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The Limits of Ancillary Jurisdiction

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In *Owen Equipment & Erection Co. v. Kroger*¹ the Supreme Court last Term addressed for the first time the permissible scope of ancillary jurisdiction under the Federal Rules of Civil Procedure.² Although the Court approved using the doctrine in the situations to which it has most commonly been applied, it disapproved applying the doctrine to a plaintiff's claim against a nondiverse third-party defendant. This Article suggests that the line drawn by the Court in *Kroger* is likely to be particularly mischievous and is inconsistent with the justifications of fairness, convenience, and economy generally advanced to support the doctrine of ancillary jurisdiction. Moreover, the Court's indication that a clear congressional directive in the basic diversity statute required this outcome adds to *Snyder v. Harris*³ and *Zahn v. International Paper Co.*⁴ another unhappy episode in the shell game whose aim seems to be reducing the federal caseload by attributing to Congress a nonexistent, but perhaps desirable, intention.

I. The Case

James Kroger was electrocuted when a steel crane belonging to Owen Equipment and Erection Company (Owen) came too close to a power line that once belonged to the Omaha Public Power District (OPPD). Kroger's widow, a citizen of Iowa, brought a wrongful death action against OPPD, a Nebraska corporation, in federal district court

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1. 437 U.S. 365 (1978).

2. See 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523, at 65 (1975).

3. 394 U.S. 332, 338-39 (1969).

4. 414 U.S. 291, 298-300 (1973).

in Nebraska, claiming negligent construction, maintenance, and operation of the power line. OPPD impleaded Owen for contribution pursuant to Federal Rule of Civil Procedure 14(a),⁵ asserting that Owen's negligence was the proximate cause of Kroger's death. Geraldine Kroger then amended her complaint to add a negligence claim against Owen, stating that Owen was a Nebraska corporation with its principal place of business in Nebraska. Soon thereafter the court granted OPPD's motion for summary judgment, leaving Kroger and Owen alone in the lawsuit.⁶

The case went to trial in that posture, and on the third day Owen revealed for the first time that its main office was in Carter Lake, Iowa, where the accident had occurred. Kroger understandably might have been confused about Owen's citizenship since Carter Lake lies west of the Missouri River, the usual boundary between Iowa and Nebraska; an avulsion apparently had separated Carter Lake from the rest of Iowa. After a verdict was returned for Kroger, the district court denied Owen's motion to dismiss for lack of jurisdiction.⁷ The Eighth Circuit affirmed, holding that the trial court could properly assert ancillary jurisdiction over Kroger's claim against Owen.⁸ It found that the sound exercise of discretion permitted retaining that claim once OPPD was out of the case, since Owen had neither specifically denied the jurisdictional allegation in Kroger's amended complaint nor moved for dismissal until the close of trial.⁹

The Supreme Court reversed.¹⁰ It began by reiterating what no one denied—that constitutional limits on federal court jurisdiction might exceed those prescribed by statute, and that while article III might not preclude entertaining Kroger's claim against Owen, the real question was whether section 1332 of Title 28 of the United States Code¹¹ (the basic diversity statute) permitted it. The Court recognized that the requirement of complete diversity between plaintiffs and defendants which had been read into that provision did not forbid jurisdiction over all state law claims between nondiverse parties.¹² In his

5. All subsequent references to rules are to the Federal Rules of Civil Procedure unless otherwise indicated.

6. *Kroger v. Omaha Pub. Power Dist.*, No. 72-0-481 (D. Neb., Aug. 23, 1974) (order granting summary judgment), *aff'd*, 523 F.2d 161 (8th Cir. 1975).

7. No. 72-0-781 (D. Neb. Jan. 20, 1976) (judgment); No. 72-0-781 (D. Neb. Jan. 23, 1976) (order denying motion to dismiss for lack of jurisdiction).

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

9. *Id.* at 426-27.

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

11. 28 U.S.C. § 1332 (1976) [hereinafter referred to textually as section 1332].

12. 437 U.S. at 375-76.

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opinion for the Court, however, Justice Stewart identified two unifying principles that he thought fatally distinguished the permissible exceptions from Kroger's suit. First, Kroger's claim against Owen, unlike OPPD's impleader claim against Owen, was not logically dependent upon the original complaint: Owen's liability to Kroger was a question independent of OPPD's liability, whereas Owen's liability to OPPD was an issue that disappeared from the case once OPPD won summary judgment.¹³ Second, "ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."¹⁴ Kroger's claim against Owen, by contrast, was brought by a plaintiff who had chosen a federal court.

The diversity statute, of course, says nothing about any of these matters; but the Court found that a proper reading of the statute required its delimitation short of Kroger's claim. For one thing, Congress has repeatedly reenacted or amended the diversity provision, but has never tampered with the Court's continual insistence on complete diversity. To permit a plaintiff's claim against a nondiverse third-party defendant would be in substance, if not in form, to allow Kroger to sue OPPD and Owen as codefendants. More pertinent, when Congress enacted section 1332 as part of the Judicial Code of 1948, it had before it, and must implicitly have approved, an Advisory Committee comment on the 1946 amendment to rule 14, which cited the "majority view" that a plaintiff's claim against a third-party defendant needed independent jurisdictional grounds.¹⁵ Finally, "[t]he policy of the statute"—although the Court did not say what that was—"calls for its strict construction."¹⁶

Justice White dissented, joined by Justice Brennan. He suggested that if article III permitted jurisdiction over the original claim, then it also allowed federal courts to entertain all other claims arising from the same "nucleus of operative fact."¹⁷ Of course it would be proper to read the rather spare language of the statutory jurisdictional grants to preclude many such claims even though allowing jurisdiction would serve systemic judicial economy. When a plaintiff has no part in bringing in a new party, however, and no assurance that the defendant can

13. *Id.*

14. *Id.*

15. *Id.* at 374 & n.16. See 28 U.S.C. app., at 414 (1976).

16. 437 U.S. at 377 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

17. *Id.* at 379 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

or will implead, the court is entitled to consider not only institutional economy, but also the convenience of and fairness to the plaintiff. Those three considerations taken together, he reasoned, justified reading section 1332 to permit ancillary jurisdiction.¹⁸ The possibility of collusion with the defendant would not require a contrary result, since another statutory provision directly addresses that problem.¹⁹

II. The Functional Limits of Ancillary Jurisdiction

Much of what the Court said in *Kroger* indicates that, quite apart from any signals Congress has given about how it wants section 1332 to be read, there may be sound reasons for refusing to extend ancillary jurisdiction to plaintiffs' claims against third-party defendants. The Court's emphasis on the similarity between the *Kroger* situation and a straightforward complaint naming a nondiverse codefendant,²⁰ and its insistence that "the efficiency plaintiff seeks so avidly is available without question in the state courts"²¹ suggest at least two such reasons. The first is the currently fashionable objective of reducing the workload of the federal courts even at the cost of pushing more litigation into state tribunals. The second, supporting the first, is a concern of federalism: the states' interest in adjudicating state-law questions should be recognized when federal jurisdiction is not necessary. The Court recognized more explicitly a third justification for limiting ancillary jurisdiction. The boundaries the Court set to contain ancillary jurisdiction seem designed to accommodate defending and neglected parties whose interests in convenience and fairness deserve attention because of their posture in the litigation. But "[a] plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims . . . since it is he who has chosen the federal rather than the state forum and must thus accept its limitations."²² Solicitude for the plaintiff's individual concerns would merely allow her to "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."²³

18. *Id.* at 381-82.

19. *Id.* at 382-83. That statute provides: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359 (1976).

20. 437 U.S. at 373-74.

21. *Id.* at 377 (quoting *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 512 F.2d 890, 894 (4th Cir. 1972)).

22. *Id.*

23. *Id.* at 374.

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This part will suggest that none of these reasons justifies freezing the doctrine of ancillary jurisdiction at the point chosen by the Court. On the contrary, there were very persuasive arguments for accepting Kroger's claim against Owen—indicating that the foundation for the Court's result was its assumption that “ ‘Congress in [section 1332] has . . . expressly or by implication negated’ the exercise of jurisdiction over” plaintiffs' claims against nondiverse third-party defendants.²⁴

A. *Limiting the Workload of the Federal Courts*

It is tempting to conjecture that the underlying reason for barring Kroger's claim against Owen was a reluctance to add even one more item of business to the already mammoth agenda confronting the federal courts. One senses that concern in the Court's statement that Kroger would have found the state courts equal to the task of deciding her claims against OPPD and Owen simultaneously.²⁵ That statement alone provides little basis for attributing any hidden motive to the Court. When considered in light of the Chief Justice's annual call for limiting diversity and some types of federal question jurisdiction,²⁶

24. *Id.* at 372 (quoting *Aldinger v. Howard*, 427 U.S. 1, 18 (1976)).

