

# LAW, EQUITY, AND SUPPLEMENTAL JURISDICTION

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*As remedies scholars continue to reflect on the consequences of the 1938 merger of law and equity into one civil action, it may be worth pondering a second merger. In 1990, responding to a Supreme Court opinion that highlighted the absence of such authority, Congress adopted a statutory framework for the exercise of judge-made doctrines of pendent and ancillary jurisdiction. In the statute, 28 U.S.C. § 1367, Congress merged the two doctrines, lumping them together in a provision for the exercise of supplemental jurisdiction over claims that bear an appropriate relationship to civil actions within the district courts' original jurisdiction.*

*This Essay, prepared for a symposium on federal equity, explores some consequences of that jurisdictional merger. We focus on cases in which federal courts have declined to exercise traditional forms of ancillary jurisdiction after concluding that those forms threatened to undermine the complete diversity rule. Thus, in *Griffin v. Lee*, a 2010 decision, the Fifth Circuit refused to allow the district court to exercise ancillary jurisdiction over a withdrawing lawyer's claim for attorney's fees. Although misguided textualism helped, the mistaken decision in *Griffin* owes much to the court's failure to appreciate the distinctively equitable underpinnings of ancillary jurisdiction.*

*Generalizing from its critique of *Griffin*, the Essay argues that federal courts should attend to the history of ancillary jurisdiction in evaluating the threat to diversity-based jurisdiction under the supplemental jurisdiction statute. For much of the nation's history, ancillary jurisdiction extended to the related claims of nondiverse claimants (like those of the lawyer in *Griffin*) that arose in the course of litigation. Reclaiming these equitable traditions will enable courts to return to the discretionary framework Congress provided as the measure of supplemental jurisdiction.*

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## INTRODUCTION

Scholars worry that we have lost something important with the merger of law and equity into a single civil action.<sup>1</sup> The same might be said of the joinder of pendent and ancillary jurisdiction into an all-purpose doctrine of supplemental jurisdiction.<sup>2</sup> By demanding a statutory text in *Finley v. United States*<sup>3</sup> and then giving the resulting statute, 28 U.S.C. § 1367, a wooden reading in *Exxon Mobil v. Allapattah Services*, the Supreme Court has deprived the doctrine of its flexibility.<sup>4</sup> Following the Court’s lead, lower court results seem unfair, wasteful, and depressingly predictable.

Consider *Griffin v. Lee*.<sup>5</sup> There, a citizen of Mississippi (Griffin) commenced an action in Louisiana state court to reform a trust and recover for fraud.<sup>6</sup> Following removal to federal court based on diversity, Griffin prevailed in part, and the district court ordered the payment of proceeds from a reformed trust as compensation.<sup>7</sup> The lawyer who represented Griffin for a time in state and federal court

1 See, e.g., Samuel L. Bray & Paul B. Miller, *Getting Into Equity*, 97 NOTRE DAME L. REV. 1763, 1767 (2022); Andrew Kull, *Equity’s Atrophy*, 97 NOTRE DAME L. REV. 1801, 1805 (2022).

2 “The terms of § 1367 do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction. Though the doctrines of pendent and ancillary jurisdiction developed separately as a historical matter, the Court has recognized that the doctrines are ‘two species of the same generic problem. . . .’” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005) (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)); see also 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, *FEDERAL PRACTICE & PROCEDURE* § 3567 (3d ed. 2008) (“Supplemental jurisdiction is a generic term encompassing what courts historically called ‘pendent’ and ‘ancillary’ jurisdiction.”); Richard D. Freer, Essay, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 471–73 (1991) (discussing how § 1367 codifies “pendent” and “ancillary” jurisdiction under the “generic term ‘supplemental jurisdiction’”).

3 See 490 U.S. 545, 552 (1989). On the centrality of *Finley*’s textualism to the adoption of a statutory framework, see James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 119–20 (1999).

4 See *Exxon Mobil*, 545 U.S. at 546–72 (concluding that the statute altered the diversity-based jurisdictional rules governing aggregation of claims under Federal Procedural Rules 20 and 23).

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

6 *Id.*

7 *Id.* at 382–83.

(Lee) would withdraw from the representation but nonetheless filed an application to recover his lawyer's fee from the proceeds of any money Griffin recovered from the defendants.<sup>8</sup> After a bench trial, the district court awarded Lee \$16,068.<sup>9</sup> But the Fifth Circuit overturned that award, finding (on its own motion) that the district court lacked supplemental jurisdiction over Lee's claim.<sup>10</sup> As the Fifth Circuit explained, Lee lacked citizenship diversity with the opposing individual trust fund defendants (all of whom were from Louisiana), and his claim did not meet the diversity statute's \$75,000 threshold.<sup>11</sup> Lee, apparently, was expected to start over in a separate state court proceeding, presumably naming his former client as the defendant.<sup>12</sup>

The result seems hard to square with the goal of litigation economy that underlies the expansion of supplemental jurisdiction. Who better to evaluate the contributions Lee made to securing relief on behalf of his client than the judge who presided over the proceeding? It also seems wholly inconsistent with the traditional use of ancillary bills in equity, which evolved to allow a party to assert a new claim to a fund or res that had been brought before the court for equitable distribution. Lee's claim for his fee, as a lawyer seeking protection upon withdrawal from litigation, falls comfortably within this ancillary tradition. But the ancillary jurisdiction tradition has been submerged in the supplemental jurisdiction statute and by its textual treatment of party intervention. Rather than engage with history, equity, and fairness, the Fifth Circuit's per curiam opinion offers a disquisition on plain language hard-hearted enough to make the *Finley* majority blush with pride.

In this Essay, we suggest that *Griffin* and other similar cases reveal the jurisdictional consequences of the merger of law and equity. Just as equity's distinctive voice has sometimes been distorted when joined

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8 *Id.* at 383.

9 *Id.*

10 *Id.* at 382.

11 *Id.* at 385–86.

12 Jurisdictional law offers a range of doctrines that seek to avoid the necessity for litigation in both state and federal court and to ward off do-overs when jurisdictional requirements fail. As Part II explains, the rise of ancillary jurisdiction and its codification in § 1367 were informed by notions of litigation efficiency to stave off duplicative proceedings. In addition, the Supreme Court has sought to narrow the scope of jurisdictionality, and the dysfunctional results such characterizations produce, by treating statutory elements as mandatory rather than jurisdictional. See *infra* note 103. In an earlier era, the Fifth Circuit itself understood these considerations. See *Mas v. Perry*, 489 F.2d 1396, 1401 (5th Cir. 1974) (concluding that the husband's claim met the diversity requirement and adding that the complete interdependence of their claims made it sensible for the district court to adjudicate the wife's claim as well as a matter of "sound judicial administration").

with law and transmitted through one civil action, so too may the distinctive quality of ancillary jurisdiction in equity be lost through its incorporation into supplemental jurisdiction. The *Griffin* court was content to apply its own narrow view of the plain meaning of the statute, apparently unaware of (or unconcerned by) an equitable tradition that argued in favor of exercising adjudicatory power over the attorney's claim. We question that analytical approach. We urge instead that federal courts consider the distinctive role of equity as they evaluate ancillary forms of supplemental jurisdiction. Just as courts of equity entertained ancillary claims that failed to pass jurisdictional muster on their own, so too should federal courts today look for ways to interpret § 1367 that will honor the equitable traditions that gave rise to ancillary jurisdiction and were incorporated into the statute.

