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Darren J. Gold
University of Michigan Law School

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NOTES

Supplemental Jurisdiction over Claims by Plaintiffs in Diversity Cases: Making Sense of 28 U.S.C. § 1367(b)

Darren J. Gold

INTRODUCTION

As courts of limited jurisdiction, the federal courts may only exercise subject matter jurisdiction over claims for which both constitutional and congressional authorization exist.\(^1\) Constitutional authority for the exercise of jurisdiction\(^2\) is found in Article III, Section 2, which enumerates the categories of cases and controversies to which federal judicial power extends.\(^3\) The two most common constitutional categories of jurisdiction are federal question jurisdiction, which grants federal courts jurisdiction over claims "arising under" the Constitution, federal laws and treaties, and diversity jurisdiction, which grants federal courts jurisdiction to hear claims between citizens of different states. Congress has authorized the exercise of federal question jurisdiction by enacting 28 U.S.C. § 1331, which grants federal courts the power to exercise jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States,\(^4\) and diversity jurisdiction by enacting 28 U.S.C. § 1332, which grants federal courts jurisdiction over

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1. Finley v. United States, 490 U.S. 545, 547-48 (1989) ("It remains rudimentary law that "[a]s regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it... To the extent that such action is not taken, the power lies dormant." (quoting The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868) (emphasis omitted)).

2. Throughout this Note, the term "jurisdiction" refers to federal subject matter jurisdiction rather than in personam jurisdiction.

3. Article III, § 2 provides that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

all civil actions between citizens of different states in which the amount in controversy exceeds $50,000.5

Although both the Constitution and section 1332 provide for diversity jurisdiction — jurisdiction over claims between citizens of different states — section 1332's grant of diversity jurisdiction has been interpreted more narrowly. Article III authorizes federal courts to exercise jurisdiction where there is only minimal diversity — where at least one plaintiff and one defendant are citizens of different states.6 On the other hand, section 1332 has been interpreted to require complete diversity — no plaintiff may be a citizen of the same state as any defendant.7

Because disputes often give rise to multiple legal claims, a party will often have a claim that is factually related to a claim within the jurisdiction of the federal courts, but that has no independent basis of federal jurisdiction. If the federal courts were prohibited from exercising jurisdiction over such a claim, a plaintiff with a valid federal claim and a factually related nonfederal claim8 would face three unsatisfactory alternatives. First, the plaintiff could split the action, litigating the federal claim in federal court and the nonfederal claim in state court. This alternative would result in additional expense, a waste of judicial resources, and problems of collateral estoppel and res judicata.9 Second, the plaintiff could forgo the nonfederal claim and proceed only on the federal claim in federal court. This option is obviously unappealing to a plaintiff with a meritorious nonfederal claim. Finally, the plaintiff could choose to litigate both the federal and nonfederal claims in state court. This alternative deprives the litigant of a federal forum, and, perhaps

5. § 1332 provides:
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —
   (1) citizens of different States;
   (2) citizens of a State and citizens or subjects of a foreign state;
   (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
   (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
8. This Note uses the term "nonfederal claim" to refer to a claim for which there is no independent basis of federal jurisdiction — i.e., a state law claim between citizens of the same state.
9. See Denis F. McLaughlin, The Federal Supplemental Jurisdiction Statute — A Constitutional and Statutory Analysis, 24 Ariz. Sr. L.J. 849, 915-18 (1992). If a litigant decides to split her claims, a federal court may be required to accord res judicata or claim-preclusive effect to the state court judgment if it is rendered prior to the resolution of the federal action. Under the full faith and credit statute, 28 U.S.C. § 1738, federal courts must give the same preclusive effect to state court judgments as state courts in the state that originally rendered the judgment would have done. 28 U.S.C. § 1738 (1988).
more importantly, is unavailable to a litigant with a federal claim for which federal jurisdiction is exclusive.10

The inability of federal courts to exercise jurisdiction over related nonfederal claims would create similar disadvantages for defendants in federal actions.11 Without such jurisdiction, a defendant forced to litigate in federal court would be unable to assert closely related counterclaims, cross-claims, and third-party claims that have no independent basis of federal jurisdiction. Like plaintiffs with related nonfederal claims, defendants forced to litigate their nonfederal claims in state court would incur greater expense and face the possibility of inconsistent verdicts.12

In response to these concerns, federal courts developed the doctrines of pendent and ancillary jurisdiction. Pendent jurisdiction allowed a plaintiff with a federal question claim and a related nonfederal claim to assert both claims in the original complaint in federal court. Ancillary jurisdiction authorized the exercise of jurisdiction over related nonfederal claims after the commencement of the lawsuit regardless of whether the plaintiff's original federal claim was based on a federal question or on diversity.

While there are obvious benefits to the exercise of pendent and ancillary jurisdiction, unlimited exercise of ancillary jurisdiction over claims by plaintiffs in diversity cases would eviscerate section 1332's requirement of complete diversity. For example, a plaintiff with a state law claim against both a diverse defendant and a nondiverse defendant would be able to bring a diversity suit only against the diverse defendant in federal court, and then wait for the nondiverse defendant to be added under the court's ancillary jurisdiction. Similarly, a diverse plaintiff and a nondiverse plaintiff would be able to evade the complete diversity requirement by having only the diverse plaintiff initiate the lawsuit and waiting for the nondi-

10. For example, in Finley v. United States, 490 U.S. 545, 547 (1989), the plaintiff's federal claim was based on the Federal Tort Claims Act, which is within the exclusive jurisdiction of the federal courts. See 28 U.S.C. § 1346(b) (1988). Thus, the plaintiff did not have the option of litigating both her state claim and her federal claim in state court. See infra notes 57-58 and accompanying text.

11. See McLaughlin, supra note 9, at 864.

12. Id. at 864 n.56. Avoiding inconsistent verdicts is one of the principal reasons why a defendant would want to add a nondiverse party to the lawsuit. Unless that party is joined in the first lawsuit, the judgment in the first lawsuit would not be binding on the nondiverse party in a later action. It is well settled that a person is not bound by a judgment rendered in a proceeding in which she was not a party. Hansberry v. Lee, 311 U.S. 32, 40 (1940).


verse plaintiff to be joined or to intervene under the court's ancillary jurisdiction. Accordingly, courts have refused to exercise ancillary jurisdiction in diversity cases over related nonfederal claims by plaintiffs against nondiverse third parties when doing so would allow plaintiffs to circumvent the complete diversity requirement.\textsuperscript{15}

In 1990, Congress codified the doctrines of pendent and ancillary jurisdiction at 28 U.S.C. § 1367\textsuperscript{16} under the new name of "supplemental jurisdiction."\textsuperscript{17} Subsection (a) of section 1367 authorizes federal courts to exercise supplemental jurisdiction over any nonfederal claim that is so related to a federal claim that the claims "form part of the same case or controversy."\textsuperscript{18} However, consistent with prior practice, subsection (b) restricts the exercise of supplemental jurisdiction in diversity cases over claims by plaintiffs against nondiverse parties. Specifically, subsection (b) prohibits the exercise of supplemental jurisdiction in diversity cases\textsuperscript{19} over claims by plaintiffs against nondiverse persons made parties under Rules 14, 19, 20, or 24, and over claims by nondiverse plaintiffs who are joined under Rule 19 or who intervene under Rule 24 "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."\textsuperscript{20}

Despite Congress's intent to preserve prior case law, all courts appear to have interpreted the statute to bar completely the exercise of supplemental jurisdiction over those claims by plaintiffs included in subsection (b).\textsuperscript{21} This reading has confirmed the fears of

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\item \textsuperscript{15} See infra section I.B. Courts have exercised ancillary jurisdiction over claims by plaintiffs in diversity suits in which there was little risk that the plaintiff was attempting to circumvent the complete diversity requirement. See infra text accompanying notes 134-55, 141.
\item \textsuperscript{17} Even before the enactment of § 1367, some courts and commentators had used the term "supplemental jurisdiction" to refer to pendent and ancillary jurisdiction. See, e.g., Community Coffee Co. v. M/S Kriti Amethyst, 715 F. Supp. 772, 774 n.3 (E.D. La. 1989) ("The term 'supplemental jurisdiction' is a general term that correlates the separate but related doctrines of pendent, ancillary, and pendent party jurisdiction."); Richard D. Freer, A Principled Statutory Approach to Supplemental Jurisdiction, 1987 Duke L.J. 34, 34; Richard A. Matasar, A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction, 17 U.C. Davis L. Rev. 103, 104 (1983); Richard A. Matasar, Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction, 71 Cal. L. Rev. 1399, 1401 (1983).
\item \textsuperscript{18} 28 U.S.C. § 1367(a) (Supp. V 1993).
\item \textsuperscript{19} Subsection (b) actually applies to cases based exclusively on § 1332. In addition to providing federal courts with diversity jurisdiction, § 1332 authorizes the federal courts to hear cases between citizens of a state and citizens of foreign countries. 28 U.S.C. § 1332(a)(2) (1988). For a discussion of how § 1367(b) may effect the exercise of supplemental jurisdiction in alienage cases, see infra note 73.
\item \textsuperscript{20} 28 U.S.C. § 1367(b) (Supp. V 1993).
\item \textsuperscript{21} See Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 412 n.15 (3d Cir. 1993) (finding that supplemental jurisdiction in diversity cases is impermissible in the
commentators that the statute might be interpreted to eliminate the previously recognized authority of courts to exercise supplemental jurisdiction in diversity cases over certain claims by plaintiffs, such as defensive claims and claims by or against nondiverse intervenors as of right. Some commentators, however, have suggested that the final phrase of subsection (b) provides courts with sufficient statutory leeway to avoid these harsh results, but they have failed to explain why the statute should be read in this manner.

This Note examines the language and legislative history of section 1367(b) and proposes a uniform test for determining the cir-

22. See, e.g., 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1917, at 51 (Supp. 1995), stating:
The statute authorizes the assertion of supplemental jurisdiction over additional claims and parties, but specifically prohibits the exercise of that jurisdiction in diversity cases for persons seeking to intervene as plaintiffs under Rule 24. This change can be criticized as contrary to the objectives of encouraging efficient joinder and some commentators have noted that it goes beyond the ‘modest but significant’ alterations stated by the drafters.

Id. at 51 (footnotes omitted) (quoting Thomas M. Mengler et al., Congress Accepts Supreme Court Invitation to Codify Supplemental Jurisdiction, 74 JUDICATURE 213, 215 (1991)); Richard D. Freer, Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute, 40 EMORY L.J. 445, 484 (1991) (“This merry-go-round amply demonstrates a serious drafting problem. If courts apply the statute as written, they reach ridiculous results. They can avoid the ridiculous results only by creative interpretation.”); see also McLaughlin, supra note 9, concluding:
Section 1367(b), therefore, potentially leads to a different result in every prior case in which jurisdiction was founded solely on § 1332 and the intervenor as of right would have aligned as a plaintiff. This is a significant change in the former law, because these prior supplemental jurisdiction cases were almost entirely diversity cases.

id. at 967.