25. *Id.* at 375-76. Whether that option was still open to her is a different question, given the Iowa statute of limitations. The Eighth Circuit, at least, thought that time had run out when it considered the case. *Kroger v. Owen Equip. & Erection Co.*, 558 F.2d 417, 420 (8th Cir. 1977). *But see id.* at 432 n.42 (Bright, J., dissenting). At any rate, that question is irrelevant if the issue is one of jurisdiction as the Supreme Court concluded, 437 U.S. at 376-77 n.20, and not of discretion as Justice White asserted in dissent, *id.* at 381-84.

26. *See* Burger, *Chief Justice's Yearend Report, 1977*, 64 A.B.A.J. 211 (1978) (abolish diversity; require impact statements to accompany legislation; encourage arbitration); Burger, *1977 Report to the American Bar Association*, 63 A.B.A.J. 504 (1977) (abolish diversity; require impact statements); Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A.J. 443, 444 (1976) (limit diversity jurisdiction); Burger, *The State of the Judiciary—1975*, 61 A.B.A.J. 439, 441 (1975) (restructure diversity); Burger, *Report on the Federal Judicial Branch—1974*, 60 A.B.A.J. 1193, 1198 (1974) (applauding development of grievance procedure to keep prisoner complaints out of the federal courts); Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1126 (1973) (abolish diversity; reduce volume of prisoners' rights cases); Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1050 (1972) (require court-impact statements to accompany legislation).

There is good cause for his concern about overloading the federal judiciary—a concern the significance of which Congress has recognized. *See* S. 2253, H.R. 9778, 95th Cong., 1st Sess., 123 CONG. REC. 12340 (1977) (proposing compulsory, nonbinding arbitration in certain civil cases); H.R. 9622, 95th Cong., 1st Sess., 123 CONG. REC. 11222 (1977) (proposing abolition of all diversity jurisdiction except in cases of statutory interpleader and suits by foreign states or citizens); S. 2094, H.R. 9123, 95th Cong., 1st Sess., 123 CONG. REC. 9525 (1977) (proposing abolition of diversity jurisdiction over suits brought by plaintiffs in their own states); DeConcini, *New Perspectives for Judicial Improvements: A Congressional View*, 24 N.Y.L.S. L. REV. 323 (1978). Many present and former members of the judiciary have also expressed concern. *See* Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 3 (1978); Clark, *A Commentary on Congestion in the Federal Courts*, 8 ST. MARY'S L.J. 407 (1976); Lasker, *The Court Crunch: A View From the Bench*, 76 F.R.D. 245 (1978); Phillips, *The Expansion of Federal Jurisdiction and the Crisis in the Courts*, 31 VAND. L. REV. 17 (1978); Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96 (1976); Tyler, *Congressional and Executive Expansion of Federal Jurisdiction*, 71 F.R.D. 229 (1976).

however, and the conviction prevalent in some quarters that the Court recently has employed forum-allocation grounds to accomplish objectives beyond mere ascertainment of congressional desires regarding jurisdiction,²⁷ the hint in *Kroger* takes on a bit more force.

All of that notwithstanding, it is difficult to accept that even a bench wholeheartedly devoted to the cause of reducing the volume of federal litigation would have chosen this particular place to make a stand. Unquestionably, a flat ban on plaintiffs' claims against nondiverse third-party defendants will reduce the time a trial court spends on such cases and will decrease the number of cases filed in federal courts, to the extent that it encourages joinder in state court rather than piecemeal litigation between state and federal courts. If we assume for the moment, however, that individual claims to convenience and fairness are relatively equal in all cases,²⁸ we would naturally expect to find the boundary of ancillary jurisdiction to be drawn just short of those situations whose exclusion would make a substantial difference in the amount of federal trial business. It is difficult to make that claim with any assurance about the situation in *Kroger*.

First, rule 14(a) allows impleader only of "a person not a party to the action who is or may be liable to [the third-party plaintiff] for all or part of the plaintiff's claim against him."²⁹ Thus, in practice a defendant can use the rule only when he has a claim for contribution, indemnity, subrogation, or breach of warranty against a third party.³⁰ It is therefore difficult to imagine many situations in which a plaintiff would have a claim against the third-party defendant that would not require the same proof necessary for the defendant's impleader claim. *Kroger* itself provides an example of the typical joint tortfeasor case.³¹ OPPD's right of contribution from Owen depended on proof that Owen was jointly liable for James Kroger's death because of negligent operation of the crane or boom that came too close to the power line.

27. See, e.g., Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863 (1977); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

28. A slightly problematic, but not irrational, assumption. See notes 61-74 *infra* & accompanying text.

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

30. See F. JAMES & G. HAZARD, CIVIL PROCEDURE 518 (2d ed. 1977); 6 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 2, § 1446.

31. Litigation involving joint tortfeasors seems to be the situation in which plaintiffs' claims are most often made against third-party defendants. See, e.g., Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970); CCF Indus. Park, Inc. v. Hastings Indus., Inc., 392 F. Supp. 1259 (E.D. Pa. 1975); Frankel v. Back, 37 F.R.D. 545 (E.D. Pa. 1965); Sklar v. Hayes, 1 F.R.D. 594 (E.D. Pa. 1941).

Owen's liability to Kroger depended on precisely the same theory, and the same elements of proof would be necessary to establish negligence in either case. Moreover, the proof of damages that plaintiff must undertake would be the same whether or not she was allowed to assert her claim against Owen. Construction or other contracts cases in which the plaintiff's claim against the third-party defendant rests on the assertion that the plaintiff was a third-party beneficiary of an agreement between the defendant and the impleaded party present analogous common requirements of proof.³²

That being so, considerations of judicial economy militate much more strongly for the exercise of ancillary jurisdiction in the *Kroger* case than over a defendant's impleader claim,³³ a claim to intervene as of right,³⁴ a compulsory counterclaim,³⁵ or a cross-claim³⁶—all cases in which the Court indicated that section 1332 would not present an obstacle. Each of the latter instances almost requires the addition of at least one new issue on which otherwise irrelevant evidence must be introduced. Moreover, impleader and intervention result in the addition of new parties, with the attendant multiplication of claims, proof, arguments, and motions.

One obvious difference between *Kroger* and the cases in which the Court suggested ancillary jurisdiction was permissible is that only in the former situation might denial of ancillary jurisdiction remove the entire case from the federal system.³⁷ If the *Kroger* rule does in fact discourage a sufficient number of plaintiffs from pursuing a federal forum, it actually might have carved the universe of ancillary jurisdiction at a natural joint. There are, however, cogent reasons to believe that

32. It might sometimes happen that the plaintiff's claim against the third-party defendant would extend to matters in which the original defendant had no right of or need for indemnity. Suppose that in a construction case the plaintiff sues the surety, who impleads the construction firm for indemnity. The plaintiff might have claims against the contractor that were not covered by the surety bond—for instance, the soundness of the construction in a case in which the bond merely covered time of performance. In such a case, however, ancillary jurisdiction might not be available anyway because the additional claims against the third-party defendant could not be said to arise from the same "nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

33. *See, e.g.*, *H.L. Peterson Co. v. Applewhite*, 383 F.2d 430, 433 (5th Cir. 1967); *Dery v. Wyer*, 265 F.2d 804 (2d Cir. 1959).

34. *See, e.g.*, *Phelps v. Oaks*, 117 U.S. 236, 241 (1886); *Smith Petroleum Serv., Inc. v. Monsanto Chem. Co.*, 420 F.2d 1103, 1113-15 (5th Cir. 1970).

35. *See, e.g.*, *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926).

36. *See, e.g.*, *LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143 (6th Cir. 1969); *Scott v. Fancher*, 369 F.2d 842, 844 (5th Cir. 1966); *Glen Falls Indem. Co. v. United States ex rel. Westinghouse Elec. Supply Co.*, 229 F.2d 370, 373-74 (9th Cir. 1955).

37. This ignores for the moment the possibility that a defendant will remove on the assumption that he can thereafter acquire ancillary jurisdiction over a counterclaim, cross-claim, or third-party claim. *See* note 61 *infra* & accompanying text.

the ability to assert a claim against a still hypothetical nondiverse third-party defendant is not often a *sine qua non* in a plaintiff's choice of federal court. First, choosing a federal forum on that assumption is risky business since there is "absolutely no assurance that the defendant will decide or be able to implead a particular third-party defendant."³⁸ In some cases lack of personal jurisdiction will bar impleader. Perhaps more commonly, the defendant will forego impleader, thinking it will be easier to pin liability on an absent party or fearing that the impleaded party will have more success establishing the defendant's liability than would an impecunious plaintiff; the defendant also might feel that a claim for contribution or indemnity would have more success in a later action before a different court and jury. The defendant also might conclude that the cost of upsetting business dealings or his own settlement negotiations with the absent party would exceed any benefit from possible contribution or indemnity toward paying the plaintiff's claim.³⁹

In other cases the plaintiff might consciously choose to omit one or more possible defendants. For example, the plaintiff may have initially selected the defendant with an eye to reducing expense, facilitating settlement, limiting the other side's peremptory challenges, avoiding jury confusion,⁴⁰ or simply maintaining good relations with the omitted party. On the other hand, it would not be surprising to find a change in the plaintiff's perception of the case during discovery; it might become apparent that his complaint against the original defendant has no chance of success, but that a claim against the impleaded party is quite strong. Explaining to the plaintiff in that case that he originally should have sued both parties in state court will provide cold comfort.

