

University of Pennsylvania Carey Law School

Penn Carey Law: Legal Scholarship Repository

All Faculty Scholarship

Faculty Works

Fall 1991

Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer

Thomas D. Rowe Jr.

Stephen B. Burbank

University of Pennsylvania Carey Law School

Thomas M. Mengler

Author ORCID Identifier:

 [Stephen Burbank 0000-0001-9024-0195](https://orcid.org/0000-0001-9024-0195)

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [American Politics Commons](#), [Civil Law Commons](#), [Civil Procedure Commons](#), [Courts Commons](#), [Jurisdiction Commons](#), [Law and Society Commons](#), [Legislation Commons](#), and the [Other Legal Studies Commons](#)

Repository Citation

Rowe, Thomas D. Jr.; Burbank, Stephen B.; and Mengler, Thomas M., "Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer" (1991). *All Faculty Scholarship*. 937. https://scholarship.law.upenn.edu/faculty_scholarship/937

This Response or Comment is brought to you for free and open access by the Faculty Works at Penn Carey Law: Legal Scholarship Repository. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Penn Carey Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

EMORY LAW JOURNAL

Volume 40

FALL 1991

Number 4

ESSAYS

COMPOUNDING OR CREATING CONFUSION ABOUT SUPPLEMENTAL JURISDICTION? A REPLY TO PROFESSOR FREER

*Thomas D. Rowe, Jr.**

*Stephen B. Burbank***

*Thomas M. Mengler****

Ah, the polemical mode. Where would we be without it? Better off, perhaps; polemics can make it harder to separate wheat from chaff. In a recent Essay in this journal¹ that includes a critique of the new federal supplemental jurisdiction statute,² Professor Richard Freer purports to

* Professor of Law, Duke University; Visiting Professor of Law, University of Virginia.

** Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania.

*** Professor of Law, University of Illinois.

¹ Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991).

² 28 U.S.C.A. § 1367 (West Supp. 1991). To save space and reduce the need for page-flipping, we omit quoting the statute in full here. Its subsection (a) provides:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. Subsection (b), quoted and discussed later, provides for exceptions in cases over which jurisdiction

separate the wheat from the chaff and then proceeds to torch the farm, exuberantly and extensively telling the federal courts how to get it all wrong. We three meeting again³ under fire need to take care not to respond out of some offended pride of kibitzership, for we did help in framing 28 U.S.C. § 1367 in the last weeks of the 101st Congress.⁴ Still, we hope we can show litigants and courts how to live their waking hours without suffering Professor Freer's nightmare.

Professor Freer's Essay makes several main criticisms of the new supplemental jurisdiction statute. First, he suggests that the lower federal courts were coalescing on a sensible, limiting view of the Supreme Court's hostile approach to supplemental jurisdiction over added parties in *Finley v. United States*,⁵ by which he may mean that there was little need for legislation and that Congress could have left well enough alone. Second, he charges that by limiting the exercise of supplemental jurisdiction in cases with original jurisdiction founded only on section 1332, the statute — part of legislation meant to implement the recommendations of the Federal Courts Study Committee [FCSC] — does not do what the FCSC suggested. His third objection, related to the second, is that the statute "codifies a fundamental anti-diversity bias,"⁶ wreaking a "punishment

exists solely under 28 U.S.C. § 1332 (1988), the general diversity statute. Subsections (c) and (d) deal respectively with discretionary authority to decline to exercise supplemental jurisdiction and with statute of limitations matters. Subsection (e) is definitional.

³ See Mengler, Burbank & Rowe, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991) [hereinafter *Invitation*]; Mengler, Burbank, & Rowe, *Recent Federal Court Legislation Made Some Noteworthy Changes*, Nat'l L.J., Dec. 31, 1990, at 20, col. 4.

⁴ See H.R. REP. No. 734, 101st Cong., 2d Sess., at 27 n.13 (1990) [hereinafter HOUSE REPORT] (acknowledging assistance of several persons in development and revision of draft statute).

⁵ 490 U.S. 545 (1989) (no pendent party jurisdiction over private codefendant in Federal Tort Claims Act suit against United States, despite exclusive federal court jurisdiction over claim against government).

For uniformity, we will ordinarily use the new statute's general term "supplemental jurisdiction" instead of the previous multiplicity of labels, even when discussing cases decided before the adoption of section 1367. "Pendent jurisdiction" had usually referred to a federal question plaintiff's inclusion or addition of a related state law claim against the same defendant without an independent basis of jurisdiction. "Pendent party jurisdiction" ordinarily referred to a federal question plaintiff's effort to add a related state law claim against a *new* party without independent jurisdictional grounds. "Ancillary jurisdiction" most commonly referred to jurisdiction without independent grounds over claims and parties added by those other than the plaintiff, such as compulsory counterclaims and impleader of third-party defendants. Section 1367's term "supplemental jurisdiction" embraces the entire area covered by the earlier labels.

⁶ Freer, *supra* note 1, at 476.

[on] the diversity plaintiff” that is “absurd.”⁷

Fourth, Professor Freer asserts that the new law mistakenly locks in the complete diversity rule as applied to alienage cases. Fifth, he says, the legislation resolves in the wrong way a well-recognized anomaly under prior law, the different treatment for supplemental jurisdiction purposes of a “necessary” party depending on whether joinder is sought at the party’s initiative by intervention under Rule 24 or at the behest of a party or the court under Rule 19. Sixth, he claims that the statute adopts a nonsensical rule in permitting the joinder of a nondiverse necessary party defendant under Rule 19 while forbidding plaintiffs from asserting claims against such a defendant. Finally, Professor Freer argues that section 1367 is badly drafted, requiring judicial contortions correctly to resolve some, and wholly neglecting other, problems he envisions.

