

“Common Nucleus of Operative Fact” and Defensive Set-Off: Beyond the *Gibbs* Test

WILLIAM A. FLETCHER*

One of the mysteries of federal jurisdiction is the location of the outer constitutional boundary of what we have come to call supplemental jurisdiction. Under the influence of modern procedural rules encouraging liberal joinder of parties and claims, the size of a permissible unit of litigation has substantially increased in this century. In both state and federal courts the goal of these joinder rules has been to foster procedural fairness and judicial efficiency, “to secure the just, speedy, and inexpensive determination of every action.”¹ But in some cases federal courts have had difficulty in achieving that goal because of limitations on their subject matter jurisdiction.

With the passage of the federal supplemental-jurisdiction statute in 1990,² the scope of supplemental jurisdiction for all federal question and some diversity suits became as broad as Article III³ permits. How broad is that? In this Comment, I use the example of an unrelated claim for defensive set-off to argue that the constitutional test for supplemental jurisdiction is broader than the “common nucleus of operative fact” test of *United Mine Workers v. Gibbs*.⁴ An analysis focused on defensive set-off is interesting for two reasons. First, while defensive set-off is a procedural device whose use should be encouraged, the modern Supreme Court has never addressed it, and there are some doubts about

* Professor of Law, University of California at Berkeley School of Law. B.A., Harvard College, 1968; B.A., Oxford University, 1970; J.D., Yale University, 1975.

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

2. 28 U.S.C. § 1367 (1994).

3. U.S. CONST. art. III.

4. 383 U.S. 715, 725 (1966). To those familiar with the academic literature, my conclusion may not be a surprise. See L. TEPLY AND R. WHITTEN, CIVIL PROCEDURE 115-16 (1994) (“Nothing in the language of Article III explicitly requires that the scope of a ‘case’ or ‘controversy’ be defined by reference to the factual relationship between the joined claims, as opposed to, for example, the entire relationship between the parties to an action, which may include factually unrelated claims.”); Richard A. Matasar, *Rediscovering “One Constitutional Case”: Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1463 (1983) (“[S]everal courts, including the Supreme Court, have upheld supplemental jurisdiction in many ancillary jurisdiction cases that do not meet the *Gibbs* fact relationship requirements. . . . Their existence undermines the conclusion that *Gibbs* sets any constitutional limits on supplemental jurisdiction based upon fact relatedness of claims.”); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 890-91 (1992) (“Although the Supreme Court arguably defined the constitutional ‘case’ limit of Article III in *Gibbs*, the Court’s attention in recent years has primarily focused on the statutory limits of supplemental jurisdiction, and the Court has given very little discussion to the constitutional limits of Article III.”); Mary B. McManamon, *Dispelling the Myths of Pendent and Ancillary Jurisdiction: The Ramifications of a Revised History*, 46 WASH. & LEE L. REV. 863, 932 (1989); Karen N. Moore, *The Supplemental Jurisdiction Statute: An Important but Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 32, 39 (1992); Wendy C. Perdue, *The New Supplemental Jurisdiction Statute—Flawed but Flexible*, 41 EMORY L.J. 69, 70-71 (1992); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 87-91 (1992).

its legitimacy in federal courts. Second, defensive set-off provides the clearest demonstration of why the *Gibbs* "common nucleus" test does not establish the outer boundary of Article III. As all students of federal jurisdiction will recognize, the conclusion that the *Gibbs* test does not control has substantial implications for other unrelated claims and parties in federal court.

