Ancillary Jurisdiction and Intervention Under Federal Rule 24: Analysis and Proposals

Jeffrey L. Rensberger
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Jurisdiction Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol58/iss1/3
Ancillary Jurisdiction and Intervention Under Federal Rule 24: Analysis and Proposals

The Federal Rules of Civil Procedure allow certain parties to intervene in actions pending in the United States district courts.\(^1\) Intervenors are divided by rule 24 into two classes, intervenors of right and permissive intervenors.\(^2\) Briefly, a party is entitled to intervention of right when a statute of the United States confers upon him an unconditional right to intervene, or where a party not already adequately represented claims an interest in the subject of the action, and the ability to protect that interest could, as a practical matter, be impaired by a disposition of the action. Permissive intervention is available, at the discretion of the district court, where a conditional right to intervene is conferred by a United States statute, or where the intervenor would present a claim or defense which has a question of law or fact in common with the main action.\(^3\)

It is axiomatic that a procedural rule, such as rule 24, cannot by its own force lend subject matter jurisdiction to a federal district court to hear a given dispute.\(^4\) Accordingly, intervenors of both classes must show

---

\(^1\) FED. R. CIV. P. 24.
\(^2\) FED. R. CIV. P. 24(a), (b).
\(^3\) Rule 24 reads in part:
(a) **Intervention of Right.** Upon a 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 he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.
(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. 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.

\(^4\) Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941); FED. R. CIV. P. 82. Although nearly everyone regards this proposition as true, its exact basis is unclear. The language of rule 82 is clear: "These rules shall not be construed to extend or limit the jurisdiction of the United States District courts ...." FED. R. CIV. P. 82. It is uncertain, however, whether this rule was required by either the Rules Enabling Act, 28 U.S.C. § 2072 (1976), or the separation of powers doctrine, or whether it is a self-imposed limitation, manifesting an attitude of judicial restraint. The Rules Enabling Act expressly provides that the rules are not to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (1976). But the line between procedure and substance is not easy to discern. See generally Hanna v. Plumer, 380 U.S. 460 (1965); Sibbach v. Wilson & Co., 312 U.S. 1 (1941). The 100-mile bulge provision of rule 4 for personal jurisdiction has been upheld as within the mandate of the Rules Enabling Act, and by implication,
themselves to be within the jurisdiction of the district court before they can utilize the procedure of rule 24 intervention. In intervention of right the jurisdictional problem is academic, for it has consistently been held that intervention of right need not be supported by an independent basis of jurisdiction. The better statement of this rule is that such intervenors need not show independent jurisdiction because they invariably fall within the ancillary jurisdiction of the district court. However, when the intervention is permissive, the majority of the cases, and most commentators, state that ancillary jurisdiction may never be relied upon; a permissive intervenor must show an independent basis of jurisdiction.

This note explores the reasoning behind this disparate treatment of the two types of intervenors, and argues that in certain cases ancillary jurisdiction is appropriate for permissive intervention as well as intervention of right. In particular, the cases that border on the division between the two types of intervention, but fall just short of intervention

procedural. Coleman v. American Export Isbrandtsen Lines, 405 F.2d 250, 252 (2d Cir. 1968); Pierce v. Globemaster Baltimore, Inc., 49 F.R.D. 63, 67, 68 (D. Md. 1969). The Constitution grants Congress the power to define the jurisdiction of the federal courts, U.S. Const. art. I, § 8, cl. 9; art. III, § 1, but it is unclear whether Congress can delegate this power; thus, it is possible that a judicially promulgated rule that expanded federal jurisdiction might violate the separation of powers doctrine. One writer has concluded that neither the Constitution nor the Rules Enabling Act mandates rule 82, and that the rule is merely a statement of general policy which should not be overly rigid in its application. Goldberg, The Influence of Procedural Rules on Federal Jurisdiction, 28 STAN. L. REV. 395, 431-43 (1976). For a discussion of rule 82, ancillary jurisdiction, and intervention, see infra notes 186-201 and accompanying text.


See, e.g., Blake v. Pallan, 554 F.2d 947 (9th Cir. 1977); Warren G. Kleban Eng'g Corp. v. Caldwell, 490 F.2d 800 (5th Cir. 1974); Gaines v. Dixie Carriers, Inc., 434 F.2d 52 (5th Cir. 1970); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 551 (6th Cir. 1970); Formulabs, Inc. v. Hartley Pen Co., 318 F.2d 485 (9th Cir.), cert. denied, 375 U.S. 945 (1963); 7A C. WRIGHT & A. MILLER, supra note 5.

E.g., Moosehead Sanitary Dist. v. S.G. Phillips Corp., 610 F.2d 49 (1st Cir. 1979); Blake v. Pallan, 554 F.2d 947 (9th Cir. 1977); Francis v. Chamber of Commerce of the United States, 481 F.2d 192 (4th Cir. 1973); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531 (8th Cir. 1970); 3B J. MOORE, supra note 5; 7A C. WRIGHT & A. MILLER, supra note 5. According to most sources, the general contours of ancillary jurisdiction intervention conform to the division between intervenors of right and permissive intervenors. But this general rule has several exceptions and qualifications. Where permissive intervention is based on a conditional right conferred by statute pursuant to rule 24(b)(1), the intervenor need not show independent jurisdiction, as such statutes are read to confer jurisdiction. 3B J. MOORE, supra note 5; 7A C. WRIGHT & A. MILLER, supra note 5, at 593; Campbell, Jurisdiction and Venue Aspects of Intervention Under Federal Rule 24, 7 U. PITT. L. REV. 1 (1940). Additionally, permissive intervention in in rem actions may rely on ancillary jurisdiction because the res in court custody provides the nexus requisite for ancillary jurisdiction. 3B J. MOORE, supra note 5; see also infra notes 81-86 and accompanying text. Finally, it has been said that permissive intervention into a class action may be had without a showing of independent jurisdiction. 3B J. MOORE, supra note 5. The area of controversy thus devolves to a permissive intervention sought in an in personam action (other than a class action) based upon a claim or defense having a legal or factual question in common with the initial action.
of right, are permissive interventions over which a federal district court will often have ancillary jurisdiction. While not all permissive interventions will meet the requirements of ancillary jurisdiction, this is no reason to apply a rigid and absolute rule denying ancillary jurisdiction to all permissive intervenors. Moreover, recognition of ancillary jurisdiction over permissive intervention will serve important procedural policies by making possible a more frequent use of discretionary permissive intervention.

The specific problem presented here is one facet of a much larger problem: the tension inherent in a system where courts of limited jurisdiction use liberal procedural rules for the joinder of claims and parties. Procedural mechanisms such as counterclaims, cross-claims, impleader, joinder of parties, and joinder of claims and remedies serve

---

9 Not all cases that have considered the availability of ancillary jurisdiction to permissive intervenors agree with the majority rule. See Northeast Clackamas County Elec. Coop. v. Continental Casualty, 221 F.2d 329 (9th Cir. 1955); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982); Usery v. Brandel, 87 F.R.D. 670 (W.D. Mich. 1980); TPI Corp. v. Merchandise Mart, 61 F.R.D. 684 (D.C. 1974); United States v. Local 638, Enter. Ass'n, 347 F. Supp. 164 (S.D.N.Y. 1972); De Korwin v. First Nat'l Bank, 94 F. Supp. 577 (N.D. Ill. 1950). Another case, Berman v. Herrick, 30 F.R.D. 9 (E.D. Pa. 1962), also flouted the general rule. Unfortunately, its author, Judge Luongo, was led to retract his views on jurisdiction in intervention in a later case, Olivieri v. Adams, 280 F. Supp. 428 (E.D. Pa. 1968). The retraction was encouraged by a less than charitable reception of the Berman opinion in Comment, Federal Jurisdiction—Intervention—Jurisdictional Requirements, 48 IOWA L. REV. 530 (1963). Professor Kennedy thought this sequence of events was "unfortunate." Kennedy, Let's All Join In: Intervention Under Federal Rule 24, 57 KY. L.J. 329, 376 n.170 (1969). Several other commentators agree that permissive intervention should be broadened. Professor Shapiro finds these limitations on the use of ancillary jurisdiction "needlessly restrictive." Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 HARV. L. REV. 721, 760 (1968). Moore apparently feels that it would be fortuitous from a policy standpoint were Congress to provide jurisdiction for permissive intervenors, but that it is beyond judicial competence to achieve the same result through the use of ancillary jurisdiction. 3B J. MOORE, supra note 5, at 24-200.

It is worth noting that cases allowing ancillary jurisdiction to permissive intervenors occur almost entirely at the district court level. It is possible to draw two different inferences from this: that the district court cases are wrong because district court judges are prone to error and aberration; or that the district court cases are correct because trial judges are more likely to reevaluate jurisdictional dogma to meet pressing practical concerns of procedure. This note supports the latter inference. See infra notes 247-63 and accompanying text. But cf. Shreve, Questioning Intervention of Right—Toward a New Methodology of Decisionmaking, 74 NW. U.L. REV. 894, 894-95, 924-27 (1980) (advocating intervention practice with increased discretion in district courts and concomitant decrease in appellate review).

10 There are two sources of restraint imposed upon federal jurisdiction: the Constitution itself, see U.S. CONST. art. III, § 2; and the power the Constitution bestows upon Congress to further regulate the judiciary, see id. art I, § 8, cl. 9; art. III, § 1; see also Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 (1978) (construing congressionally imposed limits in the diversity jurisdiction statute, 28 U.S.C. § 1332 (1976)).

11 See infra text accompanying notes 12-16.


13 Id.

14 Id. RULE 14.

15 Id. RULES 19, 20.

16 Id. RULE 18.
the interests of judicial economy and convenience. As the Supreme Court has said, "[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." Yet the effectiveness of these provisions is limited by the jurisdiction of the courts that employ them. The problem of ancillary jurisdiction is to reconcile the need for procedural convenience with the jurisdictional limits of the federal courts. The specific context of the pervasive tension that is presented here is permissive intervention. The first part of this note provides an overview of intervention practice and rule 24. The second part sketches the contours of ancillary jurisdiction and the theories that underly it. The third part synthesizes the two preceding parts by applying an ancillary jurisdiction analysis to permissive intervention, and discusses the policy implications of hearing permissive interventions under the umbrella of ancillary jurisdiction.

