

FIAT LUX

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I quite agree that our exchange's value is a function of the light rather than the heat that it generates. I am thankful for the further enlightenment provided by Professor Hartnett's reply.¹ My rejoinder is brief and does not respond to all that Professor Hartnett adds to our initial exchange, but I hope that it too will cast new light on issues that both unite and divide us.

I. WHOM DO WE SEEK TO ENLIGHTEN?

It is useful to identify the audience—beyond ourselves—to whom our remarks are directed. In all likelihood it is not the American Law Institute (ALI). The Institute has completed its work on supplemental jurisdiction, and on the other statutes embraced by its Federal Judicial Code Revision Project. All that remains is the editorial process of combining the three tentative drafts dealing with these topics, each previously approved by the Institute, into a final omnibus report of the Institute's action. As Reporter I do not have the prerogative of changing what the Institute has approved, but I can insert a note in the commentary on the proposed new § 1367 alerting the reader to the fact and substance of this exchange. It is unlikely that the Council of the ALI will decide to bring the proposed new § 1367 back to the membership in order for it formally to decide which of the responses we have discussed in these pages should be adopted as the official position of the ALI. Publishing a revised draft and submitting it to the membership is an expensive proposition, and the Institute has limited resources. While the issue of which conception of the *Kroger* rule should be codified is an important one, it is nonetheless peripheral to the reforms the Institute has approved.

In my view, the audience we are addressing is Congress itself. As I said in my first contribution to this exchange, the virtue of the ALI's

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1. Edward A. Hartnett, § 1367 Producamus, 51 DUKE L.J. 687 (2001).

approach to law reform is that it proceeds in a quasi-legislative fashion, but its recommendations lack self-executing legal effect. It thus frames but does not end the debate that should occur if its recommendations are considered by Congress for possible enactment. The preceding exchange makes clear that there is a debatable issue concerning the *Kroger* rule that Congress must resolve. It also provides considerable illumination of the pros and cons of competing means of resolution.

II. MY PROPOSED AMENDMENT

Professor Hartnett agrees with me that what I called the robust conception of the *Kroger* rule, barring supplemental jurisdiction over any claim (even one defensive in nature) by a plaintiff against an impleaded third-party defendant, should not be codified in a revised § 1367.² He would prefer to codify what I called the modest conception of the *Kroger* rule—one that permits supplemental jurisdiction over a claim asserted by a plaintiff against an impleaded third-party defendant after the plaintiff has first been placed in a defensive posture by some party's assertion of a claim against the plaintiff.³ Before proposing his own statutory language to achieve this result, he raises four objections to mine.⁴ Three are technical: they usefully call for refinement rather than rejection of my language. The fourth is essentially aesthetic and provides an argument in favor of Professor Hartnett's alternative amendment.⁵ I will discuss it in connection with that proposed alternative.

The first of Professor Hartnett's technical objections results from a semantic misunderstanding of the term "impleaded" as used in my proposed amendment, which refers to a supplemental claim "asserted by an original plaintiff against a third party impleaded by an original defendant."⁶ He apparently construes "impleaded" to mean only the joinder of a third party under Rule 14, for purposes of indemnification or contribution,⁷ and not the joinder of a third party under Rule 13(h) as an additional party to a cross-claim or counterclaim. I thought it clear that to "implead" means to join an additional party to

2. *Id.* at 687–88.

3. *Id.* at 693–94.

4. *Id.* at 687–92.

5. *Id.* at 688.

6. *Id.* at 687.

7. *See id.* at 687–88.

preexisting litigation, and there is substantial authority to support this view, both as a matter of English usage and as a matter of American practice under Rule 13(h).⁸ But nothing substantial turns on this point. Given the apparent doubt or confusion about the meaning of “impleaded,” it can be replaced by the word “joined.” Indeed, I would go further and refer to the joined party as “an additional party” rather than a “third party.” This would not change the intended effect of my amendment but would clearly ward off Professor Hartnett’s concern that supplemental jurisdiction might otherwise be construed to extend more broadly to claims by plaintiffs in multi-defendant as opposed to single-defendant cases.

