

Washington and Lee University School of Law

Washington & Lee University School of Law Scholarly Commons

Scholarly Articles

Faculty Scholarship

2014

Transactionalism Costs

Alan M. Trammell

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>



Part of the [Civil Procedure Commons](#), and the [Litigation Commons](#)

TRANSACTIONALISM COSTS

*Alan M. Trammell**

INTRODUCTION.....	1211
I. THE ROAD TO TRANSACTIONALISM.....	1216
A. <i>The Hallmarks of Transactionalism</i>	1217
B. <i>(Partially) Realizing the Vision of Transactionalism</i>	1219
II. PATHOLOGIES OF TRANSACTIONALISM.....	1225
A. <i>The Inefficiency of Transactionalism</i>	1225
B. <i>The Failure of Transactionalism to Govern Preclusion</i> <i>Effectively</i>	1235
C. <i>The Mutability of Transactions</i>	1241
III. A PROPOSAL FOR RESTRUCTURING LAWSUITS	1245
A. <i>The Mechanics of Restructuring Joinder and Claim</i> <i>Preclusion</i>	1245
B. <i>The Advantages of the Proposal</i>	1251
C. <i>Anticipated Objections</i>	1258
CONCLUSION	1268

INTRODUCTION

A civil lawsuit may comprise multiple claims. This seemingly banal truth is one that seasoned lawyers and fledgling law students take for granted. But the idea is of relatively recent provenance, reflecting a profound change in the structure of civil litigation, which now largely turns on the notion of “transactions or occurrences.”

* Associate-in-Law, Columbia Law School. I am grateful to participants in the Sixth Annual Junior Federal Courts Workshop for their comments and suggestions. I also am especially indebted to Derek Bambauer, Jane Bambauer, Emily Berman, Zack Bray, Kevin Clermont, Robin Effron, Maria Glover, Dave Marcus, Roger Michalski, Melissa Mortazavi, Jay Tidmarsh, and the members of the 10,000-Foot Legal Theory Workshop (particularly Adam Chodorow, Dan Markel, Mike Moreland, and Mark Spottswood) for their insights and suggestions. Kristen Peltonen, Yonit Rosengarten, and Benjamin Vitcov provided exemplary research assistance for which I am grateful. Finally, I thank participants in workshops at Brooklyn Law School, where I was formerly a Visiting Assistant Professor, as well as Dean Nick Allard, who provided generous support for this project through the Dean’s Summer Research Fund.

This Article is dedicated to the memory of Dan Markel, with whom I became friends while hiking in the Colorado Rockies and discussing, among many other things, the ideas that I grapple with here.

A simple example illustrates how transactionalism,¹ at its best, operates. Imagine that Hatfield negligently causes a fender bender with his neighbor, McCoy, that leaves McCoy with damage to his car and minor personal injuries. As the two inspect the damage, McCoy becomes so enraged that he punches Hatfield in the face. Three injuries have occurred: the damage to McCoy's property, McCoy's personal injury, and the battery of Hatfield. The modern approach to civil litigation likely regards all three injuries as arising from the same transaction or occurrence—the car accident. Not only do the rules of joinder in most courts allow Hatfield and McCoy to litigate all three together, preclusion *requires* them to do so (or else forfeit any unraised claims).² This is quite sensible. In this scenario, the carrots and sticks of transactionalism effectively package together all three injuries that resulted directly from the car accident. Joining these claims together makes practical sense because the evidence regarding all three injuries will be similar (involving, for instance, the same witnesses) and because it is arguably the most efficient way for a court to adjudicate the various claims. Transactionalism also prevents serial litigation of essentially the same facts and the risk of inconsistent judgments. The beauty of the transactional approach thus lies in its simple yet powerful ability to enhance efficiency and promote fairness.

Today the idea of the “transaction or occurrence” is pervasive. It overwhelmingly governs decisions about joinder (which claims and parties may, and sometimes must, form part of a lawsuit),³ claim preclusion,⁴ certain aspects of amending pleadings,⁵ and even whether a federal court has subject matter jurisdiction over certain claims.⁶ A century

¹ See Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 *Geo. Wash. L. Rev.* 1683, 1743 (1992) (describing “transactionalism” as one of “seven shared assumptions” embraced by the procedural regimes of state and federal courts throughout the United States).

² Unless otherwise noted, references to “preclusion” pertain to *claim preclusion* (the extinguishment of all facets of a claim that a party could have brought in an earlier lawsuit) rather than *issue preclusion* (the prohibition against relitigating a particular issue that arises again in the context of a different claim). Compare Restatement (Second) of Judgments § 24 (1982) (claim preclusion), with *id.* § 27 (issue preclusion).

³ See, e.g., Fed. R. Civ. P. 13(a) (compulsory counterclaims), 20(a) (permissive party joinder).

⁴ See, e.g., Restatement (Second) of Judgments § 24(1) (1982) (articulating the transactional view of preclusion).

⁵ See, e.g., Fed. R. Civ. P. 15(c)(B) (relation back of amendments).

⁶ See, e.g., 28 U.S.C. § 1367(a) (2012) (supplemental jurisdiction).

ago the transactional approach was a brilliant innovation. It abandoned the formalisms that had balkanized claims and, instead, emphasized the efficient resolution of controversies. For all of the good that transactionalism has achieved, though, it has outlived its usefulness.

Several problems always have lurked within the theory of transactionalism, but modern litigation realities have exacerbated those difficulties. The first inherent problem is that the transactional approach represents a crude *ex ante* prediction about the most efficient structure of a lawsuit. Unlike in the earlier example, transactionalism does not always operate in its ideal form. Sometimes it can be underinclusive. Imagine, for example, that Hatfield and McCoy are neighbors who have a long-running feud with claims that derive not from a single event but from a series of disputes (say, a common-law nuisance one year, breach of an oral contract the year after that, etc.). Efficiency probably suggests that a court still should resolve all of the claims in one proceeding, particularly if they turn on straightforward questions and involve the same witnesses (say, their next-door neighbors), but the transactional approach likely regards the claims as stemming from distinct transactions. On the other hand, transactionalism can be overinclusive. For instance, two large corporations might have a complicated contract, and the two parties might believe that there have been hundreds or even thousands of breaches over the years. For the sake of salvaging an ongoing relationship, the parties might want to isolate only one consequential claim that is at the heart of their dispute and not litigate every conceivable claim that derives from the contract. But the transactional approach might force them to do just that. Both situations thus lead to inefficiencies.

The second problem is that there has always been an innate tension between transactionalism's goals. On the front end of litigation, the transactional approach aspires toward maximal flexibility, giving judges certain discretion in crafting a lawsuit. That flexibility becomes problematic on the back end of litigation, though. In most jurisdictions, the transactional approach governs claim preclusion, a doctrine that extinguishes claims that a party could and should have brought in a lawsuit but did not. Although the doctrine is harsh, it is necessary as a means to effectuate the transactional vision of litigation. But because of the severe penalty that it imposes—the loss of an otherwise viable claim—basic fairness requires that the parties should be able to predict how that doctrine will operate. In other words, the transactional approach requires flexibility at the beginning of litigation in order to capture certain effi-

ciencies, but such flexibility undermines the predictability that is essential to the fair operation of claim preclusion. Exacerbating the problem is the absence of a mechanism by which parties can learn which claims belong to a single transaction or occurrence. Most of the time, a litigant will discover the precise contours of a transaction, and thus how broadly preclusion will apply, only when it's too late—when the litigant tries to bring a claim in a subsequent lawsuit. Consequently, the current notion of a transaction has ossified. By attempting to be all things at all times, it is neither fully flexible nor fully predictable.

In this Article I propose a mechanism that resolves most of these tensions and, for the first time, actually achieves the goals that transactionalism pursues imperfectly. The proposal creates a completely flexible means by which parties and judges can determine the appropriate structure of any given lawsuit and forgo imperfect heuristics. At the same time, the proposal gives the parties two things that they currently lack—first, complete clarity at the outset of litigation about which claims are subject to claim preclusion; and second, the power to control exactly how that doctrine will apply to their lawsuit. In short, it creates efficiency and predictability that transactionalism cannot.

This Article will proceed in three Parts. Part I will trace the development of transactionalism and the robust role that it now plays in structuring civil litigation. It will also identify the specific goals that transactionalism seeks to achieve as well as certain tensions between those goals. Although transactionalism was innovative and controversial a century ago, its adoption in most jurisdictions proved to be an overwhelmingly positive development.

Part II will demonstrate why transactionalism has become obsolete. First, it is infected with the deficiencies that I have sketched above—it imperfectly tries to anticipate the ideal scope of a lawsuit, uncomfortably governs a rigid notion of preclusion, and fails to provide the predictability that preclusion demands. In short, through its very ubiquity, transactionalism unsuccessfully attempts to serve too many roles. Moreover, it does not capture a single idea but, as its proponents readily acknowledge, is a fluid concept. That fact is by no means fatal, but it demonstrates that discarding the transaction or occurrence will not forsake an inherently useful legal concept or one that has acquired a settled meaning.

Part III will outline a new model for structuring litigation that can achieve what the transactional approach cannot. The proposal begins

with a mandatory claim joinder rule. At the inception of litigation, the parties must put forward *all* of the claims that they have against one another, whether or not those claims are transactionally related. Unlike the current mandatory joinder rules,⁷ this rule does not reflect a judgment that all of those claims necessarily should form part of the litigation package. Instead, it is an instrumental rule that compels the parties to put all of their claims against one another on the table for negotiation. Like the current rules governing compulsory claim joinder, though, the penalty for failing to put forward a ripe claim would be a bar against bringing that claim in future litigation.

Under the Federal Rules and many state rules of civil procedure, the parties already have an obligation to confer about how best to handle pretrial matters.⁸ At that conference, the parties would negotiate the scope of the lawsuit. If the parties are able to agree on which claims most sensibly belong in the litigation, then the court presumptively would bless that agreement during a scheduling conference.⁹ On the other hand, if the parties are unable to agree, then the court would resolve any disagreements about which claims to include in or exclude from the litigation. The judge ultimately will make the final determination about the scope of the litigation. After determining which claims to include, the judge will dismiss the excluded claims without prejudice, and preclusion will attach only to the claims that are part of the designated litigation package.

An important word about this Article's purview is in order. At various points, I speak of a model that will create the optimal litigation package and thereby realize untapped efficiencies. Indeed, that is the goal of a fully developed model. In this Article, though, I assume a static party structure and deal only with the mechanisms by which the actual parties to a lawsuit structure their claims. I leave for future work the task of crafting the appropriate litigation unit when the party structure is dynamic. Other scholars have begun to explore such party joinder questions,¹⁰ which are complex enough to require separate treatment.

⁷ See, e.g., Fed. R. Civ. P. 13(a) (compulsory counterclaim), 19 (required party joinder); see also Restatement (Second) of Judgments § 24(1) (1982) (claim preclusion); Robert C. Casad & Kevin M. Clermont, *Res Judicata: A Handbook on Its Theory, Doctrine, and Practice* 61 (2001) (describing claim preclusion as a "common-law rule of compulsory joinder").

⁸ See, e.g., Fed. R. Civ. P. 26(f).

⁹ See, e.g., *id.* 16 (providing for pretrial conferences).

¹⁰ See, e.g., Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 *Colum. L. Rev.* 1 (1989);

The new model that I propose will embody three novel developments. First, the parties and the court will determine what the appropriate structure of any given lawsuit is and no longer will be at the mercy of transactionalism's rough predictions. Second, the parties will have autonomy that they have not enjoyed before—the power to determine the preclusive consequences of their litigation. Finally, the parties will have new-found certainty regarding the scope of preclusion. At the very least, the parties will know exactly which claims constitute the litigation package and to which claim preclusion will attach. Thus, for the first time, the parties no longer will have to make educated guesses about how broadly the doctrine will sweep.

I. THE ROAD TO TRANSACTIONALISM

Structuring lawsuits around transactions and occurrences is a relatively recent innovation that defies centuries of formalism. The idea has revolutionized how litigants and courts conceive of disputes, a lawsuit's ability to resolve those disputes expeditiously, and a judicial system's power to compel litigants to realize those efficiencies.

Until the middle of the nineteenth century, courts and litigants had scant power to shape the structure of lawsuits. At common law, litigation focused on just two parties (or sets of parties),¹¹ and the pleading mechanisms were notoriously cumbersome, technical, and unforgiving.¹² Such a system, almost by definition, was inimical to bringing together other parties or claims.¹³ Although courts of equity evinced greater flex-

Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 *U. Pitt. L. Rev.* 809 (1989) [hereinafter Freer, *Avoiding Duplicative Litigation*]; Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 *N.Y.U. L. Rev.* 1061 (1985).

¹¹ See William Wirt Blume, *A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counterclaims*, 26 *Mich. L. Rev.* 1, 2 (1927); see also Charles E. Clark, *Handbook of the Law of Code Pleading* 13 (2d ed. 1947) (noting that common-law pleading narrowed the parties' dispute to a single issue).

¹² See J.H. Baker, *An Introduction to English Legal History* 53, 86 (4th ed. 2002); Clark, *supra* note 11, at 14–15.

¹³ A limited type of claim joinder was available when claims were based on the same writ, even if the claims had nothing else in common; however, there were no means for joining claims merely because they were logically related. See Clark, *supra* note 11, at 436; Blume, *supra* note 11, at 4–5, 9; Oliver L. McCaskill, *The Elusive Cause of Action*, 4 *U. Chi. L. Rev.* 281, 294–95 (1937).

ibility in structuring litigation,¹⁴ the influence of such advancements was necessarily limited as long as courts of law and equity remained distinct.

A comprehensive account of how the “transaction or occurrence” became the predominant organizing principle for lawsuits is beyond this Article’s scope. This Part briefly sketches that story, though, in order to elucidate the profound and positive impact that transactionalism has had, as well as the specific procedural goals that it seeks to achieve. It also lays the groundwork for assessing the shortcomings of the transactional approach, which has never fulfilled its expansive promises.

A. The Hallmarks of Transactionalism

The notion of “transactions” as an organizing principle for litigation originated with nineteenth-century reformers. It arose in conjunction with the code movement,¹⁵ which aspired to jettison the common law’s formalisms and instead create a more streamlined procedural regime.¹⁶ Although the nomenclature was new, it harked back to equity’s aspiration to flexibly structure litigation in order to resolve entire controversies.¹⁷ The evolution toward a truly fluid litigation structure proceeded in fits and starts over the ensuing decades, though,¹⁸ and did not come to fruition until well into the twentieth century.¹⁹

¹⁴ See Blume, *supra* note 11, at 10, 11, 13, 16 (noting equity’s focus on avoiding multiplicity of lawsuits and permitting joinder of parties and claims that shared certain commonalities).

¹⁵ The code movement began in earnest in 1848 with the adoption of the New York Code (also known as the Field Code, after its principal author, David Dudley Field) and quickly spread to other states and England. See Clark, *supra* note 11, at 21–23.

¹⁶ See *id.* at 22–23 (describing the codes’ most important characteristics as including a single form of action, fact pleading, and expanded joinder possibilities).

¹⁷ See *id.* at 435–38.

¹⁸ For instance, some courts had interpreted “transaction” exceedingly narrowly, essentially using it to refer only to a contract or a business negotiation. See *id.* at 657–58 (noting that some courts found “that ‘transaction’ refers to business negotiations”); John N. Pomeroy, *Code Remedies: Remedies and Remedial Rights by the Civil Action* § 650, at 1055 (5th ed. 1929); Charles A. Wright, *Estoppel By Rule: The Compulsory Counterclaim Under Modern Pleading*, 38 *Minn. L. Rev.* 423, 449 n.121 (1954) (arguing that the New York Court of Appeals “managed to emasculate” a joinder rule by adopting “a very narrow construction of the concept ‘same transaction’”); see also Clark, *supra* note 11, at 438–40 (noting gradual progress toward a flexible litigation structure).

¹⁹ See, e.g., Wright, *supra* note 18, at 437–53 (tracing federal and state courts’ acceptance of a broad interpretation of “transactions or occurrences” in the compulsory counterclaim context).

The idea in its mature form is relatively straightforward. Transactionalism is predicated on the notion that because lawsuits seek to resolve real-world disputes, the structure of litigation should reflect people's real-world perceptions of those disputes. In the hypothetical car accident involving Hatfield and McCoy, McCoy suffered both personal injury and property damage. Almost every non-lawyer would regard the harm as flowing from a single event and quickly would perceive the commonalities inherent to both claims. The most efficient way to resolve those claims is not only to allow, but also to require, the plaintiff to bring the two claims in one lawsuit. Organizing lawsuits around "transactions or occurrences," in the nonlegal sense, expresses the idea that commonality and efficiency are inextricably linked.²⁰

Transactionalism embodies three essential hallmarks. First, it reflects a flexible and pragmatic vision of how to organize lawsuits. According to this precept, the structure of lawsuits should turn on a grouping of facts that corresponds to a practical conception of transactions or occurrences rather than technical legal differences.²¹ Proponents and critics alike have recognized flexibility as one of transactionalism's most salient attributes.²² A half-century ago, Professor Charles A. Wright noted that "[c]ourts and commentators have, quite sensibly, refrained from any very serious attempts at definition of the phrase 'transaction or occurrence.'" ²³ That wasn't an indictment.²⁴ Instead, it was a testament to the breadth and power of the new approach.

²⁰ See, e.g., Blume, *supra* note 11, at 57 ("It is at once evident that the principle of common questions is thoroughly rational. If the causes sought to be joined present common questions of law or fact, their joinder will save time and expense for all concerned."); Robin J. Efron, *The Shadow Rules of Joinder*, 100 *Geo. L.J.* 759, 763 (2012) ("The commonalities approach represents a view that the relatedness of claims or parties conveys significant information about whether joinder is appropriate.");

²¹ See Clark, *supra* note 11, at 137–38 (advocating "looking at the facts as they will be presented at the actual trial," that is, "a lay or nonlegal grouping of the facts into a single unit," and emphasizing "trial conditions" rather than "arbitrary formal distinctions read haphazardly into vague phrases"); Wright, *supra* note 18, at 456 (noting that "a 'cause of action' is that aggregate of operative facts which may conveniently be dealt with in one lawsuit").

²² See, e.g., Bone, *supra* note 10, at 109; Efron, *supra* note 20, at 772; Ernst Schopflocher, *What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?*, 21 *Or. L. Rev.* 319, 363 (1942); Charles A. Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 *Minn. L. Rev.* 580, 582–83 (1952); see also *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926) ("'Transaction' is a word of flexible meaning.");

²³ Wright, *supra* note 18, at 437.

²⁴ See *id.* at 442 (refuting the suggestion that there is any harm in compelling broad joinder).

Second, and closely related to pragmatism, is the notion that judges should have wide discretion to determine the optimal litigating structure of each particular lawsuit. Proponents of transactionalism believed that expert judges would develop both paradigm cases as well as certain factors to guide joinder decisions and thereby in time settle “on optimal litigating structures for different types of disputes.”²⁵

The third hallmark of transactionalism is the purpose of such flexibility—effectuating goals of judicial economy, convenience, and basic fairness.²⁶ In its modern form,²⁷ the transactional approach promotes the “convenience of trial,” a phrase that Professor (and later Judge) Charles Clark, one of the principal drafters of the Federal Rules of Civil Procedure, coined as a shorthand encapsulation of those various goals.²⁸

B. (Partially) Realizing the Vision of Transactionalism

1. The Problem of Compulsion. Starting with the code movement in the nineteenth century, many jurisdictions laid the groundwork for a

²⁵ Bone, *supra* note 10, at 103 n.348; see also *id.* at 98 (noting that most twentieth-century proposals called for greater judicial discretion and procedural flexibility); Mary K. Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 *Tex. L. Rev.* 1723, 1728 (1998) (noting judicial discretion in shaping ideal litigation structure).

