ARTICLES

JOINDER'S DIVERSITY ASYMMETRY

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In federal diversity cases, plaintiffs are barred from joining nondiverse supplemental parties or claims under 28 U.S.C. § 1367(b). Defendants, however, can expand the case without the same restriction. Section 1367(b) codified the U.S. Supreme Court's concern in Owen Equipment & Erection Co. v. Kroger: *Plaintiffs might so prefer federal court that they would "sneak" nondiverse parties in by hiding them until after diversity jurisdiction is established, only then springing them on unsuspecting courts and defendants. This Article challenges the justification for that asymmetry in three ways.*

First, it explores the history of the asymmetry, starting with how joinder rules developed as cases went from simple unilateral actions to the multiparty ecosystems of today, before examining the history of diversity and the supplemental jurisdiction statute. Second, it considers the theoretical bases for assumptions about jurisdictional preferences and how litigants achieve them, finding that the theory underlying the Court's concern in Kroger *is irrational. Third, the Article shares the results of an original study analyzing dispositive motions based on joinder and diversity jurisdiction in over 1,400 federal cases. The data show a pervasive inconsistency in the ways courts have attempted to address the asymmetry, even thirty-five years after the statute's enactment, creating uncertainty for litigants and inefficiency for courts. Taken together, the history, theory, and data show that the current rule produces structural inequality and procedural inefficiency. The asymmetry is an anachronism undercut by modern litigation tactics and disparate court resolutions. This Article concludes with a modest proposed revision to the statute that would eliminate the asymmetry in § 1367(b) while preserving diversity jurisdiction as a whole.*

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INTRODUCTION

Plaintiffs file lawsuits and defendants respond to them.[1] This initial distinction casts a long shadow over the remainder of a lawsuit.[2] But this binary division between plaintiffs and defendants destabilizes as litigation becomes increasingly complex.[3] A plaintiff's initial filing may give way to

1. *See* SIR JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 60 (Oxford Univ. Press, 5th ed. 2019) (1971) ("In their earliest form, legal proceedings were commenced, or 'originated,' when a plaintiff made his complaint or demand before a court in due form.").

2. *See, e.g.*, 21B WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 5122 (2d ed.), Westlaw (database updated Apr. 2026) (describing plaintiff's burdens).

3. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976) (describing private law litigation as "*bipolar*," among other things). *See generally* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the*

counterclaims, crossclaims, third-party practice, and intervention, all of which blur the neat boundaries that once separated the two sides.[4] Although the joinder rules themselves usually apply equally regardless of whether a plaintiff or defendant invokes them, the jurisdictional consequences for each party are not equal.[5]

When federal subject matter jurisdiction is based on diversity, for example, defendants can add nondiverse supplemental claims or parties, but plaintiffs cannot.[6] Specifically, 28 U.S.C. § 1367(b) prevents the exercise of supplemental jurisdiction over "claims by plaintiffs" under certain joinder rules but allows for the exercise of supplemental jurisdiction over similar claims when brought by defendants.[7] This asymmetry can create bizarre and unfair scenarios in which liable third-party defendants who are not diverse from the original plaintiffs can sue the plaintiff, but the plaintiff must trudge off to state court to bring any counterclaim themselves.[8] Section 1367(b)'s asymmetry derived from the U.S. Supreme Court's speculation that plaintiffs would surreptitiously start by naming only diverse parties to secure diversity jurisdiction, then later add nondiverse

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Extraordinary in Institutional Litigation, 93 HARV. L. REV. 465 (1980) (offering a nuanced view of institutional litigation).

4. *See, e.g.*, George L. Priest & Judyth W. Pendell, *Foreword: Modern Civil Procedure: Issues in Controversy*, LAW & CONTEMP. PROBS., Summer 1991, at 1, 1 ("There should be no surprise, of course, that modern litigation is becoming increasingly complex."); Jerry J. Fang, *12 Confused Men: Using Flowchart Verdict Sheets to Mitigate Inconsistent Civil Verdicts*, 64 DUKE L.J. 287, 305 (2014) (noting the "increasing complexity and length of modern civil litigation").

5. *See* FED. R. CIV. P. 13, 18, 19, 20, 24. On its face, Rule 14 is not symmetrical, as it concerns defendants impleading third parties with derivative liability. *See* FED. R. CIV. P. 14(b). But, under Rule 14, plaintiffs can implead third parties if they are the subject of a counterclaim. *See id.*

6. *See* 28 U.S.C. § 1367(b); *see also infra* Part II.A (discussing diversity jurisdiction).

7. *See* 28 U.S.C. § 1367(b). Under the umbrella of "supplemental jurisdiction," § 1367 codified and clarified decades of ancillary and pendent jurisdiction doctrine but was most urgently a response to *Finley v. United States*, 490 U.S. 545 (1989). *See, e.g.*, Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 IND. L.J. 5, 5 (1998) (examining Congress's stated goal "to overrule *Finley v. United States* and, in other respects, to restore pre-*Finley* practice"). A series of tense contemporaneous exchanges between scholars contended with how effective § 1367 was in accomplishing that goal. *See, e.g.*, James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 110 n.3 (1999) (summarizing the academic back-and-forth). Those debates did not concern the issue with which this Article grapples—the asymmetry of the joinder rules written into § 1367(b). For further discussion of the Court's decision in *Finley*, see *infra* notes 153–64 and accompanying text.

8. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376–77 (1978). *Kroger* is the seminal case demonstrating this asymmetry. There, the innocent plaintiff could not recover from a liable third-party defendant that they had not sued initially because it was discovered after trial that the entity was not diverse. *See id.* at 367–69. The Court blamed the plaintiff for choosing federal court in the first place. *See id.* at 376. Lower courts have been less sanguine. *See, e.g.*, Deluxe Bldg. Sys., Inc. v. Constructamax, Inc., 94 F. Supp. 3d 601, 610 (D.N.J. 2013) ("Of course, this 'plaintiff exclusion' is somewhat arbitrary; in this scenario, not every plaintiff is necessarily guilty of jurisdictional manipulation, and not every defendant is innocent of it.").

parties after jurisdiction had been established, thereby creating an end run around the complete diversity rule.[9]

By tracing the provenance of § 1367(b), examining the behavioral assumptions through game theory, and analyzing hundreds of federal decisions construing § 1367 and the joinder rules, this Article shows that the asymmetry is historically, theoretically, and empirically unsupported.[10] The idea that plaintiffs will routinely "hide" nondiverse parties until after filing rests on flawed assumptions about litigant behavior.[11] It ignores the increasing complexity and commonality of multiparty lawsuits as well as the fact that defendants routinely remove cases to federal court, binding plaintiffs to its rules despite their initial jurisdictional choice.[12] For plaintiffs—and only plaintiffs—courts are forced to choose between incomplete adjudication and the loss of jurisdiction, which in turn increases motion practice and parallel proceedings in cases that should otherwise be resolved in a single forum. These problems have real-world consequences and occur regularly in federal court.[13]

The costs of the asymmetry are borne unevenly. The asymmetrical architecture of § 1367(b) purports to protect the complete diversity rule but in truth protects it only from plaintiffs, reallocating the burden of protecting complete diversity from courts to litigants and from defendants to plaintiffs.[14] Fragmented litigation hurts parties with fewer resources.[15] District courts in particular are highly sensitive to this imbalance and have

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9. *See Kroger*, 437 U.S. at 374; *see also* Wendy C. Perdue, *Supplemental Jurisdiction and § 1367: The Good, the Bad, and the Ugly*, 85 U. PITT. L. REV. 549, 574 (2024) (describing how a "sneaky plaintiff" could try to subvert the complete diversity rule).

10. *See infra* Parts II–IV.

11. *See infra* Part III.

12. *See, e.g.*, 13E WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3605 (3d ed.), Westlaw (database updated Apr. 2026) ("The task [of determining diversity] is simple when there is a single plaintiff and a single defendant . . . . [T]he problem . . . becomes more and more complex as the number of parties to the suit increases.").

13. While the vast majority of courts—including the Supreme Court—interpret § 1367(b) to restrain all nondiverse claims, some scholars disagree that such is the correct reading of the statute. *See, e.g.*, Patrick Woolley, *Complete Diversity and the Canon Against Jurisdictional Privilege: A Response to Professor Moller*, 77 FLA. L. REV. F. 7, 11–12 (2025) (arguing for broader common law approach to defining a civil action, which would permit more flexibility in § 1367(b) than presently assumed).

14. There is some evidence that the majority of state court lawsuits are filed by large institutional actors. *See, e.g.*, Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1731 (2022) (analyzing Westlaw data and finding that "a handful of private companies account for a very large share of all civil litigation").

15. *See, e.g.*, Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966) (emphasizing that the federal joinder rules "were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court"); *see also* DeLaventura v. Columbia Acorn Tr., 417 F. Supp. 2d 147, 155 (D. Mass. 2006) (criticizing snap removal multidistrict litigation (MDL) proceedings as creating a "David and Goliath" situation (quoting Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 MEM. ST. U. L. REV. 841, 842–43 (1993))).

routinely criticized it.[16] Further, considered through a game theory lens, defendants are imbued with significant tactical advantages: greater flexibility, sequential responsiveness, and information imbalance.[17]

Section 1367(b) is a vestige of a world of simple bilateral disputes. Modern litigation rarely looks like that world. Today's cases routinely involve layered parties, contingent liability, and overlapping claims, which make posture-based jurisdictional rules disruptive, rather than efficient, for judges who are equipped to manage complex cases.[18] An important step in achieving fairness and efficiency would be to reform § 1367(b).[19]

To establish that conclusion, Part I of this Article briefly summarizes the history of multiparty lawsuits and the adoption of the Federal Rules of Civil Procedure (FRCP or "Federal Rules") to show that technical binary constraints developed into liberal joinder for purposes of efficiency and fairness—principles that run counter to the asymmetry.[20]

After explaining the history of joinder, Part II examines (1) the history of the complete diversity rule from which the concern underlying § 1367(b) derives, (2) the origin of the theory adopted by the Court in *Owen Equipment & Erection Co. v. Kroger*,[21] and (3) the adoption of § 1367(b).[22] Part II shows that the docket protectionism that the complete diversity rule is supposed to ensure is an inadequate justification for the asymmetry.[23]

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16. *See, e.g.*, Brocious v. U.S. Steel Corp., No. 18-cv-03823, 2020 WL 362823, at *3 (D. Md. Jan. 22, 2020) ("Plaintiffs should not be forced to litigate near-identical claims, arising from an identical set of facts, in two separate lawsuits in two separate fora."); Duino v. CEM W. Vill., Inc., No. 18-cv-10249, 2020 WL 3249214, at *4 (S.D.N.Y. June 16, 2020) ("Plaintiff will be 'forced to litigate in two different fora . . . resulting in an inefficient use of judicial resources.'" (quoting Wyant v. Nat'l R.R. Passenger Corp., 881 F. Supp. 919, 923 (S.D.N.Y. 1995))); Myers v. Queen, No. 11-CV-1273, 2013 WL 5671340, at *3 (E.D. Mo. Oct. 17, 2013) ("A separate state-court action . . . would require plaintiff to litigate the same facts and legal issues in two venues."); Moreira v. SunTrust Mortg., Inc., No. 10-cv-1065-Orl-18, 2010 WL 11626827, at *2 (M.D. Fla. Aug. 26, 2010) (criticizing parallel suits that cause plaintiffs to have increased costs by requiring them to litigate in both state and federal court); Tartaglia v. Safety Bus Serv., Inc., No. 07-4766, 2008 WL 1868690, at *2 (E.D. Pa. Apr. 28, 2008) ("Plaintiffs would be significantly prejudiced if joinder is disallowed, as they would be forced to litigate two matters arising from the same incident in two separate fora.").

17. *See infra* Part III.A.

18. *See* FED. R. CIV. P. 21, 42.

19. A statutory modification permitting something less than complete diversity is hardly an outlier—that is how statutory interpleader works. *See, e.g.*, Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 304 (2019) ("To ensure maximum opportunity for joinder of claimants, the Act requires only minimal diversity and a de minimis amount in controversy."). Rule 23 also requires only minimal diversity. *See* FED. R. CIV. P. 23; *see also* Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 103–04 (1992) (noting the minimal diversity requirements of Article III and presaging the Class Action Fairness Act).

20. *See, e.g.*, William Wirt Blume, *The Scope of a Civil Action*, 42 MICH. L. REV. 257, 257, 265 (1943) (listing the constraints at common law, as contrasted with courts of equity, including the inability to add additional parties or claims).

21. 437 U.S. 365 (1978).

22. *See infra* Part II.

23. *See Kroger*, 437 U.S. at 367.

Complete diversity has been elevated to the most important consideration, when it is neither constitutionally required nor applied uniformly.[24]

Part III examines common assumptions about how plaintiffs and defendants tactically approach jurisdiction to ask whether the original grounds for the asymmetry in § 1367(b) were valid.[25] Prior scholarship has demonstrated not only that plaintiffs prefer state courts and defendants prefer federal courts, but also that these preferences are empirically supported by their respective success rates.[26] Other scholarship has examined § 1367(b) primarily through the lens of what the statute means rather than its effects. Commentators have debated whether the statute should be read narrowly to prevent jurisdictional circumvention or more literally to bar specified categories of plaintiff claims, heavily criticizing the statute as "poorly drafted" and as leading to "wasteful litigation."[27] What scholars have not done is examine how the plaintiff-defendant asymmetry embedded in § 1367(b) operates across the joinder rules in actual federal litigation, or whether the behavioral assumptions that motivated the asymmetry remain valid in modern multiparty cases. This Article fills that gap by combining historical context, game theory analysis, and an original empirical study of federal joinder decisions construing § 1367(b) to show that the statute's asymmetry produces instability and distortion unjustified by the antimanipulation rationale on which it rests.

Part IV explains the methodology for the Article's original empirical work and offers select case studies.[28] From 1990 through 2025, courts decided approximately 1,487 dispositive motions relating to supplemental jurisdiction and the joinder rules.[29] There are unsurprising results (e.g., courts dismiss 90 percent of cases where diversity is destroyed) and surprising results (e.g., courts do *not* dismiss 100 percent of cases where diversity is destroyed).[30] Part IV concludes with a review of notable cases highlighting judicial workarounds such as "party realignment" or creative uses of Rule 24 of the FRCP.[31] Moreover, the asymmetry in § 1367(b)

24. Despite (or as a result of) the Court's complete diversity protectionism, the Federal Courts Study Committee actually sought to *abolish* diversity jurisdiction entirely. *See* FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38–39 (1990).

25. *See infra* Part III.

26. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System?: Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 592–99 (1998); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1368–69 (2006).

27. 13D WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3567.2 (3d ed.), Westlaw (database updated Apr. 2026) ("Despite the obvious struggles of the federal courts and the criticism of some commentators, Congress has shown no interest in honing [§ 1367]."); Rochelle Cooper Dreyfuss, *The Debate over § 1367: Defining the Power to Define Federal Judicial Power*, 41 EMORY L.J. 13, 22 (1992) (summarizing the back-and-forth between Richard D. Freer and Thomas D. Rowe Jr., among others).

28. For an explanation of this Article's specific methodology, see *infra* Part IV.A.

29. *See infra* Part IV.B. Of the 1,487, diversity jurisdiction was an issue in 1,261 of those cases. For more detail on the methodology employed, see *infra* Part IV.A.

30. *See infra* Parts IV.A–B.

31. *See infra* Part IV.C.

contains no exception for removal.[32] This is particularly problematic given that the Court's rationale in *Kroger* is based on the idea that a plaintiff "chose" federal court.[33] In sum, recent federal cases reflect uncertainty about how to address the inefficiencies and inequities of the asymmetry.[34]

After considering likely objections to this Article's thesis, Part V offers a simple proposal to reform § 1367(b) by removing the asymmetry of § 1367(b).[35] With no credible evidence that plaintiffs manipulate jurisdiction any more than defendants do, with evidence that plaintiffs prefer state rather than federal court, and with empirical evidence of the mess the asymmetry creates, if the asymmetry was ever warranted, it is no longer so today. A change would better reflect the rationale for supplemental jurisdiction and joinder's focus on the fair and efficient resolution of complex actions.[36] Amendment would not expand Article III jurisdiction, change the complete diversity rule, or require new standards; it would simply remove the asymmetry while retaining guardrails against improper joinder.

I. SIMPLE BINARY DISPUTES TO COMPLEX MODERN LITIGATION

Part I begins with a brief history of joinder. Understanding this history is the first step toward explaining why the asymmetry is irrational and how the rules of joinder and the grant of federal diversity jurisdiction arose. This history is important for at least two reasons.

First, some fundamental principles of litigation remain deeply ingrained in the psyches of lawmakers, courts, and litigants. One such principle is that the plaintiff strategically chooses the jurisdiction.[37] Another is that the most common or traditional lawsuit concerns one plaintiff suing one defendant.[38] Modern litigation often turns both of these principles on their

32. 28 U.S.C. § 1441 ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."); *see also, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238 (1981) (dismissing on forum non conveniens grounds a case filed in California state court where one defendant removed to federal court, the other transferred to federal court in Pennsylvania, and then moved to dismiss).

33. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978).

34. Inefficiency and inequity are the antithesis of the Federal Rules, which are designed to provide certainty and consistency. *Cf.* FED. R. CIV. P. 1.

35. *See infra* Part V.

36. Judge Paul B. Matey of the U.S. Court of Appeals for the Third Circuit provided an excellent short summary of the federal joinder rules' purpose. *See* Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC, 80 F.4th 223, 227 (3d Cir. 2023) ("The Federal Rules of Civil Procedure are rules of action designed to secure the just and efficient determination of civil proceedings. And their joinder provisions promote the ancient balance among efficiency, fairness, and finality.").

37. *See* Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 300 (2014) (analyzing plaintiff jurisdictional choices).

38. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286,

heads, however, as many cases involve multiple parties and claims, and defendants can remove cases from state to federal court.[39]

Second, for hundreds of years, courts have been able to consider secondary claims alongside primary ones as long as they were related in some rational fashion.[40] Modern litigation has not only embraced this principle but also formalized it in judge-made law, statutory law, and the Federal Rules. That, however, was not always so.[41] When formalities introduce misshapen geometries—like shifting the burden of sustaining the complete diversity rule onto the party least likely to offend it—they should be discarded.

