KROGER REDUX

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INTRODUCTION

I applaud Professor Hartnett for raising an important point concerning the application and effect of the American Law Institute's (ALI) proposed revision of 28 U.S.C. § 1367.[1] His point is one that I did not consider in my commentary accompanying that draft statute, and I am grateful for the opportunity now to respond. It is both the goal and the virtue of the ALI's approach to law reform that its proposals invite critical review even after the Institute has completed its work. The Institute's recommendations are just that: specific, concrete proposals laid on the table, as it were, for potential legislative enactment or judicial adoption. They neither claim nor deserve immunity from continuing inspection. The fact that the ALI's proposals lack any self-executing legal effect assures an interval for reconsideration after the Institute has completed formal action, free of the inertia that attaches to a statute or precedent once written into law. If they can be improved by criticism and responsive proposals advanced before enactment or adoption, so much the better.

Professor Hartnett's concern is a substantial one. To fully appreciate its substance requires elaboration of just what "the *Kroger* rule" is. Professor Hartnett notes that both the present § 1367 and the ALI's proposed substitute "are designed to embody the *Kroger* rule's denial of supplemental jurisdiction over claims by plaintiffs against third-party defendants impleaded by defendants"[2]—that is, impleaded by what might be called the "original defendant" against whom the

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† Professor of Law, University of California at Davis; Reporter for the American Law Institute's Federal Judicial Code Revision Project. I would like to express my thanks to Professor Hartnett, not only for his careful review of the Institute's proposed revision of § 1367, but also for his collaboration in presenting an exchange that is both instructive and constructive.

1. Edward A. Hartnett, *Would the* Kroger *Rule Survive the ALI's Proposed Revision of § 1367?*, 51 DUKE L.J. 647 (2001).

2. *Id.* at 651.

plaintiff filed the complaint commencing a civil action (based solely on diversity jurisdiction) in a federal district court. Professor Hartnett goes on to state that the "[t]he current § 1367 achieves this goal rather straightforwardly. It denies supplemental jurisdiction in diversity cases over claims by plaintiffs against persons made parties pursuant to Rule 14. Although the current § 1367 has its problems, failure to maintain the *Kroger* rule is not one of them."[3]

I disagree. I think the current § 1367's method of codifying the *Kroger* rule, by flatly forbidding the exercise of supplemental jurisdiction in a diversity case over any claim by a plaintiff against a party joined under Rule 14,[4] is indeed problematic. It codifies a broader conception of the *Kroger* rule than either the facts or the reasoning of *Kroger* support;[5] the ALI's proposed statute was intended to cure this overinclusiveness. I do agree, however, that Professor Hartnett has discovered a significant problem with the ALI's alternative approach. The proposed text of the ALI's statute would codify an even narrower conception of the *Kroger* rule than the ALI intended. The underinclusiveness of the ALI's alternative approach to codifying the *Kroger* rule needs to be either fixed or justified.

In Part I, I discuss the problem with the current § 1367's codification of the *Kroger* rule and the ALI's attempted rectification of that problem. In Part II, I set forth three possible responses: retaining the current § 1367 (an option I reject out of hand), remedying the problem with the ALI's statute, or rehabilitating the ALI's statute by rethinking the *Kroger* rule. In Part III, I discuss the remedial alternative, offering curative language that, if added to the ALI's statute, would make its reach match the ALI's aim. In Part IV, I take up the rehabilitative alternative. I reconsider whether even the modest conception of the *Kroger* rule that the ALI sought to codify is indeed worth preserving. I conclude that it is not and that the only conception of the *Kroger* rule worth codifying is the minimal conception that is limited to *Kroger*'s facts, which in fact is codified by the ALI's proposed § 1367.

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3. *Id.* (footnote omitted).

4. FED. R. CIV. P. 14(a).

5. Indeed, it codifies a broader conception of the *Kroger* rule than that stated by Professor Hartnett. According to his just-quoted formulation, the *Kroger* rule denies "supplemental jurisdiction over claims by plaintiffs against third-party defendants *impleaded by defendants*." Hartnett, *supra* note 1, at 651. As discussed in Part I of this Essay, one of the problems of the current § 1367 is that, absent a strained construction, it forbids supplemental jurisdiction even of claims by plaintiffs against third-party defendants *impleaded by plaintiffs*.

I. WHICH *KROGER* RULE?

The current § 1367 codifies what might be called the robust conception of the *Kroger* rule. In the unqualified way that distinguishes the prospective effect of a statute from that of a precedent, it mandates a negative answer to the broadly phrased question with which the *Kroger* Court began its opinion: "In an action in which federal jurisdiction is based on diversity of citizenship, may the plaintiff assert a claim against a third-party defendant when there is no independent basis for federal jurisdiction over that claim?"[6] But this robust conception of the *Kroger* rule is almost certainly not the proper conception, if the aim is fidelity to the facts and reasoning of *Kroger*.

This is evident when one considers the factual situations that the *Kroger* Court did not address. *Kroger* did not involve a plaintiff whose claim against an already impleaded third-party defendant was asserted in reaction to that third-party defendant's prior assertion of a claim directly against the plaintiff under Rule 14(a)[6].[7] Once the plaintiff is placed in a defensive posture by the assertion of the third-party defendant's claim against the plaintiff, the plaintiff has an obligation under Rule 13(a) to assert against the third-party defendant (now an "opposing party" within the terms of Rule 13(a)) any claim the plaintiff has that arises from the same transaction or occurrence as the third-party defendant's claim against the plaintiff.[8] *Kroger* had no occasion to address whether its bar on supplemental jurisdiction over claims by plaintiffs against impleaded third-party defendants applied even when the plaintiff's claim is a compulsory counterclaim under Rule 13(a).

Nor did *Kroger* involve a plaintiff against whom had been asserted a claim alleging some liability with respect to which the plaintiff might have a right of indemnity or contribution. This might be a claim asserted against the plaintiff by a third-party defendant under

6. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 367 (1978).

7. Rule 14(a) consists of ten unenumerated sentences that differ considerably in their operative significance. FED. R. CIV. P. 14(a). For convenience I refer to these individual sentences by bracketed number based on their location within the sequence of Rule 14(a) overall. Thus I refer to the sixth sentence of Rule 14(a) as "Rule 14(a)[6]." Rule 14(a)[6] authorizes the assertion of a claim by the third-party defendant against the plaintiff, provided that the claim arises out of "the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff." The "third-party plaintiff" is the original defendant, who now wears two hats in the litigation after invoking Rule 14(a)[1] to implead the third-party defendant by the filing and service of a third-party complaint.