Nevertheless, there would probably be cagey plaintiffs who would gamble successfully on getting their claims against nondiverse third parties into federal court. The question then is whether it makes sense to preclude them simply to reduce the federal caseload.⁴¹ Of course if Congress has expressed an intention to exclude such claims, no further discussion is necessary. But suppose for the moment that it has not. The most obvious objection to exclusion is that even after *Kroger* some plaintiffs will choose federal court and then find themselves wishing

38. 437 U.S. at 383-84 (White, J., dissenting).

39. See Kennedy, *Counterclaims, Cross-Claims and Impleader in Federal Aviation Litigation*, 38 J. AM. LAW & COM. 325, 335-36 (1972).

40. See 2 L. KREINDLER, AVIATION ACCIDENT LAW § 25.01(i)(b) (1963).

41. Of course, there may be other reasons for doing so, which will be considered *infra*.

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they could assert claims against impleaded parties.⁴² The marginal cost of the federal court's deciding those claims is much less than the cost of later suits in state court.⁴³ Principles of collateral estoppel would reduce the cost to the states in cases in which the plaintiff won and the original defendant established a right to contribution or indemnity, or in which the original defendant successfully established an affirmative defense.⁴⁴ But the outcome might just as easily make collateral estoppel unavailable;⁴⁵ and in any event the necessity for pleading and proving which issues were litigated in the earlier case would remain.⁴⁶

To take account of that inefficiency is not to suggest an absence of reasons why we might want to save the scarce resource of the federal courts for only the most important or most appropriate cases. It is difficult, however, for the Supreme Court to make that decision concerning resource allocation, since its judgment in a case like *Kroger* to keep out a particular type of claim is made without regard for the possibly lesser interest in retaining federal jurisdiction over other, better established issues.⁴⁷ By far the more sensible tactic is to leave the matter to Congress, which can simultaneously reexamine the value of every category of federal litigation.⁴⁸

B. *The Federalism Concern*

A second argument that might support *Kroger's* result is in a sense

42. The change of heart might come from those who find after discovery that they have misjudged the evidence.

43. It makes no difference that it would be impossible to find a principle that would permit their claims but at the same time keep out the cagey plaintiffs. (And it undoubtedly would be difficult to do so. As the Court pointed out in *Kroger*, 365 U.S. at 374-75 n.17, the statutory rule against collusive joinder does not work.) Some court must decide the claims of these plaintiffs, and from a system-wide perspective the total cost of having the federal courts do the whole job is less than that of sending all plaintiff claims against nondiverse third-party defendants to state courts.

44. In the latter case a defendant might, for instance, establish the plaintiff's contributory negligence or anticipatory breach of contract. The former third-party defendant, sued by the plaintiff in a later action, could assert collateral estoppel defensively since the plaintiff had already litigated those issues. See RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2, 1975). But see *id.* § 68.1 (Tent. Draft No. 3, 1976). In the former case the plaintiff might be able to assert collateral estoppel offensively against the former third-party defendant. See *id.* § 88.

45. This would be the case, for example, when the plaintiff won against the original defendant, who failed to establish a right of indemnity or contribution, or when the plaintiff's claim against the original defendant rested on grounds unique to that defendant.

46. See *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876).

47. My personal choice of a starting point for cutting down the caseload, for instance, would be workmen's compensation cases filed by insurers. Cf. *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 350-52 (1961) (congressional action to forbid removal of state workmen's compensation cases to federal court did not also implicitly forbid insurer from filing same case in federal court as original matter).

48. See Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 397, 458 (1976).

the flip side of the first: if the federal courts have an interest in keeping out state-law claims between citizens of the same state, so too may the states have an interest in adjudicating cases involving their own laws and their own residents.⁴⁹ Unnecessary diversion of such litigation to federal tribunals may sometimes retard the development of state law, or at least result in misapplication of standards in cases that are beyond the state supreme court's power to correct.⁵⁰ This second argument may also be implicit in the Court's insistence on the preferability of shunting Kroger's claim against Owen into state court.⁵¹

One short answer to problems of federalism and comity in this context is that *Kroger* provides a somewhat ineffective safeguard for state autonomy. If a statistically significant number of plaintiffs still choose to split claims against defendants and third-party defendants between federal and state courts, collateral estoppel will frequently operate to make the federal tribunal's interpretation of state law binding on the state court.⁵² Even if a more substantial number of cases are entirely diverted into state courts, however, it is worth asking whether the putative benefit to the states should be permitted to outweigh the cost to litigants like Kroger. Is this not a case, like judicial intervention in questions of national commerce power, in which the Court is on weak ground in asserting the interests of the states in light of the states' ability to protect themselves by pushing for congressional limitations on jurisdiction whenever they feel that restriction is desirable?⁵³

C. *Fairness to the Foxy Plaintiff*

A third justification for the result in *Kroger*—and one that played a crucial role in the Court's resolution of the issue—is that any other result would permit cunning plaintiffs to do indirectly what they could not do directly: join diverse and nondiverse defendants in federal court.⁵⁴ The Court recognized that whenever ancillary jurisdiction is exercised it allows some party to do indirectly what he could not do as an original matter. But the Court suggested that two preconditions for this result did not exist in *Kroger*. First, unlike the claim against Owen, the "relation [of an ancillary claim] to the original complaint is [one of]

49. See ALL, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99-100 (1969).

50. *Id.* But see Note, *The Effect of Diversity Jurisdiction on State Litigation*, 40 IND. L.J. 566 (1965).

51. 437 U.S. at 376.

52. See notes 44-46 *supra* & accompanying text.

53. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

54. See 437 U.S. at 374-75.

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not mere factual similarity but logical dependence.”⁵⁵ Second, “ancillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court.”⁵⁶

Before examining these criteria one should clarify the type of plaintiff behavior at issue. The Court was not worried about collusion between plaintiff and the original defendant.⁵⁷ Even the dissenters would have blocked that sort of cunning, and another statutory provision prohibits it.⁵⁸ Furthermore, as pointed out above,⁵⁹ there might be perfectly legitimate concerns that would lead a plaintiff to omit one or more defendants in the original complaint even in state court. The same plaintiff, after a closer look at the case in the course of pleading and discovery and, again, for reasons based only on the merits or on trial strategy, might decide to join an omitted defendant. Thus a rule forbidding any plaintiff to assert a claim against a nondiverse third-party defendant is unnecessary to catch the really reprehensible characters and instead works to the disadvantage of both innocent and sly parties.

This qualification rather naturally leads to discussion of the Court’s second precondition; thus, it may be useful to take them up in reverse order. The second criterion, again, is that to invoke ancillary jurisdiction a party has to be in a defensive posture (for example, a defendant asking to counterclaim, cross-claim, or implead) or else left out of the litigation altogether (and seeking to intervene). The idea is that we should be more concerned about fairness to those who can only react to the inconvenience of litigation initiated by another person than about helping a plaintiff who could have helped himself by beginning in a forum in which he could join all his claims.

The rule seems straightforward enough, but of course it is not. To begin with the most obvious problem, suppose that Kroger had filed her action in Iowa state court, that OPPD had removed and impleaded Owen, and that Kroger had then asserted her claim against Owen. Fairness to her would certainly demand taking ancillary jurisdiction under those circumstances, and yet she is by no stretch of the imagina-

55. *Id.* at 376.

56. *Id.*

57. *Id.* at 374 n.17.

58. 28 U.S.C. § 1359 (1976). See 3 MOORE’S FEDERAL PRACTICE ¶ 14.27[1], at 14-571 (2d ed. 1978); 6 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 2, § 1444, at 231-32; Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265, 274-75 (1971).

59. See text accompanying note 40 *supra*.

tion a "defending party."⁶⁰ Perhaps the solution is to say that she was "haled into [*federal*] court against [her] will"⁶¹ and for that reason deserves the benefit of ancillary jurisdiction. That resolution, however, merely shifts the issue: since OPPD chose the federal court, why should it have the right to implead Owen, an entity incorporated in Nebraska and thus nondiverse with OPPD? More generally, why permit ancillary jurisdiction over any counterclaim, cross-claim, or third-party claim brought by a removing defendant with no independent basis for jurisdiction? The answer is clear: at least as long as we have diversity jurisdiction, the defendant has a right to a federal determination of the plaintiff's claim against him, which he may be forced to forego if we penalize removal by refusing ancillary jurisdiction over connected claims. However, precisely the same thing may be said of Kroger's claim against OPPD. In the future, plaintiffs who can get into federal court but fear they may change their minds about omitted nondiverse third parties will be encouraged by *Kroger* to forego the luxury of diversity jurisdiction.