23. One commentator states:
The statute leaves the courts free to make case-by-case determinations as to whether exercises of supplemental jurisdiction would be inconsistent with § 1332. In light of this, I am less concerned than Professor Freer about how the courts will respond to the hypotheticals he poses concerning counterclaims, cross-claims, and impleader claims that plaintiffs may seek to assert in response to claims asserted against them. Joan Steinman, Section 1367 — Another Party Heard From, 41 EMORY L.J. 85, 106-07 (1992); see also McLaughlin, supra note 9, at 969 (suggesting that subsection (b)’s last phrase “provides an opportunity for the court to extend supplemental jurisdiction for claims by plaintiff-intervenors as of right by interpreting section 1367(b) as prohibiting supplemental jurisdiction only when the intervention is filed in an attempt to evade jurisdictional requirements,” but noting that such an interpretation is problematic); Thomas D. Rowe, Jr. et al., Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer, 40 EMORY L.J. 943, 959-60 (1991) (suggesting that the last clause of subsection (b) can be used to exercise supplemental jurisdiction over claims by plaintiffs asserted in a defensive posture).
cumstances in which subsection (b) authorizes the exercise of supplemental jurisdiction. Part I of this Note explains the doctrines of pendent and ancillary jurisdiction and examines how the Supreme Court's decision in *Finley v. United States*\(^{24}\) called these doctrines into question. Part II examines the language and legislative history of section 1367 and concludes that the statute only prohibits the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases when doing so would permit plaintiffs to circumvent the complete diversity requirement. Part III proposes a bright-line rule to prevent plaintiffs from evading the complete diversity requirement: Courts should be prohibited from exercising supplemental jurisdiction over claims by plaintiffs in diversity cases that, but for the lack of complete diversity, could have been included in the original complaint.

I. THE EVOLUTION OF SUPPLEMENTAL JURISDICTION

The federal courts developed the doctrines of pendent and ancillary jurisdiction to promote the efficient disposition of increasingly complex lawsuits and to avoid piecemeal litigation. Section 1367 was enacted to codify these doctrines.\(^{25}\) Thus, in order to provide the background necessary to understand the supplemental jurisdiction statute, this Part reviews the doctrines of pendent and ancillary jurisdiction. Section I.A briefly explains the doctrines of pendent and ancillary jurisdiction. Section I.B examines how the unlimited exercise of ancillary jurisdiction in diversity cases would permit plaintiffs to circumvent section 1332's complete diversity requirement and how courts dealt with this problem prior to section 1367. Finally, section I.C discusses *Finley v. United States*\(^{26}\) and the resulting need for Congress to authorize the exercise of pendent and ancillary jurisdiction.

A. The Doctrines of Pendent and Ancillary Jurisdiction

The common law doctrines of pendent and ancillary jurisdiction served the same essential function and operated similarly.\(^{27}\) But

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25. *See* H.R. REP. No. 734, 101st Cong., 2d Sess. 28 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6874 (“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.”).
27. The Supreme Court has stated that the doctrines of pendent and ancillary jurisdiction serve essentially the same function. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978) (noting that pendent and ancillary jurisdiction “are two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?”); *Aldinger v. Howard*, 427 U.S. 1, 13 (1976) (stating that “there is little profit in attempting to decide, for example, whether there are any ‘principled’ differences between pendent and ancillary jurisdiction”).*
despite their similarity, pendent and ancillary jurisdiction developed separately\(^{28}\) and traditionally have been treated as two distinct concepts.\(^{29}\)

The doctrine of pendent jurisdiction has traditionally been divided into two parts: pendent claim jurisdiction and pendent party jurisdiction.\(^{30}\) Under pendent claim jurisdiction, a plaintiff with a federal question claim could include a closely related state law claim against the same defendant in the original federal complaint.\(^{31}\) For example, a plaintiff who brought an action in federal

\(^{28}\) Although pendent and ancillary jurisdiction developed separately, the evolution of both can be traced to Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). In that case, the Court held that the Constitution authorizes the exercise of federal jurisdiction over a case arising under the laws of the United States even though the case presents other nonfederal questions. In a now-famous passage, Chief Justice Marshall declared:

\[\text{[W]hen a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.}\]

22 U.S. (9 Wheat.) at 823.

\(^{29}\) See, e.g., JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.12, at 64 (2d ed. 1993).

\(^{30}\) See, e.g., 13B WRIGHT ET AL., supra note 22, § 3567.2.

\(^{31}\) The doctrine of pendent claim jurisdiction had its origins in two cases: Siler v. Louisville & N.R.R., 213 U.S. 175 (1909), and Hum v. Ouriler, 289 U.S. 238 (1933). In Siler, the Court held that whenever federal jurisdiction was based on a "colorable" federal question, the lower court "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." 213 U.S. at 191 (1909). The Court, however, did not address the issue of the extent to which the state law claim had to be related to the federal claim to permit the exercise of pendent claim jurisdiction. In Hum, the Supreme Court answered this question, and set forth a test for satisfying the requirement of relatedness. The Court held that a federal court may exercise jurisdiction over claims for which no independent basis of jurisdiction exists only if the federal and state law claims form a single cause of action. 289 U.S. at 246-47. Hum's single cause of action requirement, however, ultimately proved problematic because of the difficulty of defining "single cause of action" and because of the adoption of the Federal Rules of Civil Procedure which abandoned the "cause of action" terminology in favor of a liberal joinder policy. United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966) (noting the confusion caused by the Hum cause of action test); see McLoughlin, supra note 9, at 871.

In Gibbs, the Supreme Court established a new test of relatedness for pendent claim jurisdiction — a test that was essentially incorporated into subsection (a) of the supplemental jurisdiction statute. See 28 U.S.C. § 1367(a) (Supp. V 1993). In Gibbs, the Court held that pendent claim jurisdiction may be exercised whenever the relationship between the federal question and the state law claim "permits the conclusion that the entire action before the court comprises but one constitutional 'case.' " 383 U.S. at 725. The Court announced a three-part test for pendent claim jurisdiction: (1) the federal claim must have sufficient substance to confer subject matter jurisdiction on the court; (2) the state and federal claims must derive from a common nucleus of operative fact; and (3) the claims must be such that they would ordinarily be brought together in one judicial proceeding. 383 U.S. at 725. In addition, the Court noted that if the justifications for pendent jurisdiction — judicial economy, fairness and convenience to litigants — are absent in a given case, a court has discretion to decline to exercise pendent jurisdiction. 383 U.S. at 726-27.

Subsequent cases focused primarily on the second requirement of Gibbs, that the federal law claim and state law claim "derive from a common nucleus of operative fact." See 13B WRIGHT ET AL., supra note 22, § 3567.1. Although the Gibbs Court did not define this phrase, the Court clearly abandoned the stringent single cause of action requirement. See 383 U.S. at 725 (calling the Hum approach "unnecessarily grudging"). The Court empha-
court for a violation of the federal antitrust laws could also assert a related state law claim for unfair trade practices against the same defendant. Pendent party jurisdiction, on the other hand, expanded the scope of pendent jurisdiction by allowing a plaintiff to add in the original complaint a related state law claim against an additional defendant. In the above example, pendent party jurisdiction would enable the court to exercise jurisdiction over the plaintiff's related state law claim against a completely new nondiverse defendant.

Unlike pendent jurisdiction, which was exercised at the commencement of the lawsuit and was limited to cases in which the plaintiff's original federal claim was based on a federal question, ancillary jurisdiction authorized the exercise of jurisdiction over re-

sized that under the Federal Rules of Civil Procedure, "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties ... [and that] joinder of claims, parties and remedies is strongly encouraged." 383 U.S. at 724. Indeed, in applying the "common nucleus of operative fact" test, lower courts have generally exercised pendent claim jurisdiction provided that "a loose factual connection" exists between the federal and state law claims. See 13B WRIGHT ET AL., supra note 22, § 3567.1.

32. In Aldinger v. Howard, 427 U.S. 1 (1976), however, the Supreme Court significantly restricted the scope of pendent party jurisdiction. In Aldinger, the plaintiff brought a § 1983 claim in a federal district court against several officials of Spokane County, Washington for an allegedly unconstitutional dismissal from employment. He also filed a related state law claim against an additional defendant: the County. Jurisdiction over the § 1983 claim was asserted under 28 U.S.C. § 1343(3), a statute that specifically provides for federal jurisdiction over § 1983 claims. The district court did not have jurisdiction over the County, however, because at that time § 1983 did not extend to municipalities, and the plaintiff and the county were both citizens of the same state. Thus, the Court was faced with the issue of "whether the doctrine of pendent jurisdiction extends to confer jurisdiction over a party as to whom no independent basis of federal jurisdiction exists." 427 U.S. at 2-3.

The Court noted that although the case before it and the pendent claim in Gibbs served "the same considerations of judicial economy," there was something significantly different about a pendent party claim:

The situation with respect to the joining of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in Gibbs and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact."

427 U.S. at 14 (quoting Gibbs, 383 U.S. at 725). In emphasizing the well-established principle that federal courts are courts of limited jurisdiction, the Court held that before a federal court may exercise pendent party jurisdiction, it "must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." 427 U.S. at 18. The Court found that by excluding municipalities from the reach of § 1983, Congress could not have intended federal courts to circumvent this exclusion by exercising pendent jurisdiction over related state law claims. 427 U.S. at 16-17. The Court was careful, however, to limit its holding to § 1983 and § 1343(3) and to leave open the possibility of pendent party jurisdiction when a statute grants exclusive federal jurisdiction, "as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346." 427 U.S. at 18.
lated nonfederal claims after the commencement of the lawsuit, regardless of the jurisdictional basis of the plaintiff’s original federal claim. For instance, in a federal question suit between nondiverse parties, a federal court could exercise ancillary jurisdiction over the defendant’s state law compulsory counterclaim, even though the counterclaim was itself jurisdictionally insufficient. In addition, courts did not distinguish between ancillary claim and ancillary party jurisdiction. Thus, a court in a diversity case could exercise ancillary jurisdiction over a defendant’s state law compulsory counterclaim against an additional nondiverse party.

As courts of limited jurisdiction, the federal courts could exercise pendent and ancillary jurisdiction only if authorized by the Constitution and an act of Congress. Thus, the exercise of pendent and ancillary jurisdiction had to satisfy a two-step test. First, the federal and nonfederal claims had to arise from a “common nucleus of operative fact.” In other words, the claims had to form part of the same Article III case or controversy. If the court was

33. The doctrine of ancillary jurisdiction was originally limited to claims asserted against property under the control of the court. Fulton Natl. Bank v. Hazier, 267 U.S. 276, 280 (1925) (“The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court’s possession or control by the principal suit.”); Freeman v. Howe, 65 U.S. (24 How.) 450 (1861). However, in Moore v. New York Cotton Exch., 270 U.S. 593 (1926), the Supreme Court extended the concept of ancillary jurisdiction beyond property cases. In Moore, the plaintiffs filed a federal antitrust claim in federal court based on the defendant’s denial of price quotation information. In response, the defendant asserted a state law counterclaim, for which no independent basis of federal subject matter jurisdiction existed, alleging that the plaintiff was purloining its quotation information. The Court held that it could exercise jurisdiction over the defendant’s counterclaim because it arose out of the transaction upon which the plaintiffs based the original federal antitrust claim. 270 U.S. at 610. The Court stressed that federal jurisdiction over the state law counterclaim depended on the counterclaim’s logical relationship to the plaintiff’s federal claim, but that the state and federal law claims need not be “precisely identical.” 270 U.S. at 610. Finally, the Supreme Court in Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978) adopted the Gibbs “common nucleus of operative fact” test of relatedness for the exercise of ancillary jurisdiction.

34. Under Rule 13(a), a counterclaim is compulsory if it “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” FED. R. CIV. P. 13(a). Thus, by definition, a compulsory counterclaim is ancillary and did not need an independent basis of jurisdiction. See 13B WRIGHT ET AL., supra note 22, § 3523, at 106-07 & n.59. A permissive counterclaim, on the other hand, is one that does not arise out of the same transaction or occurrence as the federal claim. FED. R. CIV. P. 13(b). Accordingly, permissive counterclaims required independent jurisdictional grounds. See 13B WRIGHT ET AL., supra note 22, § 3523, at 108-09 & n.61.

35. Under Rule 13(h), a party can join “persons other than those made parties to the original action” to a counterclaim or cross-claim. FED. R. CIV. P. 13(h). Ancillary jurisdiction extended to nonfederal, compulsory counterclaims against additional parties joined under Rule 13(h). See 13B WRIGHT ET AL., supra note 22, § 3523, at 107-08.

