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ABOLISHING DIVERSITY JURISDICTION: POSITIVE SIDE EFFECTS AND POTENTIAL FOR FURTHER REFORMS

Thomas D. Rowe, Jr.*

The possibility of abolishing the general diversity jurisdiction of the federal courts has received increasing attention with the passage of an abolition bill by the House of Representatives in 1978. Discussion of abolition has tended to focus on such issues as the importance of reducing federal court caseloads, the appropriateness of transferring state law cases to state courts, and the extent to which prejudice against out-of-staters survives in state courts. Professor Rowe suggests that there would be several little-noticed but significant effects of abolishing diversity jurisdiction. He argues that abolition would eliminate or greatly reduce some of the major difficulties in federal practice and procedure, make possible judicial rationalization of some areas of ancillary and pendent jurisdiction, and facilitate further statutory or rule reforms in the federal courts. The Article concludes that these effects provide important additional support for abolition.

ONE of the more surprising developments concerning the federal courts in the last Congress was the serious consideration given to abolishing the general diversity of citizenship jurisdiction,¹ a fixture in the federal courts since the Judiciary Act of

* Associate Professor of Law, Duke University. B.A., Yale, 1964; B. Phil., Oxford, 1967; J.D., Harvard, 1970.

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¹ 28 U.S.C. § 1332(a)(1) (1976): "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—(1) citizens of different States" See H.R. 9622, 95th Cong., 2d Sess. § 1(b) (1978), *Hearings on S. 2094, S. 2389 & H.R. 9622 Before the Subcomm. on Improvements*

1789.² Other authors have canvassed the conventional arguments for and against changes in the diversity jurisdiction,³ sometimes with a repetitiveness that Professor David Currie has likened to "an Orwellian broken record."⁴ I do not propose to rehash, or to try to reevaluate, this debate. The purpose of this Article is instead to survey the federal judicial landscape in the presumed absence of the familiar landmark of general diversity jurisdiction.⁵ Though this inquiry may at first sound like a sterile exercise in the hypothetical, I hope to show that some significant issues of federal court jurisdiction and procedure would appear in a different light were Congress to abolish the general diversity jurisdiction — indeed, that thinking about some of these issues in such a context should influence how the federal courts approach them today. Further, several sorts of problems would come up in federal litigation much less often or not at all, and other nettlesome areas of federal practice would lend themselves more readily than now to reform through statutory or rule revisions. In sum, the existence of the general diversity jurisdiction has pervaded, and I dare say confused, theory and operations in the federal courts to an extent little perceived. The likely workings of a system without diversity, and the opportunities for other desirable changes that would follow, should be not the least of the arguments for abolishing it.

A principal theme of this Article is the pernicious effects of the

in *Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 10 (1978) (striking out subsection (1)) [hereinafter cited as *Senate Hearings*]. This bill was passed by the House of Representatives. 124 CONG. REC. H1569-70 (daily ed. Feb. 28, 1978).

² 1 Stat. 78 (1789) (current version in scattered sections of 28 U.S.C.).

³ See, e.g., COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, U.S. DEP'T OF JUSTICE, *THE NEEDS OF THE FEDERAL COURTS* 13-15 (1977); H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 139-52 (1973); Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963); Sheran & Isaacman, *State Cases Belong in State Courts*, 12 CREIGHTON L. REV. 1, 26-69 (1978). For an extensive listing of articles, see C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 23, at 87-89 nn.13-21, 23-25 (3d ed. 1976).

⁴ Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. CHI. L. REV. 1, 5 (1968).

⁵ I have used the term "general diversity jurisdiction" because there are specific reasons that may be weighty enough to keep some specialized forms of diversity jurisdiction, even if that for actions between citizens of different states generally is abolished. Judge Friendly, for example, argues persuasively that we should keep the present jurisdiction over actions between aliens and citizens, 28 U.S.C. § 1332(a)(2)-(3) (1976), and cases of interpleader involving claimants of diverse citizenship, 28 U.S.C. § 1335 (1976). See H. FRIENDLY, *supra* note 3, at 149-50. Whether some such forms survive is of little significance in considering the consequences of striking the general diversity provision from the Judicial Code, though this Article does try to take such matters into account.

complete diversity rule of *Strawbridge v. Curtiss*,⁶ which requires that for federal diversity jurisdiction *all* plaintiffs be of different citizenship from *all* defendants. The rule (whatever its original inspiration) might be viewed as a response to concern over intrusion by federal courts in multiparty cases into the usual province of the states. The rule, however, is hypertechnical and a mis-focused approach to the jurisdictional problems posed by complex litigation. Moreover, the federal courts have sometimes inappropriately extended it beyond the problems of complex *diversity* cases to which it arguably responds. And it has impeded thinking about what limits make sense for beyond-original jurisdiction of the federal courts. The virtual or complete disappearance of the rule with the abolition of the general diversity jurisdiction should clear away much of the underbrush surrounding such problems.⁷

Part I of this Article briefly discusses a threshold issue for my analysis — whether Congress, in abolishing diversity jurisdiction, should retain the *Strawbridge* complete diversity rule for a surviving federal alienage jurisdiction. It argues that for abolition to yield the greatest benefit, Congress should specify that “minimal” diversity — when one of *any* two adverse parties is an alien and another a citizen of an American state — shall govern in alienage cases. Part II then discusses a significant effect of abolition: the likely reduction in importance of several major jurisdictional and procedural problems. Such an effect on one category of these problems, a great lessening of the state law determinations mandated by the Rules of Decision Act⁸ and the *Erie* doctrine,⁹ has been amply noted before.¹⁰ But the extensive ramifications of

⁶ 7 U.S. (3 Cranch) 267 (1806).

⁷ One obvious response to these criticisms would be overruling *Strawbridge* instead of abolishing diversity jurisdiction, since either would eliminate this set of problems. See Currie, *supra* note 4, at 34. The Supreme Court, however, seems irreversibly committed to interpreting the general diversity statute as requiring complete diversity. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373–74 & n.13, 377 (1978). And since overruling *Strawbridge* by legislation would threaten to increase federal court caseloads considerably, it seems most unlikely that Congress would take that action except in the company of some major caseload-reducing measure such as severe restriction of the general diversity jurisdiction. Furthermore, the existence of diversity jurisdiction itself, even without *Strawbridge*, creates or adds to certain difficulties.

⁸ 28 U.S.C. § 1652 (1976): “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”

⁹ See *Erie R.R. v. Tompkins*, 304 U.S. 64, 72–73 (1938) (state “laws” in Rules of Decision Act include decisional law).

¹⁰ See, e.g., COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, U.S. DEP’T OF JUSTICE, *supra* note 3, at 13–15.

another major effect of abolition — the virtual or total elimination of the complete diversity rule and all its works — merit exploration beyond what they have generally received.

Part III looks at several problems in federal practice, mostly having to do with joinder of claims and parties. It argues that under a regime without general diversity jurisdiction, the federal courts should be more inclined than they sometimes are today to reach results hospitable to ancillary jurisdiction. Beyond that, however, thinking about a hypothetical system without diversity indicates that even now courts sometimes overextend concerns rooted in problems unique to the diversity jurisdiction. The effect has been to encumber some federal question cases with restrictions not properly applicable, or which at best should apply only after more analysis than they have generally received. Part IV turns from effects on interpretations of existing statutes and rules to amendments that should or could be made to such procedural provisions. It argues that abolition of diversity would facilitate some significant improvements in federal court procedure, such as provisions for uniform ancillary jurisdiction and nationwide service of process, and would promote a sharper focus on the question of what types of multistate disputes should come within federal jurisdiction.

Arguments against diversity jurisdiction have hitherto emphasized the lack of positive reasons for it, the need for a reduction in federal caseloads and jury trials, and the appropriateness of merging more fully the power to interpret state law with the responsibility of applying it.¹¹ This Article concludes that additional effects of abolition — elimination or reduction of some of the most vexing problems in federal practice, demystified interpretations, and facilitation of reforms — indicate that the federal judicial system would benefit considerably more than has previously been remarked.

I. COMPLETE OR MINIMAL DIVERSITY IN ALIENAGE CASES

Abolition of the general diversity jurisdiction for suits between citizens of different states would raise related questions about the alienage jurisdiction over suits between citizens and aliens.¹² Alienage jurisdiction probably should be retained, since

¹¹ See, e.g., *id.*; H. FRIENDLY, *supra* note 3, at 139-49.

¹² 28 U.S.C. § 1332(a)(2)-(3) (1976):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between —

(2) citizens of a State, and foreign states or citizens thereof;

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties . . .

the alienage caseload is small¹³ and at least part of the rationale for the jurisdiction — possible effects on the foreign relations of the United States¹⁴ — is independent of the possible reasons for general diversity jurisdiction. But there still would remain the question whether complete or minimal diversity should be the rule for alienage cases.

It seems to be well settled, though perhaps not definitively so, that the *Strawbridge* rule applies to alienage as well as diverse state citizenship cases,¹⁵ which means that either state cocitizens or coaliens as adversaries destroy complete diversity and thus federal alienage jurisdiction.¹⁶ As a result, there is a crazy quilt pattern for cases involving citizens opposing aliens, some of which come within the alienage jurisdiction and some of which do not. If an alien or aliens oppose a citizen or citizens, or if citizens of completely diverse citizenship oppose each other and an alien or aliens are also involved on one side, the federal courts have jurisdiction. But if there are aliens on both sides and citizens on only one, or aliens on only one side but incomplete diversity between citizen adversaries who are also involved, there is no federal alienage or diversity jurisdiction.¹⁷

The *Strawbridge* complete diversity requirement, I suggest,

¹³ The Annual Reports of the Director of the Administrative Office of the United States Courts do not provide separate figures on alienage and general diversity cases. A very rough idea of their relative incidence can be gleaned from the number of pages that West's United States Code Annotated devotes to headnotes focusing on cases concerning each variety. In the 1978 pocket part covering 28 U.S.C. § 1332, there were 30 pages (44-74) on general diversity matters and four (74-78) on alienage and foreign state cases (the latter arising under 28 U.S.C. §§ 1330(a), 1332(a)(4) (1976)) combined.

¹⁴ See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 108 (1969) [hereinafter cited as ALI STUDY]:

It is important in the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided. This objective can best be achieved by giving the foreigner the assurance that he can have his cases tried in a court with the best procedures the federal government can supply and with the dignity and prestige of the United States behind it.

¹⁵ See 1 J. MOORE, FEDERAL PRACTICE ¶ 0.75[1.-2], at 709.6-7 (2d ed. 1978). The Supreme Court has never squarely decided the issue, though *Strawbridge* itself — a case involving only United States citizens — used the broad language that in a suit under the predecessor of the present diversity and alienage statute, "each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts," 7 U.S. (3 Cranch) at 267.

¹⁶ See 1 J. MOORE, *supra* note 15, ¶ 0.75[1.-2], at 709.6-7. It appears not to have been decided whether the presence of aliens as parties on both sides of a suit also including completely diverse citizen adversaries affects federal jurisdiction. See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3604, at 610 (1975).

¹⁷ See 28 U.S.C. § 1332(a)(2)-(3) (1976); 1 J. MOORE, *supra* note 15, ¶ 0.75[1.-2], at 709.6-7.

is an egregiously bad rule for alienage cases, and its nefariousness would stand out in even sharper relief after abolition of general diversity. It is a major thesis of this Article that the effects of the rule are pervasive and mischievous. Yet permitting the rule to survive for alienage cases would preserve in miniature the many complex and difficult problems resulting from it. Its survival in only a small category of cases, of course, would mean that it would do less harm than it now does; but, in ways I hope to make clear, existence of a complete diversity requirement in *any* category of cases within federal jurisdiction creates significant obstacles to certain desirable measures affecting federal jurisdiction as a whole. The *Strawbridge* tail, in other words, to a certain extent wags the federal judicial dog; if an alienage jurisdiction with the complete diversity rule survived, the tail would be far smaller but the effect could remain.

Moreover, there is a serious conflict between the effects of the complete diversity rule and the possible effects on United States foreign relations that, in addition to concerns about state court prejudice against outsiders, justify alienage jurisdiction. Under the confusing and arbitrary crazy quilt pattern outlined above, the complete diversity rule excludes from federal court some cases that might affect foreign relations just as much as those allowed in. Further, the *Strawbridge* rule gives a citizen plaintiff the ability to manipulate his suit to block an alien defendant from all access to the federal courts, whatever the possible bias against the alien or the foreign relations repercussions, if the plaintiff can find a citizen of his own state who would be a proper codefendant. Thus, if the federal courts do not feel free to overrule *Strawbridge* for a surviving alienage jurisdiction, Congress should do so by authorizing alienage jurisdiction for cases involving minimal diversity.¹⁸

¹⁸ Congress may overrule *Strawbridge*, since "[i]t is settled that complete diversity is not a constitutional requirement," *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978). One conceivable problem with such a step would be the possibility of citizens' attempting substitution or joinder of aliens as a maneuver to affect federal jurisdiction, but for reasons discussed p. 973 *infra* that should not be a significant concern.

Retention of federal alienage jurisdiction would, however, raise an additional set of issues concerning the jurisdictional amount requirement. See 28 U.S.C. § 1332(a) (1976). The threshold question would be whether to retain such a requirement at all. Whatever the problems of determining the amount in controversy, see generally 1 J. MOORE, *supra* note 15, §§ 0.90-99, and the justifications for the alienage jurisdiction, they do not seem to warrant turning the United States District Courts into small claims courts for any state law case that involves an alien. The 1978 House bill abolishing diversity would have retained the requirement for alienage cases and raised it to \$25,000. See H.R. 9622, 95th Cong., 2d Sess. § 1(a) (1978), *Senate Hearings, supra* note 1, at 10.

II. PROBLEMS REDUCED OR ELIMINATED BY ABOLITION

It has not escaped the attention of those questioning the wisdom of retaining diversity jurisdiction that abolition would mean vastly fewer *Erie* problems of applicability, choice, determination, and application of state law in the federal courts.¹⁹ The federal bench would find itself far less often, in Judge Frank's phrase, playing the role of "ventriloquist's dummy to the courts of some particular state."²⁰ Of course, not all such issues would

Adoption of a minimal diversity rule would call for retention of the present case law that sharply restricts aggregation of claims to satisfy the jurisdictional amount requirement, limiting aggregation to a narrowly defined type of "joint" or "common" claims. See generally C. WRIGHT, *supra* note 3, § 36, at 139-40. Any significant broadening of ability to aggregate would often allow a single alien's involvement in a multiparty state law case to bring the case into federal court no matter how small his stake.

Related questions would be whether the claims for or against *all aliens* in a case should be eligible for aggregation on a theory that the concern of the alienage jurisdiction is with the extent to which foreign interests are being affected, and whether the courts should look to the plaintiff's or the defendant's view when a single citizen plaintiff with a total claim exceeding the minimum sued a group including an alien who could not be liable for as much as the minimum. In the interests of simplicity of administration and avoidance of false incentives to join or avoid joining alien parties, the best approach (when no exception allowing aggregation applied) would probably be to require that at least one alien's individual stake by itself be large enough to entitle him to federal jurisdiction.

Either the courts or Congress also would have to consider whether to continue under a minimal diversity approach the present "rule that multiple plaintiffs with separate and distinct claims must *each* satisfy the jurisdictional-amount requirement for suit in the federal courts," *Zahn v. International Paper Co.*, 414 U.S. 291, 294 (1973) (emphasis added). In other words, when one plaintiff (or, given that alienage cases might have aliens as defendants only, one defendant) has a large enough stake for his claim to be in federal court, may others with smaller claims take part in the same litigation? The answer seems to be that they should be able to, since excluding them would greatly reduce the effectiveness of the minimal diversity rule. Parties formerly excluded by *Strawbridge* could run afoul of a requirement that they present the minimum amount in controversy on their own, thus splitting cases parts of which would be in federal court anyway. There would be an incentive to citizen plaintiffs suing aliens for large sums and wishing to stay in state court to join codefendants and state below-minimum claims against them, to which the aliens might be tempted to respond with an effort at separate-claim removal under 28 U.S.C. § 1441(c) (1976), with all of the problems that section raises, see pp. 979-81 *infra*. Those seeking removal might also argue that the case was one of the few qualifying for aggregation, a difficult determination, see C. WRIGHT, *supra* note 3, § 36, at 139-40, that would be unnecessary if it sufficed that a single alien met the requirement. In multiparty cases, then, satisfaction of the amount in controversy requirement by *one* alien party should allow *all* properly joined parties to stay in federal court or make the case eligible for removal.

