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THREE FACES OF SUPPLEMENTAL JURISDICTION AFTER THE DEMISE OF *UNITED MINE WORKERS v. GIBBS*

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I. INTRODUCTION

In *United Mine Workers v. Gibbs*,[1] the Supreme Court rejected the narrow "cause of action" test announced in *Hurn v. Oursler*[2] for what was then termed pendent-claim jurisdiction in favor of a broader "common nucleus of operative fact" standard.[3] In subsequent cases, the Court in dicta implied, without deciding, that the same standard might govern other extensions of federal court jurisdiction to non-diverse state law claims incident to federal question or diversity claims falling within Article III of the U.S. Constitution in the related but distinct contexts of "pendent party" and "ancillary"[4] jurisdiction.[5] Meanwhile, cases in the lower courts tended

1. 383 U.S. 715 (1966).
2. 289 U.S. 238 (1933).
3. *Gibbs*, 383 U.S. at 725.
4. Before the enactment of the supplemental-jurisdiction statute, Judicial Improvements Act of 1990 § 310, 28 U.S.C. § 1367 (2000), the term "pendent claim" jurisdiction was used to refer to the power of a federal court to exercise subject matter jurisdiction over a state law claim brought by a plaintiff against a non-diverse defendant against whom the plaintiff had also asserted a federal claim. The term "pendent party" jurisdiction referred to federal court jurisdiction over a non-jurisdictional claim included in the original complaint by additional plaintiffs or against additional defendants joined under Rule 20 of the Federal Rules of Civil Procedure incident to the court's jurisdiction over a claim falling within federal jurisdiction. The term "ancillary" jurisdiction referred to a federal court's power over non-jurisdictional claims asserted by defending parties or by or against additional parties subsequent to the filing of the original complaint. *See generally* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3567–67.2 (2d ed. 1984 & Supp. 2007); C. Douglas Floyd, *The ALI, Supplemental Jurisdiction, and the Federal Constitutional Case*, 1995 BYU L. REV. 819, 827–57 [hereinafter Floyd, *Supplemental Jurisdiction*]; Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 447–48 (1991).
5. *See, e.g.*, Finley v. United States, 490 U.S. 545, 549 (1989), *superceded by statute*,

to equate the *Gibbs* standard with the "same transaction or occurrence" joinder standard that pervades the Federal Rules of Civil Procedure.[6]

The 1990 supplemental-jurisdiction statute included these three previously distinct doctrines under a single rubric, termed "supplemental jurisdiction."[7] The statute extends supplemental jurisdiction, in all joinder contexts, to non-jurisdictional state law claims that "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy" under Article III.[8]

The House Report accompanying the 1990 statute shows that the drafters of the statute assumed that the "same case or controversy" language of the statute would be interpreted in consonance with the standard for pendent jurisdiction established by *Gibbs*.[9] *Gibbs* itself appeared to equate its "common nucleus of operative fact" standard for pendent-claim jurisdiction with the scope of Article III. The Court stated:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ," and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in the federal courts to hear the whole.[10]

Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310(a), 104 Stat. 5089, 5113–14 (codified at 28 U.S.C. § 1367 (2000)); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 371–73 (1978), *superceded by statute*, § 310(a), 104 Stat. at 5113–14; Aldinger v. Howard, 427 U.S. 1 (1976), *superceded by statute* § 310(a), 104 Stat. at 5113–14.

6. *See infra* note 115.

7. *See* 28 U.S.C. § 1367.

8. *See id.* § 1367(a). The statute excludes certain exercises of supplemental jurisdiction otherwise falling within this broad authorization in diversity cases. *See id.* § 1367(b).

9. *See infra* note 123 and accompanying text.

10. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (alterations in original) (citations and footnote omitted) (quoting U.S. CONST. art III, § 2). The Court subsequently restricted the principle of *Gibbs* in *Finley v. United States*, 490 U.S. 545 (1989), on the ground that whatever justification the Court might have had for fashioning its own principles of pendent-claim jurisdiction, it would not extend the same principle to exercises of pendent-party jurisdiction absent express congressional authorization. *Id.* at 556. Although the Court characterized *Gibbs* in

Nevertheless, *Gibbs* did not inherently present the constitutional issue of how broadly statutory- or rules-based joinder provisions might reach to encompass non-diverse state law claims within the same Article III "case" or "controversy" as claims falling independently within federal subject matter jurisdiction. Instead, *Gibbs* can be viewed as nothing more than an interpretation of the statutes conferring original federal court jurisdiction or a federal common-law decision defining the scope of supplemental jurisdiction that federal courts may exercise absent explicit congressional authorization.

The enactment of the 1990 supplemental-jurisdiction statute—in which Congress expressly authorized the federal courts to exercise supplemental jurisdiction to the full extent permitted by Article III—directly posed the previously unanswered question whether the *Gibbs* "common nucleus" standard was indeed constitutionally based, or instead failed to exhaust the full constitutional scope of federal subject matter jurisdiction over non-diverse state law claims joined with claims falling within the limited categories of federal subject matter jurisdiction enumerated in Article III. Put another way, the statute signaled the demise of *Gibbs* as the central focus of supplemental-jurisdiction analysis and instead mandates direct consideration of the requirements of the Constitution itself. Following the statute's enactment, however, the main areas of controversy did not focus on this bedrock issue but rather on puzzling omissions and inconsistencies that inhered in the statute's exclusion of certain types of claims in diversity actions.[11] The Supreme Court recently resolved some of the statutory

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constitutional terms, that conclusion was unnecessary to the Court's decision and its rationale provides inferential support for the view that *Gibbs* rested on a federal common-law foundation rather than on the Constitution itself.

In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 553 (2005), the Court again suggested that *Gibbs* was constitutionally based. Again, the suggestion was unnecessary to its decision. *See infra* notes 181, 233.

11. Section 1367(b) of the supplemental-jurisdiction statute provides:

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

28 U.S.C. § 1367(b). For a spirited discussion regarding § 1367, see the following *Emory Law Journal* articles containing an exchange between Professors Richard D. Freer and Thomas C. Arthur, who criticize the statute, and Professors Thomas D. Rowe, Jr., Stephen B. Burbank, and Thomas M. Mengler, who defend it: Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt*

ambiguities with its decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.*[12] Nonetheless many other issues remain unresolved, and neither *Allapattah* nor any other decision of the Supreme Court has directly addressed the constitutional issue just described.

In recent years, however, decisions in the courts of appeals and renewed scholarly commentary have turned to the constitutional issue arising from the enactment of the supplemental-jurisdiction statute.[13] The immediate occasion for this development has been the long-standing question whether supplemental jurisdiction over permissive counterclaims asserted under Rule 13(b) of the Federal Rules of Civil Procedure[14] may exist even though, by definition, those claims do not arise out of the "same transaction or occurrence" as the plaintiff's original claim. The long-prevailing understanding—with some discordant notes—was that such claims, because of the absence of a sufficient transactional relationship with the plaintiff's claim, fell outside the supplemental jurisdiction of the court and required an independent basis for jurisdiction.[15] An exception to this general understanding was recognized where the permissive counterclaims were asserted only defensively by way of set-off and not as a basis for affirmative recovery.[16] Despite this history, several recent

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Straws: The Disaster of the Supplemental Jurisdiction Statute, 40 EMORY L.J. 963 (1991) [hereinafter Arthur & Freer, *Grasping at Straws*]; Thomas C. Arthur & Richard D. Freer, *Close Enough for Government Work: What Happens When Congress Doesn't Do Its Job*, 40 EMORY L.J. 1007 (1991); Freer, *supra* note 4; Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991); Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991).

12. 545 U.S. 546 (2005). In *Allapattah*, the Supreme Court concluded "that the threshold requirement of § 1367(a) is satisfied in cases, like those now before us, where some, but not all, of the plaintiffs in a diversity action allege a sufficient amount in controversy." *Id.* at 566. The Court further concluded that the plain language of § 1367(b) failed to exclude supplemental jurisdiction over such claims by plaintiffs joined under Rules 20 or 23 of the Federal Rules of Civil Procedure. *Id.* at 565–66. Inconsistently, the Court concluded that the statute preserved the long-standing complete-diversity requirement in that same context. *See id.* at 553–54.

13. *See, e.g.*, Jones v. Ford Motor Credit Co., 358 F.3d 205, 212–13 (2d Cir. 2004) (discussing supplemental jurisdiction under *Gibbs* and § 1367); Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385–86 (7th Cir. 1996) (concluding that § 1367 extends the scope of supplemental jurisdiction to the limits of Article III); William A. Fletcher, Commentary, *"Common Nucleus of Operative Fact" and Defensive Set-off: Beyond the* Gibbs *Test*, 74 IND. L.J. 171 (1998) (arguing that the Article III supplemental-jurisdiction test is broader than the *Gibbs* test).

14. FED. R. CIV. P. 13(b) ("A pleading may state as a counterclaim any claim against an opposing party that is not compulsory."). Under Rule 13(a), a counterclaim is compulsory if it arises out of "the same transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(a).

15. *See infra* notes 50–54, 61, 73–74 and accompanying text.

16. *See infra* notes 54, 59, 72 and accompanying text. *But see infra* notes 55, 81–82 (noting the questionable origins of the exception).

decisions have concluded, in the wake of the supplemental-jurisdiction statute, that the "same transaction" requirement of the Federal Rules of Civil Procedure is not determinative and have approved the assertion of supplemental jurisdiction over permissive counterclaims.[17]

These decisions have relied in part on the views of various commentators who, over the years, have suggested that the *Gibbs* formulation has no constitutional foundation and that the scope of the Article III "case" or "controversy" is as broad as Congress and the rules drafters might choose to make it—so long as at least one claim in the action falls within the scope of Article III.[18] Although aware of this view, the federal courts have yet to endorse it. Rather they have suggested, as an intermediate position, that the "same transaction" standard for the joinder of parties and claims that pervades the Federal Rules of Civil Procedure[19] does not establish the limits of the constitutional case: the Constitution requires only a "loose factual connection" between jurisdictional and non-jurisdictional claims.[20] Under this view, so long as a "loose factual connection" exists, supplemental jurisdiction over a permissive counterclaim that does not arise from the same transaction or occurrence as the plaintiff's main claim is proper under the 1990 statute, even if affirmative relief is sought.

Contemporaneously with these developments, I have suggested yet another view of supplemental jurisdiction that focuses neither on the degree of transactional or factual relationship among claims per se nor on the scope of the case as defined by the rules drafters or Congress. Rather, in seeking the boundaries of Article III, I would ask whether the assertion of federal jurisdiction over non-diverse state law claims in the action before the court is "necessary and proper" to permit the federal court to resolve matters clearly falling within the scope of Article III.[21]

In a post-*Gibbs* world, therefore, three competing views of the permissible scope of federal subject matter jurisdiction over non-diverse state law claims have emerged. First, a "delegation" model, which reads the Constitution to have delegated to Congress an apparently unrestricted power to define the scope of an Article III case or controversy, provided

17. *See infra* notes 87–107 and accompanying text.

18. *See infra* Part II.A.

19. *See* FED. R. CIV. P. 13(a) (compulsory counterclaims); FED. R. CIV. P. 13(b) (permissive counterclaims); FED. R. CIV. P. 13(g) (cross-claims against a co-party); FED. R. CIV. P. 14 (third-party practice); FED. R. CIV. P. 20 (permissive joinder of parties).

20. *See infra* Part II.B.

21. *See generally* Floyd, *Supplemental Jurisdiction*, *supra* note 4; C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487 (2006) [hereinafter Floyd, *Interstate Commerce*]; C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613 (2004) [hereinafter Floyd, *Minimal Diversity*].

at least one claim in the action falls within the scope of Article III. Second, a "factual relationship" model, which seeks to give more precise content to *Gibbs*'s "common nucleus of operative fact" standard and to distinguish it from the "same transaction or occurrence" joinder standard of the Federal Rules. And third, a "necessary and proper" model, which restrains Congress's ability to authorize the joinder of jurisdictional and non-jurisdictional claims based, not on the nature of the factual or transactional relationship among the claims to be joined, but rather on whether such joinder is necessary and proper to achieve the purposes underlying the enumerated heads of federal jurisdiction set out in Article III.

This Article addresses each of these theories in turn and concludes that the first two approaches to the supplemental-jurisdiction question in a world unencumbered by the *Gibbs* standard (to the extent that *Gibbs* is not constitutionally based) are subject to serious objections and should be rejected. Rather, the post-*Gibbs* contours of federal jurisdiction are properly defined by referring to the purposes underlying the limited grants of federal subject matter jurisdiction contained in Article III. In some instances, such as permissive counterclaims, this model would permit their assertion—even those seeking affirmative relief—absent any transactional or factual relationship with the plaintiff's main claims. In other instances, it would reject supplemental jurisdiction even though a transactional or factual relationship exists.

II. THE UNRESTRICTED RULES-BASED DELEGATION MODEL OF THE FEDERAL CONSTITUTIONAL CASE

A. *Emerging Suggestions in the Literature*

In an important article prescient of the constitutional issue now posed by the supplemental-jurisdiction statute, Professor Matasar suggested in 1983 that the "fact relatedness" requirement apparently adopted by *Gibbs* as the touchstone of supplemental jurisdiction is not constitutionally based.[22] Rather, the requirement was grounded in an interpretation of the statute conferring original federal court jurisdiction, or in discretionary considerations as a matter of federal common law.[23] Matasar argued instead for an extremely expansive definition of the "case" or "controversy" under Article III of the Constitution as including all matters

22. Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1401, 1463 (1983).

23. *Id.* at 1491.

authorized by "lawfully adopted procedural rules for joinder of claims and parties."[24]

Matasar's reasoning in reaching this conclusion was complex, drawing on several interrelated points. First, he parsed the language of the *Gibbs* standard itself. *Gibbs* stated that the relationship between the federal and state claims must "permit[] the conclusion that the entire action before the court comprises but one constitutional 'case.'"[25] The Court continued:

> The state and federal claims must derive from a common nucleus of operative fact. But if . . . a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[26]

Matasar noted that the "common nucleus of operative fact" formulation of *Gibbs* had no clear statutory or judicial antecedents and had been interpreted in various ways by various courts.[27] Reviewing the history of supplemental jurisdiction before *Gibbs*, he noted that *Gibbs*'s purpose was to expand the narrow interpretation of supplemental jurisdiction that had prevailed under the Supreme Court's decision in *Hurn v. Oursler*,[28] which required virtual "factual identity" among jurisdictional and non-jurisdictional claims to permit the fair and efficient adjudication of entire controversies.[29] In Matasar's view, this history argued for broadly interpreting the "common nucleus" standard in accordance with the "transactional" joinder standard that pervades the Federal Rules of Civil Procedure, which most courts had in turn interpreted as requiring only a "logical" or "loose" factual relationship among claims.[30]

Regarding *Gibbs*'s "enigmatic" additional statement that a plaintiff's claims must be such that he would "ordinarily be expected to try them all

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24. *Id.* at 1407; *see also id.* at 1479 ("Supplemental jurisdiction, therefore, is constitutionally permissible whenever the rules governing federal procedure permit the joinder in one action of jurisdictionally insufficient nonfederal claims or parties with a jurisdictionally sufficient federal claim."); *id.* at 1491 ("Once 'case' is made coextensive with the lawfully created procedural limits of joinder, the question of constitutional power to exercise supplemental jurisdiction becomes quite simple—jurisdiction exists if joinder is permissible under valid procedural rules."). Matasar also argued that *Gibbs*'s requirement that the federal question be "substantial" to support the exercise of supplemental jurisdiction was not constitutionally based. *Id.* at 1417–46, 1453.

25. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

26. *Id.*

27. Matasar, *supra* note 22, at 1448–49.

28. 289 U.S. 238 (1933).

29. Matasar, *supra* note 22, at 1449–53.

30. *Id.* at 1451–54.

in one judicial proceeding," Matasar noted that most courts had failed to give the statement any independent significance beyond the "common nucleus" requirement.[31] Matasar suggested that the "ordinarily be expected to try" formulation could be given a plausible independent reading as encompassing those claims that litigants could expect to try together under the procedural rules adopted by the Supreme Court and accepted by Congress.[32]

Next, Matasar explored the uncertainty arising from the relationship between the "common nucleus" and "ordinarily be expected to try" requirements, assuming them to have independent significance.[33] He noted that the "but if" clause could be read either in the conjunctive, requiring the satisfaction of both elements to permit the exercise of supplemental jurisdiction, or in the disjunctive, allowing the satisfaction of either element to sustain the exercise of supplemental jurisdiction.[34] He found difficulties with both interpretations. On either reading, depending on whether they were broadly or narrowly interpreted, the requirements were either redundant or internally contradictory.[35] Ultimately, he concluded

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31. *Id.* at 1454–56.

32. *Id.* at 1458.

33. *Id.* at 1458–63.

34. *Id.* at 1458–60.

35. Matasar first considered the disjunctive reading in which supplemental jurisdiction would be properly exercised if either the "common nucleus" or the "ordinarily be expected to try" requirement were satisfied. *Id.* at 1458–59. He found support for this approach in the plain-language meaning of the "but if" clause, which he interpreted to mean "unless." *Id.* at 1458–60 & n.281. If "ordinarily be expected to try" were equated with "permitted to be brought," as courts had done, then the "common nucleus" requirement would be rendered essentially superfluous because "claims arising from a common factual basis will be tried together." *Id.* at 1459. Alternatively, as Professors Wright and Miller posited, "ordinarily be expected to try" could be conflated with res judicata so that the phrase "refer[red] 'to what res judicata would require if the claims were all federally created or all state created.'" *Id.* at 1457 (quoting 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1367, at 445 (1st ed. 1975)). In this case, the phrase would be subsumed by the "common nucleus" requirement because res judicata often depends on a finding that the claims are "encompassed within the same cause of action" and because, at the time Matasar wrote his article, the scope of res judicata "encompasse[d] a narrower range of claims than a 'common nucleus of operative fact.'" *Id.* at 1459–60.

Turning to the interpretation that the "common nucleus" and "ordinarily be expected to try" elements were conjunctive, Matasar initially noted that the "but if" language used by *Gibbs* could be interpreted to mean "and" only through the use of "verbal acrobatics of the highest order." *Id.* at 1460. Moreover, if "ordinarily be expected to try" meant "permitted to be brought," then it would always be satisfied by the "common nucleus" requirement and thus would be superfluous. *Id.* Returning to the suggestion that "ordinarily be expected to try" was tied to res judicata, Matasar pointed out that the standard conception of res judicata was that a prior decision had effect only on those subsequent claims that were part of the same cause of action, and at the time, this conception was more restrictive than the "common nucleus" formulation. *Id.* Consequently, as long as courts relied upon the cause of action to define the bounds of res judicata, tying supplemental jurisdiction

that the requirements could be reconciled only if both were not constitutionally based. Rather, in his view, the second, "ordinarily be expected to try" requirement (as defined by validly adopted rules of procedure) prescribed the dimensions of the constitutional "case" or "controversy," and the first, "common nucleus" formulation represented a "subsidiary statutory barrier" to the joinder of claims.[36]

Matasar drew support for the conclusion that the "fact relatedness" requirement of *Gibbs* was not of constitutional dimension by noting six contexts in which the federal courts had upheld the exercise of supplemental jurisdiction despite the absence of such a factual relationship among jurisdictional and non-jurisdictional claims.[37] These contexts included conflicting claims to property before the court, federal receivership proceedings, aggregation of claims to satisfy the jurisdictional amount in diversity cases, bankruptcy proceedings, jurisdiction over unrelated claims for set-off, and factually unrelated attorney's fees disputes in cases properly before the court.[38]

Finally, Matasar drew support for his broad, rules-based definition of the constitutional case from language in Chief Justice Marshall's expansive definition of federal-question jurisdiction in *Osborn v. Bank of the United States*.[39] Arguing that a case "arises under" federal law whenever an "original ingredient" of the plaintiff's case involves a federal question, even if that question is not contested in the case at bar, Marshall stated that a court exercising Article III judicial power is:

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to res judicata would have the effect of returning to the *Hurn* test abandoned in *Gibbs*. *See id.* at 1460–61.

After rejecting both the conjunctive and the disjunctive readings of *Gibbs*, Matasar then described how courts had actually interpreted the *Gibbs* language. He identified two main approaches: courts either (1) ignored the problem or (2) failed to give the "ordinarily be expected to try" language independent significance. *Id.* at 1462. Both approaches could be explained by the argument that the "ordinarily be expected to try" language served merely as an example of the "common nucleus" requirement. Ultimately, Matasar reasoned that—as long as both phrases were given constitutional significance—it would be impossible to conclude whether the conjunctive or disjunctive interpretation is the proper one. *See id.* at 1461–62.

If, on the other hand, the two phrases were drawn from different sources, Matasar proposed a two-step approach that could be used to reconcile them. *Id.* at 1462–63. According to Matasar, the predominant view at the time was that the "ordinarily be expected to try" requirement was broader than the "common nucleus" requirement. *Id.* at 1463. Under this view, the "ordinarily be expected to try" requirement could be read to define the constitutional threshold of supplemental jurisdiction, while the "common nucleus" requirement denotes a "subsidiary statutory barrier to joinder of claims." *Id.*

36. *Id.*

37. *Id.* at 1463–77.

38. *Id.*

39. 22 U.S. (9 Wheat.) 738, 823 (1824).