1. *The Finley Rationale and the Need for Legislation*

Finley held that a private plaintiff suing the United States in a Federal Tort Claims Act case could not join a private defendant without an independent basis of federal court jurisdiction. The result, given that the United States can be sued under that statute only in federal court, meant that plaintiffs often had to split their actions (sue the United States in federal court and co-citizen defendants on state law claims in state court) or forgo claims against one or the other of the prospective defendants. However narrowly the lower courts might have limited its application, *Finley*’s holding itself was well worth overruling,⁸ and the Supreme Court was not about to do the job.

By listing section 1367’s overruling of *Finley* in his very short discus-

⁷ *Id.* at 480.

⁸ See REPORT OF THE FEDERAL COURTS STUDY COMM. 47 (1990) [hereinafter FCSC REPORT]:

As a result [primarily of *Finley*], a litigant with related claims against two different parties — one within and one outside original federal jurisdiction — may have to choose between (1) splitting the claims and bringing duplicative actions in state and federal courts; (2) abandoning one of the claims altogether; or (3) filing the entire case in state court, thus delegating the determination of federal issues to the state courts. The first alternative wastes judicial resources. The second is unfair to the claimant. The third forces litigants to bring a wide variety of federal claims into state courts and in some cases is unavailable because federal jurisdiction over the federal aspect is exclusive.

sion of "What Is Good About the Statute,"⁹ Professor Freer seems to agree. Nonetheless, he could be questioning the need for legislation, or at least anything more than narrow legislation to overrule just the *Finley* result, when he argues that "there is reason to believe that the lower courts would have dealt with [*Finley*] as [they] had the [Supreme Court's narrow supplemental jurisdiction] opinions of the 1970s, basically limiting it to its facts."¹⁰

As Professor Freer admits, lower court decisions after *Finley* were split on supplemental jurisdiction over third-party claims.¹¹ Yet more decisions reading *Finley* for all it was worth kept coming down, both as to third-party claims¹² and — despite Freer's assertion that this was the only area in which *Finley* had thus far caused difficulty¹³ — in other contexts as well.¹⁴

⁹ See Freer, *supra* note 1, at 473-74.

¹⁰ *Id.* at 446 (footnote omitted). Professor Freer's Essay does not make explicit what he concludes from this prediction. Early in the Essay he writes, "Had the statute simply overruled *Finley* and codified extant practice . . . it would have been a welcome addition to the federal jurisdiction family." *Id.* If he agrees that legislation was needed to overrule *Finley*, then it seems largely irrelevant what the lower federal courts were doing with the precedent; the debate should focus on the content of the overruling legislation. He may, however, be suggesting that instead of getting "involved," Congress should have "give[n] [the lower federal courts the] chance" to "read *Finley* narrowly." See *id.* at 469 (footnote omitted). If so, we disagree. See *supra* note 8 and accompanying text.

¹¹ See Freer, *supra* note 1, at 467-69.

¹² Professor Freer cites two opinions that questioned or rejected supplemental jurisdiction over original defendants' claims against third-party defendants, *Aetna Cas. & Sur. Corp. v. Spartan Mech. Corp.*, 738 F. Supp. 664 (E.D. N.Y. 1990), and *Community Coffee Co. v. M/S Kriti Amethyst*, 715 F. Supp. 772 (E.D. La. 1989). Three more cases holding that *Finley* requires independent jurisdictional grounds for impleader are *O & K Trojan, Inc. v. Mun. & Contractors Equip. Corp.*, 751 F. Supp. 431, 434-35 (S.D. N.Y. 1990); *FDIC v. Israel*, 739 F. Supp. 1411 (C.D. Cal. 1990) (using California state courts' "cross-claim" terminology but apparently involving Rule 14 third-party claims); and *U.S. Fire Ins. Co. v. Reading Municipal Airport Auth.*, 130 F.R.D. 38, 39-40 (E.D. Pa. 1990). See also 6 C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1444, at 328 (2d ed. 1990) (*Finley* "raises some question whether the Court might reject ancillary jurisdiction" over Rule 14 claims); *id.* § 1436, at 276 (same assertion with respect to persons added under Federal Rule of Civil Procedure 13(h) as parties to compulsory counterclaims or cross-claims).

¹³ Freer, *supra* note 1, at 468.

¹⁴ See, e.g., *Perkins v. Halex Co.*, 744 F. Supp. 169, 175-76 (N.D. Ohio 1990) (holding that *Finley* forbids supplemental jurisdiction over codefendant in cases removed under then-applicable version of separate-claim removal statute, 28 U.S.C. § 1441(c) (1988)); *Mayerson v. Amity Travel, Ltd.*, No. 90-1359 (E.D. Pa. Apr. 12, 1990) (LEXIS, Genfed library, Dist file) (holding that *Finley* precludes supplemental jurisdiction over codefendant in case removed by foreign state under 28 U.S.C. § 1441(d) (1988)). See also *In re School Asbestos Litig.*, 921 F.2d 1310, 1326-29 (3d Cir. 1990) (Cowen, J., dissenting) (arguing that *Finley* and other Supreme Court precedents undermine rule that in a diversity class action, only the class representatives must be of diverse citizenship from the

To the extent that narrow reading was taking place, Professor Freer and some lower courts whose opinions he cites may have been paying inadequate heed to the strength of *Finley*'s admonition not to read jurisdictional statutes broadly when it comes to the addition of *parties*. The *Finley* majority's rationale — that "with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly"¹⁵ — cuts a broad swath. Indeed, in the face of that language, we question whether the lower courts struggling to read *Finley* narrowly were being anything but inappropriately in-subordinate. As the Fifth Circuit has put it, "[t]he precise meaning of *Finley* has engendered a tremendous disarray of authority in the federal courts. Some courts analyze pendent party jurisdiction as if *Finley* were never decided."¹⁶

Moreover, there is little if any reason to believe that the Court would have tolerated continued disregard of the broad principle it announced in *Finley*. To the contrary, as Professor Freer has emphasized with evident distaste, there is recent precedent for the Court getting "involved again,"¹⁷ "[j]ust when it seemed that the lower courts had [by Freer's lights] worked things out fairly well."¹⁸

In any event, now that section 1367 is on the books, the focus does not belong on what the lower courts had been doing since *Finley* and the somewhat obscure implications of those decisions for what Congress should have done. The Supreme Court in *Finley* sent a clear message to Congress: "Whatever we say regarding the scope of jurisdiction . . . can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretative

defendants).