A. The Common Law: One Plaintiff Against One Defendant on One Claim

The overwhelming majority of private lawsuits in England from 1066 until the Judicature Acts[42] of the nineteenth century concerned a single plaintiff against a single defendant on a single claim.[43] Medieval law sometimes allowed a group (e.g., "the citizens" or "the men" of a town) to sue or be sued under a collective name, such as when the "men of Thanet" sued, appointing thirty representatives to litigate on behalf of the community.[44] In another famous example, the Abbot of Faversham brought an action of trespass against "the alderman and the whole community."[45] Claims or causes remained, however, primarily singular for centuries.[46]

290 (2013) (noting that "[t]he typical lawsuit when the [Federal] Rules became effective involved a single plaintiff and a single defendant jousting about what usually were relatively simple matters").

39. *See* Chayes, *supra* note 3, at 1282–84 (describing the traditional understanding of private law litigation as "bipolar" but noting its increasing complexity based on more modern civil litigation); Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 771–72 (2019) ("Presently, more than 143,500 cases—or substantially more than one-third of all federal civil lawsuits—are pending in an MDL proceeding.").

40. *See infra* Parts I.A–B.

41. *See* 6A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1581 (3d ed.), Westlaw (database updated Apr. 2026) ("[T]he rules relating to joinder of claims were formulated along strict and formalistic lines. The extent to which joinder was permitted tended to be governed by the forms of action rather than by any notion of litigation efficiency or trial convenience.").

42. *See* Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77 (Eng.); Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66 (Eng.).

43. *See, e.g.*, 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 632 (2d ed. 1903) ("[E]xcept by way of rare exception, the men of the vill do not hold any property . . . in common . . . . The consequence is that they rarely come before the courts as co-plaintiffs.").

44. The court treated this as a joint action; when the claim failed, those thirty were fined, indicating that the judgment bound only the participating coplaintiffs. *Id.* at 633 & n.1 ("Judgment for damages is given against 'all the men of Faversham.'").

45. *Id.* at 633 n.1; Anna Anisimova, *The Jurisdiction in a Small Kentish Town: Between Norm and Practice*, *in* GOVERNAR A CIDADE NA EUROPA MEDIEVAL 347, 352–56 (Amélia Aguiar Andrade & Gonçalo Melo da Silva eds., 2021).

46. Again, exceptions prove the rule. Note for example the situation of land dispute between the "voucher" and "warrantor." Tenants could choose to call in a third person to

The strict forms of action limited each writ to one primary cause of action.[47] Under the old common law writ system, each writ was tied to a particular cause of action, which naturally kept litigation one-dimensional and bilateral.[48]

Over time, however, procedural practice allowed multiple counts or claims to proceed in a single action if they were of the same nature or arose from the same facts.[49] By the late medieval period, pleadings could include several counts as alternative theories—a plaintiff might assert two variants of a claim (say, both *trespass* and *case*) to see which fit the proof.[50] These baby steps toward multiclaim litigation were among the first toward an informal relaxation of the single-claim principle.[51]

By the nineteenth century, English reforms cemented the ability to join claims.[52] These reforms culminated in the Judicature Acts of 1873 and 1875, which merged the separate common law and equity courts into a unified Supreme Court of Judicature.[53] The back-and-forth between English and American procedure influenced both traditions; new rules of court procedure became more liberal regarding the joinder of parties and claims.[54]

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defend themselves by "counterplead[ing] the warranty." 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 662 (2d ed. 1898). This procedure served as a precursor to impleader.

47. Formal and exclusionary writs dictated the structure of litigation. Parties were either plaintiffs or defendants, and those labels defined their procedural rights. This binary paradigm offered clarity but left little room for flexibility or efficiency, especially as the writs grew restrictive and complex.

48. *See* Charles E. Clark, *The Cause of Action*, 82 U. PA. L. REV. 354, 355 (1934) ("The old writ system and the forms of action had the effect of setting an arbitrary limit to the unit of possible grounds of action which might be disposed of in a single suit.").

49. *See* BAKER, *supra* note 1, at 83–84, 96 (explaining the historical development from strict single-claim pleading toward multiple-count pleading practices).

50. STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN, THOMAS O. MAIN & ALEXANDRA D. LAHAV, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 340–41 (6th ed. 2020).

51. Sir Frederick Pollock and Frederic William Maitland offer an amusing metaphor when describing even the broader chancery system: that each writ is its own form of action and litigants could not "use his cross-bow as a mace." 2 POLLOCK & MAITLAND, *supra* note 46, at 561.

52. Section 41 of the Common Law Procedure Act 1852, 15 & 16 Vict. c. 76, § 41 (Eng.), expressly authorized the joinder of "[a]ll [p]ersonal [a]ctions" (essentially, all causes of action in contract or tort) between the same parties in the same lawsuit. *Id.* Subsequent legislation expanded and clarified these joinder provisions. *See* Common Law Procedure Act 1854, 17 & 18 Vict. c. 125 (Eng.); Common Law Procedure Act 1860, 23 & 24 Vict. c. 126 (Eng.). This meant a plaintiff no longer needed separate suits for a debt and a closely related breach of contract against the same defendant—they could be combined, so long as the parties were identical and the claims were being pursued in the same right.

53. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 942 (1987).

54. *See id.* ("The debate over procedure in America cross-fertilized with the English dialogue; nineteenth century English procedural reform, which drew on the Field Code, became a beacon for later American procedural reformers . . . . The aim [of the Judicature Acts] was to eliminate multiplicity of law suits between parties and to apply all applicable substantive law and remedies in the same suit.").

B. Equity's Flexible Joinder of Parties and Claims

Long before common law courts allowed multiple parties or claims in one lawsuit, equity courts developed rules to manage complex cases involving several parties or related claims.[55] Equity sought to prevent a "multiplicity of suits."[56] Courts of equity assumed jurisdiction specifically because common law's rigid procedural forms required separate lawsuits, while equity could include all interested parties in a single case and grant complete relief.[57] Equity's maxim that it "delights to do justice and not by halves" guided courts and parties.[58] Equity permitted litigants to join numerous claims and diverse parties in a single action to comprehensively resolve the dispute.[59] This took several forms, which eventually took shape as formal joinder rules.[60]

For example, it was equity that created the bill of interpleader.[61] This bill permitted someone holding property or money subject to competing claims (the stakeholder) to sue multiple claimants together.[62] Instead of facing separate lawsuits from each claimant, the stakeholder could require claimants to litigate against each other in one action, allowing the court to determine who should receive the property.[63] Interpleader protected the stakeholder from having to pay twice and simplified litigation by consolidating multiple lawsuits into one.[64]

Equity also recognized early forms of representative litigation, such as a "bill of peace," where numerous persons had the same interest in a dispute. Rather than adjudicate dozens of near-identical suits, a bill of peace allowed

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55. *See* JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 273–74, 286 (2009).

56. JOSEPH STORY, 1 COMMENTARIES ON EQUITY JURISPRUDENCE § 64k, at 70–71 (13th ed. 1886).

57. *See* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 149 (1950) (discussing equity's advantage over common law in consolidating multiple related disputes into a single suit).

58. Raighne Delaney & Juanita Ferguson, *The Equitable Maxims: A Primer*, BRIEF, Summer 2019, at 44, 46.

59. *See* JOHN MITFORD REDESDALE, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY, BY ENGLISH BILL 163–65 (5th ed. 1849); STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 12–14 (2006).

60. *See* 2 STORY, *supra* note 56, §§ 800–803, at 110–12.

61. GEOFFREY C. HAZARD, JR., WILLIAM A. FLETCHER, STEPHEN MCG. BUNDY & ANDREW D. BRADT, PLEADING AND PROCEDURE: CASES AND MATERIALS 634 (11th ed. 2015).

62. *See* FED. CTS. STUDY COMM., *supra* note 24, at 40; 7 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1701 (3d ed.), Westlaw (database updated Apr. 2026) (explaining interpleader as an equitable remedy allowing stakeholders to join all claimants).

63. *See* 7 WRIGHT & MILLER, *supra* note 62, § 1702.

64. *See* CHAFEE, *supra* note 57, at 149 (highlighting interpleader's efficiency in preventing multiple lawsuits and protecting stakeholders from inconsistent obligations).

a representative few to litigate on behalf of all.[65] In such cases, the decree would effectively settle the rights of everyone in the group, even though not every individual was named in the suit.[66] Early equity established the principle that parties could represent others who shared common interests to prevent fragmented adjudication.[67] Equitable courts also wielded bills of peace,[68] the progenitors to the modern class action.[69]

These nascent joinder principles were eventually adopted in civil procedure statutes and the Federal Rules.[70] Upon the merger of courts of law and equity, joinder doctrines formalized those equitable mechanisms for the efficient and fair resolution of complex cases.[71]

Early American equity courts enthusiastically adopted these English precedents.[72] Under the Federal Equity Rules promulgated by the U.S. Supreme Court in the nineteenth century, American federal courts explicitly endorsed representative suits, interpleader, and compulsory joinder of indispensable parties.[73] Similarly, state courts followed English equity's pragmatic approach, treating efficient joinder as a hallmark of procedural justice. Justice Joseph Story described how courts could join materially interested parties and allow representation of multiple individuals.[74]

This equity tradition directly influenced the procedural reforms that culminated in the nineteenth-century merger of law and equity. The "Field Code,"[75] adopted first in New York, created a single form of civil action. Its drafters intentionally incorporated equity's flexible joinder practices, allowing multiple claims and parties to be combined more freely.[76] Under the code, representative suits previously available only in equity became

65. "A bill of peace with multiple plaintiffs who represented the whole set of possible plaintiffs—some tenants representing all of the tenants, or some parishioners representing all of the parishioners—is probably the closest analogy in traditional equity to [a modern class action]." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 426 (2017).

66. For example, under the common law of Blackstone's era, a plaintiff could not join claims for trespass and slander within one proceeding, as each required its own writ and its own distinct procedural path. This formality often fractured complex disputes into multiple lawsuits, increasing both delay and expense. *See* William Blackstone, *Of Private Wrongs*, *in* 3 COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (Wilfrid Prest ed. Oxford Univ. Press 2016) (1768); SUBRIN & WOO, *supra* note 59, at 9–12.

67. *See* 2 STORY, *supra* note 56, §§ 853–859, at 147–53.

68. *See* REDESDALE, *supra* note 59, at 145–47.

69. Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1862–63 (1998).

70. *Id.* at 1864.

71. The fact that the courts of law so readily adopted equity's focus on fairness supports a flexible and liberal interpretation of joinder rules.

72. *See* Hazard, Gedid & Sowle, *supra* note 69, at 1885.

73. Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xxxix, lvi (1843).

74. 2 STORY, *supra* note 56, §§ 853–859, at 147–53.

75. 1848 N.Y. Laws, ch. 379, §§ 117–119.

76. *See* Stephen N. Subrin, *David Dudley Field and the Field Code*, 6 LAW & HIST. REV. 311, 329 (1988).

broadly applicable to all civil proceedings, allowing one or more persons to litigate on behalf of many similarly situated parties.

This historical trajectory culminated in the adoption of the Federal Rules of Civil Procedure in 1938, which fully merged law and equity into a unified regime.[77] Stated differently, nearly a thousand years of Anglo-American civil procedure gradually acknowledged the logic behind hearing related matters in the same court and built a structure to handle it.

C. The Modern Rules of Joinder

The joinder rules make it easier for courts to hear complex disputes, a crucial principle in efficient modern litigation.[78] The drafters of the 1938 Federal Rules of Civil Procedure—most notably Judge Charles E. Clark, the principal reporter—envisioned a procedural regime that would promote complete adjudication on the merits and reduce technical traps.[79] Central to this project was joinder reform.[80] The U.S. Congress sought to promote efficiency and fairness by encouraging the resolution of all related claims and parties in a single action.[81] As Judge Clark later explained, "the revised English procedure came to the point of authorizing comparatively unlimited joinder of claims and of all parties, so long as they were interested in a common question of law or fact."[82] Later scholars strongly supported this view.[83]

The Federal Rules explicitly drew not only on English and American common law procedure but also on equitable practice and specifically embraced equity's broad joinder principles.[84] Rule 14 formalized

77. *See* Subrin, *supra* note 53, at 973.

78. *See, e.g.*, Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 768 (2012).

79. *See, e.g.*, Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 976–77 (1937) (explaining why liberal pleading rules were necessary in part to control for inequitable access to information between plaintiffs and defendants that could lead to unfair dismissals).

80. *Id.*

81. *Id.*

82. *Id.* at 977; *see also* Charles E. Clark, *The Federal Rules of Civil Procedure, 1938–1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 439 (1958).

83. *See, e.g.*, Alexander Holtzoff, *Entry of Additional Parties in a Civil Action*, 31 F.R.D. 101, 112 (1963) ("Observing and contemplating the results obtained by the use of third-party practice in the light of actual experience with it, one inevitably reaches the conclusion that third-party practice is an important achievement and a far-reaching progressive advance in the direction of simplifying civil procedure in the Federal courts, eliminating circuity of action and reducing the time consumed and the money expended in litigation."); George B. Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 42–43 (1964) ("Once a third-party defendant is brought into an action the court should be able to settle all claims arising out of the transaction that is the basis of the action, and it should be immaterial which party asserts the claim because the desirability of avoiding piecemeal litigation of disputes is as great whether the claim is asserted by a defendant or by a plaintiff.").

84. *See, e.g.*, *Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 988 (1958) ("The multiparty lawsuit originated in early English common-law practice and has traditionally been considered necessary to protect fundamental rights and prevent unfair

third-party practice, allowing defendants to bring in a nonparty "who is or may be liable to it for all or part of the claim against it."[85] This concept traced its lineage to the medieval voucher to warranty.[86] Rule 18, allowing unrestricted joinder of claims, directly mirrored equity's liberal joinder.[87]

Rule 19 codified equitable doctrines concerning necessary and "indispensable" parties, initially retaining equitable distinctions that could force dismissal only if indispensable parties could not be joined.[88] Rule 20 represented a significant liberalization and promoted judicial economy by allowing any and all claims.[89] It is important to remember, however, that just because claims can be joined does not mean jurisdiction is established.[90] Rule 20's permissive joinder standard and Rule 19's required joinder of necessary parties similarly incorporated equity's pragmatic concern for comprehensive relief and efficient resolution.[91]

Rule 24 initially permitted nonparties to intervene only under narrow conditions: either via statutory rights or where an applicant would be bound by judgment involving specific property or a fund.[92] Judicial interpretations stretched these limits to facilitate necessary interventions, recognizing the practical shortcomings of the original narrow formulation.[93] The 1966 amendments responded to these shortcomings by broadening Rule 24, permitting intervention as of right for parties claiming interests that may be "practical[ly] . . . impaired" if intervention were denied, provided existing parties inadequately represented their interests.[94]

In sum, since 1938, the Federal Rules have embraced the liberal regime of allowing litigants to plead multiple claims in a single complaint, to implead additional parties, and to intervene in actions where their interests are not adequately represented.[95] While these mechanisms do not grant

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results. The use of multiparty devices increased as equity expanded concepts of fundamental fairness, and such devices have recently been employed to facilitate the litigation of related issues when it has been considered convenient to do so." (footnote omitted)).

85. FED. R. CIV. P. 14(a)(1).

86. *See supra* notes 46–47 and accompanying text.

87. FED. R. CIV. P. 18 advisory committee's notes to 1937 adoption.

88. FED. R. CIV. P. 19 advisory committee's note to 1966 amendment.

89. *See* FED. R. CIV. P. 20; 7 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1652 n.4 (3d ed.), Westlaw (database updated Apr. 2026) ("Rule 20 should be interpreted liberally in order to enable the court to promote judicial economy by permitting all reasonably related claims for relief by or against different parties to be tried in a single proceeding.").

90. *See* 28 U.S.C. § 1367.

91. *See* FED. R. CIV. P. 19; FED. R. CIV. P. 20 advisory committee's notes to 1937 adoption.

92. FED. R. CIV. P. 24 advisory committee's note to 1937 adoption.

93. *See* FED. R. CIV. P. 24(a)(2) advisory committee's note to 1966 amendment.

94. *Id.*

95. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties."); *see also* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 357–58 (2010) ("[T]he broad joinder rules are designed to permit the action to be crafted in a way that permits most related claims to be litigated together, an innovation away from the rigidity of the common-law pleading system." (footnote omitted)).

jurisdiction themselves, the days of binary plaintiff-versus-defendant lawsuits are long gone, which at best creates awkward dynamics when statutory grants of jurisdiction are bound by simplistic historical norms.[96]

The joinder rules are the first part of the equation. The second part of the equation is jurisdictional. Part II delves into the history of the statutory grants of diversity jurisdiction and supplemental jurisdiction to interrogate whether the asymmetry can bear the scrutiny of this related context.

II. SUPPLEMENTAL DIVERSITY JURISDICTION'S ASYMMETRY

Most federal joinder rules make no distinction between which party invokes them.[97] And the procedures that permit joining parties or claims do not, in themselves, create federal jurisdiction.[98] This enables an asymmetrical two-part structure in which the liberal and broad rules of joinder, which lack an antiplaintiff bias,[99] interface with the exercise of supplemental jurisdiction over additional parties or claims, which does contain an antiplaintiff bias.

As courts of limited jurisdiction, federal courts require original jurisdiction.[100] They can also hear related claims against and by related parties.[101] The supplemental jurisdiction statute, 28 U.S.C. § 1367(a), empowers federal courts to hear related claims even where they lack original jurisdiction, but it does not grant supplemental jurisdiction over claims against impleaded parties that would destroy complete diversity of the parties when jurisdiction over the original action is based solely on diversity of citizenship under 28 U.S.C. § 1332.[102]

This asymmetry was intentional.[103] To understand why Congress carved this plaintiff-specific bar into the statute requires an understanding of three

96. This Article does not address statutory interpleader, which requires only minimal diversity, but like Rule 23, it can serve as a model for how Congress and the courts have applied a minimal diversity principle. For example, Richard Epstein opined that "it seems highly likely today that minimum federal diversity will, as a constitutional matter, be held to go beyond the interpleader situation that gave rise to its birth." Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1, 38 (1990). He was proved right.

97. *See supra* note 5 and accompanying text. Rule 14 is expressly for "defending" parties, which may include plaintiffs responding to counterclaims. *See* FED. R. CIV. P. 14. The rest are symmetrical. *See, e.g.*, FED. R. CIV. P. 13, 18, 19, 20, 24.

98. *See* FED. R. CIV. P. 13, 14, 18, 19, 20, 24.

99. *See supra* Part I.C.