8. FED. R. CIV. P. 13(a).

Rule 14(a)[6], as just described, or it might be a claim asserted by the original defendant as a compulsory or permissive counterclaim under Rule 13(a) or Rule 13(b), or it might even be a cross-claim asserted against the plaintiff by a coplaintiff, generally (but not necessarily) as a reaction to some claim having first been asserted under Rule 13 or Rule 14 against the coplaintiff, prompting the coplaintiff to cross-claim for indemnity or contribution. As a procedural matter it is clear that a plaintiff thus placed in a defensive posture has the right to implead new parties as third-party defendants who may be liable to indemnify the plaintiff for the liability asserted against the plaintiff.[9] *Kroger* had no occasion to address whether its bar on supplemental jurisdiction over claims by plaintiffs against impleaded third-party defendants applied even when the plaintiff was asserting claims not against *existing* third-party defendants but rather against *new* third-party defendants that the plaintiff itself, as a "defending party," was seeking to implead into the action.

Because *Kroger* placed particular emphasis on the circumstance that there was "factual similarity" but no "logical dependence" between the claim asserted by the plaintiff against the third-party defendant and the only other claim asserted[10] (that between the plaintiff and original defendant), there is good reason to conclude that the *Kroger* rule was not intended to foreclose ancillary jurisdiction over such "logically dependent" claims as a plaintiff's compulsory counterclaim against a third-party defendant, or a plaintiff's claim for indemnity or contribution from a third-party defendant that the plaintiff itself sought to implead. Thus an appropriately modest conception of the *Kroger* rule is tied to and limited by the facts of *Kroger*. Such a modest conception does not foreclose the exercise of supplemental jurisdiction over claims in diversity cases by plaintiffs against third-party defendants, when those claims are asserted as compulsory counterclaims or new third-party claims by plaintiffs who have been placed in a defensive posture.[11] The ALI's proposed statute's use of much

9. Rule 14(b) expressly authorizes the plaintiff to implead third-party defendants in response to a counterclaim, and Rule 14(a)[1] by its terms applies generically to allow impleader of a third-party defendant by a "defending party." FED. R. CIV. P. 14(a), 14(b).

10. 437 U.S. at 376 (noting that the respondent's claim against the petitioner is entirely separate from and not dependent on resolution of the primary lawsuit).

11. *See* AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2, at 17 (1998) [hereinafter ALI T.D. NO. 2] (lamenting the application of § 1367(b) to frustrate plaintiffs who are in a defensive position to implead third parties or assert compulsory counterclaims against third-party defendants); *id.* at 27–28 (noting that legal commentators

different language than the current § 1367 to restrict the scope of supplemental jurisdiction in diversity cases was intended, inter alia,[12] to codify this modest conception of the *Kroger* rule, rather than the robust conception codified by the current statute.

Professor Hartnett points out that although the ALI's statute purports to preserve the *Kroger* rule, and indeed would generate the *Kroger* Court's result when applied to the precise facts of that case, this depends on an idiosyncrasy of the *Kroger* facts.[13] His point is a substantial one, because it holds even under the modest conception of the *Kroger* rule just elaborated.

The impleaded third-party defendant against whom the plaintiff asserted a claim of direct liability happened in *Kroger* to be a cocitizen of *both* the plaintiff and the original defendant who impleaded the third-party defendant.[14] In the mine run of cases involving claims by plaintiffs against impleaded third-party defendants, it is far more likely that the third-party defendant will be a cocitizen of *either* the original plaintiff or the original defendant than that it will be a cocitizen of both. If the impleaded party is a cocitizen of the original defendant but not of the original plaintiff, there is no *Kroger* problem. The same diversity that permitted the plaintiff to sue the original defendant in federal court also will support the plaintiff's added claim against the third-party defendant.[15] But if the impleaded party is a cocitizen of the original plaintiff, then what the *Kroger* rule (even when

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and some district courts have declined to construe § 1367(b) as barring supplemental jurisdiction of reactive claims by plaintiffs as counterclaimants or third-party claimants).

12. *See infra* Parts II and III (discussing the ALI's additional motivation to change the language of the current § 1367 to better cohere with and exemplify the claim-specific nature of federal jurisdiction).

13. Hartnett, *supra* note 1, at 653–54.

14. 437 U.S. at 369 (noting that Owen was both incorporated in Nebraska, where the original defendant was located, and had its principal place of business in Iowa, home to the respondent).

15. The plaintiff's claim against the third-party defendant might depend upon the availability of supplemental jurisdiction for a reason other than a lack of diversity, if the amount of the claim against the third-party defendant is for less than the jurisdictional amount required by 28 U.S.C. § 1332(a) (1994), which is presently an amount in excess of $75,000. Under the current statute, 28 U.S.C. § 1367(b) (1994), this supplemental jurisdiction would be unavailable. Under the ALI's proposed statute, § 1367(c)(2), supplemental jurisdiction would be permitted, *pro tanto* overruling the rule against aggregation of the amount in controversy established by *Zahn v. International Paper Co*., 414 U.S. 291 (1973). *See* ALI T.D. NO. 2, *supra* note 11, at 67–68 (discussing the rationale for extending supplemental jurisdiction to related claims against additional defendant and plaintiff parties). Professor Hartnett notes this point, Hartnett, *supra* note 1, at 649 n.10, but does not question this feature of the ALI's revision of § 1367. He is concerned about the fate of *Kroger*, but (at least for present purposes) not the fate of *Zahn.*

modestly conceived) forbids—the exercise of supplemental jurisdiction to adjudicate the claim by the original plaintiff against the nondiverse third-party defendant—the ALI's proposed revision of § 1367 would permit.

This follows from the way in which the ALI statute would codify the *Kroger* rule. It bars supplemental jurisdiction in diversity litigation only when the sole basis for supplemental jurisdiction is a jurisdictionally self-sufficient or "freestanding" claim that is "asserted in the same pleading" as the jurisdictionally insufficient claim that requires supplemental jurisdiction. If that jurisdictionally insufficient claim is related (in the constitutional sense that both claims are part of the same "case or controversy," broadly conceived) to a freestanding claim asserted in the pleading of some other party, supplemental jurisdiction is permitted—subject to the discretion of the district court to decline to exercise its supplemental jurisdiction according to the standards of § 1367(d) of the ALI's proposed statute. If the plaintiff and the third-party defendant are citizens of State A and only State A, and the original defendant is a citizen of State B and only State B, then the defendant's claim as third-party plaintiff impleading the third-party defendant (assuming it satisfied the diversity statute's amount-in-controversy requirement) is itself a freestanding claim. It is within the district court's diversity jurisdiction under § 1332, not its supplemental jurisdiction under § 1367, and indeed could be litigated in the federal courts as a separately filed lawsuit. Except in the highly unusual circumstance in which the plaintiff's claim against the third-party defendant is unrelated to the plaintiff's claim against the original defendant (and hence to the original defendant's indemnity claim impleading the third-party defendant), the plaintiff's claim against the third-party defendant will qualify for supplemental jurisdiction under the ALI's statute based on the relationship between that claim and the original defendant's freestanding claim as third-party plaintiff against a fully diverse third-party defendant.[16] Elsewhere I was more cautious and more accurate. "As ap-