²⁶ See Casad & Clermont, *supra* note 7, at 66 (noting the efficiency rationale of claim preclusion rules based on transactionalism); Blume, *supra* note 11, at 58 (noting that the guiding principle under a transactional approach was “but a rule of convenience”); Bone, *supra* note 10, at 80, 85 (noting the preeminence of “convenience of trial”); Kane, *supra* note 25, at 1728–29 (noting the goals of convenience, efficiency, and avoiding multiplicity of litigation); John C. McCoid, *A Single Package for Multiparty Disputes*, 28 *Stan. L. Rev.* 707, 707 (1976) (noting the goals of judicial economy and avoiding the unfairness of inconsistent judgments); Douglas D. McFarland, *Seeing the Forest for the Trees: The Transaction or Occurrence and the Claim Interlock Civil Procedure*, 12 *Fla. Coastal L. Rev.* 247, 301 (2011) (“The goal of rules of procedure is to draw all factually related matters into a single action that can conveniently and efficiently be resolved in one case.”).

²⁷ The codes’ conception of a “transaction” was still tethered to a rigid belief in the inherent distinctness of rights, remedies, and procedure, whereas the “transaction or occurrence” of which the twentieth-century reformers spoke was much more flexible and pragmatic. See Bone, *supra* note 10, at 102; see also Douglas D. McFarland, *In Search of the Transaction or Occurrence: Counterclaims*, 40 *Creighton L. Rev.* 699, 705 (2007) (“Clark believed strongly a cause of action was fact-based, a set of facts that a lay person would expect to be tried together without regard to legal rights or duties; one cause of action could contain several legal theories of recovery.”).

²⁸ See Bone, *supra* note 10, at 85. Other scholars have noted that while such goals often will be complementary, they also can reflect different actors’ perspectives. See Effron, *supra* note 20, at 767 (contrasting litigants’ interest in private efficiency and fairness with the judicial system’s interest in conserving public resources); see also Bone, *supra* note 10, at 110 (noting the “tension between trial convenience and litigant autonomy”).

transactional approach to litigation by liberally authorizing the joinder of claims in a single lawsuit.²⁹ Some moved more speedily (and logically) than others in that direction.³⁰ Today, figuring out what jurisdictions *allow* in terms of claim joinder is remarkably easy: everything.³¹ Permissive claim joinder rules now go well beyond the transaction or occurrence. Federal and most state rules allow parties to bring virtually *any* claim against an opposing party, regardless of whether that claim is related to the original litigation.³²

By the middle of the twentieth century, the real work no longer lay in ascertaining what the rules allowed but, instead, what they required. A truly transactional approach to structuring litigation would have been impossible without a combination of both carrots (liberal permissive joinder rules) and sticks (claim preclusion and mandatory joinder rules). Professor Clark always recognized that the two were complementary and equally necessary.³³ The task thus centered on discerning the Goldilocks principle of compulsion—how much is “just right.”

Despite the general progress toward a transactional vision of litigation, courts initially were skeptical of rules that would have forced parties to bring all of the claims that fell within an amoeba-like definition of

²⁹ See Clark, *supra* note 11, at 128–29; see also Pomeroy, *supra* note 18, § 333, at 510–12 (noting the codes’ “exceedingly general and vague clause permitting the union of causes of action arising out of the same transaction, or transactions connected with the same subject of action”).

³⁰ Some code jurisdictions fully embraced a policy of liberal claim joinder. See Blume, *supra* note 11, at 20–21 (Kansas); *id.* at 24 (New Jersey); *id.* at 30 (Michigan); *id.* at 21 (England). Others drew “arbitrary and illogical” boundaries that hampered joinder. *Id.* at 26 (criticizing the codes of Arizona and New York).

³¹ Well, almost everything. Exceptions to the overarching rule need not detain the analysis at this point, even though certain procedural quirks can make the rule less than absolute. See, e.g., *infra* notes 100–02 and accompanying text (discussing exhaustion requirements that prevent litigants from bringing certain claims immediately).

³² See, e.g., Fed. R. Civ. P. 13(b) (allowing defendants to bring counterclaims that are not transactionally related), 18(a) (permitting a party who is already asserting a claim against an opposing party to bring “as many claims as it has” against that opposing party). Nearly every state has similar rules that permit plaintiffs and defendants to bring claims that are not transactionally related to the original lawsuits. The exceptions basically prove the rule. See, e.g., Connecticut Practice Book § 10-10 (1998) (requiring that counterclaims arise from an underlying transaction).

³³ See Clark, *supra* note 11, at 144 (arguing that “rules of repose should have even more force now in days of free amendment; a litigant has every opportunity to present the merits in the first suit”).

“transaction or occurrence.”³⁴ The skepticism was in some ways understandable. Extending the transactional approach to claim preclusion and mandatory joinder rules imposed a draconian penalty—the loss of an otherwise viable claim that a court, with hindsight, deemed to be part of a transaction or occurrence that parties had litigated in an earlier lawsuit.

Many of the misgivings stemmed from a conundrum that I elucidate more fully below, even if opponents of the transactional approach did not express themselves in such terms. Transactionalism was supposed to embrace flexibility in structuring a lawsuit at the beginning of litigation, and its effectiveness in doing so depended on a certain level of compulsion. But that compulsion—in the form of claim preclusion—required the exact opposite of flexibility. In order to apply fairly, preclusion needed to have a fixed and predictable scope.

Professor Clark acknowledged the concern about closing the door on viable claims,³⁵ particularly given the inherent vagueness of what constituted a transaction or occurrence.³⁶ Nonetheless, he argued that such compulsion—to the full extent of a transaction or occurrence—was vital to achieving the efficiencies that inhere in the transactional structure of litigation, and that courts should enforce the obligation rigorously.³⁷

Today most states and the District of Columbia have adopted the transactional structure of litigation, at least in theory.³⁸ While all jurisdictions have generous permissive joinder rules, the majority also force

³⁴ A comprehensive survey in the 1940s found gradual but incomplete progress toward a full vindication of the transactional view of litigation. See Schopflocher, *supra* note 22, at 324–28 (finding wide acceptance of the transactional approach in tort cases involving single loss but different theories of recovery); *id.* at 335–38 (finding resistance to the transactional approach in contracts cases involving single loss but different theories of recovery); *id.* at 350–51 (finding division of authority on whether to adopt the transactional approach in property cases). Other commentators expressed skepticism about the transactional approach to claim preclusion. See, e.g., Note, Problems of Res Judicata Created by Expanding “Cause of Action” Under Code Pleading, 104 U. Pa. L. Rev. 955, 972–73 (1956) (arguing that the transactional approach to preclusion should not trump party autonomy and is appropriate only if it generally corresponds to parties’ desires and expectations for litigation).

³⁵ See Clark, *supra* note 11, at 144 (“There is a fear of shutting off action by a party who may seem not to have presented his case any too well in earlier litigation he has lost . . .”).

³⁶ See *id.* (noting that transactionalism was “too broad and too vague to settle questions of res judicata and the splitting of causes”); see also *id.* at 145.

³⁷ See *id.* at 144–45.

³⁸ At present, thirty-four states and the District of Columbia have adopted the transactional approach to claim preclusion, and several other states incorporate elements of the transactional approach. See Appendix A. Moreover, the overwhelming majority of jurisdictions—forty states and the District of Columbia—have adopted a compulsory counterclaim rule similar to that of Federal Rule 13(a). See Appendix B.

both plaintiffs and defendants to bring all of their transactionally related claims in one lawsuit. For plaintiffs, that compulsion usually does not derive from an explicit joinder requirement,³⁹ but instead from the common-law doctrine of claim preclusion,⁴⁰ which most states now define in transactional terms.⁴¹ Consequently, a plaintiff who does not bring all transactionally related claims in one proceeding is barred from bringing any such claims in later lawsuits. For defendants, the compulsion is more direct—a compulsory counterclaim rule. Typical language in such rules requires that a defendant “must state as a counterclaim any claim that . . . arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”⁴² The consequence of a defendant’s failure to bring such a counterclaim is “estoppel” or “waiver” of the claim.⁴³ Notwithstanding slight terminological differences over the years,⁴⁴ the modern concept of preclusion applies to both plaintiffs and defendants and largely operates in the same way with regard to all parties—barring them from asserting a transactionally related claim in subsequent litigation.⁴⁵

³⁹ But cf. Mich. Ct. R. 2.203(A) (requiring a “pleader,” including a plaintiff, to “join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action”). The Michigan rule of mandatory claim joinder for plaintiffs is anomalous.

⁴⁰ See Casad & Clermont, *supra* note 7, at 61, 67 (describing claim preclusion as a “common-law rule of compulsory joinder”); Wright, *supra* note 18, at 428–29. Louisiana and Virginia have adopted a transactional approach to claim preclusion by statute and court rule, respectively. See La. Rev. Stat. Ann. § 13:4231 (West 2012); Va. Sup. Ct. R. 1:6(a).

⁴¹ See Restatement (Second) of Judgments § 24(1) (1982) (“[T]he 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.” (emphasis added)); see also Appendix A.

⁴² See, e.g., Fed. R. Civ. P. 13(a).

⁴³ Wright, *supra* note 18, at 428–29; see 6 Charles A. Wright et al., *Federal Practice and Procedure* § 1417 (3d ed. 2010).

⁴⁴ In early work regarding compulsory counterclaims, Professor Wright preferred to call the preclusion that attends such counterclaims “estoppel.” See Wright, *supra* note 18, at 429. The modern approach eschews any distinction in how the doctrine operates with respect to plaintiffs and defendants. See, e.g., Restatement (Second) of Judgments § 22 & cmt. e (1982). In accordance with the modern understanding, I use the term “preclusion” to encompass both the traditional concept of claim preclusion that applies to plaintiffs and also the consequences of a defendant’s failure to bring a compulsory counterclaim.

⁴⁵ Early commentators preferred *not* to describe a counterclaim as falling within the scope of claim preclusion precisely because estoppel might be more flexible and subject to equitable exceptions. See Wright, *supra* note 18, at 429 (arguing that estoppel is “a more flexible tool”); see also Schopflocher, *supra* note 22, at 364 (arguing for similar flexibility). In fact,

2. *The Contours of Transactionalism.* Although the transactional approach has become pervasive, the question remains: What counts as part of a transaction or occurrence? Although the term has been a fixture of civil litigation in most jurisdictions for several decades, it still resists a hard-and-fast definition.⁴⁶ In some ways, that is the point. After all, one of transactionalism's supposed attributes is an innate flexibility that allows courts to structure litigation in a way that best effectuates the goals of efficiency and convenience.

Courts and scholars have attempted to articulate various tests of transactionalism.⁴⁷ In the context of counterclaims, they generally agree that the best test inquires whether there is a "logical relationship" between the defendant's counterclaim and the underlying action.⁴⁸ Although it accurately conveys the expansiveness of transactions and occurrences, it does not necessarily provide a firm analytical toehold for courts and litigants.⁴⁹ In the claim preclusion context, other scholars have offered something of a negative definition to demonstrate the breadth of transactions and occurrences. Professors Robert Casad and Kevin Clermont's treatise notes that a transaction may encompass different harms, different evidence, different legal theories, different remedies, and even a se-

however, claim preclusion and estoppel have acquired the same rigidity. See *infra* notes 99–117 and accompanying text.

⁴⁶ See *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926); Wright, *supra* note 18, at 437; see also Effron, *supra* note 20, at 772 (noting that the inherent vagueness of the term "transaction" "is a long-standing complaint").

⁴⁷ For counterclaims, courts generally recognize four tests: (1) whether the claims present the same issues of law or fact; (2) whether preclusion would bar a subsequent lawsuit that attempts to raise the claim; (3) whether the same or similar evidence would support both the original claim and the counterclaim; and (4) whether there is a logical relationship between the claims. See *McFarland*, *supra* note 27, at 709–13; see also, e.g., *Tank Insulation Int'l, Inc. v. Insultherm, Inc.*, 104 F.3d 83, 85–86 (5th Cir. 1997); *FDIC v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994); *Maddox v. Ky. Fin. Co.*, 736 F.2d 380, 382 (6th Cir. 1984); *Sue & Sam Mfg. Co. v. B-L-S Constr. Co.*, 538 F.2d 1048, 1051–53 (4th Cir. 1976); cf. *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1325–26, 1326 n.4 (Fed. Cir. 2008) (recognizing the first, third, and fourth tests but rejecting the second test).

⁴⁸ See 6 Wright et al., *supra* note 43, § 1410, at 58–59; *McFarland*, *supra* note 27, at 713; Wright, *supra* note 18, at 440–42; see also Effron, *supra* note 20, at 778 (treating the "logical relationship" test as authoritative); Michael D. Conway, Comment, Narrowing the Scope of Rule 13(a), 60 U. Chi. L. Rev. 141, 151 (1993) (arguing that "the logical relationship test . . . is the most expansive and commonly used").

⁴⁹ See Robin J. Effron, Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction, 16 Lewis & Clark L. Rev. 867, 893–94 (2012); *McFarland*, *supra* note 27, at 713 (describing criticisms of the test). But see Wright, *supra* note 18, at 442–43 (arguing that the "logical relationship" test best captures how transactionalism works in teasing out litigation efficiencies).

ries of related events.⁵⁰ The point is the same—transactionalism, in its breadth and malleability, defies legalistic categories.

The various tests and formulations often sound like exercises in describing and reiterating the hallmarks and goals of the transactional approach. That probably cannot be helped. But it is cold comfort to a litigant trying to predict exactly what counts as part of a transaction.

3. *The Aspirational Symmetry of Transactionalism.* Symmetry across different procedural devices is among the principal virtues to which transactionalism aspires. Liberal joinder rules *allow* litigants, at a bare minimum, to join all of the claims that form part of the same transaction or occurrence.⁵¹ In fact, joinder rules are even broader in nearly every jurisdiction.

The transactional approach also governs which claims a party *must* bring.⁵² For plaintiffs, such compulsion usually flows from claim preclusion;⁵³ for defendants, it typically comes in the form of the compulsory counterclaim rule, which most jurisdictions have adopted.⁵⁴ Consequently, plaintiffs and defendants in most jurisdictions face the same degree of compulsion.⁵⁵

Transactionalism extends to other rules and devices, including certain amendments to pleadings⁵⁶ and party joinder mechanisms.⁵⁷ Moreover,

⁵⁰ Casad & Clermont, *supra* note 7, at 68.

⁵¹ See *supra* notes 31–32 and accompanying text.

⁵² See Casad & Clermont, *supra* note 7, at 66 (arguing that “once procedural rules for pleading, discovery, and amendment have become liberal enough to permit the parties to litigate fully the whole transaction in one lawsuit,” an equally broad rule of claim preclusion “would not be unfair”).

⁵³ See *id.* at 67; Wright, *supra* note 18, at 456; see also Mich. Ct. R. 2.203(A) (compulsory joinder rule for plaintiffs).

⁵⁴ See Appendix B (noting that forty states and the District of Columbia have adopted compulsory counterclaim rules).

⁵⁵ See Wright, *supra* note 18, at 456; see also Appendices A and B. As some commentators have noted, though, a mismatch can arise when a state defines claim preclusion for plaintiffs more narrowly than a transaction or occurrence but defines compulsory counterclaims in broad transactional terms. See Arthur F. Greenbaum, *Jacks or Better to Open: Procedural Limitations on Co-Party and Third-Party Claims*, 74 Minn. L. Rev. 507, 541 n.160 (1990); see also Conway, *supra* note 48, at 144–46 (similarly noting an “asymmetry” in how preclusion applies to plaintiffs and defendants in some states). For example, the Appendices show that Alabama, Florida, Georgia, Indiana, Nevada, North Carolina, and West Virginia have adopted the “same evidence” test for claim preclusion as applied to plaintiffs, a test that theoretically is narrower than the transactional test. But all of those states also have adopted compulsory counterclaim rules that sound in transactionalism.

⁵⁶ See Fed. R. Civ. P. 15(c) (relation back of amendments to pleadings).

⁵⁷ See, e.g., *id.* 20(a) (permissive party joinder).

2014]

Transactionalism Costs

1225

in federal court, transactionalism even governs certain jurisdictional questions.⁵⁸

The upshot is that the structure of modern civil litigation overwhelmingly turns on the transactional approach. Although the evolution toward transactionalism represented a marked improvement over earlier procedural regimes, the approach is plagued with defects, some of which are inherent and some of which developed insidiously over several decades. I turn in the following Part to these problems.

II. PATHOLOGIES OF TRANSACTIONALISM

The transactional approach represented a fundamental shift in thinking about how to structure lawsuits. It dispensed with legal formalisms in favor of flexibility, and it broadly empowered courts and litigants to realize the efficiencies of litigating related claims together. In short, it was a brilliant innovation. But its time has passed.

Transactionalism, in its modern incarnation, creates several pathologies. I speak of how the transactional approach operates today because although some of the pathologies always lay dormant within the idea of transactions or occurrences, the nature of modern litigation has exacerbated the problems. The most conspicuous pathology is the failure to create the optimal lawsuit size for resolving disputes. Lawsuits often become inefficiently bloated with too many claims. Moreover, the transactional approach fosters unpredictability in the realm of claim preclusion, thus undermining autonomy and basic fairness. This Part discusses those pathologies and ends by noting that the supposed symmetry of the transactional approach breaks down, thus suggesting that it is not an inherently meaningful concept.

A. The Inefficiency of Transactionalism

Since its inception, the transactional approach to structuring litigation always has faced precarious tensions and ambiguities. Early proponents

⁵⁸ When claims fail to satisfy the requirements of either federal question jurisdiction, see 28 U.S.C. § 1331 (2012), or diversity jurisdiction, see *id.* § 1332, federal courts nonetheless may assert supplemental jurisdiction over claims that are transactionally related to the litigation. See *id.* § 1367(a) (presumptively extending jurisdiction “over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution”). But see *id.* § 1367(b) (partially curtailing the reach of supplemental jurisdiction).

of the approach recognized those problems, but they also regarded any potential defects as corrigible and remained convinced that transactionalism would promote the most efficient resolution of conflicts. The nature of litigation has changed profoundly in recent decades, though, thus undercutting some of transactionalism's most fundamental assumptions. As those assumptions erode, so too does transactionalism's capacity to promote the efficient resolution of controversies.

1. Transactionalism's Inherent Mismatch. There was always the risk that structuring lawsuits around transactions or occurrences would not lead to the most efficient litigation unit. The problem is that the transactional approach has to reconcile two policies that never could coexist easily—flexibility (on the front end of litigation) and predictability (on the back end).

Transactionalism relied on the new liberality of joinder rules and unprecedented flexibility at the beginning of a lawsuit so that parties and judges could create the optimal structure for their lawsuit.⁵⁹ As noted above,⁶⁰ though, the progenitors of the transactional approach recognized that merely allowing parties to litigate more claims would not necessarily lead to the most efficient and socially optimal litigation package. The transactional vision could not come to fruition without the compulsion of preclusion rules. Accordingly, transactionalism governs joinder decisions at the inception of litigation and also the sanctions that apply if a party fails to bring all transactionally related claims. At first blush, that seems sensible and appears to create a certain symmetry. But the flexibility that is among transactionalism's defining attributes—and arguably works well at the beginning of a lawsuit—becomes problematic in the claim preclusion context. Precisely because preclusion extinguishes unlitigated claims, basic fairness requires that parties should have the ability to predict how those penalties will apply. Consequently, claim preclusion requires the crisp delineation that transactionalism sought to avoid.

