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PENDENT-PARTY JURISDICTION
UNDER THE FTCA: FINLEY v. UNITED STATES

Federal courts are courts of limited subject matter jurisdiction.¹

¹ See U.S. Const. art. III, § 2, cl. 1; 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3522, at 60 (2d ed. 1984). See also Insurance Corp. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 701-02 (1982) (federal courts are courts of limited jurisdiction, and therefore can decide only certain controversies). "Throughout the long summer of 1787, the Framers of the Constitution, assembled at Philadelphia, hammered the parochial prejudices of thirteen colonies into the rough framework of a union. There, a fundamental tenet of American jurisprudence was forged: federal courts are courts of limited jurisdiction." Verlinden B. V. v. Central Bank of Nigeria, 647 F.2d 320, 321 (2d Cir. 1981), rev'd on other grounds, 461 U.S. 480 (1983); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978) ("It is a fundamental precept that federal courts are courts of limited jurisdiction."); McDermott v. Toyota Motor Sales Co., 487 F. Supp. 484, 486 (E.D. Tenn. 1980) (federal courts are courts of limited jurisdiction with power to hear only certain types of cases).

The federal courts' jurisdiction is derived largely from the Constitution and the Judiciary Act of 1789. See U.S. Const. art. III, § 2, cl. 1; Judiciary Act of 1789, ch. 20, § I Stat. 73.

The federal courts will dismiss cases which exceed the parameters of proper subject matter jurisdiction. See, e.g., Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 154 (1908) (dismissed for lack of proper subject matter jurisdiction).

Traditionally, the lower federal courts are empowered to exercise subject matter jurisdiction over only those disputes which fall within the ambit of both article III of the Constitution\(^8\) and a congressional statute.\(^8\)

it is defectively pled when a proper basis for jurisdiction appears upon review of the entire complaint." (citing 5 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1206 at 77 (1969)). In addition, Federal Rule of Civil Procedure 8(a)(1) provides that "[a] pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it . . . ." FED. R. CIV. P. 8(a)(1).

The federal courts’ policy requiring proper jurisdiction is so strong that many propositions of law flow from it; for instance, subject matter jurisdiction is not waivable. See, e.g., Mitchell v. Maurer, 293 U.S. 237, 244 (1954) (parties cannot remedy lack of federal subject jurisdiction by waiver). Nor can it be conferred by consent of the parties. See, e.g., Peoples Bank v. Calhoun, 102 U.S. 256, 260-61 (1880) ("mere consent of parties cannot confer upon a court of United States the jurisdiction to hear and decide a case"). In addition, subject matter jurisdiction can be contested at any time during trial. See, e.g., Garrison v. General Motors Corp., 179 F. Supp. 315, 317 (W.D. Ark. 1959) ("the courts . . . are under a duty to raise . . . question of lack of jurisdiction at any time such lack appears"). It may even be challenged for the first time on appeal. See, e.g., Dieffenbach v. Attorney Gen. of Vt., 604 F.2d 187, 199 (2d Cir. 1979) (example of first-time challenge on appeal). Federal courts also have jurisdiction to determine their own jurisdiction. See, e.g., Pacific Towboat & Salvage Co. v. I.C.C., 620 F.2d 727, 729 (9th Cir. 1980) ("jurisdiction of the court under Article III [of U.S. Constitution] is always open to inquiry upon the court’s own motion . . . ."); Mitchell, 293 U.S. at 244 (federal court must satisfy itself as to jurisdiction). See generally Baker, Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction, 33 U. PRRT. L. REV. 759 (1972).

\(^8\) U.S. CONST. art. III, § 1 provides in relevant part: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time establish." Id. Article III also provides that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; — to all cases affecting Ambassadors, other public Ministers and Consuls; — to all cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. at § 2, cl. 1.

\(^9\) See Aldinger v. Howard, 427 U.S. 1, 16-18 (1976) ("Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that article III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922) ("Congress may confer jurisdiction upon such courts . . . ."); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845) ("[C]ourts . . . must look to the statute as the warrant for their authority."); see generally Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1362-63 (1953) (series of quotations on congressional authorization of judicial power).

It is clear, therefore, that the lower federal courts will need both constitutional and con-
In the absence of a congressional statute, the judicially created doctrine of pendent jurisdiction, under United Mine Workers of

progressional power to have jurisdiction over a dispute. See The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868).

As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it and an act of Congress must have supplied it. Their concurrence is necessary to vest it.

Id. See also Owen, 437 U.S. at 372 ("[j]urisdiction of the federal courts is limited not only by the provisions of [article] III of the Constitution, but also by acts of Congress." (citing Palmore v. United States, 411 U.S. 389 (1973)); Cary, 44 U.S. (3 How.) at 245 ("[t]he judicial power of the United States, although it has its origin in the Constitution, is ... dependent ... upon the action of Congress ... [f]or investing [it] with jurisdiction ... ."); Ex rel. McColgan v. Bruce, 129 F.2d 421, 423 (9th Cir.) (Constitution endows federal courts with capacity to take jurisdiction, but it takes an act of Congress to confer it), cert. denied, 317 U.S. 678 (1942); Dumansky v. United States, 486 F. Supp. 1078, 1082 (D.N.J. 1980) (authority must be found in congressional grants of jurisdiction and article III of Constitution); Sinchak v. Parente, 262 F. Supp. 79, 82 (W.D. Pa. 1966) ("Federal courts are empowered to hear only such cases as are within the judicial power of the United States and have been entrusted by Congress."); Carroutte, 179 F. Supp. at 317 (federal district courts lack general jurisdiction; therefore, jurisdiction is valid only when prescribed by Constitution and Congress); Baker, supra note 1, at 759-61 (jurisdiction limited by the Constitution and Congress); Note, Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs — Federal Question and Diversity Cases, 62 Va. L. Rev. 194, 196 (1976) ("Within the outer limits of article III of the Constitution, the jurisdiction of the federal district courts is theoretically subject to the will of Congress ... .") See generally H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973).


The judicial development of pendent jurisdiction can be traced back to Osborne v. United States Bank, 22 U.S. (9 Wheat.) 738, 823 (1824), in which Chief Justice Marshall recognized that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in it.

Id. See also Hagans v. Levine, 415 U.S. 528, 554 (1974) (jurisdiction of federal courts extends not only to federal issues but to non-federal issues essential to settlement of federal claim). The doctrine was expanded in Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909) in which the Court indicated that a lower federal court "had the right to decide all the questions in [a] case, even though it decided the Federal questions adversely to the party raising them, or even if it ... decided the case on local or state questions only." Id. at 191. The doctrine was further defined in Hurn v. Ousler, 289 U.S. 238 (1933), in which the Court required that the federal claim must be substantial and sufficiently related to the state claim in order to confer jurisdiction. Id. at 245-46. Pendent jurisdiction was refined and fully articulated in the landmark case of United Mine Workers v. Gibbs, 383 U.S. 715, 729 (1966). Gibbs is now synonymous with pendent jurisdiction. See, e.g., Finley v. United States, 109 S. Ct. 2003, 2006 (1989) (discussion of Gibbs as seminal case for pendent-party jurisdiction). See infra note 7 and accompanying text (description of Gibbs analysis).

