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SUPPLEMENTAL JURISDICTION OVER CLAIMS IN INTERVENTION
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I. INTRODUCTION

Recent legislation, 28 U.S.C. § 1367, supersedes existing case law governing supplemental jurisdiction over claims in intervention. Except in 28 U.S.C. § 1332 diversity cases, section 1367 provides for supplemental jurisdiction over additional claims that "form part of the same case or controversy under Article III of the United States Constitution." The term supplemental jurisdiction is a creation of section 1367. It replaces and expands upon the judicially created doctrines of ancillary and pendent jurisdiction. Through supplemental jurisdiction, a federal court can hear claims that do not have any independent basis of federal subject matter jurisdiction. When there is federal subject matter jurisdiction over the main claim, the federal court may exercise jurisdiction over additional "ancillary" or "pendent" claims that are "supplementary" to the main claim. In keeping with the statute, the term "supplementary jurisdiction" will be used throughout this article, even though the reference is to law which predates the statute.

Under section 1367(a), related claims by and against an intervening party will no longer need an independent basis of federal subject matter jurisdiction. There are two important exceptions to this general rule. First, section 1367(b) contains additional restrictions for section 1332 diversity cases. The precise application of this subsection is still somewhat unclear. Its effect is to invite the federal courts to reconcile the complete diversity requirement of Strawbridge v. Curtiss with the doctrine of supplemental jurisdiction. Second, section 1367(c) permits federal district courts to decline to exercise supplemental jurisdiction because of considerations of economy and fairness, such as the existence of novel or

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1. The term "supplemental" jurisdiction replaces and includes what was previously called "ancillary," "pendent," and "pendent-party" jurisdiction.
2. Strictly speaking, intervention is a means for joinder of parties. Problems of subject matter jurisdiction relate to joined claims, not to joined parties. The addition of a new party, however, creates the potential for new claims by and against that party. It is these additional "claims in intervention" that produce the need for supplemental or some other form of federal subject matter jurisdiction.

4. Id.
5. Id. § 1367(b).
6. 7 U.S. (3 Cranch) 267 (1806).
7. 28 U.S.C. § 1367(c).
complex state law issues, the predominance of the supposedly supplemental claim over the main claim, the dismissal of the main claim, or other exceptional circumstances.

In diversity cases, the question of supplemental jurisdiction over additional claims is closely related to the question of continuing jurisdiction over existing claims when an additional party is added to the lawsuit. In one such case, Phelps v. Oaks, the Supreme Court upheld subject matter jurisdiction even after a non-diverse party intervened. Eventually, a restrictive gloss on this case resulted in many lower courts demanding a higher level of relationship for supplemental jurisdiction over claims in intervention than would be required in other types of joinder. If a rationalizing principle governing supplemental jurisdiction existed, the commentators could not find it.

In section 1367, Congress has provided that unifying principle, a generous and expansive recognition of supplemental jurisdiction whenever constitutionally permissible, except as limited in diversity cases by the requirement of complete diversity. After a brief introduction to supplemental jurisdiction and to intervention, this article will discuss section 1367 as it applies to claims in intervention, in both non-diversity and diversity cases. It will then explore the effect of the particular limitations of section 1367(b) on plaintiffs' claims in intervention, with special emphasis on the problems of alignment in multi-polar disputes. In interpleader cases and in other cases in which the intervenor cannot be aligned as sharing an interest with any existing party, the author suggests that supplemental jurisdiction should exist under subsection (b). Finally, the article reviews pre-statutory law, demonstrating the changes effected by the new statute.

II. SUPPLEMENTAL JURISDICTION GENERALLY

As joinder liberalized, so did the need to expand the view of what constituted a single "case or controversy" under Article III of the United States Constitution. For example, a plaintiff must bring a patent infringement case to federal court, but the same plaintiff might also have other claims against the same defendant. A related state unfair competition claim would not need to have an independent basis of federal
supplemental jurisdiction if it is joined to the patent infringement claim. Without supplemental jurisdiction, federal courts would often have to proceed piecemeal, resolving only the federal part of a complex lawsuit.

In comparison, plaintiff might wish to join a totally unrelated claim to a pre-existing federal claim. If, by chance, the defendant had driven into plaintiff’s parked car, this additional claim would not be related to an act of patent infringement committed by the same defendant. It would therefore not be supplemental and could only be brought in federal court if supported by independent subject matter jurisdiction. Because unrelated claims can be efficiently brought in a different forum, there is no need for supplemental jurisdiction in such cases, nor could it be argued that it is all one Article III case, the test established by Congress in subsection 1367(a).

The Supreme Court established the constitutional test of supplemental jurisdiction in *United Mine Workers of America v. Gibbs*. There, the Court held that judicial power under Article III extends to all claims that “derive from a common nucleus of operative fact.” The main claim and the supplemental claim must be so related that the plaintiff “would ordinarily be expected to try them all in one judicial proceeding.”

That case was properly pending in federal court under section 1331 because the plaintiff had alleged a secondary boycott in violation of the Federal Labor Relations Act. The plaintiff, however, eventually prevailed only under state common law, not federal law. Nonetheless, the *Gibbs* Court upheld supplemental jurisdiction over the state claim. The underlying controversy arose because the defendant boycotted the plaintiff’s business as a result of a labor dispute. These facts were the common element of both the federal and the state claims. Therefore, the federal court had the power to entertain the entire case.

[Supplemental] jurisdiction, in the sense of judicial power exists whenever the relationship between the [federal] claim and the state claims permits the conclusion that the entire action before the court comprises but one constitutional ‘case.’ . . . The state and federal claims must derive from a common nucleus of operative fact such that he would ordinarily be expected to try them all in one judicial proceeding . . . .

17. Hurn v. Oursler, 289 U.S. 238 (1933). Section 1367 was not the first attempt by Congress to codify supplemental jurisdiction. See 28 U.S.C. § 1338(b) (“The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright patent, plant variety protection or trade-mark laws.”).


19. Id. at 725.

20. Id. In Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 371 (1978), the Supreme Court recognized that *Gibbs* established the constitutional limits of federal judicial power. It declined to reiterate, however, the common nucleus of operative facts test. Id. at 371 n.10.

21. 28 U.S.C. § 1331. “The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Id.

Supplemental jurisdiction can also exist when a defendant counterclaims against a plaintiff, or cross claims against a co-defendant.

In contrast, the plaintiff may not assert a supplemental claim in a section 1332 diversity case. In Owen Equipment & Erection Co. v. Kroger, the Supreme Court refused to permit the plaintiff to file a claim against a party whom the defendant had impled. The defendant’s claim against the impled party was for indemnification; thus, it was factually related. The plaintiff’s claim was essentially the same as the defendant’s, an assertion that the impled party was ultimately liable. The Court held that, unlike the defendant, the plaintiff in a diversity case could not rely on supplemental jurisdiction.

In diversity cases, 28 U.S.C. § 1332 requires complete diversity. In Strawbridge v. Curtiss, the Supreme Court held that each plaintiff must be diverse from each defendant. This holding, according to Kroger, is tantamount to saying that a plaintiff cannot use supplemental jurisdiction in a diversity case.

A similar problem arises when a plaintiff wishes to add an additional party to a supplemental claim in a non-diversity case. In such a case, Strawbridge, Kroger, and other interpretations of section 1332 do not govern. In Finley v. United States, the Supreme Court refused to extend supplemental jurisdiction over a plaintiff’s claim against an additional party, even in a non-diversity case where the original jurisdiction was exclusively federal due to the Federal Tort Claims Act. The Court recognized, without deciding, that the constitutional relationship test appeared to be met, but concluded on policy grounds that the additional claim would not be entitled to supplemental jurisdiction.

The reaction to Finley by Congress was relatively swift. Congress adopted section 1367 with the express purpose of overruling the Supreme Court’s grudging approach to supplemental jurisdiction in Finley. The effect of the rule in Finley was to extend Strawbridge beyond the confines of diversity cases.

26. 7 U.S. (3 Cranch) 267 (1806).
27. This holding is codified at 28 U.S.C. § 1367(b), if the effect is contrary to 28 U.S.C. § 1332.
28. The Supreme Court first distinguished pendent party from pendent jurisdiction in the case of Aldinger v. Howard, 427 U.S. 1 (1976). In Aldinger, the Supreme Court concluded that “it is one thing to authorize two parties, already present, . . . to litigate in addition to their federal claim their state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff . . . to join an entirely different defendant.” Id. at 22.
30. 28 U.S.C. § 1346(b).
32. Id. at 469-71.
of the diversity statute which it interprets. Section 1367 rejects this approach by providing for a constitutional rather than a policy test of supplemental jurisdiction in most cases.