¹⁹ See, e.g., H. FRIENDLY, *supra* note 3, at 142-43.

²⁰ *Richardson v. Commissioner*, 126 F.2d 562, 567 (2d Cir. 1942).

disappear from the federal courts. State law questions would continue to arise in contexts such as pendent jurisdiction cases²¹ and federal income tax litigation.²² This remainder, nonetheless, would no doubt constitute only a small fraction of the present *Erie* load.

There is another major set of problems, though, whose virtual disappearance might be equally significant but has received very little notice.²³ I refer chiefly to the difficulties of administering the *Strawbridge* complete diversity rule, which would be an incidental casualty of abolishing the general diversity jurisdiction. Although federal judges and practitioners have learned to live, not always comfortably, with the many and often vexing problems that *Strawbridge* creates, many of the most bedeviling areas of federal jurisdiction and procedure owe their complexity to the complete diversity rule. Since it is the focus on citizenship of parties as the basis of subject-matter jurisdiction that underlies these problems, abolition of diversity would transfer none of them to the state courts, which either are courts of general jurisdiction or normally focus on factors other than the parties' citizenships to determine their subject-matter competence. To the extent such issues ceased to arise in the federal courts, then, they would disappear entirely.²⁴

A. Noncollusive Manipulation of Citizenship Status

Once citizenship became irrelevant to a federal court's jurisdiction, litigants would have much less occasion to manipulate and contest, and the courts to decide, who was a citizen of what state.²⁵

²¹ See, e.g., P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 766 (2d ed. 1973).

²² See, e.g., *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967) (reference to state property law for federal tax purposes).

²³ The major exception to this generalization is *Currie*, *supra* note 4. This Part draws considerably on Professor Currie's fine analysis, which focused on the consequences of the complete diversity rule mainly as an argument for overruling *Strawbridge* within a retained general diversity jurisdiction.

²⁴ The survival of limited citizenship-based jurisdictions, such as alienage, 28 U.S.C. § 1332(a)(2)-(3) (1976), and statutory interpleader, *id.* § 1335, would mean that not *all* problems associated with citizenship of parties would disappear entirely. In alienage jurisdiction cases, in fact, the complete diversity requirement might survive. See generally pp. 966-68 *supra*. Minimal diversity among claimants, however, already suffices for statutory interpleader jurisdiction. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

²⁵ For an example of the kind of painstaking inquiry into state citizenship the federal courts now undertake from time to time, see *Janzen v. Goos*, 302 F.2d 421 (8th Cir. 1962). See also *Currie*, *supra* note 4, at 8-12 (indefiniteness of tests for state citizenship); *id.* at 34-43 (problems in determining citizenship of multistate corporations).

Opportunities for manipulation of citizenship status, as by a party's prefilng change of residence, or by joinder or omission of a potential coparty, may enable parties to achieve such questionable aims as putting off trial by forcing the case into a forum where delays are greater,²⁶ or taking advantage of the same local prejudice against which diversity jurisdiction seeks to protect.²⁷ A federal court jurisdiction limited mainly to federal question cases would offer fewer openings for this sort of manipulation.

After abolition state citizenship would remain relevant in federal litigation only in any surviving categories of citizenship-based jurisdiction, such as alienage cases, and for occasional purposes such as determinations on voting rights. Even in alienage cases, there should be less manipulation and litigation over citizenship than in general diversity actions today. A mere change of state citizenship would normally not affect federal jurisdiction, since all that is relevant for alienage jurisdiction, given one side's alienage and the jurisdictional amount in controversy, is the adversary's citizenship of *any* American state. And the number of prospective litigants who would be willing and able to change *national* citizenship or render themselves stateless in order to affect the availability of a federal forum for a state civil claim would doubtless be so small that the system could afford to let them have their way. Finally, the virtual or complete abandonment of the *Strawbridge* rule would almost entirely eliminate the possibility of destroying jurisdiction once attached by later discovery of error concerning a party's citizenship.²⁸ Nor would there be many times that such steps as realignment or turning up a nondiverse indispensable party²⁹ could destroy federal jurisdiction — thus greatly reducing the incentives to attempt such steps for reasons other than their intrinsic merits.

B. Realignment of Parties

As Professor David Currie has observed, to the extent that the *Strawbridge* complete diversity rule passed from the scene there would virtually disappear "the occasionally perplexing problem of realigning parties as plaintiffs or as defendants according

²⁶ See, e.g., C. WRIGHT, *supra* note 3, § 31, at 113.

²⁷ See, e.g., Currie, *supra* note 4, at 19.

²⁸ See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 368-69 (1978).

²⁹ See pp. 971-72, 974-79 *infra*. For a listing of the very rare situations (mostly involving unsuable sovereigns) in which party joinder in a federal question case might destroy a federal court's jurisdiction, see 3A J. MOORE, *supra* note 15, ¶ 19.04[2.-2], at 19-69 n.12.

to their real interests.”³⁰ Nearly always, the reason this issue is contested is to determine whether or not a federal court has jurisdiction based on complete diversity.³¹ At worst, realignment can occur after substantial proceedings on the merits, causing dismissal for want of jurisdiction and wasting the parties’ investment in the litigation.³² The elimination of the ability to save or defeat federal jurisdiction by realigning parties would mean that litigants would rarely have the incentive to put much effort into litigating the question.³³ And when the issue *was* worth litigating, the federal courts could decide it free from any distorting influence of concern for its effect on their jurisdiction.³⁴

C. Collusion to Manufacture or Defeat Federal Jurisdiction

Section 1359 of the Judicial Code 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.”³⁵ There is no corresponding provision covering similar efforts to *defeat* invocation of federal jurisdiction, but the federal courts have tended in recent years to guard against such improper or collusive tactics by approaches rather similar to those used under section 1359.³⁶ The problems in this area are very much children of diversity

³⁰ Currie, *supra* note 4, at 44. See generally *id.* at 44-45.

³¹ See generally 3A J. MOORE, *supra* note 15, ¶ 19.03 [1]; 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 16, § 3607.

The present significance of realignment for federal jurisdiction is entirely a result of the complete diversity rule. Unlike complete diversity, minimal diversity cannot be destroyed if it exists, or created if it does not, by mere realignment of parties. Consequently, if *Strawbridge* were no longer to govern in any retained categories of citizenship-based federal jurisdiction, they would rarely engender realignment problems.

³² See 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 16, § 3607, at 644-45 n.13; cf. C. WRIGHT, *supra* note 3, § 28, at 107 & n.8 (relevance of “position taken by a party during the litigation” in determining proper alignment).

³³ Parties still would occasionally contest alignment, but generally for reasons unlikely to warrant major battles or to result in appeals, reversals, and retrials. In courtroom appearances, for example, a private party in a multi-party case might prefer being aligned with or against the government.

³⁴ *In re Penn Cent. Sec. Litigation*, 335 F. Supp. 1026 (E.D. Pa. 1971), suggests how jurisdictional concerns might affect courts’ treatment of realignment issues. Responding to a new management’s effort to align itself with shareholder plaintiffs in a derivative action and wrest control of its prosecution from them, the court went through considerable analysis in granting the realignment and then dropped a footnote: “We specifically limit our decision in this respect to cases where jurisdiction is not based on diversity of citizenship.” *Id.* at 1042 n.7.

³⁵ 28 U.S.C. § 1359 (1976).

³⁶ Compare C. WRIGHT, *supra* note 3, § 31, at 114-18 (cases under 28 U.S.C. § 1359 (1976)), with 14 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 16, § 3641 (1976) (cases involving attempts to defeat diversity).

jurisdiction; the making (as by assignment of a claim or appointment of an administrator) or joining of a party rarely affects the availability of federal jurisdiction not based on parties' citizenships.

The matter requires some further analysis, since collusion issues can arise in two quite distinct contexts, depending on whether the action questioned has to do with the independent jurisdiction of the federal court or its ancillary jurisdiction.³⁷ For the most part, supposedly collusive or improper efforts to affect *independent* (nearly always, original) federal jurisdiction involve appointing a representative or assigning a claim to *make* a party out of someone who would not otherwise be involved, so as to create or destroy complete diversity. By contrast, the same "collusion" label is applied in *ancillary* jurisdiction situations to efforts to procure *joinder* of a party not subject to the federal court's independent jurisdiction but to whom ancillary jurisdiction does extend, and then to take advantage of that party's presence in the litigation to press claims against him despite the lack of an independent basis of jurisdiction over them.³⁸

Problems of collusive or otherwise improper making of parties to create or defeat *independent* federal jurisdiction could survive after abolition only in retained citizenship-based heads of jurisdiction, primarily alienage cases.³⁹ Prospective litigants unable to profit by putting their claims in the hands of citizens of other states might be tempted to reach further for an alien assignee or administrator. Most recent decisions, however, have been hostile to such tactics when seemingly engaged in solely to create or defeat diversity jurisdiction,⁴⁰ and it should be even harder to persuade a court that bringing in an alien, rather than a citizen of another state, was done for independent reasons.

Cases involving actual collusive joinder to take advantage of *ancillary* jurisdiction have been very few,⁴¹ but the prospect of

³⁷ Defined in note 139 *infra*.

³⁸ What normally fails in such situations is not the initial joinder itself, such as a defendant's impleader of a third party (since the joinder is presumably valid under the rules and within the court's ancillary jurisdiction), but the subsequent effort to add a further claim, such as plaintiff's claim against the third party. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

³⁹ Interpleader should present few if any such problems because of the availability of the device under Fed. R. Civ. P. 22 when there is complete diversity between plaintiff and claimants (even if all claimants are from the same state); under 28 U.S.C. § 1335 (1976) when there is minimal diversity among the claimants; and in state court when all parties are from one state.

⁴⁰ See generally, e.g., Daniels, *Judicial Control of Manufactured Diversity Pursuant to Section 1359*, 9 RUT.-CAM. L.J. 1 (1977).

⁴¹ For an uncommon and engagingly frank instance of such collusion, see *Saalfrank v. O'Daniel*, 390 F. Supp. 45, 53-56 (N.D. Ohio 1975) (collusive con-

it has caused considerable judicial concern.⁴² Abolition of diversity jurisdiction would not by itself eliminate temptation to engage in such collusion; parties properly before a federal court as an original matter might collude to bring in someone not subject to original federal jurisdiction. What abolition *would* eliminate is virtually all reason for concern about such collusion if it took place, since when it is an issue now it matters only because there might be an evasion of the complete diversity requirement. With little or nothing left of the *Strawbridge* rule, the federal courts could focus instead on the desirability of the type of joinder attempted.

D. "Indispensable," "Necessary," and "Proper" Parties:⁴³
Joinder and Intervention

When there are no difficulties with subject-matter or personal jurisdiction, service of process, or venue, the workings of Federal Rules of Civil Procedure 19 and 20 on joinder of addi-

duct not such as to void joinder), *rev'd on other grounds*, 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976). Plaintiff's counsel solicited defendant's impleader of plaintiff's cocitizen as a third-party defendant, pointing out to defendant the advantage of possible indemnification and adding that plaintiff would seek to pursue his state claim against the third party once it was impleaded, and even prepared the necessary papers for defendant to take the step.

⁴² "[C]ollusion is the *raison d'être* of the majority position" requiring an independent basis of jurisdiction for a diversity plaintiff's claim against a non-diverse third-party defendant. *Morgan v. Serro Travel Trailer Co.*, 69 F.R.D. 697, 703 (D. Kan. 1975). Out of concern for possible evasion of the complete diversity rule generally, and not just the potential for collusion, the Supreme Court has since adopted the majority position. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

Whatever the justifiability of efforts to guard against collusion, the results have not been fortunate. The possible approaches seem to be *Owen's* adoption of broad prophylactic rules against ancillary jurisdiction in types of situations that might present collusion problems, or trying to deal with collusion in individual cases when it appears. *See generally, e.g.*, 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1444, at 231-32 (1971). The former approach bars ancillary jurisdiction whatever its desirability or the unlikelihood of collusion in a particular case; the latter turns vigilance against collusion into a trap for those informed enough to collude but not so canny as to cover their tracks or to proceed with only tacit accord.

⁴³ For brevity and simplicity, this Section will use the terms "indispensable," "necessary," and "proper" to express differing relations to a litigation of persons to be joined; different consequences flow from these varying degrees of affiliation. When an outsider has the close relationship to an action defined by FED. R. CIV. P. 19(a), *see note 44 infra*, cannot be made a party, and is so situated that the court concludes that "in equity and good conscience" the action should not proceed without him, rule 19(b) directs the court to dismiss the action, thus treating the absentee as "indispensable." It is in this sense only that this Section uses the word.

A "necessary" party is simply one who also qualifies for joinder under rule

tional parties are reasonably intuitive and straightforward. If an outsider has a relationship to an action making it highly desirable that he be joined, rule 19(a) directs that "the court shall order that he be made a party."⁴⁴ If there is a less close but still significant relation, rule 20(a) allows parties to join as plaintiffs if they so choose or to be joined as defendants if the plaintiff includes them.⁴⁵ In brief, the practice for rule 19(a) parties is to join them and proceed with them; for merely "proper" rule 20(a) parties, it is to leave their joinder up to the initiative of those commencing the action.

Results naturally contrast with the foregoing when there is an obstacle to joinder of a rule 19 or 20 absentee. If he meets the criteria of rule 19(a) and "cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."⁴⁶ In other words, if an "indispensable" party cannot be joined, the court is to dismiss the action; if it is a merely "necessary" party who cannot be joined, the case may proceed without him. A fortiori, there is no requirement to join a merely "proper" party under rule 20(a). The resulting scheme, like the one discussed

19(a) but is, if the court must face the issue, one without whom the action *may* proceed under the criteria of rule 19(b), which directs the court to consider:

first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

A merely "proper" party, finally, is one who meets the requirements of FED. R. Civ. P. 20(a), *see* note 45 *infra*, without satisfying the more demanding criteria of rule 19(a).

⁴⁴ FED. R. CIV. P. 19(a):

A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

⁴⁵ FED. R. CIV. P. 20(a):

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

⁴⁶ FED. R. CIV. P. 19(b).

in the preceding paragraph, is sensible and intuitive: if there is someone you can't join and can't proceed without, you don't proceed; if you *can* proceed without him, you may.

Present practice, however, yields confusingly disparate results in federal question and diversity cases when the potential obstacle to joinder is lack of independent grounds of subject matter jurisdiction over the claim involving the outsider. In federal question cases, to the extent that extremely limited precedent allows any statement to be made at all, lack of independent jurisdictional grounds does not seem to be an obstacle to joinder of a rule 19(a) absentee;⁴⁷ he may be joined as pendent or ancillary to the federal court's jurisdiction over the original claim.⁴⁸ In diversity cases, by contrast, it is clear that lack of complete diversity (and of other bases for independent jurisdiction) *does* count as an obstacle making rule 19 or 20 joinder impossible. Otherwise, the result would be a litigation that could not have been brought in federal court as an original matter — most commonly, a plaintiff versus one diverse codefendant and another codefendant from plaintiff's home state. Concern with such an easy evasion of *Strawbridge* has prevailed throughout the spectrum of

⁴⁷ The statements in text may not apply when the reason for lack of subject-matter jurisdiction is failure to satisfy an applicable amount in controversy requirement. The Supreme Court seems to have indicated that such a defect is equally fatal whatever the basis of original federal jurisdiction. *See* *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978); *Zahn v. International Paper Co.*, 414 U.S. 291, 302 n.11 (1973).