Nor does removal present the only question about the soundness of the *Kroger* rule. In *Phelps v. Oaks*⁶²—the case cited by the *Kroger* Court as authority for the permissibility of ancillary jurisdiction over nondiverse intervenors—plaintiffs, citizens of Pennsylvania, had brought an action of ejectment in federal court against Oaks, a citizen of Missouri.⁶³ Oaks, however, was a tenant of John and Maria Zeidler—both of Pennsylvania—and had been paying them the rent the plaintiffs sought. Today Oaks normally would implead the Zeidlers,⁶⁴ and plaintiffs then might wish to settle the entire question by asserting their claims against the landlords. Instead, the Zeidlers intervened⁶⁵ as defendants to protect their own claim to title, and the Court permitted the action to proceed with Pennsylvanians on both sides. If permitting plaintiffs to claim against intervening defendants differs from allowing them to claim against impleaded defendants on these facts, that difference eludes me. A plaintiff might gamble on joining the omitted party either way, and whether he would win or lose after *Kroger* would depend simply on whether the defendant or the

60. 437 U.S. at 376.

61. *Id.*

62. 117 U.S. 236 (1886).

63. Actually the action was begun in Missouri state court and removed by plaintiffs pursuant to the Act of March 3, 1875, ch. 135, § 2, 18 Stat. 470. 117 U.S. at 236.

64. The Court acknowledged the possibility of Oaks vouching for his landlords. 117 U.S. at 239-40.

65. The Zeidlers intervened pursuant to Missouri procedure, followed in Missouri federal court pursuant to the Conformity Act, ch. 255, § 5, 17 Stat. 197 (1872). 117 U.S. at 238-39.

omitted party moved first.⁶⁶

Perhaps the idea is that when the omitted party intervenes there is a justifiable concern with fairness to him, since he rather than the plaintiff has asked that the issues between them be determined. The best analogy from this perspective is between the intervening defendant and the impleaded party who seeks to assert a claim against the plaintiff.⁶⁷ However, permitting jurisdiction over a particular issue to turn on who requests it presents a couple of problems. One that arises when the intervenor or third-party defendant merely inverts the plaintiff's claim in a request for declaratory relief is the incongruity with the "well-pleaded complaint" rule, which permits jurisdiction in declaratory judgment actions only if it also would have existed in the correlative coercive action with the parties reversed.⁶⁸ A more serious objection, however, is the difficulty of maintaining that the defensive (or omitted) party's convenience is served when he asks for relief against the plaintiff, but not when the plaintiff asks for relief against him. Suppose that in the *Kroger* case OPPD's summary judgment motion had been denied, and OPPD had gone to trial asserting its contribution claim against Owen. In that event Owen might have found it much more convenient to fight it out with Kroger in the federal action rather than face the possibility of a later state court suit on the same facts. Yet it is unlikely that Owen could force Kroger's hand by requesting a declaratory judgment of nonliability given the often expressed judicial preference for protecting the plaintiff's right to choose the time, place, and sequence for asserting personal injury claims.⁶⁹

The purpose of this brief discussion concerning removal and intervention is to suggest that the Court erred in using initiative in the

66. Precisely the same problem would arise under current practices in any case in which the omitted party has a right to intervene under rule 24(a), save perhaps when he would have been an indispensable party under rule 19(b). See *Insurance Co. of Am. v. Blindauers Sheet Metal & Heating Co.*, 61 F.R.D. 323 (E.D. Wis. 1973) (intervenor an indispensable party); 3B MOORE'S FEDERAL PRACTICE ¶ 24.18[3] (2d ed. 1978); 7A C. WRIGHT, A. MILLER & E. COOPER, *supra* note 2, § 1917; Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 777-78 (1972); Goldberg, *supra* note 48, at 421-24.

67. Cf. *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709 (5th Cir. 1970) (permitting the third party's claim against the plaintiff). The Fifth Circuit also adopted the *Kroger* rule for a plaintiff's claims against a third-party defendant. *Fawvor v. Texaco, Inc.*, 546 F.2d 636 (5th Cir. 1977).

68. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 VAND. L. REV. 445 (1954). The incongruity is probably not fatal, since that doctrine seems restricted to cases in which the parties seek federal question jurisdiction as an original matter rather than merely to tack on to an action already legitimately lodged in federal court. It does, however, illustrate a bias toward parity in the right to invoke federal jurisdiction.

69. See *Cummingham Bros. v. Bail*, 407 F.2d 1165 (7th Cir.), *cert. denied*, 395 U.S. 959 (1969); 10 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 2, § 2765.

choice of forum to identify a right to ancillary jurisdiction. Up to now the analysis has suggested that the test has three faults: it is likely to create considerable confusion in cases in which the party who started the litigation did not choose the federal forum; it discourages some bona fide diversity plaintiffs from choosing federal court; and it overlooks the fairness claims of others for whom the party seeking ancillary jurisdiction may act as proxy. Still a fourth problem arises if we consider some difficult problems of foreseeability that will inevitably occur. Suppose a three-car accident occurs involving *P*, *T*, and *D*. If *P* and *T* are citizens of the same state and join as plaintiffs and if *P* tries to cross-claim against *T* at the outset, it seems as though the "initiative in choice of forum" test would preclude ancillary jurisdiction.⁷⁰ Suppose, though, that *P* seeks to assert a contribution claim against *T* only after *D* has asserted a compulsory counterclaim, and (1) *T* joins *P* as an original plaintiff, or (2) *T* is impleaded by *P* under rule 14(b), or (3) *T* is brought in under rule 13(h) as an additional party to *D*'s counterclaim.⁷¹ In each instance *P* only half fits *Kroger*'s description of a "defending party haled into court against his will."⁷² *P* has chosen the federal court and could as surely predict *D*'s counterclaim as *Kroger* could have predicted *OPPD*'s inpleader of *Owen*. Moreover, *P* could be assured of resolving all claims arising from the accident by joining *T* as a plaintiff or suing him as a codefendant in state court.

Kroger seems to suggest that a party's right to have the court be fair to him in granting ancillary jurisdiction depends on whether he took the initiative in choosing federal court, since he might have avoided jurisdictional difficulties by choosing a state forum. As the foregoing example indicates, however, the plaintiff's ability to avoid trouble will depend on how foreseeable that trouble is; and the less certain that prediction is, the more the plaintiff is entitled to ancillary jurisdiction notwithstanding the fact that he chose the court. If in the example above *D*'s counterclaim had been permissive, it seems that even under the strictest application of the *Kroger* rule *P* would be allowed ancillary jurisdiction over his claim against *T*. The point is that no test based solely upon party structure or initiative in the choice of

70. There has been little careful analysis of cross-claims between plaintiffs. *Danner v. Anskis*, 256 F.2d 123 (3d Cir. 1958), a case similar to that hypothesized in text, suggests—contrary to the explicit language of the rule—that rule 13(g) does not permit a plaintiff to cross-claim unless the defendant has first filed a counterclaim. *Danner* also suggests, though, that the case is not covered by ancillary jurisdiction. See also *Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 37 (1964).

71. See *Southwest Lime Co. v. Lindley*, 12 F.R.D. 484 (W.D. Ark. 1952).

72. 437 U.S. at 376.

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forum will correspond well with the concerns of fairness that underlie ancillary jurisdiction. By far the better approach is that taken by the Supreme Court in *United Mine Workers v. Gibbs*⁷³—to recognize the possibility of ancillary jurisdiction over all claims arising from the same transaction and to leave the trial judge with discretion to determine the issues of fairness and economy.⁷⁴

The other justification Justice Stewart offered for refusing to sanction the exercise of ancillary jurisdiction in *Kroger*—that Kroger's claim against Owen was not "logically dependent" on, but only factually similar to, her claim against OPPD—is equally troublesome. It is difficult to say whether "logical dependence" is a *sine qua non* for ancillary jurisdiction in every case, since it is unclear what the Court meant by the term. The most obvious interpretation is certainly not the one the Court intended:

[T]he nonfederal claim in this case was simply not ancillary to the federal one in the same sense that, for example, the impleader by a defendant of a third-party defendant always is. A third-party complaint depends at least in part upon the resolution of the primary lawsuit. . . . Its relation to the original complaint is thus not mere factual similarity but logical dependence. Cf. *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 [1926]. The respondent's claim against the petitioner, however, was entirely separate from her original claim against OPPD, since the petitioner's liability to her depended not at all upon whether or not OPPD was also liable.⁷⁵

It is true that a third-party complaint is parasitic on the original

73. 383 U.S. 715, 726 (1966).

74. It is perhaps worthwhile to examine briefly a few other problems that may arise in light of *Kroger*. I presume that when federal jurisdiction over the main claim is exclusive, *see, e.g.*, 28 U.S.C. § 1346 (1976) (United States as defendant), the Court would look more kindly on plaintiffs' claims against nondiverse third-party defendants, since it would be unfair to treat the plaintiff's exclusive option of federal court as an "initiative in the choice of forum." *But see Aldinger v. Howard*, 427 U.S. 1, 18 (1976).