See generally 13 C. WRIGHT, supra note 1, at § 3567; Shakman, The New Pendent Jurisdiction of the Federal Courts, 20 Stan. L. Rev. 262 (1968); Note, The Evolution and Scope of the
**America v. Gibbs,** has been successfully invoked to confer the requisite jurisdiction upon the federal court. Pendent jurisdiction, under the traditional *Gibbs* analysis,* enables a plaintiff to append

***Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018 (1962).***

* 383 U.S. 715 (1966). The *Gibbs* case resulted from the rivalry between the United Mine Workers and the Southern Labor Union over representation of workers in the southern Appalachian coal mines. *Id.* at 718. After the Tennessee Consolidated Coal Company laid off one hundred miners belonging to the Union's Local 5881 when it closed one of its mines, the members forcibly prevented the opening of another mine with which respondent Paul Gibbs had a contract as its mining superintendent and hauling contractor. *Id.* at 718-19. Gibbs lost his job as well as other trucking contracts and mine leases he held in nearby areas. *Id.* at 720. Claiming that these effects were the result of a concealed union plan against him, he brought an action in the United States District Court for the Eastern District of Tennessee against the Local's International Chapter. *Id.* Jurisdiction was premised on allegations of secondary boycotts under § 303 of the Labor Management Relations Act of 1947, 61 Stat. 158, and, under the doctrine of pendent jurisdiction, a state law claim of "an unlawful conspiracy... and an unlawful... boycott aimed at him... to maliciously, wantonly, and wilfully interfere with his contract of employment and with his contract of haulage." *Id.* Gibbs was awarded compensatory and punitive damages against the United Mine Workers of America, and the Court of Appeals for the Sixth Circuit affirmed. *Id.* The Supreme Court granted certiorari and reversed, holding that while pendent jurisdiction existed even though the only recovery allowed plaintiff was on the state claim, reversal was required for failure to meet the special proof requirement imposed by the Norris-LaGuardia Act. *Id.* at 729, 735.

* See, e.g., Herald Co. v. McNeal, 553 F.2d 1125, 1131 (8th Cir. 1977) (pendent jurisdiction found to exist where claim of violation of state constitution joined with claim of violation of United States Constitution); Verville v. International Ass'n of Machinists & Aerospace Workers, 520 F.2d 615, 618 (6th Cir. 1975) (state claim by union members under contract was appended to federal claim against union under Railway Labor Act); Phillips v. Trello, 502 F.2d 1000, 1005 (3d Cir. 1974) (pendent jurisdiction exercised over state law defamation claim, joined with illegal harassment claims against civil servants under 42 U.S.C. § 1983). But see, e.g., Umdenstock v. American Mortgage & Inv. Co., 495 F.2d 589, 592-93 (10th Cir. 1974) (pendent jurisdiction over state claims for breach of trust and unjust enrichment refused where joined with federal antitrust claims); Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836, 848 (4th Cir. 1974) (no pendent jurisdiction where claims seeking payments under profit-sharing action joined with claim under Welfare and Pension Plans Disclosure Act); Deen v. Great Atlantic & Pacific Tea Co., 608 F. Supp. 783, 785 (W.D.N.C. 1985) (no pendent jurisdiction over state claims of breach of contract and infliction of emotional distress where joined with claims under Age Discrimination in Employment Act).

* Gibbs, 383 U.S. at 725-26. The analysis is two-part: both jurisdictional power and discretionary concerns must be considered. *Id.* See generally Comment, UMW v. Gibbs and Pendent Party Jurisdiction, 81 Harv. L. Rev. 657 (1968) (background to *Gibbs* analysis).

Under the first part of the *Gibbs* analysis, three requirements must be satisfied to insure that jurisdictional power exists. *See Gibbs,* 383 U.S. at 725. First, "[t]he federal claim must have substance sufficient to confer subject matter jurisdiction on the court." *Id.* In addition, "[t]he state and federal claims must derive from a common nucleus of operative fact." *Id.* Finally, the state and federal claims must be such that they would ordinarily be tried in one judicial proceeding. *Id.* If these criteria are met, the federal courts are empowered to hear the whole dispute. *Id.* See also Baker, supra note 1, at 763-65 (discussion of jurisdictional power under *Gibbs*); Note, Unravelling the 'Pendent-Party' Controversy: A Revisionist Approach to Pendent and Ancillary Jurisdiction, 64 B.U.L. Rev. 895, 900-05 (1985) (same).
Finley v. United States

a jurisdictionally insufficient state law claim onto a claim which is jurisdictionally sufficient. Historically, pendent jurisdiction has extended only to the addition of claims brought by a plaintiff against the original defendant. Recently, federal courts have extended the doctrine to allow a plaintiff with a federal question claim against one defendant to assert a closely related state claim against another defendant, provided that the criteria comprising

Under the second part of the Gibbs analysis, "[the federal courts'] power to confer pendent jurisdiction] need not be exercised in every case in which it is found to exist." Gibbs, 383 U.S. at 726. "It . . . is a doctrine of discretion, not of plaintiff's right." Id. Factors to consider include judicial economy, convenience, fairness to litigants, comity with state tribunals, predominance of state issues, and possible jury confusion in treating divergent legal theories of relief. Id. at 726-27. A court, after considering these factors, will determine whether or not it should exercise its discretion and confer pendent jurisdiction. Id. See also Baker, supra note 1, at 765-67 (discussion of discretion part of Gibbs analysis); Schenker, Ensuring Access to Federal Courts; A Revised Rationale for Pendent Jurisdiction, 75 Nw. U.L. Rev. 245, 289-305 (1980) (extensive discussion of each factor in discretion part of Gibbs analysis); Note, supra at 905-07 (same).

The majority of cases ruling on pendent jurisdiction employ the two-part Gibbs analysis. See, e.g., Simms v. Western Steel Co., 551 F.2d 811, 819-20 (10th Cir.) (illustrates use of Gibbs analysis in context of federal patent claim and state breach of licensing claim), cert. denied, 434 U.S. 858 (1977).


9 See Ayala v. United States, 550 F.2d 1196, 1198 (9th Cir.), cert. granted, 434 U.S. 814 (1977), cert. dismissed, 435 U.S. 982 (1978). "In the simple 'pendent claim' context, a plaintiff seeks to have a federal court hear a state claim . . . with a federal question action . . . between the same parties." Id. "The instant case presents the 'pendent party' variant which . . . requires for its resolution the joinder of an ancillary party." Id. In its classic form, pendent jurisdiction allows federal jurisdiction to be exercised over the state and federal claims, which are between the same parties. Id. If the state claim requires the court to exercise jurisdiction over a defendant other than the defendant to the federal claim — this is known as pendent-party jurisdiction. Id. See also Florida E. Coast Ry. v. United States, 519 F.2d 1184, 1194 (5th Cir. 1975). "This case is admittedly somewhat different from Gibbs in that the federal and state claims are not asserted against the same party." Id. Hipp v. United States, 315 F. Supp. 1152, 1154 (E.D.N.Y. 1970) (case differed from Gibbs in that it involved one cause of action against two persons, rather than two causes of action against one person).

