VALUING THE FEDERAL RIGHT: REEVALUATING THE OUTER LIMITS OF SUPPLEMENTAL JURISDICTION

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The federal circuit courts are divided on the question of whether the federal courts' supplemental jurisdiction power encompasses permissive state law counterclaims that lack an independent basis of federal jurisdiction. By analyzing the arguments set forth in various circuit court decisions, this Note develops a new approach for assessing the availability of supplemental jurisdiction over permissive state law counterclaims. It argues that the federal courts may assert jurisdiction over state law counterclaims only when the federal interest supports hearing those state law claims.

INTRODUCTION

A legal system asserts jurisdiction when it has an interest in adjudicating a specific legal conflict brought before it.[1] The heads of jurisdiction in Article III of the U.S. Constitution embody the interests that form the foundation of the federal courts' jurisdiction.[2] One specific basis found in Article III grants the federal courts power over "all cases . . . arising under . . . the Laws of the United States."[3] This Note focuses on one extension of the "arising under" power—the power of a federal court to hear a state law claim that is related to a federal law claim.[4]

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[1] *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 2 (1928) (asserting that procedure and jurisdiction are instrumental means of effectuating policy that "cannot be disassociated from the ends that law subserves"); Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1403 n.5 (1983) ("In order to ascertain Congress' intent concerning federal jurisdiction, one must start by analyzing Congress' purposes in making various federal jurisdictional grants.").

[2] U.S. CONST. art. III, § 2, cl. 1.

[3] *Id.*

[4] The Article III "arising under" grant—the grant of jurisdiction over "all cases . . . arising under . . . the Laws of the United States," U.S. CONST. art. III, § 2, cl. 1—forms the constitutional basis for two different types of jurisdictional power over legal issues that do

It has long been understood, however, that the arising under power is not limited strictly to the Constitution's explicit text. While the text of this jurisdictional grant does not seem to permit jurisdiction over any state law claims, the federal courts have recognized that effectuating power over "the Laws of the United States"[5] sometimes requires taking jurisdiction over nonfederal claims.[6] This Note looks to the interests that Article III's jurisdictional grant serves in order to determine the scope of supplemental jurisdiction as it relates to federal courts' jurisdiction over "the Laws of the United States."[7]

Prior to the enactment of the supplemental jurisdiction statute in 1990,[8] it was well accepted that the federal courts had supplemental jurisdiction only over compulsory counterclaims. The law required the federal courts to have an independent basis of jurisdiction for permissive counterclaims (the "independent basis" rule).[9] Since the passage of § 1367(a), however—which expanded the reach of supplemental jurisdiction to the limits of Article III—circuit courts have diverged over whether permissive state law counterclaims that lack an independent basis of federal jurisdiction fall under the federal courts' supplemental jurisdiction power.[10]

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not literally arise out of federal law: federal question jurisdiction (granted by Congress through 28 U.S.C. § 1331 (2006)) and supplemental jurisdiction (granted by Congress though 28 U.S.C. § 1367 (2006)).

[5] U.S. CONST. art. III, § 2, cl. 1.

[6] *See* Sidney Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 Nw. U. L. REV. 245, 261 (1980) (noting that federal courts have power to entertain state law claims linked to federal issues).

[7] U.S. CONST. art. III, § 2, cl. 1.

[8] Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113 (codified as amended at 28 U.S.C. § 1367 (2006)). For purposes of this Note, "supplemental jurisdiction" can be understood as the assertion of federal jurisdiction over a nonfederal claim that has no independent basis of federal jurisdiction but is part of the same case or controversy as a claim over which the court has original jurisdiction. "Supplemental jurisdiction" is used loosely here. Prior to § 1367, federal courts distinguished between pendent and ancillary jurisdiction depending on which party joined the state law claim without an independent basis of jurisdiction. *See infra* Part I.A. In passing § 1367, Congress coined the phrase supplemental jurisdiction and erased any legal distinction between pendent and ancillary jurisdiction. *See infra* Part I.B. Even prior to § 1367, however, the Supreme Court recognized that pendent and ancillary jurisdiction are "two species of the same generic problem," such that grouping them together when considering the scope of the courts' power is perfectly sensible. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978).

[9] *See* Arthur R. Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1, 6 (1985) ("[I]t is relatively settled that there is no ancillary jurisdiction over a permissive counterclaim . . . .").

[10] This Note addresses supplemental jurisdiction over nonfederal claims related to federal claims that arise under the federal laws of the United States. Section 1367(a) covers this part of the federal courts' supplemental jurisdiction. Section 1367(b), in contrast, concerns supplemental jurisdiction over nonfederal claims related to diversity jurisdiction. This Note does not address jurisdiction related to § 1367(b) since the constitutional source

The majority of circuit courts considering the issue since the passage of § 1367(a) have upheld the independent basis rule.[11] However, the Second and Seventh Circuits recently rejected the rule.[12] They held instead that § 1367(a), through its reference to Article III, permits supplemental jurisdiction over any permissive counterclaim that has a "'loose factual connection'" to the claim over which the court has original jurisdiction.[13] Under this view, it is immaterial whether the counterclaim is categorized as permissive or compulsory; so long as there is a loose factual connection to a federal law claim, there is jurisdiction.[14]

This Note argues for a third interpretation. It argues that courts adhering to the independent basis rule read § 1367(a) too narrowly because they fail to appreciate the scope of the language in Article III. By contrast, courts wishing to expand the reach of § 1367(a) to cover any supplemental claim even loosely connected to the underlying federal claim read the limits of Article III too broadly because they fail to consider the nature of the "federal interest"[15] in determining whether they can adjudicate these claims. This Note asserts that the question of the validity of the independent basis rule is best determined by a straightforward statutory construction of § 1367(a) and a complete reading of Article III that looks to the interests served by the supplemental jurisdiction power.

A straightforward statutory construction of § 1367(a) requires the courts to interpret the whole extent of the Article III grant of jurisdiction. A complete reading of Article III recognizes that the rationale behind its arising under grant of jurisdiction permits federal courts to assert jurisdiction over claims only when a federal interest supports hearing those claims. This reading of Article III ultimately answers the question of which permissive state law counterclaims are suitable for supplemental jurisdiction: Article III's arising under grant of juris-

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of the federal courts' diversity jurisdiction is independent from the constitutional clause underlying the § 1367(a) power.

[11] *See infra* notes 52–60 and accompanying text.

[12] *See infra* notes 69–74 and accompanying text.

[13] Jones v. Ford Motor Credit Co., 358 F.3d 205, 213 (2d Cir. 2004) (quoting Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385 (7th Cir. 1996)); *Channell*, 89 F.3d at 385 (quoting Baer v. First Options of Chi., Inc., 72 F.3d 1294, 1298–1301 (7th Cir. 1995)). It should be noted that these opinions did not coin this phrase, however: An early use of it in the pendent jurisdiction context can be found in *Frye v. Pioneer Logging Machinery, Inc.*, 555 F. Supp. 730, 732 (D.S.C. 1983).

[14] *Jones*, 358 F.3d at 212–13; *Channell*, 89 F.3d at 385.

[15] Generally, the federal interest is the federal legal system's interest in having a particular claim adjudicated before a federal court. For a more detailed definition, see *infra* Part III.A.

diction permits a federal court to assert jurisdiction over a state law claim only when the federal interest supports hearing it.

Part I of this Note sets forth the history of supplemental jurisdiction. Part II discusses the current fracture between the circuits over whether supplemental jurisdiction extends to any permissive counterclaim connected to the claim with original jurisdiction. Part III argues for a reading of Article III that ultimately concludes that federal courts can take supplemental jurisdiction over state law claims only when doing so would serve the federal interest. Part IV discusses *Jones v. Ford Motor Credit Co.*,[16] a Second Circuit case that rejected the independent basis rule, to demonstrate how a more complete reading of Article III answers the question of whether a federal court has power over a permissive counterclaim that lacks an independent basis of jurisdiction.

I
SUPPLEMENTAL JURISDICTION PRIMER

Supplemental jurisdiction is a form of federal jurisdiction exercised over a claim that has no independent basis of federal jurisdiction but "that is part of the same case or controversy as another claim over which the court has original jurisdiction."[17] The federal courts can assert jurisdiction over these claims whether they are brought by the defendant, the plaintiff, or a related third party.[18]

A combination of constitutional and statutory provisions define the reach of supplemental jurisdiction. Chief Justice John Marshall outlined the constitutional nature of supplemental jurisdiction in the seminal case *Osborn v. Bank of the United States.*[19] Osborn established the constitutional basis for supplemental jurisdiction by holding that arising under jurisdiction granted by Article III gives federal courts jurisdiction over nonfederal claims that are part of the same case (the so-called constitutional case) as a federal claim for which there is an original basis of jurisdiction.[20]

Underlying *Osborn* is a view that for federal courts to be able to adjudicate legal issues implicating a federal interest, those courts must also have the power to adjudicate nonfederal issues and causes of action that form an "ingredient of" or form the same case or contro-

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[16] 358 F.3d 205.

[17] *See* BLACK'S LAW DICTIONARY 871 (8th ed. 2004).

[18] *See generally* Miller, *supra* note 9, at 1–10.

[19] 22 U.S. (9 Wheat.) 738 (1824); Schenkier, *supra* note 6, at 261.

[20] *Osborn*, 22 U.S. (9 Wheat.) at 823; Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 115 (1983).

versy as a federal claim.[21] Under this rationale, the power to hear nonfederal issues and causes of action is ultimately tied to the existence of a federal interest in hearing the issue before a federal court.[22]

A. Supplemental Jurisdiction as a Judicial Doctrine

Although *Osborn* often is credited with laying the doctrinal foundation for supplemental jurisdiction (then called pendent and ancillary jurisdiction), the Supreme Court did not invoke *Osborn* directly in its early supplemental jurisdiction cases.[23] For 130 years before Congress passed a statute that granted supplemental jurisdiction to federal courts, supplemental jurisdiction was purely a judicial creation.[24] The Supreme Court divided this judicial doctrine into two dis-

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[21] *Osborn*, 22 U.S. (9 Wheat.) at 823; 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567, at 107 (2d ed. 1984) ("[A] court of original jurisdiction could not function, as Marshall recognized, unless it had power to decide all the questions that the case presents."). *Osborn* clarifies that under Article III, federal courts have original jurisdiction over nonfederal claims that form the same constitutional case as a federal cause of action. This is the supplemental jurisdiction power that is the center of this Note. Richard Matasar explains:

> *Osborn* holds that a federal court is empowered to hear nonfederal questions only if they are contained in the same "cause" as a federal claim. . . .
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> "Cause" . . . relates to the scope of the case or controversy . . . . Since article III, section two extends the judicial power of the United States to cases and controversies, a federal court would not exceed the limits of the Constitution by deciding nonfederal claims contained in the same case as a federal claim.