100. *See, e.g.*, 28 U.S.C. §§ 1331–1332. The basis for the federal courts' jurisdiction under § 1331 is broader than that under § 1332.

101. *See* 28 U.S.C. § 1367.

102. *See, e.g.*, James E. Pfander & Peter C. Douglas, *Law, Equity, and Supplemental Jurisdiction*, 97 NOTRE DAME L. REV. 2115, 2130 (2022) ("In adopting tailored restrictions on supplemental jurisdiction in diversity, Congress seemingly had in mind the *Owen Equipment v. Kroger* scenario and other end-runs around complete diversity.").

103. *See, e.g.*, Steinman, *supra* note 19, at 104 ("Everyone agrees that § 1367(b) went beyond *Owen Equipment* and sought to implement the rationale of that case in the context of additional configurations of claims and parties." (footnote omitted)).

interlocking pieces: (1) the complete diversity requirement, (2) the development of supplemental jurisdiction, and (3) the Supreme Court's concerns in *Owen Equipment & Erection Co. v. Kroger*.[104] Each shaped what came to be § 1367(b), and together they adopted assumptions about plaintiff behavior that this Article challenges. This section begins with the "complete diversity" rule that the asymmetry is designed to safeguard.

A. The Origins of Complete Diversity Jurisdiction

Diversity jurisdiction provides federal courts with original jurisdiction over claims with more than a statutory minimum amount in controversy between citizens of different states.[105] Although Article III of the U.S. Constitution authorized federal jurisdiction over cases "between Citizens of different States,"[106] the framers gave little direct explanation for this provision.[107] The widely accepted rationale was a desire to protect out-of-state litigants from potential bias in local courts.[108] Federal courts were believed to provide a more impartial forum because Article III grants federal judges life tenure,[109] and the courts draw from a broader jury pool.[110] Federal courts were also thought to provide a more impartial forum for "alienage" actions between citizens of England and the United States.[111] Although Article III permits minimal diversity,[112] the Supreme Court in *Strawbridge v. Curtiss*[113] interpreted the Judiciary Act of 1789[114] to require complete diversity.[115] Complete diversity means that no plaintiff

104. 437 U.S. 365, 367 (1978). Although the statutory and doctrinal foundations predate *Kroger*, that decision crystallized fears about jurisdictional manipulation that Congress later codified in the asymmetry.

105. *See* 28 U.S.C. § 1332(a).

106. U.S. CONST. art. III, § 2.

107. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 (1928).

108. *See* Burgess v. Seligman, 107 U.S. 20, 34 (1882) ("[T]he very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views.").

109. *See, e.g.*, Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 974 (1995) ("Federal judges have life tenure, one of the key components of judicial independence.").

110. *See* Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1004 (2007) ("In addition, the architects of the federal courts ensured that the demographics of federal jury pools differed radically from their state court counterparts by providing that federal juries would be drawn overwhelmingly from the urban commercial centers of the country.").

111. *See, e.g.*, Kevin R. Johnson, *Why Alienage Jurisdiction?: Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 2–3 (1996) (discussing the importance of alienage jurisdiction to early extensions of diversity jurisdiction).

112. U.S. CONST. art. III, § 2.

113. 7 U.S. (3 Cranch) 267 (1806).

114. Ch. 20, 1 Stat. 73.

115. *Strawbridge*, 7 U.S. (3 Cranch) at 267.

can share a state citizenship with any defendant.[116] Although it has long been embedded in federal jurisprudence, the complete diversity rule is a judicial creation.[117]

For instance, Patrick Woolley demonstrated that at the time of the Judiciary Act of 1789, a civil action was essentially equivalent to a single common law cause with parties treated as one unit.[118] Multiple plaintiffs or defendants with distinct interests were often treated as separate suits for jurisdictional purposes.[119] The "*Strawbridge* rule" of complete diversity properly applied only within the confines of those old, tight joinder rules.[120] Implementing Woolley's "historical understanding" of complete diversity could expand supplemental jurisdiction modestly without undermining the core policy of guarding against local bias.[121] The history of diversity jurisdiction is one of judicial prudence rather than constitutional imperative.

Congress recognized that parties might attempt to manufacture diversity jurisdiction. The First Congress mentioned the manufacturing of diversity in section 11 of the Judiciary Act of 1789, known as "the assignee clause."[122] The clause barred federal jurisdiction over claims assigned to

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116. Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998) ("Diversity jurisdiction requires complete diversity; every plaintiff must be diverse from every defendant.").

117. *Compare* U.S. CONST. art. III, § 2 (permitting minimal diversity), *with Strawbridge*, 7 U.S. (3 Cranch) at 267 (requiring complete diversity).

118. Patrick Woolley, *Diversity Jurisdiction and the Common-Law Scope of the Civil Action*, 99 WASH. U. L. REV. 573, 577 (2021) (discussing the limited structure of common law civil actions at the time of the Judiciary Act and the unified interests of parties under those procedures).

119. *See id.* at 587 ("The Marshall-era cases establishing what is now known as the complete-diversity requirement strongly suggest that the 'civil action' in which complete diversity is required has the scope of a suit at common law in 1789. Specifically, parties on the same side of the 'v.' who had distinct—as opposed to joint—interests were treated as if they were part of *separate suits* for the purpose of determining the extent to which a nondiverse party would destroy jurisdiction over claims by diverse parties."); *see also* Mark Moller, *Complete Diversity: The Origin Story*, 76 FLA. L. REV. 1221, 1254 (2024) ("*Strawbridge*, in other words, frames diversity jurisdiction as something obtained over specific claims and defenses by virtue of power over particular persons.").

120. *See* Woolley, *supra* note 118, at 588. Woolley argues that the modern application of complete diversity to broadly joined parties is a misinterpretation of the original diversity statute:

> *Strawbridge*, in other words, held that the Judiciary Act required persons suing or being sued in diversity to satisfy the citizenship requirements of the Judiciary Act even if they shared a joint interest with a person who met those requirements. And a party's inability to sue or be sued because of his citizenship would destroy subject-matter jurisdiction with respect to co-parties who shared the joint interest.

Id. Moller agrees: "The [pre-*Strawbridge*] caselaw . . . defined a 'privilege' as a special right to access a tribunal flowing from holding a legal office or a protected membership status (e.g., occupation of the office of a clerk, citizenship in a foreign state, or membership in a university)." Moller, *supra* note 119, at 1254.

121. Woolley, *supra* note 118, at 621–22 (describing how including a nondiverse plaintiff did not historically destroy jurisdiction over the diverse plaintiff's claims); *cf.* Moller, *supra* note 119, at 1224–25 (suggesting that modern justifications for the strict complete diversity rule lack originalist or functional bases).

122. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79; 13F WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3639 (3d ed.), Westlaw (database updated Apr. 2026).

out-of-state parties unless the original assignor could have brought the suit in federal court.[123] These early efforts culminated in the modern statute, 28 U.S.C. § 1359, which prohibits jurisdiction over actions where any party has been improperly or collusively made or joined to invoke federal jurisdiction.[124]

Examples of the kinds of manipulation § 1359 seeks to prevent include parties changing their domicile, appointing personal representatives from different states, or forming out-of-state shell corporations.[125] In *Morris v. Gilmer*,[126] for example, the Court found that the plaintiff's relocation to Tennessee was not a bona fide change of domicile but an effort to fabricate diversity jurisdiction.[127] Similarly, in *Southern Realty Co. v. Walker*,[128] the Court ruled that forming a corporation in another state solely to initiate a federal lawsuit constituted a sham.[129] While these are examples of plaintiffs attempting to manufacture diversity jurisdiction—and some plaintiffs do—examples of defendants attempting to manufacture diversity jurisdiction and plaintiffs seeking to avoid it are more common.[130]

The most prominent way in which plaintiffs try to avoid destroying diversity is addressed by the "fraudulent joinder doctrine."[131] A court finds that a defendant has been fraudulently joined when a plaintiff joins a nondiverse defendant (or a forum defendant) to defeat removal despite being unable to state a claim against them or where they do "not intend to secure a judgment against that particular defendant."[132] Even before *Kroger*, the legal framework was clearly constructed to keep federal courts from being used through manufactured jurisdiction.[133]

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123. *See supra* note 122.

124. *See* 28 U.S.C. § 1359 ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."); Gilbert Newman, *Manufacturing Diversity Jurisdiction*, 14 VILL. L. REV. 727, 730–33 (1969).

125. *See* Betar v. De Havilland Aircraft of Canada, Ltd., 603 F.2d 30, 33 (7th Cir. 1979) ("Devices to create federal jurisdiction have historically been limited by statute; devices to defeat jurisdiction have not." (citing Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 825–26 (1969))).

126. 129 U.S. 315 (1889).

127. *Id.* at 328–29.

128. 211 U.S. 603 (1909).

129. *Id.* at 607.

130. *See infra* Part III.A.

131. *See* 14C WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3723.1 (rev. 4th ed.), Westlaw (database updated May 2026).

132. *Id.* The inverse—where a plaintiff tries to manufacture federal jurisdiction by a specious federal question claim—is also prohibited. *See, e.g.*, Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. F. 87, 91 (2021) (describing both fraudulent joinder and bad-faith federal question claims). *But see* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1012 (2006) ("[I]n reality no court would sustain an immaterial or frivolous claim asserted with innocent motive, or dismiss a material and nonfrivolous claim asserted merely to get into federal court." (citing Hagans v. Lavine, 415 U.S. 528, 536–43 (1974))).

133. *See* 28 U.S.C. § 1359.

B. How Pendent and Ancillary Jurisdiction Were Criticized and Then Codified

Modern treatises such as *Wright and Miller's Federal Practice and Procedure* and *Moore's Federal Practice* confirm that § 1367(b) has created significant procedural distortion. Charles Alan Wright and Arthur R. Miller observe that the statutory provision's "formalistic, narrow application of the amount-in-controversy requirement . . . pale[s] in comparison to the broader goals of 'judicial economy,'" noting that it permits a defendant to bring in nondiverse parties while barring the plaintiff from asserting logically related claims.[134] *Moore's Federal Practice* points out that the statute's jurisdictional consequences turn entirely on the joinder rule invoked—so that two similarly situated parties can receive opposite outcomes depending solely on whether Rule 19 or Rule 20 was used.[135] *The Rutter Guide*, a particularly blunt and practical source, issues a plain warning: Plaintiffs must avoid adding nondiverse parties at all costs, while defendants may do so with jurisdictional impunity.[136] Congress purposefully structured § 1367(b) to limit only plaintiffs in diversity actions, reinforcing judicial policy concerns about forum manipulation.[137] Thomas D. Rowe Jr., Stephen B. Burbank, and Thomas M. Mengler—who were instrumental in drafting the statute—acknowledged that the deliberate omission of claims by defendants or third parties from subsection (b) was consistent with preserving traditional distinctions in diversity jurisdiction.[138] On the other hand, critics objected that § 1367(b) restricted joinder of indispensable nondiverse parties when those parties or intervening plaintiffs lacking a strategic motive are implicated.[139]

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134. 13D WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE §§ 3567.2, 3567.3 (3d ed.), Westlaw (database updated Apr. 2026).

135. *See* 15A MOORE'S FEDERAL PRACTICE § 106.05[3] (3d ed. 2023).

136. KAREN L. STEVENSON & JAMES E. FITZGERALD, RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL NATIONAL EDITION ¶ 7:123, Westlaw (database updated May 2026) ("*PRACTICE POINTER:* In diversity actions, plaintiff can maintain complete diversity by suing only those tortfeasors who are citizens of other states. Plaintiff can *hope* that the defendants will file third-party or ancillary claims against the other tortfeasors. (Conversely, plaintiff can *avoid* diversity by suing only the nondiverse tortfeasors.)").

137. However, the Subcommittee on the Role of the Federal Courts and Their Relation to the States considered broader language:

> In civil actions under § 1332 of this Title, jurisdiction shall not extend to claims by the plaintiff against parties joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or to claims by parties who intervene under Rule 24(b) of the Federal Rules of Civil Procedure, *provided*, that the court may hear such claims if necessary to prevent substantial prejudice to a party or third-party.

FED. CTS. STUDY COMM., 1 WORKING PAPERS AND SUBCOMMITTEE REPORTS 567–68 (1990).

138. *See* Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction?: A Reply to Professor Freer*, 40 EMORY L.J. 943, 960–61 (1991).

139. Freer, *supra* note 7, at 23–27. Freer criticized the broad prohibition on plaintiff-side joinder:

> The problem with § 1367 is that it reaches much farther than *Kroger*. It precludes supplemental jurisdiction over claims for which it was routinely exercised in

Contemporary commentary recognized from the outset that § 1367(b)'s asymmetry could not be justified simply by reference to party labels.[140] Writing shortly after the statute's enactment in an excellent student note, Darren Gold argued for a narrow interpretation—that § 1367(b) was not meant to bar all plaintiff joinder.[141] The Court's purported resolution of ancillary jurisdiction in *Kroger* continues to be criticized.[142] David Crump, for example, recently observed that applying *Kroger*'s rationale consistently "would prohibit every exercise of ancillary jurisdiction over a nondiverse state-law claim. Every such exercise of ancillary jurisdiction, then, would be illegal under § 1332, including the third-party action in *Kroger*, which was a claim supported by ancillary jurisdiction."[143]

In sum, there seems to be a scholarly consensus that plaintiff manipulation—at least to get into federal court—is overstated.[144] Mark Moller, for example, has called the complete diversity rule (and by extension its § 1367(b) offshoot) "among the most criticized" features of federal jurisdiction.[145] The last two decades of commentary cast doubt on the one-sided limitation in § 1367(b).[146]

C. Chiseling the Asymmetry into Supplemental Jurisdiction

Long before § 1367's enactment, federal courts recognized pendent and ancillary jurisdiction as doctrines allowing the collective adjudication of claims lacking an independent basis of jurisdiction.[147] In *United Mine Workers v. Gibbs*,[148] the Supreme Court established that in federal-question

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> pre-*Finley* practice and, more importantly, imposes restrictions not necessary to protect the complete diversity rule from realistic threat. By doing so, § 1367 unduly restricts efficient joinder in diversity cases.

Id. at 11.

140. *See, e.g.*, Darren J. Gold, Note, *Supplemental Jurisdiction over Claims by Plaintiffs in Diversity Cases: Making Sense of 28 U.S.C. § 1367(b)*, 93 MICH. L. REV. 2133, 2138 (1995).

141. *See id.* Section 1367(b), according to Gold's analysis, "prohibits the exercise of supplemental jurisdiction over claims by plaintiffs in diversity cases *only* when doing so would provide plaintiffs with the opportunity to evade section 1332's complete diversity requirement." *Id.* at 2150. Gold's view has not taken hold although the Supreme Court has yet to rule definitively.

142. *See, e.g.*, David Crump, *Supplemental Jurisdiction: An Analysis of Its Expansions and Reductions*, 59 IND. L. Rev. 3, 14 (2025). Crump criticizes ancillary jurisdiction as operating "in a strange universe." *Id.*

143. *Id.* (footnote omitted).

144. *See* Perdue, *supra* note 9, at 572.

145. Moller, *supra* note 119, at 1221. However, Moller thinks the complete diversity rule may be constitutionally required. *See id.* at 1225.

146. *See* Woolley, *supra* note 118, at 577.

147. *See, e.g.*, City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164–65 (1997) (emphasizing that the Supreme Court "has long adhered to principles of pendent and ancillary jurisdiction by which the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims" (citing United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); Hurn v. Oursler, 289 U.S. 238 (1933); Siler v. Louisville & Nash. R. R. Co., 213 U.S. 175 (1909))).

148. 383 U.S. 715 (1966).

cases, a federal court could hear state law claims sharing a "common nucleus of operative fact" with the federal claim since they would form part of one constitutional "case."[149] This pendent jurisdiction doctrine promoted efficiency by allowing one lawsuit to resolve all related claims.[150] Courts also developed ancillary jurisdiction to cover additional questions of state law necessary to dispose of a case.[151] Both doctrines were prudential and discretionary, aiming to permit a constitutional case to be adjudicated in one forum when appropriate.[152]

In *Finley v. United States*,[153] the Supreme Court stepped back from what it saw as a precipice of an "anything goes" approach for federal jurisdiction.[154] There, the Court declined to recognize pendent party jurisdiction in the absence of explicit statutory authorization, signaling a departure from the more expansive approach to pendent claim jurisdiction articulated in *United Mine Workers v. Gibbs*.[155] The Court's reasoning rested on a strict construction of jurisdictional statutes and underscored the principle that the extension of federal jurisdiction to additional parties requires clear congressional direction.[156] The opinion left undisturbed the doctrine of pendent claim jurisdiction but made clear that the inclusion of additional parties stands on a different footing than the inclusion of additional claims.[157] *Finley* created an anomalous situation: A plaintiff with federal and state claims arising from one accident (as in *Finley*) could not litigate both claims together in federal court if the state law defendant lacked an independent jurisdictional basis.[158]

Section 1367 represented a clear intent to overturn *Finley* and restore the broader reach of federal jurisdiction that had existed before that decision.[159]

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149. *Id.* at 725–27 (establishing test for pendent jurisdiction over state claims). The Court in *Gibbs* held that such state claims are within the constitutional "case," though the exercise of jurisdiction is discretionary. *Id.*

150. *See id.* at 724, 726.

151. *See id.* at 726.

152. *Id.* (discussing pendent jurisdiction as a "doctrine of discretion, not of plaintiff's right").

153. 490 U.S. 545 (1989).

154. *See id.* at 549–51.

155. *See id.*

156. *See id.* at 554.

157. *See id.* at 548–49.

158. *See, e.g.*, Ortega v. Schramm, 922 F.2d 684, 689 n.5 (11th Cir. 1991) (noting that while *Finley* implied pendent claims could be salvaged, several scholars have argued "that there is no analytical difference between pendent claim and pendent party jurisdiction, and speculate that *Finley* signals the end of both doctrines" (citing FED. CTS. STUDY COMM., *supra* note 137, at 554–56 (*Finley* "threatens to eliminate pendent claim and ancillary jurisdiction")); Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247, 248 (arguing that *Finley* has "undermined the viability of pendent claim and ancillary jurisdiction").