Article III of the Constitution permits supplemental jurisdiction even in diversity cases and even respecting plaintiffs' claims. The Supreme Court in State Farm Fire & Casualty Co. v. Tashire held that there is no constitutional impediment to supplemental jurisdiction over plaintiff's claims. At issue in Tashire was the constitutionality of another diversity statute, 28 U.S.C. § 1335. This statute expressly provided for federal diversity jurisdiction in statutory interpleader cases, even though only minimal jurisdiction existed. Congress had created the remedy of statutory interpleader in order to provide a forum for a kind of multipolar dispute in which various adverse claimants are all vying for the same thing. Section 1335 diversity jurisdiction, unlimited by Strawbridge, exists if there are two or more adverse claimants to a single fund, thing, or duty and they are diverse. Unless the Supreme Court is now willing to overrule Tashire to create such a constitutional impediment and, further, to apply the rule in nondiversity as well as diversity cases, in enacting section 1367, Congress has effectively overruled Finley.

Except in section 1332 diversity cases, Article III alone limits supplemental jurisdiction. In order to avoid overruling both Strawbridge and Kroger, subsection (b) of section 1367 provides a narrower rule in diversity cases. Subsection (b) strictly limits supplemental jurisdiction over plaintiffs' claims. It forbids supplemental jurisdiction over claims

33. Id. at 471.
34. 386 U.S. 523 (1967).
36. Id.
37. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967) marks the high water line of the expansion of federal subject matter jurisdiction by the Supreme Court. Since then, its decisions have shown a great reluctance to grant supplemental jurisdiction. See Finley v. United States, 490 U.S. 545 (1980); Aldinger v. Howard, 427 U.S. 1 (1976).

In Snyder v. Harris, 394 U.S. 332 (1969), the Supreme Court began the process of retreat from an expansive approach to federal subject matter jurisdiction by denying aggregation of claims by several class action members. Even when the named party had met the amount in controversy required for diversity jurisdiction, the Court denied what amounted to supplemental jurisdiction over lesser class member claims. Zahn v. International Paper Co., 414 U.S. 291, 302 (Brennan, J., dissenting) (1973).

If the last two decades of judicial "conservatism" is merely deference to the authority of Congress, the enactment of 28 U.S.C. § 1367 should reverse the trend. If, instead, the Court's true agenda is to decrease the caseload of the federal courts through a restrictive approach to jurisdiction, its primary remaining tool will be its power to narrow the holding in United Mine Workers of America v. Gibbs. 383 U.S. 715 (1966), through constitutional interpretation.

Although 28 U.S.C. § 1367 makes no mention of class actions, there has been some suggestion that it could be read to change the Zahn rule. Richard L. Marcus et al., Civil Procedure 120 (Supp. 1991); see also Thomas C. Arthur & Richard D. Freer, Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute, 40 Emory L.J. 963, 981 (1991). If there is such an effect, it will not be due to the intent of the drafters. See Thomas M. Mengler et al., Congress Accepts the Supreme Court's Invitation to Codify Supplemental Jurisdiction, 74 Judicature 213 (Dec.-Jan. 1991).

by plaintiffs against intervenors, and by intervening plaintiffs, if the effect "would be inconsistent with the jurisdictional requirements of section 1332." The obvious concern of Congress was that the complete diversity rule of *Strawbridge* be maintained.

The statute leaves it to the courts to determine how the boundary between supplemental jurisdiction and the complete diversity rule will be defined. What subsection (b) makes clear is that under section 1332, only the plaintiffs' claims need to meet the complete diversity rule. Congress has foreclosed the courts from extending *Strawbridge* to claims by parties who are not plaintiffs, while leaving the courts free to limit further the complete diversity rule as applied to plaintiffs.

### III. INTERVENTION GENERALLY

Intervention is one way that additional claims may come into a lawsuit. Federal Rule of Civil Procedure 24(a) grants non-parties the right to join a lawsuit if they claim an interest in the subject of the lawsuit such that, as a practical matter, resolution of the dispute between the original parties could affect the interest of the intervenor. This is a fairly stringent joinder test, closely approximating the wording of compulsory joinder under Federal Rule of Civil Procedure 19.

Even if the intervenor does not meet the requirements of rule 24(a), the court may allow intervention under rule 24(b). Rule 24(b) requires

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40. Intervenors voluntarily join the lawsuit. Outsiders may also be brought in by the defendant. FED. R. CIV. P. 14(a).

41. Rule 24(a) also provides for intervention of right whenever a statute of the United States grants the intervenor an unconditional right to intervene.

   (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a).

42. Rule 19 is closely parallel to rule 24. Rule 24, however, adds an additional requirement of non-representation. Therefore, in general, a person can intervene of right under rule 24(a)(2) only if the person should have been joined in the first place. See New York State Ass'n for Retarded Children, Inc. v. Carey, 438 F. Supp. 440 (E.D.N.Y. 1977).

43. Rule 24(b) provides:

   (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24(b)(2).
only that there be a common question of law or fact. Permissive intervention is discretionary with the federal judge.

Both subsections (a) and (b) of rule 24 also provide for intervention when a statute of the United States grants a right to intervene.\(^{44}\) If the right is absolute, then intervention is of right under rule 24(a). If the right to intervene is conditional, intervention is permissive under rule 24(b). Typically, such statutes grant intervention to a federal agency to represent the position of the government in a private dispute that may have important policy implications.\(^{45}\)

Rule 24 governs joinder, not jurisdiction. Indeed, joinder rules cannot grant federal subject matter jurisdiction.\(^{46}\) In order for an additional claim to be properly brought in federal court, it must meet both the requirement of joinder and the requirement of jurisdiction. Rule 24 governs joinder. Section 1367 governs supplemental jurisdiction.

The joinder test of rule 24(a) is stricter than the Gibbs "common nucleus of operative fact" test of supplemental jurisdiction.\(^{47}\) A Rule 19 case\(^{48}\) will serve to illustrate the difference. In *Provident Tradesmens Bank & Trust Co. v. Patterson*, a number of persons injured in a multiple vehicle accident brought suit to recover against the insurance company of one of the car owners. The owner, Dutcher, was not made a party to the lawsuit. He clearly had an interest in the subject matter consisting of his insurance policy; resolution of the suit could have affected him through dissipation of the entire proceeds of his liability coverage. He was, to use the terminology of rule 19, a person "to be joined if feasible."\(^{49}\) For much the same reason, he could have intervened but chose not to do so.\(^{50}\)

\(^{44}\) *FED. R. Civ. P. 24(a)(1), (b)(1).*


\(^{46}\) *FED. R. Civ. P. 82; see also Phelps v. Oaks, 117 U.S. 236 (1886); Venner v. Great N. Ry. Co., 209 U.S. 24, 35 (1908).*

\(^{47}\) *See United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966).*

\(^{48}\) Rule 19 is closely parallel to rule 24. Rule 19(a) provides:

(a) *Persons to Be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

*FED. R. Civ. P. 19(a).*

\(^{49}\) 390 U.S. 102 (1968).

\(^{50}\) *FED. R. Civ. P. 19(a).*

\(^{51}\) *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968).*
Hypothetically, Dutcher may also have had a claim against one of the plaintiffs. For example, he could have disputed the cause of the accident and sought to recover from one of the plaintiffs for the damage to his vehicle. Such a claim is related; there is a common nucleus of operative fact. Dutcher could not intervene as a matter of right to assert this claim however, because it does not meet the test of rule 24. This is because payment of insurance proceeds to the plaintiff driver would not in any way hinder Dutcher in pursuing his claim against that driver. The claim is sufficiently related to meet the Gibbs "common nucleus of operative fact" test, but is not related enough to meet the joinder requirements of rule 24(a). The relationship tests of rule 24 and Gibbs are not the same.

IV. SECTION 1367—SUPPLEMENTAL JURISDICTION OVER INTERVENTION CLAIMS

Unless the Supreme Court retreats from the constitutional standard that it appeared to adopt in Gibbs, section 1367 will substantially expand the jurisdiction of federal courts over intervention claims. Further, it is now possible to attempt to define, in theory, the rough contours of supplemental jurisdiction in intervention cases, and to reconcile supplemental jurisdiction over claims in intervention with accepted doctrines and principles of supplemental jurisdiction.

A. Non-Section 1332 Cases

When the entire case is but one constitutional case, federal subject matter jurisdiction over any one claim provides a sufficient basis, under section 1367(a), for supplemental jurisdiction over all other claims. If it would be constitutional for there to be supplemental jurisdiction over a claim in intervention, subsection (a) grants that claim supplemental jurisdiction, so long as the case is not based solely on diversity.

The Article III test is a relationship test. In United Mine Workers of America v. Gibbs, the Supreme Court used the language "common


53. Section 1367(a) states:
(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in 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 of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

nucleus of operative fact” to describe this test. It is a factual relationship test, although it is sometimes said to be a logical dependence test.\textsuperscript{55} The question comes down to whether a court would, unhampered by the artificial division of subject matter jurisdiction between state and federal court, regard the entire controversy as a single case or controversy.\textsuperscript{56} So long as the claim is related, it does not matter who asserts the claim under subsection (a).

