South Carolina Law Review

Volume 56 | Issue 3 Article 13

Spring 2005

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Recommended Citation

M. Evan Lacke, The New Breed of Permissive Counterclaim: Supplemental Jurisdiction After 28 U.S.C. § 1367, 56 S. C. L. Rev. 607 (2004).

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THE NEW BREED OF PERMISSIVE COUNTERCLAIM: SUPPLEMENTAL JURISDICTION AFTER 28 U.S.C. § 1367

I. INTRODUCTION

Parties must plead compulsive counterclaims, which arise out of the same transaction as the subject matter of the suit, in the answer. This rule reflects the necessity of determining the rights of the parties and rendering the matter res judicata to avoid future litigation. By contrast, permissive counterclaims arise outside of the same transaction as the subject matter of the suit and are not precluded under res judicata from determination in a separate suit. Although the United States Supreme Court has not addressed the issue, federal courts have traditionally held that an independent basis of jurisdiction must exist before a federal court can exercise supplemental jurisdiction over a permissive counterclaim.[1] This requirement, known as the independent basis doctrine, potentially denies a defendant the opportunity to litigate a counterclaim against a plaintiff when fairness and judicial efficiency would encourage its trial in the same proceeding as plaintiff's original claim.

The Second Circuit's recent holding in *Jones v. Ford Motor Credit Co.*[2] challenges the continuing validity of the independent basis doctrine after the enactment of 28 U.S.C. § 1367.[3] In *Jones*, the plaintiffs purchased vehicles using the defendant's financing plan.[4] Plaintiffs suit under the Equal Credit Opportunity Act alleged defendant's subjective mark-up policy penalized African-American customers with higher than customary interest rates.[5] Defendant denied the discrimination claim and asserted state law counterclaims against three of the car buyers for the delinquent amounts of their loans.[6] The district court granted plaintiffs' motion to dismiss the counterclaims on the grounds that they were permissive and lacked an independent basis of federal jurisdiction.[7] The district court noted that the Second Circuit had not yet decided whether § 1367 "alters the standards regarding jurisdiction over counterclaims."[8] The court added that "[e]ven if the counterclaims fall within the outer boundary of the court's jurisdiction under

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1. Marconi Wireless Tel. Co. of Am. v. Nat'l Elec. Signaling Co., 206 F. 295, 298 (E.D.N.Y. 1913). *See, e.g.*, Peter Farrell Supercars, Inc. v. Monsen, 82 Fed. Appx. 293, 298 (4th Cir. 2003) (retaining jurisdiction over state law supplemental claims even though the federal claim was dismissed before trial); Oak Park Trust & Sav. Bank v. Therkildsen, 209 F.3d 648, 651 (7th Cir. 2000) (affirming dismissal of defendant's counterclaim because it was permissive and without an independent basis of federal jurisdiction); Iglesias v. Mut. Life Ins. Co., 156 F.3d 237, 241 (1st Cir. 1998) (using the logical relation test to hold the counterclaim was permissive and thus not within the court's supplemental jurisdiction); Harbor Ins. Co. v. Cont'l Bank Corp., 922 F.2d 357, 360 (7th Cir. 1990) (allowing counterclaim which had an "independent federal jurisdictional basis . . .").

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

3. 28 U.S.C. § 1367 (1990) addresses supplemental jurisdiction. *See infra* notes 51–55 and accompanying text.

4. *Jones*, 358 F.3d at 207.

5. *Id.*

6. *Id.*

7. Jones v. Ford Motor Credit Co., No. 00-8830, 2002 U.S. Dist. LEXIS 10902, at *7 (S.D.N.Y. June 14, 2002).

8. *Id.*

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§ 1367(a)," dismissal of the counterclaims under the discretionary power granted to the court in § 1367(c) would be appropriate.[9]

The Second Circuit, vacating and remanding the district court's decision, held that jurisdiction authorized by 28 U.S.C. § 1367 extended to permissive counterclaims despite the lack of independent jurisdiction.[10] The Second Circuit agreed with the lower court's determination that the counterclaims were permissive since they did not arise out of the same transaction or occurrence[11] as plaintiffs' claims.[12] However, calling attention to the absence of explanation for the independent jurisdiction doctrine in case law, the Second Circuit "conclude[d] that the determination that a counterclaim is permissive within the meaning of [Federal Rule of Civil Procedure] 13 is not dispositive of the constitutional question whether there is federal jurisdiction over the counterclaim."[13]

Under the judicially-created ancillary jurisdiction doctrine[14] prior to § 1367, courts followed the view that the transaction or occurrence ancillary requirement defined the constitutional limits of supplemental jurisdiction. In *Jones*, the Second Circuit found that the language of 28 U.S.C. § 1367 expanded supplemental jurisdiction to the outer limits of the Article III "cases" or "controversies" requirement.[15] The court held that the relationship between plaintiffs' claims and defendant's counterclaims satisfied the *Gibbs*' common nucleus of operative fact standard,[16] although the relationship was not sufficient enough to make the counterclaims compulsory.[17]

From the Second Circuit's perspective, the enactment of § 1367 created a new breed of permissive counterclaims—one which arises outside of the same transaction or occurrence as a plaintiff's claim, yet falls within the bounds of an Article III case or controversy and thus requires not independent basis.[18] Under this view, the independent basis doctrine is applicable only to those permissive counterclaims which fall outside of an Article III case or controversy.

The Second Circuit's progressive view upends the traditional independent basis doctrine which applies to *all* permissive counterclaims, a doctrine which many

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9. *Id.*

10. *Jones*, 358 F.3d at 213, 216.

11. Both the district court and the Second Circuit in *Jones* maintained a narrow definition of transaction or occurrence. A broader definition of transaction or occurrence may result in labeling the counterclaim as compulsive rather than permissive. For the purpose of this Comment, however, the breadth of the definition of transaction or occurrence is not determinative. Section 1367 expanded federal supplemental jurisdiction over any claim within the same "case or controversy" as plaintiff's claim. As will be discussed *infra*, a "case or controversy" is necessarily broader than either the broad or narrow definition of a transaction or occurrence.

12. *Jones*, 358 F.3d at 209.

13. Jones v. Ford Motor Credit Co., 358 F.3d 205, 212 (2d Cir. 2004) (quoting Ambromovage v. United Mine Workers, 726 F.2d 972, 990 (3d Cir. 1984)).

14. *See infra* Part II.A.

15. *Jones*, 358 F.3d at 212. *See also* U.S. CONST. art. III discussed *infra* notes 51–55 and accompanying text.