Simply put, transactionalism governs disparate questions and thus attempts to do too much. In a slightly different context, Professor Howard Erichson has observed that “preclusion is backward-looking, while join-

⁵⁹ See supra notes 29–33 and accompanying text.

⁶⁰ See supra notes 33–37 and accompanying text.

der is forward-looking.”⁶¹ Those dynamics lead to the potential tension. Although maximal flexibility might be desirable when making forward-looking decisions about the most efficient structure of a given lawsuit, such flexibility—when applied in hindsight to the draconian doctrine of preclusion—can upset settled expectations and lead to severe unfairness.

Early proponents were not entirely blind to this potential tension. Specifically, they recognized that the notion of a transaction or occurrence could be ambiguous and thus undermine the predictability that is essential to the fair operation of claim preclusion.⁶² They insisted, however, that there was no practical problem. If anything, the ambiguity created a desirable incentive structure for parties to effectuate the broadest possible joinder of claims.⁶³ Litigants faced with the question of whether a particular claim or counterclaim is part of the same transaction or occurrence likely will err on the side of inclusion in order to avoid the prospect of effectively losing those claims.⁶⁴ Many proponents of the transactional approach believed that the more claims a court could resolve in one proceeding, the better. Consistent with this general view, some early scholars wanted to go further than the transactional requirement and mandate that the parties join together *all* of the claims that they had against one another.⁶⁵ The ambiguity of the transactional approach to preclusion thus was not, in their minds, a source of unfairness; instead, it simply encouraged parties to take full advantage of broad joinder rules. Those incentives would enable courts to resolve as many claims as possible in a single proceeding, an approach that in most instances would lead to the greatest efficiency. Scholars recognized that an occasional

⁶¹ Howard M. Erichson, *Of Horror Stories and Happy Endings: The Rise and Fall of Preclusion-Based Compulsory Party Joinder Under the New Jersey Entire Controversy Doctrine*, 9 *Seton Hall Const. L.J.* 757, 773 (1999).

⁶² See, e.g., Clark, *supra* note 11, at 144 (noting “objections raised by certain acute critics” who regarded transactionalism as “too broad and too vague to settle questions of *res judicata* and the splitting of causes”).

⁶³ See *id.* at 144–45.

⁶⁴ See *id.* at 144 (noting that “a litigant has every opportunity to present the merits in the first suit”); Blume, *supra* note 11, at 58–59 (noting that “[j]oinder should be encouraged” regardless of whether the various claims are part of the same transaction or occurrence); Wright, *supra* note 18, at 433 (“[T]hus the careful attorney can and will plead all his client’s claims as counterclaims if there is any reason at all to think that they may be compulsory.”); see also Effron, *supra* note 20, at 761 (“Litigants are taught to rely on the liberal rules of joinder to build their lawsuits . . .”).

⁶⁵ See Blume, *supra* note 11, at 58–59; see also Clark, *supra* note 11, at 145–46 (endorsing Blume’s view that expansion of compulsory claim joinder rules would be beneficial, but expressing skepticism that such further expansion would be achievable).

lawsuit might become unwieldy, but they argued that the solution was simple: A court could always order separate trials.⁶⁶

2. *New Litigation Realities.* In the early twentieth century, the potential mismatch between joinder and preclusion's respective premises—flexibility and predictability—might have been only that: a mere potentiality. Several decades later, though, it had become an insidious reality.

Two of the fundamental assumptions underlying transactionalism have eroded. First, litigation has become significantly more complex than it was many decades ago; and second, most cases do not actually proceed to trial. The interaction of those two new realities has denuded transactionalism of its power to create the most efficient litigation unit.

Several generations ago, scholars probably were correct to assume that resolving as many claims as possible in one lawsuit would be both practicable and desirable. At mid-century, a substantial majority of lawsuits involved negligence actions stemming from car accidents.⁶⁷ A lawsuit focused primarily on a car accident likely comprised a handful of individuals and probably was capable of handling any of the discrete claims that they had against one another. An incentive structure that encouraged the parties to include more, rather than fewer, claims probably enhanced judicial efficiency by allowing a court to resolve all of those discrete issues more expeditiously. But in an era in which complex cases can involve hundreds or thousands of parties, even more claims, and potentially cumbersome discovery,⁶⁸ the intuition that “more is better”

⁶⁶ See Blume, *supra* note 11, at 58; William W. Blume, *The Scope of a Civil Action*, 42 *Mich. L. Rev.* 257, 266–67 (1943) [hereinafter *Blume, Scope of a Civil Action*]; Wright, *supra* note 18, at 443.

⁶⁷ See Wright, *supra* note 18, at 459 (noting that “accident cases make up the bulk of litigation today” and quoting judicial opinions recognizing the same); see also Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. Chi. L. Rev.* 494, 508 (1986) (noting that the typical federal civil case at the time of the adoption of the Federal Rules of Civil Procedure in 1938 involved tortious injury or breach-of-contract actions between private parties).

⁶⁸ See J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 *N.Y.U. L. Rev.* 1713, 1721 (2012) (noting that “cases have grown in complexity and scope, especially in light of modern class action practice”); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 *Colum. L. Rev.* 433, 485 (1986) (noting that “the kinds of cases that came to typify the new litigation boom . . . were often complex and turned on issues of motive and intent”); see also Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 *U. Pa. L. Rev.* 909, 989 (1987) (noting that civil cases have become increasingly expensive and thus rendered trials largely obsolete).

seems less sound.⁶⁹ While the vagueness of the transactional standard still probably encourages litigants to err on the side of including more claims, lest preclusion extinguish those claims, such litigant behavior probably is no longer desirable. Consequently, even though litigants and the judicial system might recognize that a less inclusive lawsuit might be ideal, preclusion still impels litigants to lard their lawsuits with extraneous claims. In this way, the ambiguity inherent in the transactional approach no longer creates a desirable incentive structure but, instead, yields acute unpredictability and inefficiency.

Scholars and courts have begun to recognize that the transactional approach to structuring lawsuits leads to unwieldiness.⁷⁰ Although courts rarely speak directly to the issue, they use various tools at their disposal to alleviate what they perceive as a genuine problem. One such tool is to give “transaction or occurrence” a narrow definition, even when various claims almost undeniably relate to the same underlying facts. For instance, one court candidly noted that it construed the “transaction or occurrence” test of Federal Rule 13(a) narrowly in order to exclude from the litigation a counterclaim that would “unnecessarily complicate” the lawsuit.⁷¹ Similarly, some courts have attempted to restrict the scope of a “transaction or occurrence” in order to avoid confusing the trier of fact.⁷² In one case that already involved numerous claims and cross-claims alleging violations of federal securities laws (as well as common-law negligence, fraud, and deceit), the trial and appellate courts clearly worried that additional counterclaims might turn the lawsuit into an unwieldy mess. In that case, the U.S. Court of Appeals for the Second Circuit admitted that the counterclaims were factually related to the original

⁶⁹ Some scholars are right to point out that the received wisdom on the growing complexity of civil cases might be overstated. (I am especially grateful to Professor Dave Marcus for this insight.) Professor Clark recognized in the early twentieth century that even then cases were growing more complex. See Subrin, *supra* note 68, at 965–66. Presumably he believed that the new Federal Rules of Civil Procedure, which he helped draft, were up to the task of handling such complexity.

⁷⁰ See Effron, *supra* note 20, at 776–83, 790–94 (describing how judges attempt to restrict the size of lawsuits that inefficiently encompass too many claims under the “transaction or occurrence” standard).

⁷¹ *Agliam v. Ohio Sav. Ass’n*, 99 F.R.D. 145, 148 (N.D. Ohio 1983) (holding that a state-law counterclaim for unpaid balance on a mortgage note was not part of the same transaction or occurrence as the facts underlying the Truth in Lending Act claim).

⁷² See, e.g., *Roberts Metals, Inc. v. Fla. Props. Mktg. Grp.*, 138 F.R.D. 89, 91 (N.D. Ohio 1991) (finding two claims derived from distinct transactions in order to avoid confusing the trier of fact); see also Conway, *supra* note 48, at 161.

claim.⁷³ Yet in holding that the counterclaims were *not* part of the same underlying transaction or occurrence, the court focused on problems of managing such a complicated lawsuit, including the novelty of certain legal claims and differing burdens of proof that could confuse a trier of fact.⁷⁴ The ubiquity of these attempts to restrict the scope of transactions and occurrences suggests that the transactional approach indeed has led to overly broad lawsuits.

The inefficient breadth of lawsuits is only part of the problem. As early scholars noted, a judge always can order separate trials of various claims.⁷⁵ Today, though, the overwhelming majority of claims do *not* actually go to trial. Many, if not most, ripe claims will remain unpleaded,⁷⁶ and only a tiny fraction of pleaded claims will make it all the way to a trial.⁷⁷ In these respects, there is a glaring disparity between transactionalism's goal of facilitating efficient trials and the modern reality that trials have become largely obsolete.

Like many procedural reforms in the early twentieth century, the transactional approach to litigation aspired to abrogate procedural traps and help resolve a dispute's underlying merits.⁷⁸ Indeed, advocates touted transactionalism's power to promote the "convenience of trial."⁷⁹ In the first half of the twentieth century, the assumption that procedural rules should structure lawsuits with an eye toward resolving the parties'

⁷³ See *Federman v. Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 812 (2d Cir. 1979).

⁷⁴ See *id.*

⁷⁵ See Blume, *supra* note 11, at 58; Blume, *Scope of a Civil Action*, *supra* note 66, at 268; Wright, *supra* note 18, at 443; see also, e.g., Fed. R. Civ. P. 42(b) (authority to order separate trials).

⁷⁶ See Geoffrey C. Hazard, Jr., *An Examination Before and Behind the "Entire Controversy" Doctrine*, 28 Rutgers L.J. 7, 7 (1996) (noting that "[m]ost legal controversies, whether primary or secondary, will settle if the courts will leave them alone" and that courts cannot predict at the outset "whether the secondary and contingent controversies will mature into actual legal disputes").

⁷⁷ See Admin. Office of the U.S. Courts, 2012 Annual Report of the Director on Judicial Business of the United States Courts tbl.C-4 (2012) (showing that 1.2% of civil cases filed in federal court went to trial); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1255-59 (2005) (noting a steady decline in the percentage of trials in federal and state courts); see also Kevin M. Clermont, *Litigation Realities Redux*, 84 Notre Dame L. Rev. 1919, 1956 n.184 (2009) (noting that approximately 1% of federal civil cases terminate with trial); Glover, *supra* note 68, at 1720 (noting that "federal civil trials . . . are now a rarity").

⁷⁸ See, e.g., Subrin, *supra* note 68, at 962; Jay Tidmarsh, *Pound's Century, and Ours*, 81 Notre Dame L. Rev. 513, 515, 571 (2006).

⁷⁹ See Charles E. Clark, *The Code Cause of Action*, 33 Yale L.J. 817, 817-18 (1924); see also Bone, *supra* note 10, at 85.

disputes at trial appeared reasonable,⁸⁰ but today that is hardly the case. Most lawsuits are destined to end well before trial, often through dismissals and settlements.⁸¹

The fact that hardly any cases actually culminate with a trial means that the supposed antidote to bloated lawsuits—the power to order separate trials—virtually disappears.⁸² In an era in which most claims do not make it all the way to trial, that tool does almost nothing to ameliorate the concern that lawsuits have grown to include too many claims. The problem is no longer that a *trial* might become unmanageable. Instead, the modern concern is that unduly large lawsuits will unnecessarily consume time and expense during the *pretrial* phase (for instance, through discovery and motions practice). The ability to sever claims on the eve of trial cannot allay those problems.

In short, fundamental assumptions on which transactionalism originally rested have become antiquated and now conspire to undermine clarity and efficiency. The inherent ambiguity as to the contours of a transaction or occurrence likely leads parties to include any claims that are at the margins of that transaction. Unlike in bygone generations, there are good reasons to believe that tendency now leads to inefficiently large lawsuits that traditional tools of trial management are impotent to combat. Ambiguity that once was benign (or perhaps even beneficial) has come into starker relief and now leads to conspicuous inefficiencies.

⁸⁰ See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 *Wis. L. Rev.* 631, 636 (noting that “[i]n 1938, 63% of the adjudicated terminations of civil cases were trials and directed verdicts”). In some sense trials were always the exception rather than the rule. See Subrin, *supra* note 68, at 989. But in the early twentieth century, trials and contested hearings still accounted for 25–30% of dispositions. Galanter, *supra* note 77, at 1257. As Professor Subrin has observed, even if facilitating settlements is among the goals of a modern procedural regime, bargaining must be in the shadow of the law. If trials are not feasible, though, “bargaining is in the shadow of a shadow.” Subrin, *supra* note 68, at 989.

⁸¹ See Glover, *supra* note 68, at 1720–24.

⁸² Professor Clark believed that streamlined procedure should aid in the disposition of the “large amount of ordinary litigation, the greater part of which does not go to trial.” Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: Pleadings and Parties* (pt. 2), 44 *Yale L.J.* 1291, 1294 (1935). But he clearly regarded unwieldy lawsuits as “a trial problem,” the solution to which was a court’s power to “order separate trials.” *Id.* at 1320; cf. *id.* at 1321 (distinguishing between the power to sever and the power to order separate trials).

3. *Imperfect Predictions.* Even in an era in which transactionalism was more likely to produce greater efficiency, it still represented, at best, a crude *ex ante* prediction of the ideal structure of litigation. There was always the potential that the ideal lawsuit might be narrower or broader in scope than a “transaction or occurrence.” In the last generation or so, as the dynamics described above have played out, transactionalism has led to increasingly cumbersome lawsuits.

Scholars have recognized that in a world of more complicated lawsuits, the transactional approach often impels parties to include too many claims in a single lawsuit.⁸³ The world of contract law illustrates the unwieldiness that has ensued. In the first half of the twentieth century, a typical contract lawsuit involved a dispute between two private parties.⁸⁴ With an uncomplicated party structure and a discrete universe of claims, a lawsuit that grouped together all of the claims that arose from a contract was probably the most efficient way to resolve the parties’ dispute.

Today, though, treating a contract as a transaction or occurrence—and requiring the parties to litigate all claims arising from that contract—does not obviously lead to the most efficient resolution of a controversy. The distribution agreement between Starbucks and Kraft is a recent example of a complicated, far-reaching contract between large corporate entities that gave rise to myriad potential claims. Arguably the most significant claim, and the only one that independently would have led to litigation, was the question of the contract’s duration, which was uncertain based on convoluted language. By some estimates, it was nearly a three billion dollar question.⁸⁵ Under certain circumstances, the most efficient

⁸³ See Freer, *Avoiding Duplicative Litigation*, *supra* note 10, at 814 (noting that compulsory joinder rules might force “litigation of claims which otherwise might not have been asserted” and make “pleadings, motions, discovery, and trial more complicated simply by injecting more claims, defenses, and parties”); see also Effron, *supra* note 20, at 777 (noting how judges manipulate the “transaction or occurrence” standard “to mask deeper policy differences about how cases should be litigated”); Conway, *supra* note 48, at 160–61 (arguing that “a broad rule of compulsory counterclaims may remove some of the trial judge’s discretion to effectively structure litigation” and that a broad joinder rule can lead to the inclusion of too many claims that will confuse a jury).

⁸⁴ See Resnik, *supra* note 67, at 508.

⁸⁵ See Memorandum of Points and Authorities in Support of Preliminary Injunction at 6–7, 15, *Kraft Foods Global, Inc. v. Starbucks Corp.*, No. 10 CV 09085 (S.D.N.Y. Dec. 23, 2010); see also Starbucks Corp., Annual Report (Form 10-K), at 17–18 (Nov. 16, 2012), <https://www.sec.gov/Archives/edgar/data/829224/000082922412000007/sbux-9302012x10k.htm> (noting that at arbitration Starbucks sought only nominal damages for Kraft’s alleged breaches).

way to resolve that question would have been a narrow lawsuit or arbitration focused solely on the contract's duration.⁸⁶ But the transactional approach essentially forced the parties to plead *every* claim that arose from the contract, lest preclusion extinguish those claims, even if the parties did not necessarily have a desire to litigate anything beyond the question of the contract's duration. The distribution agreement thus is a typical example of a contract dispute that has become so complicated that a lawsuit that encompasses all claims arising from the contract threatens to become unmanageable.

Occasionally courts expressly recognize that the transactional approach can create unmanageable lawsuits and that they have only blunt, imperfect tools to deal with such problems. For example, in *William Blanchard Co. v. Beach Concrete Co.*, construction of a large building had taken significantly longer than anticipated, and assigning responsibility among various contractors and subcontractors had led to protracted and convoluted litigation.⁸⁷ For strategic reasons, the plaintiff had withheld certain claims and, in effect, impeded settlement between the other parties.⁸⁸ Despite such gamesmanship, applicable doctrine probably allowed the plaintiff to amend its complaint and include the omitted claims, particularly because the trial judge had determined that those claims were part of the relevant transaction or occurrence.⁸⁹ The problems were thus twofold. Not only had the plaintiff engaged in irksome (albeit permissible) gamesmanship, but the belated inclusion of certain claims threatened to create an unwieldy lawsuit.⁹⁰ The courts fairly candidly admitted that they were manipulating preclusion doctrine in order to deal with both problems and prevent the plaintiff from including the new claims.⁹¹ In other words, lawsuits can become convoluted, and—contrary to the expectations of transactionalism's early advocates—courts lack the flexibility to create efficient litigation units.

⁸⁶ In some ways I have simplified the facts for purposes of illustration. Although the question of the contract's duration was theoretically independent of the other claims, one of Starbucks's theories was that Kraft had materially breached the contract in certain respects, such that Starbucks was entitled to terminate the agreement immediately.

⁸⁷ 375 A.2d 675 (N.J. Super. Ct. App. Div. 1977).

⁸⁸ See *id.* at 684.

⁸⁹ See *id.* at 684–86.

⁹⁰ See *id.* at 686.

⁹¹ See *id.* (noting that claim preclusion does not normally operate to bar a claim during the initial litigation and that plaintiff ordinarily is permitted to amend pleadings and state a transactionally related claim, but affirming trial court's decision to bar such claims in light of plaintiff's inefficient strategic behavior).

Although transactionalism will most likely lead to the inclusion of too many claims, such that lawsuits unsurprisingly become unnecessarily cumbersome, the transactional approach might lead to the structuring of unduly narrow lawsuits. The prototypical car accident case or personal contract case no longer dominates the landscape of civil litigation, but those cases still arise.

For instance, imagine the scenario in which Hatfield and McCoy are two feuding neighbors who have a series of disputes that under modern doctrine probably count as discrete transactions or occurrences. For instance, they might have a minor contractual dispute, a fender bender might occur a year later, and then a year after that a nuisance dispute might arise (say, because of tree roots encroaching across the property line). Litigating those claims together probably would capture many efficiencies—drawing upon the resources of a court only once and gathering evidence that might be very similar across the claims (for example, the testimony of other neighbors who witnessed all of the relevant events). Indeed, such situations may have been precisely what certain scholars had in mind when they suggested that the law should move toward encouraging parties to litigate *all* of their claims against one another in a single proceeding.⁹² For the reasons that I have discussed above, the “more is better” approach no longer represents the most efficient way to resolve most disputes. But sometimes it might. In those situations, the transactional approach—and its prediction about the appropriate lawsuit structure—is underinclusive.

In recent years, the tension between flexibility and predictability inherent in the transactional approach has led to conspicuous inefficiency. No longer do the incentives align for parties to create the optimal litigation structure for their lawsuits. In the mine run of modern cases, parties have an incentive to take a kitchen-sink tack, pleading every claim that even conceivably falls within the transaction or occurrence that is at the heart of a lawsuit, even when doing so leads to pervasive inefficiencies that courts are hard-pressed to mitigate. Moreover, transactionalism can also generate lawsuits that are inefficiently narrow in scope when a lawsuit presents discrete issues that lend themselves to resolution in a single lawsuit but nominally derive from distinct transactions.