The court may, under subsection (c), decline to exercise supplemental jurisdiction in some cases.\textsuperscript{57} The intervention claim may turn on resolution of a novel or complex issue of state law, better left to the states for initial resolution. Subsection (c)(1) creates a statutory basis for applying a doctrine akin to “abstention” for denial of supplemental jurisdiction in such a case.

Subsection (c) also permits a federal court to dismiss a supplemental intervention claim when it is not truly supplemental, but rather dominates the dispute.\textsuperscript{58} There also will be instances in which the federal claim, though once substantial, has been dismissed, leaving only the intervenor’s claim or claims before the court.\textsuperscript{59} Subsection (c)(3) permits, but does not mandate, a federal court to dismiss the supplemental claims when the main claim no longer exists. Finally, subsection (c)(4) permits dismissal of supplemental claims in “exceptional circumstances.”\textsuperscript{60}

B. Diversity: The Additional Requirements of Section 1367(b)

When a case is in federal court solely because of section 1332 diversity jurisdiction, section 1367(b) introduces additional non-constitutional limitations on supplemental jurisdiction.\textsuperscript{61} In diversity cases, Congress has prohibited supplemental jurisdiction:

57. 28 U.S.C. § 1367(c) provides:
   (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
   (1) the claim raises a novel or complex issue of State law,
   (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
   (3) the district court has dismissed all claims over which it has original jurisdiction, or
   (4) in exceptional circumstances there are other compelling reasons for declining jurisdiction.
58. 28 U.S.C. § 1367(c)(2).
59. Id. § 1367(c)(3).
60. Id. § 1367(c)(4).
61. 28 U.S.C. § 1367(b) provides:
   (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.
over claims by plaintiffs against [intervenors] or over claims by persons seeking to intervene as plaintiffs when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332. 62

If there is any basis for federal subject matter jurisdiction other than section 1332 diversity, intervenors need not concern themselves with subsection (b). Federal question cases, 63 federal tort act cases, 64 and admiralty cases, 65 for example, are not affected by subsection (b). Neither are diversity cases that do not arise solely under section 1332. Thus, statutory interpleader diversity claims 66 are not limited by subsection (b).

In addition, subsection (b) applies only to plaintiffs' claims. Because only plaintiffs' claims are subject to the special limitations of subsection (b), the rule in Owen Equipment & Erection Co. v. Kroger 67 marks the outside boundary of the minimum diversity rule. The rule against supplemental jurisdiction over plaintiffs' claims is easy to state, but is particularly difficult to apply in intervention cases. When are intervenors "proposed to be joined as plaintiffs?" 68 The question is one of alignment.

The requirement of complete diversity "between citizens of different states" is difficult to apply even in cases where plaintiffs share a joint or common interest adverse to defendants. The application of, and justification for, the rule in complex lawsuits is less clear. A typical approach is to align additional parties on the basis of commonality of interest. 69 In most cases, there really are two sides, although there may be many parties. In these bi-polar cases, when the intervenor shares a commonality of interest with one and against other existing parties, intervenors can be aligned in accordance with their commonality of interest.

In some cases, the multiple parties are mutually adverse to such a degree that there are more than two sides to the dispute. In such multipolar cases, when the intervenor's interest is in conflict with both or all of the original parties, this article suggests that the rule in Strawbridge v. Curtiss 70 should not apply. 71

62. Id.
63. Id. § 1331.
64. Id. § 1346(b).
65. Id. § 1333.
66. Id. § 1335.
68. 28 U.S.C. § 1367(b).
70. 7 U.S. (3 Cranch) 267.
71. This approach is consistent with aggregation, under Federal Rule of Civil Procedure 23, of some but not all class actions. In class action cases under rule 23(b)(3), where joinder is based only on a common question of law or fact, each member of a diversity class must meet the amount in controversy requirement of 28 U.S.C. § 1332. When the interests of class members are intertwined, however, as in rule 23(b)(1) and (b)(2) cases, they may aggregate. Zahn v. International Paper Co., 414 U.S. 291 (1973). Diversity jurisdiction in class action cases is not totally consistent. Compare
The language of subsection 1367(b) recognizes in theory that even a plaintiff’s claim might qualify as supplemental. Subsection (b) requires the determination by the court whether supplemental jurisdiction “over claims by plaintiffs” would be “inconsistent with the jurisdictional requirements of section 1332.” After briefly considering the application of subsection (b) to claims by original plaintiffs against intervenors, this article will discuss how the courts might respond to the problem of multi-polar disputes, either by aligning intervenors as defendants or by broadly interpreting this final language in subsection (b).

1. Claims By Original Plaintiff Against Intervenor

Subsection (b) prohibits supplemental jurisdiction:

[i]n any civil action of which the district courts have original jurisdiction founded solely on section 1332 . . . over claims by plaintiffs against persons made parties under Rule 14 . . . of the Federal Rules of Civil Procedure . . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirement of section 1332.

This language treats plaintiffs’ claims against intervenors the same as plaintiffs’ claims under rule 14. In Kroger, the Supreme Court held that a claim by plaintiff against a party joined under Federal Rule of Civil Procedure 14 is not entitled to supplemental jurisdiction. Some commentators have concluded that the effect will be to remove jurisdiction over intervenors of right. This reading fails to distinguish between the claims filed by plaintiff subsequent to intervention and ouster of jurisdiction over pre-existing claims. It was the purpose of the statute to reach only the former, as the latter are not “inconsistent with the requirements of § 1332” as previously understood.

Zahn, 414 U.S. 291 with Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921). When, as in Zahn, the class representative meets the jurisdictional amount in controversy requirement, the issue of aggregation is really an issue of supplemental jurisdiction. Zahn, 414 U.S. at 305 (Brennan, J., dissenting). The relationship between supplemental jurisdiction and “aggregation” in Zahn was recognized by the Supreme Court in Finley v. United States, 490 U.S. 545, 551 (1980) (“[In Finley, as in; Zahn, Aldinger, and Kroger . . . the added claims involve added parties over whom no independent basis of jurisdiction exists.”). See also Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 (1978). While 28 U.S.C. § 1367 does not, by its terms, control class actions, the Supreme Court may choose to review its class action cases, in light of the statute that provides a “single rationalizing principle” of supplemental jurisdiction that has so long been lacking. Zahn, 414 U.S. at 305 (Brennan, J., dissenting).

72. 28 U.S.C. § 1367(b).
73. This would not necessarily create a claim by plaintiff, according to the statute’s drafters. Rowe, Jr. et al., supra note 52, at 957-58.
75. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978). There is supplemental jurisdiction, even in diversity cases, over claims by defendant, as third party plaintiff, against third party defendant. For pre-statutory cases in accord, see, e.g., H.L. Peterson Co. v. Applewhite, 383 F.2d 430 (5th Cir. 1967); Pennsylvania Ry. Co. v. Erie Avenue Warehouse Co., 302 F.2d 843 (3d Cir. 1962); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).
76. JAMES W. MOORE ET AL., 1 MOORE’S FEDERAL PRACTICE [hereinafter 1 MOORE’S FEDERAL PRACTICE] ¶ 0.67; see also Freer, supra note 31.
77. Rowe, Jr. et al., supra note 52.
78. 28 U.S.C. § 1367(b).
Perhaps subsection (b) will be interpreted to permit a plaintiff to claim against an intervenor or an impled third party once that party files a claim against the plaintiff. Such an attack by the new party against the plaintiff places the plaintiff in a defensive posture vis-a-vis the intervenor or third party. In such circumstances, the plaintiff’s claim could be characterized as a counterclaim. The courts are free, under section 1367(b), to limit or not to limit the effect of Kroger to permit supplemental jurisdiction where plaintiff is not the aggressor. Again, there are two avenues for asserting such a limitation; either that plaintiff is no longer acting as a plaintiff or that defensive plaintiffs’ claims are not “inconsistent with the jurisdictional requirements of section 1332.”

Subsection (b) limits claims by plaintiff against intervenor, but does not destroy diversity jurisdiction over a plaintiff’s claim once it has attached. For example, in Wichita R.R. & Light Co. v. Public Utilities Commission, the plaintiff, a Kansas purchaser of electricity, complained against defendant regulatory commission (“PUC”). The regulated utility, also a Kansas company, sought to intervene to support the PUC’s new rates. Neither plaintiff nor intervenor asserted any new claim. Rather, the issue was whether the presence of the non-diverse intervening defendant had destroyed diversity, necessitating dismissal of the case. The Supreme Court held that jurisdiction remained.

[Diversity] existed when the suit was begun . . . . Jurisdiction once acquired on that ground is not divested by a subsequent change in the citizenship of the parties . . . . Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties.

Section 1367 does not change this conclusion. Some fears have been raised that the statute inadvertently may have ousted the courts of supplemental jurisdiction over defensive interventions of right in diversity cases. There is, under the statute, an apparent equation between claims joined under rule 19 and under rule 24. It should be remembered, however, that in the case of subject matter jurisdiction, it is jurisdiction over claims, not over parties, that is in issue. A joinder under either rule does not necessarily result in a plaintiff’s claim against the joined party. Even when the plaintiff does seek to recover against the joined party, the statute could be read to extend supplemental jurisdiction over

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79. 1 Moore’s Federal Practice, supra note 76, ¶ 0.98 [4], and ¶ 0.67, suggests the “probable result” will be that plaintiff’s counterclaim will not have supplemental jurisdiction under a literal reading of the statute. In so concluding, the treatise may be giving inadequate consideration to the concluding phrase of subsection (b).

