Narrowing the Scope of Rule 13(a)

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Federal Rule of Civil Procedure 13(a) requires a defendant to plead any counterclaim that "arises out of the transaction or occurrence" that forms the basis of the plaintiff's claim. Although Rule 13(a) does not explain the consequences of failure to plead a compulsory counterclaim, virtually all courts agree that a party who fails to plead a compulsory counterclaim cannot raise that claim in a subsequent action. Courts do not as readily agree on

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1 FRCP 13(a) states:

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

While this Comment discusses the federal rule, most states have adopted substantially identical rules and many follow federal precedent. For a comparison of state and federal counterclaim rules, see generally Federal Procedure Rules Service, FRCP 13 (Lawyers Cooperative, 1991) (volumes for various circuits).

2 See, for example, Baker v Gold Seal Liquors, Inc., 417 US 467, 469 n 1 (1974). The Preliminary Draft of the Rules from May, 1936 provided, "[i]f the action proceeds to judgment without such a claim being set up, the claim shall be barred." Rule 18: Counterclaim and Cross-claim in the Answer (FRCP Preliminary Draft, May 1936). The Advisory Committee later removed the penalty provision and added an Advisory Committee note suggesting that bar would result from failure to plead. FRCP 13(a) (Advisory Committee Note 7) (1938). Although the drafters did not say why they removed the penalty provision, they probably did so to avoid crossing the boundary between procedural and substantive law.
the criteria for determining whether a claim is compulsory or merely permissive.³

The scope of Rule 13(a) depends on interpretation of the phrase “arises out of the [same] transaction or occurrence.” Virtually all courts define “transaction” as a group of facts underlying a claim.⁴ A defendant’s counterclaim arises from the same transaction as the plaintiff’s claim if the facts underlying the claims are “logically related.”

Some courts use a narrow test to measure this logical relationship—a counterclaim is compulsory only if the issues necessary to prove the defendant’s and plaintiff’s claims substantially overlap. Other courts employ a broad logical relationship test—a counterclaim is compulsory if the defendant’s and plaintiff’s claims share as little as a single relevant fact.

For example, suppose that a debtor sues her lender in federal court alleging violations of the federal Truth in Lending Act (TILA).⁵ If the debtor has defaulted on the underlying loan, the lender could counterclaim for the amount due on the note. A court applying the narrow test would hold the counterclaim permissive: the plaintiff’s suit is based on the defendant’s alleged failure to disclose certain facts in loan documents, while the lender’s counterclaim is based on proving a valid loan contract and subsequent default.⁶ A court applying the broad test would hold the counterclaim compulsory because both claims involve the loan documents.⁷

From 1938 until 1990, Rule 13(a) served two primary functions. First, Rule 13(a) marked the boundary of claim preclusion by rule⁸ for defendants. Courts barred a defendant who failed to plead a compulsory counterclaim from bringing the claim as a sep-

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³ FRCP 13(b) governs permissive counterclaims: “A pleading may state as a counterclaim 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.” Failure to plead a permissive counterclaim will not bar the defendant from asserting it in a later action.

⁴ See *Moore v New York Cotton Exchange*, 270 US 593, 610 (1926). Indeed, “transaction” was used to refer to a factual grouping underlying a claim in code provisions providing for claim preclusion. See Comment, *Counterclaims Under Modern Codes*, 33 Yale L J 892, 895 (1933).

⁵ 15 USC §§ 1601 et seq (1982).


⁷ See *Plant v Blazer Financial Services, Inc.*, 598 F2d 1357, 1363 (5th Cir 1979).

⁸ This Comment uses “claim preclusion by rule” to refer to the claim preclusive function of Rule 13(a).
arate action. The application of claim preclusion under Rule 13(a) to the defendant’s claims serves policies similar to those underlying res judicata (now labelled “common law claim preclusion”) in the context of the plaintiff’s claims.10

Second, Rule 13(a) defined ancillary jurisdiction over counterclaims.11 A compulsory counterclaim fell within a court’s ancillary jurisdiction while a permissive counterclaim did not.12 Ancillary jurisdiction under Rule 13(a) functioned similarly to pendent jurisdiction for a plaintiff’s claims.13

In 1990, however, Congress codified ancillary and pendent jurisdiction as “supplemental jurisdiction.”14 The supplemental jurisdiction standard in § 1367 permits courts to exert jurisdiction over an individual counterclaim without holding that counterclaim compulsory.15 Thus, Rule 13(a) need no longer define a federal court’s ancillary jurisdiction over counterclaims. The federal courts should take this opportunity to separate the question of jurisdiction from the question of claim preclusion under 13(a).

Specifically, the scope of “transaction or occurrence” in Rule 13(a) should be reconsidered in light of the rule’s single remaining function: determining when a claim will be lost if not raised in the

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9 A defendant can subsequently plead a counterclaim that he omitted from the answer through “oversight, inadvertence, or excusable neglect, or when justice requires . . . .” FRCP 13(f). Courts balance the defendant’s desire to assert a just claim against potential prejudice and delay. Technographics, Inc. v Mercer Corp., 142 FRD 429, 430-31 (M D Pa 1992).

10 See discussion of policies underlying claim preclusion in Part III.


12 Note that some courts disputed the link between compulsory counterclaims and ancillary jurisdiction. These courts exerted ancillary jurisdiction over some permissive counterclaims. See Ambromovage v United Mine Workers of America, 726 F2d 972, 976 (3d Cir 1984) (“we hold that the question of the existence of ancillary jurisdiction does not turn on the characterization of the counterclaim as ‘permissive’ or ‘compulsory,’ but rather on the presence or absence of a ‘common nucleus of operative fact’”). See also Thomas F. Green, Jr., Federal Jurisdiction over Counterclaims, 48 Nw U L Rev 271, 282-85 (1953).


15 As a result, a court’s determination that it has jurisdiction over a counterclaim in a particular case will not require a ruling in a similar case that the same counterclaim must be raised or lost forever. The jurisdictional decision would not create a precedent for future Rule 13(a) determinations.
instant litigation. Defining "transaction or occurrence" with reference to the narrow logical relationship test best serves the rule's claim preclusive function.

The broad logical relationship test serves the policies behind ancillary jurisdiction, but imperfectly serves the preclusive function of the Rule 13(a). Forcing weakly related claims together into one action can be inefficient. Also, prejudice to defendants occurs when the threat of later preclusion or injunction excessively forces defendants to plead counterclaims at the time, place, and forum of their opponents' choosing. Finally, the broad test produces asymmetry by forcing defendants to plead counterclaims in situations where a plaintiff could reserve an identical claim. Since the narrow logical relationship test closely resembles the modern test defining the scope of claims barred by res judicata, the narrow test reduces or eliminates this bias in the plaintiff's favor.