> "capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases . . . arising under the constitution, laws and treaties of the United States."[40]

Matasar drew further support from the broad power historically exercised by Congress and its delegates to prescribe and modify federal rules of procedure to resolve controversies in light of evolving notions of fairness and efficiency.[41] "Congress' delegation of this broad-ranging rulemaking authority to the Court should in itself demonstrate the inherent expandability of a constitutional 'case,' a concept which should be keyed to a dynamic system of procedural rules."[42]

Thirty years before Matasar, Professor Green foreshadowed Matasar's conclusions in the context of the specific example of the permissive counterclaim. Green concluded, contrary to prevailing doctrine, that "a federal district court having jurisdiction over an action has the power to try all counterclaims filed in the action."[43] Without specifically addressing the parameters of Article III, he argued, as a historic matter, that both the plaintiff's original claim and a defendant's counterclaim were "parts of a single action."[44] Further, Green argued that "the idea of disposing of the claims of plaintiff and defendant in one suit and giving affirmative relief to whichever party was entitled thereto was not unknown to the Congress which passed the first Judiciary Act," citing statutes to that effect in three of the colonies.[45] Green found strong policy reasons for favoring the comprehensive disposition of all disputes between the parties in one action, rather than inefficient piecemeal litigation.[46] Regarding the Article III problem, Green asserted that jurisdiction over the action was determined by the allegations of the complaint: "Since a counterclaim is not a new action but a continuation of the action begun by the plaintiff's complaint, the district court should be able to entertain a counterclaim even though it has no independent grounds of jurisdiction."[47] Relying on a historic, rules-based view of the Article III case, Green argued that "the framers of the Constitution did not use 'case' in a metaphorical sense but

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40. Matasar, *supra* note 22, at 1479–80 (emphasis omitted) (quoting *Osborn*, 22 U.S. at 819).

41. *Id.* at 1480–87.

42. *Id.* at 1484.

43. Thomas F. Green, Jr., *Federal Jurisdiction over Counterclaims*, 48 NW. U. L. REV. 271, 272 (1953).

44. *Id.* at 273.

45. *Id.* at 274 (noting that statutes existed in Pennsylvania, New York, and New Jersey).

46. *Id.* at 271–72.

47. *Id.* at 275–76.

were speaking of the unit of litigation that the law of procedure, in the normal course of events, allows to be disposed of at one trial."[48]

Green recognized that both precedent and scholarly analysis conflicted with his position.[49] Although the Supreme Court in *Moore v. New York Cotton Exchange*[50] had upheld ancillary jurisdiction over compulsory counterclaims arising from the same transaction as plaintiff's main claim,[51] lower courts had generally required an independent basis for jurisdiction over unrelated permissive counterclaims.[52] In Green's view, however, these decisions were poorly reasoned and unpersuasive.[53] In his leading treatise, Professor Moore also concluded that ancillary jurisdiction did not extend to permissive counterclaims but recognized that permissive counterclaims asserted only by way of defensive set-off and not as a basis for affirmative recovery could be entertained.[54] In Green's view, however, Moore provided no satisfactory basis for concluding that all permissive counterclaims were not part of the plaintiff's main action.[55] Further, the distinction was impractical because it would not be possible to know whether the counterclaim was to be used only defensively or as a basis for affirmative recovery until after the action was tried and the amount of plaintiff's judgment and defendant's recovery were known.[56] At this point, after trial, it would make no sense to hold that the court could enter

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48. *Id.* at 293.

49. *See id.* at 271.

50. 270 U.S. 593 (1926).

51. *Id.* at 609.

52. Green, *supra* note 43, at 283–85.

53. *Id.* at 285 ("Not a single well reasoned case has held that a counterclaim should be dismissed for want of jurisdiction when the court had jurisdiction over the plaintiff's claim.").

54. *Id.* at 287 (citing 3 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 54 (2d ed. 1948)).

55. *See id.*

56. *Id.* at 287–88. Green specifically stated:

> If the court has jurisdiction of the counterclaim used defensively it will hear evidence on that along with the other defenses, if any, and may have received a verdict or reached a decision on the merits before it becomes apparent that the counterclaim will result in an affirmative judgment for the defendant.

Id. at 288. This point is undercut, to some extent, by the settled rule (acknowledged by Green, *see id.* at 289) that claims by way of defensive set-off were proper only if they were liquidated or capable of liquidation, making the amount claimed by the defendant apparent at the outset. *See* 3 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 13.31 (3d ed. rev. vol. 2002) ("Claims for defensive setoff for a liquidated or otherwise ascertained amount pleaded solely to diminish or reduce a judgment for the opposing party provide an exception to the rule that permissive counterclaims require an independent basis for jurisdiction."); *see also* D'Agostino Excavators, Inc. v. Heyward-Robinson Co., 430 F.2d 1077, 1081 n.1 (2d Cir. 1970).

judgment recognizing the set-off but precluding affirmative recovery based on the same facts.[57]

More recently, Professor Fletcher returned to the example of federal jurisdiction over an unrelated claim for set-off "to argue that the constitutional test for supplemental jurisdiction is broader than the 'common nucleus of operative fact' test of *United Mine Workers v. Gibbs*."[58] Fletcher noted that American courts had followed English practice in allowing claims for defensive set-off even when the claims arose from facts unrelated to the plaintiff's claim.[59] He observed that the "utility and essential fairness of defensive set-off is clear" because, absent its availability, a plaintiff could obtain a procedural advantage by enforcing a monetary judgment without deducting an existing liquidated debt or judgment owed to the defendant, eliminating the defendant's most effective security for payment of its claim.[60] Fletcher noted that the historic treatment of defensive set-offs was in tension with the general pre-1990 requirement that pendent and ancillary jurisdiction over claims for which there was no independent basis for federal subject matter jurisdiction required the existence of a transactional—or, after *Gibbs*, "common nucleus of operative fact"—relationship with a claim or claims for which there was an independent basis for federal jurisdiction.[61] This tension had led two federal courts of appeals to hold or suggest that the defensive set-off was improper to the extent it permitted the exercise of supplemental jurisdiction over factually unrelated claims.[62] However, in Fletcher's view, these decisions were wrong, both because it was not clear that the Supreme Court would apply the *Gibbs* test to all types of supplemental jurisdiction and because doing so would be "almost certainly wrong as a matter of historical constitutional interpretation."[63] He argued that the Framers did not intend to confine Article III "cases" and

57. Green, *supra* note 43, at 288 ("Yet in sustaining the defense [by way of set-off] the court has taken jurisdiction of the counterclaim, has tried the issues of law and fact, and has arrived at a decision. All of these steps are said to be within its power, but the rendering of an affirmative judgment for the defendant is said to be beyond its power. These writers seem to be attempting to define federal jurisdiction by the use of outmoded procedural doctrines which have no necessary connection with the division of power between the state and federal governments.").

58. Fletcher, *supra* note 13, at 171.

59. *Id.* at 172.

60. *Id.* ("The rationale supporting defensive set-off is strongest in a suit by an insolvent where a defendant might not be able to recover any of the debt owed to him by a plaintiff, but it extends to all cases where it would be more difficult, uncertain, or expensive for a defendant to recover from a plaintiff without the assistance of set-off.").

61. *Id.* at 171–72.

62. *See* Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 386 (7th Cir. 1996); Ambromovage v. United Mine Workers, 726 F.2d 972, 988 (3d Cir. 1984).

63. Fletcher, *supra* note 13, at 177.

"controversies" to transactionally related claims. Instead, "civil cases and controversies in the then-contemporary practice could involve adjudication of claims arising out of unrelated facts, both in English and American courts, as they did in entertaining unrelated counterclaims for defensive set-off beginning in the early 1700s."[64] Thus, defensive set-off should not be viewed as an "exception to a general constitutional rule, for there is no such—or at least should be no such—general rule."[65]

Fletcher also argued that abandoning the *Gibbs* formulation for all types of supplemental jurisdiction would not lead to unlimited expansions of federal jurisdiction with "no stopping place."[66] Rather,

> It would be a comprehensible constitutional test to allow supplemental jurisdiction to extend no further than to whatever could have been tried in a single judicial proceeding at the time of the Constitution's adoption. Such a test would allow supplemental jurisdiction over defensive set-off claims arising out of unrelated facts, but it would limit the federal courts to joinder devices available at the time of the Constitution's framing.[67]

But, if this historic test were too confining, "a broader constitutional test could permit supplemental jurisdiction over whatever can be tried as part of a single judicial proceeding under modern joinder rules."[68] In this latter suggestion, Fletcher echoed the views of Matasar and others that the scope of the Article III case is as broad as Congress or the rules drafters may choose.

As developed below, I agree with these commentators that the scope of federal supplemental jurisdiction should not be defined solely with reference to the existence of some transactional or factual relationship among jurisdictional and non-jurisdictional claims. I also agree that supplemental jurisdiction should be recognized over permissive counterclaims, whether by way of set-off or as a basis for affirmative recovery. But the argument that there are and should be no boundaries on the ability of the rules drafters to define the scope of the federal constitutional case goes much too far. That approach would threaten the careful allocation of judicial power between federal and state governments

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64. *Id.*

65. *Id.* at 178. As discussed below, this history provides an inadequate basis for defining the limits of an "arising under" or diversity "case" or "controversy" jurisdiction under Article III. *See infra* notes 123–38 and accompanying text.

66. Fletcher, *supra* note 13, at 178.

67. *Id.*

68. *Id.*

prescribed by the Constitution. Additionally, the suggestion that historic joinder practice provides a pertinent "stopping place" is misplaced, because that practice was not addressed to the proper division of authority between the courts of different sovereigns, and in any event, imposed serious constraints on the joinder of claims both within and across jurisdictional lines.[69]

B. *Echoes in the Cases: The Problem of the Permissive Counterclaim*

In 1970, Professor Green's views on the existence of federal jurisdiction over permissive counterclaims received a distinguished endorsement in Judge Henry Friendly's concurrence in *D'Agostino Excavators, Inc. v. Heyward-Robinson Co.*[70] In *D'Agostino*, an excavation subcontractor sued the prime contractor for payments on a government contract governed by the Miller Act.[71] The prime contractor counterclaimed for overpayments and extra costs on both the government contract and a separate private contract on another job. Upholding ancillary jurisdiction over the counterclaim on the private contract for which there was no independent basis for federal jurisdiction, the Second Circuit majority applied the general rule that ancillary jurisdiction exists over compulsory but not permissive counterclaims, unless they are asserted only by way of set-off.[72] The court then found that the defendant's counterclaim on the private contract was compulsory because it arose out of the same transaction or occurrence as the plaintiff's Miller Act claim on the government contract (as required by Rule 13(a) of the Federal Rules of Civil Procedure).[73] In so doing, the court applied the very liberal "logical relationship" test that prevails in the courts of appeals for determining whether the "same transaction" standard has been satisfied. The court concluded that the test was satisfied because both contracts were entered into by the same parties regarding the same type of work carried on during the same period and because the defendant had the right to terminate or withhold payments on either contract in the event of breach or damages suffered on the other.[74] Additionally, progress payments were not allocated between the jobs, a single insurance policy covered both, and the claimed breaches related to both projects. Thus, "[t]he controversy

69. *See infra* notes 123–38 and accompanying text.
70. 430 F.2d 1077, 1087–88 (2d Cir. 1970).
71. *Id.* at 1079.
72. *Id.* at 1080–81.
73. *See id.* at 1081–82; FED. R. CIV. P. 13(a).
74. *D'Agostino*, 430 F.2d at 1081–82.

between the parties which gave rise to this litigation was with respect to both jobs and arose from occurrences affecting both."[75]

In his concurrence, Judge Friendly found these facts to be "lacking in legal significance" and concluded that claims under the private and government contracts did not arise out of the same transaction or occurrence.[76] Nevertheless, he would have upheld ancillary jurisdiction over both counterclaims on the grounds previously advocated by Green, noting that Professor Moore's exception for set-offs "carries the seeds of destruction of the supposed general rule."[77]

Despite their eminent pedigrees, the suggestions of Professor Green and Judge Friendly bore little fruit until the enactment of the supplemental-jurisdiction statute in 1990. The statute caused Professor Fletcher to revisit the topic his article previously reviewed.[78] Similarly, several courts of appeals have reconsidered the issue in light of the 1990 statute and adopted the rule that, at least in some cases, a permissive counterclaim may fall within the supplemental jurisdiction of the federal courts.

The Third Circuit questioned the conventional wisdom even before the enactment of the supplemental-jurisdiction statute. In *Abromovage v. United Mine Workers*[79]—an action by union health and welfare trustees alleging that the union was liable for failing to collect required contributions from employers—the court considered whether counterclaims by the union for set-off of unpaid loans fell within the subject matter jurisdiction of the federal courts.[80] The Third Circuit assumed for the purpose of argument that the counterclaims were permissive but declined to invoke Professor Moore's "set-off" exception to the general rule that permissive counterclaims require an independent jurisdictional basis.[81] The court noted that "[t]he origins of this exception are not totally clear" and that Moore had advanced it "without any supporting cases."[82] Rather, the court upheld ancillary jurisdiction over the presumptively permissive counterclaim on the ground that the "same transaction" standard for compulsory counterclaims under Rule 13(a) of the Federal Rules of Civil Procedure was not coextensive with the constitutional standard defining the limits on federal jurisdiction imposed

75. *Id.* at 1082.

76. *Id.* at 1087–89 (Friendly, J., concurring).

77. *Id.* at 1088 (citing Green, *supra* note 43, at 277–81, and 3 MOORE, *supra* note 54, § 13.19).

78. *See supra* notes 58–68 and accompanying text.

79. 726 F.2d 972 (3d Cir. 1984).

80. *Id.* at 974, 988.

81. *Id.* at 988–89 & nn.45–47.

82. *Id.* at 988 n.47 (citing the first edition of *Moore's Federal Practice*).

by Article III.[83] To satisfy the constitutional standard, as prescribed in *Gibbs*, the counterclaim must arise out of a "common nucleus of operative fact" with the plaintiff's main claim, and a counterclaim might meet this requirement even if the Rule 13(a) "same transaction" standard were not satisfied.[84] "[S]everal transactions may share an intersection of 'operative facts,' and commentators have recognized that the two tests . . . need not map the same landscape."[85] Thus even assuming that the union's counterclaims were permissive, the claims arose out of the same common nucleus of operative fact as the trustees' main claims because they "grew out of the relationship between the Union and the Fund, which is the subject matter of appellants' claims"; their resolution implicated "the entire factual matrix" that was before the court; and the "critical background issues with respect to liability" were the same.[86]

In *Channell v. Citicorp National Services, Inc.*,[87] the Seventh Circuit concluded that enactment of the supplemental-jurisdiction statute altered the permissive counterclaim rule.[88] The issue was whether supplemental jurisdiction existed over the defendant's counterclaims for early-termination charges under automobile leases asserted in a class action alleging that the defendant had violated the Consumer Leasing Act (CLA) by failing to adequately disclose its method of calculating the charges.[89] Judge Easterbrook's opinion assumed that the counterclaims were permissive but nonetheless held that, after the enactment of the supplemental-jurisdiction statute, the claims were part of the same case or controversy as the federal CLA claims. That was because the statute authorizes the exercise of supplemental jurisdiction "to the limits of Article III—which means that '[a] loose factual connection between the claims' can be enough."[90] In *Channell*, that "loose" standard was satisfied because the CLA claims were based on the same lease—indeed, the same clause in the lease—as the defendant's state law counterclaims for unpaid termination charges.[91] The court did not elaborate on why it believed that a "loose factual connection" that was not sufficient to satisfy the "same

83. *Id.* at 989–90.

84. *Id.*

85. *Id.* at 990.

86. *Id.* at 991–92.

87. 89 F.3d 379 (7th Cir. 1996).

88. *Id.* at 385.

89. *Id.* at 380.

90. *Id.* at 385 (quoting Baer v. First Options of Chicago, Inc., 72 F.3d 1294, 1299 (7th Cir. 1995)).

91. *Id.* at 385–86. The court explained: "The acts creating the claims differ—the claims against Citicorp stem from the signing of the lease, while the claims against the class stem from the early termination of the lease. But the parties, the lease, the clause, and even the terminations are constants . . . ." *Id.*

transaction or occurrence" standard of the compulsory-counterclaim rule nonetheless satisfied Article III's same "case or controversy" requirement, other than by an unexplained citation to two previous decisions that were not on point.[92]

In the most thorough consideration of the issue to date, a Second Circuit panel, in *Jones v. Ford Motor Credit Co.*,[93] applied the "loose factual connection" standard to sustain supplemental jurisdiction over a defendant's state law counterclaims for amounts due on loans to certain plaintiffs. The plaintiffs claimed that the defendant had violated the Equal Credit Opportunity Act (ECOA) through practices that effectively imposed higher interest rates on the basis of race on African-American customers who had purchased Ford vehicles.[94] The district court dismissed the counterclaims because they were permissive and therefore, under the traditional rule, did not fall within the court's supplemental jurisdiction.[95] The Second Circuit agreed that the counterclaims were permissive but nonetheless sustained supplemental jurisdiction over them.[96]

The Second Circuit first upheld the district court's conclusion that the counterclaims were permissive rather than compulsory.[97] The ECOA claims turned on Ford's mark-up policy, which was based on subjective factors that allegedly resulted in the imposition of higher rates for plaintiffs on racial grounds. The counterclaims were related to the same purchase contracts but to non-payment rather than to the rates that were charged. "Thus, the relationship between the counterclaims and the ECOA claim is 'logical' only in the sense that the sale, allegedly on

92. *See id.* The cases cited were *Baer*, 72 F.3d at 1294, and *Ammerman v. Sween*, 54 F.3d 423 (7th Cir. 1995). *Ammerman* derived the "loose factual relationship" standard from a statement in a leading treatise, but that portion of the treatise does not address the content of that standard, its possible relation to the "same transaction or occurrence" joinder standard that pervades the Federal Rules, or the long-standing compulsory–permissive counterclaim distinction. *Ammerman*, 54 F.3d at 424 (citing 13B WRIGHT ET AL., *supra* note 4, § 3567.1, at 117 & n.9). The factual relationship between the Title VII sexual-harassment claim and the state assault claim in that case was close, not loose. The circumstances in *Baer* are even less on point. There, a district court's order of dismissal of a Title VII action resolved a fee dispute between co-counsel with respect to settlement funds held by the clerk of the court. *Baer*, 72 F.3d at 1296. Supplemental jurisdiction therefore existed, not based on a factual relationship among claims, but to enforce the orders of the court with respect to matters within its jurisdiction. *See id.* at 1300–01; *infra* Part IV.D.4; *see also* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380–81 (1994).

93. 358 F.3d 205 (2d Cir. 2004).

94. Ford Motor Credit asserted counterclaims for unpaid loan balances against three of the four named plaintiffs and conditional counterclaims against members of the putative class that the three represented. *Id.* at 207.

95. *Id.* at 208.

96. *Id.* at 209, 213–14.

97. *Id.* at 209.

discriminatory credit terms, was the 'but for' cause of the non-payment."[98] The facts necessary to prove the claims and counterclaims were "not so closely related that resolving both sets of issues in one lawsuit would yield judicial efficiency."[99]

The court then traced the history of the requirement for independent jurisdiction over permissive counterclaims recounted above and concluded that the case law did not explain "why independent jurisdiction should be needed for permissive counterclaims."[100] The court observed that one possible reason was to avoid opening the federal courts to "every conceivable non-compulsory counterclaim that a defendant might happen to have against a plaintiff, some of which might be totally inappropriate for federal jurisdiction."[101] Recounting the objections of Professor Green and Judge Friendly to the traditional rule, the court noted that with the enactment of § 1367, the previous common-law rule no longer controlled. Congress explicitly authorized the exercise of supplemental jurisdiction to the full extent permitted by Article III's "case" or "controversy" limitation.[102] The court noted with approval Judge Easterbrook's conclusion in *Channell* that the *Gibbs* "common nucleus of operative fact" formulation of the scope of the Article III "case" required only that the claims have a "loose factual connection" and not that they arise out of the "same transaction or occurrence" as required by the compulsory counterclaim rule.[103] The claims and counterclaims before the court were "loosely connected" because all of the claims originated "from the Plaintiffs' decisions to purchase Ford cars."[104] Thus, "[t]he counterclaims and the underlying claim bear a sufficient factual relationship (*if one is necessary*) to constitute the same 'case' within the meaning of Article III and hence of section 1367."[105] In a footnote, the court explained that the outer bounds of the constitutional case might be even broader, noting the views of Matasar and others (discussed above) that would confer

98. *Id.*

99. *Id.* at 210.

100. *Id.*

101. *Id.* at 211. The court argued, for example, that a wife's federal action against her husband seeking to establish rights as a joint author should not be a vehicle for a counterclaim for divorce. *Id.* Of course, the "domestic relations" exception to federal jurisdiction would exclude the hypothetical counterclaim in any event. *See generally* 13B WRIGHT ET AL., *supra* note 4, § 3609, at 459 (noting that, despite the diversity statute's broad language, federal courts have refused to adjudicate domestic disputes even between diverse parties).

102. *Jones*, 358 F.3d at 211–12 (citing Green, *supra* note 43, at 283, and United States v. Heyward-Robinson Co., 430 F.2d 1077, 1088 (2d Cir. 1970) (Friendly, J., concurring)).

103. *Id.* at 213 (citing Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385–86 (7th Cir. 1996)).

104. *Id.* at 214.

105. *Id.* at 213–14 (emphasis added).

apparently unchecked discretion on Congress and the rules drafters to fashion whatever rules for joinder of parties and claims they might wish, even to the extent of dispensing with *any* factual relationship between the claims.[106] Finally, the court implied that a more lax constitutional standard might apply to counterclaims asserted by defendants than to claims joined by plaintiffs because "[a] plaintiff might be tempted to file an insubstantial federal law claim as an excuse to tie to it one or more state law claims that do not belong in a federal court."[107]

Thus, in the *Ford Motor* lexicon, three distinct types of relationships among claims exist for the purpose of resolving issues of joinder and supplemental jurisdiction: (1) claims that arise out of the "same transaction or occurrence" because they have a "logical relationship," (2) claims that fail to satisfy that standard but nonetheless have a "loose factual connection," and (3) claims that have no factual relationship at all. According to the Second and Seventh Circuits, the scope of the Article III case extends to the second category. According to the Second Circuit, it may extend to the third.

