

A CODA ON SUPPLEMENTAL JURISDICTION

*Thomas D. Rowe, Jr.**
*Stephen B. Burbank***
*Thomas M. Mengler****

Seers we are not, and time will tell whether, as we believe, the new supplemental jurisdiction statute will sensibly fill a gap in the federal courts' jurisdictional authority created by *Finley* — or whether it will be the unmitigated, unsalvageable flop that Professors Arthur and Freer are working hard to create. Perhaps this “trio” — as the Emory pair refers to us¹ — has spilled enough ink, just as Arthur and Freer assuredly have. Nevertheless, we take this opportunity to add a few words, hoping to avoid what Tom Lehrer once dubbed “escalatio.”

I. MOUNTAIN OR MOLEHILL?

In conceding that Congress' codification of supplemental jurisdiction is not a perfect effort,² identifying and suggesting means to deal with such genuine flaws as may exist in the statute,³ and acknowledging that the section does not expressly answer every question but in some circumstances provides only basic guidance,⁴ we apparently merit not praise for candor, but an imputation of guilt to all our critics' exaggerated and dis-

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

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

*** Professor of Law, University of Illinois. We wish to thank Larry Kramer, Rick Marcus, Jim Pfander, and Laurens Walker for their useful insights.

¹ See, e.g., Arthur & Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963, 966 (1991).

² See Rowe, Burbank & Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 961 (1991).

³ See, e.g., *id.* at 959-60. It is characteristic of Arthur and Freer's approach and style that they now emphasize, and might be thought to claim credit for revealing, the problem with Rule 20 joinder of plaintiffs that *we* brought to light after debunking all the false problems that initially preoccupied Professor Freer. Compare Arthur & Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007, 1009 (1991) (“The trio has failed to rebut our showing . . .”), with Rowe, Burbank & Mengler, *supra* note 2, at 961 n. 91 (“Far more serious than the problems Professor Freer raises is . . .”). As to that problem, they accuse us of “glibly assert[ing], without discussion, that the legislative history negatives the statutory language.” Arthur & Freer, *supra* at 1009 (footnote omitted), when we do no such thing. See *infra* note 20.

⁴ See Rowe, Burbank & Mengler, *supra* note 2, at 961.

torted charges. Our reply to Freer incited these Emory colleagues to conclude that the statute is a "disaster" and should perhaps be immediately repealed.⁵ They say it is inherently vague,⁶ ambiguous,⁷ and metaphysical,⁸ and appeals to a concept — the principal rationale of *Kroger* — that is amorphous.⁹

We believe and argue in the following pages that Arthur and Freer, engrossed in vituperative excess, have lost perspective. No statute we know of expressly answers all the questions that might arise under it. The key for us is whether a statute fairly answers the bulk of questions and sensibly guides the courts on how to resolve the rest.

In our view, section 1367 does so. For all cases in which original jurisdiction does not rest solely on diversity of citizenship, which comprise better than seventy percent of the district courts' civil docket,¹⁰ the statute authorizes a court to hear all claims that are part of the same article III case or controversy, including claims involving the joinder or intervention of additional parties.¹¹ In so doing, the statute extends supplemental jurisdiction to its constitutional limits,¹² overrules *Finley*,¹³ and elevates what had previously been called pendent party jurisdiction to the same standing as other forms of supplemental jurisdiction.

⁵ See Arthur & Freer, *supra* note 1, at 989 ("Congress should immediately repeal section 1367 or adopt a simple amendment which restores the pre-*Finley* status quo").

⁶ *Id.* at 972.

⁷ *Id.* at 967.

⁸ *Id.* at 972.

⁹ See *id.* at 965-66 (incorrectly alleging that the "drafters never define this amorphous term, but invoke it whenever they wish to reach an anti-diversity result"). If Arthur and Freer are indeed still confused about the meaning of *Kroger's* principal rationale, they can consult the legislative history, see H.R. REP. NO. 734, 101st Cong., 2d Sess. 29 (1990) [hereinafter HOUSE REPORT], or a prior article written by Professor Freer in which he defines *Kroger's* principal concern. See Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1104 n.208 (1985) ("The *Kroger* Court was principally concerned with the plaintiff's end-run around the complete diversity requirement by 'the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants.'").

