

# VIEWING THE “SAME CASE OR CONTROVERSY” OF SUPPLEMENTAL JURISDICTION THROUGH THE LENS OF THE “COMMON NUCLEUS OF OPERATIVE FACT” OF PENDENT JURISDICTION

*Douglas D. McFarland* \*

I.	INTRODUCTION.....	905
II.	CREATION OF PENDENT JURISDICTION—THE MAJOR CASES.....	906
	A. Hurn v. Oursler.....	908
	B. United Mine Workers v. Gibbs.....	911
	1. <i>Common Nucleus of Operative Fact</i> .....	914
	2. “ <i>But if</i> ”.....	916
III.	CONGRESS CREATES SUPPLEMENTAL JURISDICTION .....	920
IV.	JUDICIAL INTERPRETATIONS OF COMMON NUCLEUS OF OPERATIVE FACT.....	922
V.	A PROPER JUDICIAL ATTITUDE TOWARD INTERPRETATION OF “CASE OR CONTROVERSY UNDER ARTICLE III” OF § 1367(a).....	923
	A. <i>Historical Guidance to Interpretation</i> .....	923
	B. <i>Today’s Attitude</i> .....	926
VI.	CONCLUSION.....	928

## I. INTRODUCTION

When a federal court has jurisdiction of a claim, supplemental jurisdiction allows the court to adjudicate all parts “of the same case or controversy under Article III of the United States Constitution.”<sup>1</sup> How should that phrase be defined and delimited? How broad is a constitutional case or controversy? When it created supplemental jurisdiction in 1990, Congress provided no formal guidance by way of a “definition of terms” section in the statute.<sup>2</sup> Even

---

\* Douglas D. McFarland is Professor of Law Emeritus at Hamline University, St. Paul, Minnesota. He earned a B.A. from Macalester College in 1968, a J.D. from New York University School of Law in 1971, and a Ph.D. from the University of Minnesota in 1983.

1. 28 U.S.C. § 1367(a) (2012). Section 1367 reads as follows:  
[I]n 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.

*Id.*

2. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113-14 (codified at 28 U.S.C § 1367 (2012)). Supplemental jurisdiction was included in an amalgam of eight titles, only four of which concerned federal courts, as part of the budget reconciliation process. *Id.* One of the titles, known as

if Congress had done so, courts would still have to struggle with the scope of same case or controversy in § 1367(a) because the expansiveness of supplemental jurisdiction is in tension with the limited jurisdiction of federal courts.<sup>3</sup>

This Article plumbs the meaning and scope of same case or controversy under Article III in § 1367(a) by examining its lineal ancestor: pendent jurisdiction. It examines the major cases defining pendent jurisdiction.<sup>4</sup> It examines the language of § 1367(a) and the intent of Congress in creating supplemental jurisdiction.<sup>5</sup> It examines judicial interpretations of pendent jurisdiction.<sup>6</sup> It employs this historical context to identify the attitude a court should have toward an assertion of supplemental jurisdiction.<sup>7</sup> Finally, it proposes a sound approach for a court to follow in deciding the scope of supplemental jurisdiction in an individual case.<sup>8</sup>

## II. CREATION OF PENDENT JURISDICTION—THE MAJOR CASES

When Congress passed § 1367 to create supplemental jurisdiction in 1990, it formed an amalgam of the two common law doctrines of pendent jurisdiction and ancillary jurisdiction.<sup>9</sup> Pendent jurisdiction allowed a federal court to adjudicate a state law theory when it arose from a “common nucleus of operative fact” with a federal question theory.<sup>10</sup> Ancillary jurisdiction allowed a federal court to adjudicate a state law claim when it was part of the same “transaction or occurrence” as a federal claim.<sup>11</sup>

---

the Federal Courts Study Committee Implementation Act of 1990, included the supplemental jurisdiction statute. *Id.* §§ 301-325, 104 Stat. at 5104-21. For discussion of the enactment process, see John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 736 n.2 (1991).

3. Compare 28 U.S.C. § 1367(a) (granting federal courts broad supplemental jurisdiction over all claims that are closely related to claims within the federal courts’ original jurisdiction), with U.S. CONST. art. III, §§ 1-2 (limiting the extent of federal courts’ jurisdiction to narrowly defined types of cases and controversies).

4. See *infra* Part II.

5. See *infra* Part III.

6. See *infra* Part IV.

7. See *infra* Part V.A.

8. See *infra* Part V.B.

9. See *infra* Part III. For the history of pendent and ancillary jurisdiction, see generally 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 106.04 (3d ed. 2010), and 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523 (3d ed. 2008).

10. *United Mine Workers of Am., v. Gibbs*, 383 U.S. 715, 725 (1966) (creating the common nucleus test). Typically, a plaintiff added one or more state law theories of recovery to a federal theory of recovery arising from the same set of facts. See *infra* Part II.B.

11. See WRIGHT ET AL., *supra* note 9, § 3523. The language of the test traced back to *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926) (transaction), and the adoption of transaction or occurrence as the test for several of the joinder provisions of the Federal Rules of Civil Procedure as promulgated in 1938, see FED. R. CIV. P. 13, 14, 15, 20. Typically, a defendant asserted a compulsory counterclaim, a crossclaim, or a third-party claim to a federal claim arising from the same set of facts. See MOORE ET AL., *supra* note 9, § 106.04; WRIGHT ET AL., *supra* note 9, § 3523.

For guidance in determining the scope of supplemental jurisdiction in cases today, we naturally look to the history of these two constituent doctrines. While the contribution of the transaction or occurrence of ancillary jurisdiction should not be ignored, this Article examines the much more direct lineage of the common nucleus of operative fact of pendent jurisdiction to the same case or controversy under Article III of supplemental jurisdiction.

The lineage of pendent jurisdiction traces back two centuries to two foundational cases that established the power of the federal courts to hear and determine all parts—federal and state—of a case.<sup>12</sup> The Supreme Court first recognized that Congress had the authority to extend federal jurisdiction over non-federal parts of a case in *Osborn v. Bank of the United States*.<sup>13</sup> A century later, in *Siler v. Louisville & Nashville Railroad*, the Court asserted its own authority “to decide all the questions” when a federal question gave the federal court jurisdiction over a case.<sup>14</sup> While these two cases established the authority of the federal courts, they did not offer much guidance as to the contours or limits of what the lower courts came to call “pendent jurisdiction.”<sup>15</sup>

The Supreme Court later attempted to offer that guidance in the two primary cases interpreting pendent jurisdiction. The first unsuccessful attempt was *Hurn v. Oursler* in 1933.<sup>16</sup> Thirty-three years later, the Court recognized the failure of its first attempt, repudiated *Hurn*, and successfully replaced it with *United Mine Workers v. Gibbs*.<sup>17</sup> Both the failure of *Hurn* and the success of *Gibbs* provide substantial guidance as to the proper interpretation of supplemental jurisdiction today, so each case will be discussed in some detail.

---

12. See Richard A. Matasar, *Rediscovering “One Constitutional Case”: Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1407-17 (1983).

13. *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824). In this foundational case, the Court recognized that “[t]here is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States” in entirety. *Id.* at 820. Accordingly, the Court concluded, Congress could extend federal jurisdiction over all parts, both federal and state, of a case

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

*Id.* at 823.

14. *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 191 (1909).

The Federal questions as to the invalidity of the statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

*Id.*

15. See WRIGHT ET AL., *supra* note 9, § 3523. Not surprisingly, the lower courts struggled with the definition of pendent jurisdiction. See *id.* So, too, did the Supreme Court; it returned to the subject several times in the years following *Siler*. See *Hurn v. Oursler*, 289 U.S. 238, 241-44 (1933) (summarizing the Court’s jurisprudence).

16. *Hurn*, 289 U.S. at 238; see *infra* Part II.A.

17. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966); see *infra* Part II.B.

A. *Hurn v. Oursler*

The plaintiffs sued to enjoin the defendants from producing a play titled *The Spider* because they claimed it infringed their copyrighted play, *The Evil Hour*; plaintiffs alleged (1) federal law copyright violation and (2) state law unfair competition.<sup>18</sup> The trial court decided on the merits that the defendants' play did not infringe the federal copyright and then dismissed the state law tort for want of federal jurisdiction.<sup>19</sup> The Supreme Court affirmed because the trial court's finding of no infringement contained "every essential element necessary to justify the conclusion that there was likewise no unfair competition," and thus, the state law tort should also have been dismissed on the merits.<sup>20</sup> Before reaching that conclusion, however, the Court discoursed at length on why the federal court had pendent jurisdiction over the state law tort and should not have dismissed it for want of jurisdiction.<sup>21</sup>

*Hurn* was decided near the end of the golden era of code pleading.<sup>22</sup> The language of *Hurn* was the language of code pleading. The centerpiece of code pleading was the "cause of action," a term of art that entered civil practice as a modernizing reform and devolved over the years into a source of confusion and debate.<sup>23</sup> Using this term of art from code pleading, the Court in *Hurn* articulated the test for pendent jurisdiction as follows:

The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal *ground*; in the latter it may not do so upon the nonfederal *cause of action*.<sup>24</sup>

Consequently, when the state law tort was part of the same cause of action, federal jurisdiction encompassed it; when the state law tort was a separate cause of action, it was outside federal jurisdiction.

The Court's discourse on pendent jurisdiction was flawed because it looked backward instead of forward. In those years of code pleading, one

---

18. *Hurn*, 289 U.S. at 239.

19. *Id.* at 239-40. The court of appeals affirmed. *Id.* at 240.

20. *Id.* at 247-48.

21. *Id.* at 241-46.