The second of Professor Hartnett’s technical objections relates to a possible ambiguity in the terms “original plaintiff” and “original defendant.” His concern is that, absent the addition of a statutory definition of these terms, they might be construed not to apply to plaintiffs or defendants added by amendment of the complaint.⁹ A standing issue facing the drafter of proposed legislation is how much charity of interpretation the drafter can reasonably expect: precision of application can be achieved but only at the cost of added complexity, and at some point the degree of complexity may make a statute so dense that even charitable judges may be overwhelmed into confusion. The ALI’s proposed § 1367 generally seeks precision at the cost of complexity, but here I tried to add precision to our procedural vocabulary without adding complexity—relying instead on common sense.

I sought to distinguish the claiming and defending parties named in the complaint from parties that become claiming or defending parties by virtue of claims joined by a pleading other than the complaint. The Federal Rules of Civil Procedure are unhelpful in this regard. They frequently refer in generic terms to claiming and defending parties, but they also sometimes refer specifically to plaintiffs and defendants. Yet nowhere do the rules define what is clearly assumed—that plaintiffs and defendants are the claiming and defending parties

8. *See* *Balt. & Ohio R.R. Co. v. Cent. Ry. Servs., Inc.*, 636 F. Supp. 782, 786 (E.D. Pa. 1986) (“Rule 13(h) of the Federal Rules of Civil Procedure provides for the impleader of non-parties as defendants to cross-claims or counterclaims.”); *see also* *Reynolds v. Maples*, 214 F.2d 395, 399 (5th Cir. 1954) (refusing on jurisdictional grounds to permit “additional parties to be impleaded” under Rule 13(h)). The primary definition of “implead” is “[t]o bring (someone) into a lawsuit; esp., to bring (a new party) in the action.” *BLACK’S LAW DICTIONARY* 757 (7th ed. 1999).

9. Hartnett, *supra* note 1, at 688 n.4.

named in the complaint. Rule 17 refers to “Parties Plaintiff and Defendant” in its caption, but (astonishingly) does not use, let alone define, these terms anywhere in its text. The text of Rule 20 does speak of “plaintiffs” and “defendants,” but seems to treat these terms as synonymous with “claiming” and “defending” parties in general—no one doubts that multiple parties can join in asserting joint counterclaims and cross-claims even if the joinder of additional parties does not invoke Rule 13(h) (and hence its incorporated reference to Rule 20), or that multiple defendants can join together as third-party plaintiffs and in turn may join multiple third-party defendants in a single third-party complaint.

My proposed amendment is hardly the place to rectify this imprecision in the Federal Rules of Civil Procedure. Given the danger that reference to “original” plaintiffs and defendants may suggest some distinction between the parties to the original as opposed to an amended complaint, and thus might create more confusion than it dispels, little is lost and perhaps much is gained by dropping the qualifier “original.” Judges still will have to use common sense in determining who counts as a plaintiff and a defendant among a complex of claiming and defending parties, but at least they will be dealing with undefined terms of long and established usage. Of course this still will not “exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert.”¹⁰

Professor Hartnett’s third technical objection questions whether the proposed amendment to the ALI’s § 1367(c) should be inserted at the beginning or the end of that subsection. Here too he is anxious to thwart an “overly literal judge.”¹¹ His concern is that the district court must take account of the limitation of supplemental jurisdiction imposed by the balance of the ALI’s § 1367(c) in order correctly to apply the limitation of the proposed amendment, which bars supplemental jurisdiction when “‘the only basis’ for [such] jurisdiction” is the freestanding nature of the claim by a defendant against a diverse third-party defendant.¹² He points out that the plaintiff’s supplemental claim against the nondiverse third-party defendant is likely to be related to both the plaintiff’s freestanding claim against the diverse defendant named in the complaint, and to that defendant’s freestanding claim against the diverse third-party defendant impleaded by

10. *Paraiso v. United States*, 207 U.S. 368, 372 (1907) (Holmes, J.).

