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Supplemental Jurisdiction over Permissive Counterclaims and Set Offs: A Misconception

by Douglas D. McFarland*

I. HISTORICAL INTRODUCTION

In the years prior to 1990, courts extended federal jurisdiction over joined claims and parties in an orderly system. Pendent jurisdiction allowed a plaintiff to join a state law theory of recovery to a federal question theory in the complaint when both arose from a “common nucleus of operative fact.”1 Ancillary jurisdiction allowed a defendant to join a state law claim to a federal claim in a civil action when both arose from the same “transaction or occurrence.”2 Since a compulsory counterclaim arose from the same “transaction or occurrence” and a permissive counterclaim did not,3 courts had no difficulty in holding

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3. When defendant attempted to join a claim that did not arise from the same transaction or occurrence, ancillary jurisdiction did not apply and that claim was not heard in federal court unless it had its own federal jurisdictional basis. WRIGHT ET AL., supra § 3523.

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3. A compulsory counterclaim was defined in 1990 as “any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” JAMES W. MOORE, MOORE’S FEDERAL PRACTICE R. 13, at 143 (1990). A permissive counterclaim was defined in 1990 as “any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” Id.
that compulsory counterclaims always qualified and permissive counterclaims never qualified for ancillary jurisdiction. The law was consistent, parallel, and nearly universally accepted.

The rule today has been changed only in plain language editing. A compulsory counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a)(1)(A). A permissive counterclaim is any claim "against an opposing party . . . that is not compulsory." Fed. R. Civ. P. 13(b).

4. This result followed inevitably from the use of the same transaction or occurrence test for both counterclaims and ancillary jurisdiction. See Wright et al., supra note 2, § 3523, at 186-88 ("Courts universally exercised supplemental jurisdiction (usually called ancillary jurisdiction) over defendant's compulsory counterclaims under Civil Rule 13(a) . . . . On the other hand, permissive counterclaims, under Civil Rule 13(b) generally did not invoke supplemental jurisdiction. By definition, these claims do not arise from the same transaction or occurrence as the jurisdiction-invoking claim . . . ."); Richard D. Freer, Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute, 40 Emory L.J. 445, 451 (1991) ("Lower courts had come to equate the transactional test for joinder under the Federal Rules of Civil Procedure with the constitutional test for exercising power over claims lacking an independent basis of federal jurisdiction."); Arthur R. Miller, Ancillary and Pendent Jurisdiction, 26 S. Tex. L.J. 1, 6 (1985); Michelle S. Simon, Defining the Limits of Supplemental Jurisdiction under 28 U.S.C. § 1367: A Hearty Welcome to Permissive Counterclaims, 9 Lewis & Clark L. Rev. 295, 301-04 (2005); Neel K. Chopra, Note, Valuing the Federal Right: Reevaluating the Outer Limits of Supplemental Jurisdiction, 83 N.Y.U. L. Rev. 1915, 1916 (2008).

The doctrine may trace back to Marconi Wireless Telegraph Co. v. National Electric Signaling Co., 206 F. 295 (E.D.N.Y. 1913), a case that preceded the federal rules.

5. A lone commentator argued in 1953 that federal courts should have ancillary jurisdiction over all counterclaims, both compulsory and permissive, since both claim and counterclaim were "parts of a single action," and thus part of the same constitutional case or controversy. Thomas F. Green, Jr., Federal Jurisdiction Over Counterclaims, 48 Nw. U. L. Rev. 271, 273 (1953). Professor Green thought the framers of the Constitution used "case" to refer to "the unit of litigation which the law of procedure, in the normal course of events, allows to be disposed of at one trial." Id. at 293.

Several problems marred this argument. First, the argument tied the scope of a case or controversy to the scope of the action allowed by rules of procedure. Surely a constitutional definition cannot be as changeable as rules of procedure. Second, the argument relied on several old cases, all long-preceding the promulgation of the federal rules, for the proposition that "[a] counterclaim or set-off is not a separate action," and then equated a "civil action" under the federal rules to a constitutional case. Id. at 273 n.13, 293-94. Yet allowance of joinder under the federal rules has never provided authority for the joined claim to be part of the same constitutional case. Even the author himself later rejected the guidance of "the English courts of equity for the measure of federal jurisdiction." Id. at 288. Third, the argument looked to a "litigation unit" and stated "[a] counterclaim when used to defeat the plaintiff's claim has practically the same purpose and effect as a defense." Id. at 277-78. Well, no. A successful counterclaim may have the same practical effect as a defense in the sense it reduces the plaintiff's award, but neither does that make a factually unrelated counterclaim part of the same litigation unit, nor does it make a factually unrelated counterclaim part of the same constitutional case. Finally, the argument rested on the convenience, efficiency, and slight burden of trying the additional facts of the counterclaim. Id. at 279. But that argument applies only when the facts
II. CONGRESS CREATES SUPPLEMENTAL JURISDICTION

Congress entered this area of the law in 1990. It melded both pendent jurisdiction and ancillary jurisdiction into supplemental jurisdiction:


In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The codification in section 1367(a) used neither the common nucleus of operative fact test from pendent jurisdiction nor the transaction or occurrence test from ancillary jurisdiction as the test for the reach of supplemental jurisdiction; instead, it used the new phrase "same case or controversy under Article III."

In swapping phrases, did Congress in 1990 change the law governing supplemental jurisdiction over counterclaims? While little doubt exists that "case or controversy under Article III" encompasses both "common overlap, which almost certainly means the counterclaim is compulsory; further, these considerations cannot be the measure of federal jurisdiction.

Even with these flaws, Professor Green's argument received support from a famous judge. When the majority of the panel perhaps reached too far in its conclusion that a counterclaim was compulsory, Judge Henry Friendly disagreed that the counterclaim was compulsory but added:

I would now reject the conventional learning . . . that the permissive counterclaim ["needs independent jurisdictional grounds to support it, with one exception," to wit, set-off, 3 Moore, Federal Practice P13.19 at 53-54 (2d ed. 1968) . . . . Professor Moore's sound recognition—perhaps more accurately creation—of the exception that set-off requires no independent jurisdictional basis . . . carries the seeds of destruction of the supposed general rule.