10 See North Dakota v. Merchants Nat'l Bank & Trust Co., 634 F.2d 368, 370-74 (8th Cir. 1980) (jurisdiction permitted over claim against Comptroller of Currency granted under section 30 of the National Bank Act while pendent-party jurisdiction was exercised over state common law claims against banks for unfair competition); Federal Deposit Ins. Co. v. Otero, 598 F.2d 627, 632 (1st Cir. 1979) ("[o]ther courts have concluded, as we do, that the Supreme Court's cautious treatment of pendent jurisdiction does not preclude pendent party jurisdiction . . . ."); Florida E. Coast Ry., 519 F.2d at 1195 ("This circuit, however, like several others, has held that the doctrine of pendent jurisdiction may be invoked to join a new party . . . ."); Almenares v. Wyman, 453 F.2d 1075, 1083 (2d Cir. 1971) ("doctrine of pendent jurisdiction is sufficiently broad to support a claim within the
the Gibbs test is met. Nevertheless, in Finley v. United States, an action brought under the Federal Tort Claims Act (FTCA), the United States Supreme Court refused to allow a plaintiff to join state law claims against a city and a utility company with a federal claim against the Federal Aviation Administration (FAA), even after conceding that all claims derived from a "common nucleus of operative fact."
In Finley, petitioner's husband and two of her children were killed when a twin-engine plane, on which they were passengers, struck electric transmission lines during its approach to a San Diego, California airfield. 15

Petitioner brought a tort action in state court against the San Diego Gas and Electric Company, 16 and the city of San Diego. 17 She later discovered that the FAA was in fact the party responsible for the runway lights and filed an action against the United States in the United States District Court for the Southern District of California under the FTCA, 28 U.S.C. section 1346(b). 18

Almost a year later, petitioner sought to amend the federal complaint to add her state law claims against the city and the utility, for which there was no independent basis of federal jurisdiction. 20 The district court, finding that the federal and state claims arose from a common nucleus of operative facts, 21 granted the petitioner's motion 22 and asserted pendent jurisdiction under Gibbs. 23 The court reasoned that judicial economy and efficiency would best be served by hearing the federal claim and state claims at the same time. 24 The district court certified an interlocutory appeal 25 to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit refused to recognize pendent-party jurisdiction and summarily reversed. 26

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15 Id. at 2005. No one survived the resulting crash. Id.
16 Id. Petitioner claimed that the utility had negligently positioned and inadequately illuminated the electric transmission lines. Id.
17 Id. Finley claimed that the city negligently maintained the airport's runway lights rendering them inoperative the night of the crash. Id.
18 Id. at 2005. Petitioner alleged negligence in the FAA's operation and maintenance of the runway lights, and performance of air traffic control functions. Id.
20 Id.
21 Id.
22 Id.
24 Finley, 109 S. Ct. at 2005.
25 Id. The Court concluded that the aims underlying the Gibbs doctrine, namely, judicial economy, efficiency and convenience to litigants were applicable here since all claims arose from a "common nucleus of operative facts." Id.
26 Id.
The United States Supreme Court granted certiorari\textsuperscript{27} to resolve a split among the circuits as to whether pendent-party jurisdiction could be asserted over additional parties under the FTCA.\textsuperscript{28} In a 5-4 decision, the Court affirmed the Ninth Circuit's decision, holding that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.\textsuperscript{29} The Court had previously acknowledged that it may sometimes be necessary to forgo the efficiency and convenience of a consolidated action in favor of separate actions in state and federal courts.\textsuperscript{30} The majority in \textit{Finley} concluded that the FTCA permitted no other result.\textsuperscript{31} While it was conceded that Congress could change this, the Court stated that until then, the \textit{Gibbs} approach would not be extended to the pendent-party field.\textsuperscript{32}

Writing for the Court, Justice Scalia first examined the existing case law regarding the exercise of pendent jurisdiction.\textsuperscript{33} He stated that the application of pendent jurisdiction under \textit{Gibbs} to pendent-party claims had already been explicitly rejected.\textsuperscript{34} The significant legal difference between pendent jurisdiction and pendent-party jurisdiction is that pendent-party jurisdiction permits the addition of a new and distinct party which "would run counter..." (1989) (No. 87-1973). The basis for the Court's reversal was an earlier categorical rejection of pendent-party jurisdiction under the FTCA. \textit{Id.} 

\textsuperscript{27} \textit{Finley} v. United States, 109 S. Ct. 52 (1988). 
\textsuperscript{28} \textit{Finley}, 109 S. Ct. at 2005. 
\textsuperscript{29} \textit{Id.} at 2010. The Court added that all of its cases have consistently espoused this interpretive rule. \textit{Id. See infra} notes 77-80 (discussion of congressional intent behind FTCA in light of case law). 
\textsuperscript{30} \textit{Finley}, 109 S. Ct. at 2010.

... Judicial economy, convenience and fairness to litigants were the weighty aims upon which the \textit{Gibbs} Court justified the doctrine of pendent jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1965). 

... Courts which have approved of pendent-party jurisdiction justify the extension of the doctrine on those same aims. Maltais v. United States, 439 F. Supp. 540, 548 (N.D.N.Y. 1977) (barring use of pendent-party jurisdiction, especially under the FTCA would "defeat the common sense policy of pendent jurisdiction . . . ") (quoting Rosado v. Wyman, 397 U.S. 397, 405 (1970)). Nevertheless, the \textit{Finley} Court concluded that such interests are not sufficient to justify the extension of the doctrine of pendent jurisdiction when such extension runs contrary to the requisite congressional authorization. \textit{See Finley}, 109 S. Ct. at 2008. 

\textsuperscript{31} \textit{Finley}, 109 S. Ct. at 2010. 
\textsuperscript{32} \textit{See id.} 
\textsuperscript{33} \textit{Id.} at 2006. See also \textit{infra} notes 75-78 and accompanying text (discussion of case law). 
\textsuperscript{34} \textit{See Finley}, 109 S. Ct. at 2007.
to the well-established principle that federal courts are courts of limited jurisdiction marked out by Congress. Consistent with this practice, the Court maintained that the FTCA, which grants to the federal courts exclusive jurisdiction over claims brought against the United States, does not authorize courts to have jurisdiction over any defendants other than the United States. Moreover, the Court recognized that in cases like Finley, where a party has both a state and federal claim, and the federal claim can only be brought in federal court, the party might have to bring separate suits. However, the majority found it inconsequential that the petitioner could sue only in federal rather than state court under the FTCA.

Justice Scalia refuted several contentions presented by the petitioner and the dissenters. The majority rejected Justice Stevens' claim that the power to exercise pendent-party jurisdiction exists under Federal Rules of Civil Procedure 14(a) and 20(a) by cit-

Finley, 109 S. Ct. at 2007 (quoting Aldinger v. Howard, 427 U.S. 1, 15 (1976)). It was also emphasized that the resolution of a pendent-party claim requires careful attention to the relevant statutory language. See Aldinger, 427 U.S. at 17.

Finley, 109 S. Ct. at 2009.

The FTCA does not say 'civil actions on claims that include requested relief against the United States,' nor 'civil actions in which there is a claim against the United States' - formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions.

Id. at 2008.