16. My commentary accompanying the ALI statute failed to address this point, notwithstanding my anticipation of just the scenario that Professor Hartnett has identified as problematic. In Comment a-9, I hypothesized "the prototypical situation, where P of State A files in federal district court a complaint in which P joins two state-law claims arising out of the same transaction or occurrence, one against D1 of State B and one against D2 of State A," and specified that each claim was for more than the diversity statute's jurisdictional amount. ALI T.D. NO. 2, *supra* note 11, at 45–46. I pointed out that the ALI's statute withdrew supplemental jurisdiction over P's claim against cocitizen D2, whether the claim was asserted originally or by an

plied to the *actual* joinder of claims that occurred in the *Kroger* case, [ALI § 1367(c)] produces the same result as that reached under decisional law by the Supreme Court, and as would be produced by application of present § 1367(b)."[17]

> [U]nlike current law, T.D. No. 2 preserves *Kroger*'s *precise* application of the rule of complete diversity without restricting supplemental jurisdiction of claims asserted by plaintiffs who have been placed in a defensive posture. Under T.D. No. 2 such a plaintiff may invoke supplemental jurisdiction to implead third-party defendants in its own right, and to assert a compulsory counterclaim against a third-party defendant who has chosen to assert a claim directly against the plaintiff.[18]

These qualifications, I hasten to add, were not intended to disguise or conceal the tension between the ALI's statute and *Kroger* that Professor Hartnett has discovered and that I overlooked. They adverted only to the compatibility with *Kroger*'s "actual" facts, and with a "precise" application of the *Kroger* rule, of a modest rather than robust conception of that rule, understood as one that does not fore-

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amendment of the complaint after P had first filed suit against D1 alone. *Id.* at 46. Next I "suppose[d] that in response to P's original complaint against D1 alone, D1 impleads D2 as a third-party defendant under Rule 14(a) of the Federal Rules of Civil Procedure." *Id.* But then I nodded.

I declared that "D1's third-party claim against D2 is a supplemental claim," *id.*, but as Professor Hartnett correctly points out, it is not. D1's claim against D2 is a freestanding claim, given the previous assumption that D1 is a citizen of State A and D2 is a citizen of State B, absent some unmentioned caveat that D1's third-party claim against D2 was for less than the jurisdictional amount required by the diversity statute. Thus I erred in concluding that a claim later asserted by P1 directly against its cocitizen D2 "would have to be dismissed for lack of supplemental jurisdiction" on account of the combined effect of the ALI's § 1367(a)(3) and § 1367(c). *Id.* at 47. These provisions would not bar supplemental jurisdiction over P's claim against D2 if D2 has first been impleaded by D1, because the third-party claim by D1 against D2 is a freestanding claim (given their diversity of citizenship and assuming the requisite amount is in controversy). P's original freestanding claim against D1 is no longer the only freestanding claim in the litigation. P's subsequent claim against D2 is a supplemental claim because it is part of the same "case or controversy" as D1's freestanding claim against D2, and not only because it is (also) part of the same case or controversy as P's original claim against D1. As such, the ALI statute permits (but does not require) supplemental jurisdiction to be exercised over P's added claim against the impleaded D2. This makes misleading my conclusion that the ALI statute "protects the rule of complete diversity from such an 'end run.'" *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); ALI T.D. NO. 2, *supra* note 11, at 47. On the hypothesized facts of Comment a-9 of ALI T.D. No. 2, the statute's protection against such an "end run" requires the informed exercise of the judicial discretion to decline supplemental jurisdiction that is conferred by the ALI's § 1367(d).

17. ALI T.D. NO. 2, *supra* note 11, at 63 (emphasis added).

18. *Id.* at xxii (emphasis added).

close supplemental jurisdiction over claims asserted by plaintiffs who have been placed in a defensive posture.

II. NOW WHAT?

Professor Hartnett draws a parallel between the "potential to produce troubling unintended consequences" that he finds in the ALI's proposed statute and the problems of construction that have arisen under the present § 1367.[19] He concludes that "drafting a supplemental jurisdiction statute remains treacherous,"[20] an observation I heartily endorse,[21] but he does not take a position on what should be done next. There are two obvious alternatives. The first is to abandon the ALI proposal, on the theory that continuing to bail and patch the current statute is better than depending on the ALI's craft to provide a safer passage across treacherous waters. The second is to redraft the ALI statute to avoid the conflict with *Kroger* identified by Professor Hartnett, if that can be done in a way that leaves the rest of the proposed new statute intact and seaworthy. But there is also a third alternative, which is to reconsider just how much of *Kroger* is worth preserving. This third alternative leads to the conclusion that the ALI's proposed statute is best left unchanged.

I think the problems with the current statute are sufficiently pervasive, and sufficiently rooted in problems of structure rather than detail, that the first alternative should be rejected out of hand. It would unduly prolong this Essay to restate here the extensive discussion of these problems that I wrote as an introduction to the draft proposing the ALI's new § 1367[22] and have elaborated elsewhere.[23]

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19. Hartnett, *supra* note 1, at 649.

20. *Id.* at 657.

21. Construing a supplemental jurisdiction statute—or at least the current one—is also proving treacherous. *See* John B. Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes*, 69 TENN. L. REV. (forthcoming 2001) (criticizing current law's regulation of supplemental jurisdiction in diversity cases by reference to specifically enumerated joinder rules of the Federal Rules of Civil Procedure, and discussing frequent misunderstanding of current law in recent decisions of the federal courts of appeals).

22. *See* ALI T.D. NO. 2, *supra* note 11, at xv–xxv (giving an overview of the Tentative Draft); *id*. at 11–20 (providing the general background to proposals to change § 1367); *id.* at 20–30 (compiling the literature and cases on the supplemental jurisdiction doctrine as well as summarizing the technical and conceptual problems).

23. *See* John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 TEX. L. REV. 1829, 1831–32 (1998) [hereinafter Oakley, *Federal Jurisdiction*] (describing the claim-specific nature of federal jurisdiction); John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report*

The ALI's statute seeks not only to improve upon the current § 1367 in a number of specific respects, but also to improve the understanding of federal jurisdiction in general. It seeks to rectify a conceptual incoherence in the structure of federal jurisdiction by articulating and exemplifying the fundamental proposition that federal jurisdiction is "claim-specific" rather than "action-specific."[24] It also would squarely confront and resolve the most acute of the technical problems that have arisen under the current statute.[25]

I therefore much prefer the second alternative to the first. The fundamental difference between the current § 1367 and the ALI's § 1367 is that the latter restricts supplemental jurisdiction in diversity cases by referring to types of claims rather than types of joinder. Part III returns to the conceptual ambitions of the ALI's proposed statute in order to justify the importance of this "claim-specific" approach. It then proposes new language that if added to the ALI's statute would alleviate Professor Hartnett's concerns without impairing the conceptual ambition and technical operation of the rest of the statute.