Matasar, *supra* note 20, at 115–16.

[22] Lorretta Shaw, *A Comprehensive Theory of Protective Jurisdiction: The Missing "Ingredient" of "Arising Under" Jurisdiction*, 61 FORDHAM L. REV. 1235, 1238 (1993) (arguing that "federal 'ingredient,'" as term is used in *Osborn*, would "empower Congress to extend federal jurisdiction only when a federal forum advances a meaningful federal interest"); *cf. In re* TMI Litig. Cases Consol. II, 940 F.2d 832, 869 (3d Cir. 1991) (noting that in *Osborn*, conferral of original federal jurisdiction was tied to federal interest in having claim adjudicated in federal court and justified jurisdiction over nonfederal issues).

[23] Matasar, *supra* note 1, at 1410–11.

[24] Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385 (7th Cir. 1996). *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860), a case recognizing jurisdiction over a state claim to property by an intervening party, is one of the first supplemental jurisdiction claims heard by federal courts. *Freeman* invoked neither the Constitution nor *Osborn* in establishing this power. It was not until 1926, in *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926), that the Court permitted "ancillary jurisdiction over any nonfederal claims that are 'transactionally related' to federal matters"—the *Moore* "transaction" test. Matasar, *supra* note 1, at 1411. Congress did not grant the courts statutory power over pendent or ancillary jurisdiction until 1990. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113 (codified as amended at 28 U.S.C. § 1367 (2006)). Before this statutory grant of power, which authorized the federal courts to use their supplemental jurisdiction power to the extent permitted by the Constitution, supplemental jurisdiction power was rooted in judicial doctrine and lacked explicit legislative authorization. *See* Jones v. Ford Motor Credit Co., 358 F.3d 205, 212 (2d Cir. 2004) ("The explicit extension to the limit of Article III of a federal court's jurisdiction over 'all other claims' sought to be

tinct categories: ancillary jurisdiction and pendent jurisdiction.[25] Although it was always clear that these two forms of jurisdiction were related,[26] the Court treated them as though they were analytically distinct, resulting in two different lines of doctrine.[27]

1. Ancillary Jurisdiction Doctrine

In ancillary jurisdiction cases, courts took jurisdiction over state law based cross-claims, third-party claims, or counterclaims[28] arising out of the same transaction as a plaintiff's federal claim[29] but lacking an independent basis for jurisdiction.[30] In doing this, courts sought to improve judicial economy (by consolidating adjudication) and to promote finality of litigation.[31] However, courts traditionally balanced these rationales against the intrusion on states that resulted from the expansion of federal jurisdiction over nonfederal claims (often discussed in terms of "comity" toward states).[32]

In the counterclaim context[33]—the focus of the circuit split discussed below in Part IV of this Note—the "transaction" test led to the development of the independent basis rule. The transaction test permitted "ancillary jurisdiction over any nonfederal claims that are 'transactionally related' to federal matters."[34] Under this rule, compulsory counterclaims[35] were subject to the courts' ancillary jurisdic-

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litigated with an underlying claim within federal jurisdiction recast the jurisdictional basis of permissive counterclaims into constitutional terms.").

[25] *See* Miller, *supra* note 9, at 1–2 ("[T]wo very different chains of cases developed from *Osborn*.").

[26] 13 WRIGHT ET AL., *supra* note 21, § 3523.1, at 234 (2d ed. Supp. 2008).

[27] *Id.*; *see* Matasar, *supra* note 1, at 1411 (noting that pendent and ancillary jurisdiction went "in separate directions").

[28] Miller, *supra* note 9, at 10.

[29] 13 WRIGHT ET AL., *supra* note 21, § 3523, at 93 (2d ed. 1984).

[30] Miller, *supra* note 9, at 10.

[31] *See* Matasar, *supra* note 1, at 1404 nn.5–6 (noting that ancillary jurisdiction is justified on "convenience" and "economy" grounds, as well as judiciary's ability to resolve "entire legal dispute" between parties (internal quotation marks omitted)).

[32] *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (noting that courts should avoid deciding needless issues of state law to preserve "comity").

[33] *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926), provides a fine example of ancillary jurisdiction in the counterclaim context. In that case, the plaintiffs claimed that the defendant violated federal antitrust laws by preventing the plaintiffs from using quotations on the price of cotton while allowing other companies to do so. *Id.* at 608–10. The defendant counterclaimed, alleging that the plaintiffs illegally pirated their price quotations, which was a state offense with no federal basis of jurisdiction. *Id.* at 609. The Court asserted jurisdiction over the counterclaim because the Court found that the counterclaim arose from the same transaction as the plaintiff's federal claim. *Id.* at 610.

[34] Matasar, *supra* note 1, at 1411; *see also supra* note 24.

[35] Federal Rule of Civil Procedure 13 governs counterclaims. Rule 13 defines compulsory counterclaims as "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the *transaction or occurrence* that is the sub-

tion while permissive counterclaims[36] needed an independent basis of jurisdiction.[37] This rule originated with the codification of the Federal Rules of Civil Procedure in 1937, which incorporated a transaction-based standard into Rule 13 on counterclaims. This Rule requires, for reasons of efficiency and finality, joinder of counterclaims that stem from the same transaction as the plaintiff's claim (compulsory counterclaims). If the defendant does not raise a compulsory counterclaim in the first litigation, he is barred from raising it in a subsequent action.[38] In contrast, the defendant has the option of raising counterclaims that are not part of the same transaction (permissive counterclaims) and faces no penalty if he wishes to raise these claims in another forum at a different time.[39]

Since the compulsory counterclaim rule and the ancillary jurisdiction doctrine both use a transaction test to measure fact-relatedness and since both are justified by interests of efficiency and finality,[40] the federal courts extended ancillary jurisdiction only to compulsory counterclaims.[41] The argument proceeds as follows: Because the ancillary jurisdiction doctrine only permits federal jurisdiction over those state law claims that are part of the same transaction as the fed-

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ject matter of the opposing party's claim . . . ." FED. R. CIV. P. 13(a) (emphasis added). These claims are compulsory in the sense that a failure to bring the related claim "will result in its being barred in any subsequent action, at least in the federal courts." 6 WRIGHT ET AL., *supra* note 21, § 1409, at 46 (2d ed. 1990).

[36] Permissive counterclaims, which are permissive in the sense that they will not be forfeited if they are not brought, 6 WRIGHT ET AL., *supra* note 21, § 1409, at 46 (2d ed. 1990), are defined as "any claim against an opposing party not arising out of the *transaction or occurrence* that is the subject matter of the opposing party's claim" that is not otherwise a compulsory counterclaim. FED. R. CIV. P. 13(b) (emphasis added).

[37] 13 WRIGHT ET AL., *supra* note 21, § 3523, at 108–09 (2d ed. 1984).

[38] Although the rule itself does not explain the consequences of failing to plead a compulsory counterclaim, courts have generally held that failing to plead results in the claim being forfeited under the doctrine of res judicata. 6 *id.* § 1417, at 129 (2d. ed. 1990).

[39] *Id.* § 1409, at 46.

[40] It is important to note, however, that there are two major differences between the rationales for these two doctrines. First, the values that support supplemental jurisdiction must be balanced against a federal interest in comity toward states when taking jurisdiction over state law claims. *See infra* Part II.B (discussing federal interest in comity). Second, where supplemental jurisdiction provides an additional forum for defendants by allowing them to bring their claim in a federal forum where they would otherwise not have access, Rule 13(a) closes off possible fora by requiring the defendant either to bring his claim in the plaintiff's choice of forum or to lose his right to litigate that claim altogether.

[41] *See* 13 WRIGHT ET AL., *supra* note 21, § 3523, at 106–09 (2d ed. 1984) ("Ancillary jurisdiction is now universally accepted over defendant's compulsory counterclaims under Rule 13(a). . . . On the other hand, permissive counterclaims, under Rule 13(b), as well as additional parties related thereto, require independent jurisdictional grounds." (footnotes omitted)); *e.g.*, Crosby Yacht Yard, Inc. v. Yacht "Chardonnay," 164 F.R.D. 135, 139 (D. Mass. 1996) (stating that prior to enactment of supplemental jurisdiction statute in 1990, 28 U.S.C. § 1367(a) (2006), ancillary jurisdiction extended only to compulsory counterclaims).

eral law claim and because Rule 13 defines permissive counterclaims as those counterclaims that are not part of the same transaction as the underlying claim, logic dictates that ancillary jurisdiction can never reach a permissive counterclaim.[42] (This argument, of course, assumes that the transactions in each context are coterminous. Part II.B challenges this assumption.)

As a doctrinal matter, however, it was never clear whether the judicially created independent basis rule was constitutionally required or whether it was simply a prudential limit on ancillary jurisdiction.[43] Part II.B of this Note deals with the viability of the independent basis rule after the codification of supplemental jurisdiction in § 1367(a).

2. Pendent Jurisdiction Doctrine

Prior to the enactment of § 1367, pendent jurisdiction addressed "the situation in which the plaintiff has a jurisdictionally sufficient claim—typically a federal question claim—against the defendant, to which the plaintiff appends a jurisdictionally insufficient claim—typically a state-based claim."[44] The Supreme Court established the modern test for pendent jurisdiction in *United Mine Workers of America v. Gibbs*: Pendent jurisdiction extends federal jurisdiction to nonfederal claims stemming from the same "common nucleus of operative fact" as the federal claim.[45]

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[42] Comidas Exquisitos, Inc. v. Carlos McGee's Mexican Cafe, Inc., 602 F. Supp. 191, 200 (S.D. Iowa 1985) ("The Court can exercise ancillary jurisdiction over defendant's counterclaim only if it is compulsory, . . . that is, only if defendant's counterclaim 'arises out of the transaction or occurrence that is the subject matter of [plaintiff's] claims.'" (alteration in original) (citation omitted) (quoting FED. R. CIV. P. 13(a))).

[43] *See* Jones v. Ford Motor Credit Co., 358 F.3d 205, 211 (2d Cir. 2004) ("Perhaps lurking beneath the surface of the casual statements about an independent jurisdiction requirement was apprehension that some counterclaims lacking such a basis would extend the lawsuit beyond Article III's limiting scope of 'cases and controversies.'").