⁹² See *supra* note 65 and accompanying text.

B. The Failure of Transactionalism to Govern Preclusion Effectively

The other group of pathologies concerns the uncomfortable role that transactionalism plays in governing preclusion doctrine. As discussed above, although transactionalism aspires to create maximal flexibility in structuring lawsuits on the front end of litigation, the harsh effects of claim preclusion on the back end of litigation require predictability. But the rigidity of preclusion, when mixed with the malleable transactional standard, undercuts such predictability and thus can lead to basic unfairness. Moreover, rigidity compromises party autonomy in structuring lawsuits.

On the assumption that most lawsuits should not encompass every possible claim that the parties might assert against one another, the parties have an interest in figuring out exactly which claims they do and do not have to bring. In other words, they have an interest in being able to predict exactly how preclusion will apply to their claims.

1. The Basic Unpredictability of Preclusion Under Transactionalism. The transactional approach, by dint of its emphasis on flexibility, is not particularly well suited to the task of providing clarity about the scope of preclusion.⁹³ Moreover, there is no formal mechanism by which the parties can get clarity during the initial litigation about which claims the court considers to be part of the same transaction or occurrence.⁹⁴ Usually the parties will find out once it's too late. Only during a subsequent proceeding, when a party attempts to bring a claim, will it learn conclusively what the transaction or occurrence from the earlier lawsuit covered.⁹⁵

⁹³ See, e.g., Clark, *supra* note 11, at 144; see also Kane, *supra* note 25, at 1735 (noting the conflict among policies of fostering judicial economy, repose, and resolving cases on the merits).

⁹⁴ One exception to this is in federal court when a defendant pleads a counterclaim that is not supported by an independent ground of subject matter jurisdiction and, therefore, requires supplemental jurisdiction. Some courts construe the scope of compulsory counterclaims and supplemental jurisdiction to be identical. See *infra* note 130 and accompanying text. Consequently, the court's ruling on the jurisdictional question effectively advises the defendant about the reach of preclusion. But some courts decouple the standards governing those two inquiries. See *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 213 (2d Cir. 2004) (construing the supplemental jurisdiction statute to be broader than the scope of the compulsory counterclaim rule).

⁹⁵ Some courts and scholars have suggested that courts should be able to establish the bounds of preclusion that apply to the litigation at hand and that that determination should bind courts in subsequent litigation. See, e.g., 18 Wright et al., *supra* note 43, § 4413; Tobias B. Wolff, *Preclusion in Class Action Litigation*, 105 *Colum. L. Rev.* 717, 770–76 (2005).

As a result of the need for certainty, the notion of a transaction or occurrence has ossified somewhat. In a number of situations, the case law “permit[s] generalization about the dimensions of [claim preclusion] under the transactional view.”⁹⁶ One of the easiest situations involves the hypothetical car accident between Hatfield and McCoy: The plaintiff suffered personal injuries and property damage in one accident. The overwhelming majority of jurisdictions treat that event as a single transaction, thus obliging the plaintiff (and the defendant) to bring all of the claims that derive from the accident.⁹⁷ But the inherent flexibility of transactionalism still leaves many situations in which certainty is elusive. For instance, if a contract or negotiable instrument calls for installment payments, does each breach constitute a separate claim or are all of the breaches part of the same transaction or occurrence? The answer varies, often turning on “[p]arties’ expectations and business understandings,” reflecting the “functional flexibility of the transactional view.”⁹⁸ In short, transactionalism has lost a degree of flexibility, which contributes to the inefficiencies described in the previous section, but neither does it provide the certainty that parties need, for purposes of preclusion, as they structure lawsuits.

2. *The Rigidity of Preclusion.* Contributing to the uncertainty is the rigidity of claim preclusion. By this I mean that the parties have little to no ability to control the preclusive consequences of their litigation. For the reasons discussed above, the parties usually cannot know the precise contours of a transaction or occurrence at the beginning of a lawsuit. The bounds of the transaction or occurrence become clear only at a much later time—during a subsequent lawsuit—but at that point preclusion applies rigidly.

One of the leading federal courts treatises describes a mechanism by which some courts have effectively allowed claim splitting—specifically based on Federal Rule 41’s voluntary dismissal provision—but acknowledges that very few courts have attempted such a course. See 18 Wright et al., *supra* note 43, § 4413. Moreover, there appears to be no authority for a court’s attempt to expand the scope of claim preclusion.

⁹⁶ Casad & Clermont, *supra* note 7, at 69.

⁹⁷ See *id.* at 73. The same tends to be true when a defendant has committed multiple acts of negligence that result in a single harm (say, if a defendant improperly maintained his brakes and also followed another car too closely, both of which contributed to an accident). See *id.* at 74.

⁹⁸ See *id.* at 71. To take another example, suppose that a plaintiff sues a defendant for a continuing nuisance and seeks only damages for past harm. Does claim preclusion prevent the plaintiff from later seeking an injunction, which she could have brought in the first lawsuit, to abate the nuisance? Transactionalism does not admit of an easy answer. See *id.* at 77.

While courts do have some measure of flexibility in defining the boundaries of a transaction or occurrence, the parties generally enjoy no such power. Moreover, preclusion attaches to claims that fall within the transaction; the doctrine, at least in theory, maps the transaction perfectly and can apply neither more broadly nor more narrowly.⁹⁹

Some of the more instructive examples of the doctrine's rigidity come from the compulsory counterclaim context. In one case, a court essentially noted that the compulsory counterclaim rule does not admit of equitable exceptions, even when the defendant faces a veritable Catch-22. *United States v. Intradocs/International Management Group* involved a False Claims Act claim by the United States and a breach-of-contract counterclaim by the defendant.¹⁰⁰ Although the counterclaim was compulsory, the court had to dismiss it without prejudice because the defendant had failed to exhaust its administrative remedies, as required by statute.¹⁰¹ The court noted a disturbing possibility: It might resolve the United States' underlying claim before the defendant even had an opportunity to refile the counterclaim. In that scenario, the compulsory counterclaim rule still might extinguish the defendant's claim, despite the fact that the defendant found itself in a procedural quagmire not of its own making.¹⁰²

Other cases have highlighted another aspect of the doctrine's rigidity, specifically the parties' inability to shape the scope of preclusion. In a case decided under Kansas law, for example, a defendant sought a voluntary dismissal of a counterclaim, and the plaintiff even agreed that the dismissal was without prejudice.¹⁰³ A federal court applying Kansas's compulsory counterclaim rule noted the rule's inflexibility.

⁹⁹ See Restatement (Second) of Judgments § 24(1) (1982) (stating that claim preclusion applies to rights and remedies "with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose"); Fed. R. Civ. P. 13(a) (defining compulsory counterclaim as one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"); Wright, *supra* note 18, at 456 (arguing that the scope of plaintiffs' and defendants' compulsion under the doctrines is the same, extending to the same transactionally related operative facts).

¹⁰⁰ 277 F. Supp. 2d 55, 56–57 (D.D.C. 2003).

¹⁰¹ See *id.* at 63–66 (noting the defendant's failure to comply with the administrative exhaustion requirement of the Contract Disputes Act).

¹⁰² See *id.* at 66 (noting the inflexibility of the compulsory counterclaim rule). In light of this possibility, the court proposed a limited stay of the judicial proceeding in order to allow the defendant an opportunity to exhaust its administrative remedies. See *id.*

¹⁰³ See *Am. Plastic Equip., Inc. v. Toytrackerz, LLC*, No. C.A. 07-2253-DJW, 2008 WL 917635, at *3–4 (D. Kan. Mar. 31, 2008).

[W]hen a party files a compulsory counterclaim in an action in Kansas state court, that party must maintain that claim or be barred from later bringing another action on that claim. The fact that the counterclaimant dismisses the counterclaim without prejudice[,] and even with the other parties' agreement that the first action will not be binding in any other actions involving the parties, does not alter the preclusive effect of the dismissal.¹⁰⁴

Courts applying Ohio's,¹⁰⁵ Arkansas's,¹⁰⁶ and Tennessee's¹⁰⁷ compulsory counterclaim rules have reached the same result. Other courts, in construing the federal compulsory counterclaim rule, similarly have recognized that parties may not negotiate around the effects of that rule. They have done so, however, in more explicit terms, holding that a party has no latitude to voluntarily dismiss a compulsory counterclaim without prejudice.¹⁰⁸

There are two ways in which the doctrine of claim preclusion might not be quite as rigid as I have suggested, but those exceptions do little to ameliorate the problems discussed above. First, modern preclusion prin-

¹⁰⁴ Id. at *7 (citing *Bugner v. Farm Bureau Mut. Ins. Co.*, 18 P.3d 283 (Kan. Ct. App. 2001)).

¹⁰⁵ See, e.g., *Stern v. Whitlatch & Co.*, 631 N.E.2d 680, 682 (Ohio Ct. App. 1993) (holding that Ohio's compulsory counterclaim rule prevented a party from refile a counterclaim that it had raised and voluntarily dismissed in an earlier lawsuit); *McConnell v. Applied Performance Techs., Inc.*, No. C2-01-1273, 2002 WL 32882707, at *9 (S.D. Ohio Dec. 11, 2002) (same); see also *Pitcher v. Waldman*, No. 1:12-CV-215, 2013 WL 632368, at *6 (S.D. Ohio Feb. 20, 2013) (treating Ohio's compulsory counterclaim rule as instructive in interpreting Federal Rule 13(a)).

¹⁰⁶ See *Edwards v. Ark. Power & Light Co.*, 683 F.2d 1149, 1155 (8th Cir. 1982) (citing *Shrieves v. Yarbrough*, 247 S.W.2d 193, 194 (Ark. 1952)) (holding that a party may not maintain a later lawsuit on a compulsory counterclaim that the party had dismissed without prejudice in an earlier lawsuit). But see *Green Mach. Corp. v. Allen Eng'g Corp.*, 145 F. Supp. 2d 636, 643-44 (E.D. Pa. 2001) (construing Arkansas rules to permit a voluntary dismissal without prejudice of a counterclaim).

¹⁰⁷ See, e.g., *Clements v. Austin*, 673 S.W.2d 867, 868-70 (Tenn. Ct. App. 1983); see also *Carnation Co. v. T.U. Parks Constr. Co.*, 816 F.2d 1099, 1104 (6th Cir. 1987) (recognizing Tennessee's rule).

¹⁰⁸ See, e.g., *Steele v. Bell*, No. 11 CIV 9343 RA, 2012 WL 6641491, at *1 (S.D.N.Y. Dec. 19, 2012) ("Compulsory counterclaims, however, cannot be withdrawn without prejudice."); *Shaw Family Archives, Ltd. v. CMG Worldwide, Inc.*, No. 05 CV 3939 (CM), 2008 WL 4127549, at *11 (S.D.N.Y. Sept. 2, 2008) (same); *Pizzulli v. Nw. Mut. Life Ins. Co.*, No. 05 CIV 1889 (LAP), 2006 WL 490097, at *2 (S.D.N.Y. Feb. 28, 2006) (same); see also *Kissell Co. v. Farley*, 417 F.2d 1180, 1182-83 (7th Cir. 1969) (noting that when a defendant moves to dismiss a compulsory counterclaim, the court should dismiss it *with*, rather than *without*, prejudice).

principles at least theoretically allow parties and courts to depart from the general rule against “claim splitting” and litigate less than the full transaction.¹⁰⁹ Courts often note that parties may agree expressly to litigate only one aspect of a transaction, but “most of the statements occur in decisions that find no such agreement.”¹¹⁰ Similarly, although courts may permit claim splitting, special circumstances usually must be present. For instance, a party might discover a transactionally related claim on the eve of trial, or a court might have erroneously dismissed a transactionally related claim.¹¹¹ The infrequency with which courts recognize or authorize claim splitting suggests that such practices are anomalous and that there is still a strong presumption of applying preclusion to the entire transaction. Moreover, the potential flexibility suggested by the Restatement (Second) of Judgments and treatises stands in tension with much of the jurisprudence. The Supreme Court has endorsed a “rigorous application” of claim preclusion that does not admit of equitable exceptions.¹¹² And many of the cases just discussed have held that parties and courts have no power to negotiate around compulsory counterclaim rules, which at least theoretically are more amenable to equitable exceptions than the traditional doctrine of claim preclusion.¹¹³

The second way in which courts can mitigate the harsh effects of preclusion is by defining a transaction narrowly. For example, a party who should have brought a transactionally related claim during the initial litigation might attempt to bring that claim during a second proceeding. To avoid the application of claim preclusion, a judge in the second lawsuit simply can find that the new claim, in fact, was outside the scope of the first lawsuit’s underlying transaction. Professor Clark recognized, and argued against, “this judicial tenderness towards defeated litigants.”¹¹⁴ But it endures. Professor Douglas McFarland has noted judges’ continuing antipathy toward compulsory counterclaims and, accordingly, a ten-

¹⁰⁹ See Restatement (Second) of Judgments § 26(1)(a) (1982).

¹¹⁰ 18 Wright et al., supra note 43, § 4415.

¹¹¹ See Casad & Clermont, supra note 7, at 101.

¹¹² *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 400 (1981) (citing *Reed v. Allen*, 286 U.S. 191 (1932)); cf. *id.* at 402–03 (Blackmun, J., concurring in the judgment) (arguing that the Court should not “close the door” on “equitable tempering” of claim preclusion (internal quotation marks omitted)).

¹¹³ See Wright, supra note 18, at 429 (arguing that estoppel, Wright’s preferred term to describe the preclusion that applies to compulsory counterclaims, is “a more flexible tool”); Schopflocher, supra note 22, at 364 (arguing for similar flexibility).

¹¹⁴ See Clark, supra note 11, at 145.

dency to describe transactions in unduly narrow terms.¹¹⁵ One judge candidly acknowledged that he was doing precisely that—construing a “transaction or occurrence” narrowly in order to evade the harsh consequence of the compulsory counterclaim rule.¹¹⁶ When he became a judge, Clark pithily captured many judges’ aversion to a broad application of preclusion: “The defense of res judicata is universally respected, but actually not very well liked.”¹¹⁷

If claim preclusion has become unduly harsh or broad, the proper response hardly should be taking comfort in judges’ power to engage in post hoc prestidigitation. Not only does this approach lack candor, it fails to create predictability for litigants. A party who might want to wait and bring a claim in a later proceeding has no way of knowing whether she will be able to rely on “judicial tenderness” during the second lawsuit. Moreover, such an approach compromises the opposing party’s interest in repose. Consequently, even if some exceptions render preclusion slightly less rigid than I have described, those palliatives offer little more than cold comfort.

3. *Undermining Fairness and Party Autonomy.* Transactionalism’s role within a rigid preclusion doctrine thus operates in a way that fails to promote basic fairness and also undermines party autonomy. The above factors align to create this result. First, the inherent flexibility of the transactional approach means that parties cannot reliably predict at the start of litigation how broadly preclusion will sweep. Second, the parties have little to no opportunity to inquire of the court hearing the initial lawsuit whether a particular claim indeed falls within the scope of the lawsuit’s underlying transaction or occurrence.¹¹⁸ Finally, despite the parties’ inability to make accurate predictions at the beginning of a lawsuit as to how broadly preclusion will apply, they remain largely powerless to control or abate its harsh consequences on the back end of litigation.

¹¹⁵ See McFarland, *supra* note 27, at 715–17.

¹¹⁶ See *Aeroquip Corp. v. Chunn*, 526 F. Supp. 1259, 1262 (N.D. Ala. 1981) (“The consequences of finding such a counterclaim compulsory weigh toward a narrow construction of the rule in such a case.”).

¹¹⁷ *Riordan v. Ferguson*, 147 F.2d 983, 988 (2d Cir. 1945) (Clark, J., dissenting).

¹¹⁸ One might imagine a less sweeping proposal than mine that simply permits parties to make a formal inquiry along these lines and receive an answer from the court. Such an approach would foster greater predictability, but it would not adequately address many of the other pathologies.

For these reasons, the parties are subject to losing otherwise viable claims through the somewhat surreptitious operation of preclusion. Particularly in light of the doctrine's severity, the transactional approach can undermine basic notions of fairness. Admittedly, the unfairness is not intractable. Parties can mitigate the unforgiving consequences of preclusion simply by including any claim that might be at the margins of the transaction or occurrence that underlies the lawsuit. The rules of joinder usually allow that approach, although the *Intrados* case demonstrates how procedural rules still can create obstacles that prevent the parties from including certain claims. Moreover, the solution to the unfairness problem leads directly to the inefficiencies described in the previous section—parties will include a bevy of claims and thus construct unwieldy lawsuits.

Finally, the rigidity of preclusion undercuts party autonomy. Although any mandatory joinder rule encroaches on a party's autonomy in designing a lawsuit, such incursions usually are justifiable on the ground that they are necessary or desirable to protect other values—such as societal interests in efficiency or an opposing party's interest in predictability and repose.¹¹⁹ But preclusion protects those countervailing interests obliquely or, in some instances, actually undermines them. Consequently, although the autonomy costs of a rigid preclusion doctrine are clear, the corresponding benefits of such rigidity are not.

C. The Mutability of Transactions

In light of transactionalism's aspiration to create a flexible means of structuring lawsuits, it probably comes as no surprise that the definition of a transaction or occurrence often defies hard-and-fast definition. The ebb and flow of a transaction's boundaries is far from fatal. In fact, some scholars have embraced transactionalism's versatility in addressing different policy goals.¹²⁰ My point is simply that transactionalism never has represented a unified ideal; consequently, abandoning it in favor of a different approach that fosters greater efficiency and autonomy would not upend an inherently useful idea. A few salient examples highlight the point.

¹¹⁹ See, e.g., Freer, *Avoiding Duplicative Litigation*, *supra* note 10, at 831–37.

¹²⁰ See generally Kane, *supra* note 25 (arguing that the notion of a transaction or occurrence appropriately varies in accordance with underlying policies that procedural devices seek to effectuate).

For purposes of joinder and preclusion, New Jersey defines a transaction much more broadly than any other jurisdiction. Under its civil practice rules, parties must join together all claims that are part of their “entire controversy,” under penalty of preclusion.¹²¹ Since the middle of the twentieth century, the “entire controversy” doctrine has evolved and defined the parties’ controversy in transactional terms,¹²² but it has included far more within that definition than do the Federal Rules or the rules of other states.¹²³ Like other jurisdictions’ references to transactions or occurrences, New Jersey’s “entire controversy” doctrine seeks to foster greater efficiency and judicial economy by resolving related claims together.¹²⁴ New Jersey just has a different conception of how broad the lawsuit—and thus a “transaction”—should be.¹²⁵

One of the areas in which courts most conspicuously struggle to discern the scope of a transaction or occurrence is the supplemental jurisdiction statute. A federal court usually must have independent subject matter jurisdiction over each claim—typically, federal question jurisdiction¹²⁶ or diversity jurisdiction.¹²⁷ In some instances, though, a court may hear a claim that does *not* have an independent basis for jurisdiction. The current statute extends supplemental jurisdiction to claims that are “so related” to claims already before the court that the new claims “form

¹²¹ See N.J. Civ. Prac. R. 4:30A (“Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine . . .”).

¹²² See, e.g., *Joel v. Morocco*, 688 A.2d 1036, 1037 (N.J. 1997) (“The doctrine requires parties to a controversy before a court to assert all claims known to them that stem from the same transactional facts . . .”).