The Court bolstered its contention by drawing an analogy. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-74 (1978). "The statutory provision 'between . . . citizens of different States' has been held to mean citizens of different states and no one else." Finley, 109 S. Ct. at 2008. This led the majority to conclude that here too "against the United States" meant no other defendant could be included under the statute. Finley, 109 S. Ct. at 2008. See also Healy v. Ratta, 292 U.S. 263, 270 (1934) ("due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined").

Id. at 2010. The FTCA imparts exclusive jurisdiction to the federal courts, therefore, the petitioner cannot relegate the federal claim to state court to be heard along with the state claim. Id. at 2008.

Finley, 109 S. Ct. at 2008. "Our holding that parties to related claims cannot necessarily be sued there means that the efficiency and convenience of a consolidated action will sometimes have to be foregone in favor of separate actions in state and federal courts." Id. at 2010. The FTCA permits the federal government to be sued only in federal court. See 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1982).

See Finley, 109 S. Ct. at 2006-09.

Fed. R. Civ. P. 14(a). The rule, entitled "Third Party Practice," provides in pertinent part:

When Defendant May Bring in Third Party. At any time after commencement of
ing Federal Rule 82 which provides that the Federal Rules "shall not be construed to extend . . . the jurisdiction of the United States district courts." Furthermore, the Court rejected the petitioners contention that an affirmative grant of pendent-party jurisdiction was suggested by changes made to the jurisdictional grant of the FTCA as part of the comprehensive 1948 revision of the judicial code.

the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. 41

Id. 42 Permitting the joinder of third parties, as defendants, if they are or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

Id. 41 FED. R. Civ. P. 20(a). The rule, entitled "Permissive Joinder of Parties," provides in relevant part:

All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Id. 42 FED. R. Civ. P. 82. The rule provides in pertinent part that "these rules shall not be construed to extend or limit the jurisdiction of the United States district courts." Id.

Justice Stevens argued that the district court had statutory power to decide the case and that it was undisputed that this power would not be defeated by the joinder of two private defendants. Finley, 109 S. Ct. at 2013 (Stevens, J., dissenting). He supported his argument by references to the Federal Rules of Civil Procedure 14(a) and 20(a). Id.

The majority refuted this argument by averring that the statutory power to decide the case was not defeated by the joinder of a private party for purposes of a claim over which the district court had no independent jurisdiction, but that the statutory power to decide a case including such a claim did not exist. Id. at 2009 n.6. The reason that it did not exist was that the FTCA provided jurisdiction only for claims against the United States and Rules 14(a) and 20(a) did not alter this since Federal Rule of Civil Procedure 82 prevents the Federal Rules from being construed so as to extend the jurisdiction of the United States district courts. See id.

Id. 43 Finley, 109 S. Ct. at 2009. The original FTCA conferred upon the district courts "exclusive jurisdiction to hear, determine and render judgment on any claim against the United States." 28 U.S.C. § 931 (1946). In the 1948 revision this was changed to "exclusive jurisdiction of civil actions on claims against the United States." 28 U.S.C. § 1346(b) (1952). The petitioner urged that this broadened the scope of the statute so as to permit the assertion of jurisdiction over any civil action that included a claim against the United States. 109 S. Ct. at 2009.

The majority refuted the argument as a matter of statutory construction. Id. "[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed." Id. (quoting Anderson v. Pacific Coast S.S. Co., 225 U.S. 187, 199 (1912)). Also, in referring in particular to the 1948 recodification of the Judicial Code, the Court reiterated its earlier stance that "no changes in law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957). The majority found neither a clear expression nor even a suggestion of a substantive change resulting from this rewording. Finley, 109 S. Ct. at 2009. In addition, the Court found that the rewording would be a perfectly understanda-

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In his dissent, Justice Blackmun maintained that Congress did not intend to exclude private defendants under the FTCA. He argued that the majority considered the wrong question under *Aldinger v. Howard* and that the proper issue was whether "Congress has demonstrated an intent to exempt 'the party as to whom jurisdiction pendent to the principal claim' is asserted from being haled into federal court." Finally, Justice Blackmun stated that *Aldinger* was not an obstacle to allowing the exercise of pendent-party jurisdiction as the majority claimed since *Aldinger* asserted, in dicta, that the exercise of pendent-party jurisdiction may be proper in certain circumstances.

In a separate dissent, Justice Stevens, joined by Justices Brennan and Marshall, asserted that neither the constitutional nor the statutory power to decide the case would be defeated by the joinder of two private defendants. Justice Stevens noted that federal judges throughout the circuits, including some of the wisest and
most learned judges in the area of federal jurisdiction, had recognized that the reasoning behind the *Gibbs* decision should be applied to cases involving pendent-party jurisdiction. The dissent further reasoned that the majority's interpretation of the FTCA was inadequate because it construed the absence of an affirmative congressional grant of jurisdiction as meaning implicit rejection of jurisdictional authority. Justice Stevens maintained that this approach was inconsistent with an obligation to discern congressional intent. The fact that no congressional disapproval existed, either express or implied, coupled with the powerful circum-

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80 Id. at 2015. (Stevens J., dissenting). "Immediately after *Gibbs* was decided, federal judges ... recognized that its reasoning applied to cases in which it was necessary to add an additional party." *Id.* For example, Judge Friendly, "universally recognized, not only as one of our wisest judges, but also as one with special learning and expertise in matters of federal jurisdiction[...]" wrote three separate opinions espousing this reasoning. *Id.* In *Almenares v. Wyman*, 453 F.2d 1075, 1083 (2d Cir. 1971) (statutory claim against State Commissioner of Social Services found to be pendent to constitutional claim against City Commissioner of Social Services), *cert. denied*, 405 U.S. 944 (1972), Judge Friendly concluded that "the doctrine of pendent jurisdiction is sufficiently broad to support a claim within the limits of *Gibbs* against a person not a party to the primary, jurisdiction-granting claim." *Id.* at 1083. Then, in *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) (court found both power and discretion to exercise pendent-party jurisdiction under the Carriage of Goods By Sea Act over a related state claim), Judge Friendly observed that "the common sense considerations underlying [Justice Brennan's language in *Gibbs*] seem broad enough" to encompass pendent-party jurisdiction. *Id.* at 809 (quoting Astor-Honor, Inc. v. Grosset & Dunlop, Inc., 441 F.2d 627, 629 (2d Cir. 1971)). Finally, in *Astor-Honor*, (pendent-party jurisdiction exercised over unfair competition claim in relation to copyright infringement claim), Judge Friendly correctly described the limited scope of the holding in *Aldinger*: "The Court explicitly limited its conclusion to the issue of pendent-party jurisdiction with respect to the claims brought under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983." *Id.* Judge Friendly then concluded that under the circumstances before him, a claim brought under an exclusive jurisdiction-granting statute, "was as powerful for the exercise of pendent-party jurisdiction as can be imagined." *Id.* Cf. *Aldinger v. Howard*, 427 U.S. 1, 18 (1975) The Court stated, in pertinent part:

When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C.A. § 1246, the argument of judicial economy and convenience can be coupled with the additional argument that only in federal court may all of the claims be tried together. *Id.* See Comment, *Federal Pendent*, supra note 10, at 160-69 (agreement with and discussion of three cases and their effect on application of *Gibbs* analysis). But see Comment, *The Extension of Pendent*, supra note 10, at 190-98 (discussion of how three cases were erroneously decided and ramifications thereof).