16. Most courts view *Gibbs*' "common nucleus" standard as the threshold constitutional requirement of an Article III case or controversy for the purposes of supplemental jurisdiction. *See infra* note 44–50 and accompanying text.

17. *Jones*, 358 F.3d at 213.

18. *Id.*

jurisdictions, including the Fourth Circuit,[19] still follow.[20] In doing so, however, the Second Circuit leaves open the crucial question of what standard provides the outer limit of an Article III case or controversy. The answer is significant to federal practice and to our judicial system's perennial endeavor "to secure the just, speedy, and inexpensive determination of every action."[21]

In order to explore the ramifications of the Second Circuit's pragmatic view, Part II of this Comment describes the history of the supplemental jurisdiction doctrine and discusses the rationale behind the distinction between permissive and compulsory counterclaims for jurisdictional purposes. Part III outlines the criticisms of and inconsistencies in the treatment of permissive counterclaims. Part IV examines cases, including several from the Fourth Circuit, that apply the independent basis doctrine and argues that the Second Circuit's holding in *Jones* better promotes trial efficiency, convenience, and economy by determining both the claim and the counterclaim in one action. Part V considers the conflicting definitions of an Article III case or controversy and suggests that the logical relationship definition provides the most pragmatic and efficient standard under § 1367. Part VI concludes that federal courts should be able to exercise jurisdiction to the extent provided by Congress and the Constitution.

II. HISTORY

A. History of the Supplemental Jurisdiction Doctrine

The ability of a federal court to hear state law claims in the same proceeding as a claim over which the federal court has original jurisdiction is a subject fraught with complexities and contradictions. Article III of the Constitution provides that the judicial power of the United States "shall extend to all cases [or controversies], in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[22] This broad jurisdictional grant gives federal courts the authority to hear all claims arising under federal law. The more difficult issue is whether and when federal courts have jurisdiction to hear *state* law claims that are joined with federal law claims.

First addressed in *Osborn v. Bank of the United States*,[23] the United States Supreme Court stated that the mere presence of state law claims within a case is not

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19. *See* Harrison v. Grass, 304 F. Supp. 2d 710, 713 (D. Md. 2004); Peter Farrell Supercars, Inc. v. Monsen, 82 Fed. Appx. 293, 298 (4th Cir. 2003); Johnson v. Gala Indus., Inc., No. 95-1031-R, 1996 U.S. Dist. LEXIS 9893, at *3 (W.D. Va. June 7, 1996).

20. *See* Oak Park Trust & Sav. Bank v. Therkildsen, 209 F.3d 648, 651 (7th Cir. 2000); Iglesias v. Mut. Life Ins. Co., 156 F.3d 237, 241 (1st Cir. 1998); Harbor Ins. Co. v. Cont'l Bank Corp., 922 F.2d 357, 360 (7th Cir. 1990); Owner-Operator Indep. Drivers Assoc., Inc. v. Arctic Express, Inc., 238 F. Supp. 2d 963, 968 (S.D. Ohio 2003); Evans v. Am. Credit Sys., Inc., No. 8-02CV472, 2003 U.S. Dist. LEXIS 22433, at *4 (D. Neb. Dec. 10, 2003); Mar. & Northeast Pipeline, L.L.C. v. 16.66 Acres of Land, 190 F.R.D. 15, 18 (D. Me. 1999); Hartford Steam Boiler Inspection & Ins. Co. v. Quantum Chem. Corp., No. 91-6907, 1994 U.S. Dist. LEXIS 12716, at *15 (D. Ill. Sept. 6, 1994); Tupperware Home Parties v. Stewart, No. 92-2826, 1993 U.S. Dist. LEXIS 6874, at *7–8 (D. La. May 6, 1993).

21. FED. R. CIV. P. 1.

22. U.S. CONST. art. III, § 2.

23. 22 U.S. (9 Wheat.) 738 (1824).

sufficient to divest a federal court of jurisdiction.[24] Further, when a case contains a federal claim, Congress has the power to give federal courts jurisdiction over that case "although other questions of fact or of law may be involved in it."[25] The Court held that federal courts have jurisdiction over state law claims only when they are "submitted to it by a party who asserts his rights in the *form prescribed by law*."[26] This seemingly broad construction of jurisdictional power, however, is subject to Article III's limitations and Congress' power to dictate the jurisdiction of lower federal courts.[27]

In *Wayman v. Southard*,[28] the Court indicated that "forms prescribed by law" pertained to the procedural rules, adopted by Congress, which govern federal trial proceedings.[29] Significantly, the definition of an Article III "case," for purposes of supplemental jurisdiction, apparently relies in part for its meaning on the then current federal procedural rules.[30]

The Supreme Court later refined the concept of supplemental jurisdiction through recognition of the ancillary and pendent jurisdiction doctrines. These doctrines permit a federal court to hear claims that are collateral to a claim over which the court has subject matter or diversity jurisdiction. In *Fulton National Bank v. Hozier*,[31] the Court stated, "the general rule is that, when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies . . . ."[32]

The Court recognized pendent jurisdiction in *Siler v. Louisville & Nashville Railroad*,[33] which held federal courts have judicial power over a plaintiff's state law claims, even if the court could not hear those claims independently, when the case before the court contains a federal claim raised in good faith.[34] Pendent jurisdiction prevents the bifurcation of a plaintiff's federal and state law claims within the same case. The utilization of one federal proceeding to decide both state and federal claims prevents prejudice to the plaintiff by allowing the full adjudication of claims in a federal forum.[35] This mechanism also fosters a federal court's ability to decide important questions of federal law.[36]

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24. *Id.* at 823.

25. *Id.*

26. *Id.* at 819 (emphasis added).

27. U.S. CONST. art. III, § 1. *See, e.g.*, Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) ("Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction.").

28. 23 U.S. (10 Wheat.) 1 (1825).

29. *Id.* at 28.

30. *See, e.g.*, Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1401, 1410 (1983) (discussing the importance of federal procedural rules on the definition of an Article III case).

31. 267 U.S. 276 (1925).

32. *Id.* at 280.

33. 213 U.S. 175 (1909).

34. *Id.* at 191.

35. *See, e.g.*, Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935, 1936 (1982) ("Without pendent jurisdiction, such plaintiffs would probably choose to litigate their entire cases, including the congressionally favored federal claims, in one state court action.").