36. See supra note 1 and accompanying text.

satisfied that the claims met this minimum test of constitutional relatedness, the court could then exercise jurisdiction over the nonfederal claim only if it found that "Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."38 For example, a plaintiff who brought a federal civil rights suit against a nondiverse defendant in federal court could also bring a state law claim against the same defendant, but doing so would require that the state law claim be sufficiently related to the federal claim and that the statute authorizing jurisdiction over civil rights cases, 28 U.S.C. § 1343, did not prohibit the court from exercising jurisdiction over the state law claim.

B. Ancillary Jurisdiction in Diversity Cases

The need to determine whether statutory authorization existed for the exercise of jurisdiction over related nonfederal claims presented unique problems in diversity cases. This section examines 28 U.S.C. § 1332, the diversity statute, and the case law construing the scope of ancillary jurisdiction in diversity cases prior to section 1367.39

The jurisdictional statute that provides the federal courts with jurisdiction over cases between citizens of different states is 28 U.S.C. § 1332.40 Section 1332 requires complete diversity of citizenship — no plaintiff may be a citizen of the same state as any defendant.41 Thus, section 1332 allows a California plaintiff to bring a state law claim against a Michigan defendant in federal court, but prohibits a California plaintiff from bringing a state law claim against both a Michigan defendant and a California defendant in federal court.

Frequently, a party in a diversity suit may wish to assert a related nonfederal claim against a nondiverse party after the commencement of the lawsuit. For example, in a diversity suit in which

38. Aldinger v. Howard, 427 U.S. 1, 18 (1976). Aldinger limited this inquiry to the exercise of pendent party jurisdiction. See supra note 32. However, the Supreme Court eventually applied this test to the exercise of ancillary jurisdiction in Kroger:

The Aldinger and Zahn cases thus make clear that a finding that federal and nonfederal claims arise from a "common nucleus of operative fact," the test of Gibbs, does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones. Beyond this constitutional minimum, there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has . . . expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim.

437 U.S. at 373 (quoting Aldinger, 427 U.S. at 18 (alteration in original)).

39. Pendent jurisdiction was limited to cases in which the plaintiff's basis for federal jurisdiction was a federal question. See supra note 31 and accompanying text. Thus, in diversity cases, courts could only exercise ancillary jurisdiction.


a California plaintiff brings a state law negligence action against a Michigan contractor, the Michigan contractor may wish to assert a third-party complaint against its Michigan subcontractor for contribution and indemnity. The Michigan contractor's claim, however, lacks an independent basis of federal jurisdiction because the claim is based on state law and is between citizens of the same state. In this case, the court could exercise ancillary jurisdiction over the contractor's related claim only if it determined that section 1332's complete diversity requirement does not prohibit the exercise of such jurisdiction.

In deciding whether ancillary jurisdiction could be exercised in diversity cases, it was well recognized that while section 1332 requires complete diversity among the original parties to a lawsuit, it does not generally prohibit the exercise of ancillary jurisdiction in diversity cases over related nonfederal claims against nondiverse parties asserted after the commencement of the lawsuit. Thus, courts routinely permitted defendants in diversity cases to assert related compulsory counterclaims and related cross-claims against nondiverse parties. For example, in a diversity suit for breach of contract between a Michigan plaintiff and California defendants, section 1332's complete diversity requirement did not prevent the California defendants from asserting related state law cross-claims against each other, even though the claims lacked an independent basis of federal jurisdiction.

The exercise of ancillary jurisdiction over claims by plaintiffs in diversity suits, however, was more problematic. First, although section 1332 prohibits a plaintiff who has a state law claim against a diverse defendant and a nondiverse defendant from including both claims in its original federal complaint, the unlimited exercise of ancillary jurisdiction would have allowed the plaintiff to evade the complete diversity requirement by suing only the diverse defendant in federal court and waiting for the nondiverse defendant to be added under the court's ancillary jurisdiction. Second, while section 1332 precludes a diverse plaintiff and a nondiverse plaintiff from initiating a diversity suit in federal court, the plaintiffs could have evaded the complete diversity requirement by having only the diverse plaintiff bring the lawsuit and waiting for the nondiverse plaintiff to be joined or to intervene under the court's ancillary jurisdiction.

42. In Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978), the Court stated:

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

43. See supra notes 34-35 and accompanying text.

44. See infra notes 111-16 and accompanying text.
risdiction. In other words, the unlimited exercise of ancillary juris­
diction over claims by plaintiffs in diversity cases would have
allowed plaintiffs to achieve indirectly what they could not have
done directly in the original federal complaint.

In Owen Equipment & Erection Co. v. Kroger, the Supreme
Court prohibited the exercise of ancillary jurisdiction in diversity
cases over claims by plaintiffs against nondiverse third parties im­
pleaded by the defendant under Rule 14. The plaintiff in Kroger,
a citizen of Iowa, brought a state law tort action in federal court
against the Omaha Public Power District (OPPD), a Nebraska cor­
poration. Federal jurisdiction was based on diversity of citizenship.
OPPD then filed a third-party complaint for contribution pursuant
to Rule 14 against Owen Equipment and Erection Co., a citizen of
both Iowa and Nebraska. The lower court granted the plaintiff
leave to file an amended complaint naming Owen as an additional
defendant even though there was no independent basis of federal
jurisdiction over the plaintiff’s claim because the plaintiff and
Owen were citizens of the same state.

The Supreme Court, however, refused to allow the district court
to exercise ancillary jurisdiction over the plaintiff’s third-party
claim, reasoning that the exercise of jurisdiction over such a claim
would allow plaintiffs to circumvent the complete diversity require­
ment. The Court noted that although section 1332’s complete di­
versity requirement did not prohibit the addition of nondiverse
parties to a diversity suit, the statute did not permit the exercise of
ancillary jurisdiction over the plaintiff’s claim against Owen. The
Court reasoned that if ancillary jurisdiction could be exercised over
such claims, a plaintiff could easily evade the requirement of com­
plete diversity “by the simple expedient of suing only those defend­
ants who were of diverse citizenship and waiting for them to
implead nondiverse defendants.”

The addition of nondiverse parties under the rules governing
joinder and intervention implicates concerns similar to those in
Kroger. For example, a plaintiff with a state law claim against a
diverse defendant and a nondiverse defendant could circumvent the
complete diversity requirement by suing only the diverse defendant
and waiting for the nondiverse defendant to be joined or to inter­

45. See infra note 117 and accompanying text.
47. Rule 14 permits a defendant, as a third-party plaintiff, to assert a claim against “a
person not a party to the action who is or may be liable to the third-party plaintiff for all or
part of the plaintiff’s claim against the third-party plaintiff.” Fed. R. Civ. P. 14(a).
48. 437 U.S. at 374-77.
49. See 437 U.S. at 373-76.
50. 437 U.S. at 374.
vener under the court’s ancillary jurisdiction. Accordingly, lower courts after Kroger refused to exercise ancillary jurisdiction in diversity cases over state law claims by plaintiffs against nondiverse parties who were joined or who intervened and over state law claims by nondiverse plaintiffs who were joined or who intervened. ⁵²

Federal courts recognized, however, that the exercise of ancillary jurisdiction over claims by plaintiffs in diversity cases would not always allow plaintiffs to evade the complete diversity requirement. First, courts routinely exercised ancillary jurisdiction in diversity cases over claims by plaintiffs against nondiverse parties when the claims were asserted in a defensive posture — i.e., asserted in response to a defendant’s counterclaim. ⁵³ Second, courts exercised ancillary jurisdiction in diversity cases over claims by plaintiffs against nondiverse parties who intervened as of right under Rule 24(a) but who were not indispensable under Rule 19(b) at the commencement of the lawsuit and over claims by nondiverse plaintiffs who intervened as of right under Rule 24(a) but who were not indispensable when the lawsuit was initiated. ⁵⁴

C. The Potential Demise of Pendent and Ancillary Jurisdiction: Finley v. United States

Until 1989, courts generally assumed that they had authority to exercise pendent and ancillary jurisdiction unless this authority was expressly or impliedly negated by statute. ⁵⁵ The Supreme Court rejected this approach, however, in Finley v. United States, ⁵⁶ and held that pendent party jurisdiction requires affirmative congressional authorization.

In Finley, the plaintiff brought a tort action against the Federal Aviation Administration (FAA) in federal court. Federal jurisdiction was based on the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), which grants federal courts exclusive jurisdiction over tort actions against the United States. ⁵⁷ Subsequently, the plaintiff moved to amend her complaint to include related state law tort claims — against the San Diego Gas and Electric Company and

⁵². See infra note 139 and accompanying text.
⁵³. See infra notes 134-35 and accompanying text.
⁵⁴. See infra note 142 and accompanying text.
⁵⁷. The FTCA provides that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States" for certain torts of federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b) (1988).
against the City of San Diego — for which there was no independent basis of federal jurisdiction.\textsuperscript{58}

The Court refused to extend pendent jurisdiction to the plaintiff's state law claims against the city and the utility.\textsuperscript{59} \textit{Finley} rejected the presumption that Congress generally intended to authorize the exercise of pendent jurisdiction.\textsuperscript{60} Instead, the Court announced that pendent party jurisdiction must be authorized by an affirmative congressional grant of jurisdiction.\textsuperscript{61} Under this new test, the Court concluded that because the FTCA did not include affirmative authorization of pendent party jurisdiction over nonfederal claims against defendants other than the United States, the court was not authorized to exercise pendent party jurisdiction over the plaintiff’s nonfederal claims.\textsuperscript{62}

With one exception, prior to section 1367 none of the jurisdictional statutes expressly authorized the exercise of pendent and ancillary jurisdiction.\textsuperscript{63} As a result, after \textit{Finley}, most commentators concluded that the doctrine of pendent party jurisdiction was dead.\textsuperscript{64} Even though the \textit{Finley} decision only abolished pendent party jurisdiction under the FTCA, the Court’s reasoning suggested that any exercise of pendent party jurisdiction required an affirmative congressional grant of authorization.\textsuperscript{65} More importantly, the

\textsuperscript{58} Because the federal courts had exclusive jurisdiction over the plaintiff's claim against the FAA, a lack of pendent jurisdiction over her state law claims against the city and the utility would give the plaintiff two unsatisfactory alternatives. First, the plaintiff could have split her claims, litigating her state law claims against the city and the utility in state court and proceeding with her claim against the FAA in federal court. Alternatively, the plaintiff could have foregone her state law claims and only pursued her claim against the FAA in federal court. A third alternative — litigating her state and federal law claims in state court — was not available to the plaintiff because her federal claim was within the exclusive jurisdiction of the federal courts.

\textsuperscript{59} The Court refused to exercise jurisdiction even though the plaintiff's pendent party claims represented the precise situation that the \textit{Aldinger} Court had suggested would be appropriate for the exercise of pendent jurisdiction. \textit{See Aldinger}, 427 U.S. at 16-18.

\textsuperscript{60} Although the \textit{Finley} Court did not explicitly announce that it was rejecting the \textit{Aldinger} approach, Justice Stevens's dissenting opinion makes this clear:

The Court today adopts a sharply different approach. Without even so much as acknowledging our statement in \textit{Aldinger} that before a federal court may exercise pendent-party jurisdiction it must satisfy itself that Congress “has not expressly or by implication negated its existence," it now instructs that “a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.” \textit{Finley v. United States}, 490 U.S. 545, 574-75 (Stevens, J., dissenting) (quoting \textit{Aldinger}, 427 U.S. at 18; \textit{Finley}, 490 U.S. at 556).

\textsuperscript{61} 490 U.S. at 552-56.

\textsuperscript{62} 490 U.S. at 553-54.