AN OVERVIEW OF INTERVENTION AND FEDERAL
RULE OF CIVIL PROCEDURE 24

History of Intervention

Intervention is by no means a recent innovation. The practice of allowing

---

19 See supra note 10.
20 See, Minahan, Pendent and Ancillary Jurisdiction of the United States District Courts, 10 CREIGHTON L. REV. 279, 281, 296 (1976). Properly conceived, ancillary jurisdiction is not an identifiable set of doctrines, but merely the resolution of this tension; it is a shifting line which marks the present reconciliation of practical needs with imperatives of jurisdiction: The word "ancillary"... should be used in a conclusory sense. If... a claim is part of the transaction that is the basis of the pending action and its joinder will further the administration of justice, it is appropriate to say that it comes within the ancillary jurisdiction of the court.
21 Fraser, supra note 7, at 486 (emphasis added); see also 1 J. MOORE, supra note 5, ¶ 0.60 at 604 ("[T]he Rules have functioned quite well because the courts... have adopted and utilized the old and well established principles of ancillary and pendent jurisdiction so that independent jurisdictional grounds are not needed for the adjudication of a great many of these claims.").
22 For the purposes of this note, the term "ancillary jurisdiction" is used in a broad sense. That is, it is used to refer to any situation where a federal court hears a claim falling outside expressly conferred federal jurisdiction, doing so because the claim is factually or legally integrated with a claim within express federal jurisdiction. The term is in contradistinction to independent jurisdiction, which means simply the jurisdiction of the federal courts as expressly defined by the Constitution and Congress. Ancillary and independent jurisdiction may be further distinguished in that the latter arises directly from constitutional and legislative sources, but the former is judicially conferred. Of course the ultimate analysis concludes, not without some tautology, that all jurisdiction exercised by the federal
ANCILLARY JURISDICTION

1982

a nonparty to enter an action was known to Roman law. Modern civil law jurisdictions have continued the practice in a more limited scope. The ecclesiastical courts brought the practice into the common law, and eventually equity courts recognized a practice known as an examination pro interesse suo, which allowed a nonparty to intervene to protect an interest in property in the control of a court. In this country the practice was recognized early in in rem admiralty actions.

courts is rooted in the Constitution, because those courts, as final arbiters of the Constitution, must inevitably act pursuant to the Constitution. Thus, the term "express jurisdiction" is perhaps the most appropriate term of contrast to ancillary jurisdiction, since the only real distinction is that the former is expressly stated and the latter is not.

This use of the term ancillary jurisdiction departs from traditional usage, where ancillary jurisdiction referred to a claim that is an integral part of a case or controversy considered as an entirety, which claim the federal courts have ancillary jurisdiction over, if they have jurisdiction over the case or controversy. See C. WRIGHT, LAW OF THE FEDERAL COURTS § 9 (3d ed. 1976). The term "pendent jurisdiction" was used to refer to the jurisdiction to hear a nonfederal claim which was sufficiently related to a federal law claim so as to be "pendent" to it. See C. WRIGHT, supra, § 19, at 75. Some cases have allowed permissive intervention without independent jurisdiction under the rubric of "pendent party" jurisdiction. See Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 213 (S.D. Tex. 1982); United States v. Local 638, Enter. Ass'n, 347 F. Supp. 164, 168 (S.D.N.Y. 1972). This terminology has been avoided in this note for the sake of clarity. As used here, ancillary jurisdiction refers to all of the above situations. This is justified because both pendent and ancillary jurisdiction refer to the same problem: a claim beyond express jurisdiction being heard because of its connection to a claim over which the court has express jurisdiction. Although the two terms are historically distinct, they are at present almost indistinguishable. Baker, Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction, 33 U. Pitt. L. Rev. 759, 762 n.24 (1972) (pendent jurisdiction a "subspecies" of ancillary jurisdiction); Comment, Pendent and Ancillary Jurisdiction: Toward a Synthesis of the Two Doctrines, 22 U.C.L.A. L. Rev. 1263 (1975). Cf. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978) ("Gibbs [pendent jurisdiction] and this case [ancillary jurisdiction] are two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?") (footnote omitted). Further justification for running ancillary and pendent jurisdiction together is that the "common nucleus of operative fact" test laid out in UMW v. Gibbs, 383 U.S. 715 (1966), for pendent jurisdiction was assumed without decision to be applicable to the ancillary contexts in Kroger. 437 U.S. at 371 n.10. Accord Revere Copper & Brass v. Aetna Casualty & Sur., 426 F.2d 709, 715 (5th Cir. 1970) (test for ancillary jurisdiction is "logical relationship to the aggregate core of operative facts"). It is fair to say that the Gibbs and Revere tests differ only as to formulation. See Comment, Federal Procedure—Federal Rules of Civil Procedure—Ancillary Jurisdiction and Third-Party Practice—Owen Equipment & Erection Co. v. Kroger, 25 N.Y.L. SCH. L. Rev. 396, 410-11 (1979). Thus, at least as to the question of article III judicial power, pendent and ancillary jurisdiction are all but identical. Still, this note maintains the distinction in terminology where it is useful for historical purposes, and analytic differences are noted insofar as they remain relevant.

Moore & Levi, Federal Intervention—The Right to Intervene and Reorganization, 45 Yale L.J. 565, 566 (1936). The exact scope of intervention practice in Roman law is unknown. Id. 23

23 3B J. Moore, supra note 5, ¶ 24.03, at 24-42.

24 Id.

25 Id. at 24-43; see also the brief history of intervention in Cascade Natural Gas v. El Paso Natural Gas, 386 U.S. 129, 144-45 (1967) (Stewart, J., dissenting).

26 See, e.g., Stratton v. Jarvis, 33 U.S. (8 Pet.) 4 (1834). Justice Story found the proceedings below "irregular" only in that the owners of goods on a ship the subject of a libel action had "interposed" the claims of several owners, without distinguishing their respective proprietary interests. Id. at 8. Otherwise, the intervention was "very familiar." Id. at 9.
The original version of rule 24 was said by one roughly contemporaneous writer to do "little more than integrate the practice which had grown up under Equity Rule 37." Equity Rule 37 was couched in discretionary language, but judicial gloss had created two situations where a denial of intervention was an abuse of discretion as a matter of law; in effect, these situations created an absolute right to intervene. The distinction in the original rule 24 between intervention of right and permissive intervention was an attempt at a codification of the decisional law that had regulated intervention under the former Equity Rule 37. Thus, where a nonparty was not already adequately represented and could be "bound by a judgment in the action," or where a nonparty might be adversely affected by a disposition of property in the control of the court, he could, under the original rule 24(a) as under Equity Rule 37, intervene as of right. If these criteria were not met, but the nonparty would present a question of law or fact in common with the main action, he could intervene, at the discretion of the court, under rule 24(b) permissive intervention.

It may have been unwise to attempt to codify a rather ill-defined set of circumstances which created an absolute right to intervene. The case

---


28 Intervention was addressed quite succinctly: "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention . . . ." Equity R. 37, 226 U.S. 627, 659 (1912) (emphasis added).

29 The first situation was where the intervenor claimed an interest in property in the control of the court. E.g., Credits Commutation Co. v. United States, 177 U.S. 311 (1900); Demulso Corp. v. Tretolite Co., 74 F.2d 805 (10th Cir. 1934). The second situation was where the intervenor would be bound by a judgment, but was not already adequately represented. E.g., Central Trust Co. v. Chicago, R.I. & P.R.R., 218 F. 336 (2d Cir. 1914). In both situations the question arose in the context of an appeal from a denial of intervention. The general view was that because of the discretionary nature of intervention no appeal could be taken from such a denial unless the applicant claimed an interest in property in court control, or would be bound by a judgment; the latter two situations allowed an appeal, since a denial of intervention under these circumstances was an abuse of discretion. The bound-by-a-judgment requirement apparently referred to the situation where the applicant would be bound by res judicata, and yet his representation was inadequate by virtue of collusion, an adverse interest, or the general dereliction of the duty of representation. Moore & Levi, supra note 22, at 591-95. For the subsequent history of this branch of intervention of right, see infra notes 38-50 and accompanying text.

30 Compare supra note 29 (practice under Equity Rule 30) with infra text accompanying note 31 (practice under original rule 24(a)). The original version of rule 24 also provided for intervention of right where a statute unconditionally conferred that right. Permissive intervention was allowed upon a statutory conditional right to intervene, or where a question of law or fact in common with the main action would be presented. Fed. R. Civ. P. 24 (original version in 308 U.S. 690-91 (1939)).


32 See supra note 30.

33 The Advisory Committee Notes did not add any content to the language, apart from its reference to prior federal practice. See supra note 27.
law that the original rule 24(a) was built upon was interpreting a discretionary intervention practice. These decisions actually concerned only the appealability of a denial of intervention, on the ground of abuse of discretion. Only functionally, not theoretically, was there a right to intervene in any situation. To a degree the eventual confusion over rule 24(a) stemmed from the uncertain nature of the law which was incorporated into that rule.

This confusion stemmed from the phrase “bound by a judgment.” Even in intervention practice under Equity Rule 37 there was uncertainty as to in what sense an intervenor had to be bound in order to create a right of intervention. Courts interpreting the phrase “bound by a judgment” under the original rule 24(a)(2) split over its construction. The majority held that an intervenor must show the possibility that he would be bound in a res judicata sense by a judgment; a not insubstantial minority thought this narrow reading was overly restrictive, and held “bound” to mean the disabling effect of stare decisis, or simply a substantial impairment of the ability to protect an interest. Eventually, the narrower view triumphed, in Sam Fox Publishing Co. v. United States.

This development would not have been so important but for other developments in the law of res judicata. In Hansberry v. Lee the United

---

34 See supra notes 28-29 and accompanying text.
35 See supra note 29.
36 See infra notes 38-47 and accompanying text.
37 See, e.g., Wham, Intervention in Federal Equity Cases, 17 A.B.A. J. 160, 160 (1931) (“Few fields of jurisprudence are less understood or are the source of more conflict and confusion than that of intervention.”).
38 Cases on this question from prior to the adoption of the rules are typically opaque. See, e.g., Central Trust Co. v. Chicago, R.I. & P.R.R., 218 F. 336, 339 (2d Cir. 1914) (“There is a class of cases where the claimant’s rights are finally disposed of and intervention is necessary for their protection, in which the right to intervene is absolute . . . . It is not always easy to draw the line.”). See also Moore & Levi, supra note 22, at 591 (similarly unclear statement). This fudging of the applicable rule continued after the adoption of the rules. Note, Intervention and the Meaning of “Bound” Under Federal Rule 24(a)(2), 63 YALE L.J. 408, 410 (1954).
39 See supra note 38.
41 F. JAMES, CIVIL PROCEDURE § 10.19, at 502-03 & n.9 (1965).
42 E.g., Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960); Ford Motor Co. v. Bisanz Bros., 249 F.2d 22 (8th Cir. 1957); Clark v. Sandusky, 205 F.2d 915 (7th Cir. 1953). The then Circuit Judge Blackman said “bound” should be accorded a “utilitarian and realistic interpretation”; the res judicata meaning was rejected. 278 F.2d at 110.
43 336 U.S. 683 (1961). Although the opinion does not explicitly state that “bound” must be given a res judicata interpretation, the intendment is clear. Subsequent cases read Sam Fox Publishing to require a res judicata meaning of “bound.” E.g., International Mortgage & Inv. Corp. v. Von Clemm, 301 F.2d 857, 866 (2d Cir. 1962) (Hays, J., concurring). Cf. Atlantic Ref. v. Standard Oil Co., 304 F.2d 387, 393-94 (D.C. Cir. 1962) (interpreting Sam Fox Publishing to have chosen the res judicata meaning of “bound,” but on the facts present holding the res judicata tests “inappropriate”).
44 311 U.S. 32 (1940).
States Supreme Court held that the class action judgment cannot bind a nonparty who was not adequately represented, because of due process requirements. When the res judicata meaning of bound under rule 24(a)(2) was coupled with this due process principle, this rule became an utterly nugatory syllogistic snarl. To intervene under rule 24(a)(2) one had to show both that a "binding" judgment was possible and inadequate representation. If an intervenor's representation was adequate he did not meet the second requirement; if it was inadequate, then he could not be bound by res judicata because of Hansberry, and therefore the first requirement could not be met. Thus, rule 24(a)(2) would in theory never be available; the dual requirements for intervention under the rule were, in effect, mutually exclusive.