22. *Hurn* was decided in 1933. *Id.* at 238. The golden era of code pleading can be said to begin with enactment of the Field Code in New York in 1848, see Act of Apr. 12, 1848, ch. 379, 1848 N.Y. Laws 497, and end as early as 1934 with congressional authorization to the Supreme Court to promulgate rules of civil procedure, see Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064.

23. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38, at 225-45 (2d ed. 1947) [hereinafter CLARK, HANDBOOK].

24. *Hurn*, 289 U.S. at 246.

school of thought equated the cause of action to the right of action, which tied it back to common law pleading.<sup>25</sup> The other school of thought equated the cause of action to a grouping of facts, which tied it to what would, in the future, become rules pleading.<sup>26</sup> The Court aligned itself with the former school of thought when it concluded, “The bill alleges the violation of a single right; namely, the right to protection of the copyrighted play. And it is this violation which constitutes the cause of action.”<sup>27</sup> This backward-looking choice was made even clearer later in the opinion. The plaintiffs had sued for both infringement of copyright and unfair competition based on the copyrighted play; during the pendency of the action, the plaintiffs “amended their bill so as to make its allegations apply to the uncopyrighted version of their play.”<sup>28</sup> The Court in dictum noted, “[T]hat claim . . . was wholly independent of the claim

---

25. See, e.g., JOHN NORTON POMEROY, CODE REMEDIES: REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION § 347 (Thomas A. Bogle, ed., Little, Brown, & Co. 4th ed. 1904). This school of thought was shown in the following quotation from a leading treatise of the day:

Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant, a delict or wrong done by the defendant, which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, *the primary right and duty and the delict or wrong combined constitute the cause of action* in the legal sense of the term, and as it is used in the codes of the several States.

*Id.* (emphasis added); see also O. L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 638 (1925) (“It is that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded.”).

26. See, e.g., CLARK, HANDBOOK, *supra* note 23, § 19, at 130. The thought was that a cause of action was “such a group of facts . . . limited as a lay onlooker would to a single occurrence or affair, without particular reference to the resulting legal right or rights.” *Id.* In other words, the cause of action was bounded by a grouping of facts, not by a legal theory:

The cause of action under the code should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons. The size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business.

Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 837 (1924) [hereinafter Clark, *Code Causes of Action*].

27. *Hurn*, 289 U.S. at 246. The Court reinforced this choice later in the same paragraph by quoting the following language: “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 the 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.” *Id.* (quoting *Balt. S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927)) (internal quotation marks omitted). After deciding *Baltimore S.S.*, the Court later backed away from this definition and in *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933), recognized the possibility that “the group of operative facts” could define the cause of action. *Hurn* noted this decision but concluded that, “for the purpose of determining the bounds between state and federal jurisdiction, the meaning should be kept within the limits indicated [by *Baltimore S.S.*].” *Hurn*, 289 U.S. at 247; see Matasar, *supra* note 12, at 1449-50; Sidney Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U. L. REV. 245, 263-66 (1980).

When *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 723 (1966), rejected *Hurn*, it too quoted from *Baltimore S.S.*, this time to demonstrate the wrong choice by the *Hurn* Court of the primary-rights school of thought. See *infra* text accompanying note 57.

28. *Hurn*, 289 U.S. at 248.

of copyright infringement,” and therefore the bill alleged “two distinct rights, namely the right to the protection of the copyrighted play, and the right to the protection of the uncopyrighted play. From these averments two separate and distinct causes of action resulted.”<sup>29</sup> In other words, even though the entire action arose from one—and only one—play, it included separate causes of action. This dictum could not have made clearer that the *Hurn* Court was choosing the right-of-action school and not the grouping-of-facts school.

The choice of the Court in *Hurn* to adopt the primary-right school of thought on cause of action was questionable, and it became unworkable only five years later when the Court promulgated the Federal Rules of Civil Procedure. The primary drafter of the Federal Rules was Charles E. Clark.<sup>30</sup> Of course, he was also the primary proponent of the grouping-of-facts definition of cause of action.<sup>31</sup> Clark seized the opportunity to write his philosophy of civil procedure, including the grouping-of-facts theory of a cause of action, into the Federal Rules; he did so in parts by substituting “claim” for “cause of action” and by providing generous joinder rules through the “transaction or occurrence.”<sup>32</sup> What this meant was that lower federal courts deciding questions of pendent jurisdiction were forced to attempt to synthesize two antithetical guidelines: the grouping-of-facts approach of the Federal Rules and the primary-rights approach of *Hurn*. One commentator said the lower courts “struggled,”<sup>33</sup> and another said the result was “havoc.”<sup>34</sup> Predictably, the lower courts followed the narrow approach of the controlling precedent in *Hurn*.<sup>35</sup> Even the Second Circuit followed *Hurn* over the objections of Judge

29. *Id.*

30. See, e.g., Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976). Then-Professor Charles E. Clark of Yale University was appointed reporter of the fourteen-member committee that drafted the Rules. *Appointment of Committee to Draft Unified System of Equity and Law Rules*, 295 U.S. 774 (1935). Various writers have called Clark the primary drafter of the Federal Rules of Civil Procedure. See 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, 80-91 (1989); Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV. 1323, 1323 (1965); Smith, *supra*, at 915; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 961 (1987).

31. See *supra* note 26.

32. See FED. R. CIV. P. 13, 14, 15, 18, 20. Clark himself later stated clearly the intent he drafted into the Rules for a claim: “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) [hereinafter CLARK, *PLEADING AND PROCEDURE*]. Similarly, twenty years after broadening the code’s transaction into the Rules’ transaction or occurrence, Clark argued for a similarly broad interpretation in the remaining code states of transaction: “Conceivably, ‘transaction’ might 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.” CLARK, *HANDBOOK*, *supra* note 23, § 102, at 655.

33. WRIGHT ET AL., *supra* note 9, § 3523, at 160.

34. Matasar, *supra* note 12, at 1451. The Court itself said the *Hurn* test was “the source of considerable confusion.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966).

35. See, e.g., *Woody v. Sterling Aluminum Prods., Inc.*, 365 F.2d 448, 456 (8th Cir. 1966); *Rumbaugh v. Winifrede R.R.*, 331 F.2d 530, 539 (4th Cir. 1964); *Brown & Root, Inc. v. Gifford-Hill & Co.*, 319 F.2d 65, 67-68 (5th Cir. 1963); *Moynahan v. Pari-Mutuel Emps. Guild*, 317 F.2d 209, 211-12 (9th Cir. 1963); *Dann v.*

Charles E. Clark, who, after serving as reporter of the Rules drafting committee, had been appointed a court of appeals judge.<sup>36</sup>

For our purpose of interpreting the proper meaning of case or controversy under Article III in § 1367, *Hurn* is important as a demonstration of what not to do. The approach of *Hurn* and its progeny—looking backwards to primary rights and legal theories and requiring identical facts—was thoroughly rejected in *United Mine Workers v. Gibbs*.<sup>37</sup> Therefore, the approach of *Hurn* should be rejected just as thoroughly today.<sup>38</sup>

### B. *United Mine Workers v. Gibbs*

Following three decades of struggle with *Hurn*, the Supreme Court recognized its failure and, in 1966, repudiated the *Hurn* test in *United Mine Workers v. Gibbs*.<sup>39</sup> While the *Gibbs* decision has been widely celebrated and accepted, for many reasons it perhaps deserves even more attention than it has received. The Court was unanimous in its discussion of pendent jurisdiction.<sup>40</sup> *Gibbs* clearly abandoned the common-law and code-pleading systems in favor of the fact-based transactional approach of the Federal Rules of Civil Procedure as the proper litigation unit.<sup>41</sup> The language of *Gibbs* resulted directly in

---

Studebaker-Packard Corp., 288 F.2d 201, 215 (6th Cir. 1961).

Congress appears to have attempted to codify *Hurn* in the context of copyright actions in the 1948 revision of the judicial code, but the statute could be read to broaden *Hurn* from “identical” facts to “related” facts: “The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.” 28 U.S.C. § 1338(b) (2012).

36. *Lewis v. Vendome Bags, Inc.*, 108 F.2d 16, 17 (2d Cir. 1939). In *Lewis*, the plaintiff sued for infringement of a patent for a bag and for unfair competition with “bags not embodying the patented design.” *Id.* at 17. The majority of the panel dismissed the state law claim on the authority of *Hurn* as raising a separate and distinct cause of action with no independent federal jurisdiction. *Id.* Judge Clark attempted unsuccessfully to interpose his own interpretation of cause of action when he argued “that the test of a single cause of action indicated by [*Hurn*] is a practical one based on the extent of identity of the operative facts.” *Id.* at 19 (Clark, J., dissenting). Two years later, in *Musher Foundation, Inc. v. Alba Trading Co.*, 127 F.2d 9 (2d Cir. 1942), plaintiff alleged patent infringement and added a claim for state law unfair competition for infringement of a common law trademark for defendant’s use of certain terms of art in its advertising. *Id.* at 10. The majority could see “no substantial identity between the proof” showing infringement of the patents and infringement of the common law trademark because the two were separate causes of action. *Id.* Again, Judge Clark attempted unsuccessfully to induce his colleagues to adopt a practical view of *Hurn*. *Id.* at 11-13 (Clark, J., dissenting). Pointing out that “the core of the plaintiff’s grievance is the same,” Clark argued that the core should determine jurisdiction because “[a] converse view, requiring identity of facts, practically excludes the possibility of a single cause, since state and federal rights are hardly ever—if ever—complete equivalents, and differing rights depend on differing facts.” *Id.* at 11-12.

37. *Gibbs*, 383 U.S. at 722-25; see *infra* Part II.B.

