COMMENT

Tightening the Reigns on Pendent and Ancillary Jurisdiction

I. INTRODUCTION

Federal courts are courts of limited jurisdiction. Article III, section 2 of the United States Constitution makes this principle clear by the statement that "judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties . . . and . . . to all controversies . . . between Citizens of different States . . ."1 One might argue that "judicial power" under article III is not the same thing as jurisdiction. But the exercise of jurisdiction in situations in which a federal court does not have judicial power would not be likely to yield any conclusive results between the parties.3


2. The judicial power of the federal courts is limited to "Cases" and to "Controversies". The case and controversy requirement serves to preclude judicial determinations where concrete adversity is lacking. See, e.g., DeFunis v. Odegaard, 416 U.S. 312, 316-17 (1974) (when an individual who sues on his own behalf encounters circumstances that render his interests immune to any judicial determination, the court may not consider the substantive issues in the complaint); Flast v. Cohen, 392 U.S. 83, 102-03 (1968) (only where taxpayers have a sufficient personal stake in the outcome of a lawsuit do they have standing to sue as taxpayers).

3. Besides the fact that article III limits the jurisdiction of federal courts, history has shown that Congress may not change the jurisdictional framework of the federal court system without amending the Constitution. In the landmark case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court invalidated an act of Congress because the act would have enlarged the article III, § 2 original jurisdiction of the Supreme Court, as interpreted by the Court.

Thus, one can safely say that article III marks the outer limits of the subject matter jurisdiction of federal courts. But Congress must confer jurisdiction upon federal courts, within those limits, by statute. See, e.g., 28 U.S.C. § 1331 (granting general "federal question" jurisdiction to federal courts). It is generally accepted that Congress has never vested the entire judicial power of article III in the federal courts. See C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3526 (West 1983) [hereinafter cited as WRIGHT, MILLER, & COOPER]. This Comment focuses on the constitutional limits to jurisdiction, but the reader should keep in mind that the present extent of congressionally conferred jurisdiction of the federal courts is in fact more narrow than article III, by itself, would permit.
At the heart of the idea of limited jurisdiction is the concept of "cases" and "controversies." The following analysis will explore the limits of the scope of a constitutional case and will suggest that federal courts have lost sight of their expressly limited role in adjudication by expanding the scope of the constitutional case. This phenomenon has been responsible for an unwarranted intrusion by federal courts into adjudications on questions of state law.

State courts, in contrast to federal courts, are courts of general jurisdiction, though there are exceptions to this rule. With only a few exceptions, however, state courts are empowered to hear claims and counterclaims between parties regardless of the federal or state law character of those claims.

This bifurcated system of justice contains safeguards for the uniform application of federal law. One safeguard is the appeal process of suits originating in state courts. Where the suit involves a question of federal law and where the highest state court has decided the case, the United States Supreme Court can grant certiorari and review the case. Indeed, with only one exception, "federal question" cases could not originate in federal court until 1875. Thus, until 1875, appellate review of federal questions decided in state courts seemed to adequately minimize the risk that state court interpretations of federal law might dictate the evolution of federal law construction. But the eventual expansion in the number and scope of federal statutes led to a need for increased uniformity of construction of federal law, which in turn led to a "full independent national system of federal trial courts." A second safeguard to state court domination of federal law interpretation is the doctrine of removal,

4. Certain state courts have jurisdictional requirements regarding the amount in controversy (e.g., small claims court), while other state courts restrict the content of the claims asserted (e.g., probate court). In addition, Congress has made jurisdiction for certain types of federal question cases exclusively federal. See, e.g., 28 U.S.C. § 1334 (1982) (bankruptcy cases); 28 U.S.C. § 1338(a) (1983) (patent and copyright cases).

5. This statement assumes that no defects in personal jurisdiction over the parties exist, and that service of process can be effectively made.


whereby defendants in state court suits may request that the proceeding be removed to a federal district court.  

Although these safeguards exist to ensure that federal courts have the opportunity, at least in theory, to determine the construction of federal law, they do not address the equally important goal of allowing state courts to control the destiny of state law construction.  

The bifurcated structure described admits to a very serious risk. Too many suits involving questions of state law may originate in federal court by virtue of a claim in the suit that arises out of federal law. This deprives state courts of the opportunity to resolve questions of state law and raises issues of federalism and comity. While it is difficult to determine at what point too many suits involving state law claims are being brought to the federal courts, at some point the expansion of federal jurisdiction to accommodate suits containing state law claims is an encroachment into judicial territory that rightfully belongs to the states.

One way in which federal courts have effected their expansion of subject matter jurisdiction has been through the exercise of ancillary and pendent jurisdiction. Through historical analy-
sis of both ancillary and pendent jurisdiction, collectively referred to as auxiliary jurisdiction, this Comment will identify the constitutional limits of a federal question case under article III.\textsuperscript{14} This Comment contends, primarily, that the development of ancillary jurisdiction has had an impermissibly expansive impact on the definition of a constitutional “case.” The reason for the expansion of ancillary jurisdiction is that federal courts have shifted their perspective in viewing the propriety of federal court adjudication of nonfederal claims. Originally, the federal courts approached the question of their power to adjudicate ancillary claims by reference to the necessity of preserving the judgments and processes of federal courts.\textsuperscript{15} More recently, however, federal courts have turned to a “convenience perspective,” determining their power to hear ancillary claims by reference to the goals of expedience, convenience, and judicial economy.\textsuperscript{16} While the exercise of pendent jurisdiction has increased to some extent, it has not undergone such a change in perspective, and most federal judges now assume that the power of the federal courts to hear pendent claims is much more narrow than the power to hear ancillary claims.\textsuperscript{17}

Subject matter jurisdiction raises questions of power, or competence to adjudicate. Insofar as the two perspectives—necessity and convenience—suggest differences in the


\textsuperscript{15} A fundamental assumption in the analysis that follows is that extension of jurisdiction to pendent or ancillary claims can only be constitutionally valid if the federal claims and auxiliary claims fall within a single, consistent definition of a “case.” See U.S. CONST. art. III, § 2.

\textsuperscript{16} See infra notes 70-90 and accompanying text.

\textsuperscript{17} See generally Theses, Pendent Jurisdiction Over Claims Arising Under Federal Law, 32 HASTINGS L.J. 91, 96-97 (1980) (discussing relationship between pendent and ancillary jurisdiction); Note, Problems of Judicial Power And Discretion in Federal Pendent Jurisdiction Cases, 7 WM. MITCHELL L. REV. 689, 695 (1981) (ancillary jurisdiction broader in application than pendant jurisdiction which, strictly defined, applies only to joinder of state and federal claims brought by an original plaintiff against the same original defendant).
power of federal courts to hear auxiliary claims, no constitutional or statutory authority supports the difference. This Comment asserts that the necessity perspective marks the outer limits of power to hear auxiliary claims, and proposes a model for keeping the exercise of auxiliary jurisdiction within its constitutional limits. The more expansive convenience perspective purports to grant more power to federal courts than the Constitution allows. For this reason, federal courts should return to the necessity perspective in the exercise of ancillary jurisdiction. By doing so, federal courts can limit the number of cases coming before them that involve issues of state law, with minimum adverse effects on the parties who will be precluded from bringing their nonfederal claims in federal court. Determining jurisdiction from the necessity perspective will guarantee that state courts will be the primary fora for interpretations of state law.

