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Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the *Gibbs* Test for Supplemental Jurisdiction

Richard A. Matasar

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Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the *Gibbs* Test for Supplemental Jurisdiction

Richard A. Matasar†

The Supreme Court has now made it clear that pendent and ancillary jurisdiction¹—whatever their differences—"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?"² But the Court has outlined only a vague answer to this ques-

† Associate Professor of Law, University of Iowa College of Law. B.A. 1974, J.D. 1977, University of Pennsylvania. I gratefully acknowledge the help of my colleagues Bob Clinton, Steve Burtou, Mike Green, and Peter Shane, whose many suggestions have found their way into this Article. I also wish to thank Thomas Waterman and Dennis Ryan, third-year students at the University of Iowa College of Law, who provided research assistance for this study. Finally, I am grateful to the University of Iowa and the Iowa Law School Foundation which provided funding for this project.

1. Pendent and ancillary jurisdiction are doctrines permitting a federal court to hear and decide claims that are ordinarily outside the scope of federal judicial power as set forth in article III, § 2 of the United States Constitution. Although these doctrines sprang from the same source—*Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (suggesting that federal court has power to decide all issues in federal case), *see infra* text accompanying notes 19-24—the courts have subsequently treated them as two distinct doctrines. The courts have applied the label "ancillary" to federal jurisdiction over claims and parties ordinarily outside federal power that are brought into the litigation by defendants or intervenors, *see infra* text accompanying notes 30-32, 35-44; and they have applied the label "pendent" to federal jurisdiction over claims and parties outside federal power that are brought into the litigation by the plaintiff, *see infra* text accompanying notes 33-34, 45-55. Whatever their differences, pendent and ancillary jurisdiction should be viewed as identical at the constitutional level. *See infra* text accompanying notes 56-296.

2. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). In addition to this question, pendent and ancillary jurisdiction also involve the questions of both when a federal court may hear an otherwise proper federal claim with an insufficient amount in controversy, *see Hagans v. Lavine*, 415 U.S. 528 (1974), and when a federal court may hear an otherwise proper claim against an individual whose citizenship does not meet the constitutional requirements for diversity jurisdiction under article III, § 2, *cf. Twentieth Century-Fox Film Corp. v. Taylor*, 239 F. Supp. 913 (S.D.N.Y. 1965) (discussing lack of diversity jurisdiction over an American citizen who is not a citizen of any state).

While recognizing that pendent and ancillary jurisdiction are similar, the Supreme Court has declined to delineate the differences, if any, between them. *See Kroger*, 437 U.S. at 371 n.10 (assuming without deciding that the test for pendent jurisdiction may be applied to a case of ancillary jurisdiction); *Aldinger v. Howard*, 427 U.S. 1, 13 (1975) ("there is little profit in attempting to decide . . . whether there are any 'principled' differences between pendent and ancillary jurisdiction"). Nonetheless, historically the doctrines developed separately, *see supra* note 1, and it is apparent that at least for the purposes of joining new parties ordinarily outside federal juris-

tion, establishing what appears to be a tripartite recipe for determining whether state and federal questions may be heard in one action. The Court has held that supplemental jurisdiction³—jurisdiction by a federal court over a claim or party ordinarily outside the reach of its judicial power—is permissible only when a trial court finds constitutional power over the claim or party, statutory power over the claim or party, and a factual context in the case that warrants the discretionary exercise of its constitutional and statutory powers.⁴

The Court's attempt to provide a recipe is flawed, for the Court merely lists the various ingredients for supplemental jurisdiction. As with any list of ingredients, much is unclear, and questions must be answered before it can serve as a recipe for the desired result. In what proportion must the ingredients be mixed? In what order should the ingredients be combined? And, most importantly, have the proper ingredients been chosen?

diction, ancillary jurisdiction is broader than pendent jurisdiction. *Compare Kroger*, 437 U.S. at 375 & n.18, with *Aldinger*, 427 U.S. at 18.

3. For convenience, this Article uses "supplemental jurisdiction" throughout to refer to all exercises of pendent and ancillary jurisdiction. The term is apt, for it suggests an extension of power over claims normally outside federal jurisdiction in order to serve important federal interests that supplement the purposes underlying the decision on the original federal claims. *See, e.g.*, *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (allowing convenient and efficient litigation of an entire legal dispute); *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1861) (ensuring a forum for vindication of claims); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (preserving a federal court's ability to function effectively).

4. It is only in the last four years that the Supreme Court has clearly indicated that the exercise of pendent and ancillary jurisdiction rests on three separate elements. Prior to that, such jurisdiction apparently depended solely on a court's finding of jurisdictional power and its discretionary decision to exercise that power. *See* C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 19, at 105-06 (4th ed. 1983) (describing *Gibbs*, 383 U.S. 715 (1966), as creating this two-part test). Moreover, the courts confined their search for jurisdictional power solely to that conferred by article III of the Constitution. *See infra* note 58. They did not search for any statutory limits on jurisdiction.

The Supreme Court found this limited search for judicial power unsatisfactory because it ignored the role of Congress in defining federal judicial power. Thus, in *Aldinger v. Howard*, 427 U.S. 1 (1975), a case involving the exercise of pendent party jurisdiction (a federal court exercising power over a party who is outside federal jurisdiction, because the claim against that party is related to a claim against another party who is within federal jurisdiction), the Court held that "a federal court must satisfy itself not only that Art. III permits [jurisdiction], but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." *Id.* at 18; *see* *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978) ("Constitutional power is merely the first hurdle . . . [T]he jurisdiction of the federal courts is [also limited] by Acts of Congress.").

Although the Supreme Court has not explicitly made these holdings applicable to all exercises of supplemental jurisdiction, its opinions have been so read. *See* Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935 (1982) (three-part test implicit in recent Supreme Court opinions). Several lower courts have employed a three-part test for supplemental jurisdiction. *See, e.g.*, *United States ex rel. Hoover v. Franzen*, 669 F.2d 433, 438 (7th Cir. 1982); *Amoco Oil Co. v. Local 99, Int'l Bhd. of Elec. Workers*, 536 F. Supp. 1203, 1221 (D.R.I. 1982); *Southeastern Lumber Mfrs. Ass'n v. Walthour Agency*, 486 F. Supp. 781, 783-84 (N.D. Ga. 1980); *Brame v. Ray Bills Fin. Corp.*, 85 F.R.D. 568, 595 n.35 (N.D.N.Y. 1979); *Roxse Holmes, Inc. v. Adams*, 83 F.R.D. 398, 401-03 (D. Mass. 1979).

Recipes based on a vague list of ingredients are often doomed to failure, especially when a chef blindly reaches for ingredients that he or she has been told are appropriate, but that have been mislabeled or have never been tested for purity. Courts and commentators have acted like our bumbling chef when analyzing supplemental jurisdiction, producing indigestible opinions and inconsistencies that leave a bad taste with those trying to understand their doctrine. The problem is that producing legal opinions, like preparing *la haute cuisine*, requires a clear understanding of the appropriate elements to be used. Hence, just as a master chef selects the choicest ingredients and avoids the blandness of conventional menus, so should a legal commentator carefully define the proper decisionmaking standards and challenge dogmas.

This Article explores one such dogma that serves as the basic constitutional ingredient of supplemental jurisdiction: the requirement that before a federal court may hear a state claim with no independent federal jurisdictional basis, the claim must be "factually related" to a "substantial" federal claim properly before the court. The Article does not address either the statutory or the discretionary ingredients of supplemental jurisdiction.⁵ Rather, it concentrates solely on the Court's

5. I intend to give the statutory and discretionary elements of the supplemental jurisdiction doctrine fuller treatment in a future article on the subject and here will only briefly outline some of the important determinants of the doctrine.

In *Aldinger v. Howard*, 427 U.S. 1, 18 (1975), the Supreme Court stated that the exercise of supplemental jurisdiction requires both constitutional and statutory authority. Congress has rarely spoken explicitly of supplemental jurisdiction, *see, e.g.*, 28 U.S.C. §§ 1338(b), 1441(c) (1976). Thus, the search for statutory limitations to pendent and ancillary jurisdiction is largely a search for implied intent. Until now finding such intent has focused almost exclusively on certain dicta of the Supreme Court, such as its suggestions that joinder of parties is more difficult than joinder of claims, *Aldinger*, 427 U.S. at 18, or that jurisdiction depends on the "context" in which the nonfederal claim is raised, i.e., whether it is the defendant or the plaintiff who is adding a claim or a party, or whether there is a "logical dependence" between the federal and state claims. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375-76 (1978). The Court, however, has not connected such dicta to Congress' views of jurisdiction. Rather, it has used its contextual view as a post hoc rationalization for established cases of pendent or ancillary jurisdiction.

In my view, this myopic approach is as bad as being blind to Congress' intent altogether. In order to ascertain Congress' intent concerning federal jurisdiction, one must start by analyzing Congress' purposes in making various federal jurisdictional grants.

For example, as outlined below, Congress has expanded federal jurisdiction, at least in part, to permit federal litigants unencumbered access to federal courts. *See infra* note 6. This forum choice philosophy is reinforced by Congress' recent decision to amend 28 U.S.C. § 1331 (1976 & Supp. V 1981), amended by Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, 2369, to eliminate the amount in controversy requirement for federal question cases. Thus, the first postulate about Congress' implied intent concerning supplemental jurisdiction is that Congress means to ensure "free choice" of a federal forum. Nevertheless, the Supreme Court refused to exercise pendent party jurisdiction in *Aldinger*, 427 U.S. at 19, thereby relegating a plaintiff to the choice of either incurring a substantial risk of issue preclusion by splitting her claims between state and federal courts, or losing her "free choice" of a federal forum by litigating her whole claim in state court. *See infra* note 6.

Congress has also given both implicit and explicit jurisdictional directions to the Court by

constitutional ingredient, for its mislabeling taints the whole product. The Article demonstrates that "substantiality" and "factual relationship" are wrongly identified as constitutional requirements, and that they have their source in statutory provisions or discretionary concerns. It further demonstrates that ascribing constitutional significance to these statutory and discretionary concerns not only has created several gaps in the theory explaining currently accepted forms of ancillary and pendent jurisdiction, but it may also undermine Congress' ability to use federal jurisdiction to ensure a fair and efficient federal judiciary.⁶ Fi-

suggesting situations in which a federal court should refrain from exercising its power. *See* 28 U.S.C. § 2283 (1976) (directing no injunction of state proceedings). The Court has on occasion responded to such signals. *See* *Younger v. Harris*, 401 U.S. 37, 43-54 (1971) (implicit recognition of same principle); *Burford v. Sun Oil*, 319 U.S. 315 (1943) (same); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635-36 (1874) (interpreting congressional appeals statute as precluding federal appellate jurisdiction when there is an adequate and independent state ground). Each of these instances indicates that there is a strong congressional policy of avoiding undue interference with important state functions by the federal government. These policies make up a second postulate about Congress' implied intent concerning supplemental jurisdiction—Congress is concerned about the principles of comity and federalism.

In *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), the Supreme Court treated these concerns as "discretionary" matters unrelated to federal supplementary jurisdictional power. Instead, these considerations go to the heart of federal jurisdiction and should be addressed prior to the exercise of discretion.

Finally, pendent and ancillary jurisdiction have been justified on "convenience" and "economy" grounds. *Id.* Congress has also been guided by these concerns, *see* Judicial Courts Act of Mar. 2, 1793, ch. 22, § 7, 1 Stat. 333, 335, which underlie the current Federal Rules of Civil Procedure, *see* FED. R. CIV. P. 1. They constitute a third jurisdictional postulate.

In a future article, I will analyze the workings of these three postulates and the contextual factors outlined by the Court, which I believe ought to be discretionary concerns, in an attempt to present a unified theory of supplemental jurisdiction. I will also analyze the proper treatment of the *Gibbs* substantial federal question and factual relatedness requirements, which, as this Article shows, *Gibbs* incorrectly treated as constitutional. The future article will discuss the impact of the substantiality requirement on the federalism/comity postulate and on the "free choice" postulate; it will also analyze the impact of the factual relatedness requirement on all three postulates in order to tie *Gibbs* to a new, unified supplemental jurisdiction theory.

6. This Article uses "fair and efficient federal judiciary" to refer to a judiciary capable of deciding an "entire legal dispute" between parties. Such a judiciary would effectuate Congress' policy of allowing plaintiffs unencumbered access to a federal forum.

As outlined below, *see infra* text accompanying notes 17-18, federal judicial power expanded significantly following the Civil War. This expansion foreboded a potential change in the balance of power between federal and state courts. Had the new jurisdiction been exclusively federal, the role of state courts in enforcing federal rights would have been substantially reduced. Congress, however, rather than eliminating state jurisdiction over federal claims, instead left the choice to the plaintiff by permitting concurrent jurisdiction in the states over most federal causes of action. This policy of giving the plaintiff (and the defendant through removal) a choice has remained a dominant feature of federal jurisdiction. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1147-53 (1977).

In a simple lawsuit involving a single plaintiff with a single claim against a single defendant, limited federal jurisdiction would present little difficulty either to a court or to a litigant. The lawsuit either would come within article III, § 2 (and the jurisdictional statutes) or it would not. But lawsuits are not always so simple. Even a single claim for relief may contain elements of both state and federal law. *See Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904

nally, the Article identifies the only constitutional ingredient that pro-

(1824); *cf.* 42 U.S.C. § 1988 (1976); *id.* 28 U.S.C. § 1652 (1976) (congressional adoption of state law).

To the extent that federal procedural rules permit expanded lawsuits involving multiple claims and parties, limited federal jurisdiction might erect barriers to adjudicating the entire legal dispute between the parties. As used in this Article, an "entire legal dispute" refers to the scope of joinder of parties and claims permissible under lawfully adopted procedural rules. The term also encompasses the claims of parties who may intervene in an ongoing dispute. The potential scope of a federal lawsuit today is largely governed by the Federal Rules of Civil Procedure, which permit extremely broad-ranging disputes. *See, e.g.*, FED. R. CIV. P. 18(a) (permitting a party claiming relief from another party to join all claims against the other party); FED. R. CIV. P. 20(a) (permitting joinder of several parties as plaintiffs or defendants); FED. R. CIV. P. 13(a)-(b) (permitting all types of counterclaims); FED. R. CIV. P. 13(g) (permitting cross-claims between co-party plaintiffs or defendants); FED. R. CIV. P. 13(h) (permitting the addition of new parties to counterclaims and cross-claims); FED. R. CIV. P. 14 (permitting impleader and claims by and against third-party defendants); FED. R. CIV. P. 22 (permitting interpleader); FED. R. CIV. P. 24 (permitting intervention).

It is conceivable that only some of the myriad claims in an entire legal dispute would be within the scope of federal judicial power. A strict application of limited federal jurisdiction—one forbidding a federal court from reaching any questions in a lawsuit that could not be heard independently by a federal court—would prevent federal adjudication of other parts of the dispute not within article III. For example, a plaintiff who is the victim of police brutality could assert a federal claim (alleging a Civil Rights Act violation pursuant to 42 U.S.C. § 1983 (1976)) and a nonfederal claim (alleging assault and battery under state law) against a police officer. If the plaintiff and the officer were citizens of the same state, it is clear that the state law claim against the officer could not be brought independently to federal court. The problem would only be compounded if in addition to asserting his or her two claims, the plaintiff desired to add another defendant to his or her nonfederal claim, or if the defendant wished to implead another party.

To the degree that limited federal jurisdiction prevents adjudication of all these related claims in one suit, it frustrates the object of the Federal Rules to secure "the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. Preventing litigation of an entire legal dispute in federal court is thus undesirable. It can reduce judicial efficiency by forcing several lawsuits to take the place of one. For example, in the above civil rights hypothetical, the plaintiff could bring the § 1983 claim to federal court and the nonfederal assault and battery claim to state court. Such a splitting of related claims would surely increase costs by duplicating service, pleadings, discovery, court time, and legal fees. Furthermore, splitting federal and nonfederal claims would subject the plaintiff to the risk of claim or issue preclusion if the nonfederal claim comes to judgment before the federal claim.

Claim preclusion (*res judicata*) is a doctrine that forbids a party from relitigating any cause of action that was brought, or that could have been brought, in a prior lawsuit that resulted in a judgment on the merits. Traditionally, the defense of claim preclusion rested on a finding that the claim made in the subsequent lawsuit was part of the same cause of action brought in the first lawsuit. *See* *Cromwell v. County of Sac*, 94 U.S. 351, 356 (1877). Today, the trend is to bar subsequent claims arising from the same transaction, occurrence, or series of transactions or occurrences making up the claims in the first lawsuit. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 23-24 (1982). Since in many instances a plaintiff may bring federal and nonfederal claims together in state court, splitting federal and nonfederal claims may lead to a *res judicata* bar of the federal claim if the nonfederal claim reaches judgment first.

Even if claim preclusion is not applicable in a given case, splitting federal and nonfederal claims raises a substantial risk of issue preclusion (collateral estoppel). Issue preclusion permits a court to use a prior judgment to bar retrial of an issue arising in a second action that is identical to an issue tried in the first lawsuit, even if the subsequent action is based on a new claim. This bar applies if, in the prior litigation, the issue was finally determined and the party had an adequate opportunity to be heard on the issue. *See* *Allen v. McCurry*, 449 U.S. 90 (1980). For example, a state court might not find that a plaintiff's civil rights claim and state assault and battery claim are

duces an intellectually palatable whole: the setting of "case" or

part of the same cause of action, and hence *res judicata* would not apply. Nonetheless, the state court's findings of fact on the nonfederal claim—e.g., whether the defendant actually struck the plaintiff—could be used to preclude a contrary finding of fact by a federal court hearing the federal claim.

Insofar as issue and claim preclusion are used to prevent a federal determination of federal issues, the freedom to choose a forum is frustrated, and Congress' intent in creating concurrent jurisdiction is frustrated. This problem is aggravated if a federal court purposely delays action in a federal case to await the outcome of a state action. Under some circumstances, a federal court, as a matter of controlling its docket, might stay its hand in the federal action in order to take advantage of state fact findings made and claims decided in state court. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). While this approach saves judicial time and avoids potential inconsistencies between state and federal actions, it greatly increases the cost to litigants of splitting state and federal claims.

Similarly, limited federal jurisdiction applied with a vengeance might induce a litigant to bring his or her entire legal dispute to state court in order to have it tried in one forum. As noted above, much federal jurisdiction is concurrent with state courts. Unless Congress explicitly makes jurisdiction over a federal claim exclusively federal, state courts are ordinarily empowered (if not obligated) to hear federal claims. *See Testa v. Katt*, 330 U.S. 386 (1947). Moreover, the limited jurisdiction of article III, § 2 does not prevent litigation of nonfederal claims in state court, since, by definition, article III describes "the judicial Power" of the United States, not of the states. *See U.S. CONST. art. III, § 1.*

Thus, provided (1) that the federal claim may be heard by the state court, and (2) that the state procedural rules are broad enough to encompass all the elements of the dispute, the parties will have a state forum in which to adjudicate their entire legal dispute. Returning to our civil rights hypothetical, because jurisdiction over civil rights claims is not exclusive, *see* 28 U.S.C. § 1343 (1976), the plaintiff's federal claim could be litigated together with all the nonfederal claims in state court.

Parties desiring an efficient and economical treatment of their claims would thus be influenced to try their claims together with other claims existing in the entire dispute. A plaintiff with both federal and nonfederal claims would be forced to litigate in state court if he or she desired to have the entire case decided by one tribunal. Even if the plaintiff had no nonfederal claim, but anticipated nonfederal claims from the defendant or potential intervenors, the plaintiff might be influenced to confine the entire dispute to one forum. Similar concerns might lead defendants and intervenors to try their claims together with the plaintiff's, especially if risks would be incurred by failing to do so. *See, e.g., Iowa R. Civ. P. 29* ("A final judgment on the merits shall bar . . . a [compulsory] counterclaim, although not pleaded.").

However, creating incentives to litigate an entire legal dispute in state court still does not guarantee that all claims will be heard. First, the ability to choose where to litigate an entire legal dispute is beyond the power of any single litigant. A plaintiff possessing both federal and nonfederal claims has the option of bringing them to state court. But if the plaintiff brings suit in federal court, the other parties, absent extraordinary reasons, cannot force the action into state court. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1975). Even bringing both federal and nonfederal claims to state court does not ensure litigation of the entire legal dispute in the state court. Although the other parties would be forced to litigate their nonfederal claims in that court, any of them having a federal claim generally could not be prevented from seeking a federal forum for the federal claim.

Second, since federal jurisdiction over some claims is exclusive, *see, e.g.,* 28 U.S.C. § 1333 (1976) (admiralty); *id.* § 1334 (bankruptcy); *id.* § 1338 (patents), some federal claims may not be brought in state court at all. Finally, the important federal interest in a free choice of forum is undermined when any party possessing a federal claim is influenced to bring a federal claim to state court in order to achieve efficiency unavailable in federal court because of limited federal jurisdiction. *See, e.g., Haring v. Prosser*, 51 U.S.L.W. 4736, 4741 (1983); *Mitchum v. Foster*, 407 U.S. 225, 240-42 (1972); 28 U.S.C. § 1332 (diversity); *id.* § 1343 (civil rights) (giving litigants a

“controversy” by lawfully adopted procedural rules for joinder of claims and parties.

Part I of the Article traces the development of supplemental jurisdiction from *Osborn v. Bank of the United States*⁷ through *United Mine Workers v. Gibbs*.⁸ Part II analyzes the substantial federal question doctrine and concludes that it rests on statutory rather than constitutional grounds. First, Part II outlines the general standards governing insubstantiality dismissals and challenges their traditional use. It then examines the source of the substantiality doctrine, concluding that the case law and important federal jurisdictional policies support a statutory, rather than constitutional, basis for substantiality. Part III discusses the fact relatedness requirement and concludes that it too rests on statutory grounds. First, Part III points out the ambiguities in this requirement and offers an interpretation that accords with the appropriate constitutional test. It then discusses six classes of cases that would not be within federal jurisdictional power if fact relatedness were a constitutional requirement. Part IV rediscovers the historical basis for tying the constitutional scope of supplemental jurisdiction to federal procedural rules by looking to important early cases and the history of procedural rules in the federal courts. The Article concludes that the historical test is superior to the substantiality/factual relationship test because the historical test more effectively contributes to a fair and efficient federal judicial system.

I

INTRODUCTION: PENDENT AND ANCILLARY JURISDICTION AND THE POWER OF A FEDERAL COURT TO HEAR AN ENTIRE LEGAL DISPUTE

Article III, section 2 of the United States Constitution sets forth the judicial power held by federal courts:

The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and

choice between state and federal courts; both statutes motivated at least in part by mistrust of certain state courts).

7. 22 U.S. (9 Wheat.) 738 (1824).

8. 383 U.S. 715 (1966).

between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.⁹

It has long been thought that the nine categories of "cases" and "controversies" listed in article III, section 2 define the scope of federal jurisdictional power.¹⁰ Congress, however, retains authority to restrict the judicial power of the federal courts by limiting the jurisdiction of the lower federal courts it creates,¹¹ and by making "[e]xceptions" and "[r]egulations"¹² concerning the jurisdiction of the United States Supreme Court.¹³ Hence, it is a fundamental precept of our federal system that the jurisdiction of the federal courts is limited, not only by the Constitution, but by congressional provisions as well.¹⁴

From the inception of the Republic until the Civil War, Congress severely restricted the jurisdiction of the lower federal courts, giving them power primarily over diversity cases, as well as over a limited number of removed federal question cases.¹⁵ As a result, jurisdiction over most federal questions was reserved to the states, subject to review by the United States Supreme Court.¹⁶

The passage of the thirteenth, fourteenth, and fifteenth amendments to the Constitution radically altered this distribution of federal power. In enforcing these amendments, Congress greatly expanded lower federal court jurisdiction.¹⁷ And for the first time, Congress cre-

9. U.S. CONST. art. III, § 2.

10. See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809) (holding that in a suit involving alien plaintiffs, defendant's citizenship must be shown, because if defendant is also an alien, no jurisdiction under article III could be found, despite congressional jurisdictional statute providing jurisdiction over any suit by an alien); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding unconstitutional congressional act giving Supreme Court original jurisdiction over a case not within article III's grant of original jurisdiction to the Court).

It could be argued that Congress, acting pursuant to article I of the Constitution, might grant the federal courts power over other types of "cases" and "controversies" outside of article III. But the Supreme Court has implicitly rejected this argument, see *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (six Supreme Court justices in different opinions indicating that federal courts have no power outside of article III), and the better view is that article III, § 2 establishes the outer boundaries of federal judicial power, see *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982).

11. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (confirming Congress' power to create and control jurisdiction of the lower federal judiciary); U.S. CONST. art. I, § 8, cl. 8; *id.* art. III, § 1.

12. U.S. CONST. art. III, § 2, cl. 2.

13. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (confirming Congress' power to curtail Supreme Court jurisdiction); see U.S. CONST. art. III, § 2, cl. 2.

14. See, e.g., *Insurance 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.").

15. See, e.g., Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 73, 79 (diversity removal); Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. 231, 233-34 (removal by federal officers being prosecuted in state courts); Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633 (same).

16. See *infra* text accompanying notes 120-23.

17. See generally *Developments, supra* note 6, at 1147-53 (outlining expansion of federal jurisdiction to enforce the post-Civil War amendments). In addition, federal removal was greatly

ated effective, general federal question jurisdiction, making almost all federal questions actionable in federal court.¹⁸

Long before Congress provided for general federal question jurisdiction, the Supreme Court in *Osborn v. Bank of the United States*¹⁹ had recognized that limited federal jurisdiction could not prevent a federal court from being able to adjudicate a proper federal claim. In *Osborn*, the Court laid the groundwork for an effective and efficient federal judiciary. There, the defendants argued that the presence of nonfederal questions in a "case" containing a federal claim prevents a federal court from adjudicating the case. The Court rejected this contention, noting that such a construction of federal jurisdiction would seriously erode the judicial power of the United States because "[t]here is scarcely any case, every part of which depends on [federal law]."²⁰ The Court went on to hold not only that the federal elements of the case could be heard, but also that the entire action could be decided:

[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original *cause*, it is in the power of Congress to give [the federal courts] jurisdiction of that *cause*, although other questions of fact or law may be involved in it.²¹

Osborn suggests that "cause" is equivalent to the "case" or "controversy" between the plaintiff and the defendant,²² and makes clear that "cause" refers to matters included not only in the plaintiff's claims, but also in the defendant's defenses as well.²³ Thus, *Osborn* indicates that a federal court has power to decide all questions—federal and nonfederal—involved in article III "cases" and "controversies."²⁴

Osborn also suggests that "case" is determined by reference to the "form prescribed by law" for bringing an action in federal court.²⁵

expanded, see Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756-57, and broad habeas corpus relief was created for the first time, see Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.

18. See *infra* text accompanying notes 152-55.

19. 22 U.S. (9 Wheat.) 738 (1824).

20. *Id.* at 820.

21. *Id.* at 823 (emphasis added).

22. *Id.* at 818.

23. See *infra* note 188.

24. *Osborn* deals only with the scope of the original jurisdiction of the federal courts. The opinion seems to make clear, however, that federal appellate jurisdiction is equally expansive. *Osborn* notes that original jurisdiction "is co-extensive with the judicial power" and that nothing in the Constitution prohibits Congress from "giving the Circuit Courts original jurisdiction, in any case to which the appellate jurisdiction extends." 22 U.S. (9 Wheat.) at 821. Thus, it would seem that appellate and original article III power are coextensive. The Supreme Court has at times in fact made appellate decisions that turn on questions of state law. See, e.g., *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942) (Supreme Court review of state court judgment turning on interpretation of California law); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (review of title to land under state law made in order to effectuate federal treaty).

25. 22 U.S. (9 Wheat.) at 818. For a full discussion of *Osborn's* test for determining the meaning of a constitutional "case" or "controversy," see *infra* text accompanying notes 182-90.

And in *Wayman v. Southard*,²⁶ the Supreme Court explained that "forms prescribed by law" refers to the procedural rules adopted by Congress to govern the trial of a federal action "from its commencement to its termination."²⁷

According to *Osborn* and *Wayman*, the scope of federal jurisdiction over nonfederal matters seemed to depend only on whether those matters were contained within the same constitutional "case" or "controversy" as the federal matters properly before the federal court, and those matters would be within one "case" or "controversy" as long as lawfully adopted procedural rules permitted them to be brought together. This notion remained wholly theoretical for many years, for *Osborn* was decided long before federal procedural rules permitted joinder of parties and claims in any significant way.²⁸ More importantly, even after joinder was expanded, this straightforward reading of *Osborn* and *Wayman* was not tested.²⁹

Yet, some forty years after *Osborn*, the Supreme Court vitalized its jurisdictional analysis in *Freeman v. Howe*,³⁰ holding that a nondiverse party may intervene in a federal action in order to state a nonfederal claim to property held by the federal court.³¹ Without citing *Osborn*, *Freeman* and its numerous progeny have explained this jurisdiction by noting, as in *Fulton National Bank v. Hozier*, that "when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies."³² These cases, now considered instances of "ancillary jurisdiction," adopted *Osborn's* reasoning by resting jurisdiction over a nonfederal matter on its presence within the same "case" as a federal matter.

Similarly, the Supreme Court implicitly used *Osborn's* rationale to permit a plaintiff to bring a nonfederal claim to federal court. In *Siler v. Louisville & Nashville Railroad*,³³ the Court held that federal courts have judicial power over a plaintiff's state law claims, even if those claims could not be heard independently, when the "case" before the court contains a colorable federal claim raised in good faith.³⁴ Such jurisdiction has come to be called "pendent jurisdiction." And like the ancillary jurisdiction cases, the early pendent cases make no direct ref-

26. 23 U.S. (10 Wheat.) 1 (1825).

27. *Id.* at 28. For a full discussion of the equation between federal procedural rules and constitutional "cases" and "controversies," see *infra* text accompanying notes 358-93.

28. See *infra* text accompanying notes 218-28.

29. See *infra* text accompanying notes 51-61.

30. 65 U.S. (24 How.) 450 (1861).

31. *Id.* at 460. For a fuller discussion of *Freeman* and its progeny, see *infra* text accompanying notes 298-303.

32. *Fulton Nat'l Bank v. Hozier*, 267 U.S. 276, 280 (1925).

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

34. *Id.* at 192.

erence to *Osborn* or its contemporaries, which equated "cases" and "controversies" with procedural rules. Moreover, these decisions draw no connection between "pendent" jurisdiction and "ancillary" jurisdiction, despite the apparent fact that both types of jurisdiction are predicated on nonfederal claims being in the same "case" as federal claims.

The independent development of jurisdictional justifications in *Freeman* and *Siler* led ancillary and pendent jurisdiction in separate directions. At first, ancillary jurisdiction was specifically restricted to claims to property held by a federal court, where such claims were made by intervenors not otherwise subject to federal jurisdiction.³⁵ The *Freeman* doctrine soon expanded into other areas,³⁶ however, and in the landmark case of *Moore v. New York Cotton Exchange*,³⁷ the Supreme Court seemed to authorize broad-based ancillary jurisdiction over any nonfederal claims that are "transactionally related" to federal matters in one action before a federal court.

In *Moore*, the plaintiff sought to enjoin the defendant's alleged violation of federal antitrust laws. The defendant counterclaimed, pursuant to federal equity rules *requiring* the pleading of any counterclaim arising from the same "transaction" as a plaintiff's claim. There was no diversity of citizenship between the parties, and the counterclaim was based solely on nonfederal grounds. Even though the plaintiff's federal claim was dismissed for failure to state a claim upon which relief could be granted, the Supreme Court held that federal jurisdiction permitted the defendant's nonfederal counterclaim.³⁸

Moore could have been read quite narrowly; it dealt only with a counterclaim to a federal claim exclusively within federal jurisdiction. Furthermore, the holding in *Moore* specifically noted the extremely close factual connection between the claim and the counterclaim: "So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter"³⁹ Moreover, because opportunities for defendants to make counterclaims or bring other matters into lawsuits were still quite restricted under the federal

35. As stated by the Supreme Court in *Fultou Nat'l Bank v. Hozier*, 267 U.S. 276, 280 (1925), "[t]he general rule is that . . . no controversy can be regarded as depeudent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit."

36. See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (finding ancillary jurisdiction to permit a federal court to enjoin relitigation of a matter in state court that was previously decided by a federal court); *Dewey v. West Fairmont Gas Coal Co.*, 123 U.S. 329 (1887) (exercising ancillary jurisdiction over a new nondiverse party added to a counterclaim for recovery of a fraudulent conveyance in an underlying breach of contract action).

37. 270 U.S. 593 (1926).

38. *Id.*

39. *Id.* at 610.

procedural rules in effect when *Moore* was decided,⁴⁰ the case might have been deemed inapposite when those rules changed.

Despite the arguably narrow holding in *Moore*, ancillary jurisdiction expanded tremendously once it was removed from the "claim to property" context of *Freeman v. Howe*. The advent of the Federal Rules of Civil Procedure in 1938 increased the opportunity for defendants and intervenors to raise new types of claims, which would usually be permitted when they arose from the "same transaction or occurrence" as the plaintiff's original claim.⁴¹ Because the "transactional" test of the Federal Rules used the same language as the *Moore* counterclaim rule,⁴² courts began to find ancillary jurisdiction over nearly every nonfederal claim brought by defendants or intervenors under most of the new rules.⁴³ In applying a "transactional" test, these courts went far beyond the narrow *Moore* holding and found jurisdiction over almost any nonfederal claim "logically related" to a federal claim in the case.⁴⁴ Thus, by the late 1960's, federal courts had generally adopted liberal ancillary jurisdiction, exercising it when there was a

40. See *infra* text accompanying notes 223-28.

41. See, e.g., FED. R. CIV. P. 13(a) (compulsory counterclaims); FED. R. CIV. P. 13(g) (cross-claims); FED. R. CIV. P. 14 (claims by and against third-party defendants); FED. R. CIV. P. 20 (joinder of plaintiffs and defendants); FED. R. CIV. P. 24 (intervention). While there is only one compulsory joinder rule (rule 13(a) dealing with counterclaims), res judicata may operate to bar claims that could have been brought under the joinder rules. See *supra* note 6.

42. As the Advisory Committee Notes to the Federal Rules of Civil Procedure make clear, the "transaction" language of the Federal Rules tracks that used under the old equity rules in effect when *Moore* was decided. See FED. R. CIV. P. 13 advisory committee note 1 (equating new rules with former Equity Rule 30); *id.* note 5 (discussing jurisdictional impact of rule 13) (citing Shulman & Jaegerman, *Some Jurisdictional Limitations in Federal Procedure*, 45 YALE L.J. 393, 412-15 (1936), which favorably analyzes the *Moore* ancillary jurisdiction test).