We set down our thoughts on law, equity, and supplemental jurisdiction in three parts. We begin in Part I by sketching the statutory issues that proved decisive in *Griffin*, including the problem of intervening parties as taken up by the drafters of § 1367. We then explore in Part II the historical roots of the intervention problem, distinguishing between original suits in law and equity that were required to meet the complete diversity requirement and ancillary bills to which the requirement was deemed inapplicable. Finally, we turn in Part III to a proposed solution. We suggest that the so-called Rule 19/24 anomaly on which the statute's drafters predicated their approach did not concern itself with the exercise of ancillary jurisdiction. Indeed, the exercise of ancillary jurisdiction in cases like *Griffin* does not offend complete diversity as understood for much of the nation's history. Along the way, we call for an interpretive approach to supplemental jurisdiction that leaves room for attentive consideration of sound jurisdictional policy.

## I. TEXTUALISM AND § 1367

For much of the past thirty years, the Supreme Court has been delivering text-based lectures to lower courts called upon to consider issues of supplemental jurisdiction. It began in *Finley*, Justice Scalia's formative refusal to allow the exercise of pendent-party jurisdiction where Congress had failed to authorize such jurisdiction by statute.<sup>13</sup> It continued in *Exxon Mobil*, where the Court concluded that § 1367

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13 See *Finley v. United States*, 490 U.S. 545, 548, 552 (1989) (emphasizing that the Constitution must have given federal courts capacity to assert jurisdiction and an “act of Congress must have supplied it”). Earlier decisions, such as *Aldinger v. Howard*, had not categorically ruled out pendent-party jurisdiction but had evaluated its propriety in light of the particular statutory framework. 427 U.S. 1, 2 (1976).

had overruled its prior decision in *Zahn*.<sup>14</sup> Along the way, the Court confronted the suggestion of the statute's drafters that the federal courts should avoid that result through interpretation. The Court derided that suggestion as an attempt to "circumvent the Article I process" of bicameralism and presentment and as a confirmation of the "worst fears of [the] critics" of the use of legislative history.<sup>15</sup> The text, apparently, was to control.

Despite its hymns to the centrality of text, much of what the Court has done tempers the lessons of text with *sotto voce* acceptance of the relevance of sound jurisdictional policy. *Finley* purported to reaffirm the validity of several forms of supplemental jurisdiction that lacked any textual predicate, choosing to focus its criticisms on pendent-party jurisdiction.<sup>16</sup> Similarly, *Exxon Mobil* smuggled a non-text-based construct—the contamination theory—into its analysis to prevent its interpretation of the statute from dismantling the complete diversity rule.<sup>17</sup> The Court never explained why, in a statute like § 1332 that requires both citizenship diversity and an amount in controversy, its contamination theory would apply as a textual matter only to the citizenship requirement.<sup>18</sup> The *Exxon Mobil* Court's textualism thus turns out to be something of a distraction; its decision implements a judge-made preference for citizenship diversity as the more fundamental check on the district court's authority.<sup>19</sup>

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14 See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566–67 (2005) (overruling *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973), which had refused to allow a district court to exercise supplemental jurisdiction over claims that failed to meet the amount-in-controversy threshold on their own).

15 *Exxon Mobil*, 545 U.S. at 570.

16 See *Finley*, 490 U.S. at 556 (noting that the *Gibbs* line of cases similarly lacked any statutory underpinning but explaining that the Court did not intend to overturn pendent claim jurisdiction). *Finley* also acknowledged the existence of ancillary jurisdiction without suggesting that its lack of textual support would foreclose its assertion in the future. *Id.* at 551.

17 The problem for the Court in *Exxon Mobil* stemmed from the fact that its reading of § 1367(b) would eliminate the complete diversity requirement for plaintiffs joined under Rule 20. To sidestep that problem and preserve complete diversity, the Court applied its "contamination" theory in concluding that joinder of nondiverse parties would contaminate the litigation and require its dismissal. See *Exxon Mobil*, 545 U.S. at 560, 562 (contamination theory applies only to the requirement of citizenship diversity and not to the amount in controversy).

18 Of course, the Court's contamination theory had not in terms appeared in any prior decision applying diversity of citizenship jurisdiction. The Court developed the theory to preserve complete diversity, recognizing that it made little sense to read § 1367 as abrogating that long-standing rule. But it did not anchor the theory in any textual provision. *Id.* at 562.

19 The dissent pointed out this anomaly and suggested instead an approach would have given effect to both elements of § 1332 as barring the assertion of original jurisdiction over the claims. See *Exxon Mobil*, 545 U.S. at 585 & n.5 (Ginsburg, J., dissenting) (noting

Apart from its faint-hearted textualism, the Court has at times suggested that some matters of supplemental jurisdiction may lie entirely beyond the purview of the text. Thus, in *Kokkonen v. Guardian Life Insurance*, the Court identified two forms of ancillary jurisdiction.<sup>20</sup> The first form “permit[s] disposition by a single court of claims that are, in varying respects and degrees, factually interdependent.”<sup>21</sup> Because this form of ancillary jurisdiction depends on the factual interdependence of claims, it logically aligns with the ancillary jurisdiction codified in § 1367. The second form “enable[s] a court to function successfully . . . to manage its proceedings, vindicate its authority, and effectuate its decrees.”<sup>22</sup> The *Kokkonen* Court appears to have viewed this “ancillary enforcement” jurisdiction as flowing not from the authority conferred by § 1367 but from a court’s “inherent power.”<sup>23</sup> So much, then, for *Finley*’s notion that all assertions of judicial power require some sort of textual predicate.

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that § 1332 does not “rank order” the two jurisdictional elements). The Court’s emphasis on citizenship also seems odd, though, given its apparently unthinking assumption that *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921), defines the citizenship of a plaintiff class by reference to that of the named plaintiff.

20 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) (“Generally speaking, we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related, purposes . . .”); *see also* *Peacock v. Thomas*, 516 U.S. 349, 354 (1996); Jeffrey A. Parness & Daniel J. Sennott, *Expanded Recognition in Written Laws of Ancillary Federal Court Powers: Supplementing the Supplemental Jurisdiction Statute*, 64 U. PITT. L. REV. 303, 325 (2003) (both “forms of ancillary federal district court powers can encompass issues involving recoveries of attorneys’ fees”); *Zimmerman v. City of Austin*, 969 F.3d 564 (5th Cir. 2020) (evaluating jurisdiction over a fee petition both under § 1367 and under ancillary enforcement jurisdiction). Notably, despite the absence of statutory authority, Justice Scalia did not question the viability of ancillary jurisdiction. *See Finley*, 490 U.S. at 551 (confirming that a federal court “may assert authority over such a claim ‘ancillary’ to jurisdiction otherwise properly vested—for example, when an additional party has a claim upon contested assets within the court’s exclusive control”).