Part I of this Comment discusses the claim preclusive and jurisdictional functions of Rule 13(a). Part II discusses the tests courts have used to determine the scope of the phrase "transaction or occurrence." Part III examines the policies underlying Rule 13(a), and compares the broad and narrow tests as they relate to Rule 13(a)'s remaining purpose after the supplemental jurisdiction statute. The Comment concludes that courts should adopt the narrow test to best serve the claim preclusive function of the rule.

I. HISTORIC FUNCTIONS OF RULE 13(A)

A. Claim Preclusion by Rule

Courts agree that a defendant who fails to plead a compulsory counterclaim cannot raise that claim in a subsequent action.

16 Frequently, where two actions proceed at once, one court will stay its proceedings or enjoin the proceedings of the other court to force the defendant to plead her claim as a counterclaim. See, for example, Asset Allocation and Management Co. v Wilson Employers Ins. Co., 892 F2d 566, 572 (7th Cir 1989).

17 See notes 23-24 and accompanying text. Until 1990, this prejudice might have been justified by balancing the disadvantage to defendants against the benefit they received from having courts exert jurisdiction over the broad class of compulsory counterclaims. In fact, most cases prior to the enactment of § 1367 involve defendants arguing that a counterclaim was compulsory. See, for example, Tullos v Parks, 915 F2d 1192, 1194 (8th Cir 1990); Painter v Harvey, 863 F2d 329, 331 (4th Cir 1988).

18 See note 2. The courts do not agree, however, on the theoretical basis for the bar. Under the dominant view, the failure to plead a compulsory counterclaim results in bar by res judicata. Charles A. Wright, Arthur R. Miller, and Mary K. Kane, 6 Federal Practice and Procedure § 1417 at 131 n 7 (West, 2d ed 1990). Res judicata does not explain why courts frequently act to prevent concurrent litigation of compulsory counterclaims. Id § 1418 at 142-46. Judge Posner has argued that the interests of judicial economy authorize
While Rule 13(a), therefore, limits the defendant's control over her claims, the Federal Rules do not similarly limit the plaintiff's ability to join, bring separately, or withhold claims. Although the Federal Rules allow a court to consolidate or separate an action pending before the court, they leave the plaintiff otherwise free to determine when and where he wants to bring each claim he may have.

The doctrine of res judicata, however, limits the plaintiff's freedom to withhold claims. Res judicata bars relitigation of a "claim" or "cause of action," both for issues actually litigated and for issues which might have been litigated. The scope of claims barred has expanded over the years. In the course of this evolution, three principal standards have defined the "claim" or "cause of action" precluded by res judicata.

courts to act to discourage concurrent litigation. See Asset Allocation, 892 F2d at 572. Some courts treat the compulsory counterclaim as waived if not pled. Wright, Miller, and Kane, 6 Federal Practice § 1417 at 132 n 9 (collecting cases). See, for example Harbor Ins. Co. v Continental Bank Corp., 922 F2d 357, 360 (7th Cir 1990). See also Arthur F. Greenbaum, Jacks or Better to Open: Procedural Limitations on Co-party and Third Party Claims, 74 Minn L Rev 507, 512 (1990). Still others combine the theories, holding that compulsory counterclaims are waived if not pled in the answer in the present suit and barred by res judicata in subsequent suits. See, for example, Dragon Shipping Corp. v Union Tank Car Co., 378 F2d 241, 244 (9th Cir 1967).

19 The Federal Rules provide that the plaintiff "may join . . . as many claims, legal, equitable, or maritime, as the party has against the opposing party." FRCP 18(a).

20 Rule 42 provides that a court may consolidate or separate claims before the court. For consolidation, the claims need share only a single question of fact or law.

21 Courts have used various terms to describe the basic litigation unit. See, for example, Cromwell v County of Sac, 94 US 351, 352-53 (1876) (barred on the same "claim or demand"); Commissioner v Sunnen, 333 US 591, 597 (1948) (barred on the same "cause of action").


23 First, in 1927, the Supreme Court held that a cause of action "does not consist of facts, but of the unlawful violation of a right which the facts show," with each right violated being a separate cause of action. Baltimore Steamship Co. v Phillips, 274 US 316, 321 (1927). Later, the Restatement of Judgments took a different approach, focusing on overlapping evidentiary issues rather than rights. The Restatement deemed two claims part of the same cause of action "if the evidence needed to sustain the second action would have sustained the first action." Restatement of Judgments § 61 at 241 (comment b) (1942). See also City Communications, Inc. v City of Detroit, 888 F2d 1081, 1091 (6th Cir 1989).

Most recently, the Restatement (Second) of Judgments suggested a transactional approach. "When a valid and final judgment . . . extinguishes the plaintiff's claim . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments § 24(1) at 196 (1982). The drafters of the Restatement (Second) did not define "transaction" by explicit reference to Rule 13(a) or the tests developed under the rule. However, the drafters did state that "transaction" is to be construed broadly, as under the Federal Rules, rather than in the common usage sense of
The courts have generally followed a broader test for compulsory counterclaims than for claims barred by res judicata. Consequently, res judicata offers plaintiffs greater prerogative to withhold claims than Rule 13(a) has provided for defendants.

B. Ancillary Jurisdiction by Rule

Federal courts with jurisdiction over a primary claim can exert jurisdiction over related claims that lack an independent source of federal jurisdiction. Before § 1367, pendent jurisdiction extended over the plaintiff's related claims; ancillary jurisdiction over the defendant's. Courts used the test developed in United Mine workers v Gibbs to define pendent jurisdiction and Rule 13(a) to define ancillary jurisdiction. Compulsory counterclaims fell within the court's ancillary jurisdiction; permissive counterclaims did not. Courts thus linked Rule 13(a) with the issue of ancillary jur-

a “voluntary interchange.” Id § 24 at 199 (comment b). See also id § 24 at 196 (comment a) (“this Section responds to modern procedural ideas which have found expression in the Federal Rules of Civil Procedure and other procedural systems”). They stated that a court should define transaction “pragmatically,” considering the following factors:
(1) whether the facts are related in time, space, origin, or motivation,
(2) whether they form a convenient trial unit, and
(3) whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.
Id § 24 at 196.

This “transactional” approach to res judicata has influenced many federal courts. See Restatement (Second) of Judgments § 24 (Supp 1991), citing cases from all circuits but the Eleventh that have discussed the second Restatement's test; Nevada v United States, 463 US 110, 130-31 n 12 (1982) (citing the second Restatement's transactional definition as "a more pragmatic approach" to res judicata).

See, for example, S.E.L. Maduro v M/V Antonio De Gastaneta, 833 F2d 1477, 1482 (11th Cir 1987) (comparing factual issues to be resolved in second action with issues explored in the first action); Haefner v County of Lancaster, 543 F Supp 264, 267 (E D Pa 1982) (claims are the same if they derive from the same "liability creating conduct"). Compare NLRB v United Technologies Corp., 706 F2d 1254, 1259-60 (2d Cir 1983) (overlap of several operative facts between two actions is not sufficient to make them same claim for res judicata; court looked to see whether the same transaction was at issue in both claims, whether the same evidence supported both claims, and whether facts essential to the second claim were present in the first).