II. Ancillary Jurisdiction—Evolution of Standards

Ancillary jurisdiction, applying to certain claims filed after, or ancillary to, the original complaint, is a doctrine permitting a federal court to hear claims over which it would not otherwise have subject matter jurisdiction. A federal court may exercise ancillary jurisdiction whenever a party asserts a claim under state law, after the original complaint has been filed in a proceeding containing a federal claim, that is sufficiently closely related to the federal claim in the suit, except in the case of pendent jurisdiction—where an original plaintiff brings both federal and nonfederal claims against the same original defendant.

18. Subject matter jurisdiction is lacking when opposing parties are not diverse and where a case before the court does not arise under federal law. U.S. Const. art. III, § 2.

19. Ancillary and pendent jurisdiction have been called "two species of the same thing." Matasar, supra note 13, at 1399. Pendent jurisdiction differs from ancillary jurisdiction only in that the former refers to an original plaintiff bringing a federal claim and a nonfederal claim against the same original defendant. This difference has accounted for the separate development of the two doctrines and for an apparent consensus that exercise of pendent jurisdiction is discretionary while exercise of ancillary jurisdiction is mandatory. See Yale Note, supra note 13, at 631. There is considerable debate over which doctrine—pendent or ancillary jurisdiction—applies in circumstances where an original plaintiff brings a nonfederal claim against a defendant who, though original to the action, is not the party against whom the federal claim is brought. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978) (federal and nonfederal claims arising from common nucleus of operative facts are not alone sufficient to establish federal court power to hear nonfederal claims); Aldinger v. Howard, 427 U.S. 1, 9 (1976) (nonfederal claim cannot be the basis for joining a party over whom no independent federal jurisdiction exists simply because that claim derives from the common nucleus of operative fact
The Supreme Court first recognized ancillary jurisdiction in *Freeman v. Howe.* In *Freeman,* a United States marshal seized a number of railroad cars under writs of attachment issued by a federal court. Individuals with mortgage claims to the property then brought an action of replevin against the marshal in state court, and received a favorable judgment. The Supreme Court, reviewing the state court decision, held that a state court lacks authority to interfere with property under the control of a federal court. The mortgagees argued that a bar to their state court action would leave them remediless because they lacked diversity with the plaintiffs in the federal court action. The Court held that any party whose interests were affected by the action in federal court could bring a claim to property already in the federal court's control and that the mortgagees' state law claim would be ancillary to the original suit.

The *Freeman* holding can be explained in one of several ways. One explanation is that property occupies so special a position in American society that an exception to the normal limitations of federal subject matter jurisdiction is warranted in order to protect property interests. Another explanation is that all claims to property comprise but one constitutional case, in which event the entire matter is legitimately within the federal court's subject matter jurisdiction and no exception is neces-

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20. See, e.g., Note, The Ancillary Concept and the Federal Rules, 64 Harv. L. Rev. 968, 976 (1951) (established principles will not support ancillary intervention where there is no res in court's jurisdiction); Note, Ancillary Jurisdiction of the Federal Courts, 48 Iowa L. Rev. 383, 385-86 (1963) (when res is in court's jurisdiction, the court may adjudicate all questions relating to the title, possession or control of res, regardless whether jurisdictional requirements are met, to prevent injustice).
sary. 24 A third explanation is that extension of ancillary jurisdiction over the claim in *Freeman* was necessary to the full adjudication of the suit before the court, regardless of the claim being one to property, and that the claims of nondiverse parties were for that reason part of the same case. 25 Extension of jurisdiction can be "necessary" in that refusal to hear a nonfederal claim may violate fifth amendment due process guarantees if parties with a rightful claim to property before a federal court are completely foreclosed of a remedy. 26 This latter explanation of *Freeman* can be appropriately referred to as the "necessity perspective" of power to exercise auxiliary jurisdiction. Regardless of which of the three explanations prevailed in the minds of jurists, the *Freeman* rule was applied uniformly after 1860. 27

In 1926, the Supreme Court significantly expanded ancillary jurisdiction in *Moore v. New York Cotton Exchange* 28 by applying the doctrine to compulsory counterclaims. In *Moore*, the defendant Cotton Exchange refused to sell cotton quotations to the plaintiff Odd-Lot Exchange. The plaintiff argued that since the defendant had a monopoly on the quotations, its refusal to sell quotations to the Odd-Lot Exchange was a restraint of trade

24. See Matasar, supra note 13, at 1465 ("every claim to an identical res would involve . . . the same transaction . . . ." Matasar goes on to assert that all claims arising out of a single transaction are parts of one constitutional "case.").

25. The third approach suggests that the totality of circumstances may warrant calling two claims parts of one constitutional "case," even where the two claims do not involve a single piece of property.

26. The fifth amendment prohibits deprivations by the federal government of life, liberty, and property without due process of law. U.S. Const., amend. V. A heated debate surrounds the question of whether actions of this sort by federal courts can violate the fifth amendment.

27. See Toucey v. New York Life Ins. Co., 314 U.S. 118, 134-35 (1941) ("the court, whether federal or state, which first takes possession of a res withdraws the property from the reach of the other."); Looney v. East Tex. R.R., 247 U.S. 214, 221 (1918) (use of a federal injunction upon parties wishing to sue in state courts is proper when done to protect and preserve the jurisdiction of the federal court until it can render complete justice between the parties); Wabash R.R. v. Adelbert College, 208 U.S. 38, 54 (1908) ("a court during the continuance of its possession has, incident thereto and as ancillary to the suit . . . jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property"); In re Tyler, 149 U.S. 164, 181 (1893) ("[n]o rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court . . . and that if any person . . . intentionally interferes with such possession, he necessarily commits a contempt of court . . . ."); Krippendorf v. Hyde, 110 U.S. 276, 280-81 (1884) (defendant was deprived of the state court remedy of replevin "by the fact that the proceedings in attachment were pending in a court of the United States, [and] the property attached . . . is regarded as in the custody of the court.")

in violation of the Sherman Anti-Trust Act. The plaintiff further asserted that the refusal to supply the quotations could be enjoined by a federal court pursuant to the Clayton Act. The defendant, while denying the validity of the plaintiff's claims, counterclaimed that the plaintiff had been obtaining the quotations anyway, in violation of New York law.

The Supreme Court affirmed the district court's decision to dismiss the plaintiff's federal claim on the merits, but upheld the defendant's state law claim. The Court reasoned that the New York Cotton Exchange was conducting intrastate business, and that its contractual dealings were, therefore, beyond the reach of the Sherman Act. The Court held that the defendant's counterclaim nevertheless was compulsory under the language of Equity Rule 30, because the counterclaim arose out of the transaction that was the subject matter of the original suit. This relationship was sufficient to warrant an exercise of ancillary jurisdiction over the counterclaim.