11. Hartnett, *supra* note 1, at 688 n.4.

12. *Id.* at 689 n. 4.

that defendant.¹³ Thus an overly literal judge might conclude that the “only” basis for supplemental jurisdiction is not the relationship of that supplemental claim to the freestanding claim of the defendant against the third-party defendant, because the supplemental claim is also related to the freestanding claim asserted in the complaint by the plaintiff against the defendant. To me this danger seems remote, since the balance of the ALI’s § 1367(c) expressly says that supplemental jurisdiction cannot be predicated on the relationship between a supplemental claim and a freestanding claim “asserted in the same pleading,”¹⁴ and the ALI’s § 1367(a)(3) stipulates that a claim asserted by the plaintiff against a third-party defendant is deemed to be “asserted in the same pleading” as the plaintiff’s claim against the (dare I say) original defendant—as indeed was literally the case in *Kroger*, where the plaintiff’s claim against the third-party defendant was asserted in an amended complaint.¹⁵ But the danger can be made even more remote by Professor Hartnett’s suggested repositioning of the amendment to the end of § 1367(c), and by conforming the wording of the amendment to the wording of the other restrictions of supplemental jurisdiction that now precede it—in particular, by changing the reference to “when the only basis for such jurisdiction” to say “when such jurisdiction depends upon,” thus paralleling the language of the rest of § 1367(c).

As modified in response to Professor Hartnett’s technical objections, my proposed amendment would revise the ALI’s § 1367(c) as follows, with the amendment’s text underlined:

(c) Restriction of supplemental jurisdiction in diversity litigation. 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

13. *Id.* at 688 n.4.

14. AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2, at 58 (1998) [hereinafter ALI T.D. NO. 2].

15. *See* *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 367 (1978) (“[R]espondent [Kroger] was granted leave to file an amended complaint naming Owen as an additional defendant.”).

- (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.

In addition, the district court shall not have jurisdiction of a supplemental claim under subsection (b) if that supplemental claim has been asserted by a plaintiff against an additional party joined by a defendant and the additional party has not asserted a claim against the plaintiff, when such jurisdiction depends upon a freestanding claim that is asserted by the defendant against the additional party and that qualifies as a freestanding claim solely on the basis of the jurisdiction conferred by section 1332 of this title.

III. PROFESSOR HARTNETT'S ALTERNATIVE AMENDMENT

Professor Hartnett generously points out that there is a “certain conceptual elegance”¹⁶ to the ALI’s proposed § 1367, which uses the concept of “asserted in the same pleading” as the filter for determining when supplemental jurisdiction should be permitted in diversity cases without eviscerating the rule of complete diversity, but also without stymieing the effective joinder of reactive claims—compulsory counterclaims, cross-claims, and third-party claims—that must be allowed if a federal forum for diversity cases is to be a genuine alternative to a state forum. His aesthetic praise is not unqualified—he points also to the “rather baroque intricacy”¹⁷ of the definition of “asserted in the same pleading”—but he goes on to note that the insertion of my proposed amendment into the ALI’s § 1367(c) “sacrifices this structural elegance” by an ad hoc bar to the supplemental jurisdiction that the “asserted in the same pleading” standard would not itself forbid.¹⁸ It is, he might have said in an extension of his architectural metaphor, like a fire escape spoiling the lines of a building in order to bring it up to code—if, despite my contrary argument, the code indeed requires what I called the modest rather than the minimal conception of the *Kroger* rule.¹⁹

Professor Hartnett offers an intriguing alternative, which seeks first to identify the appropriate limiting principle governing supple-

16. *Id.* at 688.

17. *Id.*

18. *Id.*

19. John B. Oakley, *Kroger Redux*, 51 DUKE L.J. 663, 664 (2001).

mental jurisdiction in diversity cases, and then to articulate a different and less baroque standard for enforcing this principle. His limiting principle is one that I find wholly congenial: extending supplemental jurisdiction in diversity cases to “parties placed in a defensive posture.”²⁰ His operative standard is to permit supplemental jurisdiction in diversity cases not only in the three instances specified in the ALI’s § 1367(c)(1)–(3), but also as to claims “asserted by a party in response to a claim asserted against that party.”²¹

I wholeheartedly would support this alternative—which is even more elegant, because it is so much simpler, than the “asserted in the same pleading” restriction around which the ALI’s § 1367 is constructed—if it did all the work that I believe needs to be done. But let us again consider the viewpoint of the overly literal judge. What does “in response to” mean, and what limits does it impose on the overly literal judge?