United States ex rel. D'Agostino Excavators, Inc. v. Heyward-Robinson Co., 430 F.2d 1077, 1088 (2d Cir. 1970) (Friendly, J., concurring). This could have signaled a broader attack on the permissive counterclaim/no ancillary jurisdiction pairing, but no court or judge followed Judge Friendly's suggestion.

A few courts and commentators eventually recognized set off as the lone exception to the rule, but even this single exception was illusory. See infra Part V.

7. Id. The statute has four additional subsections, which limit this grant of federal jurisdiction in certain diversity cases, permit the court discretion to refuse the jurisdiction, provide for tolling the state statute of limitations, and define state to include territories. Id. § 1367(b)-(e). These additional provisions are not relevant here.
8. Id. § 1367(a).
nucleus of operative fact" and "same transaction or occurrence," the real question is whether "case or controversy under Article III" has expanded the reach of supplemental jurisdiction because it is broader than these constituent parts. The legislative history shows Congress had no such broadening intent. The intent was merely to codify the existing law of pendent and ancillary jurisdiction and to add pendent party jurisdiction. Many federal courts since 1990 have decided that

9. Wright et al., supra note 2, § 3523, at 172 nn.42-43; § 3567.1, at 337 n.9 (collecting cases).
10. Wright et al., supra note 2, § 3567.1, at 343 n.23.
11. Sometimes the position that "case or controversy under Article III" of § 1367(a) is broader than "common nucleus of operative fact" or "transaction or occurrence" is expressed in the proposition that supplemental jurisdiction requires only a "loose factual connection" between claims:

As noted, no one disputes that the Gibbs standard, and therefore § 1367(a), embraces claims that arise from the same transaction or occurrence as the underlying dispute. But it is error to equate the two. The Gibbs "common nucleus" test is broader than the "transaction or occurrence" test used in the Civil Rules. In practice, § 1367(a) requires only that the jurisdiction-invoking claim and the supplemental claim have some loose factual connection.

Wright et al., supra note 2, § 3567.1, at 349 (collecting cases). This statement is supportable as to the broad reach of "same case or controversy" but errrs when it attributes a narrow reach to "same transaction or occurrence." See infra notes 24-26 and accompanying text.


the statute made no change in the law: compulsory counterclaims still automatically qualify for supplemental jurisdiction, and permissive counterclaims still do not.\textsuperscript{14}

III. TWO CASES MISINTERPRET TRANSACTION OR OCCURRENCE CREATING A MISCONCEPTION OF SUPPLEMENTAL JURISDICTION OVER PERMISSIVE COUNTERCLAIMS

The first challenge to this settled law was raised in 1996 in \textit{Channell v. Citicorp National Services, Inc.}\textsuperscript{15} The lessee of a car had an accident that wrecked the leased car. The lease finance company demanded the deficiency balance due on the lease. The lessee took the offensive by commencing a class action for violations of the Consumer Leasing Act.\textsuperscript{16} The defendant lease finance company counterclaimed for the balance due on the lease.\textsuperscript{17}

The United States Court of Appeals for the Seventh Circuit opinion first concluded the counterclaim was permissive and not compulsory.\textsuperscript{18} In doing so, the court relied on poor authority and made no attempt at its own reasoned analysis.\textsuperscript{19} Next, the opinion concluded that only “a

Scholars accept that the primary impetus for the statute was a desire to overrule the Supreme Court’s refusal in \textit{Finley v. United States}, 490 U.S. 545 (1989), to recognize pendent party jurisdiction. \textit{See, e.g., WRIGHT ET AL., supra note 2, § 3567, at 321-22; Denis F. McLaughlin, The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis, 24 ARIZ. ST. L.J. 849, 885-89 (1992).}


\textsuperscript{15} 89 F.3d 379 (7th Cir. 1996).

\textsuperscript{16} \textit{Id.} at 381; \textit{see also 15 U.S.C. §§ 1667-1667e (Supp. 2010).}

\textsuperscript{17} \textit{Channell}, 89 F.3d at 381.

\textsuperscript{18} \textit{Id.} at 384-85.

\textsuperscript{19} \textit{See id.} The opinion cited only \textit{Valencia v. Anderson Brothers Ford}, 617 F.2d 1278, 1289-90 (7th Cir. 1980), \textit{rev’d on other grounds}, 452 U.S. 205 (1981) (concluding a counterclaim to collect the balance of a loan was permissive in a suit under the Truth in Lending Act (TILA)). The \textit{Channell} opinion made no effort to explain why this reversed
loose factual connection" was required for supplemental jurisdiction since § 1367(a) extended jurisdiction to the limits of Article III. The court then found this loose factual connection because both the plaintiff's Consumer Leasing Act claim and the defendant's debt counterclaim arose from the same lease:

Each class member's claim against Citicorp depends on the lease, and indeed on the same clause of the lease that creates Citicorp's claim for a termination charge. The acts creating the claims differ—the claims against Citicorp stem from the signing of the lease, while the claims against the class stem from the early termination of the lease. But the parties, the lease, the clause, and even the terminations are constants . . . . Signing and termination alike therefore were integral to this case[,] . . . and these events are . . . a single case or controversy.

The court put its two conclusions together to assert, for the first time, the proposition that supplemental jurisdiction reached a permissive counterclaim.22 In other words, the court concluded side-by-side that claims arising from the same lease did not arise from the same transaction or occurrence, yet claims arising from the same lease were part of the same case or controversy.23 This could not be. The two conclusions were plainly inconsistent.24 The court's belief that the two conclusions could stand together was based on a grudging misinterpretation of "transaction or occurrence."25

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20. Channell, 89 F.3d at 384-85. The court relied on two of its own precedents, Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir. 1995) (stating only a "loose factual connection" necessary), and Baer v. First Options of Chicago, Inc., 72 F.3d 1294, 1298-1301 (7th Cir. 1995) (concluding § 1367(a) extended supplemental jurisdiction to the limits of Article III).
21. Channell, 89 F.3d at 385-86.
22. Id. at 386.
23. Id. at 385-86.
24. One commentator dryly noted the court "did not elaborate on why it believed that a 'loose factual connection' that was not sufficient to satisfy the 'same transaction or occurrence' standard of the compulsory-counterclaim rule nonetheless satisfied Article III's same 'case or controversy' requirement." Floyd, supra note 12, at 293-94.
“Transaction or occurrence” demands a broad, flexible, and generous interpretation. It is entirely fact-based and fact-defined: legal

26. The “transaction or occurrence” is the core of the counterclaim rule, see supra note 3, as well as several other pleading and joinder rules. As I have written at length in previous articles, see Douglas D. McFarland, Seeing the Forest for the Trees: The Transaction or Occurrence and the Claim Interlock Civil Procedure, 12 FLA. COASTAL L. REV. 247 (2011); McFarland, supra note 19, at 701-08, these rules follow the procedural philosophy of the reporter for the advisory drafting committee, Charles E. Clark. Clark was the architect of the rules in general and the joinder rules in particular. E.g., Robert G. Bone, Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules, 89 COLUM. L. REV. 1, 80-81 (1989); Michael E. Smith, Judge Charles E. Clark and the Federal Rules of Civil Procedure, 85 YALE L.J. 914, 915 (1976).