¹⁰ See Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 99 (citing Administrative Office statistics indicating that in 1988 diversity cases accounted for 28.5% of civil filings).

¹¹ 28 U.S.C. § 1367(a) (West Supp. 1991).

¹² See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (defining one constitutional "case" in pendent claim context).

¹³ See HOUSE REPORT, *supra* note 9, at 29 ("In providing supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley v. United States*.").

For diversity-only cases, the statute provides answers in many joinder situations and substantial guidance in others. Section 1367(b) places some limitations on the power of a court to hear related claims by, as the House Committee Report indicates, codifying the principal rationale of *Owen Equipment & Erection Co. v. Kroger*.¹⁴ Although reasonable minds may differ as to the wisdom of *Kroger's* rationale,¹⁵ there is nothing particularly amorphous or vague about it. As the House Report explains:

In diversity-only actions the district courts may not hear plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdictional requirement of 28 U.S.C. § 1332 by the simple expedient of naming initially only those defendants whose joinder satisfies section 1332's requirements and later adding claims not within federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis. In accord with case law, the subsection also prohibits the joinder or intervention of persons a [sic] plaintiffs if adding them is inconsistent with section 1332's requirements.¹⁶

Subsection (b) implements this prophylactic rule by identifying the joinder situations where *Kroger's* rationale is arguably implicated and requiring a court to dismiss a supplemental claim if "exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332,"¹⁷ *i.e.*, inconsistent with *Kroger's* rationale.

Subsection (b) straightforwardly answers a number, we think the bulk, of supplemental jurisdiction issues arising in diversity cases. Cross-claims among defendants, compulsory counterclaims by defendants, and impleader claims, because they are authorized by subsection (a) and not prohibited by subsection (b), are clearly within the federal courts' supplemental jurisdiction, in diversity litigation as much as in federal question cases. So are claims by a third-party defendant.

With respect to other joinder situations — primarily those identified in subsection (b) as candidates for dismissal — the statute provides at least

¹⁴ *Id.* at 29 n.16 ("The net effect of subsection (b) is to implement the principal rationale of *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).").

¹⁵ *See, e.g., Garvey, The Limits of Ancillary Jurisdiction*, 57 TEX. L. REV. 697, 703-05 (1979).

¹⁶ HOUSE REPORT, *supra* note 9, at 29.

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

“basic guidance.”¹⁸ But here also the guidance is not vague and amorphous, as the Emory duo claims. The *Kroger* scenario itself — a state-law claim initiated by a diversity plaintiff against a nondiverse third-party defendant — is prohibited. Moreover, a federal court may not hear state law claims by such a plaintiff against nondiverse defendants who are joined pursuant to Rules 19 or 20. The same result obtains concerning such claims by a diversity plaintiff against a nondiverse intervenor, because, as Professor Freer has previously acknowledged,¹⁹ *Kroger*'s principal rationale applies here as well. In diversity-only cases the federal courts similarly may not allow claims by a nondiverse person proposed to be joined as a plaintiff under Rules 19 or 20²⁰ or seeking to intervene as a plaintiff under Rule 24.

These joinder situations constitute the bulk of the supplemental jurisdiction issues in diversity-only cases, so one might legitimately ask Arthur and Freer, what's the beef? It cannot or should not be that there remain a few unresolved situations, such as a plaintiff's state-law compulsory counterclaim against a nondiverse third-party defendant, and a few admitted problems that we expect the courts will work through.²¹ Arthur and Freer themselves seem content with subsection (c), which employs a much broader delegation to district courts than subsection (b).²²

Startlingly, the Emory colleagues' alternative to subsection (b) is an empty framework that replaces a provision providing basic guidance with one that provides practically no guidance. After their lengthy and detailed critique, it ill behooves them to duck the task of suggesting specific language. Their guideline that the joinder of “additional nondiverse parties

¹⁸ See Rowe, Burbank & Mengler, *supra* note 2, at 961.

¹⁹ See Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 73 (quoted in Rowe, Burbank & Mengler, *supra* note 2, at 956).