See Great Lakes Rubber Corporation v Herbert Cooper Co., 286 F2d 631, 633 (3d Cir 1961) ("the issue of the existence of ancillary jurisdiction and the issue as to whether a counterclaim is compulsory are to be answered by the same test").


Hartford Accident & Indemnity Co. v Sullivan, 846 F2d 377, 381 (7th Cir 1988) (citations omitted).
risdiction, despite Rule 82's prohibition on using the Federal Rules to extend jurisdiction. 30

In Gibbs, the Supreme Court expanded pendent jurisdiction. 31 The Court held that pendent jurisdiction exists if the federal and non-federal claims present one constitutional case. Primarily, one “case” exists if the federal claims have substance sufficient to con-fer subject matter jurisdiction, and the other claims “derive from a common nucleus of operative fact.” In the alternative, one “case” exists if the claims are such that the plaintiff “would ordinarily be expected to try [the claims] in one judicial proceeding,” 32 assuming the substantiality of the federal issues.

The Gibbs Court expanded pendent jurisdiction in light of the liberal permissive joinder provisions of Rule 18, which allow the plaintiff to join as many claims as she has against the opposing party. 33 In addition, the Court criticized the older Hurn test, which derived a standard for pendent jurisdiction from res judicata, as “unnecessarily grudging.” 34 This rejection of res judicata in favor of a broader standard for pendent jurisdiction created an unprincipled asymmetry with the limitation of ancillary jurisdiction to compulsory counterclaims. If federal courts had jurisdiction over plaintiffs’ claims that would not otherwise become barred by a federal judgment, then why should their jurisdiction not extend to defendants’ permissive counterclaims?

30 Federal Rule of Civil Procedure 82 provides that the rules shall not be construed “to extend or limit the jurisdiction of the United States district courts.” FRCP 82. In Young v City of New Orleans, 751 F2d 794 (5th Cir 1985), the court held that since a counterclaim had not matured at pleading, thus falling within one of Rule 13(a)'s exceptions, it was not compulsory; therefore, the counterclaim did not fall within the court's ancillary jurisdiction. Id at 801. The Seventh Circuit, however, criticized the decision, arguing that Rule 13(a) targeted the preclusive effects of a judgment, not the scope of a court's ancillary jurisdiction. Harbor Ins. Co., 922 F2d at 361. Both courts relied on the language of Rule 13(a) in their analysis of ancillary jurisdiction. However, the first approach, importing exceptions from Rule 13(a) into the jurisdictional analysis, violates Rule 82.

31 Until 1966, pendent jurisdiction was narrower than ancillary jurisdiction. Compare Moore v New York Cotton Exchange, 270 US 593, 610 (1926) (ancillary jurisdiction extends to claims arising from the same transaction or occurrence) with Hurn v Oursler, 289 US 238, 247 (1933) (pendent jurisdiction extends to different grounds asserted in support of a single cause of action).

32 383 US at 725. While the second test’s meaning is unclear, it may refer to situations where res judicata creates an expectation that all of a plaintiff’s claims will be tried in one action. This would confirm that the Gibbs Court did not view the first test as coextensive with res judicata. However, the second test has been largely ignored in light of the broad interpretation given to “common nucleus of operative fact” and the constitutional case standard in general. See, for example, Owen Equipment and Erection Co. v Kroger, 437 US 365 (1978).


34 Id at 724-25. See also Hurn v Oursler, 289 US 238 (1933).
When Congress codified ancillary and pendent jurisdiction under a single standard in § 1367, it eliminated the different treatment of plaintiffs' and defendants' related claims. Section 1367 provides that, subject to certain enumerated exceptions, a district court hearing claims over which it has original jurisdiction shall have supplemental jurisdiction over all other claims that “form part of the same case or controversy under Article III of the United States Constitution” as the original claim. “Case or controversy” in § 1367 is to be interpreted by reference to the Gibbs test. Congress enacted § 1367 in response to the actual and threatened narrowing of both pendent and ancillary jurisdiction over claims against additional parties after Finley v United States. The Finley Court held that absent explicit statutory language, courts should not infer that Congress authorized jurisdiction to the extent constitutionally permissible over claims against additional parties.

The Federal Courts Study Committee, which recommended a version of § 1367 to Congress, first proposed that supplemental jurisdiction extend to claims arising from the same “transaction or occurrence.” However, the House subcommittee instead proposed that supplemental jurisdiction extend to claims arising from a single constitutional “case or controversy.” The Senate noted that the “case or controversy” language originated in the House as a
result of substantial and helpful comment from the academic community.\(^4\)

Although there was no specific discussion of the relevant change at the House subcommittee hearing on September 6, 1990, the hearing record includes a letter from Professor Arthur Wolf suggesting the "case or controversy" limit as a broader alternative to "transaction or occurrence."\(^4\) The "case or controversy" language suggests that supplemental jurisdiction extends to the constitutional limit, currently defined by the Gibbs standard of a common nucleus of operative fact.\(^4\) The supplemental jurisdiction standard may evolve, however, if the Supreme Court redefines the constitutional limit.\(^4\)

Commentators have praised Congress for avoiding the controversy over the meaning of "transaction or occurrence" and for allowing for evolution of the jurisdictional standard by linking it with the fluid notion of a single "case or controversy."\(^4\) Under Rule 13(a), however, the standard for determining claim preclusion is still very much tied to judicial interpretation of "transaction or occurrence."

II. THE SCOPE OF RULE 13(A): THE "TRANSACTION OR OCCURRENCE" TEST

Rule 13(a) requires that a litigant raise as a counterclaim any claim which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."\(^4\) In interpreting Rule 13(a), courts have struggled to determine when claims arise from the same "transaction or occurrence."