Clark’s philosophy of procedure can be summarized in two concepts. First, procedure should serve substance, namely, procedural rules should not impede decision of a case on its merits. “One theme pervades [Clark’s writings]: procedural technicality stands in the way of reaching the merits, and of applying substantive law.” Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 909, 962 (1987). Second, all aspects of dispute between parties should, whenever possible, be decided in a single litigation with the result of efficiency and convenience to all concerned. “The purpose, as has been indicated, is to make ‘one lawsuit grow where two grew before.’” Charles A. Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 MINN. L. REV. 580, 580 (1952).

The vehicle Clark chose to carry this philosophy into the rules was the “transaction or occurrence.” The phrase was intended—and therefore should be interpreted—as a term of “great flexibility” to include “all those facts which a layman would naturally associate with, or consider as being a part of, the affair, altercation, or course of dealings between the parties.” CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 102, at 655 (2d ed. 1947). Clark was a severe critic of earlier code decisions that interpreted “transaction” narrowly: “Any attempt at such classifications gives rise to . . . technical demarcations which . . . tend to obscure the true function of the counterclaim . . . to enable litigants to settle in one suit as many controversies as feasible.” Id. at 657.
theories are irrelevant,27 and policy considerations are irrelevant,28 to its scope. It is a broad phrase of inclusion.29

Because a transaction or occurrence is a fact-based, broad phrase of inclusion, the Seventh Circuit should easily have recognized both claim and counterclaim arose out of the same transaction or occurrence. One lease gave rise to one set of facts. Competing claims concerning the same clause of the same lease doubtless were part of the same "affair, altercation, or course of dealings between the parties."30 Channell unremarkably asserted supplemental jurisdiction over a compulsory counterclaim, not a permissive counterclaim.31 This decision remained largely isolated for a decade.

27. Soon after promulgation of the federal rules in 1938, Clark wrote from his new vantage point as a federal judge: "[T]he new rules make it clear that it is not differing legal theories, but differing occurrences or transactions, which form the basis of separate units of judicial action." Atwater v. N. Am. Coal Corp., 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring). The Supreme Court agreed shortly thereafter. Reeves v. Beardall, 316 U.S. 283, 285 (1942). This search for fact boundaries, not legal theories, is consistent throughout Clark's procedural philosophy and writings. For example, on the new concept of a claim for relief, he wrote, "These rules make the extent of the claim involved depend not upon legal rights, but upon the facts, that is, upon a lay view of the past events which have given rise to the litigation." CHARLES E. CLARK, CASES ON PLEADING AND PROCEDURE 659 (2d ed. 1940). He then proceeded to tie this lay view of claim to a lay view of transaction or occurrence. Id. One commentator summed this up as follows: "Clark described the 'unit of judicial action' in terms that assumed an empirical, real-world, factual unity to disputes." Bone, supra note 26, at 103 n.349.

28. Other considerations, such as possible jury confusion or possible frustration of federal substantive policy, are irrelevant and improper. The response to all of these red herrings is the same:

All such decisions as these add to the confusion of the lawyer in understanding an essentially simple rule. And they would not be necessary if the courts would remember that the counterclaim rule affects only the pleadings; whatever advantages there may be in independent actions can be retained through the power of the courts to order separate trials, and, if need be, to enter a final judgment on the plaintiff's claim before proceeding to consider the counterclaim. Charles A. Wright, Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading, 39 IOWA L. REV. 255, 276-77 (1954).

29. Bringing all claims and parties related by the facts of the dispute into one case promotes convenience and efficiency to the court and the parties. See WRIGHT ET AL., supra note 2, § 1652, at 395; Bone, supra note 26, at 80 ("trial convenience, not in terms of right"); Smith, supra note 26, at 916 ("economy of time and resources"). The Supreme Court has roundly endorsed this philosophy: "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." Gibbs, 383 U.S. at 724.

30. See CLARK, supra note 26, § 102, at 654-55.

31. See Channell, 89 F.3d at 384-86.
Then, in 2004, the United States Court of Appeals for the Second Circuit decided *Jones v. Ford Motor Credit Co.* Plaintiff borrowers, on behalf of a class, claimed the defendant credit company violated the Equal Credit Opportunity Act when it allowed retail auto dealers to set the interest rate on auto loans in a racially discriminatory manner. The defendant counterclaimed for the debts owed on the same loans. The Second Circuit first decided in dictum that the counterclaims were permissive and not compulsory because they did not arise from the same transaction or occurrence. The court, relying heavily on *Channell*, then nevertheless decided "[t]he counterclaims and the underlying claim bear a sufficient factual relationship (if one is necessary) to constitute the same 'case' within the meaning of Article III and hence of section 1367." That was so because "[b]oth the ECOA claim and the debt collection claims originate from the Plaintiffs' decisions to purchase Ford cars." The court, therefore, said the Second Circuit, had supplemental jurisdiction over the permissive counterclaims.