These developments led to the 1966 amendments to rule 24(a)(2), which made clear the rule was not to operate in so narrow a fashion. The phrase "'bound' by a judgment" was deleted, and was replaced by the phrase "so situated that the disposition of the action might as a practical matter impair or impede his ability to protect that interest."

The former rule 24(a)(3), which provided a right of intervention where property was in the control of the court and the intervenor claimed an interest in it, was merged into the former rule 24(a)(2). In addition to a property basis for intervention, an interest in the "transaction" that is the subject of the suit became a ground for intervention. The inadequate representation requirement was maintained in the new rule.

---

45 Id. at 45.  
46 Sam Fox Publishing, 366 U.S. at 688.  
47 Shreve, supra note 9, at 905. For a discussion of this Kafkaesque state of affairs, see F. JAMES, supra note 41, at 502-04.  
48 Prior to 1966 few significant changes occurred in rule 24. In 1946 the ground for intervention under rule 24(a)(3), that the intervenor might be adversely affected by a disposition of "property which is in the custody of the court," was expanded to include situations where property, though not actually in custodia legis, was nonetheless "subject to the control or disposition of the court." FED. R. Civ. P. 24(a)(3), 329 U.S. 839, 853 (1946). In the same year rule 24(b) was amended to expressly allow permissive intervention by federal and state officials and agencies in cases where a party relied for claim or defense upon a statute, regulation, or other governmental promulgation. FED. R. Civ. P. 24(b), 329 U.S. 839, 853 (1946); see also FED. R. Civ. P. 24 advisory committee note (1946), reprinted in 28 U.S.C. app. tit. IV (1976). In 1963 a minor change was made to conform rule 24(c) to the changes made in that year to rule 5(a), concerning service of pleadings. FED. R. Civ. P. 24(c), 374 U.S. 861, 882 (1962).  
49 The Advisory Committee stated that the res judicata interpretation might be "linguistically justified by original Rule 24(a)(2); but it could lead to poor results." Also the res judicata interpretation "could defeat intervention in some meritorious cases." Finally, the "deletion of the bound language . . . frees the rule from undue preoccupation with strict considerations of res judicata." FED. R. Civ. P. 24 advisory committee note (1966), reprinted in 28 U.S.C. app. tit. IV (1976).  
50 Id.  
51 Id.  
52 Id.  
53 Id. For clarity's sake the relevant changes wrought by the 1966 amendments are set forth below; additions are italicized deletions are in parentheses.
ANCILLARY JURISDICTION

The effect of the 1966 amendment was to broaden the class of cases where intervention of right was available.\textsuperscript{54} Some cases which under the former rule could meet neither the property requirement of rule 24(a)(3) nor the bound-by-a-judgment requirement of rule 24(a)(2), could now be brought as intervention of right under the somewhat amorphous standard of an interest relating to the transaction that is the subject of the suit.\textsuperscript{55} Thus some cases which formerly could meet only the rule 24(b) permissive intervention standard of a question of law or fact in common were now within intervention of right.\textsuperscript{56}

This change could have led to a reconsideration of the jurisdictional requirements of intervention of right and permissive intervention. The general rule presently held by most cases and commentators, that permissive intervenors must demonstrate an independent basis of jurisdiction,\textsuperscript{57} but intervenors of right may rely on ancillary jurisdiction,\textsuperscript{58} was also the general rule under the pre-1966 rule 24.\textsuperscript{59} Since after the amendment what was formerly a permissive intervention became an intervention of right,\textsuperscript{60} it would have been logical for some interventions of right to be inappropriate for ancillary jurisdiction; if an intervention fact pattern was, prior to the amendment, inappropriate for ancillary jurisdiction, then the same intervention could not by force of its procedural reclassification as intervention of right suddenly come within a court's ancillary jurisdiction.\textsuperscript{61} However, the amendment produced no alteration in the jurisdictional rule; rather the rigid rule requiring independent jurisdiction for permissive intervenors, and allowing intervenors of right

\begin{itemize}
\item[(a)] Intervention of right...
\item[(2)] when the (representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control of the court or an officer thereof) applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

\end{itemize}

\textsuperscript{54} 7A C. WRIGHT & A. MILLER, supra note 5, at 597.
\textsuperscript{55} This provision is susceptible to a quite broad interpretation. See, e.g., Cascade Natural Gas v. El Paso Natural Gas, 386 U.S. 129 (1967). For a discussion of the interpretation of this provision, see infra notes 231-46 and accompanying text.
\textsuperscript{56} 7A C. WRIGHT & A. MILLER, supra note 5, at 597-98.
\textsuperscript{58} See, e.g., Formulabs, Inc. v. Hartley Pen Co., 318 F.2d 485, 491-92 (9th Cir.), cert. denied, 375 U.S. 945 (1963); Kozak v. Wells, 278 F.2d 104, 112-13 (8th Cir. 1960). See also Fraser, supra note 57; Developments in the Law, supra note 17, at 905.
\textsuperscript{59} See sources cited supra notes 57-58.
\textsuperscript{60} See supra note 55 and accompanying text.
\textsuperscript{61} 7A C. WRIGHT & A. MILLER, supra note 5, at 598. Cf. FED. R. CIV. P. 82 (rules of procedure not to expand jurisdiction).
to rely on ancillary jurisdiction, formulated prior to 1966, continued to be followed. 2

Purposes and Goals of Intervention

Intervention allows a nonparty to inject himself into an action, so that he may protect an interest which could be jeopardized. Thus, one of its primary purposes is to promote fairness to nonparties. Intervention also promotes judicial economy by allowing a court to hear a dispute in its entirety. Yet judicial economy may be done a disservice by a too liberal use of intervention, since an expansion of the scope of an action raises the possibility of trial confusion and delay. Finally, the interests of the original parties must not be forgotten.

The roots of intervention in the Anglo-American legal system lie in allowing a nonparty to intervene to protect a property interest. 3 Some modern property based interventions have been allowed where property in only the loosest sense has been present. 4 Under the present rule 24(a)(2) an endangered interest in a “transaction” the subject of an action creates a right to intervene. 5 This gradual expansion of intervention practice reflects a recognition that fairness to nonparties is a sufficient ground for intervention, regardless of the presence of property in the custody of the court. 6 This policy of fairness to nonparties is at the core of intervention, at least from a historical perspective. 7

Fairness to nonparties may be of increased importance because of the complexities of modern society. The integrated economic infrastructure of today’s world often creates widespread effects from a given litigation. 8 This phenomenon leads to another policy consideration: judicial efficiency. To the degree that a given transaction involves and affects a number of persons or legal entities, the presence of all those so related promotes economic use of court resources. 9 Intervention not only limits duplicative

62 Goldberg, supra note 4, at 423-24. For a discussion of the 1966 amendment’s lack of impact upon jurisdiction, see infra note 263.
64 See, e.g., Formulabs, Inc. v. Hartley Pen Co., 275 F.2d 52 (9th Cir. 1960) (secret formula and testing procedures for production of ink held to be “property” within meaning of former rule 24(a)(3)).
66 “If an absentee would be substantially affected in a practical sense by the determination made in an action, he should ... be entitled to intervene, and his right to intervene should not depend on whether there is a fund to be distributed or otherwise disposed of.” Fed. R. Civ. P. 24 advisory committee note (1966), reprinted in 28 U.S.C. app. tit. IV (1976).
67 See generally Moore & Levi, supra note 22, at 567-68 (intervention is the protection afforded a nonparty “if litigants in a pending action are jeopardizing his interest”).
69 For a list of the various concerns that are embodied within judicial efficiency, discussed in the context of intervention, see Kennedy, supra note 9, at 378 n.178.
actions, but also provides helpful insights and advocacy.70

But against this must be weighed the possibility that more parties will lend only confusion, not perspective.71 Additional parties may bring in additional legal or factual issues. Thus, intervention does not in every case serve the goal of judicial efficiency, and if unchecked could result in the inefficient administration of justice. In recognition of this problem, rule 24(b) provides that one factor of the district court’s discretion in permissive intervention is the possibility of delay.72 Confusion can lead to unjust results,73 and so fairness, one of the most important policies of intervention, may be harmed by a too liberal use of intervention.

The problems of confusion and delay will affect the original parties. Rule 24(b) provides against this by directing the court to protect against “prejudice [to] the adjudication of the rights of the original parties.”74 Traditionally the plaintiff was accorded an almost proprietary interest in an action at law.75 To a degree this is still true, as the course of an action depends largely upon the wishes of the plaintiff, and to a lesser degree, the defendant. The original parties raise the issues, assert claims, and join parties.76 Recognizing this, intervention practice should at the very least be wary of unfairness to the original parties. A plaintiff no longer owns his action, but he does have a substantial interest in it.

Generally, intervention practice ought to strike a balance between the interests delineated above.77 Against the many devices original parties have to control the course of a litigation, intervention stands as a protection to nonparties, who may have a very good reason to be concerned with pending litigation. Fairness to both parties and nonparties must be weighed, along with the practical limitations of a federal district court. To the degree that these policies may all be served, intervention is a useful procedural tool.78 A logical approach would be to allow intervention to anyone capable of showing that one of these policies is served, and

[Notes and references are omitted for brevity.]
to vest much discretion in the trial court to limit or deny intervention when the other policies present outweigh a full participation by the applying nonparty.  

ANCILLARY JURISDICTION

Early Cases

A discussion of ancillary jurisdiction must start with Freeman v. Howe. The United States Supreme Court held in Freeman that once a federal court took property into its custody, no state court could interfere with the property; that is, any state court process or decree as to property in the custody of a federal court would be a nullity. Further, a federal court would hear claims to property in its custody regardless of apparent jurisdictional impediments. The latter conclusion, as to a federal court's jurisdiction over ancillary claims, was a necessary corollary to the former ruling on the exclusive power of a federal court to deal with property in its custody. If a state court could not interfere with the property, then it became necessary for a federal court to hear all claims to the property regardless of express jurisdictional limits; to hold otherwise would deny any chance for a claimant falling without the express jurisdiction of the federal courts to assert his claim in any forum. Thus, ancillary jurisdiction is commonly thought to be a doctrine born of necessity, which was initially used only in the rare case where it could not be avoided.