81 *Finley*, 109 S. Ct. at 2019 (Stevens, J.; dissenting).

82 *Id.* at 2020 (Stevens, J., dissenting). "[T]he Court's approach is neither clear nor faithful to our judicial obligation to discern congressional intent." *Id.* (Stevens, J., dissenting).

83 *Id.* at 2017 n.23 (Stevens, J., dissenting). The dissenters buttressed their argument by quoting United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951). ("[W]e find no congressional disapproval of the exercise of such pendent party jurisdiction in the FTCA. The waiver of immunity . . . was made in 'sweeping language.'") Justice Stevens then listed a
stance that Congress has vested the federal district courts with exclusive jurisdiction under the FTCA, led Justice Stevens to conclude that the exercise of pendent-party jurisdiction was justified. He concluded his dissent by discussing two other flaws present in the majority’s opinion: a failure to distinguish between diversity and federal question cases, and an implicit reliance on a narrow view of the waiver of sovereign immunity in the FTCA.

This Comment will first examine the trend in the lower federal courts concerning the extension of Gibbs to the pendent-party issue, and suggest that the Finley Court espoused too narrow a holding by declining to confer pendent-party jurisdiction under the FTCA. It will then discuss how the Supreme Court has customarily analyzed the permissibility of pendent-party jurisdiction and how the district and circuit courts have concluded when pendent-party jurisdiction under the FTCA may properly be invoked. The Comment will then show how the Court’s decision in Finley will serve not only to further confuse lower federal courts as to the proper analysis to employ when deciding the issue of pendent-

line of cases in which it was held that the exercise of pendent party jurisdiction under the FTCA was allowed because Congress did not intend otherwise. Finley, 109 S. Ct. at 2017 n.23 (Stevens, J., dissenting). See infra notes 70-74 and accompanying text (discussion of various courts' interpretation of pendent-party jurisdiction under FTCA).


See Finley, 109 S. Ct. at 2021 (Stevens, J., dissenting). The majority's reliance on diversity cases caused them to overlook the purpose behind the principle of pendent jurisdiction. Id. (Stevens, J., dissenting). Forcing a federal plaintiff to litigate his case in both federal and state courts impairs the ability of the federal court to grant full relief and "imparts a fundamental bias against the utilization of the federal forum ...." Aldinger, 427 U.S. at 36 (citation omitted). The Court was incorrect in assuming that since Congress did not sanction the exercise of pendent-party jurisdiction in the diversity context, it did not intend to permit its exercise with respect to claims exclusively within the federal jurisdiction. See Finley, 109 S. Ct. at 2021 (Stevens, J., dissenting).

See Finley, 109 S. Ct. at 2022 (Stevens, J., dissenting). The majority relied on Sherwood v. United States, 312 U.S. 584 (1941) in asserting that the jurisdiction conferred by the Tucker Act was based on the history of the Court of Claims and that the sovereign's consent to suit must be strictly construed. Id. (Stevens, J., dissenting). However, since the reenactment of the FTCA, the waiver of sovereign immunity under the Tucker Act is no longer strictly construed. Id. (Stevens, J., dissenting). "When authority is given, it is liberally construed." Id. at 2023 (Stevens, J., dissenting) (quoting United States v. Shaw, 309 U.S. 501 (1939)).
party jurisdiction but also to undermine part of the congressional intent behind the FTCA. It will further discuss the arguments present in the Federal Rules of Civil Procedure for the exercise of pendent-party jurisdiction. Finally, it will demonstrate how the Finley decision has eroded the weighty concepts of judicial economy, convenience, and fairness to litigants as promulgated in the landmark decision of United Mine Workers v. Gibbs.

I. Pre-Finley Trend

In United Mine Workers v. Gibbs, the Supreme Court, after employing a two-part analysis, 57 decided that federal courts may exercise jurisdiction over jurisdictionally insufficient state law claims, if they are properly appended to jurisdictionally sufficient federal claims. 58 It is submitted that the trend in the lower federal courts prior to the Finley decision was to favor an extension of Gibbs to pendent-party jurisdiction. The overwhelming number of courts doing so strongly suggests that the majority in Finley, by denying pendent-party jurisdiction, has set forth too narrow a holding. 59 Immediately after Gibbs was decided, various lower federal courts recognized that its reasoning was applicable to cases in which it was necessary to add an additional party to a pendent federal claim in order to grant complete relief. 60 Judge Friendly, sitting on the United States Court of Appeals for the Second Circuit and a renowned expert in federal jurisdiction, was one of the first judges to consider pendent-party jurisdiction in each of three separate opinions. 61 He maintained that Justice Brennan's language in Gibbs and the common sense considerations underlying it

57 See supra note 7 (description of two-part test).
60 Finley, 109 S. Ct. at 2015. See infra note 70 and accompanying text (discussion of courts recognizing necessity of adding parties).
61 See supra note 50 and accompanying text (discussion of Judge Friendly's opinions).
seemed broad enough to cover pendent-party situations as well.\textsuperscript{62}

Moreover, the trend toward extending \textit{Gibbs} has become more pronounced in cases arising under the FTCA.\textsuperscript{63} Only the Ninth Circuit has consistently rejected the invocation of pendent-party jurisdiction under \textit{Gibbs}.\textsuperscript{64} Hence, it is submitted that the analysis employed by the lower federal courts, which have asserted pendent-party jurisdiction, is correct. It is further submitted that the Supreme Court erred in ignoring this analysis and in making such a restrictive ruling in \textit{Finley}.

II. LEGISLATIVE INTENT AND PENDENT-PARTY JURISDICTION

A. Pendent-Party Jurisdiction Under Congressional Statutes

In examining pendent-party jurisdiction, both the Supreme Court and lower federal courts have initially assessed whether power to assert the jurisdiction is within article III of the Constitution.\textsuperscript{65} In order to do this, a court looks to the posture in which


\textsuperscript{63} Further, in \textit{Astor-Honor}, Judge Friendly distinguished all cases denying pendent-party jurisdiction as either predating \textit{Gibbs}, and therefore "suspect as authority," or as relying on a theory of lack of power, which was undermined by \textit{Gibbs}. See \textit{Astor-Honor}, 441 F.2d at 629-30 (Judge Friendly distinguished cases, ultimately finding pendent-party jurisdiction); Note, \textit{supra} note 7, at 918 (\textit{Gibbs} analysis).

\textsuperscript{64} See \textit{infra} note 70 (cases brought under FTCA which upheld pendent-party jurisdiction). See also Note, \textit{supra} note 3, at 205 (trend of lower federal court decisions since \textit{Gibbs} found to have such power); Comment, \textit{Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines}, \textit{supra} note 10, at 1279 (majority of courts have followed this trend).

\textsuperscript{65} See, e.g., Idaho ex rel. Trombley v. United States Dep't of the Army, Corps of Eng'rs, 666 F.2d 444, 446 (9th Cir. 1982) (Ohio not permitted to have its state claim "ride the coattails" of its FTCA claim against United States into federal court).