Part IV summarizes an argument I have not previously published, but that I now believe needs to made. Unfortunately a full dissection and detailed examination of the *Kroger* case is beyond the scope of this Essay. Here I merely propose that a fresh look at the *Kroger* rule reveals that it rests on two propositions, one fundamental and one derivative, and that in current conditions a statutory grant of supplemental jurisdiction should cement into law only the fundamental proposition. This leads me to conclude that the ALI statute is best left as is. The concerns that led to *Kroger*'s derivative principle do not justify perpetuating the *Kroger* rule except according to the most nar-

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on the Work of the American Law Institute, 74 IND. L.J. 25, 35–41 (1998) [hereinafter Oakley, *Integrating Supplemental Jurisdiction*] (explaining the ALI's proposed revision of § 1367); John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 936–45 (1998) [hereinafter Oakley, *Prospectus*] (analyzing issues meriting reform in § 1367).

24. The distinction between a "claim-specific" and an "action-specific" model of federal jurisdiction is elaborated in Part III.

25. Professor Hartnett adverts to an expanding circuit split over the proper construction of the current § 1367 as applied to the joinder to diversity litigation of "represented members of a class action." Hartnett, *supra* note 1, at 648. Actually the relevant cases go beyond the class-action context and divide as to the jurisdictional status of additional plaintiffs joined individually under Rule 20 as well as collectively under Rule 23. Oakley, *Prospectus*, *supra* note 23, at 942. The ALI's proposed § 1367(c)(1)–(2) would expressly authorize supplemental jurisdiction in diversity cases over claims by or against unnamed class members and over claims by or against additional individual plaintiffs or defendants to cure a lack of a sufficient amount in controversy, but not to cure a lack of diversity of citizenship. ALI T.D. NO. 2, *supra* note 11, at 65–70.

row permissible conception of that rule, which limits its applicability to the facts of the *Kroger* case.

III. CAN THE ALI'S STATUTE BE FIXED WITHOUT ALTERING ITS STRUCTURE?

Two strategic choices determined the structure of the ALI's statute: first, to make the statute expressly claim-based rather than action-based and second, to preserve the full advantages of the present § 1367. Early in the evolution of the ALI's Federal Judicial Code Revision Project, the ALI had to decide whether the thrust of the project should be direct revision of the various statutes that in confused and incoherent terms grant original jurisdiction to the district courts at the level of the action rather than the claim. This approach was rejected as even more treacherous than reform of the supplemental jurisdiction statute. Both the general and the more specialized jurisdictional statutes refer, often redundantly, to various constellations of parties, issues, interests, and governing law that in virtue of their federal character bring cases within the original jurisdiction of the district courts.[26] A subtle and complex set of secondary meanings now govern these statutes' application, and any attempt at comprehensive recodification of the district courts' original jurisdiction would proceed at great risk of creating unintended consequences. The ALI instead decided to improve understanding of the statutes more conservatively, without amending them or affecting their essential scope, by using a new supplemental jurisdiction statute to clarify the procedural connection between civil disputes and their eligibility for adjudication by a federal district court. The ALI's proposed new § 1367 seeks to foster such a reconceptualization by treating the "claim" rather than the "civil action" as the fundamental unit of civil litigation.[27]

A "claim" is understood to be an assertion by one claiming party of a right to some form of judicial relief as to one defending party. In this jurisdictional sense, a "claim" is defined in terms both of a particular pair of parties and of a particular legal theory of the right to

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26. As the ALI noted,

> Sections 1331 and 1332 refer to "civil actions," as do most other sections of Chapter 85 of Title 28, where most statutes conferring original jurisdiction on the courts are located. Sections 1333(1) and 1334 of Title 28 refer to jurisdiction of "cases." Some provisions refer alternatively (e.g. § 1337) or exclusively (§ 1358) to jurisdiction of "proceedings" or "suits and proceedings" (§ 1333(2), § 1345).

ALI T.D. NO. 2, *supra* note 11, at 29–30.

27. Oakley, *Integrating Supplemental Jurisdiction*, *supra* note 23, at 26.

relief. A "civil action" is understood to be a judicial proceeding for relief of a civil nature, commenced by the pleading of one or more claims, and to which other claims may be joined in the conduct of the litigation. A "civil action," thus conceived, is simply a generic, transsubstantive means or "form of action" for seeking judicial relief of a civil nature. The intrinsic scope of a "claim" is limited by the bipolar nature of the claim and the particular legal theory upon which it is based. There is no intrinsic scope of a "civil action," which is contingent on the decisions of the parties, shaped and limited by the rules of pleading, joinder, jurisdiction, and preclusion, as to which claims are submitted simultaneously for enforcement at one time by one judge (or panel of judges, in the rare instance where jurisdiction is vested in a three-judge district court). For purposes of federal jurisdiction, however, the scope of the claims that may be adjudicated in a single "civil action" is limited by the intrinsic scope of the constitutional concept of a "case or controversy,"[28] which permits federal judicial power to be exercised not only over designated categories of claims but also, and only, over such other claims as may be transactionally related to and joined in a single civil action with claims that qualify categorically for federal jurisdiction.[29]

The structure of the ALI's statute also was influenced by a second strategic choice. There was much to recommend the old law of pendent and ancillary jurisdiction as it operated before *Finley v. United States*[30] called into question the legitimacy of that whole framework of nonstatutory jurisdictional doctrine.[31] Since *Finley* did

28. U.S. CONST. art. III, § 2.

29. Oakley, *Federal Jurisdiction*, *supra* note 23, at 1858 (rethinking jurisdictional terminology within a claim-specific model of federal jurisdiction).

30. 490 U.S. 545 (1989).

31. The Federal Courts Study Committee discussed pendent and ancillary jurisdiction as follows:

> The terms "pendent" and "ancillary" jurisdiction refer to the authority of federal courts to hear and determine, without an independent basis of federal jurisdiction, claims related to matters properly before them. These supplemental forms of jurisdiction, which may be exercised in the discretion of the federal courts, enable them to take full advantage of the rules on claim and party joinder to deal economically—in single rather than multiple litigation—with matters arising from the same transaction or occurrence. Pendent and ancillary jurisdiction may be used with respect either to additional claims between parties already before the courts (as with compulsory counterclaims) or to claims bringing in new parties (as with impleader of a third-party defendant).
>
> Recent decisions of the Supreme Court raise doubts about the scope of pendent and ancillary jurisdiction under existing federal statutes. As a result, a litigant with related claims against two different parties—one within and one outside original federal jurisdiction—may have to choose between (1) splitting the claims and bringing

not seriously question the constitutionality of this framework, but only the lack of express legislative authorization,[32] one approach seriously considered in the drafting of a new supplemental jurisdiction statute was to reduce rather than to expand the detail of present § 1367. Such a statute would be a paradigm of simplicity, since it need only consist of an express legislative delegation of discretionary power authorizing the federal courts to shape and apply doctrines of supplemental jurisdiction as they see fit. This approach was rejected, however, out of concern that the trend of judicial thinking, at least at the Supreme Court, would lead to a significant contraction rather than expansion of the supplemental jurisdiction authorized by present § 1367. Thus the preferred approach, ultimately embodied by the ALI's statute, was meant to accomplish two aims. First, it was to preserve the benefits of present § 1367: plenary supplemental jurisdiction, to the limits of Article III, granted in federal-question cases; a partial withdrawal of supplemental jurisdiction in diversity cases to preserve the rule of complete diversity as a threshold limitation on access to federal court; and express discretion, cabined by statutory standards, to decline supplemental jurisdiction in appropriate cases. At the same time, it was intended to clarify the claim-specific nature of federal jurisdiction and curtail the scope of supplemental jurisdiction in diversity cases in functional terms rather than by reference to specific joinder provisions of the Federal Rules of Civil Procedure.[33] This strategy produced a complex statute, but one intended to be coherent in principle and clear in its application to contested cases.

