined pursuant to 13(h) and one brought in under Rule 14 for purposes of determining diversity of citizenship"); Landmark Bank v. Machera, 736 F. Supp. 375, 378–79 & n.5 (D. Mass 1990). *But cf.* Finley v. United States, 490 U.S. 545, 555–56 (1989) (Scalia, J., expressing in dicta doubt whether the Court would continue to uphold ancillary jurisdiction over Rule 13(h) parties added to a compulsory counterclaim, despite the long history of such jurisdiction).

exercise of supplemental jurisdiction over such claims than inheres in other customary assertions of supplemental jurisdiction.

b. Defendants' Claims Against Persons Made Parties Under Rule 19 or 24

If the defendant seeks to assert a claim against a person made a party on the plaintiffs' side under Rule 19 or 24 of the Federal Rules, the analysis must go deeper.[180] First, we should keep in mind here that, in order for someone to be a Rule 19 plaintiff, the court has to have concluded that in the person's absence complete relief could not be accorded among those already parties, a rare situation when Rule 19 is properly construed;[181] or that the person claimed an interest relating to the subject of the action and was so situated that the disposition of the action in the person's absence might (1) as a practical matter impair or impede the person's ability to protect that interest (also the gist of the test for intervention of right) or (2) leave any of the existing parties subject to a substantial risk of incurring multiple or inconsistent obligations. When one focuses on these tests, one sees that they bring to mind a person who might have a claim against the defendant, but not a person against whom the defendant might have a claim. Moreover, even a version of § 1367(b) that treated plaintiffs and defendants evenhandedly would not prevent the court from asserting supplemental jurisdiction over the *interests* of such persons *as* Rule 19 or Rule 24 parties. So, the situation we must imagine is one in which, parties having come into or been brought into an action because of their *interests*, the defendant wants to assert a *claim* against them.

An example of this situation might be the following: An insured sues its insurer to require the latter to defend the insured in litigation anticipated from persons with claims against the insured, and to indemnify the insured if the claimants prevail. These claimants are brought in as Rule 19 plaintiffs or intervene as plaintiffs under Rule 24. The insurer then seeks to countersue all the plaintiffs for a declaratory judgment that it has no obligation to defend or indemnify.

The court has to decide whether, under the general principles governing the belated joinder of parties and of claims, the amendment should be permitted. Assuming *arguendo* that the court concludes that the equities favor allowance of the claim, the court will face the question whether to assert supplemental jurisdiction over the proposed claim.

As a matter of policy under § 1332 and of evenhanded application of the spirit animating § 1367(b), should supplemental jurisdiction be permitted? This is the context in which the argument quoted above should win the day, if it ever does. Whether the new party came into the case at her own urging, at the urging of the plaintiff, or at the urging of the defendant, when the question is whether the court should assert supplemental jurisdiction over a *claim* that the defendant seeks to assert against her, it is the defendant—the party who invoked federal jurisdiction in a removed case—who is asking the court to hold out its

180. There is no mechanism for a defendant to cause a person to be joined on the plaintiff side pursuant to Rule 20, Rule 15 or Rule 21. Additional plaintiffs can join an existing federal suit only on their own initiative, with the acquiescence of the existing plaintiffs or upon the order of the court under Rule 24 or, absent their own initiative, under authority granted to the court in Rule 19.

181. Freer, *supra* note 117, at 1062.

hand to a claim of his that is asserted against a party *on the plaintiffs' side* and that lacks an independent basis of jurisdiction. Nonetheless, even here one can defensibly conclude that the court should accept jurisdiction. *Either* the new person will not have asserted any claim against the defendant, in which case *arguably* she should not be regarded as a plaintiff for purposes of the complete diversity rule; she is essentially similar to a Rule 13(h) additional party on a counterclaim, a claim over which the court is able to assert supplemental jurisdiction; *or* she will have been permitted to assert a claim against the nondiverse defendant[182] and defendant's claim will then be a counterclaim, in which case the decision as to supplemental jurisdiction should be decided as the question generally is decided as to counterclaims. Of course, if the court decides that it should not assert supplemental jurisdiction over the defendant's claim, it should just disallow it and proceed with the matters before it, unless in equity and good conscience the case should not proceed without the claim. In that case, it should dismiss the action. By its terms, § 1447(e)[183] remand will not be available.

c. Claims by Persons Proposed to Be Joined as Defendants Under Rule 19 or Seeking to Intervene as Defendants Under Rule 24

If persons proposed to be joined as defendants under Rule 19 or seeking to intervene as defendants under Rule 24 seek to assert claims against nondiverse plaintiffs, the courts will (yet again) have to decide whether to permit such claims, as a matter of the general principles governing the joinder of claims and parties. If they decide that such claims should be permitted, the jurisdictional question will arise.