[44] Miller, *supra* note 9, at 2.

[45] 383 U.S. 715, 725 (1966). Gibbs sued the United Mine Workers union in federal court, alleging that the union had brought improper pressure on his employer to discharge him. *Id.* at 720. He asserted both a federal claim of violation of the Labor Management Relations Act and a state claim of unlawful conspiracy to interfere with an employment contract. *Id.* at 715, 717–18. The Supreme Court held that these claims fell within Article III because they could be joined to create the same constitutional case since these "claims arose from the same nucleus of operative fact." *Id.* at 728. The relationship between this test and the *Moore* transaction test remained unclear for some time. Eventually, the Supreme Court equated these two tests when it held that courts should view pendent and ancillary jurisdiction as "two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?" Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978).

Much like ancillary jurisdiction, pendent jurisdiction serves values of "judicial economy, convenience and fairness to litigants."[46] Pendent jurisdiction, however, has an additional rationale: the interest in providing a federal forum for litigating federal claims in federal courts.[47] This rationale recognizes that state courts, which have plenary jurisdiction and therefore can hear both federal and state claims, will often have concurrent jurisdiction with federal courts over a plaintiff's federal claim. Thus, a plaintiff often can bring his federal claim in either state or federal court. Without pendent jurisdiction, however, the plaintiff would not be able to bring his state claim in federal court. This would leave the plaintiff with two alternative options—splitting his claims (litigating his federal claim in federal court and his state claim in state court) or litigating them together in state court.[48] Given these options, the convenience-seeking, risk-averse plaintiff will naturally choose to bring all claims in state court.[49] Forcing a plaintiff to choose between these options frustrates the federal government's interest in promoting the adjudication of federal claims by federal courts.[50]

B. Supplemental Jurisdiction as a Statutory Doctrine

In 1990, Congress combined pendent and ancillary jurisdiction under the label "supplemental jurisdiction."[51] Section 1367(a) gives the federal courts jurisdiction over state law claims that lack an independent basis of federal jurisdiction but are related to a claim over which the federal courts have federal question jurisdiction under § 1331:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over

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[46] *Gibbs*, 383 U.S. at 726; *see supra* note 31 and accompanying text (noting that ancillary jurisdiction doctrine is premised on rationales of efficiency and finality).

[47] Miller, *supra* note 9, at 4.

[48] *Id.* The plaintiff would only have two options—split his claims or go to state court—for the following reason: Absent pendent jurisdiction, federal courts could hear only the plaintiff's federal law claim. Thus, if the plaintiff wanted to bring his federal claim in federal court, he would be required to bring his state claims in a different state court action. However, state courts, which have plenary jurisdiction, can hear both claims in one forum.

[49] *See* Matasar, *supra* note 1, at 1403 n.5 (stating that concurrent jurisdiction can discourage plaintiffs from bringing their claims in federal court by "relegating a plaintiff to the choice of either incurring a substantial risk of issue preclusion by splitting her claims between state and federal courts, or losing her 'free choice' of a federal forum by litigating her whole claim in state court").

[50] *Id.* For example, a plaintiff seeking efficiency or lacking resources would have to bring both his causes of action in state court.

[51] *See* 28 U.S.C. § 1367(a) (2006) (providing federal courts with statutory grant of jurisdiction over nonfederal claims).

> 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.[52]

Section 1367(a)'s reference to Article III effectively equates the outer limits of supplemental jurisdiction with the outer limits of what the Constitution allows.[53] However, in spite of the Article III reference, several federal courts have interpreted § 1367(a) to mean that statutory supplemental jurisdiction reaches no further than the established pendent and ancillary jurisdiction doctrines prior to the enactment of § 1367(a).[54] In contrast, a few courts have held that the outer limits of Article III may reach more supplemental claims than do the "transaction" and "common nucleus" tests that defined pendent and ancillary jurisdiction before Congress enacted § 1367(a).[55] These latter courts have held that the federal courts must analyze the constitutional grant of power (as defined by *Osborn*) to determine whether jurisdiction is appropriate and may not simply assume (as many circuits do) that the *Gibbs* test still defines the outer limits of Article III after the enactment of § 1367(a).[56] The next Part discusses this division over the proper interpretation of § 1367(a).

II
THE REACH OF SUPPLEMENTAL JURISDICTION SINCE THE PASSAGE OF 28 U.S.C. § 1367(A)

As already noted, the circuit courts are divided over whether § 1367(a) extends to permissive counterclaims that lack an independent basis of jurisdiction. This Part outlines the two competing readings of § 1367(a) that the circuit courts have developed in their efforts

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[52] 28 U.S.C. § 1367(a); *see* 28 U.S.C. § 1331 (2006).

[53] 28 U.S.C. § 1367(a); Denis F. McLaughlin, The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis, 24 ARIZ. ST. L.J. 849, 890 (1992).

[54] 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, 299–300 (2005) ("The federal courts have consistently interpreted 'case or controversy' by applying the *Gibbs* test."); *e.g.*, Iglesias v. Mut. Life Ins. Co. of N.Y., 156 F.3d 237, 241 (1st Cir. 1998); Schuyler v. Nat'l Am. Credit Corp., No. 1:08-CV-34, 2008 WL 2276847, at *2 (W.D. Mich. June 2, 2008); Sparrow v. Mazda Am. Credit, 385 F. Supp. 2d 1063, 1066–67 (E.D. Cal. 2005); Taylor v. Bryant, Inc., 275 F. Supp. 2d 1305, 1306 (D. Nev. 2003); Berrios v. Sprint Corp., No. CV-97-0081(CPS), 1998 WL 199842, at *9 (E.D.N.Y. Mar. 16, 1998); Crosby Yacht Yard, Inc. v. Yacht "Chardonnay," 164 F.R.D. 135, 139 (D. Mass. 1996).

[55] Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385 (7th Cir. 1996) ("[Section] 1367 has extended the scope of supplemental jurisdiction, as the statute's language says, to the limits of Article III . . . ."); *see also* Jones v. Ford Motor Credit Co., 358 F.3d 205, 213 (2d Cir. 2004) ("[S]ection 1367 has displaced, rather than codified, whatever validity inhered in the earlier view that a permissive counterclaim requires independent jurisdiction . . . .").

[56] *E.g.*, *Jones*, 358 F.3d at 213; *Channell*, 89 F.3d at 385.

to answer this question—one driven by the pre–§ 1367(a) jurisdictional doctrine (pendent and ancillary jurisdiction) and the other by the language of Article III. This Note concludes that both of these approaches misconceive the limits of the federal courts' supplemental jurisdiction power.

By looking to pre–§ 1367(a) jurisprudence instead of Article III, the majority of circuits misconstrue § 1367(a) in determining the scope of federal supplemental jurisdiction. In contrast, the approach of the minority of circuits—looking to Article III to define the limits of federal supplemental jurisdiction—is correct as a matter of statutory interpretation. However, this approach, as practiced by these circuits, is also flawed because it reads Article III's grant of arising under jurisdiction too broadly.

A. The Disagreement Among Circuit Courts Concerning the Reach of 28 U.S.C. § 1367(a)

The independent basis doctrine was a settled rule of law prior to the enactment of § 1367(a).[57] The doctrine asserts that permissive counterclaims can never satisfy a transaction-based relatedness test because inherent in their categorization as a permissive rather than a compulsory counterclaim is the presupposition that the counterclaim is not part of the same transaction as the original claim.[58] However, a fracture among the circuit courts developed once § 1367(a) explicitly extended supplemental jurisdiction to the outer limits of the Article III case or controversy requirement.[59]

Since the passage of § 1367(a), federal courts in several circuits have followed the traditional rule and concluded that permissive counterclaims need an independent basis of federal jurisdiction.[60]

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[57] As discussed earlier, the independent basis doctrine is the general rule underlying ancillary jurisdiction that permissive counterclaims need an independent jurisdictional ground to have access to the federal courts. Miller, *supra* note 9, at 6; McLaughlin, *supra* note 53, at 871.

[58] Miller, *supra* note 9, at 6; *see, e.g.*, O'Connell v. Erie Lackawanna R.R., 391 F.2d 156, 163 (2d Cir. 1968) ("However, this cause of action does not arise out of the same transaction or occurrence as appellees' claim. As a permissible counterclaim it must be supported by independent jurisdictional grounds."); Comidas Exquisitos, Inc. v. Carlos McGee's Mexican Cafe, Inc., 602 F. Supp. 191, 200 (S.D. Iowa 1985) ("The Court can exercise ancillary jurisdiction over defendant's counterclaim only if it is compulsory, . . . that is, only if defendant's counterclaim 'arises out of the transaction or occurrence that is the subject matter of [plaintiff's] claims.'" (alteration in original) (citation omitted) (quoting FED. R. CIV. P. 13(a))).

[59] 28 U.S.C. § 1367(a) (2006).

[60] M. Evan Lacke, Note, *The New Breed of Permissive Counterclaim: Supplemental Jurisdiction after 28 U.S.C. § 1367*, 56 S.C. L. REV. 607, 607 (2005); *e.g.*, Iglesias v. Mut. Life Ins. Co. of N.Y., 156 F.3d 237, 241 (1st Cir. 1998); Peterson v. United Accounts, Inc., 638 F.2d 1134, 1137 (8th Cir. 1981); Schuyler v. Nat'l Am. Credit Corp., No. 1:08-CV-34,

This conclusion rests on two pillars. First, it assumes that the Rule 13 transaction test is coextensive with the transaction test that applied to supplemental jurisdiction prior to the enactment of § 1367(a).[61] The argument for this pillar is that ancillary jurisdiction can never reach a permissive counterclaim because ancillary jurisdiction doctrine only permits jurisdiction over state law claims within the same transaction as the federal law claim and because Rule 13 defines permissive counterclaims as those that are not part of the same transaction as the underlying claim.[62] Second, the drafters of § 1367(a) did not intend to allow the courts to reach permissive counterclaims.[63]

In contrast, the Second and Seventh Circuits have challenged the independent basis rule, arguing that after the enactment of § 1367(a), federal courts have supplemental jurisdiction over some permissive counterclaims.[64] This line of cases ultimately concludes that federal courts have supplemental jurisdiction over a counterclaim so long as there is a "loose factual connection" between the counterclaim and the original claim.[65] At bottom, this is a statutory construction argument—courts adopting this position argue that the reference in § 1367(a) to Article III requires the federal courts to look to Article

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2008 WL 2276847, at *2 (W.D. Mich. June 2, 2008); Sparrow v. Mazda Am. Credit, 385 F. Supp. 2d 1063, 1066–67 (E.D. Cal. 2005); Taylor v. Bryant, Inc., 275 F. Supp. 2d 1305, 1306 (D. Nev. 2003); Berrios v. Sprint Corp., No. CV-97-0081(CPS), 1998 WL 199842, at *9 (E.D.N.Y. Mar. 16, 1998); Hart v. Clayton-Parker & Assocs., Inc., 869 F. Supp. 744, 776, 777–78 (D. Ariz. 1994); Gutshall v. Bailey & Assocs., No. 90-C-20182, 1991 WL 166963, at *1–2 (N.D. Ill. Feb. 11, 1991); Ayres v. Nat'l Credit Mgmt. Corp., No. 90-5535, 1991 WL 66845, at *1–4 (E.D. Pa. Apr. 25, 1991); Leatherwood v. Universal Bus. Serv. Co., 115 F.R.D. 48, 49–50 (W.D.N.Y. 1987).