As discussed in Part I, the robust conception of the *Kroger* rule codified by the current § 1367 is unnecessarily restrictive of supplemental jurisdiction over claims against third-party defendants as-

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> duplicative actions in state and federal courts; (2) abandoning one of the claims altogether; or (3) filing the entire case in state court, thus delegating the determination of federal issues to the state courts. The first alternative wastes judicial resources. The second is unfair to the claimant. The third forces litigants to bring a wide variety of federal claims into the state courts and in some cases is unavailable because federal jurisdiction over the federal aspect is exclusive.

REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990), *quoted in* ALI T.D. NO. 2, *supra* note 11, at 13–14; *see also* Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 157–78 (1983) (detailing the historical scope of the pendent and ancillary jurisdiction doctrines and their constitutional limits); John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 757–63 (1991) (reviewing the predecessor doctrines of pendent and ancillary jurisdiction).

32. 490 U.S. at 549.

33. *Cf.* current § 1367 (referring specifically to FED. R. CIV. P. 14, 19, 20, 24).

serted by plaintiffs in reaction to claims asserted against plaintiffs thus placed in a defensive posture. The ALI's § 1367 sought to codify a more modest conception of the *Kroger* rule that would not prejudice plaintiffs who are also, *pro tanto*, defending parties. Professor Hartnett has pointed out, however, that the ALI's statute also permits plaintiffs in diversity litigation to invoke supplemental jurisdiction even as to claims that they have not asserted in a defensive posture.[34]

I have drafted a new sentence that, if inserted at the beginning of the ALI's proposed § 1367(c), would obviate Professor Hartnett's concerns without altering the statute's fundamental structure, and without inhibiting the availability of supplemental jurisdiction to support defensively asserted claims by plaintiffs against third-party defendants. New § 1367(c) as thus revised is reprinted below, with the added language underlined.

> (c) Restriction of supplemental jurisdiction in diversity litigation. <u>The district court shall not have jurisdiction of a supplemental claim under subsection (b) if that supplemental claim has been asserted by an original plaintiff against a third party impleaded by an original defendant and the third party has not asserted a claim against the original plaintiff, when the only basis for such jurisdiction is that a claim asserted by the original defendant against the third-party defendant qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title.</u> When the jurisdiction of a district court over a supplemental claim depends upon a freestanding claim that is asserted in the same pleading and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title, the court shall have jurisdiction of the supplemental claim under subsection (b) only if it—
>
> > (1) is asserted representatively by or against a class of additional unnamed parties; or
> > (2) would be a freestanding claim on the basis of section 1332 of this title but for the value of the claim; or
> > (3) has been joined to the action by the intervention of a party whose joinder is not indispensable to the litigation of the action.

IV. HOW MUCH OF THE *KROGER* RULE IS WORTH SAVING?

Thus, the ALI's statute could be rewritten, without substantially disrupting its structure, to codify the modest conception of the *Kroger*

34. Hartnett, *supra* note 1, at 654–55.

rule. The remaining question is whether even that modest conception ought to be retained in preference to one that is narrower still.

Kroger sought to defend congressional limitation of the scope of general diversity jurisdiction against the expansive effect of rules of supplemental jurisdiction.[35] It thus fortified two principles. The first principle, which I call *Kroger*'s "core" principle, was to preserve the rule of complete diversity as applied at the commencement of litigation. This entails a prohibition against using supplemental jurisdiction to remedy a lack of complete diversity at the outset of litigation. Without such a limitation on supplemental jurisdiction, the rule of complete diversity codified by 28 U.S.C. § 1332(a)[36] would be a dead letter. The *Kroger* Court itself acknowledged that this core principle was its background concern.

If, as the Court of Appeals thought, a "common nucleus of operative fact" were the only requirement for ancillary jurisdiction in a diversity case, there would be no principled reason why the respondent in this case could not have joined her cause of action against Owen in her original complaint as ancillary to her claim against OPPD. Congress's requirement of complete diversity would thus have been evaded completely.[37]

But the *Kroger* Court's central concern was not this core principle. The Court was, rather, concerned with what I call *Kroger*'s extended principle: to protect against the core principle being "evaded" indirectly rather than "disregarded" directly.[38] Thus, *Kroger* barred supplemental jurisdiction from supporting a claim by a plaintiff against a cocitizen even after that cocitizen had been impleaded by the original defendant as a third-party defendant. The extended principle required rejection of "the reasoning of the Court of Appeals in this case," under which "a plaintiff could defeat the statutory re-

35. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374–77 (1978).

36. As codified, the rule of complete diversity is subject to the limited exception of § 1332(a)(3). This exception expressly allows aliens to be "additional parties," and has been held to allow aliens to be both plaintiffs and defendants, provided that the claims between the aliens are joined to claims between completely diverse citizens of different states. *See*, *e.g.*, Dresser Indus., Inc. v. Underwriters at Lloyd's of London, 106 F.3d 494, 500 (3d Cir. 1997) ("The . . . Insurers alternatively argue . . . that even if section 1332(a)(3) grants jurisdiction when aliens are present on both sides of a case, they cannot be considered 'additional parties' . . . . We disagree."). *See generally* CHARLES ALAN WRIGHT & JOHN B. OAKLEY, FEDERAL COURTS: CASES AND MATERIALS 159 n.6 (10th ed. 1999).

37. *Kroger*, 437 U.S. at 374–75.

38. "The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Id*. at 374.

quirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."[39] In an accompanying footnote, the Court declared that "[t]his is not an unlikely hypothesis, since a defendant in a tort suit such as this one would surely try to limit his liability by impleading any joint tortfeasors for indemnity or contribution."[40] This concern could not be met by application of "28 U.S.C. § 1359, which forbids collusive attempts to create federal jurisdiction," because "[t]here is nothing necessarily collusive about a plaintiff's selectively suing only those tortfeasors of diverse citizenship, or about the named defendants' desire to implead joint tortfeasors. Nonetheless, the requirement of complete diversity would be eviscerated by such a course of events."[41]

Thus the core principle of *Kroger* dictates only the reaffirmation of the rule of complete diversity as originally articulated in *Strawbridge v. Curtiss*,[42] but the extended principle impelled the *Kroger* Court to fashion what Professor Hartnett and I refer to as "the *Kroger* rule," forbidding (at least in some circumstances) supplemental jurisdiction from supporting claims by plaintiffs against third-party defendants. Two conceptions of the *Kroger* rule were previously discussed in Part I. The robust conception codified by the current § 1367 flatly prohibits any supplemental jurisdiction over claims by plaintiffs against third-party defendants. The modest conception that the ALI's § 1367 sought imperfectly to codify, and that would be better served by the revised version of the ALI's § 1367(c) proposed in Part III, authorizes supplemental jurisdiction over claims by defensively postured plaintiffs against third-party defendants.[43] Both of these conceptions of the *Kroger* rule depend upon the vitality of *Kroger*'s extended principle. But there is a third conception of the *Kroger* rule, which I call the "minimal" conception, that depends only on *Kroger*'s core principle.