⁴⁸ *See* *Bowers v. Moreno*, 520 F.2d 843, 848 (1st Cir. 1975) (upholding "pendent party" jurisdiction over defendants to state law claims in federal question case, in part because "the relief requested would require that many of the defendants be subject to the court's jurisdiction"); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 438 F. Supp. 440, 443, 444-46 (E.D.N.Y. 1977) (state claim defendant refused to intervene in federal question case; court found it a necessary party and upheld "ancillary" jurisdiction); *Jacobs v. United States*, 367 F. Supp. 1275, 1278-79 (D. Ariz. 1973) (upholding "ancillary" jurisdiction); 3A J. MOORE, *supra* note 15, ¶ 19.04[2.-2] (indicating that ancillary jurisdiction is not allowed but that pendent jurisdiction may be). It is not yet settled to what extent the rule stated in text is valid for all federal question litigation, leaving it uncertain whether or when a rule 19(a) relationship to a federal question case already before a federal court can overcome, on a "pendent party" or ancillary jurisdiction theory, want of independent jurisdiction over the claim involving the absentee.

The reason for the rarity of cases in this area is that the kind of situation that presents the issue — such as a plaintiff with a federal question claim against one party and a closely related state law claim against another, nondiverse party — is quite unusual. Normally, when there is federal question jurisdiction and a claim against another party that comes within the definitions of rule 19(a), there will be a federal question involved in the other claim as well. *See id.* ¶ 19.04[2.-2], at 19-69 n.8.

rule 19 and 20 joinder cases;⁴⁹ consequently, when a case involves an "indispensable" party who is unjoinable for lack of complete diversity it must be dismissed, but if the absentee is merely "necessary" or "proper" the litigation may proceed without him.⁵⁰ If an absentee is so essential to a litigation that it should not go on without him, the thinking goes, it should never have been brought in federal court without him. Yet it could not have been brought there *with* him, since he would have destroyed complete diversity; therefore, it should not be in federal court at all. When an absentee's presence is not so crucial, there is nothing wrong with part of the case being in federal court; the plaintiff has simply made the choice that diversity jurisdiction gives him of trying that part in federal court instead of seeking to bring it all in state court.

Under Federal Rule of Civil Procedure 24(a)(2), the position of an intervenor of right is for present purposes the same as that of a party who should be joined under rule 19(a)(2)(i).⁵¹ Strange as it may initially seem, though, there is a significant variation in practice concerning whether to require an independent basis of federal jurisdiction in diversity cases. Whereas the rule concerning *joinder* under rule 19(a) (*i.e.*, on the initiative of those already parties) of a merely "necessary" but nondiverse absentee in a diversity suit is that the action can only proceed without him, the very same absentee may *intervene* as of right under rule 24(a)(2) despite lack of complete diversity or any other independent ground of jurisdiction.⁵² An effort at intervention by an "indispensable" but nondiverse party, on the other hand, will result in dismissal of an action that is in federal court

⁴⁹ See Note, *Diversity Requirements in Multi-Party Litigation*, 58 COLUM. L. REV. 548, 549 (1958).

⁵⁰ 3A J. MOORE, *supra* note 15, § 19.04[2.-1], at 19-67; *id.* § 19.05[2], at 19-85 to -86; *id.* § 19.19, at 19-352 to -353; 7 C. WRIGHT & A. MILLER, *supra* note 42, § 1610, at 94-103 (1972); Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 362 (1969).

⁵¹ Compare FED. R. CIV. P. 19(a)(2)(i), *quoted*, note 44 *supra*, with FED. R. CIV. P. 24(a)(2):

Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest

⁵² *E.g.*, *Aman v. Kelbaugh*, 16 Fed. R. Serv. 2d 1314, 1315 (4th Cir. 1973); 7 C. WRIGHT & A. MILLER, *supra* note 42, § 1610, at 100-01 (1972); 7A *id.* § 1917, at 603 (1972); Kennedy, *supra* note 50, at 362-63; *cf.* *Wichita R.R. & Light Co. v. Public Utils. Comm'n*, 260 U.S. 48, 54 (1922):

Jurisdiction once acquired on [the] ground [of diverse citizenship] is not divested by a subsequent change in the citizenship of the parties. . . . Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties.

solely because of diversity,⁵³ just as if those already parties had raised the issue of the same outsider's joinder. As Professor Moore's treatise gently puts it, "[b]ecause of these rules intervention practice becomes complicated where jurisdiction was originally founded on diversity of citizenship."⁵⁴

The distinctions, though uncommonly fine, are at least not pure caprice. Professor Moore's supplement explains that "a finding of indispensability is in effect a finding that under *Strawbridge* the entire controversy is one not properly in the federal court"; by contrast, in the case of the merely "necessary" party the action may continue in federal court and "any rule requiring independent jurisdiction over claims justifying intervention as a matter of right would leave the intervenor exposed to the risks that the right to intervene was created to avoid."⁵⁵ Denial of initial joinder for incomplete diversity may force the entire case into state court, allowing the "necessary" party to defend his interests there. Denial of intervention once a case was in federal court and not subject to dismissal, however, would leave the "necessary" party out in the cold. The "indispensable" party whose presence would destroy complete diversity faces no such problem, since the case must be dismissed however his situation comes to the court's attention.

Whatever the justifications, the resulting system in diversity cases cannot help but strike many as baffling and perverse. There is the obvious anomaly in the availability of ancillary jurisdiction for nondiverse, intervening "necessary" parties but not for the same persons if those initiating or already in the action seek to join them as an original matter or under rule 19.⁵⁶ There is a further disparity in the treatment of intervention cases involving incomplete diversity as one proceeds down the scale from "indispensable" through "necessary" to merely "proper" parties. With the first, not only must intervention be denied but the case must be dismissed. With the second, the litigation may proceed with intervention allowed. And with the third, there can be no intervention without an independent basis of jurisdiction, though the action may proceed without the absentee. In other words, if you can't proceed without the unjoinable "indispensable" intervenor, you don't (and, since he would destroy complete diversity, the action must be dismissed); but if you *can* proceed without a rule

⁵³ 3B J. MOORE, *supra* note 15, ¶ 24.18[3], at 24-771; 7A C. WRIGHT & A. MILLER, *supra* note 42, § 1917, at 601-02 (1972).

⁵⁴ 3B J. MOORE, *supra* note 15, ¶ 24.18[3], at 24-771.

⁵⁵ *Id.* at 96 n.6a (2d ed. Supp. 1978-79).

⁵⁶ See 7A C. WRIGHT & A. MILLER, *supra* note 42, § 1917, at 603-04 (1972); Kennedy, *supra* note 50, at 362-63.

24(a)(2) "necessary" intervenor, you don't do so — you proceed *with* him, violation of the *Strawbridge* rule notwithstanding.⁵⁷ There thus arises an odd incentive for a federal court approaching determinations of "indispensability" of intervenors in diversity cases: if the court regards it as especially desirable for the litigation to proceed before it with the prospective intervenor joined, its justification apparently must be that it doesn't really need to have him!⁵⁸

The effect of abolition of the general diversity jurisdiction on the problems in this area would be, at the very least, a greatly reduced incidence of the complicated situations related to the complete diversity rule. The anomalous distinction between "necessary" party joinder and intervention of right would disappear, ending any need for concern that an original party had colluded with the prospective intervenor to secure joinder that the party could not have effected as an original matter.⁵⁹ There would cease to exist the bewildering three-tier structure in intervention cases, eliminating the need for many fine distinctions between "indispensable" and "necessary" status; in addition to being less frequent, that decision when needed could be made without the distorting incentives sometimes present in current practice. In sum, joinder and intervention practice would be greatly simplified, with far fewer deviations from the basic pattern outlined at the beginning of this section.

E. Removal of "Separate and Independent" Claims

Cases involving incomplete diversity are the main breeding

⁵⁷ For comment on this disparity between intervention by "indispensable" and "necessary" parties in diversity cases, see 7 C. WRIGHT & A. MILLER, *supra* note 42, § 1610, at 98-101 (1972); 7A *id.* § 1917, at 601-02 (1972).

⁵⁸ See 3B J. MOORE, *supra* note 15, ¶ 24.18[3], at 96 n.6a (2d ed. Supp. 1978-79) ("the more desirable the presence of the nondiverse party, the more inducement to hold that he is not indispensable").

The emphasis in the 1966 revision of rule 19 on practical concerns, such as "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder," FED. R. CIV. P. 19(b), reduces the conceptual difficulty in defining as merely "necessary" the absentee whose presence is highly desirable. See generally *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). In other words, the practical criteria of the rule make it appropriate in some circumstances to conclude that a party who seems intuitively "indispensable" is not so for purposes of the rule, which uses the word as a conclusory term of art. Still, it cannot help but seem strange for a court to strain to label a party *not* essential to the case before it so as to be able to let him intervene.

⁵⁹ Cf. Fraser, *Ancillary Jurisdiction of Federal Courts of Persons Whose Interest May Be Impaired if Not Joined*, 62 F.R.D. 483, 486 (1974) (noting incentive for collusion due to disparity between intervention and joinder practices).

ground for litigation under the troublesome section 1441(c) of the Judicial Code, which provides:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.⁶⁰

This statute aims at preventing the defeat of removal otherwise available under the general removal provisions, sections 1441(a)-(b), by addition of a claim or party in state court that causes the case as a whole not to fall within original federal jurisdiction.

Attempts to use the statute arise principally in incomplete diversity cases in state court in which the diverse defendants want to remove, seeking to persuade the federal court that the claims against them are "separate and independent" from those against their codefendants.⁶¹ The exact nature of the problem with separate-claim removal efforts does not seem pertinent here, since it has to do with the definition of "a separate and independent claim or cause of action."⁶² It should suffice to echo a federal district court that "the field luxuriates in a riotous uncertainty"⁶³ and to point out that it is mainly the *Strawbridge* requirement that forces litigants to attempt separate-claim removal. (Under a minimal diversity requirement, a case involving incomplete diversity would normally come within the general removal provisions.⁶⁴)

Abolition of the general diversity jurisdiction would eliminate nearly all such cases at a single stroke, thus disposing of most of the applications and the difficulties of the separate-claim removal provision. In cases involving only Americans, whatever their state citizenships, absent a federal question there would normally be no possibility of any original or removal jurisdiction in whole or in part. In cases including claims within the alienage jurisdiction, if there were judicial or legislative overruling of *Strawbridge* the involvement of an alien would normally mean

⁶⁰ 28 U.S.C. § 1441(c) (1976).

⁶¹ The other main issues under the separate-claim removal statute, which are perhaps more discussed by commentators than faced by courts, concern its application in federal question cases. See 1A J. MOORE, *supra* note 15, ¶ 0.163[3]; *id.* ¶ 0.163[4-5], at 270-71; 14 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 16, § 3724, at 648-50 (1976).

⁶² For discussion of the difficulties in applying the provision, see, e.g., Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 MINN. L. REV. 1, 13-19 (1961).

⁶³ *Harper v. Sonnabend*, 182 F. Supp. 594, 595 (S.D.N.Y. 1960).

⁶⁴ See Currie, *supra* note 4, at 22.

that the entire case could have been brought in federal district court, making it eligible for removal under the general removal provisions. If the *Strawbridge* rule survived for a retained alienage jurisdiction, so would the difficulties of the present system,⁶⁵ but on a much smaller scale. Use of the section in federal question cases would probably not be common, but when used it should normally be effective and free from these difficulties.⁶⁶ Abolition of diversity, then, would largely eliminate the need for a separate-claim removal statute, but for the small remaining number of cases to which it would apply, it should generally work quite well.

F. Conclusions

The foregoing discussion indicates that abolishing the general diversity jurisdiction would have quite significant but previously little-noticed effects — the elimination of much purely procedural litigation and the clarification, through the total or virtual disappearance of some of their more confounding aspects, of a few of the most obscure areas of federal practice. It would be cause for some regret, to be sure, that lore dearly learned and often ingeniously used should become outmoded and irrelevant at a single stroke. Writing off investments of intellectual capital can be painful, but most would now agree that we are better off, not worse, for having gotten rid of the likes of the distinction between general and local law under *Swift v. Tyson*,⁶⁷ the intricacies of three-

⁶⁵ The separate-claim removal section applies to aliens in the same ways it applies to citizens. See 1 J. MOORE, *supra* note 15, ¶ 0.75[1-1], at 709.3.

⁶⁶ If the definition of a "separate and independent" claim picks up where that of a "pendent" claim, see *UMW v. Gibbs*, 383 U.S. 715, 725 (1966), leaves off, so that there is no gap in which a case may come under neither the general nor the separate-claim removal provision, these two provisions will normally work together to allow removal of any case involving a removable federal question claim and a state law claim against the same defendant, be the claims related or not. Any case not coming within § 1441(c) would be entirely within a federal court's original jurisdiction and thus removable under § 1441(a)-(b). There is some agreement that the separate-claim removal statute should be so interpreted. See 1A J. MOORE, *supra* note 15, ¶ 0.163[4-5], at 270-71; 14 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 16, § 3724, at 648-49 (1976). If it is, a court need not be concerned with the difficulties of deciding whether the claims qualify as separate and independent. See *Cohen*, *supra* note 62, at 31. The separate-claim provision still serves a useful function in this situation, eliminating the temptation for a plaintiff to try to block removal by joining an unrelated, nonremovable state claim against a defendant he is also suing in state court on an otherwise removable federal claim.

⁶⁷ 41 U.S. (16 Pet.) 1 (1842), *overruled*, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); see T. ARNOLD & F. JAMES, *CASES AND MATERIALS ON TRIALS, JUDGMENTS AND APPEALS* 202-03 (1936); F. FRANKFURTER & H. SHULMAN, *CASES AND*

judge court practice,⁶⁸ and the determination of the jurisdictional amount in controversy in general federal question suits against the United States Government and its personnel.⁶⁹ The simplification resulting from elimination of the general diversity jurisdiction can only count in favor of abolition.

It is fair to ask, of course, whether the unavailability of general diversity jurisdiction would entail unacceptable costs. There is always the fundamental and probably unanswerable⁷⁰ question whether the persistence of local bias is great enough to justify the retention of a choice between federal and state forums, an issue it is not this Article's purpose to address. There are, however, two other possible problems that warrant discussion here. First, might abolishing diversity jurisdiction do away in some cases not merely with a choice of forum but with any forum at all? In the vast majority of cases coming within the general diversity jurisdiction, there is no basis for such concern; federal jurisdiction is wholly concurrent with that of state courts as to both parties and subject matter. Indeed, the federal rules on service of process are such that it should be quite rare for the reach of a federal *diversity* court's process to exceed that of a court of the same state.⁷¹ For the main situation in which state process might be incurably inadequate, multistate interpleader, there is a special federal jurisdiction⁷² with nationwide process.⁷³ Only in some fairly unusual situations, such as when a party has a state law claim against the United States within exclusive fed-

OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE 185-210 (rev. ed. 1937).

⁶⁸ See Act of June 25, 1948, ch. 646, 62 Stat. 968 (repealed 1976). See generally Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964).

⁶⁹ See Act of June 25, 1948, ch. 646, 62 Stat. 930 (amended version at 28 U.S.C. § 1331(a) (1976)); 1 J. MOORE, *supra* note 15, ¶ 0.96[3.-1], at 940-43 (conflicting approaches of lower federal courts).

⁷⁰ See Currie, *supra* note 4, at 5 n.19 (noting the difficulty of ascertaining existence of local bias in state courts).