[61] *See, e.g.*, *Hart*, 869 F. Supp. at 776 (failing to distinguish between pre–§ 1367(a) transaction test and post–§ 1367(a) transaction test).

[62] *Comidas Exquisitos*, 602 F. Supp. at 200 ("The Court can exercise ancillary jurisdiction over defendant's counterclaim only if it is compulsory, . . . that is, only if defendant's counterclaim 'arises out of the transaction or occurrence that is the subject matter of [plaintiff's] claims.'" (alteration in original) (citation omitted) (quoting FED. R. CIV. P. 13(a))).

[63] *E.g.*, *Hart*, 869 F. Supp. at 776 (noting that § 1367(a) "implicitly recognizes that only a compulsory counterclaim forms a part of the same case or controversy of the claim giving rise to federal jurisdiction"); *see* McLaughlin, *supra* note 53, at 922 (noting that § 1367 did not change federal courts' routine practice of denying supplemental jurisdiction to unrelated permissive counterclaims).

[64] *Sparrow*, 385 F. Supp. 2d at 1066–67 ("After Congress enacted 28 U.S.C. § 1367, however, at least two circuits (the Seventh and the Second) have held that a federal court may exercise supplemental jurisdiction over certain permissive counterclaims." (citation omitted)).

[65] Jones v. Ford Motor Credit Co., 358 F.3d 205, 213–14 (2d Cir. 2004); Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385 (7th Cir. 1996) (quoting Baer v. First Options of Chi., Inc., 72 F.3d 1294, 1298–1301 (7th Cir. 1995)).

III and not the Rule 13 transaction when determining whether a claim falls under the federal courts' supplemental jurisdiction power.[66]

These courts argue that prior to the enactment of § 1367, the limits of pendent and ancillary jurisdiction were in doubt because the federal courts had no statutory grant of jurisdiction.[67] As a result of this uncertainty, federal courts leaned on the permissive/compulsory distinction as a clear and objective basis to prevent the federal courts from reaching claims over which they did not have legitimate jurisdiction.[68] But now that Congress has expressly conferred supplemental jurisdiction through a statutory grant, courts should look to the actual statutory language of § 1367(a)—and thus to the language of Article III—to determine whether supplemental jurisdiction exists over any given counterclaim. As the Second Circuit noted in *Jones v. Ford Motor Credit Co.*: "After [the enactment of §] 1367, it is no longer sufficient for courts to assert, without any reason other than dicta or even holdings from the era of judge-created ancillary jurisdiction, that permissive counterclaims require independent jurisdiction."[69]

Finally, responding to the argument that Congress did not intend to expand the scope of supplemental jurisdiction, the Second and Seventh Circuits both argue that Congress made the legislative history of § 1367(a) irrelevant by invoking the constitutional limits of Article III on the face of the statute. The reference to Article III means that federal courts, and not Congress, are the final arbiters of the limits of supplemental jurisdiction.[70] Unless courts want to usurp the plain

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[66] *Jones*, 358 F.3d at 213–14; *Channell*, 89 F.3d at 385–86.

[67] *Channell*, 89 F.3d at 385, states:

> The distinction between permissive and compulsory counterclaims served an important function when every assertion of pendent jurisdiction was of doubtful propriety, because not supported by statute, but in which the law of preclusion *required* compulsory counterclaims to be presented or lost. . . . Refusal to entertain a permissive counterclaim did not create such a risk—while hearing the counterclaim could exceed the powers granted to a court of limited jurisdiction.

[68] *Cf. Jones*, 358 F.3d at 211 ("Perhaps lurking beneath the surface of the casual statements about an independent jurisdiction requirement was apprehension that some counterclaims lacking such a basis would extend the lawsuit beyond Article III's limiting scope of 'cases and controversies.'").

[69] *Id.* at 212–13.

[70] *Id.* at 212 ("The explicit extension to the limit of Article III of a federal court's jurisdiction over 'all other claims' sought to be litigated with an underlying claim within federal jurisdiction recast the jurisdictional basis of permissive counterclaims into constitutional terms.") (citation omitted); *accord Channell*, 89 F.3d at 385 ("Now that Congress has codified the supplemental jurisdiction in § 1367(a), courts should use the language of the statute to define the extent of their powers.").

statutory language of § 1367(a), the breadth of supplemental jurisdiction is inherently a constitutional conclusion.[71]

B. The Impact of 28 U.S.C. § 1367(a) on the Independent Basis Doctrine

The Second and Seventh Circuits' broader reading of § 1367(a) pinpoints the weakness of the independent basis approach. The independent basis approach assumes that Rule 13 continues to define the outer limit of the supplemental jurisdiction power even though § 1367(a) refers neither to Rule 13 nor to a transaction. Section 1367(a) permits supplemental jurisdiction over "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."[72] The independent basis approach simply misconstrues the statute. A plain reading of § 1367(a) requires the courts to interpret Article III, not Rule 13, in determining the outer limits of supplemental jurisdiction.

A defender of the independent basis approach might balk at the alternative construction and argue that its approach is superior because it is easy to apply. He might also argue that Congress intended to codify the independent basis rule and that it thus should remain good law even after § 1367(a)'s codification. The Second Circuit responded to both of these arguments in *Jones* when it held that once Congress invoked Article III in the statute, any decision on supplemental jurisdiction became a constitutional question about the boundaries of Article III.[73] The constitutional nature of this decision means that courts cannot defer to congressional intent nor give preference to easy-to-apply rules.[74]

The defender of the independent basis approach might also argue that the invocation of Article III does not mean that Rule 13 and supplemental jurisdiction have different scopes: Both are premised on the same rationales of efficiency and finality.[75] This argument, how-

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[71] *Jones*, 358 F.3d at 212; *Channell*, 89 F.3d at 385.

[72] 28 U.S.C. § 1367(a) (2006) (emphasis added).

[73] *Jones*, 358 F.3d at 212; *Channell*, 89 F.3d at 385.

[74] The definition of "transaction" by the federal rulemakers and congressional intent to rely on that definition are simply inoperative since Congress turned the issue into a constitutional one. From there, the scope of supplemental jurisdiction became an issue for the judiciary. *Jones*, 358 F.3d at 212–13; *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) (establishing that Constitution is superior to contrary legislation and that judiciary determines meaning of Constitution).

[75] *See* Mary K. Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1730 (1998) (stating that "policy of encouraging judicial efficiency and economy underlies" joinder decisions and "development of ancillary jurisdiction").

ever, fails to recognize two important differences between Rule 13 and § 1367(a). First, supplemental jurisdiction implicates questions of comity,[76] which do not apply to Rule 13. Rule 13 does not deal with the balance of power between the federal government and the states. This means that Rule 13 sometimes will apply *more broadly* than § 1367.[77] For example, Rule 13 might dictate joining two claims for the sake of efficiency, while § 1367 would counsel against a federal court hearing a state law counterclaim implicating a novel issue of state law that is best decided by a state court.

Second, these two doctrines can have opposite effects in the counterclaim context. Triggering § 1367(a) permits the defendant to present his claim in a forum to which he would not otherwise have access.[78] Conversely, triggering Rule 13(a) limits the defendant to the forum chosen by the plaintiff.[79] This means there may be other times when Rule 13 will have a *narrower* application than § 1367(a). As a result, there may be situations when a court would not want to *require* a defendant to bring his counterclaim though it would be efficient or economical to *allow* him to do so.[80] Given these two differences between Rule 13 and § 1367(a), it is flawed to use the Rule 13 transaction to determine the reach of Article III in the supplemental jurisdiction context.

C. Critique of the Second and Seventh Circuits' Approach

The approach of the Second and Seventh Circuits is superior to the majority's approach because it looks to the constitutional limits of Article III, as compelled by § 1367(a). However, the Second and Seventh Circuits' construction of § 1367(a) is also flawed because it offers an overbroad reading of the case or controversy requirement in light of the purpose of Article III's arising under grant of jurisdiction. The Second and Seventh Circuits assume that the fact-relatedness requirement is the only limit on Article III jurisdiction over

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[76] 28 U.S.C. § 1367(c) (authorizing courts to "decline to exercise supplemental jurisdiction" when, among other things, comity counsels against it); *see* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (noting that pendent jurisdiction implicates matters of comity); Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1376 (Fed. Cir. 1994) (discussing comity concerns in refusing to exercise supplemental jurisdiction).

[77] Kane, *supra* note 75, at 1733 (noting that there is federalism concern with supplemental jurisdiction that does not exist when categorizing counterclaims).

[78] 28 U.S.C. § 1367(a) (2006).

[79] *See* Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385 (7th Cir. 1996) (noting that compulsory counterclaims must be presented in forum adjudicating original claim or be forfeited).

[80] *See* Jones v. Ford Motor Credit Co., 358 F.3d 205, 213 (2d Cir. 2004) (noting that litigant's counterclaims were not compulsory, but court had subject matter jurisdiction over them).

nonfederal claims.[81] The next Part contends that there is an additional limitation over nonfederal claims that these circuits have overlooked: Federal courts must conclude that it furthers the federal interest to hear a nonfederal claim before they can assert jurisdiction via the Article III arising under grant of jurisdiction.