21 *Kokkonen*, 511 U.S. at 379–80.

22 *Id.* at 380. Addressing “issues regarding attorneys’ fees” which arise from “disrespect or some other wrongful conduct during civil litigation[.]” falls within a federal court’s “vindication authority” even “where there is no applicable statute, court rule or other written law.” Parness & Sennott, *supra* note 20, at 331.

23 *Kokkonen*, 511 U.S. at 380 (recognizing that the lower courts had relied on ancillary enforcement jurisdiction, “judging from their references to ‘inherent power’”); *see also* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, *FEDERAL PRACTICE & PROCEDURE* § 3523.2 (3d ed. 2008) (“It seems clear that § 1367 does not apply to this form of [‘ancillary enforcement’] jurisdiction.”). One might argue (as one of our interlocutors has) that the jurisdiction rejected in *Griffin* might have been defended outside of the ambit of § 1367 as a form of ancillary enforcement jurisdiction. But we think the inherent power to deploy ancillary enforcement jurisdiction to enforce judgments differs from ancillary jurisdiction over claims to property or funds before the court. In any case, we think it better to get the statutory framework right, rather than to

Unfortunately, the Court's cases do not openly acknowledge the limits of its textualism or explain where the demands of textualism should yield to concerns with good jurisdictional policy. And that lack of clarity translates into lower court decisions like *Griffin v. Lee*, exalting wooden textualism over the claims of fairness, convenience, equity, and good conscience. A citizen of Mississippi, Griffin brought suit for reformation of a trust, naming the trustee (Chase) and its officers (from Louisiana) as defendants.<sup>24</sup> Following removal of the case based on diversity, Griffin secured at least a portion of the relief sought.<sup>25</sup> Having represented Griffin in state and federal court, Lee sought to collect an attorney's fee for his work on the matter by pursuing any funds that might later be released to Griffin.<sup>26</sup> The district court agreed to hear Lee's claim and awarded him \$16,068.<sup>27</sup>

On appeal the Fifth Circuit directed the district court to dismiss Lee's claim for want of supplemental jurisdiction.<sup>28</sup> Lee was nondiverse in relation to the original defendants from Louisiana and his claim did not meet the statutory threshold for diversity.<sup>29</sup> His joinder as a suitor in the initial proceeding would have thus destroyed diversity.<sup>30</sup> Recognizing that supplemental jurisdiction might nonetheless attach, the court ruled that the proposed claim for fees ran afoul of § 1367(b).<sup>31</sup> Lee was an intervenor and thus could not join if his claim would violate the requirements of the diversity statute.<sup>32</sup> By the Fifth Circuit's lights, Lee was a plaintiff, properly aligned in opposition to the trustee and its officers, and his joinder would thus violate the precepts of diversity of citizenship.<sup>33</sup>

In rejecting sensible arguments in support of jurisdiction, the Fifth Circuit portrayed its result as compelled by text and *Exxon Mobil*. The district court had aligned Lee in opposition to Griffin (not the trustees), thereby satisfying the diverse citizenship requirement.<sup>34</sup> The

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build up a separate source of ancillary jurisdiction outside § 1367. Cf. *Exact Software N. Am., Inc. v. DeMoisey*, 718 F.3d 535, 539–44 (6th Cir. 2013) (considering ancillary enforcement jurisdiction as the basis for jurisdiction over claims to an attorney's fee but rejecting such reliance because "backing out of an agreement [to pay a fee] is not the same thing as violating a court order").

24 See *Griffin v. Lee*, 621 F.3d 380, 382 (5th Cir. 2010) (per curiam).

25 See *id.* at 382–83.

26 *Id.*

27 *Id.* at 383.

28 *Id.* at 390.

29 *Id.* at 386.

30 *Id.*

31 *Id.* at 388.

32 *Id.*

33 *Id.*

34 Prior to the merger of law and equity, one supposes that Lee would have been aligned as a defendant. As Equity Rule 37 stated, "any person may be made a defendant

Fifth Circuit rejected that alignment, declaring without explanation that Lee was best seen as a co-plaintiff with Griffin seeking to impress a lien on trust funds.<sup>35</sup> The court nodded in the direction of arguments from convenience and efficiency, the currency of supplemental jurisdiction.<sup>36</sup> But returning to textualism, the court explained that sympathy for Lee's plight cannot "confer jurisdiction upon the courts where Congress has, according to the Supreme Court, unambiguously chosen to limit such jurisdiction."<sup>37</sup>

Perhaps the most frustrating thing about the decision was its petty, schoolmarmish quality. Rather than expressing some open-mindedness toward the district court's apparently sensible resolution of a fee dispute, the Fifth Circuit chose to offer a lecture on limited judicial power. In doing so, the court overlooked both historic and statutory guideposts that should have led it to confirm the district court's decision (instead of ordering a do-over in state court). As for the history, courts have long exercised ancillary jurisdiction over fee disputes that arise in the aftermath of litigation, especially where suits in equity bring a trust fund or other property within the constructive custody of the court.<sup>38</sup> Had it acknowledged that traditional conception of ancillary jurisdiction, the Fifth Circuit might have been hard pressed to view post-judgment litigation over fees as truly "inconsistent with the jurisdictional requirements of section 1332"—the standard specified in § 1367(b).<sup>39</sup> We explore both the history and the applicable text in the next two parts.

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who has or claims an interest adverse to the plaintiff." W. M. LILE, LECTURES ON EQUITY PLEADING AND PRACTICE WITH FORMS AND THE NEW FEDERAL EQUITY RULES 241 (1916).

35 See *Griffin*, 621 F.3d at 388. The court explained that alignment was to be determined by the "ultimate" interests of the party in the outcome of the action. *Id.* It may be true that Lee shared his former client's desire for a successful reformation action but the focus of the dispute had narrowed to one between Griffin and Lee over fees. *Id.*

36 *Id.* at 389–90. The argument from jurisdictional policy and convenience might well have incorporated some awareness that the district court, having presided over the dispute, was well-placed to evaluate Lee's contributions.

37 *Id.* (citing *Exxon Mobil*, 545 U.S. at 567).

38 We collect these cases in Part II, which one commentator summarized as follows:

[W]here, subsequent to the filing of the original bill, inchoate or contingent interests involved in the suit have . . . become vested; or, where such interests have, by the occurrence of new facts, devolved upon other persons, such enlarged interests or new parties should be brought before the court by a supplemental bill.

LILE, *supra* note 34, at 55.

39 28 U.S.C. § 1367(b) (2018).



## II. EQUITY AND ANCILLARY JURISDICTION

In formative cases during the last forty years in which the Court has evaluated the existence of supplemental jurisdiction, the plaintiffs brought suits at law. *Gibbs, Finley, Owen, Exxon Mobil*, all were cases in which the plaintiff(s) sought a judgment for money against specified defendants. But even as it narrowed access to pendent-party jurisdiction in *Finley*, the Court acknowledged that the doctrine of ancillary jurisdiction in equity allowed the joinder of claims by nondiverse parties.<sup>40</sup> This Part explores the equitable roots of ancillary jurisdiction and then considers how the doctrine's submersion in statutory supplemental jurisdiction has made it come to seem inaccessible in cases like *Griffin v. Lee*.