¹²³ See *Erichson*, supra note 61, at 760–61; John A. Boyle, Note, *Returning to Its Roots: An Examination of the 1998 Amendments to the Entire Controversy Doctrine*, 30 *Seton Hall L. Rev.* 310, 349–50 (1999); see also *Rycoline Prods., Inc. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir. 1997) (“The Entire Controversy Doctrine is essentially New Jersey’s specific, and idiosyncratic, application of traditional *res judicata* principles.”).

¹²⁴ See *Olds v. Donnelly*, 696 A.2d 633, 637 (N.J. 1997) (noting that “the entire controversy doctrine seeks to assure that all aspects of a legal dispute occur in a single lawsuit”); *Cogdell v. Hosp. Ctr.*, 560 A.2d 1169, 1173 (N.J. 1989) (noting concerns of economy, efficiency, and fairness); Boyle, supra note 123, at 326; see also *Venuto v. Witco Corp.*, 117 F.3d 754, 761 (3d Cir. 1997) (noting concerns of efficiency and fairness).

¹²⁵ See, e.g., *Opdycke v. Stout*, 233 F. App’x 125, 129 n.6 (3d Cir. 2007) (observing that “the Entire Controversy Doctrine is broader than traditional *res judicata* principles”); *Paramount Aviation Corp. v. Augusta*, 178 F.3d 132, 137–46 (3d Cir. 1999) (strongly suggesting that entire controversy doctrine would define transaction more expansively, and thus apply more broadly, than traditional claim preclusion principles).

¹²⁶ See 28 U.S.C. § 1331 (2012).

¹²⁷ See *id.* § 1332.

part of the same case or controversy under Article III of the United States Constitution.”¹²⁸ Although the statute does not explicitly refer to transactions or occurrences, scholars recognize that “a transactional relationship” was, and remains, “a prerequisite for determining whether supplemental jurisdiction exists.”¹²⁹

Some courts have found that a transaction, for purposes of supplemental jurisdiction, is exactly the same as the transactional requirement of Federal Rule 13(a) that governs compulsory counterclaims.¹³⁰ In contrast, other courts have rejected the idea that “transaction” has the same meaning in both contexts. Instead, those courts have interpreted the transactional requirement more broadly in the jurisdictional context. As a result, two particular claims can be part of the *same* transaction for jurisdictional purposes but derive from *different* transactions for purposes of Federal Rule 13.¹³¹

The definition of a “transaction or occurrence” varies across other procedures as well. It governs whether certain amendments “relate back” to earlier pleadings and thus can avoid potential statute-of-limitations problems.¹³² In that context, courts often interpret the scope of a transac-

¹²⁸ Id. § 1367(a). Before passage of the supplemental jurisdiction statute, the Supreme Court, in explicating the same basic idea, said that courts had jurisdiction over all of the claims that derive from a “common nucleus of operative fact.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

¹²⁹ Kane, *supra* note 25, at 1732; see also Richard A. Matasar, Rediscovering “One Constitutional Case”: Procedural Rules and the Rejection of the *Gibbs* Test for Supplemental Jurisdiction, 71 Calif. L. Rev. 1399, 1453–54 (1983) (noting that supplemental jurisdiction, even before its codification, was rooted in transactionalism).

¹³⁰ See, e.g., *Iglesias v. Mut. Life Ins. Co. of N.Y.*, 156 F.3d 237, 241 (1st Cir. 1998) (noting that “[f]ederal courts have [supplemental] jurisdiction over compulsory counterclaims,” but “[p]ermissive counterclaims . . . do not fall within [supplemental] jurisdiction”); *Unique Concepts, Inc. v. Manuel*, 930 F.2d 573, 574 (7th Cir. 1991) (“A federal court has supplemental jurisdiction over compulsory counterclaims Permissive counterclaims, however, require their own jurisdictional basis.”); *Painter v. Harvey*, 863 F.2d 329, 331 (4th Cir. 1988) (same); see also *Oak Park Trust & Sav. Bank v. Therikildsen*, 209 F.3d 648, 651 (7th Cir. 2000) (holding that “a permissive counterclaim . . . is outside the supplemental jurisdiction”); 6 *Wright et al.*, *supra* note 43, § 1422 (describing this approach); Kane, *supra* note 25, at 1732 n.44 (same).

¹³¹ See, e.g., *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 209–10, 213–14 (2d Cir. 2004); see also *Channell v. Citicorp Nat’l Servs.*, 89 F.3d 379, 384–87 (7th Cir. 1996) (recognizing that the jurisdictional test might be more indulgent); *Walker v. THI of N.M. at Hobbs Ctr.*, 803 F. Supp. 2d 1287, 1297–1301 (D.N.M. 2011) (same); 13D *Wright et al.*, *supra* note 43, § 3567.1 (describing this approach).

¹³² A new claim that derives from a lawsuit’s original transaction or occurrence can relate back to the original pleading for purposes of the statute of limitations. See, e.g., Fed. R. Civ. P. 15(c). This is useful when the statute of limitations has expired on the new claim some-

tion in light of the notice-giving function that transactionalism serves.¹³³ Moreover, a transaction can acquire a different meaning in the contexts of claim preclusion¹³⁴ and party joinder.¹³⁵ Professor Mary Kay Kane has argued that such variation is sensible to the extent that the transactional test seeks to effectuate the differing policy goals that underlie those respective procedural devices.¹³⁶

Although scholars have differed as to whether a transaction or occurrence should have a consistent meaning *across* different procedural rules,¹³⁷ the bigger problem is inconsistency *within* each rule.¹³⁸ No one argues that the latter inconsistency is advisable or justifiable. It is, however, a natural consequence of transactionalism's futile attempt to solve too many problems. Professor Robin Effron has argued that the dilemma stems from an inadequate fit between the text of the rules, including their reliance on transactional relatedness, and the underlying purpose of the rules.¹³⁹ As judges attempt to ameliorate that mismatch, they wind up creating inconsistencies "within each rule, across the rules with similar texts, or among the circuits interpreting the rules."¹⁴⁰

The upshot is that transactions or occurrences are malleable, and courts have struggled for decades to explicate what counts as a transaction or occurrence for purposes of any given rule. Consequently, transactions or occurrences do not capture an inherently useful legal idea. Perhaps more insidiously, transactionalism obfuscates the real policies at work in many procedural rules and inhibits courts' ability to effectuate those policies.

time between the filing of the original complaint and the filing of the amendment that seeks to add the new claim.

¹³³ See Kane, *supra* note 25, at 1738–39, 1741.

¹³⁴ See *id.* at 1733–35.

¹³⁵ See *id.* at 1746; Effron, *supra* note 20, at 770–73.

¹³⁶ See Kane, *supra* note 25, at 1726.

¹³⁷ Compare *id.* at 1723–24, 1726 (arguing that "transaction or occurrence" does and should vary in accordance with the underlying purpose of each rule), with McFarland, *supra* note 26, at 301–04 (arguing that "transaction or occurrence" should have a consistent interpretation across various rules).

¹³⁸ See Effron, *supra* note 20, at 762.

¹³⁹ See *id.* at 763.

¹⁴⁰ *Id.* at 762.

III. A PROPOSAL FOR RESTRUCTURING LAWSUITS

In this Part, I propose a method for restructuring the rules of claim joinder and preclusion into a system that actually achieves the goals that transactionalism imperfectly pursues. First, it will create true flexibility in structuring lawsuits, giving courts and parties the ability to determine the appropriate scope of any given lawsuit. No longer will they have to rely on transactionalism's rough *ex ante* predictions. Second, it will empower litigants for the first time to control the preclusive consequences of their litigation. In the process, it also will clarify the scope of preclusion that will attach to any given lawsuit. Parties will know at the outset of litigation which claims a lawsuit encompasses, whereas the current regime provides clarity on that point only once it is too late—when a party attempts to bring a claim in a subsequent lawsuit.

A. The Mechanics of Restructuring Joinder and Claim Preclusion

1. The Basic Model. The proposal begins with an idea that is nearly one hundred years old—a requirement that at the initiation of litigation the parties should join *all* of the claims that they have against one another.¹⁴¹ The mandatory joinder requirement that I envision, though, is not an end in itself. It is purely instrumental. Unlike early twentieth-century scholars, I do not suggest that the typical lawsuit should comprise all of the claims that the parties might have against one another,¹⁴² nor do I assume that the parties eventually will pursue all of those claims in court. The point of a mandatory joinder rule is simply to encourage the parties to put all of the claims on the table for purposes of negotiating the scope of the lawsuit. At present, claim joinder rules are merely permissive with respect to claims that extend beyond the transaction or occurrence.¹⁴³ As a result, one party exercises sole control over whether its non-transactionally related claims will be part of the lawsuit. The proposed claim joinder rule takes away that unilateral veto. Unlike current manda-

¹⁴¹ Clark, *supra* note 11, at 145–46; Blume, *supra* note 11, at 58–60. Professor Clark recognized that such a requirement was unlikely to come to fruition given the “long struggle . . . to obtain support for even the rules of *permissive* joinder.” Clark, *supra* note 11, at 145.

¹⁴² See, e.g., Wright, *supra* note 18, at 443 (noting courts' power to order separate trials); Blume, *supra* note 11, at 58 (same).

¹⁴³ See, e.g., Fed. R. Civ. P. 13(b) (permissive counterclaim), 18(a) (claim joinder); Restatement (Second) of Judgments § 24(1) (1982) (restricting preclusion to transactionally related claims).

tory joinder rules, my proposal does not insist that the parties actually litigate all of those claims. But the compulsion would mean that if a party fails to plead any ripe claim, the penalty will be a bar against asserting that claim in any subsequent lawsuits.

The next step involves a negotiation to discern the scope of the lawsuit. That negotiation will take place within the pretrial structures that already exist under the Federal Rules and analogous rules in most states. Under Federal Rule 26(f), the parties already must meet to discuss matters such as the potential for settlement and the parameters of discovery.¹⁴⁴ At that conference, the parties will discuss which claims they believe most sensibly belong together in one litigation package. The parties already must submit a report detailing the results of this conference,¹⁴⁵ and that report now will include the results of the negotiation regarding what they believe is the appropriate scope of the lawsuit. As with the remainder of the report, the parties' recommendations are not conclusive and ultimately must receive the *imprimatur* of the court.

At a pretrial conference, the judge ultimately will decide which claims belong in the litigation package. If the parties agree whether to include a particular claim in (or exclude it from) the litigation, a strong presumption will attach to that agreement, and a judge should override the agreement only when she clearly believes that judicial economy demands a different result. If the parties do not agree whether a specific claim should be part of the litigation, then the judge will decide whether to include or exclude that claim. For reasons discussed more fully below, the parties probably will not be able to reach complete agreement, at least not with respect to every claim. But the judge will have the benefit of knowing all possible claims that could form part of the litigation unit and thus will be in a position to make an informed determination about the appropriate lawsuit structure. In deciding which claims to include and exclude, the judge should primarily consider the interests of judicial economy, fairness, and any potential prejudice to the actual parties or absent individuals.

Once the judge has determined which claims to include in the litigation, the judge will dismiss the excluded claims without prejudice. Preclusion will attach only to the claims that the judge has included in the litigation (and, as noted above, to any ripe claims that the parties failed

¹⁴⁴ See, e.g., Fed. R. Civ. P. 26(f).

¹⁴⁵ See, e.g., *id.* 16(b)(1)(A), 26(f)(2).

to plead in the first instance). The parties and the courts thus will know at the beginning of litigation whether they must resolve any particular claim. Even if a party does not prevail during the negotiation and subsequent hearing (for example, if a court includes a counterclaim that a defendant would have preferred to litigate separately), that party at the very least will know the precise bounds of the lawsuit. Litigants no longer will have to guess how a court in a subsequent action will regard the scope of their initial lawsuit.

2. *Dealing with Incomplete or Imperfect Information.* The basic model thus far has assumed that the parties know with certainty, at the time that litigation commences, exactly which claims they have against one another. But that is not always true. A party might have limited information or even be completely ignorant of a particular claim that it might have against an opposing party. In those instances, existing mechanisms, such as tolling provisions, ameliorate such problems. Moreover, the proposed model's flexibility allows judges to take account of potential dilemmas and not unfairly leave parties in the lurch.

Perhaps the easiest situation involves a claim that accrues after litigation already has begun. For instance, the plaintiff and defendant might wind up in a car accident shortly after the pleadings in a breach-of-contract action are complete. Although the parties may seek to amend the pleadings in order to add the tort claims, such claims were not ripe at the time that the litigation began. Consequently, the proposal would not require either party to add those claims.

A slightly more difficult situation arises when a party has a ripe claim at the time that litigation commences, but the party does not know about the claim. That can happen, for example, when the defendant has taken affirmative steps to conceal its illegal activity¹⁴⁶ or when a plaintiff has been exposed to a product that has a latent defect.¹⁴⁷ The claim is theoretically ripe, but holding a party responsible for failing to plead such a claim in the course of other litigation is not fair and does not promote any reasonable notion of efficiency. Most states, though, already have means for addressing such conundrums. Very often states toll the appli-

¹⁴⁶ See *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194–96 (1997) (describing “fraudulent concealment” doctrine that, in some courts’ formulation, tolls the running of the statute of limitations).

¹⁴⁷ See, e.g., *Giordano v. Mkt. Am., Inc.*, 941 N.E.2d 727, 728 (N.Y. 2010) (noting that at the time plaintiff suffered strokes, plaintiff and his doctors had no reason to know that plaintiff’s exposure to ephedra could have caused strokes).

cable statute of limitations for injuries caused by latent defects; the limitations provision does not begin to run until the plaintiff has discovered (or with reasonable diligence could have discovered) the injury.¹⁴⁸ The same is true when a defendant “fraudulent[ly] conceal[s]” its illegal activity and thereby prevents a plaintiff from learning that a claim exists.¹⁴⁹ Such an approach seems equally sensible here. Suppose, for example, that a plaintiff sues a company for failure to deliver goods on time but fails to include a product liability claim that arises from a latent defect in the goods. In determining whether the plaintiff should have pleaded the product liability claim during the initial litigation, courts should look to tolling provisions. If the law of the applicable jurisdiction deems the statute of limitations not to be running on the product liability claim when the lawsuit commenced, then the party has no obligation to raise the claim, which my proposal preserves for future litigation. On the other hand, if a party actually knows about the product liability claim (or reasonably could have discovered it) when the litigation regarding the delivery of goods commenced, then the plaintiff has an obligation to plead that claim.

Three other scenarios involving imperfect or incomplete information lend themselves to straightforward resolution—primarily because of the discretion that judges can exercise to effectuate the spirit of the proposed scheme. The key, in all of these situations, is for the party who feels unprepared or unable to litigate a claim to plead the claim, even if the party does not actually want to litigate it. An easy resolution might follow: The parties could agree that the claim does not sensibly belong in the litigation package. Most of the time, that agreement will be dispositive of the question. Alternatively, if there is disagreement between the parties, the party who believes that one of its claims does not belong in the litigation package should candidly inform the court of the reasons why the claim should be dismissed without prejudice.

In the first scenario, a party might be aware of a potential claim but worry that she lacks sufficient factual information to survive a motion to dismiss¹⁵⁰ under the new “plausibility” pleading standard from *Bell At-*

¹⁴⁸ See, e.g., N.Y. C.P.L.R. § 214-c(2) (McKinney 2013).

¹⁴⁹ *Klehr*, 521 U.S. at 194 (holding that “fraudulent concealment” doctrine, in the context of the Racketeer Influenced and Corrupt Organizations Act, applies when defendant has taken “‘affirmative steps’ to conceal [its] unlawful activity” and when plaintiff has “exercised reasonable diligence”).

¹⁵⁰ See, e.g., Fed. R. Civ. P. 12(b)(6) (motion to dismiss).

*lantic Corp. v. Twombly*¹⁵¹ and *Ashcroft v. Iqbal*.¹⁵² Or, even worse, a party might fear that in the absence of more details, pleading such a claim might be so frivolous as to be sanctionable under Federal Rule 11¹⁵³ and similar state rules. The critical point is that a party should disclose those problems to the court. If a party truthfully represents that it lacks the knowledge, time, or resources to conduct a thorough investigation of the claim, those considerations should factor heavily into the court's calculus. It might be necessary, of course, for a court to tease out whether such a representation by the party who does not wish to litigate its claim is accurate or simply demonstrates malingering. Absent clear indications of gamesmanship, though, a party's acknowledgment of those sorts of problems generally should lead a court to accede to the request and dismiss that claim without prejudice.

Second, there might be an unfairness if a party is unprepared to go forward with a claim that has a significantly longer statute of limitations. Imagine that a plaintiff sues a defendant for violations of the Fair Debt Collection Practices Act, which has a one-year statute of limitations.¹⁵⁴ The defendant believes that it has counterclaims based on the breach of a contract. In every jurisdiction, the statute of limitations for those counterclaims is significantly longer (no shorter than three years¹⁵⁵ and up to fifteen years¹⁵⁶). Thus, my proposal might force a party to plead (and potentially litigate) a claim that the defendant otherwise could wait and litigate at a time and in a forum of its choosing.

In one sense, forcing the parties to put all of their claims on the table might compromise party autonomy by constraining the flexibility that a party might have in terms of when and where to bring a claim. But that already happens. In the example above, a defendant must assert a contractual counterclaim that a court deems to be part of the same transaction or occurrence as a Fair Debt Collection Practices Act claim. Admittedly, my proposal would go further and require the defendant to plead the breach-of-contract claim, irrespective of whether it is transactionally

¹⁵¹ 550 U.S. 544 (2007).

¹⁵² 556 U.S. 662 (2009).

¹⁵³ Fed. R. Civ. P. 11.

¹⁵⁴ See 15 U.S.C. § 1692k(d) (2012).

¹⁵⁵ See, e.g., Del. Code Ann. tit. 10, § 8101 (West 2013).

¹⁵⁶ See, e.g., Ky. Rev. Stat. Ann. § 413.090 (West 2001).

related to the plaintiff's original claim.¹⁵⁷ The beauty of the proposal, though, is that it allows a party to signal to the judge that the party is unprepared to litigate a claim. A legitimate reason for not wanting to litigate a contractual counterclaim might be that a defendant has not had adequate opportunity to investigate the claim. The defendant can argue that it should be allowed to take advantage of the longer statute of limitations in order to undertake such an investigation. Ultimately the decision will rest with the judge, who must balance concerns of efficiency and fairness to a party. Under the present regime, though, a defendant does not even have the opportunity to seek a dismissal of a breach-of-contract counterclaim if a court deems it to be compulsory. Thus, while my proposal might give a party less latitude in terms of when and where to *plead* a claim initially, it has the potential to enhance party autonomy with respect to when and where the party actually *litigates* the claim.

Third, a party might learn that it has a claim only during the course of discovery. For example, a plaintiff sues his employer and alleges discrimination in violation of federal statutes; during discovery, the employer learns information that would support a counterclaim that the plaintiff breached his fiduciary duties.¹⁵⁸ Unlike the earlier examples involving a latent defect or fraudulent concealment, the counterclaim was ripe at the time the plaintiff filed his lawsuit and was not subject to tolling. Theoretically, the defendant could have known about the counterclaim and included it in its answer. The appropriate solution is for the defendant, upon discovering the counterclaim, to seek leave to amend the answer and plead the counterclaim.¹⁵⁹ As the basic model suggests, if the parties agree whether to include or exclude the claim from the litigation package, the judge will usually honor that agreement.¹⁶⁰ If, on the other hand, the parties disagree whether the claim belongs in the litigation package, the judge will resolve the dispute. Part of the decision-making process should take into account whether the opposing party will

¹⁵⁷ See, e.g., *Kimmel v. Cavalry Portfolio Servs.*, 747 F. Supp. 2d 427, 432 (E.D. Pa. 2010) (deeming breach-of-contract and unjust enrichment claims to be permissive counterclaims in lawsuit originally based on a Fair Debt Collection Practices Act claim).