The Court attempts to leave open the question of whether *Kroger* will apply to cases in which there is concurrent federal question jurisdiction over the plaintiff's original claim: "[N]either the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case." 437 U.S. at 377 (emphasis added). But it is hard to see why there should be any doubt about the matter. *Aldinger*, despite the fact that it arose under 42 U.S.C. § 1983 (1976) and 28 U.S.C. § 1343(3) (1976), seems to preclude joinder of nondiverse third parties as pendent codefendants in virtually all federal question cases. *See Comment, Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127 (1977). That being so, there seems little reason after *Kroger* to allow a plaintiff with the initiative in the choice of forum to achieve the same result when such a party is brought in as a third-party defendant. True, forcing those plaintiffs into state court requires them to abandon the right to a federal application of federal law rather than the luxury of diversity jurisdiction. But as long as both rights are on the statute books, there is no justification for treating one less cavalierly than the other.

75. 437 U.S. at 376.

complaint in a unique way, since rule 14(a) permits impleader only when the defendant can push the plaintiff's claim off on the third party. That kind of logical dependence, however, seldom characterizes counterclaims, cross-claims, or intervention, and the Court recognized the legitimacy of ancillary jurisdiction in those cases.⁷⁶

The citation of *Moore*⁷⁷ (a case concerning not impleader but a compulsory counterclaim) in the passage quoted above suggests a second possible interpretation of the phrase "[dependence] upon the resolution of the primary lawsuit." Plaintiff in *Moore* sued the New York Cotton Exchange for violating the Sherman Act by its monopoly on cotton quotations, which the Exchange refused to furnish to the plaintiff. The Exchange counterclaimed under state law for injunctive relief, alleging that plaintiff was stealing the quotations anyway and distributing them to bucket shops. Because there was no diversity,⁷⁸ the Court had to determine whether relief might be granted on the counterclaim after dismissing the claim stated in Moore's bill. The Court resolved the issue by stating that ancillary jurisdiction would exist if the counterclaim met the first requirement of old Equity Rule 30—that is, if it "[arose] out of the transaction which is the subject-matter of the suit."⁷⁹ It further concluded that "transaction" would encompass occurrences that had a "logical relationship"⁸⁰ and that here "[s]o close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter."⁸¹

Even *Moore's* statement of the test is ambiguous, but at least it seems to indicate that ancillary jurisdiction exists when a determination of the main claim—whatever the result—will necessarily affect the determination of the dependent claim. In *Moore*, for example, resolving the antitrust claim in plaintiff's favor could have been fatal to the Exchange's request for injunctive relief⁸² (though not, perhaps, to a claim for damages); and a decision that the Exchange had a right to withhold the quotations was a necessary precondition of its right to prevent their appropriation. As the Court pointed out in *Kroger*, however, a judgment that OPPD was or was not negligent had no effect on Owen's

76. *Id.*

77. 270 U.S. 593 (1926).

78. *See Moore v. New York Cotton Exch.*, 291 F. 681, 682 (S.D.N.Y. 1923), *aff'd*, 270 U.S. 593 (1926).

79. 270 U.S. at 609.

80. *Id.* at 610.

81. *Id.*

82. *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

liability.⁸³

If the above interpretation of *Moore* is what the Court meant in *Kroger* by “logical dependence,” it too does not square well with the tacit approval of ancillary jurisdiction in other types of cases. Take by way of illustration *LASA Per L’Industria Del Marmo Societa Per Azioni v. Alexander*,⁸⁴ a case cited by the Court as an example of an ancillary cross-claim. Southern, the main contractor to build a city hall in Memphis, subcontracted with Alexander to put on the marble. Alexander in turn subcontracted with LASA to furnish the marble. LASA sued Alexander, Southern, and others for the balance due on the marble, and Alexander cross-claimed against Southern for, among other things, the balance due on its subcontract, wrongful termination, and damage to business reputation. Although the Sixth Circuit held that the “logical relationship” between the main claim and the cross-claims justified taking ancillary jurisdiction,⁸⁵ it is obvious that LASA’s success or failure might have no effect whatsoever on Alexander’s cross-claims. Not only were the latter based on a different subcontract, but proof of them depended on allegations that Southern had, for instance, demanded installation in inclement weather and had failed to prepare properly the concrete base to which the marble was to be affixed.

Not only is it true that cross-claims, counterclaims, or intervention might not entail the kind of “logical dependence” that the *Moore* Court seemed to have contemplated, but it is also easy to imagine plaintiffs’ claims against third-party defendants that would. In litigation involving alternative liability in which the burden of proof on the issue of causation is imposed on the defending parties⁸⁶ or in cases in which the burden of proof on apportionment of damages is imposed on those liable,⁸⁷ the decision on the main claim would automatically resolve the plaintiff’s claim against the third-party defendant.

The inevitable conclusion is that if the Court intended “logical dependence” to be an independent condition for ancillary jurisdiction

83. A decision on the main claim *could*, of course, resolve the claim against Owen too—as it would if the decision found the deceased to have been contributorily negligent. But that is not a question that must necessarily have arisen, and a determination of the contributory negligence issue in *Kroger*’s favor would not be binding on Owen anyway.

84. 414 F.2d 143 (6th Cir. 1969).

85. *Id.* at 147.

86. *See, e.g., Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948) (shot fired by one of two defendants struck plaintiff).

87. *See, e.g., Phillips Petroleum Co. v. Hardee*, 189 F.2d 205 (5th Cir. 1951) (pollution of irrigation waters); *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 218 P.2d 17 (1950) (aggravation of fire injuries resulting from failure to provide exit doors); *De Corsey v. Purex Corp.*, 92 Cal. App. 2d 669, 207 P.2d 616 (1949) (aggravation of injuries from exploding bottle because of compound’s deterioration).

rather than simply a handy test for identifying cases that satisfy existing conditions, it was simply wrong. Although the phrase "logical relation" does have a respectable pedigree among civil procedure commentators, oddly enough the meaning most frequently attached to it in that context is the one meaning that the Court explicitly repudiated. Prior to *Kroger* the term had been employed to identify situations in which a counterclaim⁸⁸ or a cross-claim⁸⁹ arose out of the "transaction or occurrence" that was the subject matter of the original action or a properly asserted counterclaim. Indeed, the *Moore* Court used the phrase to define "transaction" for purposes of counterclaims under Equity Rule 30. For what it is worth, rule 14(a) says that "[t]he plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff";⁹⁰ it seems entirely consistent to use the "logical relation" test in its nonjurisdictional sense to identify cases meeting that description. It is no accident, however, that ancillary jurisdiction extends across the entire range of cross-claims and compulsory counterclaims, since the "transaction or occurrence" requirement aims at the same elements of judicial economy, party convenience, and fairness that justify ancillary jurisdiction. If that is so, it seems that the most common use of the phrase "logical relation" provides an argument for, rather than against, taking jurisdiction over *Kroger's* claim against *Owen*.

III. Statutory Interpretation

Up to this point I have endeavored to establish that if there is a reason that explains the outcome in *Kroger*, it can only be the Court's conviction that "'Congress . . . expressly or by implication negated' the exercise of jurisdiction over [*Kroger's*] claim."⁹¹ The Court found evidence of that negation in two places. First was Congress' repeated reenactment of the basic diversity statute in apparent awareness of the judicial insistence on complete diversity and, in 1948, in apparent approval of an Advisory Committee comment casting aspersions on claims like *Kroger's*. Second was the idea that "[t]he policy of the statute calls for its strict construction."⁹² Given the rather tenuous inferences the Court drew from equally nebulous congressional indications

88. See cases cited in 6 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 2, § 1410, at 42 n.45.

89. See *id.* § 1432, at 17 n.18.

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

91. 437 U.S. at 373 (quoting *Aldinger v. Howard*, 427 U.S. 1, 18 (1976)).

92. 437 U.S. at 377 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

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concerning jurisdictional amount in *Snyder v. Harris*⁹³ and *Zahn v. International Paper Co.*,⁹⁴ it should not be surprising that this evidence was sufficient to settle the question. But at the risk of beating a dead horse, the matter merits close examination to see just how unprincipled the Court's conclusion was.

A. *The Reenactment Thesis*

Although the *Kroger* Court speaks of repeated reenactments of the diversity statute,⁹⁵ it simplifies analysis to note that the enactments in question are the Judicial Code of 1948⁹⁶ and the amendatory Act of 1958.⁹⁷ For all practical purposes, the device of impleader did not exist in the federal courts prior to 1938,⁹⁸ and congressional enactments before that time could hardly have expressed or implied anything concerning the issue before the Court in *Kroger*. Furthermore, what other amendments there have been to section 1332 since the adoption of the original rule 14 have dealt with matters too far removed from the question presented in *Kroger* to be considered relevant.⁹⁹

93. 394 U.S. 332, 338-39 (1969). See Goldberg, *supra* note 48, at 450-54; Strausberg, *Class Actions and Jurisdictional Amount: Access to a Federal Forum—A Post Snyder v. Harris Analysis*, 22 AM. U.L. REV. 79, 88-89 (1972); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 62, 204 (1969); Note, *Unnamed Plaintiffs in Federal Class Actions: Zahn v. International Paper Co. Further Restricts the Availability of the Class Suit*, 35 OHIO ST. L.J. 190, 197-98 (1974); Comment, *Seeking a Federal Forum in Diversity Class Actions: Recent Developments in Subject Matter Jurisdiction*, 19 S.D.L. REV. 333, 342 (1974).