Nineteenth-century federal courts took the view that jurisdiction over the disposition of property brought before the court was exclusive.<sup>41</sup> That meant that state courts had no power to hear overlapping claims to the same property.<sup>42</sup> Exclusivity, in turn, demanded some expansion of the scope of the litigation, to protect the interests of those with a competing demand on the property. Building on the distinction between original and ancillary bills in equity, the Supreme Court developed a jurisprudence of ancillary jurisdiction.<sup>43</sup> Once a federal court secured original jurisdiction over a dispute between diverse parties that brought property before the court for administration—a trust or a railroad, say—the court had jurisdiction to hear a range of ancillary bills to that property. Equitable receiverships, a nineteenth-century alternative to bankruptcy jurisdiction, grew out of this conception of federal equitable priority and necessarily expanded to encompass closely related claims.<sup>44</sup>

Federal courts, sitting in equity, deployed ancillary jurisdiction to broaden their power to hear claims related to the property at the heart of the litigation. True, the requirements of diversity of citizenship fully

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40 See *Finley v. United States*, 490 U.S. 545, 551 (1989).

41 See *Hagan v. Lucas*, 35 U.S. (10 Pet.) 400, 403 (1836) (explaining that property, having been brought before a state court through levy, was immune from federal process).

42 See *Covell v. Heyman*, 111 U.S. 176, 184 (1884) (attachment by a federal marshal barred a subsequent replevin action in state court).

43 On the nature of an original writ of injunction, brought to enable the equitable plaintiff to set up an equitable defense to enforcement at law, see James E. Pfander & Nassim Nazemi, *Morris v. Allen and the Lost History of the Anti-Injunction Act of 1793*, 108 NW. U. L. REV. 187, 190–91, 229–35 (2014).

44 For an account of the equitable receivership and the role of equity in both setting up the estate's administration, in blocking competing litigation in state courts, and in expanding the scope of the litigation unit to include ancillary or auxiliary bills, see James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1, 28–31 (2013).

applied to the original proceeding. But as the Court explained in *Krippendorf v. Hyde*, where an original suit places property within the control of a federal court, “common justice” entitles other claimants to secure a remedy “equal and adequate” to that available in state court had the underlying action been filed there.<sup>45</sup> The federal court may do so through “the exercise of the inherent and equitable powers of the court in auxiliary and dependent proceedings incidental” to the original litigation.<sup>46</sup> These inherent powers exist so that “every court of justice” can “control its own process so as to prevent and redress wrong.”<sup>47</sup> In short, the federal court has a “duty . . . to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession, so as to defend and preserve its jurisdiction.”<sup>48</sup> The elements of diversity jurisdiction did not govern access to court for these auxiliary and dependent proceedings.

To see these ideas in action, consider their application in *Krippendorf* itself. Litigation began with a proceeding at law for breach of contract.<sup>49</sup> Hyde brought suit against Frey & Maag, a configuration that satisfied the requirements of diversity, but Krippendorf possessed the property that was attached at the outset of the proceeding and claimed to be its rightful owner.<sup>50</sup> Krippendorf posted a bond to secure release of the property from Hyde’s attachment.<sup>51</sup> When Hyde succeeded on the merits of the contract claim against Frey & Maag, Krippendorf paid the value of the bond to the marshal.<sup>52</sup> Yet Krippendorf still claimed the property (as now reflected in the proceeds of the bond) and brought a bill in equity naming the marshal and all other claimants to the fund.<sup>53</sup> The lower court would have remitted Krippendorf to a remedy at law, but the Supreme Court concluded on appeal that a bill in equity was the proper mode of

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45 110 U.S. at 281–82; see also Edward C. Eliot, *Interventions in the Federal Courts*, 31 AM. L. REV. 377, 378–79 (1897) (noting that, where property was in the possession of the federal court, it was “regarded as necessary to the integrity of the Federal courts, exercising as they do a concurrent jurisdiction with the State courts,” to “entertain applications of persons who may have rights in and about the subject-matter, and to give them full, complete and adequate remedies”) (citing *Gumbel v. Pitkin*, 124 U.S. 131 (1888)).

46 *Krippendorf*, 110 U.S. at 282; see also Eliot, *supra* note 45, at 379 (noting that the exercise of jurisdiction over intervening parties “is ancillary and auxiliary to the primary jurisdiction conferred by the proper institution of the original suit”).

47 *Krippendorf*, 110 U.S. at 282.

48 *Id.* at 283.

49 *Id.* at 276.

50 *Id.*

51 *Id.* at 276–77.

52 *Id.* at 277.

53 *Id.*

seeking to press a claim to the proceeds of the bond as against the many other creditors of Feit and Maag.<sup>54</sup>

In reinstating Krippendorf's equitable proceeding, the Court explained that Krippendorf had a right to protect his interest in the proceeds of the bond by bringing an ancillary bill in equity.<sup>55</sup> The Court first concluded that the principles of equity allowed the exercise of ancillary jurisdiction even where the initial proceeding (by Hyde) was brought in law rather than at equity.<sup>56</sup> That conclusion required a further innovation. Instead of treating Krippendorf's original bill in equity as the measure of the parties' configuration for diversity purposes, the Court explained that the bill operated as an ancillary petition to participate in a pending cause over which the lower court had already secured jurisdiction.<sup>57</sup> In other words, while Krippendorf's petition might have been styled "an original bill in equity,"<sup>58</sup> federal courts were to regard the bill as an intervening petition, redesignated as "ancillary," and to allow the claim to be heard.<sup>59</sup> The rules governing diversity jurisdiction did not apply to such ancillary bills,

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54 *Id.*

55 *Id.* at 287.

56 *See Freeman v. Howe*, 65 U.S. (24 How.) 450, 460 (1861) ("The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.").

57 As the Court explained,

The bill in this case is not to be treated as an original bill in equity, for, as such, it could not be maintained. It is altogether ancillary to the principal action at law . . . and should be regarded as merely a petition in that cause, or dependent upon it and connected with it, as a petition *pro interesse suo*, or of intervention in an equity or an admiralty suit, asserting a claim to property or a fund in court, the subject of the litigation, which, owing to the peculiar relations between the courts of the States and of the United States, is a necessary resort to prevent a failure of justice . . . .

*Krippendorf*, 110 U.S. at 284–85.