\textsuperscript{66} See Dumansky v. United States, 486 F. Supp. 1078, 1086 (D.N.J. 1980). "\textit{Gibbs} dictates a two tiered approach to determining whether a court may exercise pendent party jurisdiction. The first tier looks to [article] III limitations . . . ." Id. See also Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 (1978) (constitutional power is only first hurdle
the state claim is asserted in relation to the federal claim.\textsuperscript{66} If it is found that the requisite constitutional power exists, the court then determines if the specific statute under which the federal claim is brought has either "expressly or by implication negated" the exercise of pendent-party jurisdiction.\textsuperscript{67} If, upon careful attention to the statutory language, the court finds that Congress expressly negated the exercise of pendent-party jurisdiction, then the court's ability to confer it is preempted.\textsuperscript{68} However, should the statute be silent, the court has an obligation to look at congressional intent to determine if pendent-party jurisdiction has been impliedly negated.\textsuperscript{69}

that must be overcome in determining whether federal court has power to exercise pendent-party jurisdiction); Aldinger v. Howard, 427 U.S. 1, 18 (1975) (before it can be concluded that pendent-party jurisdiction exists, federal court must satisfy itself that article III permits it).

\textsuperscript{66} United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1965). See supra note 7 (test set forth in Gibbs must be met for article III jurisdiction to exist); see also Owen, 437 U.S. at 373.

\textsuperscript{67} Aldinger, 427 U.S. at 18. Before it can be concluded that pendent-party jurisdiction may be exercised "a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." Id. See Owen, 437 U.S. at 373 (court determined diversity statute impliedly negated pendent-party jurisdiction); Bourdeau v. Puckett, 611 F.2d 1028, 1030-31 (5th Cir. 1980) (court determined Motor Vehicle Act did not expressly or impliedly negate pendent-party jurisdiction); Ortiz v. United States, 595 F.2d 65, 72-73 (1st Cir. 1979) (court determined that Congress has expressly prohibited or impliedly negated pendent-party jurisdiction); Dumansky, 486 F. Supp. at 1089 (same).

\textsuperscript{68} Aldinger, 427 U.S. at 17-18 (1975). A fair reading of the statute, under which Aldinger's claim was brought, indicated to the Court that Congress impliedly negated the exercise of pendent-party jurisdiction. Id. See Owen, 437 U.S. at 373-74. In the diversity jurisdiction statute, under which Owen was brought, Congress expressly mandated that there can be no jurisdiction unless there is complete diversity between parties. Id. In the Owen situation, where pendent-party jurisdiction would produce incomplete diversity, the Court denied the existence of jurisdiction because Congress had expressly negated the results its exercise would produce. Id.

\textsuperscript{69} See Finley v. United States, 109 S. Ct. 2003, 2020 (1989) (Stevens, J., dissenting) "The Court today adopts a sharply different approach. Without even so much as acknowledging our statement in Aldinger that before a federal court may exercise pendent-party jurisdiction it must satisfy itself that Congress has not 'expressly or by implication negated its existence . . . .'" Id. (quoting Aldinger, 427 U.S. at 18). See, e.g., Owen, 437 U.S. at 373-74 (federal diversity statute impliedly negates pendent-party jurisdiction by providing that diversity is "between . . . citizens of different states"); Aldinger, 427 U.S. at 19 (Civil Rights Act impliedly negates pendent-party jurisdiction by indicating parties be persons, not counties).
B. Pendent-Party Jurisdiction Under the FTCA

Although the United States Supreme Court has never before addressed pendent-party jurisdiction under the FTCA,\(^7\) most circuit courts and district courts have already confronted the issue and have held that pendent-party jurisdiction is viable under the FTCA. The FTCA is silent as to whether the United States must be the only defendant. Instead, the statute provides that the United States will be liable "in the same manner and extent as a private individual in the same circumstance."\(^7\) Courts have, therefore, interpreted the FTCA broadly to grant exclusive jurisdiction to the federal courts over tort claims against the United States as well as to allow other defendants in the action.\(^7\) Even

\(^{7}\) Finley, 109 S. Ct. at 2005. The Court granted certiorari to resolve a split among the circuits on whether the FTCA permits an assertion of pendent-party jurisdiction. Id. See Dumansky, 486 F. Supp. at 1084. "As to the question whether a court has power to entertain pendent-party claims in an action brought under the FTCA, the circuit courts . . . have divided." Id. Barring the Third Circuit, most other circuits have confronted the question. Id.

Most courts of appeals deciding the issue of whether to exercise pendent-party jurisdiction under the FTCA against a non-federal defendant have had no difficulty in extending Gibbs to cover the situation. Id. See also Brown v. United States, 838 F.2d 1157, 1159 n.5 (11th Cir. 1988) (pendent-party jurisdiction may be exercised under FTCA); Lykins v. Pointer, Inc., 725 F.2d 645, 649 (11th Cir. 1984) (court concluded district court had power to assert pendent-party jurisdiction under FTCA); Stewart v. United States, 716 F.2d 755, 758 (10th Cir. 1982) (pendent-party jurisdiction may be exercised over non-federal defendants under FTCA), cert. denied, 469 U.S. 1018 (1984); Dick Meyers Towing Serv., Inc. v. United States, 577 F.2d 1023, 1024 n.1 (5th Cir. 1978) (exercise of pendent-party jurisdiction under FTCA held to be proper); Center Glass & Trim Co. v. United States, 637 F. Supp. 209, 212 (S.D. W. Va. 1986) (court, although using discretionary power to deny pendent-party jurisdiction, cited with approval those cases which have upheld pendent-party jurisdiction under FTCA); Maltais v. United States, 439 F. Supp 540, 548-49 (N.D.N.Y. 1977) (pendent-party jurisdiction allowable under FTCA). But see Idaho ex rel. Trombley v. United States Dep't of the Army, Corps of Eng'rs, 666 F.2d 444, 446 (9th Cir. 1981). The Ninth Circuit consistently rejects any exercise of pendent-party jurisdiction. Id. See also Munoz v. Small Business Admin., 644 F.2d 1361, 1365 (9th Cir. 1981) (court denies exercise of pendent-party jurisdiction); Hymer v. Chai, 407 F.2d 136, 137 (9th Cir. 1969) (swiping rejection of pendent-party jurisdiction).

\(^{7}\) 28 U.S.C. § 2674 (1949). See, e.g., Lykins v. Pointer, Inc., 725 F.2d 645, 648 (11th Cir. 1984). No indicia of restrictive legislative intent toward pendent-party jurisdiction exists under the FTCA. Id. "[T]he statute has not spawned any restrictive judicial interpretations that could have been tacitly embraced by Congress." Id.