94. 414 U.S. 291, 298-300 (1973). See Goldberg, *supra* note 48, at 450-53; Theis, *Zahn v. International Paper Co.: The Non-Aggregation Rule in Jurisdictional Amount Cases*, 35 LA. L. REV. 89, 95 (1974).

95. 437 U.S. at 373.

96. Act of June 25, 1948, Pub. L. No. 773, 62 Stat. 869 (current version codified at 28 U.S.C. §§ 1-2906 (1976)).

97. Act of July 25, 1958, Pub. L. No. 85-554, 74 Stat. 415 (codified in relevant part at 28 U.S.C. § 1332 (1976)).

98. The adoption of the Federal Rules of Civil Procedure in that year made third party practice generally available in all federal courts. Until then federal procedure was governed by the Conformity Act, ch. 255, § 5, 17 Stat. 197 (1872), which tracked state procedures. Only a half dozen states allowed impleader, and three of them passed their impleader statutes not long before the adoption of the Federal Rules. See Bennett, *Bringing in Third Parties by the Defendant*, 19 MINN. L. REV. 163 (1935); Cohen, *Impleader: Enforcement of Defendants' Rights Against Third Parties*, 33 COLUM. L. REV. 1147 (1933); Willis, *Five Years of Federal Third-Party Practice*, 29 VA. L. REV. 981 (1943). There was a provision for third party practice in admiralty in the federal courts dating back to 1883. See *The Hudson*, 15 F. 162 (S.D.N.Y. 1883); Sup. Ct. Adm. R. 59, 112 U.S. 743 (1884) (promulgated in 1883). In 1921 rule 56 of the Supreme Court Rules in Admiralty took the place of rule 59 (the 1883 rule), and permitted impleader both when the third party was directly answerable to the libellant, and when the only claim against the third party was a claim over by the respondent. 2 BENEDICT ON ADMIRALTY § 349 (6th ed. 1940); Cohen, *supra*, at 1168. In either case, however, the seventh amendment was understood to permit only claims within the maritime jurisdiction to be asserted against the impleaded party, *Aktieselskabet Fido v. Lloyd Brazillero*, 283 F. 62, 74 (2d Cir. 1922); Cohen, *supra*, at 1169—so no problem of ancillary jurisdiction could have arisen.

99. Besides the Judicial Code of 1948 and the 1958 amendments, the following amendments

The 1948 codification followed by two years an amendment to rule 14 that made liability over to the defendant a precondition of impleader. The Advisory Committee comment on that amendment noted that it was "the majority view" that plaintiffs' claims against third-party defendants would require independent jurisdictional grounds.¹⁰⁰ From these facts the *Kroger* Court concluded that "[t]he subsequent reenactment without relevant change of the diversity statute may thus be seen as evidence of congressional approval of that 'majority view.'"¹⁰¹

Neither the Committee reports¹⁰² nor the scanty House¹⁰³ and Senate¹⁰⁴ debates on the bill so much as mention ancillary jurisdiction, let alone the problem considered by the Advisory Committee comment. The Committee hearings¹⁰⁵ are equally silent. Indeed, the only relevant impression that emerges from examination of the legislative history is an acute awareness of the limited role a codification performs. The Senate report emphasized that "great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval."¹⁰⁶ It recommended deletion of the only provision that did occasion disagreement—a proposal to transfer provisions regarding the Tax Court from the Internal Revenue Code to the Judicial Code—"[s]ince every effort has been made to avoid controversial matters in this revision."¹⁰⁷ The Senate Hearings reiterate the desire to avoid all controversy.¹⁰⁸ Moreover, Representative Devitt

have been enacted: Act of Apr. 20, 1940, Pub. L. No. 463, 54 Stat. 143; Act of Aug. 14, 1964, Pub. L. No. 88-439, 78 Stat. 445; Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 3, 90 Stat. 2891. The first extended diversity jurisdiction to citizens of the District of Columbia and the territories; the second amended 28 U.S.C. § 1332 to provide that in any direct action against an insurance company the insurer should be considered a citizen of the same state as the insured. The Foreign Sovereign Immunities Act deleted the references to "foreign states" found in paragraphs (2) and (3) (delegating treatment of jurisdiction in actions against foreign states to the new 28 U.S.C. § 1330 (1976)), and also added a new paragraph (4) to provide for diversity jurisdiction in suits brought by foreign states as plaintiffs.

100. 28 U.S.C. app., at 414 (1976).

101. 437 U.S. at 374 n.16.

102. S. REP. NO. 1559, 80th Cong., 2d Sess. (1948); H. REP. NO. 308, 80th Cong., 1st Sess. (1947).

103. 94 CONG. REC. 8498-501 (1948); 93 CONG. REC. 5049-50, 8384-92 (1947).

104. 94 CONG. REC. 7927-30 (1948).

105. *Judicial Code and Judiciary: Hearings on H.R. 3214 Before a Subcomm. of the Comm. on the Judiciary of the United States Senate*, 80th Cong., 2d Sess. (1948) [hereinafter cited as *Hearings on H.R. 3214*]. Cf. *Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the Comm. on the Judiciary of the House of Representatives*, 80th Cong., 1st Sess. (1947) (revision makes no basic changes in diversity jurisdiction) [hereinafter cited as *Hearings on H.R. 1600 and H.R. 2055*].

106. S. REP. NO. 1559, *supra* note 102, at 2.

107. *Id.*

108. *Hearings on H.R. 3214*, *supra* note 105, at 15 (remarks of Rep. Reed), 17 (remarks of Rep. Devitt), 22 (remarks of Judge Maris). Cf. *Hearings on H.R. 1600 and H.R. 2055*, *supra* note 105, at

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stated that the House Judiciary Committee had “found it humanly impossible to make a section-by-section detailed examination of the many provisions of the bill,” and had relied in large measure on the work of the West Publishing Company, the Edward Thompson Company, and the various advisory committees that assisted them in the compilation.¹⁰⁹

This paucity of legislative history suggests that it is fanciful to infer from the fact of reenactment in code form that Congress meant to adopt one position or another on any matter that was at all in dispute.¹¹⁰ Whatever may be the implications of reenactment in the ordinary case of an individual statute,¹¹¹ the political ambiance that surrounds the codification process leaves little opportunity for substantive changes not necessary to resolve contradictions within the corpus being clarified.¹¹² Because of the very magnitude of the task and because the enterprise entails few political rewards,¹¹³ the only way a codification can be successfully accomplished is by avoiding any hint of partisan controversy and by making no changes without virtually unanimous support.¹¹⁴

6, 11 (remarks of Rep. Keogh) (Committee on Revision of the Laws sought to avoid controversy “as far as possible”).

109. *Hearings on H.R. 3214*, *supra* note 105, at 16-17. See also *Hearings on H.R. 1600 and H.R. 2055*, *supra* note 105, at 3 (remarks of Rep. Devitt).

110. *Cf. Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 139 & n.10 (1941) (reenactment of law in code form does not warrant assumption that unsettled doctrine under law has been given legislative confirmation).

111. See E. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 243 (1940); R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 130-31 (1975); 2A C. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* § 49.09 (4th ed. 1973).

112. House Report No. 308 stated that “[r]evision, as distinguished from codification, required the substitution of plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections, and consolidation of related provisions.” H. REP. NO. 308, *supra* note 102, at 2. See Note, *Legislative Adoption of Prior Judicial Construction: The Girouard Case and the Reenactment Rule*, 59 HARV. L. REV. 1277, 1282 (1946).

113. See 93 CONG. REC. 8385 (1948) (remarks of Rep. Robson) (“This bill . . . will mean little politically to anyone who gave it his time and thought.”)

114. See *id.* (“It can be said truthfully that this bill is not a partisan bill in any respect. . . . [T]here has been absolutely no opposition whatever to this codification as a whole.”); H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1402 (1958); P. MISHKIN & C. MORRIS, *ON LAW IN COURTS* 512 (1965).