38. See *infra* Part V.A-B.

39. *Gibbs*, 383 U.S. at 722-25.

40. *Id.* at 717-44.

41. *Id.* at 724-25. The test of *United Mine Workers v. Gibbs* was whether the federal and state law theories of recovery arose from a common nucleus of operative fact. *Id.* at 725. This grouping of facts identified the litigative unit. See Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 450 (1991) [hereinafter Freer, *Compounding Confusion*]; Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy*

congressional creation of supplemental jurisdiction, and the legislative history of § 1367 indicated that the statute was largely an attempt to codify *Gibbs*.<sup>42</sup> Courts and commentators generally have agreed that *Gibbs* established the limit of federal jurisdiction under Article III; because of this, courts have used the *Gibbs* standard for pendent jurisdiction in their attempts to bound the limits of the “case or controversy under Article III” test of § 1367(a) for supplemental jurisdiction.<sup>43</sup> Accordingly, we profit by a close reading and understanding of *Gibbs*.

The backdrop of *United Mine Workers v. Gibbs* was a dispute between the United Mine Workers (UMW) and another union over the representation of workers in southern Appalachian coal fields in Tennessee.<sup>44</sup> The plaintiff, Paul Gibbs, secured a job as a mine superintendent and also obtained a contract to haul the mine’s coal to a railroad loading point.<sup>45</sup> Because of union activities relating to the representation dispute, the mine did not operate, and Gibbs lost both his job and the haulage contract.<sup>46</sup> He also lost other trucking contracts and mine leases.<sup>47</sup> Gibbs sued the defendant international union in a Tennessee federal court on two counts: count one was for violation of federal labor law; count two was for tortious interference with his contracts of employment and haulage and was brought to federal court on pendent jurisdiction.<sup>48</sup> The plaintiff obtained a verdict on both counts.<sup>49</sup> The trial court then decided that the federal labor law theory did not state a claim, but the court retained jurisdiction over the pendent state law tort and entered judgment for the plaintiff.<sup>50</sup> The judgment was affirmed on appeal.<sup>51</sup>

The opinion of the Court, delivered by Justice William J. Brennan, first discussed pendent jurisdiction at length.<sup>52</sup> It concluded that the district court properly asserted pendent jurisdiction over the state law tort and opined on situations in which the district court could have exercised its discretion to decline pendent jurisdiction.<sup>53</sup> While this discussion of pendent jurisdiction

---

and the Court’s Role in Defining the Litigative Unit, 50 U. PITT. L. REV. 809, 817 (1989). In *Lewis*, Judge Charles E. Clark could not persuade his colleagues to abandon *Hurn*, see *supra* note 36, but his views on civil procedure and the proper litigation unit produced the approach of *Gibbs*, see Matasar, *supra* note 12, at 1451-53; *infra* Part II.A.

42. See H.R. REP. NO. 101-734, § 114 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6874 n.15. (“[S]ubsection (a) codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*.”); see also MOORE ET AL., *supra* note 9, § 106.20; WRIGHT ET AL., *supra* note 9, § 3523, at 172 n.43, § 3567.1, at 336 n.3; *infra* notes 114-16 and accompanying text.

43. See, e.g., WRIGHT ET AL., *supra* note 9, §§ 3523, 3567.1; see *infra* Parts III-IV.

44. *Gibbs*, 383 U.S. at 718.

45. *Id.*

46. *Id.* at 719-20.

47. *Id.*

48. *Id.* at 720.

49. *Id.*

50. *Id.*

51. *Id.* at 721.

52. *Id.* at 721-29.

53. *Id.*



was technically an extended dictum because the Court later reversed and held the state law tort claim should have fallen on the merits with the federal labor law theory, the Court’s discussion of the power of the district court to assert pendent jurisdiction has remained the core of *Gibbs* and the accepted guide to pendent jurisdiction.<sup>54</sup>

The thirty-year-old precedent of *Hurn* was the necessary starting place of the discussion of pendent jurisdiction. *Gibbs* lightly parsed the precedent for more than two pages.<sup>55</sup> It recognized that, for pendent jurisdiction, *Hurn* required “two distinct grounds in support of a single cause of action” as opposed to “two separate and distinct causes of action”<sup>56</sup> and that the *Hurn* Court had chosen the “single wrongful invasion of a single primary right” theory rather than the “grouping of facts” theory to define cause of action.<sup>57</sup>

The *Gibbs* opinion next suggested clearly that *Hurn* had become a nonviable relic following promulgation of the Federal Rules of Civil Procedure. *Gibbs* recognized that the Rules not only abated controversy over cause of action (by omitting the phrase entirely) but also “strongly encouraged” joinder of claims, parties, and remedies.<sup>58</sup> Blocking this new system of fact pleading and broad joinder stood *Hurn* and its progeny. The “limited approach” of *Hurn*, said the Court, was “unnecessarily grudging.”<sup>59</sup>

Having rejected *Hurn*, the Court announced its new test for pendent jurisdiction:

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

---

54. *Id.*; see *infra* Part II.B.1-2.

55. *Gibbs*, 383 U.S. at 722-24.

56. *Id.* at 722 (quoting *Hurn v. Oursler*, 289 U.S. 238, 246 (1933)) (internal quotation marks omitted).

57. *Id.* at 723; see *supra* notes 25-29 and accompanying text. One reason the Court recognized that *Hurn* chose the primary-rights theory was because the *Hurn* opinion quoted at length from *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 321 (1927). See *Gibbs*, 383 U.S. at 723-24; discussion *supra* note 27. Interestingly, *Gibbs* quoted at even greater length from *Baltimore S.S.* than had *Hurn*, apparently to highlight even more clearly *Hurn*’s choice of the primary-rights theory. Compare *Gibbs*, 383 U.S. at 723-24 (devoting almost two pages to a discussion of *Baltimore S.S.*), with *Hurn*, 289 U.S. at 246 (merely quoting the rule stated in *Baltimore S.S.*).

58. *Gibbs*, 383 U.S. at 724.

59. *Id.* at 725.

substantiality of the federal issues, there is power in federal courts to hear the whole.<sup>60</sup>

This single, dense paragraph provided the entire guidance from the Court of the scope of pendent jurisdiction.

What guidance did it provide? The Court said that the federal claim must be substantial,<sup>61</sup> but other cases established that noncontroversial threshold requirement.<sup>62</sup> The Court said that the Constitution allowed jurisdiction over an entire case,<sup>63</sup> but other cases also established that threshold requirement.<sup>64</sup> The guidance that was new in *Gibbs* consisted of two parallel tests for the extent of a Constitutional case.<sup>65</sup> First, the Court said that a case must “derive from a common nucleus of operative fact.”<sup>66</sup> Second, the Court said that a case could be identified when a plaintiff “would ordinarily be expected to try [it] all in one judicial proceeding.”<sup>67</sup> The Court complicated the task by connecting the two tests with “but if,”<sup>68</sup> suggesting to some that the second test was either an exception to the first or an inconsistent requirement.<sup>69</sup> Our task, then, in the next two subsections is to determine both what these two guides mean and whether they are in any way inconsistent.

### 1. Common Nucleus of Operative Fact

The outer limits of a constitutional case were said to be bounded by a common nucleus of operative fact.<sup>70</sup> This test was apparently a creation of

---

60. *Id.* (alterations in original) (footnote omitted) (citation omitted) (first quote quoting U.S. CONST. art. III, § 2). After this statement of the scope of federal jurisdictional power, the opinion then proceeded to recognize the discretion of the district court to decline pendent jurisdiction and even offered several examples of when it likely should be declined. *Id.* at 726-29. These discretionary guides are not of relevance to this Article.

61. *Id.* at 725.

62. *See, e.g.,* *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933).

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

64. *See supra* notes 12-14 and accompanying text.

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

66. *Id.*

67. *Id.*

68. *Id.*

69. *See infra* Part II.B.2.

70. *Gibbs*, 383 U.S. at 725. That this test was intended to bound the outer limits of a constitutional case was suggested strongly in the central paragraph of *Gibbs* itself:

Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim “arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .,” and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional “case.” . . . The state and federal claims must derive from a common nucleus of operative fact. . . . [T]here is power in federal courts to hear the whole.

*Id.* (first and second alterations in original) (footnote omitted) (citations omitted) (first quote quoting U.S. CONST. art. III, § 2). Many lower courts and commentators recognized that *Gibbs* established the constitutional test for pendent jurisdiction. *See* Matasar, *supra* note 12, at 1414-15 nn.57-58 (collecting authorities). The Court later confirmed its intent in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S.

*Gibbs*, as it did not appear in any earlier decision. Likewise, it did not appear in the Federal Rules of Civil Procedure.

The *Gibbs* opinion did provide some helpful assistance as to the proper interpretation of the new common-nucleus-of-operative-fact test. First, the new test clearly was intended to reject and broaden the grudging approach of *Hurn*, which required factual identity for pendent jurisdiction.<sup>71</sup> Second, the new test was intended to be tongue and groove with the strong encouragement of the Federal Rules of Civil Procedure toward joinder of claims, parties, and remedies based on factual relatedness.<sup>72</sup> Third, and most importantly, the Court turned away from the legal-rights-based past of common law and code pleading toward the fact-based future of rules pleading.<sup>73</sup>

We know from the words of the common-nucleus-of-operative-fact test itself that it is fact-based. It requires fact relatedness as the outer boundary of a constitutional case. At the same time, the proper focus should be on the common nucleus of facts of the case, not on the operative facts of the case. This is so because focus on operative facts orients the view of a court to the discredited primary-rights past of *Hurn* and code pleading instead of the intended fact-based future of rules pleading of *Gibbs*.