36. *Id.*

In contrast, ancillary jurisdiction, which generally arises when a party asserts state claims in the form of a cross-claim, counterclaim, or third-party claim, typically invokes ideas of fairness to the litigant who is before the court. For example, without ancillary jurisdiction, a defendant would be forced to bring a state law counterclaim against the plaintiff in a separate state court proceeding. The Court first recognized ancillary jurisdiction in *Freeman v. Howe*,[37] which held that a non-diverse party could intervene in a federal action in order to state a nonfederal claim to property held by the federal court.[38]

In *Moore v. New York Cotton Exchange*,[39] the Court imposed a factual relatedness requirement on the exercise of ancillary jurisdiction.[40] Despite the dismissal of the plaintiff's federal claim,[41] the Court held that the lower court retained jurisdiction over defendant's nonfederal counterclaim because it arose out of the same transaction as the subject matter of the suit.[42] The effect of *Moore*'s liberal factual relatedness requirement is extremely significant. The Federal Rules of Civil Procedure, established in 1938, adopted *Moore*'s factual relatedness requirement, a development that spurred courts to liberalize the joinder of claims and parties that the rules permitted where a "logical relationship" existed among the claims.[43]

The Court responded to this broad construction of jurisdictional power in the seminal case of *United Mine Workers of America v. Gibbs*.[44] Sensing the need to replace the pre-Rules test from *Hurn v. Oursler*,[45] the Court recognized that "[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged."[46] The *Gibbs* test requires that

> [t]he 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.[47]

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37. 65 U.S. (24 How.) 450 (1860).
38. *Id.* at 460.
39. 270 U.S. 593 (1925).
40. *Id.* at 610.
41. *Id.* at 608–09.
42. *Id.* at 610.
43. *See* Matasar, *supra* note 30, at 1412–13.
44. 383 U.S. 715 (1966).
45. 289 U.S. 238 (1933). In its narrow holding, the *Hurn* court stated that even though a close factual connection existed between a plaintiff's state law and federal claim, pendent jurisdiction did not exist when the state law claim stated a new cause of action. *Id.* at 246. Pendent jurisdiction was only appropriate, the court continued, when the state law and federal claims were identical and, thus, distinct grounds of the same cause of action. *Id.*
46. *Gibbs*, 383 U.S. at 724.
47. *Id.* at 725 (first emphasis added).

Notwithstanding the satisfaction of the factual requirement and the plaintiff's expectation, a court may still, in exercising discretion, dismiss the pendent claim if "considerations of judicial economy, convenience and fairness to litigants" should so dictate.[48]

Most courts view *Gibbs*' common nucleus test as the threshold constitutional requirement of an Article III case or controversy for the purposes of supplemental jurisdiction.[49] The Court has expressed that ancillary jurisdiction and pendent jurisdiction "are two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same state?"[50] Hence, both pendent and ancillary state law claims must derive from the same common nucleus of operative facts as the plaintiff's federal claim.

In 1990, Congress enacted 28 U.S.C. § 1367[51] in response to *Finley v. United States*[52] and what some believed to be Justice Scalia's threatening sentiments concerning supplemental jurisdiction in the majority opinion.[53] The language of 28 U.S.C. § 1367 indicates that supplemental jurisdiction now exists for any claims "form[ing] part of the same case or controversy under Article III of the United States Constitution."[54] Section 1367's expansion of supplemental jurisdiction to the outer limits of an Article III case or controversy is an implicit rejection of the

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48. *Id.* at 726.

49. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370–71 (1978); Cicio v. Does, 321 F.3d 83, 97 (2d Cir. 2003); Mich. Bell Tel. Co. v. MCI Metro Access Transmission Servs., Inc., 323 F.3d 348, 355 (6th Cir. 2003); Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1173 (9th Cir. 2002); O'Connor v. Commonwealth Gas Co., 251 F.3d 262, 273 (1st Cir. 2001); Krell v. Prudential Ins. Co. of Am., 148 F.3d 283, 300 (3d Cir. 1998); Axel Johnson, Inc. v. Carroll Carolina Oil Co., 145 F.3d 660, 662 (4th Cir. 1998); Edwards v. Okaloosa Cty., 5 F.3d 1431, 1433 (11th Cir. 1993); U.S. *ex rel.* Olson v. W.H. Cates Constr. Co., 972 F.2d 987, 992 (8th Cir. 1992); Sullivan v. Scoular Grain Co. of Utah, 930 F.2d 798, 803 (10th Cir. 1991); Huffman v. Hains, 865 F.2d 920, 922 (7th Cir. 1989); Espino v. Besteiro, 708 F.2d 1002, 1007 (5th Cir. 1983).

50. *Owen*, 437 U.S. at 370.

51. 28 U.S.C. § 1367(a) (1990) provides:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Section 1367(c) follows with:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

52. 490 U.S. 545 (1989) (declining to extend supplemental jurisdiction to pendent party claims).

53. *See, e.g.*, Arthur D. Wolf, *Comment on the Supplemental-Jurisdiction Statute: 28 U.S.C. § 1367*, 74 IND. L.J. 223, 223–24 (1998) (urging a more statutory approach to supplemental jurisdiction).

54. 28 U.S.C. § 1367(a).

narrower same transaction or occurrence standard. However, the Federal Rules of Civil Procedure distinguish permissive and compulsory counterclaims according to the same transaction or occurrence standard.[55] Because the same transaction or occurrence standard is not dispositive of whether supplemental jurisdiction is appropriate, a permissive counterclaim may fall within federal jurisdiction under § 1367. As long as the permissive counterclaim satisfies the *Gibbs* test and falls within the same case or controversy as the plaintiff's claim, the Constitution does not require any independent basis of jurisdiction.

B. The Distinction Between Compulsory and Permissive Counterclaims

The distinction between permissive and compulsory counterclaims arose in *Marconi Wireless Telegraph Co. of America v. National Electric Signaling Co.*[56] The District Court for the Eastern District of New York stated that "a counterclaim 'arising out of the transaction which is the subject-matter of the suit' *must* be included in the answer."[57] This type of counterclaim is known today as a compulsory counterclaim. The court reasoned that,

> . . . as between the parties to an equity action involving the steps to such a transaction, and the determination of rights between the parties growing out of the transaction, all claims shall be litigated in one suit, and that thus the matter shall be rendered res adjudicata and future litigation avoided.[58]

The court then indicated that claims not falling within the same transaction as plaintiff's claim, like the defendant's counterclaim, were permissive and not barred from future litigation by res judicata principles.[59]

The court realized that Equity Rule 26 permitted a plaintiff to "join in one bill as many causes of action cognizable in equity as he may have against the defendant,"[60] yet recognized the need for a limitation, absent which a defendant might bring endless counterclaims unrelated to the patent at issue. The court found such a limitation in Rule 26, which stated that "[i]f it appear[s] that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."[61] Seizing the grant of discretionary power, the court held that permissive state law counterclaims could not be subject to litigation in the same suit if they did not arise from the same transaction as plaintiff's claim.[62] Thus, the independent jurisdiction doctrine for permissive counterclaims arose as a necessary limitation to prevent burdensome litigation that would result if a defendant could assert

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55. FED. R. CIV. P. 13.
56. 206 F. 295 (E.D.N.Y. 1913).
57. *Id.* at 298.
58. *Id.*
59. *Id.* at 299.
60. *Id.* at 300.
61. *Id.*
62. Marconi Wireless Tel. Co. v. Nat'l Elec. Signaling Co., 206 F. 295, 301 (E.D.N.Y. 1913).

numerous counterclaims for any conceivable, unrelated injury suffered at the hands of the plaintiff.