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\(^4\) FRCP 13(a).
A. Moore v New York Cotton Exchange

Moore v New York Cotton Exchange\(^2\) is the primary Supreme Court case interpreting the requirement that claims arise from the same "transaction." The plaintiff sued for antitrust violations based on the defendant's refusal to supply the plaintiff with price quotations. The defendant counterclaimed, alleging that the plaintiff was stealing the quotations. The plaintiff in Moore challenged the trial court's jurisdiction over the defendant's counterclaim. The Supreme Court held the counterclaim compulsory and within the jurisdiction of the trial court.\(^5\)

The Court's analysis proceeded in two steps. First, the scope of facts underlying the plaintiff's claim (the "transaction") is determined by the logical (causal) relationship between the facts and the claim.\(^6\) Second, the defendant's counterclaim arises from the same transaction if proving the facts related to the plaintiff's claim will substantially establish the defendant's counterclaim.\(^7\) Precise identity of the issues underlying the claims is not required.\(^8\)

Two factors distance the Moore holding from the scope of Rule 13(a). First, the Court determined the scope of "transaction" as used in Rule 13(a)'s predecessor, Equity Rule 30.\(^9\) However, the Rules Advisory Committee retained substantially all of Equity Rule 30 in Rule 13(a).\(^10\) More importantly, Moore addressed ancillary jurisdiction over compulsory counterclaims rather than claim preclusion, the sole remaining function of Rule 13(a) since the enactment of § 1367. The Court justified its holding by citing the

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\(^2\) 270 US 593 (1926).
\(^5\) Id at 609-10.
\(^6\) The Court stated that "'[t]ransaction' is a word of flexible meaning," and "may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which the appellant here bases its cause of action." Id at 610.
\(^7\) The Moore Court found that essential facts alleged in support of the plaintiff's claim were such an integral part of the defendant's claim that "it only needs the failure of the former to establish a foundation for the latter." Id. In addition, the Court noted that the defendant's affirmative defense (plaintiff's intent to unlawfully distribute price quotations to non-subscribers) required proof of facts which supported the defendant's counterclaim (that the plaintiff was unlawfully receiving and distributing the price quotations). Id at 602-03.
\(^8\) Id at 610.
\(^9\) Id at 609. Equity Rule 30 provided that "'[t]he answer must state . . . any counterclaim arising out of the transaction which is the subject matter of the suit." Rules of Practice for the Courts of Equity of the United States, reprinted at 226 US 627, 657 (1912).
\(^10\) The Committee broadened Equity Rule 30 to include legal as well as equitable counterclaims. FRCP 13 (Advisory Committee Note 1) (1938).
need to provide a forum capable of providing the defendant with complete relief.\textsuperscript{56}

Focusing on the relationship between the plaintiff's and the defendant's claims, courts have formulated several other tests of whether claims arise from the same "transaction or occurrence,"\textsuperscript{57} Nevertheless, the logical relationship test, first conceived in Moore, is the most expansive and commonly used.\textsuperscript{58} Courts, however, do not agree on what constitutes a "logical relationship." Some have construed the test more broadly than others.

B. The Narrow Logical Relationship Test

A number of courts use a narrow logical relationship test. The narrow test asks whether the plaintiff's claim and defendant's counterclaim are "offshoots of the same basic controversy."\textsuperscript{59} Courts applying this test examine the relationship between the legally relevant facts underlying the plaintiff's claim and those underlying the defendant's counterclaim. If these groups of facts are "logically related," the counterclaim is compulsory.

The narrow test imposes two criteria. First, the facts common to both the defendant's counterclaim and the plaintiff's claim must be legally relevant. To this end, the Seventh Circuit states that a court must look at the totality of the two claims, comparing the nature of the claims, the legal basis of recovery, and the questions of law involved.\textsuperscript{60} To a degree, a court can test the legal relevance of facts by asking to what extent collateral estoppel in an action on

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\item \textsuperscript{56} 270 US at 610 ("the relief afforded by the dismissal of the bill is not complete without an injunction" against the plaintiff). The Court in Hurn v Ourler stated that it was immaterial that the counterclaim in Moore was compulsory since federal jurisdiction cannot be extended by a rule of court. 289 US at 242.
\item \textsuperscript{57} For example, the following tests have been used, alone or in combination, to determine whether a defendant's counterclaim arose from the same transaction or occurrence as the plaintiff's claim:
\begin{enumerate}
\item the similarity of the factual and legal issues;
\item whether res judicata would bar the defendant's claim if not pled;
\item the similarity of the evidence needed to pass on a claim and counterclaim; and
\item the logical relationship between the claim and counterclaim.
\end{enumerate}
Wright, Miller, and Kane, 6 Federal Practice § 1410 at 52-55 (cited in note 18) (citations omitted).
\item \textsuperscript{58} Id § 1410 at 65; Baker v Gold Seal Liquors, Inc., 417 US 467, 469 n 1 (1974) (lower courts "generally" follow Moore's interpretation of "transaction"), citing Great Lakes Rubber Corp. v Herbert Cooper Co., 286 F2d 631, 633 (3d Cir 1961) and United Artists Corp. v Masterpiece Productions, 221 F2d 213, 216 (2d Cir 1955).
\item \textsuperscript{59} See Xerox Corporation v SCM Corporation, 576 F2d 1057, 1059 (3d Cir 1978); Great Lakes, 286 F2d at 634; Valencia v Anderson Bros. Ford, 617 F2d 1278, 1291 (7th Cir 1980), rev'd on other grounds, 452 US 205 (1981).
\item \textsuperscript{60} Burlington Northern Railroad Co. v Strong, 907 F2d 707, 711-12 (7th Cir 1990).
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the plaintiff's claim would preclude, or effectively preclude, the defendant's counterclaims if brought in a later action.\textsuperscript{61}

Second, the legally relevant facts common to the plaintiff's claim and defendant's counterclaim must be "so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit."\textsuperscript{62} Here, courts consider whether the plaintiff's and defendant's claims are outgrowths of the same basic controversy.\textsuperscript{63} The claims are related if the defendant should have known that the counterclaim should have been tried with the plaintiff's claim.\textsuperscript{64}

A helpful way of approaching the narrow test is to think of it as a comparison of the collateral estoppel effects of the judgments on the claim and counterclaim rendered in separate actions.\textsuperscript{65} In this way the court will focus on the critical concerns of the narrow test—whether the relevant facts underlying the claims are related.

In determining whether a fact is relevant, a court should ask whether the fact will be at issue in the litigation. For example, in the TILA case, the debtor need prove only the extent of the lender's disclosures. Though the terms of the loan form part of the transaction from which the debtor's suit arises, the terms have no legal relevance to the disclosure claim. Even if the lender offered proof of the terms of the loan agreement in the TILA case, the court would not make a finding on the issue. Therefore, the loan terms are not part of the transaction from which the debtor's suit arises.

In determining whether the facts underlying the plaintiff's and defendant's claims are "logically related," the court should consider the overlap between the legally relevant facts underlying the claims. If there is substantial overlap, the court should treat the defendant's claim as compulsory. Because litigants think in terms of facts to be proved to support a claim, this approach may avoid

\textsuperscript{61} Pochiro \textit{v} Prudential Insurance Company of America, 827 F2d 1246, 1251 (9th Cir 1987).

\textsuperscript{62} See Adam \textit{v} Jacobs, 950 F2d 89, 92 (2d Cir 1991), quoting United States \textit{v} Aquavella, 615 F2d 12, 22 (2d Cir 1980). See also Pochiro, 827 F2d at 1249; Savarese \textit{v} Agriss, 883 F2d 1194, 1208 (3d Cir 1989) (claims are logically related if separate trials would involve a "substantial duplication of effort"), quoting Great Lakes Rubber Corp., 236 F2d at 631.