The Second Circuit in *Jones* labored under the same misconception as the Seventh Circuit in *Channell*. Not only did both claim and counterclaims have a loose factual connection of "the Plaintiffs' decisions to buy Ford cars," but also a tight factual connection arising from the identical loan documents. Both sides of the case arose from the same transac-

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32. 358 F.3d 205 (2d Cir. 2004).
34. *Jones*, 358 F.3d at 207.
35. *Id.*
36. *Id.* at 209-10. The trial court concluded the counterclaims were permissive, and defendant did not challenge the classification on appeal. *Id.* at 210. The Second Circuit agreed in dictum and may well not have carefully considered the result. *Id.*
37. *Id.* at 213-14.
38. *Id.* at 214.
39. *Id.* One commentator concluded the following:

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

Floyd, supra note 12, at 296. Clearly the two courts would extend jurisdiction to the first two categories. The commentator probably goes too far to suggest the Second Circuit may extend jurisdiction to the third category.
40. *Jones*, 358 F.3d at 207-08, 213-14.
tion or occurrence.\textsuperscript{41} The Jones opinion perhaps recognized this difficulty and attempted to reason around the identical factual origin of both claim and counterclaims as follows:

Ford Credit's debt collection counterclaims are related to those purchase contracts, but not to any particular clause or rate. Rather, the debt collection counterclaims concern the individual Plaintiffs' non-payment after the contract price was set. Thus, the relationship between the counterclaims and the ECOA claim is "logical" only in the sense that the sale, allegedly on discriminatory credit terms, was the "but for" cause of the non-payment... The essential facts for proving the counterclaims and the ECOA claim are not so closely related that resolving both sets of issues in one lawsuit would yield judicial efficiency.\textsuperscript{42}

The court seems to suggest that the facts of non-payment of a loan are not sufficiently related to the facts of creation of the loan.\textsuperscript{43} Did the court think this distinction made any sense? The claim and counterclaim arose from the same loan document.\textsuperscript{44} Certainly evidence of the terms of the underlying loan would be at the core of a collection claim on the very same loan. One contract gave rise to one transaction or occurrence.\textsuperscript{45} As with Channell, Jones was unremarkably asserting supplemental jurisdiction over a compulsory counterclaim.

Why Jones pushed so hard to find the counterclaim was only permissive is even more puzzling since the result was bootless. The answer almost certainly lies in the court's mention that allowing such counterclaims into federal court "might undermine the ECOA enforcement scheme."\textsuperscript{46} In other words, allowing a compulsory counterclaim into federal court to collect the debt might discourage borrowers from asserting their federal rights under various consumer protection lending

\textsuperscript{41} Id. at 207-08.
\textsuperscript{42} Id. at 209-10.
\textsuperscript{43} Id. at 213-14.
\textsuperscript{44} Id. at 207 (emphasis added).
\textsuperscript{45} All of the keys to identifying a transaction or occurrence discussed in supra notes 26-29, point in the same direction. One contract presented one set of facts. A lay person would expect all aspects of one contract to be tried together. Treating one contract as giving rise to one unit of judicial action made one case grow where two grew before. One set of facts was one unit of judicial action. Both claim and counterclaim were part of the course of dealing between the parties.
\textsuperscript{46} Jones, 358 F.3d at 208. The court apparently borrowed this thinking from some Truth in Lending Act cases that were decided prior to 1990, at a time when the law was clear that a permissive counterclaim did not qualify for ancillary jurisdiction. Simon, supra note 4, at 304. A decision at that time that a counterclaim was permissive automatically kept it out of federal court.
statutes. Not only was such a policy consideration irrelevant to distinguishing between compulsory and permissive counterclaims, but also it was completely pointless to rule the counterclaim was only permissive (so it could not be brought into federal court to undermine federal policy) and, in the next paragraph, to rule supplemental jurisdiction allowed the “permissive” counterclaim into federal court.

The end result is that both of the two seminal cases creating the line of precedent that supplemental jurisdiction can extend to a permissive counterclaim are at best seriously “grudging” and at worst transparently erroneous on their interpretation of transaction or occurrence. Both involved compulsory, not permissive, counterclaims. The precedent that supplemental jurisdiction can extend to permissive counterclaims has no foundation.

IV. Subsequent Cases Add to the Misconception

With the precedent that supplemental jurisdiction can extend to permissive counterclaims launched into the stream of the judicial process, we cannot be surprised that later courts have accepted and even extended it. With little or no reasoning or independent analysis, these courts follow Channell and Jones to define transaction or occurrence narrowly, to declare a compulsory counterclaim to be a permissive counterclaim, and then to allow supplemental jurisdiction because both claim and counterclaim are part of the same case or controversy. Some courts have even taken the next logical step to brush past consideration of type of counterclaim as no longer needed on the way to

47. See supra note 28 and accompanying text. See also infra note 54.

48. See infra Parts IV.A-B. Even respected commentators have accepted Channell and Jones at face value and thus embraced the theory that because “case or controversy under Article III” requires only a “loose factual connection,” supplemental jurisdiction can extend to permissive counterclaims. See, e.g., Wright et al., supra note 2, § 3567.1, at 359 (“courts increasingly recognize that some permissive counterclaims can satisfy § 1367(a’); Simon, supra note 4, at 308 (“statutory construction supports the courts’ decisions in [Channell and Jones]”). Cf. Floyd, supra note 12, at 331 (“jurisdiction is necessary and proper to permit the court to fairly and efficiently resolve the plaintiff’s main claim”).
Nearly all of these cases fall into two clusters.

A. A Cluster of Fair Debt Collection Practices Act Cases

The largest cluster of cases following Channell and Jones present a debtor plaintiff suing for abusive collection practices in violation of the Fair Debt Collection Practices Act (FDCPA). The defendant creditor counterclaims for collection of the underlying debt. Of course, the claim is a federal question and the counterclaim is a state law contract action. Study of development of the idea that the counterclaim is only permissive yet within supplemental jurisdiction in this line of cases is instructive.

The first case in the line actually presented the converse situation: the creditor sued on the debt in state court, the debtors later sued under the FDCPA in federal court, and the creditor moved to dismiss the federal claim on the ground it was unpleaded in state court as a compulsory counterclaim. The court concluded the FDCPA counterclaim was only permissive in an opinion that was flawed in a number of serious ways. The court relied on Truth in Lending Act cases that looked to a misleading notion of policy instead of facts. The court relied on

49. See Rothman v. Emory Univ., 123 F.3d 446, 454 (7th Cir. 1997) (concluding the counterclaim "whether compulsory or permissive, was 'so related to' Rothman's original claims that they form the same case or controversy"); CVPartners Inc. v. Boben, No. C09-68951, 2009 WL 1351108, at *1 (N.D. Cal. 2009) (stating "[w]hether defendants' counterclaims are characterized as compulsory or permissive, at a minimum they must meet Section 1367's requirement that counterclaims be 'so related' to plaintiff's claims that they form part of the same constitutional case."); Woodrow v. Satake Family Trust, No. C06-2155WB, 2006 WL 2092630, at *2 (N.D. Cal. 2006) (stating court in doubt whether counterclaim compulsory but confident within supplemental jurisdiction).