C. *Objections to the Rules-Based Delegation Model*

In effect, the concept that an Article III case encompasses all claims and parties the joinder of which is authorized by validly adopted statutes or rules of procedure delegates the definition of the constitutional case to Congress or the drafters of the rules. Such an unrestricted rules-based model of federal jurisdiction raises a host of questions and objections to which its proponents have failed to provide satisfactory answers. Most significantly, this model would authorize Congress and the rules drafters to transfer to federal court potentially unlimited numbers of non-diverse state law claims lying at the core of the historic jurisdiction of state courts. That transfer would be unfettered by any guiding or limiting principle and would lack any grounding, either in the purposes of the strictly enumerated grants of federal jurisdiction set out in Article III or in the ability of the federal courts efficiently and fairly to resolve Article III cases.[108]

Of course, the most recent invocation of a rules-based delegation model by Professor Fletcher was advanced in the limited context of arguing that supplemental jurisdiction over permissive counterclaims should be upheld even if the claims do not arise from the same transaction as the plaintiff's main claim.[109] As discussed below, supplemental jurisdiction over such

106. *Id.* at 213 n.5.

107. *Id.* at 214 n.7.

108. *See generally* Floyd, *Minimal Diversity*, *supra* note 21, at 635–37; Floyd, *Supplemental Jurisdiction*, *supra* note 4.

109. *See* Fletcher, *supra* note 13, at 176–79.

permissive counterclaims—even when asserted as a basis for affirmative recovery rather than only as a set-off against the plaintiff's main claim—should be upheld.[110] However, it is not necessary to resort to a model of federal jurisdiction that imposes essentially no limits on the definition of the Article III "case" to reach that result. Rather, this result may be grounded in the purposes of Article III, coupled with the principle that an Article III "case" or "controversy" extends to permit the resolution of non-diverse state law claims that, if resolved in a separate proceeding, might result in unfairness to a party by or against whom a claim falling within Article III was properly asserted in federal court.

Moreover, the genesis of the rules-based delegation model—which defines an Article III case or controversy as broadly as whatever provisions for joinder of parties and claims that the rules drafters might adopt, so long as one of those claims lies within the enumerated categories of Article III—is in no way confined to the narrow context of permissive counterclaims.[111] Rather, that model threatens to vastly expand federal jurisdiction at the expense of the states—sometimes in startling ways—without any grounding either in the text or purposes of Article III.

Consider, for example, the existing joinder provision of Rule 18 of the Federal Rules of Civil Procedure. That Rule authorizes any party who has properly asserted a claim falling within Article III in federal court to join with it any other claim that party may possess against the opposing party, regardless of whether it bears any legal or factual relationship with the jurisdiction-conferring claim.[112] On its face, this joinder provision would permit a party possessing one federal-question claim against an opposing party to join an unlimited number of legally and factually unrelated non-diverse state law claims, subject only to the district court's discretion to refuse to exercise jurisdiction. Under long established practice, this broad authorization in Rule 18 is constrained by the principle that the Federal Rules themselves cannot create federal jurisdiction where none otherwise

110. *See infra* Part IV.D.2.

111. *See, e.g.*, Fletcher, *supra* note 13, at 177 (arguing that limiting the definition of a "case" to transactionally related claims would not be consistent with current usage because current procedural rules allow joinder of non-transactionally related claims pursuant to FED. R. CIV. P. 13(b) (permissive counterclaim), 14 (third-party defendant claims against third-party plaintiff), and 18(a) (allowing joinder of unrelated claims)); *see also* Matasar, *supra* note 22, at 1478–79 ("'Case' or 'controversy' as used in article III refers to the limits of joinder of claims and parties set by the system of rules lawfully adopted to govern procedure in the federal courts. Supplemental jurisdiction, therefore, is constitutionally permissible whenever the rules governing federal procedure permit the joinder in one action of jurisdictionally insufficient nonfederal claims or parties with a jurisdictionally sufficient federal claim.").

112. *See* FED. R. CIV. P. 18(a) ("A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.").

would exist.[113] Thus, under existing law, in addition to satisfying the non-demanding requirements of Rule 18, such joinder is permitted only if the "common nucleus of operative fact" standard of *Gibbs* is also satisfied.[114] In practice, this requirement has been equated with the "same transaction" joinder standard that pervades the Federal Rules in other contexts—most prominently, in the context of permissive joinder of parties under Rule 20.[115] That standard, in turn, has been loosely interpreted to require only that there be a "logical relationship" among claims to support their joinder and the exercise of supplemental jurisdiction.[116] Where such a relationship exists, both the joinder of claims and the exercise of supplemental jurisdiction can be argued to achieve judicial economy and to fulfill the purposes of Article III.[117]

If a rules-based delegation model of the Article III case were adopted, however, the inevitable conclusion would be that by adopting the supplemental-jurisdiction statute, Congress radically revised this well-settled jurisdictional landscape and vastly expanded the subject matter jurisdiction of the federal courts at the expense of the states—albeit without intending to do so. The plain text of the supplemental-jurisdiction

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113. *See* 12 WRIGHT ET AL., *supra* note 4, § 3141, at 484 (1997) ("The principle is that [the Federal Rules of Civil Procedure] are not to be construed as either extending or limiting the jurisdiction of the federal courts or the venue of actions in those courts."); *see also* FED. R. CIV. P. 82.

114. *See* 6A WRIGHT ET AL., *supra* note 4, § 1588, at 540 (1990) ("In light of the *Gibbs* decision . . . a two-step approach is necessary to persuade a district court to exercise pendent jurisdiction over a state claim joined under Rule 18(a) that does not meet federal subject-matter jurisdiction requirements. First, the court must be convinced that it has judicial 'power' to exercise pendent jurisdiction in a particular case; second, once judicial 'power' over the nonfederal claim is acknowledged, the court must be encouraged to exercise its discretion to hear the claim by a demonstration that doing so would further the policy objectives underlying the pendent jurisdiction doctrine." (footnote omitted)).

115. *See* 3 MOORE, *supra* note 56, § 14.41[3] ("Through the years, the courts came to equate this 'common nucleus of operative fact' [standard of supplemental jurisdiction] with 'same transaction or occurrence,' a phrase that is employed in many of the joinder provisions of the Federal Rules."); *see also id.* § 14.41[4][a] ("The supplemental jurisdiction statute grants supplemental jurisdiction over claims that are part of the same case or controversy as the underlying dispute. The relevant test for whether the claims are sufficiently related is whether the claim over which supplemental jurisdiction is sought shares a common nucleus of operative fact with the underlying claim. Stated another way, there is supplemental jurisdiction over all claims that arise from the same transaction or occurrence as the underlying dispute." (footnote omitted)). Professor Moore's treatise cites a number of cases demonstrating the confluence of the "common nucleus" test with the "same transaction or occurrence" test, including *Ambromovage v. United Mine Workers*, 726 F.2d 972, 990 (3d Cir. 1984), and *Aetna Casualty & Surety Co. v. Spartan Mech. Corp.*, 738 F. Supp. 664, 668–70 (E.D.N.Y. 1990). 3 MOORE, *supra* note 56, § 14.41[3] n.11.

116. *See supra* notes 70–74 and accompanying text; *see also infra* notes 164–68 and accompanying text.

117. *See infra* notes 163–68 and accompanying text.

statute expands the scope of supplemental jurisdiction in federal-question cases to include "all other claims that are so related to claims in the action within such original [federal] jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution[, including] claims that involve the joinder or intervention of additional parties."[118] If the scope of the constitutional case were to extend to any claims that the Federal Rules authorize to be joined in the same action, as the rules-based delegation model asserts, then Article III would encompass all claims whose joinder is authorized by Rule 18, whether or not the claims bore the slightest relationship with any claim independently falling within the scope of Article III.[119]

Congress did not intend this dramatic expansion of federal jurisdiction when it enacted the supplemental-jurisdiction statute. The legislative history of the supplemental-jurisdiction statute shows that Congress's primary objective was to overrule the Supreme Court's restrictive decision in *Finley v. United States*,[120] which rejected "pendent party" jurisdiction over a party joined in a Federal Tort Claims Act (FTCA) action against the United States.[121] The Court denied jurisdiction because express congressional authorization for the exercise of such jurisdiction was lacking, despite the existence of a transactional relationship among the claims and despite the fact that all of these factually interrelated claims could be asserted only in a federal court because federal jurisdiction over the FTCA claim was exclusive.[122] Far from repudiating the "common nucleus of operative fact" standard for the exercise of supplemental jurisdiction derived from *Gibbs*, the supplemental-jurisdiction statute's legislative history suggests that Congress intended to codify the *Gibbs* standard.[123] Surely if Congress had intended the dramatic revision of

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118. 28 U.S.C. § 1367(a) (2000).

119. *But see* Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941) (reaffirming "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute"). *See generally* Stephen B. Burbank, *The Rules Enabling Act*, 130 U. PA. L. REV. 1015, 1029–30 n.60, 1172–73 n.673 (1982) (noting judicially recognized conflicts between the rules and pre-1934 jurisdictional limits). Under the rules-based delegation model, however, § 1367(a) would, in effect, abrogate this long-standing principle without any specific reference in either the statute or its legislative history.

120. 490 U.S. 545 (1989), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No 101-650, § 310(a), 104 Stat. 5089, 5113–14 (codified at 28 U.S.C. § 1367 (2000)).

121. *Id.* at 555–56.

122. *Id.* at 549–54.

123. On April 2, 1990, the Federal Courts Study Committee published a report recommending "that Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction." FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990).

Following the April 2 Report, the Federal Courts Study Committee published a number of Working Papers and Subcommittee Reports on June 1, 1990. These Working Papers cited *Gibbs*'s

existing and well-settled jurisdictional principles that the rules-based delegation model implies, some mention of that radical departure from existing practice would have appeared in the legislative history of the Judicial Improvements Act. Quite to the contrary, the Act was presented as a modest revision to existing practice, and no mention of any dramatic expansion of federal jurisdiction under Rule 18 appears. Nevertheless, the text of the statute is clear: It extends the scope of supplemental jurisdiction to the fullest extent permitted by Article III. If the rules-based delegation model of federal supplemental jurisdiction were the correct interpretation of Article III, an assertedly more restrictive but unexpressed congressional intent underlying the statute would be immaterial.[124] Moreover, although apparently endorsing *Gibbs*, the legislative history of the statute suggests

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"common nucleus of operative fact" language and summarized *Gibbs* as holding that "[s]eparate claims are part of the same 'case' and may be heard together if they are based on related facts. However, pendent jurisdiction is not mandatory." 1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 548 (1990) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)). The recommendation of the Working Papers noted that the "common nucleus" test was typically interpreted by courts to "require only that the claims arise out of the same transaction or occurrence." *Id.* at 560. Ultimately, the Working Papers recommended that "Congress codify this case law by authorizing federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims that require the joinder of additional parties." *Id.* It is clear, therefore, that the Working Papers recommended codification of *Gibbs*'s supplemental-jurisdiction standard, as it had been interpreted and applied by most federal courts at the time. *See id.* at 559–60.

The House Report accompanying Public Law 101-650, known as the Judicial Improvements Act of 1990, stated that the supplemental-jurisdiction provision of the Judicial Improvements Act was intended to implement the Federal Courts Study Committee's April 2, 1990, recommendation. *See* H.R. REP. NO. 101-734, at 27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6873. Later in the House Report, the supplemental-jurisdiction statute is described as "authoriz[ing] the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim or claims that provide the basis of the district court's original jurisdiction." *Id.* at 28–29, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874–75. The footnote to this statement of the Report states that "[i]n so doing, [this subsection] codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in [*Gibbs*]." *Id.* at 29 n.15, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6878 n.15.

Clearly, the supplemental-jurisdiction statute was intended to codify *Gibbs* supplemental-jurisdiction standard. However, it is unclear what Congress thought the *Gibbs* standard meant. Although the House Report directly cited the portion of the Federal Courts Study Committee Report that employed the "same transaction or occurrence" terminology, the House Report itself did not use that language. Instead, the Report broadly referred to the exercise of supplemental jurisdiction over claims that form part of the "same constitutional case or controversy" as the jurisdiction-conferring claim. As discussed below, the legislative history of the supplemental-jurisdiction statute provides support for multiple interpretations of this language. *See infra* note 125 and accompanying text.

124. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 566–68 (2005) (finding that § 1367 is unambiguous and that an "authoritative statement [about a statute] is the statutory text [itself], not the legislative history or any other extrinsic material").

multiple possible and conflicting interpretations of the *Gibbs* standard itself.[125]

Although not rejecting a rules-based model of federal jurisdiction, Professor Fletcher's article on set-offs recognizes the model's broad and potentially troubling implications.[126] Perhaps with this in mind, he suggested that a logical stopping point might be found by defining the scope of the constitutional case, not by referring to some kind of loose factual relationship among jurisdictional and non-jurisdictional claims, but rather by referring to the scope of claim and party joinder recognized in England and the United States contemporaneously with the adoption of the Constitution.[127] He thus suggested, as an alternative, a "historical" rather than transactional or fact-based model of federal jurisdiction.

In an earlier article, I concluded that Fletcher's thesis provides an inadequate principle for defining and limiting the subject matter jurisdiction of the federal courts with respect to non-diverse state law claims joined in the same action with those enumerated by Article III.[128] Fletcher's approach is inadequate for several reasons. First, to the extent that it refers to the joinder rules applicable to claims at law or in equity

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125. An early draft of the statute submitted to Representative Kastenmeier—the Chair of the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary—by professors at the Western New England College School of Law proposed two alternatives for what ultimately became § 1367(a): one requiring that the jurisdictional and non-jurisdictional claims arise out of the "same transaction or occurrence or series of transactions or occurrences," and the other requiring only that they be "so related that they constitute one case or controversy within the meaning of Article III." *Fed. Courts Study Comm. Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 686–87 (1990). The authors clearly assumed that the second alternative was broader than the first. *See id.* at 692. In particular, they defined a "case" or "controversy" to include claims that "(A) arise out of the same transaction or occurrence or series of transactions or occurrences[,] *or* (B) would ordinarily be tried together in one judicial proceeding." *Id.* at 687–88, 692 (emphasis added). Later, however, they withdrew the second alternative, but it was reinstated in lieu of the same transaction standard without explanation in a draft subsequently prepared by Professors Thomas D. Rowe, Jr., Stephen B. Burbank, and Thomas M. Mengler. *Id.* at 722. That draft was the basis for the House Committee Report, which assumed that it incorporated the *Gibbs* standard. *See supra* note 123 and accompanying text. This sequence of events is susceptible to the interpretation that either the statute incorporated a "same transaction" standard for supplemental jurisdiction or that it incorporated a broader standard extending beyond claims that are transactionally related.

126. *See* Fletcher, *supra* note 13, at 179 ("[F]ew people will object on grounds of policy to defensive set-off. The hard part is that many other transactionally unrelated claims may also be within the constitutionally permissible supplemental jurisdiction. If that extends supplemental jurisdiction too far, there is of course a solution—Congress may amend the statute.").

127. *Id.* at 177–78 ("It would be a comprehensible constitutional test to allow supplemental jurisdiction to extend no further than to whatever could have been tried in a single judicial proceeding at the time of the Constitution's adoption.").

128. Floyd, *Minimal Diversity*, *supra* note 21, at 637–42.

when the Constitution was adopted, the approach does not provide an apt analogy because rules applicable to joinder of claims and parties admittedly falling within the subject matter jurisdiction of a single system of courts are not addressed to the scope of permissible cross-jurisdictional expansions of jurisdiction between the courts of different sovereignties. As a result, such rules were fashioned without reference to Article III's careful prescription and limitation of federal court jurisdiction in relation to that of state courts and do not provide a proper basis for resolving such questions.[129]

Second, historic joinder practice within law courts, though not confined to claims arising from the same transaction, was extremely limited. No generalized joinder rules existed.[130] Every suit had to be brought under a writ, and each writ had its own peculiarities. For example, a writ of trespass allowed multiple claims to be brought even if they were factually unrelated, but multiple claims for breach of contract had to be brought separately.[131] Joinder of parties also depended upon the type of writ: Joint property owners had to be joined when bringing an action in tort;[132] defendants who acted in concert were permitted—but not required—to be joined;[133] and joint obligees and obligors had to be joined in contract actions.[134]

Equity joinder practice was more liberal, permitting all claims between a single plaintiff and a single defendant to be joined so long as they were not "multifarious" and permitting joinder of multiple parties when necessary to resolve an entire controversy.[135] However, these liberal joinder provisions assumed that all claims to be joined were equitable in nature. "[A]s long as law and equity were maintained as separate systems, it still was not possible to join a legal claim with an equitable claim in either court."[136]

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129. *Id.*

130. GEOFFREY C. HAZARD ET AL., PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS 649 (9th ed. 2005).

131. *Id.* (citing Mitchell G. Williams, *Pleading Reform in Nineteenth Century America: The Joinder of Actions at Common Law and Under the Codes*, 6 J. LEGAL HIST. 299 (1985)).

132. *Id.* (citing BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 397 (3d ed. 1923)).

133. *Id.* (citing William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 414–15 (1937)).

134. *Id.* (citing John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 356–74 (1957)).

135. Floyd, *Minimal Diversity*, *supra* note 21, at 638. *But see* HAZARD, *supra* note 130, at 649 ("In theory, equity courts could take any case that could not be handled fairly in the law courts because of the limitations of the common law joinder rules, but joinder in the equity courts became increasingly limited between about 1700 and 1850.").

136. 6A WRIGHT ET AL., *supra* note 4, § 1581, at 518 (1990).

The liberal system of equitable joinder thus provides a poor historic analogy for the kind of cross-system jurisdictional expansion contemplated by the proponents of a rules-based joinder model. To the extent that equity embraced the joinder of otherwise legal claims by requiring the joinder of necessary parties, permitting the intervention of third parties, authorizing interpleader actions, and through the class action device, it did so only when such joinder was necessary to permit the court to render a complete decree or to prevent practical prejudice to existing parties or to parties not before the court who possessed a "common interest" in the subject matter of the action.[137] Those joinder authorizations were not based simply on a transactional or other factual relationship among claims. They did not authorize the joinder of non-jurisdictional claims where the parties to be joined or class members had no common interest in the subject matter of the action, let alone where their claims were entirely unrelated to those properly before the court.[138]

The strongest defense to date of an unrestricted rules-based model of federal jurisdiction is Professor Matasar's article summarized in the previous section.[139] However, despite his detailed and thoughtful treatment of this important topic, and its subsequent citation,[140] his analysis ultimately is unpersuasive. As Matasar implicitly recognizes, his parsing of the "common nucleus" and "ordinarily be expected to try" phrases in *Gibbs* and their "but if" connector—leading to the conclusion that they represent separate requirements that can be given sensible independent meaning only if the more restrictive "common nucleus" requirement is statutorily or common-law based, while the "ordinary expectation" requirement extends the scope of the constitutional case as far as validly prescribed rules of joinder permit—has not been followed by the courts.[141] As a matter of ordinary usage, Justice Brennan's subsequent "ordinarily be expected to try" description of the scope of the Article III case was intended merely as a restatement of his earlier definition of the Article III case in terms of a "common nucleus of operative fact." For that reason, courts have not perceived the gossamer contradictions that Matasar explores and—quite properly—have not given the second articulation independent constitutional significance.[142]

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137. *See* Floyd, *Minimal Diversity*, *supra* note 21, at 638–42.

138. *Id.* at 640.

139. *See supra* notes 22–42 and accompanying text.

140. *See, e.g.*, 13B WRIGHT ET AL., *supra* note 4, §§ 3564, at 66 n.3, 3567, at 108–10 nn.8–11, 3567.1, at 114 n.1; Karen Nelson Moore, *The Supplemental Jurisdiction Statute: An Important but Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31, 34 n.10 (1992); Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 666 n.217 (1999).

141. *See* Matasar, *supra* note 22, at 1455–56.

142. *See id.*

Matasar is on firmer ground when he points out six contexts in which no requirement of "fact relatedness" has supported recognized exercises of supplemental jurisdiction.[143] From this, he correctly concludes that the "common nucleus" formulation does not define the outer boundaries of the Article III "case" or "controversy."[144] But his additional conclusion that the scope of the constitutional case is defined by whatever rules for joinder of parties and claims that Congress or its delegatees may adopt does not follow.[145] That the "common nucleus" formulation does not itself exhaust the full scope of the constitutional case in no way implies that Congress or the rules drafters have unlimited power to define and expand the limits of Article III. As pointed out below, a much narrower model of federal jurisdiction more closely tied to the purposes of Article III explains each of the six examples cited by Matasar: In each instance, the exercise of supplemental jurisdiction over the non-jurisdictional claims before the court was "necessary and proper" to permit the federal court fairly and completely to resolve a matter falling within Article III of the Constitution and properly before it for decision.[146]

Finally, the obscure language from *Osborn* quoted by Matasar will not bear the weight he has placed on it.[147] While it defines a "case," *Osborn* does not purport to define which cases presented in the "form prescribed by law" arise under Article III and which do not. *Osborn*'s discussion of that issue had nothing to do with the exercise of jurisdiction over non-jurisdictional claims supplemental to the court's "arising under" (or diversity) jurisdiction. Rather, the issue in *Osborn* was whether a single claim by the Bank of the United States seeking to invalidate the enforcement of a state tax and, subsequently, to recover money that state officials seized from the bank in collection of the tax, arose under federal law.[148] To the extent that Chief Justice Marshall's opinion was addressed to the issue of federal jurisdiction over questions of state law, it was only to whether admitted federal jurisdiction over a single federal claim that otherwise would arise under federal law (because it involved a federal question as an "original ingredient") should be held lacking because the final disposition of that claim also turned on questions of fact and state

143. *See id.* at 1463–76; *supra* notes 37–38 and accompanying text.

144. Matasar, *supra* note 22, at 1476–77.

145. *See id.* at 1477.

146. *See infra* text accompanying notes 232–33, 277–84.

147. *See* Matasar, *supra* note 22, at 1479–80 (quoting Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 818 (1824)).