\textsuperscript{63} See Xerox, 576 F2d at 1059.

\textsuperscript{64} See Restatement (Second) of Judgments § 24(2) at 198 (1982) (courts must consider "the parties' expectations or business understanding or usage").

\textsuperscript{65} Collateral estoppel bars relitigation of an issue by the same parties when the "issue of ultimate fact has been determined by a valid judgement." \textit{Black's Law Dictionary} 261-62 (West, 6th ed 1990).
unhappy surprises by helping litigants to predict the treatment the court will give to their claims. In addition, litigants and the court should be able to tell from the pleadings what issues will arise. Irrelevant factual issues that arise during discovery should not require the defendant to plead claims based on these facts.

C. The Broad Logical Relationship Test

In Revere Copper & Brass Inc. v Aetna Casualty and Surety Co., the Fifth Circuit used a broad test to determine whether a third-party defendant’s claim against the plaintiff was supported by ancillary jurisdiction pursuant to Rule 14(a). Revere was decided four years after the Supreme Court articulated the constitutionally permissible scope of pendent jurisdiction in Gibbs, and the first part of the Revere test mirrors the Gibbs standard for the limits of federal pendent jurisdiction. The Fifth Circuit, however, also analogized the jurisdictional test with the compulsory counterclaim test under Rule 13(a). Other courts have, therefore, used the Revere test to determine the scope of the compulsory counterclaim rule. Under this broad test, all counterclaims that fall within the court’s ancillary jurisdiction are compulsory.

In Plant v Blazer Financial Services, Inc., for example, the Fifth Circuit held that the claim and counterclaim were logically related if (1) the same aggregate core of operative facts served as the basis of both claims, or (2) the aggregate core of operative facts upon which the original claim rested activated additional legal rights in the defendant that would otherwise remain dormant. The TILA example illustrates how this test might be applied. Where the plaintiff asserts a claim for failure to disclose the terms of a consumer credit transaction, the court would hold the defendant’s counterclaim for the amount due on the debt compulsory.

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66 Although federal pleading is not notice pleading, FRCP 8, the facts set forth in the complaint and answer (or counterclaim and answer) together with the asserted claims should provide adequate information for a court or litigant to determine whether collateral estoppel would decide a later action.
67 426 F2d 709 (5th Cir 1970).
69 See Revere, 426 F2d at 715. The Revere court did not explicitly acknowledge the origin of the test it used to determine the scope of compulsory counterclaims.
70 Id at 716.
71 See, for example, McCaffrey v Rex Motor Transportation, Inc., 672 F2d 246, 249 (1st Cir 1982); United States v Aronson, 617 F2d 119, 121 (5th Cir 1980); Montgomery Ward Development Corp. v Juster, 932 F2d 1378, 1381-82 (11th Cir 1991).
72 598 F2d 1357 (5th Cir 1979).
73 Id at 1361, citing Revere, 426 F2d at 715.
cause the single aggregate of operative facts, the loan transaction, gave rise to both the defendant's and plaintiff's claims.\^4

Courts applying the broad test recognize it as the most inclusive test for compulsory counterclaims.\^5 The broad test parallels the broadest constitutional test for ancillary jurisdiction by tracking the "common nucleus of operative fact" language from Gibbs.\^6 Thus, the scope of compulsory counterclaims has evolved comparably to the standard for ancillary jurisdiction.

III. POLICIES UNDERLYING RULE 13(A)

A. History of the Rule

In the early twentieth century, code pleading allowed a defendant to assert a counterclaim if it arose from the same transaction as the plaintiff’s claim. However, few states provided for compulsory counterclaims.\^7 In 1912, Federal Equity Rule 30 provided that a defendant’s answer must state, “any counterclaim arising out of the transaction which is the subject matter of the [opposing party’s] suit.”\^8 The defendant was also permitted to set out any counterclaim that might have been the subject of an independent suit in equity.\^9 Prior to 1938, there was no rule requiring the pleading of compulsory counterclaims at law.\^10

In 1938, the Federal Rules of Civil Procedure superseded the Equity Rules. In Rule 13(a) and (b), the Rules Advisory Committee broadened Equity Rule 30 to apply to claims at law as well as

\^4 Id.
\^5 See, for example, McCaffrey, 672 F2d at 248 (noting that the counterclaim could not possibly qualify as compulsory under any test but the broad logical relationship test).
\^6 Note that a standard for compulsory counterclaims that exceeds the jurisdictional limits of the court might not be invalid. Where no court has jurisdiction over both the claim and counterclaim, due process would prevent a court from disallowing the counterclaim in a later action. See generally Hartford Accident & Indemnity Co. v Sullivan, 846 F2d 377, 381-82 (7th Cir 1988) (a compulsory counterclaim that a claimant could not bring due to jurisdictional limitations of the federal court should not be forfeited). However, in diversity cases or where the counterclaim presents a federal cause of action, jurisdiction over the counterclaim would not be an issue.
\^9 Id. A stated purpose of the Equity Rules was to simplify equity practice “by uniting in one action as many issues as could conveniently be disposed of.” American Mills Co. v American Surety Co., 260 US 360, 364 (1922).
\^10 See id at 365 (limiting the preclusive effect on counterclaims to those which are equitable is imperative).
in equity. The word "transaction" in Equity Rule 30 was replaced by "transaction or occurrence" without explanation. The Federal Rules thus abandoned the common law emphasis on narrowing litigation to single issues.

B. Policies Behind Rule 13(a)

Courts should avoid confusing the purpose of compulsory counterclaims and the purpose of counterclaims in general. The drafters of Rule 13(a) designed compulsory counterclaims to limit the number of lawsuits possible over one controversy. The compulsory counterclaim rule strives to balance the litigants' interest in controlling the course and scope of litigation against the judicial interest in resolving entire controversies in one adjudication. Generally, counterclaims allow courts to get at "the essence of a lawsuit," which is "the final adjudication of matters in dispute between the parties." Both compulsory and permissive counterclaims played a crucial role in displacing common law attitudes opposed to consolidating claims. But the rules were never intended to force litigants to litigate all matters in one adjudication.

Rule 13(a) delineated the scope of claim preclusion by rule and marked the boundary of ancillary jurisdiction. Both of these purposes, as well as the policies underlying the two related doc-

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81 FRCP 13 (Advisory Committee Note 1) (1938).

82 Note that the Moore Court suggested that an "occurrence" was a part of a "transaction" as used in Equity Rule 30, that is, that a transaction may comprehend a series of logically related occurrences. Moore, 270 US at 610. The addition of "occurrence" to the rule was likely only cosmetic. See Charles A. Wright, Estoppel By Rule: The Compulsory Counterclaim Under Modern Pleading, 38 Minn L Rev 423, 447-50 (1954).