The rationale for the distinction between permissive and compulsory counterclaims is, in the barest sense, a judicially created jurisdictional limitation useful for several reasons. First, the rule encourages finality by placing a litigant on notice of which claims or issues may be waived under the doctrines of res judicata and collateral estoppel, if the court does not decide the issues in the instant action. Second, the rule delineates a line in terms of factual relatedness, beyond which a defendant may not bring unrelated claims.

The Federal Rules of Civil Procedure still embody this distinction. Rule 13(a) defines a compulsory counterclaim as one that "arise[s] out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."[63] A permissive counterclaim is "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."[64] What remains unclear, however, is an explanation for the independent basis doctrine for permissive counterclaims.[65]

III. TREATMENT OF PERMISSIVE COUNTERCLAIMS

In *Moore v. New York Cotton Exchange*,[66] the Supreme Court failed to address whether supplemental jurisdiction over permissive counterclaims required an independent basis of jurisdiction. The Court held that jurisdiction existed over the defendant's counterclaim since it arose out of the same transaction as plaintiff's claim.[67] Since the counterclaim was compulsory, and thus fell under the first branch of Equity Rule 30, the Court refused to address permissive counterclaims and whether "under the second branch, federal jurisdiction independent of the original bill must appear."[68]

The Court has still not specifically addressed the independent basis doctrine or its necessity. Yet, the Court has held that "[i]f a counterclaim is compulsory, the federal court will have ancillary jurisdiction over it even though ordinarily it would be a matter for a state court," perhaps implying that permissive counterclaims do not fall within ancillary jurisdiction.[69]

Despite the lack of an explicit explanation for the independent basis doctrine, past cases suggest potential rationales. The doctrine may have arisen as a reflection of the then restrictive procedural rules concerning joinder of claims. These restrictive rules are apparent in *Hurn v. Oursler*,[70] in which the Court required the joined state law claim to be factually identical to the federal claim for pendent

63. FED. R. CIV. P. 13(a).
64. FED. R. CIV. P. 13(b).
65. Jones v. Ford Motor Credit Co., 358 F.3d 205, 210 (2d Cir. 2004).
66. 270 U.S. 593 (1926).
67. *Id.* at 609.
68. *Id.*
69. *Jones*, 358 F.3d at 210 (quoting and construing Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1 (1974)).
70. 289 U.S. 238 (1933).

jurisdiction to arise.[71] Another rationale is that under Federal Rule of Civil Procedure 13(a), all counterclaims that are non-compulsory are permissive; thus, the independent basis requirement establishes some limitation to prevent federal adjudication of numerous inappropriate counterclaims. This limitation appears reasonable in light of the fear that supplemental jurisdiction may extend a lawsuit beyond an Article III case or controversy.[72]

A. Criticism of the Independent Basis Doctrine Predating the Enactment of § 1367

Many critics lambasted the independent basis doctrine well before the enactment of § 1367. Professor Green argued that a federal court having jurisdiction over an action should have the power to try all counterclaims filed in the action in the interests of "trial convenience and efficiency."[73] He fervently stated that the creation of the doctrine by the Eastern District Court of New York in *Marconi* was purely dictum and that later cases followed the doctrine without re-examining its reasoning.[74] "[T]he very purpose of a provision for counterclaims is to avoid the bringing of an independent suit by defendant."[75] Therefore, "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."[76]

In a well-known concurring opinion,[77] Judge Friendly rejected the notion that permissive counterclaims require independent jurisdiction, a notion he followed in earlier cases.[78] The majority, Friendly reasoned, extended the definition of transaction or occurrence in order to shoehorn the facts of the case into the compulsory counterclaim category, a maneuver which could possess harsh consequences.[79] Referring to Professor Green's article,[80] Friendly noted that the permissive set-off exception,[81] "requir[ing] no independent jurisdictional basis, carries the seeds of destruction of the supposed general rule."[82]

Judge Friendly's opinion is prescient when viewed in light of § 1367 and the conclusion reached by the *Jones* court. The permissive set-off exception is valid proof that the transaction or occurrence standard is a narrower concept than Article

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71. *Id.* at 246.

72. *Jones*, 358 F.3d at 211.

73. Thomas F. Green, Jr., *Federal Jurisdiction over Counterclaims*, 48 NW. U. L. REV. 271, 272 (1953) (construed in *Jones*, 358 F.3d at 211).

74. *Id.* at 283.

75. *Id.* at 274.

76. *Id.* at 275–76.

77. United States v. Heyward-Robinson Co., 430 F.2d 1077 (2d Cir. 1970) (Friendly, J., concurring) (cited with approval in *Jones*, 358 F.3d at 211).

78. *Id.* at 1088.

79. *Id.* at 1087.

80. Green, *supra* note 73.

81. *See* 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 13-31 (3d ed. 1999) (stating that set-offs "provide an exception to the rule that permissive counterclaims require an independent basis for jurisdiction").

82. *Heyward-Robinson Co.*, 430 F.2d at 1088 (citations omitted).

III's case or controversy. Otherwise, supplemental jurisdiction over permissive set-off counterclaims would be beyond the limits of Article III and thus unconstitutional. Thus, the permissive set-off exception is an example of a claim arising outside of the same transaction or occurrence but within the same case or controversy as the plaintiff's original claim.