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39. *Id.*

40. *Id.* at 374–75 n.17.

41. *Id.*

42. 7 U.S. (3 Cranch) 267, 267 (1806). The scope and structure of the rule of complete diversity as articulated in *Strawbridge* is discussed at length in Oakley, *Integrating Supplemental Jurisdiction*, *supra* note 23, at 45–52.

43. The just-quoted language of *Kroger* itself about the facially justifiable and hence noncollusive nature of claims for indemnity or contribution by parties defending against tort claims provides additional support for the argument in Part I that the reasoning of the *Kroger* case better supports the modest rather than the robust conception of the *Kroger* rule.

The minimal conception of the *Kroger* rule forbids supplemental jurisdiction over a claim by a plaintiff against a third-party defendant only when no other claim in the action could independently be adjudicated in the exercise of the district court's diversity jurisdiction except a claim asserted by the original plaintiff against an original defendant in the fully diverse posture of the litigation as commenced. This of course was exactly the situation posed by *Kroger* itself. The ostensibly predictable third-party claim by which the original defendant impleaded the third-party defendant was no more supported by independent diversity jurisdiction than was the ensuing claim asserted against the third-party defendant by the plaintiff. To allow supplemental jurisdiction in this situation necessarily infringes on *Kroger*'s core principle—the need to fortify the rule of complete diversity by barring supplemental jurisdiction over additional claims based solely on the diversity between at least one plaintiff and one defendant at the commencement of the litigation.

Unlike both the robust and the modest versions of the *Kroger* rule, the minimal version does not depend on *Kroger*'s extended principle. For this reason, the minimal version is preferable; there seem to me to be several good reasons to question the vitality of *Kroger*'s extended principle in modern circumstances.

First. Kroger dealt with nonstatutory supplemental jurisdiction.[44] Now that supplemental jurisdiction has been codified, the appropriate degree of restriction of supplemental jurisdiction in diversity cases is now being debated as a matter of policy, not as a matter of the separation of the judicial and legislative powers. The *Kroger* Court had to consider what it should do judicially in the administration of doctrines of precedent, almost wholly unblessed by statute, that threatened erosion of a congressional restriction on the scope of the general diversity jurisdiction of the federal courts. Congress itself need not be so bashful about its authority. The constitutionality of "minimal" rather than "complete" diversity as the basis for federal jurisdiction has long been established,[45] and to my knowledge that proposition is now be-

44. *See Kroger*, 437 U.S. at 370 ("[T]he Court of Appeals relied upon the doctrine of ancillary jurisdiction, whose contours it believed were defined by . . . *Mine Workers v. Gibbs*, 383 U.S. 715 (1966) . . . .").

45. In *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967), the Court declared:

> The interpleader statute, 28 U.S.C. § 1335, applies where there are "Two or more adverse claimants, of diverse citizenship . . . ." This provision has been uniformly construed to require only "minimal diversity," that is, diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be co-citizens.

yond question. Thus Congress should be persuaded by functional concerns alone in deciding how broadly to permit supplemental jurisdiction to be exercised in diversity cases, unconstrained by concerns of institutional authority.

Second. The *Kroger* Court was dealing with a case that fell at the intersection of two lines of precedent, one dealing with "pendent" jurisdiction, and the other dealing with "ancillary" jurisdiction. The relationship between these two doctrines was complex and unsettled and is now a matter only of historical interest. The *Kroger* Court reversed the holding of the court below that extended ancillary jurisdiction to the plaintiff's claim against the third-party defendant,[46] but chose not to resolve whether the lower court had properly analyzed the question as one of ancillary as opposed to pendent jurisdiction.[47] The dissent in *Kroger* had no difficulty conceiving of the question as one of ancillary jurisdiction and called for the rule of complete diversity to be accommodated on a case-by-case basis through discretionary judicial administration of ancillary jurisdiction.[48] One reason for the majority's reluctance to accept this more flexible rule of decision may have been the fact that although discretionary application of pendent jurisdiction was well established when *Kroger* was decided, the scope and standards of judicial discretion to decline ancillary jurisdiction were far from clear.[49] Now that the categorical issue has been statutorily resolved by an omnibus grant of supplemental jurisdiction, it is clear that the same degree and the same standards of judicial discretion pertain to all forms of supplemental jurisdiction. There is no longer a concern that if supplemental jurisdiction extends to the claim by a plaintiff against a third-party defendant, it must be exercised automatically. Supplemental jurisdiction over such a claim need not be forbidden altogether in order to forestall ad hoc evasion of the rule of complete diversity. Concerns of the sort that troubled the *Kroger* Court can now be addressed by judicial exercise of statutory authority to decline supplemental jurisdiction in particular cases.

Third. The sweeping reform of the tort law of most states, discarding the absolute defense of contributory negligence in favor of

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Id. at 530–31.

46. 437 U.S. at 375–77.

47. *Id.* at 370 n.8.

48. *Id*. at 383 n.7 (White, J., dissenting).

49. For a roughly contemporaneous discussion of the muddled law pertaining to discretionary exercise of ancillary jurisdiction, see Matasar, *supra* note 31, at 184–88.

the proportional defense of comparative negligence, has made it increasingly important to permit unimpeded joinder and adjudication of the entire web of comparative negligence claims that may initially be asserted against third-party defendants. It would be bizarre in these circumstances to enforce a regime of supplemental jurisdiction in which a plaintiff engaged in complex, multicornered litigation about relative fault and liability could end up without a binding judgment as to the rights of the plaintiff against a proportionally liable third-party defendant.[50]

Fourth. *Kroger* was poorly reasoned even under the principles of law then applicable, and for sheer lack of judicial craft merits minimal deference. The Supreme Court decided *Kroger* late in its 1977 term, when several other decisions of more obvious public importance were occupying its attention.[51] The majority's opinion followed the basic