43. See generally C. WRIGHT, *supra* note 4, § 9, at 28-32 (outlining approach of federal courts to jurisdiction under Federal Rules). The Federal Rules contain the following joinder possibilities, all of which have provided a basis for ancillary jurisdiction: (1) compulsory counterclaims (rule 13(a)), see, e.g., *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981); *United States ex rel. D'Agostino Excavators, Inc. v. Heyward-Robinson Co.*, 430 F.2d 1077 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); (2) permissive counterclaims (rule 13(b)), see, e.g., *Marks v. Spitz*, 4 F.R.D. 348 (D. Mass. 1945); (3) cross-claims (rule 13(g)), see, e.g., *Amco Constr. Co. v. Mississippi State Bldg. Comm'n*, 602 F.2d 730 (5th Cir. 1979); *Lasa per L'Industria del Marmo Societa per Azioni v. Alexander*, 414 F.2d 143 (6th Cir. 1969); (4) new parties added to counterclaims or cross-claims (rule 13(h)), see, e.g., *Bauer v. Uniroyal Tire Co.*, 630 F.2d 1287 (8th Cir. 1980); *H.L. Peterson Co. v. Applewhite*, 383 F.2d 430 (5th Cir. 1967); (5) impleader (rule 14), see, e.g., *Dery v. Wyer*, 265 F.2d 804 (2d Cir. 1959); (6) third-party defendant's counterclaims on cross-claims (rule 14), see, e.g., *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200 (5th Cir. 1975); (7) third-party defendant's claim against original plaintiff (rule 14), see, e.g., *Revere Copper & Brass Inc. v. Aetna Casualty & Sur. Co.*, 426 F.2d 709 (5th Cir. 1970); (8) joinder of parties (rule 20), see, e.g., *Ortiz v. United States*, 595 F.2d 65 (1st Cir. 1979); *Schulman v. Huck Finn, Inc.*, 472 F.2d 864 (8th Cir. 1973); (9) intervention (rule 24(a)), see, e.g., *Gaines v. Dixie Carriers Inc.*, 434 F.2d 52 (5th Cir. 1970); *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531 (8th Cir. 1970).

44. See, e.g., *Peterson v. United Accounts, Inc.*, 638 F.2d 1134, 1135, 1137 (8th Cir. 1981); *Cochrane v. Iowa Beef Processors, Inc.*, 596 F.2d 254, 264 (8th Cir.), *cert. denied sub nom.* *Iowa*

loose factual connection between federal and nonfederal claims. It is significant that the courts that applied this broad ancillary jurisdiction doctrine made no attempt to describe the actual constitutional limits of the doctrine. Most of these courts cited *Moore* and noted that the new Federal Rules could be shoehorned into the *Moore* transactional rule.

The doctrine of pendent jurisdiction made no similar advance. From *Siler*⁴⁵ in 1909 until *Gibbs*⁴⁶ in 1966, the Supreme Court authorized pendent jurisdiction solely where a plaintiff sought to add a nonfederal claim that was virtually identical to a federal claim in the action. *Hurn v. Oursler*⁴⁷ typifies this spartan jurisdictional approach. In *Hurn*, the plaintiff alleged that the defendant had infringed a federally copyrighted version of the plaintiff's play, and thereby violated federal copyright and state common law. In addition, the plaintiff contended that the defendant also violated state common law by producing a slightly different, uncopyrighted version of the plaintiff's play. The Supreme Court held that the federal court had pendent jurisdiction over the state common law claim concerning the federally copyrighted version of the play, because the state claim was virtually identical to the federal copyright claim and hence was merely a separate ground of the same cause of action stated by the federal claims.⁴⁸ The Court found, however, that the other state law claim was outside pendent jurisdiction because it stated a new cause of action, even though it shared a close factual connection with the federal claim.⁴⁹

Hurn and its immediate progeny made "cause of action" the litmus test for pendent jurisdiction. This focus was reasonable at the time, for in many instances procedural rules tied joinder to "cause of action."⁵⁰ But this approach no longer made sense once the Federal Rules were adopted, since those rules permitted much broader joinder

Beef Processors, Inc. v. Hawkins, 442 U.S. 921 (1979); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961).

45. *Siler v. Louisville & N.R.R.*, 213 U.S. 175 (1909).

46. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

47. 289 U.S. 238 (1933).

48. *Id.* at 246.

49. *Id.* at 246-48.

The bill alleges the violation of a single right, namely, the right to protection of the copyrighted play. And it is this violation which constitutes the cause of action. Indeed, the claims of infringement and unfair competition . . . precisely rest upon identical facts

. . . .

. . . [But, as to the claim of unfair competition with the uncopyrighted version of plaintiff's claim], [s]ince that claim did not rest upon any federal ground and was wholly independent of copyright infringement, the district court was clearly right in dismissing it for want of jurisdiction.

Id. at 246, 248. For a fuller discussion of *Hurn*, see *infra* text accompanying notes 218-28.

50. See *infra* text accompanying notes 223-28; *infra* note 387.

of claims. As a result, in *United Mine Workers v. Gibbs*,⁵¹ the Supreme Court abandoned the "grudging" *Hurn* test,⁵² adopting instead a more liberal factual relationship standard for pendent jurisdiction. Moreover, the Court apparently attempted to describe the constitutional limits of the doctrine:

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 . . .," U.S. Const., Art. III, § 2, 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 federal courts to hear the whole.⁵³

The courts that used the *Gibbs* test greatly expanded pendent jurisdiction by treating "common nucleus of operative fact" as identical to the "logical relationship" test of ancillary jurisdiction.⁵⁴ In addition, some courts, analogizing to ancillary jurisdiction cases that permitted new parties to be added to a litigation, used pendent jurisdiction to allow "pendent parties" to be brought into cases: plaintiffs bringing a substantial federal claim against one party were permitted to bring a state claim that shared a common nucleus of operative fact with the federal claim against another party.⁵⁵ Hence, *Gibbs* might be seen as a bridge between pendent and ancillary jurisdiction.

Recently, *Gibbs*' bridge-like character seems to have been confirmed, and its substantiality and factual relatedness requirements have been understood as the constitutional predicates for the exercise of pendent and ancillary jurisdiction. In *Owen Equipment & Erection Co. v. Kroger*,⁵⁶ the Court announced—what several commentators⁵⁷ and

51. 383 U.S. 715 (1966).

52. *Id.* at 725.

53. *Id.* (footnotes omitted) (emphasis and brackets in original).

54. See *infra* notes 247-48.

55. See, e.g., *Schulman v. Huck Finn, Inc.*, 472 F.2d 864 (8th Cir. 1973); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971); *Connecticut Gen. Life Ins. Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968).

56. 437 U.S. 365 (1978).

57. Before *Kroger*, several commentators argued that *Gibbs* established the test for constitutional power to hear pendent or ancillary claims. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 921 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*]; 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3567, at 448 (1975) [hereinafter cited as *WRIGHT & MILLER*]; Bagwell, *Federal Pendent Party Jurisprudence and Pendency in Diversity*

lower courts⁵⁸ had assumed to be the case—that *United Mine Workers v. Gibbs*⁵⁹ apparently “delineated the constitutional limits”⁶⁰ of both

Cases, 38 ALA. L. REV. 333, 343 (1977); Bratton, *Pendent Jurisdiction in Diversity Cases—Some Doubts*, 11 SAN DIEGO L. REV. 296, 303 (1974); Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753, 754 (1978); Mattis & Mitchell, *The Trouble with Zahn: Progeny of Snyder v. Harris Further Cripples Class Actions*, 53 NEB. L. REV. 137, 185 (1974); Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Law*, 70 COLUM. L. REV. 423, 435 (1970); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262, 268-69 (1968); Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127, 133 (1977); Comment, *The Expanding Scope of Federal Pendent Jurisdiction*, 34 TENN. L. REV. 413, 418 (1967); Note, *Federal Jurisdiction*, 55 TEX. L. REV. 941, 947 (1977); Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs*, 62 VA. L. REV. 194, 201-02 (1976); Note, *The Concept of Law-Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered*, 87 YALE L.J. 627, 630 (1978) [hereinafter cited as *Yale Note*].

After *Kroger*, other commentators came to the same conclusion. See, e.g., Brill, *Federal Rule of Civil Procedure 14 and Ancillary Jurisdiction*, 59 NEB. L. REV. 631, 645 (1980); Chainplin, *Extension of Federal Subject Matter Jurisdiction: The Need for a Functional Approach*, 26 WAYNE L. REV. 1437, 1449-51 (1980); Schenkier, *Ensuring Access to the Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U.L. REV. 245, 256-57 (1980); Note, *Ancillary and Pendent Party Jurisdiction in the Aftermath of Owen Equipment & Erection v. Kroger*, 28 DRAKE L. REV. 758, 759 (1979); Note, *supra* note 4, at 1941; Comment, *Limiting Federal Ancillary and Pendent Jurisdiction in Diversity Cases*, 64 IOWA L. REV. 930, 940 (1980); 45 J. AIR L. & COM. 757, 762 (1980); 62 MARQ. L. REV. 89, 92 (1978); 46 TENN. L. REV. 865, 877 (1979); 31 U. FLA. L. REV. 442, 452 (1979); 58 WASH. U.L.Q. 497, 505 (1980); 18 WASHBURN L.J. 357, 361 (1979).

58. Even before *Kroger*, several lower courts had held that *Gibbs* set the constitutional limits for pendent and ancillary jurisdiction. See, e.g., *Vickers v. Quern*, 578 F.2d 685, 688 (7th Cir. 1978); *Phillips v. Rosenstiel*, 490 F.2d 509, 515 n.5 (2d Cir. 1973); *Smider v. All-State Adm'ts, Inc.*, 481 F.2d 387, 391 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974); *Webb v. Bladen*, 480 F.2d 306, 309 (4th Cir. 1973); *Wagner v. Sperry Univac*, 458 F. Supp. 505, 518-19 (E.D. Pa. 1978), *aff'd without opinion*, 624 F.2d 1092 (3d Cir. 1980); *Meadows v. Charlie Wood, Inc.*, 448 F. Supp. 717, 720 n.2 (M.D. Ga. 1978); *O'Brien v. Continental Ill. Bank & Trust*, 443 F. Supp. 1131, 1134 (N.D. Ill. 1977), *aff'd in part and rev'd in part*, 593 F.2d 54 (7th Cir. 1979); *Reichsteiner v. Madison Fund, Inc.*, 75 F.R.D. 499, 506 (D. Del. 1977); *Jones v. McElroy*, 429 F. Supp. 848, 864 (E.D. Pa. 1977); *Saalfank v. O'Daniel*, 390 F. Supp. 45, 49 (N.D. Ohio 1975), *rev'd on other grounds*, 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976); *Bache & Co. v. Roland*, 375 F. Supp. 989, 991 (S.D.N.Y. 1974); *Serpa v. Jolly King Restaurants, Inc.*, 62 F.R.D. 626, 640 (S.D. Cal. 1974); *Jacobs v. United States*, 367 F. Supp. 1275, 1282 (D. Ariz. 1973); *ITT v. GTE*, 351 F. Supp. 1153, 1212 (D. Hawaii 1972), *aff'd in part and rev'd in part*, 518 F.2d 913 (9th Cir. 1975).

After *Kroger*, several other courts held that the *Gibbs* test was the constitutional test for pendent and ancillary jurisdiction. See, e.g., *United States ex rel. Hoover v. Franzen*, 669 F.2d 433, 438 (7th Cir. 1982); *Ortiz v. United States*, 595 F.2d 65, 68-69 (1st Cir. 1979); *Amoco Oil Co. v. Local 99, Int'l Bhd. of Elec. Workers*, 536 F. Supp. 1203, 1221 (D.R.I. 1982); *Potter v. Bain Brook Feed Co.*, 530 F. Supp. 569, 572-73 (E.D. Cal. 1982); *Irwin v. Calhoun*, 522 F. Supp. 576, 582 (D. Mass. 1981); *Philipson v. Long Island R.R.*, 90 F.R.D. 644, 645 (E.D.N.Y. 1981); *Klupt v. Blue Island Fire Dep't*, 489 F. Supp. 195, 198 (N.D. Ill. 1980); *Trustees of the Retirement Benefit Plan of the Pittsburgh Press Co. v. Equibank, N.A.*, 487 F. Supp. 58, 60 (W.D. Pa. 1980); *Dumansky v. United States*, 486 F. Supp. 1078, 1087 (D.N.J. 1980); *Haddon Township Bd. of Educ. v. New Jersey Dep't of Educ.*, 476 F. Supp. 681, 686 (D.N.J. 1979); *Skinner v. American Oil Co.*, 470 F. Supp. 229, 231-33 (S.D. Iowa 1979).

59. 383 U.S. 715 (1966).

60. 437 U.S. at 371. Even before *Kroger*, the Supreme Court suggested that *Osborn* and *Gibbs* were concerned with determining the constitutional limits of supplemental jurisdiction. Those decisions, the Court said, “found nothing in *Art. III's* grant of judicial power which pre-

pendent and ancillary jurisdiction.⁶¹

The argument that *Gibbs* sets forth any constitutional test is not obvious. The opinion speaks only of judicial power, without distinguishing between constitutional and statutory power. There are two reasons supporting the argument that *Gibbs* addresses *constitutional* power. First, *Gibbs* states that pendent jurisdiction in the sense of judicial power exists when a claim arises "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" allows a court to conclude that the entire action "comprises but *one constitutional 'case.'*"⁶² Second, *Gibbs* sets forth a three-part test for the power to exercise supplemental jurisdiction—requiring substantiality, a common nucleus of operative fact, and the ordinary expectation of trial together⁶³—that serves as an operational definition of the "one constitutional 'case'" language. Thus, the *Gibbs* fact relatedness test has come to be viewed as a shorthand for defining "case" as used in the Constitution.⁶⁴

If *Gibbs* sets any constitutional standards at all, it must set them for all assertions of federal jurisdiction over state claims, whether arising in a federal question "case," a diversity "controversy," or in any other "case" within federal jurisdiction. If one assumes that *Osborn* permits jurisdiction over entire actions brought under all types of article III jurisdiction, a federal court would have power over whole "cases" under federal question jurisdiction, ambassadorial jurisdiction,

vented adjudication of the nonfederal portions of the parties' dispute"; they "represented inquiries into the scope of *Art. III jurisdiction.*" *Aldinger v. Howard*, 427 U.S. 1, 9, 13 (1976) (emphasis added).

61. *Gibbs* itself does not identify the jurisdictional power it discusses as constitutional or statutory. As discussed above, *see supra* text accompanying notes 9-14, the jurisdiction of federal courts is constrained first by the Constitution and second by congressional legislation. This fact, however, is not always remembered by courts. *See, e.g.,* *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877) (not distinguishing between statutory and constitutional "arising under" jurisdiction); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (not distinguishing between statutory and constitutional citizenship requirement for diversity jurisdiction); *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805) (not distinguishing "state" for purposes of including the District of Columbia within statutory or constitutional diversity jurisdiction).

62. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (emphasis added) (brackets in original).

63. *Id.*

64. Lower courts apply this three-prong test to determine if they have constitutional power to adjudicate nonfederal claims in federal question cases. *See, e.g.,* *Sims v. Western Steel Co.*, 551 F.2d 811, 819 (10th Cir.), *cert. denied*, 434 U.S. 858 (1977); *Florida E. Coast Ry. v. United States*, 519 F.2d 1184, 1193 (5th Cir. 1975); *Smith v. Spina*, 477 F.2d 1140, 1143 (3d Cir. 1973); *Guyette v. Stauffer Chem. Co.*, 518 F. Supp. 521, 524 (D.N.J. 1981); *Morris v. Frank IX & Sons*, 486 F. Supp. 728, 735 n.6 (W.D. Va. 1980); *Douglas v. American Cynamid Co.*, 472 F. Supp. 298, 304 (D. Conn. 1979); *Madery v. International Sound Technicians, Local 695*, 79 F.R.D. 154, 157 (C.D. Cal. 1978); *Lewis v. Brinegar*, 372 F. Supp. 424, 428 (W.D. Mo. 1974). The Supreme Court, however, has not explicitly held that the *Gibbs* test should be applied in diversity cases. *See* *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 n.10 (1978).

and admiralty jurisdiction, and it would have power over whole "controversies" under diversity jurisdiction.⁶⁵

This Article will now turn to an analysis of the *Gibbs* test for determining whether a court has the constitutional power to adjudicate state claims in a federal action in which there is no independent federal jurisdiction over the state claims. It will focus on the three prongs of the *Gibbs* analysis: (1) Does the federal claim represent a substantial federal question? (2) Do the state and federal claims arise from a common factual basis? and, (3) Would one expect to try the state and federal claims, as stated, together in one action?

II

THE SUBSTANTIAL FEDERAL QUESTION COMPONENT

Gibbs holds that before a court can exercise supplemental jurisdiction, it must find that a federal claim in the case has "substance sufficient to confer subject matter jurisdiction on the court."⁶⁶ In establishing this "substantiality" requirement, *Gibbs* relied on a rich history of federal decisions dismissing cases for want of jurisdiction because they lacked a "substantial" federal question.⁶⁷

Gibbs refers to the concept of "substantiality" in a discussion of the "judicial power" of the federal courts to hear pendent state claims. Although both the Constitution and congressional statutes control this power,⁶⁸ *Gibbs* fails to specify whether the judicial power to hear pendent state claims is constitutional or statutory. Nonetheless, in both *Kroger*⁶⁹ and *Aldinger v. Howard*⁷⁰ the Court strongly indicated that the power discussed in *Gibbs* has its source in the Constitution.⁷¹ However, the history of the substantiality doctrine in both appellate and original forms, the language of cases outside the pendent jurisdiction area, and considerations of policy support a statutory, rather than a

65. Although a few cases have suggested that there may be some differences between "case" and "controversy," see, e.g., *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937); *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 430-31 (1793), these suggestions have generally been that the latter term is narrower than the former, see *Muskra v. United States*, 219 U.S. 346, 356-57 (1911). This Article assumes that for the purpose of establishing the boundaries of a dispute between parties an article III "case" and "controversy" are coextensive.

66. 383 U.S. at 725.

67. See *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933); *Mosher v. City of Phoenix*, 287 U.S. 29, 30 (1932); *Binderup v. Pathe Exch.*, 263 U.S. 291, 305 (1923); *South Covington & C. St. Ry. v. City of Newport*, 259 U.S. 97, 99 (1922); *Niles-Bement-Pond Co. v. Iron Moulders Union, Local 68*, 254 U.S. 77, 82 (1920); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 130 (1906); *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 576 (1904); *Western Union Tel. Co. v. Ann Arbor R.R.*, 178 U.S. 239, 244 (1900).

68. See *supra* text accompanying notes 9-14.

69. 437 U.S. 365 (1978).

70. 427 U.S. 1 (1976).

71. *Kroger*, 437 U.S. at 371; *Aldinger*, 427 U.S. at 13.

constitutional, source for this doctrine.⁷²

A. The Meaning of the Substantiality Doctrine—Some Basic Principles

The substantial federal question doctrine applies in some form both to the original jurisdiction of the United States district courts⁷³ and to the appellate jurisdiction of the United States Supreme Court.⁷⁴ The doctrine requires a federal court to examine the claims before it to determine whether those claims “really” amount to matters within federal judicial power.⁷⁵ To apply the doctrine, a court must reach beyond the form in which the claims are stated in order to assess the merits of

72. See *infra* text accompanying notes 120-208.

At times, substantiality has been treated differently in pendent jurisdiction cases than in other federal matters. This Article demonstrates that despite the lack of Supreme Court guidance, substantiality questions should be treated identically in both supplemental jurisdiction cases and purely federal question cases, for in both instances, the policies underlying the doctrine are the same. Furthermore, applying the same principles of substantiality to all classes of cases has the virtue of simplifying an unnecessarily complex area, enabling courts to fashion a consistent, intelligent body of law.

That *Gibbs* purported to interpret questions of “arising under” jurisdiction, and that such “arising under” jurisdiction is conferred both by article III and congressional jurisdictional statutes, should not undercut the conclusion that *Gibbs*’ supposed constitutional test should be read as the interpretation of a statute. In several instances, the Supreme Court has interpreted statutory jurisdictional grants more narrowly than their constitutional counterparts that contain nearly identical language. For example, “arising under” as used in jurisdictional statutes requires only a well-pleaded complaint, but “arising under” as used in the Constitution has a broader meaning. See *infra* text accompanying notes 171-97. Similarly, although the requirements for diversity jurisdiction set forth in article III of the Constitution and in 28 U.S.C. § 1332 (1976) are quite similar, the citizenship necessary for diversity jurisdiction has been more narrowly defined under § 1332 than under the Constitution. Compare *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), with *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967).

73. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70 (1978); *Hagans v. Lavine*, 415 U.S. 528, 536-43 (1974); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974); *Bell v. Hood*, 327 U.S. 678, 681-82 (1946); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105-06 (1933); *South Covington & C. St. Ry. v. City of Newport*, 259 U.S. 97, 99 (1922); *Hull v. Barr*, 234 U.S. 712, 720 (1914); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *Hannis Distilling Co. v. Mayor of Baltimore*, 216 U.S. 285, 288 (1910); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 126 (1906); *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 576 (1904); *Swafford v. Templeton*, 185 U.S. 487, 493-94 (1902); *Robinson v. Anderson*, 121 U.S. 522, 524 (1887); *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 203 (1877).

74. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391-92 (1952); *Zucht v. King*, 260 U.S. 174, 176-77 (1922); *Sugarman v. United States*, 249 U.S. 182, 184 (1919); *Contributors to the Pa. Hosp. v. City of Philadelphia*, 245 U.S. 20, 24 (1917); *Consolidated Turnpike Co. v. Norfolk & O.V.R.R.*, 228 U.S. 596, 600 (1913); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 105 (1912); *Equitable Life Assurance Soc’y v. Brown*, 187 U.S. 308, 311 (1902); *Walsh v. Columbus, H.V. & A.R.R.*, 176 U.S. 469, 476 (1900); *Wilson v. North Carolina*, 169 U.S. 586, 595 (1898); *St. Joseph & G.I.R.R. v. Steele*, 167 U.S. 659, 662 (1897); *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 84 (1891); *Millingar v. Hartupee*, 73 U.S. (6 Wall.) 258, 261-62 (1868).

75. See *infra* text accompanying notes 77-79.

each claim,⁷⁶ and must dismiss the claim when those merits appear highly doubtful.

Although no single definition of the substantial federal question doctrine has prevailed in all cases, the Supreme Court in *Gibbs* pointed to the following definition in *Levering & Garrigues Co. v. Morrin*⁷⁷ as authoritative:

[J]urisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial . . . either because [it is] obviously without merit, or "because its unsoundness so clearly results from the previous decisions of [the Supreme] court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."⁷⁸

Levering suggests two critical features to the substantiality doctrine, each of which will be addressed in turn: first, insubstantiality dismissals defeat federal jurisdiction; second, insubstantiality dismissals result from a court's perception of a lack of merit in a claim.⁷⁹

1. Insubstantiality Dismissals As Jurisdictional Dismissals

Despite the statement in *Levering* that insubstantiality dismissals are jurisdictional,⁸⁰ a serious question exists whether such dismissals

76. See *infra* text accompanying notes 80-87.

77. 289 U.S. 103 (1933).

78. *Id.* at 105-06 (quoting *Hannis Distilling Co. v. Mayor of Baltimore*, 216 U.S. 285, 288 (1910)); see cases cited *id.*

Although *Gibbs* treated *Levering's* language as authoritative, other cases have relied on slightly different formulations to express the same doctrine. It has been said that a case may be dismissed if the federal question is "wholly insubstantial," *Bailey v. Patterson*, 369 U.S. 31, 33 (1962), or "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904), or "no longer open to discussion," *McGilvra v. Ross*, 215 U.S. 70, 80 (1909). Whether these formulations express a different or less stringent test than that stated in *Levering* is open to serious question. It could be argued that these formulations are simply synonymous with the *Levering* formulation, but as the Supreme Court recognized in *Hagans v. Lavine*:

The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions *inescapably* render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial

415 U.S. 528, 537-38 (1974) (emphasis added) (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)).

Much of the discussion in this section of this Article focuses on substantial *federal questions*. This focus does not, however, imply that the substantiality doctrine is inapplicable in diversity cases. As discussed below, see *infra* text accompanying notes 105-19, its essence is whether a given case "really and substantially" involves federal jurisdiction. This language derives from a statutory provision dealing not only with federal question jurisdiction, but also with diversity jurisdiction. See Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472. Thus, in diversity cases, it is often asked whether the controversy actually involves a dispute between diverse citizens. See *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969); *Vaughn v. Southern Ry.*, 542 F.2d 641 (4th Cir. 1976); 28 U.S.C. § 1359 (1976).

79. 289 U.S. at 105-06.

80. See *supra* text accompanying note 78.

should be read to go to the *power* of a federal court to decide a dispute, or to the *merits* of the claim raised.⁸¹ Unlike a dismissal for the lack of the requisite amount in controversy,⁸² for the lack of diverse citizenship,⁸³ or for the lack of *any* federal question⁸⁴—all of which involve matters collateral to the sufficiency of plaintiff's legal claim—an insubstantiality dismissal obviously requires a judgment about the merits of plaintiff's case.⁸⁵ Curiously then, insubstantiality dismissals, which are said to be jurisdictional, are nearly indistinguishable from dismissals for "failure to state a claim upon which relief can be granted,"⁸⁶ dismissals which are in fact considered decisions "upon the merits"⁸⁷ of a case.

While insubstantiality is virtually identical to a "failure to state a

81. See *Rosado v. Wyman*, 397 U.S. 397, 404 (1970) (The doctrine is "more ancient than analytically sound."); *Bell v. Hood*, 327 U.S. 678, 683 (1946) ("The accuracy of calling these dismissals jurisdictional has been questioned."); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.) (In dismissals for the frivolousness of the federal question, "jurisdiction would not be denied, except possibly in form.") (all dealing with original jurisdiction); 16 WRIGHT & MILLER, *supra* note 57, § 4014, at 631 ("There is no apparent reason why a disposition carrying such consequences [precedential value] should be wrapped in jurisdictional robes.") (dealing with appellate jurisdiction).

82. *Clark v. National Travelers Life Ins. Co.*, 518 F.2d 1167 (6th Cir. 1975); *Spears v. Robinson*, 431 F.2d 1089 (8th Cir. 1970).

83. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Firnhaber v. Lake Pewaukee Sanitary Dist.*, 409 F. Supp. 23 (E.D. Wis. 1976); *Heck v. A.P. Ross Enters.*, 414 F. Supp. 971 (N.D. Ill. 1976).

84. *Smith v. Grimm*, 534 F.2d 1346 (9th Cir.), *cert. denied*, 429 U.S. 980 (1976); *Lindy v. Lynn*, 501 F.2d 1367 (3d Cir. 1974).

85. Ulman & Spears, "Dismissed for Want of a Substantial Federal Question", 20 B.U.L. REV. 501, 505-08 (1940). The Supreme Court has held that insubstantiality dismissals of appeals from state courts have precedential value and therefore are a statement of the Court's views on a given question. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); 16 WRIGHT & MILLER, *supra* note 57, § 4014, at 631-39; Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U.L. REV. 373 (1972); Note, *The Supreme Court Dismissal of State Court Appeals for Want of a Substantial Federal Question*, 15 CREIGHTON L. REV. 749 (1982); Note, *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court After Hicks v. Miranda and Mandel v. Bradley*, 64 VA. L. REV. 117 (1978). In order for a court to make a judgment that a claim is "wholly insubstantial," "so attenuated and unsubstantial as to be absolutely devoid of merit," "no longer open to discussion," see *supra* note 78, or any other formulation for the lack of a substantial federal question, a court must review the allegations of the complaint and the facts alleged and test them against the legal standards for relief, see 13 WRIGHT & MILLER, *supra* note 57, § 3564, at 427-30. Such a procedure is analogous to a dismissal under FED. R. CIV. P. 12(b)(6) which is said to be a dismissal "on the merits." FED. R. CIV. P. 41(b). See Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 168 & n.51 (1953).

86. FED. R. CIV. P. 12(b)(6). The Supreme Court has at times suggested that there is a qualitative difference between insufficiency of facts proven or alleged and insubstantiality. See *Moore v. New York Cotton Exch.*, 270 U.S. 593, 608-09 (1926). This distinction, however, has been largely eroded. See cases cited *supra* notes 73-74.

87. FED. R. CIV. P. 41(b).

claim," and while both will lead to a dismissal,⁸⁸ there are two crucial consequences to making insubstantiality dismissals jurisdictional. First, calling an insubstantiality dismissal "jurisdictional" precludes making that dismissal *res judicata* in a subsequent suit, for *res judicata* bars relitigation only of questions that were raised in a previous action decided "on the merits," or questions that could have been raised in that action.⁸⁹ Since federal jurisdictional decisions are not "merits" decisions for the purposes of *res judicata*,⁹⁰ the issues raised in the federal case might be relitigated.⁹¹ This is detrimental to federal interests, because regardless of whether or not they are called jurisdictional,⁹² insubstantiality dismissals are in fact decisions on the merits of federal claims, and they ought to be accorded significant if not final importance on the issues decided.⁹³

Of course, this harm to federal interests might be mitigated in some cases. Federal courts would likely be deferential to decisions of another federal court, and may be bound by *stare decisis* on matters of law. Nonetheless, state courts, not being strictly subject to *stare decisis*, might not follow a restrictive federal decision, thus allowing relitigation

88. See 13 WRIGHT & MILLER, *supra* note 57, § 3564, at 428-30; Mishkin, *supra* note 85, at 168 n.51.

89. *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877); *Ross v. International Bhd. of Elec. Workers*, 634 F.2d 453, 457-58 (9th Cir. 1980). See RESTATEMENT (SECOND) OF JUDGMENTS §§ 19, 20(1)(a) (1982) (eliminating the requirement of judgment on the merits, but retaining barrier to assertion of *res judicata* in cases following a jurisdictional dismissal).

90. "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction*, . . . operates as an adjudication upon the merits." FED. R. CIV. P. 41(b) (emphasis added).

91. Insubstantiality dismissals in cases containing supplemental nonfederal claims present some potential for relitigation both of the federal and nonfederal claims, because *res judicata* will not prevent the renewal of either the federal or nonfederal claim in such a case.

By definition, a litigant cannot try any nonfederal issue in a case without a substantial federal claim, *Gibbs*, 383 U.S. at 725; and a jurisdictional dismissal is not "on the merits." See FED. R. CIV. P. 41(b). Accordingly, an insubstantiality dismissal can serve neither as a *res judicata* bar to the nonfederal claim, which could not have been tried, nor as a bar to the federal claim, which was not reached on the merits.

Because the nonfederal claims are not reached in insubstantiality dismissals, and hence are not barred by *res judicata*, it would be expected that they would be renewed after the dismissal. Given this, it is possible, if not likely, that the litigant will also attempt to reformulate the previously dismissed, and probably related, federal claim. This reformulation creates the potential for undermining the judgment of a federal court on a question of federal law—the merits of the dismissed federal claim—and there may be no effective method of preventing such relitigation.

92. See *supra* note 85.

93. Although it has at times been questioned whether federal courts are superior to state courts in deciding matters of federal law, compare *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976), with *Neuborne, The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), no serious suggestion has been made that federal courts are inadequate arbiters of federal law. When a federal court makes an evaluation of the merits of a case and enters a judgment, its views are entitled to finality. See 28 U.S.C. § 1738 (1976).

of issues dismissed as insubstantial in federal court.⁹⁴ Such relitigation

94. Professor Mishkin suggests that it is not important that *res judicata* is inapplicable to insubstantiality dismissals because *stare decisis* would prevent relitigation of the federal claim in either state or federal courts. Mishkin, *supra* note 85, at 168 n.51. Unless the decision on insubstantiality is made by the United States Supreme Court, Professor Mishkin's point is not well taken. The principle of *stare decisis* is subordinate to the principle of the supremacy of federal law, *see* U.S. CONST. art. VI, under which the state and lower federal courts are bound to follow their own view of what the federal law means, in spite of conflicting decisions by other lower courts. Accordingly, until the Supreme Court rules (or in the case of relitigation in a lower federal court, the court of appeals for the circuit in which the district court sits), a court is free, under *stare decisis*, to reinterpret a federal claim to fulfill its duty under the supremacy clause. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring) ("The federal decision would not be accorded the *stare decisis* effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction. . . . [T]he opinion might, of course, be viewed as highly persuasive."); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts."), *cert. denied*, 402 U.S. 983 (1971); *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 830, 623 P.2d 165, 179, 171 Cal. Rptr. 604, 618 (1981); *Pope v. State*, 284 Md. 309, 320 n.10, 396 A.2d 1054, 1062-63 n.10 (1979); *State v. Coleman*, 46 N.J. 16, 34-35, 214 A.2d 393, 403 (1965); *People v. Benson*, 71 Ill. App. 3d 591, 595, 390 N.E.2d 113, 116 (1979); Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 COLUM. L. REV. 943, 945-46 (1948). *But see* *First Nat'l Bank v. Carruth*, 116 Ariz. 482, 483, 569 P.2d 1380, 1381 (1977) ("bound by the decisions of the federal courts in their interpretation of a federal statute"); *State v. Knowles*, 371 A.2d 624, 627-28 (Me. 1977) ("though only a decision of the Supreme Court of the United States is the supreme law of the land . . . nevertheless in the interests of developing harmonious federal-state relationships it is a wise policy that a state court . . . accept [lower federal decisions]' ") (quoting *State v. Lafferty*, 309 A.2d 647, 667 (Me. 1973) (Wernick, J., concurring)); *Anderson v. Wagner*, 207 Neb. 87, 91, 296 N.W.2d 455, 458 (1980); *Schreiber v. Republic Internodal Corp.*, 473 Pa. 614, 620 n.5, 375 A.2d 1285, 1288 n.5 (1977).

Although Professor Mishkin's *stare decisis* analysis is faulty, his conclusion that state courts would be bound by federal insubstantiality decisions may be well taken. Even if a prior action is dismissed as jurisdictionally insufficient and thus cannot be a *res judicata* bar in a subsequent action between the parties, and even if the prior action takes place in a court where decisions would not be *stare decisis* in a subsequent action, the insufficiency determination will ordinarily be conclusive as to matters *actually decided* in the prior action. *See* RESTATEMENT OF JUDGMENTS §§ 49-50 (1942). Thus, under this collateral estoppel theory, a federal court's dismissal of a case because it raised an insubstantial federal question ought to be preclusive on the issue of the substantiality of the federal claim. *Cf.* *Montana v. United States*, 440 U.S. 147, 153 (1979) ("Once an *issue* is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits.") (emphasis added).

However, even estoppel may be avoided by a second tribunal that reads the jurisdictional dismissal quite narrowly in assessing what the first case "actually decided." *See* *Warner v. Buffalo Drydock Co.*, 67 F.2d 540, 543 (2d Cir. 1933), *cert. denied*, 291 U.S. 678 (1934); *In re Estate of Cochrane*, 72 Ill. App. 3d 812, 814-15, 391 N.E.2d 35, 36-37 (1979). Moreover, a second tribunal, in order to prevent an "injustice" or "inequitable administration of the laws," might be inclined to reject an estoppel by the first lawsuit. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982); RESTATEMENT OF JUDGMENTS § 70 (1942). Given the great potential for closely contested assessments of the substantiality of a federal claim, *see infra* note 199, the avoidance of strict estoppel by a state court may be more than hypothetical. Furthermore, Congress apparently doubted that state courts would consider themselves bound even by final merits decisions of federal courts, *see* 28 U.S.C. § 2283 (1976) (granting federal courts power to protect their judgments by enjoining relitigation of the case in state courts, even though the states are bound to respect the federal judgment by operation of 28 U.S.C. § 1738 (1976)), let alone by their jurisdictional determinations.

is encouraged by a jurisdictional rule for insubstantiality dismissals. A nonjurisdictional rule making such dismissals "decisions on the merits" would thus be preferable because it would preclude such relitigation.