However, other early cases reveal that ancillary jurisdiction had other uses apart from federal court custody of property. These cases show that convenience, as well as necessity, was a basis for the invocation of ancillary jurisdiction. Ancillary jurisdiction may be categorized as a doctrine of convenience in these cases because the ancillary claim heard by the federal court could have been brought in a state court.

9 Professor Shreve advocates a similar approach, although the formulation differs. He argues that nonstatutory intervention of right should be abolished, and a variable and discretionary intervention practice should be installed. The decision on each application for intervention should be made "according to how essential procedural values might best be served." Shreve, supra note 9, at 935. The "procedural values" referred to are fairness, expeditiousness, equal accessibility to the procedural mechanism in question, and the value of "presenting a sufficiently unobstructed view of the rights of the parties so that the court can decide fairly the merits of the case." Id. at 907. Cf. infra notes 254-62 and accompanying text.

80 A full treatment of ancillary jurisdiction is beyond the scope of this note. What follows is a historical sketch of the doctrine, and a summary of current thinking on the subject.


82 Id. at 457.

83 Id. at 460.

84 For a discussion of the terminology employed in this note see supra note 21.


86 Minahan, supra note 20, at 281.

87 See infra notes 88-92 and accompanying text.
A good example of this line of cases is *Root v. Woolworth.* A federal court was held to have jurisdiction to enjoin a nondiverse defendant from asserting any title to property previously adjudicated by a federal court to have belonged to the plaintiff. Although the case concerned property, the legal issue was the efficacy of a prior federal judgment. Entertaining this claim under the auspices of ancillary jurisdiction was in no way necessary in the same sense that it was necessary to entertain the claim in *Freeman.* The plaintiff could have made use of the prior federal decree in the state court; there was, strictly speaking, no necessity for a federal court to hear this claim.

The situations where ancillary jurisdiction was available at this time were said to be "(1) To aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; (3) or to enforce or obtain an adjudication of liens upon or claims to the property in the custody of the court in the original suit." It is apparent that ancillary jurisdiction was not always a matter of strict necessity; the first two situations above pertain to the *Root* type of convenient ancillary jurisdiction; only the last refers to the strictly necessary, *Freeman* type of ancillary jurisdiction.

Any doubt about convenience alone being a sufficient basis for the exercise of ancillary jurisdiction was set aside by *Moore v. New York Cotton Exchange.* Moore had sought injunctive relief against the cotton exchange for an alleged violation of federal antitrust law. The Cotton Exchange counterclaimed, seeking injunctive relief against Moore on a state law claim. The courts below had dismissed Moore's claim for a failure to

---

150 U.S. 401 (1893).

Id. at 403, 413. For the sake of accuracy it should be noted that the plaintiff had purchased the land from the party adjudicated to have had title in the first action.

The plaintiff could have sued in ejectment. Minahan, supra note 20, at 287 n.42. There was no more doubt about this at the time of *Root* than there is now. See, e.g., Embry v. Palmer, 107 U.S. 3, 9-10 (1882); H. BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 520 (1891). See generally RESTATEMENT (SECOND) OF JUDGMENTS § 43 (1980) (current view on preclusive effect of judgment concerning ownership of land). Although it has long been recognized that federal judgments must be honored in state courts, the exact legal basis for this proposition "has been a matter of considerable uncertainty." Id. § 87 comment a. One view is that the requirement flows from the ultimate source of federal judicial power, article III. Id. Alternatively, federal judgments may be within the scope of article VI (supremacy clause). Metcalf v. Watertown, 153 U.S. 671, 676 (1899); Embry, 107 U.S. at 9. In addition, acts of Congress effectuating the full faith and credit clause have been read to also command state courts to honor federal judgments. Metcalf, 153 U.S. at 676; Embry, 107 U.S. at 9; Hall v. Hall, 238 Md. 191, 194 n.1, 208 A.2d 593, 595 n.1 (1965). See generally 28 U.S.C. § 1738 (1976) (current provision effectuating full faith and credit clause).

For a discussion of *Root v. Woolworth* and similar cases, see Minahan, supra note 20, at 285-87.

Loy v. Alston, 172 F. 90, 94-95 (8th Cir. 1909); Brun v. Mann, 151 F. 145, 150 (8th Cir. 1906); Campbell v. Golden Cycle Mining, 141 F. 610, 612 (8th Cir. 1905).

270 U.S. 593 (1926).

Id. at 602, 603. The alleged violation stemmed from the refusal of the cotton exchange to provide cotton price quotations to Moore.

Id. at 603. The counterclaim charged that Moore was "purloining" the price quotations.
state a violation of antitrust law, and had granted the injunction sought in the counterclaim.\footnote{Id.}

Before the United States Supreme Court, Moore argued that the dismissal of his federal claim deprived the federal courts of jurisdiction over the state law counterclaim.\footnote{Moore, 270 U.S. at 607-09. See also Bell v. Hood, 327 U.S. 678 (1948) (district court erred in dismissing for want of jurisdiction, where complaint stated a federal question, even though it failed to state a claim for which relief could be granted; rather, the court should have asserted jurisdiction and dismissed on the merits); Hurn v. Oursler, 289 U.S. 238, 247-48 (1933). To hold otherwise would allow the strange result of a dismissal other than on the merits after having actually considered the merits. The question is an easy one because it is a fundamental tenet of jurisdiction that a court either has or lacks jurisdiction at the outset of a case; subsequent events cannot alter jurisdiction. Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957); Dunn v. Clarke, 33 U.S. (8 Pet.) 1, 3 (1834); Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824) ("[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."). Cf. Pennoyer v. Neff, 95 U.S. 714, 728 (1877) (same principle applies in context of personal jurisdiction; court must attach property at outset of suit to secure in rem jurisdiction).} The question of whether a dismissal on the merits can deprive a court of subject matter jurisdiction was then, and is now, easily answered in the negative.\footnote{Id.} The separate question of why a federal court had jurisdiction over a state law counterclaim in the first place was apparently not put to the Court,\footnote{Brief for Appellant at 34-37, Moore v. New York Cotton Exch., 270 U.S. 593 (1926).} nor did the Court go out of its way to provide an answer. However, the opinion speaks of a "logical relationship" between the federal and state claims:\footnote{Moore, 270 U.S. at 610.} "it needs only the failure of the former to establish a foundation for the latter."\footnote{Id.}

Although Moore did not establish clear guidelines as to the limits of ancillary jurisdiction,\footnote{See supra notes 100-01 and accompanying text.} it did establish that federal courts may exercise ancillary jurisdiction to serve convenience,\footnote{13 C. WRIGHT & A. MILLER, supra note 5, § 3523, at 64.} if there is some type of "logical relationship" between the federal and nonfederal claims. The New York Cotton Exchange could have obtained injunctive relief separately in a state court;\footnote{Note, The Ancillary Concept and the Federal Rules, 64 HARV. L. REV. 968, 971 (1951).} the federal courts could have disposed of the federal antitrust claim without resolving the nonfederal counterclaim.\footnote{Id.} In short, there was no necessity involved. Despite the lack of clarity in Moore,\footnote{Shulman & Jaegerman, supra note 99 at 412-14; Note, supra note 104, at 971; Minahan, supra note 20, at 298-99.}
ANCILLARY JURISDICTION

it has served as the foundation for modern uses of ancillary jurisdiction.\textsuperscript{107} This case defined the requirements of ancillary jurisdiction only in the vague phrase of "logical relationship."\textsuperscript{108} It became the task of subsequent cases to determine what kind of logical relationship was actually required to invoke ancillary jurisdiction.\textsuperscript{109}

\textit{Hurn v. Oursler} attempted to define with more precision the circumstances under which a nonfederal claim could be added to a federal claim under the doctrine of pendent jurisdiction.\textsuperscript{111} The plaintiff had brought three claims, a federal copyright claim, a state unfair competition claim stemming from the same copyrighted material, and another state law unfair competition claim based on a revised, uncopyrighted version of the copyrighted material.\textsuperscript{112}

The United States Supreme Court formulated a "cause of action" test: were the federal and nonfederal claims "two distinct grounds in support of a single cause of action . . . only one of which presents a federal question," or were they "two separate and distinct causes of action . . . only one of which is federal in character"?\textsuperscript{113} If the federal and nonfederal claims were the former, then there was federal jurisdiction to hear them both, as they constituted but a single "cause of action."\textsuperscript{114} If the two claims fell into the latter category, then the nonfederal claim was beyond federal jurisdiction.\textsuperscript{115}

The facts of \textit{Hurn} fit neatly into this scheme. The federal and nonfederal claims as to the copyrighted material were two grounds in support of a single cause of action, and therefore there was jurisdiction to hear the nonfederal claim stemming from the copyrighted material.\textsuperscript{116} But the nonfederal claim based on uncopyrighted material was a "separate and distinct cause of action" from the federal copyright infringement claim; hence, there was no jurisdiction over that claim.\textsuperscript{117} The cause of action test laid out in \textit{Hurn} was not so easily applied to other fact patterns,\textsuperscript{118} but it was, at least, a test, a limiting principle. A test, even a bad one, was perhaps better than the opacity of \textit{Moore}.