Our shared concern is to make the benefits of efficient joinder of related claims available in diversity litigation through the medium of supplemental jurisdiction, without eliminating the initially restrictive effect of the rule of complete diversity. One way to do this, which in my view worked quite well for a century or more, was to allow the scope of supplemental jurisdiction within the ultimate constitutional limitations of Article III to be worked out judicially. This era was brought to a close when *Finley* raised serious separation-of-powers questions about judicial power to extend the jurisdiction of the federal courts absent express statutory authorization.²² The enactment of § 1367 in 1990 provided the requisite statutory authority for supplemental jurisdiction, but adopted a mechanism for limiting its scope in diversity cases by specific reference to joinder rules that has proved to be both under- and overinclusive. Professor Hartnett and I agree that it would be undesirable simply to vest the district courts with broad discretion to exercise supplemental jurisdiction over all related claims joined to a civil action, even when the sole basis for federal judicial power is the diversity of citizenship of the parties—some threshold statutory limitation on supplemental jurisdiction should be imposed when none of the claims presents a federal question. One attractive way to do this, which is the nerve of Professor Hartnett’s proposal, is to authorize supplemental jurisdiction in pure-diversity litigation only

20. Hartnett, *supra* note 1, at 693.

21. *Id.*

22. *Finley v. United States*, 490 U.S. 545, 548–49 (1989).

with respect to claims asserted by “parties placed in a defensive posture.” The catch is how to give statutory expression to this principle.

I think Professor Hartnett’s formulation, authorizing supplemental jurisdiction of a claim “asserted by a party in response to a claim asserted against that party,” is too narrow, but perhaps not incurably so. We have focused our discussion on the three-cornered arrangement of parties that prompted Professor Hartnett’s concern over the underinclusive effect of the ALI’s “asserted in the same pleading” limitation. Assume that all parties are citizens only of State A or State B, and that their citizenship is indicated by their names. Plaintiff A sues defendant B, who impleads third-party defendant AA. Under the modest conception of the *Kroger* rule that Professor Hartnett endorses and that I would reject, but which *arguendo* I also have sought to codify with my proposed amendment of the ALI’s § 1367(c), supplemental jurisdiction should not extend to a claim asserted by A against AA unless AA (or B, as a counterclaimant) has first asserted a claim against A. Professor Hartnett’s language certainly works in this context. But suppose that once AA or B assert a claim against A, A wishes to implead another cocitizen, AAA, who is or may be liable to indemnify A for any liability A may be held to owe to AA or B. Professor Hartnett’s language would appear to grant supplemental jurisdiction over A’s Rule 14 claim against AAA, since that is surely “in response to” the claim against A by AA or B, but would appear not to extend supplemental jurisdiction to any other related claims A might have against AAA. I do not think that thus requiring disaggregation of related claims at this point in the litigation is desirable.

To make this point concrete (as it were), I will recast the joinder problem in terms of a standard hypothetical I use in my teaching of this subject.²³ A is a developer who contracts with B to construct an office building. Concrete used in the construction of the building fails to cure properly. B and its concrete subcontractor AA undertake expensive additional work attempting to fix the problem. A remains unsatisfied, and sues B for damages. B impleads AA. Both B and AA assert claims directly against A, seeking to recover their extra expenses on the ground that A provided improper plans and specifications for the building, and these were the cause of the problems with the curing of the concrete. A then impleads AAA, the architect responsible for the plans and specifications. A and AAA are cocitizens,

23. The problem is posed in FREDERIC R. MERRILL & DOMINICK VETRI, PROBLEMS AND MATERIALS ON FEDERAL COURTS AND CIVIL PROCEDURE, 176–80 (1974) (Problem 106).