Fourteen years later, the Third Circuit broke with tradition when Judge Becker realized the inconsistencies in the treatment of permissive counterclaims and held that jurisdiction existed over a permissive counterclaim absent independent jurisdictional grounds.[83] Refusing to recognize jurisdiction under the defensive set-off exception, Judge Becker stated that existing ancillary and pendent jurisdictional principles permitted such jurisdiction.[84] A three-tiered analysis was necessary, he stated, to determine if ancillary or pendent jurisdiction was permissible.[85] This analysis resembles the analysis in § 1367 but predated the statute's enactment by six years.[86]

The first tier requires a determination of whether constitutional power allows the court to determine the state law claim.[87] Thus, the ancillary or pendent claim must satisfy *Gibbs*' common nucleus of operative fact test.[88] In a break from the majority view, Judge Becker stated that a transaction or occurrence under Rule 13(a) did not define the outer limits of ancillary or pendent jurisdiction and, in fact, "[s]everal transactions may share an intersection of 'operative facts.'"[89] This led to the conclusion that a "determination that a counterclaim is permissive within the meaning of Rule 13 is not dispositive of the constitutional question whether there is federal jurisdiction over that counterclaim."[90] Citing policy considerations, Judge Becker asserted that to require independent jurisdiction would allow the plaintiff to "force the defendant to try in two forums claims he would ordinarily expect to try in one."[91] This holding represents the birth of the new breed of permissive counterclaims, which the Second Circuit later recognized in *Jones v. Ford Motor Credit Co.*,[92] though without the statutory basis that the enactment of § 1367 provides.

The second tier of analysis asks "whether the exercise of jurisdiction would violate a federal policy decision limiting federal jurisdiction," an example of which might prevent subversion of statutory limits on federal jurisdiction.[93] Significantly, finding no relevant federal policies invalidating jurisdiction, Becker stated that "where Congress has not spoken to the contrary or where we cannot find a

83. Ambromovage v. United Mine Workers of Am., 726 F.2d 972 (3d Cir. 1984) (cited with approval in Jones v. Ford Motor Credit Co., 358 F.3d 205, 211 (2d Cir. 2004)).

84. *Id.* at 988–89.

85. *Id.* at 989.

86. *See infra* Part V.B.

87. *Ambromovage*, 726 F.2d at 989.

88. *Id.* at 989–90.

89. *Id.* at 990.

90. Ambromovage v. United Mine Workers of Am., 726 F.2d 972, 990 (3d Cir. 1984).

91. *Id.* at 991.

92. 358 F.3d 205 (2d Cir. 2004).

93. *Ambromovage*, 726 F.2d at 991.

Congressional intent to the contrary, jurisdictional statutes give federal courts the power to exercise ancillary and pendent jurisdiction to the constitutional limit."[94]

The last tier invokes the scope of the district court's discretion in exercising jurisdiction, much like that permitted in § 1367(c). The discretionary factors for the court to consider are "fairness to the litigants, judicial economy, and the interest of federalism."[95] Becker's thoughtful contribution, embodied in the three-tier analysis, disposed of inherent inconsistencies in the treatment of permissive counterclaims in the Third Circuit.

B. Criticism of the Independent Basis Doctrine After the Enactment of § 1367

The enactment of § 1367 reflected the codification of supplemental jurisdiction by Congress. The extension of this jurisdiction to the outer limits of an Article III case or controversy, as opposed to the traditional transaction or occurrence, is extremely significant. As one commentator described, "[t]he Federal Courts Study Committee, which recommended a version of § 1367 to Congress, first proposed that supplemental jurisdiction extend to claims arising from the same 'transaction or occurrence.'"[96] Yet the House subcommittee maintained the case or controversy language—language, the Senate noted, attributable to "substantial and helpful comment from the academic community."[97] Although no discussion of the relevant change transpired at the hearing, "the hearing record includes a letter from Professor Arthur Wolf suggesting the 'case or controversy' limit as a broader alternative to 'transaction or occurrence.'"[98] Significantly, "[t]he 'case or controversy' language suggests that supplemental jurisdiction extends to the constitutional limit, currently defined by the *Gibbs* standard of a common nucleus of operative fact."[99]

Thus, Congress clearly intended that the case or controversy standard would govern supplemental jurisdiction, with the *Gibbs*' common nucleus test defining its constitutional borders. This clear choice of language by Congress gives credence to the proposition, suggested by Judge Becker and others, that the determination that a counterclaim is permissive is not dispositive of the constitutional question of whether a federal court has power to exercise supplemental jurisdiction over it.

Following Judge Becker's position and bolstered by the enactment of § 1367, the Seventh Circuit summarily abolished the independent basis doctrine. In *Channell v. Citicorp National Services, Inc.*,[100] the court stated that "[t]he distinction between permissive and compulsory counterclaims served an important function when every assertion of pendent jurisdiction was of doubtful propriety, because not supported by statute, but in which the law of preclusion *required*

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94. *Id.* at 991 n.57.

95. *Id.* at 991.

96. Michael D. Conway, *Narrowing the Scope of Rule 13(a)*, 60 U. CHI. L. REV. 141, 148 (1993).

97. *Id.* at 148–49.

98. *Id.* at 149.

99. *Id.* (citing H.R. REP. NO. 101-734, at 29 n.15 ("[S]ubsection (a) codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*.")).

100. 89 F.3d 379 (7th Cir. 1996) (cited with approval in Jones v. Ford Motor Credit Co., 358 F.3d 205, 213 (2d Cir. 2004)).

compulsory counterclaims to be presented or lost."[101] The court then held that jurisdictional power existed over the permissive counterclaim despite the absence of independent jurisdiction; however, the court upheld the district court's refusal to exercise jurisdiction under the discretionary factors outlined in § 1367(c).[102]

The confusion resulting from the tension between the old judicially created ancillary jurisdiction requirements and the federal jurisdictional statutes is ever present. In *Alexander v. Goldome Credit Corp.*,[103] the district court grappled with a conflict concerning 28 U.S.C. § 1441(c), which states that

> [w]henever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title 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.[104]

The provision is necessary when one defendant seeks removal and has not joined or explained the absence of all co-defendants—a requirement under § 1441(b).[105] The district court reasoned that removal of the federal Truth in Lending Act claim and two state claims by a single defendant was permissible under § 1441(c).[106] Thus, the district court held that federal supplemental jurisdiction existed over a "separate and independent" federal claim and pendent state law claims that necessarily fall outside of the same transaction and occurrence as the federal claim.[107] Interestingly, the district court's holding implies that two claims may be separate and independent because they do not arise under the same transaction or occurrence, yet are within the same common nucleus of operative fact for the purposes of supplemental jurisdiction.[108]

Courts can avoid this confusion by abandoning the transaction or occurrence language for supplemental jurisdiction purposes, an abandonment impliedly suggested by Congress' use of the case or controversy language in § 1367. Part V will further explore this notion.