²⁰ As we have previously noted, section 1367(b) does not literally bar a plaintiff from filing an original complete diversity suit and then amending to add a nondiverse co-plaintiff under Rule 20. See Rowe, Burbank & Mengler, *supra* note 2, at 961 n.91. The legislative history, however, does clearly indicate that this subsection is intended to prohibit that practice, see HOUSE REPORT, *supra* note 9, at 29 (“In accord with case law, the subsection also prohibits the joinder or intervention of persons a [sic] plaintiffs if adding them is inconsistent with section 1332's requirements.”), and we hope and believe that the courts will heed the House Report's statement. If our prediction proves incorrect, then a modest amendment to subsection (b) would be in order, which falls well short of the Emory professors' call for immediate repeal of the entire statute.

²¹ See, e.g., Rowe, Burbank & Mengler, *supra* note 2, at 959-60.

²² See Arthur & Freer, *supra* note 1, at 990.

. . . to a case properly originated under the diversity statute does not, *without more*, divest the court of jurisdiction" (their emphasis)²³ is both vaguer than the present statute ("more" of what?) and beside the point. Destruction of original diversity jurisdiction is not at issue, except in the indispensable-party cases that no one seems to dispute. The question is supplemental, not original, jurisdiction. Our critics' fumbling when they get perilously close to specifics gives us no confidence in their advice.²⁴

II. THE PRIME BEEF

As we have previously observed, Professor Freer really doesn't like *Kroger*; his colleague obviously shares that distaste as well as affection for diversity jurisdiction. Their dislike of *Kroger* and passion for diversity underlie a medley of misplaced and mistaken attacks.

A. *Overreach*

Professors Arthur and Freer allege that we overread *Kroger*, in which the Supreme Court expressed its concern for easy evasion of the complete diversity requirement in the context of a diversity plaintiff's state-law claim against a nondiverse third-party defendant. They seem to think that *Kroger* not only should be, but has been, limited to its facts.²⁵ On that point, however, they are wrong. Courts and commentators have employed *Kroger*'s principal rationale to explain why in other diversity contexts the courts under prior law were forbidden to exercise supplemental jurisdiction, including the contexts of Rule 19 joinder²⁶ and Rule 24(a) intervention by someone regarded as indispensable.²⁷

²³ *Id.*

²⁴ Another example proving that Arthur and Freer are advocating a task far more difficult than they acknowledge, and that they are not up to it, is their assertion that "[a]ddressing the issue [of preserving *Zahn*] in the statute itself would have required only the insertion of 'Rule 23' in subsection (b)." Arthur & Freer, *supra* note 3, at 1008. The effect of that insertion, however, might well have been to overrule Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (citizenship of named representatives controlling in class action), hardly what was intended. Certainly that would have been the result under Professor Freer's approach to the statute, and imagine what he would have been saying about us then!

²⁵ Arthur & Freer, *supra* note 1, at 966 ("Federal courts, including the Supreme Court, have steadfastly limited *Kroger* to its facts.").

²⁶ See, e.g., Acton Co. v. Bachman Foods, Inc., 668 F.2d 76 (1st Cir. 1982).

²⁷ 7C C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE, § 1917, at

They also contend that the statute extends *Kroger* too far by freezing antidiversity results in previously unresolved circumstances. Yet the statute's ban on supplemental jurisdiction in some situations in diversity cases when it would be "inconsistent with the jurisdictional requirements of section 1332" refers to those requirements as they are established in the text of the diversity statute and in decisions interpreting it. This is no "non-statute statute" that yields the results we like according to our whim;²⁸ it properly leaves open for debate and case law development the supplemental jurisdiction rules in some relatively uncommon situations not yet settled in pre-*Finley* decisions.

Professors Arthur and Freer dispute our contention that section 1367 does not lock in the complete diversity requirement for alienage cases, asserting that the "plain fact of the matter is that nobody thought about the alienage point."²⁹ We can testify that they are wrong as a matter of fact; some of us did think about and discuss the effect on alienage, and it is one reason why the statute refers to the "jurisdictional requirements of section 1332" rather than specifying complete diversity. The Supreme Court has never resolved the alienage question, and for that reason it was important to leave it unresolved. This point, though, seemed too arcane to suggest for inclusion in legislative history. The uncontroversial idea was to leave things alone, neither solidifying nor upsetting existing alienage doctrine. The implication that we are playing fast and loose³⁰ by saying that the courts are as free now as they were before to reinterpret the application of

479 & n.52 (1986) (agreeing with and collecting cases for the view that "a contrary view would provide an easy means to evade diversity jurisdictional requirements").