52. Id.


54. Peterson, 638 F.2d at 1136. For example, Peterson quoted the seminal precedent, Whigham v. Beneficial Finance Co., 599 F.2d 1322, 1324 (4th Cir. 1979): "The borrower's federal claim involves the same loan, but it does not arise from the obligations created by the contractual transaction . . . . Instead, the claim invokes a statutory penalty designed to enforce federal policy against inadequate disclosure by lenders." 638 F.2d at 1136. Whigham said both claim and counterclaim arose from the same contract, but it would not find them both part of the same transaction or occurrence because of concern that allowing the state law collection action to ride into federal court as a compulsory counterclaim on ancillary jurisdiction might interfere with enforcement of the Truth in Lending Act. 599 F.2d at 1323-24. Such a policy consideration not only was irrelevant to identification of a compulsory counterclaim, see supra note 28 and accompanying text, but also was a...
improper consideration of law instead of facts. The court rendered a results-driven dictum in a hard case. The court's conclusion that the counterclaim was only permissive resulted directly in the next step in the line of decisions: finding the counterclaim only permissive and then dismissing for want of supplemental jurisdiction.

Finally, several cases a decade later took the final step: they retained the erroneous notion that the debt collection counterclaim in an FDCPA action was only permissive, yet next decided the counterclaim was part of the same case or controversy for supplemental jurisdiction. The first case that bridged this gap clearly did so in dictum. Only three months later, a second case relied heavily on the first case and reached the same conclusion, also in dictum. Another three months later, a misleading red herring. See McFarland, supra note 19, at 723-28.

55. For example, Peterson quoted Valencia v. Anderson Brothers Ford, 617 F.2d 1278, 1291 (7th Cir. 1980) rev'd on other grounds, 482 U.S. 205 (1981): “The TILA claim and [debt] counterclaim raise different legal and factual issues governed by different bodies of law.” 638 F.2d at 1136. Law is irrelevant to identification of a compulsory counterclaim. See supra note 27.

56. Peterson reached this illogical conclusion: “While the debt claim and the FDCPA counterclaim raised here may, in a technical sense, arise from the same loan transaction, the two claims bear no logical relation to one another.” 638 F.2d at 1137. The court then made the results-driven nature of its opinion apparent when it opined “it would be proper for the district court to stay proceedings and direct that appellants proceed to file their action as a permissive counterclaim in state court. If the state court does not accept jurisdiction . . . the federal court may then proceed to decide the issues.” Id.

57. Hart v. Clayton-Parker & Assocs., Inc., 869 F. Supp. 774, 777 (D. Ariz. 1994). The court followed the erroneous notion that law matters in order to conclude the facts of a single contract did not form a single transaction or occurrence because “the FDCPA claim and the claim on the underlying debt raise different legal and factual issues governed by different bodies of law.” Id. The court dismissed the counterclaim because “even under section 1367(a) . . . federal courts have supplemental jurisdiction over compulsory counterclaims, but permissive counterclaims require their own jurisdictional basis.” Id. at 776.

58. Sparrow v. Mazda Am. Credit, 385 F. Supp. 2d 1063 (E.D. Cal. 2005). In Sparrow, the district court agreed with three cited district court decisions that “[w]hile the debt does provide some factual connection between the claims, because they arise out of the debt, the legal issues and evidence relating to the claims are considered sufficiently distinct so as not to meet the 'logical relationship' test.” Id. at 1068. The reference to legal issues and evidence shows the court's misunderstanding of the strictly fact-based inquiry into the compulsory nature of a counterclaim. See supra notes 26-27 and accompanying text. Nevertheless, the court sparsely concluded “[b]ecause Defendant’s counterclaims bear a logical and factual relationship to Plaintiff’s claims in that they are related to a single debt incurred by Plaintiff, supplemental jurisdiction exists over Defendant’s counterclaims under § 1367(a).” Sparrow, 385 F. Supp. 2d at 1070. The court then made its earlier conclusions dicta by exercising its discretionary power to dismiss under § 1367(c). Id. at 1070-71.

59. Campos v. W. Dental Serv., Inc., 404 F. Supp. 2d 1164, 1169 (N.D. Cal. 2005). In Campos, the court cited Sparrow for the conclusion that “[t]he claim and counterclaim are,
third case also relied heavily on the first case, then took the next logical step, also in dictum, that a court may skip consideration of whether a counterclaim is compulsory or permissive and proceed directly to decide on the existence of supplemental jurisdiction. The last two cases currently in the line simply cited these precedent cases to support the dual conclusions that the debt counterclaim was permissive yet supplemental jurisdiction existed.

What we have in these FDCPA cases is an inconsistent pair of conclusions: the debt does not arise from the same transaction or occurrence, and yet the debt is part of a common nucleus of operative fact that makes it part of the same case or controversy under Article III. Again, the difficulty is easy to resolve. The notion that a debt counterclaim to a FDCPA claim is only permissive arose in a hard case with seriously flawed analysis and developed through dicta in other cases of course, 'offshoots' of the same basic transaction, but they do not represent the same basic controversy between the parties.” Id. at 1169 (quoting Sparrow, 385 F. Supp. 2d at 1068). On the same page, Campos, with a total absence of citation or reasoning, declared “there will be some permissive counterclaims over which the court has supplemental jurisdiction and some it does not. The reason is that the standard for supplemental jurisdiction is broader than the standard for a counterclaim to be compulsory.” Id. Still on the same page, the court wrapped up by stating both claims were part of the same case or controversy since both were “related to the single debt incurred by plaintiff.” Id. Thus the court could exercise supplemental jurisdiction over this “permissive” counterclaim. As with Sparrow, all of this discussion was dicta because the court then dismissed under § 1367(c). Id. at 1170-71.