148. *Osborn*, 22 U.S. at 818–28. For a detailed discussion of the facts and holding of *Osborn*, see Floyd, *Supplemental Jurisdiction*, *supra* note 4, at 829–31.

law.[149] Given the existence of such an original federal ingredient,[150] Chief Justice Marshall concluded that the "arising under" jurisdiction would be nugatory unless the entire "arising under" claim, including incidental questions of state law, were part of the same constitutional case.[151] Nothing in *Osborn* suggests that the scope of the Article III case extends as far as Congress or the rules drafters might choose in permitting the joinder of non-jurisdictional and unrelated state law claims that contain no federal ingredient at all. Similarly, the broad discretion of Congress and the rules drafters to fashion and modify joinder rules to achieve the fair and efficient resolution of claims over which the federal courts do have jurisdiction does not imply that Congress has unlimited power to expand the scope of federal jurisdiction through those rules of joinder as Matasar contends.

Matasar's argument gives insufficient weight to the fundamental issues of federalism raised by such an expansive definition of the federal constitutional case and to the unprecedented intrusion on the reserved judicial powers of the states that his argument would permit. He contends that such concerns have improperly "blinded recent courts and commentators to the simplicity of this constitutional definition of 'case' or 'controversy.'"[152] Further, he argues that such fears are overdrawn because, to the extent expansive joinder provisions are adopted through the Rules Enabling Act process, such rules should not "'be construed to extend or limit the jurisdiction'" of the federal courts.[153] In his view, absent direct action by Congress, that proscription "limits supplemental jurisdiction to cases fairly recognizable as similar to those authorized at the Rules'

149. *Osborn*, 22 U.S. at 830.

150. *Osborn*'s "original ingredient" formulation of the juridisdiction arising under the Constitution has itself been subject to substantial criticism as unduly expansive and has rarely been applied. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 481–82 (1957) (Frankfurter, J., dissenting) ("*Osborn* . . . appears to have been based on premises that today . . . are subject to criticism. The basic premise was that every case in which a federal question might arise must be capable of being commenced in the federal courts, and when so commenced it might . . . be concluded there despite the fact that the federal question was never raised. . . . There is nothing in Article III that affirmatively supports the view that original jurisdiction over cases involving federal questions must extend to every case in which there is the potentiality of appellate jurisdiction."); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 847 (5th ed. 2003) (noting Justice Frankfurter's opinion in *Lincoln Mills*, which in turn noted the criticism of *Osborn*); 13B WRIGHT ET AL., *supra* note 4, § 3562, at 24 ("The *Osborn* theory, that when federal law is an ingredient of the claim there is a federal question, has been rejected in construing the [statute granting federal courts original jurisdiction over federal-question cases].").

151. *See* Floyd, *Supplemental Jurisdiction*, *supra* note 4, at 831.

152. Matasar, *supra* note 22, at 1479.

153. *Id.* at 1487, 1489 (quoting FED. R. CIV. P. 82).

enactment."[154] Regarding Congress, Matasar asserts that Congress likely will not *use* its broad constitutional power to expand federal judicial power at the expense of the states because it has "consistently guarded independent state authority."[155] Given the supplemental-jurisdiction statute, which extends supplemental jurisdiction to the full extent permitted by Article III—as well as other dramatic expansions of federal jurisdiction over non-diverse state law claims such as those embodied in the Class Action Fairness Act of 2005[156] and the Multiparty, Multiforum Trial Jurisdiction Act of 2002[157]—these arguments regarding congressional prudence ring hollow today. In any event, they evade the core policy issue raised by such an unrestricted rules-based model of the federal constitutional case. As discussed at greater length below, apart from its lack of historic support, such an expansive approach fails to establish the required "necessary and proper" link between the purposes of Article III and the power of the federal courts to entertain claims that fall outside the limited categories of federal jurisdiction specifically enumerated by the Constitution.

III. *GIBBS* AND THE "LOOSE FACTUAL CONNECTION" ALTERNATIVE TO THE "SAME TRANSACTION OR OCCURRENCE" STANDARD FOR SUPPLEMENTAL JURISDICTION

As previously discussed, case law development after the enactment of the supplemental-jurisdiction statute has increasingly taken the view that the "same transaction" joinder standard that pervades the Federal Rules of Civil Procedure does not define the outer boundaries of the Article III "case" with regard to which the statute has authorized the exercise of supplemental jurisdiction. Despite some suggestion that the unrestricted "delegation" model previously discussed might ultimately define the limits of the constitutional case, however, the cases tend to recognize that *some* sort of factual relationship between jurisdictional and non-jurisdictional claims is required to permit their treatment as parts of a single Article III case. Rather than abandon the *Gibbs* "common nucleus of operative fact" test altogether, the cases instead attempt to distinguish the *Gibbs* test from the rules-based "same transaction" joinder standard. While adhering to the

154. *Id.* at 1489.

155. *Id.*

156. Pub. L. No. 109-2, §§ 4–5, 119 Stat. 4, 9–13 (codified as amended at 28 U.S.C.A. §§ 1332, 1335, 1441, 1452, 1603 (West 2007)).

157. Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826 (codified as amended at 28 U.S.C. §§ 1369, 1391, 1697, 1441, 1785 (Supp. IV 2004)). For descriptions of the operation of these statutes and objections to their jurisdictional provisions see Floyd, *Minimal Diversity*, *supra* note 21, at 624–28, 671–77; Floyd, *Interstate Commerce*, *supra* note 21, at 490–93, 499–511, 520–31.

view that the *Gibbs* test was intended to and continues to define the outer boundaries of the constitutional case, the courts have concluded that *Gibbs* requires only a "loose factual connection" among claims and that such a "loose connection" may exist even when the "same transaction" standard is not satisfied.[158]

Does the "loose connection" test establish a more satisfactory boundary for the constitutional case than the "same transaction" standard of the Federal Rules? Before the enactment of the supplemental-jurisdiction statute, the cases tended to equate the "same transaction" standard of the Rules with the "common nucleus" formulation of *Gibbs*.[159] That equation was entirely logical. In defining the scope of pendent-claim jurisdiction in terms of a "common nucleus of operative fact," the Court in *Gibbs* initially appeared to equate it with the scope of the constitutional case.[160] The Court did not, at that point, articulate a functional basis for adopting the "common nucleus" formulation. But it later did so in discussing a court's discretion to decline to exercise supplemental jurisdiction even when it exists. The Court explained that the "justification [for pendent-claim jurisdiction] lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims."[161]

As discussed below, this central focus on efficiency rather than federalism was misplaced and has led to an unfortunate distortion and misdirection of supplemental-jurisdiction doctrine.[162] Accepting this efficiency-based rationale on its own terms, however, makes clear its close tie to the central goal of the "same transaction" based joinder provisions of the Federal Rules of Civil Procedure. As a leading treatise explains in discussing Rule 13(a) of the Federal Rules of Civil Procedure governing compulsory counterclaims, the prevailing test for interpreting the "same transaction" standard of that Rule is that a counterclaim is compulsory if it "is logically related to the claim being asserted by the opposing party . . . . The hallmark of this approach is its flexibility. Basically it allows the court to apply Rule 13(a) to any counterclaim that from an economy or efficiency perspective could be profitably tried with the main claim."[163] Similarly, the same treatise recommends applying the "logical relationship" standard to the transactionally based joinder of parties

158. *See supra* Part II.B.

159. *See supra* note 115 and accompanying text; *see also* Floyd, *Minimal Diversity*, *supra* note 21, at 680 n.284 (collecting additional cases).

160. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); *see supra* note 10 and quoted text.

161. *Gibbs*, 383 U.S. at 726.

162. *See infra* notes 166–69 and accompanying text.

163. 6 WRIGHT ET AL., *supra* note 4, § 1410, at 61–65 (1990).

authorized by Rule 20 of the Federal Rules, on the ground that "the flexibility of this standard enables the federal courts to promote judicial economy by permitting all reasonably related claims for relief by or against different parties to be tried in a single proceeding," noting the "liberal approach" that many courts have adopted in authorizing joinder under Rule 20.[164]

Given the liberal, efficiency-based standard that underlies both the "common nucleus of operative fact" supplemental-jurisdiction standard of *Gibbs* and the "same transaction" joinder standard of the Federal Rules, equating the two is entirely understandable. Yet, as previously discussed, after the enactment of the supplemental-jurisdiction statute, some courts have suggested that the former standard is broader than the latter because the former requires only a "loose factual connection" among claims.

What sense can this make, given that the prevailing interpretation of the "same transaction" standard of the Federal Rules already embraces all claims that have a "logical relationship" with each other and therefore includes all claims for which a joint trial would achieve non-trivial judicial economies? The "loose connection" test, if it is different, must extend the scope of *Gibbs*-based supplemental jurisdiction to claims that are *not logically related and whose trial together therefore would not achieve significant judicial economies and fairness for the parties.* This, of course, would largely if not entirely divorce the scope of supplemental jurisdiction from the pivotal rationale of *Gibbs*, which was directed fundamentally to achieving fairness and judicial economy.[165] Such a "loose connection" standard would not advance the purposes articulated by *Gibbs*. It would instead lend itself to unfairness and strategic abuse by opening the federal court to the aggregation of many unrelated claims, significantly increasing the potential for unmanageability, discovery abuse, and jury confusion—all contrary to the central purposes of *Gibbs*.

Defenders of the "loose connection" standard might respond that a district court has ample ability to control such abuses under the "discretionary" dismissal power of the supplemental-jurisdiction statute.[166]

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164. 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1653, at 410 (3d ed. 2001). The authors of the treatise further note that "the courts are inclined to find that claims arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the court." *Id.* § 1410, at 411–12.

165. *See Gibbs*, 383 U.S. at 726.

166. Section 1367(c) provides that a federal court may decline supplemental jurisdiction over a claim if:

> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

That provision derives from the second component of *Gibbs*, which stresses that judicial power is not an obligation and that federal courts may decline to exercise supplemental jurisdiction when federal claims are dismissed at the outset, when novel or complex issues of state law are present, when state law claims predominate, or when other undesirable effects such as jury confusion may result.[167] This response is inadequate, however, because *Gibbs* employed this discretionary safeguard on the assumption that exercising supplemental jurisdiction would promote judicial economy and fairness when the claims at issue arose from a common nucleus of operative fact. If only a "loose factual connection" that does not satisfy the very liberal "logical relationship" standard that prevails under the transactional joinder standard of the Federal Rules were required for the exercise of supplemental jurisdiction, this threshold presumption would not be warranted: The "logical relationship" standard itself already embraces all claims whose joinder would significantly promote judicial economy. Where that purpose is not served, the power of discretionary dismissal based on case-specific federalism or other exceptional grounds would not remedy that deficiency and would permit many state law claims that should be resolved by state courts to populate the dockets of federal courts. Moreover, considerable authority supports the view that the discretionary dismissal power of § 1367(c) is more restricted than the dismissal power articulated in *Gibbs* and, absent the novelty or predominance of state law claims, would require the federal court to exercise supplemental jurisdiction that would exist under the "loose factual connection" standard absent truly "exceptional circumstances."[168]

The "loose factual connection" standard is objectionable for other reasons. Once divorced from the efficiency-based rationale of *Gibbs*, it becomes entirely bootless. Courts adopting that standard have not explained how it serves any legitimate purpose of the federal court system

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> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c) (2000).

167. *See Gibbs*, 383 U.S. at 726 (pointing out that supplemental jurisdiction "need not be exercised in every case in which it is found to exist").

168. *See* 28 U.S.C. § 1367(c)(4). *See generally* 13 WRIGHT ET AL., *supra* note 4, § 3523 (collecting cases supporting the proposition that a court's discretion to decline supplemental jurisdiction under § 1367(c) is limited to cases where (1) novel or complex issues of state law are presented, (2) the jurisdictionally insufficient claim predominates, (3) all the jurisdictionally sufficient claims have been dismissed, or (4) exceptional circumstances involving compelling reasons to decline jurisdiction are present).

or facilitates the Article III work of those courts. Nor have they explained how the standard would serve the interests of litigants before those courts in fairly and efficiently disposing of their disputes. Indeed, because the "loose factual connection" standard is not calculated to achieve significant judicial economy and fairness by comprehensive disposition of logically related claims, such a demonstration would be impossible to make. The "loose" but not "logical" connection standard would bring claims within federal court jurisdiction that have no legitimate reason for being there. The result would be to expand federal jurisdiction in the same impermissible way as under the unrestricted delegation model, raising all of the objections to that model previously reviewed.

Finally, what sort of factual relationship satisfies the "loose" but not "logical" factual relationship of this new jurisdictional test? Trying to distinguish claims that satisfy the "same transaction" joinder standard because they have a logical relationship from those that do not but still have a sufficiently "loose" relationship to be resolved by a federal court presents a "how many angels on the head of a pin" inquiry. Is it sufficient that the same parties are involved? That the claims at issue, although not logically related in their legal or factual underpinnings, arose during the same time period or in the same geographic area? That both claims seek to redress personal or business injuries of the plaintiff, even though those injuries may be entirely unrelated? That both seek to impose liability on the same business or industry? Absent any explanation of the purpose or function of the "loose relationship" rule that might guide its application, any effort to distinguish the kinds of factual relationships that support supplemental jurisdiction from those that do not inevitably will lack logic, consistency, and purpose.

IV. THE NECESSARY AND PROPER MODEL OF FEDERAL SUPPLEMENTAL JURISDICTION

Contrary to the assumption of many courts and commentators, a choice need not be made between an unrestricted rules-based delegation model of the Article III case, on the one hand, and a transactionally defined approach of uncertain content, on the other. An alternative approach adheres closely to the purposes of Article III while giving appropriate weight to legitimate federal interests.

A. *The Necessary and Proper Thesis*

In a previous article, I suggested a "necessary and proper" model of federal jurisdiction.[169] In broad outline, that approach does not turn

169. Floyd, *Minimal Diversity*, *supra* note 21, at 643–52, 680–95.

mechanically on whether valid procedural rules authorize the joinder of non-jurisdictional claims in the same action with claims falling within the scope of Article III, or on whether those claims share some underlying transactional or other factual relationship. Rather, the model considers the specific context in which the joinder of parties or claims occurs and the purposes that joinder serves. In light of that context and purpose, the model asks whether the joinder of the non-jurisdictional claims is "necessary and proper" to permit a federal court to perform the tasks assigned to it by Article III of the Constitution.[170] As discussed in that article, this approach would not limit Congress or the rules drafters by an artificially narrow conception of what is necessary and proper to achieve the purposes underlying Article III but would exclude legislation and rules that expand federal subject matter jurisdiction for the purpose of achieving non-Article III objectives.[171]

A critical implication of such a necessary and proper analysis is that a transactional relationship among claims is neither necessary nor sufficient to support the exercise of federal supplemental jurisdiction. In some contexts, the exercise of supplemental jurisdiction over non-diverse state law claims may be necessary to permit a federal court fairly and efficiently to dispose of claims falling within the scope of Article III even absent a transactional relationship. That is true of permissive counterclaims asserted under Rule 13(b) of the Federal Rules of Civil Procedure.[172] Professor Matasar's article provides other examples.[173] These examples are fully consistent with a necessary and proper model of federal jurisdiction. They do not support an unrestricted rules-based model of supplemental jurisdiction or one based on the existence of a "loose" factual relationship of uncertain scope.

Conversely, in other contexts, even a strong transactional relationship among claims is insufficient to meet the requirements of a necessary and proper jurisdictional model. To that subject I now turn.

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170. *Id.* at 643–52.

171. *Id.* at 652–77 (evaluating the objectives of the Multiparty, Multiforum Trial Jurisdiction Act of 2002 and the proposed Class Action Fairness Act in necessary and proper terms); *see also* Floyd, *Interstate Commerce*, *supra* note 21 (criticizing the final version of the Class Action Fairness Act). This necessary and proper analysis of questions of federal subject matter jurisdiction is supported by recent scholarship recognizing that federal subject matter jurisdiction is "claim specific," requiring that either original or supplemental jurisdiction exist for each claim asserted in an action filed in a federal court. Floyd, *Minimal Diversity*, *supra* note 21, at 679–80; *see also* John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 IND. L.J. 25, 45–52 (1998).

172. FED. R. CIV. P. 13(b) ("A pleading may state as a counterclaim any claim against an opposing party that is not compulsory.").

173. Matasar, *supra* note 22, at 1463–77.

B. *The Relevance of a Transactional Relationship to the Scope of Federal Supplemental Jurisdiction Under the Necessary and Proper Model*

Gibbs's conclusion that the existence of federal supplemental jurisdiction turns on the existence of a "common nucleus of operative fact" has been with us for so long that it is difficult to imagine a different jurisdictional paradigm. The standard's appeal lies in its ostensible simplicity, coupled with its strong and explicit grounding in the policy of avoiding piecemeal litigation of overlapping claims in federal and state court. As *Gibbs* emphasized, the justification for supplemental jurisdiction (in that case, pendent-claim jurisdiction) "lies in considerations of judicial economy, convenience and fairness to litigants."[174] Although the Supreme Court never explained the origins or derivation of the "common nucleus of operative fact" standard, it seems to have been fashioned with the obvious policy goals of judicial economy, convenience to litigants, and comprehensive disposition of litigation in mind. Its enduring power lies in the strength of those policies and in the easy melding of that approach with the transactional standard for joinder of parties and claims that pervades the Federal Rules of Civil Procedure, which are designed to achieve just such comprehensive and efficient disposition of related matters. The Federal Rules admonish that "[t]hey should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[175]

Under the necessary and proper model of federal jurisdiction, however, the possibility that the exercise of federal jurisdiction may achieve a more economical and comprehensive disposition of factually related claims than would their separate adjudication in federal and state court is not, in itself, a sufficient basis for the exercise of supplemental jurisdiction over non-diverse state law claims. The Supreme Court has repeatedly held that considerations of judicial economy, standing alone, do not provide an adequate basis for the expansion of federal jurisdiction at the expense of state courts.[176] As Justice Black observed in narrowly construing the "in

174. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

175. FED. R. CIV. P. 1. For rules permitting the joinder of parties and claims based on the existence of a transactional relationship among claims, see, for example, FED. R. CIV. P. 13(a) (compulsory counterclaims); FED. R. CIV. P. 13(g) (cross-claims between co-parties); FED. R. CIV. P. 14(a) (claims asserted by or against a third-party defendant); FED. R. CIV. P. 20(a) (claims asserted by multiple plaintiffs or against multiple defendants).

176. *See* Floyd, *Minimal Diversity*, *supra* note 21, at 684–85 (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123 (1984), Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909), and John P. Dwyer, *Pendent Jurisdiction and the Eleventh Amendment*, 75 CAL. L. REV. 129, 154 (1987)); *id.* at 685 n.310 ("No matter how great the efficiency justifications for

aid of jurisdiction" exception to the Anti-Injunction Act's prohibition of federal injunctions of parallel state proceedings: "[F]rom the beginning we have had in this country two essentially separate legal systems. . . . Understandably this dual court system was bound to lead to conflicts and frictions."[177] This expectation of overlapping, sometimes inefficient state and federal litigation of the same subject matter rests, not merely on statutory grounds, but on the "fundamental constitutional independence of the States and their courts."[178]

To define the proper scope of supplemental jurisdiction, a distinction must be drawn between achieving *intrasystem* judicial economy and fairness *within the federal court system*, and achieving *intersystem* judicial economy in the resolution of related claims pending in both federal and state court. The necessary and proper model of federal jurisdiction focuses on whether the exercise of federal jurisdiction is necessary and proper to permit federal courts fairly and efficiently to resolve claims falling within the categories of judicial power enumerated in Article III. If the federal courts are able to do so without addressing possibly overlapping non-diverse state law claims, the exercise of supplemental jurisdiction over the state law claims is improper.[179]

Neither *Gibbs*'s broad recognition of the importance of judicial economy nor the transactionally based joinder standards of the Federal Rules would be significantly altered or threatened by adopting a necessary and proper approach to the definition of the federal constitutional case. Efficiency considerations would remain highly relevant in determining whether it is necessary and proper for federal courts to entertain transactionally related non-diverse state law claims in order to perform the tasks that the Constitution and Congress assign to them. Consider, for example, Rule 20, which permits joinder of claims by plaintiffs or against defendants that arise out of the "same transaction, occurrence, or series of transactions or occurrences" and share a common question of law or fact.[180] Under the necessary and proper model of federal jurisdiction, exercising supplemental jurisdiction over non-diverse state law claims that satisfy Rule 20 would be proper.[181] That is not simply because exercising

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pendent jurisdiction, it cannot be allowed if not authorized by the Constitution and the [jurisdictional] statute." (quoting Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After* Pennhurst v. Halderman, 12 HASTINGS CONST. L.Q. 643, 660 (1985))).

177. Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 286 (1970).

178. *Id.* at 287.

179. *Cf.* Temple v. Synthes Corp., 498 U.S. 5, 7 (1991) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.").

180. FED. R. CIV. P. 20(a).

181. The supplemental-jurisdiction statute authorizes the exercise of supplemental jurisdiction

such jurisdiction would achieve significant intersystem judicial economies (although it would). Rather, as has been frequently recognized, a plaintiff with a federal claim against one defendant and a non-diverse state law claim against another defendant that is transactionally related to the federal claim might be significantly deterred from invoking federal jurisdiction to resolve her Article III claim if faced with the additional cost and possibility of inconsistent judgments that would attend the separate litigation of those claims in federal and state court.[182] Similarly, the assertion of both jurisdictional and non-jurisdictional claims by multiple plaintiffs in a single action may be necessary to enhance the strength and economic viability of their case.[183]

In short, the necessary and proper model of federal jurisdiction supplies both functional purpose and intelligible content to the degree of factual connection between jurisdictional and non-jurisdictional claims required to support the exercise of supplemental jurisdiction. If the claims are

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to the widest extent permitted by the Constitution in all federal-question cases. *See* 28 U.S.C. § 1367(a) (2000) ("Except as provided in subsections (b) [relating to diversity cases] and (c) [relating to discretionary declinations of jurisdiction] . . . in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."). In diversity cases, subsection (b) expressly forbids exercising supplemental jurisdiction over claims by plaintiffs against defendants joined under Rule 20. *Id.* § 1367(b). It does not specifically exclude claims by plaintiffs joined under Rule 20. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Supreme Court held that, by this omission, the statute effectively overruled the rule against aggregating the claims of multiple plaintiffs to satisfy the jurisdictional amount in diversity cases but did not overrule the "complete diversity" requirement itself. *Id.* at 571. This Article does not address the correctness of that decision. However, under the necessary and proper model of federal jurisdiction, Congress may confer supplemental jurisdiction over all transactionally related claims properly joined under Rule 20, whether in federal-question or diversity cases.

182. AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 430 n.13 (1969) ("Congress must be able to remove impediments of this kind that might make the federal forum less attractive than the state courts and thus impose a burden on invoking federal jurisdiction."); *id.* at 434; *see also, e.g.*, Matasar, *supra* note 22, at 1404–06 & n.6; Arthur R. Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1, 4 (1985).

183. For a full development of this argument, see Floyd, *Minimal Diversity*, *supra* note 21, at 673–74, 687–88. This is most apparent, for example, in connection with the "common question" class actions authorized by Rule 23(b)(3), which amounts to a permissive joinder device designed to ensure the economic viability of small claims. *See id.* at 691–92; *see also* Jinks v. Richland County, 538 U.S. 456, 463 (2003) (sustaining the § 1367(d) provision tolling state statutes of limitations on claims asserted under the supplemental-jurisdiction authorization of § 1367(a) that were later dismissed by the federal court, relying on the necessary and proper rationale that the provision "eliminates a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal- and state-law claims that 'derive from a common nucleus of operative fact'" (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966))).

sufficiently factually related that litigating them separately would deter a litigant with an Article III claim from resorting to federal court, then the plaintiff's related non-diverse state law claims should fall within the supplemental jurisdiction of the federal court. If no significant deterrent exists—because significant judicial economy and avoidance of inconsistent outcomes would not result from their separate trials in federal and state court—exercise of supplemental jurisdiction is improper. Under this functional analysis, there is no "third category" of claims that fall outside the prevailing "logical relationship" interpretation of the "same transaction" joinder standard of the Federal Rules but that still relate sufficiently "loosely" to a litigant's jurisdictional claims to fall within the supplemental jurisdiction of the federal court. No third category exists because, when viewed in functional-deterrence terms, the efficiency-based joinder standard of the Federal Rules extends as far as necessary to avoid significantly deterring litigants from litigating Article III claims in federal court.

This approach also explains *Gibbs*'s secondary and much debated "ordinarily be expected to try" language in relation to its "common nucleus of operative fact" formulation for the exercise of supplemental jurisdiction.[184] In attempting to ascribe separate meaning to the "common nucleus" and "ordinarily be expected to try" phrases of *Gibbs*, Professor Matasar concluded that they were either superfluous or contradictory.[185] Viewed in functional terms, however, *Gibbs*'s subsequent rephrasing of the supplemental-jurisdiction test gives the "common nucleus" formulation intelligible content by highlighting its functional justification—providing incentives to litigants to invoke the federal forum. If a litigant's Article III and non-diverse state law claims are so factually related that she would "ordinarily be expected to try" them all in one judicial proceeding, the inability to do so could deter her from invoking the federal forum, thus undermining the purposes of Article III.

But does the functional "deterrence" view of the permissible scope of the necessary and proper Article III case prove that Matasar was correct after all? Even the non-transactional joinder provisions of the Federal Rules—particularly Rule 18, which authorizes a litigant properly asserting one claim in federal court to join with it any other claim that she has against the opposing party[186]—are based on the drafters' determination

184. *Gibbs*, 383 U.S. at 725 ("The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.").

185. Matasar, *supra* note 22, at 1462.

186. "A party asserting a claim, counterclaim, cross-claim, or third-party claim, may

that, once a party has properly invoked federal jurisdiction against an opponent, she should not be required to initiate multiple actions to assert all of her existing claims against the same party. However, this rationale, which can be assumed properly to define the desirable scope of one action within a single system of courts without regard to the limitations of their subject matter jurisdiction, cannot itself define those limits. The Federal Rules are procedurally—not jurisdictionally—oriented. They are based on considerations of what enlightened rules of pleading within a single system of courts should permit, not on constitutional considerations regarding the allocation of judicial power between federal and state courts. In particular, Rule 18 does not reflect a determination by the rules drafters that the joinder of unrelated claims in the same action will achieve sufficient trial economy or avoid inconsistent determinations of the same issues of law and fact in separate proceedings. As leading commentators have noted, Rule 18 specifies the scope of the claims that may be properly joined in the same pleading and does not represent a conclusion that the joint trial of those claims would be convenient or desirable. The drafters of the Federal Rules "intended Rule 18(a) to deal only with questions of joinder of claims at the pleading stage and not to matters of trial convenience."[187]

Of course, a litigant might, for purely strategic reasons, wish to assert as many claims as possible against an opponent. But this possibility hardly establishes that the inability to do so would significantly deter a litigant from bringing her Article III claims in federal court. Indeed, even greater strategic advantage might frequently result from burdening an opponent with unrelated lawsuits in multiple jurisdictions. *Gibbs*'s focus on claims that a litigant would "ordinarily be expected to try" in one proceeding clearly contains a normative component—not what an aberrant or particularly aggressive litigant might sometimes wish to do, but what a reasonable litigant should, as a matter of ordinary expectation, be permitted to do to avoid a significant adverse impact on the invocation and exercise of federal jurisdiction to resolve Article III claims. Implicitly, *Gibbs* recognized that no adverse impact reasonably could be expected to result if the non-jurisdictional claims that a litigant advances are factually unrelated to claims falling within the scope of Article III, because neither significant judicial or litigant diseconomies nor the avoidance of inconsistent outcomes would result from the separate trial of such claims in federal and state courts.

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join . . . as many claims as it has against an opposing party." FED. R. CIV. P. 18(a).

187. 6A WRIGHT ET AL., *supra* note 4, § 1586, at 532; *see also id.* §§ 1582–85, at 520–31. Rule 42(b) provides that "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate . . . claims . . . ." FED. R. CIV. P. 42(b).

That is not to say that exercising supplemental jurisdiction over factually unrelated claims is never appropriate under the necessary and proper model of federal jurisdiction. Critics of the *Gibbs* test have recognized that the test is too narrow in some contexts.[188] In some circumstances, the necessary and proper model would sustain the exercise of supplemental jurisdiction without a close—or even any—factual connection between jurisdictional and non-jurisdictional claims. Conversely, under the necessary and proper model, the existence of a transactional, "common nucleus," or other factual relationship among claims does not automatically establish that the exercise of supplemental jurisdiction would serve the purposes of Article III. The next two sections review some of the contexts in which tests for supplemental jurisdiction based solely on the factual relationship among claims are over- and under-inclusive.

C. *Contexts in Which a Transactional Relationship Among Claims Is Insufficient to Support the Exercise of Supplemental Jurisdiction*

If most of the transactionally based joinder provisions of the Federal Rules of Civil Procedure would support the exercise of supplemental jurisdiction under the necessary and proper model of federal jurisdiction, why quarrel with the broad efficiency-based approach exemplified by *Gibbs* or deny that judicial economy ultimately provides the touchstone for the exercise of supplemental jurisdiction? The answer is that, in some contexts, such an exercise of supplemental jurisdiction is not necessary to permit a federal court fairly and efficiently to resolve Article III claims or to avoid deterring litigants possessing such claims from invoking a federal forum to resolve them.

Two prominent examples are provided by the Multiparty, Multiforum Trial Jurisdiction Act of 2002[189] and the statutory recommendations set out in the 1994 Report of the ALI's Complex Litigation Project.[190] Both are focused on the desirability of eliminating overlapping, duplicative federal and state court litigation of identical issues of law and fact arising from single accidents (in the case of the Act) or mass-tort and contract disputes (in the case of the complex litigation project). Provided that certain pre-conditions are met, the Multiparty, Multiforum Act confers original federal court jurisdiction over any civil action involving "minimal diversity [of citizenship] between adverse parties that arises from a single accident,

188. *See supra* Part II.A.

189. Pub. L. No. 107-273, § 11020, 116 Stat. 1758, at 826–29 (codified as amended at 28 U.S.C. §§ 1369, 1391, 1697, 1441, 1785 (Supp. IV 2004)).

190. AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994).

where at least 75 natural persons have died in the accident at a discrete location."[191] The Act thus provides for original jurisdiction based on "minimal" rather than the "complete" diversity between opposing parties required under the general statutory conferral of diversity jurisdiction on the federal courts.[192] The Act also permits removal of actions filed in state court against a party to an action that was or could have been filed in federal court under the Act's provision for original jurisdiction and that arises from the same accident as the removed action. Removal is permitted "even if the action to be removed could not have been brought in a district court as an original matter."[193] The latter provision thus permits a state court action arising entirely under state law in which all of the parties are citizens of the same state to be removed to federal court if the defendant in that action is a party to an action (filed by other parties) that arises from the same accident and falls within the Act's provision for original jurisdiction. Similarly, the ALI's 1994 statutory recommendations would have permitted removal of a state court action involving no diversity of citizenship or federal question if the state action arose from the same transaction or occurrence and shared a common question of fact with a pending federal action.[194]

The Multiparty, Multiforum Act grounded its removal provision on the conclusion that the "complete diversity" interpretation of the general diversity statute is only a statutory, rather than a constitutional, limitation.[195] The ALI statutory recommendations endorsed that view but also relied on the concept that a transactional relationship between the removed action and actions properly pending in federal court would

191. 28 U.S.C. § 1369(a) (Supp. IV 2004). One of the following additional conditions must be satisfied: (1) one defendant must reside in a state different from that in which the accident occurred, (2) any two defendants must reside in different states, or (3) substantial parts of the accident must occur in different states. *Id.* These conditions are designed to identify situations in which dispersed litigation arising from the same accident could be expected to occur.

192. 28 U.S.C. § 1332(a) (2000); *see* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (Marshall, C.J.).

193. *See* 28 U.S.C. § 1441(e)(1) (Supp. IV 2004).

194. *See* AM. LAW INST., *supra* note 190, § 5.01(a). Section 5.01(a) provides that multiple civil actions in different state courts may be removed to federal court and consolidated under the direction of the Complex Litigation Panel "if the removed actions arise from the same transaction, occurrence, or series of transactions or occurrences as an action pending in the federal court, and share a common question of fact with that action," *id.*, provided that (1) the various state court actions involve common questions of fact and the "consolidation will promote the just, efficient, and fair conduct of the actions," *id.* § 3.01(a), and (2) such removal and consolidation would not "unduly disrupt or impinge upon state court or regulatory proceedings or impose an undue burden on the federal courts," *id.* § 5.01(a)(2). Section 5.01(e) permits removal upon either the removal request by *any* party or the certification request of any state judge. *Id.* § 5.01(e).

195. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967); *see also* Floyd, *Minimal Diversity*, *supra* note 21, at 624–28.

support the exercise of supplemental jurisdiction over the removed non-diverse state law actions.[196]

These removal provisions are invalid to the extent that they assume that the formal presence of "minimal diversity" of citizenship between any two adverse parties found somewhere in an aggregation of claims whose joinder is authorized by statute or the Federal Rules supports federal jurisdiction over the entire action regardless of the purpose or context of that joinder.[197] Rather, the jurisdictional question those provisions present should be viewed as identical to the supplemental-jurisdiction analysis outlined in this Article: for all assertions of federal jurisdiction over non-diverse state law claims or actions, the pivotal question is whether that exercise of jurisdiction is necessary and proper to achieve the purposes underlying the enumerated and limited grants of federal judicial power set out in Article III. If, considering the context in which it arises and the purposes that it serves, the exercise of federal jurisdiction is unnecessary to permit the federal courts fairly, efficiently, and completely to resolve the matters specifically assigned to them by the Constitution, neither the formal presence of "minimal diversity" between parties nor the presence of a transactional relationship among claims satisfies that test.

Viewed in this light, the provisions of the Multiparty, Multiforum Act and the ALI's proposal for removal of state law, state court actions involving no diversity of citizenship fall outside the boundaries of Article III. Even though the removed claims may be transactionally related to claims falling within the original jurisdiction of the federal courts, removal is unnecessary to permit the federal courts fairly, efficiently, and completely to resolve claims properly falling within their original jurisdiction under Article III. The fact that resolving all related claims in one court system might achieve greater intersystem judicial economy does not establish that the courts of either system must be able to entertain all related claims to resolve those that fall within their original jurisdiction.[198] Nor is it necessary for federal courts to entertain such removed actions to provide the necessary incentive for litigants possessing Article III claims to invoke federal jurisdiction. The removal provisions in question assume that those litigants have already invoked a federal forum. At most, the previously outlined deterrence rationale would permit *those litigants properly in federal court* to assert all of their own transactionally related state law claims. But the deterrence rationale does not justify permitting other litigants by whom or against whom only non-diverse state law claims are asserted to invoke the jurisdiction of the federal court.

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196. *See* Floyd, *Minimal Diversity*, *supra* note 21, at 620–24.

197. See *id.* for an in-depth development of this argument.

198. *See supra* Part IV.B.

State courts may resolve issues of law and fact in actions involving no diversity of citizenship or federal question differently than federal courts entertaining transactionally related claims and actions falling within Article III. But this fact does not establish the required necessary and proper connection for exercising supplemental jurisdiction under Article III. Inconsistent resolution of separate claims involving different parties in separate actions is endemic to litigation in both federal and state courts. Factually related claims by different parties are likely to differ in significant ways that could lead to different outcomes. This is why applying principles of non-mutual collateral estoppel in related mass-tort actions by or against new parties has proved so problematic.[199] Parties may have different litigation strategies, different counsel and resources, different degrees of risk aversion, and different jury pools, all of which create a normal expectation that the outcomes of related cases may vary significantly.[200] This variance in outcomes neither prevents federal courts from resolving the matters entrusted to them by the Constitution nor casts any doubt on the fairness or validity of their judgments. To the contrary,

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199. The asbestos litigation in the 1980s illustrates the difficulty of asserting non-mutual collateral estoppel in many situations, even in cases involving factually related claims. An early asbestos decision, *Borel v. Fibreboard Paper Products Corp*., 493 F.2d 1076 (5th Cir. 1973), held certain asbestos manufacturers liable for causing the plaintiff's asbestosis and mesothelioma. *Id.* at 1081. In a subsequent asbestos action, *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982), the trial court collaterally estopped the defendant asbestos companies, some of which had been defendants in *Borel*, from (1) arguing that asbestos exposure did not cause either asbestosis or mesothelioma and (2) asserting a state-of-the-art defense. *See id.* at 1361–63 ("[N]o evidence shall be introduced on the issue of whether asbestos causes either asbestosis or mesothelioma. . . . In essence, no evidence shall be admitted with respect to a state of the art defense."). The court collaterally estopped the defendants whether they had been parties in *Borel* or not. *Id.* at 1361.

On appeal, the Fifth Circuit reversed in *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982). The Fifth Circuit concluded that the defendants who had not been parties in *Borel* lacked sufficient privity with the *Borel* defendants to have effectively had their day in court in the earlier action. *See id.* at 338–40. The Fifth Circuit also concluded that it would be unfair to estop the *Borel* defendants because (1) the *Borel* decision was "ambiguous as to certain key issues," *id.* at 343, (2) there were "inconsistent [prior] verdicts," *id.* at 345–46, and (3) *Borel*'s result of $68,000 liability did not "foreshadow multimillion dollar asbestos liability," *id.* at 346. Thus, the factual and procedural similarities were not sufficient for the trial court to properly rely on non-mutual collateral estoppel. The trial court's failed effort to use collateral estoppel as a means of bringing order to the asbestos litigation has been discussed by Professor McGovern. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 662–63 (1989); *see also In re* Microsoft Corp. Antitrust Litig., 355 F.3d 322, 327 (4th Cir. 2004) (holding that a fact that is merely "supportive of" a prior determination does not satisfy the "critical and necessary to the [prior] judgment" requirement of collateral estoppel to preclude litigation of that fact in subsequent litigation).

200. *See* Richard A. Epstein, Commentary, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1, 7–9, 20–21 (1990).

recent scholarship suggests that the "maturity" of mass-tort litigation achieved by dispersed outcomes in federal and state court may be essential to a proper evaluation of novel and unliquidated claims and, ultimately, to their fair and efficient global resolution.[201] As Judge Posner observed in a leading decision, only "'a decentralized process of multiple trials, involving different juries, and different standards of liability, *in different jurisdictions*'" yields the information needed to accurately evaluate mass-tort claims.[202]

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201. In 1999, the Advisory Committee on Civil Rules published its Report on Mass Tort Litigation. WORKING GROUP ON MASS TORTS, ADVISORY COMM. ON CIVIL RULES, REPORT ON MASS TORT LITIGATION (1999). The report's discussion of the phenomenon of the mature mass tort is instructive. It concludes that "the maturation process is often crucial to determining the consequences of mass tort litigation." *Id.* at 25. Using the asbestos litigation as an example of the maturation process, the report notes that in the early days of the asbestos litigation cycle, "plaintiffs handled discovery independently and the defendant manufacturers were generally successful." *Id.* at 23. As documents demonstrating liability were discovered and as scientific evidence of causation came to light, an equilibrium developed and plaintiffs began to win in nearly half of all cases. "Ultimately, through repeated trials and settlements, an equilibrium was reached in which the plaintiffs and the defendants understood the limits of liability and the appropriate range of settlement." *Id.* Furthermore, even aspects of an asbestos claim that were unique to each plaintiff—such as exposure and individual injury—could be measured against the background of previous cases. *Id.*

When a mass tort moves toward a global settlement too early, as occurred in the silicone breast implant litigation, the lack of maturity may defeat settlement possibilities. In the silicone breast implant litigation, an early proposed class settlement resulted in approximately 300,000 members joining the plaintiff settlement class. *Id.* at 24. There had been no individual trials to further the parties' understanding of the tort or the science surrounding the alleged injuries. Although the defendants offered a settlement of $4.25 billion, the sheer number of claimants undermined the proposal. *Id.* at 24–25. The parties then broke the "mass tort into a combination of larger and smaller components for settlement or trial, developing a different type of maturation process through the repetition of smaller-scale settlements." *Id.* at 25.

In the process of a mass tort's maturation, it may take years to develop the necessary scientific information. *Id.* Thus, the report concludes that "[p]remature judicial attempts to determine whether injuries are caused by a product or substance can be so unreliable that the nature of the litigation is distorted dramatically." *Id.*; *see also* Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1739 n.42 (2002) ("The concept of maturity suggests that, over time, mass tort litigation will establish rather consistent, predictable values. The same type of cases tried over and over and settled over and over will generate a marketplace of consistent values. The suggestion here is that the legal rules matured but that the plaintiff profile continued to evolve."); Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1855 (1997) ("The 'mature' mass tort involves situations in which, for example, there have been multiple trials in multiple jurisdictions with a consensus that the product—at least in a given set of circumstances—is unreasonably dangerous and a solvent defendant is liable for particular types of harms. The uncertainty lies in the issues of exposure, specific causation, and individual harm. Interstate and intrafederal cooperation has become routine in these types of cases." (footnote omitted)).

202. *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002) (emphasis added) (citation omitted) (quoting *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 2002)).

Thus, the existence of a transactional relationship between claims or actions involving different parties simultaneously pending in both federal and state court would not in itself justify the removal of state court litigation to federal court merely because the state court might resolve similar or identical issues of law or fact differently than would a federal court. That situation should be contrasted with one in which the parties to the related federal and state court actions are the same.[203] Here, there is arguably greater potential for overlapping and inconsistent orders on discovery and other pre-trial matters that could undermine a federal court's ability to control the proceedings before it.[204] Moreover, because the judgment of a state court that first reaches a decision must, in most circumstances, be given claim and issue preclusive effect by a federal court under the full faith and credit statute,[205] the presence of such parallel federal–state litigation between the same parties may create a race to judgment that adversely affects the actions or may render meaningless the time and energy devoted to the federal action.

On closer examination, however, these arguments are unpersuasive. Under the "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act and the All Writs Act, federal courts already possess the power to enjoin parallel state proceedings that threaten the conduct of pending federal litigation or that undermine the federal courts' orders.[206]

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203. Of course, if only two parties are involved and they have diverse citizenship, removal is authorized if the defendant is not a citizen of the state from which removal was sought. *See* 28 U.S.C. § 1441(b) (2000). The situation described in the main text could occur when there is not complete diversity in the state court action or when a federal action raises a federal question and a state action arising from the same transaction advances only state law claims between citizens of the same state.

204. For example, the Second Circuit's decision in *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985), upheld a federal district court's injunction of potential state proceedings where such state proceedings interfered with the federal court's ability to reach a settlement agreement in a consolidated case dealing with securities fraud. *Id.* at 331, 338. Professors Tidmarsh and Trangsrud note that the *Baldwin-United* decision "clearly locat[es] the source of the power to enjoin state proceedings in the All-Writs Act." JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 409 (1998); *see also infra* note 206 (discussing the All Writs Act and the Anti-Injunction Act).

205. 18B WRIGHT ET AL., *supra* note 4, § 4469, at 71–72 (2002) ("The full faith and credit statute, 28 U.S.C.A. § 1738, is the major statutory source of the rule that federal courts must honor the res judicata effects of state-court judgments.").