Arthur and Freer additionally read the Supreme Court's recent *per curiam* opinion in *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 111 S. Ct. 858 (1991) as indicating that the Supreme Court has sharply limited *Kroger* to its facts. *Freeport-McMoRan* does no such thing. The issue before the Court was whether the post-filing addition of a nondiverse party destroys *original* diversity jurisdiction. Citing its prior authority, the Court explained, "We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." 111 S. Ct. at 860.

The Court probably referred to *Kroger* only because respondent had relied on it, *see* 111 S. Ct. at 860, and observed correctly that *Kroger* casts "no doubt on the principle established by the cases previously cited that diversity jurisdiction is to be assessed at the time the lawsuit is commenced." 111 S. Ct. at 860. Because the Court found *Kroger* irrelevant to the possible destruction of *original* diversity jurisdiction, *Freeport-McMoRan* did not present an opportunity either to narrow or to expand *Kroger* as it applies to *supplemental* jurisdiction.

²⁸ *See* Arthur & Freer, *supra* note 1, at 965, 979.

²⁹ *Id.* at 980.

³⁰ *See id.* at 978-80.

the complete diversity requirement in alienage cases³¹ is unwarranted, for we — and the statute — are properly agnostic on whether the federal courts are free to do so or not. For good or ill, nothing has changed here.

B. *Metaphysics?*

Arthur and Freer make two separate criticisms of Congress' treatment of Rule 19 joinder and Rule 24 intervention. The first criticism concerns the statute's resolution of the necessary party/intervention anomaly.³² That issue, as we previously demonstrated,³³ simply plays out our fundamental disagreements about *Kroger* on a narrow issue.³⁴ It had long been established that nondiverse, merely "necessary" Rule 19 absentees could not be added using supplemental jurisdiction at the initiative of those already parties or the court, while the same party could intervene under Rule 24(a) and take advantage of supplemental jurisdiction. The system, in other words, already tolerated the consequences on these outsiders' interests that Professors Arthur and Freer bemoan as if section 1367 had created them, as long as the outsiders did not take the initiative to intervene.

In resolving the Rule 19/24 anomaly in diversity cases by eliminating supplemental jurisdiction over claims by nondiverse plaintiff-intervenors and claims by plaintiffs against nondiverse intervenors, we argued, section 1367 properly implements the principal rationale of *Kroger*. We continue to believe that it does. Debates about the interpretation of *Kroger* aside, we note the simple reality of easy evasion of the complete diversity rule if the anomaly were resolved the other way: let a diverse plaintiff file, then wait for or precipitate joinder. Piece of cake. Under section 1367, if the interests of the absentee are sufficiently affected by the litigation, dismissal for refiling in state court is now even more appropriate than before the adoption of the new statute. Moreover, the Emory colleagues' assertion notwithstanding,³⁵ the ubiquity of state long-arm statutes makes it ex-

³¹ See Rowe, Burbank & Mengler, *supra* note 2, at 954.

³² See Arthur & Freer, *supra* note 1, at 972-74.

³³ See Rowe, Burbank & Mengler, *supra* note 2, at 955-57.

³⁴ The anomaly existed only in suits founded solely on diversity jurisdiction, and there existed an anomaly, according to Professors Wright, Miller, and Kane, only when the intervenor of right was not "indispensable." See 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 27, § 1917, at 477-81.

³⁵ See Arthur & Freer, *supra* note 1, at 974.

tremely unlikely that a state forum will be unavailable.

The Emory twosome's second criticism of our arguments on Rules 19 and 24 is, they say, grounded in philosophy. The issue they call philosophical is whether there can be a defendant against whom no plaintiff asserts a claim for relief, and therefore, whether in a diversity suit it makes any sense to permit the joinder of a nondiverse Rule 19 defendant or intervention of a nondiverse Rule 24 defendant, while prohibiting the plaintiff from raising a claim against her. Despite Arthur and Freer's aspirations to the contrary, the issue is purely linguistic, not philosophical: whether our understanding of the term "claim" is antiquated and confusing, as they allege, or contemporary and comprehensible, as we maintain.