Recognition of the background and origin of common nucleus of operative fact provides solid guidance toward proper interpretation of the § 1367(a) test.<sup>74</sup>

---

365, 371 (1978), when it said that “*Gibbs* delineated the constitutional limits of” both pendent and ancillary jurisdiction. After *Kroger*, additional lower courts and commentators repeated the same conclusion. See Matasar, *supra* note 12, at 1414-15 nn.57-58 (collecting authorities); see also MOORE ET AL., *supra* note 9, § 106.21[1] (asserting that *Gibbs* “was no doubt drawing on Chief Justice Marshall’s analysis in *Osborn v. Bank of the United States*”); C. Douglas Floyd, *Three Faces of Supplemental Jurisdiction After the Demise of United Mine Workers v. Gibbs*, 60 FLA. L. REV. 277, 306-07 (2008) (discussing an alternative to the same transaction or occurrence standard in *Gibbs*). But see WRIGHT ET AL., *supra* note 9, § 3567.1, at 337-38 n.10 (collecting authorities asserting that Article III is broader than the *Gibbs* test).

71. See *supra* text accompanying note 59. *Gibbs* rejected the factual identity approach of *Hurn* and its progeny as a limited approach and unnecessarily grudging. *Gibbs*, 383 U.S. at 725; see, e.g., Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 873 (1992); Schenkier, *supra* note 27, at 266-67.

72. *Gibbs*, 383 U.S. at 724 (“With the adoption of the Federal Rules of Civil Procedure[,] . . . 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.”); see also McLaughlin, *supra* note 71, at 873 (“[T]he 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.”).

73. See *supra* note 41 and accompanying text. After *Hurn* and before *Gibbs*, Judge Charles E. Clark, primary drafter of the Rules and proponent of a fact-based scope of a civil action, unsuccessfully argued to his colleagues on the Second Circuit in *Lewis v. Vendome Bags, Inc.*, 108 F.2d 16 (2d Cir. 1939), for a generous, practical interpretation of a cause of action “based on the extent of identity of the operative facts.” *Id.* at 19 (Clark, J., dissenting) (emphasis added). Two years later, in *Musher Foundation, Inc. v. Alba Trading Co.*, 127 F.2d 9, 11-12 (2d Cir. 1942) (Clark, J., dissenting), Clark argued the court should look to “the core of the plaintiff’s grievance” even though “differing rights depend on differing facts.” See *supra* note 36. While Clark never called his grouping-of-facts theory a common nucleus of facts, he did write of a grouping of operative facts. See, e.g., *Lewis*, 108 F.2d at 19 (Clark, J., dissenting). His procedural philosophy, and these words, traced directly to *Gibbs*’s creation of the common-nucleus-of-operative-fact test. One commentator stated that Clark’s views “clearly influenced the Supreme Court” and that *Gibbs* “embrace[d] Clark’s ‘operative facts’ formulation.” Matasar, *supra* note 12, at 1452-53.

74. See *infra* Part V.

So too does understanding the intent of the *Gibbs* Court. Yet the Court has more to say about pendent jurisdiction than this five-word guide.

## 2. “But if”

Recall that the entire crux of *Gibbs* is placed into a single paragraph of four sentences.<sup>75</sup> The first sentence notes that the federal and state law theories must comprise one case, and the second sentence notes that the federal theory must be substantial.<sup>76</sup> Laying those sentences aside as foundational, we find the touchstone of pendent jurisdiction—the requirement of a common nucleus of operative fact—in the third sentence.<sup>77</sup> Ambiguity is created because the paragraph does not end there. It continues with a fourth sentence: “But if, considered without regard to their federal or state character, a plaintiff’s claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.”<sup>78</sup> The question is whether this fourth sentence in the same paragraph adds, subtracts, or clarifies the third sentence. The troublesome part of sentence four is its introductory “but if.” Despite that unfortunate choice of words, I believe the final sentence is entirely consistent with—and adds clarity to—the third sentence, as this section will demonstrate.

Six possibilities come to mind for interpretation of the third and fourth sentences of the paragraph. Four possibilities seem clearly inadequate; they will be considered and dismissed first. That leaves two possible, plausible interpretations of the fit of the two sentences connected by “but if.”

One possibility is that the final sentence in the paragraph adds an additional requirement for pendent jurisdiction. Some commentators and courts suggest that the two sentences create separate, cumulative tests for pendent jurisdiction.<sup>79</sup> This position has never been developed beyond bare statement, which is recognized even by commentators who have proposed it.<sup>80</sup> It finds no support in *Gibbs* beyond the two words “but if.” It is not a satisfactory explanation of the Court’s words or intent.<sup>81</sup>

---

75. *Gibbs*, 383 U.S. at 725; see *supra* note 60 and accompanying text.

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

77. *Id.*

78. *Id.*

79. See, e.g., WRIGHT ET AL., *supra* note 9, § 3567.1, at 341; McLaughlin, *supra* note 71, at 871; Matasar, *supra* note 12, at 1454-63. Expressions of this position, early and late, can be found in *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402, 1412 (6th Cir. 1991) (identifying three prerequisites for supplemental jurisdiction), and in an interlocutory appeal opinion, *Achtman v. Kirby, McInerney & Squire, LLP*, 150 F. App’x. 12, 14-15 (2d Cir. 2005) (suggesting federal and state theories must, in addition to arising from a common nucleus of operative fact, also “be such that ‘he would ordinarily be expected to try them all’” together (quoting *Gibbs*, 383 U.S. at 725)), but this dual requirement is not found in the final disposition of the case on appeal, *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 334-36 (2d Cir. 2006) (discussing only common nucleus of operative fact).

80. See WRIGHT ET AL., *supra* note 9, § 3567.1, at 341; Matasar, *supra* note 12, at 1455 n.262.

81. See *infra* notes 92-107 and accompanying text.

A second possibility also adds to the common-nucleus-of-operative-fact language. The “ordinarily be expected to try them all in one judicial proceeding” language can be read as the Court’s attempt to tie the common nucleus of operative fact to the scope of claim preclusion in the case.<sup>82</sup> This position finds no support in the language of *Gibbs*. The opinion at no point discusses, or even mentions, *res judicata*.<sup>83</sup> This interpretation is not a satisfactory explanation of the Court’s words or intent.<sup>84</sup>

A third possibility is that the fourth sentence of the paragraph subtracts from the third-sentence test of common nucleus of operative fact. The “ordinarily be expected to try them all in one judicial proceeding” sentence can be read independently as spreading pendent jurisdiction over any state law claim that can properly be joined under the Federal Rules of Civil Procedure.<sup>85</sup> This possibility finds no support in the language of *Gibbs*<sup>86</sup> and appears to attempt to use the Federal Rules to expand federal jurisdiction despite the fact that the Rules cannot have any substantive effect.<sup>87</sup> It is not a satisfactory explanation of the Court’s words or intent.<sup>88</sup>

Another possibility subtracts in that it posits that courts should ignore the fourth sentence as mere surplusage.<sup>89</sup> This position is undoubtedly inadequate. We cannot conveniently ignore the Court’s language in the fourth sentence of the paragraph; the language must mean something.<sup>90</sup> Indeed, the sentence is quite helpful to our understanding, and so this possibility is not a satisfactory explanation of the Court’s words or intent.<sup>91</sup>

This brings us to the fifth possibility, which is the first one of plausible substance. This possibility is that the fourth sentence is meant to be read together with the third sentence. The connection should have been the conjunction “and.” The use of “but if” is a simple mistake in the cutting and

82. See WRIGHT ET AL., *supra* note 9, § 3567.1, at 341 n.16 (“In context, the sentence seems clearly to be referring to claim preclusion, or *res judicata*. A claim will invoke pendent jurisdiction under *Gibbs* if it is so closely related to the jurisdiction-invoking claim that principles of claim preclusion or *res judicata* would require the plaintiff to join them in one case.”); see also Freer, *Compounding Confusion*, *supra* note 41, at 450 n.33; Matasar, *supra* note 12, at 1459-60; McLaughlin, *supra* note 71, at 915.

83. *Gibbs*, 383 U.S. at 720-42.

84. See *infra* notes 92-107 and accompanying text.

85. See Joan Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 765 (1972) (“[T]he concept of ‘case’ embodied in the Rules . . . is far broader and more flexible than is the phrase ‘common nucleus of operative fact.’”); Matasar, *supra* note 12, at 1458 n.278.

86. Indeed, after raising the possibility, one commentator recognizes “this ‘refinement’ of *Gibbs*[’s] text makes *Gibbs*[’s] language virtually unrecognizable.” Matasar, *supra* note 12, at 1458.

87. See FED. R. CIV. P. 82 (“These rules do not extend or limit the jurisdiction of the district courts.”).

88. See *infra* notes 92-107 and accompanying text.

89. Some have argued directly to ignore the fourth sentence. See Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 BYU L. REV. 247, 251-52, 274 n.131; cf. Schenkier, *supra* note 27, at 268. Others have pointed to the same result by failing to regard the sentence. The Federal Courts Study Committee proposed that the new supplemental jurisdiction be based solely on the transaction or occurrence. See FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, 47 (1990); see also sources cited *supra* note 9.