The situation from the perspective of a potential Rule 19 or Rule 24 defendant may be no different than it would have been if the action had been commenced in federal court. By the time entry into the action and assertion of a claim therein is contemplated, the action is in federal court. One consequently could conclude without further analysis that the same doctrines that govern supplemental jurisdiction over such claims in cases commenced in federal court should govern in removed cases. That conclusion would not make the court's task particularly easy, however. According to Wright, Miller and Kane, the authorities disagree as to the proper treatment to be accorded "counterclaims" asserted by an intervenor.[184] Prior to adoption of § 1367, these treatise writers recommended the following set of outcomes, which have varying degrees of support in the case law: Intervenors of right should be permitted to assert compulsory counterclaims, with ancillary jurisdiction afforded; they should be permitted to assert permissive counterclaims only if there is an independent basis of jurisdiction for them. The treatise writers' position with respect to permissive intervenors is unclear. While they opine that the court should have discretion to permit or disallow all counterclaims by permissive intervenors, whether compulsory or permissive, they also seem to say that if there were independent jurisdictional grounds for the intervention (which there ordinarily has had to be), counterclaims that the intervenor wishes to assert should be

182. *See supra* text accompanying note 157.
183. *Supra* note 5.
184. 7C WRIGHT ET AL., *supra* note 79, § 1921 at 492. I put "counterclaims" in quotation marks because it is not clear from the text that in all the cases under discussion claims had been asserted by the plaintiff against the "defendant" intervenor.

tested by the same rules that apply to counterclaims by an original party,[185] ... in which case the distinction between compulsory and permissive counterclaims would be relevant.

If the situation is such that ancillary jurisdiction would be *denied* in a case commenced in federal court, it ought to be denied after removal as well since, if it is to have any effect at all, the removal weakens the case for exercise of supplemental jurisdiction over claims that a defendant seeks to assert. If ancillary jurisdiction would be *afforded* in a case commenced in federal court, further analysis may be appropriate.

If one considers whether either the original defendant or the newcomer has done something to circumvent the complete diversity requirement—such that the court should refuse to exercise supplemental jurisdiction over the newcomer's proposed claim—one has to conclude that, in a sense, this is practically impossible. Absent collusion with the plaintiff, neither the original defendants nor the newcomer played any part in the decision who would sue whom and who would be left out, yet these are the decisions in which any circumvention of the complete diversity requirement occurs. These were the plaintiff's decisions, and there is no reason to think that a plaintiff would omit a non-diverse potential defendant to facilitate the latter's assertion of a claim against the plaintiff. Moreover, absent collusion with the original defendants, the proposed defendant will have had no control over the forum in which the action is pending—a factor that may favor supplemental jurisdiction. Collusion may have occurred, however, in that it can have been the original defendant who (at the would-be newcomer's urging) persuaded the court that the additional party should be joined under Rule 19, an event without which the question of jurisdiction over claims she wants to assert would never arise. The assertion of an additional claim against the plaintiff presumably is to all defendants' strategic advantage. Alternatively, if her arrival was precipitated by the newcomer herself, one may find an effort to circumvent the complete diversity requirement in the newcomer's efforts to join the action and then to assert a claim against a non-diverse plaintiff.

The new defendant, whether or not he entered the federal court action at his own initiative, *will* voluntarily be urging the court to assert ancillary jurisdiction over his claim against a non-diverse plaintiff. Consequently, these situations should be treated with care. Perhaps the answer is to treat the claims in question the same way I proposed that defendants' claims against Rule 19 or 24 plaintiffs should be treated. That is, courts should reason that *either* the plaintiff will not have asserted any claim against the Rule 19 or 24 defendant, in which case *arguably* she should not be regarded as a plaintiff *vis-à-vis* the new defendant for purposes of the complete diversity rule, but is similar to a Rule 13(h) additional party on a counterclaim; *or* she will have been permitted to assert a claim against the non-diverse Rule 19 or 24 defendant and the latter's claim should then be treated as a counterclaim for purposes of determining supplemental jurisdiction over it. The law developed in cases commenced in federal court, confused though it is, would then guide the decision as to whether ancillary jurisdiction would be asserted over the Rule 19 party's or intervenor's claim.

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185. *Id.* at 495–500. *See also* 3B MOORE, *supra* note 137, ¶ 24.17[3.–1], at 24–170 to 24–176.