¹⁵ *Finley*, 490 U.S. at 549.

¹⁶ *Nolan v. Boeing Co.*, 919 F.2d 1058, 1062 n.4 (5th Cir. 1990) (footnotes omitted). *See also Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 361-62 (7th Cir. 1990).

¹⁷ Freer, *supra* note 1, at 464 (referring to Supreme Court's intervention via *Finley* after lower federal courts had developed case law under *Aldinger v. Howard*, 427 U.S. 1 (1976), and *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978)).

¹⁸ *Id.* *See also id.* at 452 ("The Supreme Court addressed each of [two key supplemental jurisdiction] situations in the 1970s in opinions that injected new considerations into the supplemental jurisdiction calculus and threatened to affect practice even in those areas where the rules had become well established.") (footnote omitted).

rules, so that it may know the effect of the language it adopts."¹⁹ In short, if you don't like what we've done, codify the area. Congress did so; what should concern us now is the fidelity of the statute to the FCSC's recommendation and, especially, section 1367's worth as a framework for supplemental jurisdiction in practice.

2. *The Federal Courts Study Committee's Recommendation and the Supplemental Jurisdiction Statute*

According to Professor Freer, the new statute does not do "what the Federal Courts Study Committee had suggested that it do."²⁰ In its Report in April 1990, the FCSC recommended that Congress "authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base."²¹ Professor Freer states that the FCSC's suggestions "were quite broad and evidently would have allowed supplemental jurisdiction over all transactionally related claims, subject only to a discretionary power to dismiss in the interest of federalism."²² He is a vehement critic of the Supreme Court's decision in *Owen Equipment & Erection Co. v. Kroger*,²³ which rejected supplemental jurisdiction over plaintiffs' claims against third-party defendants in diversity cases. He views the FCSC as having recommended what he favors — legislation to overrule *Kroger* as well as *Finley*: "[O]bservers who felt that *Kroger* was wrongly decided, and who wanted a statutory rejection of *Finley*, would have embraced what the Committee suggested regarding supplemental jurisdiction."²⁴ He asserts that the FCSC "would have overruled *Kroger*."²⁵

Professor Freer is wrong on this point. The Committee's explanation of its recommendation contains limiting language that Freer quotes but of which he takes no note:

[W]e recommend that Congress expressly authorize federal courts to

¹⁹ *Finley v. United States*, 490 U.S. at 556.

²⁰ Freer, *supra* note 1, at 471.

²¹ FCSC REPORT, *supra* note 8, at 47.

²² Freer, *supra* note 1, at 469 (footnote omitted).

²³ 437 U.S. 365 (1978) [hereinafter *Kroger*]. For Freer's critique of *Kroger*, see Freer, *supra* note 1, at 458-64.

²⁴ Freer, *supra* note 1, at 470.

²⁵ *Id.* at 476.

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.²⁶

If this language left any doubt that the FCSC had no intention of tinkering with the complete diversity requirement or disturbing the *Kroger* result, the Chairman of the Committee, Third Circuit Senior Judge Joseph F. Weis, Jr., soon dispelled it. Testifying in September 1990 before a House Judiciary Subcommittee chaired by then Congressman Robert Kastenmeier, also an FCSC member,²⁷ Judge Weis discussed an earlier draft of supplemental jurisdiction legislation, stating: "[It] would change the doctrine of complete diversity articulated in *Strawbridge v. Curtiss*, 3 Cranch 267 and *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). The Study Committee did not intend to encourage additional diversity litigation in that fashion."²⁸

As Judge Weis' testimony makes clear, the legislative overruling of *Kroger* favored by Professor Freer would have been inconsistent with the FCSC's recommendation to *abolish* most general diversity jurisdiction.²⁹ Indeed, it is baffling how Freer could conclude that the same committee could have recommended such diametrically contradictory proposals. Moreover, overruling *Kroger* would have taken the new statute out of the

²⁶ FCSC REPORT, *supra* note 8, at 47 (emphasis added), *quoted in* Freer, *supra* note 1, at 469 n.132. The FCSC's limit on its recommendation for supplemental jurisdiction over added parties to cases "within federal question jurisdiction" is consistent with its concern for *Finley's* effect of sometimes "delegating the determination of *federal issues* to the state courts." FCSC REPORT, *supra* note 8, at 47 (emphasis added).

²⁷ It may also be relevant on the question of what the FCSC recommended that each of the three authors of this reply was involved in some capacity with the Committee. Professor Rowe was a Reporter to an FCSC subcommittee, and Professors Burbank and Mengler were Consultants. Indeed, Professor Mengler advised the Committee specifically regarding supplemental jurisdiction.

²⁸ *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 94 (1990) (prepared statement of Judge Joseph F. Weis, Jr.) [hereinafter *House Hearing*]. See also *id.* at 713, 714-15 (letter from Professor Larry Kramer, Reporter to the FCSC subcommittee that generated the supplemental jurisdiction recommendation, to Judge Joseph F. Weis, Jr. (Aug. 21, 1990), criticizing an earlier version of the supplemental jurisdiction statute that would have overruled *Kroger*). Professor Kramer's letter is quoted in the text accompanying note 48 *infra*.