⁷¹ The general authority of a federal court to serve process out of state is derived from the long-arm statute or rule of the state in which the federal court sits. FED. R. CIV. P. 4(e). Provisions for nationwide service are tied to specific types of actions and jurisdictions, general diversity not among them. See note 177 *infra*. One might expect federal process to be superior in cases falling under the 100-mile "bulge" provision of FED. R. CIV. P. 4(f), and for international service. The general availability of state long-arm provisions, however, should mean that the "bulge" authority would rarely bring into federal court a party whom a state court could not reach; and it is not at all uncommon for states to have provisions for service in foreign countries. See note 84 *infra*.

⁷² 28 U.S.C. § 1335 (1976). The 1978 House abolition bill would have left federal statutory interpleader intact. See H.R. 9622, 95th Cong., 2d Sess. § 3(b) (1978), *Senate Hearings, supra* note 1, at 11-12.

⁷³ 28 U.S.C. § 2361 (1976).

eral jurisdiction and also has related state claims against private defendants from whom he is of completely diverse citizenship,⁷⁴ does the general diversity jurisdiction contribute to making the federal court a forum that no state can offer for an entire dispute.⁷⁵ Far more often, though, diversity jurisdiction today splits cases rather than consolidating them, as completely diverse litigants exercise their right to go into federal court while leaving those ineligible for federal jurisdiction in state forums. The unification in state court of many cases that diversity now splits between federal and state tribunals should more than offset the infrequent situations in which abolition would force litigation into two forums instead of one.

However, it might be little consolation to a party relegated to a state court that he still had a forum, if that forum were tangibly inferior to the federal court he could no longer use. The possible general superiority of federal trial court justice has been a secondary argument in discussion of abolishing diversity,⁷⁶ and I will not try to add to that debate here. Perhaps more important, state courts often do not yet come close to matching several interstate and international devices that are well developed in the federal courts,⁷⁷ such as international service of process,⁷⁸ subpoenas,⁷⁹ and discovery,⁸⁰ and interstate subpoenas,⁸¹ discovery,⁸² and enforcement of judgments.⁸³ To the extent that such facilities are not available in state courts, litigants no longer able to take advantage of federal jurisdiction would be handicapped. These are

⁷⁴ See *Jacobs v. United States*, 367 F. Supp. 1275 (D. Ariz. 1973).

Later Sections of this Article suggest that abolishing diversity would facilitate broadening of definitions of ancillary jurisdiction in the categories of original federal jurisdiction that would remain. See pp. 995-99, 1000-04 *infra*. Such a development would retain for principled reasons, and not just out of sheer coincidence, the federal courts' ability to provide a single forum for the kind of case described in the text.

⁷⁵ Though there may be constitutional obstacles to the exercise of state court jurisdiction over class actions involving scattered parties, see Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718 (1979), federal diversity jurisdiction rarely can provide a forum for such disputes because of restrictive Supreme Court interpretations of the amount in controversy requirement, see Becker, *The Class Action Conflict: A 1976 Report*, 75 F.R.D. 167, 168 (1977).

⁷⁶ See, e.g., Frank, *supra* note 3, at 10-11.

⁷⁷ See Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 328 (1977).

⁷⁸ FED. R. CIV. P. 4(i).

⁷⁹ 28 U.S.C. § 1783 (1976); FED. R. CIV. P. 28(b), 45(e)(2).

⁸⁰ 28 U.S.C. § 1781 (1976) (letters rogatory).

⁸¹ FED. R. CIV. P. 45.

⁸² FED. R. CIV. P. 28(a), 30(d), 37(b)(1), 45(d).

⁸³ 28 U.S.C. § 1963 (1976).

not, however, tools the state courts cannot offer; some exist already in several states,⁸⁴ and through uniform acts⁸⁵ or federal legislation in aid of state court proceedings⁸⁶ the state courts could approach the same level of interstate and international capability that the federal courts possess now.

Simply retaining diversity jurisdiction, however, would not be a fully adequate alternative to encouraging such state efforts, since there are various reasons why cases can fail to come within federal diversity jurisdiction — no diversity, incomplete diversity, immeasurability or inadequacy of amount in controversy. Running afoul of one of these obstacles bears no necessary relation to legitimate need for interstate and international facilities, and there is simply no reason why such facilities should be unavailable to those who cannot choose a federal forum. Until the states added needed interstate and international devices to their courts' procedural tools, abolition of diversity would result in some hardship for those who could formerly have qualified for federal jurisdiction. The eventual result, however, should be accelerated improvement in state procedures,⁸⁷ after which those litigants who would have chosen federal court should not be tangibly worse off while those who could not have done so would be measurably better served.

III. EFFECTS ON DECISIONAL LAW

Federal courts regularly find before them, by original complaint or by later attempt at addition of claims or parties, claims

⁸⁴ For service of process in foreign countries, see, *e.g.*, CAL. CIV. PROC. CODE § 413.10(c) (West 1973); MD. CTS. & JUD. PROC. CODE ANN. § 6-304 (1974); N.Y. CIV. PRAC. LAW § 313 (McKinney 1970); N.C.R. CIV. P. 4(j)(9)(d); TEX. REV. CIV. STAT. ANN. § 2092(7) (Vernon 1964).

For taking discovery in other states or foreign countries, see, *e.g.*, CAL. CIV. PROC. CODE § 2024 (West Supp. 1979); MD. R. PROC. 403, §§ b-c; NEV. REV. STAT. §§ 53.020, -.040 (1973); N.M.R. CIV. P. 28(a)-(b); N.Y. CIV. PRAC. LAW § 3113 (a)(2)-(3) (McKinney 1970); N.C.R. CIV. P. 28(a)-(b).

For taking discovery for use in other states, see, *e.g.*, CAL. CIV. PROC. CODE § 2023 (West Supp. 1979); MD. CTS. & JUD. PROC. CODE ANN. § 9-401 (Supp. 1978); NEV. REV. STAT. § 53.060 (1973); N.M. STAT. ANN. § 38-8-1 (1978); N.Y. CIV. PRAC. LAW § 3102(e) (McKinney 1970); N.C.R. CIV. P. 28(d); TEX. REV. CIV. STAT. ANN. § 3769a (Vernon Supp. 1978-79).

⁸⁵ See, *e.g.*, UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT. Twenty-two states have adopted some version of the Act. See 13 Uniform Laws Annotated 2, 6 (Supp. 1979).

⁸⁶ See, *e.g.*, 28 U.S.C. § 1781 (1976) (letters rogatory).

⁸⁷ See H.R. REP. NO. 95-893, 95th Cong., 2d Sess. 4 (1978); *cf.* Note, *supra* note 75, at 718 n.5 ("The impulse toward modernization [of state class action procedures] is due at least in part to the barriers [Supreme Court] cases raised to class actions in federal courts.").

between citizens of the same state. When there is no independent basis of subject matter jurisdiction over such a claim, diversity requirements raise the possibility that it might be improper for a federal court to hear the claim or even, should the claim be one of many in the litigation, that the case as a whole should be dismissed. In facing these problems, courts and commentators have not always considered whether the principles they evolve should apply in all federal court litigation or should be confined to the specific contexts in which they arose, such as diversity cases generally, incomplete diversity situations, or instances of possible collusion to create or defeat federal jurisdiction.⁸⁸ Worse, courts in federal question cases have sometimes relied uncritically on general language from diversity actions, frustrating efforts at joinder on the basis of rules developed in diversity litigation to deal with *Strawbridge* problems.⁸⁹ In effect, the existence of a head of federal court jurisdiction other than the one used to bring a case before the court constricts the court's jurisdiction in that case. It is hard to conceive of a court's proceeding in this manner if there were no general diversity jurisdiction.

The foregoing is not to suggest that there is a single strand of confusion running through the cases, or any uniform pattern of narrow jurisdictional interpretations based on general applications of *Strawbridge*-inspired rules. If anything, as Professor Currie has noted, there has been a tendency to resolve the "collision . . . between the complete-diversity policy of *Strawbridge v. Curtiss* and the liberal joinder philosophy of the Civil Rules . . . in favor of judicial economy at the expense of *Strawbridge*."⁹⁰ The restrictive cases and their extension to nondiversity situations may be exceptions to this tendency, but as this Part will show they are not isolated or insignificant ones.⁹¹ This

⁸⁸ See, e.g., *Danner v. Anskis*, 256 F.2d 123, 124 (3d Cir. 1958) (despite broad language of Fed. R. Civ. P. 13(g), plaintiff may not state cross-claim against coplaintiff, absent related counterclaim against cross-claimant, since otherwise rule might extend "jurisdiction of the district court to controversies not within the federal judicial power").

⁸⁹ See, e.g., *Palumbo v. Western Md. Ry.*, 271 F. Supp. 361, 362-63 (D. Md. 1967) (federal question case; absent independent grounds of jurisdiction, plaintiff may not assert claim against properly impleaded but nondiverse third-party defendant) (following *Friend v. Middle Atlantic Transp. Co.*, 153 F.2d 778 (2d Cir.) (diversity case under former provision for direct impleader of third party liable to plaintiff), *cert. denied*, 328 U.S. 865 (1946)).

⁹⁰ Currie, *supra* note 4, at 32-33.

⁹¹ Nor is there even uniformity within the categories in which these exceptions appear; the courts sometimes differ widely in their approaches to a single variety of joinder. See, e.g., 3 J. MOORE, *supra* note 15, ¶ 14.27[1], at 14-573 nn.33-34 (2d ed. 1978 & Supp. 1978-79) (conflicting decisions on ancillary jurisdiction over plaintiffs' claims against third-party defendants in federal question cases).

Part will consider three joinder problems related to *Strawbridge* — claims between plaintiffs and third-party defendants, ancillary jurisdiction over permissive intervention, and pendent parties — and sum up with a discussion of possible judicial movement towards greater uniformity in ancillary jurisdiction matters.

A. Claims Between Plaintiffs and Third-Party Defendants

In *Owen Equipment & Erection Co. v. Kroger*⁹² the Supreme Court recently held, settling a conflict in the courts of appeals,⁹³ that in a diversity case a plaintiff may not “assert a claim against a third-party defendant when there is no independent basis for federal jurisdiction over that claim.”⁹⁴ The Court’s holding, however, applies only to diversity cases,⁹⁵ leaving it unclear whether the same rule applies to cases within other heads of federal jurisdiction. That problem lends itself to analysis in the context of a presumed abolition of general diversity jurisdiction, and that analysis in turn provides insights applicable to practice under existing federal jurisdiction.

Rule 14(a) of the Federal Rules of Civil Procedure provides for impleader by a defendant of a person “who is or may be liable to him for all or part of the plaintiff’s claim against him.” The rule goes on to authorize both plaintiff and third-party defendant to assert against each other “any claim . . . arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim” against the original defendant. Efforts to press claims within the terms of the rule can obviously raise jurisdictional issues, as when a defendant in a diversity case impleads someone from his own state as a third-party defendant on a state law claim. It is well settled in the lower federal courts that there is no requirement of an independent basis of jurisdiction over such a claim.⁹⁶ If the same approach were to govern claims between the plaintiff and a cocitizen third-party defendant, though, both could bring before the federal court further matters not within its original jurisdiction.

⁹² 437 U.S. 365 (1978).

⁹³ See *id.* at 367 n.1.

⁹⁴ *Id.* at 367.

⁹⁵ In stating the issue at the beginning of its opinion, the Court included the qualifying clause, “[i]n an action in which federal jurisdiction is based on diversity of citizenship,” *id.* Its reasoning, moreover, stressed the complete diversity rule of *Strawbridge* and the ease of evading that rule by invoking ancillary jurisdiction if it were available. See *id.* at 373–75.

⁹⁶ See, e.g., 3 J. MOORE, *supra* note 15, ¶ 14.26; 6 C. WRIGHT & A. MILLER, *supra* note 42, § 1444, at 223–28. The refusal to require an independent jurisdictional basis prevails regardless of whether the original claim is in federal court under federal question or diversity jurisdiction, and regardless of whether the third-party defendant is a cocitizen of either original party. See *id.* at 223–25.

It has become increasingly accepted that when a third-party defendant asserts a claim against the plaintiff that satisfies the requirements of rule 14(a), there need be no independent jurisdictional basis, whatever the original ground of jurisdiction;⁹⁷ but when plaintiff seeks to claim directly against the third-party defendant, the courts have been divided. When original jurisdiction rests on diversity, the Supreme Court's *Owen Equipment* decision has settled that there must be an independent jurisdictional ground. The Court's opinion, like many previous lower court cases on the point, mostly or entirely confined its reasoning and language to the diversity context;⁹⁸ other lower court opinions, if not explicitly purporting to extend their holdings to federal question cases, had spoken in general terms.⁹⁹ When the issue has arisen in federal question cases, the courts have been split.¹⁰⁰ One decision, *Mickelic v. United States Postal Service*,¹⁰¹ even required an independent jurisdictional basis for the plaintiffs' claim against the third-party defendants when the original claim was within the *exclusive* jurisdiction of the federal courts.

This last result is hard to defend, even under the existing jurisdictional statutes. Plaintiffs wanted to state against third-party

⁹⁷ See, e.g., *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709 (5th Cir. 1970), followed in *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763, 772 (7th Cir. 1973) (alternative holding), cert. denied, 414 U.S. 1146 (1974); 3 J. MOORE, *supra* note 15, ¶ 14.27[2]; 6 C. WRIGHT & A. MILLER, *supra* note 42, § 1444, at 232-34. *Contra*, e.g., *James King & Son, Inc. v. Indemnity Ins. Co. of N. America*, 178 F. Supp. 146, 148 (S.D.N.Y. 1959).

⁹⁸ See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978); *Fawvor v. Texaco, Inc.*, 546 F.2d 636, 638-39, 643 (5th Cir. 1977); *Saalfank v. O'Daniel*, 533 F.2d 325, 328-29 (6th Cir.), cert. denied, 429 U.S. 922 (1976). *Fawvor*, however, at one point cited diversity and federal question cases indiscriminately in support of its statement that the then majority rule required "an independent jurisdictional basis for a plaintiff's claim against a third-party defendant," 546 F.2d at 639 & n.7 (footnote omitted).

⁹⁹ See, e.g., *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F.2d 890, 893-94 (4th Cir. 1972). However, the *Kenrose* opinion included some reasoning that applied only in diversity litigation.

The term "federal question" cases as used here includes state law cases within federal jurisdiction because the United States is a party, see 28 U.S.C. §§ 1345-46 (1976), since such jurisdiction rests on federal involvement and is not subject to the complete diversity rule. For jurisdictional purposes, therefore, such cases are in most respects like those arising under federal law.

¹⁰⁰ No independent jurisdictional ground was required in, e.g., *Florida E. Coast Ry. v. United States*, 519 F.2d 1184, 1193-97 (5th Cir. 1975); *Davis v. United States*, 350 F. Supp. 206 (E.D. Mich. 1972). Independent grounds were required in, e.g., *Schwab v. Erie L.R.R.*, 303 F. Supp. 1398 (W.D. Pa. 1969); *Palumbo v. Western Md. Ry.*, 271 F. Supp. 361 (D. Md. 1967).