III
How the Federal Interest Delimits the Article III Power over Cases Arising Under the Laws of the United States

This Part argues that the rationale for the federal courts' power over arising under jurisdiction is only justified for claims that the federal government has an interest in adjudicating. Thus, to the extent that the arising under grant determines the courts' reach over permissive counterclaims, the federal interest in hearing such claims is critical to the appropriate resolution of the circuit split discussed in Part II. Despite what the Second and Seventh Circuits have ruled, § 1367(a) does not simply confer power over any claim with a "loose factual connection" to the original claim. On the contrary, § 1367(a), via the outer limits of Article III, only confers federal court jurisdiction over related claims if there is a federal interest in adjudicating the claims together. This Part will set forth this reading of Article III by first defining the federal interest, then establishing how the federal interest delimits the reach of Article III jurisdiction, and finally explaining how this federal-interest limitation restricts the federal courts' supplemental jurisdiction power.

A. The Federal Interest Defined

The federal courts exist to promote the federal interest.[82] Before establishing this conclusion and discussing its implications in the following Sections, it is necessary to define this federal interest that is the source of the Article III arising under power.

The federal interest is the concern that the federal legal system has for adjudicating a particular claim in a federal court. This Note defines the federal interest in the arising under context as a balance of four elements: (1) a sovereignty interest, (2) an enforcement interest,

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[81] *E.g.*, *id.* at 213–14 ("The counterclaims and the underlying claim bear a sufficient factual relationship . . . to constitute the same 'case' within the meaning of Article III and hence of section 1367. Both the [Federal] [Equal Credit Opportunity Act] claim and the [state] debt collection claims originate from the Plaintiffs' decisions to purchase Ford cars.").

[82] *See infra* Part III.B (discussing federal interest as defining feature of Article III power).

(3) a national policy interest, and (4) a systemic judicial interest.[83] The first two elements are tied to the interest that a government of laws has in construing and enforcing the laws that it promulgates.[84] The third element is comprised of interests such as the uniform application of federal law, foreign relations, and national sovereignty, interests that are wholly unrelated to the substantive rights litigated before the court. The final element, systemic judicial interest, is the interest in an efficient and well functioning court system. Before examining each element in more detail, it should be noted that not every element will necessarily be present in every jurisdictional matter that comes before a court; these factors together compose the entirety of the federal interest, only some parts of which will be present in any given jurisdictional dispute.

The sovereignty interest is best understood as the legal system's interest in interpreting its own laws,[85] and the enforcement interest is best understood as the legal system's interest in seeing that its laws are obeyed.[86] These interests, while conceptually separable, are linked because they both further the interest of the federal government in protecting the substantive rights granted by Congress. In *Osborn*, the Supreme Court addressed these two interests when it stated that "[a]ll governments which are not extremely defective in their organization, must possess, within themselves, the means of *expounding*, as well as *enforcing*, their own laws. If we examine the Constitution of the United States, we find that its framers kept this great political principle in view."[87] These two components of the federal interest—the interpretation and enforcement of federal laws—ultimately circumscribe the particular federal policy enacted by Congress.[88] A statute's terms or history, a method of enforcement or remedy, and a statute's or a series of statutes' jurisdictional structure all define these aspects of the federal interest for a given policy.[89]

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[83] This notion of the federal interest draws heavily from Professor Barry Friedman's article, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211 (2004).

[84] *Id*. at 1236–43.

[85] *Id.* at 1236–37; Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles*," 78 VA. L. REV. 1769, 1774 (1992).

[86] Friedman, *supra* note 83, at 1242.

[87] Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 818–19 (1824) (emphasis added).

[88] *Cf.* Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 159 (1953) ("[I]t is desirable that Congress be competent to bring to an initial national forum all cases in which the vindication of federal policy may be at stake.").

[89] *See infra* Part IV.A (discussing federal interest aspects of Equal Credit Opportunity Act (ECOA)).

The third element of the federal interest is the national policy interest. Concerns exemplifying this interest include the uniform application of federal law, foreign relations, and national sovereignty.[90] This element is wholly unrelated to the substantive rights conferred by Congress.[91] The legislature does not confer federal jurisdiction for these laws because it wants to protect the guarantees set forth in statutes. The legislature confers jurisdiction because it wants to ensure that the adjudicator of these guarantees considers broader national policy interests when these claims come before the courts.

There are a number of examples of this national policy interest. For one, Congress granted the federal courts jurisdiction over admiralty and maritime claims because admiralty and maritime disputes have international and foreign-relations implications.[92] Additionally, the federalization of patent, copyright, and trademark law relates to an economic interest in the uniform application of these laws: Uniformity in these areas of law affects the national markets.[93]

This distinction between the national policy interest and the sovereignty and enforcement interests is relevant when courts are required to balance these four elements to determine the federal interest. In the supplemental jurisdiction context that has divided the circuit courts, for example, it might offend the federal interest to hear a state law claim that inhibits the litigation of a federal right if there is

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[90] *See* 14A WRIGHT ET AL., *supra* note 21, § 3671, at 258 n.32 (3d ed. 1998) (noting uniformity interest in federal jurisdiction of admiralty law); *see also* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 15 (5th ed. 2003) (noting that Constitution gave Supreme Court original jurisdiction over matters affecting foreign officials to put these matters in hands of national government); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 80–85 (noting foreign policy and uniformity interests of federal jurisdiction).

[91] The contrast between the national policy element, which is unrelated to the substantive rights behind the law, and the sovereignty and enforcement elements, which are motivated by protecting the substantive rights at issue, is seen by looking to the conferral of federal jurisdiction to the civil rights statutes. Federal courts were given jurisdiction over civil rights law because of a federal interest in protecting the rights passed by Congress; this interest is so uniquely federal that it is often called "quasi-constitutional" because it emanates from the nation's intense and formative experience with race relations. *E.g.*, William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 499 (2001); Sanford V. Levinson, *New Perspectives on the Reconstruction Court*, 26 STAN. L. REV. 461, 483 (1974) (book review).

[92] *See* Chemerinsky & Kramer, *supra* note 90, at 81 ("Foreign policy is the prerogative of the federal government . . . . [The federal government] should be able to provide foreign governments with a forum whose procedures it establishes and controls.").

[93] *See* Vincent Chiappetta, *The Desirability of Agreeing To Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333, 367 n.179 (2000) (noting that federalization of copyright, patent, and parts of trademark law promotes national policy interest in "creating the single market predicate to a rule of 'internal' exhaustion" (citation omitted)).

an enforcement interest in that right (for example, a civil right). On the other hand, it probably will not offend the federal interest to inhibit the litigation of a federal right in state court where the federal government has no enforcement interest in that right but only has a national policy interest in the uniform application of that right (for example, an admiralty right). One must give content to the elements that compose the federal interest to establish how the federal interest delimits the reach of Article III jurisdiction.[94]

The fourth and final element of the federal interest is the systemic judicial interest of the courts. Two major pillars of the systemic judicial interest are efficiency and finality of litigation.[95] The interest in the efficient adjudication of claims is a primary systemic judicial concern and often is cited as a fundamental rationale for supplemental jurisdiction of nonfederal claims.[96] The second pillar, finality of litigation, has two components. First, this interest serves the legal system as a whole because it makes each judgment the final resolution of a legal conflict.[97] Second, finality is important to litigants haled in front of the federal courts because it ends the litigants' controversy.[98] This latter significance to the litigants is particularly relevant in the supplemental jurisdiction context where related state law claims that are litigated later might be subject to preclusion based on the findings of the federal courts.[99]

B. Federal Interest as a Defining Feature of the Article III Power over Cases Arising Under the Laws of the United States

The central argument of this Note is that the arising under grant only confers jurisdiction on the federal courts when the federal interest supports hearing the claim brought before the court. This conclusion flows from the premise that legal systems assert jurisdic-

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94 This is likely the case because the federal interest is less motivated by an interest in promoting the right and more motivated by an interest in making sure that the right is defined in such a way that it is uniformly applied.

95 *See* Friedman, *supra* note 83, at 1243–46 (noting judicial interests in finality and efficiency).

96 *E.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (noting that supplemental jurisdiction's "justification" lies, in part, on "considerations of judicial economy").

97 Friedman, *supra* note 83, at 1244 n.91 ("Finality is also important . . . because of the role it plays in society as a whole—to ensure respect for the judicial process . . . .").

98 *Id.* (citing Daan Braveman & Richard Goldsmith, *Rules of Preclusion and Challenges to Official Action: An Essay on Finality, Fairness, and Federalism, All Gone Awry*, 39 SYRACUSE L. REV. 599, 614 (1988)).

99 Kane, *supra* note 75, at 1733–35; *cf.* Campos v. W. Dental Servs., Inc., 404 F. Supp. 2d 1164, 1170 (N.D. Cal. 2005) (denying supplemental jurisdiction in part because it would not have preclusive effect on potential counterclaim); *Gibbs*, 388 U.S. at 726 (noting that supplemental jurisdiction's rationale partly relies on fairness to litigants).

tion when they have an interest in adjudicating the specific legal conflict brought before them.[100] This premise can be found in *Osborn*[101] where Justice Marshall argued that only a "defective" form of government would make laws but not have the power to fully enforce and construe those laws.[102] The federal government is not defective, Marshall affirms, because the three branches, as a whole, have the power required to effectuate the interests set forth in federal laws.[103] The federal courts have this particular power to construe issues and causes of action relevant to federal policy.[104]

This authority, Justice Marshall concludes, requires the federal courts to be empowered to adjudicate causes of action that are not directly tied to federal law but that impact the federal interest. The arising under grant does not limit the power of the federal courts only to the laws passed by Congress:

> [W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give [federal courts] jurisdiction of that cause, although other questions of fact or of law may be involved in it.[105]

The sum of Marshall's two assertions is as follows: The arising under grant gives the federal courts power over an issue that contains a federal "ingredient" or an action that forms the same "case" as an action with original jurisdiction in the federal courts. This is so because the federal courts must be able to protect the federal interests that Congress seeks to preserve.[106] This reading of *Osborn* ties the

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100 FRANKFURTER & LANDIS, *supra* note 1, at 2 (asserting that procedure and jurisdiction are instrumental means of effectuating policy that "cannot be disassociated from the ends that law subserves").

101 Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 819–23 (1824) (holding that Court's jurisdiction over questions arising under federal law extends to questions of "general principles of the law").

102 *See id.* at 818–19 ("[T]he legislative, executive, and judicial powers, of every well constructed government, are co-extensive . . . . All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. . . . [The] framers kept this great political principle in view.").

103 *Id.*

104 *Id.* at 808 ("[The Founders] intended [the federal government] to consist of three coordinate branches, legislative, executive, and judicial. In the construction of such a government, it is an obvious maxim, that the judicial power should be competent to give efficacy to the constitutional laws of the Legislature." (citation and internal quotation marks omitted)).