60. Bakewell v. Fed. Fin. Gp., Inc., No. 1:04-CV-3538-JOF, 2006 WL 739807, at *2 (N.D. Ga. Mar. 21, 2006). The district court in Bakewell simply stated it found precedents concluding the debt counterclaim was not a compulsory counterclaim to a FDCPA claim persuasive, and then cited Sparrow for the proposition that the debt counterclaim arose from a common nucleus of operative fact, and so qualified for supplemental jurisdiction. Id. at *3-4. Earlier, the court suggested “it may no longer be necessary to determine if the counterclaim is compulsory or permissive” in favor of moving directly to analyze whether the counterclaim “bears a loose factual connection” to support supplemental jurisdiction. Id. at *2. Despite this suggestion, the opinion did proceed to that determination. Id. at *4.

61. See Randall v. Nelson & Kennard, No. CV-09-387-PHX-LOA, 2009 WL 2710141, at *3 (D. Ariz. Aug. 29, 2009) (stating debt counterclaim was permissive under precedents from Ninth Circuit courts but nonetheless part of common nucleus of operative fact since related to a single debt); Koumarian v. Chase Bank USA, N.A., No. C-08-4033MMC, 2008 WL 5120053, at *2-3 (N.D. Cal. Dec. 3, 2008) (making the remarkable assertion that counterclaim only permissive since “claim will require evidence of defendants' conduct in attempting to collect the debt . . . whereas proof of Chase's Counterclaim will require evidence that the debt in question is valid and due” yet concluding "both claims are related to a single debt" and so part of a common nucleus of operative fact for supplemental jurisdiction).
until it approached settled doctrine. This line of precedent is analytically groundless; it should be challenged and eradicated. The conclusion that the debt counterclaim is part of a common nucleus of operative fact, and so part of the same case or controversy, is consistent with the entire federal rules system. The same analysis that makes the counterclaim subject to supplemental jurisdiction makes it part of the same transaction or occurrence. It arises out of the same set of facts, which is the litigation unit of federal practice and rules states practice. These are compulsory counterclaims.

B. A Few Fair Labor Standards Act Cases Clustered in One District

The second cluster of cases extending the misconception originated in a court of appeals decision but has expanded in a single federal district. These cases present a plaintiff suing to collect wages or overtime pay under the Fair Labor Standards Act (FLSA), and the employer counterclaiming for an act of plaintiff committed during the employment relationship.

Four years after enactment of § 1367, the plaintiff sued on three theories of recovery: a FLSA violation for failure to pay overtime, a breach of contract for paying a smaller bonus than promised, and a tort for threatening to withhold a bonus. The United States Court of Appeals for the Third Circuit denied supplemental jurisdiction over plaintiff’s state law theories because the FLSA claim involved very narrow, well-defined factual issues about hours worked during particular weeks. The facts relevant to her state law contract and tort claims, which involved “[defendant’s] alleged underpayment of a bonus and its refusal to pay the bonus if [plaintiff] started looking for another job, were quite distinct.” Not only did all three theories of recovery arise from a single employment relationship, but also all three arose from failure to pay compensation due. Yet the court could not discern “even a ‘loose’ nexus.” Despite the natural factual grouping of the employment relation, the court broke the dealings between the

62. See supra notes 50-61 and accompanying text.
63. See supra notes 26-27 and accompanying text.
65. Lyon v. Whisman, 45 F.3d 758, 759 (3d Cir. 1995).
66. Id. at 764.
67. Id. at 763.
68. Id.
69. Id.
70. The “transaction or occurrence” is a term of “great flexibility” to include a “course of dealings between the parties.” CLARK, supra note 26, § 102, at 655. A lay person would expect all aspects of the dealings between employer and employee to be included, see supra
employer and the employee over one job into unrelated parts. To call this decision grudging is charitable. While this case involved supplemental jurisdiction over additional theories of recovery—formerly pendent jurisdiction—rather than supplemental jurisdiction over a compulsory counterclaim—formerly ancillary jurisdiction—the shadow of its attitude has continued to loom over FLSA cases.

This was shown in four decisions by two judges from a single federal district: all concluded a counterclaim for an employee's actions during the course of employment was only permissive to an FLSA claim by the employee for failure to pay overtime wages. These decisions relied on each other to conclude the employer's counterclaim was only permissive, yet allowed the employer's claim to continue as a set off, which was asserted to be "a well recognized exception to the independent jurisdictional requirement for permissive counterclaims." The notion that a set off is an exception that qualifies for supplemental jurisdiction has been around for a long time, but it too is a misconception.

C. A Later-Maturing Counterclaim

A single unusual case—at first glance—appears to be the only actual assertion of supplemental jurisdiction over a permissive counterclaim. The United States Court of Appeals for the First Circuit stated it was joining the Seventh Circuit [Channell] and the Second Circuit [Jones] by allowing supplemental jurisdiction over permissive counterclaims in

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note 27, and the convenience and efficiency of having a court already familiar with the parties and the dispute resolve these matters is apparent, see supra note 29.

71. Lyon, 45 F.3d at 763.

72. The first decision was Mercer v. Palm Harbor Homes, Inc., No. 805CV1425T30TGW, 2005 WL 3019302, at *1 (M.D. Fla. Nov. 10, 2005) (concluding in a one-page opinion that facts supporting counterclaim of converting equipment "are distinct" from facts supporting FLSA claim yet allowing claim as set off). Three additional opinions in the same court followed. See DeJesus v. Emerald Coast Connections of St. Petersburg, Inc., No. 8:10-CV-462-T-30TBH, 2010 WL 2508844, at *2 (M.D. Fla. June 17, 2010) (concluding counterclaim for converting equipment only permissive to FLSA claim yet allowing claim as set off); Goings v. Advanced Sys., Inc., No. 8:08-CV-1110-T-33TGW, 2008 WL 4195889, at *3 (M.D. Fla. Sept. 12, 2008) (concluding counterclaim for repayment of loan advances for health insurance of employee only permissive to FLSA claim yet allowing as set off); Cole v. Supreme Cabinets, Inc., No. 3:06-CV-772-J-33TEH 2007 WL 1696029, at *3 (M.D. Fla. June 12, 2007) (concluding counterclaim for conversion by returning company vehicle damaged is only permissive to FLSA claim because "the aggregate core of facts upon which Cole's claims rest are the facts of his employment with Supreme Cabinets, not the facts of his behavior following the termination" yet allowing as set off).