²⁹ See FCSC REPORT, *supra* note 8, at 38-42.

category of the noncontroversial. In overruling *Finley* and codifying most of the pre-*Finley* status quo, the statute remains within the noncontroversial realm and is faithful to the FCSC's recommendations.

Professor Freer is not content to charge that we "three law professors,"³⁰ all of whom were involved in the work of the FCSC,³¹ subverted its recommendation about supplemental jurisdiction. He claims that the House Report misrepresents what the statute accomplishes.³² Although he may prove correct on one point as to which the Report tries to fill a statutory gap,³³ in the main he is a victim of his preconceptions and a prisoner of his prior work in the area.³⁴ These blinders cause him at times to generalize restrictions applicable only when jurisdiction is "founded only on section 1332."³⁵ More seriously, they lead him to neglect the qualification that even those restrictions apply only when the exercise of supplemental jurisdiction "would be inconsistent with the jurisdictional requirements of section 1332."³⁶ As advertised in the House Report, "[t]he net effect of subsection (b),"³⁷ with but "one small change in pre-*Finley* practice,"³⁸

³⁰ Freer, *supra* note 1, at 446 n.13, 470.

³¹ See *supra* note 27.

³² See Freer, *supra* note 1, at 471 (statute did not do "what the House Report said that it did").

³³ See *infra* note 90.

³⁴ For example, in his Essay Professor Freer tries to perform CPR on a thesis he advanced in an earlier article. See Freer, *supra* note 1, at 454-57 (urging view previously developed in Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34). In his *Duke Law Journal* article, Professor Freer contended that Congress had already enacted supplemental jurisdiction through its adoption of the term "civil action" in the 1948 codification of the jurisdiction statutes. He continues to maintain this thesis even though neither Congress nor any court of which we and he are aware has ever expressly attached such significance to the 1948 amendments. For further criticism of Freer's thesis, see Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247, 261-65.

³⁵ See *infra* text accompanying notes 51-53.

³⁶ See *infra* text accompanying notes 56-58, note 86 and accompanying text. The quotation in the text is from subsection (b) of section 1367, which limits supplemental jurisdiction when original federal court jurisdiction rests solely on diversity of citizenship under 28 U.S.C. § 1332 (1988). The full text of the subsection, 28 U.S.C. § 1367(b) (West Supp. 1991), is as follows:

In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title [the general diversity provision], the district courts shall not have supplemental jurisdiction under subsection (a) over claims made 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.

³⁷ HOUSE REPORT, *supra* note 4, at 29 n.16.

³⁸ *Id.* at 29.

“is to implement the principal rationale of [*Kroger*].”³⁹ For Professor Freer, it appears, that is the rub.

3. *Antidiversity Bias*

Despite his view of *Kroger*, Professor Freer writes at times as if he would have endorsed legislation that codified its rule. He says that if the supplemental jurisdiction statute had “simply overruled *Finley* and codified extant practice . . . it would have been a welcome addition,”⁴⁰ and agrees that “a statute intended to codify pre-*Finley* practice would have to codify *Kroger*.”⁴¹ In almost the same breath, however, he writes that in his view *Kroger* is “unworthy of codification.”⁴² Getting past this equivocation, the reader cannot mistake Professor Freer’s dislike of *Kroger* and dismay at the statute. Using increasingly purple language,⁴³ Freer condemns section 1367 for codifying and, in his view, “greatly extend[ing]”⁴⁴ what he sees as *Kroger*’s anti-diversity bias.

As we shall explain,⁴⁵ section 1367 works no great or even significant extensions in the limits on supplemental jurisdiction in diversity cases. Indeed, the statute saves such jurisdiction over defendants’ state law claims against nondiverse third-party defendants from *Finley*’s very real threat.⁴⁶ Here, though, we focus on the charge of bias against diversity jurisdiction and against diversity plaintiffs in particular. First, for the statute to have much chance of passing Congress with the late start necessitated by the FCSC’s reporting date only seven months before elections, it could not

³⁹ *Id.* at 29 n.16.

⁴⁰ Freer, *supra* note 1, at 446.

⁴¹ *Id.* at 476.

⁴² *Id.*

⁴³ *See id.* at 446 (§ 1367 “embodies a disquieting bias against diversity of citizenship jurisdiction”); *id.* at 460 (describing *Kroger* as “a reaction of frustration . . . an unprincipled, naked antidiversity case”) (footnote omitted); *id.* at 471 (§ 1367 has effect of “maiming efficient packaging of diversity cases”); *id.* at 476 (“the supplemental jurisdiction statute codifies [*Kroger*’s] schizophrenic treatment of claims”; “*Kroger* was an unprincipled, result-oriented opinion based upon antipathy to diversity jurisdiction, . . . passed off” as following congressional intent); *id.* at 480 (statute’s “punishment of the diversity plaintiff is absurd”; its “obsession with punishing the diversity plaintiff . . . leads to preposterous . . . changes from current practice”).

⁴⁴ *Id.* at 471.

⁴⁵ *See infra* notes 61-76 and accompanying text.