We and the Emory pair seem to agree on the substance, the "philosophy" of the matter if you will. They apparently agree with us that for present purposes the litigation universe consists of two categories of defendants: (1) a defendant who is present in a suit because the defendant may owe a duty to the plaintiff, the defendant may have violated that duty, and the defendant may be obliged to provide some redress to the plaintiff for violating that duty; and (2) a defendant who is present in a suit not because the defendant allegedly owes any duty to the plaintiff, but because the defendant has or claims an interest that might be impaired if the plaintiff prevails against some other defendant who does allegedly owe a duty to the plaintiff, or because some other party — another defendant — has interests that might be harmed if this defendant were not joined.

*Martin v. Wilks*³⁶ illustrates this distinction well. The minority plaintiffs had claimed in their employment discrimination suit that the defendant, the City of Birmingham, owed a statutory duty not to discriminate against them and had violated that duty. The City of Birmingham obviously falls into the first category of defendants. The majority employees, who were plaintiffs in *Martin* and who the Court intimated should have been joined originally, would belong in the second category of defendants. As Arthur and Freer assert, "the black plaintiffs in *Martin* could not claim that the white absentees had discriminated against them in violation of Title VII."³⁷ Nonetheless, the majority employees had interests that

³⁶ 490 U.S. 755 (1989).

³⁷ Arthur & Freer, *supra* note 1, at 971.

could be impaired if such plaintiffs prevailed.³⁸

The reporters are replete with other examples of these two types of defendants, such as Judge Miles Lord's decision in *United States v. Reserve Mining Co.*³⁹ There, the United States sought to revamp the business operations of the defendant, Reserve Mining, because it was illegally discharging tailings into Lake Superior. Eleven other associations and governmental entities were permitted to intervene by right as defendants.⁴⁰ None of these eleven intervening defendants had done anything wrong; nonetheless, they were permitted to oppose the United States' claims against Reserve Mining, because they or their constituents had economic interests that might be impaired if Reserve had to change its operations. There is nothing particularly amorphous, vague, or difficult in distinguishing allegedly wrongdoing defendants from innocent defendants. Judges, lawyers, and law professors in this era of public law litigation do so all the time. The Supreme Court, for example, has made this very distinction, most recently in *Independent Federation of Flight Attendants v. Zipes*.⁴¹ In *Zipes*, a flight attendants' union intervened on the side of the defendant, TWA, in a suit by some flight attendants against the airline for sex discrimination. After relief for the plaintiffs was approved, there remained the issue of who should pay the plaintiffs' reasonable attorney fees. The Supreme Court held that the flight attendants' union was not liable for statutory attorney fees, because the union was a "blameless" intervenor; only TWA, the "wrongdoing" defendant, was responsible for plaintiffs' fees.⁴²

Section 1367(b) employs this comprehensible distinction in a diversity suit by allowing a nondiverse defendant joined under Rule 19 or intervening under Rule 24 to defend, but prohibiting a plaintiff from seeking compensation or redress from the defendant. The theory, as explained in our earlier reply to Professor Freer, is that *Kroger's* rationale does not and should not apply to prevent defendants from joining a suit to protect their

³⁸ *Id.* at 968-69.

³⁹ 56 F.R.D. 408 (D. Minn. 1972).

⁴⁰ *Id.* at 411-16.

⁴¹ 491 U.S. 754 (1989). See *Diamond v. Charles*, 476 U.S. 54, 64-69 (1986).

⁴² 491 U.S. at 761 ("Assessing fees against blameless intervenors, however, is not essential to [the end] of [attorney fees' awards in Title VII litigation]. In every lawsuit in which there is a prevailing Title VII plaintiff there will also be a losing defendant who has committed a legal wrong.").

own interests.⁴³ Arthur and Freer do not contest the substantive merits of this theory; indeed in a 1985 article, Professor Freer essentially advocated the statute's position.⁴⁴

Arthur and Freer's only beef, then, is with the language chosen to express the statute's position. In diversity-only cases, subsection (b) generally excludes exercising supplemental jurisdiction over "claims by plaintiffs" against nondiverse defendants who have been joined under Rule 19 or who have intervened under Rule 24. It allows necessary parties or intervening defendants to protect their interests, but prohibits a plaintiff from raising a claim against them.