83 As Dean Charles Clark remarked, "The whole tendency under the rules is the other way, the whole pressure." Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland at 247 (American Bar Association, 1938) ("ABA Proceedings"). See also Baltimore Steamship Co. v Phillips, 274 US 316, 320 (1927) (discussing res judicata, the Court noted that "the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time").

84 See ABA Proceedings at 247 (cited in note 83). Note that prior to the adoption of the Federal Rules, at law the failure to plead a counterclaim arising out of the same transaction did not bar the claim. Restatement of Judgments § 58 at 230 (1942).

85 See Greenbaum, 74 Minn L Rev at 539 (cited in note 18).

86 ABA Proceedings at 247. See also Baker v Gold Seal Liquors, 417 US 467, 469 n 1 (1964) (the combination of Rule 13(a) and 13(b) allows the court to dispose of all claims between the parties in one proceeding).

87 ABA Proceedings at 247. See also Clark, Code Pleading § 101 at 645 (cited in note 77) (commenting that the rules allowing counterclaim pleading of the widest scope seem to be among the more useful of the new practice provisions).

trines of res judicata and supplemental (ancillary) jurisdiction, illuminate the policies of Rule 13(a).

1. Judicial and party economy.

Rule 13(a) was designed to enhance judicial efficiency. By achieving resolution of related matters in a single lawsuit, Rule 13(a) avoids superfluous actions and thus conserves judicial resources. Some courts suggest that the rule was designed to conclude all matters in a single litigation, but the continued recognition of merely permissive counterclaims suggests that this view is an overstatement.

Ideally, compulsory counterclaims should be so related to the plaintiff's claims that litigating the claims together will always promote efficiency. Where factual and legal issues are similar, consolidating claims into a single action avoids duplicative judicial effort at trial and on appeal. Only one trial court in one proceeding need acquaint itself with the facts and law of the case. Discovery is unified under a single judge, and witnesses need testify in only one proceeding. Evidentiary concerns such as credibility determinations and authentication occur in a single proceeding. At the appellate level, only one panel need acquaint itself with the facts, law, and record of the case.

a) The jurisdictional function. The jurisdictional function of Rule 13(a) was particularly suited to achieving judicial efficiency. Upon a jurisdictional challenge, the court could assert jurisdiction over claims which litigants had pleaded by finding the claims compulsory. In so doing, the court would ratify the defendant's initial determination that litigating the claim in the present action was efficient.

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8 Id.
9 Southern Construction Co., Inc. v Pickard, 371 US 57, 60 (1962).
10 See discussion of the history of Rule 13 in text accompanying notes 77-83.
11 See Columbia Plaza Corp. v Security National Bank, 525 F2d 620, 626 (DC Cir 1975) (discussing the efficiency of trying plaintiff's and defendant's cases under one judge when similar evidence will prove the cases).
12 See Nachtman v Crucible Steel Co. of America, 165 F2d 997, 999 (3d Cir 1948).
13 See Revere, 426 F2d 715.
14 Similarly, courts frequently cite judicial economy and convenience to litigants as principal factors underlying pendent and ancillary jurisdiction. See Gibbs, 383 US at 726. Courts have noted the similarity in purpose between Rule 13(a) and common law ancillary jurisdiction and have thus linked the two. Great Lakes Rubber Corp. v Herbert Cooper Co., Inc., 286 F2d 631, 633-34 (3d Cir 1961).
The broad counterclaim rule for jurisdictional purposes posed only a minimal danger of burdening litigation with loosely related claims. Jurisdictional questions arise only after the defendant has already pled her claim. In making the decision to plead, the defendant will often have decided that it is efficient to plead the claim as part of the present action. Absent a preclusive function, the defendant will usually plead and withhold counterclaims in a manner that will minimize total litigation costs.

Yet the new supplemental jurisdiction statute, § 1367, obviates the need to use Rule 13(a) for this purpose. Courts have just begun to address the use of Rule 13(a) after the enactment of § 1367. In *Wesley v General Motors Acceptance Corp.*, the district court separated the question of whether a claim was compulsory and the determination of whether to exert supplemental jurisdiction under § 1367. The court determined that jurisdiction under § 1367 was broader than its circuit’s narrow test for compulsory counterclaims. On this view, § 1367 allows courts to assert jurisdiction over some permissive counterclaims.

Thus, § 1367 removes the need to link the determination of ancillary jurisdiction to Rule 13(a). While a broad counterclaim rule allowed courts to reap the benefits of exerting jurisdiction to the constitutional limit, the supplemental jurisdiction statute now accomplishes this aim. Adopting a narrow counterclaim rule would have no impact on jurisdiction, but has significant efficiency advantages for Rule 13(a)’s preclusive function.

b) The preclusive function. Like the jurisdictional function, Rule 13(a)’s preclusive function achieves judicial efficiency, though in a more limited way. Collateral estoppel provides an independent incentive for defendants to bring related claims in one
action. The more closely related are the defendant's and plaintiff's claims, the more likely that collateral estoppel will preclude the defendant from asserting claims after the conclusion of the main action. Where claims are not closely related, however, collateral estoppel alone will not preclude a second action. Rule 13(a) has the greatest effect in these cases, assuming the claims are not so marginally related that consolidating them in one action will thwart efficient adjudication. 100

Commentators have recognized the danger that parties will combine loosely related claims that they otherwise might not, due to fear of claim preclusion. 101 A broad rule for the preclusive function of Rule 13(a) forces more loosely related claims together, thus undermining efficiency. Even if a court attempted to mitigate this inefficiency, parties are better situated than courts to determine whether consolidating claims will promote efficient adjudication. The inefficiency of consolidating loosely related claims detracts from the incentive to do so. In addition, courts applying the broad rule are often tempted to look at the entire record available from the prior litigation in determining whether a claim was compulsory. 102 However, at the pleading stage, litigants cannot know what the record will ultimately reflect. Faced with uncertainty about the course of a plaintiff's litigation, the defendant will plead any claim which might be deemed compulsory. 103

The narrow compulsory counterclaim rule is tailored to resolve these problems. By focusing on the issues in the pleadings, the rule avoids the courts' tendency to examine the record in order to determine what facts were "logically related" to the original claims.

Judge Cudahy supported the application of a narrow preclusive rule in a similar context. 104 He suggested that a litigant with two theories of recovery, one grounded in state law and the other in federal law, may choose the most likely prospect (her "best


100 See Valencia, 617 F2d at 1291.


102 See Plant, 598 F2d at 1363. But see Heyward-Robinson, 430 F2d at 1088 (Friendly concurring) ("the determination whether a counterclaim is compulsory must be made at the pleading stage").