By itself, the decision's expansion of ancillary jurisdiction does little to undermine notions of federalism and comity. In fact, the two claims in Moore were so closely intertwined that it would be very difficult to successfully argue that the two claims constituted two distinct cases. As the Court noted: "It only needs the failure of the former [federal claim] to establish a foundation for the latter [state claim] . . . ." But, in what was apparently dictum, the Court went on to add that "transaction" was a "word of flexible meaning . . . [that] may comprehend a series of many occurrences, depending . . . upon their logical relationship." This statement gave federal courts no guidance for future adjudications because of its apparent lack of any limiting principle.

31. Moore, 270 U.S. at 603.
32. Id. at 611.
33. Id. at 604.
34. Equity Rule 30, 268 U.S. 709 (1925), is the precursor to Fed. R. Civ. P. 13(a). Both rules require a defendant who has a counterclaim that arises out of the transaction that is the subject matter of the plaintiff's original claim to bring the counterclaim in the present suit or waive the right to bring the counterclaim in a subsequent proceeding. See infra note 93 and accompanying text.
35. Moore, 270 U.S. at 609.
36. See supra note 13; infra note 106.
37. Moore, 270 U.S. at 610.
38. Id.
In addition to the vague definition of the crucial term "transaction" in Moore, another reason suggests that the case should not have been viewed as sound precedent. When Moore was decided, the rules of joinder of claims and parties were much more restrictive than the current federal rules. The Moore Court had no reason to suspect that twelve years after its decision to extend ancillary jurisdiction to compulsory counterclaims, an entirely new and expansive system of federal court procedure that uses the same transactional concepts used in Equity Rule 30 would have been adopted.

Today, courts routinely apply the doctrine of ancillary jurisdiction to compulsory counterclaims, cross-claims, impleader

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39. Courts following Moore were left with the conclusion that claims arising out of a single transaction are parts of the same case. But, from the statement that "transaction" is a word of flexible meaning, it follows that a constitutional case is a concept of flexible meaning. While many federal court opinions may support this conclusion, limits on federal judicial power to hear state law claims are illusory if federal jurisdiction can be subject to easy expansion.

40. For examples of how narrow the rules of joinder of claims and parties were before the adoption of the Federal Rules of Civil Procedure in 1938, see Matasar, supra note 13, at 1484 n. 387.

41. The rule for compulsory counter-claims is phrased very much like Equity Rule 30. See Fed. R. Civ. P. 13(a). The rule on intervention of right refers to "transaction." Fed. R. Civ. P. 24(a). The rule for cross-claims refers to the "subject matter of the original action." Fed. R. Civ. P. 13(g). But, as Professor Matasar explains, "by the late 1960s federal courts . . . noted that the new Federal Rules [as a whole] could be shoehorned into the Moore transactional rule." Matasar, supra note 13, at 1413.

42. Fed. R. Civ. P. 13(a). See, e.g., Sue & Sam Mfg. Co. v. B-L-S Constr. Co., 538 F. 2d 1048, 1053 (5th Cir. 1976) (the court exercised ancillary jurisdiction over a lessee's state law counterclaim against a lessor for rain damage to the lessee's property where the original claim was brought under diversity jurisdiction by a third party against both the lessor and the lessee for rain damage to property in the lessee's possession); Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193, 1198 (10th Cir. 1974) (union members sued their employer for violation of the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985, and the employer counterclaimed that the plaintiff had violated Colorado law and in so doing had damaged him. The federal court exercised ancillary jurisdiction over the counterclaim); Hercules Inc. v. Dynamic Export Corp., 71 F.R.D. 101, 107-08 (S.D.N.Y. 1976) (ancillary jurisdiction was extended to defendant's counterclaims that were found to be compulsory. The plaintiff had sued to recover the cost of goods delivered to defendant, who counterclaimed that the delivery was in breach of contract).

43. Fed. R. Civ. P. 13(g). See, e.g., City of Boston v. Boston Edison Co., 260 F.2d 872, 874-75 (1st Cir. 1958) (the city and the utility, both defendants in a suit deriving from a broken water main, cross-claimed against each other for indemnity. Ancillary jurisdiction was exercised over the state law indemnity claim); Miller v. Carson, 515 F. Supp. 1375, 1376-77 (M.D. Fla. 1981) (ancillary jurisdiction was extended to a cross-claim by city defendants against another defendant; the cross-claim involved a state law question arising from a permanent injunction issued by another federal court); Dow Corning Corp. v. Schpak, 65 F.R.D. 71, 72 (N.D. Ill. 1974) (ancillary jurisdiction was extended to a cross-claim between co-defendants in a breach of contract action, where
of third party defendants,\textsuperscript{44} interpleader actions,\textsuperscript{45} and intervention of right,\textsuperscript{46} although not without criticism in some circumstances. One commentator has said, "If there is any single rationalizing principle that will explain these diverse rules, it is not easily discerned."\textsuperscript{47} Nevertheless, federal courts have taken the doctrine of ancillary jurisdiction further than the Moore Court could have anticipated.

III. PENDENT JURISDICTION—EVOLUTION OF STANDARDS

Pendent jurisdiction, like ancillary jurisdiction, enables federal courts to hear claims over which they would not independently have subject matter jurisdiction.\textsuperscript{48} The crucial difference between the two doctrines is that pendent jurisdiction refers only to the circumstance in which a nonfederal claim is brought by an original plaintiff in conjunction with a federal claim against the same original defendant. The effect of this distinction is that exercise of pendent jurisdiction is said to be discretionary since a plaintiff could have chosen originally to bring the entire matter before a state court.\textsuperscript{49} Although a court may

\textsuperscript{44} Fed. R. Civ. P. 14. See, e.g., Burke v. Ernest W. Hahn Inc., 592 F.2d 542, 545-46 (9th Cir. 1979) (a federal court has ancillary jurisdiction to hear a claim by defendant employer against trustees of a trust fund, when the employer was sued for contributions allegedly due the fund); United States v. United Pac. Ins. Co., 472 F.2d 792, 794-96 (9th Cir. 1983), cert. denied, 411 U.S. 983 (1973) (ancillary jurisdiction was extended to third party claims against a contractor by the contractor's surety, where the surety was sued by a subcontractor pursuant to the Miller Act, 40 U.S.C.\textsuperscript{70} 270 (6)).

\textsuperscript{45} Fed. R. Civ. P. 22. See, e.g., Bauer v. Uniroyal Tire Co., 630 F.2d 1287, 1290 (8th Cir. 1980) (where a seller who repossessed goods for nonpayment, inadvertently took back more than was due, and was sued in diversity for conversion, ancillary jurisdiction was extended to the state law-based interpleader action to join all potential plaintiffs who might claim damages for the error even if joinder would otherwise have destroyed diversity); Walmac Co. v. Isaacs, 220 F.2d 108, 114 (1st Cir. 1955) (when defendant interpled into a suit additional plaintiffs whose claims to the disputed fund rested on state law, ancillary jurisdiction was exercised although interpleader would otherwise have destroyed diversity jurisdiction).

\textsuperscript{46} Fed. R. Civ. P. 24(a). See, e.g., Lenz v. Wagner, 240 F.2d 666, 669 (5th Cir. 1957) (ancillary jurisdiction was applied to a creditor who sought to intervene in a suit by the United States against a taxpayer's widow for taxes allegedly owed, even though the creditor's claim to particular property rested on state law); Exchange Nat'l Bank v. Abramson, 45 F.R.D. 97, 105 (D.C. Minn. 1968) (a state law claim for abuse of process by an intervening receiver of an insolvent insurer came within a federal court's ancillary jurisdiction when a bank sued an attorney retained by the receiver pursuant to 12 U.S.C. \textsuperscript{94} § 94).