105 *Id.* at 823.

106 One might quibble with this reading of *Osborn* by asking whether Chief Justice Marshall's expansive reading of Article III sets a minimum and not maximum limit on the constitutional arising under grant. Reading *Osborn* as setting a minimum for jurisdiction would be inconsistent with the notion that the federal courts are courts of limited jurisdic-

power to hear nonfederal claims to the presence of a federal interest.[107]

This understanding of federal interest as the defining feature of the constitutional arising under power is well established in jurisdictional theory. This notion was at the center of Justice Frankfurter's view of federal jurisdiction. Justice Frankfurter argued that the federal courts exist "to determine matters of national concern."[108] He agreed with Justice Marshall in *Osborn* about the "indispensability of the federal judicial system to the maintenance of our federal scheme."[109] He argued that this "postulate" led to the conclusion that "essentially local" matters were the business of state courts, while the federal courts were designed to adjudicate cases that involved interests "peculiarly in the keeping of the federal courts."[110]

Professor Paul Mishkin's seminal article on jurisdiction, *The Federal "Question" in the District Courts*,[111] also recognized the relationship between federal question jurisdiction and the federal interest. Mishkin's work, however, focused on the federal policy at stake in a litigation: "[I]t is desirable that Congress be competent to bring to an initial national forum all cases in which the vindication of federal policy may be at stake."[112] Mishkin claimed that a major purpose of the lower federal courts is ensuring that the Supreme Court can adjudicate matters that are of particular value to the federal government

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tion. *See* 5 WRIGHT ET AL., *supra* note 21, § 1206, at 110 (3d ed. 2004) ("As Article III of the Constitution makes clear, the federal courts are courts of limited jurisdiction . . . . Indeed, until the court's jurisdiction is demonstrated, the converse is true."). *Compare* Matasar, *supra* note 20, at 115 ("At first reading, the *Osborn* doctrine appears inconsistent with the commonly held belief that article III, section two of the Constitution sets the limit of federal judicial power. This appearance is deceiving. *Osborn* holds that a federal court is empowered to hear nonfederal questions only if they are contained in the same 'cause' as a federal claim.").

107 *In re* TMI Litig. Cases Consol. II, 940 F.2d 832, 869 (3d Cir. 1991) (noting that, in *Osborn*, conferral of original federal jurisdiction was tied to federal interest in having claim adjudicated in federal court and justified jurisdiction over nonfederal issues); Shaw, *supra* note 22, at 1238 ("The presence of a federal 'ingredient' . . . empower[s] Congress to extend federal jurisdiction only when a federal forum advances a meaningful federal interest.").

108 FRANKFURTER & LANDIS, *supra* note 1, at 257 (discussing essential functions of Supreme Court).

109 Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 503 (1928) (stating that such indispensability "may be taken as a political postulate"); *see Osborn*, 22 U.S. (9 Wheat.) at 811 ("[Congress] has contented itself with giving [the federal courts] appellate jurisdiction, to correct the errors of the State Courts, where a question incidentally arises under the laws and treaties of the Union.").

110 Felix Frankfurter, *The Federal Courts*, 58 THE NEW REPUBLIC 273, 274–75 (1929).

111 Mishkin, *supra* note 88.

112 *Id.* at 159.

as a lawmaking body, without requiring the Court to continually police adherence to its prior decisions.[113]

The federal interest, as a defining feature of the jurisdictional inquiry, is also critical in the analogous context of protective jurisdiction. The theory of protective jurisdiction is that Congress, under its Article I power, can shield federal interests from state courts with a jurisdictional statute that does not create any substantive rights or requirements.[114] Under this theory, the Constitution's grant of jurisdiction to the federal courts is linked to the federal interest as defined by Congress and not simply tied to the construction of substantive laws passed by Congress.[115] The use of the federal interest in the protective jurisdiction context is relevant because it illustrates an alternative application of the view that the federal interest is the defining feature of the Article III arising under grant of jurisdiction.

C. How the Federal Interest Delimits the Reach of § 1367(a)

Applying the federal-interest limitation of Article III to the courts' supplemental jurisdiction power results in the following rule: Federal courts do not have the power to adjudicate supplemental claims that are contrary to the federal interest, regardless of whether those claims are part of the same transaction. This limitation is the logical outcome of a reading of Article III as giving arising under jurisdiction to the federal courts specifically to protect the federal interest.[116] Where adjudication of a claim is not consonant with the federal interest, there is no basis for federal jurisdiction.

Supplemental jurisdiction cases can touch all of the elements that compose the federal interest. Counterclaims without an independent basis of jurisdiction can affect the underlying federal law at issue and can have a systemic impact on the claims in front of the courts. As to the effect on the federal right, counterclaims (ancillary claims) can deter litigation of the federal right by creating an additional potential cost on the federal rightholder, forcing him to risk not just losing his

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[113] *Id.* at 157–58.

[114] 13B WRIGHT ET AL., *supra* note 21, § 3565, at 77–78 (2d ed. 1984).

[115] *See generally* James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CAL. L. REV. 1423, 1423 (2007) (discussing how theories of protective jurisdiction relate to Article III limits on judicial power).

[116] The notion that *Osborn*, while expansive, also sets a limit on arising under jurisdiction is not a novel claim. Matasar, *supra* note 20, at 115, states:

> At first reading, the *Osborn* doctrine appears inconsistent with the commonly held belief that article III, section two of the Constitution sets the limit of federal judicial power. This appearance is deceiving. *Osborn* holds that a federal court is empowered to hear nonfederal questions only if they are contained in the same 'cause' as a federal claim.

claim but also being saddled with an adverse judgment on the counterclaim. The impact of deterrence on the federal interest, of course, depends on the specific federal right at issue and whether that right implicates the enforcement, sovereignty, and/or national policy interests involved. Conversely to the ancillary claim context, a plaintiff's supplemental claim (pendent claim) can support the federal right by allowing federal courts to hear a claim that the plaintiff otherwise would take to state courts. Without pendent jurisdiction, state courts would be the only fora that would hear all of the plaintiff's claims together, creating an incentive for the plaintiff to file in state court. As to the systemic judicial interests, jurisdiction over supplemental claims is premised on potential gains in judicial economy and on convenience and fairness to the litigants.[117]

In the context of the ancillary jurisdiction issue that has divided the circuit courts, both Congress and the Supreme Court have indicated that the systemic judicial interest is a very heavy weight in the balance of the federal interest. As evidence, both the congressional intent behind § 1367 and prior Supreme Court case law establish that compulsory counterclaims are fit for federal jurisdiction regardless of how much they burden the federal right involved.[118] This can be explained by the fact that jurisdiction over compulsory counterclaims, even without an independent basis of jurisdiction, almost always will result in efficiency and finality gains because the counterclaims stem from the same transaction as the original claim.[119]

Finding that the federal courts have jurisdiction over compulsory counterclaims that severely burden federal rights indicates that sometimes the systemic judicial interest can outweigh the sovereignty, enforcement, and national policy interests. This realization should guide the federal courts when they are deciding whether it serves the federal interest to hear a permissive counterclaim—an instance that probably will require the court to balance sovereignty and enforcement interests against the systemic judicial interest. However, because permissive counterclaims are less factually related to the original federal claim than compulsory counterclaims, the result of the

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[117] United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

[118] 13 WRIGHT ET AL., *supra* note 21, § 3523, at 106–07 (2d ed. 1984) ("Ancillary jurisdiction is now universally accepted over defendant's compulsory counterclaims under Rule 13(a)."); Graham M. Beck, Comment, *Supplemental Jurisdiction over Permissive Counterclaims in Light of* Exxon v. Allapattah, 41 U.S.F. L. REV. 45, 46, 50, 52–53 (2006) (noting legislative history of § 1367 clearly demonstrates intent to authorize ancillary jurisdiction over compulsory counterclaims).

[119] *Cf.* Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 385 (7th Cir. 1996) (noting that law of preclusion in effect requires ancillary jurisdiction doctrine, since compulsory counterclaims must be either presented or forfeited).

balancing would vary depending on the facts of the specific case. The next Part demonstrates how this balance might work.

IV
Application and Defenses of a Federal-Interest Limitation on the Reach of Article III

A. How the Federal Interest Can Be Used To Determine the Federal Courts' Power over Permissive Counterclaims

The division among the circuit courts over the viability of the independent basis rule has taken part largely in the context of illegal lending litigation.[120] Thus, this Part focuses on illegal lending claims to demonstrate how the federal interest applies to the reach of Article III.

Before demonstrating how the federal interest can affect the jurisdiction analysis, however, it will help to explain how this limitation on § 1367(a) leads to a different result than the Second Circuit's approach. Again, the Second Circuit held that federal courts have jurisdiction over any permissive counterclaim that has a "loose factual connection" to the underlying claim. This Note's theory of a federal-interest limitation on Article III rejects the Second Circuit's broad understanding of Article III by arguing that factual relatedness is not the only limitation on a federal court's power to hear a supplemental jurisdiction claim: Courts must also ask whether it furthers a federal interest to hear that claim.

The facts of *Jones v. Ford Motor Credit Co.*,[121] the Second Circuit case that spawned the current circuit split, provide a good example of how a federal-interest limitation on Article III affects the supplemental jurisdiction of the federal courts. In *Jones*, the plaintiffs brought a class action alleging that several Ford dealers violated the Equal Credit Opportunity Act (ECOA) by implementing financing plans that discriminated against African Americans.[122] Although the financing plans were based primarily on objective criteria, the defendant dealers were permitted to mark up rates "using subjective criteria that assessed non-risk charges."[123] The plaintiffs alleged that the dealers' reliance on these subjective criteria resulted in African

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120 *See* Beck, *supra* note 118, at 53–59 (discussing circuit split over permissive counterclaims only in context of illegal lending claims and debt collection counterclaims); Simon, *supra* note 54, at 304–06 (same).

121 358 F.3d 205 (2d Cir. 2004).

122 *Id*. at 207.

123 *Id.*

American customers paying higher rates than similarly situated Caucasian customers.[124]

Ford denied the allegations and asserted conditional counterclaims against any members of the plaintiff-class who were in default on their car loans.[125] The Second Circuit held that the "loose factual connection" between the claims—the fact that "[b]oth the ECOA claim and the debt collection claims originate[d] from the Plaintiffs' decisions to purchase Ford cars"[126]—was sufficient to satisfy the case or controversy requirement of Article III.[127] Instead, the correct interpretation of Article III, as discussed in Part III, would have required the Second Circuit to ask whether hearing these state debt collection counterclaims would have furthered the federal interest.