159. The U.S. House Judiciary Committee report—House Report No. 101-734, published September 1990—was the key committee report explaining § 1367. H.R. REP. NO. 101-734, at 27–30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6873–76. Because the U.S. Senate Committee on the Judiciary did not issue a separate report on this section (the Senate instead adopted the House's explanatory statement in full), the House Report effectively represents Congress's collective understanding of the provision. The report makes plain that

Both the text of § 1367 and the accompanying reports show that Congress intended a unified approach, merging pendent and ancillary jurisdiction under the new term "supplemental" jurisdiction.[160] Section 1367(a) provides the general grant: "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III," including claims involving the joinder or intervention of additional parties.[161] This language adopts the constitutional standard from *Gibbs* (claims forming the same "case or controversy" under Article III) and explicitly covers additional parties (thereby filling the "statutory gap" identified in *Finley*).[162] Congress chose broad wording to ensure that federal courts could entertain pendent state law claims and pendent parties when those claims are part of the same case.[163] In effect, § 1367(a) codified the doctrine of pendent claim jurisdiction and extended it to pendent parties, erasing *Finley*'s restriction.[164] At the same time, however, Congress adopted the Court's asymmetrical restrictiveness in *Owen Equipment & Erection Co. v. Kroger*.[165]

In *Kroger*, a widow, the plaintiff, filed a wrongful death action in federal court in Iowa, relying on diversity jurisdiction.[166] She sued the first defendant, Omaha Public Power District (OPPD), a Nebraska corporation.[167] OPPD filed a third-party complaint against third-party defendant, Owen Equipment & Erection Co. ("Owen"), alleging that it was responsible for the death.[168] The plaintiff then amended her complaint to assert a direct claim against Owen (the third-party defendant), mistakenly believing Owen was also a Nebraska entity.[169] In fact, Owen had its principal place of business in Iowa, but this was not apparent to the plaintiff at the time.[170] Owen's motion to dismiss was stayed pending trial, and the district court denied the motion to dismiss following the jury's verdict in

§ 1367 was designed to overrule the result in *Finley* and "essentially restore the pre-*Finley* understandings . . . of supplemental jurisdiction." *Id.* at 28. In particular, the House Report stated that § 1367 "would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction." *Id.* Thus, Congress sought to write into law what courts had traditionally done under *Gibbs* and related cases: allow federal judges to hear all claims factually related to a case properly in federal court.

160. *See* 28 U.S.C. § 1367.
161. *Id.*
162. *See* H.R. REP. NO. 101-734, at 28–29 (1990).
163. *See id.* at 28.
164. *See id.*
165. *See id.* at 29.
166. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 367 (1978).
167. *Id.*
168. *Id.* at 367–68.
169. *Id.* at 368–69.
170. *See id.* at 369.

favor of the widow.[171] The judgment was affirmed on appeal, with the appellate court finding that the district court had jurisdiction to adjudicate the plaintiff's claim against the nondiverse third-party defendant because the claim "arose from the 'core of "operative facts."'"[172] The Supreme Court granted certiorari to consider whether, in a diversity jurisdiction case, the plaintiff may assert a claim against a third-party defendant when that defendant is not diverse and there is no independent basis for jurisdiction.[173] It held that the district court lacked jurisdiction over the plaintiff's claim against Owen, reaffirming the complete diversity requirement and emphasizing that a plaintiff may not assert claims against nondiverse third-party defendants, even when the court already has supplemental jurisdiction over claims between the third-party plaintiff and third-party defendant.[174]

The Court fixated on the complete diversity rule established in *Strawbridge v. Curtiss* and embraced by Congress:

> [A] plaintiff could defeat the statutory requirement 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. 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' requirement of complete diversity would thus have been evaded completely.
>
> . . . .
>
> . . . To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command [of a strict construction of the diversity statute].[175]

The Court did not attempt to justify this rationale or show it had a factual basis.[176] It sent unhappy plaintiffs off to state court, where the "efficiency" they seek can be found—indeed, "go file in state court" has been the reaction ever since.[177] But that rationale conflicts directly with the very

171. *Id.*

172. *Id.* (quoting Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 424 (8th Cir. 1977)).

173. *Id.* at 367.

174. *See id.* at 374–77.

175. *Id.* at 374–75, 377. The Court noted the availability of ancillary jurisdiction over nondependent claims, a distinction Congress did not adopt in subsection (b).

176. *See id.* Crump suggested that "there was no particular policy reason for the statute to include this subtraction from supplemental jurisdiction." Crump, *supra* note 142, at 20. However, this Article and other scholarship concludes that there was a (flawed) policy reason—constraining sneaky plaintiffs.

177. There are, of course, legitimate concerns about sending unaware plaintiffs "back" to state court when the statute of limitations has expired. *See, e.g.*, Macheras v. Ctr. Art Galleries-Haw., Inc., 776 F. Supp. 1436, 1440 (D. Haw. 1991) ("Some may contend that the 'privilege' of litigating in federal court demands certain concessions."). In that case, the

basis for diversity jurisdiction in the first place: a concern about bias in state courts that is supposed to be alleviated in federal court.[178] Yet in *Kroger*, the Court's holding allowed defendants to implead nondiverse third parties while barring the original plaintiff from asserting claims against the very same party who may be partially or wholly liable.[179] The Court also fixated on the plaintiff's "choice" of federal court without acknowledging removal as a defendant's tool or the plaintiff's own good faith ignorance in *Kroger*.[180] What bias was being prevented in *Kroger*?

With *Finley v. United States* and *Owen Equipment & Erection Co. v. Kroger* as the background, Congress adopted § 1367.[181] Supplemental jurisdiction allows federal courts to hear claims lacking an independent basis of jurisdiction but are so connected to underlying claims over which the courts have original jurisdiction that they form a part of the "same case or controversy."[182] Other scholars have ably described the structure of § 1367.[183] The focus here is on the asymmetry expressed in subsection (b). Subsection (b) states:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental

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court acknowledged that unknown diversity problems and state statute of limitations issues are more than a sufficient "concession to be exacted from the plaintiff who chooses the federal forum." *Id.*

178. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553–54 (2005) (describing the rationale for diversity jurisdiction as providing "a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants"); Morris v. Nuzzo, 718 F.3d 660, 665 (7th Cir. 2013) (noting that the "primary rationale for diversity jurisdiction [is] to protect defendants against presumed bias of local courts"); Graham C. Lilly, *Making Sense of Nonsense: Reforming Supplemental Jurisdiction*, 74 IND. L.J. 181, 190 (1998) ("[T]he principal argument for diversity jurisdiction is [to protect] out-of-state litigants from local prejudice."). *But see* Dodson, *supra* note 19, at 270 (arguing that the bias rationale is important but not the only reason to preserve diversity jurisdiction). "The shadow of the bias rationale has loomed over recent incursions on the complete diversity rule. The supplemental jurisdiction statute, for example, took pains to preserve the complete diversity rule, and the Court has continued to interpret the supplemental jurisdiction statute in light of the bias rationale." *Id.* at 316 (footnote omitted).

179. *See Kroger*, 437 U.S. at 374–77. Assuming Congress accurately reflected the Court's chief concern of protecting the complete diversity rule, they did not do a very good job because *defendants* can circumvent the complete diversity requirement through impleader. *See* FED. R. CIV. P. 14.

180. *See Kroger*, 437 U.S. at 374–77. To be sure, *Kroger* was not a removal case, but there was good evidence that the plaintiff added the nondiverse defendant in good faith. *See id.* at 368–69.

181. *See* H.R. REP. NO. 101-734, at 28–29 (1990).

182. 28 U.S.C. § 1367(a).

183. In addition to the scholarship referenced in Parts II–IV, see, for example, Perdue, *supra* note 9, at 552–77 (analyzing the structure of subsections (a) through (c)).

> jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.[184]

If a claim has an independent basis for original jurisdiction, § 1367(b) does not apply.[185] The statute has been subject to significant criticism for its text and ambiguities.[186] Put as simply as possible, if a plaintiff tries to add parties under Rules 14, 19, 20, or 24, such that diversity would be destroyed, § 1367(b) bars it.[187] The same is true of claims by plaintiffs proposed to be joined under Rule 19, and of claims by potentially intervening plaintiffs.[188] Conversely, defendants who seek to add parties under those rules, claims by proposed defendants under Rule 19, and intervening defendants, are not barred.[189] Although the precise meaning of the statute has not always been obvious, the dichotomy between plaintiffs and defendants is obvious. What is less clear is whether that dichotomy is justified.

Once § 1367 became law, courts and commentators initially assumed that it had achieved Congress's aims: *Finley* was overruled, and the supplemental jurisdiction statute largely tracked the pre-*Finley* practice of combining claims. Indeed, lower courts soon applied § 1367 to allow pendent-party jurisdiction in federal question cases and to rationalize ancillary claims in diversity cases, citing the statute's broad language. The explicit plaintiff-only language of § 1367(b) aligned with the Supreme Court's reasoning that a plaintiff could not circumvent the complete diversity requirement by initially suing only diverse defendants and subsequently adding nondiverse parties.[190]

The Court examined the supplemental jurisdiction statute in the companion cases *Rosario-Ortega v. Star-Kist Foods, Inc.* and *Exxon Mobil Corp. v. Allapattah Services, Inc.*,[191] where it explicitly acknowledged the

184. 28 U.S.C. § 1367(b).

185. *See id.*

186. *See, e.g.*, 13D WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3567.2 n.6 (3d ed.), Westlaw (database updated Apr. 2026) ("Most of the commentary has been negative, and the majority of the criticism is aimed at § 1367(b).").

187. 28 U.S.C. § 1367(b).

188. *See id.*

189. *See id.* It is worth noting that the statutory language is not the model of clarity and has been subject to severe criticism. Some have argued that § 1367 has a "potentially gaping hole" because it does not include persons made plaintiffs under Rule 20, there is also no prohibition on multiple plaintiffs, and there is some ambiguity about persons who are joined involuntarily on the side of plaintiffs not actually being considered plaintiffs within the meaning of the statute. *See, e.g.*, Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 940–41 (1992). For a discussion of how courts deal with these ambiguities, see *infra* Part IV.C.

190. *See* H.R. REP. NO. 101-734, at 29 (1990) ("In diversity-only [cases] the district courts may not hear plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdictional requirements of 28 U.S.C. § 1332.").

191. 545 U.S. 546 (2005). In the Star-Kist component of the combined case, the Court permitted jurisdiction for coplaintiffs lacking an amount in controversy as long as one plaintiff could satisfy it. *See id.* at 571.

asymmetry.[192] In *Allapattah*, Justice Kennedy interpreted § 1367(a) to allow supplemental jurisdiction over additional claims by plaintiffs that do not meet the amount-in-controversy requirement, so long as the district court has original jurisdiction over one claim and the supplemental claims form part of the same Article III case.[193] But in dictum, the Court noted that § 1367(b) reflected a deliberate withholding of "supplemental jurisdiction . . . over claims by plaintiffs [joined under Rule 20], or over claims by persons . . . seeking to intervene as plaintiffs under Rule 24 . . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."[194] *Allapattah* may have confirmed a plain language understanding of how § 1367(b) operates, but it did nothing to justify the rationale for the asymmetry.[195]

In the last two terms, the Supreme Court has taken up the issue of the supplemental jurisdiction statute twice. In *Royal Canin U.S.A., Inc. v. Wullschleger*,[196] the Court examined a case where the plaintiff filed in state court, the defendant removed, and the plaintiff dismissed her federal claims, moving to remand.[197] But the district court found the state claims were supplemental, a decision reversed by the U.S. Court of Appeals for the Eighth Circuit.[198] The Supreme Court affirmed, relying on the text of the statute and refusing to distinguish removal cases.[199] In 2026, the Supreme Court held in *Hain Celestial Group, Inc. v. Palmquist*[200] that a district court's erroneous dismissal of a nondiverse party cannot cure a jurisdictional defect that existed at the time of removal.[201] According to the Court, there is an exception to that general rule, and it is where a district court cures the jurisdictional defect before final judgment.[202] The most critical point from *Palmquist* to the present issue is dictum wherein the Court distinguishes *Newman-Green, Inc. v. Alfonzo-Larrain*.[203]

> This case is very different from *Newman-Green*. Here, the defendants are seeking dismissal of a nondiverse defendant, whereas in *Newman-Green*,

192. *Id.* at 566.
193. *Id.* at 566–67.
194. *Id.* at 557 (quoting 28 U.S.C. § 1367(b)).
195. Other jurists have criticized a similar pre-1990 dichotomy, including Judge Henry J. Friendly in *U.S. for Use & Benefit of D'Agostino Excavators, Inc. v. Heyward-Robinson Co.*, 430 F.2d 1077 (2d Cir. 1970), where he noted that permissive counterclaims require independent bases for jurisdiction. *Id.* at 1088 (Friendly, J., concurring) (citing generally Thomas F. Green, Jr., *Federal Jurisdiction over Counterclaims*, 48 NW. U. L. REV. 271 (1953)).
196. 145 S. Ct. 41 (2025).
197. *Id.* at 48–49.
198. *Id.* at 49.
199. *See id.* at 51.
200. 146 S. Ct. 724 (2026).
201. *See id.* at 728.
202. *Id.* at 730–31 (discussing the exception in Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996)).
203. 490 U.S. 826 (1989); *Palmquist*, 146 S. Ct. at 733 (citing *Newman-Green*, 490 U.S. at 834–36).

> the plaintiff sought the dismissal. The identity of the party asking for the dismissal is important because "[t]he plaintiff is 'the master of the complaint,'" and generally has the right to choose whether to proceed in federal or state court. Dismissing a nondiverse party with the plaintiff's consent is consistent with that right, as is a plaintiff's ability to amend the complaint to "bring the suit either newly within or newly outside a federal court's jurisdiction."[204]

The Supreme Court's adherence to plaintiff-guided jurisdiction is both comforting and confounding. On the one hand, it is comforting that the Court clings to the fundamental control issue.[205] On the other hand, the Court's deference to a plaintiff's choice is hard to square with § 1367(b), where removal is irrelevant to the additional plaintiffs' additions of parties and claims.[206] Having considered the historical context of broadening joinder rules, but constricting diversity jurisdiction, the next part examines how actual litigants behave and why.

III. JURISDICTIONAL PREFERENCES AND TACTICS

Part III considers how modern litigants act and why. Part III.A shows that the traditional intuition about plaintiffs preferring state court and defendants preferring federal court is supported by empirical research. Part III.B uses principles of game theory to show that rational plaintiffs are no greater threat to the complete diversity regime than defendants and therefore do not warrant being singled out.

A. Plaintiffs Prefer State Court, Defendants Prefer Federal Court

Scholars have empirically shown that (most) plaintiffs prefer state courts and their localized jury pools, lenient pleading standards, generous discovery rules, and flexibility in joinder practices—all of which can improve plaintiffs' likelihood of success at trial or favorable settlement leverage.[207] Likewise, (most) defendants prefer federal courts based on

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204. *Id.* (citations omitted).

205. For example, the Court observed that the defendant's perspective that removal is sticky enough to survive plaintiff's dismissal of their own federal claims by using Rule 21 "would force the Palmquists to litigate this case in federal court against their wishes and despite their right to control the forum for this case." *Id.*

206. Query whether the Court's recent acknowledgment of plaintiffs' lack of agency when a case is removed suggests some openness to revising the *Kroger* asymmetry, at least for removal cases. *See infra* Part V.B.

207. Scholars have devoted substantial energy to asking and trying to prove why defendants prefer federal court, to the point of extensive empirical analyses to buttress this key intuition. *See, e.g.*, Clermont & Eisenberg, *supra* note 26, at 593; Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 186 nn.1–2 (2002) (summarizing key reasons defendants prefer federal court and plaintiffs prefer state court); Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 LAW & SOC'Y REV. 749, 760 (1980); Jerry Goldman & Kenneth S. Marks, *Diversity*

judicial neutrality, strict pleading and procedural rules, diverse jury pools, and limitations on discovery that reduce litigation expenses and exposure.[208] Procedural rules and economic realities further support this preferential dichotomy.[209] Simply stated, plaintiffs prefer state court and defendants prefer federal court.[210] Courts routinely acknowledge these preferences.[211] Studies have also shown that defendants *prevail on appeal* in federal court at a higher rate than plaintiffs do.[212] So why have a rule designed to control for the opposite of demonstrated preference and success?[213]

Jurisdiction and Local Bias: A Preliminary Empirical Inquiry, 9 J. LEGAL STUD. 93, 98 (1980); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 428 (1992); Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 972–73 (1995); Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 30 (1998).

208. *See* Stravitz, *supra* note 207, at 202–04; *see also* Miller, *supra* note 207, at 400–01.

209. *See* Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2103–04 (2019) ("Moreover, while federal courts have embraced prodefendant procedural rules in the class action, arbitration, and pleading contexts—circumscribing access to court in the process—state courts have remained relatively pro-plaintiff and have ensured broader access to court.").

210. Although this principle may be generally true, the issue is nuanced and complicated too. It is true that some plaintiffs do choose federal court, either because they are institutional corporate-style plaintiffs comfortable in federal court or are actively seeking MDL proceedings only available in federal court. That does not change the broader point, nor does it justify the asymmetry invented in *Kroger*.

211. *See, e.g.*, Allen v. Bloomingdale's, Inc., No. CV 16-772, 2016 WL 4579975, at *2 (D.N.J. July 19, 2016) ("Plaintiffs would obviously prefer to proceed in state court."), *report and recommendation adopted*, No. 16-0772, 2016 WL 4544343 (D.N.J. Aug. 30, 2016); Delfosse v. Cont'l Cas. Co., No. 11-C-199, 2011 WL 2601277, at *1 (E.D. Wis. June 30, 2011) ("For various reasons, it is quite common for plaintiffs to prefer litigating in state courts."); *In re* Rezulin Prods. Liab. Litig., No. 00 CIV.2843, 2002 WL 31002809, at *1 (S.D.N.Y. Sep. 5, 2002) ("While the Court is well aware than many plaintiffs would prefer to be in state court, defendants have removal rights that such plaintiffs are not entitled to ignore or circumvent, and the Court will not tolerate such efforts."); Hare v. Evenflo Co., No. 01 CIV. 8723, 2001 WL 1606943, at *1 (S.D.N.Y. Dec. 17, 2001) (finding that "although the Court [knows] that plaintiffs have made this motion at least in part because they prefer to be in state court, both sides are to some extent engaging in forum shopping and there is no reason why defendant's preference should be given more weight than plaintiffs' preference"); City of Hoboken v. Chevron Corp., 45 F.4th 699, 705–06 (3d Cir. 2022) ("Defendants may prefer federal court, but they may not remove their cases to federal court unless federal laws let them."); Snyder v. Davol, Inc., No. CV 07-1081, 2008 WL 113902, at *3 (D. Or. Jan. 7, 2008) (noting "the inevitable tension between plaintiffs who wish to remain in state court and defendants who prefer federal court"); Gavin v. AT&T Corp., 464 F.3d 634, 641 (7th Cir. 2006) ("We assume that the defendants would prefer to litigate the plaintiff's Illinois tort claim in federal court.").

212. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128, 130 (2000) ("[D]efendants succeeded much more often than did plaintiffs on plaintiffs' appeals.").

213. Imagine a family with a dog and a cat. The dog prefers to go outside. The cat prefers to stay inside. But both benefit from fair access to the inside and outside of the house. The family adopts a rule that penalizes the dog for trying to stay inside by making the dog door too small for the dog—only the cat can use it, ostensibly because the family is worried the dog will try to sneak inside. But the dog does not want to go inside anyway.

The scholarship that has touched on this issue is largely critical of the distinction.[214] As James E. Pfander and Peter C. Douglas observed, federal courts historically entertained related claims by nondiverse parties as a matter of ancillary equity jurisdiction, and reclaiming that tradition within the § 1367 framework would promote both fairness and efficiency.[215] Their essay urges courts (and Congress) to return to a discretionary approach: Instead of a blunt rule barring all plaintiff-side joinder that disturbs diversity, judges should decide case-by-case whether allowing the claim would actually offend the diversity policy.[216]

Wendy Collins Perdue noted how, in *Kroger*, for example, the Court imagined a tactical ploy whereby a plaintiff initially sues only diverse defendants, then later adds a nondiverse defendant once in federal court.[217] As Perdue observed, this would require a plaintiff to engineer being sued by a third party to counterclaim against them.[218] Plaintiffs rarely control postfiling events such as the addition of third-party defendants or intervenors.[219] Crump posited another sneaky plaintiff scenario—the collusive sneaky plaintiff-and-defendant:

> One theoretical factor in favor of section 1367(b) might be that it prevents a plaintiff from colluding with a defendant to add a third party for the purpose of suing that party with a state-law claim in which the plaintiff lacks complete diversity. The defendant in an extreme case might even be a sham party against whom the plaintiff has an agreement not to pursue liability.[220]

It is reasonable to assume that in-state plaintiffs would either prefer their local courts, where they could theoretically benefit from the same bias that federal diversity jurisdiction aimed to guard against, or at least avoid the kind of remote bias that defendants are armed with the removal mechanism to avoid.[221] Yet historical practice and modern data suggest a more complex story.[222] Despite having access to presumably favorable state

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Such a dog-door rule compounds the effect of the dog staying outside, perhaps more than the family even realized or intended.

214. David Crump recently and emphatically criticized subsection (b), describing its overbreadth as "overkill, like shooting a termite with a howitzer." Crump, *supra* note 142, at 23.

215. *See* Pfander & Douglas, *supra* note 102, at 2130.

216. *See id.* at 2133–34.

217. Perdue, *supra* note 9, at 572 ("[I]t is quite far-fetched to assume that Kroger structured the case in the hopes that it would *be sued* by Owen Equipment so that it could then counterclaim, and even more far-fetched to assume this was all a plot to enable Kroger to implead its insurance company.").

218. *See id.*

219. *See infra* Part IV.B. None of the cases in the dataset showed plaintiffs deliberately gaming diversity jurisdiction in this preternaturally predictive manner.

220. Crump, *supra* note 142, at 22. Even assuming such a scenario exists, Crump offers the same guardrail advocated here: the fraudulent joinder doctrine. *See infra* note 383 and accompanying text.

221. *See generally* Scott Dodson, *Why Do In-State Plaintiffs Invoke Diversity Jurisdiction?*, 49 LAW & SOC. INQUIRY 1283 (2024).

222. *See* Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 131 (2003) ("However, protection against local bias provides no justification for many

courts, in-state plaintiffs do file in federal court, even in the absence of federal question jurisdiction.[223] This has led some commentators to question the continued legitimacy of the bias rationale, and to call for limiting or even abolishing diversity jurisdiction where an in-state plaintiff sues in federal court.[224]

Empirical statistics and scholarly analysis—not to mention anecdotal evidence—strongly support the intuition that plaintiffs prefer state court and defendants prefer federal court.[225] Exceptions to this general rule exist but tend to prove the general rule rather than challenge the conventional wisdom.[226] While a few plaintiffs seek out federal court, whether because of the availability of multidistrict litigation (MDL), resignation, the likelihood the case would be removed anyway, or individual counsel's familiarity with federal practice, the general rule appears to have statistical support.[227] With these preferences in mind, it is worth considering how plaintiffs and defendants operate in game theory models.[228]

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other instances where diversity jurisdiction can be invoked . . . . In particular, protection against local bias cannot be used to support jurisdiction when a diversity case is brought by a resident plaintiff against a nonresident defendant in the plaintiff's home state.").

223. Scott Dodson's study reveals that in 2019, more than 51 percent of all original diversity cases were filed by in-state plaintiffs. *See* Dodson, *supra* note 221, at 1284.

224. *See* Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 106 ("[W]hile it would be an overstatement to say that there are no benefits from diversity jurisdiction, most of its original justifications no longer exist."); Dodson, *supra* note 19, at 298 ("Even if diversity jurisdiction were to reduce bias or the appearance of bias in some cases, the costs of diversity jurisdiction as a whole overwhelm those limited benefits.").

225. *See* Clermont & Eisenberg, *supra* note 26, at 598–99 (statistically showing plaintiff win rates are drastically lower in federal than in state court); Michelle S. Simon, Hogan vs. Gawker II*: A Statutory Solution to Fraudulent Joinder*, 70 BAYLOR L. REV. 1, 9 (2018) ("Generally, plaintiffs prefer to litigate in state court and defendants prefer to litigate in federal court for a variety of reasons, including differences in procedural rules and the general perception among litigants that state court judges are more favorable to plaintiffs and federal judges are more favorable to defendants."); E. Farish Percy, *The Fraudulent Joinder Prevention Act of 2016: Moving the Law in the Wrong Direction*, 62 VILL. L. REV. 213, 213 (2017) ("Plaintiffs generally view state court as a more favorable forum while defendants generally prefer to litigate in federal court due to a perceived advantage."); Arthur D. Hellman, *Another Voice for the Dialogue: Federal Courts as a Litigation Course*, 53 ST. LOUIS U. L.J. 761, 765–68 (2009).

226. *See generally, e.g.*, Dodson, *supra* note 221 (analyzing in-state plaintiffs who file diversity cases to determine what motivates a plaintiff to seek out federal court).

227. *See id.* Dodson found that the three primary motivating factors were: (1) eager anticipation of MDL proceedings, (2) to preempt defendant removal, and (3) individual counsel's prior experience and preference for the efficiency and quality of procedures and judges in federal court. *See id.* at 1302. The first reason seems confined to mass corporate tort cases; the second reason to resignation.

228. Litigation game theory literature is rich, deep, and controversial. This Article endeavors to select the least controversial understandings of litigation tactics to explore how plaintiffs and defendants proactively or reactively choose federal court.

B. Applying Game Theory to Jurisdictional Opportunism

Game theory assumes that parties act to maximize outcomes within the rules of the system.[229] Section 1367(b) is built on the idea that plaintiffs will manipulate joinder to gain access to federal court.[230] But that model misstates the actual payoff structure. Plaintiffs, in most cases, do not receive a net benefit from litigating in federal court—and plaintiffs know this.[231] They face higher dismissal rates, stricter procedural rules, and longer timelines. A rational actor would not seek out federal court unless compelled by exclusive federal jurisdiction, dragged there by removal, or motivated by MDL availability. On the other hand, state courts offer lower dismissal rates, more permissive pleading standards, and more favorable juries. Federal court introduces higher costs and lower probabilities of success, meaning that for most plaintiffs the rational choice—if unconstrained by jurisdiction—is to litigate in state court. Understanding the importance of bilateral jurisdictional preferences, however, requires at least a brief understanding of what some scholars refer to as "litigation game theory."[232] Litigation game theory analyzes competitive situations, including lawsuits, where "the optimal choice for any one person depends on what everyone else does."[233] Put simply, game theory generally assumes that rational plaintiffs sue defendants when their expected outcome exceeds the cost of achieving it.[234] There are several models for game theory applicable to litigation, most prominently behavioral science and law and economics.[235]

Many people may intuitively assume that plaintiffs and defendants are rational actors who want to maximize their potential recovery and minimize costs.[236] That intuition is supported by data, but it is incomplete data

229. *See, e.g.*, Stephen W. Salant & Theodore S. Sims, *Game Theory and the Law: Ready for Prime Time?*, 94 MICH. L. REV. 1839, 1846 (1996) (defining game theory as being the study of "formally what might be regarded as *the* social scientific question: How do, or should, individuals conduct themselves when each realizes that the consequences of his individual acts will depend in part on what other independent actors do?"); DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 11 (1994).

230. *See* 28 U.S.C. § 1367(b); H.R. REP. NO. 101-734, at 29 (1990).

231. *See* Clermont & Eisenberg, *supra* note 26, at 599.

232. Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 523–24 (1997) ("Game theory is extremely useful to procedural analysis because it is the best, and perhaps the only, systematic way to analyze strategic interaction essential to predicting litigation behavior.").

233. *Id.* at 547 n.94; *see, e.g.*, *Game Theory*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/game_theory [https://perma.cc/XC2J-T7QG] (last visited Aug. 4, 2026).

234. *See* Bone, *supra* note 232, at 529 (analyzing frivolous lawsuits).

235. *See, e.g.*, R. Peter Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397, 398, 404 (1981) (using evolutionary biology models to show that "inefficient legal rules are litigated more frequently than efficient ones").

236. *See* Donald R. Songer, Charles M. Cameron & Jeffrey A. Segal, *An Empirical Test of the Rational Actor Theory of Litigation*, 57 J. POL. 1119, 1127 (1995) (demonstrating that criminal defendants engage in seemingly rational behavior when deciding whether to make appeals and noting that "many analysts of courts assume that the actors in the process are instrumentally rational").

because research has shown that some litigants will make less efficient choices for economically irrational reasons.[237] However, since the data show that plaintiffs succeed at a higher rate in state court and defendants succeed at a higher rate in federal court, this would tend to undercut the asymmetry of § 1367(b) as long as litigants (1) know of these success rates, and (2) act on them.[238] Put another way, if plaintiffs know and act on success rates, their jurisdictional preference ought to be in harmony with the statutory asymmetry, not aligned against it. The asymmetry in § 1367(b) leads to an inefficiency: Each side acts in its own interest, but the result is less efficient than intended.[239] The fact that plaintiffs choose the jurisdiction first, and defendants can respond with greater flexibility, introduces "information asymmetry" into the litigation process.[240] Defendants can add nondiverse parties through impleader without much risk, while plaintiffs face the risk of losing their case if they try the same. Defendants can watch as plaintiffs stake out their initial forum, then respond with removal or impleader, wielding these tools to reshape the contours of the dispute. Plaintiffs, meanwhile, must make jurisdictional choices in the dark, unable to predict how defendants might later broaden the litigation's reach through joinder.[241] This asymmetry in information only deepens the procedural bind that § 1367(b) imposes.

Litigation resembles a sequential game in which the plaintiff must act first without knowing (for certain) how defendants will respond.[242] Defendants can respond strategically to manipulate the location, posture,

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237. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1055 (2000) (criticizing rational choice theory, which is described "alternatively as a relatively weak, or 'thin,' presumption that individuals act to maximize their expected utility, however they define this, or as a relatively strong, or 'thick,' presumption that individuals act to maximize their self-interest"). In any event, whether litigants always maximize their economic efficiencies, the assumption that plaintiffs might choose one particular forum and defendants another is not offset by the complexities of the behavioral science versus law and economics debates highlighted by Russell Korobkin and Thomas S. Ulen.

238. *See* Clermont & Eisenberg, *supra* note 26, at 598–99.

239. Arguably the most famous game theory example is the "prisoner's dilemma," where a "game imagines a pair of players who have a choice: to cooperate with one another, or to defect from a mutually beneficial agreement. The catch is that mutual cooperation is better for each than mutual defection, but that defection is better for a single player than cooperation, regardless of what the other player does." Maya Steinitz & Paul Gowder, *Transnational Litigation as a Prisoner's Dilemma*, 94 N.C. L. REV. 751, 767 (2016).

240. *See, e.g.*, Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187, 188–89 (1993) (discussing the information asymmetry of defendant's superior knowledge of rules in the alternative dispute resolution context).

241. For empirical data showing the results of this dynamic, see *infra* Part IV.

242. *See, e.g.*, Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1069 (1989) (describing the sequence of litigation). Game theory also recognizes that in sequential games, the party forced to move first often does so at a strategic disadvantage. Plaintiffs must select their forum and define their claims without knowing how defendants will respond through removal, joinder, or impleader. This inability to anticipate countermoves reduces their leverage and makes strategic optimization difficult.

and parties. By contrast, plaintiffs face a version of the prisoner's dilemma.[243] If plaintiffs attempt to add nondiverse parties, they risk dismissal of the relevant but nondiverse claims under § 1367(b).[244] If plaintiffs omit that party, they may lose a critical claim or see the court fracture the case later. Either way, plaintiffs act alone.

As relevant here, § 1367(b)'s asymmetry creates another type of game theory disadvantage. Defendants can gain tactical advantages by impleading nondiverse parties, knowing plaintiffs cannot assert claims against these same parties.[245] This creates what game theorists call a "non-cooperative equilibrium" where strategic behavior trumps efficiency.[246] Thus, the asymmetry shapes strategic behavior, rewarding unilateral tactical advantage rather than coordination. Rational litigants are forced into fragmented litigation rather than more efficient, comprehensive resolutions.[247] This, in turn, will drive plaintiffs either to avoid federal court or to forgo joining otherwise relevant parties or claims, reducing efficiency.

Viewed through the lens of behavioral economics and loss aversion, the plaintiff's dilemma here is particularly vexing.[248] In theory, plaintiffs will view federal court as more likely to result in less favorable outcomes and avoid it with greater force than they will choose state court and its potential benefits.[249] This likely reinforces a plaintiff's aversion to joining parties that might destroy the jurisdiction they otherwise sought.[250]

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243. *See supra* note 240 and accompanying text. The prisoner's dilemma may not be the most precise game theory for illustrating the asymmetry's inequity, but it helps show how litigants' failure to cooperate harms both sides.

244. *See* 28 U.S.C. § 1367(b).

245. *See* Freer, *supra* note 7, at 13–15.

246. Robert G. Bone argued that procedural rules reflect strategic interactions where parties rationally pursue private advantage even when doing so produces system-wide inefficiencies. *See* Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1372–75 (2012). In this sense, the procedural rules influence behavior in ways that favor tactical advantage for defendants over efficient, unified resolution.

247. *See id.* Bone explains that modern procedural rules already embed intense strategic interaction in which parties rationally pursue private advantage even when those choices impose external costs on third parties and the judicial system.

248. Loss aversion means individuals value avoiding pain more than acquiring a symmetrical measure of pleasure. *See, e.g.*, Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263 (1979).

249. A valuable contrast is illustrated here by comparing how civil litigation plaintiffs act as opposed to potential criminal defendants. In their seminal piece on behavioral law and economics, Christine Jolls, Cass R. Sunstein, and Richard H. Thaler explain that the basics of risk assessment only work when the actor is rational if they maintain adequate self-control. *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1538 (1998). Unlike criminal defendants, plaintiffs engaging in a rational evaluation of whether to file in state or federal court are not likely to evidence a lack of willpower.

250. *See infra* Part IV.B. For example, joining compulsory parties in their own cases that would destroy diversity under Rule 19(b).

Again, game theory assumes that actors make rational choices to maximize their advantage.[251] If this assumption holds, plaintiffs would logically prefer state courts over federal courts in most instances—precisely what the empirical evidence confirms.

Debra Lyn Bassett, who has rightly criticized the simultaneous description of litigation as a "game" while decrying "gamesmanship," also identified an antiplaintiff bias.[252] "Critics of forum shopping charge manipulation, wrongdoing, and abuse by lawyers (invariably plaintiffs' lawyers) to obtain a forum and substantive law to which they are not entitled."[253] But we should assume that plaintiffs (through their counsel) are rational actors and will select the most favorable forum, which, in most cases, is not a federal court.[254] The whole concept of jurisdiction involves a back-and-forth between parties looking for strategic advantages and the courts and Congress working to limit forum shopping, but that assumes a more level playing field, not one tilted in defendants' favor.[255] In sum, § 1367(b) misidentifies plaintiffs' incentives and imposes a restriction designed to block a strategy no reasonable plaintiff would use.[256] This creates a mismatch between the rules and the behavior they are meant to regulate.[257]

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251. With the criticism and proviso that not all litigants always maximize their economic advantage, this does not mean that their motivating factors are not tied to maximizing their chances of success. *See, e.g.*, Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 280 (2001) ("But while people are not always economically rational, their behavior is not random either."); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 116 (1996) (criticizing a simple law and economics model for litigant decision-making and proposing the addition of cognitive psychology for better analysis).

252. Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 336 (2006).

253. *Id.* at 337. "Conveniently overlooked is the broad range of forum shopping tactics available to—and regularly employed by—defense attorneys, including such tactics as removal, transfer of venue, and forum non conveniens." *Id.* at 344.

254. *See* Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 202 (2000) ("The plaintiff's privilege of forum selection is meaningful only if the plaintiff can choose a court that he believes will be more favorable to his interests than the more logical or convenient.").

255. *See id.* at 167–68 ("Notwithstanding the judicial disapproval of forum shopping, litigants can regularly affect the outcome of their dispute by where they file suit and how they cast their claims. The result is a striking disparity between the common practice of forum shopping and the widespread disapproval of the practice.").

256. *See, e.g.*, Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1532 (1984) (demonstrating the inefficiencies where prices and sanctions are based on imperfect information).

257. *See* Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1267 (1981) (summarizing George L. Priest's theories in *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980), as showing inter alia that "inefficient legal rules impose greater costs on the parties subject to them than do efficient ones").

IV. A STATISTICAL VIEW OF JOINDER ASYMMETRY

The asymmetry is unsupported by the context of the joinder rules, diversity jurisdiction, or rational litigation tactics.[258] That does not necessarily mean, however, that § 1367(b) is not operating efficiently even if unfairly.[259] Yet testing that hypothesis is a challenging endeavor.[260] An entire generation of litigators has known nothing other than thirty-five years of § 1367(b).[261] Nevertheless, this Article endeavored to study—to the greatest extent possible—the actual effect the asymmetry is having on federal cases.[262] Existing data about how federal cases with multiple parties are litigated is limited.[263] That limitation required the present study.[264] This study shows a number of inconsistencies and inefficiencies, supporting the impetus for an amendment.