The point to be taken from this brief sketch is that while ancillary jurisdiction may in a sense have been born of necessity,\textsuperscript{120} it has long been

\textsuperscript{107} Minahan, supra note 20, at 299.
\textsuperscript{108} See supra notes 100-01 and accompanying text.
\textsuperscript{109} See infra notes 110-79 and accompanying text.
\textsuperscript{110} 289 U.S. 238 (1933).
\textsuperscript{111} On the similarity of ancillary and pendent jurisdiction, see supra note 21.
\textsuperscript{112} \textit{Hurn}, 289 U.S. at 239, 248.
\textsuperscript{113} Id. at 246.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 248.
\textsuperscript{118} See infra note 130 and accompanying text.
\textsuperscript{119} See supra notes 100-08 and accompanying text.
\textsuperscript{120} See supra notes 81-86 and accompanying text.
used to serve the ends of convenience and judicial economy.\textsuperscript{121} Even in
cases such as \textit{Freeman v. Howe},\textsuperscript{122} where ancillary jurisdiction was truly
necessary to protect the integrity of the federal courts,\textsuperscript{123} a policy of
fairness to those whose claims fell outside normal federal jurisdiction was
surely present.\textsuperscript{124} As the doctrine of ancillary jurisdiction matured, it
became clear that convenience was a sufficient basis for its exercise.\textsuperscript{125}
But with expansion came concerns for some limiting principle to assure
that ancillary jurisdiction would not become a burden to the federal courts
or an offense to traditional notions of federalism.\textsuperscript{126} This cycle of expansion
and limitation by definition would be repeated some forty years later.\textsuperscript{127}

\textbf{Current Status of Ancillary Jurisdiction}

The \textit{Hurn} cause of action test led to a good deal of confusion.\textsuperscript{128} The
phrase “cause of action” has always been a troublesome one,\textsuperscript{129} and its
use in the area of pendent jurisdiction caused divergent results.\textsuperscript{130}
Dissatisfaction with the \textit{Hurn} test led to \textit{UMW v. Gibbs}\textsuperscript{131} which took an
expansive view of federal jurisdiction.\textsuperscript{132} But just over a decade after \textit{Gibbs}
came \textit{Owen Equipment & Erection Co. v. Kroger},\textsuperscript{133} which, like \textit{Hurn}, at-
ttempted to define and limit the power of federal courts to hear claims
falling outside their express jurisdiction.\textsuperscript{134} Thus, the cycle of expansion
and limitation repeated itself.\textsuperscript{135}

The plaintiff in \textit{Gibbs} alleged a violation of federal labor law,\textsuperscript{136} to which
was appended a state law tort claim.\textsuperscript{137} After discussing the \textit{Hurn} cause
of action test,\textsuperscript{138} and noting that Federal Rule of Civil Procedure 2 had
done away with the notion of distinct causes of action,\textsuperscript{139} the Supreme

\begin{thebibliography}{99}
\bibitem{121} See supra notes 87-105 and accompanying text.
\bibitem{122} 65 U.S. (24 How.) 450 (1860).
\bibitem{123} See supra notes 81-85 and accompanying text.
\bibitem{124} Minahan, \textit{supra} note 20, at 285.
\bibitem{125} See supra notes 93-105 and accompanying text.
\bibitem{126} See supra notes 110-19 and accompanying text.
\bibitem{127} See infra notes 131-35, 154-58 and accompanying text.
\bibitem{129} At the time of \textit{Hurn} the phrase had an unsettled meaning. \textit{See}, e.g., \textit{Clark, The Code Cause of Action}, 33 \textit{Yale L.J.} 817 (1924); \textit{Gavit, A “Pragmatic Definition”of the “Cause of Action”?}, 82 \textit{U. Pa. L. Rev.} 129 (1933).
\bibitem{131} 383 U.S. 715 (1966).
\bibitem{132} See infra notes 140-42 and accompanying text.
\bibitem{133} 437 U.S. 365 (1978).
\bibitem{134} See infra notes 154-59 and accompanying text.
\bibitem{135} See supra notes 93-119 and accompanying text.
\bibitem{137} \textit{Gibbs}, 383 U.S. at 717-18.
\bibitem{138} \textit{Id.} at 722.
\bibitem{139} \textit{Id.} at 724.
\end{thebibliography}
ANCILLARY JURISDICTION

Court stated that the previous approach to this problem had been "unnecessarily grudging." Rather, there is "judicial power" if the relationship between the federal and nonfederal claim permits the conclusion that the entire action comprises but one constitutional case. Specifically, if the two claims "derive from a common nucleus of operative fact," and the claims are such that one would ordinarily expect them to be tried in a single proceeding, then "there is power in the federal courts to hear the whole."

The Supreme Court was careful to distinguish between constitutional power under article III, section 2, and the discretionary exercise of that power. If there is constitutional power, because of a common nucleus of operative fact, then the federal courts may exercise that power if underlying policies of jurisdiction are served. A federal court is to consider the factors of judicial economy, convenience, and fairness to the litigants, the degree to which a federal court will be deciding state law issues, or the degree to which the state claim is closely tied to a federal policy, and the possibility of jury confusion. This approach is clearly pragmatic, meeting squarely the policy questions involved in the extension of federal jurisdiction beyond its express bounds; it is in clear distinction to the somewhat metaphysical approach of Hurn.

The Court did not go long without attempting to check the tendency toward expanding federal jurisdiction that was present in Gibbs. Along with Aldinger v. Howard and Zahn v. International Paper, brought into the analysis of ancillary jurisdiction the consideration of statutory, as well as constitutional, limits on jurisdiction. Prior to these cases most of the focus had been on constitutional limits, but

140 Id. at 725.
141 Id.
142 Id.
143 Id. at 726.
144 Id. at 725.
145 Id. at 726.
146 Id.
147 Id.
148 Id. at 726-27.
149 Id. at 727.
150 Id.

One facet of the Gibbs test is whether "a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." Id. at 725.

152 See supra notes 145-50 and accompanying text.
153 Shulman & Jaegerman, supra note 99, at 397, 399-400; The Supreme Court Term, supra note 130, at 222.
154 See supra note 140 and accompanying text.
158 See infra notes 165-69 and accompanying text.
now congressionally imposed limitations will also be a necessary part of an ancillary jurisdiction analysis.

*Kroger* involved a claim by the plaintiff against a nondiverse third-party defendant, who had been impleaded by the original defendant.\(^{162}\) Jurisdiction for the claim against the original defendant had been based upon diversity of citizenship.\(^{161}\) The circuit courts had split upon the issue of whether a plaintiff’s claim against a nondiverse third party defendant could appropriately fall within a federal court’s ancillary jurisdiction.\(^{162}\) The Supreme Court held that such a claim was beyond the scope of ancillary jurisdiction.\(^{163}\) It assumed without deciding that *Gibbs*’ common nucleus of operative fact test was the correct standard for determining constitutional power in the diversity context as well as in federal question cases.\(^{164}\) But the analysis did not stop with a determination of constitutional power; relying on *Aldinger*\(^{165}\) and *Zahn*,\(^{166}\) the Court concluded that statutory limits on federal jurisdiction also must be considered.\(^{167}\) In the diversity context Congress had impliedly adopted the longstanding judicial interpretation of diversity jurisdiction statutes requiring complete diversity.\(^{168}\) Thus, even if an ancillary claim meets the assumed constitutional standard of deriving from a common nucleus of operative fact, it still must not offend a relevant statutory requirement such as complete diversity.\(^{169}\)

An ancillary claim may overcome the complete diversity requirement if it is “logically dependent” upon a resolution of the initial, jurisdiction conferring claim;\(^{170}\) that is, a resolution of the original claim would be necessary to decide the ancillary claim.\(^{171}\) In addition, the party relying on ancillary jurisdiction must be in a defensive posture, “hailed into court against his will.”\(^{172}\) If an ancillary claim in diversity meets the constitu-

---

\(^{160}\) *Kroger*, 437 U.S. at 367-69.

\(^{161}\) *Id.* at 367.

\(^{162}\) *Id.* Earlier cases had established that the impleader of a third-party defendant fell within the scope of ancillary jurisdiction. Waylander-Peterson Co. v. Great N. Ry., 201 F.2d 408 (8th Cir. 1953); Lesnik v. Public Indus. Corp., 144 F.2d 968 (2d Cir. 1944). Likewise, a third-party defendant’s counterclaim against the original plaintiff had been held to be within the scope of ancillary jurisdiction. Revere Copper & Brass v. Aetna & Sur., 426 F.2d 709 (5th Cir. 1970).

\(^{163}\) *Kroger*, 437 U.S. at 376-77.

\(^{164}\) *Id.* at 371 n.10. Read in context, this means that the *Gibbs* test is assumed to apply to ancillary jurisdiction, as well as to pendent jurisdiction. See generally *supra* note 21.


\(^{166}\) *Zahn*, 414 U.S. 291 (1973) (construing the statutory limits in 28 U.S.C. § 1332(a) (1976)).

\(^{167}\) *Kroger*, 437 U.S. at 372.

\(^{168}\) *Id.* at 373-74. The statutory construction of the majority’s opinion was, to say the least, strained. *Id.* at 380 (White, J., dissenting).

\(^{169}\) *Id.* at 372.

\(^{170}\) *Id.* at 376.

\(^{171}\) There is support for this proposition in Moore v. New York Cotton Exch., 270 U.S. 593 (1926). See *supra* notes 100-01 and accompanying text.

\(^{172}\) *Kroger*, 437 U.S. at 376.
tional power requirement of Gibbs, and is "logically dependent" upon the initial claim, and is asserted in a defensive posture, then and only then may it be asserted notwithstanding a lack of complete diversity.173

The Supreme Court suggested examples of the proper use of ancillary jurisdiction in diversity: impleader, compulsory counterclaims, cross-claims, and intervention of right.174 In all these, there is the requisite logical dependence and defensive posture.175 But here, plaintiff Kroger was asserting an "entirely separate" claim,176 not a logically dependent one, and had chosen the federal forum, thus lacking a defensive posture.177 Accordingly, her claim against the nondiverse third-party defendant could not be allowed in light of the congressional jurisdictional limits present.178

Thus the current scope of ancillary jurisdiction turns not only on the constitutional power of a federal court to hear a nonfederal claim, but also on statutory limits which may expressly or impliedly further delineate federal jurisdictional power.179 Having surveyed the current thinking on ancillary jurisdiction the analysis can now move to the issue: whether, and under what circumstances, a permissive intervenor may rely on ancillary jurisdiction.

ANCILLARY JURISDICTION AND PERMISSIVE INTERVENORS

The Problem

The general rule on jurisdiction as to intervenors of right, that they need not show an independent basis of jurisdiction,180 is not challenged here; because of the nature of rule 24(a), every intervention of right is necessarily within the scope of ancillary jurisdiction.181 What is challenged

172 Id.
173 Id. at 375-76 & n.18. The Court merely noted cases allowing ancillary jurisdiction in these situations, without expressly sanctioning them.
174 The defensive posture requirement is met by these devices, as none of them is implemented by the party choosing the forum. In impleader, logical dependence is necessarily present since the third-party defendant must be one who may be liable to the original defendant, if the defendant is liable to the original plaintiff; thus, the third-party claim depends upon a resolution of the original claim. FED. R. CIV. P. 14. Similarly, since a compulsory counterclaim must arise out of the same "transaction or occurrence" as the plaintiff's claim, in most cases such a counterclaim will be dependent upon the resolution of the initial claim; the claim and counterclaim will usually yield mutually exclusive results. FED. R. CIV. P. 13(a). It is not so clear that intervention of right or cross-claims will in all cases meet the logical dependence requirement. See infra note 181.
175 Kroger, 437 U.S. at 376.
176 Id.
177 Id. at 377.
178 See supra notes 164-69 and accompanying text.
179 See supra note 6 and accompanying text.
180 See supra note 7 and accompanying text. This is true because under rule 24(a)(2) the intervenor must claim an "interest" in either the "property or transaction" that is the subject of the action. If intervention is based on property, then ancillary jurisdiction is
is the rule that permissive intervenors may never rely on ancillary jurisdiction.†182 Under the present reading of rule 24(a), there are intervenors who cannot meet the criteria for intervention of right, but who, as permissive intervenors under rule 24(b), can appropriately be within a court’s ancillary jurisdiction.†183 Under a narrower reading of rule 24(a) more intervenors would fall within the class of permissive intervention;†184 if this movement of the procedural classifications of intervenors were coupled with a recognition that permissive intervenors are in some cases within ancillary jurisdiction, important policies would be served.†185 These issues are discussed below.