80. Under subsection (b), the effect of such a construction would be that a plaintiff’s counterclaim would not be “inconsistent with the jurisdictional requirements of section 1332.”


82. 260 U.S. 48 (1922).

83. Id. at 54; see also Phelps v. Oaks, 117 U.S. 236 (1886).

84. 1 Moore’s Federal Practice, supra note 76, ¶ 0.67.
some additional rule 19 joinders and to limit supplemental jurisdiction over rule 24 joinders. The author suggests that such an extension would be appropriate in multi-polar cases. In any event, defensive intervenors have never been considered to violate the complete diversity rule in the past. It does not now necessarily follow that they will be held to be "inconsistent with the requirements of section 1332."

2. Claims by Intervenor

In diversity cases, subsection (b) also forbids 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." The following table describes the operation of subsection (b) in a section 1332 case, where the letter stands for the state of citizenship of the parties.

TABLE 1

<table>
<thead>
<tr>
<th>Original parties</th>
<th>Intervenor</th>
<th>Supplemental Jurisdiction under Subsection (b)-Diversity Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>N₁ v. C₁</td>
<td>N₂ as pl.</td>
<td>no supplemental jurisdiction⁸⁸</td>
</tr>
<tr>
<td>N₁ v. C₁</td>
<td>N₂ as def.</td>
<td>supplemental jurisdiction exists⁹⁰</td>
</tr>
<tr>
<td>N₁ v. C₁</td>
<td>C₂ as pl.</td>
<td>no supplemental jurisdiction⁹⁰</td>
</tr>
<tr>
<td>N₁ v. C₁</td>
<td>C₂ as def.</td>
<td>supplemental jurisdiction exists⁹⁰</td>
</tr>
</tbody>
</table>

Even though the intervenor must be aligned to give meaning to this statutory framework, the statute gives no guidance as to when the intervenor should be deemed to be a plaintiff. Clearly, the complete diversity rule will be lost, or nearly so, if a co-claimant who would destroy diversity can simply permit the other plaintiff to file the lawsuit, and then join under rule 24 rather than rules 19 or 20. Persons "like" original plaintiff should not be permitted to assert supplemental jurisdiction in a section 1332 case. Thus, the Wichita Railroad & Light Court

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⁸⁵. See infra notes 90-100 and accompanying text.
⁸⁶. 28 U.S.C. 1367(b).
⁸⁷. This chart deals with claims by intervenor, which should be distinguished from the question of loss of diversity over plaintiff's original claim as in Phelps v. Oaks, 117 U.S. 236 (1886), and Wichita Railroad & Light Co. v. Public Utilities Commission of Kansas, 260 U.S. 48 (1922). See Rowe, Jr. et al., supra note 52, at 993.
⁸⁸. Unless consistent with section 1332. Supplemental jurisdiction will be needed if the amount of the counterclaim does not exceed $50,000.
⁸⁹. Unless consistent with the requirements of complete diversity.
⁹⁰. Where the intervenor is diverse, section 1332 jurisdiction will still not exist over a claim by or against intervenor for $50,000 or less, hence the possibility that supplemental jurisdiction may be required. If C₁ is asserting a claim against C₂, the courts could conclude that C₂ is properly a plaintiff. Unless the complete diversity rule is limited to bi-polar cases, a mechanical approach to 28 U.S.C. § 1367(b) could result in denying all intervenors into diversity cases supplemental jurisdiction over claims against the original defendant.
aligned the intervenor according to its opposition to the plaintiff. "The intervention of the Kansas Company, a citizen of the same state as the Wichita Company, its opponent, did not take away the ground of diverse citizenship."^92

Similarly, in *Phelps v. Oaks*^93 the issue of alignment was clear; therefore, it was not the subject of judicial analysis. Pennsylvania plaintiffs were suing the intervenors' tenant to recover possession of real property. After removal, the defendant's landlords intervened. The Supreme Court upheld jurisdiction, even though the intervenors were joining as defendants, and, like the plaintiffs, were from Pennsylvania. "It was quite proper... to admit the landlord as a party for the purpose of defending his tenant's possession and ... to appear as a party to the record and codefendant ..."^94

In both *Phelps* and *Wichita Railroad & Light*, the Supreme Court was considering a true defensive intervention. Both were bi-polar, with the intervening parties falling clearly into defendants' camps. In such cases, alignment is relatively easy. In *Financial Guaranty Insurance Co. v. City of Fayetteville*,^95 the district court realigned parties who had been joined through intervention and otherwise, in accord with their interests in the dispute. The court concluded that the parties fell into two groups; those who supported the city incinerator and those who opposed it. While the case preceded the enactment of section 1367, the court's refusal simply to defer to the pleadings is certainly still sound.

Rule 24 does require that the intervenor's first pleading be attached to the intervention petition. The intervenor may have any number of potential pleadings, any one of which could be "initial." If, for example, the intervenor wished to file a claim against both the plaintiff and the defendant, the initial pleading could be a "complaint" against the defendant and a "cross-claim" against the plaintiff. Or, instead, the intervenor could file an "answer" to the plaintiff's complaint, a "counterclaim" against the plaintiff, and a "cross-claim" against the defendant. The litigator who assumes an initial defensive posture may elude non-observant opponents and jurists, but it is the reality of the situation, not self-characterization in the pleadings, that governs federal subject matter jurisdiction.^96 As the district court stated in *Financial Guaranty*: "[I]t is immaterial how the parties may have been designated

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93. 117 U.S. 236 (1886).
94. *Id.* at 240 (emphasis added).
in the pleadings, since the court must align them for jurisdictional purposes on the basis of their actual legal interests . . . 97

It is the same as if an injured passenger on a crashed airliner sought to intervene in a suit against the airline company filed by another injured passenger. The new claimant is intervening as a plaintiff. Similarly, if a landowner downstream from a dam sues to obtain more water, the intervening co-owner of that land is also a plaintiff.98 The claims of other downstream landowners need not be joint with other plaintiffs to share a common interest that more water should flow over the dams. They therefore should be regarded as plaintiffs.

In Financial Guaranty, as in a multiparty negligence case, the plaintiffs were mutually opposed to the defendant. If the question had been which of two sites to use as a landfill, however, alignment of an intervenor asserting yet a third site would not have been such a simple matter. Similarly, in the dam hypothetical, if some downstream or upstream landowners wish to intervene to claim that *too much* rather than *too little* water is being released by the defendant dam owner, they are "like" plaintiffs in that they are against the defendant, but they are also "like" defendants in opposing the original plaintiff's acts.

To the extent that alignment as "plaintiff" turns on an intervenor's affinity with existing parties, the test cannot be adequate in a multi-polar situation. In such situations, the intervenor is neither "like" the plaintiff nor "like" the defendant. In multi-polar cases, the commonality of interest approach cannot effectively operate to align an intervenor whose interest is not common with any existing party.99

Furthermore, the decision in Owen Equipment & Erection Co. v. Kroger100 does not resolve this issue. In that case, the Court had before it the quintessential plaintiff—a person seeking affirmative relief who initiated the lawsuit, and against whom no affirmative relief was sought. Under the narrowest possible construction of Kroger, no intervenor would

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97. *Financial Guaranty*, 749 F. Supp. at 941; see also 1 *Moore's Federal Practice*, supra note 76, ¶ 0.74[1].

98. This joint owner is a rule 19 party who should have been joined originally. The joint owner, however, may not be able to intervene of right under rule 24(a) because of adequate representation. In such cases, if intervention were permitted under rule 24(b), there would be supplemental jurisdiction under *Gibbs*. Article III of the United States Constitution would not forbid the exercise of federal supplemental jurisdiction, although, in a section 1332 case, section 1367 probably does.

99. In an interesting dialogue, Professor Freer fears the statutory language will prevent supplemental jurisdiction over defendant intervenors since this automatically will raise a plaintiff's claim against them. Freer, *supra* note 31 (citing Martin v. Wilks, 490 U.S. 755 (1989), and citing Helzberg's *Diamond Shops v. Valley West Des Moines Shopping Center*, 564 F.2d 816 (8th Cir. 1977)). Professors Rowe, Burbank, and Mengler attempt to distinguish defendants against whom plaintiff has a claim for wrongdoing from other defendants. Rowe, Jr. et al., *supra* note 52, at 943. Professors Freer and Arthur recognize the difficulties in attempting to draw such a distinction. Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 *Emory L.J.* 1007, 1010 (1991) (noting that these cases are "similar to interpleader suits" without a res); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 *Emory L.J.* 963 (1991). That is, the dispute is multi-polar and particularly deserving of supplemental jurisdiction.