\textsuperscript{63} In 1948, Congress amended 28 U.S.C. § 1338 to allow federal courts to exercise supplemental jurisdiction over related state unfair competition claims asserted in federal patent, copyright, and trademark cases. 28 U.S.C. § 1338(b) (1988).


\textsuperscript{65} \textit{Finley}, 490 U.S. at 551-56.
reach of the *Finley* decision extended beyond pendent party jurisdiction and threatened all forms of pendent and ancillary jurisdiction. 66

The potential implications of *Finley* prompted the Federal Courts Study Committee to recommend a statutory authorization for all forms of pendent and ancillary jurisdiction. 67 Indeed, the *Finley* opinion virtually invited Congress to provide the necessary statutory authorization: "Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress." 68 Congress accepted this invitation by enacting 28 U.S.C. § 1367 — the supplemental jurisdiction statute.

**II. THE MEANING OF THE SUPPLEMENTAL JURISDICTION STATUTE**

Section 1367 codifies the doctrines of pendent and ancillary jurisdiction under the new title of "supplemental jurisdiction." The statute provides, in relevant part:

(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 shall 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.

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66. See McLaughlin, *supra* note 9, at 887-88 ("*Finley* raised substantial concerns about the legitimacy of all existing forms of supplemental jurisdiction because, with one minor exception, no form of supplemental jurisdiction was expressly authorized by Congress.") (footnote omitted); Mengler, *supra* note 64, at 255 ("In *Finley*, the Supreme Court turned this analytic framework on its head and in the process took the breath away from all forms of supplemental jurisdiction."); Steinman, *supra* note 23, at 85 n.5 ("Taken to its logical limits, the Court's insistence upon statutory authorization of all aspects of federal jurisdiction also would require the abandonment of pendent claim jurisdiction.").

But see Freer, *supra* note 22, observing:

Outside the pendent parties area, *Finley* seems to have limited impact. No court has refused to uphold supplemental jurisdiction over compulsory counterclaims, cross-claims, or claims by or against an intervenor of right in the wake of *Finley*. Several courts simply apply the traditional rules in such cases without entertaining the possibility that *Finley* dictates a different result.

*Id.* at 467.


68. 490 U.S. at 556.
(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.69

In cases not based solely on diversity, section 1367(a) now provides express authorization for the exercise of supplemental jurisdiction so long as the federal and nonfederal claims satisfy the minimum constitutional test of relatedness.70 Thus, in federal question cases, courts are no longer required to determine whether the relevant jurisdictional statute permits the exercise of supplemental jurisdiction.71 Consistent with prior practice, however, subsection (b) restricts the exercise of supplemental jurisdiction in cases based solely72 on diver-


70. 28 U.S.C. § 1367(a) (Supp. V 1993). By authorizing supplemental jurisdiction over all nonfederal claims that are so related to the claims within the court's original jurisdiction "that they form part of the same case or controversy," subsection (a) restores the Gibbs test of relatedness. See supra note 31 and accompanying text. In cases not based solely on diversity of citizenship, a federal court may now exercise subject matter jurisdiction over any nonfederal claim provided that the claim satisfies the constitutional case or controversy requirement of relatedness.

Subsection (a) further authorizes the exercise of supplemental jurisdiction over "claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367(a) (Supp. V 1993). By doing so, Congress overruled Finley and authorized the use of pendent party jurisdiction in the broadest sense. In cases not founded solely on § 1332, federal courts may now exercise supplemental jurisdiction over necessary and indispensable parties who are sought to be joined under Rule 19 and over permissive intervenors and intervenors as of right under Rule 24.


72. Subsection (b) is limited to cases which are based "solely" on § 1332. Thus, if a plaintiff brings two related claims — one based on a federal question and the other based on diversity — the court is permitted to exercise supplemental jurisdiction over all related claims without the limitations of subsection (b). See Lekoff v. General Motors Corp., No. CIV. A. 92-7138, 1993 WL 193357, at *3 (E.D. Pa. June 8, 1993) (holding that subsection (b)'s restrictions did not apply to a case in which original jurisdiction was based on diversity and the Magnuson-Moss Warranty Act). Under Rule 18(a), however, it is possible for a plaintiff to assert two unrelated claims — one based on a federal question and the other based on diversity — in a single lawsuit. FED. R. CIV. P. 18(a). In this case, supplemental claims that relate only to the diversity claim should be subject to subsection (b)'s restrictions. See McLaughlin, supra note 9, at 942.

Some commentators have questioned whether subsection (b), which is limited to actions founded "solely" on § 1332, applies to removed diversity actions, over which the courts have original jurisdiction arguably by virtue of both § 1332 and § 1441(a), the removal statute. See Freer, supra note 22, at 485; Karen Nelson Moore, The Supplemental Jurisdiction Statute: An Important but Controversial Supplement to Federal Jurisdiction, 41 EMORY L.J. 31, 58 (1992). Nevertheless, the language and legislative history of § 1367 do not support such a reading. See Joan Steinman, Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress' Handiwork, 35 ARIZ. L. REV. 305, 328-30 (concluding that "Congress's
sity over certain claims by plaintiffs when doing so "would be inconsistent with the jurisdictional requirements of section 1332." A number of courts have interpreted subsection (b) to bar completely the exercise of supplemental jurisdiction over such claims.

This Part argues that the courts have incorrectly interpreted and applied subsection (b). Section II.A argues that the plain meaning of subsection (b) prohibits the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases only when the exercise of such jurisdiction would allow plaintiffs to circumvent section 1332's complete diversity requirement. Section II.B argues that the legislative history of section 1367 supports this understanding of the text and furthers the statute's underlying purpose of codifying prior Supreme Court case law.

intent was for § 1367(b) to apply to removed cases”). Assuming that subsection (b) applies to removed cases, it may still be argued that the exercise of supplemental jurisdiction over claims by plaintiffs in removed diversity cases does not allow plaintiffs to circumvent the complete diversity requirement because it is unlikely that a plaintiff will choose to sue a diverse plaintiff only in state court, gamble that the defendant will remove the case to federal court, and wait for that defendant then to add any nondiverse parties under the court's supplemental jurisdiction. At least one commentator has suggested that subsection (b) authorizes courts to determine on a case-by-case basis whether a plaintiff in a removed case filed in state court for the purpose of strategically evading the complete diversity requirement. \textit{Id.} at 337 (proposing that "courts could rebuttably presume that such strategic conduct was present and impose on the plaintiff the burden of establishing that it was not"). But many courts appear to assume that § 1367(b) applies to removed diversity cases without much further analysis. See \textit{Guaranteed Sys., Inc. v. American Natl. Can Co.}, 842 F. Supp. 855 (M.D.N.C. 1994); Lederman v. Marriott Corp., 834 F. Supp. 112 (S.D.N.Y. 1993); Mayo v. Key Fin. Servs., Inc., 812 F. Supp. 277, 277-78 (D. Mass. 1993); Cheramie v. Texaco, Inc., No. 91-3114, 1991 U.S. Dist. LEXIS 15616, at *5-*6 (E.D. La. Oct. 30, 1991).

73. In addition to diversity cases, § 1332 provides for alienage jurisdiction — cases between citizens of a state and aliens. 28 U.S.C. § 1332(a) (1988). At least one commentator has suggested that § 1367(b) now prohibits the exercise of supplemental jurisdiction in alienage cases. Freer, \textit{supra} note 22, at 474-75 (arguing that even though nothing in the legislative history suggests that the statute was supposed to apply to alienage cases, "by overbroad reference in the exceptions clause of section 1367(b) to cases brought on any of the bases contained in section 1332, the statute does just that"). In defense, the drafters of the statute — Professors Rowe, Burbank, and Mengler — claim that the failure to exclude alienage cases from the reach of subsection (b) was not an oversight and that courts are as free to exercise supplemental jurisdiction in alienage cases as they were before the enactment of the statute.

The complete diversity rule is a product of judicial interpretation, found nowhere in statutory text before or after the adoption of section 1357. To whatever extent the federal courts were free before ... to abolish the complete diversity rule for alienage cases, they remain every bit as free to do so today. Section 1367 is neutral on the subject, as it should be. Rowe et al., \textit{supra} note 23, at 954.


75. \textit{See, e.g.}, Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 412 n.15 (3d Cir. 1993); Krueger v. Cartwright, 996 F.2d 928, 933-34 & n.6 (7th Cir. 1993); Guaranteed Sys., 842 F. Supp. at 857-58.
A. The Language of Subsection (b)

Any statutory interpretation must begin with the language of the statute itself. Accordingly, this section examines the language of subsection (b) and argues that the plain meaning of the language prohibits the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases only when doing so would provide plaintiffs with the opportunity to evade section 1332's complete diversity requirement.

The language of subsection (b) begins by providing that federal courts in diversity cases are prohibited from exercising supplemental jurisdiction over claims by plaintiffs against nondiverse persons made parties under Rules 14, 19, 20, or 24, or over claims by nondiverse Rule 19 or Rule 24 plaintiffs. If the language of subsection (b) ended at this point, applying the statute would be a relatively straightforward endeavor. As soon as a court determined that its jurisdiction was based exclusively on section 1332, the court would then be prohibited from exercising supplemental jurisdiction over any of the parties listed in the statute. However, Congress chose to add to this general prohibition the final phrase — "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." Interpreting this last clause is thus essential to understanding the meaning of subsection (b).

"Inconsistent" means "[n]ot consisting; not agreeing in substance, spirit, or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous." By its plain terms, then, subsection (b) prohibits the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases only if the exercise of jurisdiction over such claims would be incompatible or at odds with the spirit or substance of section 1332's jurisdictional requirements. Section 1332 is thus the true test for defining the limits of supplemental jurisdiction under subsection (b).

Section 1332 provides federal courts with jurisdiction over cases between citizens of different states. Courts have long interpreted this language as requiring complete diversity of citizenship — no

80. 7 THE OXFORD ENGLISH DICTIONARY 818 (2d ed. 1993).
plaintiff may be a citizen of the same state as any defendant.\footnote{Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Secion 1332 also requires that the matter in controversy exceed $50,000. 28 U.S.C. § 1332(a) (1988). Thus, subsection (b), which refers to "the jurisdictional requirements of section 1332," also prohibits the exercise of supplemental jurisdiction in diversity cases over claims by plaintiffs against Rule 14, 19, 20, and 24 parties that do not meet the amount in controversy threshold.} Despite this requirement, section 1332 does not prohibit the addition of nondiverse parties to a diversity suit \textit{after} the commencement of the lawsuit.\footnote{See supra note 42.} Otherwise, courts would never have been able to exercise supplemental jurisdiction in diversity suits.\footnote{See supra section I.B.} Section 1332 only prohibits the exercise of ancillary jurisdiction over such claims when doing so would allow plaintiffs to circumvent the complete diversity requirement.\footnote{Thus, it was long recognized that courts could, consistent with § 1332, exercise ancillary jurisdiction in diversity cases over defendants' related state law counterclaims and cross-claims against nondiverse parties. See supra notes 34-35 and accompanying text.} Accordingly, the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases is inconsistent with section 1332 — and thus prohibited by subsection (b) of sec-
tion 1367 — only when exercising such jurisdiction would provide plaintiffs with the opportunity to evade the complete diversity requirement.

At the very least, the statute should not be read to bar completely the exercise of supplemental jurisdiction over every claim listed in subsection (b). Such a reading violates the principle of statutory construction that statutes should be read to give meaning to each word of the text. The final clause of subsection (b) is meaningless if it is read to preclude supplemental jurisdiction whenever there is not complete diversity among the parties. When a plaintiff seeks to bring a claim against a diverse party, section 1332 provides the court with a statutory basis for exercising jurisdiction. In such cases, there is never a need to rely on supplemental jurisdiction. Thus, every supplemental claim subject to subsection (b) necessarily involves a claim against a nondiverse party. Reading the last phrase of subsection (b) — "when exercising jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332" — to mean "whenever complete diversity is lacking" renders the phrase superfluous.