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101. *Id.* at 385.
102. *Id.* at 387.
103. 772 F. Supp. 1217 (M.D. Ala. 1991).
104. 28 U.S.C. § 1441 (1990).
105. *Alexander*, 772 F. Supp. at 1221–22.
106. *Id.* at 1223.
107. *Id.*
108. *Id.* at 1221.

IV. THE CURRENT STATE OF THE INDEPENDENT BASIS DOCTRINE

A. The Majority of the Federal Circuits

With the exception of the Second,[109] Third,[110] and Seventh[111] Circuits, the majority of the federal circuits still adhere to the traditional independent basis doctrine. However, § 1367 has superseded the doctrine,[112] and the circuits should follow § 1367 and exercise supplemental jurisdiction to the full extent Congress and the Constitution allow.

Adherence to the independent basis doctrine is not only unnecessary in light of the jurisdiction § 1367 permits, but also results in undesired consequences which conflict with the general policy of the federal courts to dispose of all litigation at hand in a single suit for efficiency and judicial economy. Sensing the possible expansion of supplemental jurisdiction under § 1367 and the abrogation of the distinction between permissive and compulsory for jurisdictional purposes, courts may tend to expand compulsory counterclaims and its definition of arising from the same transaction or occurrence to the breaking point. Labeling a claim as compulsory allows the court to avoid the contentious issue of whether independent jurisdiction is necessary for a permissive counterclaim after § 1367. Such a result will lead to unequal treatment of similar facts across jurisdictions.

Even absent any distinction between permissive and compulsory counterclaims for jurisdictional purposes, the distinction still remains for res judicata. Thus, a plaintiff attempting to bring a claim falling narrowly outside of the transaction or occurrence of a former suit, and thus labeled permissive, may find that estoppel prevents the assertion of the claim in a later suit. This may occur when the court in the later suit faces precedent dealing with nearly identical facts, and yet determines that the claim was indeed compulsory. The danger arises, of course, when the cited precedent utilizes an overbroad definition of transaction or occurrence so as to avoid the independent basis question.

B. The Fourth Circuit's Adherence to the Independent Basis Doctrine

Fourth Circuit courts still uphold the traditional independent basis doctrine. *Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*[113] is the most common pre-§ 1367 case cited for the proposition that permissive counterclaims require independent jurisdiction. In support of its position, the court cited Federal Rule of Civil Procedure 82, "which provides that the federal rules do not 'extend or limit the jurisdiction of the United States district courts.'"[114]

Sue & Sam outlined the four-prong definitive test the Fourth Circuit used to determine whether a counterclaim is compulsory or permissive. The first prong considers whether the issues of fact and law that the claim and counterclaim raise

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109. Jones v. Ford Motor Credit Co., 358 F.3d 205 (2d Cir. 2004).
110. Ambromovage v. United Mine Workers of Am., 726 F.2d 972 (3d Cir. 1984).
111. Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379 (7th Cir. 1996).
112. *See supra* Part III.B.
113. 538 F.2d 1048 (4th Cir. 1976).
114. *Id.* at 1051.

are largely the same.[115] The second prong determines whether res judicata would bar a subsequent suit on the defendant's counterclaim.[116] The third prong asks whether the same evidence would support or refute the plaintiff's claim as well as the defendant's counterclaim.[117] Finally, the fourth prong examines whether any logical relation between the claim and counterclaim exists.[118]

This four-prong test is essential in determining whether the counterclaim arises from the same transaction or occurrence as the plaintiff's original claim. However, since § 1367's case or controversy requirement is inherently broader than a transaction or occurrence, the appropriateness of this four-prong test is susceptible to criticism. Though no post-§ 1367 Fourth Circuit decisions specifically address this issue, district courts within the circuit are divided on the appropriate standard. For example, in *Johnson v. Gala Industries, Inc.*,[119] the district court noted that "[t]he central issue is whether the counterclaim arose from the 'same transaction or occurrence' as the original claim. . . . If not, then the counterclaim may be admitted, but only if it has an independent jurisdictional basis."[120] Significantly, the court noted that the statutory terminology is now same case or controversy under §1367, but that the "semantic differences [between 'case or controversy' and 'transaction or occurrence'] do not alter the analytical mechanics."[121] The court then applied the *Sue & Sam* four-prong test.[122] By applying the four-prong test, the court presumes that the analysis and scope under § 1367's same case or controversy language is identical to that of the same transaction or occurrence under the old ancillary model. This presumption is a mistake because the analysis of same case or controversy may or may not rely on the same considerations.[123] Though the analysis may be appropriate to determine whether a compulsory counterclaim exists for res judicata or estoppel purposes, the courts should not use the test to distinguish counterclaims for jurisdictional purposes.

One Fourth Circuit case contains language implying that § 1367 necessitates the same four-prong test for determining whether a counterclaim is compulsory or permissive. In *Shanaghan v. Cahill*,[124] the court stated that "supplemental jurisdiction [under § 1367] also incorporates the doctrine of ancillary jurisdiction."[125] This determination presupposes that Congress' choice of expanded language embodied in case or controversy does not alter the analysis and its relevant factors for the purposes of determining jurisdiction.

Thus, confusion within the Fourth Circuit concerns whether § 1367 supplants or incorporates case law treatment of ancillary and pendent jurisdiction. The

115. *Id.*
116. *Id.* at 1052.
117. *Id.*
118. *Id.* at 1053.
119. No. 95-1031-R, 1996 U.S. Dist. LEXIS 9893 (W.D. Va. June 7, 1996).
120. *Id.* at *3.
121. *Id.* at *3 n.1.
122. *Id.* at *4–5. *See also* Harrison v. Grass, 304 F. Supp. 2d 710, 713 (D. Md. 2004) (utilizing the four-prong test in *Sue & Sam* to determine if counterclaim is permissive or compulsory and requiring permissive counterclaims to possess an independent basis for jurisdiction).
123. *See infra* Part V.
124. 58 F.3d 106 (4th Cir. 1995).
125. *Id.* at 109 n.1.

incorporation of ancillary jurisdiction analysis for counterclaims is of limited use, however, given the expansion of supplemental jurisdiction to the outer limits of Article III. As the *Jones* court states, the determination of whether a counterclaim is permissive or compulsory is not determinative of the constitutional question of whether supplemental jurisdiction exists.[126] After § 1367, the determination that a counterclaim is permissive is only relevant for purposes of res judicata or estoppel, though the factors considered under the four-prong test may offer reasonable guidelines to determine whether jurisdiction exists.