90. See Matasar, *supra* note 12, at 1460 n.286.

91. See *infra* notes 92-107 and accompanying text.

pasting of the opinion editing process. This suggests that both sentences are intended to be read together. “According to this view, any redundancy made by equating ‘ordinarily be expected to try’ with ‘common nucleus’ was intentional, and the ‘but if’ was merely an unfortunate grammatical slip.”<sup>92</sup> A leading commentary on federal practice states, “The words ‘[b]ut if’ are curious. That sentence would make far more sense if it started with ‘and if.’ Indeed, the courts forged an early consensus in reading it as conjunctive.”<sup>93</sup>

Some writers effectively substituted “and” for “but if” by conveniently quoting around the problem. The American Law Institute (ALI) did this only two years after *Gibbs*.<sup>94</sup> Several other courts and commentators followed that lead.<sup>95</sup>

The possibility that the words “but if” are an editing mistake is quite plausible. Substitution of the word “and” aligns the two sentences perfectly as parts of a whole. The problem is that this rewrites the opinion. That is not what the Court said. Even though this interpretation states the Court’s intent, it is not a satisfactory explanation of the Court’s words in *Gibbs*.<sup>96</sup>

The sixth possible interpretation of the connection between the two sentences is similar to the fifth. The two sentences are parallel, consistent, and mutually supportive statements. The *Gibbs* test for pendent jurisdiction is unitary. When a litigation unit is composed of a common nucleus of operative

92. Matasar, *supra* note 12, at 1462. While raising this possible interpretation, Matasar does not subscribe to it because “turning ‘but if’ into ‘and’ requires verbal acrobatics of the highest order.” *Id.* at 1460. Verbal acrobatics may be required if one assumes these two sentences were the only sentences in an earlier draft, but if one assumes other language may have been deleted, the possibility seems more likely than fanciful.

93. WRIGHT ET AL., *supra* note 9, § 3523, at 164 & n.36 (footnote omitted) (collecting cases). The same statement, in slightly edited language, is made in *id.* § 3567.1, at 341 n.17 (same).

94. The ALI proposed a new jurisdiction statute:

The approach taken in this subsection is consistent with the holding in *United Mine Workers v. Gibbs* that pendent jurisdiction can exist under Article III if the state and federal claims “derive from a common nucleus of operative fact” and are such that a plaintiff “would ordinarily be expected to try them all in one judicial proceeding . . . .”

A.L.I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 210 (1969) (citation omitted).

95. The Supreme Court itself does this in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164-65 (1997) (“[T]his Court has long adhered to principles of pendent . . . jurisdiction . . . over state law claims that ‘derive from a common nucleus of operative fact,’ such that ‘the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional “case.”’”); see also *ABF Freight Sys., Inc. v. Int’l Bhd. of Teamsters*, 645 F.3d 954, 963 (8th Cir. 2011) (requiring common nucleus if expected to try together); *Cicio v. Does 1-8*, 321 F.3d 83, 97 (2d Cir. 2003) (beginning the sentence with “[i]f”), *vacated sub nom. Vytra Healthcare v. Cicio*, 542 U.S. 933 (2004); *Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 704 (2d Cir. 2000) (connecting the two sentences with “such that”); WRIGHT ET AL., *supra* note 9, § 3523, at 166-67) (requiring “common nucleus of operative fact so that a plaintiff ordinarily would be expected to try them all in one judicial proceeding”); Mengler, *supra* note 89, at 253 (replacing “but if” with “so that” and citing to *Gibbs*); 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, 299 (2005) (connecting separate quotations of the two sentences with “such that”).

96. See *infra* notes 97-107 and accompanying text.

fact, a plaintiff “would ordinarily be expected to try them all in one judicial proceeding.”<sup>97</sup> Such an interpretation accomplishes the purpose of *Gibbs*, which is to abandon the backward-looking, code-based interpretation of *Hurn* in favor of the forward-looking, rules-based philosophy of the Federal Rules of Civil Procedure.<sup>98</sup> The difference from the fifth interpretation is that this interpretation does not treat the words “but if” as a mistake.

As stated previously, the Court in *Gibbs* accepts both the procedural philosophy of the primary drafter of the Federal Rules, Charles E. Clark,<sup>99</sup> and the strong encouragement of joinder of claims, parties, and remedies embodied in the Federal Rules.<sup>100</sup> The key to Clark’s philosophy of procedure is that pleading and joinder are packaged by facts, not law.<sup>101</sup> Just as importantly, he groups facts based on a lay concept of what would be expected to be tried together.<sup>102</sup> The common nucleus of operative fact traces directly to Clark.<sup>103</sup> So too does the “would ordinarily be expected to try them all in one judicial proceeding.”<sup>104</sup> The two sentences are complementary. Instead of replacing “but if” with “and,” or creatively editing around the words, the proper interpretation of “but if” should be akin to “in other words.”<sup>105</sup> That ties the entire test together as part of the transactional view of Clark, the Federal Rules, and *Gibbs*.<sup>106</sup>

The apparent barrier to this interpretation is the words “but if,” which appear to place the two sentences into opposition. This barrier is illusory. The two sentences can be read together as complementary. A strong analogy for this reading can be found in an unexpected source. As part of the Sermon on the Mount, Jesus says the following to those gathered:

You have heard that it was said, “An eye for an eye and a tooth for a tooth.”  
But I say to you, Do not resist one who is evil. *But if* any one strikes you on the right cheek, turn to him the other also; and if any one would sue you and

---

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

98. *See supra* Part II.A.

99. *See supra* note 73 and accompanying text.

100. *Gibbs*, 383 U.S. at 724.

101. *See, e.g.*, CLARK, HANDBOOK, *supra* note 23, § 102, at 654 (“considering ‘cause of action’ as referring to that group of operative facts which give ground for judicial action”); Clark, *Code Causes of Action*, *supra* note 26, at 837 (“The cause of action under the code should be viewed as an aggregate of operative facts . . .”).

102. CLARK, HANDBOOK, *supra* note 23, § 19, at 130 (referring to a “group of facts . . . limited as a lay onlooker would to a single occurrence or affair”); CLARK, PLEADING AND PROCEDURE, *supra* note 32, at 659 (“[T]he extent of the claim involved depend[s] . . . upon the facts, that is, upon a lay view of the past events.”).

103. *See, e.g.*, discussion and sources cited *supra* note 73.

104. *See, e.g.*, Smith, *supra* note 30, at 919.

105. *See* Floyd, *supra* note 70, at 303 (“As a matter of ordinary usage, Justice Brennan’s subsequent ‘ordinarily be expected to try’ description . . . was intended merely as a restatement of his earlier definition of the Article III case in terms of a ‘common nucleus of operative fact.’”); *see, e.g.*, *Montefiore Med. Ctr. v. Teamsters Local 272*, 642 F.3d 321, 332 (2d Cir. 2011).

106. *See* Schenkier, *supra* note 27, at 266-67.

take your coat, let him have your cloak as well; and if any one forces you to go one mile, go with him two miles.<sup>107</sup>

The message contains an admonition not to resist one who is evil, followed by examples. The examples are connected to the admonition with the words “but if.” Clearly, the examples are intended to be consistent with the admonition. They are intended to illustrate the admonition. “But if” is the connection between the teaching and the illustrations. *Gibbs* can be read in the same fashion. The “would ordinarily be expected to try them all in one judicial proceeding” language is an illustration or exposition on how to recognize a “common nucleus of operative fact.”

This interpretation is superior to the other possibilities as it gives full meaning to all the sentences of the paragraph. The fourth sentence cannot be read alone as the measure of a constitutional case because the policies of efficiency and economy are well and good but they are not the measure of the constitutional grant. The common-nucleus-of-operative-fact language announces the outer limits of the constitutional case, and the “would ordinarily be expected to try them all in one judicial proceeding” language provides an illustration to assist understanding of the wide scope of a common nucleus of operative fact and, hence, of a “case.” The “but if” does not create ambiguity; it provides clarity.

### III. CONGRESS CREATES SUPPLEMENTAL JURISDICTION

Following a century of court-made law on pendent and ancillary jurisdiction, of which *Gibbs* was the centerpiece, Congress decided to act.<sup>108</sup> It authorized a Federal Courts Study Committee,<sup>109</sup> the committee recommended action,<sup>110</sup> and, in 1990, Congress created supplemental jurisdiction in § 1367.<sup>111</sup> Instead of measuring the reach of federal courts to draw in additional state law matters by a common nucleus of operative fact or as part of the same

---

107. *Matthew* 5:38-41 (Revised Standard Version) (emphasis added).

108. See WRIGHT ET AL., *supra* note 9, § 3523, at 155-56. Various reasons supported congressional action. Both pendent jurisdiction and ancillary jurisdiction were court-created. *See id.* As such, they stood in possible derogation of congressional control of the allocation of jurisdiction between federal and state courts. *See id.* at 156-57. Also, they were in tension with the primary principle of limited federal jurisdiction. *See id.* at 154. The actual impetus for Congress to act may have been an opposite concern: the Supreme Court, in a series of cases culminating in *Finley v. United States*, 490 U.S. 545, 555-56 (1989), *superseded by statute*, 28 U.S.C. § 1367 (2012), *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005), had refused to recognize pendent party jurisdiction. *See, e.g.*, WRIGHT ET AL., *supra* note 9, § 3523, at 183-85; McLaughlin, *supra* note 71, at 885-89.

109. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642.

110. FED. COURTS STUDY COMM., *supra* note 89, at 35-188.

111. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113-14 (codified at 28 U.S.C. § 1367). The history of the statute has been widely examined and will not be recounted here. *See, e.g.*, MOORE ET AL., *supra* note 9, § 106.04[5]; WRIGHT ET AL., *supra* note 9, § 3523, at 156.



transaction or occurrence, henceforth the reach would be tested by the same case or controversy under Article III.<sup>112</sup>

The relevance of the legislative history of the statute for present purposes is that it shows clearly that interpretation of “same case or controversy under Article III” is to be guided by the same considerations that enlightened both the common nucleus of operative fact and the same transaction or occurrence. So thought the drafters of the statute.<sup>113</sup> So thought the congressional sponsors, who viewed § 1367 as a noncontroversial measure intended merely to codify the area, i.e., to codify the doctrines of pendent and ancillary jurisdiction.<sup>114</sup> The Supreme Court agreed.<sup>115</sup> Commentators also agreed that the statute codified *Gibbs*’s common nucleus of operative fact.<sup>116</sup> What all of this means is that the cases and materials interpreting the common nucleus of operative fact remain vital and highly relevant in interpretation of § 1367 today.