\textsuperscript{47} Wright, Miller & Cooper, supra note 3 at § 3523 at 70.

\textsuperscript{48} See supra notes 13 & 19 and accompanying text.

\textsuperscript{49} See Moor v. County of Alameda, 411 U.S. 693, 716-17 (1973) (where plaintiff's
decline to hear a pendent state law claim, the question of the power to adjudicate state law claims is the same for pendent as for ancillary jurisdiction.50

The doctrine of pendent jurisdiction originated in Hurn v. Oursler.51 In Hurn, the plaintiff sued in federal district court, claiming that the defendants had produced a play in violation of both the copyright law of the United States and the state fair business practices law.52 When the federal claim for copyright violation failed on the merits, the district court dismissed the state claim for lack of subject matter jurisdiction. After the Court of Appeals for the Second Circuit affirmed the trial court’s decision,53 the Supreme Court modified the judgment, holding that the plaintiff needed no independent basis of subject matter jurisdiction over the pendent claim, as the two claims represented but one cause of action.54 The Hurn Court held that a court has "the right to decide all questions in the case . . . ," but more specifically, Hurn relied on the concept of a "cause of action" as the unit over which the court’s subject matter jurisdiction may reach.55

Although the "cause of action" test has been considered confusing,56 the confusion has perhaps been unwarranted because the Hurn Court defined a cause of action: a state claim is part of the original cause of action where it "results from the same acts which constitute the [federal claim] and are [sic]

50. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978) (pendent and ancillary jurisdiction considered "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?"). See also Minahan, supra note 13, at 280 (application of pendent and ancillary jurisdiction to diversity cases appears to signify an imminent merger of the doctrines); Harvard Note, supra note 13, at 1953 (the labels "pendent" and "ancillary" only confuse federal courts and should be merged into a single category of incidental jurisdiction).

51. 289 U.S. 238 (1933).
52. Id. at 239.
53. 61 F.2d 1031 (2d Cir. 1933).
54. Hurn, 289 U.S. at 248.
55. Id. at 243, citing Siler v. Louisville & N.R.R., 213 U.S. 175, 191 (1909).
56. "This standard [one cause of action], however, has suffered from a substantial lack of precision . . . ." Shakman, supra note 12, at 263. "The Court noted [in United Mineworkers of America v. Gibbs, 383 U.S. 715 (1966)] that in 1933, when Hurn was decided, the meaning of cause of action was in some dispute." Yale Note, supra note 13, at 631.
inseparable therefrom." But more specifically

A cause of action does not consist of facts, . . . but of the unlawful violation of a right which the facts show. The number and variety of facts alleged do not establish more than one cause of action so long as their result . . . is the violation of but one right by a single legal wrong.58

In spite of an apparently workable standard for determining when a court may exercise pendent jurisdiction, courts had great difficulty in determining the meaning of a cause of action and whether two claims represent a single cause of action. This difficulty increased with the adoption of the Federal Rules of Civil Procedure in 1938 and the merger of suits at law and in equity.59

In response to the difficulties in applying the Hurn cause of action test, the Supreme Court articulated a new standard for the constitutional power to exercise pendent jurisdiction in 1966. In United Mineworkers of America v. Gibbs,60 a coal company planning to open a new mine entered into employment contracts

57. Hurn, 289 U.S. at 240.
60. 383 U.S. 715 (1966). Matasar suggests that the Gibbs standard does not address constitutional power, but speaks only to statutory authority to exercise pendent (or ancillary) jurisdiction. Matasar, supra note 13. Matasar claims that an Article III case or controversy is far more broad than any of the judicial tests thus far developed would indicate; a case embodies all parties and claims allowable in a single proceeding under duly promulgated procedural rules. Id. at 1484-90.

Matasar's view is a minority position, although it is well documented. Its logic, however, is somewhat empty. Jurisdiction is a more fundamental concept than a procedural rule. The scope of subject matter jurisdiction, derived from the Constitution, has a direct and immediate impact on the balance of power between the federal and state governments. See Shakman, supra note 13, at 267. It may well be that independent and liberal construction of the Federal Rules of Civil Procedure would permit greater joinder of claims and parties than the Constitution, in a theoretical sense, would allow. Matasar's thesis contains no substantive vision of the content of a "case" under Article III, which procedural rules must respect. Unless Matasar is willing to say that a case under Article III is devoid of any substantive meaning, his assertion that a case is whatever duly promulgated rules will allow is tautological. It is the constitutional substance of an Article III case that determines which rules of procedure are duly promulgated.

Most commentators disagree with Matasar and maintain that Gibbs circumscribed a constitutional "case" and did not just decide a statutory issue. See e.g., Baker, Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction, 33 U. Prrr. L. Rev. 759, 784 (1972) [hereinafter cited as Baker] (Gibbs substitution of the word "case" for the phrase "cause of action" provided greater flexibility to include ancillary and pendent claims in federal cases).
with the plaintiff. Subsequently, a number of union members forcibly prevented the opening of the new mine and established a limited picket of the mine site.61 When Gibbs lost his job as a result of the mine not opening,62 he filed suit in federal court, claiming that the union’s actions violated section 303 of the Labor Management Relations Act (LMRA)63 and constituted conspiracy and interference with contractual relations, in violation of state common law. The Supreme Court decided that although the federal claim was correctly dismissed on the merits, a federal court still could extend pendent jurisdiction over the state law claim.64

In reaching its decision, the Gibbs Court used a three-part formula for the power to exercise pendent jurisdiction: (1) the plaintiff must assert a federal claim of a substantial nature; (2) the nonfederal claim asserted by the plaintiff must share a nucleus of operative facts with the federal claim; and (3) one must ordinarily expect the two claims to be brought at one time, without consideration of their federal or nonfederal nature.65

Largely because the Gibbs Court referred to the Hurn cause of action standard as “unnecessarily grudging,”66 most commentators have viewed the Gibbs standard as broader than the Hurn standard; that is, state law claims brought in conjunction with federal law claims are less likely to be dismissed for lack of subject matter jurisdiction under the Gibbs standard than under the Hurn standard.67 This is not entirely obvious. Gibbs offers no guidance for the degree of commonality of facts a court might require to determine that state and federal claims share a “common nucleus of operative facts.”