58 *Id.* at 285. "The *Original Bill* is the first pleading filed by the plaintiff." LILE, *supra* note 34, at 38. All subsequent bills are "*Bills not Original*." *Id.*

59 *See Bray & Miller*, *supra* note 1, at 1787 ("[F]rom equity's inception . . . grievances were entertained in equity entirely outside of the ambit of law and its institutional apparatus, and . . . any relief that might be awarded would be extralegal . . . . Complainants were *not* understood to bring an action at law precisely because they had no recourse or inadequate recourse at law. Instead, and consistent with equity's origins in exercise of prerogative powers of the crown, statements of grievances were referred to as *petitions*, persons bringing them as *petitioners* . . ."); Eliot, *supra* note 45, at 380 (noting that, even where an intervenor sought only to assert a legal claim or defense, "he might bring what would ordinarily be called an original bill in equity" and that "such bill in equity will be regarded by the court as ancillary to the original suit and judgment, and not dependent upon conditions which might be required to give the court original or initial jurisdiction").

meaning that Krippendorf was free to name co-citizens whose claims to the fund before the lower court did not satisfy the statutory threshold.

Given the procedural niceties in Krippendorf, one can easily see why the federal courts struggled to decide when to allow a nondiverse party to intervene in an action (as an ancillary matter of right) and when to do so only permissively.<sup>60</sup> These complicating niceties would soon bedevil the federal rule-makers, tasked as they were to frame the judicial inquiry into equity and good conscience that has shaped our notions of when intervention might overcome jurisdictional hurdles. Perhaps not surprisingly, claims to property that had been brought before the court came to occupy a preferred place in the intervention hierarchy. A perception that disposition of competing claims to property might prejudice an absentee encouraged expansive notions of intervention as of right; ancillary jurisdiction evolved alongside intervention of right to facilitate unitary distribution of contested property.<sup>61</sup>

As a subset of these property-before-the-court matters, claims by lawyers to secure payment of their fees from proceeds in the court's control have long been thought to fall within a federal court's ancillary jurisdiction.<sup>62</sup> Of course, one might frame the attorney's claim either

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60 *Krippendorf*, 110 U.S. at 284 (“This court has uniformly resisted the tendency to confuse the boundaries of law and equity in its procedure, and maintained the distinction between the two systems, so deeply imbedded in our jurisprudence; and in the present instance, is not to be considered as departing from the consistent course of precedents in which that distinction has been maintained.”).

61 One can see these ideas at work in other jurisdictional contexts. In *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921), the Court concluded that the citizenship of a class comprising members of a beneficial society was to be determined by reference to the citizenship of the named class representative. That venerable rule, developed in equity, has now taken root in class actions brought under Rule 23(b)(3) to recover relief at law in the form of money damages. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 560 (2005) (assuming without deciding that the citizenship of the plaintiff class in a Rule 23(b)(3) proceeding was determined by reference to that of the class representative). The *Ben-Hur* Court justified this result with ancillary jurisdiction concepts; having acquired jurisdiction over a dispute over the proposed restructuring of shares in a beneficial membership association, the lower court could exercise jurisdiction over all members of the class without regard to their state of citizenship. *Ben-Hur*, 255 U.S. at 366. For doubts that equitable constructs of ancillary jurisdiction extend into the legal context of the Rule 23(b)(3) suit for damages, see James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CALIF. L. REV. 1423, 1454–59 (2007).

62 While ancillary proceedings often entailed a claim to property brought before the court, ancillary jurisdiction was recognized in the absence of any such property. See, e.g., *Dewey v. West Fairmont Gas Coal Co.*, 123 U.S. 329, 332–33 (1887) (bill in equity against nondiverse defendant, the plaintiff at law, allowed in contract dispute) (citing *Krippendorf*, 110 U.S. 276); *Partridge v. The Ins. Co.*, 82 U.S. (15 Wall.) 573 (1873) (set-off allowed); see also WRIGHT ET AL., *supra* note 23, § 3523 (discussing exercise of ancillary jurisdiction in the

as a petition to intervene<sup>63</sup> or as a motion to impress a lien on assets in the court's control.<sup>64</sup> Under the nineteenth century's dispensation, federal courts looked to state procedures to govern suits for damages; controlling state procedural rules would often promise a right to intervene<sup>65</sup> and would secure payment by way of a lien on any ultimate judgment or settlement.<sup>66</sup> In equity, federal courts did not look to state law; federal equity practice governed the attorney's motion for payment of fees.<sup>67</sup> Courts justified their imposition of a lien on any

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absence of property under court control); Eliot, *supra* note 45, at 380. The same was true in ancillary proceedings for attorneys' fees, which can proceed other than as a claim to property before the court. *See, e.g.,* Dean v. Holiday Inns, Inc., 860 F.2d 670 (6th Cir. 1988) (rejecting attorney's attempt to challenge jurisdiction on diversity grounds after he successfully intervened to recover attorneys' fees in an underlying tort action and was disappointed with the result); Eikel v. States Marine Lines, Inc., 473 F.2d 959 (5th Cir. 1973) (allowing diversity-destroying attorney to join litigation where two other attorneys had sued a corporation *in personam*); Iowa v. Union Asphalt & Roadcoils, Inc., 409 F.2d 1239 (8th Cir. 1969) (in an antitrust action, affirming the district court's power to take ancillary jurisdiction over attorneys' fees dispute that arose during the underlying litigation); Maddox v. Jinkens, 88 F.2d 744 (D.C. Cir. 1936) (where the underlying dispute was one of contract, allowing attorney to sue in equity in an ancillary proceeding where he was otherwise entitled to sue at law).

63 *See* James Wm. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 584 (1936) ("A petitioner claiming a contingent fee was said to have a like right of intervention in an accounting suit upon the theory of a lien on the fund in court.").

64 *See* Wilkinson v. Tilden, 14 F. 778, 780–81 (C.C.S.D.N.Y. 1883) (in a suit at equity, and on the attorney's *motion*, placing a lien on any recovered funds—by decree or settlement—to cover a dismissed attorney's contingency fee prior to allowing substitution of counsel); Isaacs v. Abraham, 13 F. Cas. 151, 151 (C.C.D. Mass. 1878) (No. 7,094) (noting that "substitution of solicitors in equity is made on motion, . . . granted as a matter of course, [but] subject to the lien of the former solicitors").

65 In the nineteenth century, "Congress had provided that, for actions at law, the federal courts would apply the procedural rules of the states in which they sat." Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 244 (2000). And "in nearly all states, either by a general statute on intervention, specific statutes, or judicial decisions, a third person [could] intervene . . ." Moore & Levi, *supra* note 63, at 576; *see also* Caleb Nelson, *Intervention*, 106 VA. L. REV. 271, 308 (2020). Lee pursued intervention by relying on Louisiana law. Letter Brief for Appellee, Griffin v. Lee, 621 F.3d 380 (2010), (No. 09-30734), 2010 WL 5066838, at \*2 (explaining that intervention was predicated on "Louisiana law pertaining to the making and enforcement of contingency fee contracts in exchange for legal representation").

66 *See* Wilkinson, 14 F. at 780–81.