The second consequence of treating insubstantiality dismissals as jurisdictional is that a federal court is thereby prevented from exercising supplemental jurisdiction over nonfederal claims raised in the same case, since supplemental jurisdiction is based on the existence of a question within a federal court's article III power.⁹⁵ Under *Osborn*, as a matter of constitutional law, nonfederal issues may be heard by a federal court by virtue of its supplemental jurisdiction.⁹⁶ But when a case is dismissed for jurisdictional insubstantiality, nonfederal questions must necessarily be dismissed as well.⁹⁷ This practice may prevent a federal court from reaching a complete judgment,⁹⁸ avoiding sticky constitutional questions,⁹⁹ or achieving a result that is fair to the parties.¹⁰⁰ It might also have the effect of discouraging a plaintiff from

95. See 13 WRIGHT & MILLER, *supra* note 57, § 3564, at 430.

96. See *supra* text accompanying notes 19-24.

97. 383 U.S. at 725.

98. In many cases, it seems that treating insubstantiality dismissals as decisions on the merits would have no effect on whether a federal court could retain the nonfederal claims in the case. While the Court in *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), suggested that "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well," the Supreme Court has on occasion authorized pendent jurisdiction after the federal claim is dismissed. See *Rosado v. Wyman*, 397 U.S. 397, 405 (1970) (holding that a federal court has discretion to exercise its jurisdiction even though a federal claim is dismissed prior to trial in order to serve "the commonsense policy" of "conservation of judicial energy and the avoidance of multiplicity of litigation.>").

Following this approach, one can conceive of cases in which federal courts dismiss federal claims only after supervising significant action in the case, such as discovery or pretrial proceedings. In such a case, especially where a decision on the nonfederal issue might easily be made, the federal court should have the discretion to decide the remaining claims on the merits. See, e.g., *Koke v. Stifel, Nicolaus & Co., Inc.*, 620 F.2d 1340, 1346 (8th Cir. 1980); *Gray v. International Ass'n of Heat & Frost Insulators, Local No. 51*, 447 F.2d 1118, 1120 (6th Cir. 1971); D. CURRIE, *FEDERAL COURTS: CASES & MATERIALS* 401 (2d ed. 1975); see generally 13 WRIGHT & MILLER, *supra* note 57, § 3567, at 451-52 & n.35 (listing cases retaining jurisdiction over nonfederal claims despite dismissal of federal claims); *infra* note 100. But see *Kurzawa v. Mueller*, 545 F. Supp. 1254, 1263 (E.D. Mich. 1982); *Standridge v. City of Seaside*, 545 F. Supp. 1195, 1199 (N.D. Cal. 1982).

99. *Hagans v. Lavime*, 415 U.S. 528, 543 (1974); *Siler v. Louisville & N.R.R.*, 213 U.S. 175, 193 (1909).

100. Unfairness results when, for example, a plaintiff is barred from bringing supplemental claims in state court because the state statute of limitations ran while the action was pending in federal court. See, e.g., *Krohn v. United States*, No. 76-619-2 (D. Mass. Mar. 28, 1980) (available Sept. 1, 1983, on LEXIS, Genfed library, Dist. file) (state statute of limitations on supplemental claims ran before dismissal from federal court). In such cases, plaintiff's choice of a federal forum in which to assert his entire case could lead to a loss of all claims if the plaintiff wrongly assesses the strength of his federal claim. Currently, if a plaintiff's federal claim is dismissed as insubstantial, the court must also dismiss the supplemental claims, even if they will be barred by state law. But if substantiality decisions were on the merits, a federal court could hear the supplemental claims in order to preserve the plaintiff's rights that would otherwise be lost by operation of the statute of limitations. See *Henson v. Columbus Bank & Trust Co.*, 651 F.2d 320, 325 (5th Cir.

bringing a novel federal claim first to a federal tribunal—a result inconsistent with the purposes of federal question jurisdiction.¹⁰¹

These considerations counsel for explicitly recognizing that insubstantiality dismissals are not jurisdictional, but rather are decisions on the merits of a plaintiff's case. The nonjurisdictional approach would guarantee the finality of the decision on the federal claim and would also permit greater flexibility in treating the remaining nonfederal matters in the dispute.¹⁰² Despite these advantages, the Supreme Court has

1981); *Pharo v. Smith*, 625 F.2d 1226, 1227 (5th Cir. 1980); *O'Brien v. Continental Ill. Nat'l Bank & Trust Co.*, 593 F.2d 54, 63-65 (7th Cir. 1979); *O'Neil v. Marriott Corp.*, 538 F. Supp. 1026 (D. Md. 1982). Alternatively, the federal court could condition dismissal on the defendant's waiver of the statute of limitations defense, enabling the parties to litigate in state court. *Cf.* *Financial Gen. Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982) (instructing the district court not to dismiss until plaintiff has filed state court action and defendant has filed a waiver of any applicable statute of limitations in that court). This approach would be analogous to the practice of conditioning forum non conveniens dismissals on the parties' waiver of defenses and acceptance of venue or personal jurisdiction in the proposed forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 12.29, at 658 (1977).

101. One of the central purposes of congressional federal question jurisdictional grants has been to give plaintiffs a choice of forum in which to litigate their federal claims. *Schenkier*, *supra* note 57, at 296-98; *see supra* note 6. Making the failure to succeed in federal court costly unduly burdens the choice of the federal forum. Any construction of substantiality that would lead to this result is at odds with the jurisdiction given to the courts by Congress. Moreover, Congress can take action to rectify any overextension of federal jurisdiction that brings too many cases into the federal courts.

102. It may be argued that it is precisely in cases where the federal question is insubstantial that the exercise of supplemental jurisdiction would be most inappropriate, because without a strong federal interest in the litigation, there is no justification for taking questions not otherwise within article III of the Constitution. *See Mishkin*, *supra* note 85, at 168 n.51 (suggesting that a dismissal in such a case should be most aptly described as jurisdictional). While this observation is powerful, it does not adequately consider the consequences that the failure to make a merits decision has on both the federal court and the parties. First, the failure to make a merits decision presents the possibility of relitigation that could undermine the federal decision. *See supra* note 94. Second, it eliminates the discretionary exercise of pendent power by a district court and may thereby frustrate other important federal purposes recognized in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). *See infra* text accompanying notes 198-208. Third, it may also serve to discourage litigants from bringing their marginal or novel federal questions to federal court, because dismissal of their federal claims would preclude consideration of any other aspect of the "case." *See infra* text accompanying notes 201-06. Finally, as a corollary to the last point, in some cases it might serve to prevent *any* litigation on the merits of the supplemental claims, because the statute of limitations would bar the claims. *See supra* note 100.

Making insubstantiality dismissal decisions on the merits would not compel a federal court to exercise jurisdiction over supplemental claims; it would still have the discretion to dismiss such claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Such an approach would preserve federal power to decide supplemental claims when necessary. *Cf. infra* text accompanying notes 198-208 (policies supporting a statutory source for the substantiality doctrine).

Nor would the operation of res judicata unfairly hurt plaintiffs if insubstantiality dismissals were merits decisions, for res judicata would not apply when a federal court refuses to exercise its power to adjudicate a supplemental claim. While res judicata bars what could have been litigated as well as what was litigated, the nonfederal questions that a plaintiff previously sought to bring in federal court arguably fit neither category. Although a federal court would have the power to hear the state questions, it almost certainly would exercise its discretion to dismiss them without prejudice once the federal claims were dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715,

specifically declined to adopt this approach, adhering to its view that insubstantiality dismissals are jurisdictional.¹⁰³ The Court's failure to adopt a nonjurisdictional approach is a mistake.¹⁰⁴

2. *The Proper Use of the Insubstantiality Dismissal*

*Levering & Garrigues Co. v. Morrin*¹⁰⁵ sets forth two categories of insubstantiality dismissals: (1) those where the federal claims are obviously without merit; and (2) those where the unsoundness of the federal claim clearly results from previous decisions of the Supreme Court.¹⁰⁶ Despite the multitude of cases purportedly applying the *Levering* standard and dismissing federal question cases as insubstantial,¹⁰⁷ *Levering* has been applied inconsistently.

In order to close their dockets to nonmeritorious claims, courts have at times used an insubstantiality rationale indiscriminately with other federal dismissals that rest on pure merits grounds.¹⁰⁸ But, as outlined above, there is a cost to the federal system in so using insub-

726 (1966). Thus, state courts could easily consider the state questions as matters that could not have been brought in the prior federal action. In any event, the federal court in the first action could shape its relief to avoid this problem by conditioning its dismissal of a state claim on the defendant's agreement not to assert defenses that arose from the plaintiff's failed choice of a federal forum. See *supra* notes 98-100.

The second *Restatement of Judgments* adopts an analogous position:

If however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held *not precluded*.

RESTATEMENT (SECOND) OF JUDGMENTS § 25 comment c at 213 (1982) (emphasis added); see also Note, *The Res Judicata Implications of Pendent Jurisdiction*, 66 CORNELL L. REV. 608 (1981).

103. *Hagans v. Lavine*, 415 U.S. 528, 538 (1974).

104. See *infra* text accompanying notes 118-19.

105. 289 U.S. 103 (1933).

106. *Id.* at 105-06.

107. See, e.g., *Bailey v. Patterson*, 369 U.S. 31, 33 (1962) (per curiam) (precluded by previous decisions); *Levering & Garrigues Co. v. Morrin*, 289 U.S. at 105-06 (same); *Zucht v. King*, 260 U.S. 174, 176-77 (1922) (same); *Hannis Distilling Co. v. Mayor of Baltimore*, 216 U.S. 285, 288 (1910) (same); *Montana Catholic Mission v. Missoula County*, 200 U.S. 118, 130 (1906) (obviously without merit); *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 576 (1904) (same); *Western Union Tel. Co. v. Ann Arbor R.R.*, 178 U.S. 239, 243-44 (1900) (same).

108. See cases cited *supra* notes 73-74; *infra* note 199 and cases cited therein. The history of *Bell v. Hood*, 327 U.S. 678 (1946), is instructive as to the difficulty lower courts have had in distinguishing between insubstantiality and merits dismissals. In *Bell*, the plaintiff sought damages for the defendants' alleged violations of his fourth and fifth amendment rights. The district court dismissed the action for want of jurisdiction. The Supreme Court reversed, noting that the case turned on a question of federal law and therefore was jurisdictionally sufficient. *Id.* at 684. On remand, the district court, "being of the opinion that neither the Constitution nor the statutes of the United States give rise to any cause of action," dismissed the complaint for failure to state a claim upon which relief can be granted. *Bell v. Hood*, 71 F. Supp. 813, 820-21 (S.D. Cal. 1947). As is obvious, neither the plaintiff's allegations nor the attitude of the district court changed between the initial and the remand decisions. Rather, it was only the interposition of the Supreme Court's views that led to the change from an insubstantiality dismissal to a merits dismissal.

stantiality dismissals,¹⁰⁹ since they are not viewed as dismissals on the merits. Moreover, the mindless use of the insubstantiality doctrine is inconsistent with the admonition of the Supreme Court in *Bell v. Hood*¹¹⁰ and its progeny¹¹¹ that it be used only in extraordinary circumstances.

Today the broad use of insubstantiality dismissals in original jurisdiction cases is rare because the Supreme Court has called for an extremely broad reading of the facts in order to find substantiality.¹¹² Accordingly, a federal question case should not be dismissed unless the claim is "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise *completely devoid of merit* as not to involve a federal controversy."¹¹³

Although the Court has not acknowledged a liberalization of its standard for substantiality,¹¹⁴ commentators have perceived such a trend.¹¹⁵ A more liberal standard leads to greater flexibility in the federal courts, permitting merits decisions on both the federal claim and

109. See *supra* text accompanying notes 80-104.

110. 327 U.S. 678 (1946).

111. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Hagans v. Lavine*, 415 U.S. 528 (1974).

112. Compare cases discussed *infra* note 199 with *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70 (1978); *Hagans v. Lavine*, 415 U.S. 528, 536-43 (1974); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974); 13 WRIGHT & MILLER, *supra* note 57, § 3564, at *428.

113. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-67 (1974) (emphasis added). At least as a verbal formulation of the substantiality test, this statement seems more likely to permit questionable federal claims than the test developed in *Levering* and its progeny. See *supra* text accompanying notes 77-79. One commentator—furious over the apparent liberalization of the substantiality requirement—stated that the Supreme Court has changed the meaning of substantiality from "of serious import" to something akin to "not intolerably insubstantial." Seid, *The Tail Wags the Dog: Hagans v. Lavine and Pendent Jurisdiction*, 53 J. URB. L. 1, 12 (1975).

Although it seems clear today that federal courts should construe the pleadings quite liberally in original jurisdiction cases before dismissing for "insubstantiality," it is less clear if this same development has affected the Supreme Court's review of state court substantiality decisions.

In *Swafford v. Templeton*, the Supreme Court suggested that there might be a stricter obligation to ascertain whether there is a bona fide federal question when reviewing state court judgments than there is in cases of original jurisdiction. 185 U.S. 487, 493-94 (1902). This situation is not surprising, given the rocky political fortunes of appellate review of state decisions, see HART & WECHSLER, *supra* note 57, at 455-57. Nonetheless, some influential commentators still suggest that the distinction between appellate and original determinations of substantiality is "at best foggy." 16 WRIGHT & MILLER, *supra* note 57, § 4014, at 634. The best explanation for such a distinction may be that in an appeal, "it is easier to reach a firm conclusion [about substantiality based] on an appellate record that has been sifted through a state court system than on an original complaint." *Id.*

114. In *Hagans v. Lavine*, 415 U.S. 528, 536-39 (1974), the Court cited several tests for substantiality without distinguishing between them, but apparently adopted the most liberal of those tests.

115. See, e.g., Seid, *supra* note 113, at 12.

any supplemental claims tied to it.¹¹⁶ Furthermore, it permits a federal court to avoid decisions on the merits of a federal claim in order to serve other important goals.¹¹⁷ If the substantial federal question doctrine is read broadly enough to permit all but the most obviously specious federal claims, the concerns raised above¹¹⁸ are allayed but not eliminated. Thus, although the Supreme Court's recent substantiality decisions properly reduce the untoward consequences of making insubstantiality dismissals jurisdictional, it would be preferable for the Court to acknowledge what it already perceives—insubstantiality dismissals are decisions on the merits of federal claims.¹¹⁹

B. *Source of the Substantiality Doctrine*

Whether or not the substantiality doctrine is jurisdictional, and whether or not it is given strict *res judicata* effect, its importance is vastly different if it is of constitutional dimensions. For if the doctrine has a constitutional source, Congress' power to reshape its contours is severely limited. But if the doctrine has either a court-made or a statutory source, then Congress has the flexibility to define its scope and proper use. This Section now demonstrates that substantiality in fact has a statutory source. First, it traces the development of the doctrine in appellate and original jurisdiction cases. It then discusses the constitutional limits of "arising under" jurisdiction as developed in early federal cases. The Section concludes with an analysis of why federal policies favor a statutory source for the substantiality doctrine.

116. A decision that a federal claim is substantial permits the exercise of supplemental jurisdiction. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

117. Once a court finds a sufficiently substantial basis for federal jurisdiction, it can avoid the merits of the federal claim and base its decision solely on the supplemental claim. See *Hagans v. Lavine*, 415 U.S. 528 (1974) (federal claim joined with pendent federal claims under jurisdictional amount, simple constitutional question avoided); *Siler v. Louisville & N.R.R.*, 213 U.S. 175 (1909) (federal claim joined with pendent state claim, difficult federal issue avoided).

118. See *supra* text accompanying notes 88-101.

119. Advocating the sparing use of insubstantiality dismissals may cause some to fear the specter of plaintiffs raising tangential federal issues in an effort to bootstrap nonfederal issues into court. As argued below, see *infra* note 208, this fear is unfounded.

Another problem with the position advocated by this Article is its potential for increasing the federal workload. A related problem is that reducing the number of jurisdictional dismissals makes the exercise of supplemental jurisdiction somewhat more complex, since it forces a court to address discretionary concerns before dismissing the nonfederal claim. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966). These potential problems, however, are not significant because Congress may adopt legislation that adjusts the substantiality doctrine to changing circumstances. For instance, Congress could declare that any federal case in which the federal issue is decided before trial is insubstantial for purposes of supplemental jurisdiction. Or Congress could override the current, liberal substantiality test set forth in *Hagans v. Lavine*, 415 U.S. 528, 536 (1974), and instead instruct the courts to dismiss as insubstantial any claims in which relief would be "questionable" or "unlikely."

1. *Appellate Cases*

Prior to 1875, with one minor exception,¹²⁰ federal question jurisdiction was largely appellate and most federal questions could not be heard originally in federal courts. Accordingly, the Supreme Court could hear such questions only when reviewing state court decisions that dealt with federal questions. Not surprisingly, then, the substantial federal question doctrine is first mentioned in connection with appellate jurisdiction.

The Constitution does not explicitly authorize the Supreme Court to review decisions of state courts. However, included within the "cases" and "controversies" that come within Supreme Court appellate jurisdiction are cases arising under the laws of the United States and the Constitution—federal question cases.¹²¹ Federal questions may arise in state as well as federal courts.¹²² Thus, unless those state cases are reviewable by a federal court, some federal matters would fall outside federal judicial power. Consequently, in the Judiciary Act of 1789 Congress provided for review of state cases raising federal questions, thereby extending the appellate jurisdiction of the United States Supreme Court to certain federal questions arising in state courts.¹²³

From the passage of the Judiciary Act of 1789 until the present, federal question jurisdiction has always included at least a review of state court decisions denying the validity of a treaty, statute, or an exercise of the authority of the United States.¹²⁴ This jurisdiction has also included a review of state court decisions in favor of the validity of a

120. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (Midnight Judges Act), *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132. See HART & WECHSLER, *supra* note 57, at 36-37.

121. Article III, § 2, cl. 1 of the Constitution lists the "cases" and "controversies" within federal judicial power. See *supra* text accompanying note 9. Article III, § 2, cl. 2 then provides: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction"

122. See *supra* text accompanying notes 15-18.

123. In the first Judiciary Act, Congress made no provision for original jurisdiction over federal questions. Instead, the Supreme Court was given appellate jurisdiction over final decisions of state courts in the following situations:

where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up

Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86 (footnote omitted).

Aside from one major change in 1914, see Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, this appellate jurisdiction has basically been unchanged. See 28 U.S.C. § 1257 (1976) (current codification of Supreme Court appellate jurisdiction over state cases).

124. 28 U.S.C. § 1257 (1976).

state statute or the exercise of state authority challenged under federal law.¹²⁵

In addition to authorizing review of federal questions of this type, the Judiciary Act required such questions to have been decided in a final judgment of the highest court of the state that could render a decision.¹²⁶ Furthermore, the Supreme Court eventually read the Act to require (1) that the federal question appear on the record to have been timely presented to the state court; (2) that the federal question be "essential" to the state court decision; and (3) that the federal question be "substantial."¹²⁷ Failure to meet any of these requirements leads to a dismissal of the appeal.¹²⁸

The substantiality doctrine did not begin to take shape until 1868—nearly eighty years after the Judiciary Act was passed. This fact alone calls into question a constitutional basis for the substantiality doctrine in appellate cases; it is inconceivable that it was not until the middle of the nineteenth century that the Supreme Court first faced an insubstantial appeal.

The 1868 case of *Millingar v. Hartupee*¹²⁹ is the launching point for the substantial federal question doctrine.¹³⁰ In that case, the plaintiff sued in state court, claiming property in the hands of the defendant and alleging that the defendant was indebted to a third party who in turn was indebted to the plaintiff. The defendant argued that he held absolute title to the property through an order of a federal court releasing the property to him. But the state court denied that the federal order

125. *Id.*

126. *Id.*

127. Ulman & Spears, *supra* note 85, at 503.

128. *Id.* As outlined by Francis Ulman and Frank Spears in their seminal article on the substantial federal question doctrine, *id.*, the requirement of a substantial federal question is materially different from any other appellate jurisdictional requirement, because the substantiality dismissal goes to the merits of the federal question raised by the appeal. *Id.* at 506. Thus, they note that "a case which is within the classes of cases specifically declared to be reviewable and which complies with the procedural requirements . . . is not necessarily entitled to review." *Id.*

The use of insubstantiality dismissals to prevent consideration of a case seemingly within federal power appears to contravene federal jurisdictional statutes that do not on their face contain any substantiality requirement. As has been argued above, such dismissals hinder proper federal adjudication of cases. See *supra* text accompanying notes 88-101.

One might have thought that so critical a requirement as substantiality would have long been ingrained in appellate jurisprudence. Yet, as Ulman and Spears state:

The early cases under . . . the Judiciary Act . . . did not require the presence of a substantial federal question as a prerequisite of the Supreme Court's jurisdiction. . . . Even by the eighteen fifties, when the other basic requirements of jurisdiction had been well established by numerous decisions, the Court did not consider that questions of the merit of an appeal presented a jurisdictional problem.

Ulman & Spears, *supra* note 85, at 506-07 (footnote omitted); see Note, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488, 488 (1949).

129. 73 U.S. (6 Wall.) 258 (1868).

130. Ulman & Spears, *supra* note 85, at 507.

had given title to the defendant, and found for the plaintiff. Appealing to the Supreme Court, the defendant contended that the state court had denied "an authority exercised under the United States," and that jurisdiction was therefore proper under the Judiciary Act.¹³¹ The Supreme Court found that the federal court's release order did not purport to give title to any property. In dismissing the appeal, the Court held:

Something more than a bare assertion of such an authority [exercised under the United States] seems essential to the jurisdiction of this court. The authority *intended by the act* is one having a real existence, derived from competent governmental power. *If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States.*¹³²

Although the *Millingar* appeal failed because it lacked the "real existence" of a federal claim,¹³³ the Court found no constitutional principle blocking a decision on the merits of the appeal. Instead, the Court explicitly rested its decision on a construction of the Judiciary Act.¹³⁴ Moreover, the Court emphasized that its construction was not inflexible and that with more "fitting words" Congress could have brought the federal claim of the case within the Court's jurisdiction.¹³⁵ Obviously, then, the Court did not suggest that the presence of a "substantial" federal question was constitutionally compelled.

Even after *Millingar*, the Supreme Court was unsure of its newly discovered jurisdictional substantiality rule. In 1872, for example, the Court in *Pennywit v. Eaton*¹³⁶ denied a motion to dismiss a case in which the federal question was raised only "obscurely," noting that it could not "dismiss the case for want of jurisdiction, although [it had] a very clear conviction that the decision of the state court was correct."¹³⁷ The Court later confirmed the absolute frivolity of the appeal by subjecting the appellant to a penalty for prosecuting it.¹³⁸ The Court subsequently reaffirmed the position it took in *Pennywit* holding that it was without power to dismiss an appeal, even if it had been taken solely for

131. 73 U.S. (6 Wall.) at 261.

132. *Id.* (emphasis added).

133. *Id.* at 261-62.

134. The Court suggested that the substantial federal question doctrine appears in the statutory language governing the Supreme Court's appellate jurisdiction that calls for a federal issue to be "drawn in question." *Id.* See 28 U.S.C. § 1257 (1976). Although the Court's suggestion amounts to a somewhat strained construction of the statutory language, *Millingar*'s policy of permitting insubstantiality dismissals is nonetheless sensible in times of ever-increasing docket pressures. See *infra* note 205.

135. 73 U.S. (6 Wall.) at 261.

136. 82 U.S. (15 Wall.) 380 (1872).

137. *Id.* at 381.

138. *Id.* at 384.

the purpose of delay.¹³⁹ The Court indicated that even in such a case the "parties ha[d] the right to be heard on the merits."¹⁴⁰

By the middle of the 1870's, in order to cope with a spate of new appeals stemming from newly created federal rights,¹⁴¹ the Supreme Court promulgated a rule governing frivolous appeals from state judgments:

There may be united with a motion to dismiss a writ of error to a State court a motion to affirm, on the ground, that, *although the record may show that this court has jurisdiction*, it is manifest the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.¹⁴²

On its face this "affirmance approach" seems to recognize that insubstantial federal questions are not jurisdictionally deficient, and hence suggests that the substantiality doctrine is not constitutionally compelled. In contrast to *Millingar*'s rule calling for a dismissal, this approach forced affirmance of state court decisions on the merits.¹⁴³

It was not until almost 1900 that the *Millingar* jurisdictional approach was resurrected and the current appellate substantiality doctrine began to take shape.¹⁴⁴ And in 1902, in *Equitable Life Assurance Society v. Brown*,¹⁴⁵ the Court firmly established the insubstantiality dismissal. In *Equitable Life*, however, the Court did not suggest error in its previous affirmance approach. Rather, it specifically noted that a finding of insubstantiality would be the basis for either summarily affirming the state court's judgment *or* dismissing the appeal.¹⁴⁶ The Supreme Court's recognition of these alternatives is critical, for the Court would be without authority to affirm any judgment outside of its constitutional power.¹⁴⁷

Thus, given the long period of time during which the Supreme Court made no insubstantiality dismissals,¹⁴⁸ its clear acknowledgment of the statutory origin of the doctrine in *Millingar*,¹⁴⁹ its subsequent

139. *Amory v. Amory*, 91 U.S. 356, 357 (1875).

140. *Id.*

141. See *supra* text accompanying notes 15-18.

142. Sup. Ct. R. 6, cl. 5, 91 U.S. vii (1876) (emphasis added).

143. See, e.g., *Chanute City v. Trader*, 132 U.S. 210 (1889); *Palmer v. Hussey*, 119 U.S. 96 (1886); *Foster v. Kansas*, 112 U.S. 201 (1884); *Swope v. Leffingwell*, 105 U.S. 3 (1883).

144. See, e.g., *New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336 (1902); *New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79 (1891).

145. 187 U.S. 308 (1902).

146. *Id.* at 314-15.

147. An affirmance of a state court's judgment would clearly be a decision on the merits of the claim. Hence, if insubstantial claims were beyond the constitutional limits of federal jurisdiction, a summary affirmance by the Supreme Court would be beyond its power. Under the current Supreme Court rules, the Court must dismiss the appeal. Sup. Ct. R. 16.1(b).

148. See *supra* text accompanying notes 120-28.

149. See *supra* text accompanying notes 129-35.

rejection and revival of that doctrine,¹⁵⁰ and finally, its recognition of the alternative of either affirming a state court's rejection of an insubstantial claim on the merits or dismissing the claim as jurisdictionally insubstantial,¹⁵¹ it seems apparent that the substantiality doctrine is not constitutionally based in appellate cases.

2. *Original Cases*

The origin of the "substantial federal question" doctrine in cases of original jurisdiction is somewhat more complex. In 1875, Congress passed a statute¹⁵² that for the first time effectively gave federal courts original jurisdiction over general federal question cases.¹⁵³ The language of the statute is nearly identical to the Constitution,¹⁵⁴ and its legislative history, though scanty, indicates that the drafters were conscious of its language and intended the new Act to be read as broadly as constitutionally permissible.¹⁵⁵ If, as the legislative history suggests,

150. See *supra* text accompanying notes 136-45.

151. See *supra* text accompanying notes 146-47.

152. The Act of 1875 was the first long-lasting, broad-based congressional grant of original jurisdiction over federal question cases. The federal courts had previously received a short-lived statutory grant of original federal question jurisdiction in the famous Midnight Judges Act, ch. 4, 2 Stat. 89 (1801). Passed in the closing days of the Federalist administration, that Act was quickly repealed by the incoming Jeffersonians. Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132; see HART & WECHSLER, *supra* note 57, at 36-37.

153. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, repealed by Act of Mar. 3, 1911, ch. 231, § 297, 36 Stat. 1087, 1168-69. Prior to the 1875 act, Congress had sporadically given the federal courts jurisdiction in specific federal question contexts. See generally HART & WECHSLER, *supra* note 57, at 844-47.

154. The Act of 1875 provided in pertinent part:

That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority

Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (emphasis added), repealed by Act of Mar. 3, 1911, ch. 231, § 297, 36 Stat. 1087, 1168-69.

In contrast, the Constitution provides in pertinent part: "The judicial Power [of the United States] shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

155. As quoted in Forrester, *The Nature of a "Federal Question,"* 16 TUL. L. REV. 362, 374-75 (1942):

The Act was drafted substantially in its final form by Senator Matthew H. Carpenter as a member of the Judiciary Committee. He was the spokesman for the Committee when the bill was debated on the floor, and he was responsible, it is believed, for the repetition of the words "arising under." Some idea may be gathered, then, concerning the intended effect and meaning of these words, as well as of the Act in its entirety, by the following colloquy which occurred on June 15, 1874, in the Senate debates on the bill in connection with certain questions of venue and process:

Mr. Bayard. Is the act of 1789 in contravention of the Constitution?

Mr. Carpenter. I think it is substantially in contravention of the Constitution, and I will state why. The Constitution says that certain judicial powers shall be conferred upon the United States. The Supreme Court of the United States

the Act of 1875 and the relevant constitutional language were coextensive, it could be argued that any statutory requirement for dismissing a case from the federal trial court because it lacked a substantial federal question would simply parallel a similar constitutional requirement. Despite the similarities in language, however, federal question jurisdiction under the Act of 1875 and the Constitution differ in significant respects.

Statutory jurisdiction differs from constitutional "arising under" jurisdiction in its treatment of the substantiality doctrine. Certain cases decided soon after the passage of the 1875 Act point to a solely statutory origin for the insubstantiality dismissal. In 1877, in *Gold-Washing & Water Co. v. Keyes*,¹⁵⁶ the Supreme Court first held that as a predicate to federal question jurisdiction a court must find "that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends on the construction or effect of the Constitution, or some law or treaty of the United States."¹⁵⁷

The *Gold-Washing* Court did not explain the origin of this substantiality doctrine; however, section 5 of the 1875 Act contained the following provision, which seems to explain the doctrine's source:

That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not *really and substantially involve* a dispute or controversy properly within the jurisdiction of said circuit court, . . . the said circuit court shall proceed no further

. . . said that it is the duty of the Congress of the United States to vest all the judicial power of the Union in some Federal court and if they may withhold a part of it they may withhold all of it and defeat the Constitution by refusing or simply omitting to carry its provisions into execution . . . The act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court has said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. *This bill does . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less.* The Senator from California proposes to limit the constitutional jurisdiction and restrict it because it was restricted in 1789 . . . The whole circumstances of the case are different, and the time has now arrived it seems to me when Congress ought to do what the Supreme Court said more than forty years ago it was its duty to do, vest the power which the Constitution confers in some court of original jurisdiction.

While the above language was not explicitly directed to the "federal question" clause, the generality of the language used in referring to the Act in its entirety and the reference to the case of *Martin v. Hunter's Lessee* indicate the intent of the drafters of the statute both to give it the same scope as the judicial clause of the Constitution, and to make the words "arising under" as used in the statute the equivalent of those words in Article 3.

Id. at 374-75 (emphasis Forrester's) (footnotes omitted) (quoting 2 CONG. REC. 4986-87 (1874)). See also Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 649 (1942).

156. 96 U.S. 199 (1877).

157. *Id.* at 203-04.

therein, but shall dismiss the suit¹⁵⁸

Although the purpose of section 5 is not clearly revealed either by its language or its legislative history, its purpose becomes clearer when placed in the historical context of arising under jurisdiction.

As discussed previously, the drafters of the 1875 Act apparently intended section 1 of the Act to give the federal courts the broadest arising under jurisdiction constitutionally permissible.¹⁵⁹ Then, like today, *Osborn v. Bank of the United States*¹⁶⁰ set those constitutional limits. That case demonstrated that federal jurisdiction extends to a whole case whenever any part of it concerns a federal issue that is potentially dispositive of the action.¹⁶¹ Moreover, *Osborn* clearly showed that even if the federal part of the case was hypothetical,¹⁶² or if a prior Supreme Court decision seemed to have decided the federal issue,¹⁶³ the mere presence of a federal ingredient in the case would nonetheless give the federal court jurisdiction.

Justice Johnson, dissenting in *Osborn*, found the majority opinion potentially devastating to both an effective federal system and the federal courts because the federal courts would be swamped with many cases of only minor or even no federal importance.¹⁶⁴ Read in the light of Johnson's dissent, section 5 of the 1875 Act suggests an intent to check the potentially unlimited federal jurisdiction contained in section 1.¹⁶⁵ This mechanism for controlling the federal docket can therefore

158. Ch. 137, § 5, 18 Stat. 470, 472 (1875) (emphasis added).

159. See *supra* text accompanying notes 152-55.

160. 22 U.S. (9 Wheat.) 738 (1824).

161.

If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, . . . then all the other questions must be decided as incidental to this, which gives that jurisdiction.

Osborn, 22 U.S. (9 Wheat.) at 822. See *infra* text accompanying notes 182-90.

162. See *id.* at 824; *infra* text accompanying notes 188-90.

163. See *Osborn*, 22 U.S. (9 Wheat.) at 824; *infra* notes 184-87 and accompanying text.

164. *Osborn*, 22 U.S. (9 Wheat.) at 886-87 (Johnson, J., dissenting).

165. No real legislative history exists to explain the purpose of § 5 of the 1875 Act. It might be analogized to the assignment clause of diversity jurisdiction, see 28 U.S.C. § 1359 (1976), as a prophylactic against manufactured jurisdiction. See, e.g., *O'Brien v. Avco Corp.*, 425 F.2d 1030, 1032-33 (2d Cir. 1969); *McSparran v. Weist*, 402 F.2d 867, 872-73 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969); *Ferrara v. Philadelphia Laboratories, Inc.*, 272 F. Supp. 1000, 1006-07 (D. Vt. 1967), *aff'd*, 393 F.2d 934 (2d Cir. 1968).

However, Professors Chadbourne and Levin claim that § 5 of the 1875 Act was Congress' answer to the problem posed by unlimited federal jurisdiction.

By what . . . means would Marshall's approach be followed without precipitating the inundation forecast by Johnson? The draftsman [of the Act of 1875] had an ingenious answer. Shrewdly he provided . . . section 5. . . .

Thus, although in a given case, because of possible, albeit totally improbable, federal issues, the words of the Constitution, and, by adoption, the words of the statute confer original federal jurisdiction, yet the court must refuse to continue with the case if

be seen as a legislative judgment to exclude a narrow range of cases of slight federal importance from the unlimited jurisdiction of section 1.

Given section 5, as well as the parallel language in the *Gold-Washing* opinion, one may safely assume that the substantial federal question test of *Gold-Washing* was an interpretation of a congressional act.¹⁶⁶ Furthermore, of the post-1875 cases dismissed for want of a substantial federal question, it seems likely that the Court would have dismissed at least some of them on the authority of section 5. Few of those cases, however, actually cited this section.¹⁶⁷ Most of the cases, using language similar to section 5, dismissed actions without reference to the section.¹⁶⁸

Recognizing this fact, the revisers of the judicial code deleted section 5 in 1940 as "unnecessary," noting that "[a]ny court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion."¹⁶⁹ Read at its broadest, this comment may suggest that the Constitution implicitly commands that insubstantial

in fact the controversy actually presented for determination does not "really and substantially" turn upon a matter essentially federal in nature.

Chadbourn & Levin, *supra* note 155, at 649.

166. The conclusion of this Article that the substantial federal question doctrine is of statutory dimensions is reinforced by other congressional action. For example, Congress specifically provided for supplemental jurisdiction in patent and trademark cases:

The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a *substantial* and related claim under the copyright, patent, plant variety protection or trade-mark laws.

28 U.S.C. § 1338(b) (1976) (emphasis added). If the substantiality doctrine were constitutionally compelled, Congress' mention of substantiality would be superfluous; instead, this language is an additional burden to federal jurisdiction imposed by Congress. *Cf.* 28 U.S.C. § 1332(a) (1976) (amount in controversy); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (construing predecessor of 28 U.S.C. § 1332 (1976) as requiring complete diversity); *infra* text accompanying notes 173-80 (well-pleaded complaint rule).

167. In fact, Professors Chadbourn and Levin could point to only one case citing § 5 as authority for an insubstantiality dismissal. *See Robinson v. Anderson*, 121 U.S. 522, 524 (1887).