⁴⁶ *See supra* note 12 (post-*Finley* cases rejecting supplemental jurisdiction over impleader claims against nondiverse third-party defendants).

effect major changes in existing practice or significant expansion of federal court jurisdiction. As Professor Larry Kramer, Reporter for the FCSC subcommittee that produced the supplemental jurisdiction recommendation, wrote to Chairman Weis about an earlier draft of the statute⁴⁷ that would have overruled *Kroger* and gone at least a considerable distance toward overruling *Strawbridge*: "This makes passage riskier, since the provision no longer simply restores pre-*Finley* law but makes a substantial change that extends federal jurisdiction."⁴⁸

Second, Professor Freer's heated charges of bias, lack of principle, and covert motivation⁴⁹ appear mainly to reflect his own cast of mind; he *really* doesn't like *Kroger*, and he can't seem to accept that sincere, intelligent, principled lawyers and judges can find the decision correct or even tenable. Whether one regards *Kroger* as right or wrong, however, it evinces a concern about easy, noncollusive circumvention of the well-established complete diversity requirement. The *Kroger* holding prevents a diversity plaintiff from getting around the requirement by suing a diverse defendant, waiting for that defendant to bring a third-party indemnity complaint against a co-citizen of the plaintiff, and then adding a state law claim against the new party. Lawyers pull off more complicated maneuvers every day, and it appears that Professor Freer would leave the federal courts powerless to respond to such evasion of the complete diversity rule as long as the original defendant was not a sham party.⁵⁰

Further, it is not clear how far Professor Freer would go in overruling other applications of the complete diversity rule. At an extreme, one could

⁴⁷ H.R. 5381, 101st Cong., 2d Sess. § 120 (1990), reprinted in *House Hearing*, *supra* note 28, at 28-32.

⁴⁸ Letter from Prof. Larry Kramer to Hon. Joseph F. Weis, Jr. (Aug. 21, 1990), at 2, reprinted in *House Hearing*, *supra* note 28, at 713, 714.

⁴⁹ See *supra* note 43; Freer, *supra* note 1, at 460 (viewing *Kroger* as federal judges' "reaction of frustration" to Congress' refusal to abolish diversity jurisdiction).

⁵⁰ See Freer, *supra* note 1, at 480 (suggesting that "[i]f parties truly are suing strawpeople to create diversity jurisdiction and await the subsequent joinder of nondiverse absentees, there is an adequate remedy in section 1359"). 28 U.S.C. § 1359 (1988) provides, "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." Actually, the remedy for suing a sham defendant may be dismissal of that party without need to resort to section 1359. Professor Freer's discussion says nothing of the situation in which a plaintiff sues a diverse defendant against whom the plaintiff has a genuine claim, but also seeks to evade the bar on incomplete diversity suits by waiting to claim against an expected nondiverse third-party defendant.

abandon it entirely, which effects a potentially enormous expansion in federal diversity jurisdiction, threatening to swamp the federal courts with state-law cases involving mostly adversaries from the same state. No one can seriously suggest that such a measure would have been a faithful implementation of the FCSC Report or that the idea would have had a chance of passing Congress. This side of abandoning the complete diversity rule, one would have to make different decisions from those made in section 1367 about where to draw the lines. The likely result would be a statute of considerable complexity, subject to many of the criticisms Professor Freer levels at section 1367, in an effort to strike and define a different balance.

As for what the new statute affects, it goes nowhere nearly so far as Professor Freer claims when he writes that "supplemental jurisdiction cannot be exercised over claims asserted by a plaintiff."⁵¹ In making such broad statements,⁵² he neglects to mention the key qualification in section 1367(b) that imposes such limits on supplemental jurisdiction only in cases that are before federal courts solely under the general diversity jurisdiction.⁵³ Because of this qualification, a more accurate statement of the supplemental jurisdiction limit to which Professor Freer refers would be that under section 1367, supplemental jurisdiction cannot be exercised over some claims asserted by a plaintiff in a case brought in federal court solely under section 1332, when that exercise would permit ready circumvention of the complete diversity requirement.

Professor Freer sees in this structure an "obsession with punishing the diversity plaintiff," which he regards as "absurd."⁵⁴ His rhetoric, again, reflects his predispositions and overstates his case; one need not view as "punishment" a structure that provides choices with explicit limits on what you get when you make one of the choices. "Punishment" comes only *ex post* if the diversity plaintiff ignores the clear *ex ante* message of *Kroger* and the new statute: if you want to bring an incomplete diversity state law case all in one piece, sue in state court. Potential diversity plain-

⁵¹ See Freer, *supra* note 1, at 474.

⁵² See also *id.* ("Impleader claims will carry supplemental jurisdiction only if they are asserted by nonplaintiffs.").

⁵³ Section 1367(b), the subsection imposing the limits on supplemental jurisdiction that Professor Freer criticizes, begins: "In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title"

⁵⁴ Freer, *supra* note 1, at 480.

tiffs, unlike exclusive jurisdiction federal question plaintiffs under *Finley*, always have that option. For that matter, so do concurrent jurisdiction federal question plaintiffs. Yet one need not oppose diversity jurisdiction to believe that plaintiffs seeking to use an available federal forum for federal claims should not have to pay the price that *Finley* exacts — bring two suits, forgo one claim, or use state court.⁵⁵ If Professor Freer insists on characterizing this structure as reflecting “bias” against diversity jurisdiction, we can only say that he is replacing rational argument with a loaded word.

4. Complete Diversity in Alienage Cases

Professor Freer believes that “by overbroad reference in the exceptions clause of section 1367(b)⁵⁶ to cases brought on any of the bases contained in section 1332 [the general diversity statute],” new section 1367 “prohibit[s] pendent parties jurisdiction in alienage cases.”⁵⁷ He must not have considered the last clause of section 1367(b), under which the restrictions on supplemental jurisdiction in that subsection have effect only “when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.”⁵⁸ The complete diversity rule is a product of judicial interpretation, found nowhere in statutory text before or after the adoption of section 1367. To whatever extent the federal courts were free before to reinterpret section 1332’s “jurisdictional requirements” 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.