Rule 82

Federal Rule of Civil Procedure 82 provides in part: “These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.”†186 Despite the presence of rule 82, many of the procedural devices of the Federal Rules of Civil Procedure, when coupled with ancillary jurisdiction, result in federal courts hearing claims beyond their express jurisdiction.†187 If rule 82 is a stumbling block to the exercise of ancillary jurisdiction over permissive intervenors, then it is a curious fact that it has not impeded the use of ancillary jurisdiction over compulsory counterclaims,†188 impleaded defendants,†189 or intervention of right.†190 Rule 82 applies to all of the Federal Rules of Civil Procedure, and so, if in the abstract applying ancillary jurisdiction to permissive intervenors would violate rule 82, then a similar application to other procedural mechanisms for joinder also would violate rule 82. In short, rule 24(a) on intervention of right can no more extend jurisdiction than rule 24(b) on permissive intervention, and yet ancillary jurisdiction is allowed to the former.†191
This point is nicely illustrated by an exception to the general rule, which allows permissive intervention by class members into class actions without independent jurisdiction. Where the number of people who present a common question of law or fact are so numerous as to constitute a class, convenience and economy are served by allowing intervention over jurisdictional objections. There should be no objection to the exception made for class actions. The objection, and the point to be taken, is that the same analysis ought to apply to all permissive interventions. Rule 82 applies whether the intervention is sought in a class action or in a two-party litigation. If rule 82 is not offended by such intervention in class actions, it is hard to see why it would be in other contexts. The ultimate jurisdictional question remains. The point is that rule 82 does not provide an answer; it merely asks a necessary question.

One reason that rule 82 does not bar the use of ancillary jurisdiction is that there really is no expansion of jurisdiction when a procedural rule and ancillary jurisdiction operate to allow a federal court to hear a nonfederal claim. Ancillary jurisdiction considerably predates the rules, and so the invocation of it is not an extension of jurisdiction; rather ancillary jurisdiction may be likened to a reservoir, a latent source of judicial power, which procedural rules merely tap. As Judge Clark has put it:

\[
\text{[J]urisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case, when based upon jurisdictional principles of long standing, even though the effectiveness of the new devices makes their use more frequent. Obviously, a mere broadening of the content of a single federal action must not be confused with the extension of federal power.}
\]

A related point is that rule 82 also provides that the rules are not to limit jurisdiction. Hence, rule 82 must be read to mean that the Federal Rules of Civil Procedure “did not freeze the jurisdiction [of federal courts] at the point at which it stood in 1938 any more than it expanded it. The question of jurisdiction, while free of any compulsion from the rules, is as much a subject ... of judicial reconsideration as ever.”

\[\text{supra notes 81-101 and accompanying text.}\]

\[\text{See supra notes 595.}\]

\[\text{See United States v. Local 638, Enter. Ass'n, 347 F. Supp. 164, 168 (S.D.N.Y. 1972) ("[A]lthough this is not a ‘class action,’ the reasons of policy which permit an exception \[to the general jurisdictional rules of intervention\] in such cases also apply here.").}\]

\[\text{See supra notes 81-101 and accompanying text.}\]

\[\text{See supra note 5, \textsection 82.02(1), at 82-6 to -17.}\]
Thus, there are two responses to the contention that rule 82 bars permissive intervenors from utilizing ancillary jurisdiction. First, rule 82 is not offended by this use of ancillary jurisdiction because there is no expansion of federal jurisdiction occurring, but merely the further exercise of previously held jurisdictional power. Second, rule 82 only prohibits jurisdictional expansion by operation of the Federal Rules of Civil Procedure, whereas if this use of ancillary jurisdiction does not expand federal jurisdiction, it is effected by judicial reconsideration of ancillary jurisdiction, not by force of rule 24(b). To invoke rule 82 as a barrier to allowing permissive intervenors to use ancillary jurisdiction is to beg the question. What must be addressed is whether the contours of rule 24(b) are such that it is never possible for a permissive intervenor to come within the scope of ancillary jurisdiction. If there is exact conformity between the class of permissive intervenors and the cases where ancillary jurisdiction is not appropriate, then the general rule is correct; if otherwise, then each permissive intervention must be examined to determine if ancillary jurisdiction is appropriate.

Circumstances Where Ancillary Jurisdiction is Appropriate for Permissive Intervenors

There are three requirements for the nonstatutory intervention of right under rule 24(a)(2): the intervenor must have an interest relating to the property or transaction that is the subject of the action; that interest might be practically impaired by a disposition of the action; and the interest must not be adequately represented by existing parties. If any one of these three requirements is not met, intervention of right is unavailable, but if the applicant would present a question of law or fact in common with the initial action, permissive intervention may be available.

---

19 A third response lies in historical fact: rule 82 has not impeded federal courts from extending ancillary jurisdiction in other contexts. See, e.g., UMW v. Gibbs, 383 U.S. 715, 725 (1966) (prior approach "unnecessarily grudging"); Revere Copper & Brass v. Aetna Casualty & Sur., 426 F.2d 709, 716-17 (5th Cir. 1970) (third party defendant's counterclaim against original plaintiff held within ancillary jurisdiction); Lesnik v. Public Indus. Corp., 144 F.2d 968, 973-74 (2d Cir. 1944) (impleader may be supported by ancillary jurisdiction).

20 Those espousing the majority view on jurisdiction over permissive intervenors often offer little more than a knee jerk, reflex citation to rule 82 without a great deal of analysis. See, e.g., 7A C. Wright & A. Miller, supra note 5, at 587.

21 The problem may be conveniently stated in terms of elementary propositional logic. If \( A \) represents the class of permissive interventions, \( B \) represents the class of cases where ancillary jurisdiction is not allowable, and \( C \) represents the general rule that permissive intervenors may never rely on ancillary jurisdiction, then the truth of proposition \( C \) may be stated as follows: if, and only if, \( A \) is entirely a subset of \( B \), then \( C \) is true. But if \( A \) is not entirely a subset of \( B \), then not only is \( C \) not proven true, it is proven not true.

22 FED. R. CIV. P. 24(a)(2).


24 FED. R. CIV. P. 24(b).
ANCILLARY JURISDICTION

Under the present reading of these requirements, it is possible for a case to fall outside rule 24(a) and yet remain within the federal district court's ancillary jurisdiction. In some cases, where permissive intervention is the nonparty's only access to the action, ancillary jurisdiction is present. If ancillary jurisdiction is present for an intervenor of any type, it is because of a nexus between his claim or defense and the principal action;205 various phrases have been used in attempts to define this nexus: "logical relationship,"206 the same "cause of action,"207 a "common nucleus of operative fact,"208 or in the case where ancillary jurisdiction would defeat complete diversity, "logical dependence" coupled with a defensive posture.209 The only requirement of rule 24(a)(2) which addresses the presence of this nexus, and hence of ancillary jurisdiction, is the requirement of an interest in the subject of the action.210 An intervention of right is always within the scope of ancillary jurisdiction because the interest claimed by the intervenor establishes the necessary nexus, or ancillarity to the initial action.211

Therefore, if this interest is present, but intervention of right is unavailable because the intervenor cannot show inadequate representation, then he is within the ancillary jurisdiction of the district court as a permissive intervenor.212 This same intervenor would, under the general

---

205 See supra note 181.
207 Hurn v. Oursler, 289 U.S. 238, 246 (1933).
210 That inadequacy of representation and impairment of one's ability to protect an interest are not properly relevant to the jurisdictional analysis is illustrated by the exception for class actions. See supra note 192 and accompanying text. Courts and commentators have properly excluded the procedural requirements of intervention of right from their analysis of jurisdiction over permissive intervention into class actions, yet they would have those same procedural requirements bear on the jurisdictional question where the permissive intervention is sought into non-class actions. If as a general matter a permissive intervenor must show inadequacy of representation and a possible impairment of an interest to avail himself of ancillary jurisdiction, then why does not a class member have to make a similar showing to come within ancillary jurisdiction? The only explanation for this inconsistency is that the jurisdictional analysis has been muddled by procedural concerns. It is procedurally convenient to allow permissive intervention into class actions, and so the jurisdictional question is answered independently of procedural policies; it is not so convenient to allow permissive intervention into all other actions, and so some authorities carry over these procedural concerns into the jurisdictional analysis: put simply, jurisdiction is being used as a tool to effectuate procedural concerns. However, clarity of thought is promoted by maintaining the separate identities of these two very different problems, and is disserved by running them together.
211 See supra note 181.
212 See Usery v. Brandel, 87 F.R.D. 670 (W.D. Mich. 1980). In an action brought against an employer by the United States Secretary of Labor seeking a judgment declaring a contract with migrant farm workers to be in violation of the Fair Labor Standards Act, the employees sought to intervene to protect their interest in the employment contract. The intervenors "offered no showing that their interests are not adequately represented by their putative co-defendant." Id. at 676. Although there is authority to the contrary, see, e.g., C. WRIGHT & A. MILLER, supra note 5, § 1909, it is generally held that an intervenor
rule, come within ancillary jurisdiction accorded to intervenors of right if he could show inadequate representation. But inadequate representation has nothing to do with ancillary jurisdiction; it does not affect the degree to which a claim is ancillary to the initial claim. The constitutional requirement of a common nucleus of operative fact, and where statutory limits are relevant, the test of logical dependence, are affected only by the degree and quality of the intervenor's interest. The issue of inadequacy of representation is not, and should not be relevant to the presence of logical dependence or to the broader question of a common nucleus of operative fact. To adhere to the general rule and deny ancillary jurisdiction to such a permissive intervenor would violate rule 82 by effecting a limitation on federal jurisdiction based solely on a distinction made by a procedural rule. Adequacy of representation goes only to the question of whether it is procedurally convenient to allow a party a right of intervention. It does not pertain to substantive issues of jurisdiction.

Similarly, where an otherwise sufficient intervention of right is removed

has at least a minimal burden of proving inadequate representation. Trbovich v. UM, 404 U.S. 528, 538 n.10 (1972); Olden v. Hagerstown Cash Registers, 619 F.2d 271, 273 (3d Cir. 1980); National Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 383 (10th Cir. 1977); Edmondson v. Nebraska, 388 F.2d 123, 127 (8th Cir. 1967) (inadequacy of representation "is a necessary element to be proved"); 3B J. Moore, supra note 5, ¶ 24.09-1[4], at 24-316; Kennedy, supra note 9, at 353-54. Most importantly, the Sixth Circuit has adopted this view. Blanchard v. Johnson, 532 F.2d 1074, 1077 (6th Cir.), cert. denied, 429 U.S. 869 (1976); Afro Am. Patrolmen's League v. Duck, 503 F.2d 294, 298 (6th Cir. 1974) (applicant has burden of showing inadequate representation); Piedmont Paper Prod. v. American Fin. Corp., 89 F.R.D. 41, 44 (S.D. Ohio 1980) ("applicant has burden of proof" on inadequate representation). Accordingly, the court in Usery could not grant intervention of right without committing reversible error. It nonetheless made a gratuitous finding that, on the basis of the pleadings, the farmworkers would be "entitled" to intervene of right. Usery, 87 F.R.D. at 676-77. Still, this is but dicta, as the court ultimately concluded it would "grant" their motion . . . under Rule 24(b) [permissive intervention]. Id. (emphasis added). The court found that the "legal claims and underlying facts could not be more closely related to those of the principle cause." Id. at 681. Accordingly, the intervenors' interest in the litigation sufficed to provide that there was a "tight nexus," which was sufficient to establish ancillary jurisdiction. Id.