168. *See, e.g., Norton v. Whiteside*, 239 U.S. 144, 147 (1915) (case must be dismissed unless it "really and substantially involves a dispute" arising under federal law) (quoting *Hull v. Burr*, 234 U.S. 712, 720 (1914)); *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 203 (1877) (before jurisdiction may be exercised record must reveal that suit "really and substantially involves a dispute or controversy" arising under federal law).

169. 28 U.S.C. § 1359 (1976) (historical and revision notes). Professor Currie asks, "Were the Revisers misguided as to the effect of the Section [5 of the 1875 Act], or were Chadbourn and Levin?" D. CURRIE, *supra* note 98, at 346. It seems that neither the revisers nor Chadbourn and Levin were misguided. As a matter of linguistic analysis, Chadbourn and Levin are on solid ground; as a matter of history, the revisers are clearly right. Regardless of who is correct, courts have generally not considered the original purpose of § 5. Nonetheless, they have long recognized a need to limit statutory arising under jurisdiction to avoid the parade of horrors mentioned in Johnson's dissent in *Osborn*. Thus, whether by explicit or implicit command, a substantiality test has been read into statutory arising under jurisdiction.

Today, even without § 5's explicit statutory substantiality test, the Supreme Court continues to apply such a test as a matter of interpreting congressional jurisdictional grants. *See Hagans v. Lavine*, 415 U.S. 528, 538-39 (1974) ("Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other *The District Court's jurisdiction, a*

claims be dismissed.¹⁷⁰

Section 5 is not, however, the sole basis for the conclusion that substantiality is only a statutory requirement. In the same phrase in which *Gold-Washing* requires a "real and substantial" federal question, it also holds that "[b]efore . . . a circuit court can be required to retain a cause under [federal question] jurisdiction, [the federal question] must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as required in good pleading."¹⁷¹ This requirement—now referred to as the "well-pleaded complaint" rule—permits a federal trial court to exercise subject matter jurisdiction over a federal question only if that question appears on the face of a well-pleaded complaint, i.e., the question is not an anticipated defense, is not hypothetical, and is required to be pleaded in order to make out the elements of the cause of action.¹⁷²

*Louisville & Nashville Railroad v. Mottley*¹⁷³ provides a stark and often cited¹⁷⁴ illustration that the well-pleaded complaint rule is statutory in origin.¹⁷⁵ The Mottleys entered into a contract settling a tort claim against the railroad in consideration for a lifetime of free rides on the railroad. The railroad performed for thirty-six years, but in 1907 it refused to provide any further free rides. The previous year, Congress had passed an act forbidding the giving of free passes or free transportation.¹⁷⁶ The Mottleys brought suit, alleging that the railroad's refusal

matter for threshold determination, turned on whether the question was too insubstantial for consideration.") (emphasis added).

170. It could be contended that if this comment is accurate, the lack of a substantial federal question must be noted by a court and must serve as a basis for dismissal, regardless of any statutory provision to that effect. Moreover, it might be argued that *Gold-Washing's* reliance, if any, on statutory provisions was merely an avoidance of more difficult constitutional issues or, that the *Gold-Washing* court itself may have mistakenly thought it was making a constitutional decision. *Gold-Washing* extensively cited *Osborn*—a constitutional decision—and for this reason might be thought to have rested on constitutional principles. This contention, however, is undercut by the nearly contemporaneous Pacific Railroad Removal Cases, 115 U.S. 1 (1885), where the Supreme Court also cited *Osborn* extensively but treated it as statutory. See *infra* text accompanying notes 191-96.

171. *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 206 (1877).

172. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672-74 (1950); *Louisville & N.R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

173. 211 U.S. 149 (1908).

174. J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL PROCEDURE CASES & MATERIALS* 187-89 (3d ed. 1980); D. CURRIE, *supra* note 98, at 337-38, 341; HART & WECHSLER, *supra* note 57, at 883; Chadbourn & Levin, *supra* note 155, at 660; Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 893-96 (1967); Mishkin, *supra* note 85, at 163.

175. See *Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1962, 1972 (1983); cf. *infra* text accompanying notes 188-90 (discussion of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), indicating broader constitutional standard for arising under than for statutory well-pleaded complaint rule).

176. Act of June 29, 1906, ch. 3591, 34 Stat. 584.

to abide by the contract was based on a congressional act, and contending that the act either did not apply to the contract or that it was unconstitutional if it did.¹⁷⁷

The Supreme Court held that the suit should have been dismissed as outside the jurisdiction of the trial court. It stated:

There was no diversity of citizenship, and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a "suit . . . arising under the Constitution or laws of the United States." It is the settled interpretation of these words, *as used in this statute*, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.¹⁷⁸

Thus, the Court specifically limited its holding to the words "arising under" as used in the Act of 1875. While the "arising under" language of the Act of 1875 and the Constitution were identical, the subsequent history of the *Mottleys'* case reveals the difference in their respective meanings.

After the dismissal of their suit, the *Mottleys* brought their action in state court. The railroad successfully offered its federal defense. The *Mottleys* then appealed to the United States Supreme Court. Again, the federal question was not well-pleaded in the complaint filed in the trial court. Thus, if the first *Mottley* decision had rested on a constitutional principle, there would have been no federal appellate jurisdiction over the second case.¹⁷⁹ The Supreme Court found no juris-

177. 211 U.S. at 151.

178. *Id.* at 152 (emphasis added) (citations omitted).

179. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), sets forth the proposition that under article III of the Constitution, the appellate jurisdiction of the United States Supreme Court over arising under cases is equal to the original jurisdiction of lower federal courts over such cases. *Id.* at 821 (Original jurisdiction is "coextensive with the judicial power" and nothing in the Constitution prohibits Congress from "giving the circuit courts original jurisdiction, in any case to which the appellate jurisdiction extends"). Accordingly, if the Constitution barred any complaint not well-pleaded from original jurisdiction, the Constitution would also bar such a complaint when heard on appeal.

This construction of arising under jurisdiction would lead to absurd results if the well-pleaded complaint rule were viewed as constitutional. Important federal questions raised as defenses could not be heard in federal courts under any circumstances. It is precisely to avoid such a result that Justice Johnson in his dissent in *Osborn* proposed a well-pleaded complaint rule, but one that would have permitted immediate removal or appeal of the case to federal court once a federal issue was raised. *See id.* at 888 (Johnson, J., dissenting).

dictional barrier, however, and decided the case on the merits in favor of the railroad.¹⁸⁰

When *Gold-Washing*'s substantial federal question test is viewed in context—within the same phrase as the purely statutory well-pleaded complaint rule¹⁸¹—its statutory origin is apparent. The close textual proximity of these two "jurisdictional" prerequisites is strong circumstantial evidence that they share a common source.

3. Constitutional "Arising Under" Jurisdiction

The organization and language of *Gold-Washing*, especially in the light of the apparent purpose of section 5 of the 1875 Act, indicate that the substantial federal question doctrine is statutory. Any other conclusion would, moreover, conflict with clear and venerable Supreme Court precedent delineating the constitutional limits of federal court jurisdiction. Neither the rationale of *Osborn v. Bank of the United States*¹⁸² nor any of the holdings in the *Pacific Railroad Removal Cases*¹⁸³ is easily squared with making the substantial federal question doctrine a constitutional requirement.

Although *Osborn* involved a substantial federal question—enforcement of a federal injunction to prevent a state from taxing the Bank of the United States—the Supreme Court also dealt with hypothetical situations that presented insubstantial federal questions, suggesting that even such questions would be within the arising under jurisdiction of article III. For example, the opinion raised the question of whether article III jurisdiction would exist in an ordinary contract lawsuit involving the Bank. The Court implied that the substantive law governing such suits would be state law, and that the only federal questions involved would concern the capacity of the Bank to sue, be sued, or enter into the commercial transaction in question. The Court then strongly suggested that even if there were no real dispute concerning the Bank's capacity, the case would arise under federal law.¹⁸⁴ Fur-

180. *Louisville & N.R.R. v. Mottley*, 219 U.S. 467 (1911).

181. See *Hagans v. Lavine*, 415 U.S. 528, 538 (1974) (linking substantial federal question doctrine to well-pleaded complaint rule); *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 576 (1904) (same). Moreover, *Hagans* suggests that the substantiality doctrine is a statutory creation. 415 U.S. at 538. This suggestion, which is supported by the views of commentators, see, e.g., Chadbourne & Levin, *supra* note 155, at 649-50, has created the anomaly that while substantiality is viewed as statutory in federal question cases, it has assumed constitutional dimensions in supplemental jurisdiction cases.

182. 22 U.S. (9 Wheat.) 738 (1824).

183. 115 U.S. 1 (1885).

184. As stated by the Court:

Take the case of a contract, which is put as the strongest against the bank. When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next

thermore, the Court noted that even if the Supreme Court had decided in a previous case that the Bank had a certain capacity, federal question jurisdiction would nonetheless exist, given the potential for relitigation of questions about the Bank's capacity.¹⁸⁵

Osborn's dicta thus makes clear that at least in some instances, once a question comes within arising under jurisdiction, it will remain within that jurisdiction even if a definitive decision of the United States Supreme Court were later to eliminate any doubt about the outcome of relitigating the question. This view of substantiality in a case construing constitutional arising under jurisdiction stands in stark contrast to the test of *Levering & Garrigues Co. v. Morrin*,¹⁸⁶ and casts doubt on any conclusion that might be drawn from *Levering* that a federal matter is insubstantial as a matter of constitutional law when previous Supreme Court decisions "foreclose the subject."¹⁸⁷

Other remarks in *Osborn* further weaken the argument that substantiality is constitutionally compelled. The Court indicated that a case "may arise" under federal law even if the federal issue in the suit is only *potentially* involved:

But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. *Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on* [to create arising under jurisdiction]. The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. *The questions which the case involves, then, must determine its*

question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United State [sic]. These are important questions, and they exist in every possible case. *The right to sue, if decided once, is decided for ever; but the power of congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed.*

Osborn, 22 U.S. (9 Wheat.) at 823-24 (emphasis added).

In *Osborn*, the case of the contract was treated hypothetically; hence, this passage is merely dicta. However, in a companion case decided contemporaneously with *Osborn*, jurisdiction was upheld specifically on the basis of the *Osborn* dicta. *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904, 905 (1824) (suit by Bank of United States to collect as endorsee on checks drawn by private citizens on accounts at state bank; capacity of Bank not in question given *Osborn*; jurisdiction upheld).

185. 22 U.S. (9 Wheat.) at 824.

186. 289 U.S. 103, 105-06 (1933); see *supra* text accompanying notes 73-79.

187. 289 U.S. at 105 (citing *Hannis Distilling Co. v. Mayor of Baltimore*, 216 U.S. 285, 288 (1910)).

*character, whether those questions be made in the cause or not.*¹⁸⁸

In this passage, *Osborn* suggests that an anticipated defense may be used to assert constitutionally permissible arising under jurisdiction—in clear contrast to the statutory well-pleaded complaint rule.¹⁸⁹ Moreover, unlike later cases dismissed for want of a substantial federal question,¹⁹⁰ *Osborn* would permit arising under jurisdiction in cases where the anticipated defense is never actually offered.

Of like effect are the *Pacific Railroad Removal Cases*,¹⁹¹ where various railroad companies were sued in state court on state tort law and eminent domain theories. The railroads removed the cases to federal court, asserting that as corporations created by an act of Congress, suits against them on any theory were suits “arising under the laws of the United States.”¹⁹² Even though there was no dispute that the corporations were in fact created by an act of Congress, the Supreme Court, citing *Osborn* extensively,¹⁹³ held that the cases were within federal jurisdiction because the corporations were created by an act of Congress and owed their existence to the laws of the United States.¹⁹⁴ The dissent did not dispute the majority’s broad constitutional reading of *Os-*

188. 22 U.S. (9 Wheat.) at 824 (emphasis added). It might be contended that in this passage of *Osborn*, Chief Justice Marshall was addressing a situation in which the plaintiff’s pleadings affirmatively raised a federal element, which if denied would serve as a defense, but which defendant just did not choose to proffer. Thus, the presence of the federal issue in the plaintiff’s pleadings would create a substantial federal question. This reading, however, is unlikely.

In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Marshall made it clear that arising under jurisdiction extends even to cases where the federal issue is not raised by the plaintiff at all, but exists only as a question that the defendant could raise.

If it be, to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think, the construction too narrow. *A case in law or equity consists of the right of the one party, as well as the other*, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.

Id. at 379 (emphasis added); see also *Tennessee v. Davis*, 100 U.S. 257, 264 (1880) (“A case consists of the right of one party as well as the other . . .”). Accordingly, it seems clear that *Osborn*’s discussion of hypothetical federal issues applies not only to those actually raised by a plaintiff, but also to those that could be raised by a defendant. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1662, 1671 (1983).

189. See *supra* text accompanying notes 172-80.

190. See *Norton v. Whiteside*, 239 U.S. 144 (1915) (involving dismissal for want of a federal question where the claim of federal jurisdiction rested on assertion of title to land derived from the United States, but the question could be raised only as a potential defense attacking the title); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900) (same).

191. 115 U.S. 1 (1885).

192. The issue in the case was “whether the fact that the [railroads] are corporations of the United States created by act of Congress makes the suits against them ‘suits arising under the laws of the United States,’ within . . . the act of . . . 1875 . . .” 115 U.S. at 10-11.

193. *Id.* at 11-14.

194. The Court reasoned that since *Osborn* was still good law, the cases against the railroads “arose under” the laws of the United States because certain acts of Congress showed “that the corporations . . . not only derive[d] their existence, but their powers, their functions, their duties,

born.¹⁹⁵ Instead, it relied wholly upon a restrictive reading of the statute conferring jurisdiction.¹⁹⁶

Given the broad standards for arising under jurisdiction enunciated by *Osborn* and the *Pacific Railroad Removal Cases*, it would be difficult to say that the substantial federal question doctrine is constitutionally required, unless those cases are no longer good law. But despite occasional doubts, *Osborn* and its progeny are still regarded as authoritative.¹⁹⁷

4. Federal Jurisdictional Policies

In addition to the inconsistency between the substantial federal question doctrine and *Osborn*'s definition of the constitutional limits to

and a large portion of their resources, from those acts, and, by virtue thereof sustain[ed] important relations to the Government of the United States." *Id.* at 14.

195. "I do not doubt the power of Congress to authorize suits by or against federal corporations to be brought in the courts of the United States. That was decided in *Osborn*'s case, and with it I have no fault to find." *Id.* at 24 (Waite, C.J., dissenting).

196. *Id.* at 24-25. Chief Justice Waite clearly stated that in his opinion, "Congress did not intend to give the words 'arising under the Constitution or laws of the United States,' in the act of 1875, the broad meaning they [had] when used by Chief Justice Marshall in . . . *Osborn*." *Id.* at 24.

197. The *Pacific R.R. Removal Cases* are now considered aberrational in the light of more limited views of statutory "arising under" jurisdiction. The decision is seen as "exceptional," *Gully v. First Nat'l Bank*, 299 U.S. 109, 114 (1936), though acceptable within the limited sphere encompassed by the case, *id.* Justice Frankfurter called it a "sport," *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 481 (1957) (Frankfurter, J., dissenting), and the Supreme Court has called the case an "unfortunate decision," *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 n.50 (1959). Moreover, Congress has long since overruled the decision legislatively. See 28 U.S.C. § 1349 (1976) (providing that district courts cannot assert jurisdiction merely because a corporation was incorporated by Congress unless the United States owns more than half of the corporation's stock). Nonetheless, the decision has not been judicially overruled, and Professor Wright suggests that its reasoning has been approved in at least one modern case. C. WRIGHT, *supra* note 4, § 17, at 93 n.14 (citing *International Refugee Org. v. Republic S.S. Corp.*, 189 F.2d 858 (4th Cir. 1951)).

Osborn has been treated less harshly by scholars, see Chadbourn & Levin, *supra* note 155, at 649; Forrester, *supra* note 155, at 370-71, and courts, see *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 825 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965). Nonetheless, Professor Mishkin has suggested that *Osborn* should be narrowly construed, see Mishkin, *supra* note 85, at 187, and Justice Frankfurter questioned whether *Osborn* should receive a broad historical reading because it was based upon premises that today are subject to criticism. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 471 n.4, 480-81 (1957) (Frankfurter, J., dissenting).

Despite this mild criticism, the Supreme Court's occasional doubts on the status of *Osborn* have been voiced only in cases dealing with statutory arising under jurisdiction, see, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 n.51 (1959); *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936); *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 485 (1933), and recently the Court has affirmed *Osborn*'s constitutional vitality. See *Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1962, 1970-71 (1983) (construing *Osborn* to permit federal question jurisdiction in a case where the only federal issue was one that could be raised as a defense). Thus, it seems that *Osborn* still defines the constitutional limits of arising under jurisdiction. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2872 n.26 (1982); Chadbourn & Levin, *supra* note 155, at 649; Forrester, *supra* note 155, at 370-71.

article III jurisdiction, there are strong policy reasons arguing for the rejection of substantiality as a constitutional jurisdictional standard.

First, the meaning of substantiality is elusive,¹⁹⁸ and current substantiality decisions do not inspire confidence that substantiality is a concept that is sufficiently manageable to set constitutional limits.¹⁹⁹ To the extent that a court erroneously uses a restrictive definition of substantiality and improperly dismisses a case containing a jurisdic-

198. See *supra* text accompanying notes 105-19.

199. Several cases, both appellate and original, that dismissed federal question cases as insubstantial illustrate the difficulty of applying a substantiality test. In these cases, the merits of the federal question were found lacking even though other courts had disagreed on the merits, or judges on the same panel would have reached a different result in the same case.

Appellate—In *Hill v. Garner*, 434 U.S. 989 (1977), the Supreme Court, over the dissents of Justices Brennan and White, dismissed an appeal from a state court judgment holding a "guest statute" constitutional, although six state courts had found similar statutes unconstitutional under the United States Constitution. *Id.* at 990 n.2. Similarly, in *Kraham v. Florida*, 440 U.S. 941 (1979), the Supreme Court dismissed an appeal over the dissent of three justices who stated that they would have reversed had jurisdiction been noted. *Id.* (Brennan, Stewart & Marshall, JJ., dissenting). On numerous occasions in the last four years, at least two justices have dissented from decisions dismissing appeals on insubstantiality grounds. See *Robinson v. Pennsylvania*, 457 U.S. 1101 (1982) (Brennan & Stevens, JJ., dissenting); *Bilofsky v. Deukmejian*, 456 U.S. 1002 (1982) (Brennan & White, JJ., dissenting); *Western Md. Ry. v. Rose*, 456 U.S. 952 (1982) (White & Powell, JJ., dissenting); *Van Emmerik v. Janklow*, 454 U.S. 1131 (1982) (White & Blackmun, JJ., dissenting); *Cummings v. Town of Oakland*, 454 U.S. 1134 (1982) (Brennan, White & Powell, JJ., dissenting); *Wittner v. Cass County Welfare Dep't*, 454 U.S. 1135 (1982) (Brennan & Stevens, JJ., dissenting); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Mikos*, 445 U.S. 939 (1980) (White, Blackmun & Stevens, JJ., dissenting); *Rankins v. Commission on Professional Competence*, 444 U.S. 986 (1979) (Brennan, Blackmun & Stevens, JJ., dissenting); *Lotze v. Washington*, 444 U.S. 921 (1979) (White, Blackmun & Powell, JJ., dissenting); *School Dist. v. Department of Educ.*, 443 U.S. 901 (1979) (Blackmun, Powell & Stevens, JJ., dissenting); *Morrill v. Janklow*, 441 U.S. 938 (1979) (Brennan, White & Blackmun, JJ., dissenting); *Randolph v. Municipal Court*, 439 U.S. 1060 (1979) (Brennan, Stewart & Marshall, JJ., dissenting) (judges stated they would have reversed); *Veterans of Foreign Wars, Post 4264 v. City of Steamboat Springs*, 439 U.S. 809 (1978) (Stewart, Blackmun & Powell, JJ., dissenting); *Smith v. Gunimo*, 439 U.S. 802 (1978) (Brennan, White & Stevens, JJ., dissenting); *Sewell v. Georgia*, 435 U.S. 982 (1978) (Brennan, Marshall & Stewart, JJ., dissenting); *Ingalls Iron Works Co. v. Chilivis*, 429 U.S. 1081 (1977) (Stewart, White & Powell, JJ., dissenting).

Original—Similar uncertainty in applying a substantiality test may be found in original jurisdiction cases. For example, in *Rodriguez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977) (en banc, *cert. denied*, 434 U.S. 1047 (1978)), the Fifth Circuit affirmed the dismissal of a complaint as insubstantial, even though six of the thirteen judges found the claim sufficient to send to a jury. Of like effect is an insubstantiality dismissal by one federal court where another federal court has reached the opposite conclusion. Compare *Spark v. Catholic Univ.*, 510 F.2d 1277 (D.C. Cir. 1975) (per curiam) (dismissing as insubstantial federal question claim that significant state aid made private institution's actions state action), and *Blouin v. Loyola Univ.*, 506 F.2d 20 (5th Cir. 1975) (per curiam) (same), with *Howard Univ. v. National Collegiate Athletic Ass'n*, 510 F.2d 213 (D.C. Cir. 1975) (reaching merits on claim that significant state aid and participation in NCAA made NCAA's action state action). Compare *Briscoe v. Bock*, 540 F.2d 392 (8th Cir. 1976) (dismissing claims that significant state aid rendered private hospital's actions state action), and *Jones v. Eastern Me. Medical Center*, 448 F. Supp. 1156 (D. Me. 1978) (same), with *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975) (holding significant state aid to private hospital rendered hospital's actions state action), and *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963) (same), *cert. denied*, 376 U.S. 938 (1964).

tionally sufficient article III issue, the federal system loses an opportunity to provide relief to litigants on a possibly proper federal claim. This loss is tolerable as a consequence of statutory law, for it reduces docket pressures and eliminates marginal claims. Moreover, should Congress disagree with a court on the insubstantiality of any kind of claim, it could override the court's decision simply by directing looser interpretations of substantiality or eliminating the requirement altogether. However, the loss caused by an erroneous substantiality decision is far greater if that decision is the consequence of constitutional law. Congress could not override such a decision simply by eliminating the substantiality doctrine. Rather, it would have to enact specific substantive legislation directed at each instance in which the substantiality doctrine was overzealously applied.

Second, basing insubstantiality dismissals on constitutional grounds could undermine the purposes of arising under jurisdiction.²⁰⁰ For instance, a rigorous application of the substantial federal question doctrine discourages full treatment of issues currently considered trivial or frivolous. It also discourages novel issues from being brought in the federal courts.²⁰¹ Yet some of those same issues may later become the basis for new rights or liabilities.²⁰² Furthermore, a rigorous applica-

200. See *supra* note 6.

201. A strict substantial federal question doctrine makes bringing a case to federal court potentially costly and inefficient. A plaintiff who brings a somewhat marginal claim to federal court incurs all of the transaction costs of litigation, such as filing fees and perfection of service of process. Moreover, a jurisdictional decision on the substantiality of the federal claim may be delayed during other pretrial proceedings or pending discovery. Dismissal of the case from federal court after these costs have been incurred leads to duplication if plaintiff chooses to refile in state court and there are barriers to reusing prior discovery. Faced with the possibility of having to run the federal gauntlet only to end up in state court, a litigant might be deterred from submitting novel claims first to a federal tribunal.

202. *Levering & Garriguez Co. v. Morrin*, 289 U.S. 103 (1933), often cited for the substantiality requirement, is itself an example of a claim that was held insubstantial but later won on the merits in the same court. *Levering* dismissed as insubstantial a claim that a conspiracy to suppress local construction restrained interstate commerce. 289 U.S. at 108 (interpreting commerce provision of Sherman Act, which is read as broadly as constitutionally permissible, see *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944), to exclude claim that local activity was in restraint of commerce because the local activity relied on goods sent in commerce). The Supreme Court subsequently found local construction to be within the scope of the labor laws that regulate interstate commerce, even though the activity was wholly local, because a small amount of the goods purchased by the defendant were manufactured interstate. See, e.g., *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 683, 684 (1951).

More recently, the Supreme Court dismissed for insubstantiality an equal protection challenge to a New York statute requiring maternal but not paternal consent for the adoption of illegitimate children. *Orsini v. Blasi*, 423 U.S. 1042 (1976). Yet three years later it invalidated the statute on equal protection grounds in a case factually indistinguishable from *Orsini*. *Caban v. Mohammed*, 441 U.S. 380 (1979). See Note, *The Supreme Court Dismissal of State Court Appeals for Want of a Substantial Federal Question*, 15 CREIGHTON L. REV. 749, 753-55 (1982).

Proper treatment of novel claims is illustrated by *Bell v. Hood*, 327 U.S. 678 (1946). There, the Supreme Court reversed the insubstantiality dismissal of a claim for damages against federal

tion of the substantial federal question doctrine that precludes full scale review in cases apparently governed by precedent is especially wasteful because precedent—even of a recent vintage—may be overruled or undercut by changing views of the law.²⁰³

Again, such results might be acceptable as a matter of statutory construction that furthers a congressional policy limiting federal jurisdiction over marginal federal cases. Federal court jurisdiction has consistently been limited by congressional provisions excluding questionable or unimportant cases.²⁰⁴ In a time of ever-increasing

agents who had allegedly violated plaintiff's constitutional rights. Although the claim failed on the merits in the lower federal courts, the Supreme Court's opinion paved the way for the creation of the right to recover damages in such cases. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (citing *Bell* repeatedly). See also *Norman v. Reagan*, 95 F.R.D. 476 (D. Or. 1982) (an example of the lengths to which some courts will go to avoid an insubstantiality dismissal).

203. Recent actions of the Supreme Court indicate that today's precedent may be tomorrow's overruled doctrine. For example, in 1972, the Supreme Court reviewed the constitutionality of prejudgment replevin provisions in Florida and Pennsylvania law. It held that these laws deprived individuals of property without due process by denying them an opportunity to be heard before their chattels were taken away. *Fuentes v. Shevin*, 407 U.S. 67 (1972). In 1974, in a case challenging the constitutionality of a Louisiana law that allowed for the repossession of chattel without notice or the opportunity for a hearing, the Supreme Court found no violation of the 14th amendment. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Although the majority attempted to distinguish *Fuentes*—and the Court later may have resurrected *Fuentes* in *North Ga. Finishing Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)—Justice Stewart seems to have spoken for several of the members of the Court in suggesting that *Mitchell* actually overruled *Fuentes*, 416 U.S. at 635 (Stewart, J., dissenting); *id.* at 623 (Powell, J., concurring).

Similarly, in 1961, the Supreme Court held that municipalities were not persons for purposes of being sued under the Civil Rights Act. See *Monroe v. Pape*, 365 U.S. 167 (1961). In 1978, however, the Supreme Court reversed itself and found that municipalities were in fact persons subject to suit under the Civil Rights Act. See *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

More recently, in *United States v. Ross*, 456 U.S. 798 (1982), the Supreme Court overruled its one-year-old decision in *Robbins v. California*, 453 U.S. 420 (1981). *Robbins* had held that the opening of packages or containers while conducting a warrantless search of an automobile violates the 4th and 14th amendments. In *Ross*, however, the Court held that when the police legitimately stop an automobile and have probable cause to believe contraband is concealed somewhere within it, they may conduct a warrantless search that is as thorough as one authorized by a warrant.

These decisions were closely contested and decided by either a plurality or a slim majority of the Court. They demonstrate that Supreme Court opinions are vulnerable to swift reevaluation. Hence, it is unwise to adopt a substantiality rule keyed merely to the factual similarity of a current case to a past unfavorable decision of the Supreme Court.

Lower courts will generally adhere to Supreme Court precedent because of *stare decisis*, but they ought to do so by predicting the ability of the plaintiff to state a claim upon which relief can be granted rather than by making a jurisdictional determination. The former type of decision more closely resembles actual decisionmaking than does a substantiality dismissal. It would rest solely on a prediction that the Supreme Court will not overrule its precedent, but would put the case into a procedural posture that would force an appellate court to consider merits, not jurisdiction—a posture more conducive to reevaluating precedent.

204. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; 28 U.S.C. § 1359 (1976) (parties collusively joined, assignment clauses); 28 U.S.C. § 1332(a) (1976) (amount in controversy for diversity cases).

docket size,²⁰⁵ such limitations produce the laudable effect of leaving more time for the consideration of clearly cognizable federal claims. But as a matter of constitutional law, it is questionable whether a doctrine should be invoked to preclude (or severely inhibit) plenary federal decisionmaking in matters apparently within the constitutional jurisdiction of the federal courts. To do so freely might eliminate classes of cases that under an *Osborn* analysis are at least potential federal questions.²⁰⁶

205. The increase in the number of cases heard by the federal judiciary in the last 25 years is enormous. In 1960, 59,284 civil cases were filed in the United States district courts; in 1981, 180,576 civil cases were filed. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1981 ANNUAL REPORT OF THE DIRECTOR 200 table 13 (1981). Similarly, filings in the United States courts of appeals have increased approximately 500% since 1962, from 4823 in 1962 to 26,302 in 1981. *Id.* at 185 table 1. See Levin, *Adding Appellate Capacity to the Federal System: A National Court of Appeals or an Inter-Circuit Tribunal?*, 39 WASH. & LEE L. REV. 1, 4 (1982). In 1951, 1353 cases were docketed with the Supreme Court, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1961 ANNUAL REPORT OF THE DIRECTOR 218 table A-1 (1961); in 1981, 5144 cases were docketed, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1981 ANNUAL REPORT OF THE DIRECTOR 345 table A-1 (1981). In response to these trends, Congress authorized the appointment of 117 new district court judges and 35 new court of appeals judges. Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified as amended at 28 U.S.C. §§ 44, 133 (Supp. V 1981)).

206. At the very least, *Osborn*, 22 U.S. (9 Wheat.) 738 (1824), and its companion case, *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824), indicate that Congress ought to have the flexibility to protect an instrumentality of the United States from potential discrimination at the hands of hostile state judiciaries by providing for federal jurisdiction in cases involving those instrumentalities. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 471 n.4 (1957) (Frankfurter, J., dissenting); Mishkin, *supra* note 85, at 187. See also *Pacific R.R. Removal Cases*, 115 U.S. 1 (1885). Such jurisdiction would extend even to cases involving no substantial federal question, see *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904; *Osborn*, 22 U.S. (9 Wheat.) at 823-24. Moreover, as a corollary to the principle of protecting federal entities, federal jurisdiction would also extend to cases involving pure state law issues that have a federal question lurking in the background. See *Williams v. Austriau*, 331 U.S. 642 (1947) (bankruptcy case upholding federal jurisdiction over pure state law claims because such claims could be related to the federal question of bankruptcy); *Schumacher v. Beeler*, 293 U.S. 367 (1934) (same). Congress' grant to the federal courts of diversity jurisdiction over disputes between citizens of a state and citizens of the District of Columbia, see 28 U.S.C. § 1332(d) (1976), which includes disputes wholly determined by nonfederal law, might be seen as a similar yet broader extension of federal power. In *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), the Supreme Court upheld such a grant of jurisdiction, despite its ruling that the District of Columbia was not a state and hence not under article III's diversity grant. Professors Hart and Wechsler suggest that this holding might be interpreted to mean that Congress provided arising under jurisdiction over suits against citizens of the District of Columbia, but did not provide for a federal rule of decision in such cases. See HART & WECHSLER, *supra* note 57, at 416-17, 866-70.

These cases have been loosely described as coming under the rubric of "protective jurisdiction"; i.e., Congress' vesting of federal jurisdiction in federal courts over cases governed wholly by state law that do not directly present issues of substantive federal law. See M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 59 (1980). As Professor Redish illustrates, this phrase really refers to two separate doctrines: (1) that of Professor Wechsler which "assumes that if Congress could, in the exercise of its enumerated or implied powers under . . . the Constitution, pass substantive legislation on a particular matter, then this 'greater' power logically includes within it the 'lesser' power to provide the federal courts with jurisdiction over cases in the area." *Id.* (citing Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*,

Barring such cases from a federal forum would be especially troubling in areas where Congress has apparently chosen to give the federal courts federal question jurisdiction even in the absence of any substantial federal question. Cases such as those set forth and approved by *Osborn* would no longer be good law, and "protective jurisdiction"²⁰⁷ would be a quaint notion relegated to a historical footnote. For these reasons, the substantial federal question doctrine, as enunciated by *Gibbs*, should be viewed as a matter of statutory—not constitutional—power.²⁰⁸

13 LAW & CONTEMP. PROBS. 216, 224 (1948)); see H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 744-47 (1953); and (2) that of Professor Mishkin which would permit protective jurisdiction "where there is an articulated and active federal policy regulating a field." M. REDISH, *supra*, at 60 (quoting Mishkin, *supra* note 85, at 192.).

Although the Supreme Court has not openly embraced protective jurisdiction, see *Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1962, 1970 n.17 (1983) ("[W]e need not consider petitioner's . . . argument that the Act is constitutional as an aspect of so-called 'protective jurisdiction.'"), one lower court has used the doctrine to validate a congressional grant, see *International Bhd. of Teamsters v. W.L. Mead, Inc.*, 230 F.2d 576, 580-81 (1st Cir.), *cert. dismissed*, 352 U.S. 802 (1956), and two former members of the Supreme Court indicated their favorable inclination toward the doctrine. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Burton & Harlan, JJ., concurring). Justice Frankfurter strongly disapproved of the doctrine, *id.* at 473-75 (Frankfurter, J., dissenting), but even he admitted that the doctrine might provide a satisfactory analysis for several exercises of federal jurisdiction, *id.* at 482-83.

207. See *supra* note 206.

208. This Section has argued that the substantiality doctrine is not constitutionally compelled in either original or appellate federal jurisdiction, and that its source is found in statutory provisions. But for many purposes this conclusion is not critical, because jurisdictional statutes often require substantiality, thus making the source of the doctrine irrelevant. Under these statutes, substantiality is a firmly entrenched barrier, keeping trivial federal matters out of federal court and preventing the bootstrapping of nonfederal issues to those federal matters. See *supra* text accompanying notes 120-58. Nonetheless, if one believes that rejecting substantiality as a constitutional doctrine eliminates any effective constitutional limits to a litigant's use of seemingly trivial federal issues to obtain federal review not otherwise available, the position of this Article raises a possible concern about federalism—overbroad federal jurisdiction at the expense of the states.

As described above, the substantiality doctrine currently addresses two basic situations: the elimination of "frivolous" federal cases and of "foreclosed" federal cases. See *supra* text accompanying notes 73-79. Neither of these situations raises a federalism concern that is sufficient to outweigh the benefits of rejecting substantiality as a constitutional requirement.

First, in both situations the federal claim is stated in a form which, if the allegations were true, would give the pleader a right to recover. Hence, as a facial matter such cases seem properly within federal jurisdiction. Second, in neither situation does the exercise of jurisdiction over the federal claim directly impinge on any state prerogatives. Trivial and foreclosed cases are dismissed only because the federal issues raised in them are so frivolous that a federal court would be wasting important resources if forced to give them full review. A constitutional substantiality doctrine is not needed to avoid such waste, because the federal courts have a simpler remedy for meritless federal claims—dismissal for failure to state a claim upon which relief can be granted. See *FED. R. CIV. P.* 12(b)(6). In such instances any nonfederal claims in the case would probably be dismissed as well. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Thus, for most, if not all, cases involving frivolous or foreclosed federal claims, federalism concerns are groundless.