73. E.g., Mercer, 2005 WL 3019302, at *2.

74. See infra Part V.

Global Naps, Inc. v. Verizon New England Inc.\textsuperscript{76} The plaintiff Global Naps sued the defendant Verizon in a dispute over interconnection agreements under the federal Telecommunications Act of 1996.\textsuperscript{77} Verizon asserted a state law counterclaim for unpaid access charges.\textsuperscript{78} After four years of litigation, Verizon suspected Global Naps was transferring money to its affiliates to avoid a potential judgment on the counterclaim and amended (supplemented) the counterclaim to add state law theories of alter ego liability and disregard of the corporate form.\textsuperscript{79}

The court sensibly held that supplemental jurisdiction encompassed the additional theories in the counterclaim.\textsuperscript{80} It reasoned, "Verizon's counterclaim is more than sufficiently related to GNAPs' complaint. Both parties' claims ultimately arise from a dispute over the same agreement and involve the same basic factual question: what fees the carriers owe each other."\textsuperscript{81} The court also noted, "[I]t was sensible . . . to try Verizon's claim to pierce the corporate veil with the rest of the litigation, rather than sending count three to state court . . . . The district court was familiar with, and had developed expertise on, the complicated claims at issue."\textsuperscript{82}

The question remained what type of counterclaim was presented to the court. The First Circuit thought because the new theories did not exist at the time of the original answer, the counterclaim could not be compulsory.\textsuperscript{83} Since the counterclaim could not be compulsory, it had to be permissive. Yet because the facts that gave rise to the counter-
claim formed part of a common nucleus of operative fact with the claim, and the two should be tried together, the court thought its only possible resolution was either to apply the general rule and dismiss the permissive counterclaim for lack of federal jurisdiction or join the Channell and Jones line of precedent to assert supplemental jurisdiction over a permissive counterclaim.84

The court was not held to that dilemma. A sounder analysis would have been to recognize the new alter ego theories of the counterclaim did arise from the same transaction or occurrence as the claim. This was not a compulsory counterclaim only because it did not exist at the time of pleading the answer. It was a later-maturing counterclaim.85 Had the counterclaim been in existence at the time of the original answer, the court's analysis of why it was part of the same case or controversy without doubt would have resulted in finding it to be a compulsory counterclaim. The court could have reasoned it was asserting supplemental jurisdiction over a later-maturing counterclaim that would have been compulsory. The court simply did not recognize this line of analysis that would have been more consistent with its overall reasoning, more in line with recognized law, and more powerful.

V. THE SET OFF EXCEPTION: A RELATED MISCONCEPTION

Related to today's counterclaim practice is the common law ancestor set off. By definition, a set off is a claim by a defendant back against a plaintiff for affirmative relief; the claim has to be liquidated or capable of ready calculation, it has to be a situation in which equity will act, and it has to arise from a different transaction.86 Equity will act, for example, when a defendant might have to pay a plaintiff's claim and then be unable to collect a claim back against the plaintiff.87

84. Global Naps, Inc., 603 F.3d at 87.
85. See Fed. R. Civ. P. 13(e) ("The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.").
86. See 3 Joseph Story, Equity Jurisprudence § 1870, at 471 (4th ed. 1918); William A. Fletcher, "Common Nucleus of Operative Fact" and Defensive Set-off: Beyond the Gibbs Test, 74 Ind. L.J. 171, 172 (1998); Matasar, supra note 82, at 1474-75 & nn.344-45.

Another ancestor of the counterclaim is the common law procedure of recoupment. Recoupment is limited to a claim by defendant that arises from the same contract or transaction as plaintiff's claim. Wright et al., supra note 2, § 1401, at 4. Typically, defendant seeks to reduce damages by claiming plaintiff's breach of the same contract or obligation, and no affirmative relief can be granted. See id. Recoupment is not relevant to this Article.

One can immediately recognize that asserting supplemental jurisdiction over a set off is problematical because the set off has to arise from a different transaction, which by definition means it is factually unrelated to the plaintiff's claim. Yet many courts and commentators today assert that set off is an exception to the usual factual relatedness requirement, and that a set off qualifies for supplemental jurisdiction.

The assertion that a set off does not require independent federal jurisdiction was first made by the author of the earliest treatise on the federal rules, James William Moore, when he wrote in the same year the federal rules were promulgated that a permissive counterclaim "is an independent and unrelated claim and needs independent jurisdictional grounds to support it, with one exception. Set-off is that exception." The problem with this bold and counterintuitive assertion is Moore had neither analysis nor precedential support. He created the "set-off exception" out of the whole cloth.

Despite the lack of foundation, the set off exception has survived. More recently, the Third Circuit noted the absence of any precedential base and declined to adopt the exception, yet retained jurisdiction over what it called a permissive counterclaim because it arose out of the common nucleus of operative fact and would be expected to be tried together.

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88. The same transaction (or transaction or occurrence) requires factual relatedness. See supra notes 26-29 and accompanying text.

89. See infra notes 93-97 and accompanying text.

90. 1 James W. Moore & Joseph Friedman, Moore's Federal Practice § 13.03, at 696 (1938).

91. Moore did admit in a footnote that "[n]o cases squarely in point have been found to support the text . . . ." Moore & Friedman, supra note 90, at 696 n.17. One court said the exception "was apparently invented by Professor Moore," and that the "origins of this exception are not totally clear." Ambromovage v. United Mine Workers, 726 F.2d 972, 988, 988 n.47 (3d Cir. 1984). One well-known opinion referred to "Professor Moore's sound recognition—perhaps more accurately creation—of the exception." United States ex rel. D'Agostino Excavators, Inc. v. Heyward-Robinson Co., 430 F.2d 1077, 1088 (2d Cir. 1970) (Friendly, J., concurring). Another court thought "[t]he ancillary status given set-offs is best explained historically from their source in English statute." Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 715 n.7 (5th Cir. 1970). See also McLaughlin, supra note 13, at 923-24.


93. See Ambromovage, 726 F.2d at 988-92. While the opinion clearly stated it did not accept the "defensive set-off exception," it unfortunately continued to refer to defendant's claim as "the set-off claim." Id. at 988, 992. It retained federal jurisdiction over the "permissive counterclaim[]" on the ground that it fell within the common nucleus of
so long as the claim had a "loose factual connection" with the plaintiff's claim, but the opinion was seriously flawed. Following this unsteady lead, several courts have repeated the set off exception as settled law. As a consequence, the two leading commentaries on the federal rules have both stated that the set off is an exception to the usual requirement of factual relatedness for supplemental jurisdiction.