50. The problems of applying Rule 14 in the era of comparative negligence merit an article of their own, which appears to be yet unwritten. Those problems are procedural as well as jurisdictional, because there is considerable variation in state law as to whether the right to establish the proportional fault of a joint tortfeasor is in the nature of a right to contribution. When it is not, Rule 14 does not clearly apply but has sometimes sensibly been stretched to bridge what would otherwise be a serious procedural gap. *See* Tietz v. Blackner, 157 F.R.D. 510, 514 (D. Utah 1994) (allowing joinder under Rule 14 because "although there would not be 'liability over' in the classical sense of indemnity or contribution" such claims "would, in substance, have the same legal effect . . . of Rule 14(a)" and "[n]ot to allow the joinder under Rule 14 would create confusion, complexity, and convolution"); *see also* Degener v. Hall Contracting Corp., 27 S.W.3d 775, 779 (Ky. 2000) (discussing the applicability to comparative negligence claims of Rule 14 of the Kentucky Rules of Civil Procedure); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1084 (N.Y. 1989) (permitting the defendant DES manufacturer to implead other manufacturers as third-party defendants to determine their proportional liability); Martin v. Abbott Labs., 689 P.2d 368, 382 (Wash. 1984) (same); Collins v. Eli Lilly Co., 342 N.W.2d 37, 52–53 (Wis. 1984) (same). *See generally* 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE §§ 1446, 1448 (2d ed. 1990 & Supp. 2001) ("And even when there is a substantive right that creates secondary liability in favor of a third-party plaintiff, it must be remembered that the court may exercise its discretion to dismiss a third-party complaint."); Julie O. McClellan, *Apportioning Liability to Nonparties in Kentucky Tort Actions: A Natural Extension of Comparative Fault or a Phantom Scapegoat for Negligent Defendants?*, 82 KY. L.J. 789, 812–33 (1994) (analyzing case law after Kentucky's adoption of comparative fault principles, including a discussion on apportioning liability, inter alia, to third-party defendants, tortfeasors who were named and later dismissed from the action, and parties that could not be formally joined); David W. Robertson, *Eschewing Ersatz Percentages: A Simplified Vocabulary of Comparative Fault*, 45 ST. LOUIS U. L.J. 831, 831–55 (2001) (discussing various substantive and procedural challenges facing jurisdictions that have chosen to abandon contributory negligence and have adopted some form of a comparative fault regime).

51. The list of important cases decided between June 21, 1978 (the date of decision in *Kroger*), and the end of term on July 3, 1978, is a long one. The following four cases give a flavor of what was on the Court's table and have been selected because in each, the divisions within the Court led to the case being decided without a majority opinion as to all issues: FCC v. Pacifica Found., 438 U.S. 726 (July 3, 1978) (free speech and the "seven dirty words"); Lockett

reasoning of the dissenting judge in the court below,[52] with little attention to or enthusiasm for the Supreme Court's unique capacity, and indeed responsibility, to bring clarity and coherence to the doctrines of pendent and ancillary jurisdiction that were being developed and applied on an ad hoc basis by the lower federal courts. It ended up in an analytical box of its own creation. On the one hand, the plaintiff's claim was asserted only after the third-party defendant had already been joined by another party's pleading.[53] That was consistent with a classification of the situation as one of the availability of ancillary jurisdiction. But ancillary jurisdiction was not clearly established to admit of discretionary application. On the other hand, the plaintiff's claim was asserted in the complaint, albeit by amendment,[54] and this seemed to call for application of principles of pendent jurisdiction. Although permitting district courts to exercise pendent jurisdiction over claims asserted in the complaint (either originally or by amendment) would be subject to district court discretion, this would reduce the rule of complete diversity to a discretionary judicial doctrine rather than a threshold statutory requirement. The Court ended up ignoring the palpable ancillary characteristics of the situation it confronted. Instead, it insisted that because it lacked the power to assert pendent jurisdiction over a complaint joining nondiverse as well as diverse defendants, it also lacked the power to assert ancillary jurisdiction when the problematic claim was not, in fact, part of an original complaint that as filed was indisputably within federal jurisdiction.[55]

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v. Ohio, 438 U.S. 586 (July 3, 1978) (death penalty); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (June 28, 1978) (affirmative action in higher education); Houchins v. KQED, Inc., 438 U.S. 1 (June 26, 1978) (media access to correctional institutions).

52. *See* Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 430–31 (8th Cir. 1977) (Bright, J., dissenting), *rev'd*, 437 U.S. 365 (1978). Justice Bright maintained:

> I believe that the Supreme Court's pronouncements in *Aldinger v. Howard* . . . and cases such as *American Fire & Cas. Co. v. Finn* . . . require that we dismiss the case for want of jurisdiction. . . . I would conclude that Congress did not intend that federal courts take jurisdiction over a plaintiff's claim against a third-party defendant, in the absence of independent jurisdictional grounds.

Id.

53. 437 U.S. at 367–68.

54. *Id.* at 368.

55. The plaintiff's claim against the original defendant had already been dismissed under Rule 54(b) after that defendant had prevailed on a motion for summary judgment, a motion not decided until after the plaintiff was permitted to amend her complaint to add her claim against the nondiverse third-party defendant. This sequence of events was noted by the *Kroger* Court with no apparent concern that the judgment in favor of the diverse defendant was beyond federal jurisdiction given the prior conversion of the action into one of incomplete diversity under the amended complaint. *See id.* at 367–68 & n.4 (citing the affirmance of the dismissal of the di-

Had the Court used analysis rather than evasion, it might have cut through the Gordian knot of classification it faced and rewoven the threads of pendent and ancillary jurisdiction in a much more coherent way. It might then have reached the sensible conclusion that pendent jurisdiction cannot support a complaint initially filed against incompletely diverse defendants, the jurisdictional bar mooting questions of judicial discretion. Similarly, it might have reached the no less sensible conclusion that the later assertion of claims against nondiverse parties by a plaintiff engaged in ongoing litigation within federal diversity jurisdiction presents a question of ancillary, not pendent, jurisdiction. There is clearly jurisdictional power over litigation already proceeding in federal court. The Court could then have clarified the status of judicial discretion within the law of ancillary jurisdiction by holding that when subsequently joined claims threaten evasion of the rule of complete diversity, ancillary jurisdiction should be discretionarily declined.

I conclude that only the core principle of the *Kroger* case clearly merits codification. The core principle is that a civil action may be commenced in federal court on the basis of the general diversity statute, 28 U.S.C. § 1332, only on the basis of complete diversity. This core principle prohibits the exercise of supplemental jurisdiction over additional claims by plaintiffs against nondiverse defendants asserted at the outset of litigation, when the sole basis for supplemental jurisdiction is the relationship between these claims and the claims asserted by the plaintiff against diverse defendants. Otherwise the basic restrictive function of the rule of complete diversity would be eroded

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verse defendant in *Kroger v. Omaha Public Power District*, 523 F.2d 161 (8th Cir. 1975)). Another make-weight argument carelessly advanced in *Kroger* is that "[a] plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal forum rather than the state forum and must thus accept its limitations." *Id.* at 376. This implies, without any supporting justification or any apparent source for such justification, that the power to exercise ancillary jurisdiction somehow would have materialized had the plaintiff sued the original defendant in state court, and had the original defendant exercised its right to removal. It was not until 1988 that 28 U.S.C. § 1447(e) was enacted, which arguably (but not necessarily) addresses the situation of a plaintiff's attempt in a removed case to join to the litigation a claim against a nondiverse third-party. *See* Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, the New Law, and Rule 19*, 38 U. KAN. L. REV. 863, 895 (1990) (asserting that although the drafters of Rule 19 "presupposed that there were persons whose joinder would deprive the court of subject matter jurisdiction over the action originally filed," enacting § 1447(e) was unnecessary because "[c]ase law does not support this proposition . . . which is inconsistent with the general principle that once an action has been properly removed, nothing the plaintiff does can defeat federal jurisdiction").

by constant recourse to judicial discretion to decide whether a civil action in which diverse and nondiverse claims are joined in the complaint may nonetheless proceed without the dismissal of the jurisdictionally insufficient claims because the court chooses to exercise its discretion to permit the exercise of supplemental jurisdiction over the claims against the nondiverse defendants.