This suggestion in general terms is borne out more specifically in those passages in the legislative history of the codification that refer to diversity jurisdiction. In commenting on the predecessor of H.R. 3214—H.R. 2055—Professor J. William Moore stated that “the revision . . . might have involved far-reaching change. For example, diversity jurisdiction might have been eliminated, as many have advocated. But the revision has made no basic changes.” *Hearings on H.R. 1600 and H.R. 2055*, *supra* note 105, at 27. The House Report on H.R. 3214, the bill that ultimately was enacted, stated that “[s]ome minor changes of existing law were necessary in revising provisions relating to jurisdiction of district courts. These are noted in the reviser’s notes under sections 1332 [etc.]” H. REP. NO. 308, *supra* note 102, at 6. The reviser’s notes in relevant part speak only of clarifications regarding suits in which a citizen of a territory or the District of Co-

The second difficulty with the assumption that Congress adopted the "majority view" announced by the Advisory Committee arises from the source of the interpretation. This is not to say that the Committee's thoughts on the question were not well informed¹¹⁵ or inherently respectable. That it was the Advisory Committee, however, and not the Supreme Court who was interpreting the jurisdictional statutes casts doubt on *Kroger's* inference for two reasons. First, it is less likely that the Advisory Committee's thoughts on the matter would have come to the attention of Congress. An intent to resolve by the codification existing disagreement about applying section 1332 in impleader cases is far less easily presumed when the controversy has not received sufficient notoriety to reach the attention of the court of last resort.¹¹⁶ (The same also may be said of the cases to which the Advisory Committee referred.) Second, that the Committee's statement—if it is read as approval of the "majority view"—was not binding in any fashion means that Congress could not, consistently with the constitutionally imposed requirements of clear statement,¹¹⁷ adopt it without explicitly saying so.

lumbia is a party, and of the substitution of the phrase "all civil actions" for the words "all suits of a civil nature, at common law or in equity" to conform to FED. R. CIV. P. 2. *Id.*, app., at A115-16.

115. At the time the statement was made in 1946, the weight of authority was clearly against the assertion of ancillary jurisdiction. See *Friend v. Middle Atl. Transp. Co.*, 153 F.2d 778 (2d Cir.), *cert. denied*, 328 U.S. 865 (1946); *Hull v. United States Rubber Co.*, 9 Fed. R. Serv. 14a.62, Case 3 (E.D. Mich. 1945); *Saunders v. B&O R.R.*, 63 F. Supp. 705 (S.D. W. Va. 1945); *Banks v. Employers' Liab. Assurance Corp.*, 7 Fed. R. Serv. 14a.11, Case 2 (W.D. Mo. 1943); *Thompson v. Cranston*, 2 F.R.D. 270 (W.D.N.Y.), *aff'd*, 132 F.2d 631 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943); *Johnson v. G.J. Sherrard Co.*, 2 F.R.D. 164 (D. Mass. 1941); *Herrington v. Jones*, 2 F.R.D. 108 (E.D. La. 1941); *Hoskie v. Prudential Ins. Co. of America*, 39 F. Supp. 305 (E.D.N.Y. 1941). But it was by no means unanimous. See *Sklar v. Hayes*, 1 F.R.D. 594 (E.D. Pa. 1941). *Cf.* *Malkin v. Arundel Corp.*, 36 F. Supp. 948 (D. Md. 1941) (when original defendants could not enforce contribution against third-party defendant unless plaintiff obtained joint judgment against original and third-party defendants, motion to rescind order for third-party complaint would be granted unless plaintiff amended complaint to include nondiverse third-party defendant); *Crum v. Appalachian Elec. Power Co.*, 29 F. Supp. 90 (S.D. W. Va. 1939) (an independent basis of jurisdiction is not necessary to support a third-party proceeding); *Satink v. Holland Township*, 28 F. Supp. 67 (D.N.J. 1939). See also *Kravas v. Great Atl. & Pac. Tea Co.*, 28 F. Supp. 66 (W.D. Pa. 1939); *Bossard v. McGwinn*, 27 F. Supp. 412 (W.D. Pa. 1939); *Holtzoff, Some Problems Under Federal Third-Party Practice*, 3 LA. L. REV. 408, 415 (1941); 24 MINN. L. REV. 126 (1939).

116. See *E. CRAWFORD*, *supra* note 111, § 233. In fact, the only reference to the Federal Rules themselves in the Senate Report is a statement that "no provisions of the existing Federal Rules of Civil Procedure . . . are amended or otherwise affected by this bill." S. REP. NO. 1559, *supra* note 102, at 8. The House Report does state that the source material for the codification included, along with voluminous other material, "Notes on the Rules of Civil Procedure . . . promulgated by the Supreme Court." H. REP. NO. 308, *supra* note 102, at 1. From all that appears, however, the rules and any commentary considered were used simply to excise statutory provisions made obsolete by the rules, such as the provision in 28 U.S.C. § 41(1) (1940 ed.) which read "all suits of a civil nature, at common law or in equity." See *Hearings on H.R. 1600 and H.R. 2055*, *supra* note 105, at 19 (remarks of Judge Maris), 27 (remarks of Prof. Moore), 31 (letter from Floyd E. Thompson to John M. Robson); Maris, *New Federal Judicial Code: Enactment by 80th Congress a Notable Gain*, 34 A.B.A.J. 863 (1948).

117. See *H. HART & A. SACKS*, *supra* note 114, at 1413.

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The reason should be obvious. Statements made by courts are ranked by authoritativeness according to the position that a judge occupies within the judicial system—with the Supreme Court’s statements concerning the Federal Rules, for example, universally binding the federal courts. Outside the structure of binding judicial or administrative interpretations, however, it becomes impossible to rank arguments by any criteria other than force of logic and consistency with precedent. To the extent that application of those criteria is uncertain, it is impossible to say with assurance which among conflicting positions Congress may have had in mind unless it has made its views explicit. For the *Kroger* Court to presume that Congress came to the conclusion that the Court found most persuasive is merely to substitute judicial for legislative judgment.

Still a third difficulty with the Court’s assumption that Congress adopted the Advisory Committee’s view arises from the text of section 1332 itself. The phrase “civil actions where the matter in controversy . . . is between . . . citizens of different States” has never been unambiguous in its application to multiple party or multiple claim cases.¹¹⁸ From the outset, the provision has occasioned problems in joinder as an original matter,¹¹⁹ class actions,¹²⁰ shareholder derivative actions,¹²¹ realignment of parties,¹²² nominal parties,¹²³ fiduciaries,¹²⁴ intervention,¹²⁵ impleader,¹²⁶ counterclaims,¹²⁷ cross-claims,¹²⁸ and substitution of parties¹²⁹—to mention a few.¹³⁰ Given that breadth of generality, even congressional intention to approve the Advisory Committee’s comment need not freeze the law forever into that mold. It might mean simply that the “inajority view” of the situation was one authorized by the statute, although there might be others. This only says that the expansive terms in which the law has been drawn were chosen to give the

118. *But see* 437 U.S. at 373.

119. *See, e.g.*, *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

120. *See, e.g.*, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

121. *See, e.g.*, *Doctor v. Harrington*, 196 U.S. 579 (1905).

122. *See, e.g.*, *City of Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63 (1941).

123. *See, e.g.*, *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181 (1825).

124. *See, e.g.*, *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

125. *See, e.g.*, *Phelps v. Oaks*, 117 U.S. 236 (1886).

126. *See, e.g.*, *Dery v. Wyer*, 265 F.2d 804 (2d Cir. 1959).

127. *See, e.g.*, *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926).

128. *See, e.g.*, *Scott v. Fancher*, 369 F.2d 842 (5th Cir. 1966).

129. *See, e.g.*, *Hardenbergh v. Ray*, 151 U.S. 112 (1894).

130. Other difficulties not involving multiple parties or claims have included the definition of corporate citizenship, as in *Louisville, C.&C. R.R. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844), and *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), and the time for determining diversity, as in *Louisville, N.A.&C. Ry. v. Louisville Trnst Co.*, 174 U.S. 552 (1899).

courts power to make law on an intermediate plane of generality,¹³¹ a methodology frequently employed outside the jurisdictional context.¹³²

That the Constitution gives Congress and not the courts the power to establish "inferior Courts"¹³³—and by inference to define their jurisdiction—does not mean that Congress' inferred power to define jurisdiction precludes the courts' expansive interpretation of congressional enactments that purport to exercise that power. The Constitution also gives Congress, and not the courts, power to regulate commerce among the several states,¹³⁴ and yet the Sherman Act passed pursuant to that provision delegates far more lawmaking power to the courts than is contended for here.¹³⁵ In short, a frank awareness of the generality of section 1332 entails a recognition that in applying it the courts will have to engage in some interpolation, not merely an exercise in cognition of what Congress meant.¹³⁶ If that is so, then the courts would remain free to change their minds about interstitial decisions—even ones that Congress liked—until the delegating law is replaced by one using more specific terms in which Congress reasserts its decisionmaking primacy.

None of these arguments is strictly applicable to the Court's contention that more specific reenactments of section 1332 that "[left] intact [the] rule of complete diversity" evidence a congressional intent to preclude ancillary jurisdiction over plaintiffs' claims against nondiverse third-party defendants.¹³⁷ To the extent that argument makes any sense, it most directly refers to the 1958 Act, the only one since the enactment of the Federal Rules that has affected in a general way the terms "matter in controversy" and "citizens of different States."¹³⁸ The

131. See R. DICKERSON, *supra* note 111, at 182.

132. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (Labor Management Relations Act); *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943).

133. U.S. CONST. art. III, § 1.

134. U.S. CONST. art. I, § 8, cl. 3.

135. See *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943).

136. I here adopt terms used by Professor Dickerson, *supra* note 111, at 13-32. A related claim in favor of judicial tinkering with a basic jurisdictional scheme is made in Goldberg, *supra* note 48, at 431-41. Professor Shapiro has recently suggested that the more basic controversy over the propriety of diversity jurisdiction itself could be resolved by giving each federal court power to retain, limit, or abolish diversity jurisdiction within its borders. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 340 (1977).