The Gibbs standard can be viewed, then, as a different articulation of the same cause of action test.68 Nowhere in the

62. Id. at 720.
64. Gibbs, 383 U.S. at 729.
65. Id. at 725.
66. Id. The Gibbs Court did not state that Hurn had incorrectly assessed the power of a federal court to extend pendent jurisdiction. Instead, the Gibbs Court noted that Fed. R. Civ. P. 2, which created the unified form of action, had rendered the term “cause of action” obsolete. Courts after Hurn had difficulty defining “cause of action,” and the result was an “unnecessarily grudging” application of the Hurn mandate.
67. See, e.g., Baker, supra note 60, at 765; Minahan, supra note 13, at 303; Shakman, supra note 12, at 265.
68. The Shakman article, supra note 12, points out that the result of Hurn is to give federal courts the power to extend pendent jurisdiction where adjudication of a federal
Gibbs opinion did the Court say what "operative facts" are. Operative facts are arguably those factual events or circumstances that give rise to a remedial right—which cause the law in question, in its remedial function, to operate. The operative facts, therefore, would be acts or events that comprise the violation of a primary right. Although many commentators assume that Gibbs rejected the Hurn cause of action theory, an entirely logical reading of common nucleus of operative facts produces an identical standard. Thus, a narrow reading of Gibbs would lessen the confusion surrounding the meaning of a cause of action, without broadening the application of pendent jurisdiction.

IV. PERSPECTIVES APPROACH TO EXTENSION OF AUXILIARY JURISDICTION

A. The Necessity Perspective

The exercise of auxiliary jurisdiction over the years can be categorized by a perspectives approach; courts have exhibited a philosophy or a set of policy concerns regarding the proper circumstances for federal court adjudication of state law. Federal courts have responded to the question of power to extend auxiliary jurisdiction in terms of either necessity or convenience. In
the early applications of pendent and ancillary jurisdiction, federal courts used a necessity perspective in the determination of the scope of federal subject matter jurisdiction. Under the necessity perspective, the scope of a case arising under federal law was limited to federal questions and to those state law questions that a federal court must be able to hear to avoid jeopardizing the judgments and processes of the federal judicial system.

The obvious weakness of this standard is the difficulty in ascertaining when dismissal of state claims jeopardizes the judgments and processes of the federal judicial system. A determination of when a party's state claim will be foreclosed or impaired if the claim is not allowed into a proceeding in federal court, however, is not beyond the court's expertise. Under the neces-

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1. See supra note 70.

2. One articulation of this idea is that the judicial power of courts, as provided in article III of the Constitution, contains some notion of implied jurisdictional power. Thus, preventing federal courts from hearing some state claims would prevent them from functioning as Courts or from exercising judicial power. A.L.L. STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, § 1313 (West 1969). While this view does little to limit the scope of federal subject matter jurisdiction, its focus is crucial. Implied jurisdiction, beyond the express language of article III, is recognized cautiously, and for that reason much more fundamental than judicial economy. See Yale Note, supra note 13, at 640 (the original purpose of ancillary jurisdiction was to prevent state courts from frustrating the power of federal courts, and judicial economy and fairness to litigants were only secondary concerns.).

3. Early on, the Supreme Court adopted the idea of extending jurisdiction to state law claims where failure to do so would threaten federal court judgments. Supreme Tribe of Ben-Hur, 255 U.S. at 367 (upholding an ancillary bill to prevent members of a class in a class suit from taking their claims to state courts for adjudication, the Court expressly stated that it may enjoin relitigation in a state court of issues decided by the federal court).

4. Fed. R. Civ. P. 19(a) permits a federal court to join to an action any party with an interest "relating to the subject of the action" who is "so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest, or (ii) leave any of the persons already parties subject to a substan-
sity perspective, if a court finds that a party with a state claim runs a substantial risk of impairing the state claim by adjudication of the federal claim alone, then the similarities between the two claims compel the conclusion that the two are parts of one constitutional "case."

Failure to hear the state claim in such a circumstance could have several undesirable effects. The party with a state claim could institute a suit in state court at a later date only to find that the state court is bound by the disposition of crucial issues made in the federal suit.74 On the other hand, the state court might reject the findings and conclusions of the federal court and resolve the state claim adversely to the prior disposition.75 Finally, the federal court might enjoin the state court from deciding the state claim until after the federal claim has been resolved.76 The federal court in such a case still faces the question of whether to hear the state claims, but federal-state tensions in the meantime have been exacerbated.

Thus, a standard for the exercise of auxiliary jurisdiction, derived from the necessity perspective, can be summarized as follows: (1) the power to extend auxiliary jurisdiction exists where the state claim in question is part of the same constituti-

tial risk of incurring double, multiple, or otherwise inconsistent obligations . . . ." This is not a determination of jurisdiction, since Rule 19(a) applies only to parties who will not destroy established diversity jurisdiction. But the court's inquiry is the same one that can be made, in the jurisdictional context, to decide that it is necessary to hear a legitimate state claim joined to a related federal claim.

74. The situation described can produce inequitable results. A party in a federal suit might concede, or fail to vigorously defend, issues that are peripheral to the federal claim. A subsequent suit in state court might be lost on just such an issue by means of collateral estoppel. Although the Supreme Court has stated that collateral estoppel shall only be exercised when a party had sufficient incentive to vigorously defend a particular issue in a previous proceeding, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-332 (1979), state courts are not necessarily required to follow this rule. See also Yale Note, supra note 13 at 648-49 n. 115 (citing Degnan, Federalized Res Judicata, 86 YALE L.J. 741, 755-56 (1976), the Yale Note claims that these types of suits are likely to be settled because of the preclusive effect that state courts tend to give to federal court "judgments and matters adjudicated").

75. This scenario goes to the root of the United States' federal system of government. Federal decisional law, derived from 28 U.S.C. § 1738, makes judgments of federal courts binding on state courts. See Restatement Second of Judgements § 87 (1982). But it is not clear that state courts must accept the resolution of every issue made at the federal level since, theoretically, not all findings of fact and law are crucial to the ultimate judgment. See also infra note 76.

76. Supreme Tribe of Ben-Hur, 255 U.S. at 367 (district court has ancillary jurisdiction in a class action suit and can restrain members of fraternal organizations from bringing suit against the organization in state court).
tional case as the federal claim; (2) a case arising under federal law consists of federal law questions and those state law questions that a federal court must necessarily decide; and (3) the necessity element is present whenever adjudication of the federal claim accompanied by the dismissal of the state claim substantially risks impairing the state claim, either legally or as a practical matter. The necessity standard reconciles the landmark decisions regarding ancillary and pendent jurisdiction and provides a model for limiting the exercise of the two doctrines in future adjudications.

In *Freeman v. Howe,*78 the Supreme Court used a necessity perspective. The Court's statement that a court with jurisdiction "has a right to decide every question which occurs in the cause"79 only begs the underlying question why a court should have such a right. The *Freeman* Court did not characterize this power as a matter of mere convenience or efficiency. "Neither can one take the property from the custody of the other by replevin, of [sic] any other process; for this would produce a conflict extremely embarrassing to the administration of justice."80 Because the federal court could not permit a state court to replevy the railroad cars without jeopardizing its own disposition of the property, its exercise of ancillary jurisdiction was based upon the necessity perspective. The Court discussed the potential deterioration of effectiveness of the federal judicial system if things seized by a federal court could be interfered with by state courts or by other state bodies.81 Widespread intervention of this sort would lead to a loss of faith in the federal court's ability to render justice to parties.