\(^{7}\) See United States v. Yellow Cab Co., 340 U.S. 545, 547 (1951) ("The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language" and allows defendants other than United States in action for contribution), cert. denied, 469 U.S. 1018 (1984), accord Stewart v. United States, 716 F.2d 755, 758 (10th Cir. 1982) (court found no congressional disapproval for the exercise of pendent-party jurisdiction under the FTCA since "the waiver of immunity [FTCA] . . . was made in 'sweeping language.'"
the Ninth Circuit, which has consistently denied the exercise of pendent-party jurisdiction because it reads article III as disallowing it, admits that those circuits that interpret article III as permitting pendent-party jurisdiction must pay careful attention to statutory language and the intent behind it.\textsuperscript{73}

III. \textit{Finley in Light of Owen and Aldinger}

In \textit{Finley}, the Supreme Court relied primarily on its prior decisions in \textit{Owen Equipment \& Erection Co. v. Kroger}\textsuperscript{74} and \textit{Aldinger v. Howard} to decide that pendent-party jurisdiction was not proper under the FTCA.\textsuperscript{75} In \textit{Owen}, the Court denied the exercise of pendent-party jurisdiction in a diversity action because to do otherwise would have contradicted the congressional mandate of absolute and complete diversity.\textsuperscript{76} In \textit{Aldinger}, the Court refused to

\textsuperscript{73} See \textit{Idaho ex rel. Trombley}, 666 F.2d at 446. "[T]his court has consistently rejected the concept of pendent party jurisdiction." \textit{Id.} See \textit{Ayala v. United States}, 550 F.2d 1196, 1200 n.8 (9th Cir.) (Ninth Circuit concedes both constitutional power and lack of congressional disinclination are prerequisites to exercise of pendent-party jurisdiction, but, the Ninth Circuits' difficulty rests in its interpretation of art. III as not encompassing pendent-party jurisdiction), \textit{cert. granted}, 434 U.S. 814 (1977), \textit{cert. dismissed}, 435 U.S. 982 (1978). \textit{See also Munoz}, 644 F.2d at 1365-66 (9th Cir. 1981) (pendent party jurisdiction not available to circumvent diversity); \textit{Hymer}, 407 F.2d at 137 (sweeping rejection of pendent-party jurisdiction).

\textsuperscript{74} 437 U.S. 365 (1978).

\textsuperscript{75} \textit{Finley v. United States}, 109 S. Ct. 2003, 2007-08 (1989). The Court also relied on \textit{Zahn v. International Paper Co.}, 414 U.S. 291 (1973). In \textit{Zahn}, the Court refused to allow a class action plaintiff in a diversity action, to append another jurisdictionally insufficient diversity action so as to meet the $10,000 amount in controversy requirement. \textit{Id.} at 301-02. The Court based its decision on the historically strict judicial construction of the diversity statute which has been left undisturbed by Congress. \textit{Id.} The Court also noted that congressional disapproval of the Court's interpretation would have manifested itself in either amendments or official comments to the statute. \textit{Id.} "[W]e find not a trace to this effect." \textit{Id.} at 302.

\textsuperscript{76} \textit{Owen Equip. \& Erection Co. v. Kroger}, 437 U.S. 365, 377 (1978). Congress has mandated that diversity jurisdiction is not available unless there is complete diversity. \textit{Id.} at 374. Therefore, by implication, Congress has denied the use of pendent-party jurisdiction when, as in this case, its exercise would allow assertion of diversity jurisdiction over non-diverse parties. \textit{Id.} at 377. \textit{See Lykins v. Pointer Inc.}, 725 F.2d 645, 647-48 (11th Cir. 1984) (citing \textit{Owen}, 437 U.S. at 373-74). ("Congress' consistent re-enactment and amendment of the diversity statute without altering the long-standing judicial interpretation that the statute requires strict diversity, demonstrated a congressional mandate that diversity jurisdiction is not to be available" to non-diverse parties, because congressional intent can-
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confer pendent-party jurisdiction over a state based claim against a defendant county, reasoning that Congress exempted counties from liability under the Civil Rights Act. However, Congress has not expressed any such exemption under the FTCA. Therefore, it is submitted that by relying on Owen and Aldinger to determine the outcome in Finley, the Court’s analogy was both imprecise and inadequate.

Upon finding no affirmative grant of jurisdiction, the Finley Court simply denied its existence. Hence, the Supreme Court, in overlooking the congressional intent behind the FTCA, did not follow its own approach as set forth in Aldinger. Had the Court done so, it would have found many indications that Congress did not intend to negate jurisdiction over defendants other than the United States. The language of the FTCA indicates that Con-
gress intended the United States to be treated as any private defendant in a similar tort suit. In most tort claims involving joint tortfeasors, it is common practice for plaintiffs to join all defendants that are faced with potential liability. Moreover, courts have been inclined to construe the FTCA as indicating that all claims against the United States should be adjudicated in one action. It is submitted that the Finley Court not only ignored the second part of its own two-tiered test, but also undermined part of the congressional intent behind the FTCA. Moreover, other courts will be bound to follow Finley, a decision based on a defective analysis.

IV. THE FEDERAL RULES AND PENDENT-PARTY JURISDICTION

In his dissent, Justice Stevens asserted the constitutionality of invoking pendent-party jurisdiction over the petitioner's state claims. Indeed, even the majority conceded that the constitu-
tional criteria for pendent-party jurisdiction, which is analogous to the constitutional criteria for pendent claim jurisdiction, was met by Finley’s state law claims. However, absent express congressional authorization, the majority concluded that the requisite strict reading of jurisdictional statutes precluded the conferral of jurisdiction over the state claims by means of pendent-party jurisdiction.

To the contrary, as a matter of statutory interpretation, the state claims against the utility and the city may be appended to the FTCA claim against the United States with the assistance of the Federal Rules of Civil Procedure, and their traditional liberal construction. The impleading of joint tortfeasors under Rule 82 is mandated neither by the Constitution nor the Rules Enabling Act, but instead embodies a self-imposed policy. Therefore it does not preclude consideration of procedural changes in formulating tests for supplemental jurisdiction. Id. But see 13 C. WRIGHT, A. MILLER & E. COOPER, supra note 1, § 3523 at 94.
14(a) and the assertion of additional claims against nonfederal defendants under Rule 20(a) are both applicable to the FTCA. In addition, pendent-party jurisdiction finds "substantial analogues" in the joinder of additional parties under the well-established doctrine of ancillary jurisdiction in relation to compulsory counterclaims under Rules 13(a) and 13(h). As such, it is submitted that the Federal Rules of Civil Procedure enable the petitioner to invoke pendent-party jurisdiction, and thus permit attachment of state law claims to a federal claim, while defeating neither constitutional nor statutory power.

V. RAMIFICATIONS OF REFUSING TO RECOGNIZE PENDENT-PARTY JURISDICTION

Although the Finley Court determined that the Gibbs approach would not be extended to the pendent-party field, the Court in Aldinger noted, in dicta, that certain statutes may allow the exercise of pendent-party jurisdiction. The Court specifically cited the FTCA as an example since federal courts have exclusive jurisdiction over FTCA claims and it is the only forum that can hear (Federal Rules did not broaden scope of supplemental jurisdiction, but just permitted greater opportunities for its invocation); Comment, The Extension of Pendent Jurisdiction, supra note 10, at 196-98 ("while the Federal Rules are liberal, they do not represent an alternative means for getting a case into federal court"). Permitting pendent-party joinder under the Federal Rules extends Rules beyond the bounds intended by its authors and is in conflict with the purpose of the Rules: to establish uniformity, and bounds beyond which jurisdiction may not extend. Id.