¹⁵⁸ See *Penberg v. Healthbridge Mgmt.*, No. 08 CV 1534 (SJF), 2010 WL 2787616, at *2–3 (E.D.N.Y. Mar. 29, 2010), report and recommendation adopted, No. 08 CV 1534 (SJF) (CLP), 2010 WL 2787611 (E.D.N.Y. July 9, 2010).

¹⁵⁹ See, e.g., Fed. R. Civ. P. 15(a).

¹⁶⁰ If the parties agree to include the claim, then the result is exactly the same as under the current rules. See, e.g., *id.* (noting that “a party may amend its pleading . . . with the opposing party’s written consent”).

experience any prejudice from having to litigate a new claim. But that is already part of a court's determination in whether to allow an amendment.¹⁶¹ To the extent that the new claim is not part of an efficient litigation package or would lead to prejudice, the court should dismiss that claim without prejudice.

In all instances, the incentive structure reflects the spirit of the proposal. The parties should put forward all of their claims at the earliest possible time, forthrightly argue why the court should include the claims in (or exclude the claims from) the litigation package, and thereby enable the court to create the appropriate litigation unit. Provided that the parties behave with such candor, they will not forfeit any claims. The worst-case scenario is that the court will dismiss certain claims (for instance, ones about which a party lacks sufficient information or ones that a party learns about too late during the discovery process) without prejudice.

B. The Advantages of the Proposal

The proposal finally will accomplish the goals that the transactional approach, almost by definition, cannot fully vindicate. As discussed in the previous Part, transactionalism simultaneously attempts to serve two objectives that often are at cross-purposes: figuring out the efficient structure of litigation (which requires a high degree of flexibility) and determining the scope of preclusion (which requires a high level of predictability). The transactional approach has split the difference awkwardly and unsatisfyingly. In its place, my proposal will promote true efficiency, predictability, and autonomy.

1. Realizing Efficiency Through Unfettered Flexibility. The negotiation envisioned by the proposal affords parties and judges nearly limitless flexibility to determine the appropriate structure of any given lawsuit. A simple lawsuit between two individuals might encompass a number of discrete claims that logically belong together, even though they derive from what courts today would call distinct transactions or occurrences. On the other hand, an efficient lawsuit structure might involve only one facet of a complex contract.

¹⁶¹ See *Foman v. Davis*, 371 U.S. 178, 182 (1962) (noting that courts may deny leave to amend under Federal Rule 15(a) for many reasons, including "undue prejudice to the opposing party").

By eschewing transactionalism's rough *ex ante* predictions, the proposal will allow parties and courts to achieve a level of efficiency that transactionalism cannot.¹⁶² With *all* possible claims on the table, parties and courts will have the ability to discern which ones most logically belong together. The results of the parties' negotiation will reveal not only what they regard to be in their collective self-interest but also what the socially efficient size of a lawsuit is.

The ability to capture new efficiencies is most obvious when the parties can agree on the appropriate scope of litigation, regardless of how broad or narrow their agreement is. Suppose that the parties agree to a lawsuit that is narrower than the transactional approach would require. To return to an earlier example, assume that Starbucks and Kraft decide to litigate only one aspect of a complex distribution agreement—its duration and renewal provisions. By one estimate, those provisions presented a nearly three billion dollar question.¹⁶³ The parties might rationally conclude that they have no immediate interest in litigating other aspects of the contract (say, minor breaches that do not have great monetary significance and could distract from the main issue). Under the transactional approach to preclusion, the parties would have to include *all* claims deriving from the contract, even if that would be inefficient. Instead, by agreeing to a narrower scope of litigation, the parties signal to the court what they really want to resolve and what the socially efficient litigation unit is. If the parties represent that they genuinely have no intention of turning around and suing each other on the small-bore claims, there is no reason for a court to force the parties to litigate those claims. Otherwise, the lawsuit would (inefficiently) encompass too many claims. At the same time, a party probably does not want to relinquish those minor claims altogether in case the claims turn out to be more significant than the party initially appreciated. Thus, it is important for a court to be able to dismiss those claims without prejudice.

By contrast, suppose that the plaintiff and defendant agree to litigate a plethora of claims that do not logically belong together or capture inherent efficiencies. Such a scenario might present more significant efficien-

¹⁶² I should reiterate that the current proposal concerns only claim joinder, not party joinder, even though efficiency eventually must take account of both. Party joinder questions are of a different ilk because they raise unique due process considerations, have been the subject of an ill-fated experiment in New Jersey, and thus merit more thorough treatment in subsequent work.

¹⁶³ See *supra* notes 85–86 and accompanying text.

cy concerns, as a lawsuit might threaten to become unwieldy or cause juror confusion. But that risk already exists today because of the nearly unlimited opportunity for parties to join various claims.¹⁶⁴ The primary mechanism by which judges currently can deal with this problem is the ability to sever the issues and order separate trials.¹⁶⁵ Although my proposal preserves that option, it offers two further advantages over the current procedural system. First, during the pretrial conference, the judge has the ability to confer with the parties and dismiss certain claims without prejudice if there is clear evidence that such a solution would lead to more efficient litigation. Second, and perhaps more subtly, if the parties have *agreed* to a large lawsuit during the negotiation that my proposal envisions, the parties have sent an important signal to the judge—that they genuinely care about litigating the various claims. Under the current regime, if the parties have saturated a lawsuit with disparate claims, it is much more difficult for a judge to assess whether the parties actually care about those claims or whether they simply are blustering. By contrast, an agreement by the parties to litigate a wide array of claims demonstrates a genuine interest in those claims. The judge thus has better information as she decides how best to structure the lawsuit and whether to dismiss any claims without prejudice.

The final possible outcome of the negotiation is one in which the parties cannot agree about the appropriate scope of the lawsuit. A cynic, in fact, probably would view this as the most likely outcome of the negotiation. Although the negotiation will have been futile on one level, it similarly can lead to a socially efficient litigation structure. Even in the wake of a failed negotiation, the judge will have full knowledge about the potential range of claims. Consequently, the judge will be in a position to package together those claims that most lend themselves to resolution in a single proceeding.

In many ways, the judge who ultimately determines the appropriate breadth or narrowness of the lawsuit will rely on many of the useful analytical tools that courts currently use in defining the contours of a transaction or occurrence. For instance, if claims will rely on the same evidence, including the same witnesses, there is a greater likelihood that those claims belong together in a single litigation package. The same is

¹⁶⁴ See, e.g., Fed. R. Civ. P. 13(b) (permissive counterclaims), 18(a) (permissive claim joinder).

¹⁶⁵ See, e.g., *id.* 42(b) (separate trials).

true if the claims present overlapping factual or legal issues. But instead of considering those factors in order to answer an abstract legal question—what counts as a “transaction or occurrence”?—a court will use them to address the primary question at the beginning of litigation: Which claims most sensibly belong together in the lawsuit? In other words, the notion of a transaction has become an unnecessary way station en route to determining the appropriate litigation package. Moreover, the transactional approach to structuring a lawsuit never has attained the full measure of flexibility that its proponents envisioned, precisely because the same standard governs preclusion questions. The proposal is unencumbered by the burdens and limitations of the transactional approach. Consequently, it creates unfettered flexibility in discerning and crafting socially efficient lawsuits.

2. *Fostering Certainty and Predictability.* True flexibility on the front end of litigation is possible only because the proposal also creates predictability regarding the exact scope of preclusion. After the negotiation, the parties will know that claim preclusion will attach to any claim that the judge has included within the lawsuit. But any excluded claims fall outside the ambit of the doctrine because the judge will dismiss them without prejudice. Again, by abandoning reliance on the abstract concept of a transaction or occurrence, the proposal creates a mechanism that enables parties to know at the outset of litigation how broadly preclusion will sweep. No longer will they have to guess during the initial lawsuit whether any particular claim will be barred in subsequent litigation.

These gains in certainty and predictability hold true even when a party “loses” during the negotiation. If a defendant, for example, wishes to litigate a particular counterclaim at a later time, she can plead the claim and then ask the judge to dismiss that counterclaim without prejudice. Suppose that the judge declines, reasoning that the counterclaim is part of an efficient lawsuit. Unlike in the present regime, the defendant would know with absolute certainty that if she wants to litigate that claim, she must do so now or else forfeit it forever.

3. *Promoting Party Autonomy.* In addition to realizing greater efficiency and predictability, one of the proposal’s most innovative advantages is the parties’ ability to control the preclusive consequences of their litigation. Because of the negotiation, the parties largely have the ability to determine how broadly or narrowly preclusion will apply. Admittedly, that power is not plenary. It depends on the parties’ ability

to agree whether a particular claim should or should not be part of the litigation package. Moreover, the judge retains authority to trump that agreement, but the judge usually will accord great deference to it.

In some ways, the newfound autonomy finally will give litigants true power over something that they care about most: preclusion and repose. Giving the parties a large measure of autonomy dovetails with a model of litigation that Professor William Rubenstein described several years ago. He argued that complex civil litigation today corresponds less to traditional models of adjudication or even managerial judging; instead, it is more akin to business deals.¹⁶⁶ “What is bought and sold are rights-to-sue.”¹⁶⁷ According to this model, defendants essentially are buying finality and certainty, in some instances before plaintiffs even file a lawsuit.¹⁶⁸ Such deal making, though, occurs in the shadow of the rigid idea that claim preclusion essentially tracks transactions or occurrences. Moreover, there is currently no formal mechanism to prevent one or more parties from withholding certain claims—particularly those that belong to a distinct transaction or occurrence—and then attempting to bring such claims at another time. My proposal offers ways to avoid the current formalisms that shape preclusion and also bring greater candor to the process. Although the proposal does not necessarily depend on an acceptance of Professor Rubenstein’s model, it reflects his insight that claim preclusion is often the most important aspect of litigation. Over the last century, most jurisdictions have given parties nearly unfettered discretion to join as many claims as they want in a single lawsuit. But until now litigants have had scant control over what they frequently prize most—the repose and certainty that come from preclusion.¹⁶⁹ The power to shape preclusion’s scope thus offers a significant boon to party autonomy.

Some commentators might recoil at the crassness of characterizing the legal system as a marketplace for *res judicata*, rather than a vital fo-

¹⁶⁶ William B. Rubenstein, *A Transactional Model of Adjudication*, 89 *Geo. L.J.* 371, 416–18 (2001). Although Professor Rubenstein calls this a “transactional” model—meaning a business transaction—I avoid that term in order to avoid confusing his model with the legal concept of a “transaction or occurrence,” as I have used the latter term throughout this Article.

¹⁶⁷ *Id.* at 419.

¹⁶⁸ See *id.*

¹⁶⁹ Admittedly, settlement agreements often include broad waiver provisions. Such waivers, though, occur outside actual litigation structures and frequently reflect mere predictions about what other claims might exist between the parties.

rum for resolving both private and public rights.¹⁷⁰ Despite many of those valid concerns, there is hardly any reason to think that obscuring how preclusion operates, or making it less flexible, will promote either public or private interests. In fact, quite the opposite is true. Giving parties and courts the power to control preclusion holds the promise of fostering greater candor and transparency in resolving disputes.¹⁷¹

4. *Drawing on Managerial Judges' Expertise.* An important undercurrent running through the proposal is a reliance on managerial judging and, specifically, a judge's exercise of discretion in helping craft the lawsuit's structure. The heart of managerial judging lies in a judge's intimate involvement in a lawsuit's early stages.¹⁷² To the extent that a significant focus of litigation has shifted from trial to the pretrial phase, managerial judges can help shape the litigation and guide the parties toward the most efficient resolution of their disputes. Most scholars identify the early 1980s as the period when managerial judging acquired new significance, largely because of revisions to Federal Rules 16 and 26 that explicitly gave judges a more active role in the pretrial stages.¹⁷³ My proposal candidly relies on many of those developments. In particular, it explicitly takes advantage of the pretrial conferences and hearings that those rules foresee. Although managerial judging has been controversial in some respects, my proposal draws on those pretrial devices in order to foster greater efficiency, predictability, and autonomy, but in a way that respects the traditional judicial role.

¹⁷⁰ See, e.g., Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of *Buckhannon* for the Private Attorney General*, 54 *UCLA L. Rev.* 1087, 1088 (2007) (noting the importance of private enforcement in order to vindicate substantive civil rights laws); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 *Mich. L. Rev.* 373, 378–79 (2005) (arguing that class action waivers hamper appropriate enforcement of substantive law); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 *Wm. & Mary L. Rev.* 1137, 1142 (2012) (noting that “private litigation serves as a complement—often a crucial one—to public enforcement of various laws”); see also Rubenstein, *supra* note 166, at 431 (noting that his model is “not a normative proposal”).

¹⁷¹ The proposal has little or no bearing on whether private negotiations and enforcement mechanisms will undermine public rights. If anything, the first step of the proposal will encourage parties to plead claims and thereby apprise the judge of matters that might have particular public significance.

¹⁷² See, e.g., Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 *Duke L.J.* 669, 677 (2010); Judith Resnik, *Managerial Judges*, 96 *Harv. L. Rev.* 375, 393 (1982).

¹⁷³ See, e.g., Gensler, *supra* note 172, at 676–77; Richard L. Marcus, *Slouching Toward Discretion*, 78 *Notre Dame L. Rev.* 1561, 1587 (2003).

Over the last generation, a rich literature on managerial judging has developed. Some scholars have expressed “guarded optimism”¹⁷⁴ about judges’ potential to guide lawyers in identifying and resolving issues expeditiously.¹⁷⁵ The problem, from many critics’ perspective, is that managerial judging has come to include not only more direct engagement throughout the discovery stage but also judicial efforts to guide settlement among the parties.¹⁷⁶ Such critics argue that managerial judging thus perverts the traditional judicial role¹⁷⁷ and vests far too much discretion in judges to influence the outcome of litigation.¹⁷⁸ Chief among the concerns raised by various scholars is the fact that judges (rather than parties) typically initiate such management.¹⁷⁹ Moreover, managerial procedures often are invisible and informal,¹⁸⁰ thereby insulating them from meaningful appellate review.¹⁸¹

My proposal obviously requires judges to exercise considerable discretion during the pretrial stages of litigation. In that sense, it embraces the idea that judges, working cooperatively with the parties at an early stage of litigation, can identify ways to resolve disputes more efficiently—here, the question of a lawsuit’s appropriate structure. But the proposal’s design avoids the most significant pitfalls that scholars have attributed to managerial judging. For example, it involves a process that is largely party-driven. The initial negotiation involves the parties only, not

¹⁷⁴ Marcus, *supra* note 173, at 1605.

¹⁷⁵ See, e.g., Gensler, *supra* note 172, at 692; Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 *Calif. L. Rev.* 770, 770–73 (1981).

¹⁷⁶ See, e.g., Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 *Yale L.J.* 27, 43 (2003) (describing settlement conferences as “stray[ing] furthest from the judiciary’s traditional adjudicative role”); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 *U. Chi. L. Rev.* 306, 325–26 (1986); Resnik, *supra* note 172, at 399–402.

¹⁷⁷ See, e.g., Molot, *supra* note 176, at 118; Resnik, *supra* note 172, at 414; Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 *Ala. L. Rev.* 79, 100–01 (1997).

¹⁷⁸ See, e.g., Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 *Cardozo L. Rev.* 1961, 1963 (2007); Molot, *supra* note 176, at 40–43; see also Elliott, *supra* note 176, at 317, 325 (noting the potential for judges to abuse discretion and undermine procedural fairness); Tidmarsh, *supra* note 78, at 559 (arguing that empirical data suggest that discretion “is largely counterproductive”).

¹⁷⁹ See Molot, *supra* note 176, at 87; Resnik, *supra* note 172, at 404, 414.

¹⁸⁰ See Resnik, *supra* note 172, at 407, 413–14; see also Molot, *supra* note 176, at 84–86 (describing problems of informality).

¹⁸¹ See Molot, *supra* note 176, at 44; Resnik, *supra* note 172, at 413–14; see also Marcus, *supra* note 173, at 1590 (arguing that “case management escaped frequent oversight by appellate courts, but a laissez-faire attitude toward lawyer latitude hardly seems preferable”).

the judge, and if the parties can agree on the lawsuit's appropriate scope, the court will largely defer to that agreement. Accordingly, the judge usually becomes involved only when there is an actual dispute as to whether the lawsuit should encompass particular claims. Moreover, when the parties call upon a judge to resolve such a dispute, the proceeding bears the traditional hallmarks of judicial formality. The parties prepare a report and brief the court on any disagreements, and the judge hears the dispute in open court rather than *ex parte* or off the record. Thus, in nearly every respect, my proposal preserves the traditional judicial role, albeit within the pretrial structures that have become integral to managerial judging.

The one respect in which the proposal might raise concerns among the critics of managerial judging is that the judge's decision about the proper scope of litigation generally eludes appellate review. But this is one of the classic managerial decisions for which "it is difficult to arouse much enthusiasm for appellate review."¹⁸² Judges long have exercised discretion over how to shape a lawsuit.¹⁸³ Such everyday decisions are part and parcel of the judicial role. Moreover, appellate review is almost entirely unnecessary because the point of my proposal is to preserve all claims, provided that the parties have pleaded them at the outset of litigation. The judge is not actually adjudicating a claim or pressuring a party to settle or abandon any claim. Precisely because any dismissal of claims will be *without* prejudice, the proposal does not implicate the overarching concerns that scholars have raised with respect to other forms of managerial judging. To the contrary, while it embraces the new architecture of litigation, it respects the traditional judicial role.

C. Anticipated Objections

1. Are Efficiency and Autonomy Reconcilable? At first blush, there might seem to be an insuperable tension between efficiency and party autonomy. Put another way, what a party might perceive as being most efficient or desirable might be socially inefficient. In fact, that focus on efficiently packaging litigation, notwithstanding a party's preference for a different organization of a lawsuit, was one of the driving forces be-

¹⁸² Marcus, *supra* note 173, at 1609.

¹⁸³ See, e.g., 28 U.S.C. § 1367(c) (2012) (power to decline to exercise supplemental jurisdiction over certain claims); Fed. R. Civ. P. 42(b) (power to order separate trials).

hind the adoption of transactionalism.¹⁸⁴ For example, in one of the classic cases that articulated the transactional view of claim preclusion, *Rush v. City of Maple Heights*, a plaintiff claimed that the defendant's negligence had caused \$100 in property damage to her motorcycle, and she won that initial lawsuit.¹⁸⁵ She then sought to take advantage of issue preclusion (regarding the defendant's negligence) in a subsequent lawsuit and received a \$12,000 judgment on a personal injury claim.¹⁸⁶ Despite the plaintiff's preference for bringing two lawsuits, the Ohio Supreme Court held that the two lawsuits stemmed from the same transaction and that claim preclusion barred the second suit.¹⁸⁷ The fear, then, is that parties—left to their own devices—will opt for a level of preclusion that is suboptimal. They will bring smaller but more lawsuits and thus impose greater costs on society by litigating their grievances piecemeal.