67 *See* Moore & Levi, *supra* note 63, at 578–81. Equity Rule 37 stated, in relevant part, that "[a]nyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." LILE, *supra* note 34, at 241; *see also* Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U.S. 53, 59 (1935).

fund generated by decree or settlement by invoking their duty to protect attorneys as “officers of the court.”<sup>68</sup>

The decision of the drafters of the Federal Rules to fashion a single civil action in 1938, merging law and equity, does not appear to have had much impact on the willingness of federal courts to exercise ancillary jurisdiction over intervening parties.<sup>69</sup> By the 1930s, following the rationale espoused in leading cases,<sup>70</sup> lower federal courts consistently allowed lawyers to present fee petitions, taking the position that they were entitled to intervene and that the courts’ ancillary jurisdiction extended to such petitions regardless of the parties’ citizenship.<sup>71</sup> The drafters of Rule 24 captured the idea with a distinction between intervention of right and permissive intervention.<sup>72</sup> In an insightful account of these developments, Caleb Nelson notes the connection between intervention of right and ancillary jurisdiction; he explains that courts operating under the 1938 Rules tended to characterize some interventions as of right to ensure the presumptive availability of ancillary jurisdiction that was thought to follow.<sup>73</sup> Whatever those dynamics, federal courts applying the new rules after 1938 broadly understood that their ancillary jurisdiction

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68 *Sloo v. Law*, 22 F. Cas. 365, 365 (C.C.S.D.N.Y. 1859) (No. 12,958); *see also* *Bd. of Supervisors v. Brodhead*, 44 How. Pr. 411, 417 (N.Y. Sup. Ct. 1873) (“[An attorney] is an officer of the court, subject to its summary control, and entitled to its protection.”).

69 *Moore & Levi*, *supra* note 63, at 579–80 (noting that, while the Law and Equity Act of 1915 failed to authorize intervenors to present equitable defenses or counterclaims in actions at law, courts could “treat the equitable claim as though it were an ancillary bill in equity, dependent upon the main action as to jurisdiction, but independent in other respects”). *Moore & Levi* assumed that the problem of statutory authorization regarding the distinct domains of law and equity would “become purely academic” after the impending merger. *Id.* at 580.

70 *See, e.g.*, *Barnes v. Alexander*, 232 U.S. 117, 118–19 (1914) (upholding propriety of awarding fees to departing attorney as a condition of permitting client to change counsel in the course of litigation). *Barnes* itself arose in a territorial federal court and did not present jurisdictional issues.

71 *See, e.g.*, *Maddox v. Jinkens*, 88 F.2d 744 (D.C. Cir. 1936) (affirming ancillary equitable power to award attorneys’ fees even where the attorney could also have sued at law); *Wallace v. Fiske*, 80 F.2d 897, 901–02 (8th Cir. 1935) (allowing ancillary petition for attorneys’ fees after final conclusion of appeals on administration of estate, noting that the petition was “in no proper sense a separate and distinct suit”); *Woodbury v. Andrew Jergens Co.*, 69 F.2d 49, 50 (2d Cir. 1934) (finding that there was “no doubt” that a petition for attorneys’ fees was “strictly ancillary to the main suit” and was therefore “independent of the citizenship of the parties”); *Musica v. Prentice*, 211 F. 326 (5th Cir. 1914) (denying ancillary jurisdiction to award intervening attorneys’ fees because the fees were unrelated to the underlying action).

72 *Appel*, *supra* note 65, at 246. Since *Moore* was actually part of the Advisory Committee, his research with *Levi* “provided the template for what [would become]” Rule 24. *Nelson*, *supra* note 66, at 312–14; *see also* 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* § 1920 (3d ed. 2007).

73 *See Nelson*, *supra* note 66, at 316.

extended to petitions seeking to collect attorneys' fees from property in the court's actual or constructive control.<sup>74</sup>

### III. EQUITY AND § 1367

Enter § 1367 in 1990. Subsection (a) provides for the exercise of supplemental jurisdiction over claims so related to those in a civil action within the district court's original jurisdiction as to form a single constitutional case within the meaning of Article III.<sup>75</sup> All hands agree

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74 See, e.g., *Cluett, Peabody & Co. v. CPC Acquisition Co.*, 863 F.2d 251, 256 (2d Cir. 1988) ("It is well settled that '[a] federal court may, in its discretion, exercise ancillary jurisdiction to hear fee disputes . . . between litigants and their attorneys when the dispute relates to the main action.") (quoting *Rosenman Colin Freund Lewis & Cohen v. Richard*, 600 F. Supp. 527, 531 (S.D.N.Y. 1984)); *Dean v. Holiday Inns, Inc.*, 860 F.2d 670, 671–72 (6th Cir. 1988) (holding that, where attorneys intervened under Rule 24 to seek attorneys' fees and later challenged jurisdiction because they were unhappy with the result, the original suit's satisfaction of diversity jurisdiction could not be defeated by a nondiverse attorney intervening under Rule 24); *Taylor v. Kelsey*, 666 F.2d 53, 54 (4th Cir. 1981) (per curiam) (affirming denial of ancillary jurisdiction over attorneys' fees dispute where the dispute "did not arise as a matter of necessity from" the underlying litigation and the court lacked control of funds necessary "to establish and distribute a fee"); *Williams v. Alioto*, 625 F.2d 845, 848 (9th Cir. 1980) (noting that claims on motion for "attorneys' fees ancillary to the case survive independently under the court's equitable jurisdiction, and may be heard even though the underlying case has become moot"); *Grimes v. Chrysler Motors Corp.*, 565 F.2d 841, 844 (2d Cir. 1977) (allowing multiple plaintiff's attorneys to intervene to resolve a fee dispute against a settlement fund despite a lack of diversity between the attorneys and an absence of factual relatedness to the underlying diversity suit); *Iowa v. Union Asphalt & Roadoils, Inc.*, 409 F.2d 1239, 1244 (8th Cir. 1969) (affirming district court power over attorneys' fees dispute "as ancillary to its jurisdiction over the principal action"); *Bounougias v. Peters*, 369 F.2d 247, 249–50 (7th Cir. 1966) (rejecting exercise of ancillary jurisdiction over attorneys' fees intervention where the underlying litigation "was completely terminated" and final judgment had been "satisfied and distributed" prior to the attempted intervention such that "no property connected" to the fee dispute remained in court control); *Nat'l Equip. Rental Ltd. v. Mercury Typesetting Co.*, 323 F.2d 784, 786 (2d Cir. 1963) (granting interlocutory review over district court's decision to stay original proceedings until a dismissed attorney was paid and reversing because the attorney's claim was unrelated "to the matters still pending before the district court"); *Am. Fed'n of Tobacco-Growers, Inc. v. Allen*, 186 F.2d 590, 592 (4th Cir. 1951) (per curiam) (rejecting the need for diversity in attorneys' fees interventions and relying on constructive control of a settlement fund to justify intervention of right where the "attorney who alleges that he has been mistreated is an officer of the court"); *Moore Bros. Constr. Co. v. City of St. Louis*, 159 F.2d 586, 588 (7th Cir. 1947) (allowing intervention against diversity and noting that the suit's original parties "were both entitled to have" the attorneys' liens "determined in the main proceeding, without being subjected to the further state court litigation"); see also *Richard A. Matasar, Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1475–77 (1983) (discussing how federal courts have "exercised jurisdiction over attorney's fee disputes arising during or after the resolution of federal cases when the fee disputes are factually unrelated to the main federal case").