See Finley, 109 S. Ct. at 2013 (Stevens, J., dissenting)
Fed. R. Civ. P. 13(a). The rule, entitled "Compulsory Counterclaim," provides in pertinent part:
A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Id. (emphasis added).
Fed. R. Civ. P. 13(h). The rule, entitled "Joinder of Additional Parties," provides that "[p]ersons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with Rules 19 and 20." Id. See Moor v. County of Alameda, 411 U.S. 693, 714-15 (1972). In a case in which pendent-party jurisdiction was deemed plausible but denied on discretionary concerns, the Court drew an analogy between pendent-party jurisdiction and counterclaims and crossclaims.

Finley, 109 S. Ct. at 2010.
Aldinger v. Howard, 427 U.S. 1, 18 (1976). "Other statutory grants and other alignments of parties and claims might call for a different result." Id.
all related claims. If pendent-party jurisdiction were denied under the FTCA, plaintiffs would have to bring separate suits in state and federal courts, thereby leading to duplicative adjudication of closely related claims. In Finley, the petitioner would have to prosecute the claim against the United States in federal court and the claims against the city and the utility, involving precisely the same facts, "in a State court a block away." This results in the imposition of unnecessary additional lawsuits on an already overburdened judicial system. For example, in Finley, both state defendants filed indemnity actions against the United States; what could have been resolved in a single lawsuit re-

96 Aldinger, 427 U.S. at 18.

When the grant of jurisdiction to a federal court is exclusive, for example as in the prosecution of tort claims against United States . . . the argument of judicial economy and convenience can be coupled with the additional argument that only in federal court may all of the claims be tried together.

Id. See Stewart v. United States, 715 F.2d 755, 758 (10th Cir. 1982), (citing Aldinger, 427 U.S. at 18) cert. denied, 469 U.S. 1018 (1984). The Stewart court noted that different considerations apply under the FTCA since the only way to hear all claims together is by allowing pendent-party jurisdiction. Id.

The Aldinger Court did not espouse a broader holding, encompassing the dicta therein, not because it did not firmly believe it was correct, but to remain loyal to the judicial policy of incrementalism as it has so often done, and thereby rule solely on the facts before them. See Blake v. Arnett, 663 F.2d 906, 910 (9th Cir. 1981).

97 See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (pendent jurisdiction permits both state and federal claims to comprise one case); Astor-Honor, Inc. v. Grosset & Dunlap, 441 F.2d 622, 629 (2d Cir. 1971) (multiple suits create unjustifiable waste of judicial and professional time); Fortune, Pendent Jurisdiction - The Problem of "Pendentiating Parties", 34 U. PITT. L. REV. 1, 8-9 (1972) (discussion of negative impacts resulting from denial of exercise of pendent jurisdiction over related state claims). An argument of economy and convenience to litigants can be used in conjunction with the fact that the FTCA grants exclusive jurisdiction to the federal courts, to produce a compelling situation for the exercise of pendent-party jurisdiction. Aldinger, 427 U.S. at 18. This causes duplicative litigation no matter how expensive, wasteful and needless. Id. See also Connecticut Gen. Life Ins. Co. v. Craton, 405 F.2d 41, 48 (5th Cir. 1968). "Given the amount of time and energy already expended . . . the strong and practical policies undergirding the pendent jurisdiction doctrine" support the exercise of pendent party jurisdiction. Id.

98 Guarantee Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) (quoted in Astor-Honor, Inc. v. Grosset & Dunlap, 441 F.2d 627, 630 (2d Cir. 1971) (language here is figurative so as to demonstrate how ludicrous it is to force case to be divided up between separate buildings).


100 Brief for Petitioner at 4 n.2, Finley v. United States, 109 S. Ct. 2003 (1989) (No. 87-1973). Both state defendants, the city and the utility, filed indemnity suits against the United States. Id.
quired the adjudication of four separate suits. Clearly, one of the reasons for the exercise of pendent jurisdiction is to promote judicial economy. However, it is submitted that by not allowing the exercise of pendent-party jurisdiction the Finley decision will only serve to curtail the judicial economy which the Gibbs Court sought to promote.

In addition, when a claimant must bring separate actions in state and federal court he will be faced with bearing the costs of both lawsuits. Indigent plaintiffs, therefore, may have to make a choice between equally meritorious claims, thereby foregoing their rightf ul day in court. Forcing plaintiffs to separate actions also imposes upon the parties the risk of being subject to conflicting findings of fact and conclusions of law. Further, defendants in separate suits may seek to cast blame on each other, and it would be possible for the plaintiff to recover nothing. It is submitted that the Finley decision will only serve to diminish the importance of judicial economy, convenience and fairness to litigants, which were the compelling reasons for the creation of the federal pendent jurisdiction doctrine.

101 Id. Since the United States can only be sued in federal court, both state defendants must bring their indemnity suits in federal forums. Id. In addition to the two indemnity actions, there were the petitioner's state and federal actions. Id.

102 Gibbs, 383 U.S. at 726. The Court noted that judicial economy was one of the reasons for the creation of pendent jurisdiction. Id. See Connecticut Gen. Life Ins. Co. v. Craton, 405 F.2d 41, 48 (5th Cir. 1968) (due to amount of needless duplication of judicial time and energy separate suits would entail, court exercised pendent-party jurisdiction).

103 See generally Freer, A Principled Statutory Approach to Supplemental Jurisdiction, 1987 Duke L.J. 34, 74-75 (impact on claimants who assert pendent-party jurisdiction); Note, supra note 7, at 905-07 (discussion of evils to be borne by plaintiffs forced to bring separate actions).

104 See Aldinger v. Howard, 427 U.S. 1, 36 (1976) (Brennan, J., dissenting) (claimant penalized due to denial of pendent-party jurisdiction in matters exclusive to federal forum). See also Note, supra note 59, at 384 (avers that indefensible choice will be applied to all cases).

105 See Note, supra note 7, at 905-07. "The trial of all related claims in one forum eliminates needless repetition of efforts by courts and parties; it also reduces the possibility of conflicting findings of law and fact." Id. at 906.

106 See Hipp v. United States, 313 F. Supp. 1152, 1155 (E.D.N.Y. 1970). "The case of a joint tortfeasor made a defendant under the FTCA is peculiarly appropriate" for the exercise of pendent-party jurisdiction because "if cases are tried separately, each defendant would seek to cast blame on the other and it would be possible for the plaintiff to recover nothing." Id.
Conclusion

The Supreme Court in *Finley* set forth an unnecessarily narrow holding. In contrast, the rules suggested in the dissents are more reasonable since they would permit courts to recognize pendent-party jurisdiction in certain circumstances. Under the *Gibbs* analysis, a court would still be able to refuse its exercise as a matter of discretion. Also, by ignoring congressional intent, the Supreme Court failed to recognize that the intent behind the FTCA was to have the United States treated as any other private defendant, and to have all claims against the United States resolved in one action. Further, the Court’s decision requires the plaintiff to bring separate suits in state and federal court, which runs contrary to the aims of judicial economy, convenience and fairness to litigants. Finally, the Supreme Court granted certiorari in an effort to clarify the confusion that had existed in the federal courts on the issue of pendent-party jurisdiction under the FTCA. However, because the Supreme Court deviated from its normal mode of analysis in determining whether pendent-party jurisdiction exists under congressional statutes, the *Finley* decision provides little guidance to federal courts faced with the same determinations under different statutes.

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