137. 437 U.S. at 373.

138. The Act raised the requisite amount in controversy from \$3000 to \$10,000 and made any corporation for purposes of both original and removal jurisdiction a citizen of the state where it had its principal place of business as well as of the state where it was incorporated. Act of June 25, 1948, Pub. L. No. 773, 62 Stat. 869. The 1964 Act simply qualified the definition of corporate citizenship still further in direct action suits against insurance companies. Act of Aug. 14, 1964, Pub. L. No. 88-439, 78 Stat. 445. The 1940 Act extended diversity jurisdiction by adding after the phrase "between citizens of different States" the clause "or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory." Act of Apr. 20, 1940, Pub. L. No. 463, 54 Stat. 143.

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Court's position seems not to be that by reenacting section 1332 Congress froze the case law refusing ancillary jurisdiction over plaintiffs' claims. Rather it is this: Congress has reaffirmed the ancient conclusion¹³⁹ that "matter in controversy . . . between . . . citizens of different States" means each defendant must be from a state different from that of each plaintiff, and given that equation, the words simply will not sustain an interpretation that permits a plaintiff to assert a belated claim against a nondiverse third-party defendant.¹⁴⁰

In light of the elasticity that the words of the diversity statute have shown in other contexts,¹⁴¹ one would expect such rigid construction to be supported by at least a few pointed sentences uttered in the course of the reenactment. Once again, however, the committee reports,¹⁴² floor debate,¹⁴³ and hearings¹⁴⁴ contain not even a reference to ancillary jurisdiction, much less this small corner of it. Nor is it fair to presume that because Congress modified other parts of section 1332 (jurisdictional amount and corporate citizenship) in order to reduce significantly the federal caseload¹⁴⁵ it also indicated which way it wanted the wind to blow on ancillary jurisdiction questions. It is not the business of Congress to regulate by unspoken intention, at least not according to the enactment procedure set out in article I, section 7 of the Constitution.¹⁴⁶ We must suppose that there were reasons why Congress did not address the issue, and they are not difficult to imagine: the sticky politics of tinkering with diversity jurisdiction, drafting difficulties, or, even more likely, a failure even to consider the issue.

Let us suppose, though, that there is evidence to support the presumption that when Congress reuttered those magic words "matter in

139. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

140. See 437 U.S. at 373.

141. See notes 119-29 *supra* & accompanying text.

142. H.R. REP. NO. 1706, 85th Cong., 2d Sess. (1958); S. REP. NO. 1830, 85th Cong., 2d Sess. (1958), reprinted in [1958] U.S. CODE CONG. & AD. NEWS 3099.

143. 104 CONG. REC. 12683-90 (1958).

144. *Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearings on H.R. 2516 and H.R. 4497 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 1st Sess. (1957).

145. The Administrative Office of the United States Courts calculated that, based on cases filed in district courts during the second quarter of the fiscal year 1957, raising the jurisdictional amount to \$10,000 would have reduced the diversity jurisdiction contract caseload by 38.2% and the tort caseload by some 15.5%. It also found that making corporations citizens of states where they had their principal places of business would have reduced the diversity jurisdiction corporate caseload by 3.6% in the southern district of Texas and 23.5% in the western district of Michigan. Diversity cases constituted more than one-third of the total civil cases filed in the district courts during 1955 and 1956. Of all civil cases in 1956, 23% were diversity cases filed by nonresident corporations doing business in the state of suit. H. REP. NO. 1706, *supra* note 142, at 11-12.

146. U.S. CONST. art. I, § 7. See Radin, *A Case Study in Statutory Interpretation: Western Union Co. vs. Lenroot*, 33 CALIF. L. REV. 219, 223 (1945).

controversy . . . between . . . citizens of different States," it at least was simultaneously thinking, "This means complete diversity." Would that intention preclude all possibility of subsequent judicial interpolation? I suggest that it would not. Consider the question presented to the Massachusetts Supreme Judicial Court in *Commonwealth v. Welosky*.¹⁴⁷ A state law enacted before the nineteenth amendment to the Federal Constitution provided that a "person qualified to vote for representatives to the general court shall be liable to serve as a juror."¹⁴⁸ After the nineteenth amendment's adoption did this law subject women to jury duty?¹⁴⁹ To say that it did not because the legislature that passed the law obviously had only men in mind (only men could vote at the time) is to make the mistake that Lon Fuller called the "pointer theory of meaning."¹⁵⁰ It is to suppose that the phrase was meant to designate something in particular rather than a general idea, such as the appropriate intelligence and discretion demanded of electors.

It seems to me that something like that took place in *Kroger*. Since the last reenactment of section 1332, two Supreme Court decisions have clarified the constitutional restraints on diversity jurisdiction. First, the Court has made clear that the Constitution does not demand complete diversity even between original plaintiffs and original defendants as long as at least two adverse parties are not cocitizens.¹⁵¹ Second, the Court has reset the constitutional limits on jurisdiction over plaintiffs' claims, but at a point corresponding to the "transaction or occurrence" test employed in the Federal Rules.¹⁵² In light of these developments, it might be that the only real obstacles to ancillary jurisdiction over claims like *Kroger's*—those that were thought to be constitutionally based—have been removed. It is still possible to assign a meaningful general interpretation to "complete diversity" since there remain independent justifications for forbidding plaintiffs to join nondiverse parties as an original matter—for instance, that state courts will find it harder to discriminate in favor of their own residents. There is no reason to suppose, however, that when it thought "complete diversity" (if that was what it was thinking) Congress had in mind cases *X* (joinder of original defendants), *Y* (plaintiffs' claims against third-party defendants), and *Z* (plaintiffs' cross-claims). Con-

147. 276 Mass. 398, 177 N.E. 656 (1931).

148. *Id.* at 401, 177 N.E. at 658.

149. The court, alas, thought that it did not. *Id.* at 406, 177 N.E. at 660. I have adopted the more sensible analysis of the case put forth in R. DICKERSON, *supra* note 111, at 127-30.

150. L. FULLER, *THE MORALITY OF LAW* 84 (1969).

151. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967).

152. *United Mine Workers v. Gibbs*, 383 U.S. 715, 724-25 (1966).

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gress most likely had a more general objective, such as forcing into the state courts plaintiffs who have nothing to fear there, to the extent required by the Constitution and consistent with judicial economy, convenience, and fairness to the parties.

B. The Policy of the Statute

In the concluding paragraph of its opinion the Court appears to suggest that an independent reason for denying jurisdiction over Kroger's claim against Owen is that "[t]he policy of the statute calls for its strict construction."¹⁵³ If "policy" is something the Court has free rein in improvising from the text of the law, then part II of this Article indicates that the result should have been otherwise. What Justice Stewart seems to mean, however, is that the majority was constrained to reach its conclusion despite "the convenience of litigants [and] considerations of judicial economy" because "policy" was part of "the congressional command."¹⁵⁴ In that case the term must stand for the larger objectives Congress hoped to achieve through the provision for and limitations on diversity jurisdiction.

This is not the place to reopen the debate on that question, but neither is it necessary to do so for our purposes. Concluding that the general objectives of Congress require limiting diversity jurisdiction whenever possible is no more helpful than saying that Congress adopted the rule of complete diversity. When a grant of jurisdiction serves judicial economy and fairness and convenience for the parties we ought to have a more particular statement of intent before attributing to the legislature such a procrustean position. If, as has been shown, Congress has said nothing about the occasions for ancillary jurisdiction, it is hard to see what else will suffice. Certainly the Court's policy statements are insufficient. One of those—a suggestion that Congress wanted to observe the demands of article III in requiring complete diversity¹⁵⁵—has just been disposed of. A second—reducing the burden of diversity litigation in the federal courts to make room for "distinctive federal business"¹⁵⁶—was dealt with in part II. The notion was advanced there that a plaintiff's claim against a third-party defendant was an odd place for the Court to make a stand on that issue. The same might be said for Congress, although of course we have no

153. 437 U.S. at 377 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

154. *Id.* at 377-78.

155. *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941).

156. *Id.*

evidence that it intended the policy to apply to such a case.¹⁵⁷

The final policy the Court adverted to was avoiding offense to states' sensitivities by preserving for them cases not clearly withdrawn by congressional action.¹⁵⁸ Given the collateral estoppel effect that a federal decision on the original claim is likely to have in many cases,¹⁵⁹ however, it is not clear that the states are left with a great deal of independence anyway. In fact, the states might appreciate rather than resent having the federal courts tidy up the loose ends of their own cases.

157. Nor was *Indianapolis v. Chase National Bank* a convincing analogy, since it was a nondiverse plaintiff's attempt to acquire jurisdiction as an original matter by misalignment—or that at least is what a majority of the Court concluded.

158. *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941); *Healy v. Ratta*, 292 U.S. 263, 270 (1934). Cf. *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (policy of statute giving diversity jurisdiction to district courts requires strict construction of statute).

159. See note 44 *supra* & accompanying text.