Defensive set-off is a counterclaim asserted by the defendant to reduce the size of the plaintiff's judgment. It was available in Roman law, which allowed mutual debts to be set off against each other.⁵ By the early 1700s, defensive set-off was allowed in English equity and law courts even when the claim for set-off arose out of facts unrelated to the plaintiff's claim.⁶ American courts followed the English practice and allowed defensive set-off in comparable circumstances.⁷

The utility and essential fairness of defensive set-off is clear. If a plaintiff can enforce a monetary judgment to its full extent without deducting an existing liquidated debt or judgment owed to the defendant, he or she has a significant and undeserved procedural advantage. As Professor Shulman noted in 1936, a defendant who cannot assert a claim for set-off "would be ordered to pay out monies to the plaintiff which, otherwise, would constitute most effective security for his own claim against the plaintiff."⁸ The rationale supporting defensive set-off is strongest in a suit by an insolvent where a defendant might not be able to recover any of the debt owed to him by a plaintiff, but it extends to all cases where it would be more difficult, uncertain, or expensive for a defendant to recover from a plaintiff without the assistance of set-off.

In 1938—the same year the Federal Rules were adopted—Professor Moore asserted that a claim for defensive set-off is an exception to the general rule

5. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 436-37 (1928).

6. For example, a 1705 English statute allowed a defensive claim for set-off in suits at law when the plaintiff was insolvent, even when the claim arose out of events unrelated to the plaintiff's claim. See Statutes of the Realm, 1705, 4 Ann., ch. 17, § 11 (Eng.); BASIL MONTAGU, SUMMARY OF THE LAW OF SET-OFF WITH AN APPENDIX OF CASES ARGUED AND DETERMINED IN THE COURTS OF LAW AND EQUITY ON THAT SUBJECT 52-68 (1825) (discussing the 1705 and successor English statutes). For a useful general history, see generally McManamon, *supra* note 4.

7. See OLIVER L. BARBOUR, A TREATISE ON THE LAW OF SET OFF 24-25 (1841); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 656-69 (1836); THOMAS W. WATERMAN, A TREATISE ON THE LAW OF SET-OFF, RECOURNMENT, AND COUNTER-CLAIM 18 (1869).

8. Harry Shulman & Edward C. Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 414-15 (1936).

But if it is held that in an action for money, the defendant may not set off against the plaintiff's claim a separate claim for money against the plaintiff, conscience may be troubled a little. . . . Such a sacrifice may be required by the politics of federalism, enacted in statute or the Constitution.

...
... But its harshness may be alleviated. The remedy for equitable set-off might be afforded as an exercise of ancillary jurisdiction in some cases.

Id.

requiring an independent basis for jurisdiction for a permissive counterclaim.⁹ Beginning in 1945, a series of federal district court decisions adopted Professor Moore's view.¹⁰ According to the definition provided by Moore, a defensive set-off must be "liquidated or capable of liquidation," must "grow out of a contract or judgment," and may arise out of facts extrinsic to plaintiff's claim.¹¹ Modern treatises and academic literature have generally followed Moore and this lower court case law, though without extensive discussion. For example, the current edition of the Moore treatise says simply, "Claims for defensive set off for a liquidated or otherwise ascertained amount which are pleaded solely to diminish or reduce a judgment for the opposing party provide an exception to the rule that

9. 1 JAMES W. MOORE & JOSEPH FRIEDMAN, *MOORE'S FEDERAL PRACTICE* § 13.03, at 696 (1938).

[The permissive counterclaim] is an independent and unrelated claim and needs independent jurisdictional grounds to support it, with one exception. Set-off is that exception. Certain matter that does not arise out of the transaction sued on can nevertheless be used defensively for purposes of set-off; and for purposes of defeating or diminishing [the] plaintiff's recovery no independent jurisdictional grounds would be needed therefore.

Id.; see also *id.* at n.17 ("No cases squarely in point have been found to support the text . . .").