Although the language of subsection (b) plainly appears to prohibit the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases only when doing so would allow plaintiffs to circumvent the complete diversity requirement, the fact that many courts read section 1367(b) differently suggests that the text of subsection (b) is ambiguous. Moreover, courts and commentators disagree about the sufficiency of a purely textual approach to statutory interpretation. For these reasons, the next section examines the legislative history of section 1367.

87. See McLaughlin, supra note 9, at 948 ("Violation of the jurisdictional requirements of § 1332 is inherent in every supplemental claim" under subsection (b).); see also Wendy Collins Perdue, The New Supplemental Jurisdiction Statute — Flawed but Fixable, 41 EMORY L.J. 69, 75 (1992) ("One might conclude that anytime non-diverse parties are allowed to claim against each other, that is 'inconsistent with the jurisdictional requirements of section 1332.' . . . Of course, this interpretation would make this clause surplus because one needs to rely on supplemental jurisdiction only if there is no independent basis for jurisdiction.").
B. The Legislative History of Section 1367

The legislative history of section 1367 is limited to the House Report and the evolution of the statute as it moved through the drafting process. This section examines this legislative history and argues that it clearly supports this Note's reading of subsection (b).

1. What Congress Intended in Section 1367(b)

The House Report provides clear evidence that Congress intended to prohibit the exercise of supplemental jurisdiction in diversity cases over claims by plaintiffs against nondiverse parties only when doing so would encourage plaintiffs to circumvent the complete diversity requirement. The House Report 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.

The Report further explains that "[t]he net effect of subsection (b) is to implement the principal rationale of Owen Equipment & Erection Co. v. Kroger." As section 1.B makes clear, Kroger's principal concern was that the exercise of jurisdiction in diversity cases over claims by plaintiffs against nondiverse parties would encourage plaintiffs to evade the complete diversity requirement.


90. The limited attention given by Congress to the supplemental jurisdiction statute provoked criticism from several commentators. See, e.g., Christopher M. Fairman, Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367, 19 SETON HALL LEGIS. J. 157 (1994) (arguing that the problems with subsection (b) are a result of congressional abdication to academics in drafting the statute); Freer, supra note 22, at 471 (arguing that "Congress simply did not look at the supplemental jurisdiction statute very carefully"). Even the drafters of the statute - Professors Rowe, Burbank and Mengler - seem to agree that more attention should have been paid to § 1367. Thomas D. Rowe, Jr., et al., A Coda on Supplemental Jurisdiction, 40 EMORY L.J. 993, 1005 (1991) ("The process afforded by Congress on this provision and the many others in the Federal Courts Study Committee Implementation Act was meager. The House Subcommittee's hearing took less than one day. We agree with Arthur and Freer that perhaps Congress could have — and in an ideal world should have — provided more process and engaged in more debate and deliberation than it did.").


92. Id. at 29 n.16, reprinted in 1990 U.S.C.C.A.N. at 6875 n.16.

93. See supra text accompanying notes 48-50.
An examination of the drafting history of section 1367 provides further support for this interpretation of subsection (b). In 1989, Congress established the Federal Courts Study Committee to conduct a comprehensive examination of the federal judicial system. In April 1990, the Committee issued a report that recommended numerous changes in the organization, procedure, and jurisdiction of the federal courts. One of the recommendations was for Congress to authorize expressly the doctrines of ancillary and pendent jurisdiction under the new title of "supplemental jurisdiction." The recommendation, however, provided Congress with little guidance as to the scope of supplemental jurisdiction, and made no mention of supplemental jurisdiction in diversity cases.

In response to the Committee Report, two proposals for a supplemental jurisdiction statute were introduced in Congress. The first — prepared by Professors Wolf and Egnal — would have overruled Kroger. Concerned that the Wolf-Egnal proposal would significantly depart from prior practice, Professors Rowe, Burbank, and Mengler prepared a substitute draft that essentially became what is now section 1367. Significantly, the proposal included the language of the final clause of subsection (b): "when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."

94. Admittedly, drafting history is not a traditional tool of statutory interpretation. The opinions of the drafters of § 1367 are thus offered here merely as a supplement to the compelling evidence of congressional intent already introduced.

95. See supra note 67.

96. COURTS STUDY, supra note 67.

97. The Committee recommended that "Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely defendants against whom that plaintiff has a closely related state claim." Id. at 47.

On July 1, 1990, the Committee separately published its working papers and subcommittee reports. 1 FEDERAL COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE U.S., WORKING PAPERS AND SUBCOMMITTEE REPORTS 418-67 (1990) [hereinafter FCSC WORKING PAPERS]. See generally McLaughlin, supra note 9, at 859 n.30. The publication contains a position paper which addresses the issue of supplemental jurisdiction in greater detail and proposes a draft supplemental jurisdiction statute. 1 FCSC WORKING PAPERS, supra, at 546-68. The Committee noted, however, that the working papers and subcommittee reports should "[i]n no event . . . be construed as having been adopted by the Committee." Id. at preface page.

98. The failure to address the issue of supplemental jurisdiction in diversity cases may have been the result of the Committee's optimistic hopes for their proposal to abolish diversity jurisdiction altogether. See COURTS STUDY, supra note 67, at 38-43. Congress ultimately did not adopt this proposal.


100. See id. at 39. For the full text of the Wolf-Egnal draft, see id. at app. B.

101. For the full text of the Rowe, Burbank and Mengler draft, see id. at app. E.

102. Id.
to Professor Rowe dated August 28, 1990, Professor Mengler suggested that although the language was possibly ambiguous, this final phrase was intended to prohibit the exercise of supplemental jurisdiction only when doing so would encourage plaintiffs to defeat Kroger's rationale — preventing plaintiffs from evading section 1332's complete diversity requirement:

My language, "when exercising supplemental jurisdiction over such claims would be inconsistent with the complete diversity requirement of section 1332," solves these problems, but is possibly ambiguous. I intend it to mean, "when not inconsistent with the holding and rationale of Kroger." On this reading, as I argue in my article, some nondiverse Rule 19 parties might be joined and some nondiverse intervenors of right might not be joined. Another possible interpretation is that this language would always prohibit joinder of nondiverse Rule 19 persons and intervenors of right. We could live with either interpretation, so the ambiguity in my view is not harmful.103

Thus, the legislative history strongly suggests that Congress intended subsection (b) to prohibit the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases only when doing so would encourage plaintiffs to circumvent the complete diversity requirement.

2. The Purpose of Section 1367

The legislative history of section 1367 makes clear that the underlying purpose of the supplemental jurisdiction statute was to re-

103. Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings 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. 717 (1990) [hereinafter Hearings]. Although Professor Mengler indicated that either interpretation of subsection (b) is possible, Congress clearly meant to prohibit the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases only when doing so would encourage plaintiffs to evade the complete diversity requirement. Moreover, the article to which Professor Mengler refers in his letter makes clear that the drafters intended the last phrase of subsection (b) to achieve this result:

Codification of ancillary jurisdiction should narrowly address Kroger's focus by authorizing the federal courts to take ancillary jurisdiction over all transactionally related claims by or against existing parties to the civil action, except when original jurisdiction is based on diversity and exercising ancillary jurisdiction over a related claim would permit a plaintiff or encourage other plaintiffs to evade the complete diversity requirement. Congress could authorize a federal district court to deny jurisdiction over a related claim when the court held that exercising jurisdiction in this context would encourage plaintiffs to defeat the complete diversity requirement "by the simple expedient" of naming only those parties of diverse citizenship and waiting for other desired parties to join or be joined in the suit.

The statutory language chosen should focus on this concern. It should also provide the lower courts with the flexibility both to establish bright line tests for certain joinder contexts, such as permissive intervention and the Kroger circumstance, and to develop more flexible standards for other contexts, such as compulsory joinder or intervention of right. The statute should permit the district court the latitude to inquire, given the nature of the controversy and the relationship of the parties, whether or not the plaintiff is arguably seeking to evade complete diversity.

Mengler, supra note 64, at 286 (footnote omitted).
store the doctrines of ancillary and pendent jurisdiction to their status before *Finley*. The House Report states that section 1367 "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." 104 In addition, the House Report notes that section 1367 "codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*," and "implement[s] the principal rationale of *Owen Equipment & Erection Co. v. Kroger*." 105

The drafters of section 1367 — Professors Rowe, Burbank and Mengler — also were concerned with limiting the effect of section 1367 to codifying prior case law. In a letter to Judge Joseph Weis, Jr., the former chair of the Federal Courts Study Committee, Professor Mengler responded to the Wolf-Egnal proposal 106 which would have overruled *Kroger*:

> Even if you prefer to let our proposal die in favor of the Wolf/Egnal draft, there are some problems beyond poor draftsmanship that should be mentioned. Subsection (a)(2) overrules *Kroger* . . . . This makes passage riskier, since the provision no longer restores pre-*Finley* law but makes a substantial change that extends federal jurisdiction. . . . Subsection (b) of our proposal handles this problem differently, preserving pre-*Finley* limitations on pendent jurisdiction in diversity cases. 107

Ultimately, Congress rejected the Wolf-Egnal proposal in favor of the proposal prepared by Professors Rowe, Burbank, and Mengler, 108 suggesting that Congress's objective in enacting section 1367 was to preserve prior case law and practice.

Consistent with this purpose, subsection (b) should be interpreted to preserve prior Supreme Court case law. Prior to section 1367, courts could exercise ancillary jurisdiction in diversity cases over related claims by plaintiffs against nondiverse third parties only after determining that section 1332's complete diversity requirement permits the exercise of such jurisdiction. 109 Courts concluded that section 1332 restricted ancillary jurisdiction over such claims only when doing so would have provided plaintiffs with the opportunity to circumvent the complete diversity requirement. 110 Subsection (b) merely continues this practice by requiring courts to determine whether the exercise of supplemental jurisdiction in diversity cases is inconsistent with section 1332's jurisdictional re-

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105. Id. at 6875 nn.15-16.
106. See Wolf, supra note 99, at 53-54.
108. See supra text accompanying notes 100-01.
109. See supra text accompanying notes 48-50.
110. See infra notes 134-35, 141 and accompanying text.
requirements. The only change is that section 1367 provides the federal courts with the statutory authorization to exercise such jurisdiction, which Finley required. Thus, reading subsection (b) to prohibit the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases only where the exercise of such jurisdiction allows plaintiffs to evade the complete diversity requirement furthers section 1367's purpose of codifying prior case law and practice.

III. APPLYING SECTION 1367(b)

As Part II demonstrated, section 1367(b) essentially codifies the holding of Kroger, which authorizes a court to exercise supplemental jurisdiction over claims by plaintiffs in diversity cases provided that the court determines that the exercise of such jurisdiction is not prohibited by section 1332. While section 1332 allows the addition of claims by or against nondiverse parties after the commencement of a diversity suit, it does not permit a plaintiff to circumvent the requirement of complete diversity by using supplemental jurisdiction to do indirectly what he could not do directly in the original complaint. Neither section 1332 nor section 1367, however, specifies how courts should determine whether the exercise of supplemental jurisdiction will allow plaintiffs to evade the complete diversity rule. Indeed, ever since Kroger, courts have been uncertain about how to make this determination. This Part proposes a bright-line rule to resolve the courts' uncertainty. Section III.A argues that the exercise of supplemental jurisdiction is inconsistent with section 1332 and thus prohibited by subsection (b) only where, but for the lack of complete diversity, the plaintiff could have asserted the supplemental claim in the original complaint. Section III.B applies this bright-line rule to the claims listed in subsection (b) of section 1367 and concludes that this bright-line rule best ensures that the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases will be consistent with section 1332's complete diversity requirement.