A. Empirical Methodology

The purpose of this study was to uncover trends in the federal courts that might shed light on the propriety—or lack thereof—of § 1367(b)'s asymmetry, or, at the least, to collect for the first time in one place all of the federal cases where joinder created diversity jurisdiction issues.[265] Would a significant divergence in how courts treat cases where plaintiffs or defendants add nondiverse parties be detectable? How many of these kinds of cases end up being reported?[266] Was there a meaningful difference among the joinder rules when a nondiverse party was added? How often were cases dismissed? Did courts permit joinder only to dismiss cases? How often?

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258. *See supra* Parts II–III.

259. It is the position of this Article that the asymmetry is unfair because it hurts the flexibility of plaintiffs for a reason that is both illogical and unsupported by the history, but that does mean it is not efficient, and efficiency is one of the most important criteria for joinder in the first place. *See, e.g.*, Hagan v. Rogers, 570 F.3d 146, 153 (3d Cir. 2009) (courts entertain a broad scope of action by encouraging joinder of parties and claims).

260. Initially, it was thought this would be more straightforward—that the Federal Judicial Center would have data on multiparty cases and prior similar research might have been done—but that proved not to be the case.

261. *See* 28 U.S.C. § 1367(b).

262. *See infra* Part IV.A.

263. For example, the Federal Judicial Center does not track or code cases by whether they have multiple parties or not, let alone whether plaintiffs seek to add nondiverse parties under joinder rules. *See Integrated Database*, FED. JUD. CTR., https://www.fjc.gov/research/idb [https://perma.cc/GMC9-SNNY] (last visited Aug. 20, 2026).

264. The author is unaware of any prior study attempting to track the use of the joinder rules as applied to supplemental diversity jurisdiction but would be most happy to be corrected if something was missed.

265. It was challenging to identify cases where the asymmetry controlled the outcome, and virtually impossible to identify the cases where it discouraged plaintiffs from attempting to bring such claims or parties, being aware, as they should, of § 1367(b)'s limitations. *See* JASON J. JARVIS, JOINDER JURISDICTION ANALYSIS DATASET (on file with author and the *Fordham Law Review*).

266. All cases were considered whether they were formally "published" or not. *See id.*

Because these were broad questions and an amorphous task,[267] the survey cast a wide net: It sought to identify all federal cases following the adoption of § 1367 where the joinder of parties or claims impacted jurisdiction.[268] After identifying that initial group of cases,[269] the original data was segmented into separate Microsoft Excel sheets corresponding to each of the joinder rules.[270] The search sometimes captured the same case multiple times (because it included multiple joinder rules).[271] Duplicates were removed, and the separate joinder rule sheets were then combined into one sheet.[272] Each case was then separately coded based on a series of questions, and the responses were standardized.[273] A new sheet was then created containing each unique case based on an individual identifier.[274] This sheet lists the unique case name, date, relevant joinder rule, whether diversity was an issue in a dispositive motion, whether a plaintiff sought to

267. No prior scholarship had assembled a comprehensive dataset of cases decided after § 1367's enactment attempting to answer how federal courts actually resolve joinder-based jurisdictional disputes.

268. Specifically, the survey employed Westlaw's terms and connectors search with the following search strings, which were designed to be widely encompassing: To identify FRCP 14 cases, the survey used this search string: adv: ("frcp 14" OR "rule 14") /200 third-party /p ((((("subject matter" OR ancillary OR federal OR supplemental) /3 jurisdiction) OR ("diverse" OR "diversity")) /s (destroy! OR defeat! OR preserv! OR permit! OR limit!)) & (dismiss! OR remand! OR implead! OR join!) & DA(aft 1-1-1990). For FRCP 19, the survey used this search string: adv: ("frcp 19" OR "rule 19") /250 (dispensable OR necessary OR essential OR indispensable OR necessary) /p (diverse OR non-diverse /3 party OR person) /50 (((("subject matter" OR supplemental) /3 jurisdiction) OR "divers!") /p (destroy! OR defeat! OR preserv! OR lack!) & (amend! OR remand! OR dismiss!) & DA(aft 1-1-1990). For FRCP 20, the survey used this search string: adv: ("rule 20" OR "frcp 20") /250 (diverse OR non-diverse /3 party OR person) /100 ((("subject matter" OR supplemental) /3 jurisdiction) OR "divers!") /p (destroy! OR defeat! OR depriv!) & (amend! OR remand! OR dismiss! OR join!) & DA(aft 1-1-1990). And finally, for FRCP 24 cases, the survey used this search string: adv: ("rule 24" OR "frcp 24") & (diverse OR non-diverse /3 party OR person) /100 ((("subject matter" OR supplemental) /3 jurisdiction) OR "divers!") /p (destroy! OR defeat! OR depriv! OR eliminat! OR lack!) & (dismiss! OR intervene!) & DA(aft 1-1-1990).

269. Westlaw is not a comprehensive or error-free search tool. *See, e.g.*, Edward K. Cheng, *Detection and Correction of Case-Publication Bias*, 47 J. LEGAL STUD. 151, 151 (2018) ("The observable case law in databases like Westlaw and LexisNexis is not a representative sample of the universe of legal decisions."). However, the alternatives are no better for a study of this kind. For example, collecting cases serially from different PACER records proved to be an insurmountably massive task. Perhaps artificial intelligence will be able to handle such research in the future. And, further, the Federal Judicial Center's integrated database does not include data about the substance of dispositive motions.

270. To be clear, this is not a database of all federal cases involving the joinder rules. This is a database of all federal cases through August 1, 2025, involving the joinder rules where jurisdiction might have been an issue in a dispositive motion. That is one important limitation for future research that might seek to rely on this dataset. This database does reflect, however, when jurisdiction was *not* dispositive and in that sense remains more, rather than less, inclusive.

271. Cases sometimes appear more than once if the case went up on appeal. These instances were treated as separate cases.

272. *See* JARVIS, *supra* note 265.

273. *See id.*

274. The format of this identifier was CaseName_CourtLine_FileDate. *See* JARVIS, *supra* note 265, Unique Cases.

add a nondiverse party, and, if so, whether the court permitted the addition, and whether the addition would have destroyed diversity.[275]

B. Statistical Evidence Shows How Unpredictable Jurisdictional Joinder Is

After removing duplicates and coding the results, the survey identified 1,487 unique cases.[276] The following figures illustrate how parties use the joinder rules and how courts respond when presented with a dispositive motion.[277]

Figure 1 shows how many times each of the joinder rules arose on a dispositive motion about jurisdiction. Of the 1,487 cases identified, 315 (21.2 percent) concerned impleader (Rule 14), 770 (51.8 percent) concerned compulsory joinder (Rule 19), 361 (24.3 percent) concerned permissive joinder (Rule 20), 202 (13.6 percent) concerned intervention (Rule 24), and 146 cases (9.8 percent) invoked multiple rules.[278]

This figure illustrates the wide distribution of joinder rules, but the prevalence of Rule 19 is most striking.[279] Rule 19 dwarfs the other categories, including where multiple rules were at issue.[280] This is helpful to the statistical analysis because it illustrates a situation where a party at least *argued* that joinder was necessary, which helps explain why some of the other statistics that follow are reliable.[281]

275. *See* JARVIS, *supra* note 265. In addition, there are columns for standardized data and comments. The dataset contains every combination of a specific case and one of the rules. Duplicate case names can be found as a case can invoke multiple rules. The dataset employed formulae to standardize and extract a "Y/N" for each column. Calculations were determined by counting each "Y/N" for each standardized column. These calculations were set up to only look at visible cells (i.e., if one filters to a particular rule, the counts reflect accordingly). Thus, the dataset will allow one to filter to relevant details (e.g., exclude "Blank" cells and see relevant results). For example, one could filter to "Court Permitted" = "Y" and see the percentage in which jurisdiction is destroyed.

276. *See id.*

277. *See infra* Figures 1–6. This section focuses on the quantitative aspects of the survey; the next section focuses on the qualitative.

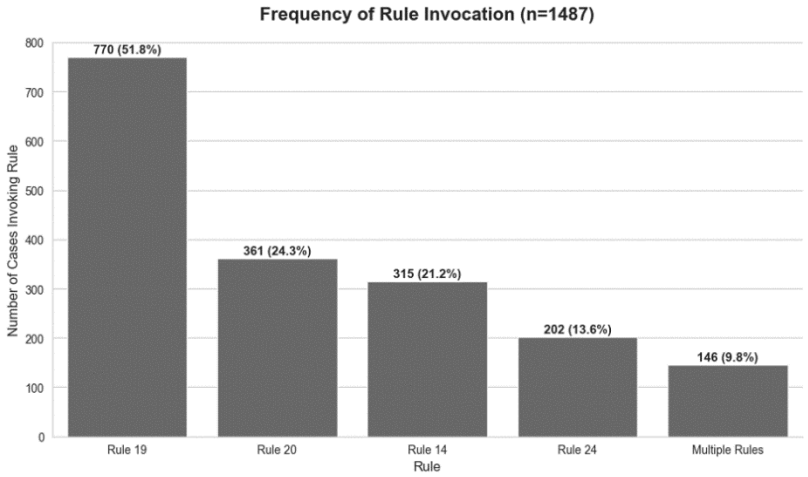
278. *See* JARVIS, *supra* note 265; FED. R. CIV. P. 14, 19, 20, 24. The relatively few number of cases with overlapping rules were one of the surprises of the survey. More overlap was expected than was shown in the data.

279. Again, to be clear, the dataset does not include all cases where any joinder rule is referenced. It is where joinder rules are referenced in a dispositive motion based on jurisdiction.

280. This may be because the way cases were selected involved seeking out cases where jurisdiction is implied, and jurisdiction is a question requiring resolution more often when the parties are also required.

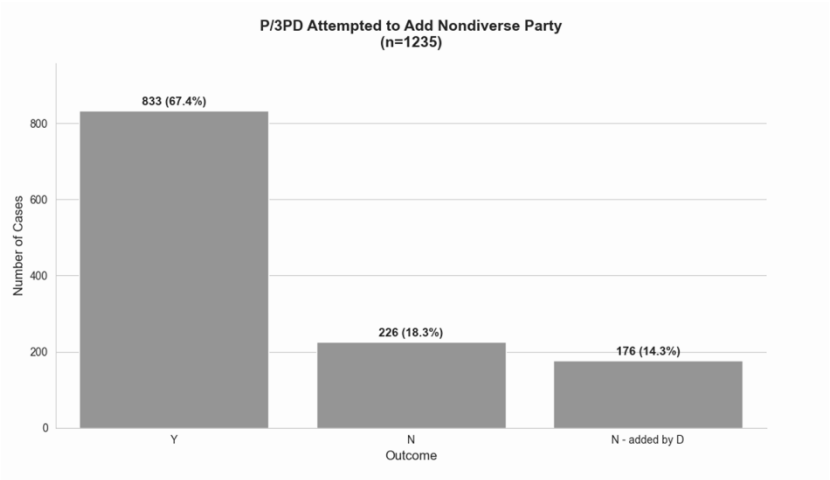
281. It was not feasible to control for which of these cases had been removed to federal court initially. Removal presents its own challenges, but the very concept challenges the propriety of the asymmetry. *See infra* Part IV.D.

Figure 1: Joinder Rule Distribution



Consider Figure 2, which shows how often in the dataset across all the joinder rules a plaintiff or third-party plaintiff sought to add a nondiverse party.[282] The volume is striking—in 833 of the 1,487 cases, a plaintiff or third-party plaintiff attempted to join a nondiverse party in spite of § 1367(b).[283]

Figure 2: Nondiverse Party Joinder

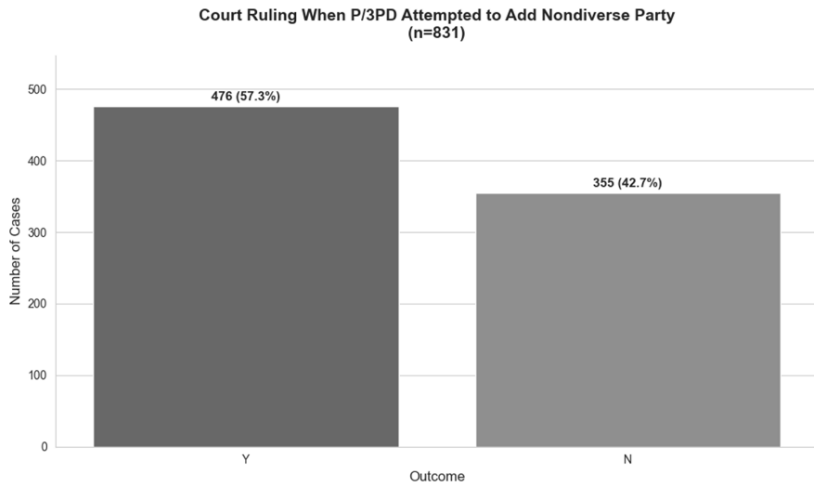


282. These statistics do not include cases where detecting whether a plaintiff or third-party plaintiff added a nondiverse party was uncertain—i.e., the yes/no code was necessarily left blank.

283. *See* JARVIS, *supra* note 265. Of these, the nondiverse additions were primarily plaintiff driven—a surprising result considering the headwinds of § 1367(b). Across all joinder rules, courts found that additional nondiverse parties destroyed diversity 89.8 percent of the time, did not destroy diversity 8.6 percent of the time, and in a small minority (1.3 percent), it was unknown.

However, of those attempts to join nondiverse parties, courts permitted the joinder fully in 476 cases (57.3 percent), denying the addition in 355 cases (42.7 percent), as reflected in Figure 3.[284]

Figure 3: How Courts Rule When Plaintiffs Seek to Add Nondiverse Parties



So far, Figures 2 and 3 have illustrated the data for all joinder rules collectively. A focus on only compulsory joinder under Rule 19 is particularly instructive because it involves a situation where another party *must* be joined in spite of jurisdictional issues.[285] It was also the rule with the greatest number of cases.[286]

A plaintiff or third-party plaintiff attempted to add a nondiverse compulsory party in 449 cases (58.3 percent), did not attempt to add a nondiverse party in 213 cases (27.7 percent), and there was no data in 79 cases (10.3 percent).[287] Figure 4 visualizes these cases.

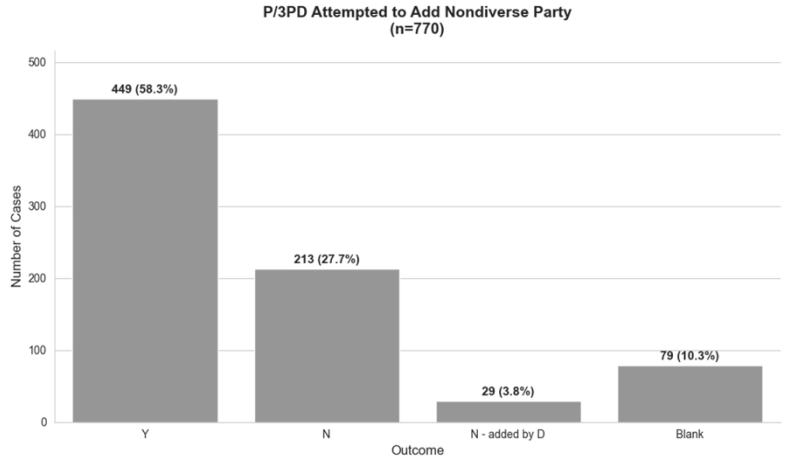
284. *See id.* Note that in two cases there was a reference but neither a yes nor a no for the court's permission, hence the missing 0.2 percent. *Id.*

285. *See* FED. R. CIV. P. 19. The statistics showed that of the 770 cases where a party invoked Rule 19, diversity was an issue on a dispositive motion in 702 (91.2 percent). *See* JARVIS, *supra* note 265.

286. *See supra* Figure 1.

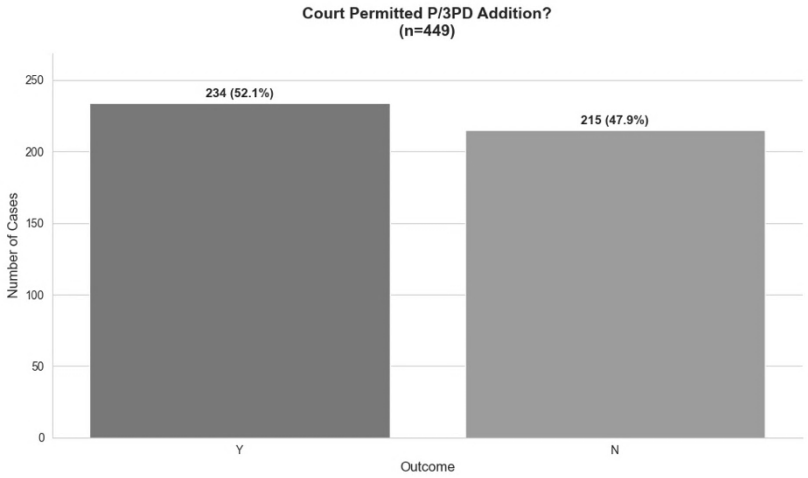
287. *See* JARVIS, *supra* note 265. In the other twenty-nine cases (3.8 percent), a defendant added a nondiverse party. *See id.* This could mean the plaintiff commenced the Rule 19 joinder argument, but another defendant made a similar argument.