103 Wright, 38 Minn L Rev at 432-33 (cited in note 82).

The "best shot" saves time and money for the parties and the court. When a party wins on her best shot, subsequent litigation may not be necessary if the party has been fully compensated. If, on the other hand, the party loses on her best shot, collateral estoppel may deter her from bringing the second action. Under either scenario, the rule promotes efficiency in litigation.

For example, the defendant in a patent infringement action might counterclaim under federal antitrust law or under state common law for unfair competition, theories which involve different factual issues. Disposition of the antitrust counterclaim in favor of the defendant will fully compensate her, nullifying the need to bring the unfair competition claim. Whenever the defendant chooses to hold the state law based counterclaim in reserve, a federal court benefits by avoiding discovery and briefing on a dissimilar claim. In contrast, the broad standard of compulsory counterclaims would inefficiently force the defendant to bring both claims at the same time.

c) Other efficiency concerns. The choice between the broad and narrow compulsory counterclaim rules raises further efficiency issues. First, many courts link the decision to prevent concurrent litigation with the determination that a claim is compulsory. Second, the broad rule will sometimes sacrifice accuracy in the name of efficiency.

Opposing parties frequently litigate a range of disputes in different fora at the same time. Courts can avoid concurrent litigation in a number of ways. One federal court can enjoin another, grant a stay of the local proceeding, transfer or dismiss the local action with leave to replead the claim in a different litigation, or remove state court actions. If actions are filed in the same court,

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105 Id. Judge Cudahy does not use the term "best shot."

106 Often when litigation begins, any preexisting relationship between the parties breaks down, causing all grievances, related or unrelated, to be aired. See Greenbaum, 74 Minn L Rev at 536-39 (cited in note 18). Because each party may prefer a different forum, this may result in multiple actions filed between the same two parties.


108 See, for example, Adam v Jacobs, 950 F2d 89, 92-94 (2d Cir 1991).

109 Where an action brought in state court could have been filed in federal court, the state court defendant (federal plaintiff) can remove the action to federal court subject to certain limitations. 28 USC § 1441.
the court may consolidate the actions. Where the conclusion of one action will make the issues in the second action moot, the court's action prevents a race to judgment and the expense of concurrent litigation. Nevertheless, where claims are weakly related, the race to judgment is illusory and no efficiency gains will accrue.

Because many courts link the decision to avoid concurrent litigation with a Rule 13(a) decision, a broad rule threatens to force consolidation of loosely related claims, undermining efficiency. At least one court has held that consolidation is mandatory once it deems a counterclaim compulsory. Thus, a broad rule of compulsory counterclaims may remove some of the trial judge's discretion to effectively structure litigation for trial.

Second, any compulsory counterclaim rule must balance efficiency and accuracy. Dean Clark, the Reporter for the first Rules Advisory Committee, felt that procedural rules applied with judicial discretion could help the courts achieve efficient and accurate adjudication. However, it has been suggested that Clark viewed accuracy—the proper enforcement of the substantive law—as a fixed quantity, unrelated to efficiency. Modern proceduralists, on the other hand, see efficiency and accuracy as interdependent. Judge Posner suggests that in some cases efficiency and accuracy bear an inverse relationship, with gains in efficiency achieved only by sacrificing accuracy. The ideal lawsuit structure will minimize

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116 See, for example, Adam v Jacobs, 950 F2d at 93, citing Wright, Miller, and Kane, 6 Federal Practice § 1418 at 142-43 (cited in note 18). Note, however, that some courts refuse to acknowledge this link. In Asset Allocation and Management Co. v Western Employers Ins. Co., 892 F2d 566, 572 (7th Cir 1989), the court noted that although Rule 13(a) does not specifically provide a basis for a federal court's power to enjoin a concurrent proceeding, courts have long exercised that power. The Seventh Circuit also suggested that courts have the power of injunction based on practical concerns for judicial economy. Id.


118 The better view, however, is that compulsory counterclaims do not have to be consolidated into one action. The trial judge is given discretion to order separate trials in the interest of convenience under FRCP 42. Presumably the trial court has the discretion to order a separate trial of compulsory counterclaims in an existing action.

119 The goal of the federal rules was the "just, speedy, and inexpensive" adjudication of cases. FRCP 1.


121 See Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J Legal Stud 399, 401 (1973) ("In general we would not want to increase the direct costs of the legal process by one dollar in order to reduce error costs by 50 (or 99) cents. The economic goal is thus to minimize the sum of error and direct costs."). See also Mathews v Eldridge, 424 US 319, 335 (1976) (suggesting that determining the requirements
the sum total of efficiency costs and accuracy costs (incorrect results).\textsuperscript{117}

A broad compulsory counterclaim rule aggregates loosely related claims, thus increasing jury confusion by increasing the number of factual issues the jury must resolve. A rule that increases confusion, even if efficient, decreases accuracy. Several courts have cited potential confusion of the trier of fact as a justification for holding a counterclaim not compulsory.\textsuperscript{118}

d) Summary. As currently applied, Rule 13(a) often fails to promote judicial economy. Litigating related claims together is not efficient where the overlap in factual and legal issues is insignificant. Yet the broad test requires only that claims be related in one of these areas rather than both of them. Courts applying the broad standard for compulsory counterclaims will, therefore, be less efficient than courts applying the narrow standard, which focuses on whether the issues to be proved in support of the plaintiff’s claim overlap with the issues underlying defendant’s counterclaim. In addition, the narrow test puts fewer issues before the trier of fact, thus promoting accuracy. The narrow test balances both goals better than the broad test.

2. Finality.

The compulsory counterclaim rule benefits plaintiffs by ensuring the finality of judicial decisions. The preclusive function of the

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\textsuperscript{117} Posner, 2 J Legal Stud at 436-37 (cited in note 116). See also Bone, 89 Colum L Rev at 99 n 336 (cited in note 114). Judge Posner has also suggested that the principal significance of the liberal federal pleading and discovery rules may be their tendency to reduce error, because it is not always clear that the rules reduce aggregate expenditures on litigation and discovery. Posner, 2 J Legal Stud at 436-37. Compare John C. McCoid, A Single Package for Multiparty Disputes, 28 Stan L Rev 707, 725 n 116 (1976) (suggesting that departures from the single plaintiff, defendant, and transaction are justified only where the departure increases the chances of fairness and consistency).