112. See 28 U.S.C. § 1367(a). The two obsolete tests governed pendent jurisdiction and ancillary jurisdiction. See *supra* notes 10-11 and accompanying text. The new test was the core of § 1367(a).

113. Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993, 994 (1991) [hereinafter Rowe, Burbank & Mengler, *A Coda on Supplemental Jurisdiction*] (stating that the statute extends supplemental jurisdiction to constitutional limits and citing to *Gibbs*); Thomas M. Mengler, Stephen B. Burbank & Thomas D. Rowe, Jr., *Congress Accepts Supreme Court’s Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 214 (1991) [hereinafter Mengler, Burbank & Rowe, *Congress Accepts Invitation*] (“[S]ection 1367 codifies supplemental jurisdiction as it existed before the *Finley* decision.”).

114. See H.R. REP. NO. 101-734, § 206 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6861 (viewing § 1367 as “implement[ing] non-controversial reforms”). The Federal Courts Study Committee had recommended that Congress “expressly authorize federal courts to hear any claim arising out of the same ‘transaction or occurrence’ as a claim within federal jurisdiction.” FED. COURTS STUDY COMM., *supra* note 89, at 47. The House committee report stated that the section “implements [this] recommendation . . . by making federal court a practical arena for the resolution of an entire controversy.” H.R. REP. NO. 101-734, § 114, reprinted in 1990 U.S.C.C.A.N. at 6876-74; see *supra* note 42; cf. LARRY L. TEPLY & RALPH W. WHITTEN, CIVIL PROCEDURE 142 (4th ed. 2009) (“Congress believed that the ‘same transaction or occurrence’ test proposed by the Federal Courts Study Committee was coextensive with the scope of an Article III case or controversy.”).

115. See *City of Chi. v. Int’l Coll. of Surgeons*, 522 U.S. 156, 164-65 (1997). In *City of Chicago*, the Court said the following:

[T]his Court has long adhered to principles of pendent and ancillary jurisdiction by which the federal courts’ original jurisdiction over federal questions carries with it jurisdiction over state law claims that “derive from a common nucleus of operative fact,” such that “the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional ‘case.’” Congress has codified those principles in the supplemental jurisdiction statute, which combines the doctrines of pendent and ancillary jurisdiction under a common heading.

*Id.* (footnote omitted) (citations omitted) (quoting *Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)). Many other courts have naturally followed. See WRIGHT ET AL., *supra* note 9, § 3567.1, at 337 n.9 (collecting cases).

116. See MOORE ET AL., *supra* note 9, § 106.20 (“Congress intended to codify the scope of supplemental jurisdiction first articulated by [*Gibbs*], which suggests that the test is to be the ‘common nucleus of operative facts.’”); WRIGHT ET AL., *supra* note 9, § 3567, at 321-22 (recognizing that the intent was noncontroversial reform but asserting that the statute was an attempt to “codify the whole of supplemental jurisdiction”); Floyd, *supra* note 70, at 299 n.123 (“Far from repudiating the ‘common nucleus of operative fact’ standard . . . derived from *Gibbs*, the supplemental-jurisdiction statute’s legislative history suggests that Congress intended to codify the *Gibbs* standard.”).

IV. JUDICIAL INTERPRETATIONS OF COMMON NUCLEUS OF OPERATIVE  
FACT

In the years following *Gibbs*, the lower courts were called on to interpret common nucleus of operative fact in the context of cases. Two primary schools of thought developed.

Some courts coalesced into what has been called a substantial-evidentiary-overlap approach.<sup>117</sup> Two examples show the thinking of this group of courts. One court concluded that a federal age-discrimination claim did not spread pendent jurisdiction over state law theories of breach of contract and breach of duty of fair dealing for the same actions because “[n]ot only must the facts be at the *nucleus* of both State and federal claims, the facts common to each case must be the *operative* facts.”<sup>118</sup> A second court refused to find a federal fair-credit-reporting claim arose from a “common set of facts” with state law contract and tort theories involving the identical debt because the “claims do not share any of the same ‘operative facts.’”<sup>119</sup>

The error of the substantial-evidentiary-overlap approach seems quite clear: it is the discredited *Hurn* approach. Focus on operative facts looks backwards through *Hurn* to code pleading instead of forward through *Gibbs* to rules pleading.<sup>120</sup> Requiring common operative facts or a substantial evidentiary overlap is inconsistent with *Gibbs* and therefore with the same case or controversy standard of § 1367(a).<sup>121</sup>

Many more courts concluded that a common nucleus of operative fact extended over a state law theory that had a “logical relationship,” sometimes expressed as a “loose factual connection,” with the federal law theory.<sup>122</sup> “Through the years, courts concluded that a loose factual connection between the jurisdiction-invoking claim and the supplemental claim would satisfy *Gibbs*.”<sup>123</sup>

While this latter approach is consistent with *Gibbs*, both logical relationship and loose factual connection are unneeded, and perhaps therefore harmful, glosses. They add nothing to common nucleus of operative fact, the *Gibbs* test itself. The common nucleus of operative fact is based on a transactional view of the litigation unit.<sup>124</sup> A transaction is composed of facts; a

117. See MOORE ET AL., *supra* note 9, § 106.22.

118. *Mason v. Richmond Motor Co.*, 625 F. Supp. 883, 887 (E.D. Va. 1986).

119. *Salei v. Boardwalk Regency Corp.*, 913 F. Supp. 993, 998-99 (E.D. Mich. 1996).

120. See *supra* Part II.A-B.

121. See *Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966); *supra* note 42 and accompanying text.

122. MOORE ET AL., *supra* note 9, § 106.22; see Matasar, *supra* note 12, at 1453.

123. WRIGHT ET AL., *supra* note 9, § 3523, at 165; see *id.* § 3523 at 165 n.38 (collecting cases).

124. See *Miller v. Carson*, 515 F. Supp. 1375, 1377 (M.D. Fla. 1981) (“The transactional analysis test provided the basis for the decision in [*Gibbs*] . . . .”); William A. Fletcher, “*Common Nucleus of Operative Fact*” and *Defensive Set-Off: Beyond the Gibbs Test*, 74 IND. L.J. 171, 175 (1998) (“The ‘common nucleus’ test of *Gibbs* is, of course, a transactional test . . . .”); Freer, *Compounding Confusion*, *supra* note 41, at 450 (“[T]he *Gibbs* Court defined the constitutional ‘case’ in transactional terms.”); Schenkier, *supra* note 27, at

transaction is bounded by the set of facts that a lay person would expect to be tried together.<sup>125</sup> The choice of the fact-based transaction as the litigation unit is, in substantial part, based on efficiency.<sup>126</sup> When both federal and state theories arise from a common set of facts, the default position is intended to be, and should be, that they form a common nucleus of operative fact.<sup>127</sup>

## V. A PROPER JUDICIAL ATTITUDE TOWARD INTERPRETATION OF “CASE OR CONTROVERSY UNDER ARTICLE III” OF § 1367(a)

### A. Historical Guidance to Interpretation

What principles can we find from this history that will guide a court in interpreting “same case or controversy under Article III”? The historical context of the common-nucleus-of-operative-fact test for pendent jurisdiction from *Gibbs* outlined in the previous parts of this Article provides clear guidance to a court today faced with an interpretation of the “same case or controversy under Article III” test in § 1367(a) for supplemental jurisdiction.<sup>128</sup> After all,

---

279 (“There is little doubt that *Gibbs* intended to apply the ‘transactional’ test for ancillary jurisdiction used in *Moore* to the context of pendent jurisdiction.”); *supra* Part II.B.

Long before *Gibbs*, one commentator recognized that “the framers of the Constitution did not use ‘case’ in a metaphorical sense but were speaking of the unit of litigation which the law of procedure, in the normal course of events, allows to be disposed of at one trial. Thus, the Constitution deals with a case as a whole . . . .” Thomas F. Green, Jr., *Federal Jurisdiction over Counterclaims*, 48 NW. U. L. REV. 271, 293-94 (1953).

125. See *infra* note 141 and accompanying text. This aligns *Gibbs* with the procedural philosophy of Charles E. Clark and, thus, the entire procedural philosophy of the Federal Rules of Civil Procedure. See *supra* notes 73-102. An early commentator on *Gibbs* recognized, “Evidentiary overlap no longer should be required to establish pendent jurisdiction. Instead, power should be acknowledged when the claims arise from the same transaction or course of dealing between the parties or, put another way, when the claims are ‘part of the basic dispute between the parties.’” Schenkier, *supra* note 27, at 275 (quoting Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 662 (1968)).

126. Efficiency is, of course, one of the primary goals of the procedural philosophy of Charles E. Clark. See, e.g., *Musher Found., Inc. v. Alba Trading Co.*, 127 F.2d 9, 11-12 (2d Cir. 1942) (Clark, J., dissenting); see also MOORE ET AL., *supra* note 9, § 106.23; Douglas D. McFarland, *In Search of the Transaction or Occurrence: Counterclaims*, 40 CREIGHTON L. REV. 699, 701-03 (2007); Smith, *supra* note 30, at 916 (“Clark implicitly urged two of the cardinal virtues of this concept of procedure: cases would be decided on their merits rather than by procedural rulings, and this would occur with an economy of time and resources.”); *infra* note 140.