75 28 U.S.C. § 1367(a) (2018).

that the provision codifies expansive conceptions of pendent and ancillary jurisdiction and expressly authorizes the joinder of new parties to supplemental claims.<sup>76</sup> The statute thus provides a framework for pendent-claim and -party jurisdiction, overruling *Finley*, and authorizes the exercise of various forms of ancillary jurisdiction, including those listed in *Owen Equipment v. Kroger* as uncontroversial: impleader, cross-claims, and counterclaims.<sup>77</sup>

Of course, much of the controversy has focused on subsection (b), which attempts to ward off the exercise of supplemental jurisdiction in specified situations in which it would threaten the rules of complete diversity.<sup>78</sup> Thus, in diversity proceedings, subsection (b) forecloses the exercise of supplemental jurisdiction over claims by *plaintiffs* against persons made parties under Rules 14, 19, 20, and 24 and claims by persons proposed for joinder as *plaintiffs* under Rule 19 or persons seeking to intervene as plaintiffs under Rule 24. But these limits come into play only when exercising jurisdiction “would be inconsistent with” the rules of diversity jurisdiction.<sup>79</sup>

In adopting tailored restrictions on supplemental jurisdiction in diversity, Congress seemingly had in mind the *Owen Equipment v. Kroger* scenario and other end-runs around complete diversity. That explains the statute’s focus on claims by *plaintiffs* against newly joined parties; ancillary jurisdiction might extend, say, to the impleader of a third-party defendant but would not extend to the plaintiff’s claim against that third-party defendant, especially one who was (as in *Kroger*) waiting in the wings. The same was apparently true when plaintiffs wait in the wings and then seek intervention. One example of such wing-waiting intervention appeared in the materials on which Congress relied in drafting the statute.

Those materials called attention to a case, *Drumright v. Texas Sugarland*, in which intervention played a role quite like that in *Kroger v. Owen Equipment*.<sup>80</sup> In *Drumright*, the district court first dismissed a

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76 See *supra* note 5.

77 See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 n.18 (1978). It may not be amiss to observe that these forms of ancillary jurisdiction arose in equity. See *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 609–10 (1926) (recognizing ancillary jurisdiction over counterclaim under Equity Rule 30); *Freeman v. Howe*, 65 U.S. (24 How.) 450, 460 (1861) (“The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.”).

78 28 U.S.C. § 1367(b) (2018).

79 *Id.*

80 See *Drumright v. Tex. Sugarland Co.*, 16 F.2d 657 (5th Cir. 1927). On *Drumright*’s importance to the drafters of § 1367, see H.R. REP. NO. 101-734, at 29 n.18 (1990) (noting



bill in equity because one of the two plaintiffs was nondiverse.<sup>81</sup> After the action was re-filed as reconfigured to omit the jurisdictional spoiler, the omitted plaintiff filed a motion to intervene, invoking the court's ancillary jurisdiction.<sup>82</sup> The Fifth Circuit upheld the district court's decision approving ancillary jurisdiction, reasoning that the omitted plaintiff was a proper party to intervene even if not indispensable.<sup>83</sup> It was the disparate treatment of the omitted plaintiff under Rule 24 and Rule 19 that Congress sought to foreclose when ending the so-called Rule 19/Rule 24 anomaly. Why foreclose jurisdiction over claims by nondiverse plaintiffs deemed indispensable only to allow it over claims by those who can thread the intervention needle?<sup>84</sup>

Whatever one might say about the threat to complete diversity posed by intervening plaintiffs in cases such as *Drumright*, no such threat appears in a case like *Griffin v. Lee*. The attorney was, as we have seen, pursuing a claim to his fee after having withdrawn from the representation.<sup>85</sup> Unlike the omitted plaintiff in *Drumright*, Lee had no legal claim against the trustee (Chase) or against the individual defendants from Louisiana.<sup>86</sup> He was not waiting in the wings, invoking the district court's supplemental jurisdiction to join as an intervening plaintiff in a claim against nondiverse defendants. His beef was with his former client and his motion sought payment of fees

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desire to end the Rule 24/19 anomaly as described in 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1917, at 472–81 (2d ed. 1986) (discussing *Drumright* as a leading illustration of the anomaly)). See generally Richard D. Freer, Essay, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 476–78 (1991) (coining the term Rule 24/19 anomaly and urging an expansion of jurisdiction to treat joinder under both Rules the same way).

81 See *Drumright*, 16 F.2d at 657.

82 See *id.*

83 See *id.* at 658.

84 See 1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 567–68 (1990) (“In civil actions under § 1332 of this Title, jurisdiction shall not extend . . . to claims by parties who intervene under Rule 24(b) . . .”). The Committee found that interventions of right “involve less danger that claimants have connived to sidestep the complete diversity rule” and that “the ordinary presumption in favor of supplemental jurisdiction” should therefore apply. *Id.* at 551–52. The concern with conniving side-steps best explains the terms of subsection (b) and its focus on plaintiffs who would use supplemental jurisdiction to evade the complete diversity requirement.

85 Notably, Griffin hired successor counsel and signaled his unwillingness to honor Lee's fee, thus bringing the fee dispute squarely within the ancillary jurisdiction of the district court. See Letter Brief of Appellee, *supra* note 65, at 14 (describing Griffin as having constructively discharged Lee by falsely denying the terms of Griffin's settlement with Chase and wrongly insisting that Lee lie in turn in an effort to abrogate the agreement).

86 See *Griffin v. Lee*, 621 F.3d 380, 383 (5th Cir. 2010) (per curiam).

from trust proceeds of which the district court had taken supervision.<sup>87</sup> Such a classically protective or defensive invocation of supplemental jurisdiction to secure the payment of an attorney's fee from property in the control of the court does not arise until the litigation (between diverse parties) in the main case has created a fund for distribution. That explains why federal courts had long agreed to assert ancillary jurisdiction over such claims, recognizing that they pose no threat to the complete diversity requirement.

While the statute does not specify that its restrictions apply to situations in which nondiverse plaintiffs "wait in the wings," federal courts have understood the provisions of § 1367(b) in precisely these terms.<sup>88</sup> Writing for the Seventh Circuit in *Aurora Loan Services v. Craddieth*, Judge Posner explained that the provision seeks "to prevent a two-step evasion of the requirement of complete diversity of citizenship by a person who, being of the same citizenship as the defendant, waits to sue until a diverse party with which it is aligned sues the defendant, and then joins the suit as an intervening plaintiff."<sup>89</sup> In other words, § 1367(b) seeks to foreclose the result in *Drumright*, "prevent[ing] *original* plaintiffs . . . from circumventing the requirements of diversity."<sup>90</sup> When the intervening party's interest arises in the course of litigation, the Seventh Circuit found that intervention poses no threat to complete diversity.<sup>91</sup> The statute's focus on plaintiffs who would have destroyed federal jurisdiction had they joined a suit at its outset "has no application to a party forced to intervene to protect an interest that arose during the course of a federal litigation in which he had no stake at the outset."<sup>92</sup> Other circuits have followed Posner's approach.<sup>93</sup>

Indeed, in a case on nearly all fours with *Griffin*, a thoughtful Sixth Circuit decision found that the equitable tradition of extending ancillary jurisdiction to the fee claims of departing attorneys had not been displaced by the language of § 1367(b). In *Exact Software v.*

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87 *See id.*

88 *See Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1025 (7th Cir. 2006) (asking whether at the time the complaint was filed, "a claimant [is] lurking in the wings").