¹⁰¹ 367 F. Supp. 1036 (W.D. Pa. 1973) (suit under Federal Tort Claims Act, over which federal courts have exclusive jurisdiction pursuant to 28 U.S.C. § 1346(b) (1976)).

defendants already in the litigation claims incontrovertibly arising out of the same occurrence sued on in plaintiffs' complaint. Since there was no other forum available for the original claim, requiring an independent basis of jurisdiction would force plaintiffs either to litigate in separate court systems matters naturally and economically triable together,¹⁰² or to forgo one or another possibly valid claim.¹⁰³

In *Mickelic* and some other cases,¹⁰⁴ lack of diversity has been a factor contributing to the courts' insistence on an independent basis for federal jurisdiction. Yet if there were no general diversity jurisdiction, absence of "diversity" would be plainly irrelevant to the decision whether to require independent jurisdictional grounds. The same, I suggest, should hold true today. Diversity jurisdiction and the *Strawbridge* rule do not forbid *all* litigation in federal court whenever there is incomplete or no diversity;¹⁰⁵ they forbid such litigation only *in diversity cases* (and then only partially, given some tolerated circumventions). Diversity requirements should have no force to reach out and destroy or prevent federal jurisdiction except when the original jurisdiction is founded upon diversity itself. Accordingly, under the doctrine of pendent jurisdiction it seems to be accepted that common state citizenship of plaintiff and defendant is no argument against the exercise of federal jurisdiction over a claim that could not have been brought in federal court as an original matter, when that claim is between adversaries already properly in court in a federal question case and is sufficiently related to their federal question dispute. Diversity of the parties could provide an independent basis of jurisdiction; lack of diversity, like absence of a federal question or failure to satisfy an amount in controversy requirement, simply means that the court must face the

¹⁰² See *Davis v. United States*, 350 F. Supp. 206, 208 (E.D. Mich. 1972); 3 J. MOORE, *supra* note 15, ¶ 14.27[1], at 14-573 n.33.

¹⁰³ The argument that plaintiffs, if allowed to proceed with the entire matter in federal court, would be doing indirectly what they could not have done directly (by suing both parties as an original matter), see, e.g., *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F.2d 890, 893 (4th Cir. 1972), proves too much: it is an argument against all ancillary jurisdiction. See Fraser, *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims*, 76 F.R.D. 525, 543 (1978); *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 245 (1978). Furthermore, since plaintiffs in such cases as *Mickelic* have nowhere else to go with their federal claims except federal court, the incentives for and likelihood of collusion seem minimal.

¹⁰⁴ See p. 989 *infra*.

¹⁰⁵ As Chief Justice Marshall pointed out in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821), in federal question cases the federal courts' "jurisdiction depends on the character of the cause, whoever may be the parties"; in diversity cases, it "depends . . . on the character of the parties."

question whether the state claim satisfies the criteria for pendent jurisdiction.¹⁰⁶

It follows that lack of diversity is no reason to impose a requirement of an independent jurisdictional basis for adding claims between parties already properly in federal court in federal question litigation. Yet that is precisely how some courts have regarded it.¹⁰⁷ The *Mickelic* opinion, for example, in support of its requirement of independent jurisdictional grounds quotes at length language on the effects of lack of diversity, even to the extent of its destroying a federal court's jurisdiction when a plaintiff asserts a claim against a cocitizen third-party defendant.¹⁰⁸ This overextension of the influence of *Strawbridge* is only a rather extreme example of the infection of occasional federal question cases by diversity concerns. Such reasoning allows the very existence of an additional but uninvolved head of jurisdiction to lessen the scope of the federal court's jurisdiction in the case before it. What the analysis of this Article suggests is, instead, that what courts do in federal question cases with respect to requiring an independent basis of jurisdiction should be the same whether the general diversity jurisdiction exists or not.

Properly viewed, the only significance of a lack of diversity when a party seeks to add a claim in a federal question case is that it means one possible independent ground of jurisdiction is wanting. When other such grounds are wanting as well, the court must face the question whether it should require an independent basis of jurisdiction; the presence or absence of diversity

¹⁰⁶ Citizenship considerations are absent from discussions of ordinary pendent jurisdiction, and they are simply irrelevant to the test for pendent jurisdiction the Supreme Court has articulated. In the leading case, *UMW v. Gibbs*, 383 U.S. 715 (1966), the Court noted the absence of diversity jurisdiction only in passing as a preliminary matter, *see id.* at 722, and established criteria for pendent jurisdiction focusing on "the relationship between [the federal] claim and the state claim," *id.* at 725. *See generally, e.g.*, 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 16, § 3567, at 439-56.

¹⁰⁷ *See also, e.g.*, *Palumbo v. Western Maryland Ry.*, 271 F. Supp. 361, 362 (D. Md. 1967) (federal question case relying on precedent from diversity litigation and viewing lack of diversity as a "jurisdictional limitation").

¹⁰⁸ 367 F. Supp. at 1038-39 (quoting *Corbi v. United States*, 298 F. Supp. 521, 522 (W.D. Pa. 1969)). *Corbi*, even more bizarrely, contains language on incomplete diversity's destroying jurisdiction — although *Corbi* was a federal question case in which the additional claim was between diverse parties but below the jurisdictional amount requirement. *See id.*

Of course it is nonsense to imply that lack of diversity has any effect whatever on properly invoked federal question jurisdiction. *See* note 105 *supra*; *cf. Jacobs v. United States*, 367 F. Supp. 1275, 1279 (D. Ariz. 1973) ("This is not a case in which joinder would destroy the jurisdiction of the court by destroying diversity. Whether [a nondiverse rule 19 "necessary" party] is in or out of this action the Court has federal question jurisdiction.").

should be irrelevant to that decision. The court must instead consider to what extent entertaining claims without independent jurisdictional grounds is constitutional, authorized or permitted by statute, and justified by factors of relatedness and economy.

B. Permissive Intervention and the Requirement of an Independent Basis for Federal Jurisdiction

It is well settled that no independent basis for federal jurisdiction is necessary in cases of intervention of right under Federal Rule of Civil Procedure 24(a),¹⁰⁹ even if the intervenor could not have been an original party because his presence would have destroyed complete diversity.¹¹⁰ Indeed, since the intervention is of right, the federal courts lack the discretion they have in connection with several other joinder devices to decline to exercise their ancillary jurisdiction.

Rule 24(b)(2), however, goes on to provide for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Within this broad description, but still outside the more demanding criteria for intervention of right,¹¹¹ there can fall attempts at intervention arising out of transactions or occurrences already properly before the court.¹¹² Allowing such intervention, even without an independent jurisdictional basis, could well serve the ends of convenience and economy that justify ancillary jurisdiction in other contexts.¹¹³ Most courts and commentators, though, have taken the position that an independent basis of jurisdiction is *always* required for an intervenor proceeding under this provision.¹¹⁴

¹⁰⁹ See, e.g., 3B J. MOORE, *supra* note 15, ¶ 24.18[1].

¹¹⁰ See, e.g., *id.* ¶ 24.18[3]. There is an exception to the rule stated in text when a rule 24(a)(2) intervenor whose presence would destroy complete diversity qualifies as "indispensable," the theory being that he should have been joined from the beginning and that with his presence the suit could not properly have been in federal court. See pp. 977-78 *supra*.

¹¹¹ FED. R. CIV. P. 24(a):

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

¹¹² There can also be permissive intervention attempts much less related to the matters before the court, particularly when the prospective intervenor's claim or defense presents only a question of *law* in common with the main action.

¹¹³ See p. 1001 *infra*; 3B J. MOORE, *supra* note 15, ¶ 24.18[1], at 24-752; *id.* ¶ 24.18[3], at 24-782.

¹¹⁴ See, e.g., *Blake v. Pallan*, 554 F.2d 947, 955-56 (9th Cir. 1977) (alternative holding); 3B J. MOORE, *supra* note 15, ¶ 24.18[1], at 24-752; 7A C. WRIGHT & A. MILLER, *supra* note 42, § 1917, at 592-95 (1972). The statement in text does

In diversity cases, in which this question most commonly arises,¹¹⁵ this rule makes excellent sense as long as *Strawbridge* stands; allowing such intervention without independent jurisdiction would allow far too facile a circumvention of the complete diversity requirement.¹¹⁶

In cases brought under federal question jurisdiction, however, the *Strawbridge* policy against having cases in federal court if any adversaries are cocitizens carries no weight. The courts do not seem in permissive intervention cases to have thought the contrary, although, as the preceding Section shows, they have made that mistake elsewhere. Any effects here of diversity jurisdiction have been subtler. The issue whether an independent basis of jurisdiction should be required for permissive intervention has arisen far more frequently in diversity than in federal question litigation,¹¹⁷ which may have obscured the possibility of independent consideration whether the requirement is justified for federal question cases.¹¹⁸ Similarly, the apparent lack of warrant for making individual exceptions to the requirement in diversity cases may have discouraged thinking about whether, in the considerably less common federal question cases, the rule need also be absolute no matter how great the convenience and economy of allowing the permissive intervention sought in a particular

not apply to permissive intervention under FED. R. CIV. P. 24(b)(1), "where a statute of the United States confers a conditional right" to intervene; to in rem actions; or to class actions. See 3B J. MOORE, *supra* note 15, ¶ 24.18[1], at 24-751 to -753.

¹¹⁵ See 7A C. WRIGHT & A. MILLER, *supra* note 42, § 1917, at 586 (1972).

¹¹⁶ See *id.* § 1917, at 593.

¹¹⁷ *Id.* § 1917, at 605 (independent basis will commonly be present in federal question cases).

¹¹⁸ Cf. *Pierson v. United States*, 71 F.R.D. 75, 82 (D. Del. 1976) ("there is no analytic basis for restricting the independent jurisdiction requirement to diversity cases"). Of course there is such a basis: incomplete diversity is a reason for requiring independent jurisdiction over permissive intervention, lest the *Strawbridge* requirement be evaded, but it applies only to diversity cases. The Supreme Court has inferred a considerable degree of congressional hostility to adding nondiverse parties in diversity cases. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978). However, there seems to be no parallel hostility—rather, a tolerant neutrality—toward adding state law matters in federal question cases. See *UMW v. Gibbs*, 383 U.S. 715 (1966); cf. *The Supreme Court, 1977 Term*, *supra* note 103, at 253 (concluding that "*Kroger*, when viewed against the backdrop of *Gibbs*, suggests that very different presumptions apply with respect to diversity and federal question cases in determining the scope of [ancillary] jurisdiction."). Such a difference in attitude follows from the nature of the jurisdictions. The "character of the parties," see note 105 *supra*, as completely or incompletely diverse is subject to change by addition of parties; the "character of the cause," see *id.*, as arising or not arising under the Constitution and laws is *not* subject to change by addition of either claims or parties.

instance.¹¹⁹ Imagining a federal court system without diversity jurisdiction helps make clear the need to consider what to do in federal question cases independently of the rule adopted for diversity litigation.

C. Pendent Parties

The much-discussed problem of "pendent parties" mainly concerns whether and when a federal court may, without independent grounds of subject matter jurisdiction, assume jurisdiction over a claim against a party not already before it when the party is related, as defined in rule 20(a) on permissive joinder of parties,¹²⁰ to a matter that *is* properly before the court.¹²¹ There is nothing extraordinary about the idea of bringing into a federal case a party who could not have sued or been sued there as an original matter; in the lower courts, at least, it seems well settled that there are several types of joinder for which an independent basis of jurisdiction is never or virtually never required¹²² (as well as others for which such a basis is always or usually essential¹²³). But the pendent party problem is often confusing and difficult, and remains far from fully settled, for several reasons:

¹¹⁹ For a recent exception requiring no independent jurisdictional basis for permissive intervention in a federal question case, see *United States v. Local 638, Enterprise Ass'n of Steam Fitters*, 347 F. Supp. 164, 167-69 (S.D.N.Y. 1972).

Declining to require an independent basis of jurisdiction for permissive intervention in some federal question cases, when the matter raised by the prospective intervenor was closely enough related to the claims before the court, would not turn such cases into *de facto* instances of intervention of right. Rule 24(b) on permissive intervention explicitly confers discretion on the court, which the court could exercise against intervention if for some reason it would be unhelpful to allow it.

¹²⁰ FED. R. CIV. P. 20(a):

All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

¹²¹ In addition to the situation defined in text, there can also be efforts to involve pendent parties *plaintiff*, though that situation is not very common. See Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases*, 62 VA. L. REV. 194, 216-17, 229-30 (1976). Sometimes, too, cases involving the problem of jurisdiction over plaintiffs' claims against third-party defendants impleaded under FED. R. CIV. P. 14(a) are treated as pendent jurisdiction matters. See, e.g., *Florida E. Coast Ry. v. United States*, 519 F.2d 1184, 1193-97 (5th Cir. 1975). Rule 19 necessary party joinder problems occasionally receive such treatment as well. See note 48 *supra*.

¹²² See, e.g., pp. 986-87 *supra* (impleader of third-party defendants, and their assertion of claims against plaintiffs); p. 990 *supra* (intervention of right).

¹²³ See, e.g., p. 986 *supra* (plaintiff's assertion of claim against third-party defendant in diversity case); p. 990 *supra* (permissive intervention).

it has arisen only in the last several years;¹²⁴ it deals for the most part with situations of an intermediate degree of relatedness to claims already within federal jurisdiction, neither so closely nor so distantly connected as to make pendent or ancillary jurisdiction issues seem easy one way or the other;¹²⁵ it arises in various quite distinct contexts;¹²⁶ and it raises questions of both statutory and constitutional boundaries of federal court jurisdiction.¹²⁷

Abolishing diversity jurisdiction would not solve all the problems with pendent parties, but it would help make some points clearer. Under the complete diversity rule, adding a party is quite different from adding a claim between existing diverse parties. The latter usually poses no jurisdictional problems at all, since complete diversity exists already and the source of the claim is immaterial to federal jurisdiction, while the former may destroy federal jurisdiction. General diversity is the only major head of federal jurisdiction for which this situation prevails; its abolition could reduce predispositions to think broadly that adding parties without independent jurisdictional grounds is somehow taboo.¹²⁸ In particular, abolition might reduce judicial inclinations to find congressional intent to forbid pendent parties in statutes that do not focus on the question. The Supreme Court in recent years has quite properly called attention to the relevance of congressional will, if there be any, to judicial decisions on pendent and ancillary jurisdiction.¹²⁹ The importance of general diversity jurisdiction, though, may obscure the fact that it is probably one of the very few federal jurisdictions in which there is any basis for inferences either way on legislative intentions concerning

¹²⁴ The main impetus for developments in this area has come from the Supreme Court's broadening of the concept of pendent jurisdiction over state claims in federal question cases in *UMW v. Gibbs*, 383 U.S. 715 (1966).

¹²⁵ Compare, for example, the close degree of relatedness required for intervention of right, for which there is usually no requirement of an independent basis of jurisdiction, with the distant relation possible in permissive intervention, for which there must normally be an independent ground. See p. 990 *supra*.

¹²⁶ See, e.g., 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 16, § 3567, at 457-59 (pointing out distinctions when reason for lack of independent jurisdictional basis is failure to satisfy amount in controversy requirement, absence of complete diversity in diversity case, or state law basis of claim in federal question case); Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 767-79 (1972).

¹²⁷ See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976). See generally Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127 (1977).

¹²⁸ This analysis thus supports, at least for federal question cases, the position of some present case law and commentary that "there is no magical line to be drawn on the basis of the fact that new parties are added, once the requisite connection exists between claims." 3A J. MOORE, *supra* note 15, ¶ 20.07[5.-1], at 20-73.

¹²⁹ See cases cited note 127 *supra*.

pendent parties.¹³⁰ In defining most other heads of federal jurisdiction, Congress has spoken of types of claims and not of parties.¹³¹ To seek in such statutes signs of intent whether or not to allow joinder of absentees is likely to be an exercise in futility.