See supra notes 6-7 and accompanying text.

See supra note 142 and accompanying text.

See supra notes 170-71 and accompanying text. The other requirement, of defensive posture, is present for all intervenors. See supra note 181.

A permissive intervenor must present a "question of law or fact" in common with the initial action. Fed. R. Civ. P. 24(b). Thus, some intervenors, particularly where there is an extensive factual connection to the principal action, would present claims arising from the same core of operative fact. If statutory limits, such as complete diversity, are present, the degree of identity of legal questions would determine whether there is the necessary logical dependence. See Usery, 87 F.R.D. at 680-81 (outcome of intervention dependent upon initial action, where United States Secretary of Labor sought to nullify contract to which intervenors were a party; hence, logical dependence met).

See supra notes 186-201 and accompanying text.

That is, if a party is adequately represented, then procedurally it would be awkward and burdensome to allow intervention in all such cases. However, this procedural consideration has no place in an analysis of subject matter jurisdiction. What is jurisdictionally relevant is the type of nexus present between the initial claim and the intervention.
ANCILLARY JURISDICTION

from the benefits of rule 24(a)(2) because the disposition of the action would not impair the applicant's ability to protect that interest, he may intervene permissively and fall within the federal courts' ancillary jurisdiction.\(^{219}\) This is not to say that it is necessarily a good thing in every case to grant entrance to an action to a party who will not be impaired by its disposition; rather, in such circumstances a district court is \textit{jurisdictionally competent} to hear his claim, providing his interest in the litigation provides the type of nexus needed for ancillary jurisdiction.\(^{220}\) Impairment of an interest is not relevant to ancillary jurisdiction, but only to the question of whether it is procedurally wise to grant such a party entry to the suit. The procedural problems presented by an intervenor whose ability to protect his interests is not being impaired may be dealt with through the discretionary power of the district courts over permissive intervenors.\(^{221}\) Such procedural problems ought not be elevated to the level of jurisdictional doctrine.\(^{222}\)

There will, perhaps, be other situations in which ancillary jurisdiction is appropriate for permissive intervenors. Ancillary jurisdiction, like many other legal problems, is fact sensitive, and so it is difficult to state a rule of general applicability to cover all possible variations.\(^{223}\) This is the central problem with the general rule in this area: it is absolute and unbend-

\(^{219}\) See TPI Corp. v. Merchandise Mart of S.C., 651 F.R.D. 684 (D.S.C. 1974). In a diversity action the vendor sued vendee for breach of contract. \textit{Id.} at 686-87. Several business concerns, all part of a single enterprise with the initial defendant, and all involved in the transaction in one way or another, sought to intervene and assert counterclaims. \textit{Id.} There was complete diversity, but several counterclaims were for less than the jurisdictional amount. Intervention of right was inappropriate because the intervenors could not show that they would be disabled in protecting their interests. \textit{Id.} at 688. Permissive intervention was granted. \textit{Id.} at 692. The court had found that the intervenors' interest in the transaction would have qualified them for intervention of right. \textit{Id.} at 687. Ancillary jurisdiction was allowed. \textit{Id.} at 690, 692. It should be noted that there was both legal and factual commonality between the original claim and the intervention, that is, whether the vendor's goods were defective such as to breach the contract controlled both. \textit{Id.} at 686-87. Accordingly, there was logical dependence present. \textit{Compare} Moore v. New York Cotton Exch., 270 U.S. 593, 610 (1926) (nonjurisdictional claim needs only failure of jurisdictional claim to be established) \textit{with} Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978) (no logical dependence between claims, and therefore ancillary jurisdiction inappropriate in light of statutory limits).

\(^{220}\) See supra note 218. The distinction between procedural convenience and jurisdictional power must be kept in mind.

\(^{221}\) See infra notes 254-60 and accompanying text.

\(^{222}\) See Kennedy, supra note 9, at 378-79 (ancillary jurisdiction "should be evaluated on its own rationale and not on the basis of a definitional distinction").

\(^{223}\) This is admitted as true even by one who has supported the general rule on jurisdiction over intervenors.

The difficulties presented by the ancillary jurisdiction concept are a problem for each of the joinder devices ... but nowhere else are the problems as acute as with intervention under Rule 24. No satisfactory rules have yet been developed for determining when an intervenor comes within the limits of ancillary jurisdiction.

7A C. WRIGHT & A. MILLER, supra note 5, at 590.
ing, but this area is sufficiently murky to require a case by case analysis.\textsuperscript{224} The focus of the jurisdictional question should be shifted away from the procedural requirements of intervention of right and back to the real issue: Is there a sufficient relationship between the intervention and the initial claim to warrant the exercise of ancillary jurisdiction?\textsuperscript{225}

\textit{Proposals for Intervention Practice}

\textbf{A Tale of Two Cases}

From the above it is clear that in certain cases ancillary jurisdiction is appropriate for permissive intervenors. While this conclusion is important in itself, if it were coupled with a realignment of intervention of right and permissive intervention, the entire course of intervention practice would run more smoothly.\textsuperscript{226} The distinction between intervenors is not one found in nature, but rather is a line drawn to effectuate procedural policies.\textsuperscript{227} The 1966 amendments to rule 24 shifted some cases of permissive intervention into the category of intervention of right.\textsuperscript{228} In addition, the requirements of rule 24(a)(2) have been broadly construed, further expanding the cases where intervention of right is available.\textsuperscript{229} However, procedural convenience would dictate handling more cases under the discretionary regime of permissive intervention.\textsuperscript{230} This may be achieved if it is recognized that ancillary jurisdiction is appropriate for permissive intervenors.

\textit{Cascade Natural Gas Corp. v. El Paso Natural Gas Co.}\textsuperscript{231} illustrates the broad construction that has been given rule 24(a)(2). Here a corporation was allowed to intervene in an antitrust action, to assure that a divestiture order would restore a natural gas supplier to full competitive status.\textsuperscript{232} The United States Supreme Court concluded that the intervenor had an "interest" in the "transaction" that was the subject of the action.\textsuperscript{233} It delved at length into the substantive terms of the lower court's divestiture order to find that the United States Justice Department had not ade-

\textsuperscript{224} Usery, 87 F.R.D. at 681.
\textsuperscript{225} See supra note 222.
\textsuperscript{226} See infra notes 247-63 and accompanying text.
\textsuperscript{227} Shapiro, Some Thoughts on Intervention Before Courts, Agencies and Arbitrators, 81 Harv. L. Rev. 721, 730, 752-56 (1968). See Fraser, Ancillary Jurisdiction and Joinder of Claims, 33 F.R.D. 27, 43 (1963) ("[I]t is not always easy to determine which type of intervention is involved.").
\textsuperscript{228} See supra notes 54-56 and accompanying text.
\textsuperscript{229} See infra notes 231-37 and accompanying text.
\textsuperscript{230} See infra notes 247-63 and accompanying text.
\textsuperscript{231} 386 U.S. 129 (1967).
\textsuperscript{232} Id. at 132-33.
\textsuperscript{233} Cascade, 386 U.S. at 135.
quately represented the intervenors' interests. A strident dissent found
the interest here “insubstantial,” and the majority’s conclusion of inadequately representation by the Justice Department “wholly unjustified.”
In short, the case involved “radical extensions of intervention doctrines” which “rushed headlong into a jurisprudential quagmire.”

This broad reading of rule 24(a)(2) stands in stark contrast to United States v. Local 638, Enterprise Association. The facts were functionally similar to those in Cascade. An agency of New York City sought to intervene in an action brought by the United States Justice Department. The district court refused intervention of right because there was no evidence of insufficient representation by the United States Attorney General, and because it would not stretch the word “transaction” to include this situation. This construction was supported by the policy considerations present: to allow intervention of right here would open the door to many more similar interventions, where there was only a “transaction” in the loosest sense of that word. This approach avoided picking apart the representation afforded by the Justice Department and the expansion of the normal scope of judicial review that was present in Cascade.

The district court did allow permissive intervention and based it upon ancillary jurisdiction. The result was the same as in Cascade and in Local 638, Enterprise Association, but the former achieved intervention with a meat ax, while the latter used the precision of a scalpel. The former stretched the language of rule 24(a)(2), and the latter maintained the integrity of that language. By recognizing that ancillary jurisdiction may be appropriate for permissive intervenors, the court in Local 638, Enterprise Association was able to do justice both to the language of rule 24(a)(2) and to an intervention which the court thought ought to be before it.

---

234 Id. at 136-42. The Court’s view was that the United States Justice Department had “knuckled under.” Id. at 141.
235 Id. at 154 (Stewart, J., dissenting).
236 Id.
237 Id. at 160.
239 Id. at 165.
240 Id.
241 Id.
242 Id.
243 See supra note 234 and accompanying text.
244 Local 638, Enter. Ass’n, 347 F. Supp. at 169.
245 Id.
246 The claim here was properly ancillary because the “legal issues in the federal action are substantially the same” as the nonfederal claim. Id. at 166. The intervention was “vitaly related” to the main action. Id. at 168. Clearly there was the requisite nexus. Both the intervenor and the initial plaintiff were governmental units, litigating the legality of the same allegedly discriminatory practices; both the original and the intervening claim must, therefore, have arisen from the same core of operative fact. See supra note 216.
The wisdom of such a reading of rule 24(a)(2), when coupled with the proper exercise of ancillary jurisdiction is set forth below.

Policy Implications of a Strict Reading of Rule 24(a)(2)

Under a liberal reading of the requirements of intervention of right, there are cases which qualify only for permissive intervention but over which a federal district court has ancillary jurisdiction. Contracting the class of intervenors of right, by a stricter reading of rule 24(a)(2), would cause a concomitant expansion of the class of permissive intervenors. The borderline cases, which would fall into the category of permissive intervention if rule 24(a)(2) were more strictly construed, would present a clear case for the exercise of ancillary jurisdiction. Under a liberal reading of rule 24(a)(2) these cases are within intervention of right, and hence ancillary jurisdiction is available in them. Procedural realignment would cause the same fact pattern to drop to the level of permissive intervention, but this reclassification would not address jurisdictional issues. It is clear, then, that these permissive intervenors are within federal ancillary jurisdiction. A stricter adherence to the requirements for intervention of right, and thus an expansion of the class of permissive intervenors, would effectuate important policies, if it is recognized that ancillary jurisdiction is available to certain permissive intervenors.