A. A Proposed Bright-Line Rule

Subsection (b) is designed to prohibit plaintiffs from evading the complete diversity requirement. This section proposes a bright-line rule to prevent plaintiffs from using supplemental jurisdiction to evade this requirement. This section argues that the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases allows plaintiffs to circumvent the complete diversity requirement — and is thus prohibited by subsection (b) — only if, but for the absence of complete diversity, the plaintiff could have included the claim against the nondiverse party in the original complaint.
There is a substantial risk that the exercise of supplemental jurisdiction in diversity cases over claims by plaintiffs against nondiverse parties will allow plaintiffs to circumvent the complete diversity requirement where the plaintiff could have asserted its claim against the nondiverse party at the commencement of the lawsuit. First, a plaintiff with a nonfederal claim against both a diverse defendant and a nondiverse defendant can simply sue only the diverse defendant and then wait for that defendant to implead the nondiverse party under the court's supplemental jurisdiction. Indeed, the plaintiff risks little in waiting for the nondiverse defendant to be added to the lawsuit. The diverse defendant has a strong financial incentive to implead another potentially liable defendant. By impleading the nondiverse defendant, the diverse defendant avoids the expense of an additional trial and improves his chances at trial by allowing the jury to attribute fault to another party. Furthermore, if the diverse defendant does not implead the nondiverse defendant, the plaintiff may dismiss the action voluntarily and begin a new lawsuit in state court having had the benefit of federal discovery.

A second way a plaintiff could circumvent the complete diversity rule is to sue only the diverse defendant and wait for the nondiverse defendant to be joined or to intervene. Under the rules governing joinder, circumvention is easy since the plaintiff herself may initiate the joinder of the nondiverse defendant. Evasion of the complete diversity requirement is also possible by waiting for the nondiverse defendant to intervene, although the plaintiff has to rely on the initiative of the nondiverse defendant. The plaintiff will be able to rely, however, on the fact that self-interest will often force absent defendants to intervene.

111. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 n.17 (1978) ("[A] defendant in a tort suit such as this one would surely try to limit his liability by impleading any joint tortfeasors for indemnity or contribution."). But see John H. Garvey, The Limits of Ancillary Jurisdiction, 57 Texas L. Rev. 697, 704 (1979) (speculating that defendants may forego impleader because it may increase chances of liability).

112. See 1 FSCC Working Papers, supra note 97, at 565-66.

113. See id. at 566 & n.43 (noting that "[t]his maneuver will seldom be sanctionable under Federal Rule of Civil Procedure 11, because the plaintiff can simply explain that his evaluation of the importance of having the non-diverse party in the case has changed").

114. Under Rules 19 and 20, the court or any party to the lawsuit may initiate the joinder of a nonparty. See infra notes 137, 140.

115. Unlike joinder, intervention under Rule 24 must be initiated by the person entering the lawsuit. See infra note 138.

116. See Freer, supra note 17, at 73 ("The plaintiff may choose, for example, to sue only one of two potential defendants, 'knowing' that self-interest will force the nondiverse absentee to intervene and that intervention of right will carry with it ancillary jurisdiction. In such a case, the plaintiff is achieving indirectly what he could not achieve directly ... ") (footnotes omitted).
Finally, a diverse plaintiff and a nondiverse plaintiff with a nonfederal claim can circumvent the complete diversity requirement by having only the diverse plaintiff bring a diversity suit and waiting for the nondiverse plaintiff to be joined or to intervene under the court’s supplemental jurisdiction after the lawsuit is filed.117

There is no danger, however, that the exercise of supplemental jurisdiction in diversity cases over claims by plaintiffs against nondiverse parties will allow plaintiffs to evade the complete diversity requirement where the plaintiff’s supplemental claim did not arise until after the commencement of the lawsuit.118 For example, sup-

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117. At least one commentator, however, has argued that there is little risk that exercising supplemental jurisdiction in diversity cases over claims by nondiverse plaintiff intervenors as of right will allow plaintiffs to evade the complete diversity requirement. Under Rule 24(a)(2) the intervenor as of right must show that the first action will impair the intervenor’s rights as a practical matter and that the existing parties do not adequately represent the intervenor’s interests. Because a plaintiff-intervenor as of right cannot join the action without legimately demonstrating that the intervenor is not adequately represented by the current plaintiffs, it is unlikely that the plaintiff-intervenor would be colluding with these plaintiffs. McLaughlin, supra note 9, at 964.

118. Prior to § 1367, the dispositive factor in deciding whether to exercise ancillary jurisdiction over the joinder or intervention of nondiverse parties was whether the nondiverse party was indispensable at the time of the lawsuit. See infra note 141 and accompanying text. Nevertheless, at least some courts seemed to understand that the true indication of whether exercising ancillary jurisdiction would allow plaintiffs to circumvent the complete diversity requirement is whether the claim could have been asserted in the original complaint. See, e.g., American Natl. Bank & Trust Co. v. Bailey, 750 F.2d 577 (7th Cir. 1984), cert. denied, 471 U.S. 1100 (1985); Mutual Fire, Marine & Inland Ins. v. Adler, 726 F. Supp. 478 (S.D.N.Y. 1989). Bailey involved a diversity suit between a landlord and a tenant. After the commencement of the lawsuit, the tenant assigned its option to buy the leased property to a nondiverse party. The nondiverse party then intervened as of right, but the district court refused to exercise ancillary jurisdiction over the landlord’s claim against the nondiverse party. In reversing the lower court, the Seventh Circuit explained that ancillary jurisdiction extends to claims by a plaintiff against a nondiverse intervenor as of right who was not indispensable when the lawsuit was commenced. Judge Posner, writing for the court, reasoned that:

[I]t seems that the basis of [the Kroger] result is that the plaintiff was doing in two steps what, if she had done it in one, would have clearly disclosed the absence of federal jurisdiction; for she could easily have joined the resident tortfeasor as a defendant in her original complaint . . . and then the federal court would have had no jurisdiction. That was not a possibility here. When the landlord brought its suit against the tenant, Chicago Investment claimed no interest in the subject matter of the suit; its claim arose later, when it signed a contract with the tenant. Thus this case is controlled by the competing principle that jurisdiction, once it attaches, is not defeated by later events . . . .

750 F.2d at 583 (emphasis added).

Although involving the addition of a nondiverse plaintiff under Rule 25(c), the Supreme Court’s per curiam opinion in Freeport-McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426 (1991), provides further support for the argument that the exercise of jurisdiction in diversity cases over claims by nondiverse Rule 19 and Rule 24 plaintiffs only encourages plaintiffs to circumvent the complete diversity requirement if the claim could have been brought at the commencement of the lawsuit. In Freeport-McMoRan, a diversity suit for breach of contract, one of the diverse plaintiffs transferred its interest in the contract to a nondiverse party after the commencement of the lawsuit. The Court addressed the issue of whether joinder of the nondiverse plaintiff under Rule 25(c) was permissible. Rule 25(c) permits the substitution or joinder of an additional party in cases involving any transfer of interest. Fed. R. Civ. P.
pose that a California plaintiff brings a diversity suit in federal court against a Michigan defendant to collect unpaid fees for construction work that the plaintiff had performed for the defendant. The defendant then counterclaims against the plaintiff alleging that the plaintiff had been negligent in the performance of its construction work. Finally, the plaintiff impleads its Michigan subcontractor under Rule 14 for indemnity and contribution in response to the defendant's counterclaim. The exercise of supplemental jurisdiction over the plaintiff's Rule 14 claim against its nondiverse subcontractor would not provide the plaintiff with an opportunity to defeat the complete diversity requirement. At the commencement of the lawsuit, the plaintiff could not have elected strategically to sue only the diverse defendant and planned to wait for the addition of the nondiverse subcontractor under the court's supplemental jurisdiction, because the plaintiff's claim against the subcontractor did not arise until the defendant counterclaimed. Accordingly, subsection (b) should permit the exercise of supplemental jurisdiction over the plaintiff's claim against its nondiverse subcontractor.

The case of a simple automobile accident further illustrates this point. Suppose that a California driver and a Michigan passenger in an automobile are struck by an automobile negligently driven by a Michigan driver, and that only the California driver is injured. The California driver, assuming his damages exceed $50,000,\textsuperscript{119} can bring a diversity suit in federal court against the Michigan driver. Suppose further that after the California driver commences the lawsuit, the Michigan passenger discovers injuries that he attributes to the accident and that became apparent after the filing of the lawsuit. The Michigan passenger could not have asserted his claim when the California driver filed his complaint because his injuries did not appear until after the lawsuit was commenced. Subsection (b) authorizes the court to exercise supplemental jurisdiction over the Michigan passenger's claim because there is no possibility that the Michigan passenger, by intervening in the lawsuit, is attempting to evade the complete diversity requirement.

A test that turns on whether the plaintiff, but for the absence of complete diversity, could have included its supplemental claim in the original complaint may, of course, exclude more claims by plaintiffs than section 1332 requires. Not every plaintiff who could have brought a supplemental claim at the commencement of the

\textsuperscript{25(c).} Distinguishing \textit{Kroger}, the Court upheld the exercise of jurisdiction over the nondiverse plaintiff's claim, reasoning that the nondiverse plaintiff "was not an 'indispensable' party at the time the complaint was filed; in fact, it had no interest whatsoever in the outcome of the litigation until sometime after suit was commenced." \textit{Freeport-McMoRan}, 498 U.S. at 428.

\textsuperscript{119.} Section 1332 requires that the amount in controversy exceed $50,000. \textit{See supra} note 5 and accompanying text.
lawsuit is attempting to circumvent the complete diversity requirement by later asserting the claim under the court's supplemental jurisdiction. For instance, a plaintiff may choose to omit a nondiverse defendant from the original complaint believing that the claim against that defendant was not worth pursuing, and later add the nondiverse defendant under the court's supplemental jurisdiction after learning through discovery that the claim is particularly strong.\textsuperscript{120} Furthermore, a diverse plaintiff may bring a diversity suit in federal court without the nondiverse plaintiff, for fear that the presence of the nondiverse plaintiff will jeopardize its settlement opportunities with the defendant.\textsuperscript{121} Allowing the nondiverse plaintiff to be joined or to intervene in such a case would not defeat the complete diversity rule. Thus, it may be argued that the courts should determine on a case-by-case basis whether the exercise of supplemental jurisdiction would be inconsistent with section 1332.\textsuperscript{122}

The bright-line rule proposed in this Note, however, is preferable to a case-by-case approach. The test avoids both the administrative difficulties of making individual determinations of whether the plaintiff deliberately sought to evade the complete diversity requirement by failing to include the supplemental claim in the original complaint and the delay inherent in such inquiries.\textsuperscript{123} A court must merely consider one simple criterion — whether, but for the lack of complete diversity, the plaintiff could have asserted the supplemental claim at the commencement of the lawsuit. Indeed, the Supreme Court has already expressed its preference for a per se rule in this area.\textsuperscript{124}

\textsuperscript{120.} See Garvey, \textit{supra} note 111, at 704 ("[I]t would not be surprising to find a change in the plaintiff's perception of the case during discovery; it might become apparent that his complaint against the original defendant has no chance of success, but that a claim against the impleaded party is quite strong.").

\textsuperscript{121.} See Mengler, \textit{supra} note 64, at 284 (discussing Helzberg's Diamond Shops, Inc. \textit{v.} Valley W. Des Moines Shopping Ctr., 564 F.2d 816 (8th Cir. 1977)).