V. THE LITIGATION UNIT UNDER § 1367'S "CASE OR CONTROVERSY"

If the determination that a counterclaim is permissive and arises outside the transaction or occurrence is not determinative of whether supplemental jurisdiction exists, as the *Jones* court states,[127] then how does one determine if the counterclaim arises in the same case or controversy? As Professor Green has stated, the real issue is determining what the correct litigation unit is for jurisdictional purposes.[128] Due to the enactment of § 1367 and its use of the broader case or controversy language, this question is more relevant now than ever. Does § 1367 incorporate the *Gibbs* constitutional definition of a case or controversy? Is the *Gibbs* standard a constitutional definition at all? Whether or not the *Gibbs* test applies, what factors must courts consider to determine the reasonable litigation unit for supplemental jurisdictional purposes after § 1367?

A. The Gibbs *Test and § 1367*

Even before the enactment of § 1367, commentators suggested that *Gibbs'* factual relatedness requirement does not in fact determine the outer limits of an Article III case or controversy.[129] Professor Matasar posited that the factual relatedness requirement should be viewed as a statutory, not constitutional, requirement for supplemental jurisdiction.[130] He provided six examples in which supplemental jurisdiction over factually unrelated claims is permissible—jurisdiction that is unconstitutional if factual relatedness is indeed a constitutional requirement after *Gibbs*.[131] These six examples are cases involving claims to property, receivership actions, aggregation of factually unrelated claims to meet the amount in controversy requirement in diversity cases, bankruptcy jurisdiction, attorney's fees dispute cases, and, most notably, set-off cases.[132] Considering these exceptions to the *Gibbs* principle, Professor Matasar stated, "one is converted back to the old time religion—supplemental jurisdiction may be

126. Jones v. Ford Motor Credit Co., 358 F.3d 205, 212 (2d Cir. 2004) (quoting Ambromovage v. United Mine Workers of Am., 726 F.2d 972, 990 (3d Cir. 1984)).

127. *Id.*

128. Green, *supra* note 73, at 293.

129. *See supra* Part III.A.

130. Matasar, *supra* note 30, at 1448.

131. *Id.* at 1463.

132. *Id.* at 1463–77.

exercised when the federal and nonfederal claims are part of one constitutional 'case' or 'controversy.'"[133]

According to Matasar, case or controversy harkens back to the "forms prescribed by law," which is a reference to the rules of procedure Congress established—the modern day Federal Rules of Civil Procedure.[134] He stated that the power to assert supplemental jurisdiction "*is 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 . . . .*"[135] The *Gibbs* "ordinarily be expected to try" test[136] also bolsters this interpretation.[137] If the Federal Rules permit a particular breed of joinder, a party would ordinarily expect to try the joined claim in the instant case. Thus, one factor in defining a litigation unit is determining what is permissive under the Federal Rules of Civil Procedure in terms of joinder of claims or parties. Since the Rules do not state that permissive counterclaims require independent jurisdiction, the independent basis doctrine need not apply.

Professor Fletcher also asserted that the *Gibbs* common nucleus test should not apply to all forms of supplemental jurisdiction.[138] First, he stated, the Supreme Court has not decided whether the *Gibbs* test applies to all types of supplemental jurisdiction, though it has encountered the issue in three seminal cases.[139] Second, as a matter of historical interpretation, adjudication of factually unrelated claims, including defensive set-offs, has been permitted both in English and American courts.[140] Finally, as a matter of current practice and usage, under the modern Federal Rules, factually unrelated claims "are allowed, even encouraged, as part of the same litigation."[141]

As a matter of practicality, however, courts should utilize the *Gibbs* common nucleus and ordinarily expected to try tests in determining whether a permissive claim falls within the same case or controversy as the plaintiff's claim, at least until the Supreme Court devises another standard to define case or controversy. Despite inherent inconsistencies, the common nucleus test still provides a reliable standard for the purposes of supplemental jurisdiction.

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133. *Id.* at 1478.

134. *Id.* at 1479–80.

135. *Id.* at 1479 (quoting Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818 (1824)).

136. Matasar, *supra* note 30, at 1463. For a discussion of the possible interpretations of the "ordinarily be expected to try" language in *Gibbs*, see *id.* at 1454–58. Professor Matasar argued that courts should read the ordinarily be expected to try test and the common nucleus of the operative facts test together. *Id.* at 1458. The full scope of the test and its interplay with the "common nucleus of operative facts" test is beyond the scope of this Article.

137. *Id.* at 1463.

138. William A. Fletcher, "*Common Nucleus of Operative Fact" and Defensive Set-Off: Beyond the* Gibbs *Test*, 74 IND. L.J. 171, 171 (1998).

139. *Id.* at 176 (citing Aldinger v. Howard, 427 U.S. 1 (1976), Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978), Finley v. United States, 490 U.S. 545 (1989)).

140. *Id.* at 177.

141. *Id. See* FED. R. CIV. P. 13(b) ("A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."); FED. R. CIV. P. 18 ("A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.").

The utilization of the *Gibbs* test also permits the conclusion that some permissive counterclaims, though arising outside a transaction or occurrence, fall within the same case or controversy as the plaintiff's claim. Illustrating such a flexibility in terms of factual relatedness, both courts and commentators have "given the phrase several different interpretations, ranging from those requiring near identity between the facts . . . to those requiring only a loose 'logical relationship' between the claims."[142]

This flexibility is evident in *Jones*, where the court found the permissive counterclaim to fall within the same case or controversy as plaintiff's claim.[143] The court determined that both the plaintiff's discrimination claim under the Equal Credit Opportunity Act and defendant's state law debt collection counterclaims "originate[d] from the Plaintiffs' decisions to purchase Ford cars."[144] This factual relationship, the court stated, at least satisfied the *Gibbs* common nucleus standard, though the court expressed uncertainty that the "*Gibbs* . . . standard provide[s] the outer limit of an Article III 'case'" under § 1367.[145]

Interestingly, the *Jones* court stated the *Gibbs* test "was developed to provide some limit upon the state law claims that a *plaintiff* could join with its federal law claims."[146] Yet, "[t]hat rationale does not necessarily apply to a defendant's counterclaims," because "[t]here is no corresponding risk that a defendant will decline to file in state court an available state law claim, hoping to be lucky enough to be sued by his adversary on a federal claim so that he can assert a state law counterclaim."[147]