206. The All Writs Act, 28 U.S.C. § 1651 (2000), provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Anti-Injunction Act § 1, 28 U.S.C. § 2283 (2000), however, prohibits a federal court from issuing an injunction to "stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Professors Wright, Miller, and Cooper argue that the "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act "may be fairly read as incorporating [the] historical in rem

The rarity with which such injunctions have been found to be necessary[207] undercuts the existence of a general necessary and proper rationale for the removal from state to federal court of parallel actions between the same parties. Despite broad language in some opinions, decisions authorizing injunctions of parallel state proceedings under the Anti-Injunction Act have recognized that duplicative in personam litigation—or the potential preclusive effect of a state judgment in federal court when it is ultimately rendered—does not justify a conclusion that a federal injunction is necessary in aid of federal court jurisdiction.[208] As one court put it, the

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exception," which permitted a federal court that first exercised jurisdiction over a res to enjoin state court proceedings from exerting jurisdiction over the same res. 17A WRIGHT ET AL., *supra* note 164, § 4225, at 91–92 (2007). However, they also note that there is support for a broader reading of this exception, pointing to the Supreme Court's statement that the exception may "allow federal relief where [it] is 'necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.'" *Id.* § 4225, at 94 (quoting Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 295 (1970)). Although the general rule is that "an injunction cannot issue to restrain a state action in personam involving the same subject matter from going on at the same time," *id.* § 4225, at 98, Wright, Miller, and Cooper conclude that there have been signs of greater flexibility in some recent decisions, *id.* § 4225, at 94–97 & nn. 9–11. As discussed in the main text, however, most if not all of these exceptional cases involved situations in which a state court order threatened to undermine a conditionally or finally approved settlement of the federal action or contradicted a federal court's orders entered to govern the proceedings before it. *See, e.g.*, *In re* Diet Drugs, 282 F.3d 220, 239 (3d Cir. 2002) (holding that where a settlement class had been conditionally certified and the settlement provisionally approved, the federal court properly enjoined the implementation of a state court order purporting to opt members of a state court class out of the federal action); *In re* Prudential Ins. Co. of Am. Sales Practice Litig., 261 F.3d 355, 369–70 (3d Cir. 2001) (holding that where a federal court had entered final approval of a federal class action settlement, the court properly enjoined a state court proceeding that would have seriously undermined the federal settlement); Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1205–06 (7th Cir. 1996) (holding that a federal court in a consolidated action may enjoin state court proceedings to prevent a state court from circumventing its discovery order); Carlough v. Amchem Prods., 10 F.3d 189, 203–04 (3d Cir. 1993) (permitting an injunction of a state court action where a federal class action settlement was imminent and the state court proceeding was perceived as a "preemptive strike" against the federal court); *In re Baldwin-United Corp.*, 770 F.2d at 338 (upholding a district court's injunction of related state court proceedings where the federal court had tentatively approved a settlement order as to some defendants and settlement negotiations with the remaining defendants were close to fruition); United States v. District of Columbia, 654 F.2d 802, 811 (D.C. Cir. 1981) (upholding an injunction against state court proceedings that enjoined conduct required for a local governmental agency to comply with a previous federal court order); Valley v. Rapides Parish Sch. Bd., 646 F.2d 925, 943 (5th Cir.) (upholding an injunction against a state court custody proceeding that was intended to circumvent a federal court's desegregation plan), *modified on other grounds,* 653 F.2d 941 (5th. Cir. 1981).

207. *See supra* note 206.

208. *See, e.g.*, *In re Diet Drugs*, 282 F.3d at 236, 239 (stating that the danger "[t]hat a state court may resolve an issue first (which may operate as res judicata), is not by itself a sufficient threat to the federal court's jurisdiction that justifies an injunction," but upholding an injunction against a state court order purporting to opt a class out of a conditionally approved federal

state court litigation must not simply duplicate the federal action or threaten to reach judgment first but "must interfere with the federal court's own path to judgment" on the matters properly before it.[209]

Moreover, the fact that a preclusive state court judgment resolving identical issues of law or fact might preempt or negate federal proceedings already conducted improperly looks backward to the "sunk costs" of federal litigation that would have been incurred in any event. Instead, the relevant consideration is the future costs to both litigants and the federal judicial system that will be necessary to conclude the federal action. Broadly speaking, both the Full Faith and Credit Clause[210] and its implementing legislation aim to conserve judicial and litigant resources, and to further the strong interest in finality and repose by avoiding relitigation of matters already settled between the parties. It is difficult to see how this policy, which is generally consistent with the purposes of the Multiparty, Multiforum Act[211] and the ALI's proposals,[212] could create a

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settlement).

209. *Id.* at 234.

210. U.S. CONST. art. IV, § 1. This section is implemented by 28 U.S.C. § 1738 (2000).

211. The Multiparty, Multiforum Act permits removal of non-diverse state law claims pending in state court that are transactionally related to claims falling within the original jurisdiction conferred by the Act. *See supra* notes 192–93 and accompanying text. The Act requires the removed action to be filed against a party that is also a party to an action falling within the Act's conferral of original federal jurisdiction in actions arising out of a single accident involving minimal diversity of citizenship. Thus, one could argue that some or all of the dangers of interference with a pending federal proceeding—such as a race to judgment or wasteful federal proceedings aborted by the collateral estoppel effect of a previous state court judgment—might exist in some circumstances. But the impact of collateral estoppel in aborting the time and effort previously invested in the federal proceeding as a result of the preclusive effect of the state court's judgment is very restricted. In cases brought by other parties against a defendant in an action falling within the Act's provisions for original jurisdiction, the judgment in the state court action must be reached first, be adverse to the defendant, involve precisely the same issues as the federal action, and involve no conditions of unfairness that would preclude the application of offensive non-mutual collateral estoppel under the *Parklane Hosiery* doctrine. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329–31 (1979); *see also* Syverson v. Int'l Bus. Machs. Corp., 472 F.3d 1072, 1078–79 (9th Cir. 2007).

In the converse situation—where the judgment in the state court action is adverse to state plaintiffs who differed from the plaintiffs in the federal action against the same defendant—non-mutual collateral estoppel cannot apply against the federal plaintiffs because they are non-parties to the state court action. *See* Richards v. Jefferson County, 517 U.S. 793, 795–97 (1996); *see also* S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 167–68 (1999). Thus, in the context of the Multiparty, Multiforum Act, this argument is even less persuasive than in the context of parallel federal and state proceedings between the same parties. In light of the attenuated and highly speculative nature of this entire line of argument, a much clearer indication that Congress predicated the removal provisions of the Act on such concerns should be required before they are sustained under the necessary and proper model of federal supplemental jurisdiction. *See* Floyd, *Minimal Diversity*, *supra* note 21, at 651 ("Courts should not strain to supply, *ex post*, some 'conceivable' rationale that possibly might have led Congress to enact the proposed

necessary and proper basis for the removal and federal consolidation of parallel state court litigation between the same parties.[213] Preemption through removal or injunction of state court litigation before judgment on the ground that a judgment, when ultimately entered, might have preclusive effect in a pending federal action would represent a dramatic change in long-standing federal policy. This policy, embodied in the provisions of the Anti-Injunction Act and grounded in fundamental considerations of federalism, prohibits federal injunctions of parallel state court litigation between the same parties in almost all circumstances, despite the Act's explicit authorization of such injunctions when they are "necessary in aid of [the district court's] jurisdiction."[214] In sum, the presence of parallel federal and state litigation involving transactionally related claims does not, without more, establish a basis for exercising supplemental federal subject matter jurisdiction over non-diverse state law claims.

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legislation . . . no [matter] how attenuated it might be and without any evidence that Congress shared that objective.").

212. *See supra* note 194 and accompanying text.

213. When the state judgment relates to issues not yet resolved in the federal proceedings, preclusion will save future federal judicial and litigant resources. When the state judgment conflicts with interlocutory orders already entered in the federal proceedings, the judgment may either reduce or increase subsequent costs in the federal action, and thus does not support the general conclusion that costs will be increased. Even if costs increase, the Full Faith and Credit Clause and its implementing statute reflect the conclusion that such occasional costs are outweighed by a general policy of intersystem preclusion, undercutting any necessary and proper rationale for removal of parallel state proceedings simply because they may in the future result in a judgment that forecloses or determines the scope of subsequent federal litigation.

214. *See* 28 U.S.C. § 2283 (2000). In *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), the Supreme Court narrowly interpreted this provision to prohibit such in-aid-of-jurisdiction injunctions based merely on the presence of parallel federal and state proceedings between the same parties, despite the possibility of inconsistent outcomes. *Id.* at 295–97. The exception to the Act's broad prohibition of federal court injunctions of state proceedings applied only when its issuance was "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case *as to seriously impair the federal court's flexibility and authority to decide that case.*" *Id.* at 295 (emphasis added). That standard was not satisfied by the mere possibility of inconsistent outcomes. *Id.* at 296. The Court's narrow interpretation was based on "*the fundamental constitutional independence of the States and their courts*." *Id.* at 287 (emphasis added).

D. *Non-transactional Relationships That Support the Exercise of Supplemental Jurisdiction*

1. Preventing Prejudice from the Operation of the Court's Decree

Many of the current joinder provisions of the Federal Rules of Civil Procedure do not depend on the existence of a transactional relationship among the claims to be joined (although, in many instances, such a transactional relationship may exist). Rather, those provisions are designed to ensure that the court can render a complete and effective decree with respect to a claim or claims within its Article III jurisdiction without prejudicing, as a practical matter, the interests of those before the court or of absent parties.

Rule 14's provision for the impleader of third-party defendants by the original defendants named in the action provides an example. Rule 14 authorizes an original defendant, as a third-party plaintiff, to assert a claim against "a nonparty who is or may be liable to [the third-party plaintiff] for all or part of the claim against [the third-party plaintiff]."[215] Such third-party complaints are not based on a transactional relationship but on the existence of a claim of "derivative liability" against the third-party defendant, such as a claim for contribution or indemnity, in the event the original defendant is held liable to the plaintiff.[216] The Rule protects a defendant hauled involuntarily into court from the necessity of duplicative litigation and the potential for unfairness resulting from inconsistent judgments that might result if the defendant were forced to litigate the derivative-liability claim in a separate action.[217] While such claims are frequently transactionally related to the plaintiff's claim against the

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

216. As a leading treatise notes:

> A third-party claim may be asserted under Rule 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant. If the claim is separate or independent from the main action, impleader will be denied. The secondary or derivative liability notion is central and it is irrelevant whether the basis of the third-party claim is indemnity, subrogation, contribution, express or implied warranty, or some other theory. But impleader is proper only when a right to relief exists under the applicable substantive law.

6 WRIGHT ET AL., *supra* note 4, § 1446, at 355–67 (1990) (footnotes omitted).

217. *See id.* § 1442, at 290 (allowing a defendant to implead a third party based on derivative liability promotes efficiency and "increases the likelihood that consistent results will be reached when multiple claims turn upon identical or similar proof"); *see also* 3 MOORE, *supra* note 56, § 14.03[1] (explaining that Rule 14(a) impleader "avoids the possibility of inconsistent judgments").

original defendant—as in actions seeking contribution by joint tortfeasors—they need not be. For example, a third-party claim based on a pre-existing insurance or indemnity contract would fall within Rule 14(a) even though the factual basis for the claim turns on the existence and coverage of the contract, rather than on the events giving rise to the plaintiff's claim. As the Supreme Court recognized in *Owen Equipment & Erection Co. v. Kroger*,[218] a third-party complaint's "relation to the original complaint is thus not mere factual similarity but logical dependence."[219]

Federal courts have regularly sustained supplemental jurisdiction over such third-party claims even though the claims are based on state law and are asserted between citizens of the same state.[220] In *Owen*, the Court rejected the exercise of supplemental jurisdiction over a claim asserted by the original plaintiff against a third party impleaded by the original defendant under Rule 14(a) because doing so might subvert the complete-

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218. 437 U.S. 365 (1978), *superceded by statute*, Judicial Improvements Act of 1990, Pub. L. No 101-650, § 301(a), 104 Stat. 5089, 5113–14 (codified at 28 U.S.C. 1367 (2000)).

219. *Id.* at 371.

220. As leading commentators have noted:

> [I]n situations in which there is no independent subject matter jurisdiction over a third-party claim (as, for example, when both parties to the impleader claim are citizens of the same state and no federal question is involved), on what theory do the courts exercise ancillary jurisdiction? The mere provision for third-party claims in Rule 14 is not a sufficient basis for extending subject matter jurisdiction to them. Although it is clear that the value of Rule 14 would be diminished substantially if the ordinary jurisdictional strictures were applied to third-party actions, Rule 82 expressly provides that the rules shall not be construed to extend or limit the jurisdiction of the courts.
>
> The justification for applying ancillary jurisdiction is independent of Rule 14; indeed, it finds its source outside the federal rules. This proposition was stated by the Second Circuit in *Dery v. Wyer*[, 265 F.2d 804, 808 (2d Cir. 1959),] in the following fashion:
>
> > Rule 14 does not extend jurisdiction. It merely sanctions an impleader procedure which rests upon the broad conception of a claim as comprising a set of facts giving rise to rights flowing both to and from a defendant. For solution of the incidental jurisdictional problems which often attend utilization of the procedure, the concept of ancillary jurisdiction, which long antedated the Federal Rules, may often be drawn upon.
>
> Thus the federal courts have decided to extend subject-matter jurisdiction to embrace third-party claims because they satisfy the underlying rationale of ancillary jurisdiction, not simply because these claims are provided for in Rule 14.

6 WRIGHT ET AL., *supra* note 4, § 1444, at 315–16 (1990) (footnotes omitted).

diversity requirement.[221] However, the Court recognized that exercising supplemental jurisdiction over a claim asserted by an original defendant hauled involuntarily into court against a potentially responsible third-party defendant would be proper precisely because requiring the original defendant to litigate the derivative-liability claims separately would be unfair. "Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction."[222] From the standpoint of the necessary and proper model of federal jurisdiction, the exercise of supplemental jurisdiction over such non-diverse state law claims of derivative liability is proper because it is necessary to prevent the burden and unfairness that operation of the federal court's judgment would impose on the original defendant if separate litigation of its third-party claim were required. Unlike the mere possibility of duplicative litigation or inconsistent outcomes in separate actions previously discussed, preventing practical or legal prejudice to parties properly before the federal court flowing directly from the operation of a federal court judgment clearly provides a sufficient necessary and proper basis for the exercise of supplemental jurisdiction.

Similar necessary and proper considerations support exercising supplemental jurisdiction over claims asserted by or against parties under other statutory provisions and federal rules designed to ensure that a federal court's judgment on Article III claims will be complete and effective, and will not inflict practical prejudice on absent parties or those before the court. For example, Rule 24 permits intervention of right by a party that "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."[223]

The supplemental-jurisdiction statute properly confers jurisdiction over non-diverse state law claims asserted by or against intervenors of right under this provision in all federal-question cases, but carves out certain cases in which the federal court's original jurisdiction is based on diversity of citizenship.[224] This exclusion was unwise as a matter of policy.[225] The

221. *Owen*, 437 U.S. at 367–68, 377.

222. *Id.* at 377.

223. FED. R. CIV. P. 24(a)(2). For a general discussion of Rule 24(a), see 7C WRIGHT ET AL., *supra* note 164, §§ 1906–1908 (2007).

224. *See* 28 U.S.C. § 1367(a)–(b) (2000). In diversity cases, § 1367(b) precludes supplemental jurisdiction "over claims by plaintiffs against persons made parties under Rule . . . 24 . . . , or over claims by persons . . . seeking to intervene as plaintiffs under Rule 24 . . . , when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional

exercise of supplemental jurisdiction over all claims asserted under Rule 24(a) in both federal-question and diversity cases is proper under a necessary and proper analysis because entertaining such claims is necessary to permit a federal court to enter a decree that effectively resolves claims properly before it under Article III without legally or practically prejudicing the interests of parties or non-parties as a result of the direct operation of the court's own judgment.

Many of the same considerations support exercising supplemental jurisdiction over all Rule 19(a) "necessary" parties, who are required to be joined "if feasible" if, in their absence, complete relief cannot be accorded among the parties before the court; or they claim an interest in the subject of the action and would suffer practical prejudice if not joined; or if existing parties would be subject to a substantial risk of incurring inconsistent obligations.[226] The supplemental-jurisdiction statute questionably excludes claims asserted by or against parties joined under Rule 19 in diversity cases,[227] but the necessary and proper model of federal jurisdiction would sustain jurisdiction to assure that the court's judgment on Article III claims is complete and effective, and does not inflict practical prejudice on either the absentees or existing parties. Similarly, in interpleader actions involving multiple and conflicting claims to the same "stake,"[228] if one of the conflicting claims to the property or fund arises under Article III, all others should be entertained supplemental to the court's jurisdiction over that claim to permit the court to render a fair and effective decree. In this light, the federal interpleader statute, which authorizes federal jurisdiction over actions in the nature of interpleader

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requirements of section 1332." *Id.* § 1367(b).

225. Professor Freer has criticized the statute's treatment of supplemental jurisdiction over intervenors of right in diversity cases. Freer, *supra* note 4, at 475–79; *see also* Arthur & Freer, *Grasping at Straws*, *supra* note 11, at 966–78 (elaborating on the criticisms of the previously cited article). Professors Wright, Miller, and Kane also note the undesirability of prohibiting supplemental jurisdiction in diversity cases under Rules 19 and 24. 7 WRIGHT ET AL., *supra* note 164, § 1610, at 152–53 & n.23.

226. *See* FED. R. CIV. P. 19(a) (establishing conditions for mandatory joinder of parties). *See generally* 7 WRIGHT ET AL., *supra* note 164, §§ 1601–11.

227. *See* 28 U.S.C. § 1367(b) (providing that in cases in which original jurisdiction is based on diversity of citizenship, "the district courts shall not have supplemental jurisdiction . . . over claims by plaintiffs against persons made parties under Rule . . . 19 . . . , or over claims by persons proposed to be joined as plaintiffs under Rule 19 . . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332").

228. FED. R. CIV. P. 22 (permitting parties with inconsistent claims against a plaintiff to be joined as interpleader defendants); *see also* 28 U.S.C.A. §§ 1335, 1397, 2361 (West 2007) (defining the jurisdiction, venue, and procedure of federal courts regarding interpleader practice). *See generally* 7 WRIGHT ET AL., *supra* note 164, §§ 1701–21 (discussing interpleader). Professors Wright, Miller, and Kane note that supplemental jurisdiction may be exercised "if the interpleader claim is attached to an otherwise jurisdictionally sufficient related claim." *Id.* § 1710, at 582–83.

when any two adverse claimants are of diverse citizenship even though other claimants are not diverse, is valid, not because of the formal presence of "minimal diversity" of citizenship, but because the exercise of such jurisdiction is necessary to permit the federal court fairly and effectively to dispose of claims falling within the scope of Article III.[229]

Similar necessary and proper considerations clearly support the important category of class actions authorized by Rule 23(b)(1).[230] That subdivision permits class actions if the prerequisites of Rule 23(a) are satisfied and if maintaining separate actions would create a risk of inconsistent or varying adjudications with respect to individual class members which would establish "incompatible standards of conduct for the party opposing the class," or if individual adjudications with respect to class members would, as a practical matter, be dispositive of the interests of non-parties or substantially impair their ability to protect their interests.[231] Such class actions satisfy the requirements of a necessary and proper model of federal jurisdiction because they are necessary to ensure that the court's decree as to some class members does not unfairly prejudice the interests of the parties before the court or those of the absent class members.

Viewed in this light, Professor Matasar's recognition that, in certain contexts, the federal courts have upheld the exercise of jurisdiction over claims that have no factual relationship with Article III claims supports his conclusion that a transactional or other factual relationship is not the *sine qua non* for the exercise of supplemental jurisdiction.[232] The cases do not, however, support his further conclusion that the scope of the Article III case is as broad as Congress or the rules drafters may choose. Rather, the primary examples that he cites—conflicting claims to a specific res within the control of the federal court, and federal bankruptcy and receivership proceedings—all involve situations in which a federal court must assert jurisdiction over all of the conflicting claims to specific property or limited assets in order effectively and fairly to resolve claims to the same property or assets properly brought before the court under Article III.[233]

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229. *See* Floyd, *Minimal Diversity*, *supra* note 21, at 632–33 (discussing State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967)).

230. *See* FED. R. CIV. P. 23(b)(1).

231. *Id.*

232. *See supra* notes 37–38 and accompanying text.

233. Bankruptcy jurisdiction is properly vested by Congress in the federal courts pursuant to its power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. The bankruptcy proceedings themselves clearly "arise under" the federal bankruptcy laws, and the adjudication of non-diverse state law claims by or against the bankruptcy estate should be viewed as "ancillary" to that core Article III function to permit the fair and effective exercise of the bankruptcy jurisdiction. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 472 (1957) (Frankfurter, J., dissenting); Matasar, *supra* note 22, at 1470–74. Federal

2. Permissive Counterclaims

From the standpoint of the necessary and proper model of federal jurisdiction, Professors Green and Fletcher's position that supplemental jurisdiction over permissive counterclaims should be recognized despite the absence of a transactional relationship among claims is correct.[234] That is not simply because, as Matasar contends, the Federal Rules of Civil Procedure authorize the joinder of such claims.[235] Rather, it is because such jurisdiction is necessary and proper to permit the court to fairly and efficiently resolve the plaintiff's main claim, which falls within the scope of Article III.

This conclusion is most apparent with respect to the historic jurisdiction involving liquidated counterclaims asserted defensively by way of set-off, but the same rationale would extend to all permissive counterclaims that seek simply to reduce or defeat the plaintiff's recovery. As Fletcher recognized, unless jurisdiction over such claims is upheld, an affirmative judgment by the federal court on the plaintiff's claim might become an instrument of unfairness by depriving the defendant of the only

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court jurisdiction over bankruptcy matters is conferred by 28 U.S.C.A. § 1334 (West 2007); *see also* Marshall v. Marshall, 547 U.S. 293, 308 (2006) ("Federal jurisdiction in this case is premised on 28 U.S.C. § 1334, the statute vesting in federal district courts jurisdiction in bankruptcy cases and related proceedings.").