Despite the general rule that federal courts would not assume jurisdiction over nonfederal issues when federal issues are dismissed, this Article has identified some important instances where a federal court ought to have the power to retain the remaining nonfederal claims. See

III

THE COMMON NUCLEUS OF OPERATIVE FACT AND
THE ORDINARY EXPECTATION COMPONENTS

Although *Gibbs*' substantiality requirement has a statutory source, the origin of its other "power" requirements is murky. In addition to requiring that the federal claims be substantial, *Gibbs* makes supplemental jurisdiction over nonfederal claims dependent on the "fact relatedness"²⁰⁹ of those claims to the federal claims made in the same

supra text accompanying notes 98-101. Although of little solace to state sovereignty interests, in such a case a federal court at one point has, at least in form, a proper federal matter before it which could be subjected to federal review and which could be determinative of the action. See *Bell v. Hood*, 327 U.S. 678, 682-84 (1946) (discussing how a federal claim that might fail on the merits nonetheless, in form, states a potentially dispositive claim). More importantly, federal courts would be able to invoke power over the nonfederal claims in such cases only to serve important federal interests in efficiency, such as completing judgments, avoiding sticky constitutional questions, or ensuring at least one forum for litigating the nonfederal claims. See *supra* note 6; *supra* text accompanying notes 98-99. Achieving these important federal ends seems worth the consequent diminishment of state power.

The most troublesome federalism problem one could imagine would be if a federal court were to exercise jurisdiction over a nonfederal issue in a case in which the federal issues could not affect the outcome of the litigation. For example, a plaintiff might allege that he or she held land pursuant to a federal title, and then seek relief against one coming on the land, which relief could be sought regardless of the plaintiff's ownership. In such a situation, the federal claim would be wholly immaterial; under no circumstances could the ownership, or lack thereof, be dispositive of the litigation.

Notwithstanding this supposedly horrible scenario, there is little reason to make insubstantiality dismissals a constitutional requirement. First, even without a substantiality doctrine, there are significant constitutional limits to using nondispositive federal issues to provide a basis for bringing nonfederal issues to federal court that could not otherwise be brought there.

Osborn v. Bank of the United States made this plain:

If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, . . . then all the other questions must be decided as incidental to this

22 U.S. (9 Wheat.) 738, 822 (1824). For applications of this principle in a statutory context, see *Bell v. Hood*, 327 U.S. 678 (1946); *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936); *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912).

Osborn's rule thus places a constitutional limit on federal judicial power. Unless the federal part of a case potentially affects the outcome of a lawsuit, the case remains outside article III. Nor would it seem that Congress could use its article I powers to evade the limits of article III on federal judicial power by allowing a federal court to decide nonarticle III matters; see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2867-69 (1982).

Second, it may well be that *Osborn's* dispositiveness requirement is not a constitutional requirement, and that Congress—relying on notions of protective jurisdiction—could in fact provide for federal jurisdiction even in cases with no article III issues. Insofar as protective jurisdiction provides a basis for federal jurisdiction, there can be no objection to the absence of a substantiality barrier. Moreover, given that protective jurisdiction can only be exercised when important federal interests are served, these interests outweigh any impact that asserting federal jurisdiction over nonfederal claims that contain no dispositive federal issues might have on state sovereignty.

209. As used in this Article, fact relatedness refers to the degree to which separate claims either arise from a common source or share certain facts as elements of proof of the claim. For a more specific discussion of the fact relatedness concept, see *infra* text accompanying notes 214-55.

action:

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.²¹⁰

Gibbs says nothing about the source of this "fact relatedness" requirement. Its placement in a passage speaking of "judicial power," article III of the Constitution, and a "constitutional case"²¹¹ lends some support to the conclusion of courts and commentators that fact relatedness is a constitutional predicate to the exercise of supplemental jurisdiction.²¹² Upon closer analysis, however, fact relatedness, like substantiality, should be deemed a statutory requirement for the exercise of supplemental jurisdiction.

A. *The Ambiguity of the Gibbs Fact Relatedness Requirement*

Before specifically addressing the source of the *Gibbs* fact relatedness requirement,²¹³ several ambiguities in the requirement must be highlighted.

1. *The "Common Nucleus of Operative Fact" Requirement*

The phrase "common nucleus of operative fact" is not self-defining; courts and commentators have given the phrase several different interpretations, ranging from those requiring near identity between the facts making up the nonfederal and federal claims, to those requiring only a loose "logical relationship"²¹⁴ between the claims.²¹⁵

Justice Brennan's opinion in *Gibbs* contains no citation indicating the origin of the phrase "common nucleus of operative fact." Although the opinion refers several times to the Federal Rules of Civil Proce-

210. 383 U.S. at 725 (emphasis in original).

211. *Id.*

212. *See supra* notes 57-58.

213. *See infra* text accompanying notes 297-351.

214. "Logical relationship" is a legal term of art that is not without substantial ambiguity. In *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926), the Supreme Court suggested that a "logical relationship" between claims is synonymous with a close connection, *id.* at 610, one so close that the failure of one claim would "establish a foundation" for the other, *id.* More recently, the phrase has been given a much broader use, in which a logical relationship exists between claims as long as "separate trials on each . . . respective claim[] would involve a substantial duplication of effort and time by the parties and the courts." *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961). But in *Oweu Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978), the Supreme Court seems to have signalled a return to a more narrow definition of "logical relationship," indicating that logical relationship may focus on the dependence of one claim on the resolution of another. *Id.* at 376.

215. *See infra* text accompanying notes 248-50.

ture,²¹⁶ which consistently provide for joinder when there is fact relatedness—that is, when the claims arise from a common “transaction or occurrence”²¹⁷—there is no Federal Rule keyed to the “common nucleus of operative fact” language.

The origin of “common nucleus” becomes clear only by briefly reviewing the relevant pre-*Gibbs* case law once again. The “common nucleus” test was a response to the “grudging”²¹⁸ fact relatedness approach enunciated by the Supreme Court in *Hurn v. Oursler*.²¹⁹ In *Hurn*, the Court had tied permissible supplemental jurisdiction to the identity of the facts underlying the federal and nonfederal claims; i.e., proof of a virtually identical set of facts would establish both claims. The Court held that this identity of facts allowed joinder because in such an instance the federal and nonfederal claims would merely be separate grounds of the same cause of action.²²⁰ Indeed, the Court suggested that the claims would be “little more than the equivalent of different epithets to characterize the same group of circumstances.”²²¹ In contrast, the Court went on to hold that separate federal and nonfederal causes of action could not be joined, even if they shared a common factual base.²²²

Hurn’s hypertechnical distinction between separate grounds of the same cause of action and separate causes of action was consistent with the strict pleading rules that existed under both common law and code pleading. Under the common law, plaintiffs could join different claims only when seeking relief under a common form of action.²²³ In some cases, however, the rules allowed joinder of claims as separate counts, if they merely reflected different theories of relief for the same invasion of a single right.²²⁴ This latter form of joinder survived the demise of

216. 383 U.S. at 724.

217. See, e.g., FED. R. CIV. P. 13(a), 13(g), 14, 20(a). For a discussion of the meaning of “transaction or occurrence,” see *infra* text accompanying notes 247-50.

218. *Gibbs*, 383 U.S. at 725.

219. 289 U.S. 238 (1933).

220. *Id.* at 246. As stated by the Court in *Hurn*:

The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground

. . . .

Id. (emphasis in original).

221. *Id.*

222. *Id.* at 245-46 (Supplemental jurisdiction “does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action.”).

223. See *infra* note 387.

224. *Id.* For example, *Hurn*’s discussion of the state and federal claims regarding the same

common law pleading, and was adopted by *Hurn*, which permitted joining separate claims based on violations of a single right.²²⁵ Under code pleading,²²⁶ plaintiffs were required to allege facts constituting a "cause of action,"²²⁷ and joinder of separate causes or separate parties was severely circumscribed.²²⁸

Soon after *Hurn*, the rules for federal pleading were substantially altered with the adoption in 1938 of the Federal Rules of Civil Procedure.²²⁹ Prior to the adoption of the Rules, federal courts, except in equitable actions, would follow the pleading rules of the state in which they were located.²³⁰ Hence, the limited joinder rules of code pleading were adopted for federal actions. With the advent of the Federal Rules, however, all federal actions became subject to liberal, uniform procedural rules, enacted "to secure the just, speedy, and inexpensive determination of every action."²³¹ To further this objective, the Rules completely abandoned complex pleading requirements and the term "cause of action,"²³² and encouraged the free joinder of parties²³³ and claims.²³⁴

play illustrates different theories of relief for the same invasion of one of plaintiff's rights, whereas the state claims concerning a *different* play were seen as a different invasion of a different right. See *supra* text accompanying notes 47-49.

225. See *supra* note 224.

226. In 1848, New York adopted the Field Code, the first comprehensive codification of civil procedure. Act of Apr. 12, 1848, ch. 379, 1848 N.Y. Laws 497. Other states soon followed New York's example. See C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 19-20 (1928).

227. See, e.g., Act of Apr. 12, 1848, ch. 379, § 120, 1848 N.Y. Laws 497, 521; IOWA CODE OF CIVIL PRACTICE tit. XVIII, § 3559 (1897); see also C. CLARK, *supra* note 226, at 138-87.

228. See, e.g., Act of Apr. 12, 1848, ch. 379, §§ 94-99, 1848 N.Y. Laws 497, 515-16; IOWA CODE OF CIVIL PRACTICE tit. XVIII, § 3545 (1897). See also C. CLARK, *supra* note 226, at 241-92; *infra* note 387. Judicial interpretations of some state codes of procedure predicated joinder on a finding that the parties were united in interest. Thus, state courts barred joinder of like actions arising from a single incident against a common defendant because the legal interests of the plaintiffs were several. See, e.g., *Ryder v. Jefferson Hotel Co.*, 121 S.C. 72, 75-76, 113 S.E. 474, 475 (1922). See also T. POMEROY, CODE REMEDIES 215 (4th ed. 1904) (joint action for personal tort committed against multiple parties barred absent prior bond of legal union).

229. The Enabling Act of 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1976)), authorized the Supreme Court to promulgate rules of procedure for the federal courts. The rules were submitted to Congress and became effective on September 16, 1938 when Congress failed to oppose their adoption. See generally C. WRIGHT, *supra* note 4, § 62, at 403-05.

230. See *infra* text accompanying notes 370-74.

231. FED. R. CIV. P. 1.

232. See FED. R. CIV. P. 8(a). Rule 8(a) requires that a pleading contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement requires merely an outline of the claim sufficient to give general notice to the adverse party of what the plaintiff is claiming. This rule starkly contrasts with previous pleading systems which required a detailed statement of facts sufficient to show a cause of action. See *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (mere statement of claim sufficient to survive dismissal motion, even though lacking explicit facts necessary to make out a cause of action).

233. See, e.g., FED. R. CIV. P. 19, 20, 22, 24.

234. FED. R. CIV. P. 18; see *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966) (footnote omitted) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of

These procedural advances created havoc in cases attempting to apply the *Hurn* test for separate grounds of one cause of action. Most courts continued strict adherence to *Hurn*'s reliance on fact identity.²³⁵ These cases, which recognized the inconsistency of the *Hurn* rule with the advances made by the Federal Rules, expressed a desire to expand supplemental jurisdiction accordingly, but were reluctant to adopt broader standards either because of rule 82²³⁶ or stare decisis.²³⁷ Nonetheless, several judges, led by Judge Charles E. Clark²³⁸ of the Second Circuit, called for more liberal use of supplemental jurisdiction in order to achieve the fair and efficient adjudication of cases promised by the Federal Rules.²³⁹

Arguing for a broader reading of *Hurn*, Judge Clark noted that it contained the elements of a flexible approach to supplemental jurisdiction that would permit joinder so long as some "identity of operative

action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.").

235. See, e.g., *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 325 (1938); *Woody v. Sterling Aluminum Prods., Inc.*, 365 F.2d 448, 456 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967); *Runbaugh v. Winifrede R.R.*, 331 F.2d 530, 539 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964); *Brown & Root, Inc. v. Gifford-Hill & Co.*, 319 F.2d 65, 67-68 (5th Cir. 1963); *Moynahan v. Pari-Mutuel Employees Guild, Local 280*, 317 F.2d 209, 211-12 (9th Cir.), *cert. denied*, 375 U.S. 911 (1963); *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 215 (6th Cir. 1961); *Zalkind v. Scheinman*, 139 F.2d 895, 902-03 (2d Cir. 1943), *cert. denied*, 322 U.S. 738 (1944); *Musher Found. v. Alba Trading Co.*, 127 F.2d 9, 10 (2d Cir.), *cert. denied*, 317 U.S. 641 (1942). Some judges, however, rejected a pure factual identity test and used more flexible approaches in searching for a factual nexus between federal and nonfederal claims. See, e.g., *Strachman v. Palmer*, 177 F.2d 427, 431-33 (1st Cir. 1949) (Magruder, C.J., concurring).

236. FED. R. CIV. P. 82 provides that the Federal Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts." See *infra* text accompanying note 402.

237. *Zalkind v. Scheinman* typifies this view:

From the point of view of convenience to plaintiffs and "judicial economy," there is indeed much to be said in favor of the proposal generously to extend the *Oursler* doctrine. But this court cannot indulge in such generosity until the Supreme Court authorizes us to do so. . . . Patently, the Supreme Court has, in this field, felt the constraint of constitutional and statutory limitations which often interfere with convenient and desirable practices.

139 F.2d 895, 902-03 (2d Cir. 1943) (footnotes omitted), *cert. denied*, 322 U.S. 738 (1944).

238. In 1935, along with James Moore, Judge Clark authored an influential law review article that spurred the development of the Federal Rules of Civil Procedure. See Clark & Moore, *A New Federal Civil Procedure* (pt. 1), 44 YALE L.J. 387 (1935). As a result of his work, he was designated the reporter for the Advisory Committee on Rules of Civil Procedure for the United States Courts. See Order of June 3, 1935, 295 U.S. 774. Ultimately, his draft was enacted into law with minor changes. See Order of Dec. 20, 1937, 302 U.S. 783.

Even after his appointment to the bench, Clark actively continued the academic pursuit of civil procedure. In 1947, he revised his treatise on code pleading to reflect advances made by the Federal Rules. In the treatise, he criticized *Hurn v. Oursler* and its progeny for restricting supplemental jurisdiction, and he advocated permitting joinder in federal court when a nonfederal claim either shared an operative fact with a federal claim or could be proved by overlapping testimony. See C. CLARK, *supra* note 226, § 71, at 465-66 (2d ed. 1947).

239. See FED. R. CIV. P. 1.

facts"²⁴⁰ between federal and nonfederal claims could be found. He pointed to the unnecessary narrowness of the *Hurn* rule, which was based on outmoded pleading rules, and urged recognition of the current notions of judicial efficiency evidenced by the Federal Rules. Judge Clark reasoned that supplemental jurisdiction would allow the joinder of federal and nonfederal claims sharing a "fundamental core" of facts constituting the case between the parties.²⁴¹ He stopped short, however, of advocating either the unlimited joinder permitted by the Federal Rules or even the more limited—though quite liberal—"same transaction or occurrence" tests found in them.²⁴² Instead, he proposed the adoption of a different joinder approach, focusing on factual overlap, though not identity, between federal and nonfederal claims. This approach would encourage more expansive joinder without doing violence to the *Hurn* factual relatedness approach—a wise course for one advocating reinterpretation of a Supreme Court opinion.²⁴³

Although the Second Circuit did not adopt Judge Clark's reasoning,²⁴⁴ his views clearly influenced the Supreme Court in *Gibbs*. The *Gibbs* opinion, written by Justice Brennan, takes note of the changes wrought by the Federal Rules and the unnecessary narrowness of the *Hurn* rule.²⁴⁵ Following Clark's lead, however, *Gibbs* opts for a revision of the *Hurn* test rather than a totally new standard. Accordingly, *Gibbs* retains a fact relatedness requirement, and rather than adopting

240. See *Lewis v. Vendome Bags, Inc.*, 108 F.2d 16, 19 (2d Cir. 1939) (Clark, J., dissenting), cert. denied, 309 U.S. 660 (1940).

241. *Musher Found. v. Alba Trading Co.*, 127 F.2d 9, 12 (2d Cir.), cert. denied, 317 U.S. 64 (1942) (Clark, J., dissenting). See also C. CLARK, *supra* note 226, § 71, at 466 (2d ed. 1947).

242. Under the Federal Rules, once parties have met the threshold jurisdictional requirement for one claim, they may assert *all* claims—whether factually related or not—held at the time of the pleading. See FED. R. CIV. P. 13(b); FED. R. CIV. P. 18(a) ("A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join . . . as many claims . . . as he has against an opposing party.").

Additionally, the Rules specifically allow for other types of joinder in which the claims have a loose factual relationship; that is, they must arise from the same "transaction or occurrence." See, e.g., FED. R. CIV. P. 13(a), 13(g), 14, 20; see also *infra* text accompanying notes 247-50. The combination of rule 18(a) with the transactional joinder rules makes virtually unlimited joinder possible.

243. It is also possible that Judge Clark intentionally used "operative facts" in order to avoid confusion with the "transaction or occurrence" fact relatedness test used by the Federal Rules. In *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926), the Supreme Court narrowly construed the word "transaction" in former Equity Rule 30, the precursor to FED. R. CIV. P. 13(a). Moreover, in *Hurn*, the Supreme Court expressly relied on *Moore's* narrow construction of "transaction." See 289 U.S. 238, 242 (1933). Given the Supreme Court's narrow view of "transaction" in *Moore*, Clark might have intentionally chosen a different phrase to avoid potential limits caused by the Court's harsh treatment of "transaction."

244. See *Zalkind v. Scheinman*, 139 F.2d 895 (2d Cir. 1943), cert. denied, 322 U.S. 738 (1944); *Musher Found. v. Alba Trading Co.*, 127 F.2d 9 (2d Cir.), cert. denied, 317 U.S. 641 (1942).

245. *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966).

the "same transaction or occurrence" language of the Federal Rules, it embraces Clark's "operative facts" formulation.

The *Gibbs* approach to fact relatedness—which cites the Federal Rules but adopts a different test for measuring joinder²⁴⁶—has led to varying interpretations of "common nucleus" by courts and commentators. On the one hand, courts that focus on *Gibbs*' apparent retention of a "facts" approach, while adopting widely differing requirements of fact relatedness, generally have conditioned supplemental jurisdiction on finding some degree of factual overlap between federal and nonfederal claims. In other words, some portion of the evidence needed to make out the federal claim is also required to make out the nonfederal claim.²⁴⁷ On the other hand, courts that focus on *Gibbs*' apparent recognition of the influence of the Federal Rules have adopted a transactional approach to supplemental jurisdiction, one that permits joinder of claims containing only the "loosest" factual connection but having a sufficiently close logical relationship to afford the litigants substantial saving in time and effort if tried together.²⁴⁸

Given *Gibbs*' rejection of the *Hurn* approach, its recognition of the trend toward judicial economy evidenced by the Federal Rules, and its apparent coining of the phrase "common nucleus of operative fact," it

246. *Id.* at 725.

247. Some courts have required a substantial evidentiary overlap. *See, e.g.,* *Ferguson v. Mobil Oil Corp.*, 443 F. Supp. 1334, 1340-42 (S.D.N.Y. 1978) (denying joinder of claims against employer who discharged and blacklisted employee), *aff'd without opinion*, 607 F.2d 995 (2d. Cir. 1979); *Wilder v. Irvin*, 423 F. Supp. 639, 642-43 (N.D. Ga. 1976) (denying joinder despite factual overlap because different evidence required to prove nonfederal claim); *Fanning v. School Bd.*, 395 F. Supp. 18, 23 (W.D. Okla. 1975) (denying joinder for insufficient factual overlap, while conceding that claims arose from same transaction).

Other courts have apparently required little factual overlap. *See, e.g.,* *Beck v. Athens Bldg. Loan & Sav. Ass'n*, 65 F.R.D. 691, 696 (M.D. Pa. 1974) (*Gibbs* requires "only a loose factual connection"); *Pennsylvania v. Brown*, 260 F. Supp. 323, 335 (E.D. Pa. 1966), *vacated in part and remanded*, 373 F.2d 771 (3d Cir. 1967) (joinder permitted despite different elements of proof for state claim).

248. *See, e.g.,* *Kimbrough v. O'Neil*, 523 F.2d 1057, 1062-63 (7th Cir. 1975) (Stevens, J., concurring), *aff'd on reh'g en banc*, 545 F.2d 1059 (1976); *Hudak v. Economic Research Analysts, Inc.*, 499 F.2d 996, 1001 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); *Blake v. Town of Del. City*, 441 F. Supp. 1189, 1204 (D. Del. 1977).

The Federal Rules employ a transactional approach to joinder. *See* FED. R. CIV. P. 13(a), 13(g), 14(a), 24(a). "Transaction" in the Federal Rules has generally been given a liberal interpretation, *Warsawsky & Co. v. Arcata Nat'l Corp.*, 552 F.2d 1257, 1261 (7th Cir. 1977); 6 WRIGHT & MILLER, *supra* note 57, § 1410, at 40, that requires only that trial of separate claims would involve a saving in time and effort by the parties. *See* *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961). This interpretation has strongly influenced the exercise of supplemental jurisdiction. *See, e.g.,* *Vernon J. Rockler & Co. v. Minneapolis Shareholders Co.*, 69 F.R.D. 1, 4 (D. Minn. 1975) ("transaction" encompasses a series of events from which arise claims with a logical relationship); *United Fruit Co. v. Standard Fruit & S.S. Co.*, 282 F. Supp. 338, 339 (D. Mass. 1968) ("transaction" includes logically related acts of parties); *cf.* *Beck v. Athens Bldg. Loan & Sav. Ass'n*, 65 F.R.D. 691, 696 (M.D. Pa. 1974) (*Gibbs* requires only a "loose factual connection").

seems that the "transactional" approach more closely adheres to the intent of *Gibbs*. This approach would equate a "common nucleus of operative fact" with the fact relatedness language employed in the Federal Rules—the same "transaction or occurrence"²⁴⁹—and permit supplemental jurisdiction over a nonfederal claim where the facts making up that claim have a "logical relationship" to those making up a federal claim in the case.²⁵⁰

It has been asserted that if the *Gibbs* doctrine is justified by considerations of judicial economy, a greater factual overlap than a loose "logical relationship" is necessary, for little efficiency is gained by trying claims together that arise from only tangentially related events.²⁵¹ But this argument fails because of two erroneous assumptions: first, that no saving is made by trying loosely related claims together in one action;²⁵² second, that the constitutional power to exercise supplemental jurisdiction exists for the sole purpose of judicial economy.²⁵³ In fact, the "economy" rationale of *Gibbs*, insofar as it focuses on fact relatedness, reflects statutory or judicial concerns.²⁵⁴ As *Osborn* and its progeny make clear, supplemental jurisdiction rests on far broader concerns: preserving the integrity of federal jurisdiction, granting those with federal claims unimpeded access to a federal forum, and giving federal courts the flexibility to resolve whole "cases"²⁵⁵ in appropriate circumstances.²⁵⁶

2. The Ordinary Expectation Requirement

In an enigmatic passage, *Gibbs* states that there is judicial power to exercise supplemental jurisdiction "if, considered without regard to their federal or state character, a plaintiff's claims are such that he

249. See *supra* note 248.

250. See *id.*

251. See Schenkier, *supra* note 57, at 269 (If the purpose of supplemental jurisdiction is "the facilitation of judicial economy and convenience, then the requirement of evidentiary overlap would make sense. The less the overlap, the less is the gain in economy derived from joinder.").

252. In fact, the Federal Rules appear to be premised on the belief that the opportunity to resolve all claims between parties will secure fair and efficient adjudication of entire controversies. See FED. R. CIV. P. 1, 18(a). As stated by the Advisory Committee: "The Rules 'proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common.'" FED. R. CIV. P. 18(a) 1966 advisory committee note (quoting Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 13 (1938)).

253. Schenkier, *supra* note 57, at 269.

254. As this Article demonstrates below, see *infra* text accompanying notes 297-351, the *Gibbs* fact relatedness requirement is not constitutionally compelled. Consequently, the requirement must have a statutory or other nonconstitutional source. I intend to explore the statutory requirements for pendent and ancillary jurisdiction in a future article.

255. See *supra* notes 3 & 6; *supra* text accompanying notes 19-24.

256. See *supra* note 6.

would ordinarily be expected to try them all in one judicial proceeding.”²⁵⁷ Whereas *Gibbs*’ substantiality and common nucleus requirements have received ample judicial construction and commentary,²⁵⁸ its “ordinarily be expected to try” language has received only scant attention,²⁵⁹ despite the patent ambiguity of its language. Moreover, the uncertain relationship between the “ordinarily be expected to try” language and the “common nucleus” language adds to the ambiguities.²⁶⁰

The difficulty of construing the “ordinarily be expected to try” language becomes apparent when one attempts to use it to test the permissibility of joining two claims. A few courts and influential commentators have suggested that the “ordinarily be expected to try” test is an independent barrier to assertion of supplemental jurisdiction.²⁶¹ Yet their position is dubious because the phrase has rarely been applied in other than a conclusory fashion.²⁶²

A review of the court decisions interpreting *Gibbs* does not resolve these problems, since most cases ignore the “ordinarily be expected to try” phrase,²⁶³ cite it without analysis,²⁶⁴ or subsume it under the more

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

258. *See supra* notes 57-58.

259. *See, e.g.*, *Reyes v. Edmunds*, 416 F. Supp. 649, 651 (D. Minn. 1976); *Eidschun v. Pierce*, 335 F. Supp. 603, 608 (S.D. Iowa 1971); 13 WRIGHT & MILLER, *supra* note 57, § 3567, at 445; Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 764-65 (1972).

260. *See infra* text accompanying notes 280-96.

261. *See, e.g.*, *Tower v. Moss*, 625 F.2d 1161, 1163 n.1 (5th Cir. 1980); *Almenares v. Wyman*, 453 F.2d 1075, 1083 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); *Beverly Hills Nat'l Bank & Trust Co. v. Compania De Navegacion Almirante*, 437 F.2d 301, 306 (9th Cir.), *cert. denied*, 402 U.S. 996 (1971); 13 WRIGHT & MILLER, *supra* note 57, § 3567, at 445; Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs — Federal Question and Diversity Cases*, 62 VA. L. REV. 194, 201 & n.40 (1976).

262. In fact, in its proposals on supplemental jurisdiction, the American Law Institute eliminated the “expected to try” test completely, *see* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURT § 1313 (1968) (keying supplemental jurisdiction to the nonfederal claim sharing the same transaction or occurrence or series of transactions or occurrences as the federal claim). *See also infra* text accompanying notes 280-96.

263. *Jackson v. Stinchcomb*, 635 F.2d 462, 470-71 (5th Cir. 1981); *Silva v. Vowell*, 621 F.2d 640, 645 (5th Cir. 1980), *cert. denied sub nom. Johnston v. Silva* (1981), 449 U.S. 1125 (1981); *Louise B. v. Coluatti*, 606 F.2d 392, 399 (3d Cir. 1979); *Rosario v. Amalgamated Ladies Garment Cutters' Union, Local 10*, 605 F.2d 1228, 1247 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); *Ortiz v. United States Gov't*, 595 F.2d 65, 71 (1st Cir. 1979); *Hamilton v. Chaffin*, 506 F.2d 904, 909 (5th Cir. 1975); *Burton v. Waller*, 502 F.2d 1261, 1265 n.1 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420, 427 (3d Cir. 1968), *aff'd in part and rev'd in part*, 463 F.2d 470 (3d Cir. 1972).

264. *Uptown People's Community Health Servs. Bd. v. Board of Comm'rs*, 647 F.2d 727, 731-32 (7th Cir.), *cert. denied*, 454 U.S. 866 (1981); *Tower v. Moss*, 625 F.2d 1161, 1163 n.1 (5th Cir. 1980); *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 561 (2d Cir. 1978); *Florida E. Coast Ry. v. United States*, 519 F.2d 1184, 1193-94 (5th Cir. 1975); *Almenares v. Wyman*, 453 F.2d 1075, 1083 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); *Beverly Hills Nat'l Bank & Trust Co. v. Compania de Navegacion Almirante*, 437 F.2d 301, 306 (9th Cir.), *cert. denied*, 402 U.S. 996 (1971);

easily applied "common nucleus" phrase.²⁶⁵ The phrase, however, cries out for further analysis.

The failure to give meaning to the phrase "ordinarily be expected to try" results from the difficulty of considering the phrase independently from the "common nucleus" test. Moreover, the phrase is susceptible of varied meanings. The word "try" could be construed to mean either the submission of facts and legal contentions to the judicial process or the actual adjudication of those facts and contentions.²⁶⁶ The former meaning focuses on the ordinary expectation that a litigant would *bring* the claims together; the latter focuses on the ordinary expectation that the trier of fact would *hear* the claims together.

The phrase "ordinarily be expected to try" them all in one judicial proceeding" cannot be construed as requiring a judgment whether claims would actually be adjudicated before a single trier of fact.²⁶⁷ Such an interpretation flies in the face of the *Gibbs* opinion. This language appears during *Gibbs*' threshold treatment of jurisdictional power.²⁶⁸ Such jurisdictional decisions are invariably made at the pleadings stage of a case.²⁶⁹ Hence, interpreting "ordinarily be expected to try" as a statement about actual trial together, a judgment necessarily made subsequent to the pleading stage, would be inconsis-

Roberson v. Wood, 464 F. Supp. 983, 987-88 (E.D. Ill. 1979); Hall v. Security Planning Servs., Inc., 462 F. Supp. 1058, 1060 (D. Ariz. 1978).

265. Trustees of Retirement Benefit Plan v. Equibank, N.A., 487 F. Supp. 58, 61 (W.D. Pa. 1980) ("Do the state and federal claims derive from a common nucleus of operative fact, so that a plaintiff would ordinarily be expected to try both claims in one proceeding?") (emphasis added), *dismissed without opinion*, 639 F.2d 772 (3d Cir. 1980); New Watch-Dog Comm. v. New York City Taxi Drivers Union, Local 3036, 438 F. Supp. 1242, 1247 (S.D.N.Y. 1977) (power exists if there is "a sufficiently common nucleus . . . to justify the conclusion that 'considered without regard to their federal or state character, [plaintiffs'] claims are such that [they] would ordinarily be expected to try them in one judicial proceeding'") (quoting *Gibbs*, 383 U.S. at 725); *In re Penn Cent. Sec. Litig.*, 367 F. Supp. 1158, 1176 (E.D. Pa. 1973).

266. See WEBSTER'S NEW COLLEGIATE DICTIONARY 1256 (1976) ("Try" means "to put to test or trial" or "to examine or investigate judicially.").

267. One district court, however, has apparently made such an interpretation. In *Eidschun v. Pierce*, 335 F. Supp. 603 (S.D. Iowa 1971), the court stated:

It is . . . quite clear that should all of these claims have met federal jurisdictional requirements independently, this Court would have expected, indeed demanded under Federal Rule of Civil Procedure 42(a), that they be tried in one judicial proceeding.

Thus, the court has the *power* to hear the pendent claims

Id. at 608 (emphasis in original). Although the court's ambiguous reference to consolidation under FED. R. Civ. P. 42(a) might refer to consolidated pretrial proceedings, *because* the claims in the case *were* brought together, it appears that the court was focusing on actually *hearing* state and federal claims in one trial before the same trier of fact. Significantly, the court made no attempt to explain its certainty that the claims would be tried together.

268. *United Mine Workers v. Gibbs*, 383 U.S. 715, 721 (1966).

269. See, e.g., *Williams v. Zbaraz*, 448 U.S. 358, 367-68 (1980); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966); 5 WRIGHT & MILLER, *supra* note 57, § 1349, at 539 (jurisdictional questions should be adjudicated early in the action).

tent with the structure of the *Gibbs* opinion. Moreover, *Gibbs* addresses the question of whether all claims should be heard by a single trier of fact in the portion of the opinion dealing with the discretionary exercise of pendent jurisdictional power.²⁷⁰ Therefore, it is unlikely that the use of the word "try" in a discussion of jurisdictional power is intended to incorporate this discretionary question. Accordingly, *Gibbs* can be understood to mean that judicial power extends to claims that would "ordinarily be expected to be [brought] in one judicial proceeding."

An additional problem is raised by *Gibbs*' use of "ordinarily be expected to try." The words appear to call for an empirical judgment whether persons would join the claims in question. Yet *Gibbs* does not suggest how this empirical observation may be made. Obviously, if courts generally permit the joinder of such claims, plaintiffs will ordinarily expect to have similar claims tried in one proceeding; if courts generally do not permit the joinder, plaintiffs ordinarily will have no such expectation. Thus, the sum of prior judicial decisions will always predetermine the results of the "ordinarily be expected to try" test.

Professors Wright and Miller suggest that the phrase "ordinarily be expected" refers "to what res judicata would require if the claims were all federally created or all state created."²⁷¹ In essence, this would mean that a claim would ordinarily be expected to be brought together with another claim only if the first claim would be barred from retrial if omitted. To paraphrase the words of Judge Friendly in another context, this is a test better used to lead to inclusion of matters within supplemental jurisdiction rather than exclusion from jurisdiction.²⁷² As discussed below,²⁷³ making "ordinarily be expected to try" an independent predicate to supplemental jurisdiction, as Professors Wright and Miller suggest,²⁷⁴ and equating that predicate with res judicata—might emasculate *Gibbs* and reinstate the *Hurn* test,²⁷⁵ because the res judicata doctrine, however much expanded in current jurisprudence, is still linked in many minds to the phrase "cause of action,"²⁷⁶ a phrase

270. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). This bifurcation of the questions of jurisdictional power and discretion to exercise that power is mirrored in the Federal Rules pertaining to joinder, which separate the power to permit joining claims and parties, see FED. R. CIV. P. 13(a), 13(b), 13(g), 13(h), 14, 18, 19, 20(a), 22, 24, from the discretion to permit their actual litigation together, see FED. R. CIV. P. 20(b), 42(b).

271. 13 WRIGHT & MILLER, *supra* note 57, § 3567, at 445.

272. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

273. See *infra* text accompanying notes 283-90.

274. 13 WRIGHT & MILLER, *supra* note 57, § 3567, at 445 ("It seems apparent that the requirements of a common nucleus of operative fact and that the claims be such that they ordinarily would be expected to be tried in a single proceeding are cumulative.").

275. *Hurn v. Oursler*, 289 U.S. 238, 246 (1933).

276. See *infra* notes 287-88.

that *Gibbs* discards.²⁷⁷

"Ordinarily be expected to try" can be given a plausible reading. The courts do have ready access to a compilation consisting of generations of empirical observations of litigants' actions and judicial responses—the Federal Rules of Civil Procedure. By tying the words "ordinarily be expected" to judgments about real-world litigation made by the Supreme Court and accepted by Congress, "ordinarily be expected to try" takes on a clear and understandable meaning. Claims may be joined if "without regard to their federal or state character, [they] are such that [federal procedural rules would permit them to be brought] in one judicial proceeding."²⁷⁸ Of course, this "refinement" of *Gibbs*' test makes *Gibbs*' language virtually unrecognizable. Nonetheless, this reading explains the failure of the courts to give independent significance to the "ordinarily be expected to try" phrase,²⁷⁹ and accounts for the conclusory treatment it is given: if the claims may be brought together, one expects them to be brought together.