so A's Rule 14 claim against AAA requires supplemental jurisdiction. But A invokes Rule 18 to join to its third-party complaint against AAA a claim not just for indemnification, but for independent relief—A now realizes that if AAA's plans and specifications were indeed defective, then the damages that A originally sought from B for breach of the construction contract can be recovered only from AAA for breach of the design contract. It makes no sense to me to require A to pursue this potential liability of AAA separately in state court litigation, with all the attendant costs of duplicative litigation and the risk of inconsistent results (mitigated only partially by the likely issue-preclusive effect of the determination of AAA's liability as a third-party defendant in the federal litigation). Yet I suspect that many judges, and surely any of an overly literal bent, would conclude that only the Rule 14 claim by A against AAA was "in response to" the claims against A, and that the Rule 18 claim was not.

It is possible to broaden Professor Hartnett's language to avoid this undesirable restriction of the supplemental jurisdiction that A may invoke. Professor Hartnett's proposed § 1367(c)(4) could provide instead that supplemental jurisdiction in a pure-diversity case extends to any related claim "asserted by a party against whom a claim has been asserted."²⁴ This would achieve codification of the "party placed in a defensive posture" principle in its fullest flower.

Constraints of time and space bar any attempt here fully to explore the ramifications of such broader language. There seems to me some risk that it would convert an underinclusive grant of supplemental jurisdiction into an overinclusive one. For instance, given the actual alignment of parties in the *Kroger* case, where A sues B and B impleads AB (a cocitizen of both A and B), AB's assertion of a claim against A would allow A to invoke supplemental jurisdiction over claims against additional nondiverse defendants joined by A's amendment of the complaint. This would not be allowed by the ALI's proposed § 1367, since the only basis for supplemental jurisdiction

24. Hartnett, *supra* note 1, at 693. Professor Hartnett's proposal leaves unaltered the ALI's § 1367(a)(2), which has the effect of limiting supplemental jurisdiction to what is there defined as a supplemental claim, i.e., a claim that is related to some other jurisdictionally self-sufficient or "freestanding" claim in the litigation in the constitutional sense of being part of the same case or controversy, as well as the introductory language of the ALI's § 1367(c), which limits the special restrictions of supplemental jurisdiction there imposed to cases in which none of the related freestanding claims are federal-question claims. If any related claim in what is otherwise a diversity case is within federal-question jurisdiction, then the case is not a pure-diversity case and unrestricted supplemental jurisdiction is granted by the ALI's § 1367(b), which in this respect mirrors § 1367(a) as currently enacted.

over A's claims against the new defendants would be the claim asserted in the original complaint by A against B, which the ALI's statute defines as "asserted in the same pleading" as the amended complaint and thus disqualifies as the basis for supplemental jurisdiction over the claims added in the amended complaint.

IV. IS ANY AMENDMENT NEEDED?

In my initial contribution to this exchange, I conceded that the ALI's statute would codify the minimal conception of the *Kroger* rule, rather than the modest conception that the ALI statute meant to codify, and that Professor Hartnett prefers. While I proffered an amendment to the ALI's statute that would tailor its effect to its intent, I also undertook to answer a question that I had not confronted in drafting the ALI's statute: Which conception of the *Kroger* rule is the best one to codify? The ALI's statute clearly is premised on a preference for the modest conception (which permits supplemental jurisdiction over a claim by a plaintiff against a nondiverse third party that is joined after the plaintiff has been placed in a defensive posture) as opposed to the robust conception that would bar any supplemental jurisdiction over claims by plaintiffs against nondiverse third parties. But the ALI's statute was not drafted with an eye to a choice between the modest and minimal conceptions of the *Kroger* rule. Professor Hartnett's objection that it actually codifies the minimal rather than robust conception was accompanied by a defense of the modest conception, but this is an issue that neither I nor the ALI had addressed. After an inquest into *Kroger*, I concluded that in modern circumstances only its core principle—that the rule of complete diversity should be enforced at the commencement of litigation—retains current vitality, and thus that only the minimal conception of the *Kroger* rule merits codification. Since this is the present effect of the ALI statute, I argued that the best legislative outcome would be to enact the ALI's statute as is, without either my or Professor Hartnett's suggested amendments.