Matasar's example of the exercise of diversity jurisdiction over claims falling below the jurisdictional amount through the process of "aggregation" of all of the claims of a single plaintiff against a single defendant, *see* Matasar, *supra* note 22, at 1466–67, is not relevant because the jurisdictional amount requirement is purely statutory. Clearly all claims between adverse parties of diverse citizenship fall within the scope of Article III regardless of the amount in controversy.

In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Supreme Court held that the supplemental-jurisdiction statute reversed the long-standing rule prohibiting the aggregation of claims joined by multiple plaintiffs under Rules 20 and 23. *Id.* at 549, 558. However, the Court concluded that the language of the statute did not overrule the complete-diversity requirement itself, as some courts had held. *See id.* at 553 ("[W]e have consistently interpreted § 1332 as requiring complete diversity: In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action."). Even if Congress should alter this result, however, the conclusion that supplemental jurisdiction might be exercised over non-diverse state law claims joined with those asserted by diverse plaintiffs or against diverse defendants joined under Rule 20 should not rest on the formal presence of "minimal diversity" between any two parties in the action, which does not in itself supply a necessary and proper basis for the exercise of federal jurisdiction over such claims. *See* Floyd, *Minimal Diversity*, *supra* note 21, at 686–92. Rather, given the "same transaction" joinder standard of Rule 20, the exercise of supplemental jurisdiction would be sustained under the "deterrence" rationale previously discussed. *See supra* text accompanying notes 182–87.

234. *See* Fletcher, *supra* note 13, at 175–79; Green, *supra* note 43, at 282–89.

235. *See* Matasar, *supra* note 22, at 12–14.

security it has for the payment of its own claim.[236] Under a necessary and proper analysis, a federal court should have the power to exercise jurisdiction in a way that will prevent its own judgments from unfairly disadvantaging parties properly before the court.[237]

The remaining question is whether it is also necessary and proper for the federal court to entertain non-jurisdictional permissive counterclaims that seek affirmative recovery from the plaintiff rather than merely to reduce the plaintiff's recovery. One argument that supports allowing an affirmative recovery comes from Green's observation that procedural rules should seek to avoid piecemeal litigation and to achieve the comprehensive and efficient disposition of factually related claims.[238] This view would draw support from the obvious efficiency-based rationale of *Gibbs* itself.[239] As I have argued, however, such considerations of efficiency do not, in themselves, justify the exercise of supplemental jurisdiction.[240] The focus of supplemental-jurisdiction analysis should be on whether its exercise is necessary and proper to permit the federal courts to achieve *intrasystem* judicial economy and fairness in the resolution of claims falling within the scope of Article III. The focus should not be on whether *intersystem* judicial economy between federal and state courts will be attained. If federal courts can fairly and efficiently resolve claims falling within their jurisdiction without entertaining related or unrelated non-diverse state law claims as well, the fact that concurrent or prospective state court litigation might result in duplicative proceedings regarding the same subject matter should not alone provide a basis for the exercise of federal subject matter jurisdiction over those non-jurisdictional claims.

Nevertheless, the necessary and proper view of supplemental jurisdiction would sustain the exercise of supplemental jurisdiction over permissive counterclaims seeking affirmative recovery as well as those used defensively by way of set-off. Most obviously, as Green noted, until the claim and counterclaim have been tried, it cannot be known with

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236. *See* Fletcher, *supra* note 13, at 172.

237. *See supra* Part IV.D.1; *cf.* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) (recognizing the power of federal courts to effectuate their decrees). See *infra* Part IV.D.4 for a discussion of *Kokkonen*.

238. Green, *supra* note 43, at 271 ("Two court actions should not be encouraged where one will do. The principle that piecemeal litigation is undesirable has been repeatedly recognized by the federal courts in their opinions and rules of court."); *see also id.* at 272 ("The attainment of trial convenience and efficiency should be recognized as the prevailing public policy toward the federal courts.").

239. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (stating that the doctrine of supplemental jurisdiction is grounded in "considerations of judicial economy, convenience and fairness to litigants").

240. *See* Floyd, *Minimal Diversity*, *supra* note 21.

certainty whether the judgment on the counterclaim will operate only defensively or will support affirmative recovery.[241] Under long-established doctrine, jurisdictional issues should be settled at the outset, and jurisdiction, once obtained, is not divested by subsequent events, such as, for example, the failure to recover the jurisdictional amount.[242]

Additionally, subsequent litigation of the same counterclaim in state court would be limited to issues regarding the amount of damages. All pivotal issues of liability would have been determined in the previous federal counterclaim proceedings. Even if the federal court lacked subject matter jurisdiction over the counterclaim to the extent the claim sought affirmative recovery, the federal court's liability determinations should be accorded issue preclusive effect.[243] Permitting the assertion of federal jurisdiction over permissive counterclaims to their full extent would thus ensure that the federal judgment would be accorded the finality it deserves[244] and would not involve a significant intrusion on state sovereignty. Exercising federal supplemental jurisdiction over permissive counterclaims might also be necessary and proper to avoid subjecting litigants to a procedural system that permits them to avoid the unfairness that may result from failing to assert counterclaims defensively by way of set-off only at the cost of exposing themselves to duplicative litigation (at

241. *See* Green, *supra* note 43, at 278–81.

242. *See* 13B WRIGHT ET AL., *supra* note 4, § 3608, at 430 (Supp. 2007) ("Once jurisdiction is established it cannot be divested by subsequent events.").

243. *Cf.*, *e.g.*, Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380–81 (1985) (citing previous decisions establishing that state court judgments may have issue-preclusive effect in subsequent federal litigation of claims falling within the exclusive subject matter jurisdiction of the federal courts, despite the general rule that the judgment of a court lacking subject matter jurisdiction over a claim does not preclude later litigation of that claim in a court that has jurisdiction); Kremer v. Chem. Constr. Corp., 456 U.S. 461, 482 (1982) (cited in *Marrese*); Becher v. Contoure Labs., Inc., 279 U.S. 388, 391–92 (1929) (cited in *Marrese*); 18 WRIGHT ET AL., *supra* note 4, § 4423, at 602 (2002) ("Preclusion problems emerging from the relative jurisdictional competence of different courts generally arise . . . between state and federal courts. . . . Today, the tendency is to allow preclusion unless the first court followed severely limited procedures or there is a clear and strong policy requiring independent redetermination by the second court."); RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. e (1982) (stating that an earlier state court decision may be given issue-preclusive effect in a subsequent federal action that falls within the exclusive jurisdiction of the federal courts).

244. For this reason, the Anti-Injunction Act permits federal courts to enjoin state proceedings to "protect or effectuate" their judgments. *See* 28 U.S.C. § 2283 (2000). This permits federal courts to enforce the claim- and issue-preclusive effect of judgments they have previously entered. 17A WRIGHT ET AL., *supra* note 164, § 4226, at 108–13 (2007) ("[T]here are many cases in which injunctions have issued to prevent relitigation of matters that have been finally decided by a federal court. If the state action is an attempt to relitigate a claim that has been litigated in federal court, claim preclusion . . . applies . . . . Even if the claims are different, issue preclusion . . . applies to those issues that were actually determined in the first suit, and the federal court has power . . . to effectuate its judgment by enjoining relitigation of issues it has determined." (footnotes omitted)).

least on the issue of damages) in state court if they wish to obtain full recovery. In these circumstances, absent the ability to seek full recovery on a permissive counterclaim in federal court, a party possessing a claim for set-off might be deterred from invoking the federal forum. This would provide a basis for the exercise of supplemental jurisdiction over a permissive counterclaim seeking affirmative recovery under the "deterrence" rationale discussed above.

3. Removal of "Separate and Independent" Claims

Another example supporting the view that the scope of the Article III "case" or "controversy" extends beyond factually related claims is the statutory provision for removal of "separate and independent" claims falling within the federal-question jurisdiction joined with one or more otherwise non-removable claims.[245] In that event, the "entire case," including the otherwise non-removable state law claims, may be removed to federal court.[246] Clearly, this statute contemplates that the federal district court may properly exercise subject matter jurisdiction over the separate and independent state law claims whose removal is authorized even though they may be factually unrelated to the removable federal-question claim with which they are joined.

The long and convoluted evolution of the current version of the statute has been recounted at length.[247] In brief, the statute traces its origins to an 1866 statute that authorized the removal of "'*separable controvers[ies]* between citizens of different states,'" leaving the remainder of the action in state court.[248] In 1948, the statute was amended to limit its application to "separate and independent" claims or causes of action that would be removable under either the diversity or federal-question jurisdiction if sued upon alone joined with otherwise non-removable state law claims or causes of actions.[249] The 1948 revision authorized the removal of the entire action, including the "otherwise non-removable claims."[250] In *American Fire & Casualty Co. v. Finn*,[251] the Supreme Court interpreted the

245. 28 U.S.C. § 1441(c) (Supp. IV 2004) ("Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title [conferring "arising under" jurisdiction] is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.").

246. *See id.*

247. *See* 14C WRIGHT ET AL., *supra* note 164, § 3724, at 3–10 & nn.3–20 (1998).

248. *Id.* § 3724, at 4 & n.3 (emphasis added) (quoting Act of July 27, 1866, ch. 288, 14 Stat. 306).

249. *Id.* § 3724, at 6.

250. *Id.*; *see also* 28 U.S.C. 1441(c).

251. 341 U.S. 6 (1951).

"separate and independent" language very narrowly on the ground that Congress intended the 1948 amendment to narrow the application of the previous law authorizing removal of "separable" controversies.[252] The Court stated that a claim was "separate and independent" only if it sought recovery for a different violation of the plaintiff's legal rights for which separate recovery might be obtained, and strongly implied that factually related claims against different defendants seeking recovery for the same wrong did not satisfy this test.[253] The Court's interpretation of the statute appeared to eliminate its valid application in diversity cases and, perhaps for this reason, Congress again amended the statute in 1990 to limit its application to federal-question cases.[254]

This limitation created an additional puzzle, however. As respected commentators have observed, if claims were sufficiently factually related to fall within *Gibbs*'s "common nucleus of operative fact" formulation of the scope of federal supplemental jurisdiction, they could be removed

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252. *Id.* at 16.

253. *Id.* at 13–14. In *Finn*, the plaintiff, a Texas citizen, sued three defendants: two insurance companies, one a Florida corporation and the other an Indiana corporation, and one individual, the local agent of both insurance companies, who was a Texas citizen. *Id.* at 7–8. The defendants removed the action to federal court and subsequently lost their claim on the merits. Following the defeat, one of the insurance companies moved to vacate the district court's decision on the grounds that it lacked jurisdiction because there was not complete diversity between the adverse parties. The district court denied the motion to vacate, and the court of appeals affirmed. In affirming, the court of appeals stated that this action would have been removable under both the pre-1948 and post-1948 removal statutes. *See id.*

The Supreme Court reversed, noting that the purposes of the 1948 revisions to the removal statute included a "simplification to avoid the difficulties experienced in determining the meaning of" the prior version of the removal statute and to "limit removal from state courts." *Id.* at 9–10, 16. The Court concluded that the 1948 revision required a controversy that "constitutes a separate and independent claim or cause of action." *Id.* at 11. It defined "cause of action" in factual terms, stating that "'a cause of action does not consist of facts, but of the unlawful violation of a right which the facts show.'" *Id.* at 13 (quoting Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927)). Applying these legal principles, the Court looked to the plaintiff's complaint and concluded that each claim sought relief for "the failure to pay compensation for the loss on the property." *Id.* at 14. The allegations involving the non-diverse individual defendant relied upon "substantially the same facts and transactions as [did] the allegations in the first portion of the complaint against the foreign insurance companies." *Id.* at 16. The Court concluded that there were no "separate and independent claims for relief as § 1441(c) require[d]" and thus no right to removal. *Id.*

254. *See* 14C WRIGHT ET AL., *supra* note 164, § 3724, at 8–10 & nn.19–20 (1998). Wright, Miller, and Cooper note that the 1990 revision to the removal statute restricts "the availability of removal involving a 'separate or independent claim or cause of action' to situations in which the jurisdictionally sufficient claim providing the predicate for removal falls within the subject matter jurisdiction conferred by Section 1331—the general federal question statute." *Id.* § 3724, at 8–9. Although the 1990 amendment was intended to reduce the amount of diversity-based litigation in federal courts, the "'separate and independent claim or cause of action' language in the statute, which has caused much of the confusion in the past, has remained unchanged." *Id.* § 3724, at 9–10.

under § 1441(a) and (b) of the Judicial Code.[255] Thus, the "separate and independent claim or cause of action" removal provision of § 1441(c) appeared to independently apply only when a federal-question claim was joined with an otherwise non-removable state law claim that did *not* arise from a common nucleus of operative fact as the federal-question claim with which it was joined. If the *Gibbs* "common nucleus" formulation defines the scope of the Article III "case," this would suggest that the statute is unconstitutional insofar as it authorizes the removal of factually unrelated non-diverse state law claims that would not be removable under the general removal provisions of § 1441(a) and (b).[256]

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255. *See infra* note 256.

256. Respected commentators have also noted that it is possible to read the statute as creating a "tripartite" classification under which some claims would be so related to a federal question as to be removable under 28 U.S.C. §§ 1441 (a) and (b), while others would fall outside that category but still would be closely enough related to the removable federal-question claim not to be removable under the "separate and independent" claim provision of § 1441(c), while still others would be so factually unrelated to the federal-question claim that the entire action could be removed under the latter provision. *See* 14C WRIGHT ET AL., *supra* note 164, § 3247, at 62 (1998). The authors criticize this possibility as "absurd because of its complexity, and the practical impossibility of drawing the requisite lines in a coherent and consistent manner," but they acknowledge that some scholars and courts have read the statute in that way. *Id.* Whatever the resolution of this conundrum, either interpretation recognizes that the statute authorizes the removal of claims that are so factually unrelated to the plaintiff's main federal-question claim that they do not satisfy the *Gibbs* test or even the "loose factual relationship" test that some courts have suggested as an alternative definition of the Article III case. *See supra* text accompanying notes 79–107.

One scholar has suggested that § 1441(c) could have constitutional application even if *Gibbs* defines the scope of the Article III case, but he does not dispute that the statute would be unconstitutional in some circumstances. *See* Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1150–55 (1995). Hartnett posits that those who argue that § 1441(c) is unconstitutional because it grants federal courts jurisdiction over claims not encompassed by *Gibbs* fail to recognize the distinction between the constitutionality of removing an entire case and the constitutionality of ultimately adjudicating that entire case. *Id.* at 1153–54. He notes that statutes may be constitutional in certain applications and unconstitutional in others; consequently, although § 1441(c) may authorize federal jurisdiction in some cases where it would be unconstitutional to do so, that does not render the statute "wholly invalid." *Id.* at 1154 & n.307.

According to Hartnett, even if *Gibbs* defines the constitutional limit of federal jurisdiction over claims without an independent basis of federal jurisdiction, removal of an entire case may be authorized by Congress "so that the federal court can determine the scope of its own jurisdiction." *Id.* at 1154. "'A primordial element of our jurisprudence is that federal courts have jurisdiction to determine whether they have subject matter jurisdiction.'" *Id.* (quoting Shannon v. Shannon, 965 F.2d 542, 545 (7th Cir. 1992)). Hartnett believes that it should be no more controversial to permit removal of an entire case under § 1441(c) than it currently is for a plaintiff to bring an action in federal court where the court later determines that it has no jurisdiction. *Id.* Moreover, without § 1441(c), "if a defendant removes a case that includes a claim outside the federal court's jurisdiction, the district court is obliged to remand the entire case because § 1441(a) permits

On the other hand, if one were to conclude, as Matasar correctly did, that the scope of the Article III case is not limited to claims that satisfy the *Gibbs* "common nucleus" formulation,[257] then the constitutional objections to § 1441(c) would be ameliorated, and the Supreme Court's apparent assumption, in *Barney v. Latham*,[258] that the statute was constitutional in

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removal only if the entire case is within the district court's original jurisdiction." *Id.* at 1155. Hartnett also reviews several specific contexts in which § 1441(c) arguably operates constitutionally. *See id*. at 1150–52.

257. Matasar, *supra* note 22, at 1463–78.

258. 103 U.S. 205 (1880). In the *Limits of Minimal Diversity*, I suggested an alternative justification for *Barney* applying a necessary and proper model of federal jurisdiction. *See* Floyd, *Minimal Diversity*, *supra* note 21, at 615–16. In the diversity context, removal of diversity claims by the defendant protects out-of-state citizens from local bias, and Congress could have reasonably decided that a plaintiff should not have to sacrifice her initial joinder choice to achieve that objective. *Id.* at 668–69. Additionally, there was some factual connection among the claims asserted in *Barney*.

The dispute in *Barney* related to lands granted by the United States to Minnesota and then by Minnesota to a Minnesota corporation (the railroad company) to aid in the development of a railroad. *Barney*, 103 U.S. at 206. The *Barney* plaintiffs were two individuals—one a citizen of Indiana, the other of Minnesota—who alleged that they were equitably entitled to an undivided interest in the lands as a result of their contributions to the railroad and that the individual defendants defrauded them of that interest. *Id.* at 206–07. The defendants consisted of a number of individuals—all of whom were citizens of either New York, Wisconsin, or Massachusetts—and a second Minnesota corporation (the land company) that the individual defendants formed and to which the first Minnesota corporation conveyed all the unsold land from the grant from Minnesota. *Id.* at 206. The plaintiffs requested relief in two respects: (1) that the individual defendants give an accounting of the sale of the land prior to the conveyance to the land company, and (2) that the land company account for the proceeds of all land sold since the conveyance and convey an undivided interest in the remaining lands to the plaintiffs. *Id.* at 207–08. The individual defendants removed the action to federal court on the basis of diversity jurisdiction, whereupon the court remanded the action to state court for lack of complete diversity because one of the plaintiffs was a Minnesota citizen, as was the land company. *Id.*

The Supreme Court determined that the remand was erroneous and that the federal court could properly assert jurisdiction over all of the claims brought by the plaintiffs. *Id.* at 216. The Court concluded that, because the plaintiffs' claims against the individual defendants were separate and distinct from its claim against the Minnesota land corporation, all the plaintiffs' claims could be removed pursuant to the 1875 version of the removal act. *Id.* at 214 ("[S]ince the presence of the land company is not essential to [the full determination of the claim against the individual defendants], the defendants, citizens of New York, Wisconsin, and Massachusetts, were entitled . . . to have the suit removed to the Federal court.").

The Court noted that under the prior version of the removal statute, when an action involved claims between diverse parties that could be concluded without the presence of non-diverse parties, removal of only the diverse controversy was proper, leaving the plaintiff to pursue some of her claims against the non-diverse defendants in state court while pursuing the diverse defendant in federal court. *Id.* at 212. The 1875 revision, however, worked "radical changes in the law regulating the removal of causes from State courts." *Id.* Because of the confusion, embarrassment, and increased cost of litigation—and to enhance convenience—Congress opted in 1875 to allow removal of the separable controversy to "transfer the whole suit to the Federal court." *Id.* at 212–13.

the diversity context, might inferentially support Matasar's rules-based model of the federal constitutional case. On closer examination, however, this argument is unpersuasive. Instead, the statute's constitutionality may be sustained by applying a necessary and proper model of federal jurisdiction.

Some commentators supporting the constitutionality of the statute have argued that the scope of original jurisdiction is not inexorably tied to that of removal jurisdiction and, in the latter context, a transactional relationship is not the *sine qua non* of constitutionality, but they have failed adequately to justify their argument.[259] In a leading case considering the constitutionality of § 1441(c), however, Judge Weinstein concluded that § 1441(c) was constitutional as applied to separate and independent claims in a diversity case by applying a necessary and proper rationale.[260]

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259. As a leading treatise points out, the supporters of § 1441(c)'s constitutionality were led by Professors Moore and VanDercreek. 14C WRIGHT ET AL., *supra* note 164, § 3724, at 65 & n.107 (1998) (citing James Moore & William VanDercreek, *Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim Under Section 1441(c)*, 46 IOWA L. REV. 489, 495–98 (1961), and Marilyn J. Ireland, *Entire Case Removal Under 1441(c): Toward a Unified Theory of Additional Parties and Claims in Federal Courts*, 11 IND. L. REV. 555, 574–76 (1978)). Moore and VanDercreek point out that even though § 1441(c) grants broader removal jurisdiction than original jurisdiction, this "means only that statutory removal is broader than *statutory* original jurisdiction." Moore & VanDercreek, *supra*, at 496. Moore and VanDercreek saw no constitutional prohibition to Congress's decision to grant broader removal jurisdiction than original jurisdiction. *Id.* at 498. They pointed to examples, such as a plenary suit involving a federal receiver, in which federal courts may adjudicate claims that have no connection with the main claim giving rise to the federal receivership. *Id.* at 497–98. Thus, they concluded, "The fact that [the non-jurisdictional claim] is unrelated to [the jurisdictional claim] does not necessarily put it beyond the pale of ancillary jurisdiction." *Id.* at 498.