10. See *Marks v. Spitz*, 4 F.R.D. 348, 350 (D. Mass. 1945). For cases applying the defensive set-off exception, see also *Curtis v. Caldwell*, 86 F.R.D. 454, 457-58 (E.D. Pa. 1980); *Binnick v. Avco Fin. Servs.*, 435 F. Supp. 359, 366 (D. Neb. 1977); *Herrmann v. Atlantic Richfield Co.*, 72 F.R.D. 182, 185 (W.D. Pa. 1976); *United States v. Thermo Contracting Corp.*, 437 F. Supp. 195, 199 (D.N.J. 1976); *Newburger, Loeb & Co. v. Gross*, 365 F. Supp. 1364, 1367 (S.D.N.Y. 1973); *Sherburne Corp. v. Ohio Spring Specialities, Inc.*, 13 Fed. R. Serv. 2d (Callaghan) 100, 101 (N.D. Oh. 1969); and *Fraser v. Astra Steamship Corp.*, 18 F.R.D. 240, 242 (S.D.N.Y. 1955). For cases noting the exception but finding it not applicable, see *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1081 n.1 (2d Cir. 1970); *Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 715 (5th Cir. 1970); *Barrett v. L.F.P.*, No. 85-C-6495, 1986 U.S. Dist. LEXIS 23673, at *6 (N.D. Ill. June 25, 1986); *Olevares v. Viking Dodge, Inc.*, 626 F. Supp. 114, 115 (N.D. Ill. 1985); *Jones v. Sonny Gerber Auto Sales, Inc.*, 71 F.R.D. 695, 697 (D. Neb. 1976); *Wigglesworth v. Teamsters Local No. 592*, 68 F.R.D. 609, 613 (E.D. Va. 1975); *Kaiser Aluminum & Chem. Sales, Inc. v. Ralston Steel Corp.*, 25 F.R.D. 23, 26 (N.D. Ill. 1959); and *Marks*, 4 F.R.D. at 350. *But see* *Wolfson v. Artisans Sav. Bank*, 83 F.R.D. 549 (D. Del. 1979) (rejecting the defensive set-off exception); *Roberson Bros. & Co. v. Tygart Steel Prods. Co.*, 9 F.R.D. 468, 469 (W.D. Pa. 1949) (same).

11. According to Professor Moore, a claim for set-off must be "liquidated and emerge from a contract or judgment." 1 MOORE & FRIEDMAN, *supra* note 9, § 13.01, at 667 n.1 (emphasis added). A more accurate, simplified definition had been provided by Professor Clark 10 years before. According to Clark, "it was necessary that the [set-off] demands either be liquidated, or arise out of contract or judgment." CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 438 (1928) (emphasis added). In fact, the law of set-off was (and is) a complicated subject which no single sentence can hope to capture. Several treatises were devoted to set-off in the nineteenth century. See MONTAGUE, *supra* note 6; BARBOUR, *supra* note 7; WATERMAN, *supra* note 7. Joseph Story devoted a chapter of his equity treatise to the subject. 2 STORY, *supra* note 7, at 601-10. Modern definitions of set-off are varied and generally broader than Professor Moore's. See, e.g., 11 U.S.C. § 553(b) (1994) (set-off in bankruptcy); 28 U.S.C. §§ 1503, 2508 (1994) (authorizing set-off in favor of the United States); George B. Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 32-33 (1964) (describing variations in set-off under state law).

permissive counterclaims require an independent basis for jurisdiction."¹² The Wright and Miller treatise is similarly straightforward: "[P]ermissive counterclaims, under Rule 13(b) . . . require independent jurisdictional grounds. The only exception to this rule is when the permissive counterclaim takes the form of a set-off, in which case ancillary jurisdiction will be available."¹³

What is the general rule to which defensive set-off is an exception, and where does it come from? Narrowly stated, the rule is—or, before the 1990 supplemental-jurisdiction statute, was—that federal courts have ancillary jurisdiction over compulsory but not permissive counterclaims.¹⁴ The difference in treatment resulted from the fact that a compulsory counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" whereas a permissive counterclaim does not.¹⁵ Indeed, in all instances where ancillary jurisdiction was allowed, there was a consistent rule-based requirement that the claim arise out of the same transaction as the claim for which there was original jurisdiction—compulsory counterclaims under Rule 13(a),¹⁶ crossclaims under Rule 13(g),¹⁷ impleaders under Rule 14,¹⁸ class actions under Rule 23,¹⁹ and interventions as of right under Rule 24(a)(2) prior to the 1966

12. 3 WAYNE D. BRAZIL ET AL., MOORE'S FEDERAL PRACTICE § 13.40, at 13-52 (3d ed. 1998).

13. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523, at 108-09 (2d ed. 1984); *see also* 6 *id.* § 1422, at 175-76 (2d ed. 1990).

Some courts have indicated that a permissive counterclaim in the form of a set off, if used defensively rather than as the basis for affirmative relief, does not need independent jurisdictional grounds even though the claim is unconnected with the transaction or occurrence on which the main claim is based. This attitude is consistent with the treatment historically given to set offs.

Id. (footnotes omitted).

14. *See* Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1073 (2d Cir. 1977). Professor Thomas E. Green argued forcefully that there should be ancillary jurisdiction over both compulsory and permissive counterclaims in *Federal Jurisdiction over Counterclaims*, 48 NW. U.L. REV. 271 (1953), convincing Judge Friendly of the correctness of his position, *see* United States v. Heyward-Robinson Co., 430 F.2d 1077, 1088 (2d Cir. 1970) (Friendly, J., concurring) (citing to Professor Green).

15. FED. R. CIV. P. 13(a) (compulsory counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"); *see id.* at 13(b) (stating that a permissive counterclaim is "any claim . . . not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim").

16. *See* Moore v. New York Cotton Exch., 270 U.S. 593, 609 (1926).

17. *See* Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 617 n.14 (1966).

18. *See* West v. United States, 592 F.2d 487, 190-92 (8th Cir. 1979) (claims by the defendant against a third-party defendant); Sheppard v. Atlantic States Gas Co., 167 F.2d 841, 845 (3d Cir. 1948) (claims by the defendant against a third-party defendant); Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 714-15 (5th Cir. 1970) (claim by a third-party defendant against the plaintiff).

19. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365-67 (1921) (unnamed plaintiffs in a class action need not be of diverse citizenship). *But cf.* Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (unnamed plaintiffs must satisfy the jurisdictional amount). 28 U.S.C. § 1367 may have overruled *Zahn*. *See In re Abbott Lab.*, 51 F.3d 524, 526-27 (5th Cir. 1995).

amendment to that rule.²⁰ Thus, broadly stated, the general rule was that ancillary jurisdiction required that a claim be transactionally related to the original claim.²¹

Prior to *United Mine Workers v. Gibbs* in 1966, the requirement of a transactional relationship was essentially a judge-made rule serving as a gloss on the federal district courts' jurisdictional statutes. In *Gibbs*, the Court expanded pendent jurisdiction, rejecting the old *Hurn v. Ousler*²² cause of action test as "unnecessarily grudging."²³ According to *Gibbs*,

[p]endent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under . . . [federal law]," 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*.²⁴

The "common nucleus" test of *Gibbs* is, of course, a transactional test, similar to the non-constitutional test that had been employed as the "general rule" in ancillary jurisdiction. After *Gibbs*, does the Constitution require a "common nucleus of operative fact" for all claims for which there is no independent basis for jurisdiction? If so, the "exception" to the general rule for defensive set-off may be in serious jeopardy. It is one thing to be an exception to a judge-made gloss on jurisdictional statutes, as it had been before *Gibbs*. It is quite another to be an exception to the Constitution.

Two recent court of appeals decisions, both written by distinguished judges, have directly addressed the defensive set-off exception.²⁵ One unequivocally

20. See *Formulabs, Inc. v. Hartley Pen Co.*, 318 F.2d 485, 491-92 (9th Cir. 1963). After intervention of right was made more easily available in the 1966 amendment to Rule 23(a), it was likely but not certain that ancillary jurisdiction was available for all interventions as of right. See *Curtis v. Sears, Roebuck & Co.*, 754 F.2d 781, 783 (8th Cir. 1985). In an odd anomaly, a would-be intervenor as of right who also would have been an indispensable party under Rule 19 could not invoke ancillary jurisdiction. See *Chance v. County Bd. of Sch. Trustees*, 332 F.2d 971, 973-74 (7th Cir. 1964). Under the new statute, there is supplemental jurisdiction over claims brought by a defendant intervening as of right in a diversity case, irrespective of what status he or she might have had under Rule 19. See 28 U.S.C. § 1367(b) (1994). For discussion of these complications, see 7C CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1917 (2d ed. 1986).