The extended principle of the *Kroger* case does not merit codification, except (and even this is debatable) in the form of what I have called the minimal conception of the *Kroger* rule. The extended principle seeks to bar recourse to supplemental jurisdiction to support later-added claims by plaintiffs against nondiverse parties that under the core principle could not have been asserted at the commencement of the litigation. Its ambition is to protect the rule of complete diversity against evasion by contrivance. It supposes that a plaintiff might initiate a complete-diversity suit in federal court that would otherwise have been brought in state court against a combination of diverse and nondiverse defendants, because the plaintiff hopes that the nondiverse defendants will be impleaded by the diverse defendant as third-party defendants, thereby allowing the plaintiff to invoke supplemental jurisdiction over the claims it later asserts against its impleaded cocitizens. I think discretionary judicial denial of supplemental jurisdiction in such cases adequately can curtail such an evasion of the core principle that supplemental jurisdiction must be subordinate to the rule of complete diversity.

This reasoning argues against codification of both the robust and modest conceptions of the *Kroger* rule that I have discussed.[56] The robust conception of the *Kroger* rule, which is the conception codified by the current § 1367, goes beyond the reasoning of *Kroger* to prohibit supplemental jurisdiction over claims by plaintiffs against third-party defendants that result from plaintiffs being placed in a defensive position in the litigation they commenced. But even the modest conception of the *Kroger* rule that the ALI draft imperfectly codifies, permitting supplemental jurisdiction with respect to plaintiffs' claims asserted in reaction to claims against them, fails to give proper leeway to federal judges to promote efficient, integrated adjudication of related claims.

The minimal conception of the *Kroger* rule—barring supplemental jurisdiction over a plaintiff's claim against a third-party defendant

56. *See supra* Part I.

when federal power to exercise supplemental jurisdiction depends solely on the plaintiff's own assertion of a claim against a diverse defendant—also depends on an extension of the core principle that supplemental jurisdiction cannot cure a lack of complete diversity at the outset of the litigation. But this minimal conception of the *Kroger* rule, which limits its restriction of supplemental jurisdiction to claims and parties having the jurisdictional status and posture of those in *Kroger* itself, differs in a key respect from the robust and modest conceptions of the *Kroger* rule that I now believe should not be codified. It preserves symmetry in the jurisdictional posture of the litigation without regard to which party sues first.

Suppose that there are three parties in a conventional three-cornered relationship in which each of the three has suffered some harm for which the others may be liable, or at least that under comparative negligence principles any uninjured party may have claims against the other two for apportionment of fault.

In the *Kroger* scenario, the three parties involved are A of State A, B of State B, and AB, a citizen of both State A and State B. None of these parties can initiate litigation against the other two in federal court, for lack of complete diversity. The enforcement of the complete-diversity rule, the core principle of the *Kroger* case, requires that if suit is nevertheless brought in federal court, as in a suit by A against B, A not be permitted to invoke supplemental jurisdiction over a claim added against AB just because AB has been impleaded by B. All three conceptions of the *Kroger* rule agree to this extent.[57]

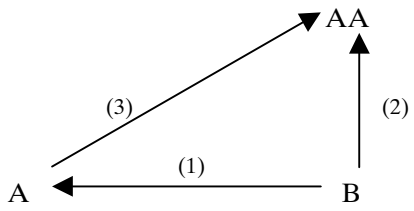
But in the Hartnett scenario, the three parties involved are A of State A, B of State B, and AA of State A.[58] Now, as depicted in Figure 1, it is possible for one of the parties to bring a diversity suit against the other two: B can commence the litigation against A and AA. If B does so, A of course can invoke supplemental jurisdiction under every conception of the *Kroger* rule to cross-claim against co-

57. The conceptions disagree if B not only impleads AB but also counterclaims against A to establish A's proportional fault. The robust conception and its codification by the current § 1367(b) would still prohibit supplemental jurisdiction over A's responsive claim against the impleaded third-party—and according to Professor Hartnett's interpretation by which a party joined under Rule 13(h) is deemed to have been joined under Rule 19 or 20, this is true even if B impleads AB not under Rule 14, but rather under Rule 13(h) as an additional party to a counterclaim against A. The modest and minimal conceptions of the *Kroger* rule, which would be codified respectively by the revised ALI statute proposed in Part III or by the ALI statute as presently worded, both would confer supplemental jurisdiction over a responsive claim by A against AB as either a counterclaim codefendant or a third-party defendant.

58. Hartnett, *supra* note 1, at 654.

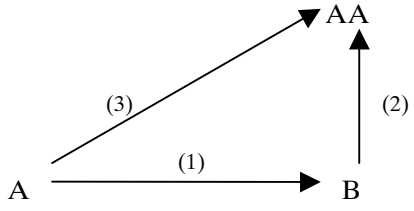
citizen AA. As demonstrated in Figure 2, the relationship between A and AA that results from A suing B, B impleading AA, and A then asserting a claim against AA now mirrors that which would result if B instead of A (or AA) had initiated the litigation. I can see no good reason for federal jurisdiction over this relationship to be available only if B initiates the litigation, but not A or AA.

FIGURE 1: JURISDICTIONAL POSTURE OF LITIGATION COMMENCED BY B



Claim no. 1 and claim no. 2, both asserted by B against codefendants A and AA, are freestanding claims. Supplemental jurisdiction exists over claim no. 3, A's cross-claim against codefendant AA, under every conception of the *Kroger* rule.

FIGURE 2: JURISDICTIONAL POSTURE OF LITIGATION COMMENCED BY A



Claim no. 1 by A against B (asserted in the original complaint) and claim no. 2 by B against AA (asserted in B's third-party complaint) are both freestanding claims. Under the minimal conception of the *Kroger* rule, A may invoke supplemental jurisdiction to assert claim no. 3 against third-party defendant AA once AA has been impleaded by B's assertion of claim no. 2.

CONCLUSION

The minimal conception of the *Kroger* rule actually codified by the ALI's proposed § 1367 is the best conception for a supplemental jurisdiction statute to codify. It is true that the ALI advertised the modest conception of the *Kroger* rule in presenting its draft to the membership, and I am grateful to Professor Hartnett for calling attention to the discrepancy between the version of the *Kroger* rule that was on offer and that which actually was delivered. I have proposed an amendment that, if inserted in the current ALI draft, would deliver a statute that conforms to the ALI's intention of codifying the modest conception of the *Kroger* rule. But the ALI's unmodified draft, which codifies instead only the minimal conception of the *Kroger* rule, is a better value. Thus I conclude that the ALI ought to leave its proposed statute as is, and that Congress should enact the ALI's statute in its unmodified form.