100. 437 U.S. 365 (1978).
be the plaintiff, and thus the language in subsection (b), "claim by intervening plaintiff," would have no meaning. Therefore, if this language of subsection (b) is to have any meaning, the Kroger principle must extend to cases in which the claimant was not originally a party plaintiff. Nor can all claiming intervenors be characterized as plaintiffs merely because they voluntarily enter the lawsuit to file a claim.\textsuperscript{101}

When an intervenor can be readily aligned in interest "against" one and "with" another party, the Kroger corollary to Strawbridge \textit{v.} Curtiss\textsuperscript{102} can effectively define the boundary between supplemental jurisdiction and the complete diversity rule. The application of the "plaintiff's claim" limitation on the complete diversity rule confounds rather than clarifies analysis when the intervenor is one of many claimants who are mutually adverse. Such cases can be held to be supplemental by "deeming" the intervenor not to be a plaintiff, a justifiable if complicated approach that only raises a new question as to whether the original plaintiff's diversity has been destroyed. More honestly, the issue is whether the joined claim is "inconsistent with the requirements of section 1332."\textsuperscript{103}

\textbf{C. \textit{"Inconsistent With the Requirements of Section 1332"}}

Subsection 1367(b) forbids supplemental jurisdiction only if it would be "inconsistent with the jurisdictional requirements of section 1332." The structure of the language indicates that this phrase modifies and limits the foreclosure of plaintiffs' claims in a section 1332 diversity case. The reference is clearly to Strawbridge \textit{v.} Curtiss.\textsuperscript{104}

The precise meaning and scope of Strawbridge has remained an enigma since it was decided by the Court in 1806. Nearly two centuries later, in subsection 1367(b), Congress eschewed any attempt at codification other than to limit its effect to plaintiff’s claims. Complete diversity is required except, of course, when supplemental jurisdiction is available.\textsuperscript{105}

The complete diversity rule does not apply to statutory interpleader cases. When there are multiple adverse claimants to a single fund, minimum diversity between two claimants will suffice for jurisdiction under section 1335. Initially, the complete diversity rule applied only when there was a single joint claim by multiple parties rather than many separate and independent claims united under the liberal joinder rules now available. The Supreme Court stated that it did "not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not [diverse]."\textsuperscript{106}

\textsuperscript{101} If this was the intent of Congress it could have simply denied supplemental jurisdiction to "claims in intervention," not just claims by intervening plaintiff. Neither should the voluntary appearance of a defendant be cause for doubting the well established rule that defendants' compulsory counterclaims are supplemental. Moore \textit{v.} New York Cotton Exchange, 270 U.S. 593 (1926).
\textsuperscript{102} 7 U.S. (3 Cranch) 267 (1806).
\textsuperscript{103} 28 U.S.C. § 1367(b).
\textsuperscript{104} 7 U.S. (3 Cranch) 267 (1806).
\textsuperscript{105} Shields \textit{v.} Barrow, 58 U.S. (17 How.) 130 (1855).
\textsuperscript{106} Strawbridge, 7 U.S. (3 Cranch) at 267-68.
This "separate and distinct" language of the Strawbridge court was for years a cause of substantial controversy. In Hooe v. Jamieson,\(^ {107} \)
the Court extended the rule to require complete diversity over each of four owners of undivided interests of land held in common and not jointly. Under a strict system of joinder quite unlike our own, it was difficult to see what kinds of claims, if any, were reserved by this language. Indeed, for a time it was thought that the complete diversity rule could not be abrogated, even by Congress, absent a "separate and independent claim."\(^ {108} \)

In adopting section 1335, Congress implicitly recognized what the Court intuited when it reserved the issue of what to do with cases in which there were "several distinct interests;" the complete diversity rule operates properly only in bi-polar disputes. In a multi-polar case, State Farm Fire & Casualty Co. v. Tashire,\(^ {109} \) the Supreme Court concluded that the "separate and independent" requirement was not a constitutional requirement of Article III. Strawbridge is a gloss on section 1332, not Article III. In subsection 1367(b), Congress limited the scope of the complete diversity rule to plaintiffs' claims. Even as to plaintiffs' claims, Congress provided that they would only be denied supplemental jurisdiction if "inconsistent with section 1332."\(^ {110} \) If this language means anything, it means that some plaintiffs' claims may be supplemental.

The need for supplemental jurisdiction in order to adjudicate disputes fully, fairly, and efficiently is particularly strong in the case of joinder under Federal Rule of Civil Procedure 24(a)(2) in a multi-polar dispute. The intervenor claims an interest in the subject of the action, and not only is he not adequately represented by the existing parties, but in fact both original parties are hostile to the intervenor.

Not all such cases are interpleaders, but there is frequently a close relationship between intervention and interpleader. For example, in K.G. Poland v. Atlantis Credit Corp,\(^ {111} \) a ship had been totally destroyed, resulting in losses to the owner, the mortgage holder, and numerous creditors. The insurance carriers interpled the owner, mortgagee, and some creditors. Others quite properly sought to intervene. The court did not address supplemental jurisdiction in that case. Even in interpleader cases brought under rule 22, however, where the minimum diversity rule does not apply, there is precedent for upholding supplemental juris-

\(^ {107} \) 166 U.S. 395 (1897).
\(^ {108} \) See Marilyn J. Ireland, Entire Case Removal Under 1441(c): Toward a Unified Theory of Additional Parties and Claims in Federal Courts, 11 Ind. L. Rev. 555, 573 (1978). The joint/several dichotomy fails to tell the entire story of potential relationships among multiple parties in a complex lawsuit. A claim may be neither joint nor a mere convenience; that is, a claim may be separate and adverse yet so interconnected that the various distinct claims cannot practically be resolved except in a single controversy.
\(^ {109} \) 386 U.S. 523, 530 (1967).
\(^ {110} \) 28 U.S.C. § 1367(b).
The intervening creditors are neither plaintiffs, nor are their adverse claims inconsistent with section 1332.

When a case is already pending pursuant to statutory interpleader, an additional intervening claimant need not rely on section 1367 for supplemental jurisdiction. Since section 1335 permits minimum diversity, the non-diverse intervenor can nonetheless rely on minimum diversity for jurisdiction. In this sense, section 1335 creates its own basis of supplemental jurisdiction. If it did not, supplemental jurisdiction would exist under section 1367.113

In some multi-polar cases, section 1335 jurisdiction may not be the original basis of the subject matter jurisdiction. A plaintiff may have overlooked the availability of section 1335, or may not have wished to deposit the disputed res into court, as required by section 1335. Perhaps, until the intervention was filed, the dispute appeared to have been bipolar. For example, a plaintiff may have asserted that a defendant insurance company should pay an obligation on an insurance policy. Only later may the plaintiff discover that it is not the sole claimant.

Also, the intervention may for the first time reveal the minimum diversity among claimants necessary for the assertion of section 1335 jurisdiction. Since the inception of such a case, section 1335 jurisdiction arguably existed even though this basis of jurisdiction was not initially pled. Section 1335 does not, however, provide a jurisdictional basis for all multi-polar interventions.114 If the intervenor is diverse from the plaintiff, but not from the defendant, section 1335 jurisdiction will not exist. In such a case, section 1367 should provide the necessary jurisdiction.

Numerous complex problems respecting alignment of parties and the scope of section 1335 will be avoided if supplemental jurisdiction is available in all multi-polar intervention cases. Further, the fair and efficient resolution of such an entire case will not substantially undermine the complete diversity rule. The federal courts are free to exercise such jurisdiction under the broad authority granted by Congress in subsection (b), and in a manner that would be consistent with the language of Strawbridge v. Curtiss.115 Rule 19 and section 1335, or rule 24 and section 1367, achieve the same result in ensuring that all related claims are heard together.

V. CHANGES IN PRE-STATUTORY LAW

Pre-statutory cases often turned on criteria that are not mentioned in section 1367. It was sometimes said, for example, that only interventions

112. See Walmac Co. v. Isaacs, 220 F.2d 108 (1st Cir. 1955).
113. The limits of section 1367(b) apply only to section 1332 diversity, not section 1335 diversity.
114. Some interpleaders qualify for 28 U.S.C. § 1332 but not § 1335 diversity because of a lack of diversity between claimants. E.g., Underwriters at Lloyd's v. Nichols, 363 F.2d 357 (8th Cir. 1966). Further, a disputed duty may not provide the fund necessary for interpleader.
115. 7 U.S. (3 Cranch) 267 (1806).
of right could be supplemental; permissive intervention needed its own basis of subject matter jurisdiction.\textsuperscript{116} A modification permitted supplemental jurisdiction if the basis of personal jurisdiction was in rem but not if it was in personam.\textsuperscript{117} In addition, persons intervening as plaintiffs could not utilize supplemental jurisdiction, at least not in diversity cases.\textsuperscript{118} Finally, if the intervenors were regarded as indispensable, under Federal Rules of Civil Procedure 19\textsuperscript{119} the case would have to be dismissed.