The concern that the party autonomy envisioned by my proposal will lead to less efficient litigation is generally unfounded, however. In the days before courts adopted the transactional approach to litigation, the problem was not party autonomy writ large. Instead, the problem was that one party had the unilateral power to split claims. In *Rush*, for example, the plaintiff litigated a small-dollar claim, obtained a favorable judgment, and then tried to take advantage of that judgment in a subsequent lawsuit regarding a much larger claim (specifically, by arguing that the first lawsuit had resolved the question of the defendant's negligence). That sort of gamesmanship is highly unlikely under my proposal; in fact, it would be pointless. Unlike in the actual *Rush* case, the plaintiff could not hide the ball during the initial lawsuit and dupe the defendant into thinking that only a small \$100 property claim was at stake. Rather, she would have to plead the \$12,000 personal injury claim as well. Once a plaintiff has shown her cards, the incentive to engage in gamesmanship and attempt to split the claims would disappear. Her own self-interest in efficiency likely would lead her to want to resolve both claims in one proceeding. More importantly, it is highly unlikely that the

¹⁸⁴ See, e.g., Casad & Clermont, *supra* note 7, at 66 (arguing that the modern approach to preclusion “seeks to maximize the efficiency of judicial proceedings by encouraging the presentation of all grievances that can conveniently and fairly be tried together”).

¹⁸⁵ 147 N.E.2d 599, 600 (Ohio 1958).

¹⁸⁶ See *id.* at 601.

¹⁸⁷ *Id.* at 599; see also *id.* at 605 (noting the “vexatious litigation” stemming from the splitting of causes of action). In fairness to the plaintiff in *Rush*, earlier precedent appeared to require the piecemeal approach. See *Vasu v. Kohlers, Inc.*, 61 N.E.2d 707, 709 (Ohio 1945).

defendant would agree to litigate only the small-dollar claim in the first lawsuit. From the defendants' perspective, there would be no substantive advantage to defending the claims in one lawsuit or two; either way, the plaintiff would be able to pursue the claims.¹⁸⁸ But the defendant's self-interest in efficiency, like the plaintiff's, would lead to a strong desire to resolve the matters in just one lawsuit.

The point is that party autonomy will lead to greater efficiency because parties enjoy autonomy in shaping preclusion only to the extent that they *agree* whether to include or exclude certain claims. For the reasons just articulated, in a case like *Rush*, there is hardly any reason to believe that the parties would agree to an inefficiently narrow lawsuit. By contrast, if the parties actually do agree that their lawsuit should be narrow in scope, they send a strong signal about the issues that they genuinely care about and thus the most efficient way to structure their litigation.

Despite my optimism that the levers of party autonomy, as I have constructed them in the proposal, will lead to a more efficient litigation unit, some cases undoubtedly will arise in which the two goals pull in opposite directions.¹⁸⁹ In such situations, the judge can intervene. If the judge concludes at the scheduling conference that the parties have agreed to an inefficient litigation structure—one that ultimately will burden the judicial system unnecessarily—the judge can trump the parties' agreement.¹⁹⁰ Such a determination should be based on clear evidence.

Perhaps cases in which party autonomy does not lead to the most socially efficient litigation structure will become disappointingly ubiquitous, thus belying my optimism. If that worst-case scenario comes to pass, all is not lost. A jurisdiction simply will have to decide whether it places greater weight on party autonomy to shape preclusion or on social efficiency. The proposal, though, lends itself to tweaking along either

¹⁸⁸ Theoretically, the defendant might think that the plaintiff wanted to pursue only a \$100 property claim and might never bring a \$12,000 personal injury claim. But a rational defendant is likely to recognize that a rational plaintiff probably would not do that.

¹⁸⁹ One possible scenario might arise when each party irrationally overestimates its chances of prevailing on a particular claim. Such overconfidence might lead the parties to agree to narrow the litigation to a single issue on which each believes that it will prevail.

¹⁹⁰ This is most likely to be the case when the parties have agreed to an inefficiently narrow litigation structure. In the converse situation—an agreement to litigate too many claims—the solution usually will be to order separate trials under Federal Rule 42(b) and analogous state provisions.

dimension. If the emphasis is on party autonomy, then a court should continue to accord substantial deference to any agreement that the parties reach as to the lawsuit's scope. On the other hand, a state that wishes to emphasize social efficiency should still require the parties to negotiate what they believe to be the appropriate scope of litigation. As noted above, the results of that negotiation can convey valuable information to the judge. But if efficiency is the highest value, the judge would owe no deference to any agreement that the parties reach and would make an independent decision about the lawsuit's appropriate structure. In any event, though, the judge's decision about the lawsuit's scope still will serve a valuable role—apprising the parties of the precise scope of preclusion.

In the best-case scenario, as I have described it, there will be a marked improvement with respect to three principal goals: efficiency, predictability, and party autonomy. The worst-case scenario still isn't bad, though, offering significant improvements in two out of the three areas. A jurisdiction might have to choose between autonomy and efficiency. But the proposal will achieve newfound predictability, as parties no longer will have to guess what the preclusive consequences of their litigation will be.

2. *Will the Proposal Lead to More Litigation?* One fear might be that forcing the parties to join all claims that they have against one another could induce parties to litigate more claims than they otherwise would choose to.¹⁹¹ Such a course would undermine efficiency and, to a certain extent, party autonomy. If the proposal only included a mandatory claim joinder rule, parties almost assuredly would litigate an inefficiently high number of claims. But the court's power to dismiss certain claims without prejudice, often at the suggestion of either or both parties, largely blunts this criticism.

The proposal actually makes strides toward eliminating the inefficient litigation of claims. Right now, a litigant has an incentive to include any claim—even one that the party does not actually want to litigate yet—if it even arguably falls within the transaction or occurrence, for fear of losing the claim altogether. Dispensing with the transaction or occurrence as the organizing principle of lawsuits helps solve the problem. Whether a claim is transactionally related to the lawsuit no longer mat-

¹⁹¹ See Hazard, *supra* note 76, at 7 (arguing that many controversies, if left alone, will not mature into legal claims).

ters. Instead, the parties can negotiate which claims they actually want to litigate and receive clarity from the court about how preclusion will operate. Such clarity arguably might lead to less litigation. Parties no longer will face a compulsion to litigate claims that they do not have an immediate interest in trying (and that they may not intend to litigate ever but do not want to forfeit).

Relatedly, there might be a concern that parties will turn around and litigate claims that the court dismissed without prejudice, thus undermining any newfound efficiency. Imagine that Hatfield and McCoy have a significant property boundary dispute. They also plead minor property damage claims against one another but agree that the judge should dismiss those minor claims without prejudice. The judge does so, relying on the parties' representations that those claims are insignificant and would not independently lead to litigation. After the lawsuit concludes, either party theoretically could return to court immediately to litigate the minor claims. In other words, the promise of greater efficiency depends on the parties *not* changing their minds, either out of caprice or vengeance.

The law and psychology literature suggests that my proposal actually will foster greater outcome acceptance, such that the parties will not return to court immediately. For instance, research has revealed that parties' willingness to accept the results of a lawsuit depends less on the actual outcome and more on the extent to which the procedures were fair.¹⁹² The parties' perceptions of procedural fairness frequently turn on the neutrality of the forum and the trustworthiness of the decision maker.¹⁹³ Most interestingly, for purposes of the proposal, procedural fairness also depends on the extent to which a party believes that it has had a voice in the process and some manner of control over procedures.¹⁹⁴ Specifically, the ideal way to foster procedural justice, and thus outcome acceptance, is to give parties control over the procedures and then have a neutral judge mediate any procedural disputes.¹⁹⁵ My proposal fits comfortably within that ideal. Consequently, there are good reasons to be-

¹⁹² See Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in Federal Courts*, 63 *Hastings L.J.* 127, 149 (2011).

¹⁹³ See Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 *Int'l J. Psychol.* 117, 121 (2000).

¹⁹⁴ See *id.*

¹⁹⁵ See Kevin M. Clermont, *Principles of Civil Procedure* § 7.1, at 477–78 (3d ed. 2012) (summarizing psychological research).

lieve that it will promote outcome acceptance and will not lead to vexatious litigation after the principal lawsuit has concluded.

3. *Will This Create Too Much Work for an Overburdened Judiciary?* The way that I have conceived the proposal, the additional imposition on the judiciary should be minimal. It would function within the current pretrial structure of party conferences (without the judge present) and scheduling conferences (with the judge). To the extent that the parties reach an agreement about the appropriate structure of their lawsuit, the judge's role will be small. In the absence of clear evidence that the parties have chosen a manifestly inefficient litigation structure, the judge will defer to the parties' agreement.

Even if a judge has to spend additional time considering disputes about the scope of the lawsuit, that effort is unlikely to be in vain. Insofar as a judge becomes more familiar with the claims, that effort will bear fruit later in the litigation when the judge resolves questions about the scope of discovery, other pretrial matters, and, in all likelihood, dispositive motions.¹⁹⁶

Finally, much of the responsibility for reviewing the parties' agreements and resolving any disputes about the proper scope of the lawsuit probably will fall to magistrate judges, who already resolve many pretrial matters.¹⁹⁷ Moreover, the stakes are relatively low. If a magistrate or trial judge makes a "wrong" decision about which claims to include or exclude, neither party suffers prejudice precisely because the proposal preserves all claims.

4. *Does New Jersey's Experiment with the "Entire Controversy" Doctrine Suggest Greater Caution?* New Jersey has long adopted the view that a lawsuit should resolve the "entire controversy" at issue.¹⁹⁸ The entire controversy doctrine traditionally has taken a broader view of which claims most logically lend themselves to efficient resolution in a single lawsuit, and New Jersey generally enforces that vision through

¹⁹⁶ Chief among these dispositive motions is a motion to dismiss. See, e.g., Fed. R. Civ. P. 12(b)(6).

¹⁹⁷ Admittedly, rule makers probably must choose which goal is more important. If the ultimate decision maker is to become familiar with issues earlier on, the trial judge should supervise the negotiation. If the goal is to minimize trial judges' workloads, magistrates should take on that responsibility.

¹⁹⁸ See Erichson, *supra* note 61, at 760–61 (tracing the first references of this view to the merger of law and equity in 1947 and more expansive development to the 1980s).

strict preclusion principles.¹⁹⁹ New Jersey's most novel and controversial experiment, though, came in the 1980s and 1990s when its courts extended the doctrine to include mandatory *party* joinder.²⁰⁰ Among the most maligned aspects of the doctrine, a legal malpractice claim constituted part of the same controversy that gave rise to the original lawsuit.²⁰¹ Thus, failure to join the allegedly negligent attorneys in the original litigation meant that preclusion prevented the client from bringing the malpractice claim at a later date.²⁰² In response to vociferous criticism by scholars and practitioners, the New Jersey Supreme Court re-entertained.²⁰³ Although New Jersey still has a robust mandatory party joinder requirement, it comes in a softer, gentler form. New Jersey no longer enforces the requirement through preclusion principles.²⁰⁴

For all of the Sturm und Drang surrounding the mandatory *party* joinder rules, New Jersey's expansive *claim* joinder rules have proved remarkably uncontroversial.²⁰⁵ As I mentioned earlier,²⁰⁶ party joinder rules, unlike rules concerning claim joinder, present a host of unique concerns about fairness and complexity.²⁰⁷ Accordingly, while New Jersey recognized that enforcing party joinder rules through preclusion was problematic, it has continued to embrace the notion that preclusion offers an effective way to vindicate an expansive approach to claim joinder. Moreover, my proposal offers a distinct advantage over the claim joinder aspect of New Jersey's entire controversy doctrine. Unlike in

¹⁹⁹ As currently codified, the doctrine provides: "Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine . . ." N.J. Ct. R. 4:30A.

²⁰⁰ See Erichson, *supra* note 61, at 760–61; Boyle, *supra* note 123, at 326–36.

²⁰¹ See *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 513 (N.J. 1995), abrogated by *Olds v. Donnelly*, 696 A.2d 633, 634 (N.J. 1997).

²⁰² See *Circle Chevrolet*, 662 A.2d at 520.

²⁰³ See *Olds*, 696 A.2d at 634.

²⁰⁴ The rules instead focus on providing notice to interested non-parties and enforcing the requirement through the imposition of costs rather than preclusion. See N.J. Ct. R. 4:5-1; N.J. Ct. R. 4:28-1; N.J. Ct. R. 4:29-1.

²⁰⁵ See Burrell I. Humphreys, *The Reshaping of the Entire Controversy Doctrine: A View from the Bench*, 9 Seton Hall Const. L.J. 807, 808 (1999) (noting that the claim joinder aspect of the entire controversy doctrine "has not been seriously criticized"); see also Erichson, *supra* note 61, at 774 n.96 (noting that "the revisions did not alter mandatory claims joinder under the entire controversy doctrine"); Boyle, *supra* note 123, at 349–50 (same).

²⁰⁶ See *supra* note 162.

²⁰⁷ See Erichson, *supra* note 61, at 774 ("[I]n comparison to party joinder, joinder of claims among those already parties generally creates less complexity and expense, and imposes less on extra-litigative values and relationships.").

New Jersey, the negotiation envisioned by the proposed system gives parties and courts an opportunity to remove certain claims from the litigation and thereby introduces more flexibility. Although New Jersey's experiment with preclusion-based *party* joinder offers a cautionary tale, its experience with broad *claim* joinder rules suggests the feasibility of my proposal.

5. *Is a Preclusion-Based Approach Unnecessarily Harsh?* Despite New Jersey's generally positive experience with broad claim joinder rules, which the courts enforce through preclusion principles, one might wonder whether a more forgiving approach might be more appropriate. Specifically, could my proposal enforce the claim joinder requirement through less severe penalties, such as shifting costs to a non-compliant party? After all, that is New Jersey's current preferred mechanism for enforcing party joinder rules.²⁰⁸

If the proposal's principal goal were to provide notice of certain claims, a less severe sanction might be appropriate. The difficulty lies in the fact that my proposal aspires to give parties the power to shape the preclusive consequences of their litigation. A mandatory claim joinder rule, enforced only through a cost-shifting mechanism, would not be the most effective way to enable a negotiation over the scope of preclusion. In fact, it might lead to a reversion back to the days when one party could unilaterally decide to split claims. For example, imagine a situation akin to *Rush*—a plaintiff has a low-value property claim and a high-value personal injury claim. Suppose further that the plaintiff wants to withhold the personal injury claim and sue only on the property claim. If the only penalty involved certain cost-shifting, the plaintiff might well decide that those costs would be a price worth paying in order to split the claims. The result would be that the parties could not meaningfully negotiate the scope of preclusion. Instead, the plaintiff could act unilaterally, split the claims at minimal cost, and effectively impose an inefficient litigation structure on both the defendant and the court system. To my mind, the only way to foster a meaningful negotiation is to require that the parties put all of their claims on the table and enforce that requirement through preclusion principles.²⁰⁹

²⁰⁸ See N.J. Ct. R. 4:5-1.

²⁰⁹ In order to mitigate unnecessary harshness, I have discussed earlier a number of scenarios in which preclusion would not attach to certain claims, usually because a party lacked sufficient knowledge that a claim existed. See *supra* notes 146–60 and accompanying text. Most of those examples rely on well-established equitable doctrines, such as tolling.

6. *Do Limitations on Federal Subject Matter Jurisdiction Prevent Federal Courts from Adopting the Proposal?* Because federal courts have only limited subject matter jurisdiction, there is the problem that a court might not have jurisdiction over a claim that my proposal would compel a party to plead. To illustrate the potential problem, imagine that a plaintiff sues his stockbroker for violating the federal securities statutes; jurisdiction is appropriate because the claim is based on federal law.²¹⁰ The defendant in turn counterclaims against the plaintiff, seeking to recover an unrelated debt of \$8000. The counterclaim does not satisfy the requirements of either federal question jurisdiction (because it is based on state law) or diversity jurisdiction (because the counterclaim is well below the jurisdictional amount in controversy).²¹¹ The only other possibility is supplemental jurisdiction, which extends to claims that are “so related” to the claims in the original action “that they form part of the same case or controversy under Article III of the United States Constitution.”²¹² As most courts have construed that language, supplemental jurisdiction is not possible here because the counterclaim is not transactionally related to the plaintiff’s original claim.²¹³ Thus, the potential dilemma arises that my proposal would require the defendant to plead a counterclaim over which a federal court may not exercise jurisdiction.

The idea that supplemental jurisdiction requires at least some factual connection between the claims is long-standing.²¹⁴ Its modern incarnation derives from *United Mine Workers of America v. Gibbs*, which considered whether a federal court that had jurisdiction over a federal-law claim also could hear a plaintiff’s state-law claim for which there was no independent basis of jurisdiction.²¹⁵ The Supreme Court found that jurisdiction was proper. It held that “the entire action before the court,” including both claims, “comprises but one constitutional ‘case’” for purposes of Article III as long as those claims “derive from a common nucleus of operative fact.”²¹⁶

²¹⁰ See 28 U.S.C. § 1331 (2012) (federal question jurisdiction).

²¹¹ See *id.* § 1332(b) (permitting diversity jurisdiction only when the amount in controversy exceeds \$75,000).

²¹² *Id.* § 1367(a).

²¹³ See 13D Wright et al., *supra* note 43, § 3567.1.

²¹⁴ See Kane, *supra* note 25, at 1732; Matasar, *supra* note 129, at 1454.

²¹⁵ 383 U.S. 715, 722 (1966).

²¹⁶ See *id.* at 725. The Court articulated a second requirement—that a party “would ordinarily be expected to try [the claims] in one judicial proceeding”—but most commentators

When Congress passed the supplemental jurisdiction statute in 1990, the consensus was that it had codified *Gibbs*'s "common nucleus of operative fact" test.²¹⁷ That test, as virtually every commentator recognizes, is rooted in transactionalism.²¹⁸ Some courts have held that the statute allows a slightly looser connection between the claims than the *Gibbs* test had,²¹⁹ but most courts' working assumption is that the Constitution requires at least some level of transactional relatedness in order for supplemental jurisdiction to be proper.²²⁰ That assumption is probably wrong, though.

Over the years, the Supreme Court and other federal courts have allowed supplemental jurisdiction over certain claims that were *not* factually related to the original action.²²¹ Professor (now Judge) William Fletcher explored one particular type of counterclaim to illustrate this point: the defensive set-off. In essence, it allows a defendant to reduce the amount he owes to a plaintiff based on a debt that the plaintiff owes to the defendant. The basic requirements are that the counterclaim must (1) be liquidated or capable of liquidation; (2) stem from a contract or judgment; and (3) derive from facts *extrinsic* to the plaintiff's claim.²²² Federal courts long have assumed that they have supplemental jurisdiction over defensive set-off counterclaims even though, by definition, they are factually unrelated to the plaintiff's claim.²²³ Moreover, defensive set-offs were common during the Founding period, suggesting that Article III did not define "cases" or "controversies" in terms of factual relatedness.²²⁴

and courts have treated the requirement as either conclusory or redundant (or both). See 13D Wright et al., *supra* note 43, § 3567.1; Matasar, *supra* note 129, at 1458.

²¹⁷ See 13D Wright et al., *supra* note 43, § 3567.1.

²¹⁸ See, e.g., William A. Fletcher, "Common Nucleus of Operative Fact" and Defensive Set-Off: Beyond the *Gibbs* Test, 74 Ind. L.J. 171, 175 (1998); Kane, *supra* note 25, at 1732; Matasar, *supra* note 129, at 1453–54.

²¹⁹ See, e.g., *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 213 (2d Cir. 2004); *Channell v. Citicorp Nat'l Servs.*, 89 F.3d 379, 385 (7th Cir. 1996); *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995).

²²⁰ The Supreme Court itself, albeit in dicta, treated the *Gibbs* test as constitutionally required. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 (1978).

²²¹ See Matasar, *supra* note 129, at 1463; see also *id.* at 1463–77 (cataloging cases).

²²² See 13 Wright et al., *supra* note 43, § 3523; Fletcher, *supra* note 218, at 172–73 (articulating elements and collecting cases); Matasar, *supra* note 129, at 1474–75 (same).