The federal courts’ application of the complete diversity rule to alienage cases has produced a dysfunctional crazy quilt of results,⁵⁹ and we agree with Professor Freer’s implication that serious consideration should be

⁵⁵ The FCSC observed that both judicial and legislative rules to confine diversity jurisdiction have long existed. It described the nature of some of these limiting rules and explained their relation to the federal courts’ mission of enforcing *federal* law, viewing the rules as “pragmatic but essentially arbitrary attempt[s] to limit the diversion of federal courts from their primary role of litigating federal constitutional and statutory issues.” FCSC REPORT, *supra* note 8, at 40.

⁵⁶ See *supra* note 36.

⁵⁷ Freer, *supra* note 1, at 475.

⁵⁸ 28 U.S.C. § 1367(b) (West Supp. 1991).

⁵⁹ See, e.g., Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 967-68 (1979).

given to adopting a rule of minimal diversity for alienage cases. Yet abolishing the complete diversity rule in this far from trivial portion of the federal docket,⁶⁰ by judicial decision or by legislation, should come only after careful assessment of its likely impact. That would not have been possible under the circumstances of section 1367's adoption in the waning days of the last Congress. The new statute does not lock in the complete diversity rule for alienage cases; it properly leaves the situation as it stood before.

5. *The Necessary Party/Intervention Anomaly*

Before section 1367's enactment, the same person could intervene in a diversity suit as of right under Rule 24(a) on a supplemental basis, but fall outside the court's supplemental jurisdiction if parties already in the action (or the court) sought to effect that person's joinder as a necessary party under Rule 19. The distinction lay solely in who took the initiative, not in any difference in the way that the outsider's situation related to the existing proceeding and parties. If the nonparty sought to intervene as a plaintiff, the court could exercise supplemental jurisdiction over the plaintiff intervenor's claims; if the outsider sought to intervene as a defendant, the court could exercise supplemental jurisdiction and additionally permit the nondiverse plaintiff to amend its complaint to bring claims against the defendant intervenor. By contrast, if the court or a party already in the action sought to join the same outsider as either a plaintiff or a defendant via Rule 19, the court could not permit the joinder on a supplemental basis.⁶¹

This anomaly made no sense to most commentators,⁶² and Professor

⁶⁰ See A. PARTRIDGE, *THE BUDGETARY IMPACT OF POSSIBLE CHANGES IN DIVERSITY JURISDICTION 23-24* (1988) (alienage cases accounted for 8.3% of sample of 403 diversity cases filed in 1986).

⁶¹ See generally 7C C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1917, at 472-81 (2d ed. 1986). The rules stated in the text did not apply, regardless of which party took the joinder initiative, if the court concluded that the outsider was a diversity-destroying "indispensable" party. In that case the court was obliged not only to deny the joinder but also to dismiss the entire action.

⁶² See, e.g., Berch, *The Erection of a Barrier Against Assertion of Ancillary Claims: An Examination of Owen Equipment and Erection Company v. Kroger*, 1979 ARIZ. ST. L.J. 253, 258-60; Garvey, *The Limits of Ancillary Jurisdiction*, 57 TEX. L. REV. 697, 708-09 (1979); Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 362-63 (1969); Mengler, *supra* note 34, at 285.

Freer is a member of the club.⁶³ One option for Congress, of course, would have been to ignore these commentators' calls for consistency; in codifying supplemental jurisdiction as it essentially existed before *Finley*, Congress could have kept this blemish. Sensibly, it chose not to follow this route. That left the issue of how best to resolve the anomaly. The drafters believed that codifying the essentials of supplemental jurisdiction as it existed before *Finley* meant taking *Kroger* seriously. In parts of his Essay, Professor Freer — despite his distaste for *Kroger* — grudgingly agrees.⁶⁴ Still, he argues strenuously that section 1367 resolves the old anomaly the wrong way. He expresses particular concern for the plight of excluded plaintiff intervenors of right, despite the federal courts' ability to protect them from harm in their absence by dismissing the federal action for refiling in state court.⁶⁵

Once it is conceded that, in codifying the essentials of pre-*Finley* supplemental jurisdiction, one "would have to codify *Kroger*,"⁶⁶ resolving the anomaly becomes straightforward. *Kroger's* principal rationale is implicated when a diversity plaintiff who chose the federal forum seeks to assert a claim against a nondiverse defendant intervenor. As Professor Freer has acknowledged in an earlier article,

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 directly⁶⁷

Kroger's rationale is also implicated by efforts at joinder of prospective plaintiffs under Rules 19 and 24: those who would have destroyed complete diversity if joined originally should not succeed later by the simple, expedient method of waiting for someone else to bring a complete diversity suit first. Congress' choice in eliminating the anomaly — not to foster easy evasions of the complete diversity requirement — is the only resolution

⁶³ See Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. Rev. 1061, 1085-88 (1985).

⁶⁴ See *supra* text accompanying notes 40-41.

⁶⁵ See Freer, *supra* note 1, at 476-78.

⁶⁶ *Id.* at 476.

⁶⁷ Freer, *supra* note 34, at 73 (footnotes omitted).

that takes seriously the Supreme Court's treatment of supplemental jurisdiction before *Finley*.

6. Joinder of Nondiverse Defendants Under Rule 19

Section 1367 generally prohibits supplemental jurisdiction over a diversity plaintiff's claim against a nondiverse defendant joined as a necessary party under Rule 19, but does not prohibit the Rule 19 defendant's joinder.⁶⁸ This, Professor Freer alleges, is nonsense. "How can an absentee," he asks, "be a necessary *defendant* without the plaintiff's having a claim against him?"⁶⁹

Professor Freer has apparently overlooked the implications of the Supreme Court's 1989 decision in *Martin v. Wilks*.⁷⁰ In that case a class of minority employees had brought an employment discrimination suit under Title VII against their employer, the city of Birmingham, Alabama. The plaintiff class did not raise any claims against the city's majority employees. When the latter subsequently challenged the consent decree that had settled the litigation, the Supreme Court, allowing their challenge, suggested that the plaintiff class could have properly joined them as necessary party defendants under Rule 19.⁷¹ Because the majority employees had protectable interests that might have been impaired by an affirmative action decree, they could have been joined as Rule 19 defendants, even though the plaintiff class had no claims against them.