*Hurn v. Oursler*82 also used the necessity perspective to determine auxiliary jurisdiction. The failure to exercise pendent jurisdiction could have produced the same kind of embarrassment that the *Freeman* Court feared. Part of the reason the *Hurn* Court extended pendent jurisdiction was that the federal claim of copyright violation "contain[ed] every essential element

77. See supra notes 5, 20-27 & 50-59 and accompanying text.
78. 65 U.S. (24 How.) 450 (1860).
79. Id. at 457.
80. Id. at 458-59.
81. Id. at 459. ("We need scarcely remark, that no Government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another.").
82. 289 U.S. 238 (1933).
necessary to justify the conclusion that there was likewise no unfair competition . . . ."83 If the federal court had not heard the state claim, collateral estoppel most likely would have foreclosed the plaintiff's unfair competition claim in a later state court proceeding, for most of the issues would have been adjudicated by the federal court. Issue preclusion would have resulted without the plaintiff ever having argued his state claim. Disregarding potential due process problems,84 this situation would, as a practical matter, have forced the plaintiff to have brought the original action in state court.85

Even the Gibbs Court grounded auxiliary jurisdiction in necessity, although the language in parts of the opinion suggests convenience and expedience. The Court noted that the exercise of pendent jurisdiction is discretionary and should be justified by "considerations of judicial economy, convenience and fairness to litigants . . . ."86 This Comment contends that pendent jurisdiction is not really discretionary in the broad sense that Gibbs suggests.87 But regardless of whether discretion is more limited

83. Id. at 247. See supra notes 51-53 and accompanying text.
84. See supra note 26 and accompanying text.
85. While forcing suits to be brought in one forum as opposed to another is not necessarily undesirable, the consequence of a plaintiff taking both his federal and nonfederal claims to federal court is irrational under any standard that does not stem from the necessity perspective. The closer the factual relationship between a state claim and a federal claim, the more likely that adjudication of the federal claim will resolve issues central to the state claim. If the plaintiff chooses to bring both state and federal claims together in federal court, he bears a greater risk of damaging his state claim by collateral estoppel when it shares most issues with the federal claim as opposed to when it shares only a few. Such an environment would chill parties from bringing state claims before a federal court in some circumstances when the federal court would actually entertain that state claim.
87. This comment prefers the view of Shakman, supra note 12. Shakman suggests that a federal court should extend pendent jurisdiction (and arguably ancillary jurisdiction too) when (1) resolution of the federal claim necessarily decides the state claim; (2) resolution of the federal claim necessarily decides crucial issues in the state claim; (3) failure to decide the state claim makes the judgment of the federal claim "hollow"; (4) double liability to a party is risked by failure to decide the state claim; (5) a federal claim to property would leave a party with a state claim remediless if the state claim is dismissed; or (6) double litigation would necessarily follow dismissal of the state claim. Id. at 285.

This Comment rejects (6) as an issue of minor importance. See infra notes 123-124 and accompanying text. See also Yale Note, supra note 13, at 648-49 n.115. The objection to a standard of power more broad than the necessity formula, outlined above, is simply that a greater number of cases will be brought to federal court that otherwise would be decided in state court. Congress has a well settled policy of entrusting state courts with the task of deciding matters of federal law. Shakman, supra note 12, at 266. The same cannot be said for federal courts interpreting state law. Shakman criticizes
than many cases indicate, the interests involved in the exercise of discretion are quite separate from the interests underlying the determination of power to hear a state claim. "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." Thus, although a state claim may be within the pendent jurisdiction of a court, the court should exercise its jurisdiction only where necessary.

part of the Gibbs opinion for effectively expanding the concept of a "case", by citing a number of authorities that do not support a test for pendent jurisdiction that is as broad as post-Gibbs interpretations. Id. at 269.

The conclusion that Shakman does not draw, and that this Comment does, is that a federal court is left with very little discretion when its power to adjudicate a state claim is couched in language of comity, urgency, and necessity. Hence, in most cases where courts have announced their use of Gibbs discretion in dismissing a state claim, they really lacked the power to hear the state claim. See, e.g., Ruiz v. Estelle, 679 F.2d 1115, 1158 (5th Cir. 1982) (where the pleadings did not attempt to invoke pendent jurisdiction over state law claims the trial court improperly decided those claims); Smith v. Meijer of Ohio, Inc., 566 F. Supp. 113, 115-16 (S.D. Ohio 1983) (in a discrimination suit brought pursuant to 29 U.S.C. § 621, the court recognized the power to hear plaintiff's state law claims for breach of contract, but dismissed the state claims because of the many differences in elements of proof); Fisher Foods, Inc. v. Ohio Dep't of Liquor Control, 555 F. Supp. 641, 649 (N.D. Ohio 1982) (the court used discretion to dismiss plaintiff's state law claim that the tax on the base price of wine violated the Ohio Constitution, where plaintiff's federal claim asserted that the Liquor Control was engaging in resale price maintenance in violation of the federal anti-trust laws); Wells v. Schwicker, 536 F. Supp. 1314, 1330 (E.D. La. 1982) (in a class action suit brought under the Administrative Procedure Act, 5 U.S.C. § 551, the federal court dismissed the plaintiff's state law claim that the defendant also violated Louisiana's Administrative Procedure Act because the state law was relatively unsettled and because the two claims would have had little evidentiary overlap). This is so because use of the necessity perspective leads to the conclusion, in those cases, that the state claim is not part of the same case as the federal claim. Where these courts see lack of factual, evidentiary, or issue overlap as inconvenient for the court or a party, and, therefore, warranting dismissal of the state claim, this analysis views the lack as proof of two or more distinct constitutional cases, which deprives the court of the power to hear the state claim.

Thus, a federal court should have discretion not to extend auxiliary jurisdiction in only two instances. First, a federal court should not hear a state claim where federal claims are dismissed from a suit before trial. See Gibbs, 383 U.S. at 726. Assume that jurisdiction over the state claim has been obtained by virtue of the necessity formula described above. When the federal claims are dismissed before trial, there is no court record to impair the state claim. The federal court, however, retains jurisdiction once acquired, so a dismissal in this instance is not for lack of power to hear the state claim. Moore v. New York Cotton Exchange, 270 U.S. 593, 608 (1926). Second, a federal court should dismiss a state claim where hearing both state and federal claims incurs a substantial risk of confusing a jury. In this case, the federal court must weigh the potential harms to the parties involved, in either hearing or not hearing the state claim.

88. Gibbs, 383 U.S. at 726.

89. The Gibbs court viewed the adjudication of the state law claim before it as necessary to ensure the rendering of full justice between the parties. At least two commentators believe that adjudication of Mr. Gibbs' Labor Management Relations Act claim
B. The Convenience Perspective

Ancillary jurisdiction, more than pendent jurisdiction, increasingly has been justified by convenience and not by necessity. The decision in *Moore v. New York Cotton Exchange* began this shift.91

*Moore* held that ancillary jurisdiction exists for compulsory counterclaims.92 At first glance, the holding seems to reflect the necessity perspective because the consequence of failing to bring a compulsory counterclaim is that the claim will be barred in a subsequent proceeding.93 Such an approach, however, is circular because the characterization of a counterclaim as compulsory cannot rest on the consequence of such a characterization. Consistent application of a logical definition of "transaction or occurrence" is the only way a court can know if a counterclaim is really compulsory. The *Moore* Court, however, made no attempt to define transaction, calling it "a word of flexible meaning."94 The *Moore* decision, then, is of little use in the formulation of a workable definition of transaction, as contemplated by Equity Rule 30. Unfortunately, the *Moore* decision developed into a per se rule with no logical foundation.95


90. 270 U.S. 593 (1933).