But Arthur and Freer object: how can there be a defendant against whom no plaintiff has a claim?⁴⁵ The answer is simple. A plaintiff can be said to have a "claim" only against a wrongdoing defendant, someone who allegedly owes a duty to the plaintiff and who has breached that duty. A plaintiff cannot be said to have a claim against a blameless or innocent defendant, someone who owes no duty to the plaintiff but is present in a suit only to protect its interests.

Arthur and Freer allege that our use of "claim" is "antiquated," "narrow," and "nonfunctional."⁴⁶ We believe our understanding, rather than

⁴³ See Rowe, Burbank & Mengler, *supra* note 2, at 957-58; see also Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247, 284-85.

The argument in the text shows why Professors Arthur and Freer are mistaken in contending that we have replaced one Rule 19/Rule 24 anomaly with another, one that "arbitrarily favors at least some Rule 19/24 defendants over equally deserving Rule 19/24 plaintiffs and other Rule 19/24 defendants." Arthur & Freer, *supra* note 1, at 973. The prior law's treatment of Rule 19 and Rule 24(a) parties was anomalous because there existed no good rationale for treating the two joinders differently. In contrast, the *Kroger* rationale supports the distinction made by the statute. What Arthur and Freer mislabel as "anomalous" is, in fact, consistent implementation of *Kroger's* rationale in the contexts of Rules 19 and 24. The statute's treatment of Rules 19 and 24 also cuts against their repeated assertion of the fevered charge that section 1367 "maims" packaging in diversity cases. See Arthur & Freer, *supra*, at 974; Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 471 (1991).

⁴⁴ See Freer, *supra* note 9, at 1104 (acknowledging that *Kroger's* rationale does not apply to the Rule 19 joinder in *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*, 564 F.2d 816 (8th Cir. 1977), a case we rely on for the same point in Rowe, Burbank & Mengler, *supra* note 2, at 958).

⁴⁵ Arthur & Freer, *supra* note 1, at 968-70.

⁴⁶ *Id.* at 970. In its place, the Emory professors define a claim as "simply a fact-based request to a court for relief against a particular defendant who contends, at least implicitly, that this relief would invade his legally protected rights." *Id.* We are as mystified by Arthur and Freer's notion of "property-type claims," *id.* at 971, as we are by their latest attempt to sow confusion on the subject, to wit,

being eccentric, is what judges, lawyers, and most — but apparently not all — law professors mean when they say that a plaintiff has a claim against a defendant.⁴⁷ We think that understanding is embodied in Rule 8(a), which requires a pleading setting forth a claim for relief to include a “showing that the pleader is entitled to relief” and a “demand for . . . relief.”⁴⁸ And we see that understanding reflected in the decisions we have offered as illustrations. In *Martin*, *Reserve Mining*, and *Zipes*, the original plaintiffs were not seeking relief against those who could have been joined or who in fact intervened.

C. *Venting Their Spleen*

Professors Arthur and Freer also complain that there was inadequate public ventilation and scrutiny of 28 U.S.C. § 1367: “If the *Kroger* ‘rationale,’ even as idiosyncratically defined by the trio, can prevail in a *fair* fight, so be it.”⁴⁹ Arthur and Freer seem to feel that they had no fair chance to criticize *Kroger* and praise diversity jurisdiction, and to participate in the drafting and redrafting of section 1367’s language.

They most certainly had ample opportunity to state their views on *Kroger* and diversity. We are sorry that neither Arthur nor Freer chose to

their assertion that a plaintiff has a “claim” against anyone who may be bound by the judgment. See Arthur & Freer, *supra* note 3, at 1010. If anything is metaphysical, it is their notion of “inherent claim[s].” See *id.* at 1011.

⁴⁷ See, e.g., F. JAMES & G. HAZARD, CIVIL PROCEDURE, § 3.14, at 163 (3d ed. 1985): [The] general structure [of pleadings stating claims], is . . . : (1) a description of the relationship or situation of plaintiff and defendant, with respect to which the law creates a duty in defendant; (2) a description of the conduct of the defendant, which the law proscribes as a violation of the duty; (3) the consequences to plaintiff resulting from defendant’s conduct that the law recognizes as compensable or justifying other redress (such as injunctive relief); and (4) a demand or prayer for relief.