Other commentators, including one of us, have noted that the *Wilks* scenario is fairly common.⁷² Third persons often have interests that might be affected by a lawsuit if the plaintiff were to prevail, even though the

⁶⁸ See *supra* note 36 (quoting subsection (b) of the statute); *Invitation*, *supra* note 3, at 215 n.23. Section 1367(b) also prohibits supplemental jurisdiction over a diversity plaintiff's claim against a nondiverse intervenor-defendant but does not prohibit the intervention itself.

⁶⁹ Freer, *supra* note 1, at 479 (emphasis in original).

⁷⁰ 490 U.S. 755 (1989).

⁷¹ See *id.* at 765-67.

⁷² See Mengler, *supra* note 34, at 284-85; see also Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, the New Law, and Rule 19*, 38 U. KAN. L. REV. 863, 911 (1990) ("Before proceeding, it is important to recognize that a person can be someone to be joined as a defendant if feasible, and even can be an indispensable party, *when the plaintiff has no claim against the person.*") (emphasis in original). In an earlier article, Professor Freer also seems to have understood that there can be necessary defendants against whom the plaintiff has no claim. See Freer, *supra* note 63, at 1104 & n.208.

plaintiff has no claims against the outsiders. A diversity case that illustrates the point is *Helzberg's Diamond Shops v. Valley West Des Moines Shopping Center*.⁷³ In that case Valley West, a shopping center operator, leased space to Helzberg's, a jeweler. Later, the operator leased other space in the same shopping center to Lord's, a second jeweler. Helzberg's then sued Valley West in federal court, contending that the lease to Lord's violated a noncompetition clause in its lease with Valley West. Helzberg's sought to enjoin Valley West from effectuating its lease with Lord's.

On these facts, Helzberg's probably has no claim against Lord's. Yet Lord's has substantial interests that may be impaired or impeded by an injunction and should be joined, if possible, as a necessary party defendant under Rule 19.⁷⁴ Under the prior supplemental jurisdiction law, Lord's could not be joined on a supplemental basis. But that result, the drafters of section 1367 believed, is unwarranted. Lord's has interests related to the transaction that is the subject matter of Helzberg's action, and the *Kroger* rationale is not implicated.⁷⁵ Indeed, Helzberg's may oppose, rather than eagerly anticipate, participation by Lord's for fear that its involvement in the litigation will hinder settlement between Helzberg's and Valley West. *Helzberg's* suggests that in some circumstances plaintiffs may file in federal court in an effort to take advantage of jurisdictional limits and thus *avoid* having to litigate an entire controversy, not to bring the whole matter into federal court deviously. Supplemental jurisdiction, previously unavailable in such situations in diversity cases, now makes complete justice possible — without undermining *Kroger* by making it easy for plaintiffs to bring claims against nondiverse defendants.

If Professor Freer had considered how section 1367 can work in cases like *Helzberg's*, he might not have been so quick to claim that the new statute "maims packaging in diversity cases."⁷⁶ Overall, the net effect of the statute's modest alteration of pre-*Finley* law — in diversity cases, restricting supplemental jurisdiction over Rule 24(a) intervention of right

⁷³ 564 F.2d 816 (8th Cir. 1977). Professor Freer cited and discussed this case in a previous article. See Freer, *supra* note 63, at 1090 & n.141.

⁷⁴ In the actual case, personal jurisdiction obstacles kept Lord's from being joined. See 564 F.2d at 817 n.1.

⁷⁵ For further discussion, see Mengler, *supra* note 34, at 284-85. In an earlier article, Professor Freer acknowledged this point. See Freer, *supra* note 63, at 1104 ("In a [case like *Helzberg's*], no such manipulation of diversity jurisdiction would result by exercising ancillary jurisdiction.").

⁷⁶ Freer, *supra* note 1, at 446.

and expanding it over Rule 19 necessary party joinder — may be a wash.

7. *Preposterous Results and Unanswered Questions?*

Professor Freer discusses several situations not specifically addressed in the statute,⁷⁷ suggesting either that its language yields “preposterous”⁷⁸ and “ridiculous results”⁷⁹ that the courts can avoid “only by creative interpretation,”⁸⁰ or that it may yield no answer at all.⁸¹ Whatever one’s view on the individual questions raised, it is hard to read Professor Freer’s criticisms without concluding that the underlying issue is whose ox is gored. Knowing that it is Professor Freer’s ox helps one to understand, if not to agree with, his extravagant claims about the impact of the new statute. To our minds, responsible courts should usually have little if any difficulty reading it to avoid the “absurd”⁸² results conjured up by a disappointed advocate of a radically different structure.

First, some of the unanswered questions to which Professor Freer points — such as supplemental jurisdiction over plaintiffs’ compulsory state law counterclaims against nondiverse third-party defendants,⁸³ and over impleader and crossclaims against nondiverse parties by plaintiffs defending against counterclaims⁸⁴ — have probably come up far more on law school exams than in reported decisions. Legislating on such specifics without more concrete case law experience would have risked the very statutory rigidity that Professor Freer erroneously imputes to section 1367,⁸⁵ and would have forgone the benefits of the lower court case law development that he is so eager to embrace when he is not straining to score points against the new statute.

Further, as we suggested in our discussion of the statute’s application to alienage cases, the final clause of section 1367(b) — which imposes some

⁷⁷ See *id.* at 481-86.

⁷⁸ *Id.* at 482.

⁷⁹ *Id.* at 484.