Abolition would also eliminate a misleading comparison between pendent party appropriateness in diversity and federal question cases. This contrast, drawn by the Ninth Circuit in *Aldinger v. Howard*¹³² and summarized with apparent approval in Mr. Justice Rehnquist's opinion for the Supreme Court affirming the decision below, is that "diversity cases generally present more attractive opportunities for exercise of pendent-party jurisdiction, since all claims therein by definition arise from state law."¹³³ The comparison is an appealing one; as a district court applying *Aldinger* put it, it is only when "the main claim involves federal and not state law" that there is room for special "concern

¹³⁰ The case in which the Supreme Court first made explicit its emphasis on inferences of congressional intent, *Aldinger v. Howard*, 427 U.S. 1 (1976), has since been apparently overruled at least in part by a decision reinterpreting the statute on which *Aldinger's* negative inference rested. See *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). But cf. *id.* at 701 n.66 (reserving decision on whether *Aldinger* was correctly decided on its facts). Besides diversity jurisdiction, in which the basis for inferences against pendent parties seems strong, cf. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978) (reenactment of diversity jurisdiction statute without disturbing *Strawbridge*, and dangers of circumvention of complete diversity rule), there appear to be only three other situations in which the *Aldinger* approach is likely to yield much. These are cases involving efforts at adding pendent parties with claims below an applicable jurisdictional amount requirement, see *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. at 372 (mentioning requirement of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that each member of plaintiff class satisfy \$10,000 jurisdictional minimum), and cases either arising under 28 U.S.C. § 1338(b) (1976) (jurisdiction over state law "claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws") or removed under 28 U.S.C. § 1441(c) (1976) (removability of "entire case" in separate-claim removal). See 3A J. MOORE, *supra* note 15, § 20.07[5.-1], at 20-79 n.36 (apart from §§ 1338(b) and 1441(c), "all the jurisdictional statutes are silent on this subject").

¹³¹ Apart from diversity, the main exception to this generalization is jurisdiction over cases involving the United States as a party. See 28 U.S.C. § 1345 (1976) (United States as plaintiff); *id.* § 1346 (United States as defendant). Under a major portion of that jurisdiction, the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976), it now appears to be settled — pendent party issues aside — that the statute does not require that the United States be the sole defendant. See, e.g., *Maltais v. United States*, 439 F. Supp. 540, 544-45 (N.D.N.Y. 1977). In other words, party-focused jurisdictional statutes other than diversity need carry no hostility to party joinder analogous to that found in the diversity statute under the *Strawbridge* interpretation.

¹³² 513 F.2d 1257, 1261 (9th Cir. 1975), *aff'd*, 427 U.S. 1 (1976).

¹³³ *Aldinger v. Howard*, 427 U.S. 1, 5-6 (1976).

over concurrently adding a non-federal party *and* a non-federal claim" to a case already in federal court.¹³⁴

On analysis, though, the contrast appears entirely specious. Presumably, the courts cannot be talking about cases in which there is a pendent party problem because of failure to meet an applicable jurisdictional amount requirement; recent decisions indicate that that defect bars pendent party jurisdiction at least as strongly in diversity cases as in federal question litigation.¹³⁵ The only relevant comparison is between diversity cases involving efforts to add nondiverse parties and federal question cases involving attempts to add parties whose only involvement is through related state law claims. Whatever the strength of the argument against the latter, if nothing else seems clear in this whole area it does appear incontestable that there is no stronger objection than that against adding nondiverse parties in diversity cases.¹³⁶ Thus, federal question cases are in no sense less "attractive" ones for allowing pendent party treatment than diversity litigation.¹³⁷ The fallacy of *Aldinger's* comparison is apparent without hypothesizing a system lacking general diversity jurisdiction; what abolition would do is eliminate the basis for this seductive and persistent bit of confusion, facilitating a clearer focus on the justifiability of including or excluding pendent parties.¹³⁸

*D. Greater Uniformity in Ancillary Jurisdiction*¹³⁹

Abolishing the general diversity jurisdiction should eliminate, or at least very greatly reduce, the influence of the *Strawbridge*

¹³⁴ *Chatzicharalambus v. Petit*, 430 F. Supp. 1087, 1091 n.8 (E.D. La. 1977) (emphasis added).

¹³⁵ See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

¹³⁶ See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978). This is not to say that the complete diversity requirement always prevails — see p. 985 *supra* — but simply that it is as strong an objection to extensions of federal jurisdiction, based on inference from statute, as the courts have recognized.

¹³⁷ See, e.g., Fortune, *Pendent Jurisdiction — The Problem of "Pendent Parties"*, 34 U. PITT. L. REV. 1 (1972); Note, *supra* note 121, at 196; 55 TEX. L. REV. 941, 947-49 (1977) (commenting on *Aldinger v. Howard*, 427 U.S. 1 (1976)).

¹³⁸ That basic issue remains an unsettled one that divides the lower courts, even in federal question cases, and raises problems of the scope of article III jurisdiction as well as congressional intent under existing jurisdictional statutes. Compare *Ayala v. United States*, 550 F.2d 1196, 1199-200 & n.8 (9th Cir. 1977) (constitutional difficulties underlie Ninth Circuit's rejection of pendent party theory), *cert. dismissed*, 435 U.S. 982 (1978), with, e.g., *Wood v. Standard Prods. Co.*, 456 F. Supp. 1098, 1100-03 (E.D. Va. 1978) (declining to follow *Ayala*); *Pearce v. United States*, 450 F. Supp. 613 (D. Kan. 1978) (same).

¹³⁹ There seems to be much confusion surrounding the labels "ancillary juris-

rule on "pendent" and "ancillary" jurisdiction determinations in federal question cases. This effect would facilitate (though not mandate) changes in decisional law in several contexts, making less likely a judicial insistence on independent jurisdictional grounds for joinder of related matters in federal question cases. Such changes, if they came about, would produce an increased degree of uniformity in the principles governing federal ancillary jurisdiction.

Currently, as the preceding sections have shown, these principles are anything but regular. Even though the nature of a party's or a claim's relation to a dispute in federal court may be the same, ancillary jurisdiction rules often vary for different joinder devices, both as to whether there must be an independent basis of jurisdiction at all and, if there need not be, as to what relation the party or claim must bear to the action to come within ancillary jurisdiction. In diversity cases, once ancillary jurisdiction is permitted to bring in incompletely diverse parties at all, such disparities seem inevitable because the possibility of permitting evasion of the *Strawbridge* requirement varies under different joinder devices.¹⁴⁰ And the ancillary jurisdiction rules evolved in

diction" and "pendent jurisdiction," and indeed their usage has often been far from consistent. There is a fairly clear core meaning to "pendent jurisdiction," namely a federal court's authority to hear a federal question plaintiff's state law claim against the same defendant without independent jurisdictional grounds, as long as the federal and state claims are part of a "common nucleus of operative fact." *UMW v. Gibbs*, 383 U.S. 715, 725 (1966). "Pendent party" cases represent efforts to use the *Gibbs* definition and economy rationale to support joinder not of related state law claims against *existing* parties but of such claims against outsiders not themselves subject to claims within independent federal jurisdiction. See generally *Aldinger v. Howard*, 427 U.S. 1 (1976).

"Ancillary jurisdiction" is a broader term most commonly used to refer to the authority of federal courts in several types of situations to hear and determine, again without independent jurisdictional grounds, matters involving claims and parties closely related to the claim supporting original jurisdiction, such as compulsory counterclaims, cross-claims, third-party claims, and intervention of right. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 n.18 (1978). One way of summarizing the distinction is that "pendent" jurisdiction refers to matters that are, or at least could be, stated in the original complaint, whereas "ancillary" jurisdiction refers to those matters that can only come in by later addition of claims or parties. See Comment, *supra* note 127, at 128 n.5.

For convenience, this Section will often use the term "ancillary jurisdiction" — without quotation marks — in a generic sense, including situations to which the label "pendent" would often apply. Whatever label a court uses, the underlying problem is the same: whether to require an independent basis of federal jurisdiction.

¹⁴⁰ For example, allowing ancillary jurisdiction in diversity cases for rule 20(a) permissive joinder of nondiverse parties would leave little of the *Strawbridge* rule; permitting rule 14(a) impleader of a defendant's cocitizen without independent jurisdictional grounds leaves the requirement of complete diversity for *original*

diversity cases have had a significant carryover effect on the rules applied in federal question cases.

In various ways, of which the appeal of the "pendent party" idea in many lower federal courts is a good example,¹⁴¹ there has been some movement toward a more nearly uniform approach to federal ancillary jurisdiction, based on the notion that the federal courts should at least have discretion to hear and determine matters sufficiently related to claims already before them. It has become increasingly clear, however, that the *Strawbridge* complete diversity rule is a major barrier to carrying such developments very far. Allowing ancillary jurisdiction in certain situations, whatever the justifications of relatedness and economy, is simply impossible if there are not to be circumventions of *Strawbridge* that the courts are unwilling to tolerate.¹⁴² This concern may have contributed to the Supreme Court's refusal in the non-diversity case of *Aldinger v. Howard*¹⁴³ to accept invitations to regard the lines of cases dealing with "pendent" and "ancillary" jurisdiction as having merged.¹⁴⁴ The danger of too-easy evasion of the complete diversity requirement is strongest with "pendent" (initial) joinder because, if the courts allow it in the face of *Strawbridge* problems, a plaintiff can simply join the nondiverse party in his complaint, effectively nullifying the complete diversity rule.¹⁴⁵ As is shown by decisions allowing "ancillary" (subsequent) joinder in some situations despite *Strawbridge* problems, however, these concerns are reduced if a plaintiff must rely on the initiative of the defendant or an intervenor to effect the joinder of a nondiverse party against whom the plaintiff would like to claim.¹⁴⁶

jurisdiction intact and leads to no further *Strawbridge* problems if the plaintiff and the impleaded third-party defendant seek to press claims against each other.

¹⁴¹ See, e.g., *Pearce v. United States*, 450 F. Supp. 613, 615-16 (D. Kan. 1978) (weight of lower court authority before *Aldinger v. Howard*, 427 U.S. 1 (1976), against Ninth Circuit's rejection of pendent party jurisdiction).

¹⁴² See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-77 (1978) (*Strawbridge* rule requires independent basis of federal jurisdiction for diversity plaintiff's claim against nondiverse third-party defendant); *Parker v. W.W. Moore & Sons*, 528 F.2d 764, 766 (4th Cir. 1975).

¹⁴³ 427 U.S. 1, 12-13 (1976).

¹⁴⁴ See, e.g., Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A. L. REV. 1263 (1975).

¹⁴⁵ Joinder, as by later amendment of the plaintiff's complaint, of something that might have been pleaded originally should receive the same treatment as material included in the original complaint. What matters is not the formality of inclusion in the complaint as initially filed but the reality of plaintiff's ability to accomplish the joinder on his sole initiative.

¹⁴⁶ Another possible distinction between "pendent" and "ancillary" jurisdiction is that denial of jurisdiction at the beginning of a litigation makes it clear that if the case is to proceed as a whole (and if it contains no claim within exclusive

Abolition would eliminate these reasons for distinguishing between joinder routes, so that the federal courts could much more often make decisions on ancillary jurisdiction animated solely by the idea of economical settlement of related claims in a single litigation. Even after abolition, though, some legitimate concerns would still restrain the federal courts from expanding their ancillary jurisdiction as far as the Constitution might permit. A first such concern, if the complete diversity rule in the alienage jurisdiction were not overruled by statute or decision, would come from that remainder of *Strawbridge* itself. Second, the Supreme Court has indicated that it regards unsatisfied amount in controversy requirements as precluding the extension of ancillary jurisdiction in certain situations.¹⁴⁷ And under the Court's emphasis on seeking congressional intent concerning ancillary jurisdiction in statutes affecting federal jurisdiction, the courts may discover further indications of intent to leave them no discretion to allow ancillary jurisdiction.¹⁴⁸

Yet it seems likely that once general diversity jurisdiction were abolished, the list of situations in which the federal courts would feel they could not exercise ancillary jurisdiction would not be a long one. The alienage jurisdiction, in which cases are not very numerous to begin with, might require only minimal diversity.¹⁴⁹ The 1978 House bill would have virtually eliminated amount in controversy requirements, abolishing the general diversity jurisdiction in which they apply and repealing such little of an amount requirement as survives today for federal question cases.¹⁵⁰ Moreover, most indications of congressional intent other

federal jurisdiction) it must be in state court, thus encouraging litigants not to waste time on two separate proceedings. With later determinations, by contrast, at least part of the case is already properly in federal court and will probably remain there; hence, to avoid duplication, the court should be more lenient in its definition of what it will accept as "ancillary." See Comment, *supra* note 127, at 149 n.115. This view makes sense if the federal courts are sometimes constrained to stop short of the constitutional limits of their jurisdiction in "pendent" cases; it provides a basis for pushing closer to constitutional bounds when economy considerations are most pressing. This Section goes on to suggest, however, that after abolition it would be possible and desirable to adopt a more nearly uniform approach toward ancillary jurisdiction generally. In that case, there would be no need to push beyond the limits on initial "pendent" joinder in postfiling "ancillary" cases, since the limits in both would be defined by a common constitutional criterion.

¹⁴⁷ See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978).

¹⁴⁸ See, e.g., *Depaja Enterprises Ltd. v. American Bank & Trust Co.*, 454 F. Supp. 413, 415-16 (S.D.N.Y. 1978) (holding "pendent party" jurisdiction impermissible in action brought under 12 U.S.C. § 1819 (1976), which authorizes Federal Deposit Insurance Corporation to sue and be sued in federal courts).

¹⁴⁹ See pp. 966-68 *supra*.

¹⁵⁰ See H.R. 9622, 95th Cong., 2d Sess. § 1(b) (1978), *Senate Hearings, supra*

than the complete diversity rule seem neutral or favorable towards ancillary jurisdiction.¹⁵¹

After abolition, then, there would often be no *statutory* fetters on the ancillary jurisdiction of the federal courts. When there are none, the Supreme Court has indicated, the federal courts are free "to fashion [their] own rules under the general language of Art. III."¹⁵² It is not yet settled, particularly for pendent parties, exactly what those rules are; but apparently they would permit ancillary jurisdiction in accordance with a general criterion of economical settling of related claims in one litigation.¹⁵³ There could thus be more frequent resort to a common constitutional criterion,¹⁵⁴ displacing the present bewildering array of discrete and irregular rules requiring or not requiring independent jurisdictional grounds for different types of joinder and under different heads of jurisdiction. It would less often be necessary to decide first whether to require an independent basis of jurisdiction, and then, if none were required, whether a particular case came within the standards for ancillary jurisdiction; the criteria for both determinations would be the same, thus merging them. For those situations governed by constitutional ancillary jurisdiction criteria, then, there would be a fairly simple, uniform approach: If a party or claim met the criteria of the Federal Rules for joinder and of the Constitution for ancillary jurisdiction, it could be joined without an independent basis of jurisdiction. If it met rule criteria but not those of the Constitution (as would be true, for example, of many instances of permissive intervention), there could be joinder but only with independent jurisdiction. And failure to meet rule criteria for joinder would end the matter without need for inquiry into jurisdiction.

note 1, at 10 (repealing general diversity jurisdiction); *id.* § 2(a), *Senate Hearings*, *supra* note 1, at 11 (eliminating amount in controversy requirement from general federal question jurisdiction statute, 28 U.S.C. § 1331 (1976)).

¹⁵¹ See note 130 *supra*.

¹⁵² *Aldinger v. Howard*, 427 U.S. 1, 15 (1976).

¹⁵³ See pp. 1001-02 *infra*.

¹⁵⁴ It seems reasonable to expect that there would be a *common* constitutional criterion, not varying from one type of joinder to another. The Supreme Court in *UMW v. Gibbs* was speaking of the constitutional limits on federal judicial power when it used the general language of "common nucleus of operative fact" and a plaintiff's claims' being "such that he would ordinarily be expected to try them all in one judicial proceeding." 383 U.S. 715, 725 (1966). If the jurisdiction-conferring and pendent claims are related in this way, that "permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *Id.* There seems to be nothing in the idea of a "constitutional 'case'" that would require differing treatment of similar situations depending on the type of joinder, which the *Strawbridge* rule, based on statutory interpretation, does seem to entail. See p. 996 *supra*.