127. Two courts of appeals strongly endorsed this position in the language of *Gibbs* and pendent jurisdiction, even though both wrote opinions after the advent of § 1367(a). The Second Circuit stated, “the exercise of pendent jurisdiction ‘is a favored and normal course of action’” that should be “routinely upheld” when the facts “substantially overlapped” or presentation of the federal facts “necessarily brought” the state facts before the court. *Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 704 (2d Cir. 2000) (quoting *Promisel v. First Am. Artificial Flowers, Inc.*, 943 F.2d 251, 254 (2d Cir. 1991)). The Sixth Circuit stated even more explicitly that “the default assumption is that the court will exercise supplemental jurisdiction over all related claims.” *Blakely v. United States*, 276 F.3d 853, 861 (6th Cir. 2002) (quoting *Campanella v. Commerce Exch. Bank*, 137 F.3d 885, 892 (6th Cir. 1998)). The Sixth Circuit in *Blakely* relied in part on the Fourth Circuit’s recognition that a common nucleus of operative fact exists when the federal and state theories “revolve around a central fact pattern.” *Id.* (quoting *White v. Cnty. of Newberry, S.C.*, 985 F.2d 168, 172 (4th Cir. 1993)) (internal quotation marks omitted).

128. See *supra* Parts II.B, IV.

the § 1367(a) test is intended merely to be a codification of the common-nucleus-of-operative-fact test.<sup>129</sup>

We can say with near certainty that the same-case-or-controversy test does extend supplemental jurisdiction to the limits of the Article III constitutional grant of power to the federal courts. This is apparent from the very language of the statute, which explicitly defines the scope of supplemental jurisdiction by reference to Article III of the Constitution.<sup>130</sup> While this assertion could perhaps be challenged, given the history of differing interpretations of the same words “arising under” in Article III and in § 1331, no court or commentator has shown an inclination to contest that § 1367(a) extends to the limits of Article III.

More controversially—and more importantly for the day-to-day work of the federal courts—we can say with assurance that the “same case or controversy under Article III” test of § 1367(a) is substantively indistinguishable from its constituent parts, i.e., both the common nucleus of operative fact from *Gibbs* and the same transaction or occurrence from various joinder devices. The accuracy of this assertion is supported in many ways. First, that is the intent of the Federal Courts Study Committee, the drafters of § 1367(a), and Congress.<sup>131</sup> Second, *Gibbs* itself treats both the constitutional case and the common nucleus of operative fact in synonymous terms.<sup>132</sup> Some commentators suggest that a debate exists on the question of whether case or controversy extends beyond common nucleus of operative fact and transaction or occurrence, but that debate exists only based on a narrow misunderstanding

---

129. See *supra* notes 114-15 and accompanying text.

130. 28 U.S.C. § 1367(a) (2012) (“[T]he 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.”); see, e.g., Fletcher, *supra* note 124, at 171 (“With the passage of [§ 1367(a)], . . . supplemental jurisdiction for all federal question and some diversity suits became as broad as Article III permits.”); Floyd, *supra* note 70, at 300 (“Nevertheless, the text of the statute is clear: It extends the scope of supplemental jurisdiction to the fullest extent permitted by Article III.”); Rowe, Burbank & Mengler, *A Coda on Supplemental Jurisdiction*, *supra* note 113, at 994 (“The statute extends supplemental jurisdiction to its constitutional limits . . .”); cf. Simon, *supra* note 95, at 308 (“[L]anguage must be interpreted the same way it is interpreted in Article III . . .”).

131. See *supra* notes 111-14. The Federal Courts Study Committee recommended codifying the doctrines of pendent and ancillary jurisdiction under the test of same transaction or occurrence. See *supra* note 111. The drafters thought they were proposing a straightforward codification of the doctrine. See *supra* note 113. Congress believed it was codifying the doctrines under the test of same case or controversy under Article III. See *supra* note 114. The direct lineage of *Gibbs*, with its common-nucleus-of-operative-fact test to § 1367, has been well-documented.

132. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). Jurisdiction exists when “the entire action before the court comprises but one constitutional ‘case.’ . . . The state and federal claims must derive from a common nucleus of operative fact. [If] . . . plaintiff’s claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then . . . there is power in federal courts to hear the whole.” *Id.* While courts and commentators have rightfully fastened on the common nucleus of operative fact language, we should also note that Justice Brennan, the primary author of *Gibbs*, later also wrote that “the question of Art. III power in the federal judiciary to exercise subject-matter jurisdiction concerns whether the claims asserted are such as ‘would ordinarily be expected to [be tried] in one judicial proceeding.’” *Aldinger v. Howard*, 427 U.S. 1, 20 (1976) (Brennan, J., dissenting) (quoting *Gibbs*, 383 U.S. at 725), *superseded by statute*, 28 U.S.C. § 1367.

of the prior tests.<sup>133</sup> Because the *Gibbs* test is recognized to extend to the limits of Article III,<sup>134</sup> another test can hardly be broader. Third, most courts have recognized that the three tests are, in their essence, synonymous.<sup>135</sup> Fourth, most commentators agree.<sup>136</sup> Fifth, this understanding ties supplemental jurisdiction in tightly with other areas of federal practice.<sup>137</sup>

---

133. One example will suffice. After asserting that a debate exists regarding whether the test of § 1367(a) is broader than the prior tests, the authors proceed to create a sort of stepping-stone approach, asserting that the transaction or occurrence test is encompassed within the broader common-nucleus-of-operative-fact test that is, in turn, encompassed within the broader same case or controversy test. See WRIGHT ET AL., *supra* note 9, § 3567.1. The foundation of this hierarchy seems to be a Seventh Circuit misunderstanding that only a loose factual connection is required for supplemental claims, while earlier tests required something more. See, e.g., *Baer v. First Options of Chi., Inc.*, 72 F.3d 1294, 1301 (7th Cir. 1995) (making an otherwise unremarkable decision that an award of attorneys' fees is supplemental to Title VII action); *Ammerman v. Sween*, 54 F.3d 423, 425 (7th Cir. 1995) (making the standard holding that an assault-and-battery theory is supplemental to a Title VII theory for the same acts). The misunderstanding is that all three of these tests require only a loose *factual* connection, and this loose factual connection itself is merely an unneeded gloss on the three tests themselves. See *supra* notes 122-27 and accompanying text. To the extent that gloss can be used in such a fashion to distinguish among these tests, the gloss escalates from unneeded to pernicious.

134. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 (1978); *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1374 (Fed. Cir. 1994) ("In *Gibbs*, the Court delineated the constitutional limits of a federal court's authority to hear pendent non-federal claims."); see also WRIGHT ET AL., *supra* note 9, § 3567.1, at 339-40 n.11 (collecting cases). The drafters of § 1367 believed that "subsection (a) codifie[d] supplemental jurisdiction at the outer constitutional boundary that existed before *Finley's* statutory revisionism." Mengler, Burbank & Rowe, *Congress Accepts Invitation*, *supra* note 113, at 215.

135. See, e.g., *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 335 (2d Cir. 2006). The Second Circuit said the following:

Turning to the terms of the statute, we have held that disputes are part of the "same case or controversy" within § 1367 when they "derive from a common nucleus of operative fact." . . . When both pendent and ancillary jurisdiction were codified in 1990 as § 1367, however, the "common nucleus" test was retained by nearly all the Circuits to interpret the statute's "case or controversy" language.

In determining whether two disputes arise from a "common nucleus of operative fact," we have traditionally asked whether "the facts underlying the federal and state claims substantially overlapped . . . [or] the federal claim necessarily brought the facts underlying the state claim before the court."

*Id.* (citations omitted).

136. See, e.g., McLaughlin, *supra* note 71, at 896 n.275 (collecting authorities); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 90 (1992) (suggesting that three tests may be interpreted as synonyms).

137. See Freer, *Compounding Confusion*, *supra* note 41, at 450 ("[M]odern procedure generally bases proper joinder on transactional relatedness. Reflecting this evolution, the *Gibbs* Court defined the constitutional 'case' in transactional terms. It upheld supplemental jurisdiction over claims that shared a 'common nucleus of operative fact . . . ."). One opinion found a strong, and highly appropriate, analogy in removal jurisdiction over a separate and independent claim under 28 U.S.C. § 1441(c). See *Roe v. Little Co. of Mary Hosp.*, 800 F. Supp. 620, 624 (N.D. Ill. 1992) ("Where, as here, there is a single wrong alleged by a plaintiff arising out of an interlocked series of transactions and giving rise to the relief that is sought, the Court should find that the claims against all of the defendants form part of the 'same case or controversy.'").

*B. Today's Attitude*

Of course, the important concept today is not whether the test of § 1367(a) should be interpreted co-extensively with its ancestors. The important concept is that same case or controversy under Article III should be interpreted both as intended and as consistent with other areas of federal practice. Interpretation should be broad, not grudging. *Gibbs* makes this admonition clear.<sup>138</sup> Courts should look for a related set of facts, whether those facts are called a common nucleus of operative fact, the same transaction or occurrence, overlapping facts, related facts, facts giving rise to other facts, but-for facts, facts in a logical relationship, or any similar designation. Just as importantly, in deciding whether the fact pattern presented in a litigation coalesces into a case or controversy, courts should make that decision largely by deciding whether the “claims are such that [a court] would ordinarily be expected to try them all in one judicial proceeding.”<sup>139</sup> Supplemental jurisdiction is not only about factual relatedness but also about economy, efficiency, and fairness.<sup>140</sup> When the facts of the litigation present a natural grouping that a lay person would expect to be tried together in one proceeding, “then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.”<sup>141</sup> The court has identified a case or controversy under Article III. Supplemental jurisdiction under § 1367(a) exists.