Not a single one of these sources provides any analytical basis for the "set-off exception." The so-called exception makes no analytical sense. It cannot be justified on the ground of equity. Federal jurisdiction is neither grounded nor limned by equity. It cannot be justified on the grounds of efficiency and convenience. Federal jurisdiction is not based on efficiency and convenience. It cannot be justified on the ground that the claim and the set off are parts of a single litigation unit. By definition a set off arises from a separate transaction, which means it operative fact and expected to try together the tests of Gibbs. Id. at 990-92.


95. The opinion stated that the "award in favor of each subclass member need not be paid, but could be set off against sums due to Citicorp." Id. at 386. Here the court's use of "set off" was not a true use of the term. First, it was approving plaintiffs setting off their awards against a counterclaiming defendant. Second, it retained these claims because of their factual connection; this was contrary to the definition of set off, which has always required a separate and unrelated transaction. Accordingly, this case should not be cited as support for the set off exception. Beyond that, the opinion in Channell was seriously flawed on the question of supplemental jurisdiction. See supra Part III.

In a similar fashion, an influential article sometimes cited to support the set off exception used the term in a loose sense and did not actually support the exception. See Green, supra note 5. Professor Green did write that a "counterclaim or set-off is not a separate action," id. at 273 n.13, and that defensive set-off resulted in saving time and effort with only a slightly added burden on the federal court, id. at 279, yet he expressly disapproved resort to the equitable roots of set off "for the measure of federal jurisdiction." Id. at 288.

96. See MOORE ET AL., supra note 2, at § 13.40 (collecting cases); WRIGHT ET AL., supra note 2, at § 3523, 189 n.89 (collecting cases).

97. See MOORE ET AL., supra note 2, at § 13.110(1)(b) ("Claims for setoff, not seeking affirmative relief and interposed merely to defeat or reduce the opposing party's claim, provide an exception to the Rule that permissive counterclaims require an independent basis for jurisdiction."); WRIGHT ET AL., supra note 2, at § 3523, at 189 ("The only exception to this latter rule was when the permissive counterclaim took the form of a set-off, in which case supplemental jurisdiction would be available.").

98. The efficiency and convenience to the court and the parties of handling all disputes between the parties appear to be the principal justification for the exception. See, e.g., WRIGHT ET AL., supra note 2, § 1422, at 202 (asserting set off promotes general "federal policy against multiplicity of actions"); Green, supra note 5, at 279 ("The general convenience will be served and a saving made in effort, time, and money of parties, witnesses, lawyers, state jurors, and the state court . . . [while] burden on the federal court will be slight.").
cannot be part of the same litigation unit; it is part of a separate transaction (or occurrence) and cannot be factually related. \(^9\) The set off exception by its very nature contravenes the "same case or controversy under Article III" limit on supplemental jurisdiction established in § 1367(a). \(^{10}\)

VI. CONCLUSION: NO SUPPLEMENTAL JURISDICTION EXISTS OVER PERMISSIVE COUNTERCLAIMS

This Article examines the rapidly growing line of precedent that supplemental jurisdiction can exist over a permissive counterclaim. The line springs from two decisions boldly asserting the "case or controversy under Article III" test of § 1367(a) for supplemental jurisdiction requires only a "loose factual connection" of the facts, and so is broader than the "transaction or occurrence" test of the compulsory counterclaim rule. \(^{11}\) Almost every one of the later cases in the line of precedent simply cites the two founding cases without attempting any additional reasoning or analysis. \(^{12}\)

The entire line of precedent—every one of these cases—is based on a narrow, grudging definition of transaction or occurrence. Of course, when transaction or occurrence is defined narrowly, case or controversy is broader. Yet when transaction or occurrence is properly defined broadly, it too requires only a "loose factual connection." \(^{13}\) Certainly this was the exact concept Gibbs was attempting to convey with "common nucleus of operative fact." \(^{14}\)

Even though several cases announce they are asserting supplemental jurisdiction over a "permissive counterclaim," analysis demonstrates that

\(^9\) Marks, 4 F.R.D. at 350.

\(^{10}\) See McLaughlin, supra note 13, at 924. Cf. Matasar, supra note 82, at 1475 n.347.

\(^{11}\) The two founding cases are Channell v. Citicorp National Services, Inc., 89 F.3d 379, 385 (7th Cir. 1996), and Jones v. Ford Motor Credit Co., 358 F.3d 205, 213 (2d Cir. 2004). See supra Part III. For the compulsory counterclaim rule, see supra note 3.

\(^{12}\) See supra Parts IV.A-B.

\(^{13}\) See supra notes 26-29 and accompanying text. See also WRIGHT ET AL., supra note 2, § 3567.1, at 349 (collecting cases).

\(^{14}\) United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). One commentator puts the matter in a straightforward fashion: "[T]he supplemental claim must be so transactionally related to the underlying dispute as to be part of one case." Freer, supra note 4, at 447. Indeed, tying the concepts together was perhaps the overriding theme of Gibbs: "the underlying theme of the Gibbs opinion was to offer parallel jurisdictional support, within constitutional limits, to complement the liberal joinder provisions of the Federal Rules of Civil Procedure." McLaughlin, supra note 13, at 873. A similar thought was expressed prior to the statutory codification of supplemental jurisdiction in 1990. See Matasar, supra note 82, at 1453. But see WRIGHT ET AL., supra note 2, § 3567.1, at 349; Fletcher, supra note 86, at 171 n.4.
is not so. The great bulk of cases forming this burgeoning line of precedent clearly involves compulsory counterclaims. One unusual case presents what is better analyzed as a later-maturing counterclaim that would have been compulsory. A few cases involve the baseless "set-off exception." Not one case soundly asserts supplemental jurisdiction over a true permissive counterclaim.

Well-accepted law prior to 1990 was that compulsory counterclaims were carried into federal court by ancillary jurisdiction and permissive counterclaims were not. The creation of supplemental jurisdiction in § 1367 does not change the law. The assertion that supplemental jurisdiction exists over permissive counterclaims is merely a misconception.

105. See supra Parts IV.A-B.
106. See supra Part IV.C.
107. See supra Part V.