89 *Id.*

90 *Id.* (quoting *Viacom Int'l, Inc. v. Kearney*, 212 F.3d 721, 726–27 (2d Cir. 2000)).

91 *See id.*

92 *Id.*

93 *See PTA-FLA, Inc. v. ZTE USA, Inc.*, 844 F.3d 1299, 1311 (11th Cir. 2016); *Karsner v. Lothian*, 532 F.3d 876, 884 (D.C. Cir. 2008). One finds Judge Posner's approach anticipated to some extent in *Krippendorf v. Hyde*, 110 U.S. 276, 285 (1884), which explained that courts should focus less on "the rules of equity pleading" and more on whether the claim in question "is to be considered entirely new and original, in the sense which this court has sanctioned, with reference to the line which divides the jurisdiction of the federal courts from that of the State courts."

*DeMoisey*, Judge Sutton drew on the history of ancillary jurisdiction over fee questions in concluding that the attorney's motion to recover his fee on the way out of the litigation was properly cognizable in a diversity proceeding without regard to his citizenship.<sup>94</sup> Judge Sutton described the practice of ancillary jurisdiction as longstanding, he explained that Congress would not lightly overturn so well-established a tradition, and he noted that the apparent purpose of the statutory limitation was to ward off evasions of the complete diversity requirement.<sup>95</sup> The fee dispute at the heart of the case did not implicate the statute's concern with evasion.

Some might worry that the reintroduction of equitable conceptions of ancillary jurisdiction to reach results like those in the Sixth and Seventh Circuits may tend to unsettle or at least muddy the clean lines that supposedly keep federal courts in their lane. Such a concern may have animated the Fifth Circuit in *Griffin* and may overlap with the perception that equitable discretion threatens the rule-of-law values of certainty and predictability.<sup>96</sup> We share the goal of jurisdictional clarity but do not believe that an embrace of ancillary concepts poses a threat to the rule of (jurisdictional) law. The structure of § 1367 suggests that Congress meant to broaden subject-matter jurisdiction in subsection (a), to narrow it slightly in subsection (b) to protect complete diversity, and to call for the exercise of judicial discretion in subsection (c) in the assessment of the wisdom of supplemental jurisdiction in particular cases. On our approach, ancillary jurisdiction concepts can help

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94 See *Exact Software N. Am., Inc. v. DeMoisey*, 718 F.3d 535, 542–44 (6th Cir. 2013).

95 *Id.* at 543–44. For confirmation, see *Herrmann v. Edwards*, 238 U.S. 107, 118 (1915) (prior judicial construction of national bank status as insufficient to confer federal question jurisdiction was not altered by passage of the 1911 Judicial Code because “the intention of Congress to make . . . so radical a change from the rule which had prevailed for so long a period is not to be indulged in without a clear manifestation of such purpose”); *Gay v. Ruff*, 292 U.S. 25, 31, 37 (1934) (discussing at length, per Justice Brandeis, statutory construction, arguing that a new statute or amendment to a statute must be read in context, that, when read in such context, “there arises at least a doubt whether Congress intended to give the words . . . the comprehensive meaning attributed to them,” and that in the 1916 Judicial Code, there is no evidence of congressional “intention to repeal any existing law or to depart from the long-existing policy of restricting the federal jurisdiction”); *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 145 (1941) (Reed, J., dissenting) (“The courts properly are hesitant to depart from literalism in interpreting a statute. Strong equities do induce departure from the ordinary course where the purpose of the Congress appears plain. It is hard to conceive of a statute, new or old, which has a meaning totally disassociated from supporting legislation or the body of adjudications within its ambit.”); *Shields v. Barrow*, 58 U.S. (17 How.) 130, 141 (1855) (choosing to construe a new statute, “so far as it touches suits in equity . . . to be no more than a legislative affirmance of the rule previously established by” Supreme Court decisions).

96 For an evaluation and ultimate rejection of these rule-of-law concerns with equity, see Matthew Harding, *Equity and the Rule of Law*, 132 L.Q. REV. 278, 279–80 (2016).

answer the jurisdictional questions in subsection (b) without displacing the discretionary analysis of equitable factors in subsection (c). Such an approach tracks that in *United Mine Workers v. Gibbs*<sup>97</sup> and aligns with the Court's own efforts to facilitate the more efficient resolution of disputes by narrowing jurisdictionality.<sup>98</sup>

### CONCLUSION

The supplemental jurisdiction statute was meant to solve a modest collection of problems, putting the federal courts in a position to consider fairness and convenience as they define the scope of litigation. The statute directly confers statutory authority, identified as missing in *Finley*, and otherwise confers a broad grant of jurisdiction. It directs the federal courts, in subsection (c), to bring judicial discretion (a hallmark of equity) to bear in deciding whether to allow certain legally permissible expansions of the litigation unit. Even subsection (b), which otherwise imposes limits, invites the federal courts to exercise judgment in testing jurisdictional expansions for "consistency" with the requirements of diversity. Although it does foreclose claims by those waiting in the wings, subsection (b) leaves ancillary jurisdiction intact.

In a statute that provides a framework for equitable assessments of jurisdictional expansion, federal courts go badly wrong if they bring a text-based, common-law mindset to the interpretation of subsection (b). Section 1367 does not define the scope of supplemental jurisdiction with the precision or prolixity of a tax code. Instead, by incorporating the requirements of original jurisdiction as the predicate for jurisdictional expansion, it contemplates continuity with the past.<sup>99</sup> Maintaining that continuity can be challenging; with its merger into a statutory grant of supplemental jurisdiction, the distinctive history of ancillary proceedings in equity has receded from view. But with patience and judgment and curiosity (all of which went

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97 See *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966) (distinguishing the question of jurisdictional power as one ordinarily resolved "on the pleadings" from district court's continuing authority to evaluate the wisdom of pendent-claim jurisdiction as the case progresses).

98 In a series of cases, the Supreme Court has taken a progressively narrower view of jurisdiction in part to avoid the disruptive consequences of jurisdictional characterizations and dismissals. See, e.g., *Henderson v. Shinseki*, 562 U.S. 428, 434–35 (2011). See generally Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2030 (2015).

99 For an account of a similar problem with excessive textualism in the interpretation of the bankruptcy code, see Kull, *supra* note 1, at 1805 (citing *In re Omegas Group*, 16 F.3d 1443 (6th Cir. 1994), as a "notorious" example of a court's refusing to recognize a constructive trust on the ground that it had not been authorized by statute).

missing in *Griffin*), federal courts can yet recover the qualities of equity jurisprudence that gave rise to ancillary jurisdiction. With their power to adjudicate restored, federal courts might well attend to the discretionary considerations in subsection (c) as they take up the responsibility for fashioning the jurisdictional policy with which Congress entrusted them.