²²³ See Fletcher, *supra* note 218, at 175–77; Matasar, *supra* note 129, at 1475; cf. Fletcher, *supra* note 218, at 175–76 (noting but criticizing two lower court opinions that question whether supplemental jurisdiction extends so far).

²²⁴ See Fletcher, *supra* note 218, at 177.

Although my brief summary cannot do justice to the careful and insightful work by Professors Fletcher and Matasar, their conclusions are clear. Any requirement of transactional relatedness in the exercise of supplemental jurisdiction is of either a statutory or common-law nature; it is not a constitutional requirement.²²⁵ Instead, a constitutional “‘case’ or ‘controversy’ is measured by federal procedural rules.”²²⁶ For purposes of Article III jurisdiction, a case or controversy thus consists of the claims and parties that a court lawfully may bring together under the various joinder rules, regardless of the extent to which those claims may (or may not) be transactionally related. Accordingly, my proposal presents no constitutional problems. Moreover, because the supplemental jurisdiction statute presumptively reaches the full extent allowed by the Constitution,²²⁷ federal courts already have statutory authority to entertain the full range of claims that my proposal requires the parties to plead.²²⁸ Admittedly, the Supreme Court will need to recognize that the supplemental jurisdiction statute extends further than Congress probably anticipated, but the Court’s interpretation of Congress’s language (not Congress’s erroneous assumption) ultimately obtains.²²⁹ Thus, in all likelihood, the Constitution, the relevant statutes, and the Federal Rules allow federal courts to adopt my proposal.

CONCLUSION

In this Article, I have offered a way to reconceptualize how litigants and courts structure lawsuits. Since the early twentieth century, the essential organizing principle has been the “transaction or occurrence,” which attempts to forecast the ideal structure of any given lawsuit. Despite certain inherent tensions in the idea of transactionalism, it was a

²²⁵ See Matasar, *supra* note 129, at 1491.

²²⁶ *Id.*; see also Fletcher, *supra* note 218, at 178 (“[A] broader constitutional test could permit supplemental jurisdiction over whatever can be tried as part of a single judicial proceeding under modern joinder rules.”); Matasar, *supra* note 129, at 1478–79 (“‘Case’ or ‘controversy’ as used in article III refers to the limits of joinder of claims and parties set by the system of rules lawfully adopted to govern procedure in the federal courts.”).

²²⁷ See 28 U.S.C. § 1367(a) (2012).

²²⁸ A possible wrinkle might include the withdrawal of supplemental jurisdiction from claims that a plaintiff asserts against parties joined through certain party-joinder devices. See *id.* § 1367(b). To the extent that problems arise, they are not constitutional in nature and lend themselves to resolution by a statutory revision.

²²⁹ See *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 212 n.5 (2d Cir. 2004) (“Congress’s understanding of the extent of Article III is of course not binding as constitutional interpretation”); accord 13D Wright et al., *supra* note 43, § 3567.1.

2014]

Transactionalism Costs

1269

transformative and largely successful idea. As the nature of litigation has evolved, though, inefficiency and uncertainty have proliferated.

I have suggested a way to rethink the approach to structuring lawsuits, arguing that increasing party autonomy will serve to enhance the efficiency of litigation. For the first time, parties will have the power to determine exactly how claim preclusion will apply. Moreover, through negotiated procedure, they will provide the judge with the information necessary to construct a socially efficient litigation unit. Finally, my proposal will provide clarity that has not existed before, informing the parties precisely how preclusion will apply to their lawsuits. Rethinking the means of structuring litigation along these lines thus holds the promise of greater autonomy, efficiency, and predictability.

APPENDIX A – CLAIM PRECLUSION

The following chart details the approach to claim preclusion that the fifty states and the District of Columbia have adopted. The approach in most states is clear, and the chart cites representative case law, statutes, or rules. When a state’s highest court has not directly articulated the standard, the chart cites lower state court cases that offer the best evidence of that state’s approach. (Such is the situation, for example, with Indiana and Massachusetts.)

Thirty-four states and the District of Columbia unambiguously or quite likely take a transactional approach to claim preclusion. At least four others (Iowa, Minnesota, South Carolina, and Washington) do not subscribe to the transactional approach but expressly draw on certain elements of transactionalism to guide the analysis. Moreover, South Dakota’s approach—looking to whether the second lawsuit seeks to redress the same wrongs—bears striking similarity to the breadth of the transactional approach.

State	Approach	Citation
Alabama	Same Evidence Test	Equity Res. Mgmt. v. Vinson, 723 So.2d 634, 636–37 (Ala. 1998).
Alaska	Transactional	Alderman v. Iditarod Props., Inc., 104 P.3d 136, 141 (Alaska 2004).
Arizona	Unclear	Fann v. Cardenas, No. 1 CA-CV 10-0087, 2011 WL 1948921 (Ariz. Ct. App. May 12, 2011) (noting division of authority over whether Arizona applies “same evidence” or transactional test).
Arkansas	Transactional	Golden Host Westchase, Inc. v. First Serv. Corp., 778 S.W.2d 633, 639 (Ark. Ct. App. 1989).
California	Primary Rights Theory	Slater v. Blackwood, 543 P.2d 593, 594 (Cal. 1975).
Colorado	Transactional	Argus Real Estate, Inc. v. E-470 Pub. Highway Auth., 109 P.3d 604, 608–09 (Colo. 2005).

2014]

Transactionalism Costs

1271

Connecticut	Transactional	Duhaime v. Am. Reserve Life Ins. Co., 511 A.2d 333, 335 (Conn. 1986).
Delaware	Transactional	LaPoint v. AmerisourceBergen Corp., 970 A.2d 185, 192–94 (Del. 2009).
District of Columbia	Transactional	Patton v. Klein, 746 A.2d 866, 869–70 (D.C. 1999).
Florida	Same Evidence Test	Albrecht v. State, 444 So. 2d 8, 12 (Fla. 1984); see also Fla. Power Corp. v. Garcia, 780 So. 2d 34, 44 (Fla. 2001).
Georgia	Same Evidence Test	Haley v. Regions Bank, 586 S.E.2d 633, 638–39 (Ga. 2003).
Hawaii	Transactional	Kauhane v. Acutron Co., 795 P.2d 276, 279 (Haw. 1990).
Idaho	Transactional	Ticor Title Co. v. Stanion, 157 P.3d 613, 620 (Idaho 2007).
Illinois	Transactional	River Park, Inc. v. City of Highland Park, 703 N.E.2d 883, 892–94 (Ill. 1998).
Indiana	Same Evidence Test	Afolabi v. Atl. Mortg. & Inv. Corp., 849 N.E.2d 1170, 1173–74 (Ind. Ct. App. 2006); Richter v. Asbestos Insulating & Roofing, 790 N.E.2d 1000, 1003 (Ind. Ct. App. 2003).
Iowa	Unclear. Traditionally a same evidence state, but <i>Pavone</i> introduced Re-statement and transactional analysis.	Pavone v. Kirke, 807 N.W.2d 828, 836–38 (Iowa 2011).

Kansas	Likely Transactional	Stanfield v. Osborne Indus., 949 P.2d 602, 611 (Kan. 1997) (noting that the transactional standard governs when the first lawsuit was in federal court). Other courts have cited <i>Stanfield</i> when determining the scope of a “cause of action” for purposes of Kansas claim preclusion standards. See, e.g., O’Keefe v. Merrill Lynch & Co., 84 P.3d 613, 618 (Kan. Ct. App. 2004); Grimmett v. S&W Auto Sales Co., 988 P.2d 755, 759 (Kan. Ct. App. 1999) (“The Kansas Supreme Court in [<i>Stanfield</i>] found that Kansas law does not appear to differ significantly from the federal law regarding preclusion doctrines.”).
Kentucky	Transactional	Yeoman v. Commonwealth, 983 S.W.2d 459, 464–65 (Ky. 1998).
Louisiana	Transactional	La. Rev. Stat. Ann. § 13:4231 (1991).
Maine	Transactional	Norton v. Town of Long Island, 2005 ME 109, 883 A.2d 889, 895.
Maryland	Transactional	Kent Cnty. Bd. of Educ. v. Bilbrough, 525 A.2d 232, 237–38 (Md. 1987).
Massachusetts	Transactional	Baby Furniture Warehouse Store, Inc. v. Meubles D&F Ltee, 911 N.E.2d 800, 806 (Mass. App. Ct. 2009); Saint Louis v. Baystate Med. Ctr., Inc., 568 N.E.2d 1181, 1186 (Mass. App. Ct. 1991); see also St. Germaine v. Pendergast, 626 N.E.2d 857, 861 (Mass. 1993) (O’Connor, J., concurring).

2014]

Transactionalism Costs

1273

Michigan	Transactional	Adair v. State, 680 N.W.2d 386, 397–98 (Mich. 2004).
Minnesota	Same evidence test (but with some reference to the transactional standard).	Hauschildt v. Beckingham, 686 N.W.2d 829, 840–41 (Minn. 2004); see also Brown-Wilbert, Inc. v. Copeland Buhl & Co., 732 N.W.2d 209, 223 (Minn. 2007) (citing the transactional test).
Mississippi	Transactional	Harrison v. Chandler-Sampson Ins., Inc., 891 So. 2d 224, 232–36 (Miss. 2005).
Missouri	Transactional	Kesterson v. State Farm Fire & Cas. Co., 242 S.W.3d 712, 715–17 (Mo. 2008).
Montana	Transactional	Brilz v. Metro. Gen. Ins. Co., 2012 MT 184, 285 P.3d 494, 500–02.
Nebraska	Same Evidence Test	Baer v. Southroads Mall Ltd. P’ship, 566 N.W.2d 734, 738–39 (Neb. 1997).
Nevada	Same Evidence Test	Rosenbaum v. Rosenbaum, 471 P.2d 254, 256 (Nev. 1970).
New Hampshire	Transactional	Sleeper v. Hoban Family P’ship, 955 A.2d 879, 883 (N.H. 2008).
New Jersey	Transactional	N.J. Civ. Prac. R. 4:30A; McNeil v. Legislative Apportionment Comm’n of State, 828 A.2d 840, 858–59 (N.J. 2003).
New Mexico	Transactional	Computer One, Inc. v. Grisham & Lawless, P.A., 188 P.3d 1175, 1183 (N.M. 2008).
New York	Transactional	Reilly v. Reid, 379 N.E.2d 172, 175–76 (N.Y. 1978).
North Carolina	Unclear, but appears to take same evidence approach.	Hayes v. Ricard, 112 S.E.2d 123, 127 (N.C. 1960).

North Dakota	Transactional	Lucas v. Porter, 2008 ND 160, 755 N.W.2d 88, 97; Simpson v. Chi. Pneumatic Tool Co., 2005 ND 55, 693 N.W.2d 612, 617.
Ohio	Transactional	Grava v. Parkman Twp., 653 N.E.2d 226, 227, 229 (Ohio 1995).
Oklahoma	Transactional	Retherford v. Halliburton Co., 572 P.2d 966, 968–69 (Okla. 1977).
Oregon	Transactional	Bloomfield v. Weakland, 123 P.3d 275, 279–81 (Or. 2005).
Pennsylvania	Unclear	Most analyses are conclusory as to whether a second lawsuit involves the same cause of action as a prior lawsuit. The Pennsylvania Supreme Court has observed that “it is not self-evident that the New York [transactional] test for <i>res judicata</i> is coterminous with the approach prevailing in Pennsylvania.” Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co., 902 A.2d 366, 401 (Pa. 2006). The court then noted the Pennsylvania requirement that there must be an “identity of causes of action” but never articulated a test for determining such identity.
Rhode Island	Transactional	Waters v. Magee, 877 A.2d 658, 666 (R.I. 2005).
South Carolina	Does not endorse one test, but includes transactional approach as one of four “factors.”	Judy v. Judy, 712 S.E.2d 408, 414 (S.C. 2011).

2014]

Transactionalism Costs

1275

South Dakota	Same Wrongs to be Redressed	Dakota Plains AG Ctr., LLC v. Smithey, 772 N.W.2d 170, 179–80 (S.D. 2009). Courts describe the test as “broad” and treat it as more encompassing than the “same evidence test.” Similar to the transactional approach, it is based on the same constellation of facts.
Tennessee	Transactional	Creech v. Addington, 281 S.W.3d 363, 380–81 (Tenn. 2009).
Texas	Transactional	Barr v. Resolution Trust Corp. ex rel. Sunbelt Fed. Sav., 837 S.W.2d 627, 630–31 (Tex. 1992).
Utah	Transactional	Mack v. Utah State Dep’t of Commerce, Div. of Sec., 2009 UT 47, 221 P.3d 194, 203.
Vermont	Transactional	Iannarone v. Limoggio, 2011 VT 91, 30 A.3d 655, 659–60.
Virginia	Transactional	Va. Sup. Ct. R. 1:6(a).
Washington	Does not endorse one test, but includes transactional approach as one of four “factors.”	Marshall v. Thurston Cnty., 267 P.3d 491, 496 (Wash. Ct. App. 2011).
West Virginia	Same Evidence Test	Blake v. Charleston Area Med. Ctr., Inc., 498 S.E.2d 41, 48–49 (W. Va. 1997).
Wisconsin	Transactional	Kruckenberg v. Harvey, 2005 WI 43, 694 N.W.2d 879, 884–86 (Wis. 2005).
Wyoming	Transactional	Foianini v. Brinton, 855 P.2d 1238, 1240–41 (Wyo. 1993).

APPENDIX B – COMPULSORY COUNTERCLAIMS

The following chart demonstrates that forty states and the District of Columbia—listed in normal typeface—have adopted compulsory counterclaim rules akin to Federal Rule 13(a). Although the rules differ in certain particulars, they all express the overarching principle that a defendant must plead a transactionally related counterclaim or else forfeit that claim in a future lawsuit. The ten italicized states have not adopted compulsory counterclaim rules based on the transactional approach.²³⁰

Alabama	Ala. R. Civ. P. 13(a).
Alaska	Alaska R. Civ. P. 13(a).
Arizona	Ariz. R. Civ. P. 13(a).
Arkansas	Ark. R. Civ. P. 13(a).
California	Cal. Civ. Proc. Code § 426.30(a) (West 2014).
Colorado	Colo. R. Civ. P. 13(a).
<i>Connecticut</i>	See, e.g., <i>Hansted v. Safeco Ins. Co. of Am.</i> , 562 A.2d 1148, 1151 n.4 (Conn. App. Ct. 1989).
Delaware	Del. Super. Ct. R. Civ. P. 13(a).
District of Columbia	D.C. Super. Ct. R. Civ. 13(a).
Florida	Fla. R. Civ. P. 1.170(a).
Georgia	Ga. Code Ann. § 9-11-13(a) (2013).
Hawaii	Haw. R. Civ. P. 13(a).
Idaho	Idaho R. Civ. P. 13(a).
<i>Illinois</i>	See 735 Ill. Comp. Stat. Ann. 5/2-608 (West 2010); see also, e.g., <i>Kasny v. Coonen & Roth, Ltd.</i> , 924 N.E.2d 1103, 1107 (Ill. App. Ct. 2009).

²³⁰ Among the ten states that deem all counterclaims to be permissive, some have expressly adopted or favorably alluded to the so-called common law compulsory counterclaim rule. The common law rule prevents a party from later bringing a counterclaim, even a supposedly permissive counterclaim, that “would nullify the initial judgment or would impair rights established in the initial action.” Restatement (Second) of Judgments § 22(2)(b) (1982); see also, e.g., *Kasny v. Coonen & Roth, Ltd.*, 924 N.E.2d 1103, 1107 (Ill. App. Ct. 2009) (alluding to a version of claim preclusion that would prevent a defendant from later litigating a claim that would “nullify the judgment entered in the initial action”); *Menard, Inc. v. Lite-way Lighting Prods.*, 698 N.W.2d 738, 745 (Wis. 2005) (noting that Wisconsin has adopted the common law compulsory counterclaim rule); *Rowland v. Harrison*, 577 A.2d 51, 53–58 (Md. 1990) (expressly considering the applicability of the common law counterclaim rule). However, the common law rule is significantly narrower than the transactional approach that the forty states and the District of Columbia have embraced.

2014]

Transactionalism Costs

1277

Indiana	Ind. Trial Proc. R. 13(a).
Iowa	Iowa Code R. 1.241.
Kansas	Kan. Stat. 60-213(a).
Kentucky	Ky. R. Civ. P. 13.01.
Louisiana	La. Code Civ. Proc. Ann. art. 1061 (2006).
Maine	Me. R. Civ. P. 13(a).
Maryland	See Md. R. 2-331(a), 3-331(a); see also, e.g., Fairfax Sav., F.S.B. v. Kris Jen Ltd. P'ship, 655 A.2d 1265, 1270 (Md. 1995).
Massachusetts	Mass. R. Civ. P. 13(a).
Michigan	See Mich. Ct. R. 2.203(A). A defendant need not bring <i>any</i> counterclaims; however, once a defendant pleads one counterclaim, the defendant must plead all transactionally related counterclaims. See, e.g., Gross v. Landin, No. 246282, 2004 WL 1908124, at *6 (Mich. Ct. App. Aug. 26, 2004).
Minnesota	Minn. R. Civ. P. 13.01.
Mississippi	Miss. R. Civ. P. 13(a).
Missouri	Mo. Sup. Ct. R. 55.32(a).
Montana	Mont. R. Civ. P. 13(a).
Nebraska	Neb. Ct. R. Pldg. §§ 6-1113(a), (b); see also 5 Nebraska Practice, Civil Procedure § 13:8.
Nevada	Nev. R. Civ. P. 13(a).
New Hampshire	N.H. Super. Ct. Civ. R. 10(a).
New Jersey	N.J. Ct. R. 4:7-1; N.J. Ct. R. 4:30A.
New Mexico	N.M. Rule 1-013(A).
New York	N.Y. C.P.L.R. 3019 (McKinney 2013); see also, e.g., Textile Tech. Exch., Inc. v. Davis, 611 N.E.2d 768, 769 (N.Y. 1993).
North Carolina	N.C. R. Civ. P. 13(a).
North Dakota	N.D. R. Civ. P. 13(a).
Ohio	Ohio R. Civ. P. 13(A).
Oklahoma	Okla. Stat. Ann. tit. 12, § 2013(A) (West 2011).
Oregon	Or. R. Civ. P. 22(A); see also, e.g., State ex rel. English ex rel. Sellers v. Multnomah Cnty., 238 P.3d 980, 989 (Or. 2010).

1278

Virginia Law Review

[Vol. 100:1211]

<i>Pennsylvania</i>	Pa. R. Civ. P. 1031; see also, e.g., <i>Birdsboro Mun. Auth. v. Reading Co. & Wilmington & N. R.R.</i> , 758 A.2d 222, 225 n.3 (Pa. Super. Ct. 2000).
Rhode Island	R.I. Super. R. Civ. P. 13(a).
South Carolina	S.C. R. Civ. P. 13(a).
South Dakota	S.D. Codified Laws § 15-6-13(a) (1966).
Tennessee	Tenn. R. Civ. P. 13.01.
Texas	Tex. R. Civ. P. 97(a).
Utah	Utah R. Civ. P. 13(a).
Vermont	Vt. R. Civ. P. 13(a).
<i>Virginia</i>	Va. Sup. Ct. R. 3:9.
Washington	Wash. R. Super. Ct. Civ. R. 13(a).
West Virginia	W. Va. R. Civ. P. 13(a).
<i>Wisconsin</i>	Wis. Stat. Ann. § 802.07(1) (West 2013); see also, e.g., <i>Menard, Inc. v. Liteway Lighting Prods.</i> , 698 N.W.2d 738, 745 (Wis. 2005).
Wyoming	Wyo. R. Civ. P. 13(a).