\textsuperscript{122.} See McLaughlin, \textit{supra} note 9, at 968 n.580 (arguing by analogy that the Supreme Court's approach in \textit{Carnegie-Mellon Univ. v. Cohill}, 484 U.S. 343, 357 (1988), may support a case-by-case approach under § 1367(b)). McLaughlin says the Court in \textit{Cohill} eschewed "a blanket rule prohibiting remand of cases involving pendent state law claims in favor of a case-by-case approach to determine 'if plaintiff had attempted to manipulate the forum' by deleting all federal law claims from the complaint." \textit{Id.} (quoting \textit{Cohill}, 484 U.S. at 357); \textit{see also} Steinman, \textit{supra} note 23, at 106-07 ("The statute leaves the courts free to make case-by-case determinations as to whether exercises of supplemental jurisdiction would be inconsistent with § 1332.").

\textsuperscript{123.} See Perdue, \textit{supra} note 87, at 72-73 ("I agree that it makes sense to treat equally all cases in the same procedural posture. It is just not worth the effort to determine in each case whether, without supplemental jurisdiction, this particular plaintiff would have brought suit in federal court anyway.").

\textsuperscript{124.} See Owen Equip. & Erection Co. \textit{v. Kroger}, 437 U.S. 365 (1978). In \textit{Kroger}, the Court held that § 1332 prohibited the district court from exercising ancillary jurisdiction over the plaintiff's claim against a nondiverse third-party defendant impleaded by the original defendant. However, it was not until the third day of trial that it was disclosed that the third-
In addition, the bright-line rule is fair to plaintiffs. A plaintiff who has a supplemental claim at the commencement of the lawsuit cannot later complain that the inability to add a nondiverse defendant under the court’s supplemental jurisdiction will force him to split his claims and litigate two lawsuits. A plaintiff with a claim against both a diverse defendant and a nondiverse defendant should sue in state court if she wishes to preserve the right to litigate both claims in one forum. Under the rule proposed in this Note, a plaintiff in a federal diversity suit who omits a claim against a nondiverse party from the original complaint is on notice that she will be unable later to assert that claim under the court’s supplemental jurisdiction.

B. Applying the Bright-Line Rule Under Subsection (b)

Following the rationale of Kroger, prior to section 1367 courts generally refused to exercise ancillary jurisdiction over claims by plaintiffs in diversity cases because of the likelihood that exercising jurisdiction over such claims would allow plaintiffs to evade the complete diversity rule. Courts recognized, however, that there might be circumstances in which the exercise of such jurisdiction would not defeat section 1332 and, accordingly, devised exceptions to the general rule. Unfortunately, these exceptions were ineffective and unprincipled. This section applies the bright-line rule proposed in this Note to the claims included in section 1367(b) and concludes that this application of the statute better ensures fidelity to section 1332’s complete diversity requirement than the haphazard approach that prevailed prior to the enactment of section 1367.

party defendant was nondiverse. 437 U.S. at 369. Thus, the plaintiff could not have attempted to strategically evade the complete diversity requirement because at the commencement of the lawsuit the plaintiff believed that the third-party defendant was diverse. Nevertheless, the Court chose to establish a blanket rule against exercising ancillary jurisdiction over claims by plaintiffs against impleaded nondiverse third parties, implicitly rejecting a case-by-case approach. One commentator observed:

I believe the Court [in Kroger] wanted to avoid burdening trial judges with an unduly fact specific inquiry. In the actual facts of Kroger, there was little reason to believe that Mrs. Kroger was a sneaky plaintiff seeking to circumvent the total diversity rule. Up until the middle of trial, everyone apparently believed that Mrs. Kroger was diverse from the impleaded party. The majority, however, rejected this particularized inquiry and focused instead on the broader category of cases in which a plaintiff seeks to claim against a non-diverse impleaded party.

Perdue, supra note 87, at 72.

125. The rule is also fair to a prospective intervenor whose interests might be harmed if the action proceeded in his absence. If the inability to exercise supplemental jurisdiction threatened unavoidable prejudice to the prospective intervenor, the court could simply dismiss the action under Rule 19(b) and force the plaintiff to refile in federal court. See H.R. Rep. No. 734, supra note 25, at 29, reprinted in 1990 U.S.C.C.A.N. at 6875. But see McLaughlin, supra note 9, at 967 (“[E]ven accepting dismissal as a valid protective measure, not all plaintiff-intervenors as of right will qualify as indispensable parties to justify dismissal under Rule 19(b).”).

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Section III.B.1 applies the rule advanced in this Note to claims by plaintiffs against nondiverse impleaded Rule 14 parties and concludes that applying the statute in this way will preserve the holding of *Kroger* and will only allow the exercise of supplemental jurisdiction over those defensive claims that do not arise until after the commencement of the lawsuit. Section III.B.2 examines supplemental jurisdiction over claims by plaintiffs against nondiverse parties joined under Rule 19 or who intervene under Rule 24, and over claims by nondiverse Rule 19 and Rule 24 plaintiffs. Section III.B.2 then applies the bright-line rule to such claims and concludes that subsection (b) authorizes the exercise of supplemental jurisdiction over such claims regardless of whether the nondiverse party is joined under Rule 19 or intervenes under Rule 24 where the plaintiff's supplemental claim does not arise until after the filing of the original complaint.

1. **Implieader Under Rule 14: The Kroger Plaintiff and Defensive Claims**

Subsection (b) prohibits the exercise of supplemental jurisdiction in diversity cases over claims by plaintiffs against nondiverse parties impleaded under Rule 14 when doing so would be inconsistent with section 1332. The necessity for supplemental jurisdiction over such claims arises in two types of cases. First, a plaintiff may attempt to assert a claim against a nondiverse third-party defendant impleaded by the original defendant. For example, a California plaintiff with a nonfederal claim against a Michigan defendant and a California defendant may choose to bring a diversity suit in federal court against only the Michigan defendant. The Michigan defendant may then implead the California defendant for contribution and indemnity. If the plaintiff attempts to amend its complaint to assert a state law claim against the impleaded California defendant, the plaintiff's claim would need supplemental jurisdiction because the claim would be between citizens of the same state. Under the bright-line rule proposed in this Note, the court would be prohibited from exercising supplemental jurisdiction over the plaintiff's claim because the plaintiff, but for the lack of complete diversity, could have included the claim in the original complaint.

This result preserves the holding in *Owen Equipment & Erection Co. v. Kroger*. The Court in *Kroger* held that section 1332 prohibits the exercise of ancillary jurisdiction in a diversity case over a claim by a plaintiff against a nondiverse third-party defend-

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126. Fed. R. Civ. P. 14(a); see also supra note 47.
ant impleaded under Rule 14 by the original defendant. 128 The Court reasoned that exercising ancillary jurisdiction would allow a plaintiff to circumvent the complete diversity requirement by choosing to sue only the diverse defendant and waiting for that defendant to implead the nondiverse defendant under the court’s ancillary jurisdiction. 129

The second situation in which the need for supplemental jurisdiction arises is where the plaintiff in a diversity case asserts a claim against a nondiverse Rule 14 party in a defensive posture — i.e., in response to a counterclaim. Under the bright line approach to section 1367(b) advanced in this Note, a court may exercise supplemental jurisdiction in a diversity case over defensive claims by plaintiffs against nondiverse Rule 14 parties only if the plaintiff’s supplemental claim does not arise until after the commencement of the lawsuit. 130 As a result, some defensive claims will be permitted and some will not. For instance, a plaintiff may implead a nondiverse third-party defendant under Rule 14(b) 131 for indemnity and contribution in response to the original diverse defendant’s counterclaim because the plaintiff’s state law claim for indemnity and contribution 132 did not arise until the defendant filed its counterclaim. 133 On the other hand, a plaintiff may not assert a counter-

128. 437 U.S. at 373-77.
129. 437 U.S. at 374-75.
130. In prohibiting supplemental jurisdiction over claims by plaintiffs against persons made parties under Rules 14, 19, 20, or 24, subsection (b) fails to mention claims against persons made parties under Rule 13(h). Rule 13(h) permits the joinder of additional parties “to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.” FED. R. CIV. P. 13(h). The plaintiff’s opportunity to circumvent the complete diversity requirement by asserting a nonfederal claim against a nondiverse third-party is the same irrespective of how the additional party is joined to the lawsuit. Thus, a literal reading of the statute will permit courts to exercise supplemental jurisdiction in diversity cases over claims by plaintiffs against nondiverse Rule 13(h) parties, and thus allow plaintiffs to circumvent the complete diversity requirement where the claim could have been brought at the commencement of the lawsuit. One way of avoiding this result is to decide that under Rule 13(h), parties are joined “in accordance with the provisions of Rules 19 and 20” and, thus, within the restrictions of subsection (b). See McLaughlin, supra note 9, at 940 n.471. The one court that has addressed this issue adopted this reasoning. Mayatextil, S.A. v. Litztex U.S.A., No. 92CIV. 4528RJF, 1993 WL 180371, at *2-*3 (S.D.N.Y. May 19, 1993).
131. Rule 14(b) permits plaintiffs to implead third-party defendants in response to a counterclaim. FED. R. CIV. P. 14(b).
132. There are situations in which the plaintiff’s right to seek indemnity or contribution is based on federal law in which case federal question jurisdiction would provide an independent basis of federal jurisdiction for the plaintiff’s responsive claim. See, e.g., Maryville Academy v. Loeb Rhoades & Co., 530 F. Supp. 1061, 1070 (N.D. Ill. 1981) (noting that in federal securities case law, indemnity is a matter of federal, not state law). However, the majority of impleader claims for indemnity or contribution are based on state law. See 3 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 14.06 (2d ed. 1995).
133. The one court that has addressed this issue, however, concluded that § 1367(b) did not permit a plaintiff in a diversity suit to implead a nondiverse third-party defendant for contribution and indemnity in response to the original diverse defendant’s counterclaim. Guaranteed Sys., Inc. v. American Natl. Can Co., 842 F. Supp. 855 (M.D.N.C. 1994). The court began by noting that the principal rationale of both Kroger and § 1367(b) is “to prevent
claim against a nondiverse third-party defendant impleaded by the
original defendant if the claim, but for the lack of complete diver-
sity, could have been brought when the lawsuit was first filed.

This application of subsection (b) changes somewhat the prac-
tice of courts prior to section 1367. Before the supplemental juris-
diction statute, courts interpreted Kroger as allowing ancillary
jurisdiction in diversity cases over claims by plaintiffs against nondi-
verse Rule 14 parties whenever such claims were asserted in a de-
defensive posture. Courts in these cases reasoned that the exercise
of ancillary jurisdiction over such claims is consistent with section
1332 because there is little danger that a plaintiff, by asserting the
claim in a defensive posture, is trying intentionally to defeat the
requirement of complete diversity. The fact that the plaintiff as-

a plaintiff from 'evading] the jurisdictional requirements of 28 U.S.C. § 1332 by the simple
expedient of naming initially only those defendants whose joinder satisfies § 1332's require-
ments and later adding claims not within original federal jurisdiction against other defend-
ants who have intervened or been joined on a supplemental basis.' " 842 F. Supp. at 857
court concluded that the exercise of supplemental jurisdiction over the plaintiff's defensive
claim would not be inconsistent with this rationale:

Essentially, Plaintiff acts as a defendant to National Can's claim when it impleads
HydroVac for indemnity. Plaintiff had no logical reason to join HydroVac in the original
action because HydroVac's alleged liability to Plaintiff is contingent on Plaintiff's liabil-
ity to National Can on their counterclaim. Plaintiff cannot be said to have tried to evade
the requirements of the diversity statute when it first filed in state court and then im-
pleaded HydroVac only in response to National Can's counterclaim. Plaintiff desires
simply and sensibly to avoid the piecemeal and potentially adverse resolution of the
liabilities in question.

842 F. Supp. at 857. Nevertheless, the court held that the language of subsection (b) prohib-
ited it from exercising supplemental jurisdiction over Guaranteed Systems' third-party claim.
The court reasoned that:

If it were not bound by the plain terms of the statutes, the court would be swayed by the
interests of justice and efficiency to construe Plaintiff's claim as a claim by a defendant
against a person made party under Rule 14 rather than a claim by a plaintiff, and thus
allow it to proceed under 28 U.S.C. § 1367(b). The court believes, however, that such a
construction would reach beyond the limits of Section 1367(b).