3. The "But if" Clause

Up to this point, this Part of the Article has discussed "common nucleus" and "ordinarily be expected to try" as if they established independent tests. But this approach is too literal, for legal interpretation calls for a review of an opinion's holding, its language, and its various parts. Accordingly, this Section focuses on the articulation between *Gibbs*' "common nucleus" and "ordinarily be expected to try" phrases—the words "but if":

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 . . . there is power in federal courts to hear the whole.²⁸⁰

The words "but if" create a difficult ambiguity in the fact relatedness test. On its face, the use of "but if" to join the "common nucleus" and "ordinarily be expected to try" clauses seems to mandate disjunctive tests for fact relatedness: the nonfederal and federal claims may be heard together if they derive from a common nucleus of operative fact,

277. *United Mine Workers v. Gibbs*, 383 U.S. 715, 724-25 (1966).

278. One commentator has read the "expected to try" language in this way. See Baker, *supra* note 259, at 765 ("In general, *Gibbs* says that a court has jurisdiction (power) to hear a whole 'case'—a 'case' within the ordinary expectations of litigants as measured by the Federal Rules of Civil Procedure.") (emphasis omitted). This Article later proposes a similar test for the constitutional limits to supplemental jurisdiction, see *infra* text accompanying notes 358-415, though it does not seem likely that *Gibbs* meant to tie constitutional power to the Federal Rules of Civil Procedure.

279. See *supra* text accompanying notes 263-65.

280. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (emphasis in original).

or if they would ordinarily be expected to be tried together in one judicial proceeding.²⁸¹ This interpretation, however, has been soundly rejected by most commentators and courts. Instead, they have suggested that common nucleus and expectation of trial together form cumulative requirements for the exercise of supplemental jurisdiction.²⁸² Under this view, supplemental jurisdiction over a nonfederal claim exists only when there is first, the presence of a federal claim sharing a common factual basis with the nonfederal claim, and second, the expectation that the claims would ordinarily be tried together.

There are significant problems, however, with either an alternative or cumulative reading of the *Gibbs* fact relatedness language. As discussed above, courts have equated the phrase "ordinarily be expected to try in one judicial proceeding" with "permitted to be brought" in one proceeding.²⁸³ This interpretation makes a disjunctive reading of the "but if" clause unlikely, for it would render the common nucleus alternative essentially superfluous; it seems clear that one ordinarily expects that claims arising from a common factual basis will be tried together.²⁸⁴ However, if the approach of Professors Wright and Miller is taken, a disjunctive reading might be sensible and consistent with *Gibbs*: res judicata would set a limit on permissible joinder that could be expanded to allow joinder of claims sharing a common nucleus of operative fact, but not covered by res judicata. This approach, though, suffers from making the "ordinarily be expected to try" clause invariably subordinate to the "common nucleus of operative fact" clause, since res judicata is often keyed to a finding that claims are encom-

281. The conjunction "but" means "outside, without, except that," WEBSTER'S NEW COLLEGIATE DICTIONARY 150 (1976), and when used with the word "if," means "unless," *id.* With this understanding of *Gibbs*' words "but if," it could be argued that the presence of either a "common nucleus" or an ordinary expectation of trial together would permit supplemental jurisdiction. See Baker, *supra* note 259, at 764-65.

282. See 13 WRIGHT & MILLER, *supra* note 57, § 3567, at 445; Schenkier, *supra* note 57, at 267-68; Uptown People's Community Health Servs. Bd. v. Board of Comm'rs, 647 F.2d 727, 732 (7th Cir.), *cert. denied*, 454 U.S. 866 (1981); Naylor v. Case & McGrath, Inc., 585 F.2d 557, 561 (2d Cir. 1978); Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1193-94 (5th Cir. 1975); Almenares v. Wyman, 453 F.2d 1075, 1083 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); Beverly Hills Nat'l Bank & Trust Co. v. Compania De Navegacione Almirante, 437 F.2d 301 (9th Cir.), *cert. denied*, 402 U.S. 996 (1971); Ferguson v. Mobil Oil Corp., 443 F. Supp. 1334, 1340 (S.D.N.Y. 1978), *aff'd without opinion*, 607 F.2d 995 (2d Cir. 1979); Comment, *Pendent Jurisdiction and Minimal Diversity*, 59 IOWA L. REV. 179, 182 (1973); Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 658 (1968). *Contra* Baker, *supra* note 259 at 764-65 (requirements viewed as alternative).

283. See *supra* text accompanying notes 277-79.

284. Recent scholarly writing has emphasized the current trend toward expecting to try all matters arising from the same transaction or occurrence in one proceeding. See RESTATEMENT (SECOND) OF JUDGMENTS § 24, at 196-209 (1982). Moreover, both the cases, *see, e.g.*, cases cited *supra* notes 263-65, and the commentators writing in the supplemental jurisdiction area, *see, e.g.*, Schenkier, *supra* note 57, at 267-68, assume that claims sharing a common nucleus of operative fact will ordinarily be tried together.

passed within the same cause of action, and since *res judicata* currently encompasses a narrower range of claims than a "common nucleus of operative fact."²⁸⁵

Reading "common nucleus" and "ordinarily be expected to try" as cumulative requirements raises similar problems. First, turning "but if" into "and" requires verbal acrobatics of the highest order. Second, if the "ordinarily be expected to try" requirement is equated with "permitted to be brought," the requirement is superfluous, for it would always be satisfied by *Gibbs*' second test—showing a "common nucleus of operative fact."²⁸⁶ It would be senseless for *Gibbs* to have created an independent third requirement for jurisdiction that would always be met by fulfilling the second requirement. Recognition of this assertion might have led Professors Wright and Miller to tie their interpretation of "ordinarily be expected to try" to *res judicata*. Their interpretation of the "ordinarily be expected to try" requirement is inconsistent with the intent of *Gibbs*, however, if, as they suggest, this requirement is treated as an additional, independent requirement.

Res judicata bars relitigation of claims that either were tried or could have been tried in a prior finally adjudicated action.²⁸⁷ Historically, the measure of when such claims "could have been brought" was whether they were part of the same, previously tried "cause of action."²⁸⁸ Insofar as courts continue to focus on the outmoded phrase "cause of action,"²⁸⁹ *res judicata* resembles the supplemental jurisdic-

285. See Schenkier, *supra* note 57, at 272-75. This approach would make sense, however, if the modern view of *res judicata*, see *infra* note 288, were employed.

286. See Schenkier, *supra* note 57.

287. *Brown v. Felsen*, 442 U.S. 127, 131 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 19, at 161 (1982).

288. Traditionally, *res judicata* was tied to "cause of action." See RESTATEMENT OF JUDGMENTS §§ 47-48, at 181-93 (1942) (final judgment precludes subsequent litigation on the same "cause of action"). Thus, *res judicata* was premised on an identity of legal theories of relief; a plaintiff failing to recover under one theory could sue again on a different theory (cause of action), even if each action arose from the same incident. This approach became anachronistic when the Federal Rules of Civil Procedure, which permitted liberal joinder of transactionally related claims, were adopted. To conform the law of finality to current procedural systems, the second *Restatement of Judgments* has replaced the "cause of action" test with a "claim" test that makes transactionally related events part of the same claim and bars relitigation of any part of the claim. See RESTATEMENT (SECOND) OF JUDGMENTS § 20, at 171 (1982); *id.* § 24, at 197 ("The transaction is the basis of the litigative unit or entity which may not be split.").

289. Although the second *Restatement of Judgments* has proposed a *res judicata* test that would encompass any *Gibbs*' common nucleus claim, a majority of states still employ the traditional "cause of action" terminology in *res judicata* decisions. See, e.g., *Plenix-Girard Bank v. Cobb*, 416 So. 2d 748, 749 (Ala. 1982); *Norman v. Nichiro Gyogyo Kaisha, Ltd.*, 645 P.2d 191, 197 (Alaska 1982); *Salt River Project v. Industrial Comm'n*, 128 Ariz. 541, 543, 627 P.2d 692, 694 (1981); *Bower v. Danna*, 632 S.W.2d 234, 235 (Ark. Ct. App. 1982); *Uniroyal, Inc. v. Board of Tax Review*, 182 Conn. 619, 633, 438 A.2d 782, 789 (1981); *Cappello v. Patrician Towers, Inc.*, No. 102, 1980 (Del. Jan. 14, 1981) (available Sept. 1, 1983, on LEXIS, Del library, Sup file); *McNeal v. Paine, Webber, Jackson & Curtis Inc.*, 249 Ga. 662, 663, 293 S.E.2d 331, 332 (1982); *Westway*

tion test used by *Hurn* and apparently abandoned by *Gibbs*.²⁹⁰ To make a finding of distinct grounds of one cause of action a predicate to exercising supplemental jurisdiction would confound *Gibbs*' intent to liberalize supplemental jurisdiction and render its common nucleus test nugatory.

Courts have not, however, adopted a *res judicata* reading of the "ordinarily be expected to try" clause.²⁹¹ Instead, they generally have

Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 401 (Iowa 1982); *Lamb v. Lamb*, 411 So. 2d 1, 1-2 (La. 1982); *Mackall v. Zayre Corp.*, 293 Md. 221, 228, 443 A.2d 98, 102 (1982); *M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Comm'n*, 386 Mass. 64, 69-70, 434 N.E.2d 986, 989-90 (1982); *Biloxi Dev. Comm'n v. Frey*, 401 So. 2d 716, 718 (Miss. 1981); *American Polled Hereford Ass'n v. Kansas City*, 626 S.W.2d 237, 241 (Mo. 1982); *Coleman v. State*, 633 P.2d 624, 629 (Mont. 1981), *cert. denied*, 455 U.S. 983 (1982); *Gaspar v. Flott*, 209 Neb. 260, 263, 307 N.W.2d 500, 502 (1981); *Horvath v. Gladstone*, 97 Nev. 594, 596, 637 P.2d 531, 533 (1981); *Town of Durham v. Cutter*, 121 N.H. 243, 246, 428 A.2d 904, 906 (1981); *Romero v. State*, 97 N.M. 569, 572, 642 P.2d 172, 175 (1982); *Zarcone v. Perry*, 78 A.D.2d 70, 77-78, 434 N.Y.S.2d 437, 441 (1980), *aff'd*, 55 N.Y.2d 782, 431 N.E.2d 974, 447 N.Y.S.2d 248 (1981), *cert. denied*, 456 U.S. 979 (1982); *Johnson's Island, Inc. v. Board of Township Trustees*, 69 Ohio St. 2d 241, 244, 431 N.E.2d 672, 674 (1982); *Schell v. Walker*, 305 N.W.2d 920, 922 (S.D. 1981); *Bradshaw v. Kershaw*, 627 P.2d 528, 531 (Utah 1981); *Greene v. Warrenton Prod. Credit Ass'n*, 223 Va. 462, 465-66, 291 S.E.2d 209, 211-12 (1982); *Culinary Workers v. Gateway Cafe, Inc.*, 95 Wash. 2d 791, 794, 630 P.2d 1348, 1350 (1981), *cert. denied*, 103 S. Ct. 87 (1982); *Rife v. Woolfolk*, 289 S.E.2d 220, 222 (W. Va. 1982); *Pike v. Markman*, 633 P.2d 944, 947 (Wyo. 1981).

290. *Hurn*, it will be remembered, permitted supplemental jurisdiction over a separate state ground for relief contained in the same cause of action as a federal ground for relief. *Huru v. Oursler*, 289 U.S. 238, 245-47 (1933); see *supra* text accompanying notes 219-28. In *res judicata* terms, *Hurn* permitted jurisdiction over any claim which, in the absence of a jurisdictional barrier, would have been barred by *res judicata* from being brought in a subsequent lawsuit. *Gibbs* held that this approach was "unnecessarily grudging" in view of procedural advances made in the Federal Rules. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Although modern procedural rules have sought to expand *res judicata* to match this expansion in permissible joinder, see RESTATEMENT (SECOND) OF JUDGMENTS §§ 23-24 (1982), many courts have not yet abandoned the cause of action test, see *supra* note 289. Thus, to the extent that *res judicata* does not apply to a claim coming under the common nucleus umbrella, *Gibbs*' intent to liberalize *Hurn* is undermined. See *Gibbs*, 383 U.S. at 724-25.

There is even further reason to reject an equation between the *Gibbs* approach and *res judicata*. Even if one believes that a federal court would find federal *res judicata* law governed by the *Restatement's* standards, it is uncertain what the court would do if state law were more limited. Since any relitigation of a proposed pendent claim would probably take place in state court, it might be appropriate for the federal court to look to state *res judicata* law. In that case, the federal law on supplemental jurisdiction might become inextricably intertwined with state law—a result that *Gibbs* surely would have rejected.

291. However, one district court, relying on Professors Wright and Miller's treatise, dismissed a pendent state claim as outside its power because in its view *res judicata* would not have barred the future assertion of the state claim if it were omitted. *Reyes v. Edmunds*, 416 F. Supp. 649 (D. Minn. 1976). The plaintiff had asserted state and federal claims arising out of the search of her premises for a welfare application. The complaint asserted first that such searches were unreasonable under the United States Constitution, and second that the state agency had "illegally collected, stored and used information" in violation of state privacy law. *Id.* at 650. Even though these claims might have been deemed to have arisen from the same transaction or occurrence (the search of the plaintiff's premises), the court declined to make a judgment of the fact relatedness of the state and federal claims. *Id.* at 651. Instead, the court held:

[I]t is clear that the court lacks subject matter jurisdiction. Because the doctrine of *res*

ignored the difficulty caused by *Gibbs*' "but if" language, and either have not attempted to reconcile "common nucleus" with "ordinarily be expected to try," or have failed to give independent significance to the latter phrase.²⁹² Courts have not articulated a justification for ignoring the "ordinarily be expected to try" phrase, possibly because it is thought that *Gibbs* used that phrase as an appendage or example of the "common nucleus" test.²⁹³ According to this view, any redundancy made by equating "ordinarily be expected to try" with "common nucleus" was intentional, and the "but if" was merely an unfortunate grammatical slip.

It may well be impossible to conclude definitively whether "but if" is a disjunctive or conjunctive link between "common nucleus" and "ordinarily be expected to try," or whether it should be ignored entirely.²⁹⁴ Either a disjunctive or conjunctive reading seriously conflicts with the intent of the opinion. *Gibbs*' use of "common nucleus" calls for a fact relatedness test narrower than the unlimited joinder possible under the Federal Rules. To read "ordinarily be expected to try" in the light of the Federal Rules as an alternative means of obtaining supplemental jurisdiction would, therefore, erode *Gibbs*' facts approach. Similarly, any reading of "ordinarily be expected to try" as a cumulative requirement with "common nucleus" would raise interpretive problems. Equating "ordinarily be expected to try" with "permitted to be brought" would make the requirement superfluous, and equating it with *res judicata* would contradict *Gibbs*' intent to liberalize *Hurn*. Thus, so long as "common nucleus" and "ordinarily be expected to try" are both given constitutional significance, they are inconsistent if treated as independent jurisdictional requirements.

But if the two requirements have different sources—for example, if one requirement were constitutional and the other statutory or court-

judicata would not bar trying these claims separately even if they were all federally created or all state created, the "would ordinarily be expected to try them all in one judicial proceeding" branch of the *Gibbs* test has not been satisfied.

Id.

The *Reyes* case illustrates several inherent problems in Wright and Miller's suggestion that *res judicata* be used as a cumulative requirement with "common nucleus." First, as used by the courts, *res judicata* lags behind its expansive theoretical limits. Compare *Reyes v. Edmunds*, 416 F. Supp. 649, 651 (D. Minn. 1976), with RESTATEMENT (SECOND) OF JUDGMENTS §§ 23-24 (1982). Second, *Reyes* makes no effort either to analyze the requirements of *res judicata* or discuss the law applicable to the case. Because *Gibbs* does not clearly indicate which *res judicata* law should be referred to in applying the "expected to try" test, courts such as the *Reyes* court are apparently free to make their own judgments about what law to apply. Third, the rule of *Reyes* leaves future litigants with practically no guidance concerning the *res judicata* consequences of other joinder attempts of tangentially related state and federal claims.

292. See *supra* notes 263-65.

293. See *id.*

294. One commentator has suggested that "[t]here may be no satisfactory way to reconcile" this interpretational problem. Schenkier, *supra* note 57, at 268.

made—a two-step approach to the *Gibbs* fact relatedness test could be employed. This approach would make satisfaction of the broader test a threshold constitutional requirement for the exercise of any form of supplemental jurisdiction, and satisfaction of the narrower test a subsidiary requirement for the exercise of a particular type of supplemental jurisdiction. The predominant view is that the “ordinarily be expected to try” language in *Gibbs* is broader than its “common nucleus” language.²⁹⁵ Thus, in using a two-level approach to supplemental jurisdiction in cases of joinder of claims by plaintiffs—the particular exercise of jurisdiction at stake in *Gibbs*—the “ordinarily be expected to try” test (permitted to be brought under applicable rules of procedure) would be a constitutional threshold to jurisdiction, and “common nucleus” would be a subsidiary statutory barrier to joinder of claims.²⁹⁶

B. Source of the Fact Relatedness Requirement

However one resolves the ambiguities of *Gibbs*, it is apparent that the opinion makes fact relatedness a prerequisite to the exercise of jurisdiction. But if fact relatedness is a constitutional requirement, then it would seem that any assertions of federal jurisdiction outside the scope of this definition would be unconstitutional.²⁹⁷ However, several courts, including the Supreme Court, have upheld supplemental jurisdiction in many ancillary jurisdiction cases that do not meet the *Gibbs* fact relationship requirements. This Section reviews such apparently valid deviations from *Gibbs*' supposed constitutional requirements. Their existence undermines the conclusion that *Gibbs* sets any constitutional limits on supplemental jurisdiction based upon fact relatedness of claims. The Section begins with a review of three types of diversity actions in which fact relatedness is not a prerequisite to federal jurisdiction. It then analyzes one type of federal question jurisdiction—bankruptcy—in which fact relatedness is not required. It concludes with a discussion of two types of cases that can arise in either diversity or federal question actions.

1. Cases Involving Claims to Property

Along with *Osborn, Freeman v. Howe*²⁹⁸ is often viewed as a cornerstone of supplemental jurisdiction. The opinion severely weakens any contention that supplemental jurisdiction requires a “common nucleus of operative fact” between federal and nonfederal claims as a constitutional predicate for jurisdiction.

295. See Baker, *supra* note 259, at 765; Schenkier, *supra* note 57, at 268.

296. See *infra* text accompanying notes 352-415.

297. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 n.10 (1978); *Aldinger v. Howard*, 427 U.S. 1, 13 (1976).

298. 65 U.S. (24 How.) 450 (1861).

Prior to the lawsuit in *Freeman*, a New Hampshire resident had sued a Massachusetts corporation in a federal diversity action, seeking recovery of "certain demands."²⁹⁹ To secure judgment in the case, the plaintiff obtained a writ of attachment against the defendant. Freeman, the marshal for the United States circuit court, then executed the writ against some railroad cars owned by the defendant. Later, Howe, a Massachusetts citizen, brought a writ of replevin in state court against Freeman, seeking recovery of the cars as mortgagee of the federal defendant. The cars had been mortgaged by the federal defendant to secure a large debt owed to Howe. This debt was apparently unrelated to the subject of the federal action.³⁰⁰ Freeman's defense in the state replevin action rested on his assertion that the property was held by the federal court and could not be replevied in a state action. Howe argued that denying replevin would deprive him of a remedy since he could not sue the nondiverse federal defendant in federal court to obtain the property. The Massachusetts Supreme Judicial Court held for Howe. The United States Supreme Court reversed on appeal, rejecting Howe's arguments both that replevin in state court was necessary, and that the federal court had no jurisdiction over his claim against the nondiverse federal defendant. It stated the now unexceptional principle that persons with interests in property held in federal courts can make claims to the property even in the absence of diversity of citizenship, because such claims are within ancillary jurisdiction.³⁰¹ The Court suggested no requirement that an intervenor's claims must share a factual relationship with the underlying federal claim for a court to acquire ancillary jurisdiction.³⁰²

299. *Id.* at 453.

300. The Supreme Court did not describe the exact nature of the federal defendant's debt to Howe. Moreover, the Court did not speak of any factual relationship between the debt owed in the federal action and Howe's debt.

301. *Freeman v. Howe*, 65 U.S. (24 How.) at 460.

302. Several other ancillary jurisdiction cases are of like effect. See *In re Tyler*, 149 U.S. 164, 181 (1893); *Phelps v. Oaks*, 117 U.S. 236, 241 (1886); *Stewart v. Dunham*, 115 U.S. 61, 64 (1885); *Krippendorf v. Hyde*, 110 U.S. 276, 281-82 (1884). Today, the federal interpleader statute codifies the ability of individuals possessing adverse and unrelated claims to property—even individuals who are nondiverse with the plaintiff and not otherwise within federal jurisdiction—to litigate their claims in one case. See 28 U.S.C. §§ 1335, 1397 (1976); see also Chafec, *Interpleader in the United States Courts*, 41 YALE L.J. 1134, 1145-60 (1932) (discussing ancillary jurisdiction in interpleader cases). This statute would be subject to serious constitutional challenge if the *Gibbs* factual relationship requirement were constitutionally compelled.

Neither *Fulton Nat'l Bank v. Hozier*, 267 U.S. 276 (1925), nor *Christinas v. Russell*, 81 U.S. (14 Wall.) 69 (1872), undermines the conclusion of this Article that early property cases required no common nucleus of operative fact. In *Fulton*, the Court held that "no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." 267 U.S. at 280. This holding might be seen as calling for some sort of factual overlap; in fact, as the case makes clear, it is a rule that only requires that there be claims to an identical res, not claims based on

It might be contended that *Freeman* and its progeny are in fact "common nucleus" cases that seek an answer to the common question: Who is entitled to possess a piece of property? Thus, every claim to an identical res would involve either the same transaction (claims of ownership derived from one source) or series of transactions (various claims of ownership derived from different sources). Although this argument would stretch fact relatedness to the breaking point,³⁰³ it is not without some plausibility. Nonetheless, even if claims to a single res might be analogized to a "common nucleus of operative fact," another traditionally valid form of ancillary jurisdiction—receivership—may not be so analogized.

2. Receivership Actions

Typical of the receivership cases is *White v. Ewing*,³⁰⁴ in which a debtor was sued by a diverse creditor. The circuit court appointed a receiver to collect the debtor's assets and pay the debts owed by the debtor to all creditors filing claims with the receiver. The controversy in *White* involved the permissibility of a suit by the receiver to secure all of the debtor's assets, among them approximately 130 unliquidated lawsuits based on promissory notes received from several individuals arising from the sale of some of the debtor's property. Several of these unliquidated claims involved either amounts under the jurisdictional limit or potential defendants nondiverse to the receiver (or the debtor). Nonetheless, the Supreme Court held:

The Circuit Court obtained jurisdiction over the [defendant] by the filing of the original creditor's bill by [a diverse creditor] and by the appointment of a receiver, and any suit by or against such receiver . . . whether for the collection of [the defendant's] assets or for the defence of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties, or of the amount in controversy.³⁰⁵

The Court went on to state that for jurisdictional purposes it made no difference whether the receiver was sued by those making claims to a common res or whether he made independent claims to establish a

identical facts. *Id.* at 280. Despite dicta in *Russell* that seem to call for some relationship between federal and nonfederal claims, *see* 81 U.S. (14 Wall.) at 80, the case turns on the Court's holding that the intervenors in the case had not established their right to make a claim against the property that was the subject of the underlying suit, *id.* at 83.

303. The Federal Rules suggest that an interest relating to a "transaction" that is the subject of an action is different from an interest relating to "property" that is the subject matter of an action. Both rule 13(g) (cross-claims) and rule 24(a) (intervention) treat a claim to property as separate from a claim arising out of the same transaction or occurrence as another claim.

304. 159 U.S. 36 (1895).

305. *Id.* at 39.

res.³⁰⁶ This statement undercuts any supposition that the claim to property cases noted above³⁰⁷ in fact rest on an expansive common nucleus test; for even if one can draw a limited analogy between the common nucleus test and the "claim to res" cases, this analogy does not extend to the exercise of jurisdiction over a receiver's attempt to create a single res from several diverse sources.³⁰⁸ The only thing common to such cases is the common plaintiff. But as *Gibbs* and its progeny make clear, unrelated claims by a single plaintiff do not arise out of a common nucleus of operative fact merely because the same plaintiff is suing on each claim.³⁰⁹

3. *Aggregation of Claims to Meet the Amount in Controversy Requirement in Diversity Controversies*

Although article III of the Constitution permits federal courts to exercise jurisdiction over "Controversies . . . between Citizens of different States,"³¹⁰ diversity jurisdiction has always been limited by Congress to actions in which a certain monetary amount is in controversy.³¹¹ One particularly vexing problem in determining the amount in controversy in diversity suits has been whether a plaintiff may aggregate the amounts of separate claims against the defendant in order to meet the statutory amount.³¹² The long-accepted rule has permitted a plaintiff to combine any properly joined claims against a defendant to meet the amount in controversy requirement.³¹³ This practice helps

306. *Id.* at 38.

307. See *supra* text accompanying notes 298-302.

308. See *Riehle v. Margolies*, 279 U.S. 218, 223 (1929) ("The appointment of a receiver of a debtor's property . . . confers upon it, regardless of citizenship . . . federal jurisdiction to decide all questions incident to the preservation, collection and distribution of the assets."); *Pope v. Louisville & N.A. & C. Ry.*, 173 U.S. 573, 577 (1899); *Tcherepnin v. Franz*, 485 F.2d 1251, 1255-56 (7th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

309. However, if the "ordinary expectations" requirement is viewed as the sole constitutional element of the test, see *supra* text accompanying notes 294-96, these cases are constitutional.

310. U.S. CONST. art. III, § 2, cl. 1.

311. The first Congress instituted an amount in controversy requirement for diversity actions of more than \$500. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Subsequently, the amount in controversy requirement became more than \$2000. Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 552. Twenty-four years later, it became more than \$3000. Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091. Currently, the jurisdictional amount must exceed \$10,000. Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (codified at 28 U.S.C. § 1332 (1976)).

312. Professor Wright has suggested that the current status of "[t]he law on aggregation of claims to satisfy the requirement of amount in controversy is in a very unsatisfactory state." C. WRIGHT, *supra* note 4, § 36, at 196. Moreover, he states that it is "not altogether easy to say what the law is in this area," and "quite hard to say why it is as it seems to be." *Id.*

313. As stated by the Fourth Circuit in *Griffin v. Red Run Lodge, Inc.*, 610 F.2d 1198, 1204 (4th Cir. 1979) (*dicta*):

It is well established that where a plaintiff joins several claims against a defendant, and one of them satisfies the jurisdictional amount requirement, jurisdiction is present for all counts, including those for which the amount in controversy is patently less than [the

answer the question posed in this Section—whether the constitutional “case” or “controversy” clauses require a common nucleus of operative fact between jurisdictionally sufficient and jurisdictionally deficient claims.

The only apparent limit to aggregation is that the claims be “of such character that they may properly be joined in one suit.”³¹⁴ Thus, courts have not only permitted plaintiffs to join related claims against a single defendant,³¹⁵ but have also permitted aggregation of properly joined but factually distinct claims.³¹⁶ Since there is unlimited joinder of claims by a single plaintiff against a single defendant under rule 18(a) of the Federal Rules of Civil Procedure, the operation of the aggregation rule would seem to permit joinder of any claim held by a plaintiff who is diverse from a defendant.³¹⁷

required amount]. Even if no single claim is for an amount in excess of [the required amount], if the aggregate amount of all claims is in excess of [the required amount], jurisdiction exists for each count.

See also *Snyder v. Harris*, 394 U.S. 332, 335 (1969) (“Aggregation has been permitted [where] a single plaintiff seeks to aggregate two or more of his own claims against a single defendant.”); *Crawford v. Neal*, 144 U.S. 585 (1892); *Davis H. Elliott Co. v. Caribbean Utils. Co.*, 513 F.2d 1176 (6th Cir. 1975); *Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836 (4th Cir. 1974).

314. *Alberty v. Western Sur. Co.*, 249 F.2d 537, 538 (10th Cir. 1957); see *Pearson v. National Soc’y of Pub. Accountants*, 200 F.2d 897, 898 (5th Cir. 1953) (“It is conceded that the . . . claims may be joined. . . . That the claims may also be aggregated . . . is too clear for comment.”); *Gray v. Blight*, 112 F.2d 696, 700 (10th Cir.) (“The jurisdictional amount is the sum of all the claims which are properly joined.”), *cert. denied*, 311 U.S. 704 (1940); *Nickelson v. Nestles Milk Prods. Corp.*, 107 F.2d 17, 18 (5th Cir. 1939) (“Since he sought to recover the aggregate of . . . all counts, and might have done so, it is clear that the [requisite] amount . . . was involved.”); *Simecek v. United States Nat’l Bank*, 91 F.2d 214, 217 (8th Cir. 1937) (“where the plaintiff has several demands . . . which he may join . . . the aggregate of those demands . . . is the amount in controversy”); *Kimel v. Missouri State Life Ins. Co.*, 71 F.2d 921, 924 (10th Cir. 1934); see also *Adams v. State Farm Mut. Auto Ins. Co.*, 313 F. Supp. 1349, 1353 (N.D. Miss. 1970); *Tsavaridis v. T.J. Stevenson & Co.*, 165 F. Supp. 174, 176 (S.D.N.Y. 1958); *Hunter-Wilson Distilling Co. v. Foust Distilling Co.*, 84 F. Supp. 996, 998 (M.D. Pa. 1949), *aff’d in part and rev’d in part*, 181 F.2d 543 (3d Cir. 1950).

315. See, e.g., *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911); *Manufacturers Casualty Ins. Co. v. Coker*, 219 F.2d 631, 633-34 (4th Cir. 1955); *Liberty Mut. Ins. Co. v. Tel-Mor Garage Corp.*, 92 F. Supp. 445, 446 (S.D.N.Y. 1950).

316. *United States v. Louisville & N.R.R.*, 221 F.2d 698, 702 (6th Cir. 1955); *Pearson v. National Soc’y of Pub. Accountants*, 200 F.2d 897, 898 (5th Cir. 1953); *Cashmere Valley Bank v. Pacific Fruit & Produce Co.*, 33 F. Supp. 946, 948 (E.D. Wash. 1940); cf. *Bullard v. City of Cisco*, 290 U.S. 179, 189-90 (1933) (treating claims arising from the same transaction or series of transactions as if they were separate, but nonetheless permitting consolidation and aggregation); *Baltimore & O. Sw. R.R. v. United States*, 220 U.S. 94, 106 (1911) (same).

317. Professor Wright notes that aggregated claims are ordinarily factually related, but “the statement of the rule in a multitude of decisions has never treated this as relevant to whether aggregation should be permissible.” C. WRIGHT, *supra* note 4, § 36, at 196. He can find “no apparent reason why plaintiff should be able to sue on two unrelated claims in federal court when neither claim would in itself be cognizable . . .” *Id.* He does, however, find virtue in this rule as a method of avoiding difficult inquiries into fact relatedness. *Id.* at 196-97 (quoting D. CURRIE, *supra* note 98, at 365).

In fact, as this Article contends, the assertion of jurisdiction over aggregated claims in diver-

It might be contended that none of the three above-discussed classes of cases—cases involving claims to property, receivership actions, and aggregation of claims—is relevant to determining whether a “common nucleus of operative fact” is constitutionally required because these cases rest upon diversity rather than federal question jurisdiction. This argument is based on the notion that once a plaintiff has a claim against one diverse defendant, the only jurisdictional barriers to joining other nondiverse defendants are the statutory amount in controversy requirement and the complete diversity requirement of *Strawbridge v. Curtiss*,³¹⁸ which, according to *State Farm Fire & Casualty Co. v. Tashire*,³¹⁹ is also only a statutory barrier.³²⁰ It could therefore be argued that once one meets the *Tashire* “minimal diversity” and the statutory amount requirements, other actions against a nondiverse defendant could be joined constitutionally in one case. Accordingly, the property, receivership, and aggregation cases do not concern the constitutional question addressed by *Gibbs*.

This tortured argument must fail for several reasons. First, until *Tashire*, the status of the complete diversity rule was unclear; respectable authorities contended that the requirement was constitutional.³²¹ Second, the minimal diversity and amount in controversy rules are irrelevant to whether a common nucleus of operative fact requirement is constitutionally compelled. Regardless of whether the article III citizenship and the statutory amount in controversy requirements are satisfied, there is still a constitutional “case” or “controversy” requirement. Unless the ancillary claim in a claim to property, a receivership, or an aggregation case is part of the same constitutional controversy as the underlying claims in the action, it is unconstitutional to join the claims in one action, even if the citizenship and amount requirements are fulfilled for another claim asserted in the action.³²²

sity is amply justified. First, because diversity of citizenship is by definition present, the action is constitutionally within federal jurisdiction. Second, since the joined claims are part of one case—as defined by procedural rules—they are such that they would be expected to be brought together. See *supra* text accompanying notes 257-96. As such, if the aggregate amount in controversy exceeds the amount required by Congress to enter federal courts, it would not be inconsistent with Congress’ jurisdictional grant to permit federal courts to try the whole “case” or “controversy” which in fact exceeds amount in controversy limits.

318. 7 U.S. (3 Cranch) 267 (1806).

319. 386 U.S. 523 (1967).

320. *Id.* at 530-31.

321. See McGovney, *A Supreme Court Fiction* (pt. 2), 56 HARV. L. REV. 1090, 1103-11 (1943). Moreover, as recently as 1939, the Supreme Court specifically reserved the question of whether complete diversity was constitutionally required. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 71 (1939).

322. This conclusion rests on the assumption that under article III a federal court must have the ability to render a full decision in the action before it—even if the action includes nonfederal questions. Thus, the exercise of all supplemental jurisdiction is dependent on the presence of

The decisions permitting aggregation of unrelated claims strongly imply that those claims are encompassed within one controversy for the purposes of statutory diversity jurisdiction. Congress' vision of what constitutes one *statutory* controversy does not also demonstrate the contours of one *constitutional* controversy. Congress' vision is suggestive, however, of a broad approach to permissible joinder at a constitutional level, especially in the light of the other types of federal jurisdiction noted in this Section.³²³ Hence, the decision of any court to permit ancillary jurisdiction—even in diversity cases—has constitutional underpinnings beyond the existence of minimal diversity.

It might be contended that even if Supreme Court precedent suggests that joining factually independent claims in diversity "controversies" is constitutional, it is nonetheless impermissible to do so in federal question cases. Such a contention is doubly suspect. It ignores constitutional history indicating that any distinctions between "case" and "controversy" make "controversy" less comprehensive³²⁴ than "case." This history suggests broader constitutional boundaries for supplemental jurisdiction in federal question cases than in diversity cases, not the opposite. Moreover, in at least one class of federal question "case"—bankruptcy actions—there is jurisdiction over state claims arising from factual bases different from that of the underlying federal claim.

federal and nonfederal claims within a single constitutional action. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *supra* text accompanying notes 19-24, 183-90.

323. The reference in the aggregation decisions to the Federal Rules governing joinder of claims, see *supra* note 43, reinforces this conclusion. As discussed below, the system of procedural rules governing joinder sets the constitutional limits of the terms "case" and "controversy" used in article III. See *infra* text accompanying notes 352-415. Under this view, if two claims may be joined under applicable federal procedure, they are part of one constitutional case.