Among the arguments I offered in support of the minimal conception of the *Kroger* rule was an argument grounded in symmetry: If B sued A and AA in federal court, A could invoke supplemental jurisdiction to cross-claim against AA. So if A sues B in federal court and B joins AA, why not let A invoke supplemental jurisdiction to assert a claim against AA? I could see "no good reason" why not. Professor Hartnett is unpersuaded by this argument and voices two re-

sponsive concerns. One questions the predicate for my symmetry concern, pointing to the possibility that B's suit would be dismissed for lack of jurisdiction after realignment of the parties.²⁵ The second, prompted in part by my own assertion of a negative rather than affirmative proposition, asks in the same vein whether there might also be "no good reason" why A could not simply initiate the litigation against B and AA."

The overall justification for supplemental jurisdiction is to permit fair and efficient adjudication of all related claims within a federal forum once federal jurisdiction has properly been invoked at the outset of litigation and to avoid parties being deterred from exercising their right to a federal forum, or burdened in the conduct of litigation brought against them in federal court, by the threat of the disaggregation of related claims into litigations that must proceed separately, and possibly inconsistently, in state and federal courts. Professor Hartnett and I agree that there is inherent tension between supplemental jurisdiction, thus justified, and the rule of complete diversity. We differ as to how this tension is to be resolved.

I think there is indeed a reasoned basis for codifying the core principle of the rule of complete diversity, and hence the minimal conception of the *Kroger* rule, without either abrogating the rule of complete diversity or extending it in the way that the modest conception of the *Kroger* rule would codify. A is entitled to sue B in federal court, but not B and AA jointly. That is the essential firewall of the rule of complete diversity that prevents general diversity jurisdiction from too great a displacement of state courts in the litigation of state-created claims. As with any boundary, it is perhaps arbitrarily drawn, but its restrictive effect is important, and were it to be abolished, the

25. There is considerable uncertainty about the scope of the realignment doctrine, with the circuits split between the "principal purpose" test that favors realignment, and the "substantial controversy" test that generally defers to the structure of the litigation as framed by the complaint. See *United States Fid. & Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131 (4th Cir. 1995) (discussing the circuit split and joining the Third, Sixth, and Ninth Circuits in adopting the "primary purpose" test rather than the "substantial purpose" test followed by the Second and Seventh Circuits); see also *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386-88 (10th Cir. 1978) (rejecting realignment of insured parties and insurer as coplaintiffs in a declaratory-judgment action brought by insurer against insured parties and others, and applying an "actual controversy" test that appears to align the Tenth Circuit with the Second and Seventh Circuits). It is thus a legitimate argument that my symmetry concerns are undercut by the potential for realignment, but it is no less legitimate to argue that the scope of supplemental jurisdiction should not be tailored to fit so formless a pattern.

impact on the allocation of jurisdiction between state and federal courts would be profound.

Once properly brought into federal court as a defendant, B is entitled to join third parties on related claims in order to protect B's interests in a forum not of B's choosing, and from which B cannot escape. If B joins a cocitizen, B depends solely on supplemental jurisdiction: B's claim against the third party is not one B could have chosen initially to bring to the federal courts. But if B joins a claim against a diverse third party (and claims a sufficient amount), B is simply taking advantage of liberal federal joinder rules, not any extension of federal jurisdiction. B could litigate its claim against the third party in a separate action, but at the risk of inconsistent results.

If B joins a cocitizen third party, A will be diverse from that third party unless (as in *Kroger* itself) the third party is a cocitizen of both the plaintiff and the defendant. This leaves A unfettered by diversity concerns in joining claims it may have against the third party. But if B joins a third party such as AA, diverse from defendant B but a cocitizen of plaintiff A, the sticking point arises. In my view, extension of the rule of complete diversity to bar supplemental jurisdiction over A's claim against AA comes at a substantial cost. This may not be unfair to A, who chose the federal forum initially (and had a federal right to do so, provided A was willing to set aside any guaranteed right to join AA to the litigation). But it does create inefficiency by making two lawsuits out of what could be one, should A indeed file a state-court action against AA.