⁸⁰ *Id.*

⁸¹ See *id.* at 485 (expressing uncertainty whether exclusions from supplemental jurisdiction apply in removed diversity cases).

⁸² Freer, *supra* note 1, at 483.

⁸³ See *id.* at 481-82.

⁸⁴ See *id.* at 482-84.

⁸⁵ See *id.* at 480.

restrictions on supplemental jurisdiction in diversity cases only when its exercise "would be inconsistent with the jurisdictional requirements of section 1332" — provides a basis for treating such situations.⁸⁶ Sympathetic attention to that language, in light of the expressed congressional intent "to implement the principal rationale of *Kroger*,"⁸⁷ should provide a sensible answer to the questions raised by Professor Freer and enable the federal courts to avoid the "preposterous"⁸⁸ and "ridiculous"⁸⁹ results he belabors.⁹⁰ His neglect of this key aspect of the statute means, to sepa-

⁸⁶ See *supra* text following note 57. Our view of this clause in section 1367(b) means that we do not accept Professor Freer's charge that judicial interpretations to avoid results he fears would be "without one shred of support in the statute," Freer, *supra* note 1, at 483. We do, however, agree with him that our previously suggested distinction between "claims" and "counterclaims" to deal with supplemental jurisdiction over diversity plaintiffs' compulsory counterclaims against nondiverse third-party defendants is too facile. *Id.* at 481 & n.189 (citing *Invitation*, *supra* note 3, at 215 n.17). The federal courts still remain free to consider whether the jurisdictional requirements of section 1332 do or do not exclude supplemental jurisdiction over such counterclaims. The legislative history's general endorsement of prior case law, see HOUSE REPORT, *supra* note 4, at 29, provides a solid foundation for upholding supplemental jurisdiction over diversity plaintiffs' compulsory counterclaims against third-party defendants. See, e.g., *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951 (7th Cir.), cert. denied, 459 U.S. 1017 (1982).

⁸⁷ HOUSE REPORT, *supra* note 4, at 29 n.16.

⁸⁸ Freer, *supra* note 1, at 482.

⁸⁹ *Id.* at 484.

⁹⁰ Two other situations mentioned by Professor Freer call for brief discussion. First, he raises the possibility that section 1367(b) may not govern in removed diversity cases because the general removal statute, 28 U.S.C. § 1441(a), (b) (1988), could be interpreted as granting original jurisdiction and would then take such cases out of the category of actions with "original jurisdiction founded solely on section 1332" to which section 1367(b) applies. Freer, *supra* note 1, at 485. We do not see the problem because section 1441(a) removal depends on the existence of original district court jurisdiction created elsewhere in federal law. Applicability of section 1367(b), of course, need not mean that all rules for supplemental jurisdiction in diversity cases filed in federal court govern in removed diversity cases, depending on the view the courts take of "the jurisdictional requirements of section 1332." These requirements might not prohibit supplemental jurisdiction over the claim of a plaintiff who did not choose the federal forum against a nondiverse third-party defendant, even though the concern for evasion of diversity requirements persists (albeit in attenuated form).

Professor Freer also points out that on its face, section 1367 does not appear to forbid supplemental jurisdiction over claims of class members that do not satisfy section 1332's jurisdictional amount requirement, which would overrule *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (holding that unnamed class members with separate claims must each satisfy any applicable jurisdictional amount requirement). He notes a disclaimer of intent to accomplish this result in the legislative history. Freer, *supra* note 1, at 485-86 (citing HOUSE REPORT, *supra* note 4, at 29). It would have been better had the statute dealt explicitly with this problem, and the legislative history was an attempt to correct the oversight. The resulting combination of statutory language and legislative history, however, creates the delicious possibility that despite Justice Scalia's opposition to the use of legislative history, he will have to look to the history or conclude that section 1367 has wiped *Zahn* off the books. See generally Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress*

rate wheat from chaff, that his parade of horrors is made of straw.

More broadly, codifying a complex area like supplemental jurisdiction — as Professor Freer's discussion illustrates — is itself complex business. A danger is that the result of the effort to deal with all the foreseeable will be a statute too prolix and baroque for everyday use and application by practitioners and judges. Section 1367 reflects an effort to provide sufficient detail without overdoing it. The statute is concededly not perfect.⁹¹ What it accomplishes, however, is to change the direction taken by the Supreme Court in *Finley*, to provide basic guidance (in particular the legislative history's general approval of pre-*Finley* case law, which has treated some specific issues Professor Freer raises), and then to trust the federal courts under the changed direction to interpret the statute sensibly — much as Professor Freer puzzlingly seems to think they would have done under *Finley*'s mistaken lead without the statute. Why he should be so optimistic about their performance under *Finley*, and so fearful of what they will do with that decision overruled by statute, is a mystery. With his illumination of the wrong turns the federal courts might take if they wanted to make the worst of the new regime, we hope and believe they can be trusted to make the best of it.

Always Loses, 1990 DUKE L.J. 160.

⁹¹ Far more serious than the problems Professor Freer raises is section 1367(b)'s silence about supplemental jurisdiction over nondiverse parties proposed to be added after initial filing as *plaintiffs* under Rule 20 (permissive joinder of parties), given the explicit restriction on supplemental jurisdiction over claims by existing plaintiffs *against* "persons made parties under Rule . . . 20." Original filing of a diversity complaint by two plaintiffs, one of them not of diverse citizenship from a defendant, remains barred by the complete diversity interpretation of the requirements for original diversity jurisdiction. Literally, though, section 1367(b) does not bar an original complete diversity filing and subsequent amendment to add a nondiverse co-plaintiff under Rule 20, taking advantage of supplemental jurisdiction over the claim of the new plaintiff against the existing defendant. We can only hope that the federal courts will plug that potentially gaping hole in the complete diversity requirement — 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.