842 F. Supp. at 857-58. The court, however, never explained why the language of subsection
(b) mandated such a result.

Swiss Bank Corp., 673 F.2d 951, 959-60 (7th Cir.), cert. denied, 459 U.S. 1017 (1982); Berel
Ketorn Constr., Inc., 686 F. Supp. 542, 544-45 (M.D.N.C. 1988); Morse/Diesel, Inc. v. Trinity
(2d Cir. 1988); Brown & Caldwell v. Institute for Energy Funding, Ltd., 617 F. Supp. 649, 651

1985), for example, the plaintiff brought suit against the defendant for breach of contract
based on diversity of citizenship. The defendant then filed counterclaims
against the plaintiff for breach of contract and negligence. In response to the counterclaims,
the plaintiff filed a complaint against a nondiverse third party for indemnity. In holding that
the plaintiff's third-party complaint was within the court's ancillary jurisdiction, the court
distinguished the case from the plaintiff's third-party complaint in Kroger:

Unlike the circumstance in [Kroger], where the court noted that the only barrier to the
naming of the impleaded defendant as defendant in the original action was the diversity-
serts the supplemental claim in a defensive posture, however, does not always ensure that the plaintiff is not attempting to circumvent the complete diversity requirement. For example, a plaintiff who has a claim against a diverse defendant and a nondiverse defendant can choose to sue only the diverse defendant, rely on the diverse defendant to implead the nondiverse defendant and hope that the nondiverse defendant will assert a direct claim against the plaintiff. Acting in a defensive posture, the plaintiff could then assert a counterclaim against the nondiverse defendant under the court's supplemental jurisdiction and achieve indirectly what he could not do directly at the beginning of the lawsuit. Although the risk that a plaintiff acting in a defensive posture is attempting to evade the complete diversity requirement is more attenuated than the Kroger scenario, it is not unrealistic to assume that plaintiffs will engage in such strategic gamesmanship.

2. Joinder and Intervention Under Rule 19 and Rule 24

Like impleader under Rule 14, the rules governing joinder and intervention provide plaintiffs with an opportunity to circumvent the complete diversity requirement. For example, a plaintiff with a claim against both a diverse defendant and a nondiverse defendant could sue only the diverse defendant and wait for the nondiverse defendant to be joined under Rule 19 or for the nondiverse de-
fendant to intervene under Rule 24. Similarly, a diverse plaintiff and a nondiverse plaintiff could create diversity jurisdiction by simply omitting the nondiverse plaintiff from the original federal complaint and then waiting for the nondiverse plaintiff to be joined under Rule 19 or to intervene under Rule 24. Accordingly, lower courts after *Kroger* refused to exercise ancillary jurisdiction in diversity cases over claims by plaintiffs against nondiverse parties joined under Rule 19 or who intervened under Rule 24, and over claims by nondiverse Rule 19 or Rule 24 plaintiffs. The application of subsection (b) proposed in this Note codifies this approach.

Even before the adoption of section 1367, however, courts recognized that exercising supplemental jurisdiction in diversity cases

138. Rule 24 provides the circumstances under which a nonparty may intervene in an existing lawsuit. Intervention essentially means that a nonparty may join a lawsuit but must do so on its own initiative. Rule 24 divides intervention into two categories: intervention as of right and permissive intervention. Generally, a nonparty is allowed to intervene as of right when it has an interest in the subject matter of the action and the nonparty's absence would impair its ability to protect its interests. FED. R. CIV. P. 24(a). On the other hand, intervention is permissive when "an applicant's claim or defense and the main action have a question of law or fact in common." FED. R. CIV. P. 24(b). Permissive intervention, unlike intervention as of right, is subject to the court's discretion.


140. Rule 20 provides for the permissive joinder of absentee persons. Under Rule 20, a court has discretion to join a nonparty whose claim arises "out of the same transaction, occurrence, or series of transactions or occurrences." FED. R. CIV. P. 20(a). Section 1367(b) prohibits the exercise of supplemental jurisdiction over claims by plaintiffs against nondiverse Rule 20 parties. Subsection (b), however, inadvertently fails to impose a restriction on claims by nondiverse plaintiffs who are joined under Rule 20. A literal reading of subsection (b), then, would authorize the exercise of supplemental jurisdiction over claims by nondiverse Rule 20 plaintiffs, assuming that such claims meet the relatedness requirement of subsection (a), and would allow plaintiffs to strategically circumvent the complete diversity requirement by having only the diverse plaintiff bring a diversity suit in federal court and then joining the nondiverse plaintiff under Rule 20. The drafters of § 1367 — Professors Rowe, Burbank, and Mengler — acknowledge this omission as a "potentially gaping hole." Rowe et al., *supra* note 23, at 961 n.91. The drafters urged courts faced with this issue to disregard the statutory omission "either by regarding it as an unacceptable circumvention of original diversity jurisdiction requirements, or by reference to the intent not to abandon the complete diversity rule that is clearly expressed in the legislative history of section 1367." *Id.* At least one court has so interpreted the statute. Griffin v. Dana Point Condominium Assn., 768 F. Supp. 1299, 1301-02 (N.D. Ill. 1991) (holding that § 1367(b) prohibits supplemental jurisdiction for a Rule 20 plaintiff who failed to satisfy the minimum amount in controversy requirement).
over claims by plaintiffs against nondiverse Rule 19 or Rule 24 parties and over claims by nondiverse Rule 19 or Rule 24 plaintiffs would not always defeat section 1332 and thus recognized an exception to this general rule. A court could exercise jurisdiction in a diversity case over claims by a plaintiff against a nondiverse intervenor as of right and over claims by a nondiverse plaintiff intervenor as of right provided that the intervenor was not indispensable when the lawsuit was filed. This exception, however, created several problems. First, the fact that the intervenor was not indispensable at the commencement of the lawsuit did not guarantee that the exercise of jurisdiction would not defeat the complete diversity rule. A plaintiff who was necessary but not indispensable could circumvent section 1332 by waiting until after the commencement of the lawsuit to intervene as of right under the court's ancillary jurisdiction. Second, although courts exercised jurisdiction in diversity cases over claims by nondiverse plaintiff intervenors as of right who were not indispensable and claims by plaintiffs against nondiverse intervenors as of right who were not indispensable, the courts anomalously refused to extend ancillary jurisdiction to the same claims if the nondiverse party, instead of intervening, was sought to be joined under Rule 19. The application of subsection (b) proposed in this Note resolves these problems. First, it eliminates the test of indispensability as the dispositive factor in determining whether to exercise supplemental jurisdiction. Second, the bright-line rule resolves the anomalous treatment of Rule 19 parties by excluding supplemental jurisdiction.


142. See 7 WRIGHT ET AL., supra note 22, § 1917, at 479-80 ("Thus there is the anomaly that the court cannot order this absentee in, because his presence would defeat jurisdiction, but that if he comes in on his own motion he is within ancillary jurisdiction."). Several commentators prior to § 1367 argued that the anomaly should be resolved by extending supplemental jurisdiction to nondiverse Rule 19 parties. See George B. Fraser, Ancillary Jurisdiction of Federal Courts of Persons Whose Interest May Be Impaired If Not Joined, 62 F.R.D. 483, 485-87 (1974); Richard D. Freer, Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19, 60 N.Y.U. L. Rev. 1061, 1085-88 (1985); John E. Kennedy, Let's All Join In: Intervention Under Federal Rule 24, 57 Ky. L.J. 329, 362-63 (1968-69). But see McLaughlin, supra note 9, at 966:

If the party chooses to intervene in the action, a logical basis exists for distinguishing this party from a non-intervening Rule 19 party and permitting the intervening party to protect its interests through supplemental jurisdiction. Extending supplemental jurisdiction only when the party chooses to intervene also reaffirms that the sole rationale for this extension of supplemental jurisdiction is to protect the absentee party and not to benefit the plaintiff.

At least one court recognized that the anomaly made little sense. New York State Assn. for Retarded Children, Inc. v. Carey, 438 F. Supp. 440, 445 (E.D.N.Y. 1977) ("Since the general rule is that parties cannot confer subject matter jurisdiction on the federal courts by consent or by conduct, it should make no difference as far as ancillary jurisdiction is concerned whether the new party was involuntarily joined or applied to intervene.") (citation omitted).
jurisdiction over claims by plaintiffs against nondiverse Rule 24 parties and claims by nondiverse Rule 24 plaintiffs to the same extent as claims by plaintiffs against nondiverse parties and claims by nondiverse plaintiffs who are sought to be joined under Rule 19.143 Thus, a court may exercise supplemental jurisdiction in a diversity case over such claims where the claims did not exist at the commencement of the lawsuit regardless of whether the nondiverse party is joined or intervenes.144

CONCLUSION

Any discussion of supplemental jurisdiction in diversity cases will undoubtedly evoke spirited debate over the desirability of the complete diversity requirement and the wisdom of retaining diversity jurisdiction at all.145 Nevertheless, Congress has chosen not to abolish diversity jurisdiction146 and the Supreme Court continues to

143. This result is consistent with § 1367's legislative history. The House Report states: Subsection (b) makes one small change in pre-Finley practice. Anomalously, under current practice, the same party might intervene as of right . . . and take advantage of supplemental jurisdiction, but not come within supplemental jurisdiction if parties already in the action sought to effect the joinder under Rule 19. Subsection (b) would eliminate this anomaly, excluding . . . plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19. H.R. REP. No. 734, supra note 25, at 29, reprinted in 1990 U.S.C.C.A.N. 6875 (footnote omitted).

144. Prior to § 1367, courts refused to exercise ancillary jurisdiction in diversity cases over claims by plaintiffs against nondiverse parties who had intervened permissively under Rule 24(b) and over claims by nondiverse permissive plaintiff intervenors. See Wright et al., supra note 30, § 3523, at 113. Subsection (b) generally continues this prohibition but authorizes the exercise of supplemental jurisdiction over such claims where the claims did not exist until after the commencement of the lawsuit. Of course, such claims must still satisfy subsection (a)'s test of relatedness. See Jeffrey L. Rensberger, Note, Ancillary Jurisdiction and Intervention under Rule 24: Analysis and Proposals, 58 IND. L.J. 111, 112-13 (1982) (arguing that ancillary jurisdiction is appropriate over claims against certain permissive intervenors, namely those "that border on the division between the two types of intervention, but fall just short of intervention of right.").


146. See supra note 98.
interpret section 1332 as requiring complete diversity.147 This Note does not attempt to enter this debate, and accordingly proceeds on the assumption that the rule of complete diversity, whether desirable or not, must be adhered to.

In enacting section 1367, Congress sought to preserve the requirement of complete diversity by prohibiting the exercise of supplemental jurisdiction in diversity cases over certain claims by plaintiffs when exercising jurisdiction over such claims would be inconsistent with the requirements of section 1332. Courts have interpreted this language to mean that supplemental jurisdiction may not be extended to these claims whenever the claim is between citizens of the same state. This reading of the statute is inconsistent with the plain meaning and legislative history of section 1367, and creates a substantive change from the prior Supreme Court precedent that Congress meant to codify in subsection (b).

This Note seeks to clarify section 1332's requirements and to show that in certain circumstances a plaintiff may assert a claim against a nondiverse party without violating the complete diversity rule and thus without running afoul of section 1367(b). This Note also provides courts with a bright-line rule to determine whether the exercise of supplemental jurisdiction is permitted under subsection (b). This way of reading the statute best accords with its language, legislative history, and purpose, and balances the desire for efficiency and fairness against the limitation of the complete diversity rule.