An analysis of the federal interest in hearing these debt collection counterclaims before a federal court reveals that the federal government has (1) strong sovereignty and enforcement interests in protecting the ECOA claims brought by the plaintiffs, which are severely frustrated by hearing the counterclaims, and (2) a weak systemic judicial interest in hearing these counterclaims because they do not achieve the efficiency or finality gains that underlie this element of the federal interest. Thus, if the Second Circuit had weighed the sovereignty and enforcement interests in the ECOA claims against the systemic judicial interest in hearing the counterclaims, it would have concluded that the federal interest clearly militates against hearing these permissive state law debt collection counterclaims.

To ascertain whether the federal interest supports hearing a supplemental claim, a court then must determine the federal interest related to the interpretation and enforcement of the statute (here, the ECOA). The specific federal policy at issue in the litigation establishes whether there are sovereignty, enforcement, national policy, or systemic judicial interests in the underlying federal right. In the *Jones* case, the history and substance of the statute, the method of enforcement, and the jurisdictional grant all point to a strong federal policy of rooting out discriminatory lending. The federal government passed the ECOA, a civil rights law, during an era when Congress sought to eradicate private institutional arrangements that frustrated the progress of women and minorities. [128] This statutory scheme was a reac-

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124 *Id.*

125 *Id.* at 207–08.

126 *Id.* at 214.

127 *Id.*

128 *See* Ronald K. Schuster, *Lending Discrimination: Is the Secondary Market Helping To Make the "American Dream" a Reality?*, 36 GONZ. L. REV. 153, 158–59 (2000) ("Congress recognized that discrimination in the lending market was an issue that needed

tion to the plight of women and minorities who were unable to borrow money at fair rates as a result of discrimination by banks and other financial institutions. [129]

The ECOA, among other things, makes it unlawful for a creditor to discriminate against a loan applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, sex, marital status, national origin, or age.[130] The statute is not concerned with the debtor's obligations to the creditor for the specific loan; it seeks solely to eradicate discriminatory lending. The purpose and substance underlying the statute thus indicate an interest in punishing discriminatory lenders regardless of borrowers' actions.

The statute aims to root out discriminatory lending both by creating regulatory enforcement[131] and by affording aggrieved individuals private rights of action in federal court for actual damages and capped punitive damages.[132] This private right of action can be seen as creating private attorneys general in the form of aggrieved parties, thereby enabling a greater level of enforcement than a mere regulatory body could achieve.[133] This private attorneys general scheme, which aims to increase litigation of ECOA claims, indicates a strong federal policy of punishing those lenders who engage in discriminatory behavior.

Along with the purpose of the statute, its substantive guarantees, and its method of enforcement, the grant of original jurisdiction to the federal courts for these claims speaks to the strong sovereignty and enforcement interests in protecting the fair litigation of ECOA claims. The ECOA also creates concurrent jurisdiction so that these causes of action can be brought either in state court or federal court.[134] As is the case with many civil rights laws, the grant of federal jurisdiction is

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to be specifically addressed. Between 1974 and 1977, Congress enacted . . . legislation . . . to combat discrimination in the lending market . . . .").

[129] *Id.*; *see also, e.g.*, WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861–1915, at 18–22 (1991) (describing oppressive nature of sharecropping).

[130] 15 U.S.C. § 1691(a)(1) (2006).

[131] 15 U.S.C. § 1691c (2006).

[132] 15 U.S.C. § 1691e(a)–(b).

[133] Keith Greiner, Comment, *Judicial Imprimatur Required: Raising the Standard for Awards of Attorneys' Fees Under the IDEA in* Smith v. Fitchburg Public Schools, 41 NEW ENG. L. REV. 711, 720–21 (2007) ("The 'private attorney general' concept . . . allowed an award of attorneys' fees to a plaintiff who . . . was not [bringing a lawsuit] 'for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest priority.'" (citing Newman v. Piggie Park Enters. 390 U.S. 400, 402 (1968))).

[134] 15 U.S.C. § 1691e(c) ("Upon application by an aggrieved applicant, the appropriate United States district court *or any other court of competent jurisdiction* may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.") (emphasis added).

best understood as a statement by Congress that there is a federal interest in adjudicating discriminatory lending in a fair forum.

The Supreme Court and commentators alike have recognized that Congress granted jurisdiction to the federal courts over civil rights specifically because it deemed federal jurisdiction necessary to shield litigation of these rights from bias in parochial state courts.[135] In this sense, Congress's decision to make federal courts protectors of civil rights (such as the right against discriminatory lending) should be viewed as a statement by Congress that a uniquely federal interest exists in protecting the given right.[136]

The second step in weighing the sovereignty, enforcement, and national policy interests is determining how hearing the nonfederal claim will affect the litigation of the federal right in question. In *Jones*, for example, hearing the ECOA claim and the state debt collection counterclaims would run contrary to the federal interest because adjudication of the state debt collection counterclaims would discourage plaintiffs from bringing ECOA claims in federal court.

Since the inception of the circuit split discussed in Part II, courts that have adjudicated illegal lending litigation have found that taking supplemental jurisdiction over the state debt collection counterclaims may deter people who otherwise would bring meritorious illegal lending suits.[137] Debt collection counterclaims chill litigation of ECOA claims because plaintiffs fear that if they lose both their discriminatory lending claims and their counterclaims, they will have to pay back loans that they would not have been asked to pay had they not tried to vindicate their rights in the first place.[138] To the extent

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[135] *See* Zwickler v. Koota, 389 U.S. 241, 246–47 (1967) (noting that broadened federal domain in area of individual rights transformed federal courts into "'the *primary* and powerful reliances for vindicating every right given by . . . the laws . . . of the United States'" (quoting FRANKFURTER & LANDIS, *supra* note 1, at 65)); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1119 (1977) (arguing that civil rights are better protected by federal courts).

[136] See *supra* note 91 for a discussion of the uniquely federal interest in civil rights as quasi-constitutional in nature.

[137] *See, e.g.*, Heaven v. Trust Co. Bank, 118 F.3d 735, 738 (11th Cir. 1997) (affirming denial of class certification where compulsory debt collection counterclaims would render class action litigation contrary to interests of some plaintiff-class members); Sparrow v. Mazda Am. Credit, 385 F. Supp. 2d 1063, 1071 (E.D. Cal. 2005) ("[A]llowing a debt collector to bring an action for the underlying debt in a case brought under the FDCPA may deter litigants from pursuing their rights under that statute . . . ."); Crawford v. Equifax Payment Servs., No. 97-C-4240, 1998 WL 704050, at *7 (N.D. Ill. Sept. 30, 1998) (declining to exercise jurisdiction over debt collection counterclaim in order to avoid chilling effect on litigants bringing actions under fair lending statute).

[138] One might ask whether these debt collection claims would instead be brought in state court and have the same chilling effect as a conferral of federal jurisdiction. While this can never be known in any specific case, the economics of the situation dictate that, as

that the ECOA does not free a creditor from liability for discriminatory lending if the debtor is delinquent, deterring ECOA claims by hearing the debt collection counterclaims in federal courts undermines the congressional intent of rooting out discriminatory lending.

In addition to assessing the value of the federal policy at issue and how it will be affected by litigation of a supplemental claim, federal courts also must consider the systemic judicial interest in efficiency and finality that might come from hearing a given supplemental claim. Hearing the debt collection counterclaims presented in *Jones*, for instance, would not result in efficiency or finality gains for the federal system. These debt collection counterclaims were permissive counterclaims with little connection to the original claim. The discriminatory lending claims and the debt collection counterclaims "raise different issues, involve different facts and evidence, and implicate different law."[139]

Plaintiffs in an ECOA action must show overt discrimination, disparate treatment, or disparate impact. Such claims introduce evidence concerning the origination of the debt vis-à-vis the origination of the debts of other borrowers.[140] Proving discrimination under the ECOA often involves showing that the use of certain factors in the underwriting process or policies regarding the granting or terms of loans result in disparate impact or treatment for protected groups.[141] Thus, these cases focus on policies and practices in place at the point of debt origination.

In contrast, the creditor's debt collection counterclaims primarily concern the payments made *after* the debt's origination and how those

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a general matter, it is unlikely that these debt collection claims would be brought as separate actions. Generally, when a debtor cannot pay his debt it is not in the lender's interest to institute an independent action against the debtor, which is precisely why the debt collection claims are brought as counterclaims and not litigated in the first instance. Telephone Interview with Robert J. Hobbs, Deputy Director, National Consumer Law Center (July 24, 2007). It is not in lenders' interests to pursue a debtor since delinquent debtors often are not shirking their debt; rather, events in the debtors' lives leave them unable to meet their financial obligations. *Id.* Often, beyond repossession, creditors do not go into state court to obtain a judgment against delinquent debtors. Instead of bringing an independent action, lenders often simply place a comment on the debtor's credit report that makes it nearly impossible for the debtor to borrow any money until his or her debt is paid off. As a result, when a debtor gets the money to repay his debt, he generally will do so voluntarily. *Id*. And thus, a creditor might institute an independent set-off action if the debtor wins the discriminatory lending action.

139 Jones v. Ford Motor Credit Co., No. 00-Civ.-8330(LMM), 2002 WL 1334812, at *2 (S.D.N.Y. June 17, 2002).

140 *See* Gwen A. Ashton, Note, *The Equal Credit Opportunity Act from a Civil Rights Perspective: The Disparate Impact Standard*, 17 ANN. REV. BANKING L. 465, 473–77 (1998) (discussing means of proving discrimination in ECOA actions).

141 *Id.* at 473, 476.

payments affect the balance of the debt.[142] The sole evidentiary connection between the ECOA claims and the debt counterclaims is the initial execution of the loan document, providing for little gain in economy.[143] Additionally, there is minimal legal overlap between the two claims. The plaintiff's claim arises from the consumer's right to nondiscriminatory lending practices, while the defendant's legal claims involve state contract law issues that have no connection to federal law.[144]

Moreover, hearing the defendant's run-of-the-mill debt collection action would hamper the efficiency of the federal courts.[145] Hearing these claims would relegate the federal courts to the level of state small claims courts. As one court found, allowing debt collection counterclaims to ride into federal court on the back of discriminatory lending claims would "create an administrative nightmare for [federal courts]."[146] There are many such state law counterclaims for any given class action.[147] Hearing them in federal court would flood the federal docket with contract claims and each debtor's specific defenses. The adjudication of those issues probably would be far more time-consuming than the adjudication of the discriminatory lending actions themselves.[148]

Jurisdiction over these debt collection counterclaims also does not serve the second dimension of the systemic judicial interest: the

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142 Telephone Interview with Robert J. Hobbs, *supra* note 138.