21. Note that a transactional relationship was a necessary but not sufficient condition for ancillary jurisdiction. In several notable instances, ancillary and pendent party jurisdiction was denied despite the presence of a transactional relation. See *Aldinger v. Howard*, 427 U.S. 1, 18-19 (1976) (no pendent-party jurisdiction over additional defendant); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (no ancillary jurisdiction over claim by plaintiff against third-party defendant); *Finley v. United States*, 490 U.S. 545, 556 (1989) (no pendent-party jurisdiction over additional defendant).

22. 289 U.S. 238, 246 (1933) (sustaining federal judicial power to decide both state and federal claims if both constitute separate grounds "in support of a single cause of action" for redress of a violation of a "primary right" belonging to the plaintiff).

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

24. *Id.* (quoting U.S. CONST. art. III, § 2) (second emphasis and alteration added) (citation omitted).

25. See also *Wolfson v. Artisans Savs. Bank*, 83 F.R.D. 549, 551 (D. Del. 1979) (rejecting the defensive set-off exception); *Robinson Bros. & Co. v. Tygart Steel Prods. Co.*, 9 F.R.D. 468, 469 (W.D. Pa. 1949) (same).

rejected the exception as inconsistent with *Gibbs*. The other was more circumspect, but also appeared to disapprove. The first was *Ambromovage v. United Mine Workers*,²⁶ in which Judge Becker allowed a claim for defensive set-off, but only because it was transactionally related to the claim over which there was jurisdiction.²⁷ He wrote that the origins of the exception for unrelated claims of defensive set-off are "not entirely clear"; indeed, it was "apparently invented by Professor Moore."²⁸ Because he believed that the "constitutional test is whether a pendent or ancillary claim has a 'common nucleus of operative fact' with the underlying federal claim," Judge Becker concluded that Moore's exception could not survive *Gibbs*.²⁹ The second was *Channell v. Citicorp National Services, Inc.*,³⁰ in which Judge Easterbrook allowed a claim for defensive set-off, but only because it fell "within the outer boundary" of the new supplemental-jurisdiction statute.³¹ In his view, the Constitution required a soft version of the *Gibbs* "common nucleus" test: The new statute "has extended the scope of supplemental jurisdiction . . . to the limits of Article III—which means that '[a] loose factual connection between the claims' can be enough . . ."³²

For a number of reasons, *Ambromovage* and *Channell* are wrong. First, it is unclear that the Court would itself apply the *Gibbs* "common nucleus" test to all types of supplemental jurisdiction. In *Aldinger v. Howard*,³³ in which pendent party jurisdiction was denied, the Court declined to determine "whether there are any 'principled' differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences."³⁴ In *Owen Equipment & Erection Co. v. Kroger*,³⁵ in which ancillary jurisdiction was denied, the Court wrote that *Gibbs* "delineated the constitutional limits of federal judicial power," but it only "assume[d] without deciding" that the court of appeals had been correct in applying the *Gibbs* test to ancillary jurisdiction.³⁶ Finally, in *Finley v. United States*,³⁷ in which pendent party jurisdiction was denied, the Court again "assume[d] without deciding" that the *Gibbs* test applied.³⁸ The Court in these cases may have been hinting that the *Gibbs*-test was too generous, and that in a later case it might find that a narrower rather than a broader constitutional test applied in pendent party and ancillary jurisdiction cases. This is at least a possible reading, for in all three cases the Court refused jurisdiction on statutory grounds, making it unnecessary to use a narrower constitutional test than *Gibbs*

26. 726 F.2d 972 (3d Cir. 1984).