⁴⁸ FED. R. CIV. P. 8(a). We vigorously disagree, therefore, with the Emory professors’ contention that the Federal Rules “make no sense” if there can be a defendant against whom no plaintiff asserts a claim. See Arthur & Freer, *supra* note 1, at 970. To support their contention, Arthur and Freer cite Rule 24(c), which requires that a motion for intervention as a defendant “be accompanied by a pleading setting forth the . . . defense for which intervention is sought.” FED. R. CIV. P. 24(c). They apparently cannot comprehend how an intervening defendant can raise “defenses to the plaintiff’s claims if there are none.” Arthur & Freer, *supra* note 1, at 971. The answer here also is simple and not too “metaphysical.” A “blameless” intervening defendant can protect its interests from impairment by raising defenses that assist the “wrongdoing” defendant against whom the plaintiff has raised a claim, in the same manner that a third-party defendant “may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff’s claim.” See FED. R. CIV. P. 14(a).

⁴⁹ Arthur & Freer, *supra* note 1, at 991 (emphasis in original).

participate during the Federal Court Study Committee's public comment period or to testify in person at any of the fourteen Committee public hearings, including one held in Atlanta, Georgia, where they live and profess.⁵⁰ More than 340 people testified at those hearings,⁵¹ including law professors from across the country.⁵² Although we believe that the Committee, which ultimately recommended that Congress should abolish much of diversity jurisdiction,⁵³ would have rejected Arthur and Freer's views about *Kroger* and diversity jurisdiction, we agree with them that their participation might have enriched the Committee's deliberations.⁵⁴

With respect to their complaints concerning Congress' deliberative process, it should be noted that a bill to codify supplemental jurisdiction was introduced on July 26, 1990;⁵⁵ that the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice held a hearing on September 6, 1990 to consider the Federal Courts Study Committee Implementation Act (at which hearing the provision on supplemental jurisdiction was discussed);⁵⁶ that the House Judiciary Committee

⁵⁰ See REPORT OF THE FEDERAL COURTS STUDY COMM. 32-33 (1990) [hereinafter FCSC REPORT].

⁵¹ See *id.*

⁵² For a listing of those who testified, see FEDERAL COURT STUDY COMMITTEE, II WORKING PAPERS AND SUBCOMMITTEE REPORTS (July 1, 1990), under the heading, LIST OF SPEAKERS AT HEARINGS.

⁵³ See FCSC REPORT, *supra* note 50, at 38-42.

⁵⁴ In our initial reply, we rebutted Freer's contention that section 1367 is inconsistent with the recommendation of the Federal Courts Study Committee, which Freer claimed had recommended the overruling of *Kroger*. See Rowe, Burbank & Mengler, *supra* note 2, at 948-50; see also Note, *Pendent Party Jurisdiction: Congress Giveth What the Eighth Circuit Taketh Away*, 17 WM. MITCHELL L. REV. 753, 779 (1991) ("Consistent with the Committee's recommendation to retain the 'complete diversity' rule as articulated in [*Kroger*], section 1367(b) severely restricts the exercise of supplemental jurisdiction where federal jurisdiction is based solely on diversity of the parties . . ."). We discussed this issue partly because Professor Freer had raised it, which makes the present assertion by Professors Arthur and Freer that the question (which, by the way, they continue to argue) is "irrelevant" and a strawman seem wholly unwarranted. See Arthur & Freer, *supra* note 1, at 963. Moreover, whether the Federal Courts Study Committee, a committee established by Congress and required to report to it, recommended the overruling of *Kroger* is relevant to whether Arthur and Freer had an opportunity to state their views in the process leading to the statute's adoption.

⁵⁵ See H.R. 5381, 101st Cong., 2d Sess. § 120, at 27-31 (1990), reprinted in *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3998 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 2, 28-32 (1990) [hereinafter *House Hearing*].

⁵⁶ See *House Hearing*, *supra* note 55.

published a report on September 10, 1990 (which contains the version of section 1367 that was enacted and the full text of the explanation of the statute that was before both Houses of Congress when they acted);⁵⁷ and that Congress did not enact section 1367 until October 27, 1990.⁵⁸ Here also, we are sorry that, unlike ourselves and others, Arthur and Freer did not contribute to Congress' deliberations.