143 *Cf.* Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1291 (7th Cir. 1980) ("The sole connection between a TILA [Truth in Lending Act] claim and a debt counterclaim is the initial execution of the loan document."), *rev'd on other grounds*, 452 U.S. 205 (1981).

144 *Cf. id.* (discussing different legal bases for plaintiff's TILA claim and defendant's debt collection counterclaim).

145 Crawford v. Equifax Payment Servs., No. 97-C-4240, 1998 WL 704050, at *7 (N.D. Ill. Sept. 30, 1998) (holding that debt collection claims are best suited for state courts because state courts "have set up special small claims courts that have streamlined and cost-effective procedures [specifically] designed to handle these types of small individual contract actions" (quoting Channell v. Citicorp Nat'l Servs., Inc., No. 91-C-3428, 1996 WL 563536, at *2 (N.D. Ill. Sept. 30, 1996))).

146 *Channell*, 1996 WL 563536, at *2.

147 *See, e.g.*, Jones v. Ford Motor Credit Co., No. 00-Civ.-8330(LMM), 2002 WL 1334812, at *3 (S.D.N.Y. June 17, 2002) ("Exercising jurisdiction over the counterclaims would mire this Court in what would most likely be a tremendous number of separate collection actions . . . ."); *Channell*, 1996 WL 563536, at *2 (noting that state contract claims in Consumer Leasing Act class action amounted to 96 separate collection actions).

148 The Northern District of Illinois determined that litigating these claims would entail much more than a "mechanical calculation" because the counterclaim defendants (the original plaintiffs) might still raise other traditional contract and damage defenses that would require full adjudication of state contract law issues. *Channell*, 1996 WL 563536, at *2 (internal quotation marks omitted) (dismissing counterclaims because "exercising jurisdiction over [the debt collection] counterclaims would transform this litigation into a virtual Pandora's Box of 96 separate collection actions, which this Court is ill-equipped to handle").

interest in finality. Because there is minimal factual overlap, courts have found no real threat of inconsistent results and no preclusion against a defendant who wishes to litigate the underlying debt collection claims in state court.[149] Moreover, there is no systemic judicial interest in solving a single legal dispute in one forum because the two claims before the court are really two separate legal disputes between the same parties.

B. The Wider Application of the Federal-Interest Limitation on Supplemental Jurisdiction

Since the balance of the elements that constitute the federal interest is case-specific, the *Jones* example should not be taken to suggest that most supplemental claims are not fit for federal jurisdiction. There will be many instances in which a claim under § 1367(a) does not cut against the federal interest. For example, the federal interest almost always will support pendent jurisdiction. In *Gibbs*, for example, the plaintiff filed suit in federal court against the United Mine Workers (UMW) for violating the Federal Taft-Hartley Act by bringing improper pressure on Gibbs's employer to discharge Gibbs for undermining UMW efforts.[150] Gibbs also brought a state law action for unlawful conspiracy to interfere with his contract for employment.[151]

In *Gibbs*, the federal interest supported hearing the pendent state claim for two reasons. First, hearing the state claim served the sovereignty and enforcement elements of the federal interest because it promoted adjudication of federal labor rights in federal courts.[152] If the plaintiff were forced to choose between splitting his cause of action and bringing his whole case in state court, it is likely that he would not have chosen the federal forum to adjudicate the federal right. Second, the systemic judicial element of the federal interest supported hearing both claims in one forum. To the extent that there

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[149] *E.g.*, Campos v. W. Dental Servs., Inc., 404 F. Supp. 2d 1164, 1170 (N.D. Cal. 2005) (finding that risk of inconsistent judgments cannot overcome public policy reasons for declining jurisdiction and noting that defendant "is in no way precluded from litigating the underlying in [sic] debt in state court"); *see also* Therese G. Franzen & Robert S. Carlson, *Defense Strategies in Fair Debt Collection Practices Act Litigation*, 53 CONSUMER FIN. L.Q. REP. 34, 41 (1999) ("[O]f the few federal courts addressing the collateral estoppel doctrine under the FDCPA [Fair Debt Collection Practices Act], none have found the underlying debt collection action . . . to bear a substantial enough relationship to bar subsequent litigation.").

[150] United Mine Workers v. Gibbs, 383 U.S. 715, 717 (1966).

[151] This was a state claim without an independent basis of jurisdiction. *Id.* at 720.

[152] A fuller analysis of this issue would look into the purpose, remedies, enforcement mechanisms, and jurisdictional grant of the Taft-Hartley Act. The *Jones* example is intended to illustrate how a fuller examination of the federal interest might look.

were overlapping factual and legal claims, the court system could realize efficiency gains by avoiding relitigation of the same issues. Systemic gains also would accrue because these two actions essentially form the same dispute, and settling this dispute in one forum would achieve finality.[153]

The federal interest also will likely favor federal jurisdiction for compulsory counterclaims because hearing these claims serves the systemic interest in finality and economy. *Fox Chemical Co. v. Amsoil, Inc.*[154] illustrates how looking to the federal interest to determine the scope of supplemental jurisdiction probably will not affect a federal court's jurisdiction over the typical compulsory counterclaim. In *Fox*, the plaintiff sued the defendant in federal court under the Federal Lanham Act for making false representations.[155] The plaintiff also published and distributed pamphlets alleging that the defendant was making false representations.[156] The defendant counterclaimed, asserting a state law libel claim against the plaintiff.[157]

In this context, the balance of the elements that compose the federal interest likely would cut in favor of hearing the counterclaim. The Lanham Act does not implicate the same sovereignty and enforcement interests that civil rights statutes, such as the ECOA, implicate. The Lanham Act federalized trademark and service mark rights largely to support a national interest in the uniformity of federal law; the Act does not track issues of substantive justice, like civil rights, that are uniquely important to the federal government.[158] In this sense, trademark claims touch a national policy interest that has less to do with protection of the federal right than with the concern that one law should govern trademark issues. This latter national policy interest does not call for the protection of the federal right in the same way that the sovereignty and enforcement interests of the ECOA do.

It is certainly true that the counterclaim will somewhat deter litigation of the false advertising claim. However, deterring the litigation of trademark infringement carries less weight against jurisdiction than

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153 Note that I do not address national policy interests in this discussion because they are not implicated in this example. This analysis illustrates the fact that not every element is applicable to every jurisdictional instance that might arise before federal courts.

154 445 F. Supp. 1355 (D. Minn. 1978).

155 *Id.* at 1357–58.

156 *Id.* at 1361.

157 *Id.* The court considered this a compulsory counterclaim because it stemmed from the same transaction as defined by Rule 13. *Id.*

158 *See supra* text accompanying note 93 (discussing how trademark rights are given federal jurisdiction for uniformity purposes and not because of any particular federal interest at stake).

deterring civil rights litigation because of the differences between the sovereignty and enforcement interests underlying trademark claims and civil rights claims. The deterrent effect on trademark infringement litigation would not offend the federal sovereignty and enforcement interests as much as it would in a case like *Jones*, which implicated a federal statute aimed at eliminating discriminatory lending practices.[159]

However, the most salient difference between *Fox* and *Jones* is the systemic judicial interest in having federal courts hear the compulsory counterclaim. In *Fox*, there are great efficiency gains in hearing two claims that both turn on whether the defendant engaged in false representations. Moreover, issue preclusion probably would result from the first action over the question of whether the defendant misrepresented his product. In such a case, the risk of preclusion would deny the defendant an opportunity to tell a jury his side of the story and would place a tremendous burden on him by compromising his ability ever to state his case fully in court. And finally, the litigants benefit from the finality achieved by settling this single dispute about false representations in one forum.

Thus, this review of typical pendent claims and compulsory counterclaims without an independent basis of jurisdiction suggests that supplemental jurisdiction, under the reading of § 1367(a) set forth in Part III, will continue to operate as it currently does in the majority of cases. However, the federal-interest limitation on Article III will likely affect the class of cases that caused the circuit split discussed in Part II: permissive counterclaims that have a "loose factual connection" to the original claim. Because there are few such cases outside of the illegal lending context on the federal docket, this Note cannot definitively answer how the balance of the federal interest will come out in those cases. One can imagine cases with a "loose factual connection" to the original claim that might result in sufficient efficiency gains to warrant extending federal jurisdiction.[160] At the same time, it

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[159] A serious study of the purposes of the Lanham Act and the economic effects of related libel claims on Lanham Act claims is outside the scope of this Note. Nonetheless, this discussion is meant to illustrate briefly how the factors that compose the federal interest might line up differently than they did in the *Jones* case.

[160] Allow me to offer a hypothetical. Imagine a case where a plaintiff-employee sued an employer for unpaid overtime compensation under the Fair Labor Standards Act, and the defendant-employer counterclaimed for illegal appropriation of company resources in relation to the plaintiff's responsibilities (a state law claim without an independent basis of federal jurisdiction). These two claims have a "loose factual connection"—the employment relationship—although they do not stem from the same transaction as defined by Rule 13. While the counterclaim will likely deter litigation of the federal right, courts might attribute a lesser sovereignty or enforcement interest to Fair Labor Standards Act claims concerning overtime pay than they would to, say, civil rights claims. Moreover, this

is possible that most permissive counterclaims are not fit for federal jurisdiction because their connection with the underlying claim is too "loose" to result in significant efficiency or finality gains for the federal courts. The effect that future permissive counterclaims have on the federal interest is a matter that future litigation, and perhaps future scholarship, will resolve.

Conclusion

Litigation regarding the viability of the independent basis rule after the enactment of § 1367(a) is an opportunity for the federal courts to reconsider the appropriate approach to supplemental jurisdiction doctrine. Building on *Osborn* and some of the seminal jurisdiction theories of the past century, this Note argues that federal courts are permitted to assert jurisdiction over claims only when the federal interest supports hearing those claims. With the federal interest as its guidepost, this Note argues that the federal courts can achieve a sensible approach to supplemental jurisdiction doctrine: one that does not require federal courts to adjudicate nonfederal claims that burden the interests of the federal government.

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case may implicate an important systemic judicial interest in economy because the bulk of the evidence for both claims stems from factual determinations about the nature of the employment relationship, an issue that may be contested in this case.