Figure 4: Plaintiffs and Third Parties Seeking to Add Nondiverse Compulsory Party



Statistically, the courts permitted plaintiffs to add compulsory nondiverse parties almost evenly: yes, in 234 cases (52.1 percent), and no, in 215 cases (47.9 percent).[288]

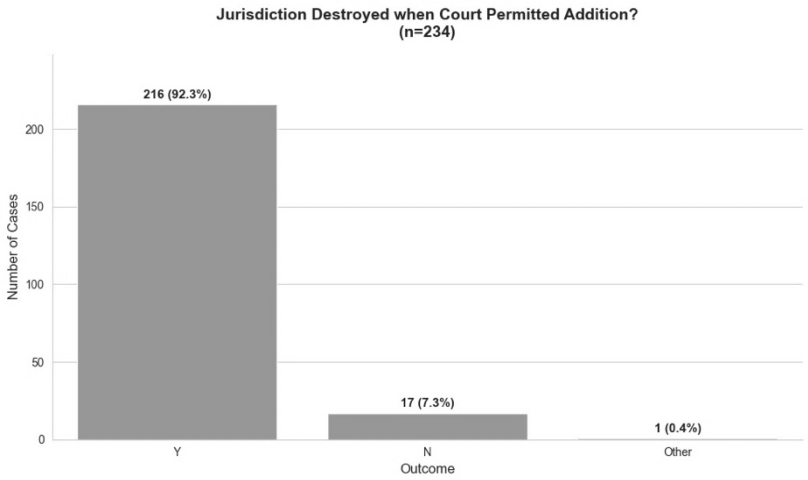
Figure 5: Court Permitted Joinder of Compulsory Parties



As might be expected, when the plaintiffs were permitted to add nondiverse parties, it resulted in a finding of destroyed diversity in 216 cases (92.3 percent).[289] Figure 6 illustrates this overwhelming majority.[290]

288. *See infra* Figure 5.
289. *See* JARVIS, *supra* note 265.

Figure 6: Courts Finding Diversity Destroyed by Joinder of Nondiverse Compulsory Party[291]



The juxtaposition of these statistics belies a simple explanation.[292] In hundreds of cases, plaintiffs sought to join additional parties, and in at least one third of those, it was permitted, but also in about one third of those cases, diversity was destroyed.[293] Courts permit the joinder of nondiverse parties knowing they would destroy diversity and then, unsurprisingly, follow through 92.3 percent of the time.[294] It seems reasonable to assume that diligent plaintiffs are not attempting to destroy diversity for their own claims.[295]

Although uneven and lacking obvious explanations, these results seem to undermine the premise that plaintiffs present a unique or dominant threat to diversity jurisdiction. Across the entire dataset, diversity jurisdiction was implicated in the majority of instances. Attempts to add nondiverse parties were not uncommon, occurring in roughly half of all case-rule observations.

290. The one case labeled "other" in Figure 6 concerned a decision where the court referenced but had not yet ruled on the jurisdictional issue, so no outcome could be coded. Hager v. Thomas, No. 18-cv-139, 2019 WL 13200642, at *3 (S.D. Miss. Apr. 2, 2019) ("Because the Court has merely granted Plaintiff leave to amend its complaint and Dunn Roadbuilders has not yet been added as a party in this action, the Court declines to make an advance ruling on the issue of jurisdiction at this time.").

291. Why did the plaintiffs seek to add nondiverse compulsory parties? Or, if that party was so crucial, why was the case not in state court in the first place? These questions would need to be answered on a granular case-by-case basis. *See infra* Part IV.C.

292. The limitations of coding cases are reflected in the ambiguity of these statistics. For example, it is unclear how many times diversity was destroyed after a permitted joinder.

293. *See supra* Figure 6.

294. *See* JARVIS, *supra* note 265.

295. The disparity may be explained by the fact that, when complete relief can be given, nonjoinder is available under Rule 19. Or, it may be explained by unsophisticated plaintiffs making tactical mistakes.

Of course, defendants can also introduce nondiverse parties without triggering the same jurisdictional prohibitions.[296]

What's more, the data shows inconsistency in how courts have resolved jurisdictional joinder questions.[297] Courts permitted the addition of nondiverse parties in approximately one-third of relevant observations and denied it in nearly the same proportion, producing a near-even split, which suggests practical uncertainty rather than predictable efficiency. When courts did permit joinder, diversity jurisdiction was destroyed in more than 90 percent of instances.[298] In other words, courts routinely permitted the joinder of nondiverse parties even though they knew that diversity jurisdiction would be destroyed.

The empirical record shows that nondiverse parties are frequently added in diversity cases, including by defendants and third parties not subject to § 1367(b)'s prohibition, while plaintiffs are uniquely constrained by formal status rather than functional role. The resulting lack of a discernible rational pattern supports the inefficiency this Article predicts: Courts divide almost evenly on whether to permit joinder, and when joinder is allowed, it overwhelmingly results in the loss of jurisdiction. Simply put, although the asymmetry is straightforward, it does not appear to have led to consistent acceptance or rejection of plaintiffs adding nondiverse parties. This Article turns next to specific case studies to illuminate some of these statistical findings.

C. Federal Courts Grapple with the Irrationality of the Asymmetry

We know from the data that courts are divided on how strictly to apply the § 1367(b) bar. To more fully understand how § 1367(b) has been operating since its adoption, however, requires individual case studies.

Generally speaking, most courts have employed a formalistic approach, labeling later-aligned parties on the plaintiff's side as "plaintiffs" for § 1367(b) purposes and denying jurisdiction. For example, the U.S. Court of Appeals for the Fifth Circuit in *Griffin v. Lee*[299] realigned a postjudgment intervenor (an attorney seeking fees) as a coplaintiff and accordingly ousted jurisdiction because adding that claim destroyed complete diversity.[300] There, the Fifth Circuit rejected a nondiverse attorney's attempt to intervene in a suit to recover legal fees, holding that § 1367(b) barred jurisdiction.[301] While the court expressed concern about the inefficiency of forcing the intervenor to file a separate suit, it held that

296. *See* JARVIS, *supra* note 265.

297. A rational joinder regime would treat similarly situated actors alike and produce consistent jurisdictional results when factual relationships are held constant. The data here reveals the opposite: Near-identical procedural circumstances yield unpredictable outcomes based solely on party posture.

298. This should not be surprising. It is the other 10 percent that is curious.

299. 621 F.3d 380 (5th Cir. 2010).

300. *See id.* at 388.

301. *Id.* at 390.

statutory constraints must prevail over considerations of judicial economy.[302] The Fifth Circuit insisted that § 1367(b)'s text compelled this result, giving no weight to the pragmatic alignment the district court had used to preserve jurisdiction.[303]

By contrast, other courts—notably the U.S. Court of Appeals for the Seventh Circuit in *Aurora Loan Services v. Craddieth*[304]—took a more functional view.[305] Judge Richard A. Posner reasoned that § 1367(b) was meant to prevent a two-step evasion of complete diversity by a person who would have been nondiverse at the outset.[306] That concern, however, "has no application to a party forced to intervene," i.e., a party drawn in later through no scheme of the original plaintiff.[307] In the Seventh Circuit's approach, if an intervenor or third-party claimant arises in the course of litigation (rather than by plaintiff's design at filing), § 1367(b) need not be read to strip jurisdiction. Some circuits have followed this sensible interpretation, allowing courts to retain supplemental jurisdiction when fairness and efficiency favor it.[308] But others, like the Fifth Circuit, balk at any doctrine (such as equitable realignment or discretionary ancillary jurisdiction) that might seem to circumvent the text of § 1367(b).[309]

A narrower reading of *Aurora* emerged in *Mid-Continent Casualty Co. v. Old Dominion Insurance Co.*,[310] where a district court denied intervention to a nondiverse party whose legal interest predated the litigation.[311] The court in *Old Dominion* emphasized that the *Aurora* exception applied only to intervenors whose interest arose mid-litigation.[312]

Consider impleader under Rule 14. In *Gulf South Medical & Surgical Institute, Inc. v. James River Insurance Co.*,[313] a district court granted a defendant's motion to strike a plaintiff's third-party complaint precisely because it would defeat diversity jurisdiction.[314] Conversely, in cases like

302. *Id.* at 389–90 ("We are sympathetic to the added expense and potential waste of judicial resources Lee will likely face in pursuing his claim for legal fees in a separate action and forum. However, efficiency and economy cannot confer jurisdiction upon the courts where Congress has, according to the Supreme Court, unambiguously chosen to limit such jurisdiction.").

303. *Id.* at 387–88. Section 1367(b) refers to parties who are "joined" under the particular rules, which would occur before realignment occurs.

304. 442 F.3d 1018 (7th Cir. 2006).

305. *Id.* at 1025.

306. *Id.* (noting that the "evident purpose of the provision, however, is to prevent a two-step evasion of the requirement of complete diversity of citizenship by a person who, being of the same citizenship as the defendant, waits to sue until a diverse party with which it is aligned sues the defendant, and then joins the suit as an intervening plaintiff").

307. *See id.*

308. *Supra* notes 297–302 and accompanying text.

309. *See, e.g.*, City of Vestavia Hills v. Gen. Fid. Ins. Co., 676 F.3d 1310, 1313 (11th Cir. 2012) (acknowledging in support of realignment "a strong federal preference to align the parties in line with their interests in the litigation").

310. No. 11-CV-367-OC-34, 2011 WL 5510802 (M.D. Fla. Oct. 3, 2011).

311. *Id.* at *2–4.

312. *Id.* at *3–4.

313. No. CIV.A. 06–3474, 2007 WL 1029490 (E.D. La. Mar. 29, 2007).

314. *See id.* at *2.

Wright v. Western Shamrock Corp.[315] and *Morris & Judith Family Partnership, LLC v. Fidelity Brokerage Services LLC*,[316] courts refused dismissal of third-party claims, thus preserving diversity jurisdiction despite the involvement of nondiverse parties.[317]

In *Chase Manhattan Bank, N.A. v. Aldridge*,[318] Chase Manhattan Bank ("Chase") sued Lloyd's of London ("Lloyd's") underwriters in a diversity action to recover under an insurance policy.[319] Lloyd's counterclaimed, alleging nondiverse third parties made misrepresentations.[320] Chase then attempted to implead the nondiverse third parties and filed a motion to "confirm jurisdiction."[321] The district court concluded that Chase remained the plaintiff and was barred from adding nondiverse parties by § 1367(b).[322]

In *State National Insurance Co. v. Yates*,[323] the defendant filed a third-party indemnity claim against a nondiverse insurance agent.[324] The Fifth Circuit held that the district court had supplemental jurisdiction over the defendant's third-party claim because Rule 14 claims fall comfortably within § 1367(a).[325] When the plaintiff tried to assert its own claim against that same nondiverse party, however, the court held that § 1367(b) prohibited supplemental jurisdiction because the claim was brought by a plaintiff against a party made part of the case under Rule 14.[326] The rules were identical, and the claims arose from the same underlying transaction, yet jurisdiction turned entirely on who filed the claim. These Rule 14 cases—where the courts highlighted that the plaintiff chose federal court and the defendant did not—are particularly instructive because the derivative liability relevant to Rule 14 is particularly unlikely to result from sneaky plaintiffs hiding third parties.[327]

Rule 19 cases reveal a similar pattern. For instance, in *Lamar Advantage GP Co. v. Joyce*,[328] a district court rejected plaintiffs' efforts to dismiss nondiverse parties deemed indispensable, forcing plaintiffs into jurisdictional dilemmas that defendants rarely face.[329] In *Kristensen v. de Dampierre*,[330] however, the defendant's motion to dismiss a nondiverse

315. No. 13-CV-419, 2014 WL 2481869 (N.D. Okla. June 3, 2014).
316. 329 F.R.D. 148 (S.D.N.Y. 2019).
317. *Id.* at 150–51; *Wright*, 2014 WL 2481869, at *1.
318. 906 F. Supp. 866 (S.D.N.Y. 1995).
319. *See id.* at 867. *Aldridge* was one of the earlier and more important district court cases interpreting the relatively new subsection (b).
320. *See id.*
321. *Id.* at 869.
322. *See id.*
323. 391 F.3d 577 (5th Cir. 2004).
324. *Id.* at 578.
325. *See id.* at 579–81.
326. *Id.* at 579–80.
327. Even assuming such a scenario exists, the fraudulent joinder doctrine should be an effective guardrail.
328. No. 13-CV-01830, 2017 WL 4558006 (M.D. Pa. Oct. 12, 2017).
329. *Id.* at *22.
330. No. 89 Civ. 6683, 1990 WL 103957 (S.D.N.Y. July 19, 1990).

party seeking realignment succeeded, highlighting not only the asymmetry in the statute but also in Rule 19's application.[331]

Courts sometimes granted plaintiffs' motions to remand or amend complaints to join nondiverse defendants in Rule 20 cases, as in *Bell v. Werner Enterprises, Inc.*[332] Conversely, in *Cortez-Contreras v. Government Employees Insurance Co.*,[333] the permissive joinder of nondiverse defendants was denied explicitly to prevent prejudice to existing defendants, revealing how courts selectively employ procedural rules to maintain jurisdictional integrity, frequently at plaintiffs' expense.[334]

Courts in Rule 24 interventions have generally rejected intervention by plaintiffs or plaintiff-aligned parties when it threatened complete diversity. *Mid-Continent Casualty Co.* and *Terrebonne Land Development Corp. v. Superior Oil Co.*[335] illustrate how intervention motions are routinely denied when they threaten jurisdiction, underscoring the rigidity of § 1367(b)'s bar.[336]

Faced with the constraints of § 1367(b), courts have occasionally employed realignment as a means of preserving jurisdiction. In *Development Finance Corp. v. Alpha Housing & Health Care, Inc.*,[337] the U.S. Court of Appeals for the Third Circuit allowed a nondiverse party to intervene by realigning it as a defendant.[338] The court treated the party's claim as a counterclaim and held that it fell within § 1367(a) and beyond the reach of the § 1367(b) bar.[339] Similarly, in *Colonial Penn Insurance Co. v. American Centennial Insurance Co.*,[340] a district court realigned a nondiverse reinsurer as a defendant, finding that its interests were adverse to the plaintiff's.[341]

In *Viacom International, Inc. v. Kearney*,[342] the U.S. Court of Appeals for the Second Circuit confirmed that while a third-party defendant may assert claims against the original plaintiff (so-called "downsloping" claims), the plaintiff may not respond in kind with "upsloping" claims.[343] *Viacom* involved a diversity action where the plaintiffs sought to assert claims against parties who were joined under Rule 19.[344] The plaintiffs argued

331. *See id.* at *3.
332. No. 11CV18, 2011 WL 1297115 (N.D. W. Va. Apr. 5, 2011); *id.* at *2–3, *6.
333. No. 19-2591, 2019 WL 6715425 (D. Kan. Dec. 10, 2019).
334. *Id.* at *5–6.
335. 65 F.R.D. 375 (E.D. La. 1974).
336. *Id.* at 379; Mid-Continent Cas. Co. v. Old Dominion Ins. Co., No. 11-CV-367-OC34, 2011 WL 5510802, at *1 (M.D. Fla. Oct. 3, 2011).
337. 54 F.3d 156 (3d Cir. 1995).
338. *Id.* at 160.
339. *Id.* at 161 ("We conclude that § 1367(b) does not deprive the district court of supplemental jurisdiction over a counterclaim or cross-claim raised by an intervening defendant, even where the intervenor shares citizenship with an original party.").
340. No. 92 Civ. 3791, 1992 WL 350838 (S.D.N.Y. Nov. 17, 1992).
341. *Id.* at *4 (noting that, where joinder would destroy jurisdiction, the court may realign an intervenor as defendant and treat that claim as a counterclaim to maintain jurisdiction).
342. 212 F.3d 721 (2d Cir. 2000).
343. *Id.* at 726–27.
344. *Id.* at 723–24.

that the claims were part of the same case or controversy and therefore within supplemental jurisdiction.[345] The Second Circuit disagreed.[346] It held that § 1367(b) expressly withdraws supplemental jurisdiction over "claims *by plaintiffs*" against persons joined under Rule 19 when doing so would defeat complete diversity.[347] The rule at issue was Rule 19, and its normal function would have allowed all necessary parties to be included in a single lawsuit—but § 1367(b) prevented supplemental jurisdiction solely because the claim was asserted by the plaintiff.[348]

Viacom demonstrates that the asymmetry is statutory, not rule-based: A defendant could seek to join the same party without a jurisdictional problem, but the plaintiff could not assert a parallel claim, even when the party's participation was required for complete resolution of the dispute. Similarly, in *Metro Foundation Contractors, Inc. v. Arch Insurance Co.*,[349] the Second Circuit again upheld jurisdiction over a third-party defendant's claim against the plaintiff but denied jurisdiction over any reciprocal claim that the plaintiff might wish to assert.[350] In sum, these cases show courts grappling with the awkwardness of enforcing the asymmetry when plaintiffs are not responsible for joined parties, or, even when they are, how refusing jurisdiction creates hardships for plaintiffs and inefficiencies for courts.

D. When Defendants Remove Cases to Federal Court

Section 1367 applies equally to cases removed from state court, as confirmed by the Supreme Court in *City of Chicago v. International College of Surgeons*.[351] This has created particular problems in cases where plaintiffs, following removal, seek to amend their complaints to add nondiverse parties. Under § 1447(e), federal courts can deny joinder or permit it and remand the case to state court.[352]

In *Watkins v. Hansford*,[353] for example, the court granted joinder and remanded after weighing the plaintiff's purpose, timeliness, and potential prejudice.[354] Yet in *Barnett v. MV Transportation, Inc.*,[355] the court denied joinder where it found that the plaintiff's motive was to defeat jurisdiction.[356] Meanwhile, *Nelson v. Whirlpool Corp.*[357] emphasized that jurisdiction, once established, is not destroyed by postremoval changes in

345. *Id.* at 726.
346. *Id.*
347. *Id.* (quoting 28 U.S.C. § 1367(b)).
348. *Id.* at 727.
349. 498 F. App'x. 98 (2d Cir. 2012).
350. *Id.* at 101–02.
351. 522 U.S. 156 (1997); *id.* at 164–66.
352. 28 U.S.C. § 1447(e).
353. No. 17CV-00069, 2017 WL 4159401 (W.D. Ky. June 27, 2017).
354. *Id.* at *2–5.
355. No. 14-CV-00250, 2014 WL 1831151 (W.D. Ky. May 8, 2014).
356. *Id.* at *3–4.
357. 727 F. Supp. 2d 1294 (S.D. Ala. 2010).

party citizenship, relying on *Freeport-McMoRan v. K N Energy, Inc.*[358] to support its conclusion.[359] Courts have developed multifactor tests to determine whether joinder should be permitted postremoval. These include considerations of whether the amendment sought to defeat jurisdiction, the timing of the request, and the importance of the new party to the litigation.[360] Even where joinder is allowed, the result is often a remand to state court, disrupting federal jurisdiction long after the case has begun.[361]

Yet this reasoning sits uneasily with the historical rationale for removal jurisdiction, which is to protect out-of-state defendants from local prejudice.[362] Even at the time of the statute's adoption, commentators struggled to reconcile removal with permission for a defendant to implead a nondiverse third party.[363]

The asymmetry becomes more jarring when considering the importance that the Supreme Court has placed on efficiency and reliability depending on whether a case has been removed or not. For example, in *Caterpillar Inc. v. Lewis*,[364] the Supreme Court acknowledged there was a lack of diversity jurisdiction at the time the case was removed but held that remand was appropriately denied "based on considerations of finality, efficiency, and economy, given that the jurisdictional defect—the lack of complete diversity—was cured by the time of final judgment in the federal court."[365]

Conversely, in *Grupo Dataflux v. Atlas Global Group, L.P.*,[366] the Court distinguished *Caterpillar* by noting that *Caterpillar* had arisen from a removal case rather than a plaintiff's original filing.[367] In *Grupo Dataflux*, the Court held that the timing of a diversity defect is critical: Curing a defect after the statutory requirement of § 1441 but before judgment could be permitted in the interests of "finality, efficiency, and economy," but curing the defective subject matter jurisdictional requirements could not be permitted.[368] Assuming the Court's justified distinction between § 1331 (subject matter jurisdiction) and § 1441 (statutory jurisdiction) is valid, it is unclear why such a distinction would not favor greater flexibility concerning § 1367(b). These cases also reveal some weaknesses in the fortress of complete diversity.