Some courts have tried to explain aggregation on a theory of consolidation of independent matters. See, e.g., *Baltimore & O. Sw. R.R. v. United States*, 220 U.S. 94, 106 (1911); *United States v. Louisville & N.R.R.*, 221 F.2d 698, 702 (6th Cir. 1955). There are two serious conceptual problems with this view. First, in order to consolidate matters for trial, each of those matters must be within the independent jurisdiction of the federal court. Cf. FED. R. CIV. P. 42(a) (permitting the consolidation of only those matters "pending" in a federal court; a jurisdictionally insufficient claim could not be *pending* in federal court). Thus, although the presence of diversity gives a constitutional basis for jurisdiction, each independent claim would fail under congressional jurisdictional grants. Second, it would be inconsistent with congressional jurisdictional grants for two jurisdictionally insufficient, *independent* matters to be consolidated. Because such matters are each individually insufficient and would not be expected to be brought together (not being part of the same case), it seems that any congressional jurisdictional barriers could not be surmounted. However, if the separate claims are treated as part of the same case, it would not do violence to Congress' intent to permit aggregation. See *supra* note 317.

324. See *supra* note 65. The only apparent salient distinction between a "case" and a "controversy" is that the latter term refers only to civil matters while the former may include criminal matters. See *Muskraat v. United States*, 219 U.S. 346, 356-57 (1911) (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431-32 (1793)).

4. *Bankruptcy Jurisdiction*

The Constitution gives Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."³²⁵ Congress has accordingly enacted a series of bankruptcy acts since the 1800's,³²⁶ and has long given the federal courts federal question jurisdiction over bankruptcy matters.³²⁷

Since 1898, the bankruptcy acts have included broad powers permitting a bankrupt's creditors to sue the trustee in federal court for a share of the bankrupt's assets. These acts have permitted adjudication of unliquidated legal claims against the bankrupt, including those of nondiverse creditors based on state law.³²⁸ Similarly, these acts have permitted the trustee to bring unliquidated legal claims against creditors on behalf of the bankrupt, including claims against nondiverse defendants based on state law.³²⁹ A critical feature of these state law suits by and against the trustee is that there is no requirement that the suits be factually related either to each other or to the bankruptcy.³³⁰ Such state law claims thus resemble the claims both to a res³³¹ and to create a res³³² discussed above.

A series of Supreme Court decisions have held that the federal

325. U.S. CONST. art. I, § 8, cl. 4.

326. The earliest bankruptcy act was passed by the United States Congress in 1800. *See* Bankruptcy Act of 1800, ch. 19, 2 Stat. 19. It was repealed three years later by the Act of Dec. 19, 1803, ch. 6, 2 Stat. 248. In 1841, a second act was passed, Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, which was repealed in 1843, Act of Mar. 3, 1843, ch. 82, 5 Stat. 614. The bankruptcy power remained dormant until 1867, when Congress enacted a broad bankruptcy act, *see* Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, which was subsequently repealed in 1878, Act of June 7, 1878, ch. 160, 20 Stat. 99. Then, in 1898, Congress enacted a revised bankruptcy act which, with amendments, survived until 1978. *See* Nelson Act, ch. 541, 30 Stat. 544 (1898), *amended by* Chandler Act, ch. 575, 52 Stat. 840 (1938), *and amended by* Act of June 23, 1959, Pub. L. No. 86-64, 73 Stat. 109, *repealed by* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2682. Currently, bankruptcy is governed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified primarily at 11 U.S.C. §§ 101-151326 (Supp. V 1981) and 28 U.S.C. §§ 1471-1482 (Supp. V 1981)).

327. *See* 28 U.S.C. § 1334 (1976 & Supp. V 1981); 28 U.S.C. § 1471 (Supp. V 1981); Nelson Act, ch. 541, §§ 1(7), 1(8), 1(16), 2, 22, 23, 34, 30 Stat. 544, 544-45, 552, 555 (1898), *amended by* Chandler Act, ch. 575, 52 Stat. 840 (1938), *and amended by* Act of June 23, 1959, Pub. L. No. 86-64, 73 Stat. 109, *repealed by* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2682; Act of Mar. 2, 1867, ch. 176, §§ 1-2, 14 Stat. 517, 517-18, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99; Bankruptcy Act of 1841, ch. 9, § 6, 5 Stat. 440, 445, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; Act of Apr. 29, 1802, ch. 31, § 14, 2 Stat. 156, 164; Act of Feb. 13, 1801, ch. 4, § 12, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132; Bankruptcy Act of 1800, ch. 19, § 2, 2 Stat. 19, 21, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

328. *See, e.g.,* Nelson Act, ch. 541, §§ 2, 23, 30 Stat. 544, 545, 552 (1898), *repealed by* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2682.

329. *Id.* § 23, 30 Stat. at 552.

330. *See* Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 HARV. L. REV. 703, 710 n.37 (1982) ("[S]uits by a trustee to augment the estate will seldom share factual elements" with core elements of bankruptcy.).

331. *See supra* text accompanying notes 298-302.

332. *See supra* text accompanying notes 304-08.

courts have constitutional power to adjudicate these state law claims not otherwise within federal court jurisdiction.³³³ Although a number of justifications have been offered for this jurisdiction, the most plausible explanation is that the federal courts have supplemental jurisdiction over state law claims contained in the bankruptcy case.³³⁴

The current bankruptcy act,³³⁵ while greatly expanding certain features of federal bankruptcy law,³³⁶ continues to permit federal adju-

333. *Williams v. Austrian*, 331 U.S. 642 (1947); *Schumacher v. Beeler*, 293 U.S. 367 (1934); *Lathrop v. Drake*, 91 U.S. 516, 517 (1875); see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2872 n.26 (1982) (dictum).

334. The Supreme Court has not specifically held that broad bankruptcy jurisdiction is authorized by the supplemental jurisdiction doctrine. However, on several occasions members of the Court have made such a suggestion. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2872 n.26 (1982) (suggesting that power to decide state contract law claim in bankruptcy comes from relationship of that claim to bankruptcy and citing *Osborn v. Bank of the United States*); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 472 (1957) (Frankfurter, J., dissenting) (analogizing broad bankruptcy jurisdiction to *Hurn v. Oursler* and *Siler v. Louisville & N.R.R.*); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 652 n.3 (1949) (Frankfurter, J., dissenting) (asserting that bankruptcy matters "arise under" the laws of the United States); *id.* at 611, 613-15 (Rutledge, J., concurring) (using *Osborn* analysis to conclude that all matters in bankruptcy are part of one federal question); see also Note, *supra* note 330, at 706-13.

The plurality opinion in the *Tidewater* case suggested that broad bankruptcy jurisdiction over unrelated state claims is based solely on Congress' article I bankruptcy power and does not reflect the scope of an article III case. See 337 U.S. at 596. This conclusion, however, is undercut by the limited view of arising under jurisdiction taken by the plurality. Compare *id.* at 596-98 with *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921), and *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) (Friendly, J.), *cert. denied*, 381 U.S. 915 (1965). Moreover, six justices in *Tidewater* disagreed with the plurality that article I may be used to give article III courts judicial power over nonfederal matters. See 337 U.S. at 607 (Rutledge, J., joined by Murphy, J., concurring); *id.* at 645 (Vinson, C.J., joined by Douglas, J., dissenting); *id.* at 650 (Frankfurter, J., joined by Reed, J., dissenting).

Professor Mishkin and his colleagues suggest that bankruptcy jurisdiction is supported by the doctrine of "protective jurisdiction," discussed at *supra* note 206. See Mishkin, *supra* note 85, at 195-96; HART & WECHSLER, *supra* note 57, at 860-61, 865-66. As pointed out by one leading commentator, however, protective jurisdiction has not yet been embraced by a majority of the Supreme Court, and consequently must be considered a doctrine of questionable validity. See C. WRIGHT, *supra* note 4, § 20, at 110. But see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Burton & Harlan, JJ., concurring in result) (embracing doctrine of protective jurisdiction); *International Bhd. of Teamsters v. W.L. Mead, Inc.*, 230 F.2d 576, 580-81 (1st Cir.), *cert. dismissed*, 352 U.S. 802 (1956); cf. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (jurisdiction could hypothetically be exercised over state claims even in absence of any real federal dispute). Moreover, under any view of protective jurisdiction, Congress' grant of jurisdiction over nonfederal matters is founded upon the federal question grant of article III. See Mishkin, *supra* note 85, at 195-96; HART & WECHSLER, *supra* note 57, at 860-61, 865-66.

335. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified primarily at 11 U.S.C. §§ 101-151326 (Supp. V 1981) and 28 U.S.C. §§ 1471-1482 (Supp. V 1981)).

336. Under the prior bankruptcy act, the federal district courts served as bankruptcy courts and used a "referee" system to help with the adjudication of bankruptcy matters. 1 COLLIER ON BANKRUPTCY ¶ 1.02, at 1-2 to -9 (15th ed. 1983) [hereinafter cited as W. COLLIER]. In fact, the referee fulfilled most judicial functions under the old act. *Id.* ¶ 3.01[1][b], at 3-10. Any orders issued by the referees were subject to direct appeal to the district court. *Id.* ¶ 3.03[1][a], at 3-224. The district courts, sitting as bankruptcy courts, had "summary jurisdiction" over controversies

dication of factually unrelated state law claims. The trustee may still be sued in federal court by nondiverse creditors seeking to assert unliquidated and unrelated state law claims against the bankrupt's estate, and the trustee may make unrelated state law claims against nondiverse defendants.³³⁷ Recently, the United States Supreme Court held that

concerning property within the court's actual possession. *Id.* ¶ 3.01[1][b][ii]-[iii], at 3-20 to -24; Chandler Act, ch. 575, § 2(a)(7), 52 Stat. 840, 842 (1938), *amended by* Act of June 23, 1959, Pub. L. No. 86-64, 73 Stat. 109, *repealed by* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2682. With the consent of third parties, a district court had jurisdiction in bankruptcy over "plenary" suits to recover property in the hands of third parties. 1 W. COLLIER, *supra*, ¶ 3.01[1][b][ii]-[iii], at 3-21 to -30; Nelson Act, ch. 541, § 23(a), 30 Stat. 544, 552 (1898), *amended by* Chandler Act, ch. 575, 52 Stat. 840 (1938), *and amended by* Act of June 23, 1959, Pub. L. No. 86-64, 73 Stat. 109, *repealed by* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2682.

The new bankruptcy act establishes "in each judicial district . . . a bankruptcy court which shall be a court of record . . . for the district." 28 U.S.C. § 151(a) (Supp. V 1981). These courts act as "an adjunct to the district court," *id.*, and are given broad authority to resolve legal questions in all "civil proceedings arising under [the new act] or arising in or related to cases under [the act]," 28 U.S.C. § 1471(b) (Supp. V 1981). These provisions make no distinction between "summary" and "plenary" suits. In addition, the bankruptcy courts are given an array of various other powers. *See* 11 U.S.C. § 105 (Supp. V 1981) (power to issue all writs necessary to its jurisdiction); 28 U.S.C. § 1480 (Supp. V 1981) (power to hold jury trials); *id.* § 2201 (1976 & Supp. V 1981) (power to issue declaratory judgments); *id.* § 2256 (power to issue writs of habeas corpus in appropriate circumstances) (Supp. V 1981). Moreover, the new act provides for a first tier of appeal from the bankruptcy court to a panel of bankruptcy judges rather than the district court. *See* 28 U.S.C. §§ 160, 1482 (Supp. V 1981).

337. 28 U.S.C. § 1471(a)-(b) (Supp. V 1981) (emphasis added) provides in relevant part:

- (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under [the bankruptcy act].
- (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under [the bankruptcy act] or arising in or related to cases under [the bankruptcy act].

A bankruptcy "case" is initiated by filing either a voluntary, a joint, or an involuntary bankruptcy petition. *See* 11 U.S.C. §§ 301-303 (Supp. V 1981). This filing creates an estate that basically consists of property in the debtor's hands at the time of filing and other claims that may be recoverable on behalf of the debtor after the filing. *Id.* § 541. Property that is in the estate at the commencement of the bankruptcy case is under the exclusive jurisdiction of the bankruptcy court. 28 U.S.C. § 1471(e) (Supp. V 1981).

Under the Act, the trustee in bankruptcy stands in the shoes of the debtor as the representative of the estate and may be sued in that capacity. 11 U.S.C. § 323(a)-(b) (Supp. V 1981). Once the estate has been created by the filing of a petition, creditors may file claims of proof against the trustee to share in the debtor's property. *Id.* § 501. Such claims are then adjudicated by the bankruptcy court. *Id.* § 502(b). These claims are within the district court's bankruptcy jurisdiction as part of the bankruptcy case. 28 U.S.C. § 1471(c) (Supp. V 1981). *See* 1 W. COLLIER, *supra* note 336, ¶ 3.01[1][d][iii], at 3-41 to -43. There is no restriction that claims be factually related. The only limit is that they "arise under," "arise in," or "relate to," "proceedings" under the bankruptcy act.

Similarly, the Act grants the trustee the authority to sue on behalf of the estate. 11 U.S.C. § 323(a)-(b) (Supp. V 1981). Section 541(a) of the Act identifies property of the estate as "all legal or equitable interests of the debtor", and specifically includes "[a]ny interest in property that the estate acquires after the commencement of the case." *Id.* § 541(a)(7). These provisions include "all kinds of property, including tangible or intangible property [and] causes of action . . ." S. REP. NO. 989, 95th Cong., 2d Sess. 82 (1978) (emphasis added), *reprinted in* 11 U.S.C. § 541 (Supp. V 1981). Those holding property of the estate must turn the property over to the trustee. *Id.*

certain features of the jurisdiction given to federal courts under the bankruptcy act are unconstitutional.³³⁸ In essence, the Court found that the act unconstitutionally permitted an article III case to be heard by a nonarticle III judge.³³⁹ This holding is particularly important to the subject at hand, first, because the court apparently assumed that the bankruptcy itself and the claims of the creditors and trustee constituted a single article III case,³⁴⁰ and second, because the Court specifically

§ 542(a). Failure to do so gives the trustee a right to sue for collection of the property. 28 U.S.C. § 1471 (Supp. V 1981); 11 U.S.C. § 323(b) (Supp. V 1981); 1 W. COLLIER, *supra* note 336, ¶ 3.01[1][e], at 3-47 to -49. Once again, there is no need for factual overlap between claims, and the only requirement is that the claims "arise under," "arise in," or "relate to," bankruptcy "proceedings." In sum, as described by the Supreme Court:

[28 U.S.C. § 1471(b) (Supp. V 1981)] empowers bankruptcy courts to entertain a wide variety of cases involving claims that may affect the property of the estate once a petition has been filed under title 11 of the Act. Included within the bankruptcy courts' jurisdiction are suits to recover accounts, controversies involving exempt property, actions to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy. *The bankruptcy courts can hear claims based on state law as well as those based on federal law.*

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2862 (1982) (emphasis added) (footnote omitted) (citing 1 W. COLLIER, *supra* note 336, ¶ 3.01, at 3-47 to -48 (15th ed. 1981)).

338. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982).

339. Justice Brennan, writing for a plurality of the Court, found that the bankruptcy act unconstitutionally gives article III jurisdiction to the bankruptcy courts, whose judges do not enjoy article III's protection against salary diminishment and removal from office. 102 S. Ct. at 2879-80 ("[T]he Bankruptcy Act of 1978 has impermissibly removed most . . . of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct."). Although on other occasions the Supreme Court has validated congressional grants of article III cases to tribunals not possessing article III protections, *see, e.g.*, *United States v. Raddatz*, 447 U.S. 667 (1980); *Palmore v. United States*, 411 U.S. 389 (1973); *Crowell v. Benson*, 285 U.S. 22 (1932); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858); *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828), the plurality held in *Northern Pipeline* that the bankruptcy jurisdiction did not "fall within any of the historically recognized situations" in which article III protections did not apply. 102 S. Ct. at 2874.

Justices Rehnquist and O'Connor concurred in the judgment on the narrow ground that "so much of the Bankruptcy Act . . . as enables a Bankruptcy Court to entertain and decide" the issues posed by the particular lawsuit involved in the case violates the Constitution. *Id.* at 2882 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment).

An evaluation of this decision and issues raised by it is beyond the scope of this Article. For a more detailed discussion of the constitutionality of the bankruptcy act, *see id.* at 2866 n.12 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.) (noting various authorities that discuss the constitutional status of the bankruptcy act); Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941 (1979); Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297 (1981).

340. All of the opinions in *Northern Pipeline* assume that the varied questions of law, both state and federal, contained in the broad jurisdiction extended to bankruptcy courts by the new bankruptcy act, could be heard by an article III court. *See* 102 S. Ct. at 2880 n.40 (1982) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.) (indicating that Congress would be able to restructure bankruptcy act to validate broad jurisdiction); *id.* at 2880-82 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment) (indicating only that specific question in suit is not a constitutional one, and not raising any doubt that an article III court could hear the case); *id.* at 2882 (Burger, C.J., dissenting) (indicating that transfer of "ancillary common-law actions" from bankruptcy courts to article III courts would cure defects in current act); *id.* at 2894-2896 (White,

reaffirmed its prior holdings that certain article III courts have jurisdiction over an entire bankruptcy case.³⁴¹

5. *Set-Off Cases*

The federal courts have uniformly held that a defendant's compulsory counterclaims, which arise from the same transaction or occurrence as the plaintiff's claims, are within the jurisdiction of federal courts, even if the counterclaims could not have been brought independently in federal court.³⁴² Conversely, it has almost uniformly been held that permissive counterclaims, which do not arise from the same transaction or occurrence as the plaintiff's claims, may not be heard by a federal court without an independent basis for jurisdiction.³⁴³ These general principles seem to suggest that the *Gibbs* common nucleus requirement may in fact have some constitutional underpinnings despite the obvious exceptions noted above. But even with counterclaims, there is one major exception to the general fact relatedness rule: set-offs may be heard by a federal court without any independent basis for federal jurisdiction, even if the set-off is unrelated to the underlying federal claim.

A set-off is a counterclaim that is used defensively: i.e., a defendant may not receive any independent relief under the claim and may

J., joined by Burger, C.J., and Powell, J., dissenting) (indicating that bankruptcy act even as currently written is permissible).

As stated previously, the permissibility of broad bankruptcy jurisdiction by an article III court over unrelated state claims rests on supplemental jurisdiction, *see supra* text accompanying notes 333-34, which in turn rests on the presence of those claims in the same constitutional case as a claim within federal jurisdiction. *See supra* text accompanying notes 19-24, 183-90. Hence, the assumption in *Northern Pipeline* that article III courts would be permitted to hear the claims encompassed by the new bankruptcy act suggests that all claims under the Act are within one constitutional case.

341. *Northern Pipeline*, 102 S. Ct. at 2872 n.26. Since *Northern Pipeline*, the Judicial Conference of the United States has adopted Model Interim Emergency Bankruptcy Rules to preserve the constitutionality of the bankruptcy act until Congress addresses the problems raised in *Northern Pipeline*. In essence, the Rules provide that any "related proceedings"—those which could be heard by a court outside of bankruptcy—must rest within the final authority of the United States district court, an article III tribunal. *Model Interim Emergency Rule*, [1981-1982 Transfer Binder] BANKR. L. REP. (CCH) ¶ 68,908 (Dec. 25, 1982). In *White Motor Corp. v. Citibank*, 704 F.2d 254 (6th Cir. 1983), the Sixth Circuit upheld the validity of the interim rules.

342. *E.g.*, *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974); *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926); *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 633 (3d Cir. 1961); *see Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); 6 *WRIGHT & MILLER, supra* note 57, § 1414, at 69.

343. *E.g.*, *Aldens, Inc. v. Packel*, 524 F.2d 38, 52 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); *Newburger, Loeb & Co. v. Gross*, 365 F. Supp. 1364, 1367 (S.D.N.Y. 1973). *But see United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1088 (2d Cir. 1970), (Friendly, J., concurring) ("conventional view is wrong"), *cert. denied*, 400 U.S. 1021 (1971); *Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 28-31 (1963); *Green, Federal Jurisdiction Over Counterclaims*, 48 *Nw. U.L. Rev.* 271, 282-89 (1953).

use it only to reduce any judgment ultimately obtained by the plaintiff.³⁴⁴ The primary requirements for a set-off are (1) that the claim be liquidated or capable of liquidation; (2) that it grow out of a contract or judgment; and most significantly, (3) that it arise out of a transaction extrinsic to that out of which plaintiff's claim arose.³⁴⁵ Such claims have been held within federal court jurisdiction, even when there is no independent ground for jurisdiction.³⁴⁶ Thus, despite the complete lack of fact relatedness to the primary federal claim, nonfederal set-offs are apparently within federal jurisdiction.³⁴⁷

6. Attorney's Fee Dispute Cases

Federal courts have also exercised jurisdiction over attorney's fee disputes arising during or after the resolution of federal cases when the fee disputes are factually unrelated to the main federal case.³⁴⁸ *Grimes*

344. *Curtis v. J.E. Caldwell & Co.*, 86 F.R.D. 454, 457-58 (E.D. Pa. 1980); *Binnick v. Avco Fin. Servs., Inc.*, 435 F. Supp. 359, 366-67 (D. Neb. 1977); *Herrmann v. Atlantic Richfield Co.*, 72 F.R.D. 182, 185 (W.D. Pa. 1976); *Newburger, Loeb & Co. v. Gross*, 365 F. Supp. 1364, 1367 (S.D.N.Y. 1973); *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1081 n.1 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

345. *Curtis v. J.E. Caldwell & Co.*, 86 F.R.D. 454, 458 (E.D. Pa. 1980); *Binnick v. Avco Fin. Servs., Inc.*, 435 F. Supp. 359, 367 (D. Neb. 1977); *Fraser v. Astra S.S. Corp.*, 18 F.R.D. 240, 242 (S.D.N.Y. 1955).

346. *Binnick v. Avco Fin. Servs., Inc.*, 435 F. Supp. 359, 366-67 (D. Neb. 1977); *Herrmann v. Atlantic Richfield Co.*, 72 F.R.D. 182, 185-86 (W.D. Pa. 1976); *see Curtis v. J.E. Caldwell & Co.*, 86 F.R.D. 454, 457-58 (E.D. Pa. 1980); *Jones v. Goodyear Tire & Rubber Co.*, 73 F.R.D. 577, 579 (E.D. La. 1976); *Kaiser Aluminum & Chem. Sales, Inc. v. Ralston Steel Corp.*, 25 F.R.D. 23, 26 (N.D. Ill. 1959); *United States v. P.J. Walker Constr. Co.*, 24 F.R.D. 136, 138 (S.D. Cal. 1959); *Fraser v. Astra S.S. Corp.*, 18 F.R.D. 240, 242 (S.D.N.Y. 1955); *Marks v. Spitz*, 4 F.R.D. 348, 350 (D. Mass. 1945); *see also* 6 WRIGHT & MILLER, *supra* note 57, § 1422, at 122. *But see Robinson Bros. & Co. v. Tygart Steel Prods. Co.*, 9 F.R.D. 468, 469 (W.D. Pa. 1949) (suggesting that set-offs should not be considered ancillary to main suits because decision on the set-off would not "promote procedural economy and efficiency and convenience to the Court and parties litigant").

347. The Supreme Court has not specifically held that set-offs are within the supplemental jurisdiction of the federal courts. *But see Partridge v. Insurance Co.*, 82 U.S. (15 Wall.) 573, 580 (1872) (dictum suggesting that the state set-off remedy may be within removal jurisdiction). Moreover, the federal set-off rule is of recent vintage. *See United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1088 (2d Cir. 1970) (Friendly, J., concurring), *cert. denied*, 400 U.S. 1021 (1971) (implying that the set-off rule was created by Professor Moore in his treatise and only then adopted by federal courts).

It is difficult to reconcile the apparent permissibility of asserting supplemental jurisdiction over a set-off, which by definition is unrelated to the main claim, with the rejection of supplemental jurisdiction over other permissive counterclaims. *See Green, supra* note 343, at 282-85. Professors Wright and Miller suggest that this rule is "consistent with the treatment historically given to set-offs." 6 WRIGHT & MILLER, *supra* note 57, § 1422, at 122. They assert that the rule is justifiable as promoting "the general federal policy against multiplicity of actions." *Id.* Further, they contend that set-offs may be distinguished from other types of permissive counterclaims because trial of set-offs—given their traditional basis—"would not result in a substantial extension of subject matter jurisdiction," *id.*, but trial of permissive counterclaims would be only slightly more efficient and hence would be a greater incursion on state sovereignty, *id.*

348. *See Grimes v. Chrysler Motors Corp.*, 565 F.2d 841, 844 (2d Cir. 1977); *American Fed'n of Tobacco Growers, Inc. v. Allen*, 186 F.2d 590, 592 (4th Cir. 1951) (*per curiam*); *Moore Bros.*

*v. Chrysler Motors Corp.*³⁴⁹ illustrates this type of jurisdiction. In *Grimes*, a federal diversity suit was settled, but before the plaintiff received the proceeds of the settlement, an attorney's fee dispute erupted between two of the plaintiff's lawyers. Seeking to enforce his contractual claim to a fee, one lawyer brought suit in state court against the other lawyer and the plaintiff. The other lawyer then brought a motion in the United States district court in which the diversity case was filed, naming the lawyer who was the plaintiff in the state case as an opposing party and seeking an order by the district court to freeze the settlement fund. The petition also asked that the district court supervise the actual allocation of the fund between the client and the two lawyers. Despite the absence of diversity between the lawyers and the factual unrelatedness of their fee claims to the underlying diversity suit, the court exercised ancillary jurisdiction over the fee petition.³⁵⁰

In conclusion, the foregoing six examples are classes of cases within federal jurisdiction that permit the federal courts to exercise power over factually unrelated claims.³⁵¹ *Gibbs'* call for a common nucleus of operative fact, therefore, cannot be considered a constitutional

Constr. Co. v. City of St. Louis, 159 F.2d 586, 588 (7th Cir. 1947); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 520 F. Supp. 635, 649-52 (D. Minn. 1981); *Andrews v. Central Sur. Ins. Co.*, 295 F. Supp. 1223, 1227-28 (D.S.C. 1969); *State v. Union Asphalt & Road-oils, Inc.*, 281 F. Supp. 391, 396 (S.D. Iowa 1968), *aff'd*, 409 F.2d 1239 (8th Cir. 1969); *In re Hoy's Claim*, 93 F. Supp. 265, 266 (D. Mass. 1950). *But see* *Bounougias v. Peters*, 369 F.2d 247 (7th Cir. 1966), *cert. denied*, 386 U.S. 983 (1967); *Adams v. Allied Chem. Corp.*, 503 F. Supp. 253, 255 (E.D. Va. 1980), *aff'd per curiam sub nom.* *Taylor v. Kelsey*, 666 F.2d 53 (4th Cir. 1981).

349. 565 F.2d 841 (2d Cir. 1977).

350. *Id.* at 844. It has been asserted that such attorney's fee disputes are within supplemental jurisdiction due to the relationship of the fee dispute to property before the court. *Id.* (citing *Fulton Nat'l Bank v. Hozier*, 267 U.S. 276, 280 (1925)). Hence, some courts suggest that supplemental jurisdiction may not be exercised if the main action has terminated and no funds are left with the district court for ultimate distribution. *See, e.g., Adams v. Allied Chem. Corp.*, 503 F. Supp. 253, 254-55 (E.D. Va. 1980), *aff'd per curiam sub nom.* *Taylor v. Kelsey*, 666 F.2d 53 (4th Cir. 1981). These cases assume that supplemental jurisdiction over a fee dispute exists only by virtue of some vague factual connection to "property" already within the court—a sort of modified *Freeman v. Howe* argument. *Id.*

The weight of authority is against this view. *See* cases cited *supra* note 348. Moreover, even if there is a fund deposited with the court, claims to that fund by attorneys generally involve wholly different factual issues than the underlying claim, e.g., the relative contractual rights of attorneys to share in the fund, *see Grimes v. Chrysler Motors Corp.*, 565 F.2d 841 (2d Cir. 1977), or the terms of a contract between an attorney and one of the litigants to the main action, *see In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 520 F. Supp. 635 (D. Minn. 1981). Hence, regardless of the presence of a res, it would be difficult to conceive of a fee dispute as either arising from the same transaction or occurrence as the underlying lawsuit or sharing a common nucleus of operative fact with it.

351. In addition to the types of federal jurisdiction noted above that authorize supplemental jurisdiction over a factually unrelated nonfederal claim, the federal removal provision, 28 U.S.C. § 1441(c) (1976), on its face allows federal judicial power over a nonfederal claim contained in an action involving an unrelated federal claim. Section 1441(c) provides in relevant part, that "[w]henever a separate and independent claim or cause of action, which would be removable if

predicate to the exercise of supplemental jurisdiction without seriously jeopardizing the validity of these long-established cases, some of which have been approved by the Supreme Court. Moreover, there is no good reason for adopting different rules for the various assertions of supplemental jurisdiction, whether pendent or ancillary, or whether in a diversity, a federal question, or any other article III action.

The next Part of the Article presents a simple, unified theory of supplemental jurisdiction based on the presence of a nonfederal claim within the same constitutional "case" or "controversy" as a federal claim.

IV

THE CONSTITUTIONAL LIMITS OF SUPPLEMENTAL JURISDICTION

From *Osborn* to *Gibbs* to *Kroger*, the Supreme Court has authorized jurisdiction over nonfederal and federal claims so long as both claims are part of the same constitutional "case" or "controversy."³⁵² It has long been assumed that *Gibbs* sets forth the operative definition of "case" or "controversy." This definition consists of (1) the presence of a substantial federal question or true diversity of citizenship,³⁵³ (2) the presence of a common nucleus of operative fact between federal claims within federal jurisdiction and nonfederal claims outside federal jurisdiction, and (3) the expectation that jurisdictionally permissible and jurisdictionally impermissible claims will be tried together in the absence of a jurisdictional barrier.³⁵⁴

As demonstrated above, however, there is no constitutional re-

sued upon alone, 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."

As outlined by Professor Wright, if read literally this statute "means that there will be some cases where a federal court will have jurisdiction of a non-federal claim, though diversity is absent and though the claim bears no relation to any federal claim in the case." C. WRIGHT, *supra* note 4, § 39, at 225. Professor Wright then notes that this would pose a "serious constitutional question" if the constitutional test for supplemental jurisdiction is the *Gibbs* test. *Id.*

Section 1441(c) is constitutionally sustainable so long as the unrelated nonfederal claims are part of the same "case" or "controversy" as the federal claims. Some commentators writing prior to *Gibbs* made a similar observation. See Green, *Jurisdiction of United States District Courts in Multiple-Claim Cases*, 7 VAND. L. REV. 472, 489-93 (1954); Moore & VanDercreek, *Multi-party, Multi-claim Removal Problems: The Separate and Independent Claim Under Section 1441(c)*, 46 IOWA L. REV. 489, 506 n.81 (1961). But see Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 441 (1953). Nonetheless, given the current status accorded the *Gibbs* case, see *supra* text accompanying notes 57-58, the constitutionality of § 1441(c) is sufficiently doubtful to lead Professor Wright to suggest that the question is still undecided. See C. WRIGHT, *supra* note 4, § 39, at 225.

352. See *supra* text accompanying notes 19-24, 51-61, 182-88.

353. See *supra* text accompanying notes 66-72.

354. See *supra* text accompanying notes 209-12.

quirement for a substantial federal question; some cases that lack substantiality have consistently been recognized as within federal jurisdiction, and important policy considerations militate against substantiality being considered constitutional.³⁵⁵ In addition, the presence of a common nucleus of operative fact is not a constitutional predicate to the exercise of supplemental jurisdiction; in several different types of cases, supplemental jurisdiction is exercised over jurisdictionally insufficient nonfederal claims brought in the same action as factually unrelated, though jurisdictionally sufficient, federal claims.³⁵⁶ Finally, the expectation of trial requirement generally has not been considered independent of the common nucleus requirement.³⁵⁷ Thus, after closely scrutinizing the gospel according to *Gibbs*, one is converted back to the old time religion—supplemental jurisdiction may be exercised when the federal and nonfederal claims are part of one constitutional “case” or “controversy.”

To the extent that *Gibbs* actually did attempt to set the constitutional parameters for supplemental jurisdiction, it failed to focus directly on the meaning of “case” or “controversy” as used in the Constitution. Rather, it attempted to define these terms indirectly, by developing a shorthand description for the elements of a constitutional case; it adopted fact relatedness between claims as the *sine qua non* to jurisdiction. By asking seemingly simple questions about the relationship between claims, which presumably could be answered by referring to objective criteria, *Gibbs* avoided a direct answer to the question of what constitutes a constitutional “case” or “controversy.” Yet this attempt at clarification, which avoids the words “case” or “controversy,” has only obfuscated their meaning, especially given the numerous cases not fitting neatly within the shorthand.

Contrary to *Gibbs*' assumption that the meanings of “case” or “controversy” are equivalent to a substantial federal question plus a factual relationship, a review of leading supplemental jurisdiction decisions demonstrates that this meaning for “case” or “controversy” has never been accepted.³⁵⁸ “Case” or “controversy” as used in article III refers to the limits of joinder of claims and parties set by the system of

355. See *supra* text accompanying notes 120-208.

356. See *supra* text accompanying notes 297-351.

357. See *supra* text accompanying notes 257-96.

358. *Gibbs* recognized that supplemental jurisdiction exists whenever the nonfederal and federal claims have a sufficient relationship to constitute “but one constitutional ‘case.’” 383 U.S. at 725; see *Siler v. Louisville & N.R.R.*, 213 U.S. 175, 191 (1909) (The circuit court “had the right to decide all the questions in the case.”) (emphasis added). The rest of *Gibbs*' power discussion focuses on defining this type of relationship—“fact relatedness.” 383 U.S. at 725. This approach, of course, was a continuation of the trend started in the *Hurn* opinion. See *supra* text accompanying notes 47-50, 219-28. But a close reading of *Hurn* indicates that fact relatedness, while a necessary predicate to the exercise of supplemental jurisdiction, was *not* equated with “case.” Instead,

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.³⁵⁹

Difficult independent constitutional concerns such as federalism, independent state sovereignty, and the scope of legislative power have blinded recent courts and commentators to the simplicity of this constitutional definition of "case" or "controversy." But the source from which the doctrine of supplemental jurisdiction sprang—*Osborn v. Bank of the United States*³⁶⁰—provides ample support for this simple constitutional rule.

As described previously, in *Osborn*, Chief Justice Marshall addressed the permissibility of a federal court hearing and deciding state law questions in actions containing elements of federal law.³⁶¹ His enduring opinion held that a federal court had constitutional power to reach all questions contained in a "case" before it.³⁶² Most significantly, Marshall outlined the contours of the word "case" in article III. As he stated:

[Article III] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. *That power 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*, and the constitution declares, that the judicial power shall extend to all cases [in law and equity] arising under the constitution, laws and treaties of the United

"case" was seen as a broader unit, which comprised more claims than jurisdictionally permissible. As stated by the Court:

But the [supplemental jurisdiction] rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between *a case* where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, *and a case* where two separate and distinct causes of action are alleged, one only of which is federal in character.

Hurn v. Oursler, 289 U.S. 238, 245-46 (1933) (emphasis added); see Note, *Problems of Parallel State and Federal Remedies*, 71 HARV. L. REV. 513, 514 (1952) ("The . . . test enunciated in [*Hurn*] . . . does not necessarily express the constitutional limits of . . . the . . . doctrine.").

359. *Gibbs'* statement that judicial power over state claims is tied to the ordinary expectation of trial in one proceeding, 383 U.S. at 725, might be read as adopting the position advocated in this Article. As discussed previously, see *supra* text accompanying notes 267-79, when "ordinarily be expected to try" is defined to mean "permitted to be brought," *Gibbs'* constitutional power test could be read essentially as a test of what the rules permit. It is apparent, however, that *Gibbs* itself ties the constitutional power to exercise supplemental jurisdiction to "fact relatedness."