260. Twentieth Century Fox Film Corp. v. Taylor, 239 F. Supp. 913, 918 (S.D.N.Y. 1965). In *Taylor*, Twentieth Century Fox sued actors Richard Burton and Elizabeth Taylor alleging five causes of action sounding in both contract and tort. *Id.* at 914. The first and fifth causes of action were against Taylor personally, while the second cause of action was against Burton personally. The third and fourth causes of action were against Taylor and Burton severally and jointly. It was clear to the court that, had Burton been the only defendant, removal would have been proper based on diversity of citizenship. Conversely, had Taylor been named as the sole defendant, removal would have been improper because she was a foreign domiciliary and therefore was not a citizen of any state. *Id.* at 915. Named together, the court concluded that all the claims against Taylor, except one, were removable under § 1441(c) because they were separate from the second cause of action against Burton alone, which was removable. *Id.*

Having concluded that the action was properly removed under § 1441(c), the court turned to Twentieth Century's alternative argument that § 1441(c) was an unconstitutional grant of jurisdiction to federal courts because it exceeded the scope of Article III. *Id.* at 918. The court presented four reasons why § 1441(c) was not unconstitutional. The first, mentioned only briefly, was that statutes are entitled to a "presumption of constitutionality." *Id.* at 919. Second, § 1441(c) and its predecessors received approval from numerous federal courts in more than one hundred years of jurisprudence. *Id.* Third, the court rejected Twentieth Century's argument that the Supreme Court's decision in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), requiring complete

He argued that even though the diversity claim at issue was "separate and independent" from the non-removable claims in the action under the Supreme Court's narrow interpretation of that term, removal of the entire action was proper to achieve the efficient and economical disposition of all of the interrelated claims.[261]

Despite the correctness of his necessary and proper approach, Judge Weinstein's analysis ultimately was deficient because achieving *intersystem* judicial economy, standing alone, does not provide a sufficient necessary and proper justification for the removal of non-diverse state law actions and claims even though they may be factually related to claims pending before a federal court. Such parallel state court litigation, even though it may be untidy, does not significantly interfere with a federal court's ability to resolve the Article III claims properly pending before it. In any event, Judge Weinstein's necessary and proper rationale does not apply in the present context because it posits a factual overlap between simultaneously pending federal and state actions, even though the claims asserted may be "separate and independent" under *Finn*'s narrow interpretation of that phrase. In contrast, the conundrum posed by the application of § 1441(c) in the federal-question context arises from the fact that the statute appears to authorize the removal of non-diverse state law claims that have no factual relationship with the federal-question claim that supplies the basis for removal.

A leading treatise suggests an alternative necessary and proper rationale for removal of factually unrelated state law claims under § 1441(c) in the federal-question context—namely, the "deterrence" rationale previously discussed.[262] Thus, § 1441(c) arguably provides "a legitimate way for Congress to protect the defendant's right of removal under Section 1441(a) because it reduces the possibility that the invocation of the removal right might well force the defendant to litigate in two forums, which very well might inhibit the use of removal."[263] This

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diversity of citizenship between opposing parties, was constitutionally based. *Id.* at 919–20.

Fourth, the court relied on the Necessary and Proper Clause, noting that Congress "manifested concern lest the removal jurisdiction result in the fragmentation of litigation." *Id.* at 920. The court based the entire concept of removal jurisdiction on Congress's power "'[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all Powers vested by this Constitution.'" *Id.* at 921 (alterations in original) (quoting Tennessee v. Davis, 100 U.S. 257 (1880)). It also noted that "the expansive 'necessary and proper' clause frequently ha[d] been relied upon to sustain judicial power *beyond the strict limits of Article III*." *Id.* (emphasis added).

261. *Id.* at 921–22 ("To splinter the case and to require a separate trial in this Court, and another in the State Court as to those claims, would needlessly waste the time and effort of all concerned—litigants, witnesses, counsel and courts."). The court remanded one of the claims that bore no factual relationship to the others. *Id.* at 922.

262. *See supra* text accompanying notes 182–88.

263. *See* 14C WRIGHT ET AL., *supra* note 164, § 3724, at 65 (1998).

argument also is subject to question, however. As discussed above, significant "deterrence" of invocation of a federal forum to resolve Article III claims should not result from the prospect that entirely *unrelated* state law claims might be litigated separately in state court.[264] Trying the claims together would not achieve judicial economies, nor would any be lost by trying them separately. Moreover, in view of the lack of a factual relationship among the claims, a state court defendant might frequently prefer a separate trial, which a court would likely order in any event. Additionally, a federal district court would likely exercise its discretion under § 1441(c) to remand such unrelated state law claims for separate trial in state court.[265]

Even if these necessary and proper arguments were unpersuasive however, Matasar's expansive conclusion would not follow because a valid necessary and proper justification for § 1441(c) still exists. The joinder of all the claims at issue was a benefit that flowed naturally from the plaintiff's original choice of a state forum. Congress might reasonably have concluded that such a litigant, having properly invoked the state forum and its attendant joinder rules, should not be deprived of that advantage in the event the plaintiff were involuntarily forced to litigate in a federal court as a result of the defendant's removal under § 1441(c). The removal of the entire case, coupled with the district court's discretion to remand unrelated matters, appears to have been a reasonable effort to achieve the purposes of Article III without unduly intruding on the advantages that flowed from the plaintiff's initial choice of a state forum.

This view would draw support from the Supreme Court's recognition, in *Owen Equipment & Erection Co. v. Kroger*,[266] that claims of

264. *See supra* text accompanying notes 182–88.

265. This was what happened in the *Taylor* case previously discussed. *See supra* note 261.

266. 437 U.S. 365 (1978), *superceded by statute*, Judicial Improvements Act of 1990, Pub. L. No 101-650, § 310(a), 104 Stat. 5089, 5113–14 (codified at 28 U.S.C. § 1367 (2000)). The facts of *Owen* are well known to all first-year law students of civil procedure. Kroger, an Iowa citizen acting as administratrix of her late husband's estate, filed a wrongful-death claim in federal court based on diversity of citizenship against the Omaha Public Power District (OPPD), alleging negligence in the operation, construction, and maintenance of a power line that electrocuted Kroger's husband when a boom crane passed too close to the power line. *Id.* at 367–68. OPPD impleaded Owen, the owner and operator of the crane, which was a Nebraska corporation. *Id.* at 368. Kroger then amended her complaint to name Owen as a defendant. OPPD's motion for summary judgment was granted, leaving only Kroger and Owen in the litigation. During trial it was revealed that Owen's principal place of business was in Iowa, although it appeared to be in Nebraska owing to an irregular avulsion of the Missouri River. Complete diversity was therefore lacking. *Id.* at 374. The district court denied Owen's motion to dismiss and entered judgment in favor of Kroger. The court of appeals affirmed. *Id.* at 369.

The Supreme Court reversed, holding that to allow a plaintiff to join only diverse defendants and then wait for the defendants to implead any non-diverse parties against whom the plaintiff might assert a claim would defeat the congressional policy of requiring complete diversity under

supplemental jurisdiction by parties occupying a defensive position should be viewed more leniently than those by parties who invoke a federal forum offensively.[267] In *Owen*, the Court interpreted the diversity jurisdiction statute to preclude an original plaintiff from asserting a transactionally related but non-diverse state law claim against a third-party defendant. At the same time, the Court recognized and appeared to endorse settled authority permitting an original defendant to implead a non-diverse third-party defendant.[268] The Court distinguished the supplemental-jurisdiction issue presented by these contexts, stating:

> [T]he nonfederal claim here was asserted by the plaintiff, who voluntarily chose to bring suit upon a state-law claim in a federal court. By contrast, ancillary jurisdiction typically involves claims by a defending party haled into court against his will . . . . A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims . . . since it is he who has chosen the federal rather than the state forum and must thus accept its limitations.[269]

In the context of removal of separate and independent state law claims under § 1441(c), the original plaintiff, rather than the defendant, occupies a "defensive" position with respect to the choice of a federal forum. Thus, Article III should permit the plaintiff to preserve the original joinder advantage she properly obtained in state court in the event of removal by the defendant. That is true even though, as previously discussed, the absence of any factual relationship among the claims at issue would have precluded the plaintiff from joining them under the supplemental jurisdiction of the federal court had she originally chosen to litigate in a federal forum. The necessary and proper approach properly suggests that, as a constitutional matter, the scope of federal removal jurisdiction may differ from the scope of federal original jurisdiction, notwithstanding the

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28 U.S.C. § 1332(a)(1). *Id.* at 373–74. Thus, it was not sufficient to establish ancillary jurisdiction for a non-diverse claim to arise from the "common nucleus of operative fact" as required by *Gibbs*. *Id.* at 374–75. The Court stated that the context in which ancillary jurisdiction was sought was "crucial." *Id.* at 376. In *Owen*, ancillary jurisdiction was improper because (1) the claim against Owen was not dependent on the claim against OPPD and (2) the plaintiff was asserting the non-diverse claim and could not complain that she was unable to conveniently try all her claims in the same action when she could have easily brought all her claims in a single state court proceeding. *Id.*

267. *See id.* at 376.

268. *Id.* at 375 ("It is true . . . that the exercise of ancillary jurisdiction over nonfederal claims has often been upheld in situations involving impleader, cross-claims or counterclaims.").

269. *Id.* at 376.

long statutory tie between the two in the general removal provisions of the Judicial Code.

This conclusion once again illustrates the importance of "context and purpose" in assessing supplemental-jurisdiction issues that flow naturally from a necessary and proper model of federal jurisdiction. By contrast, such nuanced considerations are lacking under supplemental-jurisdiction tests that turn on mechanical invocation of a "factual relationship" test, without further inquiry into whether such joinder is necessary to achieve the purposes underlying the limited grants of federal jurisdiction enumerated in Article III.

4. Orders Necessary to Ensure Fair and Comprehensive Disposition of Claims Falling Within the Scope of Article III and to Effectuate the Court's Decree

Finally, the necessary and proper model of federal jurisdiction takes ample account of situations in which a federal court must exercise supplemental jurisdiction over non-diverse state law claims to permit the court fairly and completely to resolve Article III claims that are properly before it and to effectuate the court's decree.

In *Kokkonen v. Guardian Life Insurance Co. of America*,[270] the Supreme Court held that a federal district court lacks jurisdiction to enforce the terms of a private settlement agreement between the parties to a previous federal action unless an independent basis for federal jurisdiction supports the action *or* unless the court in the previous action either incorporated the settlement agreement into the terms of its dismissal order or expressly retained jurisdiction to enforce the agreement.[271] The Court reasoned that enforcing the settlement was "more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction."[272] Rejecting the claim that the doctrine of "ancillary" jurisdiction permitted enforcement of the agreement, the Court placed its prior supplemental-jurisdiction cases into two categories. First, "to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent."[273] I have discussed the "factual relationship" basis for supplemental jurisdiction—and the limits that should be placed on it—at length above.

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270. 511 U.S. 375 (1994).

271. *Id.* at 381.

272. *Id.* at 378. Thus, because a settlement agreement is a private contract governed by state law, no federal jurisdiction to enforce it would exist unless the requirements for diversity jurisdiction were satisfied. *See* 28 U.S.C.A. § 1332 (West 2007).

273. *Kokkonen*, 511 U.S. at 379–80.

Second, the Court clarified that the exercise of supplemental jurisdiction is proper "*to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees*."[274] The Court then distinguished cases in which a federal district court expressly reserved jurisdiction over the settlement, or incorporated the settlement's terms into the final order of dismissal, from the case in *Kokkonen*, where it had not done so. In the former situations, enforcing the settlement would be necessary to enforce the court's order,[275] in the latter it would not.

Kokkonen thus provides the clearest illustration of the inadequacy of a purely fact-based model of federal supplemental jurisdiction. *Kokkenen*'s "second category" of supplemental jurisdiction, which rings distinctly in necessary and proper tones, properly authorizes exercising supplemental jurisdiction over non-diverse state law claims where it is necessary to vindicate the court's authority and enforce its orders. When this authorization is combined with the long-standing recognition of the appropriateness of exercising supplemental jurisdiction where the failure to do so will result in an incomplete decree or, as a practical matter, will prejudice existing parties or absent persons possessing an interest in the subject matter of the action,[276] and with the recognition that supplemental jurisdiction may appropriately be based on a factual relationship among claims where necessary to assure unimpeded access to federal court by those possessing claims encompassed by Article III, a more complete and satisfactory description of the scope of federal supplemental jurisdiction emerges.

Kokkonen also explains why Matasar's final example of contexts in which supplemental jurisdiction has been recognized—the authority of federal courts to resolve attorneys' fee disputes in cases properly pending before them even though they present only non-diverse state law claims[277]—does not support the broad rules-based delegation model that he advocates. As the Second Circuit recently recognized in a comprehensive and thoughtful examination of the subject,[278] the question

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274. *Id.* at 380 (emphasis added).

275. *Id.* at 381 ("In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.").

276. *See supra* Part IV.D.1.

277. *See Matasar*, *supra* note 22, at 1475–77.

278. Garcia v. Teitler, 443 F.3d 202 (2d Cir. 2006). The dispute in *Garcia* arose in the context of a fee dispute between clients and their former attorney who had been disqualified because of a conflict of interest. *Garcia* was a criminal case, but as the Second Circuit recognized, civil actions are indistinguishable with respect to the supplemental-jurisdiction issue. *Id.* at 209–10. Civil cases recognizing such ancillary jurisdiction include: Grimes v. Chrysler Motors Corp., 565 F.2d 841, 844 (2d Cir. 1977) ("[J]urisdiction over the distribution of the [disputed] settlement funds can be sustained as ancillary to jurisdiction over the claim itself."); Nat'l Equip. Rental Ltd. v. Mercury

of who is entitled to disputed fees in such cases, whether the contest arises between lawyers or between clients and their attorneys, is entirely incidental to and derivative of an underlying action that falls within the scope of Article III.[279] For that reason, fee disputes are properly and customarily raised by motion filed in the main action, rather than solely in independent proceedings.[280] Such disputes implicate the conduct and fairness of the court's proceedings among lawyers, who are officers of the court, and with respect to their clients, who are parties to the action. Fee disputes may also affect the disposition of settlement funds within the control of the court and affect a party's ability to obtain and compensate counsel of its choosing.[281] Attorneys' fees disputes relate to "the court's ability to 'function successfully'" and "'bear directly upon the ability of the court to dispose of cases before it in a fair manner.'"[282] As such, they fall squarely within *Kokkonen*'s endorsement of exercising supplemental jurisdiction to permit a court to "manage its proceedings, vindicate its authority, and effectuate its decrees"[283] in cases properly pending before it under Article III. A court's power to resolve such disputes does not imply that free-standing, non-diverse state law claims may be brought within federal jurisdiction simply because some rule or statute may authorize their joinder, or because they have some arguable factual relationship to such claims.[284]

Typesetting Co., 323 F.2d 784, 786–87 & n.1 (2d Cir. 1963) (holding that a district court has ancillary jurisdiction to "condition the substitution of attorneys in litigation pending before it upon the client's either paying the attorney or posting security for the attorney's reasonable fees and disbursements" because "[t]he termination of relations between a party in litigation in a federal court and his attorney is a matter relating to the protection of the court's own officers"); Petition of Rosenman Colin Freund Lewis & Cohen, 600 F. Supp. 527, 531 (S.D.N.Y. 1984) ("It is well settled that '[a] federal court may, in its discretion, exercise ancillary jurisdiction to hear fee disputes and lien claims between litigants and their attorneys when the dispute relates to the main action, regardless of the jurisdictional basis of the main action.'" (quoting Marrero v. Christiano, 575 F. Supp. 837, 839 (S.D.N.Y.1983))); *see also* 13 WRIGHT ET AL., *supra* note 4, § 3523, at 82–83 ("[I]f the federal court has jurisdiction of the principal action, it also may hear any ancillary proceeding therein, regardless of the citizenship of the parties, the amount in controversy, or any other factor that normally would determine subject matter jurisdiction. The situations in which ancillary jurisdiction has been invoked include proceedings involving attorneys' fees . . . ." (footnotes omitted)).

279. *Garcia*, 443 F.3d at 208–10.

280. *See* FED. R. CIV. P. 54(d)(2)(B) (motion for attorney's fees should be filed within fourteen days after the entry of judgment); *see also* 10 MOORE, *supra* note 56, § 54.150 ("Under Rule 54(d)(2), the proper method for seeking attorney's fees, whether the basis for the fee is statutory or equitable, is the filing of a timely motion.").

281. See the discussion in *Garcia*, 443 F.3d at 208–10.

282. *Id*. at 208–09 (quoting Novinger v. E.I. DuPont de Nemours & Co., 809 F.2d 212, 217 (3d Cir. 1987)).

283. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 380 (1994).

284. The Sixth Circuit joined several of its sister circuits in holding that disputes over

V. CONCLUSION

The supplemental-jurisdiction statute expressly authorizes the federal courts to expand their exercise of supplemental jurisdiction to the fullest extent permitted by Article III of the Constitution. This expansion provides the occasion for a fresh examination of whether the "common nucleus of operative fact" formulation articulated by the Supreme Court in *Gibbs* is constitutionally based and, if not, what the constitutional standard should be. The effect of the statute has been the demise of *Gibbs* as the primary focus of supplemental-jurisdiction analysis and its replacement by a direct inquiry into the requirements of the Constitution itself.

Recent judicial and academic exploration of this question, which has surfaced in the context of the exercise of supplemental jurisdiction over permissive counterclaims and with respect to the expansive jurisdictional provisions of legislation such as the Class Action Fairness Act of 2005,[285] has led to the emergence of three sharply contrasting views of the proper scope of the Article III "case" or "controversy." Under the first view, the boundaries of a constitutional case may be defined by Congress or the rules drafters in any way that they please, so long as at least one claim in the action falls within one of the enumerated categories of federal jurisdiction set out in Article III. Under the second view, at least some factual relationship between jurisdictional and non-jurisdictional claims must exist to make them part of the same constitutional case. The

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attorneys' fees are properly within a federal court's supplemental jurisdiction. In *Kalyawongsa v. Moffett*, 105 F.3d 283 (6th Cir. 1997), the court stated:

> Lawyers are officers of the court. Their fees are part of the overall costs of the underlying litigation. Resolution of related fee disputes is often required to provide a full and fair resolution of the litigation. Unlike a state court judge hearing a separate contract action, a federal judge who has presided over a case is already familiar with the relevant facts and legal issues. Considerations of judicial economy are at stake. Thus, we hold that although attorneys' fee arrangements are contracts under state law, the federal court's interest in fully and fairly resolving the controversies before it *requires courts to exercise supplemental jurisdiction over fee disputes that are related to the main action*.

Id. at 287–88 (emphasis added); *accord* Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1329 (9th Cir. 1999) ("No Article III case or controversy is needed with regard to attorney fees as such, because they are but an ancillary matter over which the district court retains equitable jurisdiction even when the underlying case is moot."); Cammermeyer v. Perry, 97 F.3d 1235, 1238 (9th Cir. 1996) ("'[C]laims 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.'" (quoting Williams v. Alioto, 625 F.2d 845, 848 (9th Cir. 1980))).

285. Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C.A. §§ 1453, 1711–1715) (West 2007).

emerging consensus of cases taking this "factual relationship" approach is that *Gibbs*'s "common nucleus" test was indeed constitutionally based. However—contrary to the previously accepted view—that test is not limited by the "same transaction" joinder standard that pervades the Federal Rules of Civil Procedure, but embraces claims having only a "loose factual connection" to one or more claims falling within the scope of Article III. Finally, the third view rejects both the first, rules-based delegation model of federal supplemental jurisdiction and the second, "factual relationship" approach. Rather, this view asks whether, considering the particular context in which the joinder of jurisdictional and non-jurisdictional claims is presented and the purposes that joinder serves, such joinder is "necessary and proper" to achieve the purposes underlying Article III.

For the reasons stated in this Article, the first two models of federal supplemental jurisdiction should be rejected. The first would permit the unlimited expansion of the scope of the Article III to embrace a host of non-diverse state law claims and actions filed originally in federal court or removed from state court. Under this "delegation" model, supplemental jurisdiction is constrained only by the discretion of Congress and the rules drafters in enacting jurisdictional legislation and rules governing the joinder of parties and claims. That approach would threaten large and unwarranted accessions of federal jurisdiction—and consequent improper intrusion on the judicial powers reserved to the states by the Constitution—without any limiting or guiding principle and regardless of whether the exercise of supplemental jurisdiction in the particular context at issue would further the purposes of Article III.

The second "factual relationship" model also is deficient. Most obviously, it is under-inclusive because it fails to consider or explain the many contexts in which the exercise of supplemental jurisdiction has been sustained historically despite the absence of any factual relationship among the jurisdictional and non-jurisdictional claims.[286] Professor Matasar correctly recognized this inadequacy in rejecting *Gibbs* as a constitutional standard, but the rules-based alternative that he advocated is unduly expansive for the reasons just discussed.

Conversely, a "factual relationship" approach to supplemental jurisdiction is over-inclusive because it would bring within the scope of federal supplemental jurisdiction non-diverse state law claims and actions—even free-standing state law actions entirely between citizens of the same state—merely because they may bear some factual relationship to a pending federal action, even though the exercise of such jurisdiction

286. *See supra* Part IV.D.

is not necessary to achieve the purposes underlying Article III.[287] Additionally, the content of the "loose factual connection" standard increasingly suggested by the courts of appeals as defining the scope of the Article III case, and how that standard differs from the "same transaction" joinder standard of the federal rules, remains undefined. That is because the test is purely mechanical, applicable regardless of the context in which joinder is proposed or the purpose that it serves. Because the "loose factual connection" standard lacks any functional justification or tie to the purposes of Article III, it is inherently undefined and undefinable.

Only a necessary and proper model of federal supplemental jurisdiction adequately resolves these difficulties. Because this model focuses directly on the context and purpose of the joinder provisions at issue, it contains discernable limits that the rules-based delegation model of federal jurisdiction suggested by Matasar and others lacks. It properly respects the reserved judicial powers of the states while according ample leeway for the promotion of legitimate federal interests, including the achievement of judicial and litigant economy when such economy might be thought to be necessary to achieve the purposes of Article III. Because this model is not based on the existence of a factual relationship among claims per se, it suffers neither from the lack of definition nor from the over- and under-inclusiveness of a mechanical "some factual relationship" approach. At the same time, it takes proper account of such a relationship in assessing whether, in particular contexts, the joinder at issue might serve the purposes of Article III. In a post-*Gibbs* world, a necessary and proper model of federal supplemental jurisdiction provides the best path to the future.

287. Thus, both the proposals in the Report of the ALI's Complex Litigation Project and in the Multiparty, Multiforum Trial Jurisdiction Act of 2002 would permit the removal of state court, state law actions entirely between citizens of the same state merely because they involve some factual relationship with an action properly pending in federal court. *See supra* notes 189–96 and accompanying text.