E. Conclusions

Uncritical overextensions of principles developed in one context into other areas are not unique to the general diversity jurisdiction, but it does seem to engender them uncommonly often. Thinking about a system without diversity jurisdiction brings out ways in which courts today sometimes display confusion in analysis because of inappropriate influences from and comparisons with diversity case law. Even if Congress never abolishes diversity, this approach suggests that the federal courts in federal question cases should treat absence of complete diversity as wholly irrelevant to decisions whether to require an independent basis of federal jurisdiction, and should not automatically apply the restrictive rules evolved in and for diversity situations. Moreover, if diversity is abolished, there should follow greater movement toward simplicity and uniformity in ancillary jurisdiction matters than seems possible today with the complicating influence of the *Strawbridge* rule.

IV. FACILITATION OF STATUTE AND RULE CHANGES

The present federal judicial system has been constructed with diversity jurisdiction as a major starting point; any change so fundamental as abolition would inevitably have far-reaching effects on many aspects of the system. The preceding Part discussed effects on decisional law. This Part considers significant reforms requiring changes in rules or statutes that might be made more readily because of diversity's absence.¹⁵⁵ The discussion cannot be conclusive, since independent considerations affect the desirability of such reforms; the point generally is not that without diversity certain steps should clearly be taken, but simply that abolition would affect the balance of considerations for and against them.

A. Uniform Ancillary Jurisdiction Statute

However far the federal courts might want to move after abolition of diversity toward greater uniformity in ancillary jurisdiction,¹⁵⁶ it seems clear that the Supreme Court would regard

¹⁵⁵ This Part does not consider any of the myriad possible expansions of federal court jurisdiction that might become more attractive simply because of the elimination of any large fraction of the present federal court caseload, but only those changes that would in some way be facilitated because it was *diversity* that had been abolished.

¹⁵⁶ See pp. 995-99 *supra*. This Section will use the term "ancillary" to include jurisdiction often labeled "pendent." See note 139 *supra*.

as inappropriate a judicial initiative aimed at full rationalization of the area. Since Congress regulates the jurisdiction of the federal courts, the Supreme Court in the face of lower court extensions of jurisdiction has properly stressed the need to look to whether "the statute conferring jurisdiction over the federal claim [allows] the exercise of jurisdiction over the nonfederal claim."¹⁵⁷ As the Court has pointed out, "There are, of course, many variations in the language which Congress has employed to confer jurisdiction upon the federal courts."¹⁵⁸ Thus, even though abolition might result in greatly increased uniformity in ancillary jurisdiction through decisional development, there would likely remain a considerable degree of the present irregularity.

The very deference to congressional intent that might preclude a full-scale judicial cleanup of ancillary jurisdiction, though, suggests that the federal courts would follow a congressional lead in that direction. If a good deal of the present lack of uniformity survived case law development after abolition, then Congress might do well to take the Court's approach as an invitation to eliminate the complexities and uncertainties that now work to defeat the purpose of ancillary jurisdiction — fostering economy for courts and litigants by making possible the settling of related claims in a single case.¹⁵⁹

The present difficulties mostly concern the decision whether to require an independent jurisdictional basis for the ancillary claim; the many factors that influence that decision for different heads of jurisdiction and for various joinder devices produce the current confusing welter of rules requiring independent grounds in some cases and not in others. There seems to be relatively little disagreement or difficulty, though, about how far ancillary jurisdiction ought to extend once freed of the limiting factors that now force the courts to conclude they must require independent grounds of jurisdiction in various situations no matter what the desirability of joinder. When federal courts defining the boundaries of their ancillary jurisdiction have felt free to focus on what a litigation should optimally comprise, rather than on congressional intent, the effect of the complete diversity rule or other problems, they have in various contexts articulated defini-

¹⁵⁷ *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978) (footnote omitted).

¹⁵⁸ *Aldinger v. Howard*, 427 U.S. 1, 18 (1976). Whatever the variations in language, it may well turn out that only a few jurisdictional statutes provide any basis for inferring congressional intent for or against the exercise of ancillary jurisdiction, *see* note 130 *supra*, a situation that might result in irregularity in ancillary jurisdiction decisions because of the lack of guidance for judicial determinations under other statutes.

¹⁵⁹ *See, e.g.*, 6 C. WRIGHT & A. MILLER, *supra* note 42, § 1414, at 73.

tions very similar in effect and often in phrasing. The theme has been the same as that found in increasingly accepted articulations of what constitutes an appropriate litigation unit for purposes of many aspects of joinder¹⁶⁰ and preclusion:¹⁶¹ there can be ancillary jurisdiction over a claim that arises "out of the same transaction or occurrence or series of transactions or occurrences"¹⁶² as the jurisdiction-conferring claim.¹⁶³

By means of a statute authorizing the federal courts to exercise their ancillary jurisdiction in accordance with these concepts, Congress could free the federal courts from the fetters that complicate the area today.¹⁶⁴ One possible approach to the drafting of such a statute would be that followed by the American Law Institute in a proposed pendent jurisdiction statute, defining the relationship an ancillary matter must bear to claims already before the court.¹⁶⁵ An alternative that would minimize drafting problems, and avoid some other difficulties,¹⁶⁶ would be for the

¹⁶⁰ See FED. R. CIV. P. 13(a) (compulsory counterclaims) ("arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"); FED. R. CIV. P. 14(a) (claims between plaintiff and third-party defendant) ("any claim . . . arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim" against the original defendant); FED. R. CIV. P. 20(a) (permissive party joinder) ("arising out of the same transaction, occurrence, or series of transactions or occurrences").

¹⁶¹ See RESTATEMENT (SECOND) OF JUDGMENTS § 61(1) (Tent. Draft No. 5, 1978) (claim preclusion) ("all or any part of the transaction, or series of connected transactions, out of which the action arose").

¹⁶² ALI STUDY, *supra* note 14, at 28 (proposed 28 U.S.C. § 1313(a)).

¹⁶³ The language of such formulations may differ. The Supreme Court has defined a pendent state law claim for purposes of the constitutional reach of federal court jurisdiction as one that derives "from a common nucleus of operative fact," so that "a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding," *UMW v. Gibbs*, 383 U.S. 715, 725 (1966). But the effect of the various phrasings is the same; thus the ALI's "same transaction or occurrence" formulation attempts to codify the Supreme Court's "common nucleus of operative fact" concept. On the essential identity of these definitions, see RESTATEMENT (SECOND) OF JUDGMENTS 138-44 (Tent. Draft No. 5, 1978); Note, *The Concept of Law-Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered*, 87 YALE L.J. 627, 631 n.26 (1978).

¹⁶⁴ The troublesome limitations, after all, are inferred requirements of the jurisdictional statutes, mainly complete diversity but also others such as the rule that parties brought in on an ancillary basis often must independently satisfy the jurisdictional amount requirement. See p. 998 *supra*.

¹⁶⁵ See ALI STUDY, *supra* note 14, at 28 (proposed 28 U.S.C. § 1313(a), employing phrasing quoted in preceding text paragraph).

¹⁶⁶ A statute drafted as the text suggests, referring in terms to the constitutional limits of ancillary jurisdiction instead of articulating a definition of its scope, would make it unnecessary to consider writing special extensions for forms of joinder that do not fit the conventional "same transaction or occurrence" formulation yet have been regularly held to come within ancillary jurisdiction. Rule 14(a) impleader, for example, "is considered ancillary even though such an action

statute to confer explicitly on the federal courts authority to exercise their ancillary jurisdiction over any form of joinder authorized by rule or by other statute, to the extent permitted by the Constitution.¹⁶⁷ Since the "same transaction or occurrence" formulation itself probably defines the general constitutional limits of federal ancillary jurisdiction,¹⁶⁸ the aim of drafting a statute

does not, as a general rule, directly involve the aggregate of operative facts upon which the original claim is based," *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 715 (5th Cir. 1970). *See also, e.g.*, 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 16, § 3523, at 67 (ancillary jurisdiction over permissive counterclaims that take form of setoff).

If the aim were to confine ancillary jurisdiction short of constitutional limits, the ALI approach with the additional requisites specified would probably be more workable. The *ALI Study* proposed requirements in the alternative for a common question of fact or a need to determine a state claim in order to give effective relief on the jurisdiction-conferring federal claim. *See ALI STUDY, supra* note 14, at 28 (proposed 28 U.S.C. § 1313(a)).

¹⁶⁷ There should not be grounds for concern over excessive breadth in such an approach, since the joinder rules would continue to provide guidance and limitation.

¹⁶⁸ There are a few exceptional situations that fall outside the formulation yet are held within ancillary jurisdiction, *see* note 166 *supra*, apparently on the theory that joinder still clearly serves the ends of economy and convenience.

Formulations based on the "same transaction or occurrence" phrasing probably would not exceed constitutional bounds because their effect is similar or identical to the articulation of the scope of a "constitutional 'case'" by the Supreme Court in *UMW v. Gibbs*, 383 U.S. 715, 725 (1966). *Gibbs* did, however, deal with addition of claims between existing parties and not with addition of parties, and the Court has recently emphasized — though in a statutory, not a constitutional, context — that the two are quite different. *See Aldinger v. Howard*, 427 U.S. 1, 14-15 (1976). Moreover, the state of the law on the constitutionality of adding parties as a matter of ancillary jurisdiction is rather surprisingly underdeveloped. There seems to be a universal assumption in the lower courts that in at least some types of situations, ancillary jurisdiction over parties need not be justified by sheer necessity, as it was in the leading early ancillary jurisdiction case of *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860). Instead, it may extend to parties whose presence will do no more than serve the important but hardly imperative goals of convenience and economy. *See, e.g.*, cases cited in *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 n.18 (1978). Yet the Supreme Court in modern times has never had to confirm or reject the assumption on which the lower courts have been operating for decades. *See id.*

Still, it seems most unlikely that the Court would hold ancillary jurisdiction over claims involving new parties to be outside constitutional bounds if the "same transaction or occurrence" or "common nucleus of operative fact" test were met. The Court has failed to reserve the question in cases in which it might have done so, *see, e.g.*, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. at 375 & n.18; *Aldinger v. Howard*, 427 U.S. at 14-15, seeming to proceed from the general constitutionality of such ancillary jurisdiction as a premise it was not merely assuming *arguendo* and emphasizing the statutory limits on federal jurisdiction *in addition* to the boundaries set by article III, *see Owen Equip. & Erection Co. v. Kroger*, 437 U.S. at 371-77. Further, it is hard to see how adding a claim involving a new party is *constitutionally* different from adding a claim against an already joined party if the test is whether the claims are such that one "would ordinarily

referring in terms to the Constitution would be to duplicate the effect of a broadly drafted ALI-model statute, without forcing determinations whether the chosen formulation exceeded constitutional bounds or renouncing the benefits of any ancillary jurisdiction that might be constitutional yet excluded by some particular phrasing. Whatever the drafting approach, such a uniform ancillary jurisdiction statute could clarify a confused area of the law and eliminate redundant litigation by making it more often possible to litigate related claims in one proceeding.¹⁶⁹

*B. Nationwide Service of Process*¹⁷⁰

Under rule 4 of the Federal Rules of Civil Procedure, the general authority of the federal courts to serve process is confined to the borders of the state in which the court sits, the authorizations of that state's long arm statute, and some limited extensions. The spread of comprehensive state long arm provisions has greatly expanded the federal courts' ability to effect service of process out of state; but the states' approaches vary considerably, and a few still lack anything resembling a modern long arm statute.¹⁷¹ Moreover, the restriction to state long arm authority applies just as fully to federal question cases (when there is no special federal statute allowing broader service) as it does to diversity actions. But because the United States is treated like one big state for purposes of constitutional limits on federal courts' personal jurisdiction in federal question cases,¹⁷² what could fail to come within

be expected to try them all in one judicial proceeding" and all the claims do "derive from a common nucleus of operative fact," *UMW v. Gibbs*, 383 U.S. at 725. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. at 379 (White, J., dissenting) ("as far as Art. III of the Constitution is concerned, the District Court had power to entertain Mrs. Kroger's claim against Owen"); 3A J. MOORE, *supra* note 15, § 20.07[5.-1], at 20-73 ("there is no magical line to be drawn on the basis of the fact that new parties are added, once the requisite connection exists between claims"). See also *Symm v. United States*, 47 U.S.L.W. 3480 (U.S. Jan. 15, 1979) (affirming without opinion, over dissent urging lack of pendent party jurisdiction, decision apparently involving exercise of such jurisdiction).

¹⁶⁹ A significant additional effect of a statute that would probably not result from case law development would be the elimination of amount in controversy problems in ancillary jurisdiction determinations, assuming that the uniform statute permitted ancillary jurisdiction without regard to amount in controversy.

¹⁷⁰ This Section uses the common and convenient term of "nationwide" process, but that is not meant to exclude the possibility of even broader authority, such as foreign service employed to the limits of federal constitutional power.

¹⁷¹ See, e.g., IOWA CODE ANN. § 617.3 (West Supp. 1978-1979) ("doing business" provision).

¹⁷² See, e.g., *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974) ("It is not the State . . . but the United States 'which would exercise its jurisdiction over' the defendants). A federal court hearing a case within its diversity jurisdiction, by

even a broad state long arm provision might still satisfy due process requirements for a federal district court's exercise of personal jurisdiction.¹⁷³ The most liberal of state long arms, then, even if adopted in all states, would leave some gap between the constitutional limits on federal courts' process and those cases they could reach by piggybacking on state court authority.¹⁷⁴

A nationwide federal service provision available in diversity cases might raise significant problems, however, because it could bring before a federal court persons who could not have been sued in the courts of the same state. Were they sued elsewhere, the conflicts law and substantive law applied might differ from what the (unavailable) courts of the first state would have followed. Under existing federal court process authority, then, the substantive law that the first state would apply could not normally govern these parties. But under the *Klaxon* rule,¹⁷⁵ a federal court choosing among potentially applicable state laws must follow the conflicts law of the state in which it sits, at least in diversity cases. Hence, nationwide service might bring into federal court parties not subject to state process and, because of the *Klaxon* rule, subject them to a regime of substantive law that

contrast, is effectively acting as a court of the state in which it sits. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

¹⁷³ See *Driver v. Helms*, 74 F.R.D. 382, 390-91 (D.R.I. 1977) (citations and footnote omitted), *aff'd in part and rev'd on other grounds in part*, 577 F.2d 147 (1st Cir. 1978), *cert. granted in part sub nom. Colby v. Driver*, 47 U.S.L.W. 3482 (U.S. Jan. 15, 1979) (No. 78-303):

For those cases in which Congress has decided that the jurisdiction of federal courts shall be coextensive with the jurisdiction of the states in which they sit (that is, all cases directly ruled by Rule 4(d)), minimum contacts analysis is indeed in order. State courts may exercise jurisdiction only over defendants within their territory or over defendants who are deemed present within the territory by virtue of purposeful activity which constitutes such minimum contacts. *International Shoe [Co. v. Washington]*, 326 U.S. 310 (1945)].

However, Congress may provide for national service of process, i.e., national exercise of personal jurisdiction by each of the district courts based on presence of the defendant in the United States, rather than in any particular state. . . . When Congress does so provide, the district court's service is not constrained by the due process . . . limits to which state courts are subject. . . . Instead, the due process limitation on national service of process is found by inquiring into the fairness of such jurisdiction in the particular circumstances and facts of the case at hand, an inquiry mandated by the Fifth Amendment Due Process Clause.

¹⁷⁴ The gap between a liberal state long arm statute and the constitutional applicability of a federal nationwide process provision would probably not be wide, and the need to satisfy venue requirements for suit in federal court would further limit the number of occasions that federal nationwide service might bring a party before federal court when resort to the state's long arm could not. However, those cases in which the federal nationwide process provision might be needed could be important ones, since the process might make the difference between being able to bring all parties in a multiparty dispute before a single forum and having to proceed in several forums.

¹⁷⁵ See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

could not otherwise have been applied to them.¹⁷⁶ Because of the existence of diversity jurisdiction, which under *Erie* is *not* supposed to add to the number of possibly applicable substantive law regimes, nationwide service could produce precisely that result.