Let us not, however, exaggerate. The process afforded by Congress on this provision and the many others in the Federal Courts Study Committee Implementation Act was meager. The House Subcommittee's hearing took less than one day. We agree with Arthur and Freer that perhaps Congress could have — and in an ideal world should have — provided more process and engaged in more debate and deliberation than it did. The world, however, was not ideal in the fall of 1990, and we are sure Arthur and Freer can appreciate that this trio of law professors exercises no control over how Congress conducts its business.⁵⁹

III. CONCLUSION

As we have noted, it is still too early to tell for certain whether the federal courts will sensibly interpret section 1367. In ridiculing our "hope" that the courts will interpret the statute to avoid some possible problems, Professors Arthur and Freer unfairly omit that we also expressed our expectation — supported by stated reasons — that they would do so. A recent example confirming our hope and expectation is Judge Shadur's opinion in *Fink v. Heath*,⁶⁰ in which he relies on the legislative history to find no overruling of *Zahn v. International Paper Co.*⁶¹ by section 1367.⁶² We frankly described the legislative history coverage as

⁵⁷ See HOUSE REPORT, *supra* note 9.

⁵⁸ See 150 CONG. REC. H13301-07 (daily ed. Oct. 27, 1990). The Emory professors' implausible claim "that the legislative history was written *after* the statute's passage" is therefore manifestly false.†

⁵⁹ Their latest salvo, however, suggests that they do *not* appreciate this. They are under the delusion that we three law professors had the power to "fix" any problem we foresaw. See Arthur & Freer, *supra* note 3, at 1008. We would recommend to them readings on the legislative process that include more than the writings of Justice Scalia.

⁶⁰ No. 91 C2982 (N.D. Ill. July 8, 1991) (Westlaw, DCTU database).

⁶¹ 414 U.S. 291 (1973).

⁶² *Fink v. Heath*, No. 91 C2982, at 3 & n.4.

† Editor's Note: Note 58 refers to the following material that was deleted by Professors Arthur and Freer during the editing process:

second-best to more explicit treatment in the statute,⁶³ but are reassured already by *Fink v. Heath*'s sympathetic reading of the statute and legislative history.⁶⁴

If section 1367 needs amending to solve real problems, we will be happy to support such amendments.⁶⁵ In the meantime, we continue to believe that the statute is well if not perfectly drafted and in need of little, if any, change. Limited experience thus far strikes us as confirming that view. Whatever else may be called for, we trust that cooler heads than those of Professors Arthur and Freer⁶⁶ will join us in resisting their call to gut or scrap a needed statute that is already proving its value.

This [inability to know whether Congress really intended a statute's result] is especially true of post-enactment history on which members of Congress could not have relied. . . .

.....
[the drafters'] suggestion [of legislative history attempting to correct an oversight in section 1367, see *supra* *Compounding or Creating Confusion*, at 960 n.90] merely exacerbates the problem by implying that the legislative history was written *after* the statute's passage. Reliance on post-enactment history has received especially hard criticism, as it is not clear that Congress ever saw the history, much less relied upon it.

⁶³ Rowe, Burbank & Mengler, *supra* note 2, at 960 n.90.

⁶⁴ See also Note, *The Congressional Resurrection of Supplemental Jurisdiction in the Post-Finley Era*, 42 HASTINGS L.J. 1611 (1991) (stating that section 1367 "makes great strides in resolving much of the confusion surrounding" supplemental jurisdiction, *id.* at 1613, and advocating interpretations generally in accord with those we have suggested).

⁶⁵ See *supra* note 20.

⁶⁶ Arthur and Freer have taken weight of authority arguments to new depths. For instance, readers who might otherwise be impressed by their references to "professional commentator[s]" who have "seem[ed] to criticize some aspect of the statutory language," Arthur & Freer, *supra* note 3, at 1007, may wish to consider that "Professor Field died in 1978 and Justice Kaplan's absorption in judging has precluded active participation in recent editions." R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE xxii (6th ed. 1990). We trust that such readers are as capable of distinguishing fair from unfair criticism as they are questions in casebook supplements from sustained scholarly attention or, for that matter, the living from the dead.