It is undoubtedly the intended effect of the rule of complete diversity that A be encouraged to file suit in state court in the first instance against all parties adverse to A, whether diverse or not. To this extent the rule of complete diversity both protects the role of the state courts in our federal system and burdens access to a federal forum by a plaintiff who desires its protections in the adjudication of a claim against a citizen of the other state, but has no right to such protections against all potential adversaries. But once B has broadened the litigation, by bringing into the federal suit a claim against a third party that independently qualifies for federal adjudication, I see diminishing returns from extension of the rule of complete diversity to bar A's claim against the cocitizen that B has thus joined without invocation by B of supplemental jurisdiction.²⁶

26. This leaves lingering the relatively rare situation of *Kroger* itself, where the third party is diverse from neither the plaintiff nor the defendant. Is there a good reason to restrict supple-

For this reason, I prefer to leave the implementation of this marginal extension of the rule of complete diversity to the courts, in the exercise of their case-by-case discretion to decline to exercise supplemental jurisdiction. Professor Hartnett questions whether the provisions of the ALI's § 1367(d) go far enough in conferring on the district courts the discretion necessary to withhold supplemental jurisdiction in problematic cases of this sort. I think they do,²⁷ but I do not insist on the point. If Congress wishes to amend the ALI draft, I would prefer that it direct its attention to the scope of the discretion of district courts to decline supplemental jurisdiction in the quasi-*Kroger* situation that Professor Hartnett contemplates (where the impleaded third party is diverse from the defendant) rather than that it seek to bar at the threshold any potential exercise of supplemental jurisdiction in that situation.

We thus confront a range of alternatives. It is certainly possible that Professor Hartnett's suggested amendment can be revised to strike the right balance in diversity cases between impairment of the rule of complete diversity and achievement of the efficient and consistent adjudication of related claims that ought to be joined to federal diversity litigation once it is underway. My proposed amendment seeks a similar balance by other means. Or the ALI's statute might be found already to strike the right balance, possibly with some reinforcement of its provision for discretionary declination of supplemen-

mental jurisdiction here, such that the plaintiff cannot join a claim against the mutually nondiverse third party? I think there is, because there is no claim independently qualified for federal jurisdiction, and hence available to support supplemental jurisdiction, except the plaintiff's claim against the original defendant. To extend supplemental jurisdiction there to the plaintiff's claim against a nondiverse third-party defendant would create an inverted pyramid of supplemental jurisdiction founded on a single claim. But the pyramid is not inverted, and bootstrapping is avoided, if both the initial claim of the plaintiff against the defendant and the subsequent claim of the defendant against the third party independently qualify for federal jurisdiction, and the latter independently supports the supplemental jurisdiction that the plaintiff seeks to invoke. There also is no potential asymmetry. Whether A or B initiates the litigation, neither can join AB as an initial codefendant, and thus the opportunity to invoke supplemental jurisdiction of a cross-claim between nondiverse codefendants is not contingent on which of the original adversaries sues first.

27. The ALI's statute would refine the standards and narrow the scope of the discretion granted to district courts to decline supplemental jurisdiction, in order to avoid arbitrary variation in how that discretion is exercised. A full elaboration of the ALI's approach is beyond the scope of this exchange. Notwithstanding its concern to promote consistency in the exercise of this discretion, the ALI's statute "grants the district courts broad discretion to decline to exercise supplemental jurisdiction. . . . The exercise of supplemental jurisdiction should be flexible, and that flexibility should be informed by the particular circumstances confronting a district court in the given case." ALI T.D. NO. 2, *supra* note 14, Comment d-4, at 84-85.

tal jurisdiction where overreaching may have occurred. Thus I conclude where I began, thankful both for Professor Hartnett's careful scrutiny of the operation of the ALI's § 1367, and for the cardinal feature of the ALI's drafting efforts: Congress has the last word, not the ALI or its Reporter. Discussion, evaluation, and attempted improvement of the ALI's proposals should continue until Congress is ready to act, so that it can proceed confident that all alternatives have been considered, and all consequences foreseen.