27. *See id.* at 992.

28. *Id.* at 988 & n.47.

29. *See id.* at 990.

30. 89 F.3d 379 (7th Cir. 1996).

31. *Id.* at 386.

32. *Id.* (quoting *Ammermen v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995)) (alteration in original). A number of lower courts have held that *Gibbs* requires only a "loose factual connection." *See, e.g.*, 13B WRIGHT ET AL., *supra* note 13, § 3567.1, at 117 (citing cases).

33. 427 U.S. 1 (1976).

34. *Id.* at 13.

35. 437 U.S. 365 (1978).

36. *Id.* at 371 & n.10.

37. 490 U.S. 545 (1989).

38. *Id.* at 549.

to reach that result. But the Court may have been hinting at nothing, telling us simply that it has not decided whether the *Gibbs* test applies to all types of supplemental jurisdiction.

Second, if the *Gibbs* test does apply to all types of supplemental jurisdiction, it is almost certainly wrong as a matter of historical constitutional interpretation. The Court's opinion relies on the term "case" in Article III, but it supplies no evidence—and so far as I am aware there is none—that to the framers the terms "case" and "controversy" meant only disputes involving transactionally related claims. The *Gibbs* Court relies on the term "case," as was proper in analyzing jurisdiction pendent to a federal claim, but supplemental jurisdiction in civil disputes includes both "cases" (for example, cases arising under federal law) and "controversies" (for example, controversies between citizens of diverse states).³⁹ It is quite clear that civil cases and controversies in the then-contemporary practice could involve adjudication of claims arising out of unrelated facts, both in English and American courts, as they did in entertaining unrelated counterclaims for defensive set-off beginning in the early 1700s.⁴⁰

Third, to define a case as involving only transactionally related claims would also be wrong as a matter of current practice and usage. Modern federal and state procedural rules for civil cases are filled with examples of unrelated claims that are allowed, even encouraged, as part of the same litigation. For example, Federal Rule 13(b)⁴¹ provides that a defendant may state as a permissive counterclaim any claim against an opposing party not arising out of the transaction or occurrence of the subject matter of the opposing party's claim; Rule 14⁴² allows a third-party defendant to make any counterclaims against the third-party plaintiff that would be available under Rule 13; and Rule 18(a)⁴³ allows a party to join as many claims as that party has against the opposing party without regard to whether they arise out of the same transaction.

Finally, to use the *Gibbs* "common nucleus" test to limit the scope of supplemental jurisdiction across the board would be to ignore the test's origin and purpose. *Gibbs* was a pendent jurisdiction case, involving the assertion by a plaintiff of an additional claim for which there was no independent basis for jurisdiction. To apply a test developed in that setting to the whole range of supplemental jurisdiction is to apply it in circumstances almost certainly not in the contemplation of the *Gibbs* Court. Further, *Gibbs* abandoned the "unnecessarily grudging" *Hurn v. Ousler* test and substituted the more generous and expansive "common nucleus" test.⁴⁴ It would be ironic if a liberalizing test,

39. I regard the most likely explanation of the contemporary distinction between the terms "case" and "controversy" to be that stated by St. George Tucker in his edition of Blackstone: "Case" comprises criminal and civil disputes, whereas "controversy" comprises only civil disputes. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, app. E at 420-21 (1803); see also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431-32 (1793) (Iredell, J., dissenting); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 536 n.2 (1833).