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358. 498 U.S. 426 (1991).

359. *Nelson*, 727 F. Supp. 2d at 1301–03 (citing *Freeport-McMoRan*, 498 U.S. at 428).

360. *See, e.g.*, *Barnett*, 2014 WL 1831151, at *2; Mayes v. Rapoport, 198 F.3d 457, 462–63 (4th Cir. 1999); Schur v. L.A. Weight Loss Ctrs., Inc., 577 F.3d 752, 759 (7th Cir. 2009).

361. *See Nelson*, 727 F. Supp. 2d at 1301–03.

362. *See* Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

363. *See, e.g.*, McLaughlin, *supra* note 189, at 949–51 (noting that the initial text of the bill would have exempted removed diversity cases from the limitations on supplemental jurisdiction). This provision vanished without explanation in the final version. *See id.* at 943.

364. 519 U.S. 61 (1996).

365. 14C WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3739.1 (rev. 4th ed.), Westlaw (database updated Apr. 2026) (discussing *Caterpillar*, 519 U.S. at 61).

366. 541 U.S. 567 (2004).

367. *Id.* at 573–74; *see id.* at 597–98 (Ginsburg, J., dissenting).

368. *Id.* at 572 (majority opinion) (citing *Caterpillar*, 519 U.S. at 75).

Of course, empirical evidence of the way the joinder rules have been used in conjunction with § 1367(b) does not tell the whole story—and neither do these anecdotal cases. But they reflect an ongoing and deepening problem in the federal courts. The asymmetry has concrete institutional consequences for less resourced plaintiffs. When joinder destroys diversity, courts often remand or sever cases after substantial federal proceedings, forcing plaintiffs to relitigate in multiple forums. Well-resourced defendants can absorb that fragmentation and use it to delay resolution and pressure settlement. The resulting costs fall disproportionately on individual and small business plaintiffs who seek a single federal forum. The next part proposes a solution.

V. REORIENTING SUPPLEMENTAL DIVERSITY JURISDICTION

The asymmetry imposed by § 1367(b) is unjustified. If the original purpose of the statute was to prevent plaintiffs from manufacturing federal jurisdiction through strategically timed joinder, that goal conflicts with the point of liberal joinder and empirically supported assumptions about how plaintiffs and defendants operate in jurisdictional litigation. Put another way, efficiency is running headlong into the wall of complete diversity. Accordingly, this part proposes a reform designed to create an appropriate gateway through that wall; but first, objections to the notion that § 1367(b) needs any reform at all are addressed.

A. Objections to Reforming Supplemental Jurisdiction's Asymmetry

Section 1367(b) is often treated as a narrow or even technical limitation. Because it bars only some plaintiff claims and leaves state court available, the problem is dismissed as inconsequential; indeed, that might be an a priori objection.[369] Such an explanation is unsatisfying. If federal jurisdiction should exist, its denial is a mistake, and the availability of a state court option does not cure jurisdictional bias.

The first serious objection is that § 1367(b) is a thoughtful way of preserving complete diversity while efficiently avoiding case-by-case motive inquiries.[370] The administrability of a categorical rule is itself a principal justification for retaining the asymmetry, even if the evidence of strategic evasion is uncertain.[371] While a categorical rule is easier to administer, the empirical evidence seems to show no greater degree of simplicity and consistency than might be expected without it.[372] In fact, courts seem to have no discernible pattern other than dismissing nondiverse

369. To paraphrase Shakespeare, "get thee [to] a [state court-ery]." WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1, l. 131 (first alteration in original).

370. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005) (citing Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375 (1978)).

371. *See id.* at 553–54.

372. *See supra* Part IV.B.

parties (as expected); the circuits are split on how to handle realignment or a more precise interpretation of § 1367(b).[373]

Moreover, a bright-line "claims by plaintiffs" rule may be overinclusive, as the argument would go, but it reduces litigation over jurisdiction itself—whereas a functional approach would generate more "minitrials" about who is a plaintiff, what counts as reactive, and whether joinder is tactical. The cases in the dataset do not, however, reflect minitrials even when there were disputes about jurisdiction, and the solution offered below would not invite them.[374]

A second objection is that, because federal courts are designed by the Constitution to have only limited jurisdiction, we should err on the side of fewer cases, parties, and claims.[375] Eliminating the plaintiff-only limitation would broaden federal diversity cases, increasing federal court workload tremendously. Another, blunter, way of putting this is the fewer cases in federal court, the better. Wright and Miller, for example, suggest that subsection (b) prevents "havoc in diversity of citizenship cases" because otherwise plaintiffs "would risk inundating the federal courts with a catastrophic increase in caseload."[376] On this view, even if § 1367(b) is imperfect, it functions as a containment mechanism that prevents supplemental jurisdiction from becoming an engine of state law consolidation in federal court.[377] However, there is little evidence of plaintiff-side demand for federal court and only sporadic theoretical bases to expect it.[378] The fearful expectation that allowing plaintiffs to add nondiverse parties will mean an avalanche of new cases is unsupported.[379]

Relatedly, one could argue that the reason defendants are not prevented from adding nondiverse parties is that they could otherwise use a necessary party to destroy diversity and manipulate a case into the state court systems. But this approach does not align with actual defendant action or game theory, which generally posits defendants' preference for federal court; nor

373. *See supra* Part IV.C.

374. *See infra* Part V.B.

375. *See, e.g.*, Adam Feldman, *Judicial Business in the District Courts 2024: How Surging Caseloads Are Reshaping Justice*, LEGALYTICS (Feb. 27, 2025), https://legalytics.substack.com/p/judicial-business-in-the-district [https://perma.cc/3QR5-62UR] (highlighting increased federal cases on dockets and concern about how districts can absorb them).

376. 13D WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3567.2 (rev. 4th ed.), Westlaw (database updated Apr. 2026). Wright and Miller cite no scholarship or statistics for this assertion. One might ask: Where is the evidence that plaintiffs will so desperately seek federal court that there will be a "catastrophic increase" in the number of plaintiff-filed cases? The data collected for this Article shows no propensity for catastrophe and the scholarship previously examining plaintiff preferences and success rates shows the opposite. *See supra* Part III.A.

377. This imaginary horrible increase, incidentally, would not be based on § 1367 itself because those cases *are already in federal court on original grounds*. Rather, it must be anticipated based on the notion that plaintiffs will no longer be dissuaded from federal court due to the asymmetry. While possible, there is no evidence of this and it contradicts game theory and empirical data about forum preferences.

378. *See supra* Parts II–III.

379. To be sure, the cases might be marginally more complex. But district courts retain discretion to refuse supplemental jurisdiction under § 1367(c) and to sever under Rule 42.

does it account for the considerable effort defendants go to in order to remove cases to federal court, sometimes even before they are served.[380] That said, some scholars have criticized defendants' ability to remove cases to federal court and then squelch plaintiffs' claims on the merits as "catch and kill jurisdiction."[381] Furthermore, one could argue that although plaintiffs *as a whole* prefer state court, plaintiffs that do seek out federal court should not be afforded the same ability to add nondiverse parties that defendants—at least defendants who did not remove—are allowed to employ.

In other words, why not permit the asymmetry only when plaintiffs initially filed in federal court? After all, they are the master of their complaint.[382] If they file in state court and a defendant removes, then the asymmetry cannot bear the imbalanced weight. But when plaintiffs file in federal court, their choice comes with acknowledged consequences. This argument probably focuses too far on removal as a narrow shield for a broader problem,[383] but it would still require an amendment to the current version of the statute, which the next section addresses. Relatedly, since there are counterexamples where plaintiffs seek out federal court and defendants try to avoid it, does this not justify an asymmetry for those times when plaintiffs do exactly what the Court in *Kroger* feared? Perhaps for those very limited circumstances, it would, but even then, the current asymmetry is too blunt of an instrument, and the majority of plaintiffs neither want to be in federal court nor are they engineering party structure to falsify diversity.

In sum, there are objections that are not outlandish, but they do not overcome the strong historical record supporting broad joinder, the lack of a constitutional imperative for complete diversity, the tactical imperative for plaintiffs to avoid federal court unless dragged in by defendants, or the data and case law.

380. *See, e.g.*, Texas Brine Co., L.L.C. v. Am. Arb. Ass'n, Inc., 955 F.3d 482, 485 (5th Cir. 2020) ("[R]emoval prior to service on all defendants is 'snap removal.'").

381. Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171, 174 (2022) ("In litigation, catch and kill jurisdiction involves a judge-made expansion of court access in federal courts in order to 'catch' more state court cases, followed by the use of federal-court doctrines to 'kill' those cases with a dismissal.").

382. *See, e.g.*, Est. of Ayres *ex rel.* Strugnell v. Beaver, 48 F. Supp. 2d 1335, 1339 (M.D. Fla. 1999) ("A plaintiff is, necessarily, the 'master of his complaint' and may choose either federal or state jurisdiction."); Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 871 (6th Cir. 2000) (noting that plaintiffs can avoid removal by pleading less than the jurisdictional minimum).

383. If the only amendment palatable to Congress would be an exception to the asymmetry for removed cases, so be it, but that still would not squarely address the more fundamental problems with using "complete diversity" as the grounds for banning plaintiffs who add nondiverse parties while permitting defendants to do so.

B. Amending § 1367(b)

Section 1367(b) operates irrationally and at cross-purposes of the liberal joinder rules' goal of efficient administration of justice.[384] But what replaces it?[385] This section suggests potential solutions—either abrogating the entire subsection or modifying it in one of two discrete ways to remove the unfair and inefficient asymmetry.[386]

The simplest solution is to either repeal the subsection altogether or eliminate § 1367(b)'s asymmetry. Either approach would preserve supplemental jurisdiction but align the statute more closely with the preference for resolving related disputes in a single action. These are unsatisfying solutions, however, given their ramifications.

First, in considering an abrogation, remember that subsection (b) operates as a *limitation* on jurisdiction that already exists rather than as a *grant* of jurisdiction that does not. Because the statute initially prevented adding those claims when they would be "inconsistent" with diversity jurisdiction, abrogation of the subsection would mean that claims could not be added if they were inconsistent with diversity jurisdiction. Thus, abrogating subsection (b) would mean that supplemental jurisdiction would be maintained when the related claims form a part of the same case or controversy and there are no discretionary reasons under subsection (c) to refuse.

In practice, this would likely not result in additional claims or parties being added to cases already on the federal docket because defendants seeking to add nondiverse joined parties would also be precluded. It also likely would not increase the number of plaintiff filings since there would be no increased flexibility.[387] The cost of providing efficient joinder of parties and claims would thereby be borne in greater proportion by the federal courts than they do now. But query whether plaintiffs bear an unfairly asymmetrical burden of defendants' claims now.[388] While continued limited guardrails might make sense,[389] subsection (c) already provides discretionary power for courts to resist unwarranted supplemental

384. *See supra* Parts II–IV.

385. As amendments are considered, it is important to remember that the statute is about *supplemental* jurisdiction, not original jurisdiction. There must always be a priori either federal question or diversity original jurisdiction. And if the joinder of a party or claim is considered where that claim has an original federal question basis, or the individual party is in fact diverse from the other side of the citizenship equation, then supplemental jurisdiction is irrelevant.

386. There are two reasonable modifications, as explained *infra*.

387. Consider again that plaintiffs are expected to be rational and aware of the current limitations of § 1367(b) and have chosen federal court due to its limitations.

388. Does the fact that the asymmetry exists, in other words, actually contribute to the success of defendants in federal court and plaintiffs' avoidance? If so, the problem is even more troubling.

389. *See infra* notes 393–94 and accompanying text (discussing more modest revisions).

jurisdiction.[390] The Constitution requires only minimal diversity, a principle embraced by Rule 23 and interpleader.[391]

Second, § 1367(b) could also be revised to deny jurisdiction over joinder claims that arise out of the same transaction or occurrence as a claim already properly before the court, regardless of which party asserts it. For instance, a revised § 1367(b) might state, in redline:

> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims ~~by plaintiffs~~ against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined ~~as plaintiffs~~ under Rule 19 of such rules, or seeking to intervene ~~as plaintiffs~~ under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

Such a remedy is against the liberal joinder the Federal Rules are designed to promote, but it would alleviate the asymmetry while at the same time preserving the complete diversity rule.[392] Under such a revision, nondiverse parties simply could not be added, regardless of the party seeking to add them. While less imbalanced, this would be against the efficient administration of justice, creating the unfortunate dynamic that any defendant sued in diversity with claims that lack an independent basis of jurisdiction could not implead or crossclaim against nondiverse but directly relevant parties.

The asymmetrical problem is a nuanced one; these broad-brush revisions are too extreme, either opening wide the diversity gateway or closing the door entirely. A better and more discrete revision of § 1367(b) would make the bar applicable only to claims that would destroy diversity *in the original action*.[393] Such a revision would more accurately reflect the structural realities of multiparty litigation and avoid the current statute's formalist traps. It would still guard against manipulation. Claims asserted solely for jurisdictional advantage—such as those that do not respond to an existing claim or that bear no factual connection to the core controversy—could be

390. *See* 28 U.S.C. § 1367(c).

391. *See* FED. R. CIV. P. 23; 28 U.S.C. § 1335.

392. How would this impact defendant removal rights? Very little on the original basis, quite a bit at any subsequent joinder phase. For example, a defendant sued by a plaintiff in state court where diversity exists and they are not already at home could still remove the case. But if the removing defendant then wanted to implead a nondiverse party, they would not be able to do so without a federal question claim because otherwise doing so would be inconsistent with § 1332. Is this unfair to defendants in federal court? No more than it is now for plaintiffs—even less since in that scenario, the defendant removed the case. What about when a plaintiff, however, sued a diverse defendant originally in federal court, and the defendant was precluded from impleading a nondiverse third party defendant? Is this unfair to defendants in federal court? No more than it is now for plaintiffs dragged into federal court by removal, but the inequity is perhaps easier to see.

393. Another way of saying this would be to replace "plaintiff" in § 1367(b) with "a party not defending against a claim or counterclaim."

screened using judicial discretion, Rule 11 sanctions, or fraudulent joinder doctrines. Yet claims that are reactive, logically tied to the existing controversy, and necessary for complete resolution should not be excluded solely because of the party asserting them. Courts might, for example, adopt a "procedural functionalism" test for determining whether a claim barred under § 1367(b) is actually reactive or defensive. Congress could amend § 1367(b) to add an exception for claims that respond to counterclaims, impleader claims, or interventions where the asserting party is defending its legal interest rather than initiating an independent claim. Consider how *Owen Equipment & Erection Co. v. Kroger* would have resolved with this amendment.

Plaintiff-widow files her diversity action, suing diverse D1 (Omaha Public Power District); D1 files its third-party complaint against third-party defendant, Owen Equipment & Erection Co. Plaintiff amends her complaint to assert a direct claim against Owen even though Owen is also from Iowa. But for OPPD bringing Owen into the case, the plaintiff would never have sued Owen; accordingly, as a "nonoriginal claim," a revised § 1367(b) would permit Owen's joinder without destroying diversity.

Yes, if the plaintiff knew Owen was nondiverse, strategically sought out federal court, and concealed Owen until after she sued Owen, this would have been the "sneaky plaintiff" scenario that alarmed the Court in *Kroger*. But such a scenario is no harder to unravel than a fraudulent joinder scenario and considerably less likely, because the plaintiff would have to risk waiting to see if the first defendant impleaded a nondiverse third-party defendant.[394] What plaintiff who knew of a second, possibly liable defendant would risk giving up that opportunity? If the plaintiff in *Kroger* had filed in state court and the case was removed, the equities tilt even more in favor of reformation.

The Court has already held that the complete diversity rule need not exist at all moments in time in the course of a lawsuit.[395] An amended § 1367(b) would do no more than extend the same "statutory" allowance for efficiency and practicality that the Court has already embraced in distinguishing between *Caterpillar* and *Grupo Dataflux*.[396] The text would then read:

> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by a party not defending against a claim or counterclaim ~~plaintiffs~~ against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as a party not defending ~~plaintiffs~~ under Rule 19 of such rules, or seeking to intervene as a party not defending ~~plaintiffs~~ under Rule 24 of such rules,

394. *See, e.g.*, Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 95 (1921).
395. *See supra* notes 364–65 and accompanying text.
396. *See supra* notes 361–66 and accompanying text.

> when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

CONCLUSION

Section 1367(b) rests on assumptions that were not even true when it was adopted and certainly no longer fit modern litigation. Plaintiffs do not uniquely manipulate jurisdiction. Courts respond to an otherwise statutory requirement with little discernible pattern. Litigants should not be subject to different jurisdictional rules based on procedural posture. That the asymmetry protects the complete diversity rule is only half right—and it is the wrong half. Plaintiffs should not alone bear the burden of sustaining the complete diversity rule for joined claims and parties while defendants are free to disregard it, distorting joinder practice. Defendants add nondiverse parties with impunity, challenging the very basis of complete diversity that the asymmetry is designed to protect. This imbalance foists on plaintiffs systemic structural burdens defendants lack, allocating risk to plaintiffs and power to defendants, which in turn exacerbates preferences for federal versus state court. Thirty-five years of data confirm the inefficiency and inconsistency of the present regime. Removing the plaintiff-only bar—or extending § 1367(b) to defendants—are possible solutions, but the best approach would be to clarify that the bar to joining nondiverse parties applies only in the original action.