91. *See Matasar, supra* note 13, at 1413. "[B]y the late 1960s federal courts . . . noted that the new federal rules [as a whole] could be shoehorned into the *Moore* transactional rule." *Id.*


93. Equity Rule 30, 268 U.S. 709 (1925), provides in pertinent part: "The answer *must* state in short and simple form any counterclaim arising out of the transaction that is the subject matter of the suit." (emphasis added). The significant difference between Equity Rule 30 and Federal Rule of Civil Procedure 13(a) is that the latter is not limited to equitable claims, but is open to legal claims as well. The effect of both rules, however, is that failure to bring a compulsory counterclaim in an earlier proceeding is a waiver of the right to bring it at a later date. *See C. Wright & A. Miller, Federal Practice and Procedure § 1403 at 14 (West 1983) [hereinafter cited as Wright & Miller].*


96. Perhaps because of the *Moore* Court's failure to define transaction as it applied to compulsory counterclaims under Equity Rule 30, courts that have confronted state law counterclaims have merely cited *Moore* and routinely exercised ancillary jurisdiction. *See, e.g.*, United States ex rel. D'Agostino Excavators, Inc. v. Heyward-Robinson Co., 430 F.2d 1077, 1080-82 (2d Cir. 1970); Chance v. County Bd. of School Trustees, 332 F.2d 971, 972-73 (7th Cir. 1964); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633-34 (3d Cir. 1961); Lenz v. Wagner, 240 F.2d 666, 669 (5th Cir. 1957). The same routine application has occurred for Federal Rule of Civil Procedure 13(g) cross-
As a result of this rule, ancillary jurisdiction has been used to effectuate the stated goals of the Federal Rules of Civil Procedure—convenience and judicial economy.\textsuperscript{97} Undefined phrases like "transaction," "subject matter of the original claim," and "occurrence," enable the federal courts to determine that state claims are within the courts' ancillary jurisdiction whenever it is convenient to so determine. As one commentator noted, "[T]here is a recurring temptation to view questions of federal jurisdiction as if they were simple procedural questions, to be resolved in whatever fashion will best serve the desirable goal of efficient judicial administration."\textsuperscript{98}

The shift from a necessity to a convenience perspective has caused an expansion in the number of cases involving state law that are brought to federal court and an increasingly broad scope of the "case . . . arising under this Constitution, [and] the laws of the United States . . . ."\textsuperscript{99} The Federal Rules themselves, as well as the Constitution, militate against this expansion.

Federal Rule of Civil Procedure 82 states that the Federal "[R]ules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."\textsuperscript{100} Courts thus must use the Federal Rules within an existing framework of power allocation, and their use may not extend jurisdiction. Since procedural rules cannot confer jurisdiction upon a court, attempts to "secure the just, speedy and inexpensive determination"\textsuperscript{101} of suits should not cause a distortion of jurisdictional scope established from other sources.\textsuperscript{102}

\begin{footnotesize}
\textsuperscript{97} See Fed. R. Civ. P. 1.
\textsuperscript{98} WRIGHT, MILLER, & COOPER, supra note 3, at § 3502.
\textsuperscript{99} U.S. CONST. art. III, § 2. See also id. at §§ 3505-07 (noting a recent sharp increase in the number of cases commenced in federal courts).
\textsuperscript{100} Fed. R. Civ. P. 82. See also Washington-Southern Navig. Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 635 (1924) (decided prior to the Federal Rules of Civil Procedure, in reference to Admiralty Rules: "Occasionally, a rule is employed to express . . . a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction.").
\textsuperscript{101} Fed. R. Civ. P. 1.
\textsuperscript{102} The sources of federal court jurisdiction—the power to interpret the law—derive from article III of the Constitution and statutes enacted by Congress. See, e.g., 28 U.S.C. § 1331 (1982) (federal question jurisdiction); 28 U.S.C. § 1332 (1982) (diversity jurisdiction); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Congress can-
Expanding upon the majority interpretation of Federal Rule of Civil Procedure 82, Professor Wright notes that "courts cannot employ the federal rule goal of settling the various aspects of a particular dispute in one action to rationalize a violation of the integrity of the congressional policy to restrict federal jurisdiction . . . ."\(^{103}\) Thus, "[n]o consideration need be given to the rules in determining whether a [federal] court has jurisdiction of a particular action."\(^{104}\) There is a virtual consensus that article III of the Constitution, the provision which circumscribes federal court jurisdiction, was drafted with the intention of preserving state court jurisdiction.\(^{105}\) The expansion of auxiliary jurisdiction to promote efficiency has produced an allocation of federal and state jurisdiction at odds with the intent of the framers of the Constitution.\(^{106}\) The new allocation may be due, not enlarge the article III, section 2 original jurisdiction of the Supreme Court).

103. Wright & Miller *supra* note 93, at § 1414 at 74.
104. Wright, Miller, & Cooper *supra* note 3, at § 3141 at 210-11.
105. Id. § 3502 at 4; Shakman, *supra* note 12; Yale Note, *supra* note 13, at 645. An original draft of article III included "questions which involve national peace and harmony," in the judicial power of federal courts. Yale Note, *supra* note 12, at 644-45 n.99. This language was stricken because of fears that the words "questions" and "involving" would be impossible to limit, making it impossible to keep suits that rest primarily on state law out of federal courts. *Id.*

106. The writings of Alexander Hamilton are representative of the framers' intent in the area of the allocation of power between the federal government and the various state governments. In *The Federalist* No. 32 (A. Hamilton), *supra* note 12, Hamilton states, "State governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act [the consolidation of states into a union by the Constitution] exclusively delegated to the United States." *Id.* at 186 (emphasis in original). More specifically, in *The Federalist* No. 82, he says, "[T]he State courts will retain the jurisdiction they now have unless it appears to be taken away in one of the enumerated modes." *Id.* at 513 (emphasis in original). The sentiment of the day, at the time of the adoption of the Constitution, was to let federal courts decide only matters of federal law.

Some commentators have recently begun to argue, in persuasive terms, that Framers' intent is irrelevant to constitutional interpretation. For an excellent and comprehensive debate on the relevance of Framers' intent, compare Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981) (advocating that courts stick to their attempt to ascertain framers' intent and give such intent weight in constitutional adjudication) with Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469 (1981) (urging an abandonment of framers' intent, since it is both unknowable and unimportant in modern constitutional adjudication). Professor Dworkin may soon win the conflict. Framers' intent, however, is still looked to for guidance in interpreting the Constitution. The reason may be not so much for reverence toward giants in American history as much as for stability of the institution of government. Many legislators and judges still favor the ideals of federalism—local solutions for local concerns, and an abhorrence of a central planning institution. Thus, when this Comment speaks of Framers' intent, it refers to a set of concepts that many consider relevant to the structure of today's society, and not just a romantic piece of historical curiosity.
to some extent, to overzealous attempts to effectuate the goals of the Federal Rules of Civil Procedure—convenience and judicial economy— which conflict with the system of federalism envisioned by the framers.