Jones exemplifies the appropriate analysis courts should undertake to determine whether to exercise supplemental jurisdiction over a permissive counterclaim under § 1367. However, in a recent case within the Fourth Circuit, *Johnson v. Gala Industries, Inc.*, the court incorrectly utilized the *Sue & Sam* four-prong test to establish that the counterclaim was permissive and then dismissed it for lack of independent jurisdiction.[148]

Section 1367 sets out the correct standard, which the *Johnson* court erroneously equated to the four-prong test.[149] Though conceding that the witnesses would be the same for both the claim and counterclaim, the court rested its decision on a lack of evidentiary similarity.[150] In revealing language, the court stated that "[w]hile it is often true that absent the circumstances giving rise to the original claim, the actions creating the counterclaim never would have occurred, equally often there are fundamental evidentiary differences between the claim and counterclaim."[151] The circumstances from which the claim and counterclaim arose in this case were the plaintiff's employment with defendant and subsequent alleged discriminatory

142. Matasar, *supra* note 30, at 1448.

143. Jones v. Ford Motor Credit Co., 358 F.3d 205, 214 (2d Cir. 2004).

144. *Id.*

145. *Id.* at 213–14.

146. *Id.* at 214 n.7.

147. *Id.*

148. Johnson v. Gala Indus., Inc., No. 95-1031-R, 1996 U.S. Dist. LEXIS 9893, at *4–5 (W.D. Va. June 7, 1996). For a full discussion of the *Sue & Sam* four-prong test see *supra* Part IV.B.

149. *Id.* at *3 n.1.

150. *Id.* at *6–7.

151. *Id.* at *6.

discharge.[152] The defendant's counterclaims consisted of slander per se and breach of fiduciary duty.[153]

Had the *Johnson* court utilized the correct analysis under § 1367, as the *Jones* court did, a strong argument would have existed that the circumstances of the employee's discharge, out of which both claim and counterclaims derived, established a sufficient common nucleus of operative fact to constitute a case or controversy for § 1367 purposes. Recall that the *Jones* court, following the correct analysis, found that the plaintiff's decision to purchase cars from defendant satisfied the same case or controversy standard.[154] However, the result in *Johnson* is less important than the means the court utilized to attain the result. The court used the four-prong analysis to determine whether both the claim and the counterclaim derived from the same transaction or occurrence,[155] the incorrect standard for § 1367 purposes.

B. The Correct Analysis for Permissive Counterclaims Under § 1367

The first step in considering whether federal power exists to exercise supplemental jurisdiction over a permissive counterclaim is to determine whether the claim and counterclaim derive from the same case or controversy, as defined in *Gibbs*, under § 1367. Summary dismissal of the permissive counterclaim for lack of independent jurisdiction is no longer a valid option, though this antiquated standard is still exercised by most federal courts today, including those within the Fourth Circuit.[156] The permissive counterclaim may still derive from the same case or controversy as the plaintiff's claim, like the counterclaim in *Jones*.[157]

A case or controversy is present when both the claim and counterclaim arise from a common nucleus of operative fact and the litigant would ordinarily be expected to try his claim or counterclaim in the same proceeding. Though varying definitions abound for a common nucleus of operative fact, given the liberal joinder of claims and parties that the modern Federal Rules of Civil Procedure permit and the shift in language away from same transaction or occurrence in § 1367, at least a logical relationship should exist between the claim and permissive counterclaim.

One commentator noted that those who assert that more than a logical relationship should be necessary in the interests of judicial economy rest their assertion on two erroneous assumptions: first, "that no saving is made by trying loosely related claims together in one action; second, that the constitutional power to exercise supplemental jurisdiction exists for the sole purpose of judicial economy."[158] In fact, "supplemental jurisdiction rests on far broader concerns: preserving the integrity of the federal jurisdiction, granting those with federal claims

152. *Id.* at *1.

153. *Id.* at *2.

154. Jones v. Ford Motor Credit Co., 358 F.3d 205, 214 (2d Cir. 2004).

155. Johnson v. Gala Indus., Inc., No. 95-1031-R, 1996 U.S. District LEXIS 9893, at *3–5 (W.D. Va. June 7, 1995).

156. *See supra* Part IV.

157. Jones v. Ford Motor Credit Co., 358 F.3d 205, 212–13 (2d Cir. 2004).

158. Matasar, *supra* note 30, at 1454.

unimpeded access to a federal forum, and giving courts the flexibility to resolve whole 'cases' in appropriate circumstances."[159]

After a determination that the claim and permissive counterclaim constitute one case or controversy, the court must then consider whether any of the four circumstances under § 1367(c) "are present to an extent that would warrant the exercise of discretion to decline assertion of supplemental jurisdiction."[160] When "at least one of the subsection 1367(c) factors is applicable, a district court should not decline to exercise supplemental jurisdiction unless it also determines that doing so would not promote the values articulated in *Gibbs*: economy, convenience, fairness, and comity."[161]

VI. CONCLUSION

The evolution of supplemental jurisdiction is long and complex. Yet, the enactment of § 1367 should leave no question in the minds of courts that determining that a counterclaim is permissive is not dispositive to the constitutional question of whether the power to exercise supplemental jurisdiction exists over the counterclaim. A permissive counterclaim may still maintain a logical relationship to the plaintiff's claim, such that both, taken together, constitute one case or controversy, satisfying the constitutional requirements of the *Gibbs* test and the statutory requirement of § 1367.

The ancillary and pendent principles, which have developed over the years, necessarily reflect the then current judicial concerns and forms of proceeding. Supplemental jurisdictional principles are not static, however, but evolve in response to the increasing efficiency of the judicial system and to those concerns expressed by the people through Congress. Much is to gain in a judicial system in which it is in the court's discretion to determine all matters and claims in one proceeding, when appropriate and within constitutional bounds. Consequently, federal courts should endeavor to exercise jurisdiction to the full extent the Constitution and Congress permit.

Full access by our citizens to a federal forum is also a prerequisite to an efficient and fair judicial system. This concern is of particular importance when that citizen is a defendant who is brought before a federal court and who deserves the full opportunity to assert a counterclaim against the plaintiff. Section 1367 provides the citizen this opportunity, and the courts should reassess the jurisdiction this statute permits. Such a reassessment should lead the courts to the conclusion that permissive counterclaims may indeed fall within the same case or controversy as plaintiff's claim.

Courts possess a discretionary grant of power to dismiss permissive counterclaims when necessary. The considerations in § 1367(c) outline that discretion, and those considerations are the mechanism through which Congress has expressly limited the courts to dismiss or remand a claim or counterclaim.

M. Evan Lacke

159. *Id.*
160. *Jones*, 358 F.3d at 214.
161. *Id.* (citation omitted).