There are three pre-statutory limitations on supplemental intervention: (1) the intervention of right/permissive intervention distinction; (2) the in rem/in personam distinction; and (3) the indispensable problem. It is the author's contention that, under section 1367, the distinction between permissive and compulsory intervention cannot stand.\textsuperscript{120} Similarly, a special rule for in rem cases, if ever justifiable, finds no basis in section 1367.\textsuperscript{121} Section 1367 does require a main claim to which the intervening claim can be supplemental. Thus, essential parties cannot, through intervention, salvage a plaintiff's original jurisdictionless claim.\textsuperscript{122} Yet, the practical tests of rule 19 "indispensability" cannot be mechanically applied to determine jurisdiction.

A. Permissive Intervention and Intervention of Right

It was assumed that prior to enactment of 28 U.S.C. § 1367 permissive intervention claims required an independent basis of federal subject matter jurisdiction.\textsuperscript{123} The district court held this in \textit{Curtis v. American Book Co.},\textsuperscript{124} citing as rationale numerous cases which held that interventions of right, but not permissive interventions, are supplemental.

\textit{Curtis} cited \textit{Phelps v. Oaks},\textsuperscript{125} as did the Supreme Court in dicta in \textit{Zahn v. International Paper Co.}\textsuperscript{126} While it may be true that under the modern joinder rules, the intervening landlords in \textit{Phelps} could now intervene of right under rule 24(a)(2), they were entitled to intervene at the time under a Missouri statute. The Court concluded as follows:

\begin{quote}
[I]t is claimed that, under the decisions of the Supreme Court of the State [of Missouri] the right of the owner or warrantor of the title [intervening landlord] to be let in as a party to defend, does not rest in the discretion of the court, but is absolute (citation omitted). It is assumed that the [Missouri] statute is equally obligatory upon the
\end{quote}

\begin{footnotes}

\textsuperscript{117} Id.

\textsuperscript{118} Id.

\textsuperscript{119} Id.

\textsuperscript{120} See infra notes 108-27 and accompanying text.

\textsuperscript{121} See infra notes 128-46 and accompanying text.

\textsuperscript{122} See infra notes 147-56 and accompanying text.

\textsuperscript{123} 7 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE § 1923, at 629 (1984).

\textsuperscript{124} 137 F. Supp. 950, 951-52 (S.D.N.Y. 1955). Although this was a strongly held view, some courts were not fully convinced. See Secretary of Labor v. King, 775 F.2d 666 (6th Cir. 1985).

\textsuperscript{125} 117 U.S. 236 (1886).

\textsuperscript{126} 414 U.S. 291, 306 (1973) (Brennan, J., dissenting).
\end{footnotes}
courts of the United States. But this is a mistake . . . . Certainly it was not intended that these [state joinder] statutes were to be adopted with the effect of defeating the jurisdiction of the courts of the United States . . . .

Neither does jurisdiction turn on federal joinder rules, which was not even an issue in *Phelps*. In spite of numerous recitations of the supposed coincidence of rule 24(a)(2) and supplemental jurisdiction by highly reliable commentators, the rule rests on an insecure foundation. In a 1969 article, Professor Kennedy cited only a few district court cases on point. It must be remembered that prior to the decision in *Owen Equipment & Erection Co. v. Kroger*, there was only a hazy line marking the boundary between complete diversity and supplemental jurisdiction. The courts and commentators were struggling to find a line of demarcation. For example, in one of the earliest cases relied upon by Professor Kennedy, *Maryland ex rel. Carnesdale v. Rolen*, a permissive intervenor was attempting to join as plaintiff in a negligence action. Under subsection 1367(b) this is totally improper, not because the intervention is permissive, but rather because it is a plaintiff's intervention in a diversity case.

In the only pre-statutory scholarly article to focus exclusively on the subject of supplemental jurisdiction over claims in intervention, Professor Fraser properly reasoned that "the same test is used to determine when a person can intervene as a matter of right under rule 24(a)(2) and when [supplemental] jurisdiction exists." Indeed, it is the relationship between the claims and not the joinder rules that create supplemental jurisdiction. Professor Fraser analogized the rule against supplemental jurisdiction over permissive interventions to the rule against supplemental jurisdiction over permissive counterclaims. Unfortunately, if (as section 1367 suggests) the same test is to govern all supplemental jurisdiction, regardless of the form of the joinder, the analogy is faulty. The relational test of compulsory counterclaims is much less demanding than the relational test of intervention of right. These different tests cannot both be the same test as the common nucleus of operative facts relational test.

The court cited by Professor Fraser explained the relationship between supplemental jurisdiction and joinder quite effectively. Supplemental jurisdiction does not arise, or fail, because the counterclaim is compulsory or permissive. Rather, the test of rule 13(a) happens to be the same as the test of supplemental jurisdiction. The Third Circuit has stated that:

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128. *FED. R. CIV. P.* 82.
129. E.g., I *MOORE'S FEDERAL PRACTICE*, supra note 76, ¶ 0.67 n.14 (1992).
[a] federal court has [supplemental] jurisdiction of the subject matter of a counterclaim if it arises out of the transaction or occurrence that is the subject matter of an opposing party’s claim of which the court has jurisdiction. Similarly, a counterclaim that arises out of the transaction or occurrence that is the subject matter of an opposing party’s claim is a “compulsory counterclaim” within the meaning of Rule 13(a) of the Federal Rules of Civil Procedure. Such a statement of the law relating to [supplemental] jurisdiction of counterclaims is not intended to suggest that Rule 13(a) extends the jurisdiction of the federal courts to entertain counterclaims for the Federal Rules of Civil Procedure cannot expand the jurisdiction of the United States courts. What is meant is that the issue of the existence of [supplemental] jurisdiction and the issue as to whether a counterclaim is compulsory are to be answered by the same test.  

Compulsory counterclaims are entitled to supplemental jurisdiction and permissive counterclaims are not. This is not because of the compulsory/permissive distinction, however, but rather because a counterclaim is compulsory only if it meets the “same transaction” test of rule 13(a). This is a factual relationship test that is a close surrogate to the “common nucleus” test of supplemental jurisdiction. Federal Rule of Civil Procedure 24, pertaining to intervention of right, applies a totally different test.

Section 1367(a) establishes the same constitutionally defined test for counterclaims, cross-claims, impleaders, and claims in intervention. Unlike permissive counterclaims, permissive cross claims are, for the most part, entitled to supplemental jurisdiction. Like compulsory counterclaims they are, by definition, factually related indemnification claims. For this reason, they have supplemental jurisdiction.

136. Permissive counterclaims cannot rely on supplemental jurisdiction because, by definition of rule 13(b), they are not factually related.
137. Professor Freer remarks on the “confluence” of the transactional joinder test with the test for jurisdiction. Freer, supra note 31. Note that the transactional test is not the test of rule 24(a)(2); hence, there is no confluence.
138. Unrelated cross-claims cannot be brought under rule 13(g). Thus, except in diversity cases, all cross claims have supplemental jurisdiction. In diversity cases, the additional requirements of section 1367(b) prevent a plaintiff’s cross claims from being supplemental if they would violate the complete diversity rule of section 1332. But see Danner v. Anskis, 256 F.2d 123 (3d Cir. 1958) (correctly concluding under pre-statutory analysis that plaintiff’s diversity cross claim had to be dismissed, but confusing joinder and jurisdiction).
139. The Supreme Court in Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978), recognized that related permissive claims are entitled to supplemental jurisdiction. Section 1367(a) applies the same supplemental jurisdiction test to rules 14 and 24. To have supplemental jurisdiction, an intervention claim must be related enough to meet the test of United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

Plaintiff’s impleaders under rule 14(b) are, in a diversity case, not supplemental. Similarly, factually related claims by a plaintiff against a rule 14(a) third party defendant are not supplemental in a diversity case. If the third party defendant claims against the plaintiff, the plaintiff’s counterclaim is a claim by the plaintiff that may or may not be consistent with complete diversity. This is one of the questions left open by the language of 28 U.S.C. § 1367(b). It is also unclear whether subsection (b) would apply when the original claim is based on 28 U.S.C. § 1332, but there are additional claims by parties other than plaintiffs that are based on section 1331 jurisdiction to which the claim in question might be deemed supplemental.
Some interventions will fail to meet the stringent test of rule 24(a) intervention of right, but will still be as factually related as, for example, a compulsory counterclaim. Rule 24(b) requires only that there be a "common question of law or facts." Therefore, some permissive intervention claims will not meet the test in United Mine Workers of America v. Gibbs,\textsuperscript{140} requiring a common nucleus of operative fact. This does not mean that no permissive interventions are supplemental.\textsuperscript{141} In Figure 1, the area between point "x" and point "y" illustrates those permissive intervention claims that logically should be entitled to supplemental jurisdiction under subsection 1367(a).