The allocation of the adjudicatory function between federal and state courts is exceedingly fragile without a firm conception of the contents of a constitutional “case.” Questions of convenience in the operation of the federal judicial system are entirely subordinate to questions of power allocation between quasi-autonomous governmental entities. Under the convenience perspective, the Supreme Court is able to expand the constitutional “case” by simple rule promulgation. Thus, the Supreme Court can virtually extinguish the role of state courts in interpreting their own law, all in the name of expedience, convenience, and economy. This author is not the first to assert that federalism is itself slow, inconvenient, and expensive.

C. A Construction of “Transaction” to Maintain the Necessity Perspective

The convenience perspective is indeed a dangerous approach to auxiliary jurisdiction because it enables the Supreme Court to expand the definition of a constitutional “case” with alarming ease, thereby allowing the federal courts to hear an ever increasing number of state law-based claims. In order to preserve the role of state courts as the primary fora for interpretation of state law-based claims, “transaction or occurrence” must be confined to a narrow definition. At least with regard to compulsory counterclaims, four different definitions of transaction or occurrence have been suggested. Are the issues of fact and law raised by the two claims largely the same? Would res judicata bar a subsequent suit on the state claim absent compulsion orines by virtue of the Federal Rules of Civil Procedure?

108. See supra note 60; Minahan supra note 12; Yale Note supra note 13 at 648-49 n.115. But see Matasar, supra note 13, at 1478-79.
109. The idea of a government of enumerated powers and courts of limited jurisdiction on the one hand, and the idea of judicial economy on the other, seem inherently contradictory.
Will substantially the same evidence support or refute both claims?\textsuperscript{112} Is there any logical relation between the original claim and the auxiliary claim?\textsuperscript{113} The first and third tests are problematic because there is no ready way to ascertain the degree of factual or evidentiary overlap that a court will require to conclude that two claims are parts of one case.\textsuperscript{114} The second test only begs the question, for res judicata follows from a finding that the state claim arose out of the same transaction as the federal claim.\textsuperscript{115}

The fourth test has by far the widest acceptance among the courts.\textsuperscript{116} Courts differ, however, in their interpretations of "logical relation," just as they differed in constructions of "cause of action," "transaction," and "common nucleus of operative fact." The Fifth Circuit Court of Appeals, in \textit{Revere Copper \\& Brass Inc. v. Aetna Casualty \\& Surety Co.}, \textsuperscript{117} defined "transaction" or "occurrence" as

the subject matter of a claim, rather than the legal rights arising therefrom . . . . The same aggregate or core of facts may give rise not only to rights in the plaintiff against the defendant [the federal claim] but also to rights in the [defendant] against third parties [the state claim] . . . [T]he court which has jurisdiction over the aggregate of facts which constitutes the plaintiff's claim needs not [sic] additional ground of jurisdiction to determine the third-party claim which compromises [sic] the same core of facts.\textsuperscript{118}

The \textit{Revere} description of the logical relation necessary for two claims to arise out of a single transaction closely resembles


\textsuperscript{113} Moore, 270 U.S. at 609-10; Revere Copper \\& Brass Inc. v. Aetna Casualty \\& Sur. Co., 426 F.2d 709, 715-16 (5th Cir. 1970); Koufakis v. Carvel, 425 F.2d 892, 899 (2d Cir. 1970); D'Agostino Inc., 430 F. Supp. at 1081.

\textsuperscript{114} See Wright, Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading, 38 MINN. L. REV. 423, 438-45 (1954) (advocates a test to determine whether a claim is compulsory or permissive rather than search for a definition of transaction or occurrence).

\textsuperscript{115} See supra text accompanying notes 93-94.

\textsuperscript{116} Wright \\& Miller, supra note 93, at § 1410 at 48.

\textsuperscript{117} 426 F.2d 709 (5th Cir. 1970).

\textsuperscript{118} Id. at 713.
the *Hurn* definition of cause of action.\textsuperscript{119} Both focus on the acts or events that constitute the violation of a legal right. Where those acts or events, or core of operative facts, support remedial rights under both state law and federal law, the state and federal claims can be said to arise out of the same transaction or occurrence, and hence are parts of a single constitutional "case."

The *Revere* standard signifies a meaningful turn back in the direction of the necessity perspective; *Revere* allows federal courts to consistently apply the Federal Rules of Civil Procedure without allowing such application to have the expansive effect on jurisdiction that results from loose definitions of terms.\textsuperscript{120} If the acts that violate a state-based right are not the same as the acts that violate a federal right, the state claim is not compulsory, because the federal court lacks the subject matter jurisdiction to hear it. Res judicata and collateral estoppel, therefore, will not affect the party's ability to successfully bring the state claim at a later time. But where the same acts give rise to both federal and state rights, the state claim is part of the same "case" as the federal claim.\textsuperscript{121} Failure to extend auxiliary jurisdiction in this circumstance would run the risk of impairing the state claim, for the federal court will be unable to avoid making findings of fact, or deciding issues, that are central to the state claim.\textsuperscript{122}

\section*{V. Conclusion}

A return to the necessity perspective in determining when a federal court may decide issues of state law in non-diversity cases will offer both obvious and latent benefits. Fewer cases will crowd federal court dockets. When a suit containing federal and state claims is brought before a federal court, and the court concludes that the claims represent two distinct cases under the necessity perspective, the process of coming to such a conclusion minimizes the risk that adjudication of the federal claim alone would impair the state claim in a future adjudication at the state level.\textsuperscript{123}

\begin{footnotes}
\item[119] See supra text accompanying notes 52-54.
\item[120] See supra note 39 and accompanying text.
\item[121] *Revere*, 426 F.2d at 715-16; *Gibbs*, 383 U.S. at 725.
\item[122] See supra notes 72-75 and accompanying text.
\item[123] "[A] claim has a logical relationship to the original claim if it *arises* out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate
The cost of the necessity approach to auxiliary jurisdiction is that some parties will be forced into two lawsuits instead of one if they elect to bring their federal and state claims to federal court instead of bringing all of their claims to a state court. This attitude, however, is true to the rather fundamental characterization of jurisdiction as a question of constitutional power. No justification exists for the defection of auxiliary jurisdiction doctrines from the constitutional "case" concept, and this Comment urges a conscious return to that concept. The dismissal of state claims from federal court has been applauded by commentators and the Supreme Court alike to enhance and protect federalism principles.\textsuperscript{124} Liberal dismissals are justified in the context of auxiliary jurisdiction because, unrestrained, the two doctrines have the capacity to topple the framework of a bifurcated system of justice.

David Lawyer

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\textbf{124.} Gibbs, 383 U.S. at 726 ("Needless decisions of state law should be avoided [by federal courts] both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.") See also Shakman, supra note 12, at 266 (federal court determinations of state law can safely be avoided because cases decided in state court can be appealed on their federal issues, and because Congress can make federal jurisdiction exclusive where state courts show a pattern of incompetency or discrimination); Yale Note, supra note 13, at 638-39 ("By tying federal jurisdiction to a body of federal law and thereby divorcing that jurisdiction from state law, this 'source of law' examination preserves a system of limited jurisdiction.").
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