If the decision is against supplemental jurisdiction over defendant's *claim*, the court will have to consider whether the *interests* that were viewed as warranting Rule 19 joinder or Rule 24 intervention are separable from the claim. If they are not, the court will need to revisit the decision to allow joinder or intervention and the question of the indispensability of the would-be new party.

V. Conclusion

This Article has explored the interplay of the supplemental jurisdiction statute, § 1367, and § 1441 removal. Among its most important conclusions are:

that § 1367, in its entirety, does apply to cases removed to federal court;

that § 1367(b) does *not* govern claims asserted prior to removal—and, as a result, federal courts have supplemental jurisdiction over all the claims filed pre-removal that are so related to the claims within statutory diversity jurisdiction that they form part of the same case or controversy under Article III. The statute consequently may offer the Court unexpected opportunities to decide the Article III limits on diversity controversies;

that plaintiffs in removed cases should be afforded all the benefits of supplemental jurisdiction that are afforded to plaintiffs who commence their actions in federal court; and

that, despite the invocation of federal jurisdiction by defendants rather than by plaintiffs, the doctrines that limit the existence or exercise of supplemental jurisdiction in cases commenced in federal court should both govern in removed cases *and* lead to the same outcomes *unless* plaintiffs can establish that they did not act strategically in filing in state court, as a first step in a series of events calculated to obtain federal court jurisdiction that would be *ultra vires* if the action had been commenced in federal court initially. When plaintiffs can make that showing, however, the federal courts should construe § 1367(b) to empower them to assert supplemental jurisdiction over plaintiffs' claims that would be beyond their authority if the case had been commenced in federal court. My conclusions are predicated on my understanding that Congress (wisely or not) wants the complete diversity requirement to be stringently enforced, and on my belief that that goal can be accomplished only if state court filing is not seen as obviating all concerns about plaintiffs' efforts to circumvent the complete diversity requirement. I have rejected an absolute rule against supplemental jurisdiction over claims that plaintiffs seek to assert post-removal, however, in order to avoid unduly harsh treatment of plaintiffs who did not act strategically and either, despite reasonable inquiry, initially did not know of non-diverse parties who could have been made defendants or came to have legitimate grounds for belated assertion of their claims, based upon developments in the lawsuit that were beyond plaintiffs' control.

Having concluded that § 1367(b)'s "list" is not over-inclusive in the removal context, the article also concludes that it is not under-inclusive in failing to qualifiedly deny supplemental jurisdiction to claims asserted by defendants after removal. In my view, supplemental jurisdiction remains proper as to counterclaims, cross-claims, and third-party claims asserted by defendants, even when non-diverse parties are made additional parties on those claims. Cases in which defendants seek to assert claims against a person made a party on the plaintiffs' side under Rule 19 or 24 of the Federal Rules and in which persons proposed to be joined as defendants under those same Rules seek to assert claims against non-diverse plaintiffs are a tougher call. Nonetheless, even here, one can defensibly conclude that the court should accept jurisdiction, by analogy to Rule 13(h) configurations when the targeted plaintiffs have not asserted a claim against the claim proposing defendant and under the supplemental jurisdiction doctrines governing counterclaims when they have.

The Article also offers my views on the scope of the civil actions that are removable in the wake of § 1367, on which defendants should have to join notices of removal, and on the scope and limits of federal judicial authority to remand claims within supplemental jurisdiction. The Article concludes that the civil actions that § 1441(a) and (b) authorize to be removed include both the claims over which there is an independent basis of federal subject matter jurisdiction and the claims that are now within supplemental jurisdiction, as defined by § 1367. Section 1367 renders removable combinations of claims that would not have been removable before its passage. The Article argues that in (what used to be known as) pendent party situations, only the defendants against whom federal question claims have been pleaded should be required to join in the removal notice; defendants against whom only state law claims have been plead should not be empowered to thwart removal by refusing to join the notice. The Article also notes the absence of statutory authority to remand claims within supplemental jurisdiction when the court decides not to exercise that jurisdiction, questions the propriety of extra-statutory power to remand them, and criticizes the law for a perverse and crazy quilt doctrine of reviewability: We exclude review of remand decisions based upon lack of subject matter jurisdiction while allowing review of dismissals for lack of such jurisdiction, allowing review of discretionary dismissals based upon supplemental jurisdiction doctrines, and being unclear as to the reviewability of remand decisions predicated on those same discretionary grounds. In my view, Congress ought to repeal § 1447(d)'s prohibition against appellate review of remand orders.

This is the first word in the legal academic literature on several of the issues explored here. It may not be the last word, literally or figuratively, but I hope it will be a valuable contribution to the dialogue, useful to the courts, and instructive to Congress when it next makes a foray into the fields of supplemental jurisdiction and removal.