The Cascade reading of rule 24(a)(2) creates the danger that a multitude of interventions of right will flow into the federal court system. The court in Local 638, Enterprise Association, recognizing this danger, opted for a narrower reading of rule 24(a)(2), and allowed only permissive intervention under rule 24(b). In general, intervention practice is better regulated through the use of discretionary permissive intervention.

---

247 See supra notes 205-25 and accompanying text.
248 Essentially, this would partially reverse the movement of permissive intervenors into the class of intervenors of right that was effected by the 1966 amendments to rule 24. See supra notes 54-56 and accompanying text. Thus, narrowing the class of intervention of right would not be a radical step in an uncharted course, but rather a partial reversion to practice before 1966.
249 See supra notes 57, 181 and accompanying text.
250 See FED. R. Civ. P. 82. See also supra note 218.
251 See Local 638, Enter. Ass'n, 347 F. Supp. at 165.
252 Id. at 164.
253 See supra text accompanying notes 240-42.
254 Professor Kennedy argues that the distinction between intervention of right and permissive intervention ought to be abolished, and instead only permissive, discretionary intervention should be available. Kennedy, supra note 9, at 375-80. This should be coupled with an express authorization by rule 24 for the trial judge to utilize his "creative power" to impose such conditions upon the intervention as are deemed useful. As to jurisdiction, if "procedural convenience dictates that the intervenor's claim should be tried with the original controversy, then modern theories of pendent and ancillary jurisdiction should be used to sustain federal jurisdiction." It should be noted that these procedural policies apply in both federal question and diversity settings.
ANCILLARY JURISDICTION

allows a trial court not only to grant or deny entrance altogether, but also to tailor the degree and type of intervention to the exigencies of the situation.\textsuperscript{255} This type of variable intervention has been advocated by Professor Shapiro.\textsuperscript{256}

The advantages of variable intervention are present not only in cases such as Cascade and Local 638, Enterprise Association, where entrance is sought to an action brought by the government, but in all cases of intervention.\textsuperscript{257} To implement this proposed change in the volume of intervention of right, it is necessary to recognize that there is no principled reason for denying ancillary jurisdiction to a permissive intervenor merely because he is a permissive intervenor. The increase in the use of ancillary jurisdiction in this context should not be thought to increase the federal courts' caseload or the amount of energy spent by them. Intervention and ancillary jurisdiction come into play only after an action within federal jurisdiction has been initiated; thus, the number of cases does not increase. It is of course true that, as a practical matter, allowing intervention increases the amount of judicial energy necessary to resolve a given action. But increasing the use of ancillary jurisdiction in this context, where coupled with a transfer of intervenors to the discretionary regime of rule 24(b) permissive intervention, would result in a decrease in the net judicial effort spent on intervention practice. Use of permissive intervention could eliminate the time-consuming or wasteful interventions, or make them more efficient by the imposition of conditions upon the intervention.\textsuperscript{258}

In short, the current scope of intervention of right is too broad, while the use of ancillary jurisdiction over intervenors is too narrow. Because of the often-cited general rule that ancillary jurisdiction is never available to a permissive intervenor, a trial court, to allow intervention at all, must grant it in the form of intervention of right if the intervenor meets the requirements of ancillary jurisdiction only; this operates to loosen the requirements for intervention of right. However, once an intervenor is

\textsuperscript{255} See FED. R. CIV. P. 24(b) (discretionary language); 3B J. MOORE, supra note 5, ¶ 24.17[3.-1], at 24-185 (“the court is able to determine before intervention is allowed . . . whether the intervenor proposes to counterclaim or add new parties, and it may then determine the scope of the intervention which it wishes to allow”); id. at 24-196 (“Where intervention is of right the court literally should have no authority to strike out any counterclaims the intervener might set up.”); id. at ¶ 24.17[3.-2] (same rules apply to cross-claims); 7A C. WRIGHT & A. MILLER, supra note 5, §§ 1921-1922. See also infra note 259.

\textsuperscript{256} Shapiro, supra note 227, at 762. See also supra note 254.

\textsuperscript{257} See supra notes 254, 256 and accompanying text.

\textsuperscript{258} The argument could be made that while this note's proposal would be more efficient for the district courts, the case by case analysis of jurisdiction would create a burden on the appellate courts. This might be true, at least initially, but the burden would be offset by the decrease in appellate review required over the initial decision on the intervention itself. That is, if more cases were handled under permissive intervention, as is advocated, the scope of judicial review would eventually be narrowed, as many decisions on the intervention question would be reviewed only for abuse of discretion. See generally Shreve, supra note 9.
allowed in under rule 24(a)(2) he is in all the way. If such cases were treated under rule 24(b), the court would retain more control over the course of the litigation, and could better balance the policies of judicial economy, fairness to nonparties, and fairness to the original parties. Nor would the policy of federalism be offended. If a given intervention would result in unnecessary decisions of state law, then the intervention may be denied or limited.

The policies which would determine the scope of a discretionary intervention dovetail nicely into the underlying policies of ancillary jurisdiction. Judicial economy is furthered by free joinder of claims and parties, which both ancillary jurisdiction and intervention help to implement. Judicial economy can be hampered by a too liberal use of joinder, when such devices lead to an unmanageable judicial proceeding, but ancillary jurisdiction coupled with permissive intervention allows the trial court to regulate the scope of an action. Ancillary jurisdiction is concerned with fairness to those not initially involved in the action; intervention is the mechanism that allows nonparties to become involved. Once intervention is granted, judicial economy is benefited further by lending more efficacy to a given federal judgment, as the intervenor will be bound by the judgment. Of the two types of intervention, discretionary intervention is clearly the more attractive and useful because it is better

239 3B J. MOORE, supra note 5, ¶ 24.17(3)-1, at 24-727, 24-741. Although this is true, additional comment is necessary to understand the status of a party as an intervenor of right. Because of the mandatory language of rule 24(a), it is fairly clear that once an intervenor establishes grounds for intervention of right the district court must grant entrance to the action. See generally Shreve, supra note 9, at 898 n.15. This construction of the plain words of rule 24(a) should not be confused by the statements of some courts that there is an element of discretion in making the threshold determination of whether the requirements of intervention of right have been met. See, e.g., Hodgson v. UMWA, 473 F.2d 118, 125 n.36 (D.C. Cir. 1972). The requirement that an intervention be timely sought is subject to a particularly discretionary finding. See, e.g., NAACP v. New York, 413 U.S. 345, 366 (1973); Smith Petroleum Serv. v. Monsanto Chem., 420 F.2d 1103, 1115 (5th Cir. 1970); Diaz v. Southern Drilling, 427 F.2d 1118, 1125 (5th Cir. 1970). The hard question is whether an intervenor of right may be precluded from raising new issues or adding new parties. It would seem strange that a party having a right to intervene may nonetheless lack the ability to effectuate that right fully. The better reasoned view is that an intervenor of right may counterclaim, cross-claim, or bring in a third-party defendant, assuming there is jurisdiction to do so (this jurisdiction, over the intervenor's new claims or added parties, must not be confused with jurisdiction over the intervention itself). See 3B J. MOORE, supra note 5, ¶ 24.17(3). Shapiro takes a narrower view on this question; only those issues which are related to the initial claim may be raised by an intervenor. Shapiro, supra note 227, at 754-55. A strong argument in Moore's favor is that intervention under the former Equity Rule 37 was always to be "in subordination to" the main action, from which it may be inferred that an intervenor's claims were to be similarly subordinate. The lack of any such limitation in the language of the present rule 24, along with the broad language of rule 13, indicate that an intervenor of right may avail himself of all the procedural perogatives of an original party. See generally C. WRIGHT & A. MILLER, supra note 5, §§ 1921-1922.

240 See supra notes 77-79 and accompanying text.

241 Developments in the Law, supra note 17, at 905.

ANCILLARY JURISDICTION

equipped to balance all the interests present. For these reasons policy strongly indicates that ancillary jurisdiction should be available in certain cases to permissive intervenors, in order that a larger proportion of interventions may be handled under the discretion of permissive intervention.

CONCLUSION

While the generally accepted rule as to the jurisdictional requirements for intervention is that intervenors of right may rely on ancillary jurisdiction and need not show an independent basis of jurisdiction, but permissive intervenors may never rely on ancillary jurisdiction, there is no principled reason for imposing this arbitrary distinction. The requirements of intervention of right are meant only to delineate under what circumstances it is procedurally convenient to grant a right of intervention. The question of ancillary jurisdiction is entirely separate from this procedural distinction. Therefore, each permissive intervention should be examined individually, and ancillary jurisdiction granted on a case-by-case basis. In addition, if it is recognized that ancillary jurisdiction is sometimes appropriate for permissive intervenors, then the scope of intervention of right may be narrowed. Such an adjustment would smooth the entire course of intervention practice.

JEFFREY L. RENSBERGER

---

A contrary argument can be made that the distinction between the two types of intervenors is a convenient place to draw the jurisdictional line. Under the general rule one need only determine whether a given intervention is permissive or of right, and then the jurisdictional problems are solved as well. Professor Wright is one advocate of this "bright line" theory of intervention jurisdiction. 7A C. WRIGHT & A. MILLER, supra note 5, at 598-99. It is hard to explain the fact that the shifting of some permissive intervenors into the class of intervention of right, which was effected by the 1966 amendments to rule 24, See supra notes 54-56 and accompanying text, did not cause a reconsideration of the jurisdictional requirements of the two types of intervention, see supra notes 57-62 and accompanying text, without supposing that the federal courts have been deciding jurisdiction over intervention on the basis of a "bright line" both before and after 1966. Professor Wright explains the lack of judicial consideration of the jurisdictional impact of the 1966 amendments to rule 24 by facilely concluding that the pre-1966 jurisdictional views were "too narrowly confined." 7A C. WRIGHT & A. MILLER, supra note 5, at 598. No doubt jurisdictional tests should be "bright lines," as should all rules of law. But the jurisdictional test for intervenors, under the general rule, is no brighter than the test for determining which type of intervention is present, and the requirements of rule 24 are by no means simple and easy to apply. See supra notes 55 and accompanying text. Further, a "bright line" as to the jurisdiction over intervenors, should still be a jurisdictional test, not a procedural one. Basing the jurisdictional test on the contours of rule 24, for mere procedural convenience and not because of any jurisdictional analysis, clearly offends Fed. R. Civ. P. 82; the effect is to allow a procedural rule, rule 24, to limit the jurisdiction of federal district courts. Moreover, the United States Supreme Court decisions on ancillary jurisdiction in general do not appear to draw any "bright line," with the possible exception of Hurn v. Oursler, 289 U.S. 239 (1933), which was a failure. See supra notes 93-178 and accompanying text.