\textsuperscript{118} See Agliam v Ohio Savings Ass’n, 99 FRD 145, 148 (N D Ohio 1983) (counterclaim for debt in suit under TILA not compulsory, partly on the grounds that the additional issues were likely to confuse the trier of fact). See also, Roberts Metals Inc. v Florida Properties Marketing Group, Inc., 138 FRD 89, 91 (N D Ohio 1991). Certain types of litigation present a myriad of issues which will confuse the trier of fact. The greatest confusion will occur when the relation between the counterclaim and claim is the most attenuated or where the counterclaim is particularly complicated.
The compulsory counterclaim rule ensures that a single action concludes all compulsory counterclaims arising from a transaction.119

Finality is a particularly strong concern where the defendant's successful prosecution of a claim in a subsequent proceeding might modify the respective rights and responsibilities allocated in the first.120 Subjecting judicial determinations to later revision, even in part, could reduce parties' incentives to litigate. In addition, finality promotes reliance on judicial decisions by preventing inconsistent judgments.121

The Supreme Court has repeatedly emphasized the importance of finality to the judicial system.122 Specifically, the finality of judicial decisions has long been a strong argument for the application of res judicata to a plaintiff's related but unpled claims.123 But the Court has wholeheartedly rejected the position that the doctrine should be left to judicial discretion. The Supreme Court recently reaffirmed its view that "[the] doctrine of res judicata is not a mere matter of practice or procedure . . . [but rather] a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts,"124 The Court rejected the argument that there could be any public policy or simple justice exceptions to the doctrine of res judicata.125

120 Common law res judicata prevents litigation of potential counterclaims that threaten rights established in prior litigation. See, for example, Rudell v Comprehensive Accounting Corp., 802 F2d 926, 930 (7th Cir 1986) (allowing second action would open for reexamination the rights previously established). Rule 13(a) extends this protection to concurrent actions.
123 See, for example, Commissioner v Sunnen, 333 US 591, 597 (1948).
125 Federated, 452 US at 398-402.
While both the broad and narrow tests promote finality, the broad test may be criticized as unduly discretionary, especially in light of the Court's rigid application of res judicata. The narrow test's focus on legal relevance and the collateral estoppel effects of a judgment on the plaintiff's claim provide clearer guidance than the broad test's reference to a core of operative facts and thus more effectively confines judicial discretion.

The narrow test reduces the vagaries of judicial discretion in the context of compulsory counterclaims. The narrow test also mirrors the thinking of litigants who focus on issues which must be proved to succeed on a cause of action. Litigants do not think in terms of "aggregate cores of operative facts."

The jurisdictional function of the compulsory counterclaim rule was at best weakly related to finality. Linking the determination of whether a counterclaim was compulsory with the question of jurisdiction resolved whether the first court had jurisdiction to hear the counterclaim if it had been pled. This remains the case under § 1367, because courts will continue to exercise jurisdiction over all compulsory counterclaims. Moreover, now that the jurisdictional function is codified, Rule 13(a) only serves its claim preclusive function. The narrow test better governs the area of preclusion that impacts an individual claimant.


The claim preclusion function of the compulsory counterclaim rule weakens the defendant's control over the time, place, and manner used to pursue her claims. Courts attempt to mitigate this effect of the compulsory counterclaim rule by balancing the defendant's interest in control against the interest in efficient and final resolution of disputes. But in practice, courts seldom find the defendant's interest in control a persuasive reason for finding a counterclaim permissive rather than compulsory.

Perhaps this is because in the past, the broadly construed jurisdictional function of the compulsory counterclaim rule enhanced the defendant's control to the extent that the rule provided jurisd-

128 See, for example, Grumman, 125 FRD at 163-64 (criticizing Mead Data Central v West Publishing Co., 679 F Supp 1455, 1457-62 (S D Ohio 1987), for explicitly providing for judicial discretion in Rule 13(a) analysis).

129 See text accompanying notes 84-88.

129 See Martino v McDonald's System, Inc., 598 F2d 1079, 1082 (7th Cir 1979).

129 See id (noting the balancing test, but also noting that the "convenience of the party with a compulsory counterclaim is sacrificed in the interest of judicial economy"). Other factors may merit greater weight.
diction for a defendant's compulsory counterclaims. After Gibbs, however, the courts could have exercised jurisdiction over the same counterclaims even without a compulsory counterclaim rule.\footnote{See Great Lakes Rubber Corp. v Herbert Cooper Co., 286 F2d 631, 633-34 (3d Cir 1961) (purpose of Rule 13(a) is to abolish piecemeal litigation); Plant v Blazer Financial Services, Inc., 598 F2d 1357, 1364 (6th Cir 1979) (purpose of Rule 13(a) is to provide an opportunity for the defendant to receive complete relief).}

The broad test for Rule 13(a) preclusion fails to balance the interest in judicial efficiency against the competing interest in party autonomy. Formerly, the jurisdictional function of Rule 13(a) promoted both efficiency and party autonomy: in the jurisdictional context the litigant frequently wanted the court to exert jurisdiction.

But Rule 13(a) no longer serves a jurisdictional role. And when the defendant recognizes a potential claim but would prefer to bring the claim at a later time or in a different forum, the defendant's interest clashes with a broadly-construed Rule 13. Res judicata represents the judicially determined balance between the plaintiff's interest in controlling the course of litigation and the need for judicial efficiency and finality. Because the defendant did not choose the forum or time of the first litigation, the defendant's interest in autonomy should carry at least as much weight as the plaintiff's interest. Yet a broad Rule 13(a) may force the defendant to plead a counterclaim when the plaintiff could reserve a similar claim.\footnote{See, for example, Eagerton v Valuations, Inc., 698 F2d 1115, 1119 (11th Cir 1983) (applying ancillary jurisdiction to a counterclaim without linking the determination to exercise jurisdiction with a Rule 13 analysis).} The narrow rule better reflects the appropriate balance between the defendant's autonomy and the interests of efficiency and finality.

\textbf{CONCLUSION}

Both the narrow and broad tests for the scope of Rule 13(a) look for a "logical relationship" between the plaintiff's and defendant's claims. The narrow test deems a counterclaim compulsory when the claim shares a substantial number of relevant factual issues with the plaintiff's claim. The narrow test parallels the scope of res judicata for plaintiff's claims. The broad test, on the other hand, looks for facts common between the plaintiff's case and the defendant's case. Under the broad test, a single common "operative" fact may make a counterclaim compulsory.

\footnote{See text accompanying notes 18-24.}
The broad test fails the purposes of compulsory counterclaims. By forcing loosely related claims into one action, the test sacrifices efficiency. Furthermore, under the broad test, courts force defendants to plead counterclaims where a plaintiff would have the freedom to plead or reserve a similar claim.

The narrow test for compulsory counterclaims better serves the purposes of Rule 13(a). The narrow test focuses on meeting the preclusion function policies. In contrast, a prime motivator behind the broad test is the link between the test for compulsory counterclaims and ancillary jurisdiction. Because § 1367 now governs supplemental jurisdiction, the test for compulsory counterclaims should no longer define the scope of supplemental jurisdiction. The narrow test closely resembles the test for the scope of claims barred by res judicata. Adopting the narrow test reduces or eliminates any bias in favor of the plaintiff. The narrow test promotes efficient adjudication while enhancing fairness and party autonomy, and allowing the independent development of supplemental jurisdiction.