**Figure 1**

\[\text{JOINDER}
\]

\[\text{SUPPLEMENTAL JURISDICTION}
\]

\[\text{§1367(a)}
\]

\[\text{Gibbs}
\]

\[\text{(Common Nucleus)}
\]

\[\text{(of Operative Fact)}
\]

Simply put, neither the test of permissive intervention nor the test of intervention of right serve as sufficient surrogates for Article III. Therefore, under subsection 1367(a) the courts should undertake an independent analysis of jurisdiction, one unconfused by totally different joinder tests in the Federal Rules of Civil Procedure.

Deference to the role of Congress has been cited as a primary reason for withholding supplemental jurisdiction in cases of permissive intervention. One commentator has stated that:

> [p]rocedurally, it may be very desirable to permit the [supplemental jurisdiction in permissive] intervention and perhaps Congress should act to allow joinder where there is jurisdiction over one of the claims. But, until Congress acts, it would constitute an undue expansion of federal jurisdiction to dispense with independent jurisdictional requirements.\textsuperscript{142}

In adopting section 1367, Congress has acted to eliminate all impediments to supplemental jurisdiction except those created by the Constitution,\textsuperscript{143} by the requirements of section 1332 diversity,\textsuperscript{144} or by the special considerations enumerated in subsection (c).\textsuperscript{145} Therefore, section 1367 should

\textsuperscript{140} 383 U.S. 715 (1966).
\textsuperscript{141} 3B MOORE'S FEDERAL PRACTICE, supra note 116.
\textsuperscript{142} Id. ¶ 24.18[1].
\textsuperscript{143} U.S. CONST. art. III.
\textsuperscript{144} 28 U.S.C. § 1332.
\textsuperscript{145} Id. § 1367(c).
erase doubts as to the propriety of supplemental jurisdiction in appropriate permissive intervention cases.

In addition to intervention under relatedness tests, rule 24 provides for intervention when a federal statute confers an absolute or conditional right to intervene.46 So long as the federal statute confers that right respecting only related issues, intervention under rule 24(a)(1) also is entitled to supplemental jurisdiction. The particular exceptions of subsection 1367(b) and (c), of course, apply.

B. The In-Rem/In-Personam Distinction

Section 1367 also eliminates the dubious use of old personal jurisdiction divisions to determine supplemental jurisdictions. It has been said that permissive intervention could be supplemental in in rem cases, but not in in personam cases.47 In rem cases supposedly were more likely to "ripen into an absolute right" to intervene.48 The reason for "ripening" was never the personal jurisdictional base of the lawsuit; rather, it was the remedy that would ultimately be awarded. And neither the base of personal jurisdiction nor the remedy sought is the constitutional test of subsection 1367(a).

Neither in Wichita Railroad & Light Co. v. Public Utilities Commission of Kansas,149 nor in Phelps v. Oaks,150 nor in any other case, has the Supreme Court applied any limitation on the subject matter jurisdiction based on the now obsolete categorization of personal jurisdiction into in rem and in personam. One court151 has suggested that the res requirement arose from a rather zealous reading of Hoffman v. McClelland152 in a student comment in the Harvard Law Review.153 Regardless of its source, the rule finds no basis in the United States Constitution or in section 1367.

If there was ever a doctrinal difference between in rem and in personam cases, that difference has significantly blurred.154 In Mullane v. Central Hanover Bank & Trust Co.,155 the Court declined to adopt the in rem/in personam distinction as the test of personal jurisdiction under the Fourteenth Amendment to the Constitution.

Distinctions between actions in rem and those in personam are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own... It is not readily apparent

146. FED. R. CIV. P. 24(a)(i), (b)(i).
147. Reedsburg Bank v. Apollo, 508 F.2d 995 (7th Cir. 1975); see also Curtis v. American Book Co., 137 F. Supp. 950, 951 (S.D.N.Y. 1955), and cases cited therein.
148. 3B Moore's FEDERAL PRACTICE, supra note 116, ¶ 24.18[1].
149. 260 U.S. 48 (1922).
150. 117 U.S. 236 (1886).
152. 264 U.S. 552 (1924).
how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both in rem and in personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally . . . .

The in rem/in personam standards are not only elusive and confused under the Fourteenth Amendment; they are also elusive, confused, and irrelevant to Article III.

The basis of personal jurisdiction is only indirectly related to the subject matter of a claim. Provident Tradesmens Bank & Trust Co. v. Lumbermens Mutual Casualty Co. provides a useful illustration. The proceeds of a liability insurance policy were at issue in the case. Theoretically, the case might have been brought by personal service on the insurance company—in personam. Alternatively, it might have begun by a writ of attachment of the policy—in rem. In either event, a claim by or against Dutcher, the intervening policy owner, is the same. The real difference lies in the nature of the claim and of the relief sought, not in the nature of the court’s personal jurisdiction.

For example, a non-diverse, non-admiralty claim for personal relief by an intervenor in an admiralty case is similar to the claim which the Supreme Court denied in Finley v. United States. In both situations, an additional state claim is brought by or against someone who was not a party to the original federal claim. It was the intent of Congress to overturn Finley and to grant supplemental jurisdiction even where additional parties as well as additional claims are joined. Therefore, under subsection 1367(a), courts in admiralty do have supplemental subject matter jurisdiction to hear state claims by and against permissive intervenors, even if the claim is in personam.

In State Farm Fire & Casualty Co. v. Tashire, the Supreme Court upheld the grant of jurisdiction over non-diverse interpleader claimants in section 1335. When two or more diverse parties have adverse claims to a single thing, debt, or duty federal courts can adjudicate additional

156. Id. at 312 (1950); see also Shaffer v. Heitner, 433 U.S. 186 (1977).
158. There is a difference between a claim by Dutcher to recover against the policy and a claim by Dutcher to recover personally against one of the other claimants. When the former situation exists, intervention should be of right. Even where the conflict has not “ripened,” resolution of the case “may as a practical matter” effect the intervenor. Fed. R. Civ. P. 24(a). The precursor to rule 24 required an interest in the property that was the subject of the lawsuit. This perhaps led to the current confusion.
159. 490 U.S. 545 (1980).
160. In an in rem case, it is possible to pretend that the intervenor was present all along, at least to the extent that anyone is a party in an in rem case.
162. The claim might be refused on some other basis. A federal court may simply deny permissive interventions under its rule 24(b) discretion. Therefore, there is no need for complex rules of supplemental jurisdiction to prevent joinder of undesirable permissive intervention claims.
claims of non-diverse parties. This is not because personal jurisdiction is in rem. Federal interpleader cases rely on in personam, not in rem, personal jurisdiction. Rather, the additional claims can be adjudicated because the requirement of complete diversity applies only under section 1332, not section 1335.

C. Supplemental Jurisdiction Over Rule 19 Plaintiffs: Indispensability

Section 1367 does not mention the pre-statutory requirement that intervenors, to be entitled to supplemental jurisdiction, may not be essential to the jurisdiction of the court. Some commentators have equated this requirement with the factors of rule 19(b) for determining when to regard an absent party as indispensable. Because rule 19 has substituted a practical test for a jurisdictional test of "indispensability," the analogy is imprecise. When an absent party is truly essential to the court's jurisdiction there can have been no claim pending to serve as a fulcrum upon which supplemental jurisdiction might attach. In the words of the Supreme Court in Wichita Railroad & Light Co. v. Public Utilities Commission, the Kansas intervenor was "not essential to a decision of the controversy between the original parties... The Kansas Company, while it had an interest and was a proper party, was not an indispensable party."

The quintessential indispensable party is the sole defendant. Plaintiff absolutely must join the defendant against whom recovery is sought. The defendant is not merely necessary, but is indispensable. Supplemental jurisdiction cannot supply the basis for subject matter jurisdiction over the original claim against the indispensable defendant since there is no main claim, absent the indispensable party, to which to add any supplemental claim.

When extended to additional parties, the logic continues to be impeccable, but the result is often counter-intuitive. Logically, if the claim in intervention is by a person who is so related that he or she should have been joined, the failure to join can be cured by intervention. If the relationship between the outside party and the dispute is so strong that the party is indispensable, however, there is no main claim and the case must be dismissed. This logic reverses the process of denying supplemental jurisdiction, under United Mine Workers of America v. Gibbs, because the claim is too unrelated. Rather, the intervenor is too related for there to be supplemental jurisdiction. Figure 2 (next page) illustrates the situation.

164. Id.
168. Id. at 53.
The logical fallacy of this approach is obvious. If you can proceed without the intervenor, the intervenor can intervene; but, if you cannot proceed without the intervenor, the intervenor cannot intervene. It was to avoid this tautological approach that rule 19 was amended, replacing the jurisdictional test of indispensability with a practical and flexible test. The test of "indispensability" in rule 19 is not jurisdictional, and should not be misapplied to determine jurisdiction.\textsuperscript{170}

Rule 19 replaces an earlier version of compulsory party joinder that was more jurisdictional in approach.\textsuperscript{171} Under old rule 19, persons were "necessary" if they claimed an interest in the subject of the dispute, and "indispensable" if they would be bound by the judgment. In a sense, the indispensable party, as someone bound, had to be regarded as a


\textsuperscript{171} Rule 19(b) currently provides:

\textit{Determination by Court Whenever Joinder Not Feasible.} If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

\textit{Fed. R. Civ. P. 19(b).}
party. Dismissal of a case for non-joinder of an indispensable party was a jurisdictional defect.