40. See *supra* text accompanying note 7.

41. FED. R. CIV. P. 13(b).

42. FED. R. CIV. P. 14.

43. FED. R. CIV. P. 18(a).

44. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1996).

designed to produce procedural fairness and judicial efficiency,⁴⁵ were applied restrictively in later cases to defeat that very enterprise.⁴⁶

The Court may choose to preserve the *Gibbs* test in pendent jurisdiction cases for reasons of stare decisis, but there is little warrant to apply it to all of supplemental jurisdiction. Defensive set-off is thus not an exception to a general constitutional rule, for there is no such—or at least should be no such—general rule. It might be objected that if the *Gibbs* “common nucleus” test does not set the outer constitutional limit of supplemental jurisdiction, there is no stopping place. Judge Friendly saw a variation of this objection in *United States v. Heyward-Robinson Co.*⁴⁷ when he wrote that the “exception” for defensive set-off “carries [with it] the seeds of destruction of the supposed general rule.”⁴⁸ But, of course, there would be a constitutional stopping place. It just would not be the “common nucleus” stopping place provided by the *Gibbs* test.

It would be a comprehensible constitutional test to allow supplemental jurisdiction to extend no further than to whatever could have been tried in a single judicial proceeding at the time of the Constitution’s adoption. Such a test would allow supplemental jurisdiction over defensive set-off claims arising out of unrelated facts, but it would limit the federal courts to joinder devices available at the time of the Constitution’s framing. Or, if the Court is inclined to adapt Article III to the conditions of modern litigation, a broader constitutional test could permit supplemental jurisdiction over whatever can be tried as part of a single judicial proceeding under modern joinder rules. Indeed, with some creative work by the Court, language from *Gibbs* itself could support such an approach, for immediately after stating the “common nucleus” test, the Court went on: “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*

45. See *id.* at 726 (stating that a justification for pendent jurisdiction “lies in considerations of judicial economy, convenience and fairness to litigants”); *Consolo v. Fed. Maritime Comm’n*, 383 U.S. 607, 617 n.14 (1966) (noting that “considerations of judicial economy and fairness to all the parties lie behind the doctrine of ancillary jurisdiction”).

46. This would not be the first time that what was originally a more generous Article III standard has later been used as a restrictive standard. In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), the Supreme Court granted standing more generously than in previous cases, stating for the first time that Article III required a plaintiff to have “injury in fact.” *Id.* at 152-53. Though the “injury in fact” standard was intended by the Court in *Data Processing* to be a basis for granting standing more generously, it has recently been the basis for an Article III denial of standing to plaintiffs acting as private attorneys general. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); see also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229-31 (1988) (calling the “injury in fact” requirement a “singularly unhelpful, even incoherent, addition to the law of standing”); Cass R. Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992) (discussing standing in general).

47. 430 F.2d 1077 (2d Cir. 1970) (Friendly, J., concurring).

48. *Id.* at 1088.

judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.”⁴⁹

If the constitutional test is too generous, allowing supplemental jurisdiction where it should not exist, we may look to Congress. Indeed, we *must* look to Congress, for it is only by virtue of an affirmative statutory grant of jurisdiction that the lower federal courts ever have subject matter jurisdiction. This is, of course, bedrock principle. To establish the actual—as distinct from the constitutionally available—scope of supplemental jurisdiction, we may either look to the federal courts to construe general jurisdictional statutes, as they did for many years, or to Congress to pass a statute specifically regulating supplemental jurisdiction, as it did in 1990.

The present statute provides, subject to certain exceptions for diversity cases, that federal 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.”⁵⁰ If the *Gibbs* “common nucleus” test is not the test of what constitutes a case or controversy under Article III, a claim for defensive set-off arising out of unrelated facts falls within the supplemental jurisdiction of the federal courts, in both federal question and diversity cases. That is the easy part, for few people will object on grounds of policy to defensive set-off. The hard part is that many other transactionally unrelated claims may also be within the constitutionally permissible supplemental jurisdiction. If that extends supplemental jurisdiction too far, there is of course a solution—Congress may amend the statute.

49. *Gibbs*, 383 U.S. at 725 (emphasis added). There has been much discussion in the literature of the relationship between this sentence of *Gibbs* and the preceding “common nucleus” language. See, e.g., Matasar, *supra* note 4, at 1458-63; 13B WRIGHT ET AL., *supra* note 13, § 3567.1, at 114.

50. 28 U.S.C. § 1367(a) (1994).