Attempts to gloss over the statute’s same-case-or-controversy language are fruitless and often detrimental. Courts should abandon the misleading quest for a more specific test stated in terms of law and simply focus on the facts of the litigation before them, as does one court in this strong, simple, sufficient statement: “[T]he claims against all defendants arose from the same facts.”<sup>142</sup> Several related questions will usually guide the decision. Do the facts all arise

---

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

139. *Id.*

140. *See, e.g., U.S. ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186, 209 (D.D.C. 2011) (“[C]ourts should be guided by considerations of judicial economy as well as convenience and fairness to the parties.”); *Chaluisan v. Simsmetal E. LLC*, 698 F. Supp. 2d 397, 403 (S.D.N.Y. 2010) (retaining the state law claim for bonus and vacation pay as supplemental to the FLSA overtime claim because they all related to compensation and “principles of judicial economy dictate” avoidance of duplication of efforts in federal and state courts); *see also supra* note 126.

141. *Gibbs*, 383 U.S. at 725. A strong example is *Montefiore Medical Center v. Teamsters Local 272*, 642 F.3d 321, 332 (2d Cir. 2011), in which the court approves the amalgamation of five years of facts in a single case with the sensible recognition “that all of the claims asserted by Montefiore involve the Fund’s alleged failure to reimburse Montefiore for medical services provided to Plan beneficiaries between May 2003 and August 2008.”

142. *ABF Freight Sys., Inc. v. Int’l Bhd. of Teamsters*, 645 F.3d 954, 963 (8th Cir. 2011). Another court stated this principle in common-sense terms: “As a logical matter, both the words and the important analytical question are essentially the same no matter whether one consults *Gibbs*, Rule 13, or section 1367(a): Are the main claims . . . sufficiently related to be considered one dispute?” *Blue Dane Simmental Corp. v. Am. Simmental Ass’n*, 952 F. Supp. 1399, 1407 (D. Neb. 1997). Despite this recognition, the court then proceeded to plod through no fewer than four glosses to reach the notable decision that a federal claim for improperly registering bulls as full-blooded is not sufficiently factually related to a state counterclaim for false statements that the bulls were improperly registered to allow supplemental jurisdiction. *Id.* at 1410.

out of a single event or related series of events?<sup>143</sup> Will the state law theory bring many of the same witnesses and other evidence before the court as will the federal law theory? Would dividing the litigation into federal and state parts, thereby requiring a separate state law trial, be duplicative and inefficient? Would a lay person expect this set of facts to be tried together?<sup>144</sup> Failure to ask these questions leads to narrow, grudging rejections of supplemental jurisdiction by courts that misunderstand the fact-based and economy-driven nature of the doctrine.<sup>145</sup> “Yes” answers to these questions lead to assertions of supplemental jurisdiction over clearly fact-related state law claims or theories—even though motions to dismiss are pursued by attorneys who can most charitably be called overzealous advocates.<sup>146</sup>

---

143. An excellent example is *Diversified Carting, Inc. v. City of New York*, 423 F. Supp. 2d 85 (S.D.N.Y. 2005). The court had no difficulty spreading supplemental jurisdiction over an entire case presenting three plaintiffs, sixteen defendants, and a welter of federal and state theories. *Id.* at 88-89. “The common nucleus is the search, excavation, and clean-up efforts at the World Trade Center site.” *Id.* at 99.

In contrast is *Bradley v. North Carolina Department of Transportation*, 286 F. Supp. 2d 697, 704-05 (W.D.N.C. 2003). Even though the governing Fourth Circuit in *White v. County of Newberry, South Carolina*, 985 F.2d 168, 172 (4th Cir. 1993), instructed that “[t]he claims need only revolve around a central fact pattern,” the district court proceeded to compartmentalize the operative facts narrowly into seemingly separate incidents even though all involve a running dispute among the parties. *N.C. Dep’t of Transp.*, 286 F. Supp. at 704.

A strong, albeit sub silentio, rejection of compartmentalizing facts is *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005). The Supreme Court held that supplemental jurisdiction extends to class members failing to meet the jurisdictional amount requirement individually even though every class member necessarily presents facts separated in time and detail. *Id.* at 567-71.

144. See *supra* Part II.B.

145. See, e.g., *Serrano-Moran v. Grau-Gaztambide*, 195 F.3d 68, 69 (1st Cir. 1999) (noting that, while the plaintiffs sued under federal civil rights law for a police beating and under state law for medical malpractice by the hospital and the doctors who treated resulting injuries, the court found no supplemental jurisdiction over the single event of son’s death because “facts and witnesses as to the two sets of claims [were] essentially different”); *Lyon v. Whisman*, 45 F.3d 758, 763 (3d Cir. 1995) (noting that the plaintiff’s additional state law theories surrounding the nonpayment of a bonus was not supplemental to the federal law theory of nonpayment of overtime because the federal facts were “very narrow, well-defined” and the state facts arising out of nonpayment to the same employee for the same job “were quite distinct”); *Taylor v. District of Columbia*, 626 F. Supp. 2d 25, 29 (D.D.C. 2009) (rejecting supplemental jurisdiction over federal and state claims involving one house as “completely separate: Hicks’[s] liability stems from an alleged failure to remedy the lead-based paint hazard, whereas the District’s liability stems from its alleged failure to compel Hicks to remedy the lead-based paint hazard”); *Singh v. George Washington Univ.*, 368 F. Supp. 2d 58, 72 (D.D.C. 2005) (noting that while the plaintiff sued under federal disability law for dismissal from school by the dean, court could perceive “almost no factual or legal overlap” with the dean’s counterclaim for defamation for bringing the suit), *vacated sub nom. Singh v. George Washington Univ. Sch. of Med. & Health Scis.*, 508 F.3d 1097 (D.C. Cir. 2007); *Roberts v. Lakeview Cmty. Hosp.*, 985 F. Supp. 1351, 1351-52 (M.D. Ala. 1997) (discussing a case in which the plaintiff sued the hospital under Title VII for demotion and replacement for her reaction to battery by the surgeon but the court had no supplemental jurisdiction over the state law battery theory against the surgeon).

146. Most of these cases involve the exercise of what would undoubtedly have been pendent jurisdiction under *Gibbs*. See, e.g., *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995) (noting that when defendant pursued his objection as far as appeal of plaintiff’s adding state law theories to her federal claim for same acts of sex discrimination, court commented defendant’s “argument is rather incredible”); *White*, 985 F.2d at 169-70 (noting that the plaintiffs sued under both federal environmental law and various state law tort theories for same acts of polluting same well); *Martinez-Rosado v. Instituto Medico Del Norte*, 145 F. Supp. 2d 164, 167 (D.P.R. 2001) (discussing that the plaintiffs sued under both federal and state law theories for same acts of defendants leading to same death); *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 671

## VI. CONCLUSION

Pendent jurisdiction, the primary ingredient of supplemental jurisdiction, allowed the federal court to spread its jurisdictional reach over the entire case or controversy because the litigative unit was identified as the common nucleus of operative fact.<sup>147</sup> This common nucleus was properly viewed as the broad grouping of facts, without regard to legal theories or categories, that a lay person would expect to be tried together.<sup>148</sup> The Supreme Court's clearly implied instruction to lower federal courts was that, in identifying the grouping of facts constituting the same case or controversy, they should not be grudging.<sup>149</sup>

Perhaps prior to 1990, under the regime of *Gibbs*, a federal court might rightly be chary of extending federal jurisdiction beyond congressional authorization by the court-made doctrines of pendent and ancillary jurisdiction.<sup>150</sup> That should no longer be a concern. In 1990, Congress expressly authorized federal courts to exercise supplemental jurisdiction over all parts of the same case or controversy under Article III.<sup>151</sup>

Given the history of pendent jurisdiction, what "same case or controversy" means for purposes of supplemental jurisdiction is the broad grouping of facts, without regard to legal theories or categories, that a lay person would expect to be tried together. And in limning the boundaries of that grouping of facts, the court should not be grudging. The statement that assertion of federal jurisdiction over all related facts should be the default position in identifying a case or controversy under Article III seems, at first blush, to be inconsistent with the nature of limited federal jurisdiction, yet it is the proper judicial attitude to assertions of supplemental jurisdiction.<sup>152</sup>

---

(S.D.N.Y. 1995) (noting that the plaintiff sued under federal Title VII and equal pay statute plus state law theories for same acts of sex discrimination); *Yeager v. Norwest Multifamily, Inc.*, 865 F. Supp. 768, 769 (M.D. Ala. 1994) (discussing a case in which the plaintiff sued under federal Title VII and state law theories for same acts of sex discrimination including a battery); *Ellis ex rel. Ingram v. Bankhead*, 828 F. Supp. 45, 46 (N.D. Ill. 1993) (mentioning that when the plaintiffs sued under both federal and state theories for same acts of arrest and physical abuse, the court commented that "[e]ven a brief analysis discloses that [defendant] is wrong in attacking those counts").

147. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966); *see supra* note 41.

148. *See supra* Part II.B.1. The other building block of supplemental jurisdiction, ancillary jurisdiction, was based on recognition of the litigative unit arising out of the same transaction or occurrence. *See supra* note 10 and accompanying text. This was largely synonymous with the common nucleus of operative fact. *See supra* Part V.

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

150. *See supra* note 15 and accompanying text.

151. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113-14 (1990) (codified at 28 U.S.C. § 1367(a) (2012)).

152. *See supra* note 126 and accompanying text.