Under rule 19, if joinder is not possible, the federal court must determine whether it should proceed piecemeal, thus shaping a less than complete judgment in order to avoid prejudice. If this proves impractical, the absent party is deemed "indispensable."\textsuperscript{172} In this case, judicial efficiency and the interest of justice to the parties and non-parties, not absence of jurisdiction, dictate that the better course would be to dismiss the lawsuit. Rule 24, governing intervention, was also re-written when rule 19 was amended. Rule 24, like rule 19, reflects this pragmatic approach to joinder and deviates from the jurisdictional approach. In general, rule 24(a)(2) grants intervention of right whenever rule 19 requires joinder.\textsuperscript{173}

This practical test of rule 19(b) "indispensability" focuses on protecting the interests of the parties in the absence of the outside party, and on the efficacy and efficiency of a partial judgment.\textsuperscript{174} Rule 19(b) speaks of prejudice to the outside persons, or to the adequacy of a judgment in their absence. In an intervention case, no such prejudice will occur; intervention will solve the problem or the case will be dismissed. Similarly, the exercise under rule 19(b) of shaping relief is a purely theoretical exercise when an intervenor is present. Either the court will render a complete judgment or none at all. A practical approach to determine what to do when parties are absent is not an effective approach to decide whether to admit them.

Where the outside party is knocking on the courthouse door, it is at best artificial to rely on the tests of rule 19(b). The purpose of changing rules 19 and 24 was to introduce a pragmatic joinder test to replace a jurisdictional test. It would be improper now to attempt directly to apply these tests to jurisdictional analysis. As one commentator has stated:

\begin{quote}
It would be unfortunate if Section 1367's overall policy of encouraging efficient joinder and consistent adjudication were thwarted by a construction of Section 1367(b) that ruled out supplemental jurisdiction over a nondiverse intervenor in a diversity action whose interest in the action qualifies the intervenor as merely a Rule 19(a) "necessary" party [footnote omitted] but not as a Rule 19(b) "indispensable" party.\textsuperscript{175}
\end{quote}

Not only would it be unfortunate, but it would be counter to the purpose of rules 19 and 24, and to section 1367.

If the intervenor is intervening as a plaintiff, section 1367(b) will ordinarily preclude supplemental jurisdiction in a permissive intervention

\textsuperscript{172} Id.
\textsuperscript{173} Rule 24 adds a requirement of non-representation. In addition, there may be statutory grounds for intervention of right, even when the test of rule 19 is not met.
\textsuperscript{174} Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).
\textsuperscript{175} Oakley, supra note 161, at 765-66. On the possible other readings of the coincidence of rules 19 and 24, see Thomas C. Arthur & Richard D. Freer, Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute, 40 EMORY L.J. 963, 966-74 (1991). The primary concern is that whatever interpretation prevails, there will be no easy evasion of the complete diversity rule. Rowe, Jr. et al., supra note 166.
case. For example, if one injured airplane passenger seeks to intervene into a lawsuit filed by another passenger, there is no reason why the intervenor should be entitled to a federal forum merely because a fellow passenger injured in the same accident happened to be diverse from the air carrier. It does not necessarily follow, however, that there is no supplemental jurisdiction over joinder or intervention by a landowner who may be effected by litigation respecting a dam. The issue is not whether the party was an original party or an intervening party, nor is it whether the party is “necessary” or “indispensable.” Instead, it is whether the claim is related, and, in a diversity case, whether an intervening party would be regarded as a plaintiff whose additional claim is “inconsistent with the jurisdictional requirements of section 1332.”

When failure to join a party is jurisdictional, the error cannot be corrected by supplemental jurisdiction. However, in other cases there is a separate and distinct dispute between existing parties. It should be permitted to serve as the main claim so long as it has a basis of federal subject matter jurisdiction. Even where the only possible relief is “in kind” and will “as a practical matter impair or impede” the interests of others, a main claim may exist that could have stood alone. If there are competing interests which are several and distinct, subject matter jurisdiction over one of them should suffice for supplemental jurisdiction over the rest, regardless of whether the joinder is pursuant to rule 24 or to rule 19.

The issue left unclear by subsection 1367(b) is not whether the party should be regarded as “necessary” rather than “indispensable”; it is whether the intervening party whose claim cannot reasonably be forced into a bi-polar dispute model will be foreclosed by the rule in *Strawbridge v. Curtiss*.

VI. CONCLUSION

Ancillary and pendant jurisdiction were at odds with the basic rule that lower federal courts obtain jurisdiction by statute rather than by assuming power. Therefore, those courts were reluctant to expand these concepts. In section 1367, Congress has given the federal courts a statutory mandate to continue to exercise supplemental jurisdiction, and to do so liberally. In subsection (a), Congress authorized the federal courts to exercise supplemental jurisdiction to the extent permitted by Article III of the United States Constitution.

Before enactment of section 1367, the federal courts were particularly reluctant to extend federal judicial power over claims in intervention.

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177. 28 U.S.C. § 1367(b).
178. 7 U.S. (3 Cranch) 267 (1806).
179. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). Ancillary and pendant law were at odds with this philosophy because they had no basis in a federal statute. This jurisprudential difficulty is rectified by creation, in 28 U.S.C. § 1367, of a statutory basis for supplemental jurisdiction.
Section 1367 is a clear message by Congress to the federal courts that they should not shirk from resolving an entire dispute in an efficient manner, regardless of the form of joinder.

There must, of course, be a main claim properly pending in federal court. Absent such a main claim, supplemental intervention claims are not possible. The factors of rule 19(b), however, are not designed to determine jurisdictional indispensability. The grain of truth, in pre-statutory cases, that the intervention cannot cure failure to join an essential party should not be read to elevate rule 19 to jurisdictional dimensions under section 1367. Other pre-statutory limitations that forbid supplemental jurisdiction over interventions, or over permissive interventions in in personam cases, find no support in the broad statutory grant of authority of section 1367. In non-diversity cases, Article III is the only limitation on supplemental jurisdiction.

In section 1332 diversity cases, section 1367 limits supplemental jurisdiction over plaintiffs' claims. In federal question cases, federal tort claim act cases, admiralty cases, statutory interpleader cases, and other non-1332 cases, the special rules of section 1367(b) governing plaintiffs' claims by and against intervenors do not apply. Only in section 1332 cases are plaintiffs' claims not supplemental if "inconsistent with the jurisdictional requirements of section 1332." That is, Strawbridge v. Curtiss continues to govern diversity cases. The Kroger corollary to Strawbridge, adopted by Congress in subsection (b), forbids plaintiffs from asserting supplemental jurisdiction, at least in the typical case.

It is relatively easy to identify claims by a plaintiff against an intervenor. Subsection (b), however, provides no guidance as to when a claim by an intervenor should be regarded as a claim by a person "proposed to be joined as plaintiff." In making this determination, the courts are not likely simply to defer to the characterization of the intervenor in the intervenor's pleadings. Nor is a total foreclosure of all claims by an intervenor supported by the language of the statute. In most cases, an intervenor can be aligned with an existing party because of a commonality of interest. In a multi-polar dispute, this approach is not satisfactory because the intervenor does not share a common interest with either the plaintiff or the defendant.

This article suggests that the complete diversity rule and the requirements of section 1332 are served by denying supplemental jurisdiction only to claims by original plaintiffs and to claims by additional parties who are aligned in common interest with the original plaintiffs. This approach fosters the goal of complete adjudication which would otherwise be frustrated by the artificial division of subject matter jurisdiction between state and federal courts.

180. 7 U.S. (3 Cranch) 267 (1806).
Strawbridge itself reserved the issue of how or whether the rule would apply when there were "separate, distinct" interests.\textsuperscript{183} When interests are joint, the additional party can easily be aligned; when interests are several and permissive, there are policy grounds for relegating an intervenor to a state forum.\textsuperscript{184} Many cases of intervention of right concern a multi-polar dispute that is neither joint, common, nor easily severable. Judicial efficiency and complete adjudication will be served in such cases by supplemental jurisdiction.

The federal courts will continue to exercise much discretion over claims in intervention, either by application of the rules of joinder, by interpretation of ambiguities in section 1367(b), or by relying on their authority to decline supplemental jurisdiction under section 1367(c). Nonetheless, it is to be hoped that section 1367 will be a cleansing wind that washes away the haze of restrictive precedents that have unduly complicated an already complex area of law.

\textsuperscript{183} Strawbridge, 7 U.S. (3 Cranch) at 267-68.

\textsuperscript{184} Even in non-28 U.S.C. § 1332 cases, when supplemental jurisdiction exists over a plaintiff's claims, there is judicial discretion to deny permissive intervention under rule 24(b).