There are several other areas in which this problem either can arise at present because of federal service authority exceeding that of state courts¹⁷⁷ or could arise if there were nationwide service.¹⁷⁸ Yet it seems likely that the problem arises by far the most frequently in diversity cases.¹⁷⁹ Given this situation, the rulemakers understandably did not adopt nationwide service generally, but it is questionable why they did not bifurcate the rule—confining federal process to that authorized by the state in diversity cases, yet providing for nationwide service in other actions.¹⁸⁰ Abolition of diversity jurisdiction, by eliminating the category in which nationwide service would most frequently raise the problem described above, would change the balance of factors that led to the present rule and offer a good opportunity for consideration of broader nationwide service authority.

C. Uniform Rule on Testimonial Privileges

In 1972, the Supreme Court proposed the Federal Rules of Evidence,¹⁸¹ including an article V that would have established a

¹⁷⁶ See Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963* (I), 77 HARV. L. REV. 601, 633-34 (1964).

¹⁷⁷ For statutory interpleader pursuant to 28 U.S.C. § 1335 (1976), there is special provision, *id.* § 2361, for nationwide service. In the case that most sharply illustrates the problem discussed in the text, the Supreme Court in *Griffin v. McCoach*, 313 U.S. 498 (1941), held that a federal court in a statutory interpleader case must follow the conflicts law of the state in which it sits. Federal Rule 4(f) permits service up to 100 miles from the courthouse on parties to be added under rules 14 and 19, which might also exceed the reach of some states' authority. See Kaplan, *supra* note 176, at 630, 633; Vestal, *Expanding the Jurisdictional Reach of the Federal Courts: The 1963 Changes in Federal Rule 4*, 38 N.Y.U. L. REV. 1053, 1071-76 (1963). And there are numerous specific provisions for extraterritorial service in actions under various federal statutes. See 2 J. MOORE, *supra* note 15, ¶ 4.42[1], at 4-518 to -523.

¹⁷⁸ Nationwide service would introduce these problems in alienage cases and in actions involving pendent state claims in which extraterritorial service is not now available.

¹⁷⁹ Cases in statutory interpleader raising this problem seem to be infrequent; state long arm authority could probably reach most parties brought into federal court under the 100-mile "bulge" of FED. R. CIV. P. 4(f); and the alienage case-load is not heavy, see note 13 *supra*.

¹⁸⁰ See generally Kaplan, *supra* note 176, at 631 & n.130. The American Law Institute has proposed nationwide service for cases within general federal question jurisdiction, see ALI STUDY, *supra* note 14, at 31 (proposed 28 U.S.C. § 1314), with service in diversity cases left unchanged, see *id.* at 216.

¹⁸¹ Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183,

detailed set of rules for testimonial privileges without regard to the basis of jurisdiction over a case or the source of law relevant to the issue in connection with which a witness claimed a privilege.¹⁸² Congress, concerned that in diversity cases state law should provide not only the substantive rules of decision but also the rules of privilege,¹⁸³ replaced the proposed article with a single rule providing for a federal common law of testimonial privileges in civil cases, but requiring reference to state privilege law "with respect to an element of a claim or defense as to which State law supplies the rule of decision."¹⁸⁴

The objection to the idea of a uniform set of privilege rules for the federal courts seems more political than legal (which is not to imply that it is inappropriate). Professor Ely described it as "a feeling that by refusing to recognize in diversity cases the privileges provided by local law, the federal government was making law that should be made by the states."¹⁸⁵ There is considerable agreement, nonetheless, that whatever the desirability of the existing provision, *Erie* does not mandate observance of state privilege rules.¹⁸⁶

The great reduction in the number of state law issues in federal courts that would follow from abolishing diversity would significantly affect the political equation that led to the present rule, making it feasible to reconsider the idea of a uniform set of federal privilege rules. The objections to the idea of uniformity that helped cause rejection of the 1972 proposal would have considerably less weight simply because the occasions for application of state rules would become much less frequent.¹⁸⁷

D. The Proper Uses of Citizenship-Based Federal Jurisdiction

Even the most vigorous advocates of abolishing the general diversity jurisdiction seem to agree on the retention of statutory

184 (1972) (Order of Nov. 20, 1972) [hereinafter cited as Proposed Evidence Rules].

¹⁸² See *id.* at 230-61.

¹⁸³ See Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 693-94 (1974). There was also considerable opposition to the substance of the privilege proposals. See *id.*

¹⁸⁴ FED. R. EVID. 501.

¹⁸⁵ Ely, *supra* note 183, at 694.

¹⁸⁶ See, e.g., 10 J. MOORE, *supra* note 15, § 501.05. For the Advisory Committee's argument to the same effect, see Proposed Evidence Rules, *supra* note 181, 56 F.R.D. at 232-33.

¹⁸⁷ If the present rule were retained, abolition would not make it unworkable; it could continue to operate just as it does now, but with the federal courts applying federal evidence law most of the time (thus increasing the degree of uniformity), while applying state rules in the reduced number of cases in which they would govern.

interpleader,¹⁸⁸ for which scattered sections of the Judicial Code¹⁸⁹ provide subject-matter jurisdiction, venue, and nationwide service of process in cases involving minimally diverse defendants and a stake of \$500 or more. Underlying this consensus is acceptance of the need to make sure a forum is available to resolve disputes among scattered claimants to a common fund or asset, a situation that threatens to leave a stakeholder liable on more than one mutually exclusive claim if he cannot join all the claimants.¹⁹⁰ Since it is sometimes possible that no state court could enable him to do so,¹⁹¹ only the federal system can always provide a forum. Similarly, there seems to be no inclination to eliminate federal alienage jurisdiction;¹⁹² like statutory interpleader, it rests at least in part on a rationale — possible effect on American foreign relations — that is independent of the concern for prejudice against outsiders commonly used to explain general diversity.

Statutory interpleader and alienage are widely accepted as entirely appropriate uses of the federal courts' article III judicial power over "Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Another such use is the recently revised federal jurisdiction over cases involving a foreign state as plaintiff¹⁹³ or defendant.¹⁹⁴ Of course, many believe that general diversity is itself a desirable use of Congress' authority to create citizenship-based federal jurisdiction. Whatever the merits of that position, general diversity and the *Strawbridge* rule have impeded focus on precisely what uses there should be of citizenship-based federal jurisdiction. An incidental but

¹⁸⁸ See, e.g., H. FRIENDLY, *supra* note 3, at 150.

¹⁸⁹ 28 U.S.C. §§ 1335, 1397, 2361 (1976).

¹⁹⁰ See *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916).

¹⁹¹ Since the *Dunlevy* case, *id.*, and the subsequent enactment of the federal interpleader provisions, there have come state long arm statutes making it more often possible for state courts to reach distant claimants, plus developments in the constitutional law of personal jurisdiction recognizing the significance for the scope of personal jurisdiction of difficulty in finding a forum, see, e.g., *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 906 & n.10, 458 P.2d 57, 67 & n.10, 80 Cal. Rptr. 113, 123 & n.10 (1969). See generally 3A J. MOORE, *supra* note 15, ¶ 22.04[2.-2], at 22-28 to -32. These developments suggest that federal statutory interpleader may no longer be so sorely needed, but as long as some states have restrictive long arm provisions, see note 171 *supra*, the *Dunlevy* problem could readily recur and the need for the federal provision seems clear.

¹⁹² See, e.g., H.R. 9622, 95th Cong., 2d Sess. § 1(b) (1978), *Senate Hearings, supra* note 1, at 10 (abolishing general diversity but retaining alienage subsections); H. FRIENDLY, *supra* note 3, at 149-50.

¹⁹³ 28 U.S.C. § 1332(a)(4) (1976).

¹⁹⁴ *Id.* § 1330(a).

significant effect of abolition would be to facilitate consideration of appropriate limited uses and their proper characteristics.¹⁹⁵

A first illustration of general diversity's effect in impeding inquiry into these questions is the extension to alienage cases of the complete diversity rule, discussed in Part I of this Article. In the case of interpleader, Congress seems to have perceived that the rule would be at odds with the purpose of the device¹⁹⁶ and wrote in a minimal diversity requirement instead.¹⁹⁷ Yet in the shadow of the general diversity jurisdiction and the *Strawbridge* rule, to my knowledge no court has ever noted that the complete diversity requirement runs quite as contrary to the foreign relations concern underlying the alienage jurisdiction¹⁹⁸ as it would to the danger of forum unavailability that justifies federal statutory interpleader.

The American Law Institute's proposal for a "dispersed necessary parties" jurisdiction also illustrates the difficulties that diversity jurisdiction produces in this area. At present, American courts provide neither a general procedural device nor a guaranteed forum offering resolution in one litigation of all related matters arising out of multiparty, multistate disputes.¹⁹⁹ Apparently in partial response to that problem, the ALI's *Study of the Division of Jurisdiction Between State and Federal Courts* proposed special federal jurisdiction for cases involving at least minimal diversity and necessary parties not all amenable to process

¹⁹⁵ Abolition of general diversity would make removal to federal court unavailable to out-of-state defendants sued on state claims in state courts, since removal is usually available only in cases that would have been within original federal jurisdiction. See *id.* § 1441(a). Given removal's general unavailability, one idea for limited citizenship-based jurisdiction would be to permit removal on some showing of local bias. See, e.g., Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A.J. 443, 444 n.4 (1976). However, such a mechanism would probably result in so much purely procedural litigation as to swamp any benefits it would produce. See Comment, *Diversity Removal Where the Federal Court Would Not Have Original Jurisdiction: A Suggested Reform*, 114 U. PA. L. REV. 709, 711-12 (1966).

¹⁹⁶ Complete diversity in interpleader would presumably require that the stakeholder-plaintiff not be a citizen of the same state as any claimant-defendant. Yet shared citizenship with one or more (but less than all) claimants makes the stakeholder no more able to bring the *others* into a single state court than if he shared citizenship with none, thus leaving him exposed to multiple liability if excluded from federal court.

¹⁹⁷ 28 U.S.C. § 1335(a)(1) (1976). The Supreme Court has upheld the constitutionality of basing federal jurisdiction on minimal diversity. See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

¹⁹⁸ See p. 968 *supra*.

¹⁹⁹ See generally McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707 (1976); see also *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 535 (1967) ("our view of interpleader means that it cannot be used to solve all the vexing problems of multiparty litigation arising out of a mass tort").

in one state.²⁰⁰ As Professor David Currie pointed out,²⁰¹ the problems created by *Strawbridge* provided the main impetus for the proposal: without the complete diversity rule, a case that came within the ALI's definition (and satisfied amount in controversy requirements) would come within the general diversity jurisdiction. Professor Currie questioned the need for the provisions, noting that the ALI had given "not one example . . . of a case requiring this treatment."²⁰²

It is not hard, though, to give examples of cases that could benefit from the availability of some action-consolidating device — situations such as mass torts involving plaintiffs from many states. There have been some efforts in that direction, employing devices such as class actions,²⁰³ transfer of venue,²⁰⁴ consolidated pretrial proceedings,²⁰⁵ and preclusion rules.²⁰⁶ But it remains possible for such judicial circuses to go to trial in several rings and for there to be inconsistent outcomes. The ALI's proposal shows how diversity jurisdiction and the *Strawbridge* rule can send efforts in this field into obscure corners. After abolition, at least, discussion could proceed free from the possible distractions of the complete diversity rule and the dangers of creating circumventions of it, focusing instead on the types of situations in which the federal courts could usefully provide a forum for multi-state disputes and on the sorts of procedural devices that would be appropriate.²⁰⁷

²⁰⁰ See ALI STUDY, *supra* note 14, at 67-76, 375-410 (proposed 28 U.S.C. §§ 2371-2376).

²⁰¹ See Currie, *supra* note 4, at 32 n.150, 34.

²⁰² *Id.* at 29.

²⁰³ See FED. R. CIV. P. 23. Though class actions are not out of the question in mass tort litigation, "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Advisory Committee Notes on 1966 Amendment to Rules, *reprinted in* 28 U.S.C. app., at 429 (1976). See generally 3B J. MOORE, *supra* note 15, ¶ 23.02[2.-18].

²⁰⁴ See 28 U.S.C. § 1404(a) (1976).

²⁰⁵ See *id.* § 1407.

²⁰⁶ See RESTATEMENT (SECOND) OF JUDGMENTS § 88(3) (Tent. Draft No. 3, 1976) (factor influencing decisions on issue preclusion from previous litigation with others can be whether "[t]he person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary"); McCoid, *supra* note 199, at 709-10, 714-24.

²⁰⁷ Confinement of the availability of the federal forum to litigation for which it seems especially appropriate — mainly, federal question cases and the limited citizenship-based jurisdictions discussed in this Section — could have side effects on the desirability of a general provision for nationwide service of process. If the jurisdiction of the federal courts were based on deliberate decisions about what kinds of cases it is especially desirable that they be available for, it would make

V. CONCLUSION

Even if courts, legislators, and rulemakers took little advantage of the opportunities offered by abolition for further change and development, the considerable simplification in federal practice resulting from abolition would be an important benefit of the measure, rendering mostly superfluous the "enormous infrastructure that has grown up to support and to define the diversity jurisdiction."²⁰⁸ Many complex problems that are largely products of the diversity jurisdiction would virtually disappear. Beyond these benefits, abolition would facilitate several decisional developments and statutory and rule reforms that are now difficult or impossible because of problems that flow from diversity jurisdiction. Taking full advantage of these opportunities would lead to a federal judicial system different in important respects from the present one, but with characteristics that would be attractive to many — a system with authority to serve process nationwide and across national boundaries to the limits permitted by the Constitution, having uniform ancillary jurisdiction to dispose of matters not within its original competence but closely enough related to claims properly before it, and devoted primarily to the articulation and enforcement of our national law.

I do not offer the arguments presented here as dispositive ones that should clinch a case for abolition beyond possibility of reply. The reasons that others have urged for retaining diversity — continuing reality of some local prejudice, quality of federal court justice, broadening of federal judges' experience, and so on — are not directly refuted by the points explored in this Article. But this examination of abolition's effects, and of the opportunities it would create, yields an additional set of reasons for eliminating the general diversity jurisdiction.²⁰⁹ Especially if further re-

all the more sense to have the broadest possible process in order to make sure they were indeed available. *See also* pp. 1004-06 *supra*.

²⁰⁸ Currie, *supra* note 4, at 49.

²⁰⁹ These benefits, moreover, would not result from measures short of abolition, such as the no-home-state-plaintiff approach urged by the ALI, *see* ALI STUDY, *supra* note 14, at 12 (proposed 28 U.S.C. § 1302(a)) ("No person can invoke [general diversity] jurisdiction . . . in any district in a State of which he is a citizen"), and the Department of Justice, *see* H.R. 9123, 95th Cong., 1st Sess. § 1 (1977), *Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 25 (1977) ("No person can invoke the [general diversity] jurisdiction . . . as a plaintiff in any district in a State of which he is a citizen."). That proposal would effect some reduction in the diversity caseload, but it would leave us with all the problems of complete diversity that trammel federal litigation and impede reforms. It might even add to the present burden of purely procedural litigation as parties maneu-

forms accompany or follow it, but even if they do not, abolition of diversity jurisdiction would probably constitute one of the greater steps since the adoption of the Federal Rules of Civil Procedure toward the goal rule 1 sets for civil litigation in the federal courts — “the just, speedy, and inexpensive determination of every action.”

vered and countermaneuvered in efforts to evade or take advantage of a new limit on the still-available diversity jurisdiction. *See* Currie, *supra* note 4, at 45-46. Since its 1977 endorsement of the no-home-state-plaintiff approach, the Administration has changed its position and now supports the outright abolition of diversity jurisdiction. *See* President's Message to Congress on Proposed Legislation to Reform the Federal Civil Justice System, 15 WEEKLY COMP. OF PRES. DOC. 342, 343-44 (Feb. 27, 1979).