360. 22 U.S. (9 Wheat.) 738 (1824).

361. See *supra* text accompanying notes 19-24, 183-90.

362. 22 U.S. (9 Wheat.) at 823.

States.³⁶³

Marshall's reference to the "form[s] prescribed by law" should be taken as a reference to the basic system for trying lawsuits. He thus appears to tie "case" to the procedural rules governing actions in courts.³⁶⁴ *Osborn* does not, however, describe just what procedural rules or forms are "prescribed by law," nor does it suggest who provides such forms.

A review of both legislative action and court decisions in our early constitutional history provides a gloss on *Osborn's* reference to forms prescribed by law. This review indicates that the Constitution empowers Congress (or by congressional delegation, the Supreme Court) to promulgate rules of procedure for the federal courts pursuant to its obligation to convene a Supreme Court,³⁶⁵ its right to constitute lower federal tribunals and define their jurisdiction,³⁶⁶ and its ability to carry out its powers by "necessary" and "proper" means.³⁶⁷

The constitutional foundation of Congress' rulemaking authority is confirmed by the first Congress' passage—soon after ratification of the Constitution—of the Process Act of 1789³⁶⁸ and by Congress' enactment of succeeding procedural acts to this day.³⁶⁹ The Process Act of 1789 basically provided that the "modes of process" in effect in the state in which a federal court was located would govern the procedure for common law actions in that federal court; in equity and admiralty actions those modes would be set "according" to the course of the "civil" law.³⁷⁰ These provisions were intended to be of temporary du-

363. *Id.* at 818 (emphasis added); *accord* *Tutun v. United States*, 270 U.S. 568, 577 (1926) ("Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure . . . there arises a case within the meaning of the Constitution."); *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (A case is "a suit instituted according to the regular course of judicial procedure.") (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)); *ICC v. Brimson*, 154 U.S. 447, 475 (1894) (The judicial "power 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."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

364. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 7-9 (1825) (Marshall, C.J.) (defining "forms and modes of proceedings" as relating "to the progress of a suit from its commencement to its close"); see *infra* text accompanying notes 370-76.

365. See U.S. CONST. art. III, § 1; Judiciary Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73, 73.

366. U.S. CONST. art. III, § 1; *id.* art. I, § 8, cl. 9.

367. *Id.* art. I, § 8, cl. 18.

368. Process Act of Sept. 29, 1789, ch. 21, 1 Stat. 93 (codified as amended at 28 U.S.C. § 2072 (1976)).

369. Rules Enabling Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1976)); Conformity Act of June 1, 1872, ch. 255, 17 Stat. 196; Act of Aug. 23, 1842, ch. 188, 5 Stat. 516; Act of Aug. 1, 1842, ch. 109, 5 Stat. 499; Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278, 278; Judicial Courts Act of Mar. 2, 1793, ch. 22, 1 Stat. 333; Process Act of May 8, 1792, ch. 36, 1 Stat. 275.

370. Process Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93-94 (codified as amended at 28 U.S.C. § 2072 (1976)).

ration.³⁷¹ Nonetheless, when Congress adopted a new process act in 1792, it incorporated the former act by reference, merely clarifying some of its language. The Process Act of May 8, 1792,³⁷² which basically governed federal procedure until 1872,³⁷³ provided:

[T]he forms of writs, executions and other process, except their style and the *forms and modes of proceedings* in suits in those of common law shall be the same as are now used in [federal courts] in pursuance of the [Process Act of September 29, 1789,] in those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as distinguished from courts of common law³⁷⁴

In *Wayman v. Southard*,³⁷⁵ Chief Justice Marshall explained what Congress meant by "forms and modes of proceeding" as used in the Act of 1792:

*The term is applicable . . . to every step taken in a cause. It indicates the progressive course of the business, from its commencement to its termination; and 'modes of process' may be considered as equivalent to modes or manner of proceeding. . . . It has not, we believe, been doubted, that this sentence was intended to regulate the whole course of proceeding 'in causes of equity, and of admiralty and maritime jurisdiction.' It would be difficult to assign a reason for the solicitude of Congress to regulate all the proceedings of the court, sitting as a court of equity or of admiralty, [and not] when sitting as a court of common law. The two subjects were equally within the province of the legislature, equally demanded their attention, and were brought together to their view. 'The forms of writs and executions, and modes of process in suits at common law,' and 'the forms and modes of proceedings, in causes of equity, and of maritime jurisdiction' embrace the same subject, and both relate to the progress of a suit from its commencement to its close.*³⁷⁶

Wayman v. Southard thus seems to confirm that *Osborn's* "form[s] prescribed by law" refers to the system governing "the progress of a suit from its commencement to its close," i.e., the rules of procedure.

The recognition that *Osborn* keys the definition of constitutional "case" to the procedural rules adopted by Congress (and by those to whom Congress delegates the rulemaking authority) does not, however, establish that "case" therefore must encompass claims brought pursuant to *any* rules adopted by Congress. According to an early interpre-

371. Section 3 of the Act provided that the Act would "continue in force until the end of the next session of Congress, and no longer." *Id.* § 3, 1 Stat. at 94.

372. Ch. 36, 1 Stat. 275 (codified as amended at 28 U.S.C. § 2072 (1976)).

373. See HART & WECHSLER, *supra* note 57, at 663-71.

374. Process Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (codified at 28 U.S.C. § 2072 (1976)).

375. 23 U.S. (10 Wheat.) 1 (1825).

376. *Id.* at 7-9 (emphasis added).

tation of the Process Act of 1792, the process acts arguably did no more than freeze certain types of procedures in effect in 1789; therefore, it could be contended that procedural rules that extended beyond those procedures promulgated under the 1792 Act would exceed constitutional limits.³⁷⁷ Aside from the fact that this theory would cast doubt on almost every procedural advance made in the last 190 years,³⁷⁸ it fallaciously assumes that the process acts were intended to be static.

First, all of the process acts refer to the laws of the individual states in which the federal courts were located.³⁷⁹ Second, Congress specifically permitted the federal courts to adopt the rules currently in force in the states that entered the Union subsequent to 1792, even if those rules differed from those adopted by the states in the Union at the

377. In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), the Supreme Court faced the question of whether a federal court sitting in Kentucky was bound to follow the then current Kentucky procedures governing executions on judgments or whether the court was obligated to follow Kentucky procedures in effect in 1789, the year the Process Act took effect. The Court held that the Process Act of 1792 governed executions, and that that act adopted the Process Act of 1789. Then, Marshall held that those acts adopted state law "in force in September 1789," not state law as it "might be afterwards passed." *Id.* at 14.

The implication of this holding is that federal procedure was static—frozen to procedures used in 1789. Of course this rule was an interpretation of a congressional act, not the Constitution. Nonetheless, given the close proximity of the 1789 and 1792 process acts to the passage of the Constitution, it might be contended that Congress' actions were dictated by its understanding of a constitutional principle.

378. In 1789, for example, equity, admiralty, and law were all considered separate systems of adjudication. Joinder of actions in law with actions in equity or admiralty was basically impermissible. Today, all equitable and legal claims may be joined. *See* FED. R. CIV. P. 18(a). Similarly, in 1789, common law pleading and forms of action required strict adherence to pleading within a set format. Currently, formal pleading rules have been abolished, *see* FED. R. CIV. P. 8(a), and there is only one form of action—the "civil action," FED. R. CIV. P. 2.

379. *See, e.g.*, Conformity Act of June 1, 1872, ch. 260, § 5, 17 Stat. 196, 197 ("the . . . modes of proceeding . . . in the circuit and district courts of the United States shall conform . . . to the . . . modes of proceeding [with] courts of record of the State within which such circuit or district courts are held"); Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278, 278-80 ("the forms of . . . process . . . in suits in the courts of the United States . . . shall be the same in each of the said states, respectively, as are now used in the highest court . . . of the same"); Process Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93-94 ("the forms of writs and executions . . . shall be the same in each state respectively as are now used or allowed in the supreme courts of the same") (codified as amended at 28 U.S.C. § 2072 (1976)).

The process acts indicated a preference for federal conformity to state diversities and for uniformity among all courts sitting in a single state, whether state or federal. *See* HART & WECHSLER, *supra* note 57, at 664-76; *cf.* Judiciary Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified at 28 U.S.C. § 1652 (1976)), as interpreted by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (requiring conformity to state substantive law, making law uniform within the state for all courts, state and federal). This call for conformity suggests the likelihood of substantial differences in procedure between the states. Otherwise, Congress could have adopted uniform rules of procedure to govern the federal courts, since such uniform rules could have been patterned on the uniformity of the states' rules.

It is obvious that by the 1930's any uniformity among states that might have existed at one time had completely vanished. *See* Clark & Moore, *A New Federal Procedure*, 44 YALE L.J. 387, 394-401 (1935).

time of the 1792 Process Act.³⁸⁰ Finally, and most importantly, each of the process acts since 1792 has specifically empowered the federal courts to promulgate deviations from state procedure. For example, after tying federal "modes of process" to state procedures, the 1792 Process Act made the following proviso:

[S]ubject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same.³⁸¹

This language, said Marshall, enabled a federal court "to make such improvements in its forms and modes of proceeding as experience may suggest."³⁸²

Pursuant to such rulemaking power, the Supreme Court has adopted various rules and practices over the years.³⁸³ Moreover, even when making specific rules, the Supreme Court has delegated the authority to lower courts to "make further rules and regulations" not inconsistent with the rules promulgated by the Court itself.³⁸⁴

380. See, e.g., Act of Aug. 1, 1842, ch. 109, 5 Stat. 499; Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278, 278-80 ("[T]he forms of . . . process . . . and the forms and modes of proceeding in suits in the courts of the United States, held in those states admitted into the Union since [September 29, 1789 (the date of the first process act)] . . . shall be the same in each of the states, respectively . . .").

Immediately after *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), Congress apparently acquiesced in the Supreme Court's holding that the process acts required static conformity to procedures used at the time of the passage of the acts. See Act of Aug. 23, 1842, ch. 188, 5 Stat. 516. By 1872, however, Congress abandoned static conformity and provided that the federal courts in all states, including those in the Union in 1789, would have to "conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time, in like causes in the courts of record of the State." Conformity Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 (emphasis added). This language underscores the variability inherent in federal procedure, even where conformity to state procedure has been required.

381. Process Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276; see also Judicial Courts Act of Mar. 2, 1793, ch. 22, § 7, 1 Stat. 333, 335 ("[I]t shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts."); Act of May 19, 1828, ch. 68, 4 Stat. 278. Even after *Wayman v. Southard*, Congress endorsed Supreme Court authority to make necessary rules altering conformity. In the Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518, Congress provided:

[T]he Supreme Court shall have full power and authority . . . to prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, . . . and generally to regulate the whole practice of the said courts . . .

382. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41-42 (1825).

383. See, e.g., FED. R. CIV. P., 28 U.S.C. (1976 & Supp. V 1981); Equity R. 17, 20 U.S. (7 Wheat.) ix (1822); Sup. Ct. R. 17, 5 U.S. (1 Cranch) xvii (1803).

384. FED. R. CIV. P. 83 ("Each district court . . . may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these

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. Nonetheless, it has been suggested that the term "case" is severely limited in scope, because whatever expansions might have been envisioned by the Framers, they could not have contemplated gross deviations from the practice of their time.³⁸⁵ By this reasoning the outer limits of "case" refer "to the traditional judicial business of the English courts."³⁸⁶ This theory would thus limit "case"—with some adjustments for the differences between American and British legal systems—to the supposedly narrow rules of common law pleading.³⁸⁷

rules."); FED. R. APP. P. 47 ("Each court of appeals . . . may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules."); EQUITY R. 32, 20 U.S. (7 Wheat.) xxi (1822) ("The circuit courts may make further rules and regulations, not inconsistent with the rules hereby prescribed, in their discretion.").

385. See Yale Note, *supra* note 57, at 644 & nn.98-99.

386. *Id.* at 644 n.98.

387. *Id.* at 644 & n.98 ("[T]here are a number of indications that the term ["case"] refers to the traditional judicial business of the English courts. An examination of the meaning of "case" at the time the Constitution was adopted tends to show that "case" was [narrowly defined.]") (footnote omitted). The commentator goes on to assert that early Supreme Court cases adopted the procedure of the English courts, and to indicate that joinder of claims and parties at common law was quite narrow. *Id.* In addition, the commentator notes that equity provided for broader joinder, but that equity was held in disrepute by the Framers, and that the Framers would not have permitted expansive uses of "case" that were unknown at the time of the Constitution. *Id.*

Some of the basic assumptions made by the commentator are questionable. First, as demonstrated above, see *supra* text accompanying notes 368-84, federal procedure was largely home-grown, arising from federal conformity with state practice. Second, the practice of American courts applying English, common law, and equitable principles concerning joinder, while in form quite restrictive, contained analogues to nearly every procedural device now in force.

At common law, joinder of claims was permitted in three narrow circumstances: (1) where the claims fell into the same form of action, see C. CLARK, *supra* note 226, at 436 (2d ed. 1947); 6 WRIGHT & MILLER, *supra* note 57, § 1581, at 788; (2) where the claims were of "similar quality or character," see B. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 200-01 (3d ed. H. Ballantine 1923); and (3) where the claims were merely separate counts within only one cause of action, see *id.* at 203; *Hurn v. Oursler*, 289 U.S. 238, 246 (1933). While commentators have noted that this system failed to permit joinder of factually related claims, but did permit joinder of legally related (but factually unrelated) claims, see C. CLARK, *supra*, at 436; 6 WRIGHT & MILLER, *supra* note 57, § 1581, at 787-88, it is significant that common law joinder provided an analogue to FED. R. CIV. P. 18(a), which permits joinder of unrelated claims, because this parallel suggests that even under a strict pleading regime, the *Gibbs* fact relatedness test would be too restrictive. Moreover, the recognition that several counts of the same cause of action may be joined is not too far from a fact relatedness system of joinder of claims. See *supra* text accompanying notes 219-50.

Even though common law joinder was somewhat circumscribed, chancery courts provided for much broader types of joinder in equitable actions. One of the most dominant features of equitable jurisdiction was its insistence on doing complete justice between the parties interested in the subject matter of a lawsuit. See *West v. Randall*, 29 F. Cas. 718, 721 (C.C.R.I. 1820) (No. 17,424) (Story, J.); *Varick v. Smith*, 5 Paige Ch. 137, 141 (N.Y. Ch. 1835) ("The rule is, that however numerous the persons may be who are interested, they must all be made parties, plaintiffs or defendants, so that a complete decree may be made"); 1 J. POMEROY'S EQUITY JURISPRUDENCE

It is true that in 1791 the Supreme Court adopted a rule governing

§ 114, at 52-53 (S. Symons ed. 1941) [hereinafter cited as J. POMEROY]; B. SHIPMAN, *supra*, at 56-58; J. STORY, COMMENTARIES ON EQUITY PLEADINGS § 72, at 74 (1838) ("It is the constant aim of Courts of Equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit"). Secondly, a guiding principle of equity was avoiding a multiplicity of litigation arising out of a common factual situation. *Varick v. Smith*, 5 Paige Ch. 137, 141 (N.Y. Ch. 1835) (joinder is necessary "in order to prevent future litigation"); *Boyd v. Hoyt*, 5 Paige Ch. 65, 78 (N.Y. Ch. 1835) (joinder necessary "to prevent further unnecessary and useless litigation"); *Fellows v. Fellows*, 4 Cow. 682, 699 (N.Y. 1825) ("It is a favorite object with a Court of Equity, to prevent multiplicity of suits"); C. CLARK, *supra*, at 437; I E. DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY 240 (J. Perkins 1st Am. ed. 1846).

The doctrine of avoidance of multiplicity of actions is a major element in equity jurisprudence, and provides the seed for expanding the scope of a lawsuit to encompass all claims between all parties to a suit. Significant costs are associated with multiple litigation between the same parties. Service of process must be obtained more than once; dockets must be started in different courts; duplicative pleadings may be necessary; and several separate enforcement proceedings may occur. These transaction costs are significantly reduced by permitting litigating parties who are present in one action together by virtue of their relationship to the event precipitating the lawsuit to resolve all the legal disputes between them, related or not.

Equity, while potentially broad enough to encompass all questions between parties, did adopt a significant limit to joinder—parties could neither join a claim nor a party that would lead to multifarious litigation. See J. POMEROY, *supra*, § 251, at 478; J. STORY, *supra*, § 280, at 231 ("A bill might be multifarious because of a joinder of an improper number of either unrelated parties or unrelated issues or both."); C. CLARK, *supra*, at 437; *Boyd v. Hoyt*, 5 Paige Ch. 65, 78-79 (N.Y. Ch. 1835); *Whaley v. Dawson*, 2 Sch. & Lefr. 367, 371-73 (Irish Ch. 1804). But see 6 WRIGHT & MILLER, *supra* note 57, § 1581, at 789 (suggesting that in an equitable "suit involving a single plaintiff and a single defendant unlimited joinder was allowed").

Multifariousness was a broad term, however, that was inconsistently applied and was "not cast in definite and precise form." C. CLARK, *supra*, at 437. For example, while some cases barred the trial of distinct matters not common to all parties in the suit, see *Boyd v. Hoyt*, 5 Paige Ch. 65, 78-79 (N.Y. Ch. 1835); *Whaley v. Dawson*, 2 Sch. & Lefr. 367, 371-73 (Irish Ch. 1804), other cases permitted trial of varied and distinct matters, see *Fellows v. Fellows*, 4 Cow. 682, 700 (N.Y. 1825) (Multifariousness will not be found "where one general right is claimed by the bill, though the defendants have separate and distinct rights."); *Mayor of York v. Pilkington*, 26 Eng. Rep. 180, 181 (Ch. 1737) ("[T]he courts suffer such bills, though the defendants might make distinct defenses, and though there was no privity."). Moreover, in at least one type of case—suits by creditors to collect and distribute debtor's property—the plaintiffs could join and litigate the factually unrelated claims to defendant's property as well as the priority of their claims to the property. See *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, 151-52 (N.Y. Ch. 1822) ("[J]udgment creditors . . . have a right to unite in one bill, to detect and suppress . . . fraud, and have the debtor's fund distributed according to the priority of their respective liens, or ratably, as the case may be.").

In addition, equity contains the ancestral roots of (1) the merger of law and equity, see Levin, *Equitable Clean-up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320, 321 (1951) (suggesting equity courts often decided incidental legal questions in equitable cases, even if all equitable relief denied); (2) bankruptcy jurisdiction, see *Brinkerhoff v. Brown*, 6 Johns. Ch. 139 (N.Y. Ch. 1822); (3) class actions, see *Mayor of York v. Pilkington*, 26 Eng. Rep. 180 (Ch. 1737); and (4) counterclaims, both permissive and compulsory, see C. CLARK, *supra*, at 634-36 (describing recoupment as a form of factually related counterclaim, and set-off as a form of factually unrelated counterclaim).

It can be seen from the above that the common law and equity systems, far from being alien to current procedural rules, had elements in common with most of our expansive federal procedural guidelines. In fact, the equitable doctrine of avoiding multiplicity of suits corresponds to current views of the purpose of the Federal Rules. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966).

The only major impediment to complete joinder of all claims between all parties involved in

its procedure in accordance with "the practice of the courts of king's bench, and of chancery, in England,"³⁸⁸ that the Court confirmed this practice in *Hayburn's Case*,³⁸⁹ and that nearly one hundred years later the Court reaffirmed this principle.³⁹⁰ But in all these instances the Court specifically noted that it would "from time to time, make such alteration therein as circumstances may render necessary."³⁹¹ This retention of power, of course, is precisely the point—the Court in its own rules, like Congress in the process acts,³⁹² built a system that could re-

any transaction was the vague doctrine of multifariousness. That doctrine, however, rested primarily on the assumption that "by swelling the Pleadings" with various unrelated matters, uninterested parties would face unnecessary financial burdens. *Fellows v. Fellows*, 4 Cow. 682, 700 (N.Y. 1825). That assumption may very well have been true in an era of difficult communication and travel, when delays would prove highly inconvenient, but such conditions no longer exist. Moreover, equity's basic goal of avoiding costs would be served today by eliminating unnecessary transaction costs, such as several filings in several different places.

From the above, one might conclude that our current system is not an unacceptable alteration of the practice existing at the time of the framing of the Constitution. There remains, however, the possibility that the Framers would not have been aware of the theoretical expansiveness of equitable jurisdiction, or that they would not have supported such a broad use of equity. *See Yale Note*, *supra* note 57, at 644 n.99. Early congressional action, however, undercuts this supposition.

As early as the Process Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93-94, Congress permitted the federal courts some equitable power, referring them to traditional equity practice. Moreover, nearly contemporaneously with the adoption of the Constitution, Congress seemed to embrace equity's prevailing philosophy of avoiding costs and streamlining litigation. *See* Judicial Courts Act of Mar. 2, 1793, ch. 22, § 7, 1 Stat. 333, 335 (permitting courts to make rules "as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings"); *see also* Act of Aug. 23, 1842, § 6, 5 Stat. 516, 518 (permitting rulemaking "so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein"). It is also apparent that during the ratification process, several of the Framers may have believed that article III contained within it virtually limitless potential for expansion. *See* 3 J. ELLIOT, *ELLIOT'S DEBATES* 521 (1941) ("I am greatly mistaken if there be any limitation whatsoever, with respect to the nature or jurisdiction of these courts.") (remarks of George Mason); *id.* at 565 ("The jurisdiction of all cases arising under the constitution and the laws of the union is of stupendous magnitude.") (remarks of Mr. Grayson); *id.* at 572 ("If my interpretation be right, the word *arising* will be carried so far that it will be made use of to aid and extend the federal jurisdiction.") (remarks of Mr. Randolph). Congress' broad recognition of equity jurisdiction and the philosophy of efficient and inexpensive rules of procedure goes a long way in indicating historical precedent for the current Federal Rules of Civil Procedure.

388. *See* Sup. Ct. R. 7, 5 U.S. (1 Cranch) xvii (1791). Rule 7 required that the Supreme "[C]ourt consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of [the] court. *Id.*

389. 2 U.S. (2 Dall.) 408, 413-14 (1792).

390. *California v. Southern Pac. Co.*, 157 U.S. 229, 248-49 (1895); *see also* *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring) (federal courts to follow "the business of the Colonial courts and the courts of Westminster when the Constitution was framed").

391. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 414 (1792); Sup. Ct. R. 7, 5 U.S. (1 Cranch) xvii (1791); *see* *California v. Southern Pac. Co.*, 157 U.S. 229, 249 (1895) (adopting English practice, "although the court is not bound to follow this practice when it would embarrass the case by unnecessary technicalities or defeat the purposes of justice").

392. *See supra* text accompanying notes 368-81.

spond to changing circumstances. Moreover, a review of early American common law and equity decisions shows antecedents to nearly every joinder device currently permitted by the Federal Rules.³⁹³

Despite those factors suggesting that "case" is tied to procedural rules, a nagging doubt remains whether a constitutional definition should be so closely tied to currently fashionable rules enacted by a legislative body (or even worse, by a nonelected body receiving delegated power from the legislature). Our current procedural system would no doubt be somewhat alien to the Framers in most of its particulars.³⁹⁴ Moreover, it could be argued that giving broad rulemaking power to a legislature would allow it to expand "case" to such extremes as to circumvent article III's limited jurisdiction, or constrict "case" so as to all but eliminate article III jurisdiction.³⁹⁵

Upon reflection, however, neither apprehension should lead one to reject the view that a constitutional case is defined by reference to current procedural rules. One essential consideration is that there are limits to Congress' ability to manipulate the definition of "case" for the purpose of opening the federal courts to disputes beyond their limited jurisdiction. As a prerequisite to the exercise of any jurisdiction, article III requires the presence of a federal claim,³⁹⁶ and such a claim must be at least potentially dispositive of the litigation.³⁹⁷ Moreover, federal courts may not hear any matter, but are limited by the Constitution to cases of a judicial nature.³⁹⁸ Furthermore, several constitutional principles other than article III may impinge on Congress' ability to use

393. See *supra* note 387.

394. *Id.*

395. It could be argued that Congress could make the joinder provisions such that any claim held by any party involved in federal litigation could be joined. Since many of these claims could involve only questions of state law and since many parties to these claims could be nondiverse, the limitations of article III would be avoided by permitting litigation of the whole case. See *infra* text accompanying notes 396-407.

Conversely, it could be contended that Congress could adopt such a strict definition of "case" that most federal questions would be eliminated, for instance, by requiring either that every element of a suit be a federal question, or that every party be diverse to every other party. Cf. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 820-23 (1824) (suggesting that such an interpretation of article III would cripple federal jurisdiction). See *infra* text accompanying notes 409-10.

396. Even *Osborn* requires as a threshold jurisdictional barrier the presence of "a question to which the judicial power of the Union is extended by the constitution [to] form[] an ingredient" of the case. 22 U.S. (9 Wheat.) at 823.

397. See *supra* note 208. Or in the case of protective jurisdiction, the claims must implicate an important federal interest. See *supra* note 206.

398. 22 U.S. (9 Wheat.) at 819 (article III gives jurisdiction only over matters that take "such a form that the judicial power is capable of acting on it"); see *Muskrat v. United States*, 219 U.S. 346, 357 (1911). In fact, the only discussion of "case" that occurred at the constitutional conventions made clear that "case" as used in article III implicitly referred to "cases of a Judiciary nature." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (1911).

procedural devices and the definition of "case" to obtain jurisdiction over purely state law controversies not within the diversity clause.³⁹⁹ Finally, even if Congress broadly permits nonfederal issues to come to federal court, *Erie Railroad v. Tompkins*⁴⁰⁰ erodes the ability of the federal courts to generate decisions in state law cases at variance with

399. The tenth amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. This amendment has often been viewed as a mere truism; that is, that Congress may not act unless the Constitution delegates to it the power to act. *See, e.g.*, *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947); *United States v. Darby*, 312 U.S. 100, 124 (1941). However, the tenth amendment has recently been rediscovered as a limit on congressional power to "displace the States' freedom to structure integral operations in areas of traditional governmental functions." *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). Similarly, "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." *Id.* at 845. *But see* *Equal Employment Opportunity Comm'n v. Wyoming*, 103 S. Ct. 1054 (1983).

It would be arguably impermissible under the tenth amendment, even if within article III's limits, for Congress to manipulate the word "case" in order to take state matters from state courts and place them in federal courts. No less a constitutional authority than Alexander Hamilton suggested that the passage of article III would not eliminate concurrent state court jurisdiction and that the "state courts [would] retain the jurisdiction" they had at the signing of the Constitution. *THE FEDERALIST* No. 82, at 252 (A. Hamilton) (R. Fairfield 2d ed. 1966); *see also* 3 J. ELLIOT, *supra* note 387, at 554 ("The state courts will not lose the jurisdiction of the causes they now decide.") (remarks of John Marshall). Hamilton, of course, recognized that Congress expressly or by implication could make some matters exclusively federal. *THE FEDERALIST* No. 82, *supra*, at 252. However, it is doubtful that Congress, under the guise of acting pursuant to some delegated power, could so expand federal jurisdiction as to reduce the likelihood that parties would submit their traditionally state controversies to state court jurisdiction. Surely, a system of adjudication is a critical feature of sovereignty and congressional interference with this function would, at the least, raise questions under *Usery*.

400. 304 U.S. 64, 78 (1938) (holding that in diversity cases, state law, statutory and precedential, controls the rule of decision in a federal action). *Erie* and its progeny, especially as applied to cases in which a Federal Rule of Civil Procedure is challenged as contrary to a state rule, *see* *Hanna v. Plumer*, 380 U.S. 460 (1965), illustrate the existence of limits on congressional power to create "rules" for federal courts. It is only when Congress legitimately creates rules that such rules govern in federal actions over contrary state practices. *See id.*; *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); 28 U.S.C. § 2072 (1976); M. REDISH, *supra* note 206, at 169-203; Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 694 (1974).

Congress has authorized the Supreme Court to promulgate "by general rules the forms of process, writs, pleadings, and motions, and the practice and procedure" of federal courts. 28 U.S.C. § 2072 (1976). But, "[s]uch rules shall not abridge, enlarge or modify any substantive right." *Id.* Although § 2072 is merely a statutory limit on the Supreme Court's rulemaking authority, a similar constitutional restraint must prevent Congress from using its rulemaking authority and the word "case" to enact substantive policies wrapped in procedural garb. Thus, congressional acts (and court rules made pursuant to Congress' delegation of power) that reflect procedural concerns—efficiency, convenience, necessity—would be within Congress' rulemaking authority, but rules seeking to affect substantive policies by taking state claims and placing them in federal courts would be outside Congress' authority to make procedure, and could be supported only by reference to another power delegated to Congress by the Constitution. *Cf.* M. REDISH, *supra*; Ely, *supra*.

either precedential or statutory state law.⁴⁰¹

Congress has stated specifically in rule 82 that the Federal Rules—even though theoretically broad enough to permit almost any joinder and hence allow supplemental jurisdiction over almost any nonfederal claim—“shall not be construed to extend or limit the jurisdiction of the United States district courts.”⁴⁰² The significance of rule 82 cannot be overstated; in essence, it limits supplemental jurisdiction to cases fairly recognizable as similar to those authorized at the Rules’ enactment.⁴⁰³ In practice, then, only Congress’ direct statutory action can extend or constrict the limits imposed on the Rules. What Congress giveth, it may taketh away.

One has little reason to fear that Congress will *use* its broad constitutional power to expand federal judicial power at the expense of the states. Congress has only sparingly used the word “case” to bring tangential state claims into federal courts.⁴⁰⁴ Moreover, Congress has consistently guarded independent state authority. Accordingly, original arising under jurisdiction is more limited than the Constitution would permit,⁴⁰⁵ a certain amount in controversy has been required as a prerequisite to federal jurisdiction,⁴⁰⁶ and statutes have been enacted curtailing various powers of the federal courts.⁴⁰⁷ Similarly, the federal courts themselves have shown no inclination to accept the open invitation of the Federal Rules to permit the adjudication of all questions contained in any suit pleaded under the Rules.⁴⁰⁸ In fact, the some-

401. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (indicating that even in a federal question case, questions of state law should be governed by the *Erie* rule).

402. FED. R. CIV. P. 82.

403. See, e.g., *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

404. See, e.g., Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (Supp. V 1981). In fact, as I hope to demonstrate in my next Article on the doctrines of pendent and ancillary jurisdiction, most supplemental jurisdiction is narrowly confined to situations where its exercise is necessary to serve a clearly articulated federal policy.

405. See *supra* text accompanying notes 171-90.

406. See *supra* note 311.

407. See Norris-Laguardia Act, 29 U.S.C. §§ 101-115 (1976) (restricting federal courts’ injunctive powers and relegating litigation to state courts); Anti-Injunction Statute, 28 U.S.C. § 2283 (1976) (same); Johnson Act, 28 U.S.C. § 1342 (1976) (same); Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1976) (same).

408. Although the Federal Rules provide for broad joinder of parties, see FED. R. CIV. P. 20, the Supreme Court has not yet accepted all exercises of pendent party jurisdiction, see *Aldinger v. Howard*, 427 U.S. 1 (1976). Similarly, although the Federal Rules provide for broad joinder of claims, see FED. R. CIV. P. 18(a), the Court has erected a fact relatedness barrier against many asserted claims, see *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

In addition, the Supreme Court, on its own initiative, has obviously limited federal jurisdiction over various claims, and relegated litigants to state remedies. See, e.g., *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-21 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941); cf. *Stone v. Powell*, 428 U.S. 465 (1976) (restricting federal habeas corpus jurisdiction if adequate opportunity

times extremely limited view of federal jurisdiction taken by Congress and the courts might lead one to fear that control over the scope of "case" would unduly restrict article III.⁴⁰⁹ This fear, however, like that of overexpansion, is unwarranted. Indeed, as various commentators have argued, Congress' ability to eliminate "essential functions" of federal jurisdiction is quite limited.⁴¹⁰

The recognition of the broad constitutional flexibility given to Congress to define the word "case" is both necessary and long overdue. Any imagined horrors in such a rule should be put to rest by the actual use of supplemental jurisdiction. Historically, "case" has been an important vehicle for ensuring efficacious federal decisionmaking,⁴¹¹ protecting those normally outside of federal jurisdiction who could be harined by federal practice,⁴¹² and creating an efficient and workable system for vindicating rights.⁴¹³

CONCLUSION

In the last few years, the Supreme Court and several commentators have adopted the standards enunciated in *United Mine Workers v. Gibbs* as setting the constitutional limits on a federal court's power to hear and decide nonfederal matters ordinarily outside federal jurisdiction. The adoption of these standards has meant that a federal court must look both for the "substantiality" of federal claims in a lawsuit

for presentation of claims in a state case). But see *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (exhaustion of state administrative remedies is not a prerequisite to an action under § 1983).

409. During the last century, attempts have been made to curtail federal jurisdiction over various classes of cases, see, e.g., H.R. REP. NO. 11926, 88th Cong., 2d Sess. (1964); S. REP. NO. 2646, 85th Cong., 2d Sess. (1958). Currently, there are a number of proposals pending in Congress that would limit federal jurisdiction in various ways. For a description of these proposals, see Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 18 & nn.3-5 (1981).

As an alternative to these attempts to curtail jurisdiction by statute, Congress might instead narrow jurisdiction by restricting the elements of a "case" under article III.

410. See, e.g., Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), reprinted in HART & WECHSLER, *supra* note 57, at 330; Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); see also Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974). Some Supreme Court decisions, however, indicate much broader congressional power. See, e.g., *Yakus v. United States*, 321 U.S. 414, 443 (1944); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513 (1869); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 442 (1850). For a comprehensive discussion of these issues, see Sager, *supra* note 409.

411. See, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Siler v. Louisville & N.R.R.*, 213 U.S. 175 (1909); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

412. *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860).

413. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926); Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (Supp. V 1981); 28 U.S.C. § 1338 (1976); see Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518; Judicial Courts Act of Mar. 2, 1793, ch. 22, § 7, 1 Stat. 333, 335.

and the factual relationship of those claims to any nonfederal claims asserted. But a review of both the "substantiality" and "factual relationship" parts of the *Gibbs* test reveals that they are statutory or court-made doctrines. A review of well-established supplemental jurisdiction cases reveals that the only constitutional limit to supplemental jurisdiction is the presence of a nonfederal claim in the same "case" or "controversy" as a federal claim, and that a "case" or "controversy" is measured by federal procedural rules.

Once "case" is made coextensive with the lawfully created procedural limits of joinder, the question of the constitutional power to exercise supplemental jurisdiction becomes quite simple—jurisdiction exists if joinder is permissible under valid procedural rules.⁴¹⁴ Nonetheless, an inquiry into the constitutional underpinnings of supplemental jurisdiction is necessary. Unless *Gibbs*' constitutional standard is rejected, several kinds of federal jurisdiction will be undermined. Moreover, Congress' ability to create an efficient, economical, and fair federal judicial system is inhibited by *Gibbs*' call for strict fact relatedness. Only by recognizing the inherent procedural expandability of the United States Constitution will supplemental jurisdiction become a tool that may be used to fulfill federal procedural goals—securing "the just, speedy, and inexpensive determination of every action."⁴¹⁵

414. It is apparent, then, that the major question involving a federal court's ancillary or pendent jurisdiction is whether that jurisdiction is within the statutory power of the court. *See Aldinger v. Howard*, 427 U.S. 1, 17 (1976) (issue is whether Congress in the statutes conferring jurisdiction has not expressly or by implication negated the existence of ancillary or pendent jurisdiction). I intend to examine the question of determining Congress' implied intent in my next Article on this subject.

415. FED. R. CIV. P. 1.